“DIMITRIE CANTEMIR” CHRISTIAN UNIVERSITY
BUCHAREST
FACULTY OF LAW CLUJ-NAPOCA

Fiat Iustitia

No 1/2019

Fiat Iustitia is indexed IDB in
EBSCO, CEEOL and RePEc

Editorial office:
Faculty of Law "Dimitrie Cantemir"
Cluj-Napoca, Burebista st, no. 2
tel: 0264-432211, fax: 0264-432265
e-mail: drept@dimitriecantemir.ro
www.dimitriecantemir.ro

Pro Universitaria Publising House
Bucharest, Bld. Iuliu Maniu, no. 7, Corp C
Parter sect.6
tel: 0733-672111, fax: 021-3149316
e-mail: editura@prouniversitaria.ro
www.prouniversitaria.ro

ISSN 1224-4015

TABLE OF CONTENTS

THE RULE OF LAW AND PRINCIPLE OF THE SUPREMACY OF LAW

Dr. Marius ANDREESCU[*]
Claudia ANDREESCU[**]

Abstract

The doctrine of the rule of law originates from German theory and case-law, but is now a requirement and a reality of constitutional democracy in contemporary society. At present, the rule of law is no longer a simple doctrine but a fundamental principle of democracy consecrated by the Constitution and international political and legal documents. In essence, the concept of the rule of law is based on the supremacy of the law in general and of the Constitution in general. Essential for the contemporary realities of the rule of law are the following fundamental elements: the moderation of the exercise of state power in relation to the law, the consecration, the guarantee and the observance of the constitutional rights of man especially by the state power and, last but not least, the independence and impartiality of justice.

In this study we analyse the most important elements and features of the rule of law with reference to the contemporary realities in Romania. An important aspect of the analysis refers to the separation, balance and cooperation of the state powers, in relation to the constitutional provisions. The most significant aspects of the case-law of the Constitutional Court on the rule of law are being analysed.

Keywords: *Conditions of the rule of law / powers separation and balance / law supremacy / guarantee of fundamental rights / contemporary realities and aspects of constitutional case-law*

JEL Classification: [K 00]

1. Brief considerations on the notion of the rule of law

The notion of state attributes means its defining dimensions as they result from constitutional provisions, as an expression of the political will and determined by the political regime and at the same time values of principle of constitutional order.

The rule of law, pluralism, democracy, civil society are unquestionable universal values of contemporary political thinking and practice and are found to be expressed in the Constitution of Romania as well as in international

[*] *Judge, Piteşti Court of Appeal; Assistant Professor, PhD., University of Piteşti.*
[**] *Lawyer, Bucharest Bar.*

documents. The state attributes configure its quality as constitutional law subject and define the power, but also the complex reports between the state and citizens and the other constitutional law subjects. The attributes of the Romanian state regulated by the provisions of art. 1 para. 3 of the Romanian Constitution: 1. rule of law; 2. social state; 3. pluralist state; 4. democratic state.

The rule of law is one of the most discussed concepts of constitutional law and is unquestionably related to the transition from the state law to the rule of law. In the literature, contradictory opinions were sometimes affirmed, according to which the rule of law corresponds to an anthropological necessity or is a myth, a postulate and an axiom, and on the other hand, the rule of law is a pleonasm, a legal nonsense.

The concept of the rule of law is a constitutional reality whose foundation is found in the mechanisms of the exercise of state power, in the relations between power and liberty of every individual of society and in the application of the principle of legality to the entire state activity, but also in the behaviour of each member of society.

The rule of law has formed and spread over three major models:

1. The *English model of* "Rule of Law" is characterized by the limitation of the monarch's power and, on the other hand, by preserving the power of the parliament, which in terms of constitutional law means: a) the restriction of the powers of the monarch and their recognition of a power constituted by the norms of positive law, b) the necessity to found acts of the executive directly or indirectly on the authority of the Parliament, c) the obligation of all subjects of law to submit to the law of jurisdiction.

2. The *German concept* emphasizes the need to ensure the legality of the administration and its judicial control.

3. The *French concept* regards the rule of law as a legal state, which proclaims and defends the principle of legality.

In the expression rule of law there are two aspects of the legal, seemingly contradictory but still complementary: normativism and ideology. In the normative plane, the rule of law appears as a structural principle of the Constitution along with other essential attributes of the state, materializing the fundamental values on which the existence of society and state are based.

From the normative point of view, the requirements of the rule of law are manifested in a double sense: a) the formal meaning expresses the requirement that the state and its organs observe the laws, strictly subordinate to the juridical rules regarding the composition of the state bodies, their attributions and their functions, and b) the material meaning - the requirement that the state bodies, exercising their functions, comply with the legal guarantees concerning the exercise of citizens' fundamental rights and freedoms.

In the field of ideology, the rule of law confers a logical system of ideas by which people represent their society, the state, in all its manifestations, and which confer the legitimacy of the state.

The term "rule of law" is not a simple logical concept but it expresses a fundamental constitutional necessity according to which: a) the state is indispensable for the law in order to create for it its norms and to ensure the finality and effectiveness of the legal norms; b) the law is indispensable for the state to express power by establishing a general and binding behaviour.

In essence, the rule of law expresses a condition of power, a movement to rationalize it, but also a new conception of law, its role and functions. Professor Tudor Drăganu, in his paper (Drăganu, 1993), proposes an interesting and comprehensive definition of this concept of constitutional law: "The rule of law is considered to be that state which was organized on the basis of the principle of separation of powers of the state, the application of which justice acquires real independence and pursues through its legislation the promotion of the rights and freedoms inherent in human nature, ensures the strict observance of its regulations by all its organs in all their activity."

The definition defines the main elements of the rule of law - the separation of powers as a reality of the state activity, in the application of which justice acquires real independence and pursues through its legislation the promotion of rights and freedoms inherent in human nature, ensures the strict observance of its regulations by all its organs, in their entire activity".

This definition renders the basic features of the rule of law – separation of powers, as reality of the state activity, the application of the principle of legality in the activity of all the state bodies, the observance and the guarantee of fundamental human rights. Also, from the same definition result the basic features of the rule of law, respectively: *a)* the freedoms of the human being require guarantees of security and justice through the primacy of law and in particular the Constitution; *b)* the moderation of the execution of the power requires the organization and adaptation of the functions of the erratic organisms and a hierarchical normative system.

2. Conditions of the rule of law

In the final document of the Copenhagen Summit in 1990 was stated that *the rule of law* does not simply mean a formal legality, and in the Charter of Paris from 1990 *the rule of law* is prefigured not only in terms of human rights but also of democracy, as the only governing system.

From the corroboration of the principles written in international documents, as well as in relation to the constitutional law doctrine, we consider as conditions or characters of the rule of law the following: 1. the accreditation of a new concept concerning the state, especially under the following aspects: the voluntary or consensual nature of the state, the delimitation of the state from the

civil society, the responsibility of the state and the authorities that make it, and the moderation of constraint as a means of intervention of the state in society by appropriate and reasonable forms; 2. capitalization of the rations and mechanisms of the principle of separation of powers in the state; 3. the establishment and deepening of an authentic and real democracy; 4. institutionalization and guaranteeing of the rights and freedoms of man and citizen; 5. the establishment of a coherent and hierarchical legal order and of an area of law.

The systematic functionality and consistency of the rule of law must be ensured by a number of regulatory systems, namely: *a)* political control by Parliament as one of its essential functions through various institutional means *b)* administrative control that is carried out in the system public authorities, either on their own initiative or at the initiative of citizens; *c)* judicial review of the legality of administrative acts entrusted to either the courts of common law or the specialized courts; *d)* control of the constitutionality of laws; *e)* control of the observance of fundamental rights and freedoms through the bodies of the authority and the judiciary; *f)* the conciliation and control procedure, which is carried out through the institution of the "ombudsman" or the People's Advocate; g) free access to justice and organizing the court activity in several degrees of jurisdiction.

The consecration of the rule of law in the Constitution of Romania is achieved not only by art. 1 para. 3 of the 1st thesis, but also by many other constitutional provisions expressing the content of this principle of organization and exercise of power in a democratic society. In this respect we reiterate the provisions of art. 16 para. 2, which provide that no one is above the law and those of art. 15 para. 2 proclaiming the principle of the unretroactivity of the law, principles essential to the entire construction of the rule of law.

The content of the rule of law is expressed in particular in the constitutional provisions regarding the separation and balance of state powers as well as those regarding the organization, functioning and attributions of the state institutions.

The provisions refer to the fundamental rights, freedoms and duties of the citizens, to the mechanism of the separations of powers, pluralism, free access to justice, independence of courts, and the organization and functioning of parliamentary, administrative and judicial control. They can be considered as a constitutional normative expression of the content and requirements of the rule of law.

The rule of law is not a state whose essence is exhausted by constitutional regulations and other normative acts at a given moment. The rule of law is not exclusively an institution of constitutional law but must become a reality found at the level of the conduct of each subject of law, whether it is a state organ or a simple citizen.

This means and implies a complex evolutionary process in which all the structures of society participate, and at the same time a process of perfection on

the ideological and moral level in order to improve the activity of the organs of state and to effectively establish the principle of legality, to form a civic behaviour in the spirit of observance the law and the fundamental values of democratism.

The Constitution of Romania establishes, in its normative content, the main guarantees of the rule of law:

a) the constitutional regime, that is, the establishment in the Constitution of the fundamental principles of organization and activity of the three powers. Establishing the legal regime applied to the revision of the Constitution;

b) the direct or indirect popular legitimacy of state and public authorities;

c) ensuring the supremacy of the Constitution through political or judicial control, as well as ensuring the rule of law, over other normative acts;

d) the exercise of fundamental rights and freedoms may be restricted only temporarily, only in cases expressly determined in proportion to the circumstance justifying the restriction and without suppressing the very right or fundamental freedom;

e) independence and impartiality of justice.

Therefore, art. 21 para. 2 of the Constitution of Romania stipulates that no law may impede the free access of a person to justice for the protection of legitimate rights, freedoms and interests (Andreescu & Puran, 2018).

3. Application of the principle of proportionality in terms of state organization of power

From the complexity of the issue of the rule of law, we further on refer to the implicit application of the principle of proportionality in the constitutional provisions on the state organization of power.

This principle is explicitly expressed in the Constitution of Romania only in the provisions of art. 53, but it is implicitly found in other constitutional regulations as it has been emphasized in the specialized literature. The constitutional principle of proportionality is a synthesis of other principles of law and expresses the ideas of fairness, and the correctness of the state's dispositions to the intended purpose.

We consider it a criterion in relation to which the powers of the state are organized in a state of law because by its application a dynamic and functional balance is realized in the institutional diversity of the state system. We also underline the fact that this principle confers legitimacy and not only the legality of state decisions and is a criterion already used in case-law which establishes the demarcation between the exercise of power within the limits of the Constitution and laws and on the other hand the excess of power in the activity of the organs of the state in situations where state decisions have the appearance

of legality but are also not legitimate because they are not appropriate to the intended purpose defined by constitutional or secondary legislation. We believe that the constitutional principle of proportionality can be considered a requirement of the rule of law.

Further on, briefly analyze the application of the principle of proportionality to the state organization of power in our country, as it results explicitly or implicitly from the constitutional provisions applicable.

The principle of the separation of powers in the state, considered to be a foundation of democracy, is at the same time a reflection on the moderation and rationalization of state power. "Balancing these powers by judiciously distributing the powers and equipping each of them with effective means of control over the others, thus defeating the inherent tendency of the human power to grasp the whole power and to abuse it is the condition of social harmony and the guarantee of human freedom".

In its classical form, as it is known by the decisive contribution of Montesquieu, the principle of separation of powers in the state affirms that in any society there are three distinct powers: legislative, executive and judicial power. These three powers must be exercised by separate organisms independent of each other. The purpose of this division is that power should not focus on a single state organ, which would naturally tend to abuse the prerogatives entrusted to it. "In order that power not be abused, it is necessary that by the arrangement of things power stops power" - says Montesquieu. At the same time, the division of state power is necessary to respect individual rights and freedoms, so that one power opposes the other and creates itself instead of a single force, a balance of force.

In order to achieve these goals, the organs of the state must be independent of one another in the sense that no one can exercise the function entrusted to the other. Consequently, it is not possible for an organ of the state to be subordinated to another, if it exercises a separate power.

The doctrine states that: "The theory of separation of powers is in fact an ideological justification of a very concrete political purpose: weakening the power of the governors as a whole, limiting one another. It is considered that the separation of powers has two well-defined aspects: a) separation of parliament from the government; b) separation of jurisdictions against the governors, which allows them to be controlled by independent judges (Muraru & Tănăsescu, 2003). The theory and principle of the separation of powers in its classical form were criticized in doctrine. "Montesquieu's error", wrote Carré de Malberg, "is certainly to have thought it possible to regulate the game of the public powers by their mechanical separation and, in a certain way, mathematical, as if the problems of the state organization were susceptible to be solved by procedures of such rigor and precision" (Malberg, 1992).

In the doctrine, other inaccuracies and limitations were noted as well, among which we recall: from the terminology used, it is not clear whether a "state body" or a "function" is to be understood by power; power is unique and indivisible and belongs to a single titular - the people.

That is why we cannot speak of the division of powers, but, possibly, the distribution of the functions involved in the exercise of power; the separation of powers, conceived in the form of opposition between them, is likely to block the functioning of state authorities.

It is not possible for the sovereign exercise of the completeness of each of the static functions to be assigned to a separate authority or group of authorities. None of the state organs perform a function in integrity, and consequently the steady organs cannot be rigidly and functionally separated; in most constitutional systems, as a result of the existence of political parties, the real problem is not the separation of powers, but the relationship between the majority and the minority or, in other words, between the governors and the opposition. There is no antagonistic relationship between parliament and government.

A government that has a parliamentary majority will work in close association with the parliament, which is considered a modern state of their efficiency; the legislative function is not equal to the executive function.

Execution of the law is by definition subject to legalization. If the two functions are in hierarchical relations, then the organs that perform those functions are in the same ratios.

It should also be underlined that, in doctrine, there is more and more talk of a decline of legislative power in favour of the executive; the separation of powers does not solve the issue of guaranteeing fundamental human rights. Constitutional justice is the main guarantor of respect for fundamental rights, but it does not find its place in the classic scheme of separation of powers in the state, as (Eisenmann, 1984), (Rousseau, 1990), (Muraru & Tănăsescu, 2003) develop in their papers. In the case of the theory of separation of powers in state it was said that "the myth" far exceeds the reality. In fact, it is the dogmatic confidence to impose on a concrete reality a pre-established theoretical and abstract framework (Duhamel & Meny, 1992).

The criticisms formulated and the modernization tendencies cannot result in the abandonment of this principle. "The great force of the theory of separation of powers in the state - said Professor Ioan Muraru - lies in its fantastic social, political and moral resonance (Muraru & Tănăsescu, 2003).

It should not be forgotten that the principle is enshrined, explicitly or implicitly, in the constitutions of the democratic states. From the perspective of our research theme, it is important to consider the autonomy of the state authorities and the relations between them in order to prevent separatism and rigidity.

The myth of absolute separation of powers is in fact, Carré de Malberg says, irreconcilable, "with the principle of unity of the state and its powers" (Malberg, 1992). The will of the state, he continues, being necessarily a single one, must be maintained between the authorities that held a certain cohesion, without which the state would risk being harassed, divided and destroyed by the opposite pressures to which it would be subjected.

It is thus impossible to conceive that the powers in the state are equal. "That is why, in any state, even in those whose Constitution is said to be based on Montesquieu's theory and pursues a certain equalization of powers, invariably will find a supreme organ that will dominate all the others and thus achieve the unity of the state" (Malberg, 1922).

As the author states, it is not so much about separation, but rather about the "gradation of powers". There would then be a single power that would first manifest through acts of initial will - the legislative power - and would be exercised at a lower level through law enforcement acts - the executive power.

It follows that the powers of the state are unequal, but this cannot have the significance of subordination, nor can allow for excess power. "State means also force, hence the risk of escaping from the control of the holder, of considering himself being the owner of the power" (Muraru & Tănăsescu, 2003). At the same time, a coherent functioning of the organs of the state is not possible, nor can it be conceived, unless there are some relations between them.

It was said that, given the existence of political parties and their access to power, "the real problem is not that of the relations between the institutionalized powers but of the relations between the majority and the minority, between the government and the opposition, especially when the government comes from a parliamentary majority, comfortable and homogeneous and leaning on it" (Deleanu, 1996).

In a wider sense, it must be stressed that democracy generates a majority that leads, imposing its will and values to minorities, but they also have the opportunity to express themselves and their rights have to be respected. Achieving the democratic and functional balance between the majority and the minorities is the solution to avoid what the doctrine is called the "tyranny of the majority". Undivided power - says Sartori (Sartori, 1999) - is always an excessive and dangerous power. Thus, the tyranny of the majority, relevant from a constitutional point of view, is defined according to the rights of the minority, especially if the right to opposition is complied with or not. The main problem in this context is that the minority or the minorities have the right to oppose, have the right to opposition.

The relationship between the majority and the minority involves the analysis of the very complex interaction between those that govern and the ones that are governed. Interaction consists of a multilevel process in which majorities

and minorities are materialized in different ways and at different levels.

The rule that allows the functioning of such a complex system of democracy is the application of the principle of majority in decision-making. However, Hamilton observed very well: "Give all the power to many, and they will oppress the few. Give all the power of the few, and they will oppress the many" (Elliot, 1941).

Therefore, the problem is to avoid giving all or most of the power to all, by distributing it, alternately and/or at the same time to the majority and minority.

Therefore, in order to avoid dogmatism, in order to respond to these problems of social, political and state realities, it is necessary to reconsider the theory of the separation of powers in the state from the point of view of the principle of proportionality.

The fundamental idea has already been stated: the moderation of power and the balance in the exercise of power that actually reflects, to a certain extent, the balance of social forces (Grewe & Fabri, 1995). When discussing the content and meanings of the separation of powers, it is less about separation, but especially about the balance of powers (Deleanu, 1996). Balancing the powers in the state by judiciously distributing the powers and equipping each with effective means of control over the others, thus stabilizing the tendency to capture the whole power and to abuse it, is essentially the application of the principle of proportionality to the organization of state power.

This is the condition of social harmony and the guarantee of human freedom [even though, until now, an explicit reference to the principle of proportionality has not been made in the specialized literature, it results from the context of supporting some authors: "So, weight and counterweights in the power tiles so that none of them dominates the others. It would not be so much a separation of powers, but especially about their relative autonomy and their mutual dependence: the balance of powers" (Deleanu, 1996).

Rethinking the separation of powers in terms of the constitutional principle of proportionality can be answered, in our opinion, to all the problems listed above.

The principle of the separation of powers in the state was not explicitly enshrined in the Constitution of Romania before its revision in 2003, but from the analysis of the constitutional texts, the doctrine ascertained that the balance of state powers as a principle was found in the content of the norms of the Constitution Through the Review Law, the Romanian derived constituent expressly enshrined this principle, referring not only to the separation of powers but also to the balance between them: "The State is organized according to the principle of separation and balance of powers - legislative, executive and judicial - within constitutional democracy" [Art. 1 para. 4].

The necessary balance between state authorities is the expression of the principle of proportionality applied in the matter of organizing the institutional system of power in Romania. State authorities are neither equal nor independent in the absolute sense.

The balance that a proportionality relationship implies is based on differences but also on interrelations that allow the functioning of the institutional system so as to avoid excessive concentration of power or exercise of the same, as well as the excess of power, especially by violating human rights and fundamental freedoms.

The finality of the proportionality ratio between public authorities is "the establishment of balanced correlations between the governors and the ones that are governed, complying with the public freedoms" (Muraru & Constantinescu, 1996).

We will refer to some of the constitutional regulations concerning the Romanian state institutional system, which reflects the principle of proportionality:

A. Elements of *difference* between state authorities, meaning the autonomy of each category of organs and their position within the system:

Public authorities are governed distinctly by the rules contained in Title III of the Constitution. These are the "three classic powers" in the traditional order: legislative, executive and judicial power.

The Constitution confers a certain degree of prerogative to Parliament in relation to the other state authorities: "Parliament is the supreme representative body of the Romanian people and the sole legislator authority of the country" (art. 61 para. 1);

Besides the classic scheme of the separation of powers in the state, the Constitutional Court achieved constitutional power (art. 142 and subsequent of the Fundamental Law), which is the guarantor of the supremacy of the Constitution, the only constitutional jurisdictional authority of Romania, independent of the any other public authority [art. 1 para. (3) of the Law no. 47/1992 on the organization and functioning of the Constitutional Court, republished]. The People's Advocate is also independent of any other public authority. He is appointed by the Parliament in the joint session of the Chambers [art. 65 para. (2) letter i)]. Ex officio or at the request of persons injured in their rights or freedoms, the People's Advocate may refer the matter to the public authorities in order to take measures to eliminate acts or facts that affect subjective rights or legitimate protected legal interests (art. 58 and subsequent). It has the power to notify the Constitutional Court, in the situations provided by art. 146 letters a) and d);

The bicameral structure of Parliament is an expression of the balance involved in the principle of proportionality. Thus, Chambers are equal but are functionally differentiated in the exercise of their legislative powers.

The distinction between the Chamber referred first (of reflection) and the Decision Chamber, made by art. 75, expresses the "quasi-perfect" bicameralism, which is a proportionality ratio. We agree with the opinion expressed in the literature, according to which "the system of parliamentary bicameralism in Romania must be preserved, but it must be transformed into a differentiated bicameralism. Thus, to the law of democratization and efficiency can be ensured, and to the legislative organ a representativeness and responsibility increment" (Muraru & Muraru, 2005).

The difference between the lengths of the term of office of some state authorities contributes to a proportionate ratio between the powers of the state, is the expression of the balance and not of the formal equality, in order to ensure the good functioning of the Romanian institutional system. Thus, the duration of Parliament's mandate is 4 years (art. 63), of the President of Romania is 5 years (art. 83), of the members of the Superior Council of Magistracy is 6 years (art. 133), the mandate of the judges at the Constitutional Court is 9 years, and the president of this institution is elected for a period of 3 years (art. 142), the judges of the courts appointed by the President of Romania have practically an indefinite mandate in time because they are irremovable under the law (art. 125). The People's Advocate mandate is 5 years (art. 58).

B. The specialty literature highlighted the particularities of the relations between the state authorities, which in our opinion materialize the principle of proportionality, because the relational balance also implies the difference. In this respect, it was stated that: "The election of the President of Romania by the people, an essential feature of the presidential republics, combines in our country with the pre-eminence of the Parliament, as a result, mainly, of the parliamentary origin of the government, thus defining a semi-presidential political regime" (Constantinescu, 1993).

The set of interrelations between the different categories of organs of the state is the form of achieving the balance and mutual control of the powers. These relations, which form the "identity card of the state power system" (Deleanu, 1996), presuppose the autonomy of the state authorities and the differences between them. The complex structure of the state power system is a concretisation of the principle of proportionality, in other words, it strikes a balance between the powers of the state, which are based on autonomy, differentiation and interrelations.

The more the constitutional regulations in the field manage to materialize the requirements of the principle of proportionality, the more exists the guarantee of avoiding some forms of concentration of the state powers, the tyranny of the majority or minorities and obviously the excess of power.

The concern of the Romanian constituent legislator to achieve a functional balance between the powers of the state, between these and society,

is obvious, if we refer to the provisions of art. 80, according to which: "The President exercises the function of mediation between the powers of the state as well as between state and society", but also to the provisions of art. 146 letter e) according to which our constitutional court has the competence to resolve constitutional legal conflicts between public authorities.

We also need to remember the role of mediator and balance factor for the powers of the state, but also for the society that justice has. In this respect, the provisions of art. 124 of the Constitution consecrate the general "uniqueness, impartiality and equality" of justice, which represents important guarantees for the achievement of the functions of the judicial power in society.

Of course, the system of state power is an open, dynamic one, implying not only the multiplication of its constituent elements or their reorganization, but also of the functions that correspond them and of the interrelationships between the elements of the system. Within the internal system, the social-political system, and externally the system of the international community of states represent the "environment" with which the state authorities interact.

Therefore, the balance, as a particular aspect of the principle of proportionality, between the powers of the state must be understood in its dynamics, including in the continuous process of interpreting and applying the constitutional provisions in the matter.

Proportionality, as a principle of constitutional law, has a concrete dimension. The existence of a proportionate, balanced relationship between the state authorities, between them and society, is verified in practice through the functioning of the political and social system, the avoidance of crises, or, when they occur, through the capacity of the state authorities to manage these, complying in any situation with the principles of the rule of law.

Essential for the fulfilment of the requirements of separation and balance between the powers of the state, but also for stability, in its social and political system dynamics, from the perspective of pluralism in society, there is the existence of a proportionate balance between the majority and the minorities between the government and the opposition.

4. Aspects of the constitutional court case-law on garanteeing and complying with the requirements of the rule of law

At the end of this analysis we shall refer to some decisions of the Constitutional Court which we consider relevant to the rule of law.

The Constitutional Court identifies the fundamental feature of the rule of law, namely the supremacy of the Constitution and the obligation to observe the law[1].

[1] Decision no. 232 of July 5th 2001, published in the Official Gazette no. 727 of November 15th 2001; Decision no. 53 of January 25th 2011, published in in the Official Gazette no. 90 of February 3rd 2011.

At the same time, it has been stated in the case-law of the constitutional court that the rule of law, ensuring the supremacy of the Constitution, also realizes "the correlation of all laws and all normative acts with it"[2].

The requirements of the rule of law concern the major purposes of state activity, namely the supremacy of law, which implies the subordination of the state to the law.

In this respect, the law provides the means by which the political options or decisions can be censored and performs the abolition of any abusive and discretionary tendencies of the state structures. Further on, the rule of law ensures the supremacy of the Constitution, the existence of the regime of separation of the public powers and establishes guarantees, including of a judicial nature, that ensure the observance of citizens' rights and freedoms, primarily by limiting the state authority, which represent the framing of the public authorities' activities within the limits of the law.

The case-law of the Constitutional Court expresses the main requirements of the rule of law in relation to the goals of the state activity. Thus, by case-law is achieved a very eloquent synthesis of the doctrine on the notion and features of the rule of law. It is significant in this respect the Decision no. 17 of January 21st 2015[3], by which the Constitutional Court gives an explanation concerning the state of law, enshrined in art. 1 para. (3) thesis I of the Constitution: "The requirements of the rule of law concern the major purposes of its activity, prefigured in what is commonly called the reign of law, a phrase involving the subordination of the state to the law, the guarantee of the means to allow the law to censor political choices and, in this context, to weigh the potential abusive, discretionary tendencies of the static 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 the public powers that must act within the limits of the law, namely within the limits of a law expressing the general will. The rule of law enshrines a series of safeguards, including jurisdictional, to ensure that citizens' rights and freedoms are complied with by the state's self-restraint, namely the involvement of public authorities in the coordinates of law".[4]

The principle of stability and security of legal relations is not explicitly enshrined in the Constitution of Romania, but, like other constitutional principles, it is involved in the constitutional normative provisions, respectively art. 1 para. (3), which enshrines the rule of law.

In this way, our constitutional court accepts the deduction, by way of interpretation, of the principles of law implied by the express rules of the

[2] Decision no. 22 of January 27th 2004, published in the Official Gazette no. 233 of March 17th 2004.
[3] Decision no. 17 of January 21st 2015, published in the Official Gazette no. 79 of January 30th 2015.
[4] Decision no. 70 of April 18th 2000, published in the Official Gazette no. 334 of July 19th 2000.

fundamental Law. In this respect, by means of the Decision no. 404 of April 10th 2008[5], the Constitutional Court stated that: "The principle of stability and security of legal relations, although not explicitly enshrined in the Romanian Constitution, is deduced both from the provisions of art. 1 para. (3), according to which Romania is a state of 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 case-law[6]. Furthermore, our constitutional court has considered that the principle of security of civil legal relationships is a fundamental dimension of the rule of law[7]

Constitutional Court decides constantly for clarity and predictability of law, which are requirements of the rule of law. Thus, "the existence of contradictory legislative solutions and the annulment of legal provisions through other provisions contained in the same normative act lead to the violation of the principle of security of legal relations, due to the lack of clarity and predictability of the norm, principles which 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 [8]

Concerning 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 law, specific powers regarding the defense of public order and tranquility, of citizens' fundamental rights and freedoms, of public and private property, of prevention and detection of crimes, and other violations of applicable laws, and the protection of state institutions and the fight against acts of terrorism. Consequently, the Constitutional Court ruled: "By the possibility of militarized authorities to find contraventions committed by civilians, art. 1 para. (3) of the Constitution is not affected in any way, regarding the Romanian state, as a rule of law, democratic and social"[9]

Human dignity, together with the freedoms and rights of citizens, the free development of human personality, justice and political pluralism, are supreme values of the rule of law (art. 1 para. (3)).

---

[5] Decision no. 404 of April 10th 2008, published in the Official Gazette no. 347 of May 6th 2008.
[6] Decision no. 685 of November 25th 2014, published in the Official Gazette no. 68 of January 27th 2015.
[7] Decision no. 570 of May 29th 2012, published in the Official Gazette no. 404 of June 18th 2012; Decision no. 615
of June 12th 2012, published in the Official Gazette no. 454 of July 6th 2012.
[8] Decision no. 26 of January 18th 2012, published in the Official Gazette no. 116 of February 15th 2012.
[9] Decision no. 1330 of December 4th 2008, published in the Official Gazette no. 873 of December 23rd 2008.

In the light of these constitutional regulations, it has been stated in the Constitutional Court's case-law that the state is forbidden to adopt legislative solutions that can be interpreted as being disrespectful of religious or philosophical beliefs of parents, which is why organizing 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 behaviours specific to a certain attitude of belief or philosophical, religious or non-religious beliefs must not be subject to sanctions that the state requires for such behaviour, regardless of the person's motivation for faith. "As part of the constitutional system of values, freedom of religious conscience is attributed to the imperative of tolerance, especially to human dignity, guaranteed by art. 1 para. (3) of the fundamental Law, which dominates the entire value system as a supreme value".[10]

It is also interesting to note that our constitutional court considers human dignity as the supreme value of the entire system of values constitutionally consecrated, value that is found in the content of all human rights and fundamental freedoms. At the same time, it is an important aspect that requires the state authorities in their entire activity to first consider respecting the human dignity.

It should be noted that in its case-law the Constitutional Court also identifies the content components of human dignity, as a moral value but at the same time constitutional, specific to the rule of law: "Human dignity, in constitutional terms, presupposes two inherent dimensions, namely the relations between people, which refers to the right and obligation of the people to be respected and, in a correlative way, to respect the fundamental rights and freedoms of their peers, as well as the relation of man to the environment, including the animal world".[11]

Conclusions

Antonie Iorgovan said that an essential problem of the rule of law is to answer the question: "where discretionary power ends and where the abuse of law begins, where the legal behaviour of the administration ends, materialized in its right of appreciation and where the violation of a subjective right or legitimate interest of the citizen begins?"

Therefore, the application and observance of the principle of legality in the activity of state authorities is a complex issue because the exercise of state

[10] Decision no. 669 of November 12th 2014, published in the Official Gazette no. 59 of January 23rd 2015.

[11] Decision no. 1 of January 11th 2012, published in the Official Gazette no. 53 of January 23rd 2012; Decision no. 80 of February 16th 2014, published in Official Gazette no. 246 of February 7th 2014.

functions presupposes the discretionary power with which the organs of the state are invested, or in other words the authorities' "right of appreciation" regarding the moment of adoption and the content of the measures imposed. What is important to emphasize is that discretionary power cannot be opposed to the principle of legality, as a dimension of the rule of law.

The excess of power can be manifested in these circumstances by at least three aspects: a) the appraisal of a factual situation as an exceptional case, although it does not have this significance (lack of objective and reasonable motivation); b) the measures ordered by the competent authorities of the State, by virtue of discretion, to go beyond what is necessary to protect the publicly threatened public interest; c) if these measures unduly and unjustifiably restrict the exercise of fundamental rights and freedoms constitutionally recognized.

The key issue for the practitioner and the theorist is to identify criteria by which to establish the limits of the discretionary power of the state authorities and to differentiate it from the excess of power that must be sanctioned. Of course, there is also the question of using these criteria in court practice or constitutional litigation.

Concerning these aspects, the opinion of the specialized literature was that the purpose of the law will be the legal limit of the right of appreciation (of opportunity). For discretionary power does not mean a freedom beyond the law, but one permitted by law. Of course, "the purpose of the law" is a condition of legality or, as the case may be, the constitutionality of the legal acts of the organs of the state, and can therefore be considered a criterion for delimiting discretionary power from excess of power.

As can be seen from the case law of some international and domestic courts in relation to our research theme, the purpose of the law cannot be the only criterion to delimit discretionary power (synonymous with the margin of appreciation, term used by the ECHR) of the State may be an excess of power not only in the case where the measures adopted do not pursue a legitimate aim but also in the case that the measures ordered are not appropriate to the purpose of the law and are not necessary in relation to the factual situation and the legitimate aim pursued.

The adequacy of the measures ordered by the state authorities to the legitimate aims pursued is a particular aspect of the principle of proportionality. Significant is the opinion expressed by Antonie Iorgovan, who considers that the limits of discretionary power are set by: "positive written rules, general principles of law, principle of equality, principle of nonretroactivity of administrative acts, right to defense and principle of contradictory, principle of proportionality"

Therefore, the principle of proportionality is an essential criterion that allows the discretionary power to delimit excess of power in the work of state authorities. And by this is an essential principle of the rule of law.

Bibliography

1. Andreescu, M., Puran, A., (2018), *Drept constituţional. Teoria generală a statului*, Ediţia a 3-a, Bucureşti: C.H. Beck.
2. Carré de Malberg, (1922), *Contribution á la théorie géneral de l'Etat*, vol. II, Paris: Tenin.
3. Constantinescu, M., (1993), Echilibrul puterilor în regimul constituţional din România. *Dreptul*, Issue 3.
4. Deleanu, I., (1996), *Drept constituţional şi instituţii politice*, vol. I, Bucureşti: Europa Nova.
5. Drăganu, T., (1993), *Introducere în teoria şi practica statului de drept*, Cluj-Napoca: Dacia.
6. Duhamel, O., Meny, I., (1992), *Dictionnaire constitutionnel*, Paris: PUF.
7. Eisenmann, Ch., (1984), *L'espirit des lois et la separation des pouvoirs*. Cahiers de philosophie politique: Ousia.
8. Elliot, J., (1941), *Debates on the Adoption of the Federal Constitution*, Philadelphia: Lippincott.
9. Grewe, C., Fabri, H., (1995), *Droit constitutionnels europeans*, Paris: PUF.
10. Malberg, C., (1992), *Contribution a la theorie general de l'Etat*, Paris: Tenin.
11. Muraru, I., Constantinescu, M., (1996), Rolul Curţii Constituţionale în asigurarea echilibrului puterilor în stat. *Dreptul*, Issue 9.
12. Muraru, I., Muraru, A., (2005), Scurtă pledoarie pentru un bicameralism parlamentar diferenţiat. *Revista de Drept public*.
13. Muraru, I., Tănăsescu E. S., (2003), *Drept constituţional şi instituţii politice*, vol. II, Bucureşti: All Beck.
14. Rousseau, D., (1990), *Droit du contentieux constitutionnel*, Paris.
15. Sartori, G., (1999), *Teoria democraţiei reinterpretată*, Bucureşti: Polirom.

VALENCES OF THE INFORMATION OBLIGATION UNDER THE PACKAGE TRAVEL CONTRACT IN THE AGE OF GLOBALISATION VS "THE TRAVEL OF DILETTANTES"?

Rodica-Diana APAN[*]
Angela MIFF[**]

Abstract

One of the areas of regulation at national and European level, which has a great impact, is that of travel services. Having in view the increase of the population's mobility across the entire European Union for interests connected to work, business as well as for pleasure, the norms which regulate the travel services are of particular importance, but the travels for tourism have an even more special relevance for each person.

On these grounds, the present paper analyses the development of the package travel contract according to the new national regulation harmonized with the European regulation in the matter, highlighting the aspect of novelty compared to the previous regulation.

Keywords: *travel services, traveler, contract, information obligation, organizing travel agency*

JEL Classification: [K 22]

1. Sedes materiae

The package travel contract, on which we count to institute improved protection of travelers in relation to the travel agencies so that the travelers will not remain stuck in the age of „dilettantism"[1], is currently regulated by the provisions of G.O. no. 2 of 2 August 2018 on package travel and linked travel arrangements, as well as for the amendment of certain normative acts entered into force on 2 September 2018.[2]

---

[*] Associate professor, PhD., Christian University "Dimitrie Cantemir" Bucharest, Faculty of Law Cluj-Napoca, PhD., avocat.apan@gmail.com.

[**] Assistant professor, PhD., Faculty of Economic Sciences and Business Administration, „Babeș-Bolyai" University Cluj-Napoca.

*** The present article is part of the research project "Guide to the legal regime of foreign investments in Romania – Doing business in Romania" that is carried out during the university years 2014-2019 within the "Dimitrie Cantemir" Christian University of Bucharest, Faculty of Law, Cluj-Napoca.

[1] The title of the article adopts the title of the novel "The travel of dilettantes" by Bulat Okudjava.

[2] G.O. no. 2/2018 was published in the Off. Gazette of Romania, Part I, no. 728 of 23.08.2018, hereinafter called G.O. no. 2/2018.

Until the date of entry into force of the new regulation, the contract for the marketing of the tourist package was regulated by the special rules contained in the G.O. no. 107/1999 regarding the regarding the marketing of tourist services packages,[3] as amended and supplemented by the G.O. no. 26/2017 which was approved by Law no. 277/2017.[4]

The special normative framework supplemented with the provisions of the Order of the National Association of Tourism Agencies no. 1387/2015[5] for the approval of the framework contract for the marketing of tourist services packages, adopted by the minister, in force as of 17.02.2016, act with normative power which repealed Order no. 516/2005.[6]

The purpose of the regulation is to harmonize national legislation with that of the Member States of the European Union, (hereinafter called the EU) on package travels and linked travel services sold or offered for sale on the territory of Romania, no matter where they are performed, in order to ensure a high level of protection consumers and, implicitly, the proper functioning of the market.

The G.O. no. 2/2018 establishes the legal framework regarding the package travel contracts, art. 3, pt. 12, as well as the linked travel arrangements, art. 3 pt. 16 of the normative act, concluded between the travelers and traders.

The mentioned legal act transposes the provisions of Directive (EU) 2302/2015 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements,[7] amending Regulation (EC) No 2006/2004 and the 2011 Directive/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours.[8]

2. Conceptual clarifications

G.O. no. 2/2018 highlights a complex regulation of the issues posed by this type of contract and naturally provides users with a set of legal definitions that explain the notional content of terminology in an approach designed to clarify and facilitate the correct application and effective legal provisions.

[3] G.O. no. 107/1999 was republished (1) in the Off. Gazette of Romania, Part I, no. 387 of 7.06.2007 and (2) in the Off. Gazette of Romania, Part I, no. 448 of 16.06.2008, hereinafter called G.O. no. 107/1999.
[4] G.O. no. 26/2017 was published in the Off. Gazette of Romania, Part I, no. 706 of 31.08.2017 and was approved by Law no. 277/2017 published in the Off. Gazette of Romania, Part I, no. 8 of 4.01.2018, hereinafter called G.O. no. 26/2017.
[5] Published in the Off. Gazette of Romania Part I no. 122 of 17.02.2016.
[6] Published in the Off. Gazette of Romania Part I no. 334 of 20.04.2005.
[7] Published in the JOCE series L, no. 326 of 11.12.2015.
[8] Published in the JOCE series L, no. 158 of June 23, 1990.

Thus, from article 3, pts.1 – 19 of G.O. no. 2/2018, we propose to select some of the legal definitions that comprehend a comparative look with the legal definitions mentioned previously by the provisions of Ordinance no. 107/1999, presently repealed.

Concepts whose notional content was clarified by art. 2 from G.O. no. 07/1999, and is reproduced by G.O. no. 2/2018, are the following:

(i) '*tourist package'* - represented the pre-arranged combination of not fewer than two of the following three groups of services when the service covers a period of more than twenty-four hours or includes overnight accommodation: (a) transport; (b) accommodation; (c) other tourist services not ancillary to transport or accommodation and accounting for a significant proportion of the package, such as food, balneary treatment and other such".

In the meaning of art. 3, pt. 12 of the G.O. no. 2/2018, the *package travel* is the "combination of at least two different types of travel services for the purpose of the same trip or holiday" if it is fulfilled one of the requirements indicated at letters a)-b), namely: those services are combined by one trader, including at the request of or in accordance with the selection of the traveler, before a single contract on all services is concluded (a); those services must fulfill one of the requirements listed at letter b) irrespective of whether separate contracts are concluded with individual travel service providers, more precisely (i) they are purchased from a single point of sale and those services have been selected before the traveler agrees to pay; (ii) they are offered, sold or charged at an inclusive or total price, (iii) they are advertised or sold under the term 'package' or under a similar term, (iv) they are combined after the conclusion of a contract by which a trader entitles the traveler to choose among a selection of different types of travel services;
(v) they are purchased from separate traders through linked online booking processes where the traveler's name, payment details and e-mail address are transmitted from the trader with whom the first contract is concluded to another trader or traders and a contract with the latter trader or traders is concluded at the latest 24 hours after the confirmation of the booking of the first travel service".

(ii) *Contract for the marketing of the tourist package* - represented "the agreement between tourism agency and the tourist, the object of which is the purchase of a tourist package by the tourist and the issue of payment and travel documents by the travel agency".

According to art. 3 pt. 5 of G.O. no. 2/2018, the *package travel contract* is the agreement "whose object is a package as a whole or, if the package is provided under separate contracts, all contracts covering travel services included in the package".

(iii) In tight correlation with the phrase defined above, the *travel arrangement* represents – according to the meaning given by art. 3, pt. 15 of GO no. 2/2018 - *carriage of passengers (a); accommodation* which is not intrinsically part of carriage of passengers and is not for residential purposes (b); *rental of cars, other motor vehicles* within the meaning of section 2, chapter I, pt. 3 letter a) of the Regulations on the type homologation and the issue of the identity card of vehicles, as well as the type homologation of the products used by these - RNTR 2, approved through the Order of the Ministry of Public Works, Transports and Housing no. 211/2003[9] subsequently amended and completed, or in the case of motorcycles, in accordance with art. 6, pt. 22 of the Government Emergency Ordinance no. 195/2002 regarding traffic on public roads[10] subsequently amended and supplemented, for which it is required driving license (c); any other tourist service not intrinsically part of a travel service (d).

The *linked travel arrangement* refers to the existence of *at least two different types of travel services purchased for the purpose of the same trip or holiday*, not constituting a package, resulting in the conclusion of separate contracts with the individual travel service providers, if a trader facilitates one of the options mentioned in art. 3 pt. 16, namely: a) the separate selection and separate payment of each travel service by travelers on the occasion of a single visit or contact with his point of sale; b) in a targeted manner, the procurement of at least one additional travel service from another trader where a contract with such other trader is concluded at the latest 24 hours after the confirmation of the booking of the first travel service.

(iv) *Travel agency* – was "Any specialized unit, legal person, which organizes, offers and sells tourist packages or components thereof". According to art. 2 pt. 3 of G.O. no. 107/1999 travel agencies can be of two types:

a) tour operator, having as object the organization and sale of tourist packages or their components on their own, directly or through intermediaries;

b) a retailer travel agency that sells or offers for sale, on the account of a tour operator, a tourist package or parts thereof, contracted with it.

If a travel agency acts *as an intermediary* for a *tour operator that is not established in Romania*, it is considered to be a *tourist travel organizer for the tourist*.

According to art. 3 pt. 1 of G.O. no. 2/2018, the *travel agency* represents a *specialized unit owned by an economic operator holding a valid tourism*

[9] Published in the Off. Gazette of Romania Part I no. 275 of 18.04.2003, consolidated version of 08.02.2019.
[10] Published in the Off. Gazette of Romania Part I no. 670 of 03.08.2006, consolidated version of 08.02.2019.

license, issued under the law, which can carry out the activities mentioned at letters (a)-(b) namely: a) *organizing activity*: the activity by which the agency combines and sells or offers for sale packages either directly or through another trader or with another trader, or the activity of a trader transmitting the traveler's data to another trader in the online booking process, the travel agency that carries out organizing activity and is referred to as the "organizing travel agency"; b) brokering activity: the activity by which the agency, other than the organizing agency, sells or offers for sale, as an intermediary, combined packages by an organizing travel agency, and "the travel agency that functions as an intermediary is called an intermediary travel agency".

We therefore observe that the new regulation replaces terminologically the phrase "tour operator travel agency" and respectively "retail travel agency" with the phrases "organizing travel agency" and" respectively intermediary travel agency".

(v). *Travel services consumer* – was defined as being "any person or group of natural persons established in associations who purchase or undertake to purchase the tourist package - principal contractor - or any person on whose behalf the main contractor undertakes to purchase the tourist package - other beneficiaries - or any person in the favor to which the main contractor or other beneficiaries gives up the tourist package - the transferee", according to Art. 2 point 4 of G.O. no. 107/1999.

G.O. no. 2/2018 does not contain a definition of the term "consumer of travel services" instead it defines the "traveler" in art. 3(2) as being "any person wishing to conclude a contract or entitled to travel on the basis of a contract concluded under the terms of this ordinance ".

We consider that the mere intent of a person who "wishes to conclude" a contract on travel services cannot attribute to him the status of a traveler or, in the previous terminology, a "tourist".

Previously, the person being provided the tourist services would be called by the term "tourist" who according to the old regulations "is the person defined as a beneficiary under art. 2 pt. 4 or who bought the tourist package or components thereof from the travel agency".

From this perspective and in comparison with the above-mentioned norm, the legal definition of the tourist is conceptually more correctly formulated because it nominates the tourist as the person who bought the tourist *package or components thereof or is the beneficiary of the tourist package.*

G.O. no. 2/2018 contains in art. 2 other legal definitions of concepts and phrases such as: "trader", "inevitable and extraordinary circumstances", "guaranteed claim", "travel package guarantee fund", "insolvency" "start of package", "minor", "lack of conformity", "point of sale", "repatriation",

"establishment", "Member State", "durable medium", on which we will develop in the following.

3. The legal characteristics of the contract on tourist packages

(i) Complex contract – has a specific legal configuration encompassing rights and obligations of the parties that combine general elements in the field of contracts with those specific to the business of marketing tourist packages, so that it is not a classic sale or purchase contract or a service contract (Miff, 2012, p. 133);

(ii) Named contract – its name is prescribed by law, the current special normative act in force being G.O. no. 2/2018;

(iii) Consensual contract – is concluded validly by the formation of the parties' simple agreement; the written form of the contract is provided by the law for its probation (*ad probationem);*

(iv) Mutually binding contract – both contracting parties undertake reciprocal rights and obligations;

(v) Commutative contract – the parties know, from the very moment of its conclusion, the extent of the obligations they undertake.

4. Particular aspects of the package travel contract

4.1. Concluding the package travel contract

The contract regarding the package travel services is concluded, as a rule, just like any other contract, at the time of the agreement of the parties.

According to the previous regulation, if the contract concerned tourist services that were not part of the travel agency's offer, the travel agency would proceed - according to art. 11 from G.O. no. 107/1999, currently abrogated - to issue an order form for the tourist.

In the aforementioned hypothesis, the contract for the marketing of tourist packages was valid when *the tourist received the written confirmation of the reservation,* which was transmitted by the organizer or the retailer of the trip, acting on behalf of the organizer, *within 60 days calendar days from the date of signature of the* order receipt.

The tour operator or retailer was obliged to provide the tourist with *an order receipt only when requesting tourist packages that are not part of the travel agency's offer.*

If the content of the order receipt differed from the content of the confirmation of the trip *or* if this confirmation was not made within 60 calendar days from the date of the order receipt signing, *the tourist could consider that the voyage was not reserved and is entitled to immediate reimbursement of all amounts already paid.*

Failure to comply with the aforementioned provisions did not prevent the contract of sale of the package from being concluded late, irrespective of the period remaining until departure, *if the parties agreed*.

The purchase order included essential items to be found in the contract, such as: the destination(s) of travel, the duration and dates of arrival and departure; means of transport and their category(s); type and category of receiving structures; food services (full/half board/breakfast); the requested tourist program; the number of people for whom the tourist package is ordered, the number of children, the age and the identification documents; other special requests.

4.2. Concluding the package travel contract; precontractual information and information during the execution of the contract

Concluding the package travel contract is preceded by a *precontractual phase* - before the traveler signs the contract or any other offer - during which the organizing travel agency or the intermediary travel agency, if the package travel is marketed by the latter, provides the traveler with the *standard information* by means of the relevant form as set out in annex no. 1 part A or B, as well as the *precontractual information* indicated in art. 5 called "Precontractual information", para. 1, letters a)-h), if it is applicable to the package.

The information refers to: (a) the main characteristics of the travel services: (i) the travel destination(s), itinerary and periods of stay, with dates and, where accommodation is included, the number of nights included; (ii) the means, characteristics and categories of transport, the points, dates and time of departure and return, the duration and places of intermediate stops and transport connections.

Where the exact time is not yet determined, the organizer and, where applicable, the retailer shall inform the traveler of the approximate time of departure and return; (iii) the location, main features and, where applicable, tourist category of the accommodation under the rules of the country of destination; (iv) the meal plan; (v) visits, excursion(s) or other services included in the total price agreed for the package; (vi) where it is not apparent from the context, whether any of the travel services will be provided to the traveler as part of a group and, if so, where possible, the approximate size of the group; (vii) where the traveler's benefit from other tourist services depends on effective oral communication, the language in which those services will be carried out; (viii) whether the trip or holiday is generally suitable for persons with reduced mobility and, upon the traveler's request, precise information on the suitability of the trip or holiday taking into account the traveler's needs; (b) the trading name and geographical address of the organizer and, where

applicable, of the retailer, as well as their telephone number and, where applicable, e-mail address; (c) the total price of the package inclusive of taxes and, where applicable, of all additional fees, charges and other costs or, where those costs cannot reasonably be calculated in advance of the conclusion of the contract, an indication of the type of additional costs which the traveler may still have to bear; (d) the arrangements for payment, including any amount or percentage of the price which is to be paid as a down payment and the timetable for payment of the balance, or financial guarantees to be paid or provided by the traveler; (e) the minimum number of persons required for the package to take place and the time-limit, within which the organizing travel agency must inform the traveler regarding the termination of the contract because the number of persons enrolled for the package is smaller than the minimum number stated in the contract, before the start of the package for the possible termination of the contract if that number is not reached; (f) general information on passport and visa requirements, including approximate periods for obtaining visas and information on health formalities, of the country of destination; (g) information that the traveler may terminate the contract at any time before the start of the package in return for payment of an appropriate termination fee, or, where applicable, the standardised termination fees requested by the organizer, according to art. 13 para. 1 and 2 of G.O no. 2/2018; (h) information on optional or compulsory insurance to cover the cost of termination of the contract by the traveler or the cost of assistance, including repatriation, in the event of accident, illness or death.

For package travel contracts concluded by telephone, the organizer and, where applicable, the retailer shall provide the traveler with the standard information set out in Part B of Annex I, and the information set out above.

With reference to packages purchased from various traders by means of linked online booking as defined in art. 3, pt. 12, letter (b) pt. (v) of G.O. no. 2/2018 the organizer and the trader to whom the data are transmitted shall ensure that each of them provides, before the traveler is bound by a contract or any corresponding offer, the precontractual information in so far as it is relevant for the respective travel services they offer. The organizer shall also provide, at the same time, the standard information by means of the form set out in Part C of Annex I of G.O. no. 2/2018.

The precontractual information shall be provided in a clear, comprehensible and prominent manner and where such information is provided in writing, it shall be legible.

The precontractual information regarding the main characteristics of the travel services, the total price of the package (inclusive of taxes and, where applicable, of all additional fees, charges and other costs), the arrangements for payment, the minimum number of persons required for the package to take

place and the time-limit for the possible termination of the contract if that number is not reached, as well as information on that the traveler may terminate the contract at any time before the start of the package in return for payment of an appropriate termination fee, according to art. 5 para. 1 letter. a), c), d), e) and g) of G.O. no. 2/2018, shall form an integral part of the package travel contract and shall not be altered unless the contracting parties expressly agree otherwise.

The legal text of art. 6 para. 2 of O.G. no. 2/2018 stresses the importance of providing pre-contractual information on additional fees, charges, termination fees or other additional costs, with the consequence of absolving the traveler of the obligation to bear them in the event of failure by the agency to meet the precontractual information requirement.

The obligation to inform the traveler is *an essential duty* of the tourist services or travel services provider, at this point existing an actual "paradigm of information in the European consumer law" (Reich et al, 2014, p. 21).

The obligation to inform is currently established as such mainly by Chapter II, art. 5 of the G.O. no. 2/2018 but also resulting from the previous regulation, art. 6 - art. 10, G.O. no. 107/1999, currently abrogated.

In this matter, the obligation to provide information has specific content which ultimately highlights the particularities of the contract for the provision of travel services.

Thus, the tour operator or his intermediary must provide the traveler with a set of information on the package of travel services, its price and all other conditions applicable to the contract, containing *correct and clear indications that do not allow for equivocal interpretations.*

In order to carry out this task, in accordance with the old regulation, *the travel agency* had the obligation to provide tourists, *in writing*, for the conclusion of the contract, with *specific information* on: the destination town; route; the means of transport used, characteristics and category(s) of the means of transport; type of accommodation units, addresses and categories thereof; food services offered and the classification of food units; the duration of the program, indicating the date of arrival and departure; general information on the passport and visa regime, as well as the health insurance required for travel and stay; the amount of the advance, if any, as well as the time limit for payment of the outstanding balance; the minimum number of people required to complete the program and the deadline for informing the tourist in case of cancellation of the tourist trip; the possibilities of concluding voluntary insurance policies for assistance in the event of sickness, accidents and the like; the duration of the tourist offer, according to art. 7 of G.O. no. 107/1999.

Similarly, the corresponding obligations incumbent on the organizing and intermediary travel agency at the *precontractual stage* and the content of

which is part of the package travel contract are currently stipulated, as we have pointed out above, in the provisions of Chapter II of G.O. no. 2/2018.

Information that is communicated to the traveler, in writing or in any other appropriate form, at the pre-contractual stage, also refers to the general indications/references regarding the passport regime, namely the visas and health formalities required for travel and stay. In the current legislation this pre-contractual information is stipulated in art. 5, para. 1, letter h) of G.O. no. 2/2018.

Some components of the obligation to inform, equally in the old regulation and in the law currently in force, explicitly refer to the execution of the contract stage, referring to: timetables, stopovers and the connecting flights and, where appropriate, the place to be occupied by the tourist on each of the means of transport included in the contract; name, headquarters/address, telephone and fax number of the local representative of the organizer and/or the intermediary or, if these are not provided, those of the local authorities that can assist the traveler in case of need; if these local representatives or authorities do not exist, the traveler must have an emergency call number or any other information enabling him or her to contact the organizer and/or the intermediary; for the travel and subsistence of children, information enabling direct contact with the child or the person in charge of the child's place of residence; the possibility of signing an optional insurance contract to cover traveler transfer taxes or a contract of assistance covering the cost of repatriation in the event of injury or sickness, according to art. 5 para. 1 combined with art. 7 from G.O. no. 2/2018 and for the old regulation, art. 10 of G.O. no. 107/1999.

If the travel agency modifies any of the essential clauses of the contract, it has the obligation to inform the tourist at least 15 days before the departure date and the tourist is obliged to inform the travel agency within 5 days of receipt of the notification, its decision *to opt* either for the *termination of the contract* without payment of penalties, or for *the acceptance of the new terms* of the contract, according to art. 15 of G.O. no. 107/1999.

From a wider perspective on contract matters, in general, the obligation to inform, developed in Popescu (Popescu, 2018, p. 79-81), in contracts is a component of the obligation of good faith which must govern the conduct of the contracting parties, the latter being formally enshrined as a general principle of contracts in art. 1170 of the Civil Code.[11]

The breach of this obligation implies the liability of the defaulting party under the provisions of the special law and, in addition, to the extent of compatibility, the rules of the common law in the matter.

[11] Civil Code, republished in 2011, the version consolidated on 24.03.2017, the Vth Book "On obligations" hereinafter called the *Civil Code.*

As part of the information that defines the tourist product offered to the potential tourists, consumers of these services, are included in the advertising materials, in the field of promoting tourism products, art. 8 of G.O. no. 107/1999, republished, stipulated that *the information from the tourist advertising materials engage the tour operator or intermediary*, except when:
a) any changes in this information have been clearly communicated to the tourist before the conclusion of the contract; (b) the modifications have been made, with the agreement of the Contracting Parties, following the conclusion of the contract.

As stated in the doctrine (Goicovici, 2011, p. 190), according to the Civil Code, Book V on obligations, the rule on the contractual obligation of information provided in advertisements, in the case of the marketing of package travel derogates from the rule of common law that advertising messages "are in principle deprived of a contractual clause, their issuance having the purpose (as a general rule, in civil and commercial contracts) to attract and retain customers, namely to promote products and services and not to engage in contractual obligations."

The burden of proof as regards compliance with the information requirements shall be on the trader, as provided by art. 8 of G.O. no. 2/2018.

The obligation to provide information is not unilateral in this field because it is not incumbent only on the provider of travel services.

The traveler shall also have a contractual obligation to inform the travel service provider, respectively the organizing and/or intermediary travel agency, taking into account the circumstances, of *any nonconformity found during the performance of a travel service* included in contractual package on travel services, according to art. 14 para. 6 combined with art. 16 of G.O. no. 2/2018. In such a situation the passenger is entitled to send messages, requests or complaints in connection with the performance of the package directly to the intermediary travel agency from which he purchased the package, the latter having the obligation to forward them, without unjustified delays to the organizing travel agency.

The date of receiving the messages, requests or complaints is considered as the date of receipt by the organizing travel agency, clarification which the legal text of art. 16 para. 2 of G.O. no. 2/2018 specifies for a correct interpretation, for compliance with prescription periods, the non-compliance of which is likely to cause negative consequences for the contracting parties.

Article 17 of the referred normative act, formally and distinctly enshrines the obligation of the organizing travel agency to provide assistance to the traveler in difficulty, a duty which is part of the obligation of good faith which must characterize the conduct of the contracting parties. This duty shall be carried out by the travel agency, in particular by providing appropriate

information on health services, local authorities and consular assistance and assisting the traveler to make distance communications and helping the traveler to find alternative travel arrangements.

In performing the obligation to provide assistance, the organizer shall be able to charge a *reasonable fee* for such assistance if the difficulty is caused intentionally by the traveler or through the traveler's negligence. That fee shall not in any event exceed the actual costs incurred by the organizer, the legal text having an imperative character.

5. The contents of the package travel contract

5.1. The minimum set of clauses specific to this type of contract, currently involve the corroboration of the legal provisions under chapter II-IV of G.O. no. 2/2018 and were mentioned in the previous regulation in art. 12 para. 2 of G.O. no. 107/1999 repealed. These clauses were part of *the framework contract for the marketing of tourist packages*, as set out in the annex to Order no. 1387/2015 for the approval of the contract for the marketing of tourist packages.[12]

Specific rules on this type of contract are to be complemented to the extent that they are compatible with *the rules of the common law on contracts* contained in the Civil Code, namely: art. 1201 (external clauses), art. 1202 (standard clauses), art. 1203 (uncommon clauses), and art. 1272 (content of contract).

Therefore, art. 1272 of the code, entitled "Content of the Contract", states: "(1) The valid contract concluded obliges not only to what is expressly stipulated but also to all the consequences which the established practices between the parties, the customs, the law or equity give the contract, by its nature. (2) The usual clauses in a contract are understood, although not expressly stipulated."

In the context of the *special rules* on the contract for the provision of tourist services, expressed in the provisions of former chapter III, art. 11-art. 23 of G.O. no. 107/1999, presently repealed, the contract is governed by the *principle of contractual freedom and the priority of the parties' will*, as well as by *the principle of availability* developed by the doctrine (Apan, Miff, 2018).

This principle is stated in a global manner and implicitly in art. 11 para. 4 of the normative act invoked, according to which the conclusion of the contract, even with a delay and irrespective of the remaining period until the departure of the tourist, was *possible and allowed if the parties agreed*, notwithstanding the non-observance of the provisions of former art. 11 para. 1 - 3 regarding the obligation of the organizing or intermediary tourism agency

[12] Published in the Off. Gazette, Part I, no. 122 of 17.02.2016.

to provide the tourist with an *order receipt* when requesting tourist packages that are not part of the travel agency's offer.

The only *limitation of these principles* resulted from *the provisions of the law, public order and good morals.*

In the legal context described by G.O. no. 2/2018, the principles set out are equally present since they are general principles of the law governing private law matters, which integrate also the relations, including contractual ones, generated by the performance of travel services.

The contract for the provision of tourist services included, according to art. 12 para. 2 of G.O. no. 107/1999 presently repealed, *at least clauses referring to*: the destination/destinations of the trip and, in the case of periods of stay, the duration and dates of arrival and departure; the means of transport used; the characteristics and categories thereof, the dates, times and places of departure/arrival, at departure and return; the address and classification category of the tourist reception facilities, in accordance with the regulations of the receiving countries, where the tourist package also includes accommodation; food services provided: full board, half board, breakfast; if the execution of the tourist package requires a minimum number of persons, the deadline for informing the tourist about canceling the ordered trip; the route; visits, excursions or other services that are included in the total agreed package price of the tourist package; the name and headquarters/address of the organizing agency/travel agencies and, where appropriate, of the intermediate travel agency and insurance company; the price of the service package, indicating the circumstances in which it may be modified, and the charges for certain services: landing charges, embarkation/disembarkation at ports and airports, tourist taxes, if not included in the package price of tourist services; terms and method of payment; special tourist requests made known to the organizing or intermediary travel agency at the time of the order and accepted by both parties; the time limits for the tourist to submit a possible complaint for the non-execution or improper execution of the travel contract; the conditions for modification and termination of the contract; the obligations of the travel agency in the event of cancellation of the journey, replacement or non-insurance of certain services; the possibility of transfer of the contract by the tourist to a third person and the way of realization thereof; any changes that the travel agency can bring to the purchased services; liability of the agency and compensation to the tourist in the event of non-compliance with the contractual clauses.

From the legal perspective offered by G.O. no. 2/2018, the *content of the package travel contract,* as described by art. 7, must comprise the full content of the agreement concluded between the travel agency and the traveler, which shall include all the precontractual information as well as clauses that express the information contained by art. 7 para. 3, letters a)-h). More precisely, these

clauses refer to: a) special requirements of the traveler which the organizer has accepted; b) information that the organizer is responsible for the proper performance of all travel services included in the contract, according to art. 14 of the G.O no. 2/2018, and it is obliged to provide assistance if the traveler is in difficulty, according to art. 17 of the G.O no. 2/2018; c) the name of the entity in charge of the insolvency protection and its contact details, including its geographical address, and, where applicable, the name of the competent authority designated by the Member State concerned for that purpose and its contact details; d) the name, address, telephone number, e-mail address and, where applicable, the fax number of the organizer's local representative, of a contact point or of another service which enables the traveler to contact the organizer quickly and communicate with him efficiently, to request assistance when the traveler is in difficulty or to complain about any lack of conformity perceived during the performance of the package; e)information that the traveler is required to communicate any lack of conformity which he perceives during the performance of the package; f) where minors, unaccompanied by a parent or another authorized person, travel on the basis of a package travel contract which includes accommodation, information enabling direct contact with the minor or the person responsible for the minor at the minor's place of stay; g) information on available in-house complaint handling procedures and on alternative dispute resolution ('ADR') mechanisms pursuant to G.O. no. 38/2015[13] on alternative dispute resolution for consumers and traders subsequently amended and completed, and, where applicable, on the ADR entity by which the trader is covered and on the online dispute resolution platform pursuant to Regulation (EU) no. 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) no. 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR); h) information on the traveler's right to transfer the contract to another traveler, according to art. 10 of G.O no. 2/2018.

5.2. The price is *an essential element* of the contract and the special rules for this type of contract contain *provisions that set the limits* between which the contracting parties may agree on any adjustments or price changes.

Thus, art. 11 of G.O. no. 2/2018 details how the price may be altered and art. 12 refer to the modification of other contractual clauses.

Increasing the price is conditional upon the explicitly stipulating in the contract a corresponding clause as well as the passenger's right to a price reduction in relation to the agency's cost reduction after the conclusion of the contract but before the start of the travel package.

[13] Published in the Off. Gazette, Part I no. 654 of 28.08.2015, consolidated version of 28.02.2019.

This change must be justified by a price increase as a direct consequence of the changes related to at least one of the aspects specified in art. 11, para. 1, letters a)-c) of the normative act, namely: the price of the carriage of passengers resulting from the cost of fuel or other power sources (a); the level of taxes or fees on the travel services included in the contract imposed by third parties not directly involved in the performance of the package, including tourist taxes, landing taxes or embarkation or disembarkation fees at ports and airports (b); the relevant exchange rate for that package (c).

However, the price increase exceeding 8 % of the total price of the package, entitles the traveler either to accept the proposed change within a reasonable period set by the agency or to terminate the contract without paying any penalty.

In addition, another requirement imposed by the law, irrespective of the percentage of price increase, is the obligation of the organizing travel agency to send the traveler a notification clearly indicating the amount and justification of the price increase as well as the method of calculation, on a durable medium, at least 20 days prior to the start of the package.

A durable medium is, in the sense of art. 3 pt. 19 of G O. no. 2/2018, "any instrument enabling the traveler or the trader to store personally-addressed information in an accessible manner for further reference for information purposes for an appropriate period of time and allowing reproduction without changes to stored information".

If the alteration concerns price reduction, the organizing travel agency is entitled to deduct the actual administrative costs from the reimbursement due to the traveler, while presenting at the request of the traveler, proof of the respective administrative expenses.

In the previous regulation, the *prices* stipulated in the contract could be changed only under the conditions stipulated by former art. 14 paragraph 1 of G.O. no. 107/1999 presently repealed, namely: the contract *explicitly* stipulated the possibility of changing the price, both for the increase and the reduction thereof, as well as the way of its calculation; the change in price *needs to be justified by the variations in*: a) transport costs, including the cost of fuel; (b) royalties and charges for landing, embarkation/disembarkation in ports and airports, and tourist taxes; c) exchange rates for the contracted tourist package.

In the case of a price reduction, the organizing travel agency was entitled to deduct the actual administrative costs from the reimbursement owed to the passenger. At the traveler's request, the organizing travel agency was required to provide evidence of the respective administrative expenses.

The price increase stipulated in the contract, being a modification of the contract, could not "in any case" take place, (under the terms of art. 14, para.

2, of G.O. no. 107/1999) during the 20 calendar days preceding the departure date of the tourist. We consider that the imperative wording of the legal text invoked only allowed it to be interpreted as restrictive.

However, if the prices set in the contract were increased by more than 10%, *no matter the reasons for the increase*, the tourist could *terminate* the contract without any obligation towards the travel agency; in this case, the travel agency had the obligation to immediately refund to the tourist all the sums related to the trip paid by him, including the commission.

Compared to previous legislation, the minimum limit, by percentage, of the increase in the price of the package travel that may authorize the traveler to decide to terminate the contract is reduced from 10% to 8%, but as regards the length of the period within which the organizing travel agency is obliged to reimburse the payments made by or on behalf of the passenger, the current regulation stipulates a maximum of 14 days, as compared to the previous provision stipulating the immediate refund of the amounts paid by the tourist, including the fee.

5.3. Regarding the *alteration of other package travel contract terms*, art. 12 para. 1 of G.O. no. 2/2018 establishes the *interdiction to unilaterally change* package travel contract terms other than the price – according to art. 11 referred above – or unless the following conditions are cumulatively met: the organizer has reserved that right in the contract (a); the change of the clause is insignificant (b); he organizer informs the traveler of the change in a clear, comprehensible and prominent manner on a durable medium (c).

However, if the organizer proceeds (in the wording of the legal text of art. 12, para. 2, of G.O. no. 2/2018 it is "constrained") *to altering significantly any of the main characteristics of the travel services* or cannot fulfill the traveler's special requirements, or intends to increase the price of the package by more than 8 %, before the start of the package, the traveler may within a reasonable period specified by the organizer may either accept the proposed change or terminate the contract without paying a termination fee.

Including changing the accommodation is considered to be a significant change, in which case passengers are offered the closest option of that location of equivalent or higher quality.

If the traveler chooses to *terminate the package travel* contract, the traveler may accept a substitute package where this is offered by the organizer, if possible of an equivalent or a higher quality.

In the above-mentioned situations, the travel agency is *obliged to inform the traveler*, in clear and unambiguous terms, on a durable medium without undue delay, on the proposed changes and their impact on the price, as well as on the reasonable time available to the traveler to make the decision known to

the agency and, last but not least, to the consequences of the traveller's lack of response regarding the substitution package offered and its price.

5.4. The organizer has the obligation to reimburse any payments made by or on behalf of the traveler, without undue delay and in any event not later than 14 days after the package travel contract is terminated, when the traveler does not accept another package, the traveler's right to be paid paying compensation being examined under art. 15, para. 2-6 of G.O. no. 2/2018.

Finally, *the traveler shall be entitled to an appropriate price reduction* if the changes to the package travel contract result in a package of lower quality or cost.

5.5. In what concerns the wording of the contractual clauses, *the language used must be plain and intelligible,* the traveler being entitled to request a paper copy if the package travel contract has been concluded in the "simultaneous physical presence of the parties" as stipulated by art. 7 para. 1 of G.O. no. 2/2018. However, it should be noted that the common law norms on contractual matters in Book V of the Civil Code, republished in 2011, consolidated version of 24.03.2017, provides that the contracts concluded by telephone are considered to be contracts concluded in the presence of the parties.

With respect to *off-premises contracts* as defined in art. 2, pt. 8 of the G.O. no. 34/2014 on consumers rights in contracts concluded with professionals, and amending and completing certain regulations, approved with amendments through Law no. 157/2015[14], a copy or confirmation of the package travel contract shall be provided to the traveler on paper or, if the traveler agrees, on another durable medium.

Conclusions

By the entry into force of G.O. no. 2/2018, a new regulation of the package travels we are revealed a series of changes by comparison to the previous regulation which, as shown in the doctrine (Dumitru, p. 96-102), presented difficulties of application, but awareness in relation to these new regulations will attract a change of paradigm so that trips do not become true travels of dilettantes.

What can be seen as favourable about the new regulation is a strengthening of the information obligation and the liability regime of the organizing travel agency for insolvency cases.

[14] Published in the Off. Gazette Part I no. 449 of 23.06.2015, consolidated version of 28.02.2019.

Both aspects attract more effective protection of travelers in relation to organizing travel agencies.

It can be noticed that the legal relationship between the traveler and the travel agency is bivalent, both parties being obliged to inform and advise oneself and each other, both regarding the contract and on the performance of the contract for a mutually beneficial relationship, so as John Steinbeck used to say, "people do not take trips, trips take people".

Bibliography

Books, articles

1. Apan, R.D., Miff, A., (2018), The Constants of the Disposition Principle vs with the Challenges in the Field of Private Law, *Journal of Law and Public Administration*. Volume IV, Issue 8.
2. Dumitru, D., *Dificultăţi de interpretare şi aplicare a Directivei 90/314/CEE privind pachetele de servicii pentru călătorii, vacanţe şi circuite;* Universul Juridic review.
3. Goicovici, J., (2011), Particularităţi ale contractului de comercializare a pachetelor de servicii turistice. *Revista de drept comercial*, Issue 7-8.
4. Miff, A., (2012), *Dreptul afacerilor. Reglementarea activităţii de turism în România*, Cluj-Napoca: Editura Fundaţiei pentru Studii Europene.
5. Popescu, A., (2018), The Evolution of the Right to Information of the Consumer: References to European Policies and Legislation with Effects on Internal Law, *Journal of Law and Public Administration*, Volume IV, Issue 7.
6. Reich, N., Micklitz, H.W., Rott, P., Tonner, K., (2014), *European Consumer Law,* 2nd edition, Cambridge Antwerp Portland: Intersentia.

National and EU legislation

1. Government Ordinance no. 2/2018 package travels and associated travel services, as well as for the amendment of some normative acts, published in the Off. Gazette of Romania Part I, no. 728 of 23.08.2018
2. Civil Code, republished in 2011, in the Off. Gazette of Romania, Part I, no. 505/15.07.2011, consolidated version on 24.03.2017;
3. Order of NATA no. 1387/2015 of 11.11.2015 for the approval of the framework contract for the marketing of package travels, published in the Off. Gazette of Romania, Part I, no. 122/17.02.2016;
4. Government Ordinance no. 107/1999 on the marketing of package travels republished (2) in 2008, in the Off. Gazette of Romania, Part I, no. 448/16.06.2008, consolidated version on 7.01.2018;
5. Government Ordinance no. 26/2017 of 30.08.2017 on the amendment and supplementation of Government Ordinance no. 107/1999, published in the Off. Gazette of Romania, Part I, no. 706/31.08.2017;
6. Law no. 277/2017 of 28.12.2017 approving G.O. no. 26/2017 on the amendment and supplementation of Government Ordinance no. 107/1999 on the marketing of package travels, published in the Off. Gazette of Romania, Part I, no. 8/4.01.2018;

7. Directive 90/314/EEC of 13 June, on package travel, package holiday and package tours, published in the Official Journal of the European Union (JOCE) no. L 158 of 23 June 1990;
8. Directive (EU) 2.302/2015 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC.

THE SPECIAL FEATURE OF THE INSTITUTION'S CAPACITY TO EXERCISE A NATURAL PERSON AFTER THE LEGISLATION OF THE REPUBLIC OF MOLDOVA

Grigore ARDELEAN[*]
Alexandru CICALĂ[**]

Abstract

After the essence and usefulness, the institution of legal capacity to exercise a natural person always occupied a position in the list of priority concerns the doctrine of, in particular, the Republic of Moldova in the process of consolidation and the development of legislative base, during the transitional period.

Although, to a certain extent, to the formation of a juridical institutions with promising prospects in the raw material the capacity to exercise, even with elements which had never before fallen in the way in the legislation of other Member States, after the year 2017, the legal decree in the field in question has given to understand that without a review within the meaning of modernization will not be able to continue to ensure efficient coveted.

In these conditions, recently, the legislature of the Republic of Moldova decided to initiate the process of reconsidering the concept of the capacity to exercise a natural person, placing emphasis on intensification of judicial measures for the protection of the interests of them in return for giving up on some circumstances that previously withdrawing into the field of action in the personal exercise of legal acts of provision.

The tactics chosen by the inspired is our legislator in the process of formulating the new legal framework to guarantee the civil rights in the case of special categories of subjects, remains to be seized after the generated effects, and until then, by doctrinally in the framework of the new research and interpretations of the possible effects in the plan Application Note.

Keywords: *civil capacity, legal acts of provision, natural person, discerning, aptitude, tutelage, legal protection, family council, approval, emancipation*

JEL Classification: [K 15]

[*] Associate Professor. PhD., „Ștefan cel Mare” Academy of Ministry of Internal Affairs of Moldova;

** Assistant professor, PhD. candidate, „Ștefan cel Mare” Academy of Ministry of Internal Affairs of Moldova.

1. Introduction. The concept of the full exercise capacity

Notion. Exercise capacity is the ability of the person to gain by its own deed, and to exercise the civil rights, to assume personal civil obligations and to run (Article 19 CC). In the way of expression of our legislator the definition of the concept of capacity to exercise, mind, after a slight superficial exams, the phrase:„(…) the suitability of the person to gain by its own deed (…)" But the capacity of the civil society to exercise a natural person should relate exclusively to its ability to conclude staff legal acts, the aptitude test does not have anything to commit certain facts, whether they are of the nature of the material, legal, civil, commercial even. But the ability to exercise only affects the civil legal acts, namely the property-related, as in the case of legal documents related to the other branches of "capacity problem of minors is regulated separately, sometimes different from how the regulatory framework of civil law" (Mureşan, 2001, p. 92).

What is right, and the roman legislature within the actual legislation admit a mistake to define the capacity to exercise: "Exercise capacity is the ability of a person to conclude the only acts civil society' (Article 37 RCC).

Although it is appreciated the idea of reference only to the ability to complete the legal acts, in particular those civil society, and legal acts of any other nature (Beleiu, 1992, p. 317), it seems correct observation of authors (Lupan, 2007, p. 98), which considers the expression "single" as one unhappy, arguing that the same aptitude test shall be required, and then, when the legal act civil is completed by more than one person.

Therefore, in their opinion, and with good reason, the capacity of the civil society to exercise is the ability of the natural person to conclude staff legal acts civil society. In the context, the authors of the quoted continue to examine the style of defining the capacity to exercise and in the content of the other regulations with a special character. Thus, in Article 5(3) of the Decree no. 31/1954 they identify a definition more explicit, after which the: "Exercise capacity is the capacity of a person to exercise their rights and to assume the obligations, committed legal acts".

However, and here it should be noted that this legal definition is not rigorously formulated scientific, the formulation of the concept "the capacity to exercise capacity" as "person capacity", and on the other hand, it is more correctly to say: "finishing legal acts" and not "committed" such acts.

Thus, the diversity of how to define the institution's capacity to exercise a natural person in the Romanian specialized doctrine is obvious, beginning her to define on the basis of the simple account that:„Full exercise capacity is

the ability of a person to commit itself, directly and without the aid of the juridical status of another person, legal acts of civil law" (Ghimpu, 1960, p. 40) and continuing with the definitions more complete after the content and purpose, according which "the ability to exercise a natural person is that part of the capacity of the civil society of man, which consists in the ability to exercise their civil rights and assume the obligations of the civil society by the conclusion of legal acts civil society" (Beleiu, 1982, p. 105).

As a matter of fact, although based on a history not too long, the evolution of advisors and efforts directed toward the achievement of the longing in the formula and assign a concept, as appropriate the institution of the capacity to exercise does not allow overlooked and specialized in the Moldavian doctrine. According to the national authors (Baies, 2004, p. 269), through the exercise capacity of the natural person" means that part of the capacity of the civil law of man, which consists in the ability to acquire and to exercise the civil rights and assume the obligations and execute civil society by the conclusion of legal acts civil society.

Having regard to the foregoing, without entering into the polemic, we adhere to the definition of what the author considers the capacity of the civil society the exercise of the natural person as part of the capacity of the civil law of man, which consists in the ability to acquire and exercise the civil rights subjective and to assume the obligations and execute civil society by the conclusion of the staff of legal acts. (Lupan, 1999, p. 93).

In these circumstances, the author less considers that in the definition of the capacity of the civil society to exercise is not necessary to mention about the suitability of the natural person to sit in the justice system, since this is already the scope of civil procedure, though we believe that the importance of the assignment of the possibility to acquire and exercise personal rights and obligations shall be reduced to zero if the person cannot take personal action in court for the purpose complaint their protection.

The headquarters of the matter. The various aspects of the capacity of the civil society to exercise are regulated directly by the content of the articles 19-25 of the Civil Code of the Republic of Moldova. Some aspects of the tangential refers to the capacity of the civil society to exercise a natural person shall contain and elsewhere: The Family Code; The Law no. 845/1992 regarding the entrepreneurship and enterprises, some laws in the field of trade, the Government Decision No. 1047/1999 for approving the rules of registration of motor vehicles and their trailers etc.

Steps taken by the person under the aspect of the capacity of the civil society to exercise.

In principle, it is considered that the person in life can be found in three capacities of the capacity to exercise: lack the capacity to exercise, limited

exercise capacity and full exercise capacity.

Among other things, the Romanian legislator in the content of Article 40 of the Civil Code, recognizes another chance to exercise capacity, hereinafter referred to as "advance" exercise capacity, which would recognize certain individuals. Thus, the quoted rule provides that the grounds, the appellate court guardianship can recognize the minor who has reached the age of 16 years full exercise capacity. For this purpose, will be listening to their parents or guardian of the minor, account being taken, where appropriate, and the opinion of the Council of the family. (Romanian Civil Code, Article 40).

With all civil law in the Republic of Moldova does not recognize the institution capacity to exercise early elections recognizes, in exchange, empowerment of institution (the acquisition of the full capacity to exercise by the minor who has reached the age of 16 years), imposing a certain additional condition, this consists in the fact that the minor working under a contract of employment or, with the agreement of their parents, curator or joiners, the practice of self-activity (art. 20 paragraph 3 CC).

Obviously, the full exercise capacity allocation of a minor by emancipation shall be carried out on the basis of the decision of the authority may, with the agreement of both parents, curator or joiners, and in the absence of such agreement, the court ruling. However, being in accordance with Romanian authors (Lupan, 2007, pp. 105-106) we believe that there should be no talk about three hypostases (stages) of the capacity to exercise a natural person, because of the total lack of capacity cannot be considered as a category. But, if it is missing, then does not exist.

In this exposure, stating the steps and examining the capacity to exercise, which affects the person in the different periods of his life, we consider it appropriate to we mention: that the entire legal protection regime of the capacity of the civil society to exercise in relation to its stages cannot be regarded solely from the progressive optical, (ascension) dictated by the evolution of the maturation of person (no capacity - up to the age of 7 years, a limited exercise capacity - from 7 to 18 years[1] and the full exercise capacity - after 18 years) but and vice versa in order regression (decline) its suitability mental what characterizes the judgment and who does not already have nothing with age (the full capacity - after 18 years of limited capacity[2] and,

[1] In the text below we come up with explanations and answer to the question: why limited exercise capacity shall be considered from the age of 7 years and not from the age of 14, once the minor concludes staff legal acts only at this age.

[2] We mention that the Civil Code of the Republic of Moldova in the editorial office of up to 13.04.17 regulate the institution of the limitation on the exercise of the capacity of the natural person, a situation which we will express disagreement and regret toward the end of the work.

finally, the deprivation of exercise capacity[3] - under the conditions laid down in Article 24 cc of RM).

In the context, if we spoke of limited exercise capacity - category unfits for the Romanian legislation, it may require to be noted that, although the institution capacity restricted exercise would closely resemble a remarkable likeness to the limited exercise capacity, they shall be distinguished by virtue of invocation.

The first is independent of the will of man - the age, and the last because of the abuses of part of what has already acquired the full capacity to exercise. Not in vain was saying that the evolution of the capacity to exercise does not only has a unique sense gradually, obviously, with the exception of some (Which are not abuse of alcohol or drugs, as well as for those who after the acquisition of the full capacity to exercise are not affected by a mental illness and were born without mental deficiencies). As for the rest, those who have followed all stages of production in the exercise capacity at any time may go back where he had started once, i.e. from the lack the capacity to exercise.

Obviously, some of them may return to the incapacity directly, without going through the limitation (in the case of mental illness), others may go back to the inability to exercise through the limitation in this, and those of the third category may not reach have never the exercise capacity (people born with mental deficiencies).

2. The capacity of the civil society of limited exercise of persons

Notion. Taking into account the fact that the great majority of the notions exposed in literature through which it is intended to define limited exercise capacity rotate around the ability of a person aged between 14 and 18 years to conclude a certain category of legal acts civil society, in the compartment front we will try to show that on grounds imposed by national legislation in this field, the notion of capacity restricted exercise, should be defined.

Namely, that it is necessary given the need of the provisions referred to in Article 22(2) of the Civil Code of the Republic of Moldova which allow the minor aged from 7 to 14 years to conclude staff, attention, even without the prior consent of the parents, legal acts, the civil law, only a certain category of documents, that's why it's ability to exercise and call - restricted.

[3] Civil legislation of the Republic of Moldova in the current version, after 13.04.17, does not accept deprivation of the person in the exercise capacity on the question of mental illness, setting for this an alternative which consists in the imposition of measures against it legal protection, Bringing it so in the category of persons with limited exercise capacity, similar to the minor aged from 7 to 14 years, once it is stated that the first has the right to conclude its own legal acts referred to in Article 22(2).

Therefore, we consider that the legal exercise of the conclusion of the legal acts with the consent of their parents do not need to be the sole indicator (element) of the restricted exercise capacity, but must be taken into account that the person has a limited exercise capacity, if this is the unvarying two circumstances: the first consists in the restriction to conclude staff all categories of acts legal-civil society, because it can conclude staff only a certain category of legal acts and, second, that other categories of legal acts are completed, or by the protection guardians. But, as more support in our specialized literature (Baies, 2004, p. 276), we do not recognize that minors between the ages of 7 and 14 years have not exercise capacity, as long as the law establishes a certain degree of exercise capacity[4]. Even more so, the previous civil law (the Civil Code in 1964, Article 14) which limited exercise capacity of the minor, even from birth until the age of 15 years.

Therefore, we notice that in the end, according to the legislation of the Republic of Moldova, the capacity of the unvarying exercise know, so to speak, two steps: the first is that between 7-14 years of age, and the two, between 14-18 years, the difference between them being imposed not only by age, but even to the category of acts which may be concluded by them personally (minors from 14-18 may conclude other categories of legal acts personal than those aged from 7 to 14) but the fact that in the first case all other amendments shall be concluded by the parents of the minor in his name, and in the latter case, the staff are completed by the minor, but with the approval of the parents.

Among other things, the capacity of the limited exercise, in general, to be defined without referring to a certain age, because the degree the ability to penetrate the essence of certain things, events, effects which may cause the legal acts against the person may vary from case to case. It all depends on their degree of intellectual development of the minor, the degree of education or even by his personal experience in areas narrower, the ability to judge and to appreciate things at their fair value.

As a matter of fact, that's not what counts, even if we are of the opinion that is illogic to appreciate the degree of development of the ability of each time it intends to conclude the legal acts which it affects, finally, the law may not allow to reach the subject of the possibility to decide after their own belief the existence or absence of someone, the more the realm of degree, where in general may not be graduated flask. But the law is operating in the field of

[4] Although, according to the latest changes, of the Romanian civil law (art. 43 parag. 3 CC) accepts cases in the person without the exercise capacity may be terminated only certain acts provided by law, the acts of preservation, as well as acts of provision of small value, with the current character and which shall be carried out at the time of their conclusion. However, as a last resort, be considered without an exercise capacity.

exercise capacity with the ends that have well-defined limits - the existence or absence of discerning.

Therefore, the sentence which tend to move inward in context, is that the institution restricted exercise capacity may not have a universal concept, but rather to be designed according to different parameters on a case-by-case basis, from state to state, from region to region or to a system of law to another. There is a member the legislation which expressly provides that the minor has limited exercise capacity from the age of 14 years. Is Romania's case where Article 12(1) of the Decree 31/1954 clearly says that they do not have the capacity to exercise the minors who have not reached the age of 14 years.

For the reasons stated above, we can define limited exercise capacity as an aptitude test a natural person, considered from the age laid down by law, ask him given the opportunity, and in some cases, to conclude staff only a certain category of legal instruments, and in others, only with the prior consent of the legal protection, through which, acquires and exercise the civil rights subjective, assume the obligations and execute the civil society.

2.1. The beginning of the civil limited exercise capacity

As regards the beginning of the capacity of the restricted exercise, we stressed that the national legislation, the problem deductively, connecting to the date on which the minor has reached the age of 7 years and lasts until the date on which he is almost 18 years old and is not between the age of 14-18 years, because as we have previously seen, the minor aged from 7 to 14 years may conclude staff legal acts of little value, the execution of which takes place at the time of their conclusion, therefore it has a limited exercise capacity even at the age of 7 years and 14 as in the case of civil law of Romania.

However, analysing and other rules[5] contained in national legislation, we can easily notice with the lack of a coherent regulatory framework which would suggest on another start of the capacity of the restricted exercise marked by reaching the age of 14 years.

Here it is said that in cases in which the owners of the vehicles are persons that have not reached the age of 14 years, the registration operations shall be carried out on their behalf, at the request of the parents legal tutors or joiners and, in cases where the owners are persons aged from 14 to 18 years, the registration operations shall be carried out at the request of those persons with the approval of their parents, legal tutors or joiners, giving to understand that until the age of 14 years together and they do not have the capacity to exercise once will not be able to act registration.

[5] The judgment of the Government of the Republic of Moldova nr. 1047/1999 for the approval of the rules of registration of motor vehicles and their trailers.

Anyway, about the inability to commit acts of registration still remains to be discussed, as long as previously mention that exercise capacity is related only to the suitability of the conclusion of the legal acts civil engineering and those of another kind, and registration is a simple non-recording, in the category of unilateral legal acts civil society. Moreover, it is not necessary for the validity of the legal sector of the Act (contract of sale-purchase) in considering the transmission of ownership, nor even for the recording of the state of the rights (in the case the right of ownership of the car), but is the act which marks the moment in which the State shall authorize the participation of the vehicle in road traffic or the technological process. (GJ. 1047/1999 pct. 9). And in general, in carrying out the formalities for advertising of economic rights, the capacity problem exercise ought not to be put in question.

But if the legal act by which it has acquired a right in rem is valid, then what is the legal person, be required the existence of the capacity of the person to the registration of this law, all the more so that this operation has nothing in common with the psychic ability of the person. How then acts of conservation measures on which the civil law (Article 22(2)(c) (CC) entrust them to be committed by the minor aged up to 14 years, and one of the acts of preservation would be pledging of goods.

Obviously, here is just about to guarantee its obligations to which it is entitled to assume once acquired by itself a heritage (the totality of the rights and obligations indissoluble) and others obligations.

Therefore, we appreciate in this respect, the decision of the Romanian legislator, where Article 19 CC of the stipulated clearly that the formality advertising can be requested by any person, even if it is lacking the capacity to exercise. Another disparity in the raw material to the start of the capacity of the restricted exercise, identify between the standard referred to in Article 22(2) CC and in Article 53(5) CF, where it is stated that the minor can defend itself, and of his legitimate rights and interests at the age of 14 years.

We note, therefore, the paradox in which the minor aged from 7 to 14 years has the possibility of acquiring and the exercise of certain rights personally, but at the same time, may not and protect them personally in court, a fact about which we mention, that reduces the capacity of the importance of the assignment of restricted exercise once shall not give entitlement to the prepared in justice for defense of the rights acquired in this period of his life.

2.2. The contents of the restricted exercise capacity

As previously saying, in the determination of the content of the capacity of the restricted exercise is necessary to take into account the two indicators (components), the first refers to the fact that the person may conclude staff only a limited category of legal acts, and second, that all other legal acts shall be

concluded only with the approval of the parents and, in the case of limited capacity of the minor aged between 7 and 14 years, only by the parents on their behalf.

That is why in the content of Article 21 of the CC in paragraph 1 to identify the second indicator: „the minor who has reached the age of 14 years conclude legal acts with the consent of their parents, legal tutors or joiners, and, in the cases provided by law, and with the approval of the Authority, and in paragraph 2, the first indicator: " the minor who has reached the age of 14 years shall be entitled, without the consent of their parents, legal tutors or joiners:

(A) have salary, the stock exchange or other revenue resulting from its own activities;

(B) to exercise the rights of an author of a literary or scientific works of art, on an invention or another result of intellectual activity defended by law;

(C) make deposits in financial institutions and to dispose of these deposits in accordance with applicable law;

(D) to conclude the legal acts referred to in Article 22(2).

It is noted that as a result of recent additions of the text of the Civil Code of the Republic of Moldova (Article 222), the cash of the minor which does not have the full capacity to exercise enjoys a detailed regulatory.

According to the standard:

(1) the operations of collection, payment and cash management carried out on behalf of the minor which does not have the full capacity to exercise shall be made exclusively by the account opened in the name of the representative, if the law provides otherwise for certain categories of payments.

(2) the family or, in the absence of the latter, the decision-making authority may prescribe that a certain amount of money which belongs to the minor which does not have the full exercise capacity to be deposited on a special account representative, which will be carried out extractors only with the authorization of the family or, in the absence thereof, the competent authority may accept. The provisions of this paragraph shall not apply in the case of forced execution on the minor's cash.

(3) the family or, in the absence of the latter, the decision-making authority is obliged to take all necessary measures to bring it to the attention of the institution to which is open to the account name of the minor which does not have the full capacity to exercise about the special regime established by paragraph 2.

As regards the list of acts which cannot be completed by the person with a limited exercise capacity civil society, naturally, is missing, as this would be impossible, and, in fact, absurd. Therefore, it is understood by default for other legal acts outside those provided for in Article 21(2) CC may not be concluded by them personally, but ends on their behalf by the legal protection or with their consent.

As a matter of fact, we identify and an exception. People with limited exercise capacity civil society may not available through the donation even with the approval of the parents, more recent nor may conclude acts with the title for free (donation) contracts in the name of the minor unable due to the age, things taking in the chain.

I mean, if parents concluded on behalf of the minor unable (up to 7 years) legal acts, and after that age (limited exercise capacity) only allow, and conversely, if he couldn't hold by donation on behalf of the minor unable, means that cannot nodded nor the completion of the acts of the minor with a limited exercise capacity. In fact, these bans are identified and in the text of the Civil Code of the Republic of Moldova in the editorial office after 02.06.2017, according to which: "May not be authorized, and the guardian is not entitled to conclude: Acts concerning the free disposal of the goods or of the rights of the person protected, including the remission of the debt, the waiver free a right acquired, the issue of a real or personal security constituted for the benefit of the person nurtured, without the obligation guaranteed to have been extinguished in full, as well as the documents on the setting up of a real or personal security to guarantee the obligations of a third party".

Even more so, a string of legal acts, other than those referred[6] to, can be concluded on behalf of the minor which does not have the full capacity to exercise, but which produces legal effects only after authorisation by the Council of the family or, in the absence of the latter, by the decision-making authority.

Returning to the inability of the minor with a limited exercise capacity to conclude certain acts of provision, we notice that it shall be deducted from the other rules of the Civil Code and of Article 832(a) according to which, it is prohibited to the donation in the name of the persons incapable, on the assumption that people with limited exercise capacity, the more may not available through the donation even with the consent of their parents. What right, in the legislation of the civil society in Romania is expressly says that the meaningless exercise capacity or with a limited exercise capacity can not dispose of its assets through liberality except for the cases provided by law (article 988 CC).

[6] The contract of sale and other legal acts of provision; the contract of the tenancy and other legal acts of administration of goods protected person whose term beyond the term of the measure of protection; the contract of transaction; the contract for the sharing of common goods; the act of acceptance or waiver of inheritance; the contract to receive a loan; the contract between the guardian or its affiliated persons and person equally protected, except in the case of acts free of charge, concluded on behalf of the person nurtured. At the end of this legal act, the Guardian shall be deemed to be an interest which is contrary to the interest of the person nurtured (art. 48^{75} align. 1 CC).

2.3. The end of the exercise capacity restricted - the beginning of the full exercise capacity

As a part of the end of the exercise capacity is restricted, obviously, the beginning of the capacity of the civil society full exercise, the marked line or the time of the anticipation of majority, i.e. the age of 18 years (article. 20 align. 1 CC), in some cases at the age of 16, when this time is determined by the conclusion of the marriage. Although, in this latter respect, all the details relating to the end of the restricted exercise capacity are not offered expressly provided for by the legislation of the civil society, they can only be detached in the interpretation of linked to standard referred to in Article 20(2) CC with Article 14 of the Family Code.

The first establishes that the minor acquired by marriage full exercise capacity, and the second, that age of marriage minimum is 18 years old, but that for the grounds, may be reduced by 2 years, obviously, with the approval of the conclusion of the marriage by legal protection.

This reduction in the age of the matrimonial is valid for both spouses, although according to the legislation of the family in the previous editorial staff, the age at which the woman had the right to conclude the marriage was 16 years. The same confirm and in the previous legislation of Romania in the editorial office of up to 2012 when the provisions of the Family Code have been integrated into the Romanian Civil Code, i.e. matrimonial age of the woman and the man were different, respectively 18 and 16 years, regulations which do not support, especially in the context in which this link and the beginning of the full capacity to exercise.

In fact, the woman can acquire full civil capacity before reaching the age of majority, and the man is not, or their judgment appears at different age? Is not possible. Currently we find with great appreciation that legislative situation in the age matrimonial rules has been recovered. Pursuant to Article 272 of the Romanian Civil Code expressly mention that: „for grounds, the minor who has reached the age of 16 years may be married under a medical advice, with the approval of his parents or, as the case may be, of the trustee and with the authorization of the court patronage in whose constituency the minor resides" without showing that the rules in question affects only the woman.

The same logic in regulations shall be identified and in the current legislation of the Republic of Moldova (Article 14 of the FC). According to rule, the minimum matrimonial age is 18 years. For grounds, it may be nodded conclusion of the marriage with the reduction in matrimonial age, but not more than two years. Reduction of the marital age will be ought to local authority in whose territorial range residing persons wishing to marry, on the basis of their application and agreement of the minor's parents.

At the same time, we should we mention that in general cases restricted capacity of exercise, shall cease on the day on which the minor has reached the age of 18 years, in the event of cessation of restricted capacity at the age of 16 years, this time does not coincide with the anticipation of the age in question and not from the time of the end of her marriage, but from the time of the conclusion of the effective implementation thereof.

Therefore, if parents have expressed agreement with respect to the conclusion of a marriage when the minor was 16 years, and the marriage has ended in front of the civil status officer at the age when it was 17 years ago, when the capacity of the restricted the exercise has ceased at the age of 17 years and not when the minor has received the approval of their parents. Dissolution of the marriage shall not affect with nothing on the former husbands in the full capacity to exercise. Things are different in the case of declaring the nullity of marriage, the court may be dispensed with her husband minor full exercise capacity at the time of her.

Here, we can infer that according to the legislation of civil society in the Republic of Moldova, as well as family law (Article 44 of the CF), alike, even in a case after declaring a marriage null and void, "Former husbands" and retain the full capacity to exercise, even at that proof of good faith at the end of them, as provided for in the legislation of the civil society in Romania (Article 39(2) (CC), regulatory authorities which we hold.

In the case of i suggest and our legislator that come up with statement in the text of the standard referred to in Article 22(2) the last sentence by which provide that after a declaration of invalidity of a marriage between minors, at what has made use of this institution only for the purpose of acquiring the full capacity to exercise, be deprived of this by decision of the Court of Justice.

What is the record of the legislation of the Republic of Moldova in the raw material of cessation of restricted exercise capacity before reaching the age of majority, that it does not provide for the acquisition of the anticipated only in the case of the conclusion of the marriage at the age of 16 years, but also by the empowerment, I.e. the minor who has reached the age of 16 years working under a contract of employment or, with the agreement of their parents, legal tutors and joiners, the practice of self-activity. Full exercise capacity allocation of a minor (empowerment) shall be carried out by the decision of the authority may, with the agreement of both parents, legal tutors or joiners, in the absence of such agreement, the court ruling (Article 20(3) CC of RM).

3. „The nostalgia of the doctrine" of the institution in the exercise capacity limitation

First of all, we consider a large regression for civil legislation of the Republic of Moldova, the repeal of the rule provided for in Article 25 cc

which regulate the institution of the limitation of the natural person in the exercise capacity, in fact, through which it was left without legal protection a large number of families against the actions of those who have wasteful patrimonial obligation to maintain, but a string of legal relations in which undertake to those who have judgment affected by certain substances with psihotrop effect.

Moreover, it is not only about the reallocation of interest to qualify for the maintenance of the wasteful, but also the interests of all. Only one year from the time of the repeal of the rule in question, the families that have among them a state of category discussed, large commercial claim against legislature, because I have been deprived of the opportunity of requesting the limitation of the exercise capacity of children majors leading up everything in the house because of the vices which could inflict, without subsequently invoke the nullity of the legal acts for disposing concluded by them.

However, we do not understand the position of the front legislature by the institution of the limitation on the exercise capacity after amendments, it has abandoned her permanently or in part, once in Article 23(3) CC mentions that nobody can be limited in the capacity to use and exercise capacity than in the case, and in the manner prescribed by the law, it means that you are still there somewhere rules which would allow the limitation of the person in the exercise capacity.

The former statutory provision. According to the former legislation of the Republic of Moldova (Article 25 of the Civil Code), the person who, as a result of abusive consumption of alcohol or consumption of drugs and psychotropic substances, worsening the condition of material of his family may be limited by the court in the exercise capacity. On such a person shall be established guardianship.

For reasons which have determined the need for regulating the exercise of the institution's capacity of the natural person. Still the Romanians ancients establish the possibility of the capacity limitation of the exercise by the judgment of the court. This is confirmed by the law of the XII Table which specifies a category of person’s restricted rights - wasteful (*prodigus*).

The person could be recognized prodigus only pursuant to a decision by the magistrate, on the basis of which on her guardianship is hereby established. Since the person was declared prodigus, she lost the possibility that in the absence of consensus curatoris to conclude the legal acts of provision (which lowers of the heritage). With all these, they could conclude contracts less important with traditional character or legal acts which does not affect their assets, for example, marriage. They were responsible for offenses committed, but could not dispose of assets or by testament.

With the cessation of the unreasonable consumption of cash, a situation that has the direct cause abusive consumption of drugs and alcohol, this limit may be raised by the decision of the praetor. (Хвостов, 1996, p. 522).

Therefore, noting that regulate the institution of the limitation on the exercise capacity has its roots quite partition in history, identify that it has survived and in the texts of the civil law, in fact, due to reasons that, from our point of view, because there is more and more aimed at two major[7] goals: the protection of the heritage of the family of vices (alcoholism and drugs) against his westful unreasonable and discourage the consumption of such substances having a negative impact on the entire society.

The Essence and the conditions of limiting the exercise capacity. As show above, the institution of the limited capacity of exercise presents a completely different legal nature than that of the capacity to exercise restricted, the first being a cause dependence on the will of the subject matter of the limited, on the last is due to the lack of what constitutes a question, independent of the will of man (age).

The express conditions. As conditions require to be met in the event of restrictions in the exercise capacity, say that they are two in number and that have to be met cumulatively, i.e. one without the other does not give reason to limit the person in the exercise capacity.

- abusive consumption of alcohol or consumption of drugs and psychotropic substances;
- worse family status materials as a result of abuse.

Other defaults conditions.

1. I materialized in the exposure of the second conditions as worse status materials should be direct cause of abusive consumption of alcohol, drugs or psychotropic substances, with all that many times this is obvious for itself. If the consumption of the narcotic drugs and psychotropic substances, obviously not you where to ensure a decent living standard for your family.

2. Under these circumstances, we notice that the legislator to focus not only on the heritage wastage, as a condition of the capacity limitation on the exercise of wasteful, but also on the fact that the failure of the means which

[7] The opinion of those who disputes the justice by the text of the Judgment of the Court of First Instance sitting in plenary session under the Supreme Court No 1 of 14 May 1979 with the amendments introduced by the Judgment of the Court of First Instance sitting in plenary session under the Supreme Court of Justice No 10 of 25.11.1991 and the Judgment of the Court of First Instance sitting in plenary session under the Supreme Court of Justice No 38 of 20.12.1999. "About judicial practice in the causes of the civil society concerning the capacity limitation of the exercise of the citizens that they abuse the spirituous beverages or narcotic drugs", is confined to the reason why would the visa combating the torrent, alcoholism and drugs.

would increase the assets or, so necessary to complete the obligation for maintenance of the family. But a drunken can perform work in exchange for a bottle of alcohol. Hypothetically, in this case, the condition of the material of his family do not is getting worse with nothing, because neither has not improved prior to worsen.

But a drunken can perform work in exchange for a bottle of alcohol.

Hypothetically, in this case, the condition of the material of his family do not is getting worse with nothing, because neither has not improved prior to worsen.

The topic is the person entitled to the right of the action in court to claim the limitation of the person in the exercise capacity. In the category of a form all members of the wasteful family. In this case, remember to title for instance, the judgment of the Court of 19.04.2005 Center on the edge of the dos. 2-1170, at the request of the Prosecutor Sect. The center on the limitation of the exercise capacity on I.F. The intervener has been drawn to his mother, who confirmed that her son consumes narcotic drugs, in fact, the worsening material situation of the whole family. The Court decided to recognize him on the I.F. limited exercise capacity, with the ban to conclude legal acts relating to the disposal of heritage, receipt and disposition of the salary of a pension or other types of income.

At the same time, the court ruled the obligation of the patronage and his I.F. guardianship to establish a trustee.

3. The capacity limitation exercise occurs not only on the basis of the abusive consumption of drugs, but is sufficient facts for their consumption „moderately". But the condition concerning the abuse affects not only the consumption of alcohol and the drugs or other substances with psihotrop effect, once the legislature is expressed by the phrase: „a person who, as a result of the abusive consumption of alcohol or consumption of drugs and psychotropic substances".

Another person would have been the meaning if it is noted that: "The person who, as a result of abusive consumption of alcohol or drugs.". At the same time, the other vices or the abuse of a person such as: gambling, betting, some of the hobby will not constitute grounds for limiting the capacity to exercise (Ardelean, 2008, p. 103).

4. The declaration of inability to exercise a natural person

The title of the compartment in question coincided with the title of the rule of Article 24 CC, currently have been repealed. According to it, the person as a result of mental disorders (mental illness or mental deficiencies) may not even contemplate or directing his actions may be declared by the court as unable. On guardianship is hereby established.

Therefore, in accordance with rule shown, the person regardless of age and the fact if ordered any date of full exercise capacity or not, when the is suffering from a mental disturbance likely to adversely affect discernment, is declared by the court as being incapable or as it is said in the literature, without an exercise capacity, all the legal acts on behalf of them being concluded by the guardianship.

Conclusions

But, as I was saying, the civil law of the Republic of Moldova in the current version, after 13.04.17, does not accept deprivation of the person in the exercise capacity on the question of mental illness, setting for this an alternative which consists in the imposition of measures against judicial protection, bringing it so in the category of persons with limited exercise capacity, similar to the minor aged from 7 to 14 years, once it is stated that the first has the right to conclude its own legal acts referred to in Article 22(2).

But, according to this rule the current editorial staff, in respect of the natural person who, as a result of mental diseases or of a visually impaired physical, mental or psychological impairments cannot, in full, even contemplate his actions or expressed willingness may be established by Decision of the court, the extent of the judicial protection in the form of provisional curatorship, healthcare or guardianship.

I agree with the new regulations, the segment of their acceptance of the possibility to conclude staff legal acts of small value, although here could fit place for discussion (may be affected by a property interest or of any other nature of their parents or legal tutors when the minor or subject to judicial protection measures would buy 100 chocolate through several legal acts cycles) we do not agree with the legislator decision to fall within the same category visually impaired persons with mental disabilities with those suffering of physical deficiencies in the plan of discerning.

We understand that our legislator resorted to such tactics, once out of the preferment, institution, but we don't see a problem if it remained regulated separately, as long as the shortcomings of the physical person has nothing to do with her judgment.

Bibliography

Books, articles

1. Ardelean, G., (2008) Limitarea persoanei fizice în capacitatea de exerciţiu ca urmare a consumului de droguri. *Materialele Conferinţei ştiinţifico-practice internaţionale*. Chişinău.
2. Baieş, S., Roşca, N., (2004), *Drept civil. Partea generală. Persoana fizică. Persoana juridică*. Chişinău: Cartier juridic.
3. Beleiu, Gh., (1982), *Drept civil român. Introducere în dreptul civil. Subiectele dreptului civil.* Bucureşti.
4. Beleiu, Gh., (1992), *Drept civil român*. *Introducere în dreptul civil. Subiectele dreptului civil.* Bucureşti: Casa de editură şi presă „ŞANSA"
5. Constituţia Republicii Moldova din 29.07.1994. Monitorul Oficial al Republicii Moldova, 18.08.1994, nr. 1.
6. Ghimpu, S. Grossu., (1960), *Capacitatea şi reprezentarea persoanelor fizice în dreptul R.P.R.* Bucureşti: Editura Ştiinţifică.
7. Хвостов В.М., (1996), Система римского права. *Учебник.* Москва: Спарк.
8. LP66 din 13.04.17, MO171-180/02.06.17.
9. Lupan, E., (1999), *Drept civil. Persoana fizică.* Bucureşti: Ed. Lumina Lex.
10. Lupan, E., Pop I.S., (2007), *Tratat de drept civil român. Vol. II. Persoanele.* Bucureşti: CH. Beck.
11. Mureşan, M., Ciacli, P., (2001), *Drept civil. Partea generală.* Cluj-Napoca: Cordial Lex.

Legislation

a. Civil Code of Republic of Moldova adoptat by Law no. 1107-XV from 06.06.2002. Monitorul Oficial al Republicii Moldova, 22.06.2002, no. 82.
b. Civil Code of Romania adoptat by Law no. 71/2011, republished. Monitorul oficial al României, 15.07.2011, no. 505.
c. Code of the undersoil of Republica of Moldova 2009 adoptat by Law no. 3 from 02.02.2009. Monitorul Oficial no. 75-77.
d. Gouvern of Rupublic of Moldova Decision no. 1047/1999.
e. Decision of CSJ no. 1 from 14 mai 1979 modified by Decision of CSJ no. 10 from 25.11.1991 and Decision of CSJ no. 38 from 20.12.1999.

THE LEGAL FRAMEWORK OF THE NORMATIVE REGULATION OF SPECIAL INVESTIGATIVE MEASURES

Ilie BOTNARI*

Abstract

Effective prevention of criminality is impossible without the use by the competent authorities of a complex of special measures, means and methods outside the limits of the criminal proceeding.

The special investigative activity, by the use of its methods, means and forces, contributes directly to the prevention and detection of the offences, to the ensuring of the return of the damage caused as a result of the offense, the search for the persons that are hiding from the criminal investigation authorities, from the court or are evading the criminal sanction and of the missing persons.

The practice accumulated in the domain of the prevention and control of criminality and assurance of the legal norms proves that namely by means of the implementation of special investigative measures it is possible the timely identification of criminal intentions, of the actions of the preparation of the offence as well as of the attempted crimes.

The special investigative activity consists in the realization of a wide range of measures oriented inclusively to the detection of the indices of criminal activity.

Keywords: *legal rules, special investigative activity, operative actions, special measures, rule of law*

JEL Classification: [K 14]

1. Introduction

The special investigative activity constitutes a variety of the activity of the state, since only the state in the person of the higher legislative, executive and judicial authorities, within the limits of their competence, may assign the right to exercise this activity, to impose some obligations and to carry out the control of the realization and the fulfillment of the legal norms within the special investigative activity.

Special investigative measures represent the structural element of the special investigative activity, which consists of a totality of the interconnected activities aimed at the settlement of some concrete objectives.

Special investigative measures are of the operative nature of search and are directed to the disclosure and accumulation of the information about the

* PhD. candidate, Academy "Ştefan cel Mare", Chisinew, Republic of Moldova.

persons that prepare or commit the offenses, the presence of the material traces of criminal activity, the place of finding of the persons that escape from the criminal prosecution and the trial, of the missing persons.

Special investigative measures mean a whole range of socially useful, intentional and confidential activities, stipulated by the Law on special investigative activity, through which the theoreticians and practitioners carry out the objectives and the purpose of the activity. On the basis of the rules of conduct that govern this activity there were elaborated the principles and categories of the classification of special investigative measures.

The importance of the classification of special investigative measures for the purpose of the determination of the grounds and conditions of their implementation is due to the fact that knowledge of the categories of special measures allows establishing easier which is the legal status of the measures to be realized as well as what are the conditions necessary for their accomplishment.

2. Methodological and theoretical-scientific support of the work

The methodological basis of the study is constituted by the fundamental ideas of the special investigative activity. The complex nature of the concerned work is determined by the diversity of the used methods, procedures and techniques.

According to the proposed objectives, the given research focuses on the general scientific methods, such as: logical analysis, legal analysis, historical analysis, system analysis, dynamic analysis and synthesis. Also, the performed researches are based on the study of doctrines, legislation and judicial practice existing in the given domain.

3. The used methods of scientific research

The methodological basis of the researches is constituted by a totality of methods, theoretical and practical procedures determined strictly by the knowledge of the researched domain, of the legal relations.

According to the proposed objectives, the research focuses on the general scientific methods: logical analysis, legal analysis, historical analysis, systemic analysis, dynamic analysis and synthesis.

4. Basic content

The special investigative activity is carried out in two forms that complement each other: public and secret.

The public officials of the state authorities that exercise the special investigative activity can represent officially, publicly the interests of a state authority. In addition, the operative employee or the person that contributes to

the conduct of the special investigative activity may exercise his/her granted powers, in a secret form[1].

The practice accumulated in the domain of the prevention and control of criminality and assurance of the legal norms proves that namely through the realization of the special investigative measures it is possible the timely detection of the criminal intentions, of the actions of the preparation of the offense, as well as of the attempted offenses.

At the same time, through the special investigative activity, becomes possible the full statement of the circumstances of the offense, the reasons that led to its commission, as well as the obtainment of certain data of probative value that would ensure the proving of the guilt of the perpetrators according to the participation in the commission of the act (Cusnir, 2012, p. 76).

On the basis of the mentioned we state that the special investigative activity is initially an offensive activity, because it is aimed at the detection, prevention and control of criminality, i.e. consists of a set of active measures directed to the annihilation of criminality. We note this fact even in the situation in which the Law on special investigative activity stipulates among the principles of the special investigative activity – the principle of inoffensiveness[2].

We consider that the assignment to the special investigative activity of inoffensive character, if we look at it from the point of view of the essence of the concerned activity, is an error. Even in case in which we admit that the authors of the Law on special investigative activity, by the inclusion of the principle of inoffensiveness, were guided by the necessity of the non-admission of the unjustified violation of the fundamental human rights and freedoms, we consider that this fact does not reflect the specificity of the special investigative activity performed by the authorized subjects of state.

Moreover, the observance of the human rights and freedoms is guaranteed by the institution of the procedure of the authorization of special investigative measures, through the control of the lawfulness of their exercise and through the inclusion in the Law of the articles 4 and 5, within which are regulated the peculiarities of the protection of human rights and of the protection of data with personal character.

Although, according to the peculiarities, the special investigative activity consists in the realization of a wide range of the measures oriented inclusively to

[1] International Covenant on Economic, Social and Cultural Rights no. 1966 of 16.12.1966. Published in international treaties no. 1 of 30.12.1998, Chișinău, can be accessed at: http://lex.justice.md/md/356369/, viewed on 09.01.2019.

[2] Law No. 59 of March 29th, 2012 on special investigative activity // Monitorul Oficial No. 113-118 of June 08th, Chișinău, 2012, in force of December 08th, 2012, can be accessed at http://lex.justice.md/md/343452/, viewed on 08.01.2019.

the detection of the indices of criminal activity, the Law on special investigative activity makes the main emphasis on the execution of special investigative measures within the criminal trial. Thus, out of 20 special investigative measures, stipulated in the art. 18 of the Law on special investigative activity, 11 can be carried out only within a criminal trial, 6 - both within a criminal trial and outside it and only 3 – outside the criminal trial.

Out of those 11 special investigative measures carried out only within a criminal trial, 8 measures can be carried out only with the authorization of the court investigator, on request of the prosecutor, and 3 measures – with the authorization of the prosecutor.

The measures carried out with the authorization of the court investigator, on request of the prosecutor are:

a) research of domicile and/or installation in it of the devices that ensure the audio and video supervision and recording, of the recording and filming devices;
b) supervision of domicile through the use of the technical means that ensure the recording;
c) interception and recording of communications and images;
d) retention, research, transfer, search or seizure of the postal items;
e) monitoring of the connections of the telegraph and electronic communications;
f) monitoring or control of the financial transactions and the access to the financial information;
g) documentation with the help of the technical methods and means as well as the localization and following by the global positioning system (GPS) or by other technical means;
h) collection of the information from the providers of the electronic communications services.

With the authorization of the prosecutor, within the criminal trial, may be carried out the following special investigative measures:

1) control of the transmission of money or of other extorted material values;
2) cross-border supervision;
3) controlled delivery.

At the same time, with the authorization of the prosecutor, but both within the criminal trial and outside it, the following special investigative measures may be carried out:

I. identification of the subscriber, owner or user of an electronic communications system or of an access point to a computer system;
II. visual tracking;
III. undercover investigation;

IV. collection of the samples for comparative research;
V. research of objects and documents;
VI. control purchase.

The law limits the circle of the subjects competent to carry out certain specific investigative measures. Thus, the control of the transfer of money or other extorted material values can be carried out only by the specialized subdivisions of the Ministry of Internal Affairs and of the National Anticorruption Centre[3].

Only outside the criminal trial, with the authorization of the head of the specialized subdivision, the following special investigative measures may be carried out:

1) interrogation;
2) collection of the information about persons and facts;
3) identification of person.

As we can observe, the number of special investigative measures that can be performed with the authorization of the head of the specialized subdivision was limited essentially.

We consider that this fact can complicate the activity of the detection and prevention of the criminality, especially by the authorities that do not have the criminal prosecution body. In the context, we note that it would become very complicated the execution of the objective provided in the letter d) of the article 2 of the Law on special investigative activity[4], and namely – collection of information about the possible events and/or actions that could endanger the security of the state. Moreover, among the reasons for the execution of the special investigative measures are not mentioned directly the events, the circumstances that could endanger the security of the state.

For this reason, we consider that it would be welcomed the extension of the possibilities of the head of the specialized subdivision. Thus, since the special investigative measures authorized by the prosecutor are carried out both within a criminal trial and outside it, it is possible their delimitation depending on the stage at which they are authorized.

In such a case, if the special investigative measure is to be carried out within a criminal proceeding, then it should be authorized by the prosecutor, and if it is carried out until the commencement of the criminal trial, then it should be authorized by the head of the specialized subdivision, especially

[3] Law on the National Anticorruption Centre No. 1104 of June 06th, 2002. Monitorul Oficial No. 209-211 of October 05th, Chișinău, 2012, can be accessed at http://lex.justice.md/md/344902/, viewed on 12.01.2019.

[4] Law No. 59 of March 29th, 2012 on special investigative activity. Monitorul Oficial No. 113-118 of June 08th, Chișinău, 2012, in force of December 08th, 2012, can be accessed at http://lex.justice.md/md/343452/, viewed on 08.01.2019.

since is responsible for the entire activity of the authority that leads it and the legality of the fulfilled measures.

According to the art. 19 of the Law on special investigative activity, the grounds for the execution of the special investigative measures are:

a) unclear circumstances in connection with the commencement of the criminal prosecution;
b) information that became known, regarding:
c) the detrimental action in the course of preparation, of commission or committed, as well as the persons that prepare it, committing it or committed it;
d) the persons hiding from the criminal investigation authorities or from the court or escape the execution of the criminal punishment;
e) the missing persons and the necessity of the establishment of the identity of the unidentified cadavers;
f) the circumstances that endanger the public order, the military, economic, ecological security or the security of other nature of the state;
g) the circumstances that endanger the security of the undercover investigator or of the members of his/her family (Botnari, 2018, p. 174);

1) the procedural documents of the criminal prosecution officer, of the prosecutor or of the investigating judge in the criminal cases that are under their proceeding;

2) interrogations of the international organizations and of the law enforcement authorities of other states in accordance with the international treaties to which the Republic of Moldova is a party;

3) the report of the investigative officer on the circumstances that endanger his/her own security, of his/her family and of his/her close ones.

According to the par. (2), of the same article, the special investigative measures shall be authorized and carried out in case in which the following conditions are met cumulatively:

- the realization of the purpose of the criminal proceeding is impossible by other means or there is a danger to the security of the state;
- the special investigative measure is proportionate to the restraint of the and fundamental human rights and freedoms.

The Law on special investigative activity[5] regulates the special investigative measures, the modality of their arrangement and execution, as well as of the execution of the control over their legality. In fact, the special investigative measures can be carried out only within the framework of special

[5] Law No. 59 of March 29th, 2012 on special investigative activity. Monitorul Oficial No. 113-118 of June 08th, Chişinău, 2012, in force of December 08th, 2012, can be accessed at http://lex.justice.md/md/343452/, viewed on 08.01.2019.

investigative activities, by the law enforcement authorities and in compliance with the requirements expressly stated in the law.

The special investigative measures are component part of the special investigative activity that consists of the totality of the actions oriented to the settlement of certain concrete tactical objectives. Special investigative measures have the investigational character of search being directed to the obtainment of information about the persons that conceive, prepare or commit an offense, about the detection of the indices of criminal activity, about the place of finding of the people that are hiding from the criminal prosecution and from the court, as well as of the missing persons (Gherman & Botnari, 2018, p. 248).

In the majority of the states of the European Union, the institution of the special investigative measures is catalogued as the special investigative techniques. Thus, in accordance with the provisions of the Recommendation number 10 of 2005 of the Committee of Ministers of the Council of Europe, by the special investigative techniques are understood the special means, inclusively the interception of communications and the access to communications traffic and localization data, the clandestine surveillance and electronic audio and video surveillance of the public places and private premises, clandestine research of the private premises, controlled delivery, infiltration of the undercover agents and the use of informers, clandestine surveillance of the financial transactions and other clandestine measures applied by the law enforcement authorities within the criminal prosecution, for the purpose of the detection or investigation of some serious criminal offenses[6].

Special investigative measures, on the one hand, constitute the vital and effective means of the control of serious offenses, and on the other hand presuppose through the operation manner, the interferences in the rights of the person protected by law. An essential feature of the special investigative techniques resides in the institution of more stringent normative conditions for their application, since according to the essence the concerned investigative techniques affect the rights of the person protected by law (Şumilov, 2000:178).

Proceeding from the provisions of the Law on special investigative activity[7], the features specific to the special investigative measures can be deduced, and namely:

a) the special investigative measures are determined strictly by law. The list of the special investigative measures is stipulated expressly in the

[6] Recommendation No. 10 of 2005 of the Committee of Ministers of the Council of Europe, can be accessed at http://www.mfa.gov.md/consiliul-europei/rm-representation-in-coe-ro/, viewed on 14.01.2019.

[7] Law No. 59 of March 29th, 2012 on special investigative activity // Monitorul Oficial No. 113-118 of June 08th, Chişinău, 2012, in force of December 08th, 2012, can be accessed at http://lex.justice.md/md/343452/, viewed on 08.01.2019.

article 18 of the nominated law, in the paragraph 2 of the same article, being noted that this list is the exhaustive one and may be amended or supplemented only by law;

b) the special investigative measures may be carried out only by the subjects stipulated directly in the art. 6 of the law;
c) the special investigative measures shall be carried out only in order to achieve the purpose and objectives of the special investigative activity;
d) the special investigative measures shall be carried out only in accordance with the legislation and only in case in which it is impossible otherwise to ensure the fulfillment of the objectives stipulated in the art. 2 of the Law;
e) the confidentiality and conspiracy of organization, tactics and methods of the conduct of the special investigative measures (Cusnir, 2012, p. 77).

In order to comply with the legal provisions the special investigative measures are to be authorized under the conditions of the established procedure. Thus, the special investigative measures that can be authorized by the investigating judge on request of the prosecutor are authorized under the conditions of the Criminal procedure code of the Republic of Moldova[8].

The special investigative measures that may be authorized by the prosecutor shall be authorized by the prosecutor ex officio or on request of the criminal prosecution officer, of the investigative officer or of the head of the specialized subdivision within a specially formed and registered file.

In the order of the prosecutor should be indicated:

1. the authorized concrete measure;
2. the period for which the measure was authorized;
3. the identity assigned to the undercover investigator, as well as the activities that he she will carry out;
4. the surname, name, identification number of the person subject to the special investigative measure or his/her identification data, if are known;
5. the reason of the execution of the special investigative measure;
6. information on the technical devices necessary for the execution of the special investigative measure (Cusnir, 2012, p. 78).

The special investigative measures that may be authorized by the head of the specialized subdivision shall be ordered by the resolution of the head of the specialized subdivision ex officio, as well as on request of the investigative officer, criminal prosecution officer or prosecutor.

[8] The Criminal Procedure Code of the Republic of Moldova No. 122 of March 14th, 2003. Monitorul Oficial No. 104-110 of June 07th, 2003, in force since June 12th, Chişinău, 2003, can be accessed at http://lex.justice.md/md/326970/, viewed on 06.01.2019.

A particular attention the legislator paid to the term of the conduct of the special investigative measures. Thus, according to the paragraph 7 of the article 20 of the Law on special investigative activity[9], the special investigative measure is ordered for a period of 30 days, with the possibility of the founded prolongation up to 6 months. Any prolongation of the duration of the special investigative measure may not exceed the term of 30 days.

In case in which the term of the authorization of the execution of the special investigative measure was prolonged up to 6 months, it is prohibited the repeated authorization of the special investigative measure on the same grounds and on the same subject, except for the cases of the use of the undercover investigators or the emergence of new circumstances, as well as of the cases of the investigation of the facts related to the investigation of the organized crimes and of the financing of terrorism.

The special investigative measures shall be initiated on the date indicated in the administrative document or at the latest on the expiry date of the term for which it was authorized.

In case in which the grounds and reasons that justified the authorization of the special investigative measure disappeared before the expiry of the term for which it was authorized, the prosecutor or, as the case may be, the head of the specialized subdivision shall order its immediate cessation.

However, if there are no longer the grounds for the execution of special investigative measures, the investigative officer shall request the prosecutor or, as the case may be, the head of the specialized subdivision the immediate cessation of such measures.

In order to ensure the control of the conduct of the special investigative measure, the investigative officer that performs the special investigative measures, within the term of one month since the date of the ordering of the measures or within the term stipulated in the administrative document, shall inform through a report the prosecutor or, as the case may be, the head of the specialized subdivision that authorized the special investigative measure on the results obtained in the implementation of the special investigative measures. If, within the examination of the report, the prosecutor or the head of the specialized subdivision states that the conditions of the execution of the special investigative measure are not met or that by the ordered measure it is infringed in the disproportionate manner or evidently the legitimate rights and interests of the persons, he/she orders its cessation.

The results obtained as a result of the execution of the special investigative measures shall be recorded by the investigative officer that

[9] Law No. 59 of March 29th, 2012 on special investigative activity. Monitorul Oficial No. 113-118 of June 08th, Chișinău, 2012, in force of December 08th, 2012, can be accessed at http://lex.justice.md/md/343452/, viewed on 08.01.2019.

performs the special investigative measure through the formulation of a report for each measure authorized by the investigating judge or prosecutor, and in case of the special investigative measures authorized by the head of the specialized subdivision – through a report that is presented to him/her.

The results of the special investigative measures may serve as the basis for the execution of other special investigative measures for the purpose of the prevention of criminality and assurance of the security of the state, public order, as well as the evidence if they were carried out within a criminal case.

Conclusions

The legislator does not establish any limitations or criteria for the occurrence of such data or information. The grounds of the execution of the special investigative measures are closely related to the purposes and objectives of the special investigative activity. Having examined the grounds in connection with the purposes and objectives of the special investigative activity, it can be concluded that for the execution of the special investigative measures are enough only the assumptions regarding the preparation or the commission of the offenses on the basis of the presence of some specific indices that indicate to such activities or persons that prepare, commit or committed them, even if that such assumption has the nature of the version, based on certain facts.

In case in which the act already contains the constituent elements of the offense, it is about the solving of the problems regarding the revelation of the offense, detection of the persons that committed it, and if such a person is detected, but hides from the criminal prosecution, then of his/her search.

Proceeding from the mentioned, we reiterate that in order to solve the objectives of the special activity, the results of a special investigative measure may serve as the grounds for the implementation of another measure. In the process of the execution of the special investigative measures regarding a specific case, special information can be obtained regarding the events or cases that are not the part of the initial purposes of the implementation of the special measures.

In the process of the execution of special investigative activity there is the revelation and accumulation of the information that at the initial stage is not related to the verified events. But in the process of its apposition it is possible the obtainment of new data, founded assumptions, conclusions, presentation of versions that require the verification and correspondingly the implementation of the additional special measures. In such cases, the implementation of special investigative measures is always grounded.

The obtainment of the initial information is possible from any source, inclusively from the sources that are not related to the special investigative

activity. This information can be obtained from the observations of the citizens, documents attached to them, acknowledgement of guilt, press releases, materials of the verifications on the administrative offenses, in cases of the detection of the indications of the offense by the public functionaries that are not the subjects of the special investigative activity or from the confidants.

In each case of the execution of the special investigative measures, or for the detection of a concrete offense, or for the revelation and accumulation of the information of operative interest, the grounds for their execution shall be present.

Bibliography

Books, articles

1. Cușnir, V., (2012) The Legal Regime of the Operative Investigative Measures: Conceptual and Multidisciplinary Approaches. *The Materials of the Scientific-Practical Conference "Prosecutor's Office of the Republic of Moldova on the 20th anniversary. The Role and Place of the Prosecutor's Office in a Constitutional State", Chişinău, January 27th 2012*.
2. Gherman, M., Botnari, I., (2018), General conditions of the execution of special investigative measures within the criminal proceedings. *International scientific journal. Modern scientific research journal*, London.
3. Botnari, I., (2018) The role of the undercover investigator in the execution of the special investigative measures within the criminal trial. *Materials of the Scientific-Practical Conference "The Concept of the Development of the Constitutional State in Moldova and Ukraine in the Euro-Integration Processes" of November 2nd-3rd, 2018*, Chişinău: Cetatea de sus.
4. Șumilov, Al., (2000), *Brief detective encyclopedia: Operational search, counterintelligence, private detective*, Moscow.

Legislation

1. The Criminal Procedure Code of the Republic of Moldova No. 122 of March 14th, 2003 // Monitorul Oficial No. 104-110 of June 07th, 2003, in force since June 12th, Chișinău, 2003, can be accessed at: http://lex.justice.md/md/326970/, viewed on 06.01.2019.
2. Law No. 59 of March 29th, 2012 on special investigative activity // Monitorul Oficial No. 113-118 of June 08th, Chişinău, 2012, in force of December 08th, 2012, can be accessed at: http://lex.justice.md/md/343452/, viewed on 08.01.2019.
3. Law on the National Anticorruption Centre No. 1104 of June 06th, 2002 // Monitorul Oficial No. 209-211 of October 05th, Chișinău, 2012, can be accessed at: http://lex.justice.md/md/344902/, viewed on 12.01.2019.
4. Recommendation No. 10 of 2005 of the Committee of Ministers of the Council of Europe, can be accessed at: http://www.mfa.gov.md/consiliul-europei/rm-representation-in-coe-ro/, viewed on 14.01.2019.
5. International Covenant on Economic, Social and Cultural Rights no. 1966 of 16.12.1966 // Published in international treaties no. 1 of 30.12.1998, Chisinau, can be accessed at: http://lex.justice.md/md/356369/, viewed on 09.01.2019.

CONCEPTUAL EVOLUTIONS OF SOVEREIGNTY - A CONSTITUTIONAL ATTRIBUTE - IN THE CONTEXT OF GLOBALISATION

Emilian CIONGARU*

Abstract

The state is not weakened in the conditions of globalisation and integration, but is only changed, as an institutional structure in terms of its functions and ways in which it acts.

Regarding the variety of meanings that sovereignty presents, the difference between sovereignty seen from an internal point of view and sovereignty seen from an external point of view is highlighted. In this context, it is shown that sovereignty developed at the same time as the emergence of national states and the exclusive right to govern within territorial borders.

Theoretically, the sovereign equality of states was proclaimed, sovereignty having the role to justify the territorial delimitation and to be the basis for negotiation between states, as well as to help enforce an order, other than that based on force, an order based on trade and, in general, on interactions between states.

From a conceptual point of view, we may say that globalisation represents a phenomenon which expands the ways of communication between states and communities and has as an effect the fact that the internal legal order of a state extends to a new concept, that of worldwide legal order.

Keywords: *sovereignty; globalisation; state; sovereign equality; sovereign rights*

JEL Classification: [K 40]

1. Introductory elements

Speciality papers (Gruia, 1939, p. 272) have presented sovereignty as the supreme power to command from within, as independence from the outside and as that reality of the state based on which it has the right to freely resolve, based on its own evaluation, the internal and external problems, and to fulfil its functions, without breaching the sovereign rights of other states and the rules and principles of international law.

The internal and external sides of sovereignty are indissolubly connected and cumulatively necessary for its existence.

* Professor, PhD., University "Bioterra" Bucharest, Faculty of Law; Associate scientific researcher, Romanian Academy - Institute of Legal Research "Acad. Andrei Rădulescu", Bucharest, Romania.

In order to move to certain historical considerations, we may mention an author (Bodin, 1993, p. 27), a supporter of the absolute power of the monarch, who identified sovereignty as the supreme, independent, indivisible, inalienable and indefeasible power of the monarch over the subjects, subordinated only to divine power.

In its fundamental work, an author (Rousseau, 1957, p. 27) set the bases for the theory of the sovereignty of the people, aimed against absolutism.

The great historian Nicolae Balcescu believed that sovereignty must be the sovereignty of the people, which consists of (…) *enforcing the power of all limited by the boundaries of justice and following a spirit of brotherhood.* At the same time, he also thought that the republican form of government was that necessary to ensure the sovereignty of the people, the dissolution of any limitations to the sovereign rights of the state, inside and outside its borders.

Simion Bărnuţiu (Bărnuţiu, 1867, p. 87), said that: *The Romanian Republic must be sovereign, as the majesty of the Romanian people is the supreme authority itself to which it is entitled and only within its entire territory, its national goals and negations.*

The theory of the sovereignty of the people was abandoned, being replaced with various theories, as that of Blackstone (Blackostone, 1970, p. 44), appearing the 18th century in England, under the name *The theory of parliamentary sovereignty.* This theory was subsequently declared obsolete and in the end abandoned by most lawyers.

H. Kelsen (Kelsen, 1928, p. 223) criticised the theory of the parliamentary sovereignty, showing that we cannot speak of the sovereignty of an organ of the state, even though the sovereignty of the entire state order is accepted.

H. Kelsen's theory of the sovereignty of the rule of law identified the state with the rule of law and defined sovereignty as a property of the rule of law, an order arising from the fundamental rule, independent of the national particularities and state borders.

In the 20th century, Hegel developed the theory of the absolute sovereignty of the state. In his view, the monarch personified sovereignty, having unlimited power.

The famous sociologist (Duguit, 1908, p. 146) labeled sovereignty as a fictitious notion which does not correspond to reality. As the author of the theory of social solidarity, he envisaged the establishment of a state order in which the notion of sovereignty would completely disappear.

Apart from evidently or subtly nihilistic theories, new theories appeared in the 20th century. As an example, we may mention the theory of relative or limited sovereignty, according to which this type of sovereignty does not mean abandoning certain sovereign rights, but merely suspending their exercise.

2. Conceptual elements

From a conceptual point of view, we may say that globalisation represents a phenomenon which expands the ways of communication between states and communities and has as an effect the fact that the internal legal order of a state extends to a new concept, that of worldwide legal order. The science of law, of all subjects, is that most affected by this process of continuous unification of the world, because the science of law must be continuously updated, so that it can cover as many of the aspects of contemporary social life as possible, because new spaces and areas of the law, new practice methods and strategies or regulating techniques are permanently created, so that we may reach the situation where many of the ones which in the past were fiction, can now become an n *aquis* even regarding strictly constitutional attributes which belong to nations, such as the attribute of sovereignty.

In a succinct conceptual analysis of sovereignty, we may retain some views which can be considered significant, as follows.

Therefore, in a first view (Le petit Larousse illustre, 2007), sovereignty is characterised as a *supreme authority* and as a *supreme power*, belonging to the state, which involves the exclusivity of its competence on its national territory and its international independence, area in which it is not limited but by its own commitments.

In an English law dictionary (Campbell & Minn, 1991, pp. 970-971), *sovereign power suverana* or *sovereign prerogative* are defined as that power existing in a state, to which no other power is superior or equal and which includes all the specific mandates necessary for achieving the goals of government. The term of *sovereign right* is also connected to the issue of sovereignty, and it is characterised in the aforementioned dictionary as the right that only the state itself or one of its organs may have or which it has, based on its sovereign character and for the general benefit. Due to its sovereign right, the state can fulfil its own functions. The sovereign right is different from other rights, such as the right to property, the owner of which can be the state as well as a private individual.

Also in the same dictionary, sovereign states are described as those the subjects or citizens of which obey by habit and who are not subjects of any other state or any other sovereign state, in any respect.

Furthermore, it is also stated that a state is said to be semi-sovereign and not sovereign, when it is liable in every respect, being controlled by a superior authority.

At the same time, it is also added that, in international relations, certain states are independent from others and can perform all the acts that can be performed by any state, in this area. They also have the same self-governing power, that is, independence from other states, in terms of their own territory

and its citizens who do not live abroad. No foreign power and no foreign right may exercise control over sovereign states, except for the case in which conventions are signed. The power to act independently in internal and external relations represents complete sovereignty.

Sovereignty can have the following meanings:

1. the supreme, absolute and uncontrollable power which governs any independent state;
2. the supreme political authority;
3. the supreme will;
4. the supreme control of the constitution and of the framework of government and administration;
5. a self-sufficient source of political power out of which all the specific political powers arise;
6. the international independence of a state, combined with that right and attribution to regulate internal affairs, without foreign orders;
7. a political society or a state which is sovereign and independent.

In conclusion, sovereignty is presented as the power to do anything in a state, without justification; to draft laws; to execute and apply them; to set and collect taxes; to declare war or make peace; to sign treaties of alliance of trade with foreign nations, and other similar ones.

It is necessary to explain the notion of national sovereignty which belongs to the people and which represents the principle of public law according to which the sovereignty previously exercised by the king is now exercised by the representatives of the people.(Micu, 2016, pp. 21-22) The sovereign people is defined as the political organism made up of the entirety of the citizens and voters, who, based on their collective capacity, hold the specific powers of sovereignty and exercise them through their chosen representatives.

The state was defined by reference to three components: population; territory and public power or sovereignty.

Nicolae Popa (Popa, 1994, pp. 92-93) shows that, regarding a certain territory, the state sets its relations with its citizens, structures its mechanisms, and sizes its sovereignty.

Dealing with the components of the state, another author (Vonica, 2000, pp. 135-136) highlights that public power or state power is sovereign. Sovereignty is defined by the quoted author as an essential attribute of the state, which means the right of the state power to rule the society, being supreme within the state, the right to not recognise another power above it, and the adaptability to other states, being independent from them.

In a broad sense, a famous author (Vrabie, 1993, p. 52) shows that the state is interpreted as an organised society, having an autonomous (sovereign) leadership in relation to other powers. In the opinion of the same author, the

state, as an organisational system which exercises leadership of a society, must not be understood as a purpose in itself, but as a means to enforce the sovereign power of the people. Of the constants of the states mentioned by most lawyers and political scientists, the author mentions, apart from the territory, the population, organisations which represent public power and sovereignty.

3. Sovereignty and globalisation

The state is not weakened in the conditions of globalisation and integration, but is only changed, as an institutional structure in terms of its functions and ways in which it acts. One of the participants at the World Congress of Philosophy of Law and Social Philosophy (Helsigfors, 1993, p. 248) defined current *sovereignty* as mere legal fiction and, instead of this concept, proposed to use the concept of *state autonomy*; because state sovereignty entails its absolute prerogatives, whereas state autonomy does not. (Micu, 2007, p. 45)

Regarding the variety of meanings that sovereignty presents, the difference between sovereignty seen from an internal point of view and sovereignty seen from an external point of view is highlighted (George, 1995, pp. 130-132). In this context, it is shown that sovereignty developed at the same time as the emergence of national states and the exclusive right to govern within territorial borders. The rulers of the states claimed that they represented the supreme authority, they claimed to govern in this quality throughout the territory of the state, to resolve, as a supreme court of law, the disputes in the territory. Each state claimed, from an external point of view, its independence from other state and from any other super-national authority.

Theoretically, the *sovereign equality of states* (Gemanu, 1981, p. 131) was proclaimed, sovereignty having the role to justify the territorial demarcation and to be the basis for negotiation between states, as well as to help enforce an order, other than that based on force, an order based on trade and, in general, on interactions between states.

It is noted that claims of sovereignty, both internal and external, appeared together.

In the same opinion, the notion of sovereignty, seen from an external point of view, was built on the legal fiction of the equality of states, contrasting with the obvious inequalities between them, with the economic dependence of small and weak states to big and strong states. It is noted that sovereign independence involves legal and not absolute sovereignty, not *de facto*, but *de jure* sovereignty.

In these situations, the conclusion that can be drawn is that it would be a mistake to think that sovereignty is a static, or a clear and unequivocal concept, but, on the contrary, sovereignty should be considered a vague and variable concept, from a historical point of view.

In another conceptual sense, a distinction is made between *democratic* and *sovereign absolutist sovereignty*. With this occasion, the issue of sovereignty was associated to that of interest. Thus, an author (Tarantino, 1995, p. 142) observed that, in general, the topic of sovereignty was seen from two different angles, corresponding to different types of political organisation of civil society. The author took into account: a) the political organisation in which the personal interest of the prince prevails over the material legal system, as *jus voluntarium* and b) the political organisation in which the general interest of the country prevails, as a public interest, thus having *jus involuntarium*.

Regarding the question whether the personal will of the prince or the laws should rule, whether sovereignty is an attribute of the prince or an attribute of the laws, the author considered the aristocratic idea to be justified, according to which it is important that the laws are sovereign. But, in order for the laws to have this quality, a suitable government must exist and laws must be drafted based on the model of suitable constitutions. The final conclusion was that, when statesmen govern for the general interest and laws are drafted in accordance with suitable constitutions, the necessary conditions for laws to be sovereign are fulfilled. Otherwise, democratic sovereignty cannot exist, but, on the contrary, absolute sovereignty would.

Two aspects cannot be omitted from another, albeit restricted, conceptual analysis of sovereignty.

The first aspect assumes the fact that a correlation of state sovereignty with the sovereignty of the people is assumed within the democratic interpretation of sovereignty, because democracy is based on the idea of sovereignty of the people. Furthermore, in these conditions, the *sine qua non* condition that the will of the people must have the quality of the will of the state, a will that must be unique, arises.

The second aspect which must be taken into consideration is the criticism aimed at the specialists in the field, that they have only taken into consideration the connection between sovereignty and power, between sovereignty and law, not taking into account that the independent organisation, implicit to sovereignty, is also specific to non-state institutions, such as economic, religious, and even illegal, mafia-type, institutions, which do not obey universal values. The idea that the institutions that obey human rights, having as the basis of their organisation freedom, and not unlimited, discretionary power, should have the status of sovereign institutions, has been proposed (Tarantino, 1995, pp. 143-144).

4. Sovereignty and human rights

A current perspective from which sovereignty is analysed is that of human rights. A conclusive approach is that which convinces the reader that, when the aim is the protection of human rights, the freedom and dignity of the human being are the bases of the supremacy which sovereignty entails. In order to support his point of view, the same author assures us that such an approach is not subject to the risk of reaching the conclusion of the supremacy of people and not that of law. This risk would exist only if freedom were conceived not as what the Romans called *libertas,* but as what they called *licentia,* that is, unlimited, discretionary power.

One of the warnings from specialists is that sovereignty represents an obstacle in protecting human rights. One of the supporters of this point of view is an author (Resende de Barros, 200, p. 443) who justifies the need for the appearance of a third generation of human rights, based on brotherhood, solidarity of all individuals and aimed against the actions and omissions which may again endanger the conservation and survival of the human species itself, as it happened during the second world war. The rights in question are requested to be legally enforced in international declarations and pacts, but, if the states do not obey their obligations undertaken through treaties, they only offer a few means of constraint, such an action being blocked by the sovereignty of the signatory states.

However, the possibility of relativising state sovereignty through super-national treaties, as a new type of treaty based on which political societies superior to national states are established, which have their own coercive power, is suggested.

The indisputable fact that modern society continues to structure itself in national states is observed, that, in the time that has passed from the beginning of the modern era, a relativisation, a super-national limitation of sovereignty has taken place, but not to the extent where it can prevent national states, especially powerful ones, to practice actions and omissions to the detriment of human rights. Finally, the quoted author concludes that, as long as a definitive institutional form, able to peacefully revitalise sovereignty, through law, is not reached, it will continue to impede the effectiveness of human rights.

Another author (Jackson, 1995, p. 74) has a partially similar position, signaling the appearance of an incipient legal and moral cosmopolitism, resulting from the fact that the international instruments regarding human rights equally guarantee fundamental rights and freedoms to each individual, regardless of his affiliation to a certain internal legal order.

The same author shows that international human rights law is enforced by various organisms: local, regional and international, which exercise control over sovereignty and which perform the legal interpretation in principle, in the

field of human rights, and the volume of competence and the importance of sovereign authority in terms of human rights are relative, being frequently object of disputes.

Thus, sovereignty has begun to be subjected to attacks, from the point of view of morality, when it was opposed to human rights. The defenders of human rights have invoked their universal character, the fact that they extend to all people and that no government has the right to violate the rights of those within the borders of the state.

Not only the moral condemnation of such violations, but also the enforcement of legal sanctions, even direct intervention in the countries that allow such violations, has been claimed, recommending that the U.N. support the intervention.

Conclusions

The positive conclusion is that the structure of sovereignty is flexible enough to be compatible with the numerous changes caused by globalisation, in the areas of economics, communication, etc.

Nevertheless, we must not ignore the negative functions of sovereign, among which, that of being a mask - in certain respects -, to hide the true inequalities between states. On the other hand, the fact that sovereignty is erroneously considered to grant rights to states, although states are not human beings in order to own rights, that nations do not have a legal personality, is hidden.

The doctrine of sovereignty can be criticised that it is sometimes used to defend the actions of governments or tyrants, aimed against their own people and in order to avoid the intervention of the international community. The claim to sovereignty cannot, however, protect the actions of a despot, and the ones culpable for violating human rights must not be protected by sovereignty.

Bibliography

1. Bărnuțiu, S., (1867), *Drept public al romanilor*. Iași.
2. Blackstone, (1969-1970), Domat and the French Code. *Tulane Law Review*, Issue 44.
3. Bodin, J., (1993), *Les six livres de la République. Un abrégé du texte de l'édition de Paris de 1583*. Paris: Librairie générale française/Le Livre de poche.
4. Campbell, H., Paul Minn, St., (1991), *Black Law Dictionary*. West Publishing co.
5. De George, R.T., 1995. Many faces of Sovereignty. *Vol. 17th IVR World Congress, Bologna, 16-21 June 1995, Challenges to law at the end of the 20th Century, IV Working groups 30-49 Pluralism, Sovereignty, Citizenship*. Bologna: Coop. Universitaria.
6. Duguit, L., (1908), *Droit social, Droit individuel et la transformation de l'Etat*, Paris.

7. Eriksson Helsigfors, L.D., (1993), The disintegration of the Nation-State. *Law, Justice and the State. Studies in Democracy, Nationality, National State a supra-national State from the stands points of Lega Theory, social Philosophy and Social Science*. Berlin: Duncker and Humblot.
8. Geamănu, G., (1981), *Drept internaţional public*, vol. 1, Bucureşti: Didactică şi pedagogică.
9. Gruia, V.I., (1938-1939), *Curs de drept constituţional. Despre libertăţi*, University Bucharest, Faculty of Law, Bucureşti.
10. Jackson, K.T., (1995), Sovereignty, Citizenship and global Community. When domestic courts adjudicate international human rights. *Vol. 17th IVR Congres, Bologna, 16-21 June* 1995.
11. Kelsen, H., (1928), La garantie jurisdictionelle de la Constitution. *Revue du droit public et de la science politique*, Issue XIV.
12. *Le petit Larousse illustre*, (2007) *Souveraint, Souveranisme si Souveraniste*. Paris: Larousse.
13. Micu, G., (2007), *Ordinea juridică instituţională comunitară*. Bucureşti: Paidea.
14. Micu, G., (2016), *European Construction*. Bucureşti: Pro Universitaria.
15. Popa, N., (1994), *Teoria generală a dreptului*. Actami.
16. Resende de Barros, S., (2005), Constitutional reform and acquired right. Sovereignty against the law? *Ad honorem Ion Dogaru, Studii juridice alese*. Bucureşti: All Beck.
17. Rousseau, J.J., (1957), *Contractul* social. Bucureşti: Ştiinţifică.
18. Taratino, A., (1995), Person of Institutions and Sovereignty. *Vol. 17th IVR Congress, Bologna, 16-21 June 1995, Challenges to law at the end of the 20th Century, Working groups 30-49, Pluralism, sovereignty, citizenship*. Bologna: Coop. Universitaria.
19. Vonica, R.P., (2000), *Introducere generală în drept,* Bucureşti: Lumina Lex.
20. Vrabie, G., (1993), *Drept constituţional şi instituţii politice contemporane*. Iaşi: Ştefan Pricopiu.

THE ANALYSIS OF THE COMPARATIVE LAW ELEMENTS ON THE ACTIVITY OF MERCENARIES IN THE EXPERIENCE OF THE COMMONWEALTH OF INDEPENDENT STATES (CIS)

Radion COJOCARU[*]
Igor SOROCEANU[**]

Abstract

Proficiency elements of criminal activity of mercenaries are inextricably linked to the comparative study regarding various criminal legislation, especially those which have common elements with national criminal law.

*Given the historical context of criminal law common development of countries of the Commonwealth of Independent States (CIS), in this article we deal with a comparative analysis aimed at legislation which concerns the offense of mercenary activity. Such an objective is natural, since comparative criminal law is an area of science of criminal law, which is intended **to** study rules and legal institutions belonging to different national systems in order to know the meaning and content, and the differences between these rules and institutions.*

Keywords: *law, war, peace, mercenary, criminal punishment, deprivation of liberty*

JEL Classification: [K 14]

1. Introduction

The offense of mercenary activity is described in art. 141 of the Criminal Code of the Republic of Moldova, in Chapter I entitled "Crimes against peace and security of mankind", war crimes. The current wording of the criminalization is the effect of the commitments assumed by the Republic of Moldova, which tried to implement the incriminating standards provided by the International Convention on the Fight Against the Recruitment, Use, Financing and Training of Mercenaries, signed in New York on 4-th December 1989.

[*] Associate Professor, PhD., Academy "Ştefan cel Mare" of Ministry of Internal Affairs, Republic of Moldavia.

[**] Bachelor, Faculty of Law, Academy "Ştefan cel Mare" of Ministry of Internal Affairs, Republic of Moldova.

From the very title of the above-mentioned Chapter it is apparent that the offenses it incorporates, depending on the particular legal object, can be classified into three categories:

- Crimes against peace: planning, preparing, launching or leading the war – art. 139 PC of the RM; propaganda of the war – art. 140 PC of the RM; use, development, production, otherwise obtaining, processing, possession, storage or preservation, direct or indirect transfer, storage, transport of weapons of mass destruction – art. 1401 PC of the RM; attack on the person benefiting from international protection – art. 142 PC of the RM;
- Crimes against human security: genocide – art. 135 PC of the RM; crime against humanity – art. 1351 PC of the RM; ecocide – art. 136 PC of the RM; cloning – art. 144 PC of the RM;
- War crimes: war crimes against persons – art. 137 PC of the RM; war crimes against property and other rights – art. 137^1 PC of the RM; use of forbidden means of war – art. 137^2 PC of the RM; use of prohibited methods of warfare – art. 137^3 PC of the RM, unlawful use of distinctive signs of international humanitarian law – art. 137^4 PC of the RM; giving or executing a manifestly illegal order; non-exercise or inappropriate exercise of due control – art. 138 PC of the RM; activity of mercenaries – art. 141 PC of the RM.

Present classification is absolutely necessary for knowing the criminal facts mentioned above, especially when it comes to elucidating their special legal object. We can easily notice that the crime of mercenary activity is a deed that attacks the social relations that are conditioned by the observance of the norms of international humanitarian law to lead the war.

This clearly results from the provisions of the International Convention on the Fight against the Recruitment, Use, Financing and Training of Mercenaries, which regulates these rules as to the prohibition of practicing such activities.

2. The purpose of the scientific article

The purpose of this scientific exposure is to highlight the importance of performing comparative documentation to identify the strengths of harmonization of its own legislation.

3. Basic content

Art. 141 PC of the Republic of Moldova provides criminal liability for two deeds involving mercenary activities:

1. Actual activity of mercenaries, which, in accordance with paragraph (1) article 141 consists of the participation of the mercenary in an armed conflict, military action or other violent actions aimed at overthrowing or undermining constitutional order or violation of the territorial integrity of the state. Such an act is punishable by imprisonment from 3 to 7 years.

2. Activity of supporting and using mercenaries, which, in accordance with art. 141 parag. (2) consists of hiring, training, financing or other mercenaries insurance and their use in armed conflict, in military actions or other violent actions aimed at toppling or undermining the constitutional order or violate the territorial integrity of the state. The act is punishable by imprisonment from 5 to 10 years (Cojocaru & Soroceanu, 2018, p. 10).

In the criminal law of the Russian Federation, criminalization is stated in art. 359 PC of the RM titled as marginal criminal liability on mercenary activity. Essentially offense is committed by two typical embodiments, the particular form taken and which consist of separate offenses:

1. *Recruiting, training, financing or material support of a mercenary, as well as its use in armed conflicts at military or violent actions. It is punished by imprisonment for a period of 4 to 8 years [art. 359 par. (1) FR Criminal Code]*;

2. *Participation of a mercenary in an armed conflict or violent military action. It is punished by imprisonment for a period of 3 to 7 years [art. 359 par. (3) Criminal Code]*[1].

In art. 359 par. (2) Russian Federation Criminal Code is provided a compounded version of the facts described in par. (1) provides that: the same act committed by a person who uses his office or in relation to a minor. Aggravated form is punished with imprisonment for 7-15 years with a fine of up to 500 000 RUB.

Belorussian criminal law of the Republic provides for criminal liability for mercenary activities in several articles placed in different chapters of the Special Part of the Penal Code:

1. *recruitment, training, financing or material support of a mercenary and use in armed conflicts or violent military action – art. 132 of Chapter XVIII of war crimes and other illegal actions on carrying war. Such an offense is punishable by imprisonment from 7 to 15 years.*

2. *participation of a person on the territory of a foreign state in armed conflicts, military action that is not part of the armed forces of belligerents and acts to receive remuneration materials without the State of nationality or in which he has his permanent residence (Mercenary) art. 133 of Chapter XVIII of war crimes and other illegal actions on carrying war. The act is punishable by imprisonment from 3 to 7 years.*

3. enrollment of citizens of Belarus or stateless person permanently residing in the Republic of Belarus in formation armed on the territory of a

[1] Penal Code of the Russian Federation, adopted by the State Duma on 24.05.1996, with the last modifications and completions of 27.12.2009, art. 359. http://www.consultant.ru/document/cons_doc_LAW_10699/a9e28227f557dc1e6659c1d88613790bb3dddb5b/ (viewed on 14.12.2018).

foreign state which is party to an armed conflict, and the participation itself to an armed conflict, military actions or other violent actions without state authority in the absence of signs crime under art. 133. Incrimination is deployed at Art. 361.3 paragraph (1) of Chapter 32, entitled: Crime against the State. The act is punished by such a deed of 2 to 5 years.

4. *recruitment, preparation, training or use of citizens of Belarus or stateless persons who have permanent residence in the Republic of Belarus to participate in the territory of a foreign state in armed formations of one of the warring parties in armed conflicts, military actions or other violent actions as well as the financing or granting of other material support in the absence of the signs of the offense referred to in art. 132. This act is provided in Art. 361.3 paragraph (2) of Chapter 32, Crime against the State. The punishment that can be applied for such an act is imprisonment for a period of 5 to 10 years*[2].

The offense of illegal activity of mercenaries is also enforced in art. 375 PC of the Kyrgyz Republic. This can be presented in the form of three normative modalities, described with different content. Thus, according to art. 375 par. (1) shall be punished with imprisonment from 8 to 15 years and with the confiscation of property the illicit actions of recruitment, training, training aimed at acquiring skills and abilities for committing a terrorist or extremist offense as well as financing or other material support offered to a mercenary or its use in armed conflicts or other military actions. In par. 2 of the same article shall be punished by imprisonment from 8 to 15 years and the confiscation of the assets of a mercenary's participation in an armed conflict or military or violent actions.

The aforementioned facts are characteristic of the following aggravating forms, provided in art. 375 par. (3) PC of the Kyrgyz Republic:

1) by a group of people by prior agreement;

2) by an organized criminal group;

3) using its official function;

4) using a minor. In the presence of aggravating forms, the facts are punishable by imprisonment for a period of 15 to 20 years or by life imprisonment and confiscation of property[3].

A similar pattern of criminalization of mercenary activity that established the criminal laws of the Member above, concerns and criminal laws of other countries in the former Soviet space, such as the Penal Code. of

[2] Penal Code of the Republic of Belorus, adopted by the House of Representatives on 09.07.1999, with the latest amendments and additions of 17.02.2018, art. 132, 133 and art. 361.3. http: //xn----ctbcgfviccvibf9bq8k.xn--90ais/ (viewed on 24.12.2018).

[3] Penal Code of the Republic of Kyrgyzstan, in force with the last modifications and additions of 04.08.2018, art. 375. http://continent-online.com/Document/?doc_id=30222833#pos=4207; -71 (viewed on 24.12.2018).

the Republic of Tajikistan (Article 401)[4]; PC of the Republic of Turkmenistan (Article 169)[5]; PC of the Republic of Kazakhstan (Article 170)[6]; PC of the Republic of Armenia (Article 395)[7]; PC of Georgia (Article 410)[8].

In the criminal legislation of Ukraine, the activity of mercenaries is punished by art. 447 of the PC, Section 20, Crime against peace, human security, laws and international order. The incriminating rule is structured in five paragraphs.

The first four are similar to the criminal norms of some of the criminal laws of the states analyzed above, such as: Moldova, Russian Federation, Belarus. Particularly, in art. 447 par. (5) Penal Code of Ukraine provides for a special way of releasing criminal liability, which can be applied when the person voluntarily ceases to participate in an armed conflict, to military or violent acts and reported his participation in an armed conflict or otherwise contributed to stopping or detecting offenses related to mercenary activity before criminal prosecution began. In order to benefit from this rule, it is also necessary for the person's actions not to identify another criminal offense provided by PC of Ukraine[9].

In Chapter XVII of the Penal Code of the Republic of Azerbaijan, with the generic name of War Crimes, at Art. 114 criminal liability for mercenaries' activity is stipulated. This embraces three normative modalities that involve mercenary activities:

- *recruitment, training, financing or material support of a mercenary, and the use of military action in armed conflicts or violence (art. 114 par. (1) of the Penal Code.)*;

- *action under par. (1) committed by a person using his official position or against a minor (art. 114 par. (2) Penal Code.)*;

[4] Penal Code of the Republic of Tajikistan of 21.05.1998, with the last amendments and additions of 03.07.2014, art. 401. https://www.wipo.int/edocs/lexdocs/laws/ru/tj/tj023ru.pdf (viewed on 25.12.2018).

[5] Penal Code of the Republic of Turkmenistan, dated 12.06.1997, with the latest amendments and additions of 09.11.2013, art. 169. https://www.wipo.int/edocs/lexdocs/laws/ru/tm/tm015ru.pdf (viewed on 12.01.2019).

[6] Penal Code of the Republic of Kazakhstan, 21.05.1998, with the last modifications and additions of 03.07.2014, art. 170. https://zakon.uchet.kz/rus/docs/K1400000226 (viewed on 12.01.2019).

[7] Penal Code of the Armenian Republic, dated 29.04.2003, art. 395. https://www.wipo.int/edocs/lexdocs/laws/ru/am/am012ru.pdf (viewed on 12.01.2019).

[8] Penal Code of Georgian 22.07.1999, art. 410.https://matsne.gov.ge/ka/document/download/16426/143/ru/pdf (viewed on 12.01.2019).

[9] Penal Code of Ukraine with the latest amendments of 18 October 2018. https://meget.kiev.ua/kodeks/ugolovniy-kodeks/razdel-1-20/ (viewed on 15.01.2019).

- *participation of a mercenary in an armed conflict or military action violence (art. 114 par. (3) of the Penal Code.)*[10];

In the Penal Code of the Republic of Uzbekistan, the headquarters are devoted to art. 154[1]. According to art. 154 par. (1) is subject to criminal liability, *a person who participate as a member of a foreign State in an armed conflict or military action and who is not a citizen or soldier of a conflict country or who does not permanently reside in the controlled territory of the conflicting party or is not officially designated any state in carrying out official duties as part of the armed forces in order to obtain material remuneration or other personal benefits*. This is punished by imprisonment from 5 to 10 years. In art. 154 par. (2) PC of Uzbekistan is responsible for the criminal responsibility for the activity of mercenaries committed in the form *recruiting, training, financing or material support of a mercenary, as well as its use in armed conflicts at military or violent actions*. A punishment of 7 to 12 years may be applied for committing the deed.

We can observe that unlike other criminal laws, at art. 154 PC of Uzbekistan, the legislative technique, the definition of mercenary is described even in the content of the incriminating rule. In the above-described legislation, the notion of mercenary is laid down in a descriptive criminal rule, formulated either in the rules of the general part or in the special part of PC.

These notions are, as a rule, a faithful reproduction of the notion of mercenary as laid down in the International Convention on the Fight against the Recruitment, Use, Financing and Training of Mercenaries. For example, match art. 130 PC of the Republic of Moldova: by mercenary is meant the person specially recruited in the country or abroad to fight in an armed conflict that takes part in the military operations in order to obtain a personal advantage or a promised remuneration by a party to conflict or on its behalf, who is neither a national of the conflict party nor a resident of the territory controlled by a party to the conflict, is not a member of the armed forces of a party to the conflict and has not been sent by a state other than party to the conflict, on official mission as a member of the armed forces of that State.

A similar pattern of criminalization of the notion of mercenary to that established in the criminal law of the Republic of Moldova is also enshrined in the criminal law of other states in the ex-Soviet space, such as: PC of the Republic of Azerbaijan (Article 114); PC of the Kyrgyz Republic (Article 375); PC of the Republic of Armenia (Article 395); PC of Georgia (Article 410); PC of the Russian Federation (Article 359); PC of Ukraine (Article 447);

[10] Penal Code of the Republic of Azerbaijan of 30-th December 1999, as last amended by 01.06.2018, art. 114. http://continent-online.com/Document/?doc_id=30420353#pos=1366;-56 (viewed on 15.01.2019).

PC of the Republic of Turkmenistan (Article 169); PC of the Donetsk People's Republic (Article 421).

According to art. 154 of the PC of Uzbekistan is subject to criminal liability, the person who is a citizen of the Republic of Uzbekistan, falls within the military service, security agencies, police, military justice or other similar bodies of foreign states. The latter is punished with a fine of up to 300 minimum wages or unconditional community work up to 3 years. According to par. (2) of the same article the person is punished who recruits a citizen of the Republic of Uzbekistan to military service to serve in security agencies, police, military justice or other similar bodies in foreign states.

This person is punished by restricting freedom (house arrest or prohibition to leave the country) from 3 to 5 years or by imprisonment from 3 to 5 years[11].

Tense situation which occurred last time in Ukraine, had as consequence the separation of Donbas from region Donetsk province, which until 2014 were a whole. Therefore, Donetsk People's Republic became independent in the fact but not in reality, it is the product of a policy promoted by the separatist Russian Federation, adopted its own Penal Code, which in art. 421 provides for criminal liability for the activity of mercenaries[12].

Despite the stated incrimination separatist authorities of Donetsk region were most often accused of using mercenaries in warfare with armed forces of Ukraine.

Conclusion

The first finding that appears is that the criminal legislation of the CIS implements a legislative technique specific and simultaneously common incrimination of crime activities of mercenaries dictated that these laws have evolved in the same historical space, with quality of the former Soviet Union republics.

However, between incriminations above were also highlighted some differences of essentially determined on the one hand specific national political system of governance and their experience taken in the face of such phenomena and, on the other hand, concern of legislators to provide differentiated criteria for the individualization of criminal punishment for mercenary activity.

[11] Penal Code of the Republic of Uzbekistan, dated 12.06.1997, with the last amendments and additions of 01.12.2015, art. 154, 1541. http://lex.uz/docs/111457 (viewed on 21.01.2019).
[12] Penal Code of the Donetsk People's Republic, adopted by resolution of the President of the Council of Ministers of August 17, 2014, art. 421. https://dnrsovet.su/zakonodatelnaya-deyatelnost/dokumenty-verhovnogo-soveta-dnr/ugolovnyj-kodeks-donetskoj-narodnoj-respubliki/ (viewed on 22.01.2019).

Bibliography

1. Cojocaru, R., Soroceanu, I., 2018. Personality traits of mercenary offender citizen of Moldova – case study. *Law and Life*. Issue 11.

Legislation

1. Penal Code of the Russian Federation, adopted by the State Duma on 24.05.1996, with the last modifications and completions of 27.12.2009. http://www.consultant.ru/document/cons_doc_LAW_10699/a9e28227f557dc1e6659c1d88613790bb3dddb5b/, (viewed on 14.12.2018).
2. Penal Code of the Republic of Belorus, adopted by the House of Representatives on 09.07.1999, with the latest amendments and additions of 17.02.2018. http: //xn----ctbcgfviccvibf9bq8k.xn--90ais/, (viewed on 24.12.2018).
3. Penal Code of the Republic of Kyrgyzstan, in force with the last modifications and additions of 04.08.2018. http://continent-online.com/Document/?doc_id=30222833#pos=4207;-71, (viewed on 24.12.2018).
4. Penal Code of the Republic of Tajikistan of 21.05.1998, with the last amendments and additions of 03.07.2014. https://www.wipo.int/edocs/lexdocs/laws/ru/tj/tj023ru.pdf, (viewed on 25.12.2018).
5. Penal Code of the Republic of Turkmenistan, dated 12.06.1997, with the latest amendments and additions of 09.11.2013. https://www.wipo.int/edocs/lexdocs/laws/ru/tm/tm015ru.pdf, (viewed on 12.01.2019).
6. Penal Code of the Republic of Kazakhstan, 21.05.1998, with the last modifications and additions of 03.07.2014. https://zakon.uchet.kz/rus/docs/K1400000226, (viewed on 12.01.2019).
7. Penal Code of the Armenian Republic, dated 29.04.2003. https://www.wipo.int/edocs/lexdocs/laws/ru/am/am012ru.pdf, (viewed on 12.01.2019).
8. Penal Code of Georgian 22.07.1999. https://matsne.gov.ge/ka/document/download/16426/143/ru/pdf, (viewed on 12.01.2019).
9. Penal Code of Ukraine with the latest amendments of 18 October 2018. https://meget.kiev.ua/kodeks/ugolovniy-kodeks/razdel-1-20/, (viewed on 15.01.2019).
10. Penal Code of the Republic of Azerbaijan of 30-th December 1999, as last amended by 01.06.2018. http://continent-online.com/Document/?doc_id=30420353#pos=1366;-56, (viewed on 15.01.2019).
11. Penal Code of the Republic of Uzbekistan, dated 12.06.1997, with the last amendments and additions of 01.12.2015. http://lex.uz/docs/111457, (viewed on 21.01.2019).
12. Penal Code of the Donetsk People's Republic, adopted by resolution of the President of the Council of Ministers of 17August 2014. https://dnrsovet.su/zakonodatelnaya-deyatelnost/dokumenty-verhovnogo-soveta-dnr/ugolovnyj-kodeks-donetskoj-narodnoj-respubliki/, (viewed on 22.01.2019).

LE RÔLE DES PRINCIPES GÉNÉRAUX DANS LA GLOBALISATION DU DROIT CONSTITUTIONNEL

Mircea CRISTE*

Abstract

The valorization of principles in the science of law appeared as a counterpoint to the theory of legal positivism, which made the judge a mere executor of the legal rules in a trial. The development that constitutional law has known since the last quarter of the last century was largely due to the recognition of the importance of principles, both from a jurisprudential perspective and as a contribution to the standardization of certain values of law.

The present study aims to briefly present and analyze some of the principles by which constitutional law has contributed to the general globalization of law

Keywords: *principles, Constitution, fundamental rights, rule of law, globalisation*

JEL Classification: [K 19]

La valorisation des principes dans la science du droit est apparue comme une contre position à la théorie du positivisme juridique, qui faisait du juge un simple exécutant d'une norme donnée dans le procès. L'application des règles juridiques doit être concordante avec certains principes juridiques et tempérée parcelle-ci[1], principes qui sont aussi des normes, écrites ou non-écrites, explicites ou implicites, mais avec un plus haut degré de généralité et d'abstraction. La reconnaissance de l'application des principes, parallèlement ou contre les règles écrites, a représenté un appui pour le juge qui, dans des cas difficiles et complexes, ne trouve pas toujours la solution dans le droit positif et il la déduit de la révélation d'un principe juridique. Les principes constituent en même temps le facteur par lequel le droit est standardisé, en recevant des valeurs universelles.

* Professeur aux Facultés de droit à l'Université de l'Ouest de Timisoara et l'Université "1 Decembrie 1918" d'Alba Iulia.

[1] Ainsi, soutenant l'importance des principles dans l'application du droit, Dworkin a fondé sa théorie sur un cas porté devant la Cour d'Appelde New York en 1889, Riggs v. Palmer (www.courts.state.ny.us/reporter/archives/riggs_palmer.html), dans lequel on a décidé que, bien qu'il n'existe une règle écrite qui écarte de la succession un héritier qu'avait tué le testateur et qui était condamné pour ce fait, toutefois on ne peut pas reconnaitre ce droit parce qu'il est un principe non écrit qui ne permet pas que quelqu'un profite de son action illicite (Dworkin, 1996, p. 80).

Le droit constitutionnel contribue au phénomène de la globalisation du droit par la promotion de certains principes généraux, en particulier en matière des droits fondamentaux. Ces droits prennent une place importante dans le monde contemporain et on leur assure une protection sur tous les plans et relative à n'importe quel rapport dans lequel se trouve une personne: national, régionale international. Sur tous ces paliers, ont été édictés tant de véritables Chartes des droits de l'homme, ainsi que des instruments et des institutions de vérification, promotion et garantie de leur respect.

Un accent de plus en plus fort est mis en ce qui concerne un système légal transnational comme système de droit dans le quel toutes les autorités ont l'obligation de respecter, dans le cadre de leur juridiction, les droits fondamentaux de chaque personne, quelque soit sa citoyenneté. Par l'adoption de la Convention relative aux droits de l'homme et son incorporation dans le droit national des États membres, l'Europe offre l'exemple d'un tel système cosmopolite, caractérisé par une action indépendante des cours nationales, guidées seulement par les règles promues par la jurisprudence de la Cour de Strasbourg (Stone Sweet, 2012, p. 53).

Les droits fondamentaux ne sont affirmés que par la Constitution ou par un acte équivalent, mais la question de la reconnaissance, de la promotion et de la protection de certains droits fondamentaux n'est plus posée (seulement) en connexion avec une constitution/législation nationale, mais elle est rapportée aux valeurs morales transnationales. Reprenant une affirmation Kai Möller, on constate non seulement que l'approche des droits constitutionnels est devenue l'une globale, mais aussi que nous assistons à une vraie inflation des droits fondamentaux, soit par l'insertion des nouveaux droits dans les chartes adoptées après la deuxième guerre mondiale, soit par voie prétorienne, par l'activisme de certaines instances constitutionnelles, parmi lesquelles on peut remarquer notamment la Cour constitutionnelle fédérale de l'Allemagne (Möller, 2014).

En plus, cette inflation est déterminée aussi par la réception dans beaucoup de pays de la soit dite théorie des „droits non écrits", avec un rang égal aux droits inscrits à titre d'exemple et pas d'une façon limitative dans une constitution. Leur existence est justifiée par le fait que le législateur contemporain ne peut pas prévoir toutes les situations d'interférences de l'État dans la vie privée des citoyens (Fleiner & Giacometti, 1976, pp. 241-242).

Aussi bien du texte constitutionnel, que des autres actes à valeur internationale et de la contribution de la jurisprudence, on peut remarquer certains principes qui rangent et déterminent l'interprétation et l'application des droits fondamentaux reconnus à chaque personne.

1. Le principe *de la bonne foi*

La bonne foi est, en même temps, une mesure d'appréciation du comportement humain, un standard, mais aussi un principe de droit, en contribuant à la *moralisation* du Droit. En effet, le premier aspect détermine le second. Les normes de droit sont interprétées et appliquées, et le comportement de chacun sera jugé par rapport à certaines valeurs sociales fondamentales et quasi-unanimement acceptées par la société (honnêteté, équitabilité, loyauté, sincérité, tolérance etc.). L'observation et la consécration de ces valeurs dans le comportement de chaque sujet de droit déterminera la conclusion d'une action faite avec bonne foi, ainsi comme l'ignorance de celles-ci déterminera la qualification de ce comportement comme dépourvu de conséquences juridiques ou même pénalisé, cause à la mauvaise foi sur laquelle a été fondée l'action.

C'est la raison pour laquelle l'usage de droit, caractérisé par la bonne foi, exclut l'abus de droit, comme manifestation de la mauvaise foi. Par conséquent, la violation de la bonne foi, considérée comme règle primaire et *sine qua non* de l'exercice des droits fondamentaux, présuppose l'existence d'un abus de droit.

L'abus de droit apparait en tant qu'un exercice illicite d'un droit reconnu à une personne sur le fondement d'une norme de loi ou de l'une conventionnelle, outre les limites établies et/ou contraires au but pour la réalisation duquel le droit a été stipulé[2]. Par la suite, ce qui peut être qualifié comme abusif n'est pas le contenu d'un droit, mais la modalité dans laquelle il est exercé. De cette perspective, une relation peut être établie entre abus de droit et application du principe de la proportionnalité: il devient abusif l'exercice d'un droit par l'usage inadapté de certains moyens rapporté au but suivi.

L'abus de droit est apprécié en fonction d'un critère subjectif et de l'un objectif. Le premier, consiste dans l'intention de préjudicier (*animus nocendi*). L'atteinte apportée par négligence ou par imprudence ne fait pas que l'exercice du droit soit qualifié comme abusif. Le critère objectif vise le but dans l'accomplissement duquel un droit a été reconnu, étant apprécié si l'exercice de celui-ci est fait en accord avec la finalité sociale prise en considération.

Ni en matière des droits fondamentaux, l'exercice de ceux-ci n'est pas un absolu, une limitation étant donnée par le respect même des droits fondamentaux des autres personnes.

---

[2] Dès 1962, le Plénum de l'ancien Tribunal Suprême statuait que „les droitssubjectifs sont reconnus aux personnes physiques seulement dans le but de satisfaire leurs intérêts légitimes. Le dépassement de ce but et l'exercice d'un droit subjectif sans intérêt légitime constitue un abus de droit, qui est contraire aux principes de droit et aux règles de cohabitation" (DTS no 24/1962).

L'article 57 de la Constitution de la Roumanie élève au rang constitutionnel le principe de la bonne foi consacré en droit civil[3]. Un cas particulier, mais expressif, d'abus de droit en matière de droit constitutionnel est représenté par le recours à l'exception d'inconstitutionnalité au cours d'un procès, dans le but évident de tergiverser la solution du litige. Pour empêcher ce type d'abus de droit, la Loi no 177 du 28 septembre 2010 a abrogé la possibilité de suspendre le procès pour cette raison, introduisant un nouveau cas de révision d'un arrêt judiciaire, or, après que le jugement soit devenu définitif, la Cour constitutionnelle s'est prononcée sur l'exception invoquée devant le juge *a quo*, en déclarant la loi ou l'ordonnance inconstitutionnelle.

La Convention européenne des Droits de l'Homme interdit elle aussi l'abus de droit (article 17), précisant qu'aucune disposition de la Convention ne peut pas être interprétée au sens qu'elle donne à un État, àun groupe ouà un individu, un droit quelconque de déployer une activité ou de remplir un acte qui poursuit de méconnaitre les droits ou les libertés reconnus par la Convention oude porter des limitations à ceux-ci, autres que celles prévues dans la Convention.

2. Le principe *de l'égalité*

L'exercice des droits fondamentaux reconnus par la Convention de Roumanie se fait avec l'observation d'un principe essentiel stipulé dans l'art16 de la loi fondamentale, à savoir celui que les citoyens sont égaux devant la loi et les autorités publiques, sans privilèges et sans discriminations. C'est un principe que les révolutionnaires français de 1789 avaient placé en tête de la Déclaration des Droits de l'Homme et du Citoyen („Les hommes naissent et demeurent libres et égaux en droits").

L'égalité des citoyens se manifeste tant en plan horizontal dans les rapports entre ceux-ci, qu'en plan vertical dans les rapports dans lesquels ils inter actionnent avec différentes autorités de l'État. En plan horizontal, l'égalité exprime la reconnaissance du même statut pour tous les citoyens, de l'exercice de tous les droits, sans distinction de race, de nationalité, d'origines ethniques, de langue, de religion, de sexe, d'opinion, de convictions politiques, de conditions économiques oud'origine sociale (article 4 alinéa 2 de la Constitution). Ils sont pris en considération dans ce cas, notamment, les rapports juridiques de droit privé dans lesquels se trouvent les personnes. En

[3] „La bonne foi a été soulevée par la Constitution au niveau des catégories constitutionnelles, en s'imposant ainsi à tous les sujets de droit et à tous les rapports juridiques, indifféremment de leur nature. C'est la raison pour laquelle la justice et, bien sûr, la justice constitutionnelle aussi, est tenue à l'observer dans le jugement de tout procès" (DCC no 2 de 5 janvier 1995, publiée dans *Monitorul Oficial* no 5 du 13 janvier 1995). Voir aussi DCC no 146 du 7 octobre 1999, publiée dans *Monitorul Oficial* no 628 du 23 décembre 1999.

plan vertical, on remarque avant tout la disposition inscrite dans l'article 16 alinéa 1er de la Constitution: „Les citoyens sont égaux devant la loi et les autorités publiques, sans privilèges ni discriminations". Celle-ci exprime l'obligation de l'État (autorités de l'État) de traiter sans discrimination et sans préférence toutes les personnes, en leur appliquant la même interprétation de la loi. La Cour constitutionnelle avait souligné que le principe de l'égalité vise *l'égalité devant la loi* des citoyens, c'est-à-dire des *personnes physiques, et pas une potentielle égalité entre ceux-ci et les autorités de l'État ou leurs représentants*[4]. Dans sa jurisprudence, la Cour a retenu quelle fait de ne pas tenir compte du principe de l'égalité en droits a pour conséquence l'inconstitutionnalité du privilège ou de la discrimination qui a déterminé, du point de vue normatif, la violation du principe. Si elle est constatée *l'inconstitutionnalité de la discrimination*, le remède réside dans la reconnaissance du bénéfice du droit[5], alors que, le privilège étant défini comme un avantage ou une faveur injustifiée accordée à une personne ou groupe de personnes, *l'inconstitutionnalité du privilège* ne signifie pas qu'on donne le bénéfice de celui-ci à tous, mais que l'on élimine.

L'application du principe constitutionnel de l'égalité est assurée par l'Ordonnance du Gouvernement no 137/2000 sur la prévention et la répression de toutes formes de discriminations[6].

Dans l'opinion de la Cour constitutionnelle, le principe de l'égalité, consacré par l'article 16 alinéa 1er de la Constitution, présuppose l'application d'un traitement juridique égal aux personnes qui se trouvent dans des situations juridiques identiques ou similaires. Toutefois, l'égalité ne signifie pas uniformité, ainsi il est possible d'établir un traitement juridique différent pour des situations différentes, alors qu'il est justifié rationnellement et objectivement[7].

Selon la Cour européenne des Droits de l'Homme (Arrêt du 18 juillet 1994, Karlheinz Schmidt c. Allemagne), une différence de traitement est discriminatoire du point de vue de l'article 14 si elle n'a pas „une justification objective et raisonnable", c'est-à-dire si elle ne poursuit pas un „but légitime" ou s'il n'existe une relation de proportionnalité raisonnable entre les moyens usités et la fin suivie. L'invocation d'un acte ou d'une action discriminatoire ne peut pas avoir pourtant comme effet la limitation du droit à la liberté d'expression, du droit à l'opinion ou du droit à l'information.

[4] DCC no 1314 du 4 octobre 2011, publiée dans *Monitorul Oficial* no 907 du 21 décembre 2011.
[5] DCC no 685 du 28 juin 2012, publiée dans *Monitorul Oficial* no 470 du 11 juillet 2012, DCC no 164 du 12 mars 2013, publiée au *Monitorul Oficial* no 296 du 23 mai 2013, DCC no 681 du 13 novembre 2014, publiée dans *Monitorul Oficial* no 889 du 8 décembre 2014.
[6] Republiée dans *Monitorul Oficial* no 166 du 7 mars 2014.
[7] DCC no 313 du 14 juin 2005, publiée au *Monitorul Oficial* no 613 du 14 juillet 2005.

La garantie d'un traitement égal dans l'exercice des droits fondamentaux n'exclue ni l'institution au niveau constitutionnel d'une protection spéciale pour certaines personnes. Cette protection trouve sa justification dans la préoccupation d'assurer l'existence et l'expression des minorités nationales (article 62), dans le statut social et biologique spécial de la femme et des jeunes (article 41 et 49) ou dans la nécessité de certaines mesures de protection spécifiques pour les personnes handicapées (article 50).

La doctrine qualifie parfois cette protection spéciale accordée à certaines catégories de personnes - par une expression qu'onne considère pas appropriée -, comme une *discrimination positive*. En effet, cette protection est reconnue dans la considération de l'appartenance à un groupe qui *virtuellement* se trouve dans une position sans avantage, inférieure par rapport à d'autres personnes, dans une situation donnée. Ce rapport est apprécié *in abstracto*, n'étant pas relevant, sous l'aspect de la reconnaissance de la protection, le fait que dans un cas concret n'existerait ce désavantage présumé. Certains auteurs distinguent entre égalité formelle, relative au traitement égal de chaque individu tant par les autorités publiques, que par la loi (l'égalité devant la loi, devant la justice, l'égalité entre les femmes et les hommes etc.) et l'égalité réelle, qui vise notamment cette „discrimination positive"(Chagnollaud, 2005, p. 83). À une analyse sérieuse on peut constater que ceux qui bénéficient de la „discrimination positive" appartiennent à des groupes qui, le long de l'histoire, avaient fait l'objet des actions d'exclusion et d'oppression de la part de ceux qui détenaient le pouvoir (Calvès, 2004, p. 32).

Au niveau de l'Union européenne, selon l'article 18 et 19 TFUE, elle on interdit toute discrimination exercée à raison de citoyenneté ou de nationalité. Le Conseil, décidant à l'unanimité et avec l'approbation du Parlement européen, peut prendre les mesures nécessaires pour combattre toute discrimination à cause de sexe, de race ou d'origines ethniques, de religion ou de convictions, d'handicap, d'âge ou d'orientation de sexe.

3. La limitation de l'exercice des certains droits et libertés fondamentaux

L'exercice des droits fondamentaux ne peut pas être l'un absolu, une limitation étant donnée par le même respect des droits fondamentaux des autres, car selon l'article 57 de la Constitution, les citoyens roumains, les citoyens étrangers et les apatrides doivent exercer leurs droits et libertés constitutionnelles avec bonne foi, dans le respect des droits et des libertés des autres. Une seconde limitation est inscrite dans l'article 53 de la Constitution, qui stipule que ***l'exercice*** *de certains droits ou de certaines libertés* ***peut être restreint uniquement*** par la loi, *seulement* s'il s'imposée *seulement* pour:

i. protéger la sécurité nationale, l'ordre, la santé ou la morale publique, les droits et les libertés des citoyens ;

ii. le déroulement de l'instruction pénale ;

iii. prévenir les conséquences d'une calamité naturelle, d'un désastre ou d'un sinistre extrêmement grave.

Dans toutes les situations énumérées, la mesure doit être proportionnelle à la situation qui l'avait déterminée, être appliquée de manière non discriminatoire et ne peut porter atteinte à l'existence du droit ou de la liberté. À la suite de la révision de 2003, le texte constitutionnel précis que la restriction ne pourra être décidée que si elle est nécessaire dans une société démocratique.

Il est à souligner que l'article 53 de la Constitution vise seulement les droits consacrés par la Loi fondamentale, et pas ceux établis par des lois organiques ou ordinaires, ce qui nous amène à la conclusion que, dans ce dernier cas, le législateur pourra modifier ou même cesser d'accorder certaines mesures de protection sociale, sans qu'il soit nécessaire de se soumettre aux condition insérées dans l'article 53 de la Constitution[8].

Vu les dispositions de la Constitution de la Roumanie[9], mais aussi la jurisprudence des autres instances constitutionnelles européennes, on peut affirmer que ce n'est pas tout droit fondamental qui soit susceptible de faire l'objet d'une limitation à un moment donné et dans certaines circonstances, observant au premier lieu le droit à la dignité. Ainsi, la Cour constitutionnelle allemande, appelée à se prononcer sur la constitutionnalité du § 14 alinéa 3 de la Loi relative à la sécurité du trafic aérien, adoptée après les évènements du 11 septembre 2001 dans les États Unis, qui autorisait l'armée d'abattre les avions utilisés comme armes contre la vie des hommes[10], a déclaré le texte contrôlé inconstitutionnel et nul, entre autres aussi parce qu'il n'est pas compatible avec le droit fondamental à la vie et avec la *garantie de la dignité humaine* inscrite dans la Loi fondamentale allemande, dans la mesure où l'intervention militaire de l'État porte atteinte à des hommes qui ne sont pas impliqués, mais qui se trouvent au bord de l'avion. Par le fait que leur mort est utilisée dans la sauvegarde d'autres vies, ces personnes seraient traitées comme simples objets et pour cela, leur dignité, en tant que valeur reconnue à tous, serait niée. Même si on estimerait qu'en tout cas les personnes impliquées sont déjà condamnées, l'assassinat des gens innocents a le caractère d'une violation de leur droit à la dignité. La vie humaine et la dignité humaine jouissent de la même protection constitutionnelle, sans regard à la durée de l'existence physique de chacun.

---

[8] DCC no 478 du 12 juillet 2018, publiée dans *Monitorul Oficial* no 945 du 8 novembre 2018.

[9] Article 1er alinéa 3 de la Constitution: „La Roumanie est un État de droit, démocratique et social, dans lequel *la dignité de l'être humain*, les droits et les libertés des citoyens, *le libre développement de la personnalité humaine, la justice* et le pluralisme politique *représentent les valeurs suprêmes*, dans l'esprit des traditions démocratiques du peuple roumain et des idéaux de la Révolution de décembre 1989 et sont garantis".

[10] Arrêt du 15 février 2006, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2006/02/rs20060215_1bvr035705.html.

4.* Le principe *de la proportionnalité

Ce principe trouve une applicabilité spéciale et spécifique dans le cadre du droit constitutionnel, qui, tant au niveau national qu'international, par l'intervention des instances qui protègent les droits de l'homme, a connu un développement dans un rythme soutenu, en s'imposant comme un standard dans l'appréciation de la violation de ces droits. L'interprétation du respect des droits et des libertés fondamentaux par l'application du principe de la proportionnalité a connu une évolution marquée par sa réception du droit administratif allemand dans le droit constitutionnel allemand, pour passer dans la jurisprudence des instances canadiennes et, ensuite, dans celles des instances de l'Afrique de Sud, de la Nouvelle Zélande, de l'Israël, de l'Europe de l'Est, de l'Amérique Centrale et de Sud, et finalement dans la pratique des instances anglaises et de la Cour européenne des Droits de l'Homme. Ce principe est plus souvent mis en connexion avec le principe de la décision raisonnable, développé par le droit administratif anglais dès la moitié du dernier siècle déjà, dans le procès *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* de 1948.

Le principe de la proportionnalité est consacré par l'article 53 alinéa 2 de la Constitution de la Roumanie, invoqué plus haut, qui stipule que la limitation des droits et des libertés fondamentaux ne pourra être décidée que si elle est *proportionnelle à la situation l'ayant déterminée*. La reconnaissance comme principe de la proportionnalité a été consacrée par la jurisprudence de la Cour constitutionnelle roumaine[11], qui fait souvent recours à lui dans l'appréciation de la violation des dispositions constitutionnelles. D'ailleurs, c'est le devoir du juge, et en matière constitutionnelle, du juge constitutionnel, de faire l'application concrète du principe de la proportionnalité, autant qu'il n'a pas une prédétermination légale (Deleanu, 2006, p. 123).

Le principe de la proportionnalité a un double sens et une double application. L'une se manifeste dans les relations sur horizontale, entre les citoyens, qui doivent exercer leurs droits avec bonne foi, sans porter atteinte aux droits et libertés des autres (article 57), une deuxième application du principe de la proportionnalité - sur verticale, dans le rapport citoyens-pouvoir d'État. Un droit ou une liberté fondamentale ne peut être limitée par voie normative, que s'il est respecté, avant tout, le principe de la proportionnalité. C'est le moment où le respect de ce principe est apprécié par le juge constitutionnel pour décider s'il existe une violation constitutionnelle.

Le champ d'application de ce principe est très large, rapporté à l'ensemble des droits et des libertés reconnus constitutionnellement, déterminant

[11] DCC no 139 du 14 décembre 1994, précitée, DCC no 157 du 10 novembre 1998, publiée au *Monitorul Oficial* no 3 du 11 janvier 1999; DCC no 161 du 10 novembre 1998, publiée au *Monitorul Oficial* no 3 du 11 janvier 1999.

l'appréciation de la modalité d'application d'un certain droit fondamental, comme par exemple, l'appréciation de la nécessité de limiter la liberté individuelle. Ainsi, la Cour constitutionnelle allemande[12], appliquant le principe de la proportionnalité, a considéré comme excessive et sans justification l'arrestation préventive en 1965 d'une personne âgée de 76 ans, accusée d'avoir sabordé plusieurs navires en 1944, alors qu'il était attaché à la marine allemande, au Japon. La Cour avait considéré que l'arrestation a dépassé les proportions, parce qu'il n'existait nille risque que l'accusé contourne la loi, ni qu'il représente un péril pour la communauté. En général, dans sa jurisprudence, la Cour constitutionnelle de Karlsruhe a fait l'application du principe de la proportionnalité par un exercice simple, en comparant la perte subie par le droit affecté, dans le cas où la loi soit validée, avec celle subie par l'intérêt protégé par la loi, dans le cas où le droit fondamental prévaut (Grimm, 2007, p. 393).

En ce qui concerne la Cour constitutionnelle de la Roumanie, elle a manifesté dans les dernières années un activisme de plus en plus fort dans l'application du principe de la proportionnalité. La vérification de l'accomplissement de la proportionnalité prévue dans l'article 53 de la Constitution présuppose pour la Cour une analyse pour établir dans quelle mesure il y a un juste équilibre entre la limitation à la quelle il est soumis un droit et l'intérêt public protégé par cette limitation.

5. Le principe *de la solidarité*

La solidarité entre les citoyens, inscrite dans l'article 4 alinéa 1 de la Constitution, représente un autre principe important en la matière, une fois que la norme mentionnée le considère, à côté de l'unité du peuple roumain, un fondement de l'État. Comme une application de ce principe, la Loi no 95/2006 republiée[13], relative à la réforme dans le domaine de la santé, prévoit que les assurances sociales de santé soient obligatoires et agissent comme un système unitaire, et ses objectifs se réalisent, entre autres, sur le principe de la solidarité. La Cour constitutionnelle a contribué à la consécration constitutionnelle de ce principe, statuant que le système des assurances sociales de santé ne peut accomplir l'objectif principal que grâce à la solidarité de ceux qui y contribuent[14].

Une reconnaissance constitutionnelle de ce principe on trouve dans les dispositions de l'art.56 alinéa 2 de la Loi fondamentale, selon lesquelles le système légal d'impôt doit assurer la juste répartition des charges fiscales. L'application du principe de la solidarité, corroborée à celui de la subsidiarité,

[12] Décision 513/65 du premier Senat de la Cour constitutionnelle fédérale de la R.F. Allemagne du 15 décembre 1965, http://www.servat.unibe.ch/dfr/bv019342.html.
[13] *Monitorul Oficial* no 490 du 3 juillet 2015.
[14] DCC no 705 du 11 septembre 2007, publiée au *Monitorul Oficial* no 736 du 31 octobre 2007.

dans la collecte et l'utilisation des fonds, applicable en matière d'assurances sociales de santé, justifie la différence de valeur de la contribution d'une personne à l'autre, en fonction du quantum des revenus réalisés. Cette différence est jugée par la Cour constitutionnelle comme raisonnable et justifiée par la situation spéciale dans laquelle se trouvent les personnes qui réalisent des revenus plus importants que ceux dont les revenus sont réduits[15].

À notre avis, ce principe devrait être appliqué par les juges constitutionnels alors qu'ils sont appelés à se prononcer sur la constitutionnalité de l'article 2 et des articles 17–25 de la Loi no 329/2009, relative à la réorganisation de certaines autorités et institutions publiques et à la rationalisation des dépenses publiques. La Cour constitutionnelle a considéré que nous sommes dans la présence d'une limitation d'un droit fondamental qui intervient dans les conditions de l'article 53 de la Constitution, motivée par l'existence d'un contexte social affecté par la crise économique, qui a imposé l'adoption de certaines mesures avec un caractère exceptionnel, qui, par l'efficacité et la promptitude de l'application, conduise à la réduction de ses effets et crée les prémisses de la relance de l'économie nationale. De cette perspective, la mesure adoptée était proportionnelle à la situation qui l'avait déterminée, respectivement la situation de crise économique dans laquelle se situait l'État, étant appliquée d'une façon non-discriminatoire à toutes les personnes qui se trouvaient dans l'hypothèse de la norme.

La Cour a considéré qu'il n'existe aucune discrimination entre retraités en général, auxquels on applique cette limitation, et les retraités qui sont dans l'exercice d'un mandat d'autorité et qui peuvent cumuler la pension avec l'indemnisation (le correspondant du salaire pour les fonctions de dignité), s'agissant de situations différentes qui permettent des solutions différentes.

Par conséquent, les juges constitutionnels se sont limités à faire un seul examen de proportionnalité et à vérifier le respect de l'article 16 de la Constitution. Toutefois, dans l'espèce il n'était pas mis en question le problème d'une limitation ordinaire d'un droit fondamental, qui réclamerait seulement un examen de proportionnalité. Toute la question de constitutionnalité a été déterminée par l'existence d'un cas de force majeure résulté de la crise économique avec des implications importantes et immédiates sur la situation économique du pays et du niveau de vie de chaque citoyen, et elle devrait être examinée de cette perspective. Une telle compréhension du problème déterminerait les juges constitutionnels d'arriver à la conclusion qu'il ne s'agit pas d'une simple limitation d'un droit pour mettre en valeur un autre droit fondamental ou intérêt social général, mais

[15] DCC no 56 du 26 janvier 2006, publiée dans *Monitorul Oficial* no 164 du 21 février 2006, DCC no 539 du 27 juin 2006, publiée dans *Monitorul Oficial* no 661 du 1 août 2006.

d'une menace sérieuse pour l'existence de la société qui ne demande pas la limitation des certains droits, mais un abandon, une autolimitation, sur une période déterminée, à certains droits, en raison du principe de la solidarité.

Une matérialisation du principe de la solidarité au niveau européen peut être remarquée en matière de protection diplomatique ou consulaire offerte à tous les citoyens de l'Union au-delà de sa frontière, alors que les autorités diplomatiques sont habiletés à intervenir dans leur appui (article 20 TFUE et article 46 Charte). D'ailleurs, la protection à laquelle l'État est tenu d'accorder à ses citoyens est un autre principe constitutionnel à valeur universelle.

6. Le principe *de l'accès libre à la justice*

Plus qu'un simple principe, l'accès libre à la justice constitue une condition *sine qua non* pour l'exercice plénier de tout droit fondamental, étant aujourd'hui perçu comme un élément essentiel de l'État de droit et ainsi, reconnu dans tous les systèmes de droit du monde démocratique.

La Constitution de la Roumanie reconnait, dans l'article 21, le droit de chaque personne de s'adresser à la justice pour défendre ses droits, libertés et intérêts légitimes, ainsi quelle droit à un procès équitable et à un jugement dans un délai raisonnable, droits auxquels exercice ne peut pas faire l'objet d'une quelconque limitation de la part du législateur.

Il est évident dans cette règlementation l'influence de la globalisation du droit, plus exactement de la Convention européenne des Droits de l'Homme qui, dans l'article 6, prévoit que toute personne a un droit à un jugement équitable, public et dans un délai raisonnable, devant une instance indépendante et impartiale, instituée par la loi. D'ailleurs, comme à juste titre il a été remarqué (Tănăsescu, 2004, p. 34), vu la règlementation de l'article 20 de la Constitution, l'accès libre à la justice serait, quand même, protégé par rapport à la Convention européenne et la jurisprudence de la Cour européenne des Droits de l'Homme (CEDH), mais par sa mention expresse il a été poursuivi par le fait de mettre en évidence son importance dans le cadre de l'État de droit, telle que proclame la Roumanie dans sa Loi fondamentale (article 1er alinéa 3). De plus, la reconnaissance par le droit de l'Union européenne à un procès équitable a représenté le premier pas sur la voie de l'acceptation réciproque des arrêts et a été le fondement sur lequel a été construite la coopération judiciaire dans l'espace européen, étant un ingrédient de la confiance réciproque, outre même les règles communes relatives aux compétences de la reconnaissance des arrêts, un ingrédient de l'entente et de la bienveillance réciproque (Université Paul Cezanné, Aix Marseille III, 2009, p. 53). C'est la raison pour laquelle, dans l'application de ce principe, un regard spécial est accordé à la jurisprudence des cours européennes.

La Cour de Strasbourg a statué d'une façon constante que le droit d'accès à une instance judiciaire constitue un élément inhérent du droit à un procès équitable[16]. Mais ce droit ne représente qu'un aspect, à lui s'ajoutant les garanties relatives à l'organisation et à la composition de l'instance, voire à la procédure de jugement, toutes celles-ci formant le droit à un procès équitable[17]. Quant à la quantification de ce que signifie *terme raisonnable,* cela ne peut pas être généralisée et règlementée, mais elle représente une appréciation de l'instance, CEDH mettant en évidence quelques éléments qui devraient être pris en considération, telle la complexité du litige, la conduite du requérant et des autorités compétentes et l'importance du litige pour le requérant[18].

En général, le procès qui se déroule dans l'absence de l'inculpé n'est pas en soi-même incompatible avec l'article 6 de la Convention, toutefois la Cour précise qu'il existe une évidente dénégation de justice dans le cas où une personne condamnée *in absentia* n'aurait ultérieurement la possibilité d'obtenir un réexamen sur le fond de son procès – endroit et en fait – alors qu'il n'était établi qu'elle ait renoncé à son droit d'être présente devant l'instance et de se défendre. Il est reconnu aux États contractants une marge large d'appréciation en ce qui concerne le choix des voies procédurales, mais celles-ci doivent être efficaces dans le cas où l'inculpé n'ait pas renoncé à son droit d'être présent et de se défendre et ni n'ait tenté de se soustraire aujugement[19].

La Cour constitutionnelle roumaine a statué constamment que la règlementation par le législateur des conditions d'exercice de l'accès libre à la justice, y compris par l'institution de certains délais, ne constitue une limitation de son exercice, mais seulement une modalité efficiente de prévenir un exercice abusif, au détriment d'autres titulaires de droits, également protégés[20]. Dans l'adoption des règles d'accès des justiciables aux droits procéduraux, le législateur est néanmoins tenu de respecter le principe de l'égalité des citoyens devant la loi.

L'accès libre à la justice est un droit affecté au principe de l'équité, car „l'accès libre à la justice ne peut pas être une garantie constitutionnelle suffisante à tous les droits et libertés fondamentaux, si la Justice même n'est pas *équitable*" (Deleanu, 2006, p. 552). Un premier exemple du lien qui existe

[16] Arrêt du 21 février 1975, *Golder c.Royaume Uni*, paragraphe 36, Arrêt du 30 octobre 1998, *F.E. c. France*, paragraphe 44, Arrêt du 7 mai 2002, *McVicar c.Royaume Uni,* para 46.
[17] Arrêt du 21 février 1975, *Golder c.Royaume Uni,* paragraphe 36.
[18] Ainsi, une procédure qui a duré approximativement quatre ans, parcourant trois instances, n'a pas été appréciée comme portant atteinte aux dispositions de l'article 6 alinéa 1 de la Convention, un tel délai étant considéré comme raisonnable (Décision du 11 juin 2002 de la Cour européenne des Droits de l'Homme, *Costandache c.Roumanie*, publiée dans *Monitorul Oficial* no 1133 du 1 décembre 2004).
[19] Arrêt de la Cour européenne des Droits de l'Homme du 6 octobre 2015 *Coniac c.Roumanie,* publiée dans *Monitorul Oficial* no 281 du 13 avril 2016.
[20] DCC no 1022 du 14 juillet 2011, publiée dans *Monitorul Oficial* no 675 du 22 septembre 2011.

entre le droit prévu par l'article 21 de la Constitution et le principe de l'équité nous a été fourni par la Cour constitutionnelle à l'occasion del'examen de la dépénalisation de l'infraction d'insulte et de calomnie. À cette occasion, la Cour a décidé quelle libre accès à la justice ne signifie pas seulement la possibilité de saisir les instances judiciaires, mais aussi de bénéficier des moyens adéquats pour protéger le droit violé, approprié à la sévérité et au risque social de l'atteinte produite. On a invoquée dans ce sens la jurisprudence de la C.E.D.H.[21], qui a constamment statué que l'effet essentiel de la disposition comprise dans l'article 13 de la Convention consiste à imposer l'existence d'un recours interne qui habilite l'instance nationale à offrir une *réparation adéquate*, recours qui doit être *effectif* tant dans le cadre des règlementations légales, que dans la pratique de leurs applications.

L'accès libre à la justice est, également, un droit affecté au principe du raisonnable. En réglant l'exercice de ce droit, le législateur a la possibilité d'imposer certaines conditions de forme, certaines limites raisonnables, sans porter atteinte à l'accès libre à la justice, car, comme tout autre droit fondamental, celui-ci a aussi un caractère légitime seulement dans la mesure où il est exercé à bonne foi, dans le respect des droits et des intérêts des autres sujets de droit, également protégés[22].

7. Le principe *de la non rétroactivité de la loi*

C'est un principe à reconnaissance universelle, qui assure la stabilité du circuit civil. Chaque fois qu'une nouvelle loi modifie l'état légal antérieur relatif à certains rapports, tous les effets du rapport antérieur susceptibles de se produire, s'ils se sont réalisés avant que la nouvelle loi soit entrée en vigueur, ne peuvent plus être modifiés à la suite de l'adoption de cette loi, qui doit respecter la souveraineté de la précédente loi. Décider que par ses dispositions la nouvelle loi pourrait éliminer ou modifier des situations juridiques antérieures, comme une conséquence des actes normatifs qui ne sont plus en vigueur, signifierait d'enfreindre le principe constitutionnel de la non rétroactivité de la loi civile. En revanche, la nouvelle loi est applicable tout de suite à toutes les situations qui se constitueront, se modifieront ou cesseront d'exister après son entrée en vigueur, ainsi qu'à tous les effets produits par les situations juridiques formées après l'abrogation de l'ancienne loi[23].

[21] *Aydin c.Turquie* de 1997 et *Čonka c.Belgique* de 2002.
[22] DCC no 56 du 17 février 2004, publiée dans *Monitorul Oficial* no 215 du 11 mars 2004.
[23] DCC no 409 du 4 novembre 2003, publiée dans *Monitorul Oficial* no 848 du 27 novembre 2003, DCC no 830 du 8 juillet 2008, publiée dans *Monitorul Oficial* no 559 du 24 juillet 2008, DCC no 437 du 29 octobre 2013, publiée dans *Monitorul Oficial* no 685 du 7 novembre 2013.

8.* Le principe *de l'universalité des droits et des libertés fondamentaux

C'est un principe promu par l'article 15, l'alinéa 1 de la Constitution de la Roumanie, qui stipule que les citoyens bénéficient de droits et de libertés consacrés dans la Constitution et dans d'autres lois et ont les obligations prévues par celles-ci. Cela veut dire que, d'une part, il vise tous les droits et libertés énumérés par les textes constitutionnels et législatifs et, d'autre part, qu'il est virtuellement reconnu à tous, bien qu'il existe aussi des droits que certaines personnes n'exerceront jamais, parce qu'ils ne seront pas dans les situations spécifiques prévues pour leur exercice (par exemple, le droit à la protection des personnes handicapées) (Deaconu, 2013, pp. 171-172). De plus, de la perspective du principe de l'universalité des droits et des libertés fondamentaux il fauter connaitre à chacun l'exercice de tous les droits promus par ces actes à valeur constitutionnelle et/ou internationale. Ce principe implique également une reconnaissance de tous les droits et libertés fondamentaux entre tous les gens.

Ainsi, la Déclaration Universelle des Droits de l'Homme adoptée parl'O.N.U. à 10 décembre 1948, par sa reconnaissance de tous les États adhérents, a standardisé les droits qu'elle proclame, imposant à ces États l'obligation de promouvoir et de garantir leur exercice.

9.* Le principe *de la primordialité du droit de l'Union européenne

Le 15 juillet 1964, la Cour de Luxembourg a prononcé une décision historique dans le procès *Costa c. Enel*[24], quand elle a statué que les normes du droit européen s'appliquent prioritairement par rapport aux normes internes, en s'intégrant dans les systèmes judiciaires des États membres, et ceux-ci sont obligés de les respecter et d'appliquer la disposition européenne, même si celle-ci a été adoptée ultérieurement à la norme interne. Par cette décision, on a établi la primordialité du droit de l'Union, à l'égard, d'une part, de tout acte européen qui a un caractère obligatoire, tant ceux de la législation primaire, que ceux de la législation secondaire, et d'autre part, de tout acte national, indifféremment de l'autorité qui l'avait adopté.

L'affirmation du principe de la primordialité du droit de l'Union européenne a fait que le droit constitutionnel soit appelé à examiner le rapport entre les normes de droit européen et celles nationales, même celles constitutionnelles, corroborée avec l'acceptation du droit constitutionnel comme un ensemble de normes qui visent l'organisation et le fonctionnement

[24] http://eur-lex.europa.eu/Notice.do?val=5203%3Acs&lang=ro&list=5188%3Acs%2C5190%3Acs%2C5204%3Acs%2C5181%3Acs%2C5203%3Acs%2C5186%3Acs%2C5170%3Acs%2C5185%3Acs%2C5203%3Acs%2C5186%3Acs%2C5170%3Acs%2C5185%3cs%2C5183%3Acs%2C5180%3Acs%2C&pos=5&page=1&nbl= 31&pgs=10&hwords=

du pouvoir ou l'élaboration d'autres normes. Ainsi on a facilité l'opinion selon laquelle le droit de l'Union européenne fait partie de la branche du droit constitutionnel, d'autant plus que la ressemblance qui existe entre les normes européennes et celles nationales en ce qui concerne la règlementation de l'organisation et du fonctionnement du pouvoir est évidente (Hamon & Troper, 2009, p. 315).

La question qui naît est si le principe de la primordialité s'applique aussi aux normes constitutionnelles, en d'autres mots si les normes de l'Union ont une valeur non seulement supra-légale, mais aussi supra-constitutionnelle, et la réponse semble être négative, justifiée par l'invocation soit de la souveraineté nationale, soit de la meilleure protection que la loi fondamentale nationale offre par rapport à la législation européenne[25]. D'autre part, on ne peut pas ignorer que lorsque que le juge constitutionnel a constaté une contradiction entre le texte de la Constitution et un acte de l'Union, ce n'était pas le dernier qui ait été réformé pour exister une concordance, mais c'était la Constitution qui a été révisée ou, parfois, on a donné à celle-ci une interprétation qui écarterait toute discordance[26], ce qui nous relève un rapport entre la législation de l'Union européenne et la législation des États membres, semblable à celui qui existe dans les États fédéraux, entre législation fédérale et celle de l'État membre, en ce qui concerne la distribution et le respect des compétences.

Conclusions

D'autres principes qui avaient fondé l'évolution du droit constitutionnel en tant qu'un droit globalisé par rapport au monde démocratique ont été celui de la séparation des pouvoirs et celui de l'État de droit. Nous avons mentionné ces principes dans une étude antérieure (Criste, 2018), raison pour laquelle nous ne reprenons pas les considérations formulées à cette occasion-là.

Il est à souligner toutefois que le concept d'État de droit s'était situé sur une tendance haussière comme un principe fondamental de toute démocratie contemporaine, étant considéré comme "un paradigme organisationnel dominant du droit constitutionnel moderne" (Kokott, 1999, p. 99), de la manière que, même là où il n'est pas expressément mentionné, comme dans le Royaume-Uni, par exemple, on lui reconnait, cependant, le caractère de principe inhérent dans l'organisation de l'État (Lord Falconer cité dans Pech, 2010)[27].

Bien qu'il ne soit pas évident, il est difficile de trouver une réponse généralement acceptable pour définir *l'État de droit*, car il est invoqué dans

[25] Cette tendance de comparer le degré de protection offert par le droit de l'Union européenne et celui assuré par la législation nationale a été affirmée par l'arrêt du 29 mai 1974 de la Cour constitutionnelle fédérale allemande, connue aussi comme Solange I.

[26] Voir pour une présentation détaillée (Criste, 2008, p. 51 et suiv.).

[27] Lord Falconer, les débats de la Chambres des Lords du 7 décembre 2004, tome 667, col. 739.

beaucoup de situations. Même si la majorité des auteurs se réfère à l'État de droit par rapport aux mêmes notions et expressions, on a souvent une représentation différente, ce qui nous amène à comparer l'évolution de la notion d*'État de droit* avec l'expansion de l'univers, en lui ajoutant en permanence d'autres valences, sans renoncer à aucune de celles anciennes ou, plus prosaïquement, avec un emballage dans lequel sont englobés tous les concepts et les réalités relatifs à un État démocratique. En effet, outre tout ce contenu de l'*emballage*, il est impossible d'identifier et de définir l'État de droit. Celui-ci s'avère ne pas avoir une existence indépendante de ce contenu, étant un standard conditionné de la vérification de l'accomplissement des caractéristiques d'une démocratie.

Entre État de droit et séparation des pouvoirs il y a une étroite liaison, perceptible dans l'un des aspects qui reflètent et présument l'État de droit, à savoir l'intervention du juge constitutionnel en tant qu'arbitre entre les pouvoirs constitutionnels. De cette perspective, on peut affirmer que celui-ci solutionne (indirectement) un conflit entre les autorités constitutionnelles même dans l'absence d'une compétence qui lui soit reconnue expressément, lorsqu'il fonde une décision d'inconstitutionnalité sur le principe de la séparation des pouvoirs.

Le droit constitutionnel, en tant que branche de droit structurante, connaitra, étant donné la réalité contemporaine tellement interconnectée, une évolution constante dans le sens de l'identification et de la promotion de certains principes à valeur universelle, qui constitueront le fondement de l'affirmation de certains systèmes de droit pareillement interconnectés, en s'exprimant dans des modalités très semblables.

Bibliographie

1. Calvès, G., (2004), Les politiques françaises de discrimination positive: trois spécificités. *Pouvoirs*, Issue 111.
2. Chagnollaud, D., (2005), *Droit constitutionnel contemporain.* 4 éd. Paris: Dalloz.
3. Criste, M., 2008. Traité ou Constitution?. Dans: D. Blanc & B. Boissard, éds. *Institutions Européennes, serie EuPA.* Miskolc,: University Press.
4. Criste, M., (2018), La démocratie dans la réalité constitutionnelle contemporaine. *Fiat Iustitia*, Issue 1, pp. 74-87.
5. Deaconu, Ş., (2013), *Drept constituţional.* Bucharest: C.H. Beck.
6. Deleanu, I., (2006), *Instituţii şi proceduri constituţionale – în dreptul român şi în dreptul constituţional.* Bucharest: C.H. Beck.
7. Dworkin, R., (1996), *Prendre les droits aux sérieux.* Paris: PUF.
8. Fleiner, F. & Giacometti, Z., 1976. *Schweizerischen Bundesstatsrecht.* Zürich: s.n.
9. Grimm, D., (2007), Proportionality in Canadian and German constitutional jurisprudence. *University of Toronto Law Journal*, 57(2), pp. 283-297.
10. Hamon, F. & Troper, M., (2009), *Droit constitutionnel.* 31 éd. Paris: LGDJ.

11. Kokott, J., 1999. From Reception and Transplantation to Convergence of Constitutional Models in the Age of Globalization. Dans: C. Starck, éd. Baden-Baden: Nomos.
12. Pech, L., (2010), A Union Founded on the Rule of Law: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law. *European Constitutional Law Review*, 7 décembre, Volume 6.
13. Möller, K., (2014), From constitutional to human rights: On the moral structure of international human rights. *Global Constitutionalism*, Issue 3, pp. 373-403.
14. Stone Sweet, A., (2012), A cosmopolitan legal order: Constitutional pluralism and rights adjudication in Europe. *Global Constitutionalism*, 1(1).
15. Tănăsescu, E. S., (2004), Articolul 21 Accesul liber la justiţie. Dans: *Constituţia României revizuită-comentarii şi explicaţii.* Bucharest: ALL Beck.
16. Université Paul Cezanné, Aix Marseille III, (2009), *L'emergence d'une culture judiciaire europeenne. Avancées et difficultés d'une culture judiciaire européenne dans l'espace judiciaire européen.* [En ligne] disponible à l'adresse: http://docplayer.fr/2290855-Laboratoire-de-theorie-du-droit-ea-892-centre-de-recherche-en-matiere-penale [Accès le 17 avril 2019].

THE RELATION BETWEEN PRIVATE INTERATIONAL LAW AND CONSTITUTIONAL LAW IN FEDERAL SYSTEMS

Horea CRIŞAN*

Abstract

This article is exploring and analogy, its purpose is not to identify or comment on the present rules or practice of private international law in federal systems, but rather to examine the ideas and theories relating to private international law which have been developed in these states as a result of their federal structure, the ways in which the ideas of private international law have been affected by or are part of the constitutional ordering of the federal systems. These ideas are operative and they may still be usefully applied by way analogy in the context of the emerging idea of international federalism.

The idea involves secondary norms which deal with distribution of regulatory authority between states and between the international and national realms. By looking at the effect on private international law of equivalent norms within federal systems, the article identifies a conceptual framework which provides the foundations for a new perspective on international private law.

Keywords: *constitutional law, private international law, federal systems*

JEL Classification: [K 33, K 49]

1. Introduction

International law has traditionally constructed a conceptual barrier between the realms of their international and the national (between the universal and the particular), viewing them as operating in distinct contexts. Although international law has moved beyond its private conception through the assertion of further universal norms, there is an opposition and increasing internal engagement with the problem of limits of that universality, a recognition that there are normative boundaries to international law (Mills, 2009).

Rather than existing in discrete realms, international and national law are in dynamic tension; the pull of constitutional law, represented the "ideal" of universal regulation, may be contrasted with the pull if individual states, represented in the ideals of pluralism, diversity and national self-determination.

This development, which provides a conceptual framework for international law that rejects both positivist (apologist) dependence on a priori

* Assistant Professor, PhD., "Dimitrie Cantemir" Christian University Bucharest, Faculty of Law Cluj Napoca, Romania.

state sovereignty and the (utopian) commitment to limitless universalization, can best be described as part of a process of international constitutionalisation (Weiler&Wind, 2003, p. 115).

Conflicts law must address three principal questions. First, when a legal problem touches upon more than one country, it must be determined which court has jurisdiction to adjucate the matter. Second, once a court has taken jurisdiction, it must decide what law it should apply to the question before it. The rules governing the court may direct it to apply its own law or call for the application of the law of another country. Third, assuming that the court ultimately renders a judgment in favour of the plaintiff, conflicts law must address the enforcement of the judgment.

In the event that the defendant has insufficient assets locally, recognition and enforcement of the judgment must besought in a country where assets do exist (Weiler & Wind, 2003, p. 15).

2. The role of private international law in federal systems

The idea of federal private international law identifies and discusses the basic differences between internal and international private law and suggests reasons why the recognition of the impact of federal systems, introducing special role of private international law has been slow.

The possibility of federal private international law as modern approach to private international law is based on positivist theory which emphasis on state sovereignty led to the view of private international law. The change in theory and practice created the possibility that private international law, as a national discipline, could reflect the characteristics of each state, its local context, conditions and values. In particular, it created the possibility that private international law could reflect the characteristics of each state, its local context, conditions and values.

The inherent complexity of federal systems creates special problems for private international law, both internally and externally. Much of significant development in private international law theory emerged out of federal or quasi-federal systems – at different stages in history, those of Italy, France, the Netherlands and Germany. In federal systems, the combination of internal diversity and unifying mutual respect, difference and deference, creates what has been called conflict of laws paradise and laboratory of private international law experimentation.

The continued existence of federal states such US, Australia, Canada, and growth of federal regional organizations such as EU mean that federal systems have retained their importance for private international law throughout the twentieth and into twenty-first century. Historically, the different States of

federal systems have been treated simply as if they were separate countries for the purposes of private international law (Stone, 2006, p. 4).

The characterization of private international law rules discretionary had an impact on the characterization of private international law rules in States and federal systems. The problematic view of international private international law as a matter of discretion for each state was even more problematically transplanted to the view that private international law within a federal system also ought to be a matter of discretion for each State. In the EU, national resistance to Europeanized private international law rules is part of continued assertions of Member State sovereignty. As in the US, this corresponds with more general political concerns regarding the rights of States in the balance of power within the federal system.

The effect of this perspective has been to slow the development of conceptions of private international law which might place limits on the discretion of States by virtue of their federal context (Broude&Shany, 2008, p. 17).

Choice of law rules try to find a single most closely connected law to a dispute, although there can be disagreement on how such a connection should be measured. Even if there were complete agreement difficulties in proving the content of foreign law and differences in the procedural law of the forum could still lead to inconsistent legal treatment of disputes, although the likelihood os such differences is minimised by the concurrent application of the rules which limit jurisdiction.

At the same time, foreign judgments are frequently recognised and enforced, reducing the likelihood that inconsistent judgments will arise through duplicated local proceedings. But a foreign judgment will only be enforced when it is final, not merely an interim award which could be varied by the judgment court, a requierment clearly motivated by the desire to avoid increasing the possibility of inconsistent judgments.

3. Applicable law in different jurisdictions

The development of private international law within a federal system may thus be neglected or rejected on the basis that it represents an undue centralization of power – the opposite of the idea of universalism considered above, but with identical effect.

Each federal system contains a unique and complex balance between multiple sources of authority, its own federalism philosophy. The analysis of each federal system must reflect this specific context. However, the two dimensions of the architecture of this distribution of power may be analyzed in general terms. However the two dimensions of the architecture of the distribution of power may be analyzed in general context.

The vertical division of regulatory authority in federal system determines which powers are centralized and which are distributed to the States. Although one purpose of a federal system is to centralize the powers in pursuit of common goals, any federal system is premised on the idea that unification of law is not necessary possible. Localised systems of regulation may also be more desirable because of concerns about accountability, legitimacy and cultural diversity – ideas which may be encapsulated in the concept of subsidiarity.

The division of powers between the federal and State governments is a source of legal and political contestation in every federal system. The conflicts are traditionally part of domain of constitutional law although in some federal systems they may be characterized as private international law problems and addressed though private international law methodology or arise in the context of private international disputes.

The existence of distributed powers creates a further horizontal dimension for division of regulatory authority, which presents a structural problem. The difference regulatory regimes of the State may conflict with each other, leading to the possibility if inconsistent legal treatment. A federal system therefore imposes a division of regulatory authority between the laws of different States. The two dimensions, the vertical and horizontal, are inextricably linked, the horizontal division facilitates the vertical, by ordering the exercise of distributed powers.

These two dimensions of the distribution of regulatory authority in a federation create the possibility for special role of private international law. In the last fifteen years in particular, new ideas concerning the relationship between private international law and federal constitutional law have been developed, particularly in Australia, Canada and EU, with old antecedents in the constitutional jurisprudence of the US. These approaches have developed new ideas of private international law by viewing it through its relationship with the two dimensions of the architecture of federal system – horizontal and vertical divisions of regulatory authority (Petersmann, 2006, p. 45).

Conclusions

The establishment of constitutional rights as part of federal system is a part of vertical division regulatory authority. A State is not merely requiered to recognise constitutional rights. These rights are qualifications of regulatory authority of the State and this idea recognises that private international law must be subject of State regulatory authority in federal constitution.

The analysis of private international law in federal systems is most clearly articulated in the opinion of Alex Mills throug the jurisprudence of the Canadian Supreme Court wich states: “Legal systems and rules are a reflection

and expression of the fundamental values of society, so to resoect diversity of societies it is important to respect differences in legal systems. But if this is to work in our era where numerous transactions and interactions spill over the borders defining legal communities in our decentralized world legal order, there must also be a workable method of coordinatinating this diversity. Otherwise, the anarhic system's worst attributes emergem and individual litigants will pay the inevitable price of unfairness. Developing such coordination in the face of diversity is a common of both public and private international law.

It is also one of the major objectives of the division of powers among federal and provincial governments in a federation it raises issues that lie at the confluence of private international law and constitutional law". (Mills, 2009, p. 207)

Bibliography

1. Mills, A., (2009) *Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law*. Cambridge: Cambridge University Press.
2. Brussels Regulation, (2001), Council Regulation (EC) No. 44/2001 of December 2000 on Jurisdiction and the Recognition and Enfocement of Judgements in Civil and Commercial Matters.
3. Bomberg, E., Stubb, A., (2016), *The new European Union Series*. Oxford: Oxford University Press.
4. Petersmann, E., (2006), State Sovereiggnity, Popular Sovereignty and Individual Sovereignty. *European University Law Working Paper*.
5. Weiler and Wind, (2003), *European Constitutionalism Beyond the State*: Cambridge: Cambridge University Press.
6. The New Civil Code, officially Law no. 287/2009 on the Civil Code, adopted by Parliament on 17 July 2009, came into force on 1st of October 2011. It replaced the Civil Code of 1865 as well as the Commercial Code of 1887 and the Family Code of 1954.

HUMAN RIGHTS AND BUSINESS IN A GLOBALISED WORLD

Elena-Mihaela FODOR[*]

Abstract

Globalisation generated the multinational corporations. As the movement for the protection of human rights intensified, it reached the activities of the large corporations which quite often disregard the human rights. In this context, the responsibilities of the states are no longer limited to positive or negative obligations in their relations with the citizens, but they include efforts for protecting human rights in relationships between private individuals.

The paper presents some of the infringements that are associated with business activities and the solutions promoted by international organisms. International documents promoting principles and proposing measures in the area of soft law, European solutions and national legislation are presented.

The article also looks into new rights in the field of human rights shaped by the progress of information and technology in business such as the right to be forgotten by the internet, the right to the protection of personal data and rights associated to the copy-right.

Keywords: *human rights; business; international documents; jurisdiction*

JEL Classification: [K 2, K 38]

1. Introduction

Business activities are commercial, industrial or financial activities performed in order to obtain a profit. The purpose of these activities makes it so that, in some situations, the owners of the business run their activity in such a fashion that it violates human rights.

In an era of intense development in what concerns industry, communications and globalisation, a great number of human activities is performed in the domain of private or public businesses. Fewer and fewer activities that ensure the fulfilment of a general interest need are still effectively run by the state, as most of the them are outsourced to a larger or smaller extent, and more and more of them take the form of industrial and commercial public services.

Thus, the number of legal relationships generated by industrial and commercial public services in which the state must respect the human rights guaranteed by various international conventions is increased. Among these,

[*] Associated Profesor, PhD., "Dimitrie Cantemir" Christian University, Faculty of Law from Cluj-Napoca.

the European Convention of Human Rights has a particularly important role, as the violations of its dispositions and the interpretation of these dispositions are covered by an international court of justice – the European Court of Human Rights, and the application of the Convention is guaranteed through various mechanisms ratified by the member states of the European Council.

The case-law of the European Court of Human Rights has ruled that the state is obligated to ensure that the rights established in the Convention are respected not just in the relationships between the state and its citizens or residents, but also in the relationships between private individuals, in certain situations.[1] Protection against certain violations of human rights during the activities performed by private individuals can be attained by means of legislative dispositions adopted by the state and of the judicial system (Cherednychenko, 2006, p. 203).

Thus, the state's role in protecting the rights enshrined by the Convention in the relationships born due to business activities is extended.

2. International documents concerning human rights and business

The Universal Declaration of Human Rights was adopted by the General Assembly of the United Nations on September 10, 1948. Romania signed the Declaration on December 4, 1955 when, through Resolution R 955 (X) of the General Assembly of the UN, it became part of the member states.

The dispositions contained in the UN documents more resemble recommendations. However, the activity of the UN is especially important in defending the fundamental rights, known under the generic term of "human rights." The United Nations carry out numerous studies and formulates recommendations. Even if the member states of the UN are not always immediately receptive, the reports raise awareness among the populations in what concerns their rights.

Private organizations, in many cases, manage to find the levers for the obtainment of protection for their various rights through legal or moral means, in accordance with the recommendations of the UN or other international organizations at state level, as their role as partners has been recognized by the UN ever since the end of the 1960's (Stamatopoulou, 1999, p. 284). At the same time, the UN's recommendations serve as a guide for the interpretations that the European Court of Human Rights (ECtHR) gives to the European Convention of Human Rights (ECHR).

In the domain of business, in 2011, the UN created a set of Guiding Principles on Business and Human Rights, upheld through Resolution R 17/4 of June 16, 2011 (United Nations Organization, 2011). This Guide defines

[1] *X and Y v. the Netherlands,* March 26, 1985.

business enterprises as "specialized organs of society performing specialized functions," and it has been established that they are obligated to heed all legal regulations whose purpose is the respect for human rights.

The purpose of the guide is to support globalisation that is socially sustainable, to support the individuals and collectives affected by the violation of human rights, and to reinforce the standards and practices in the domain of human rights. First of all, the state has an enshrined role in ensuring protection against the abuse resulting from violations of human rights by third parties, including here business enterprises, in its territory and jurisdiction. In order to achieve this, the states must take measures to prevent, investigate and punish abuse, as well as to ensure that reparations are given for the produced damages, by means of efficient policies, legislation and legal remedies (United Nations Organization, 2011, pp. 3-4), as well as to make visible and known their requirement from all enterprises operating on their territory to respect human rights in any activity that they undertake.

The content of the document shows that there is a connection between the state and business enterprises first of all through the enterprises owned or controlled by the state, but also through the enterprises that are supported by the state in their activity, through credit export and insurance agencies or through guarantees offered by the state for investments, through commercial treaties or concluded contracts.

In what concerns private businesses, the state is obligated, according to the Guide, to ensure that the business enterprises operating in war zones around the world are not involved in activities that violate human rights (United Nations Organization, 2011, pp. 3-4). In general, the states must ensure a coherent conduct among all of their bodies in order to highlight the obligation to respect human rights on their respective territories in what concerns business activities and in order to offer information that is relevant to the enterprises, as well as guidance and assistance to this end.

The companies themselves are obligated to respect human rights while carrying out their activities, at least to the minimum established through the Universal Declaration of Human Rights and the International Labour Organization's Declaration of Fundamental Principles and Rights at Work. The responsibility of the enterprises is directly proportional with their size and the severity of the consequences of the violation of human rights.

A third pillar, beside the states' obligations to protect citizens from the actions of third parties and the obligations of the companies to respect human rights in the case of those affected by their actions, is the victims' right to an effective remedy in case their human rights are violated.

The Guide establishes the obligatory existence of adequate judicial, administrative, legislative and other non-judicial means to ensure the possibility

to ascertain any violation of human rights and the remedy for its effects. This final pillar has attracted the least attention, as the fewest of actions have been carried out to find solutions to implement it (Yiannibas & Roorda, 2017).

When responding on April 26, 2013 to a question asked through official channels, the Office of the High Commissioner for Human Rights showed that the requirements of the Guide are applicable to financial activities in the case of minority shareholders, who must supervise the manner in which their investment is used and, should they notice that the financial institution that they hold shares in is using their funds for activities that are detrimental to human rights, it is their duty to cease their relationship with said institution.[2]

Beside the Guide upheld by Resolution R 17/4 of June 16, 2011, the following documents also feature international standards:

1. Universal Declaration of Human Rights (UN, 1948);
2. International Covenant on Civil and Political Rights (UN, 1966);
3. International Covenant on Economic, Social and Cultural Rights (UN, 1966);
4. Declaration on Fundamental Principles and Rights at Work (International Labour Organization/ILO, 1998);
5. Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (ILO, 1977);
6. The Geneva Conventions on humanitarian law (1949);
7. OECD Guidelines for Multinational Enterprises (1976). The Guidelines present a Due Diligence Guidance for Responsible Business Conduct;
8. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (2008)[3]
9. Interpretive guide to UN Guiding Principles' corporate responsibility to respect human rights, by Office of UN High Commissioner for Human Rights[4].

[2] The official response of the Office of the High Commissioner for Human Rights from April 26, 2013 to the question regarding the applicability of the Guiding Principles on Business and Human Rights for Minority Shareholders, http://www.ohchr.org/Documents/Issues/Business/LetterSOMO.pdf, accessed on 06.10.2016.

[3] https://business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-report-7-Apr-2008.pdf, accessed on 06.10.2016.

[4] http://www.ohchr.org/Documents/Issues/Business/RtRInterpretativeGuide.pdf, accessed on 06.10.2016.

3. Mechanisms for the protection of human rights in the context of business activities

Globalisation, and the extraordinary circulation of capital and workforce that have come with it, has led the United Nations, as well as other international organizations and structures, to get involved in the identification of problems and the formulation of solutions concerning the protection of human rights in the context of business activities. Issues were especially found in developing countries, connected to the use of child labour in light industry, natural disasters produced by the extractive and natural resource processing industries or the violation of the right to a private life by telecommunications companies.[5] Problems were found in the activity of private companies and in the domains where, traditionally, the responsibility had fallen on the shoulders of the states, such as with military activities or ensuring the application of the law. In this sense, Recommendation 1858 (2009) of the Parliament of the European Union showcased the legislative void in regard to the activity of private security and military firms, pointing at the erosion of the states' monopoly in utilising force without any legislative statement concerning the protection of human rights.

The key element of these issues is, thus, the identification of the manner in which the states can verify that the companies whose headquarters are located on their territory, but carry out their activities on the territory of other states respect human rights, and the identification of the manner in which a state's citizens can obtain protection from their state and reparations for the damages caused by the companies who perform their activities in the state that the victims are residents of, but have their headquarters in another state.

A study conducted at the request of the Council of Europe (Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, 2010)[6] highlighted some of the relevant aspects concerning the failure to respect human rights in carrying out business activities and the existing international possibilities to counter these violations.

This document leads to a few conclusions.

The first of them is that the globalisation of the economy exhibits concrete challenges in the effective protection of human rights, especially in developing countries. Numerous situations are presented where multinational companies conduct activities through subsidiaries that are part of the group coordinated or led by such a company, activities during which some of the most important human rights are flagrantly violated (the right to life, the right

[5] https://business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-report-7-Apr-2008.pdf, accessed on 06.10.2016.

[6] Doc. 12361/27.09.2010, Raportor: H. Haibach, member of the European People's Party group.

not to be tortured or treated in an inhuman or degrading way, the right to private and family life), sometimes at a large scale, with assistance from the states where these companies are conducting their activities.[7][8][9]

These situations occur especially in the states where no real protection of human rights is ensured and which are outside the jurisdiction of the bodies monitoring that human rights are respected in the states where the companies have their headquarters.

In general, the fight against the violation of human rights is, for now, conducted internationally through recommendations adopted by various international bodies with responsibilities in this field, such as the Organization for Economic Cooperation and Development, the Subcommittee for the UN Human Rights of the International Labour Organization, and, on a European level, the Council of Europe and the European Parliament.

These recommendations have led to the formation of the concept of „corporate social responsibility" (or CSR), a concept that demands of companies to voluntarily take into consideration and adapt accordingly to the current social and environmental issues when conducting their business activities and in their interactions with their shareholders (Commision of the

[7] The European Center for Constitutional and Human Rights, a non-governmental organization with headquarters in Germany, forwarded, on 26.08.2013, a legal opinion in the capacity of *amicus curiae*, to an Argentinian tribunal, in a case whereMercedes-Benz Argentina S.A., a subsidiary of Mercedes-Benzwhose headquarters is in Germany, was accused of human rights violations. The non-governmental organization claimed that the subsidiary of Mercedes-Benz was involved in the kidnapping and disappearance of certain members of their trade union during the 1976-1983 Argentinian military dictatorship. See: https://www.ecchr.eu/en/our_work/business-and-human-rigts/corporations-and-dictatorships.html.

[8] In 2006, the multinational oil company Trafigura, with headquarters in the United Kingdom, illegally transported and deposited toxic waste from Amsterdam in the Ivory Coast, and concealed what the contents of their cargo were. As a result of the spread of the toxic waste, more than 100,000 people required medical care and 15 deaths occurred, according to the information offered by Amnesty International UK (www.amnesty.org/en/latest/news/2016/04/trafigura-a-toxic-journey/), accessed on 06.10.2016.

[9] According to Amnesty International, in 1990, the Shell Petroleum Development Company of Nigeria (SPDC), a subsidiary of the English-Dutch company Shell requested, on 29.10.1990, the protection of the Nigerian state from the peaceful protests against the building of an oil transportation conduit over the property of the protesters. In the following days, the police attacked a village that was home to the protesters with firearms and grenades, killing at least 80 people and setting almost 600 houses on fire. Shell constructions were used as starting bases for the attacks, while the food and payment of the soldiers was provided by the company. Shell requested the same type of help in the following years, being subsequently accused of being an accessory to murder, torture and other violations of human rights (business-humanrights.org/en/shell-lawsuit-re-nigeria-kiobel-wiwa; www.aljazeera.com/news/2017/11/amnesty-shell-involved-nigeria-abuses-1990s-171128091650769.html, accessed on 06.10.2016.).

European Communities, 2006). We should also mention the fact that the International Guidance on Social Responsibility, ISO 26000 was released in 2010 – developed by the International Standardization Organization (ISO).

A more concrete result was obtained by private initiatives, such as the Global Network Initiative(created in 2008 through the association of various important companies from the information technology field in order to ensure freedom of expression in the digital sphere and the right to the confidentiality of personal data), Business for Social Responsibility (which deals with offering guidance in terms of the environment, human rights, economic development or transparency), the Fair Trade Movement or Social Accountability International (which created the 8000 standard, awarded to firms that allow the free association of workers, do not obtain any advantages from forced or child labour, abstain from discrimination against personnel, ensure a safe and healthy workplace environment, treat their employees with dignity and respect, heed the legislation in terms of work schedules and rest periods, and ensure a salary that at least meets the minimum legal threshold and the industry standards) (Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, 2010).

On a national level, states such as Germany, the United Kingdom and Denmark have chosen to associate with recommendation mechanisms, while Belgium has passed laws to award certificates and labels for corporate conduct that fits the concept of social responsibility (Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, 2010). Norway has assumed a more cutting position, as they have legislated the obligation of private pension funds to make known its investments, as the state can, through the National Pension Fund of Norway, withdraw the money from these funds if the investments were related to companies that have performed their activity while violating human rights, and, in 2005, Norway founded the Ethics Council Advising the Ministry of Finance on ethical matters associated with investments – murders, torture, deprivation of freedom, forced labour, hard labour in the case of children and other forms of child exploitation, severe violations of human rights during war times, severe degradation of the environment, massive corruption, etc. (Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, 2010).

As a result of the recommendations given by this council, the Norwegian Pension Fund has excluded from its portfolio the following companies: Grupo Carso from Mexico, Shanghai Industrial Holdings from China, and Lingui Development Berhad from Malaysia for severe violations of human rights, the environment, and the manufacturing of weapons and tobacco (Sourbes, 2011).

If, on a national level, a commercial company with headquarters in a certain state can be held responsible for activities that have violated human

rights, pursuant to the national legislation, on an international level, several legal mechanisms have been noted that allow holding corporations with headquarters in a certain state accountable for the activities performed with the violation of human rights by one of its subsidiaries in another state, pursuant to international conventions.

Two problems arise from such situations: that of the jurisdiction of the court summoned to protect the violated right and that of proving culpability and the causation between the management of the multinational company and the activity of the subsidiary. In this context, the states are assigned an important role in adopting internal legislation in the field of private international law that grants jurisdiction to their own courts in the cases where the victims, who are citizens of another state, were under the authority and control of the state that they have submitted their complaint to. In the case of the signatory states of the ECHR, this obligation was confirmed in the case of *Markovic et al. v. Italy*, where the Italian state believed that they do not have competence in presiding over cases stemming from complaints that concern civil damages for a group of people from Serbia and Montenegro due to human rights violations committed during a 1999 NATO mission in Belgrade.

The Italian courts declared that they are not competent given that the Italian legislation did not provide for the possibility of obtaining civil damages for violations of public international law norms. The European Court of Human Rights believed, however, that the plaintiffs were under the jurisdiction of Italy that concerns the respect for human rights and, as a result, they had to benefit from the state's obligation to ensure them access to justice. There have been commentaries and observations concerning certain treaties by the United Nations that indicate the fact that the states have obligations that subscribe to the international requirements concerning human rights for the prevention of, but also to guarantee remedies in the case of abuse committed by multinational corporations on the territory of other states (Augenstein & Jägers, 2017, p. 15).

We must mention that there are already precedents in what concerns accountability for the violation, through business activities, of international rules related to human rights. The tribunals of Nuremberg have convicted, for being accessories to war crimes, several leaders of commercial companies due to their co-opting slavery in their labour practices or for providing German military organizations with the gas used in Nazi gas chambers (Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, 2010, p. 20).[10]

[10] Also see footnote 106 of the document.

More recently, the Dutch courts convicted a Dutch citizen for being an accessory to the violation of war time laws and customs, as he delivered chemical substances to the Saddam Hussein Iraqi regime in the 1980s, substances that were used in the obtainment of the toxic gases used against the Iraqi population. It was considered that this case demonstrates that international criminal law is no longer directed only towards state officials, but also companies, businessmen and businesswomen, if it can be demonstrated that they were accomplices in the violation of international criminal law norms (Clapham, 2008).

The United States of America initially identified a possible approach through a normative act dating back to 1789, named the *Alien Tort Claims Act* (a normative act concerning foreigners' claims for damages). According to this document, the federal courts of the USA have jurisdiction of "any civil action by an alien for a tort only, committed in violation of the law of nations." On the basis of this law (Windsor, n.d.), the American federal courts declared themselves competent, in the 1990s, to preside over cases such as *Wiwa v. Royal Dutch Petroleum Co.* (1995)[11], *Mushikiwabo v. Barayagwiza* (1996)[12] and *Doe v. Unocal* (1996).[13] However, as of late, the application of the *Alien Tort Claims Act* has been limited, as the Supreme Court of the USA narrowed, in 2004, the purpose for which a lawsuit can be filed on the basis of this law to those lawsuits that are related to violations of international „specific, universal and obligatory" norms, which do not include baseless arrest and detention.[14]

Following the debates concerning the applicability of the *Alien Tort Claims Act* that arose in the American case-law in regards to the cases of accountability on the part of companies for incitement and complicity (Anon., 2008), in 2013, it was again the Supreme Court of the United States of America which ruled that the *Alien Tort Claims Act* has to do with accountability on the basis of federal laws and does not apply in the case of damages produced in a foreign country, due to the fact that the American

[11] Nigerian US immigrants sued the oil company, claiming that it participated, along with the Nigerian government, in actions that violated human rights, among which were the confiscation of property and air and water pollution. The case ended in 2009 through a transaction, where the company paid 15.5 million dollars' worth of damages.

[12] An American district court awarded 105 million dollars' worth of damages to 5 Rwandan citizens for the torture and murder of their relatives by Hutu governmental forces and militias during the 1994 Rwandan genocide.

[13] A group of human rights activists sued, on behalf of several anonymous farmers (John Does) from Burma, the American company Unocal, claiming that it was an accomplice to the Burmese government in the case of several violations of human rights, among which were forced labour, forced relocation, rape and murder, during the construction of the Yadana natural gas pipeline in southern Myanmar. The case ended with Unocal paying a sum of money that was not disclosed to the public.

[14] The case of *Sosa v. Alvarez-Machain.*

courts would interfere with the legislation of other states, with possible exceptions, however, in the cases where „the claims for damages touch and concern the territory of the United States" with „sufficient force" in order to rebut the presumption of non-extraterritoriality of the *Alien Tort Claims Act* (Supreme Court of the United States, 2012).

In the European Union, Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters provides, in art. 2, that the persons who reside on the territory of a member state can be sued before the courts of the respective member state. In regards to these dispositions, the European Court of Justice showed in the case of *Owusu v. N. B. Jackson*, 2005 (C-281/02) that a court of law from a member state of the European Union cannot decline the jurisdiction that it is given according to art. 2 of the 1968 Brussels Convention (which established dispositions that are identical to those of art. 2 of European Regulation no. 44/2002) on the grounds of a non-member state possibly being a more suitable forum for the trial of the case that it was presented with, even if no other member state is involved in the case (meaning that the plaintiff resides in a non-member state and the actions and consequences that the complaint was filed for happened in a non-memberstate).

As a result, civil suits concerning human rights violations, whose subject is civil rights and obligations, against corporations whose headquarters are located in a member state of the European Union can be brought before the courts of the state where the corporation is headquartered even if the plaintiff does not come from a member state and the damages were produced outside of the European Union, most frequently in the state where the plaintiff resides.

This regulation is useful, given that the corporation is subject to heeding the legal dispositions from the state that it is headquartered in, as European legislation gives more attention to human rights. However, subsidiaries that effectively cause damages in states outside of the European Union are distinct entities. The fault of the parent corporation in what concerns the conduct of the subsidiary must be established for a successful trial, which is, in most cases, an especially difficult aspect to prove (Augenstein & Jägers, 2017, p. 19).

Currently, the ECHR is no longer the only European normative act on this matter. On December 7, 2000, the Charter of Fundamental Rights of the European Union (the Charter) was adopted at the European Union Level, standing as a declaration, with the purpose of being a point of reference for a unified approach in terms of human rights across the Union. Along with the Treaty of Lisbon, concluded in 2007 and entered into force on December 1, 2009, where, in art. 6, par. (1), it is provided that the juridical value of the Charter is the same as that of European treaties, the Charter became obligatory for the member states and European institutions.

In what concerns the correlation between the ECHR and the Charter, the preamble of the latter shows that it should be interpreted by the courts of justice of the Union and the member states while minding the explanations written under the authority of the presidium of the Convention that developed the Charter and updated under the responsibility of the presidium of the European Convention. The activity of the institutions and the legislation of the European Union are especially important not only to the member states, but also to the candidate states which adopt the cultural and moral models that go on to become true benchmarks of democracy (Gasmi, 2018, p. 160).

4. New challenges in the era of globalisation

One of the factors that have made globalisation possible is communications technology. Along with the appearance of the Internet, wide and fast access to information from all domains of social life has become possible, and the organisation, coordination and management of multinational companies has become easier.

At the same time, the possibility of transmitting information to consumers has also become greater, and the idea of collecting information that allows the optimisation of the transmission of advertising information has developed to a large extent.

The personal data of consumers, the information about their lives has, thus, become a precious commodity. Advertising is not, however, the only domain where the personal data of natural persons is used, as medical research also resorts to it, for example, collecting the data of patients suffering from various conditions and undergoing various treatments.

The massive scale of the process of collecting and processing data has led to the concept of "Big Data," which characterizes sets of data that are extremely large and can be electronically analysed and processed in order to find patterns, trends and associations that especially focus on human behaviour and the interactions between individuals.

In this context, it did not take long for the necessity to protect personal data to arise on a global level. Thus, the right to the protection of personal data was enshrined as a fundamental right traced from the right to a private life (McDermott, 2017). EU Regulation 2016/679 – General Data Protection Regulation (GDPR), which entered into force on May 25, 2018, expressly refers to these rights, as article 1 states that the regulation „protects fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data."

The right to the protection of personal data is, however, distinct from the right to a private life, as the former right was born only with respect to the processing of personal data to serve a greater array of purposes (Mostert & et

al., 2017, p. 6). A special issue is protecting the personal data of employees when it comes to the employers, in the human resource management process that uses information about employees such as work performance, health, economic situation, preferences or interests, behavior, location or travels.

The Independent EU Advisory Body on Data Protection and Privacy (Article 29 Working Party, the so-called WP29) issued Opinion 2/2017, which highlights the vulnerable position of employees in what concerns the legal relationship framework at the workplace and underlines that the proportionality between the interests of the companies and the employees' right to a private life must be preserved (Ogriseg, 2017).

There has also been „a right to be forgotten" developed in relation to the specificity of the communications instated by the Internet, respectively the perenniality of a piece of information about a certain person in the online sphere and the possibility for this information to be accessed at any time and by anyone and the right to a private life (Szeghalmi, 2018). In the case known as *Google Spain*[15], the Court of Justice of the European Union ruled that one has „the right to be forgotten by the Internet." Currently, this right is expressly provided for in art. 17 of the GDPR, which also states the conditions under which this right can be exercised.

It is the same virtual sphere that has also made issues concerning intellectual property more acute. Many current and legal activities by consumers are, in fact, from the perspective of the current legislation, violations of intellectual property rights.

A directive project concerning these rights on the Digital Single Market is attempting to establish a balance between the protection of copyrighted-content of copyright-holders on the Internet, on the one hand, and the competing interests and rights of Internet-intermediaries and end-users, on the other (Himanshu, 2018). Controversy was sparked between the companies that profit from exploiting websites that offer free access to artistic works promoting the freedom of information and the copyright holders.

The directive project still incites many controversies, especially art. 13 on the monitoring and filtering of Internet materials, which could clash with the right to freedom of expression, the right to information and, also, the right to a private life.

Conclusions

Business activities affect the lives of many people and can lead to the violation of rights that are perceived as fundamental to human beings.

[15] *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González* (2014).

This has made it necessary for the obligation of states to abstain from any action that can violate fundamental human rights to also extend to ensuring that these rights are respected in the context of the relationships between private individuals and that legal remedy is possible in the case of a violation resulting from such interactions. Globalisation, when perceived as an international meshing of economies associated with the possibility of the actions of social agents, „individuals, collectives, corporations, etc.," from one place to often have significant consequences, whether they be intentional or not, on the behavior of other agents situated somewhere else has intensified the need to protect human rights.

The rapid evolution of technology, along with the inventive nature of the business sphere in terms of the exploitation of new technologies and in terms of its frequent international institutional organisation, has highlighted that legal rules barely manage to keep up with the evolution of society in general in order to ensure efficient protection to individuals.

The difficulty is increased by the fact that, in order to have efficient protection on a global scale, several states must agree on the legal rules that should be adopted, the largest hurdle here being the problem of jurisdiction in situations with cross-border features.

The international bodies aiming to preserve the protection of human rights are writing studies and recommendations, and performing actions for the identification of issues born in the context of globalisation in order to raise awareness of these human rights, on the one hand, and, on the other, to increase the responsibility of the companies, while also drawing the states' attention towards the necessity to adopt legislation that is adapted to the issues identified, which vary from violations of rights concerning workplace relationships to ensuring the respect for the right to a private and family life, property or a healthy environment and to ensuring the respect for the right not to be subjected to torture, inhuman or degrading treatment and even respect for the right to life.

We can see that there is progress in the European area. The case-law of the ECtHR obligates states to offer access to the justice system not only in the cases of violation of national law, but also of public international law norms.

The European Union is aware of the new challenges regarding the violation of human rights and is intensely active in identifying issues and promoting legislation that ensures a just balance between the rights of individuals and those of corporations, along with as much access as possible to the justice system in order to protect human rights in situations with a transnational context.

Bibliography

Books, articles

1. Anon., (2008) Khulumani v. Barclay National Bank Ltd. Second Circuit Holds that Human Rights Plaintifs May Plead Aiding and Abetting Theory of Liability. *Harvard Law Review*, 121(7).
2. Augenstein, D. & Jägers, N., (2017), Judicial remedies: The isue of juristiction. In: J.J.Á. Rubio & K. Yiannibas, eds. *Human Rights in Business. Removal of Bariers to Access to Justice in the European Union.*. London & New York: Rutlege, pp. 7-37.
3. Cherednychenko, O., (2006), Towards the Control of Private Acts by the European Court of Human Rights?. *Maastricht Journal of European and Comparative Law*, 13(2), pp. 195-218.
4. Clapham, a., (2008), Extending International Criminal Law beyond the Individual to Corporations and Armed Opposition Groups. *Journal of International Criminal Justice*, Issue 6, pp. 899-926.
5. Gasmi, G., (2018) European Legal Principles on Human Rights and Democracy - Importance For the Western Balkans. *Fiat Iustitia*, Issue 1, pp. 159-174.
6. Himanshu, A., (2018) Article 13 of EU Copyright Directive – A Step Forward or Rearward?. 6 December. [Online] Available at: http://dx.doi.org/10.2139/ssrn. 3296955 [Accessed 02 march 2019].
7. McDermott, Y., (2017), Conceptualising the right to data protection in an era of Big Data. *Big Data & Society*, January-June. [Online] Available at: https://doi.org/ 10.1177/2053951716686994 [Accessed 02 march 2019].
8. Mostert, M. & et al., (2017), From Privacy to Data Protection in the EU: Implications for Big Data Health Research. Volume 24, pp. 1-13. [Online] Available at: https://bartvandersloot.com/onewebmedia/From%20privacy%20 to%20Data%20
9. Protection.pdf [Accessed 02 March 2019].
10. Ogriseg, C., (2017), GDPR and Personal Data Protection in the Employment Context. *Labour & Law Issues*, 3(2), pp. 2-24. [Online] Available at:https://labourlaw. unibo.it/article/view/7573. [Accessed 02 March 2019].
11. Sourbes, C., (2011), *Norway's sovereign fund excludes Mexican company on ethical grounds.* [Online] Available at: https://www.ipe.com/norways-sovereign-fund-excludes-mexican-company-on-ethical-grounds/www.ipe.com/norways-sovereign-fund-excludes-mexican-company-on-ethical-grounds/41811.fullarticle [Accessed 02 March 2019].
12. Stamatopoulou, E., (1999), The Importance of the Universal Declaration of Human Rights in the Past and Future of the United Nation's Human Rights Efforts. *ILSA Journal of International & Comparative Law*, Volume 5, pp. 281-289.
13. Szeghalmi, V., (2018), Difficulties Regarding the Right to Be Forgotten in the Case Law of the Strasbourg Court. *Athens Journal of Law*, 4(3), pp. 255-270.
14. Windsor, D., n.d. *Alien Tort Claims Act.* [Online] Available at: https://www.britannica. com/topic/Alien-Tort-Claims-Act [Accessed 20 February 2019].
15. Yiannibas, K. & Roorda, L., (2017), Introduction. In: J. J. Á. Rubio & K. Yiannibas, eds. *Human Rights in Business. Removal of Barriers to Access to Justice in the European Union*. London & New York: Routlege, pp. 1-6.

Legislation

1. Commision of the European Communities, 2006. *Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence for CSR.*

2. Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, 2010. *Human rights and business.*

3. Supreme Court of the United States, 2012. *Syllabus, Kiobel v. Royal Dutch Petroleum.* [Online] Available at: https://www.supremecourt.gov/opinions/12pdf/10-1491_l6gn.pdf [Accessed 29 October 2018].

4. United Nations Organization, 2011. *Implementing the United Nations "Protect, Respect and Remedy" Framework.* [Interactiv] Available at: https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf [Accessed 02 March 2019].

GLOBAL SIGNIFICANCE OF EUROPEAN STANDARDS OF WOMEN HUMAN RIGHTS' PROTECTION IN DOMAIN OF GENDER BASED AND DOMESTIC VIOLENCE

"Women are in double jeopardy. Discriminated against as women,
They are also as likely as men, if not more so,
To become victims of human rights violations…
Today, what unites women internationally
- transcending class, race, culture, religion, nationality and ethnic origin
is their vulnerability to the denial and violation of their fundamental human rights,
and their dedicated efforts to claim those rights."
(Amnesty International, Human Rights are Women's Rights)

Gordana GASMI*

Abstract

One of the most important domain of women human rights' protection is combating gender based and domestic violence. Every woman has the right to live freely of any form of violence, but reality shows dark picture, since one in three women has experienced physical or sexual violence – 22% at the hands of their partner.

The UN estimates that 70% of domestic violence fatalities are women. Gender-based violence against women is a human rights violation and must be combated vigorously. European standards of combating and preventing gender based and domestic violence are defined in the Council of Europe Conventionon preventing and combating violence against women and domestic violence ("Istanbul Convention", which entered into force in 2014).

The Istanbul Convention is the most comprehensive, legally binding and far-reaching international treaty to address violence against women laying out state obligations to prevent violence, protect victims and prosecute the perpetrators. It is noteworthy that 33 countries out of 47-member states of the Council of Europe have already ratified it (at the moment of writing this study).

However, global reach of this regional human rights instrument is far more significant, bearing in mind that it promotes zero tolerance to all forms of violence globally and through requiring states to criminalize a broad range of violence against women, including physical, sexual and psychological violence, stalking, sexual harassment, female genital mutilation and forced marriage.

The independent expert body (GREVIO) is tasked to assess the implementation of the Istanbul Convention and to set relevant recommendations based on evaluation reports. Although of regional character, this Convention seeks to achieve universal application, since it is open to accession to non-member countries of the Council of Europe, and accordingly, the author emphasizes the global importance of its provisions.

Keywords: *women human rights, gender-based violence, Istanbul Convention, global significance*

JEL Classification: [K 33]

* Professor, PhD., Institute of Comparative Law, Faculty "Dositej" Belgrad.

Introduction

The issue of regulating domestic violence and gender-based violence in the international law has been largely neglected till recent period. The Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women was adopted in Belém do Pará, Brazil, in 1994. It proclaims that violence against women constitutes a violation of human rights and fundamental freedoms. The Belém do Pará Convention established for the first time the development of mechanisms for the protection and defense of women's rights in the struggle to eliminate violence against their physical, sexual and psychological integrity, in both the public and private spheres.

However, in Europe, until the adoption of the Council of Europe (CoE) Convention on the Prevention and Combating Violence against Women and Domestic Violence (Istanbul Convention, at the beginning of August 2014[1]), there was no international legal instrument on this subject implemented, except for the UN CEDAW Convention on elimination of all forms of discrimination against women, with its Optional Protocol and Recommendation no. 19. brought by CEDAW Committee under this UN Convention. Seen from a global and regional perspective, it can be assessed that there is a time "after the Istanbul Convention", in contrast with the time "before the Istanbul Convention".

Istanbul Convention is the first European treaty specifically targeting violence against women and domestic violence. What is more important is that it sets out commonly agreed legal standards on prevention, protection, prosecution, and integrated policies in the area of fight against gender-based violence and domestic violence. It launched several ground-breaking features and has been ratified by thirty-three member states of the CoE and signed by fifteen states, including the European Union (at the moment of writing this study). Countries ratifying it must also establish services such as hotlines, shelters, medical services, counseling, and legal aid. Istanbul Convention entered into force on 1st of August 2014. The Istanbul Convention is open also for the accession of non-member states of the Council of Europe (Gasmi, 2012).

[1] This CoE Convention on Preventing and Combating Violence against Women and Domestic Violence is named Istanbul Convention, since it was signed by members of the Committee of Ministers of the Council of Europe at the session in Istanbul, Turkey, in May 2011 after two years of drafting negotiations in the expert CAHVIO Committee of the Council of Europe in Strasbourg, France (2009-2011). In further text the title Istanbul Convention will be used as the synonym with the CoE Convention on Preventing and Combating Violence against Women and Domestic Violence.

Ad Hoc CoE Committee on Preventing and Combating Violence against Women and Domestic Violence (CAHVIO) that was established by the CoE Committee of Ministers on behalf of 47-member states and their 800 million citizens, started its work on the Convention on Preventing and Combating Violence against Women and Domestic Violence in April 2009. Before the Convention, in 2002, the adoption of Council of Europe Recommendation Rec No (2002)5 of the Committee of Ministers to member states on the protection of women against violence represented a milestone in that it proposes, for the first time in Europe, a comprehensive strategy for the prevention of violence against women and the protection of victims in all Council of Europe member states.

The Istanbul Convention represents setting new European legal standards, but with global importance. Text of the Coe Convention was adopted at the CAHVIO session in December 2010. In May 2011 at the CoE Istanbul conference of the Committee of Ministers started the signing of the new Convention. It was at the same time the start of its ratification process.

The Istanbul Convention aims at zero tolerance for gender based violence in each society. The aim of the Istanbul Convention is to ensure protection for victims of domestic violence, particularly women and girls, since they are prevalent majority of victims, but also for other victims of domestic violence, children, elderly people and men. European standards on combating domestic violence and violence against women are based on the so-called "Concept three P": prevention, protection, punishment, plus integrated Policies of countries, parties of the CoE Convention. It recognizes violence against women as a violation of human rights and a form of discrimination. This means that states are held responsible if they do not respond adequately to such violence.

On a global level, in most countries, people are increasingly aware that gender based and domestic violence is a negative and dangerous social phenomenon, and not just an isolated, individual private problem. This is a fact especially if we take into account the accompanying devastating effects of domestic and gender based violence[2]. Therefore, in most of the countries, gender based and domestic violence is legally classified in a category of criminal offenses.

Domestic violence is deeply rooted in society. Among the victims of domestic violence women are predominant, as evidenced by the empirical results of relevant research at the global level. Since it is taking place in the private sphere, very often is difficult to recognize and punish it in relation to

[2] The World's Women 2010, Trends and Statistics, United Nations, New York, 2010, Department of Economic and Social Affairs, ST/ESA/STAT/SER.K/19, ISBN 978-92-1-161539-5, p. 131.

other forms of public violence. Hence, the agencies and services responsible for providing assistance to victims face different forms of hiding the truth in the four walls. Punishment occurs only in cases of prolonged manifestation of gender based violence in a cruel way, with sometimes fatal consequences. Violence against women in the family context is a form of continuing violence and abuse, the situation of repeated victimization, where the victim (woman, girl) is vulnerable precisely because she shares a home with her abuser, and has a sense of loyalty, or even love, towards him[3].

The reason why the CoE Istanbul Convention is chosen for this analysis is that it is the first regional international legal instrument, which is legally binding for countries signatories, contrary to other relevant international recommendations and declarations. The legally binding character is also assured through its monitoring mechanism, which has been established (GREVIO)[4], as well as through precise content of state duties in this area of women human rights protection, such as protection against all forms of violence. Furthermore, this CoE Convention is based on several fundamental legal standards, which derive from international law. In this way, the Istanbul Convention is mirroring global legal principles, aiming at the same time to gain global implementation for itself.

1. Concept of gender based and domestic violence – link with global definition

The Council of Europe Istanbul Convention consists of the Preamble and 12 chapters (81 articles and an annex on the privileges and immunities of the members of the GREVIO Monitoring Expert Body for the implementation of the Convention). The text of the Convention has been the subject of almost two years of negotiations between member states of the Council of Europe at expert level within the 9th Ad Hoc Committee for the Prevention and Fight against Violence against Women and Domestic Violence[5].

In order to enter into force the CoE Convention on the Prevention and Combating Violence against Women and Domestic Violence, it was necessary

[3] Kelly, 2003. In Ignjatovic Tanja, „Violence against women in intimate partnership: Model of coordinated community response“, AZC, Belgrade, 2011, p. 21.

[4] GREVIO – monitoring mechanism of the Istanbul Convention in the form of the independent expert body (15 members)

[5] Prof. Dr. Gordana Gasmi, the author of this paper, represented Serbia at the expert level when formulating the text of the Istanbul Convention during the two-years negotiations in CAHVIO, after that she became the Council of Europe expert in the field of human rights and gender equality. The CAHVIO Committee, formed by a decision of the Committee of Ministers of the CoE in December 2008, started its work in April 2009 on the basis of the mandate entrusted by the CoE Committee of Ministers.

that ten States pass ratification instruments on the acceptance of the Convention, of which at least eight out of ten initial states must be members of the Council of Europe. The Convention enters into force on the first day of the month following the expiration of a period of three months after the deposit of the instruments of ratification by the ten States Parties ratifying, accepting or approving the Convention. This happened on August 1, 2014, and thus, the Convention has acquired a mandatory legal character for its States Parties (Gasmi, 2012).

How does the Istanbul Convention define violence against women and domestic violence? The phenomenon of "violence against women" represents the violation of women human rights and form of discrimination against women and represents all forms of gender-based violence that lead to, or can lead to, physical, sexual, psychological or economic injuries or suffering for women, including threats to such acts, coercion or arbitrary deprivation of liberty, whether in public or in private life.

Convention reaffirms gendered understanding of violence against women (VAW) and defines it as a form of discrimination against women and as a violation of human rights (Article 3.a, 3.d). Under Article 3.d, it adopts a crucial part of definition provided in the General Recommendation 19 of the UN Committee on the Elimination of Discrimination against Women (CEDAW) in 1992: gender-based violence against women is "violence that is directed against a woman because she is a woman or that affects women disproportionately"[6].

Furthermore, the Preamble of the Convention is strongly linked with the UN CEDAW Convention on the Elimination of Discrimination against Women. As famous lawyer V. Bogisic wrote: "Who knows only the legal wording, he does not know yet real law, until he understands its reason and meaning." It is therefore particularly important to point out the essence, formulations and reasons for the adoption of common legal standards in the domain of definition and criminal processing of perpetrators of domestic and gender-based violence, i.e. violence against women.

This is even more important, given the comprehensiveness of the standards and norms of the Istanbul Convention and the future global scope of its provisions, since it is open for accession to non-member countries of the Council of Europe. The overall objective of this Convention is to protect the rights of victims of violence, primarily violence against women and other victims of domestic violence, and to provide them with the highest level of protection.

The Convention regulates the fight against violence against women, but also includes the protection of children, elderly and men against domestic

[6] Committee's General Recommendation No. 19 on "Violence Against Women," (1992) UN doc. CEDAW/C/1992/L.1/Add. 15.

violence. The specific focus of the Convention is to prevent violence against women, bearing in mind the real state of the problem: violence against women = severe form of discrimination against women.

Furthermore, empirical global research[7] points to the fact that most of the perpetrators of domestic violence are men, and hence the emphasis of the Convention is directed towards the prevention and fight against violence against women, i.e. gender based violence. However, the scope of the Convention applies explicitly to all victims of domestic violence, but the States Parties of the Convention undertook obligation to pay special attention to women who are victims of gender-based violence (Article 2 of the Convention).

On a global scale, the percentage of women affected by physical violence, even once in their lives, varies from a few percent to a total of 59% depending on where they live. Current statistical indicators of violence against women give very limited data (Despotović, V, Filipovski, L, Ivanović, J, Veselinović, J., Badnjarević, N, 2008). Therefore, statistical definitions and classification of the problem of violence against women require further enrichment at the international, as well as at national level.

Genital mutilation of women, the most harmful and most serious form of human rights violations of women and girls, is very widespread and according to the current UN report on women (2010)[8] shows a slight decline in practice. Nevertheless, in many regions of the world, long-standing customs and negative gender stereotypes have exerted heavy pressures on women to accept different forms of violence.

In paragraph 1 of Art. 2. it is stated that the Convention refers to all areas of violence against women that include domestic violence committed against women. The Convention therefore signifies that women represent the majority of victims of domestic violence.

It is explicitly stated that the Convention covers all forms of violence against women, including domestic violence, which affects women disproportionately in relation to men. Under all forms of violence, economic and psychological violence against women should be taken into accounts, which were particularly emphasized by some countries (Norway, Spain, etc.). This is significant because the economic control of a man over a woman in the family is a very common phenomenon.

For these reasons, the Istanbul Convention (paragraph 2, Article 2) directly requires member states to pay special attention to women who are

[7] UNDP, WHO, UNODC, „Global Status Report on Violence Prevention 2014“, 2014, p.10.
[8] The World's Women 2010, Trends and Statistics, United Nations, New York, 2010, Department of Economic and Social Affairs, ST/ESA/STAT/SER.K/19, ISBN 978-92-1-161539-5, p. 132.

victims of gender-based violence in the application of the Convention. This means that gender-based violence against women, in its various manifestations, of which one is domestic violence, must be at the core of all measures of policy and the adoption of relevant national regulations, which are being undertaken in the application of this Convention.

The implementation of the Convention covers the time of peace as well as the situation of armed conflict. Provisions of paragraph 3. Art. 2 of the Convention should be interpreted as mirror of the basic principles of international humanitarian law and the Rome Statute of the International Criminal Court, as set out in the Preamble to the Convention. These principles confirm individual criminal responsibility under international law for violence that comes primarily (but not exclusively) during an armed conflict[9].The CoE Convention is recalling in its Preamble the basic principles of international humanitarian law, and especially the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949) and the Additional Protocols I and II (1977)[10].

3. Gender equality as a global principle and combating genderbased violence in legal sense – Istanbul Convention

The Istanbul Convention is a comprehensive and complex treaty - it is at the same time a human rights treaty, covering both civil and criminal laws, and a normative instrument for greater gender equality. Putting an end to *de jure* discrimination against women is a fundamental prerequisite for the achievement of true, *de facto* equality between women and men (Gasmi, 2013). Article 1 of the Istanbul Convention therefore lists the contribution "to the elimination of all forms of discrimination against women" and the promotion of "substantive equality between women and men, including by empowering women" as among the purposes of the Convention.

The Preamble of the Istanbul Convention contains references to these and other international legal standards such as those contained in the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW Convention).The Preamble contains the drafters' recognition that the "realization of *de jure* and *de facto* equality between women and men is a key element in the prevention of violence against women" and that "violence against women is a manifestation of historically unequal power relations between

[9] Article 7 of the Rome Statute (crimes against humanity committed in the framework of a widespread and systematic attack directed against each civilian population) and Article 8 (war crimes) involving acts of violence committed mainly against women such as rape and sexual violence.

[10] Convention on the Prevention and Combating Violence against Women and Domestic Violence (Istanbul Convention), CM (2011) 49 final.

women and men, which have led to domination over, and discrimination against, women by men and to the prevention of the full advancement of women". The Preamble thus firmly establishes the link between achieving gender equality and the eradication of violence against women. On the one hand, the drafters affirmed that violence against women, including domestic violence, is a distinctly gendered phenomenon because it is violence targeted at women to control them or their sexuality.

In line with this stated purpose of the Convention, Article 4 paragraph 2 requires States Parties to condemn all forms of discrimination against women and to take, without delay, measures to prevent any such discrimination. These measures include: (a) enshrining the principle of equality between women and men in law and ensuring its practical realization; (b) prohibiting discrimination against women by law; and (c) abolishing any discriminatory legislation or practices.

European principles in the Convention frame the eradication of violence against women within the wider context of combating discrimination against women and achieving gender equality in law and in fact. It should also be noted that the term "discrimination against women" should be interpreted as constituting "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field" as provided in Article 1 of CEDAW. This is clearly stated in the Explanatory Report of the Convention[11].

The Istanbul Convention also contains a definition of "gender" (Article 3.c); defines contribution to the elimination of all forms of discrimination against women as one of its purposes (Article 1), and contains provisions pursuing this aim as well as empowering women (Articles 4, 6). Most importantly, it establishes structural connections between violence against women (VAW) and gender inequality.

Resulting from the established link between achieving gender equality and the eradication of violence against women, the Convention contains a number of provisions that aim at advancing the status of women in society in law and in fact. As legally-binding obligations, they are expected to give new impetus to the pursuit of equality between women and men at national level. Last but not least, these provisions will further the overall aim of non-discrimination against women as required by the CEDAW Convention[12] because they can be grouped

[11] Council of Europe Convention on preventing and combating violence against women and domestic violence - Explanatory report, CM (2011) 49 addfinal, p. 8, 7th April 2011.
[12] All Council of Europe member states are States Parties to the UN CEDAW Convention.

under the following three central obligations identified by the CEDAW Committee in its General Recommendation No. 25[13].

The violence against women is seriously and deeply engrained in the social and cultural structures, norms and values that govern society, and often survives due to the culture of denial and silence. The use of the term "gender-based violence against women" in this Convention means the same as the term "gender-based violence" as used in General Recommendation no. 19 of the UN CEDAW Committee on Violence against Women (1992), the United Nations General Assembly Declaration on the Elimination of Violence against Women (1993) in the Art. 1 and in the CoERecommendation Rec (2002) 5 of the Committee of Ministers of the Council of Europe to member states on the protection of women against violence (2002).

The CoE Convention is the first international legal instrument containing the definition of gender and gender-based violence in Art. 3, which read: "gender" shall mean the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men".

The question arises why it is so important to define those categories. The answers to these questions should be primarily addressed by the fact that the Convention sets out the obligation to prevent and combat violence within the wider framework of achieving equality between women and men, and it is important to define the term "gender". In the context of this Convention, the term gender, based on the two sexes, male and female, explains that there are also socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men. Relevant research has shown that certain roles or stereotypes reproduce unwanted and harmful practices and contribute to make violence against women acceptable.

In order to overcome such harmful gender roles, Art. 12 (1) provides a framework for the suppression of prejudices, customs, traditions and other practices that are based on the inferiority of women and stereotypical gender roles, and becomes a general obligation of States Parties to prevent violence. In addition, the Convention calls for consideration of violence against women and domestic violence from a gender perspective, which should be at the heart of all measures for the protection and support of victims. This means that these forms of violence should be dealt with in the context of the prevailing inequality between women and men, existing stereotypes, gender roles and

[13] CEDAW Committee General Recommendation 25, paragraphs 6 and 7, which lists the elimination of any direct or indirect discrimination against women by law, the improvement of the *de facto* position of women through concrete and effective policies and programmes, and the need to address gender relations and gender-based stereotypes that affect women through individual acts and through law and societal structures, as the three central obligations of States Parties to the CEDAW Convention.

discrimination against women in order to respond to the complexity of this phenomenon. Hence, the term "gender" according to this definition is not a substitute for the terms "women" and "men" in the Convention.

'Violence against women' is a manifestation of the historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of women's full advancement[14].

European standards contained in the CoE Conventions are inspired by global principles defined in the UN the Beijing Declaration and Platform for Action adopted at the Fourth World Conference of Women in 1995, the report of the Ad Hoc Committee of the whole of the 23rd special session of the United Nations General Assembly (Beijing + 5 – political declaration and outcome document) as well as the political declaration from the 49th session of the United Nations Commission on the Status of Women in 2005 (Beijing + 10) and 54th session of the United Nations Commission on the Status of Women in 2010 (Beijing + 15) and Women 2000: Gender Equality, Development and Peace for the 21st Century. All those international declarations are listed in the Explanatory report of the Convention[15], which proves global legal foundation of European principles that are contained in the CoE Convention.

4. Global origin of the principle of due diligence in the CoE Istanbul Convention

Violence against women represents a violation of human rights and a form of unlawful and severe discrimination. This means that states are held responsible if they do not respond adequately to such violence. State obligations and due diligence principle mean that, under international public law, a state is responsible for the commission of an internationally wrongful act which is attributable to it, through the conduct of their agents such as the police, immigration officials and prison officers.

This principle is set out in the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (2001), which are widely accepted as customary international law.

Under international human rights law, the state has both negative duties and positive duties: state officials must both respect the law and refrain from the commission of internationally wrongful acts and must protect individuals from their commission by other non-state actors. Article 5 of the Convention, paragraph 1, addresses the state obligation to ensure that their authorities,

[14] United Nations: The Beijing Declaration and the Platform for Action, Fourth World Conference on Women Beijing, China 4-15 September 1995.
[15] *Ibid.*, p. 7, 2011.

officials, agents, institutions and other actors acting on behalf of the state refrain from acts of violence against women, whereas paragraph 2 sets out States Parties' obligation to exercise due diligence in relation to acts covered by the scope of this Convention perpetrated by non-state actors. In both cases, failure to do so will incur state responsibility.

"Article 5:

1. Parties shall refrain from engaging in any act of violence against women and ensure that state authority, officials, agents, institutions and other actors acting on behalf of the state act in conformity with this obligation.

2. Parties shall take the necessary legislative and other measures to exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of this Convention that are perpetrated by non-state actors".

This regulation is inspired also by European Court of Human Rights (ECHR) case law. In ECHR Case Opuz v. Turkey (2009)[16], ECHR brought the judgment that Turkey has violated art. 2, 3, and 14 of the European Convention on Human Rights and Fundamental Freedoms: right to live, interdiction of torture and ban of discrimination.

The legal basis for the ultimate attribution of responsibility to a State for private acts relies on State failure to comply with the duty to ensure human rights protection, as set out in Article 1(1) of the American Convention on Human Rights (1969). Court concludes that the national authorities of Turkey cannot be considered to have displayed due diligence. They therefore failed in their positive obligation to protect the right to life of the applicant's mother within the meaning of Article 2 of the European Convention.

A requirement of due diligence has been adopted in a number of international human rights instruments, interpretations, and judgments with

[16] The case originated in an application (no. 33401/02) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Mrs Nahide Opuz ("the applicant"), on 15 July 2002. The applicant alleged, in particular, that the State authorities had failed to protect her and her mother from domestic violence, which had resulted in the death of her mother and her own ill-treatment. In the period of 1995-2002 H.O. attacked seriously six times his wife and her mother, with severe health consequences that were life-dangerous. Investigation was stopped three times due to giving up of the victim to file the suit and two times because of the lack of evidence. Case resulted in shooting the applicant's mother by H.O. firearm and her instant death. It was the final consequence of the long-term repeated domestic violence. ECHR brought the judgment that Turkey has violated art. 2, 3, and 14 of the European Convention on Human Rights: right to live, interdiction of torture and ban of discrimination. The legal basis for the ultimate attribution of responsibility to a State for private acts relies on State failure to comply with the duty to ensure human rights protection, as set out in Article 1(1) of the American Convention on Human Rights (1969).

respect to violence against women. These include CEDAW Committee General Recommendation No. 19 on violence against women (1992), Article 4 of the United Nations General Assembly Declaration on the Elimination of Violence against Women (1993), the Convention on the Prevention of Violence against Women (Convention of Belém do Pará, 1994) adopted by the Organisation of American States as well as the Council of Europe Recommendation Rec No (2002)5 of the Committee of Ministers to member states on the protection of women against violence (2002).

In relation to such development of the international law and judicial jurisprudence, it is very important to include the principle of due diligence of the state in this CoE Convention. It does not represent an obligation that relates to a result, but an obligation that relates to a means. The term "non-state actor" refers to natural persons, as previously explained in the CoE Recommendation (2002)5 on protection of women against violence.

Violence against women perpetrated by non-state actors crosses the threshold of constituting a violation of human rights as referred to in Article 2 insofar as Parties have the obligation to take the legislative and other measures necessary to exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of this Convention, as well as to provide protection to the victims, and that failure to do so violates and impairs or nullifies the enjoyment of their human rights and fundamental freedoms[17].

Conclusions

The Preamble of the CoE Istanbul Convention reaffirms the commitment of the countries signatories to protect universal human rights and fundamental freedoms, and especially women human rights, since they are prevalent victims of domestic and gender-based violence. The Convention contains legal standards that recall the most important international legal instruments, which directly deal with the scope of this Convention in the framework of the United Nations (UN).

In the coming period, the implementation of the provisions of the Convention at the national level of States Parties, as well as international cooperation in the exchange of relevant data and cooperation on criminal and civil legal issues, are to be monitored. Thus, the obligations of international cooperation do not end, but they also relate to cooperation in terms of preventing all forms of violence covered by this Convention and providing assistance to victims of violence.

The adoption of the Convention after two years of intensive negotiations and ratification procedures in the required number of countries marks a great

[17] Explanatory report, CM (2011) 49 addfinal, p. 18, 7th April 2011.

legal and civilization achievement at the beginning of the 21st century. The Council of Europe Convention is a renewed aspiration towards establishing essential equality between women and men, aimed at removing deeply rooted unequal power relations between the sexes. Hence, violence against women is legally perceived through the prism of severe discrimination and the violation of the human rights of women with experience of violence.

In addition to gender-based approach, the Convention also contains a wide scope of application, as it instructs the signatory states that its provisions also regulate the protection of other victims of domestic violence.

The universal legal contribution of the Convention is the fact that it obliges the signatory states to introduce into their domestic legislation regulations on the prosecution of certain crimes, such as: genital mutilation of women and girls, forced marriage, stalking, sexual harassment, psychological violence, forced abortion and forced sterilization. In this context, important message is proclaimed: that violence against women and domestic violence are not private matters.

Fundamental value of the Convention is reflected in the establishment of a special monitoring mechanism (GREVIO) to monitor its application in the form of an independent expert body, with a view to the long-term effectiveness of the provisions of the Convention in the member states of the Convention.

It is important to point out the far-reaching provisions of the Convention, of global importance, especially with regard to prevention, the protection of victims of violence and, in particular, the processing of perpetrators, which in total constitutes the basis of the concept: "three P" plus integrated gender-based approach to all public policy measures. The Council of Europe's Convention on Preventing and Combating Violence against Women and Domestic Violence is precisely such an unavoidable international legal document, which is primarily aimed at protecting the human rights of women and other victims of domestic violence.

The basic objective of the European standards embodied in the Council of Europe Istanbul Convention is to establish zero tolerance in relation to violence against women and domestic violence, not only in Europe, but also globally.

Furthermore, the global value of the legal solutions contained in the Istanbul Convention make it a predominantly international legal instrument for the protection of human rights, since its essence is not in prosecution of perpetrators nor in a crime control. Therefore, the Convention relies on the most important legal documents of the Council of Europe[18] and the United Nations (UN).

[18] Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5, 1950) and its Protocols, the European Social Charter (ETS No. 35, 1961, revised in 1996, ETS

These are the following international instruments concerning human rights on a global level:

- The International Covenant on Civil and Political Rights (1966),
- The International Covenant on Economic, Social and Cultural Rights (1966),
- The UN Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW", 1979) and its Optional Protocol (1999), as well as General Recommendation No. 19 of the CEDAW Committee on violence against women,
- The United Nations Convention on the Rights of the Child (1989) and its Optional Protocols (2000) and
- The United Nations Convention on the Rights of Persons with Disabilities (2006).

The Council of Europe Convention on preventing and combating violence against women and domestic violence is open for ratification and accession to non-member states. It complements and expands the standards set by other regional human rights organisations, such as the Inter-American Convention on the prevention, punishment and eradication of violence against women, adopted in 1994 by the Organisation of American States, and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted in 2003 by the African Union, both address the issue of violence against women.

However, the CoE Convention is more comprehensive and it significantly reinforces action to prevent and combat violence against women and domestic violence at world level.

The importance of the European legal standards in the area of fight against gender-based violence and domestic violence that are set up by the CoE Istanbul Convention, is in its contribution to dismantling globally widespread negative gender stereotypes (Gasmi, G., 2014, p. 54), which are one of main causes of violence against women.

No. 163), the Council of Europe Convention on Action against Trafficking in Human Beings (ETS No. 197, 2005) and the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (ETS No. 201, 2007).

Bibliography

Books, articles

1. About the perpetrators of domestic violence and partnership relations (Edit. Snežana Lakićević), 2011. Ministry of Labor and Social Policy, UNDP Project Fighting Sexual and Gender-Based Violence, Belgrade.
2. Despotović, V, Filipovski, L, Ivanović, J, Veselinović, J., Badnjarević, N, (2008), Systemic intervention Program for stopping domestic violence. *Accredited Training Program*, Republic Institute for Social Protection, Belgrade.
3. Gasmi, Gordana, (2013), European Legal Standards on Gender Equality – Situation in Serbia, *Efficiency of Legal Norms II, Law Faculty Cluj-Napoca, Romania*, pp. 482-492.
4. Gasmi, Gordana, (2014), New CoE Convention on Preventing and Combating Violence against Women and Domestic Violence "Istanbul Convention" – Importance of Setting European Legal Standards. *Foreign Legal Life* (Stranipravniživot), UDK 34. Belgrade. Issue 2, pp. 37 – 57.
5. Gasmi, Gordana, (2012), New European Legal Standards in the area of women human rights - CoE Convention on combating violence against women and domestic violence. *Collection of papers presented at the international conference Efficiency of Legal Norms I, Cluj-Napoca, Romania*, pp. 141- 153.
6. Gasmi, Gordana, (2012), The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence - Legal Commentary, *UNDP Project and Kingdom of Norway Fight against Sexual and Gender-Based Violence*. Belgrade. pp. 122.
7. Ignjatović, Tanja, (2011), *Nasiljepremaženama u intimnompartnerskomodnosu: Model koordiniranogodgovorazajednice*, (Violence towards women in intimate partnership: A model of coordinated community response), RekonstrukcijaŽenski fond, Belgrade.

Legislation

1. Committee's General Recommendation No. 19 on "Violence Against Women," (1992) UN doc. CEDAW/C/1992/L.1/Add. 15.
2. Council of Europe Convention on preventing and combating violence against women and domestic violence - Explanatory report, CM (2011) 49 add final, p. 8, 7th April 2011.
3. Recommendation of the Council of Europe (2002)5 on protection of women against violence, Strasbourg, www.coe.int/violence.
4. United Nations, *The World's Women 2010, Trends and Statistics*, New York (2010), Department of Economic and Social Affairs, ST/ESA/STAT/SER.K/19.
5. UNDP, WHO, UNODC, *Global Status Report on Violence Prevention 2014*, New York, 2014.

THE CHANGING LAWS: "IMMIGRATION AS A GLOBAL PHENOMENON, THE UNTIMELY FATE OF SYRIAN REFUGEES"

Meriem GUERILLI*

Abstract

The Syrian Crisis has taken unexpected turns and has been on the news since its eruption in 2011. The crisis gained considerable momentum which led Syrian people to flee the country in masses. The neighboring countries like: Jordan, Lebanon and Turkey have taken the lion's share of the stricken refugees. As the country has been engulfed in chaos, the masses headed to Europe via Turkey or crossing the Mediterranean Sea.

The European countries were hit by refugees' waves not only Syrians but also from other countries too which led to the issuing of new norms and laws to host the unprecedented number of new comers. The process of taking in refugees as asylum seekers or individuals for need of protection until their country is safe again gathered many international powers to deal with the matter.

The European Law in compliance with international law had to face the situation of these refugees. It had to adapt and limit the overflow of refugees that eventually would pose an imminent threat to the host societies' stability. The flood of immigrants every year to Europe since conflict and war broke in the Middle East and North Africa left the E.U and the neighboring countries divided on how to approach the growing concerns over the refugees' crisis.

Keywords: *Immigration, Syrian Refugees, Illegal immigrants, Europe*

JEL Classification: [K 30, K 33, K 37, K 38]

1. Introduction

International peace is a relative concept since the outbreak of conflict and war is unpredictable and unstoppable once it turns ugly and violent. 2011 marked unprecedented wave of outrage in the Middle East and North Africa (MENA). The MENA region since Tunisia set the example for other Arab countries to follow as well as it was the epicenter of Arab uprisings to call for the Archaic regimes to step down entered a new era of openness and change.

Syria like other fellow Arab countries was censured for luck of seriousness in dealing with the uprising at the outset. The country now is in its ninth year from what has started as a peaceful protest to a global crisis that gathered many powers to discuss Syria's future and its people's fate. The

* Associate Professor, PhD. candidate, "20 Août 1955" University-Skikda, Algeria.

conflicting sides within the same country had taken the protest to turn to the level of a civil war with a religious dimension when ISIS (Islamic State in Iraq and Syria) took over in the country.

The aggravating situation in the country has made people flee the country to escape violence or move away from hot spots running for their lives. Migration has been a gateway to the fleeing masses from affected countries and at the same time an issue that has intensified and led to displace people internally or across borders fleeing their home country.

Europe to those people who escaped chaos seemed a better alternative and an opportunity to a dream life away from their repellent life conditions back home. The host continent was hit by the influx that reshuffled the European Union (EU) member states cards.

For Europe, the concept of immigration is not new as much as it became a burden that now all member states have to shoulder and share the responsibility to curb the exodus that target mainly Western Europe. Most southern states that are considered potential entries are taking all the blame for this no end.

2. The Axiomatic Shift in European Stance towards Immigration

The welcoming of new comers each year to the shores of European countries has shrunk and tightened since the host countries adopted new norms and laws to regulate the uncontrolled increase in the number of those comers. European immigration centers are not Refugees' detention centers and the unprecedented number of illegal immigrants from different countries that made Europe vulnerable in the face of this contemporary crisis has just complicated the situation for people who are in desperate need for an asylum.

From the signing of the Lisbon Treaty, Europe has faced many challenges and nothing could have been done to reduce or shrink the number of these immigrants. The Lisbon Treaty even if it started in 2001 as a constitutional project did not really cover all cases that face the union "The Treaty was signed at the European Council of Lisbon on 13 December 2007 and has been ratified by all Member States" (Panizza, 2018, p. 1) to join all member states under the same constitution. The treaty entered into force in December 2009 and since then "[EU] Parliament has been actively involved, as a full legislator, in the adoption of new legislation dealing with both irregular and regular immigration" (Schmid-Drüner, 2018, p. 6) As an outcome of all the hassle around immigration, the EU is still facing issues in the Mediterranean concerning illegal immigrants who come to Europe in over-crowded boats dreaming of a better life.

The affected countries of this global issue of immigration are European courtiers bordered by the Mediterranean Sea mostly Italy, Spain and Malta.

The issue of immigration is not recent and has been ailing the aforementioned countries for decades. In previous years especially with the beginning of the flow of refugees this phenomenon has taken another social and even human dimension.

At the end of September 2018, Italian Interior Minister Matteo Salvini, asserted that charity rescue ships were bringing "hundreds of thousands of immigrants each day" to Italian shores. This number is too exaggerated and far from being real even for each year. Those comments were made to the right-wing French news magazine *Valeurs Actuelles*. Catherine Nicholson for her show *Fact or Fake*, on France 24 news channel, checked and it turned out to be fake news. (Nicholson, 2018)

"In the absence of a common European policy, states have taken individual steps to address immigration. Spain and Malta, struggling to accommodate immigration from Africa, have called on the European Union to shoulder some of the responsibility" because they were both the easiest entry gate to the continent. Also, "Malta's foreign minister announced that "Malta cannot become a holding area for all of Europe," (*IHT*) while Spain's justice minister has called for an increase in EU funds to secure his country's borders" (Choe, 2007).

European member states have had some disagreements over the issue of immigration and this led in one of the cases to a diplomatic strife especially the one in 2016 between Austria and Greece Greece's foreign ministry said the ambassador was being recalled "in order to safeguard the friendly relations between the states and the people of Greece and Austria" (BBC, 2016) over migrant crisis and the flow of Syrian refugees to Greece crossing the sea.

The situation of illegal immigration in Europe led to the legislation of new norms and enforcement of pre-existing regulations in order to control the flow of individuals and the different countries from where the immigrants originate were also involved.

3. European Measures to Fight Illegal Immigration

Illegal immigration has caused many member states to disagree on how to deal with the issue. There were many attempts and plans first were at least to regulate the flow of illegal comers. The Lisbon Treaty has set the pillars to tackle the issue but with the rapid change that has happened, the situation needed a call for a new regulations and laws.

The Lisbon Treaty itself has changed to the Treaty on the Functioning of the European Union[1] (TFEU); this treaty helps to understand how each

[1] For more details on the Treaty on the Functioning of the European Union (TFEU) https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN.

member state should act towards many issues such as immigration and asylum on legal basis that is unified for all the E.U States.

For immigration[2], both articles 79 and 80 of the Treaty on the TFEU deal with this issue without reference to the subjects of this policy: either people from E.U member states or third-country nationals which can be defined as ambiguous and unclear to properly address the issue. Article 80 is an example of this ambiguity, the EU policies and their implementation "…shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between member states." So here no clear application of the article except general directives.

Irregular immigration as a phenomenon that affects mostly the countries that are considered the gate to Europe is not well-understood to be suitably dealt with. The next policy about asylum can partially help asylum seekers on the basis of their need to seek haven in any member state in the EU.

For Asylum[3] also there is a need to clarify some issues around this matter, the aim of the Asylum policy is "offer appropriate status to any third country national requiring international protection in one of the Member States and ensure compliance with the principle of non-refoulement. To this end, the Union is striving to develop a Common European Asylum System" (Schmid-Drüner, 2018). There is no transparency in taking the category of Asylum seekers on the basis of their protection like with Syrian refugees that caused EU member states to really revise their existing policies.

For EU members the issue of immigration, either for individuals who across the sea undocumented to be in any state or those who seek a place to live away from war and death, could not have one definition or explanation in other words this phenomenon is a fact to be dealt with case by case which is far from being applied.

4. Running Away from Home Countries: the Deadliest Journeys despite Local Laws

There are many reasons that took young people to risk their lives on the hope to reach Europe and have a dream life. The Mediterranean Sea is the theatre of movement of opportunity seekers to straighten up their luck on the expense of their precious lives.

In the United Nations (U.N) Universal Declaration of Human Rights [4]article 13 (2): "Everyone has the right to leave any country, including his

[2] For laws regulating immigration http://www.europarl.europa.eu/ftu/pdf/en/FTU_4.2.3.pdf.
[3] For Asylum policy http://www.europarl.europa.eu/ftu/pdf/en/FTU_4.2.2.pdf.
[4] Universal Declaration of Human Rights https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf.

own, and to return to his country". As individuals leave the shores of their home countries to the unknown has become a burden on the shoulders of both the government of those migrants and the receiving countries.

Legal initiatives to combat secret immigration were put and enforced in the face of the growing numbers of migrants. Most supplier countries of migrants mostly from North Africa, Algeria here is taken as an example, tried to put a legal frame to this practice.

In the Algerian penal code article 175[5] (bis 1): illegally leaving the national territory in violation of the laws and regulations in force in the country is incriminated and repressed. This text was implemented and people who leave the country, in any illegal way by: land, air or sea, are subject to this law.

The Algerian law is clear about the act of trafficking and helping illegal immigrants to cross the sea. In article 303[6](bis 31): Anyone who commits an act of smuggling of migrants shall be punished with imprisonment from five years to ten years and a fine of 500 thousand to one million dinars, if one of the following conditions is present: a smuggled person is a minor, endangering the life or safety of smuggled migrants or potential endangerment, Smuggled migrants are treated inhumanely or degradingly.

The above laws and all section 5 (bis 2-1) of the Algerian penal code about smuggling immigrants did not deter immigrants or smugglers from acting to encourage and promote to illegal immigration as a gateway to a better life.

"*Harragas*" as the undocumented individuals are called; the word is also widely used by print media to report about the countless attempts made by young people to cross the sea to the other side of the Mediterranean, summed it all as the meaning is 'those who burn' which can be both, go undocumented or enter legally but stay after visa expiration.

The price those "*Harragas*" pay is far from being punished by any law: their lives and despite the tough regulations and norms about this phenomenon the Algerian government could not combat illegal immigration. Houari Kadour, in charge of the files of the Algerian League for the Defense of Human Rights that the only remedy to this problem is to "fight unemployment, bribery and nepotism, so that our young people enjoy a better life than searching for them by riding in death boats" because according to him there were dozens of immigrants who were imprisoned and returned to repeat the risk (Boudia, 2016).

[5] Translated from the original text in Arabic of the Algerian Penal Code.
[6] Translated from the original text in Arabic of the Algerian Penal Code.

5. Syrians movement as Scattered Groups, Destination Europe

Syria has entered its ninth year of the crisis with no clear end, transfer of power. The country has gathered many fronts and could not keep people safe from the ravaging war that destroyed most of the country's infrastructures and left people homeless. People are in search for a safe haven away from death that lurks around every corner and each part of Syrian soil.

Thousands of refugees fled across the borders to neighboring countries such as Lebanon, Turkey, Jordan, and Iraq. It is important to note that people were also displaced from area to area within the country to avoid spots of confrontations between the regime forces and the rebels. Refugees at that stage of the conflict lost hope of a peaceful solution. The Syrian government could do nothing to protect its own nationals.

Recent statistics about the number of refugees in the neighboring countries is still high even if the country for now is more stable than it was. The total number is 5,684,010 refugees according to a last update on 28 February 2019. The following figure shows the repartition of Syrian evacuees in the neighboring countries.

Location name	Source	Data date	Population	
Turkey	*UNHCR, Government of Turkey*	7 Feb 2019	64.1%	3,644,342
Lebanon	*UNHCR*	28 Feb 2019	16.6%	946,291
Jordan	*UNHCR*	13 Jan 2019	11.8%	671,551
Iraq	*UNHCR*	28 Feb 2019	4.5%	253,085
Egypt	*UNHCR*	31 Jan 2019	2.3%	133,028
Other (North Africa)	*UNHCR*	30 Nov 2018	0.6%	35,713

Figure 01: Total Persons of Concern by Country of Asylum
Source: https://data2.unhcr.org/en/situations/syria#

As shown in the figure, Turkey has taken the largest share of refugees over 3.5 million refugees and this true from the first years of the crisis. The migration crisis started in Europe when Turkey could not regulate all the flow from Syria and things just went out of control.

2015 marked the mass migration towards mainly Western Europe "In 2015, Syrians represented 49 per cent of the over 1 million people who risked their lives crossing the Mediterranean" (Darwish, 2016, p. 3). With those Syrians there are other nationals two from Iraq and Afghanistan. In Bulgaria and Hungary, they approached the situation as "The main nationalities of detained asylum seekers in both countries are Syrians, Afghans and Iraqis" (Matevžič, 2019, p. 9) which made the Syrian situation even harder to tackle.

The nationals from Iraq, Afghanistan and immigrants from North Africa (Egypt, Libya, Tunisia, Algeria and Morocco) have aggravated the situation for Syrians to seek asylum in EU member states as most of them look for an escape, the receiving countries are dealing with them equally as the treatment of their applications take time.

The measures taken to detain refugees or other immigrants slowed down Syrians' movement toward other parts in Europe and eventually worsened their status as individuals in need of humanitarian aid. The following passage sums the route Syrians take to enter Europe:

In the period between March 2015 and March 2016, hundreds of thousands of destitute Syrians, Afghans, Iraqis, etc. made the short but life-threatening journey from the coast of Asia Minor to the nearby islands of Lesbos, Chios, Samos, Kos and Leros. From there they would reach mainland Greece by boat, and, helped by GPS technology available through smart phones, trekked all the way to the border with Macedonia, some 800 km to the west. Then they would head to Vienna or Munich via Serbia and Hungary or Serbia, Croatia and Slovenia. The Western Balkans became, in effect, Europe's refugee and migrant highway (Bechev, 2016, p. 2-3).

The Syrian refugees' movement has been under scrutiny for fear to destabilize the region and pose a threat to EU societies.

Conclusions

Syria's internal turmoil has been one of the most socially mediated political crises in the world's modern history. Syria's nearly nine-year-old internal strife has come to be described as the biggest humanitarian and refugee crisis of our time. Many players on the international arena approached the situation differently with mixing the Syrian case to other migration crises.

The receiving countries especially in Europe disagreed on how to address the issue of refugees and separate them from undocumented immigrants. The Syrian tragedy is far from being unfold as most Syrians are still scattered in refugees' camps, detention centers in different countries. Solidarity is the key to win the fight against injustice and to protect basic human dignity for those refugees.

Europe has become a difficult destination, issuing a visa for people who need to enter the European space is under heavy scrutiny, people in need for movement or even tourism are affected by the migration crisis implicitly.

Europe need to redefine its policies and the concept of immigration must be viewed accordingly without any bias or discrimination among nationals who seek a visit to any member state of the EU space. The responsibility sharing should take care of all obstacles in the way of refugees or legal immigrants.

Bibliography

Books, articles

1. BBC, (2016), *Migrant Crisis: Greece recalls ambassador from Austria amid EU rifts.* Available at: https://www.bbc.com/news/world-europe-35658776. accessed [25.02.2019].
2. Bechev, D., (2016), *Europe's Refugee Crisis and the Balkans.* Available at: https://www.sharqforum.org/wp-content/uploads/Europe---s-Refugee-Crisis-and-the-Balkans.pdf accessed [04.03.2019].
3. Boudia, K., (2016), *Legal Deterrent: the Latest Concerns of Illegal Immigrants!.* [En ligne] Available at: https://www.elkhabar.com/press/article/110254/ accessed [03.03. 2019].
4. Choe, J., (2007), *Backgrounder: African Migration to Europe.* Available at: https://archive.nytimes.com/www.nytimes.com/cfr/world/slot3_20070710.html?pagewanted=all, accessed [28.02.2019].
5. Darwish, H., (2016), *Global Responsibility Sharing: through Pathways for Admission of Syrian Refugees.* Available at: https://www.unhcr.org/events/conferences/56f29f579/global-responsibility-sharing-factsheet.html. accessed [25.02. 2019].
6. Matevžič, G. e.a., (2019), *Crossing a Red Line: How EU Countries undermine the Right to Liberty by Expanding the Use of Detention of Asylum Seekers upon Entry: Case Studies in Bulgaria, Greece, Hungary, and Italy.* Available at: https://www.helsinki.hu/wp-content/uploads/crossing_a_red_line.pdf accessed [07.03. 2019].
7. Nicholson, C., (2018), *Fact or Fake*:France 24.
8. Panizza, R., (2018), *Fact sheet: The Treaty of Lisbon.* Available at: http://www.europarl.europa.eu/factsheets/en/sheet/5/the-treaty-of-lisbon accessed [27.02. 2019].
9. Schmid-Drüner, M., (2018), *Fact sheet: Immigration Policy.* Available at: http://www.europarl.europa.eu/factsheets/en/sheet/152/immigration-policy accessed [27.02. 2019].

Legislation

The Penal Code of the Democratic Republic of Algeria (2012) Arabic version. Available at: https://www.wipo.int/edocs/lexdocs/laws/ar/dz/dz027ar.pdf

ECONOMIC FREEDOM AND TRADE FREEDOM

Cristina (GHERMAN) IUHAS*

Abstract

The paper has a multidisciplinary, historical and comparative approach on the origin and evolution of trade freedom in the sense of seeing whether it is part of, or distinct from, the economic freedom. In this approach, we will start from the premise that the economic freedom is part of the fundamental rights of man and of the citizen. With the evolution of social relations, the economic freedom has undergone changes in the sense of divisions of its material content, among which we can mention the freedom of trade. We also intend to highlight the trends towards which the market economy in our country is moving due to the obligations assumed by Romania as a member state of the European Union.

Keywords: *market economy, economic freedom, trade freedom, Romania, the European Union*

JEL Classification: [K 1, K 10]

1. Economic freedom vs. trade freedom - doctrinal distinctions

Doctrine distinguishes between human rights and freedoms. The notion of "human rights" (...) "derives from the concept of natural law, according to which man, precisely because he is a human being, has an ensemble of rights inherent in himself. Regardless if the positive law enshrines them or not, these rights subsist in themselves, closely related to man, as the subject to which they are recognized" (Bîrsan, 2005, p. 8).

To the contrary, freedom appears as "a power to act or not to act" and all freedoms are public freedoms in that they do not enter into positive law unless the state enshrines them in the national legal system, regulates their exercise and ensures their observance" (Bîrsan, 2005, p. 8). To perceive a relationship between economic freedom and trade freedom requires a conceptual discussion on their material content.

Starting from Adam Smith's system that sustained freedom in its natural state to the capitalism of Karl Marx (Boudreaux et all, 2015, p. 67), economic freedom is one of the benchmarks for the organization of the state and the removal of the arbitrary and chaotic behavior of individuals. That is why

* Lawyer, PhD. candidate, Doctoral School of the West University of Timisoara, Faculty of Law, e-mail: avocatiuhas@gmail.com.

economic freedom is a creation of the state, through centralized planning and control of the means of production, which must not be left to "the discretion of the decentralized decisions of individuals" (Boudreaux et all, 2015, p. 67). Therefore, "economic freedom is the foundation of all freedoms" (Barron, 2018). Economic freedom is an exponent of public human liberties, with a pragmatic reflection in positive law. Economic freedom is part of the generation of economic, social and cultural rights that was born by accepting that they are of a public nature (Băeşu, 2-15, p. 90). Thus, "The economic rights of man as public liberties are not to be mistaken for the subjective rights, which are the rights belonging to a subject, while public freedom belongs to all subjects of law equally from a legal point of view, an universal legal freedom" (Băeşu, 2-15, p. 90).

In another opinion, it is argued that "subjective law is a conceded faculty, while public freedom is not conceded by the legal order, but only ascertained and defended by it" (Pescatore, 1978, p. 239).

In another sense, it is argued that economic freedom is dependent on the existence of a market economy whereby any person can initiate and undertake a lucrative or economic activity, under the legal consecration of unrestricted exercise and access to free enterprise (Muraru & Tănăsescu, 2011, p. 178) (Preduca, 2011, p. 200). Correlatively, it is considered that economic freedom is the result of the conduct of individuals who pursue their own interest (...) and who succeed in indirectly promoting the general or collective well-being" (Iliescu, 1998, p. 66).

We consider that economic freedom is dependent on a democratic state because it guarantees the free exercise of economic activities.

2. Constitutional evidence on economic freedom and trade freedom

In practice, economic freedom is guaranteed by the constitutionalization of the economic rights as fundamental human rights and it is protected by the fundamental principles of the modern state, namely the principle of the rule of law, the principle of market economy, the principle of free trade, the principle of unfair competition, and so on.

Creating opportunities by providing a stable and predictable legislative framework has led to economic growth and development, to overcoming traditional and geographical legal boundaries and to the development of international relations through which the classical economic principles have become transnational.

In this context, economic freedom has favoured free trade, which has also generated the legal concept of freedom of trade. Nowadays, the two concepts are interdependent and they create rights and obligations. The free trade thus "gives the citizens of the world the economic freedom to promote

their economic interests as consumers, distributors and producers without the state intervention" (Kafele, 2018). Trade freedom therefore creates entrepreneurship, economic growth and innovation in a global society.

Free trade has given rise to commercial practices derived from the commercial law, which, although juggling with the same economic patterns - market, demand, offer, producer, consumer - focuses on international agreements or partnerships.

In this regard, it was appreciated that we would find ourselves in a situation where a state carries on trade with other states as a result of the fact that only its own economy generates a series of unique products (Ricardo, 1821) by virtue of which it is faced with an activity trade between nations, "even if a country has an absolute advantage in producing all the traded products" (Pressum (coord.), 1995, p. 35). In other words, the actual activity has an economic nature and is subject to the fundamental principles of the economy, namely the principle of free trade, the principle of fair competition and the principle of mutual observance of the agreements concluded between the parties.

Therefore, art. 27 par. (1) of the Swiss Constitution guarantees economic freedom. Par. (2) of that same article mentions the material content of that freedom, namely the freedom to choose a profession, the freedom to enjoy free access and the free exercise of a private economic activity.

Art. 45 of the Romanian Constitution enshrines "economic freedom", namely the free access of individuals to an economic activity, the free initiative and the exercise thereof under the law.

On the other hand, trade freedom is not a novelty in the European constitutional landscape. This concept was born in the 18th century France, together with the Decree d'Allarde of 1791 and the Chapelier Law, which abolished guild organizations and promoted the freedom to practice professions, trade and crafts.

In 1849, the first Danish Constitution (Grundloven) abolished all restrictions on commercial freedom and the free and non-discriminatory access to trade activities.

In Sweden, the Royal Decree of 1864 on the extension of freedoms granted both women and men the right to conduct commercial activities.

In the twentieth century trade freedom was constitutionalized as part of the process of transition from absolutist regimes to representative democracy regimes and to guaranteeing market economy. For this reference period, we take into account the example of Germany and Italy in 1940, of Greece, of Portugal and of Spain in 1970 and of the countries of Central and South-Eastern Europe in 1990.

3. The Influence of International Law on commercial freedom or the influence of commercial freedom on International Law?

Within the universal documents stating human rights, there is the notion of "economic rights", which tend to be discussed "as part of a wider group of economic, social and cultural rights, which is the basis for defining this concept" (Daintit, 2004, p. 57). In this context, we refer to the Pact on Economic, Social and Cultural Rights adopted by the United Nations General Assembly on 16 December 1966, together with the Convention on Civil and Political Rights.

International agreements have been important for the dissemination of economic rights as well as for their definition. In the Charter of Fundamental Rights and Freedoms of the European Union, the Member States of the Union listed the fundamental rights which, in their view, should govern the Union's work.

Article 16 of the Charter of Fundamental Rights of the European Union establishes the freedom to conduct a trade activity. The freedom to conduct a commercial activity, viewed in the light of the European Union, has a dimension influenced by globalization.

Based on these economic concepts, a new structure has emerged, which promotes commercial freedom and is characterized by the phenomenon of globalization. Influences have been reciprocal in removing the terminological and material barriers between economic freedom and trade freedom, as globalization has eluded traditional and innovating constructions.

Trade development has influenced the demand and supply on the market and has boosted the global production. Economic globalization has given rise to a rethink of the legal space and has influenced the policies of the states. Thus, we can talk about a transnational right that reformed monetary and financial policies, employment policy, consumer protection standards, and so on. The global economy is guaranteed by economic freedom and the trade freedom. This type of economy has been formed by facilitating the investments of multinational companies through legislation, with the main purpose of employment.

By eliminating the isolation of certain national economies and their integration at the international level, the possibilities of major financial crises are diminishing. Accelerating the globalization process has triggered an explosion of international production and financial transactions within the free market economy (Hansen et. All, 1997, p. 7).

World trade is growing faster than production and highlights the duality of the globalization process: trade is growing internationally, but is also growing at the regional level (Hansen et. All, 1997, p. 7).

The trend in lowering customs duties is evident as a result of agreements under the General Agreement on Tariffs and Trade (GATT) or those concluded under the auspices of the World Trade Organization. These agreements have failed to release all kinds of trade activities, with the world's states having a series of "customs barriers" - taxes, allowances, administrative authorizations, sanitary rules, technical regulations, regulated marketing agreements or voluntary export restrictions.

In the European Union, the 1958 Treaty of Rome is of great importance, which in Art. 9 states the following: „The Community shall be based upon a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect". 10 years later, in 1986, the tariff barriers and quantitative restrictions on trade between the Member States of the Community were eliminated, by creating a single market.

According to an abstract interpretation, the doctrine states that "the market is the space within which goods and services are exchanged between sellers and buyers in a geographical area" (Bozian, 2009, p. 50). In the literature, there is also the concept of "market sociology", which addresses "*information that is a bridge to economic science*". (Neményi & Eleodor, 2011, p. 14) In particular, it is the appreciation that "the economic models of the markets are a *sui generis* form of expertise that must be investigated using the tools of scientific knowledge sociology." Thus, the analogy of information emerges with what is meant by "social action", "knowledge", "trust", "uncertainty" (Neményi & Eleodor, 2011, p. 14), concepts taken from the parents of the economy - Adam Smith, Karl Marx, Max Weber Georg Simmel and others.

In our opinion, the market is born at the conceptual meeting of economic freedom with trade freedom, as a legal response to social facts.

At the European Union level, we meet the terms "common market", "domestic market" or "single market", which have the same meaning. From the legal point of view, the concept of the market is defining competition law as "an instrument for identifying and defining the boundaries in which competition takes place between companies" (Bozian, 2009, p. 50). Consequently, „The relevant market is therefore the market on which the competition takes place, the concept being used to identify products and economic agents in direct competition" (Bozian, 2009, p. 50). In 1985, at the initiative of the President of the European Commission, Jacques Delors, the White Charter on completing the internal market was launched, which proposed that by 1 January 1993 there would be no border control for the 12 Member States. In 1997, the European Commission presented the "Single Market Action Plan" to the Amsterdam European Council, proposing measures to improve the single market operation and prepare for the

introduction of the single European currency. In the single market we are talking about the free movement of people, goods, services and capital.

The free movement of persons was guaranteed by art. 48 of the Treaty of Rome, without any discrimination based on nationality, in terms of employment, wage setting and working conditions. Correlatively, the Social Charter of Fundamental Rights of Workers, signed in 1989, proclaimed as fundamental rights the freedom of movement of labor, employment and wages, living and working conditions, social protection, freedom of association and collective bargaining, training, equal treatment of women and men, information, consultation and participation of workers, protection of health and safety at work, protection of children and adolescents, the rights of the elderly, the rights of persons with disabilities.

As regards to ensuring the free movement of goods, we are considering the abolition of intra-Community border control[1].

The free movement of services is enshrined in art. 52 and 54 of the Rome Treaty and allows companies in a Member State to operate in the European Union under the operating license obtained in the country of origin. Financial services, banking services, insurance, telecommunications, transport, electricity, digitization, etc. are also included in this freedom.

The free movement of capital implies the elimination of control over capital transactions, the harmonization of national taxes on capital, and ensuring of fair competition between low taxation and high taxation countries.

We note that the European Union's single market is pan-European in nature, through trans-European networks for transport, energy and telecommunications.

The liberalization of trade in the European Union has been achieved by creating a global network of bilateral relations with a view to concluding partnerships or association agreements with third countries. These include the European Free Trade Association (EFTA), the G-7 Group, with Japan, the Central and Eastern European Countries (TECE), the Commonwealth of Independent States (Russia, Ukraine, Belarus, Moldova, Kazakhstan and Kyrgyzstan), the Mediterranean Area (preferential trade agreements under Art. 113 of the Treaty of Rome: Israel (1975) and Lebanon (1977); association agreements (based on Art. 238 of the Treaty of Rome) which sometimes provided the grant of financial support: Algeria, Tunisia and Morocco (in 1976), Egypt, Syria and Jordan (in 1977); association agreements providing for the establishment of a customs union: Turkey (1963), Malta (1970) and Cyprus (1972), Africa-Caribbean-Pacific (ACP), Latin America, Asia (ASEM).

[1] Exceptions make the unexpected controls on drugs, firearms and irregular migrants.

Conclusions

Economic freedom has made room for trade freedom, which is complex in nature, with sustainable economic valences and prospects. Consequently, acts of competition are considered to be genuine acts that encourage sustainable development through innovation and efficiency. But the enforcement of competition policy is only effective if these instruments are continually upgraded and maintained at the level of real market developments." (Neagoe, Rădulescu, 2010, p. 44)

The distinction made by doctrine between economic freedom and trade freedom does not go much further from their constitutional conceptualization. We note that economic freedom guarantees the field of action of the trade freedom by providing mechanisms and instruments for its development, deployment and consolidation. Trade freedom goes beyond the traditional limits of economic freedom, reinventing the pattern of market economy, between transnational valences. The idea of a territorial border disappears in the way of trade, leaving a free path to capital markets, goods and services. However, the future of economic or commercial freedom does not appear to be restricted by the geographical or territorial dimension, but by the legal obstacles promoted by the public policies of the world's states.

Bibliography

1. Baeşu, V., (2015), Drepturile economice ale omului - drepturi subiective sau libertăţi publice. *Studii Juridice Universitare*, Issue 1-2.
2. P. Barron, *There's No Political Freedom Without Economic Freedom*, MISES DAILY ARTICLES, Mises Institute, Austrian economics, freedom and peace, of 21 February 2015, on: https://mises.org/library/there%E2%80%99s-no-political-freedom-without-economic-freedom, accessed at 17.10.2018.
3. Bîrsan, C., (2005), *Convenţia europeană a drepturilor omului, Comentariu pe articole, Vol. I. Drepturi şi libertăţi*, Bucureşti: All Beck.
4. Boudreaux, D., Lawson, R., Meiners, R., Morriss, A., Palagashvili, L., Sobel, R., Crews, W., (2015), *What America's Decline in Economic Freedom Means for Entrepreneurship and Prosperity*, Fraser Institute, Mercatus Center at George Mason University; 1 edition.
5. Bozian, L., (2009), The relevant market concept and the hypothetical monopolist test. *Revista Concurenţa*. Issue 1.
6. Daintit, T., (2004), *The constitutional protection of economic rights*, Oxford University Press and New York University School of Law 2004, Volume 2, Issue 1.
7. Hansen, Th., Muller, A., Vera, G., 1997. Evolution of NATO in the Postcold War Era", Study of the US Department of Commerce and Staff College Research Department.
8. Iliescu, A., 1998. Liberalismul între succese şi iluzii, Bucureşti: All.
9. Kafele, B.L., Free Trade Is the Key to Economic Growth, Contrary to what the political class has been saying, Foundation for economic freedom of 9 October

2016, on the web address: https://fee.org/articles/free-trade-is-the-key-to-economic-growth/ accessed on 17.10.2018.

10. Muraru, I., Tănăsescu, E.S., (2011), *Drept Constituţional şi instituţii politice*. ed. 14, vol. I, Bucureşti: C. H. Beck.
11. Neagoe, Şt.P., Rădulescu, Gh., (2010), Un scurt compendium cu privire la politica de concurenţă a Uniunii Europene pentru următorii ani. *Competition survey - Studies, Researches And Analyses Relating To Economic Competition, Competition Council – România*. Issue 1.
12. Neményi, P.I.-N., Eleodor, D., (2011), Repoziţionarea relaţiei dintre pieţe şi cetăţeni? Reflecţii pe marginea analizei lui Paul Preda cu privire la sociologia pieţelor. *Revista Concurenţa, Studii, cercetări, analize privind protecţia concurenţei economice*. Issue 1.
13. Pescatore, P., (1978), *Introduction a la science du droit*, Luxembourg: Office des imprimés de l'Etat.
14. Preduca, G.M., (2011), *Drepturile Omului - valenţe juridice şi canonice*. Bucureşti: C.H. Beck.
15. Pressum S., (coord.), (1998), *Fifty Major Economists*. New York: Routledge.
16. Ricardo, D., 1821. *On the Principles of Political Economy and Taxation, 3rd edition.* London: John Murray Publishing.

THE COURT'S COMPETENCEIN ADDRESSING APPEALS FOR THE DECISIONS OF EXCLUSION FROM POLITICAL PARTIES

Codruţa-Ştefania JUCAN[*]
Roxana-Maria MIRON[**]

Abstract

This paper seeks to analyze the courts' competence in what concerns the litigation focusing on the exclusion from a political party. Given that the party is and can be assimilated, on the basis of the legal provisions, into a public legal institution, exercising public utility, it is obvious that the texts that it issues, if they have a potential impact in the public sphere in the ways outlined in this article, they shall be administrative documents. In this context, the analysis of such documents cannot be carried out in any other way than contentious administrative litigation by the specialized courts within the Municipal Tribunals. This article aims to draw attention towards case rulings as well, ones that infringe this notion, that we consider to be erroneous and contrary to the legal provisions.

Keywords: *exclusion, political party, administrative document, contentious administrative, civil, competent court*

JEL Classification: [K 41, K 16]

1. Introduction

Becoming the member of a political party in Romania is achieved in accordance with the statute that acts as groundwork for the founding and functioning of said political formation, but is also evidently rooted in the voluntary adhesion of the person who wishes to be part of said party based, in theory, on the similarity between their values and those of the party, on finding their own personal values among those of the party, on the adhesion towards these values, but also towards the public discourse of the party.

In order to keep this membership, all internal norms and regulations must be heeded, as well as any other regulations that concern the party, which are to be mandatorily communicated in due time and with maximum transparency to the members.

Of course, there are persons who, for various reasons, breach these rules, which entail, in most cases, the birth of the political formation's right to

[*] Assistant Professor, PhD., Cluj-Napoca Faculty of Law, "Dimitrie Cantemir" University, Bucharest.
[**] Attorney, Cluj Bar.

sanction said person. Based on the severity of the act, on the regulations and statute of the party, as well as other subjective aspects, the sanction may be anything from a simple reprimand or warning to the exclusion from the political formation, when the guilt of the person in question can be ascertained and the internal mechanisms allow to do so, as a maximum penalty.

Litigation of this sort is thus characterized by the presence of a natural person applicant who was excluded from a political formation that they were a member of and the presence of said political formation, respectively the local division (branch, etc.) that the applicant was directly a part of, but also the central institution, the party per se.

The purpose for litigation is to annul the documents drawn up to exclude the applicant from the political formation, both the principal ones and any subsequent ones, should they exist.

The following discussion shall address the courts of justice that can carry out such a litigation, an aspect that obviously depends on where the litigation can be categorized among the various types of legal cases.

2. A summary of the applicable legislation

Before we proceed to present the reasoning that we had in mind per se, we would like to underline the legal norms that are applicable in this case.

Obviously, the first normative document that is applicable here is Law no. 14/2003, the one regulating the activity of political parties, along with the „adjustments" brought to this law especially through CCR Ruling no. 530/2013 on the exception of unconstitutionality of the provisions in art. 16 par. (3) of the Law on political parties no. 14/2003, a decision that has a direct impact here and that we will refer to specifically later in this text.

Also as a normative aspect, but as an internal structure of the party, the court must take into account the statute and internal regulation of the party.

Then, they must also take into consideration the provisions of Law no. 554/2004, of the Civil Procedure Code (which in any case represents common law in terms of procedure), and, respectively, of the Civil Code, in order to verify to what extent the litigation is civil or administrative in nature.

Given what we have stated above, our coordinate to establishing the competent court of justice is, in fact, the question (along with its answer) regarding the nature, the characteristics of the document issued by the party, respectively if we are dealing with a civil or an administrative text. (Vedinaș, 2018, pp. 37-38)

3. Hypotheses concerning the competent court of law

Starting from the aspects we have pointed out above, we can thus see that, in the practice of the courts of law (and here we also include the case that

this study is based on) and in the practice of the doctrine, four hypotheses took shape, which we will summarily present in the following. In order to understand the situation, we must emphasize that the domicile of the applicant is different from the headquarters of one of the defendants. (Dragoş, 2005, p. 237 sq.)(Tăbârcă, 2013, p. 569 sq.)

3.1. Civil case falling under the competence of the Tribunal around which the applicant's residence is located.

The case, first assigned to the contentious administrative court (through the automatic distribution process initiated upon submitting the file), was passed on to the civil section of the same Tribunal.

The reasoning provided was that the challenged documents were not subject to the provisions of Law no. 554/2004, meaning that they were not administrative documents as they were defined in art. 2 of this normative document, which we will address in the following, and that the provisions of art. 8 of the same law were not applicable either.

The court also noted that CCR Ruling no. 530/2013, which was invoked in the case, did not make reference to the competent court and that, in the absence of a derogation, the competence of the contentious administrative and fiscal section could not be presumed.

We can see here that we do not know any rule that applies to this case, from civil law, which states that the court found in the jurisdiction of the applicant's residence is competent in this situation, as the rule concerns the defendant's headquarters / residence, without the court applying this rule, however, and explaining what the derogation would be, if there were one. Thus, if we were to follow the judicial logic of the court, the case should have been sent to the court having jurisdiction over the headquarters of the defendants.

3.2. Civil case where the Appeals Court retaining jurisdiction over the headquarters of the political formation (the central organization) is competent.

The court that was initially passed the litigation also considered that they were not competent in presiding over the case that they were presented for judgment.

They did not object to the civil nature of the suit, but believed that it was not the Tribunal that was the competent court for the trial of litigation of this sort.

They invoked, when justifying their position, the provisions of art. 610 of the Civ. Pr. C. and the references concerning arbitration, which would entail the competence of the Appeals Court, from a material respect, located, in what concerns territorial competence, near the headquarters of the political formation, not the office of the local branch.

3.3. Civil case where the Appeals Court retaining jurisdiction over the main headquarters of the political formation (the central organization) is competent.

A somewhat similar point of view also provided the final solution, passed via the competence regulator, for this repeated negative conflict of competence, which would be the Supreme Court.

Thus, the court believed that this is a civil litigation (as the challenged documents exclusively regulated matters concerning the internal order of the party), that these documents were not, indeed, issued with a public power, and those they did not concern the contentious administrative sphere, but the civil one.

The court around the headquarters of the branch was believed to be competent from a territorial point of view (which is debatable, when we also take into consideration its possible lack of general legal competence). This ruling is also debatable given the denial, with no pertinent reasoning, of the statements made by one of the courts which were passed the case, sent through administrative channels (the Appeals Court, the contentious administrative section) or by one of the parties, of the aspects concerning the invoked administrative law matters. To conclude, it is difficult to say, in terms of territorial competence, why this court chose the court holding jurisdiction around the headquarters of the branch and not the headquarters of the central organization, both being involved in the procedure.

3.4. Contentious administrative case where the Tribunal retaining jurisdiction over the residence of the applicant is competent.

The final option in terms of material and territorial competence in trying this case is the one that one of the courts who was previously given the case believed to be most suitable, namely the Appeals Court holding jurisdiction over the headquarters of the party's central organization. (Vedinaș, 2018, pp. 278-284)

The case made it to this section of the Appeals Court by chance, probably due to the simple reason that, even upon filing the suit, it was believed that the litigation was of a contentious administrative nature.

The Appeals Court also believed that this is an administrative law case, in its classic form, which made it necessary for the file to be passed to the Tribunal, which was the competent court, holding jurisdiction over the applicant's residence, on the basis of the provisions of Law no. 554/2004 and the rules of competence that it institutes. The reasoning provided by the court was that in no case could the situation be seen as similar to an arbitration procedure, that the document issued was an assimilated administrative document and had to be treated as such.

This option is also our own for the reasons that we will provide in the following.

4. The political party – an institution of civil or public law?

4.1. The political party – a citizens' association

According to the normative documents regulating the activity of political parties, there are several regulations that indubitably lead to this interpretation.

Thus, in accordance with the provisions of art. 1 of Law no. 14/2003, which we have otherwise underlined previously, "the political party is an association of political nature of Romanian citizens who are eligible to vote, who freely participate in the formation and exercise of their political will (…)."

According to art. 2 of Law no. 14/2003, "through their activity, political parties promote national values and interests, political pluralism, contribute to the shaping of public opinion, participate in elections with their own candidates and in the constitution of public authorities, and stimulate the participation of citizens in elections, in accordance with the law," aspects that lead us to think of both private matters and public matters, but do not, however, sufficiently extend the scale of political parties' definition to be able to speak of their falling exclusively within the scope of public law.

4.2. The political party – a public law institution

Art. 1 of Law no. 14/2003 however continues the definition which would lead us to identify the political party as a simple association of citizens by underlining the purpose of these associations which "fulfill a public mission guaranteed by the Constitution. They are legal persons governed by public law."

This definition must also be correlated with the provisions of art. 2 par. 1 letter b) of Law no. 554/2004 which establishes as a public authority "any state body or any body of the administrative territorial units acting as a public power for the satisfaction of a public interest; assimilated to public authorities, for the purposes of this law, are the legal persons governed by private law who, according to the law, have obtained the status of public utility or are authorized to provide a public service."

The definition of the notion of public interest is the one established in art. 2 par. 1 letter 1) of Law no. 554/2004, the interests that focus on legal order and constitutional democracy, on guaranteeing the fundamental rights, liberties and obligations of the citizens, the satisfaction of community needs, and the accomplishment of the public authorities' responsibilities.

Upon reading all of these legal norms that we have invoked earlier, it stands to reason, without a shadow of a doubt, that political parties are legal persons governed by public law, who serve a public interest and, thus, are and

can be subjected to the provisions of Law no. 554/2004 when the law allows for this or when all of the conditions established by this normative document are fulfilled in order to identify the context of a contentious administrative matter.

Starting from these definitions, it is obvious that political parties are and can be seen as public authorities, given that they are legal persons governed by private law and hold the status of public utility which is awarded to them by the law. (Tofan, 2005, pp. 90-103)

After having taken these aspects into consideration, it is clear that the documents that the parties can issue, through their various structures, denominated by case and statute, can be administrative documents or assimilated administrative documents, respectively administrative-jurisdictional documents. (Bogasiu, Legea contenciosului administrativ. Comentată și adnotată, 2015, pp. 122-124) Of course, as any other public authority, public institution or legal person governed by public law, it is obvious that political parties can also have legal relations that are governed by civil law, a fact that cannot be contested.

5. The decision of exclusion from the political party – a document assimilated to administrative documents

However, in order to establish the nature of a document issued by a party, which thus has the capacity of public law person, we must establish whether the issued document is subject to the provisions of art. 2 par. 1 letter c) of Law no. 554/2004, which defines the administrative document thus, "administrative document – the unilateral document that is individual or normative in nature, issued by a public authority in order to enforce or organize the enforcement of the law, generating, altering or terminating legal relationships". (Georgescu & Bîrsan, 2008, pp. 97-98)

Thus, concretely, it must be established whether, in this situation, the document is administrative or civil in nature.

In this context, we must concretely identify, if the documents challenged fulfill these conditions, what happens in the case of a document that serves as an exclusion from a political party of a person who is also a local elected official.

Thus, the party, a public law institution assimilated to a public authority, has issued a series of documents which are, evidently, unilateral.

Furthermore, these documents are, obviously, in this situation, administrative in nature, because exclusion from the party clearly leads to an indisputable consequence, which is tied to public interest, which generates, alters and terminates certain legal relationships, which all fall within the scope of public law, from the sphere of public administration: the termination of

one's capacity of local councilor, with all of its consequences. (Vedinaş, 2018, pp. 354-361)

The documents challenged in the lawsuit are not simple sanctioning texts issued by the political organization, because their tangible and direct consequence is the termination of the applicant's capacity of local councilor. (Roş N., Îndrumar practic legislativ pentru aleşii locali, 2015, pp. 145-147)

The main concern in the case is, obviously, public interest, which is tied to the applicant's capacity of councilor, and not the private law aspect, which entails that the challenged documents are perceived as issued by a public power, and that the lawsuit has to do with contentious administrative law.

Moreover, the other conditions related to the administrative document are themselves fulfilled.

Thus, the document is, evidently, unilateral, individual in nature, issued by a public power, enforceable without the need for any other manifestation of will on the part of the applicant, defendant or any other state institution. (Fodor E.-M., Drept administrativ, 2017, pp. 175-176)

In fact, this is one of the main characteristics which confer the exclusion document the status of an administrative document, as this trait of enforceability is specific to administrative documents. (Iorgovan, 2005, p. 52)

The purpose for the issuance is, obviously, the enforcement of the law, with the normative document of reference being Law no. 14/2013 itself.

We will not insist on the legal effects produced, because they have already been outlined, but we will remind the reader of the loss of the possibility to be elected, and, especially for those who have already been elected as local officials, the loss of this capacity. (Vedinaş, 2018, pp. 319-321, 360-361)

Under these circumstances, it would appear that we are dealing with a unilateral administrative document that only a contentious administrative court can address.

6. CCR Ruling no. 530/2013

We believe that this decision serves to add to the previous statements, being a supplementary argument for our thesis, and addresses the exception of unconstitutionality in the provisions of art. 16 par. 3 of Law no. 14/2003. The initial iteration of this article did not even provide for the possibility of remedy, and, as such, the persons affected by an action similar to the one in our case did not even have the possibility to appeal it.

The ruling does not expressly award competence to a certain court of law, but, upon reading the motivation behind it, it is clear that they perceive the appeal of the actions in question as administrative actions, as a problem that relates to public interest and the capacity of public power, as political parties are assimilated to public authorities regardless.

In the aforementioned ruling, the Court stated that "according to art. 8 par. (2) of the Constitution, political parties are constituted and carry out their activity in accordance with the conditions set forth by the law. They contribute to defining and expressing the political will of the citizens, respecting national sovereignty, territorial integrity, legal order and the principles of democracy".

The decision also similarly refers to the provisions of art. 1 and 2 of Law no. 14/2003, but also the legislations of other European states (Hungary, Portugal), which all regulate the same procedure of public utility in what concerns political parties.

In its reasoning, the Court also maintains that "At the same time, the dispositions of art. 37 of the Constitution, which provide for the right to be elected, must be corroborated with the dispositions of art. 15 par. (1) of the Constitution, according to which "the citizens benefit from the rights and liberties enshrined in the Constitution and other laws and have the obligations provided by them," and, thus, the local elected official must also benefit from their right to serve, without any hindrances, in the position that they have been chosen for through the votes of the electorate. Taking into account that, in the case of local councilors, without distinguishing whether the loss of membership of the party is or is not imputable, the measure of exclusion from the party produces an extremely serious judicial effect – the termination of the councilor's term, the Court maintains that the impossibility to contest such a measure, arranged without verifying whether the statute and statutory procedures were heeded, before a court of law goes against the right to access to a court of law and thus renders the stated rights devoid of their legal content guaranteed by a democratic state found under the rule of law."

Consequently, the Court's reasoning was built on administrative law grounds and underlined the clear character related to public interest, public office and membership of a local autonomous administration that the party member – judicial councilor has, which entails, as an additional argument, that the entire case is a contentious administrative law matter.

Obviously, this decision is legally binding for all courts of justice and for all of the institutions and rulings to follow.

7. The problem of jurisdiction

The solutions that can be reached by the courts are varied, and the practice is, obviously, not unitary. Thus, there are courts that can consider a matter such as the one that this study centers around to be subject to civil litigation, but there are multiple examples of courts of justice that can consider it to be administrative in nature.

Thus, Civil Sentence no. 103/2016 of January 27, 2016, passed by the Tribunal of Sibiu, the Second Civil Section, dedicated to contentious

administrative and fiscal matters stated that the lawsuit for the annulment of the documents for the exclusion from the applicant's political party was accepted.[1]

Civil Ruling no. 331 of 23.09.2014, passed by the Appeals Court of Craiova[2], established that the competence for resolving the lawsuit for the annulment of the documents excluding the applicant from their political party fell within the scope of the Contentious Administrative and Fiscal Section of the Tribunal, stating that „in this suit, the exclusion from the political party also led to the termination of the applicant's tenure as local councilor, the public interest prevailing over the private interest, as it is defined in art. 2 letter r of Law 554/2004: „r) legitimate public interest – the interest that focuses on legal order and constitutional democracy, the guarantee of citizens' fundamental rights, liberties and obligations, the satisfaction of community needs, the public authorities' accomplishment of their responsibilities," with the decision leading to the exclusion engaging a constitutional right – the right to associate, but also the accomplishment of a public authority's responsibilities.

The Court, while also basing its arguments on the definition of the political party as a legal person governed by public law, maintained that „it can be assimilated to a public authority, as it is defined in art. 2 letter b of Law 554/2004 „any state body or any body of the administrative territorial units acting as a public power for the satisfaction of a legitimate public interest." Given these reference points, and taking the provisions of art. 1 of Law 554/2004 into account, "Any persons who believes that they have been deprived of a right or legitimate interest by a public authority through an administrative document or through failure to resolve a claim by its legal deadline can address the competent contentious administrative court for the annulment of the document, the acknowledgment of said right or legitimate interest, and the rectification of any damage the applicant may have incurred as a result of said document."

The Joint Contentious Administrative, Fiscal, Labor Conflict and Social Security Section of the Tribunal of Cluj also, in numerous litigations, favorably resolved lawsuits for the annulment of political party-issued documents. For example, we can refer to Civil Sentence no. 2413/2015 of 07.07.2015, but also Civil Sentence no. 773/2015 of 06.03.2015[3]. We can also remind here the Civil Sentence no. 2340/18.05.2018 and the Civil Sentence no. 2344/18.05.2018, both by the Civil Section of Appeals Court of Bucharest.[4]

[1] Civil Sentence no. 103/2016 available at https://www.avocatura.com/speta/453135/anulare-act-administrativ-tribunalul-sibiu.html accessed on 23rd of February 2019, 20.00.
[2] Civil Ruling no. 331/2014 available at: https://www.jurisprudenta.com/jurisprudenta/speta-x3s5zx7/ accessed on 23rd of February 2019, 20.30.
[3] Both sentences are available at: http://www.rolii.ro/ accessed on 23rd of February 2019, 20.40.
[4] Both available on https://idrept.ro/DocumentView.aspx?DocumentId=00170908accesed on 9th of March 2019, 18.27, subscription required.

The Appeals Court of Cluj also went the same way, trying a similar litigation with file no. 6052/117/2017, addressing the nullity of the documents in a contentious administrative setting (the Civil Ruling No. 3882/2018 of 27 September 2018 by the Contentious Administrative and Fiscal Section of the Appeals Court of Cluj, unfortunately not available online).

Moreover, there are contradictions even within the same court. Thus, litigations where the annulment of the prefect's order issued subsequently to the decision of exclusion from the political party was requested saw some courts believing this claim to be unfounded (reasoning that the prefect could no longer carry out any verification concerning the issued documents).

Even so, the court underlined in the reasoning behind their ruling that they perceive a request to suspend the effects produced by the documents for the exclusion from the political party as a suitable remedy, which is not possible unless the court believes these documents to be administrative, since suspension, based on the provisions of Law no. 554/2004, is exclusively possible for administrative documents (Civil Sentence no. 388/2018 by the Joint Contentious Administrative, Fiscal, Labor Conflict and Social Security Section of the Tribunal of Cluj, upheld definitively by Civil Ruling no. 2209/2018 of April 4, 2018 by the Contentious Administrative and Fiscal Section of the Appeals Court of Cluj is a good reference in this sense, but not available online).

Conclusions

It is, thus, clear, from our demonstration, that both the legal provisions, and the manner in which Romanian courts interpret them are far from consistent.

It is clear that, as with any other institution or authority or legal person governed by public law, the political party can enter into relationships governed by civil law. Nobody is denying this aspect, which is more than transparent.

However, when confronted with the aspects presented in our demonstration, we believe that the decision to exclude a person from a political party, especially if said person holds a public office or was elected to a public office, can, obviously, no longer be perceived as a private law issue.

As long as such a decision affects the life of a public authority, regardless of which one it is, by establishing / creating a situation of incompatibility for said person or even through

Upon reading all of the abovementioned legal norms, it is without a shadow of a doubt that political parties are legal persons governed by public law, serving a public interest and who, consequently, are also subject to the provisions of Law no. 554/2004, when the law allows for it or when the conditions established by this normative text are fulfilled in order to fall within the scope of the contentious administrative sphere.

These definitions make it evident that political parties are and can be assimilated to a public authority, given that they are legal persons governed by private law and bear the status of public utility, which is given to them by the law. Given these aspects, it is just as evident that the documents that the parties can issue, through their various structures, denominated by case and statute, can consequently be administrative, assimilated administrative or, respectively, administrative jurisdictional documents, especially where the exclusion from the political party also leads to the termination of one's position as local councilor.

However, in order to establish whether the document issued by the party is administrative, we must establish whether the issued document is subject to the provisions of art. 2 par. 1 letter c) of Law no. 554/2004, which defines the administrative document as "the unilateral document that is individual or normative in nature, issued by a public authority in order to enforce or organize the enforcement of the law, generating, altering or terminating legal relationships."

In this context, when appealing the documents for the exclusion from a political party, we must concretely identify whether the appealed documents meet these requirements, which is obviously true in the analyzed situation.

Thus, the political party, an institution governed by public law and assimilated to a public authority, issues a series of documents which are, evidently, unilateral. Furthermore, these documents are, in our situation, administrative in nature, since the exclusion from the party clearly leads to an undisputable consequence, which is linked to public interest, generates, alters and terminates certain legal relationships, which all fall within the scope of public law, the sphere of public administration, namely: the termination of one's capacity of local councilor, with all of its consequences. Moreover, these exclusion documents are enforceable in themselves.

Documents to exclude a person from a political party cannot simply be deemed as sanctioning texts within the political organization, since their tangible and direct consequence is the termination of one's capacity of local councilor.

The main interest in cases such as this is, obviously, public interest, which is linked to the applicant's capacity of local councilor, and not the aspect of private law, which means that the challenged documents fall within the scope of public power, and that the lawsuit should be tried in a contentious administrative setting.

Another argument can be found in Decision no. 530/2013 of the Constitutional Court itself, which refers to the exception of unconstitutionality of the provisions of art. 16 par. 3 of Law no. 14/2003, which we have already mentioned, whose reasoning underlines the clear character at the basis of all

aspects that deal with the contentious administrative sphere. Evidently, this decision is legally binding for all courts of justice and all subsequent institutions or solutions, and thus, cannot be ignored.

We believe that, at least in the future, clearer regulation should be formulated for these aspects in order to avoid prolonging lawsuits due to the repeated deferments to other courts of justice deemed to be competent, and we also believe that the trial of these cases should be overseen by specialized courts, which possess a far better understanding of the purpose of the aspects related to the sphere of public law that this problem is linked to, and the courts in question are those that deal with contentious administrative matters.

Bibliography

Books, articles

1. Bîrsan, G.-V., Georgescu, B., (2008), *Legea contenciosului administrativ nr. 554/2004 adnotată.* 2 ed. Bucureşti: Hamangiu.
2. Bogasiu, G., (2015), *Legea contenciosului administrativ. Comentată şi adnotată.* 3 ed. Bucureşti: Universul Juridic.
3. Dragoş, D.C., (2005), *Legea contenciosului administrativ. Comentarii şi explicaţii.* Bucureşti: All Beck.
4. Fodor, E.-M., (2017), *Drept administrativ.* Cluj-Napoca: Albastră.
5. Iorgovan, A., (2005), *Tratat de drept administrativ.* 4 ed. Bucureşti: All Beck.
6. Roş, N., (2015), *Îndrumar practic legislativ pentru aleşii locali*. Cluj-Napoca: Presa Universitară Clujeană.
7. Tăbârcă, M., (2013), *Drept procesual civil. teoria generală.* Bucureşti: Universul Juridic.
8. Tofan, D.A., (2005), Modificările esenţiale aduse instituţiei contenciosului administrativ prin noua lege cadru în materie (I). *Curierul Juridic,* Volume 3, pp. 90-103.
9. Vedinaş, V., (2018), *Tratat teoretic şi practic de drept administrativ.* Bucureşti: Universul Juridic.

Sites

https://www.avocatura.com
https://idrept.ro/
https://www.jurisprudenta.com/jurisprudenta
http://www.rolii.ro/

THE RIGHT TO "GOOD DEATH" – A NEW RIGHT ALONGSIDE THE RIGHT TO LIFE?

Carmen-Oana MIHĂILĂ*

Abstract

"Neither will I administer a poison to anybody when asked to do so, nor will I suggest such a course." – The Hippocratic Oath

We are far from the moment when our country recognizes a right to death as the Netherlands, Belgium, Luxembourg, the USA (Oregon State), Canada, Finland, Argentina or Australia did, either in the form of active euthanasia or passive euthanasia.[1] However, medically assisted euthanasia and suicide are subjects as sensitive as real and generating many pro and con debates, involving areas such as law, religion, medicine or bioethics. Given that Europe has abolished the death penalty, as many European documents recognize the right of every person to life, there is a growing debate about the recognition of the right to die with dignity.

There are many questions to ask: Should the freedom of each person to decide for himself be considered in this context? Are we playing with fate?

As long as there are incurable diseases, diseases that take man's dignity, diseases that cause unbearable pain, euthanasia will remain a topical subject.

Keywords*: Euthanasia, ethical questions, the right to death*

JEL Classification*:* [K 15, K 38]

* Assistant Professor, PhD., Faculty of Law, Department of Juridical and Administrative Sciences, University of Oradea, Oradea.

[1] Euthanasia is considered active when committing acts of causing death (lethal injection, intravenous injection of air, inhalation of carbon monoxide). This is the most controversial and is accepted in very few states. Passive euthanasia consists in discontinuing or not granting treatment to cause the person to die (or stop feeding). The concept of passive euthanasia was abandoned in the modern age. Voluntary euthanasia (called the Dutch euthanasia model) is made at the patient's request. Euthanasia is not voluntary in the case of a patient with terminal illness or with unbearable pain that is unable, not capable to express their will. Involuntary euthanasia occurs without consulting the patient, although he or she has the capacity to make an informed decision. There is another form of ending a patient's life with the help of a non-physician, such as a relative. Several types of euthanasia are distinguished in medical literature: crypto-thanasia, medicathanasia, dystanasia, cryo-tanasia, economic euthanasia, eugenic euthanasia.

1. Liberation or murder?

Euthanasia can be defined as the process by which human life is stopped by some means due to the agonizing effects of a disease (generally no distinction is made between euthanasia and assisted suicide, the latter being considered passive voluntary euthanasia).

It conveys the idea of a noble and tranquil end (to the Romans *felicivelhonestamortemori*). The purpose of euthanasia is not to speed up death but to shorten the prolongation of the suffering of a sick person.

The intellectual debate concerning euthanasia, in terms of legal or medical ethics, or religion will probably last a long time.

We cannot determine for sure what would be the ultimate argument for accepting such a solution, but those who support it show that euthanasia, also from an economic and social point of view (social Darwinism), is a beneficial practice: the high cost of caring for such patients, the fact that society must eliminate those who can no longer contribute to its development from physical or mental causes, the compassion that we must have towards those who suffer from incurable diseases that cause them unbearable pain. How can we make the moral distinction between killing a person and letting them die?

The right to life is a fundamental right of man, protected by internal rules such as the Constitution or the Civil Code and the Criminal Code, but also by the Universal Declaration of Human Rights, the European Convention on Human Rights, the International Covenant on Civil and Political Rights, WMA Declaration of Tokyo, the Right to Life is inviolable.

In 2012, the Parliamentary Assembly of the Council of Europe approved Resolution 1859/2012 against Euthanasia (Protecting human rights and dignity by taking into account previously expressed wishes of patient), which states that regardless of whether it is accomplished through action or omission, euthanasia must be prohibited.[2]

But why would not there be a right to death? What are the boundaries of human suffering from which this process might interfere? Should every person's right to self-determination be as important as the right to life? Should each of us have a dignified death?

Everyone has the right to personal decisions, the right to act according to those decisions.

Imago dei, the association with human dignity, the right to dignity, regulated by the Romanian legislation in Art. 72 of the Civil Code must be seen in correlation with the fundamental right to life.

[2] http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=18064&lang=en.

The right to death can be considered a natural right of any person. Euthanasia can thus be considered an achievement of the right to life.

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." (Article 4, European Charter of Fundamental Rights, 2000)

2. History

Euthanasia is a concept that has quite different connotations depending on the historical period analyzed.

In mythology, euthanasia, the gentle, quick and painless death was seen as the most beautiful gift people could receive from the gods.

In order not to live a life full of senility, weakness and disease, the Greek elders used to drink a liquor called hemlock at a final festivity (Mystakidou et al., 2005).

The Greek poet Cratinus (5th century BC) uses the term in the sense of *dying a good death.* Other Greek comedy authors (Menander) use it to talk about a greedy man who enjoys so much life that he wants to die on the spot.

In antiquity, the Hippocratic tradition forbade the killing of a human being, including suicide aid, on the other hand, the current imposed by Plato or Aristotle imposed the idea of killing people who consume community resources in vain (the same fate should be for children with disabilities or seriously ill).

The Christians were advised to die in a noble manner (euthanatizein), as Eleazar (Old Testament priest). (Van Hooff,2004)

In the Law of the Twelve Tables, it was stipulated to kill children who were born with malformations.

In Sparta disabled children were left to die (Plato and Aristotle justified these practices for reasons of public utility). În Sparta copiii cu handicap erau lăsaţi să moară (Platon şi Aristotel justificau aceste practici prin motive de utilitate publică). Also, in India, the incurable patients were chocked with mud by the family and then thrown into the Ganges (Trifet al.,2002). In Hungary, in a village, the elders voluntarily retreated to a cave to commit suicide, so that the rest of the family survived the hunger.

The Christian Church represented by Thomas Aquinas and other authors of the Middle Ages considered suicide one of the most serious sins (he affirmed that *life is the property of God*).

Thomas More, in Utopia, considers the killing of the sick as *an act of wisdom, religious and holy*, a last option for the patients without hope of healing. He said that no one can be euthanized against their will and that euthanasia will be used only in medical desperate situations (Kuře, 2011).

The term *euthanasia*, translated by the phrase *good death*, is believed to belong to the English Renaissance philosopher, Francis Bacon, who in his

book Novum Organum (Novum Organum Scientiarum) treated the philosophical aspects of death (he supported the help given to the dying to have an easy death, and considered that medicine should contain information that should help people die easily and as naturally as possible).

In the philosophers' view, the term rather meant a painless or happy ending than the end of a sickness-stricken life.

David Hume, in his work *Of Suicide* (1783), criticizes the false religion that urges man to prolong a miserable existence in order not to offend God (Hume, 2011). In the same meaning, Friedrich Nietzsche introduces the idea of *dying at the right time*. His concepts have clearly influenced how euthanasia is seen today. Kant, on the other hand, claimed that suicide could not become a recognized element of universal law because it was against natural law.

Hippocrates, Cicero, or St. Augustine are the ones who have supported the importance of life and vehemently fought the idea of suicide and euthanasia.

In the Middle Ages even though life was considered sacred, euthanasia was nevertheless practiced in the case of tuberculosis or rabies patients (Trifet al., 2002).

In the 18th century euthanasia was seen as a sufferance suppressive science that helped the patient to die easily (the palliative care of today).

In the 19th century, professor Samuel Williams brought again the issue of euthanasia into discussion, suggesting the use of chloroform as a solution to shorten the lives of patients with terminal illnesses. The essay he wrote (*Euthanasia*, 1872) in this sense influenced those times. Euthanasia became a subject of controversy, as it is today only at the end of the 19th century. In the 20th century eugenics has become an instrument through which the *pure race* could be achieved (starting with the killing of people with disabilities).

During the Second World War, Hitler imposed a program to eliminate *life unworthy of life* (Lebensunwertes Lebens). The eugenic concept was masked under the name of euthanasia (more than 100,000 of people with mental illnesses were thus killed) followed by the Aktion T4 program in which euthanasia was used not only in newborns with medical problems but also in chronic, incurable, homosexual patients, Gypsies, or Jews[3]. Hitler saw euthanasia as a release by death. Probably the term extermination is more correct for these practices than euthanasia.

Professors Karl Binding and Alfred Hoche published the work *Die Freigabe der VernichtunglebensunwertenLebens* (*Allowing the Destruction of Life Unworthy of Life)* which laid the foundations for the pro-euthanasia movement in Germany.

[3] In 1945, it was estimated that the number of those killed reached 200,000.

In 1980, Pope John Paul II issued the "Declaration on Euthanasia", stating his opposition to euthanasia.

Jacques Monod, Linus Pauling, George Thomson, Nobel Prize winners have become supporters of the phenomenon, showing that the dignity of man is important, that no ethics can stop the individual from ending his life if the disease cannot be cured by therapeutic methods known.

The advances in medicine (antibiotics, palliative care, transplantation, cardiac resuscitation, life-support machines) have made euthanasia no longer seen as before, but the quality of life of the suffering person has been raised.

3. The reality of today

Euthanasia is legal in the Netherlands, Belgium, Canada, Luxembourg, and assisted suicide in the Netherlands, Canada, Switzerland, Luxembourg and some US states. In *Islam*, euthanasia is considered a crime. Similary in *Italy*, *Romania, Serbia, Ireland* or *Poland*.

The first legislative regulation dates back to 1906, Ohio. The legislative proposal, *An Act Concerning the Administration of Drugs to Mortally Injured and Diseased Persons*, was initially rejected by the state legislature.

In 1935, *The Voluntary Euthanasia Legalization Society*, now called *Dignity in Dying*, was established in the UK; it fought for the legalization of euthanasia in this country. Ever since past times we were talking about euthanasia. Lord Dawson of Penn, the doctor of King George V used to administer the king a substance (cocaine and morphine) to get rid of the pain caused by the incurable disease he suffered[4]. In 1961, the *Suicide Act*[5] emerges whereby any act which encourages or assists the suicide or attempted suicide of another person is considered an offense.

In 1980, the first suicide guide in the world, *How to Die with Dignity,* is published here. Today, in practice, there are few cases of criminal prosecution. Most of the British who resort to euthanasia or assisted suicide are traveling to Switzerland[6] for this. In 2013, the *Commission on Assisted Dying*published a document to legalize assisted suicide in England and Wales.

Pro-euthanasia societies: Dignity in Dying, My Death My Decision-MDMD, in Scotland, Voluntary Euthanasia Society of Scotland -VESS.

In *Belgium*, euthanasia has been legalized since 2002[7]. The provisions of the law were extended in 2013 to the case of sick children. In 2013, there were 1807 cases. In 2014, age requirements for euthanasia were abolished.

[4] https://en.wikipedia.org/wiki/Bertrand_Dawson,_1st_Viscount_Dawson_of_Penn.
[5] http://www.legislation.gov.uk/ukpga/Eliz2/9-10/60.
[6] http://www.drze.de/in-focus/euthanasia/legal-regulations.
[7] http://www.ejustice.just.fgov.be/eli/wet/2002/05/28/2002009590/staatsblad.

In *the Netherlands*, in 1969, the article of physician Van den Berg, *Medischemacht en medischeethiek* (Medical Power and Medical Ethics) advocated voluntary and involuntary euthanasia for elderly or those suffering from dementia.

There is a high standard of health in this country, therefore euthanasia cannot be seen as a choice to avoid the patient being a burden to the family or the state, and no source of income for doctors (Peter & Şamotă, 2008). Although law banned euthanasia in 2001, the Dutch courts of justice have accepted these practices in many cases. It has been shown in the courts' reasoning that the solution was inevitable due to the agony of the patients who were dying. As in other countries where euthanasia is allowed, some conditions are required to resort to this solution: the patient is terminally ill, has no chance of healing, has terrible pains that cannot be alleviated, the aim is suppressing the patient's pain, be done by a physician only, and be done through an ethically accepted method.

In 1990 a commission was set up in the Netherlands to investigate cases of euthanasia. Thus, the Remmelink Report (after the name of the General Prosecutor Jan Remmelink) was drawn up revealing that there were 2300 cases of euthanasia. However, the same committee found from interviews with doctors that there were 20,000 cases where euthanasia occurred without the patient's express consent[8].

In 1995, the Dutch Justice Ministry showed that 0.7% of the cases of euthanasia and assisted suicide were without the patient's request.

Research has shown that the number of euthanasia cases has not increased since it was legalized in 2002. The percentage of people who died through active euthanasia is 6.9% - 475 out of 6861 in 2010, comparable to 1995 or 2001.

Children aged 12-16 can request euthanasia, but only with the consent of their parents[9].

It is not mandatory for the patient to be in the terminal state. The case of euthanasia is notified to the public prosecutor.

Pro-euthanasia societies: The Dutch Federation for Voluntary Euthanasia.

In the *USA* it is illegal in most states. There are no uniform regulations on euthanasia.

In 1997 *California Natural Death Act* was adopted in California, by which the patient was able to write a document called *living will* authorizing

[8] ERLC (The Ethics&Religious Liberty Commission), *How the "right to die" came to Europe (Part I)*, 4th Sept. 2014 on https://erlc.com/resource-library/articles/how-the-right-to-die-came-to-europe-part-i.

[9] In 2004, the Academic Hospital in Groningen proposed a Protocol that allows doctors to legally euthanize children under the age of 12 if there was no hope of healing for them.

the refusal to receive treatment for prolonging life when the end was near. Under these circumstances, the doctors who participated in such practices were not punished.

In 1997, Oregon became the first state to legalize euthanasia for patients with poor prognosis in the short term. Washington, 10 years later, in 2008, adopts a law on dying with dignity. People with a life expectancy of less than 6 months may require and may administer their lethal medications prescribed by the physician. The *living will* (*a document for the recognition and legalization of euthanasia*) is accepted in most states. Medically assisted suicide is also allowed in Columbia. Starting with 2019, assisted suicide will be allowed in Hawaii under comparable conditions to Oregon. In Montana, assisted suicide is not a right recognized by the Constitution, but a Supreme Court ruling states that a patient with a terminal illness can be helped in committing suicide, that is he may require and receive lethal medications from his/her physician. In Vermont, physician-assisted suicide has been allowed since 2013.

Pro-euthanasia societies: Compassion in Dying.

In *Canada*, voluntary euthanasia became legal in 2016 with the adoption of the Bill C-14[10] (not legal in the case of minors or mentally ill people). The regulation was based on a decision by the Supreme Court of Canada in 2015, Carter v Canada, which decided that mentally capable adults and suffering from an incurable disease can receive help in death. In legal regulation, the term euthanasia is not used, but the term medical aid in dying.

In Luxembourg euthanasia has been legalized since 2009[11]. In this country too certain conditions are imposed for the act of euthanasia: the patient must be elderly and have a disease without hope of healing, have physical or mental pain that cannot be kept under control. There must be the express, written request of the patient. Children between 16 and 18 years of age cannot be subject to the procedure unless their parents have given their consent. The cases should be reported to a review board that reviews the compliance with the legal requirements.

In France, in 2005, a law[12] was adopted on the rights of the sick and the end of life, allowing any adult person to make decisions about their end beforehand if they cannot express their will (this agreement must be done with at least 3 years before becoming incapacitated). These decisions are revocable.

[10] http://www.parl.ca/DocumentViewer/en/42-1/bill/C-14/royal-assent.

[11] Loi du 16 mars 2009 sur l'euthanasie et l'assistance au suicide http://legilux.public.lu/eli/etat/leg/loi/2009/03/16/n2/jo.

[12] LOI n° 2005-370 du 22 avril 2005 relative aux droits des malades et à la fin de vie on https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000446240&categorieLien=id.

Thus, discontinuation of treatment at the patient's request in the case of incurable disease is no longer punishable by law. Active euthanasia is prohibited by law. In 2016, another law allows continuous and profound sedation of people suffering from a disease that would certainly cause their death[13].

In Switzerland the ban on euthanasia is not explicitly regulated. However, active euthanasia is considered a crime. Passive euthanasia, also the assisted suicide by patients who administer lethal drugs to themselves (the person must suffer from a lethal illness, be over 18 years of age and in sound mind) are allowed.

The National Advisory Committee on Biomedical Ethics (NEC) has delivered an opinion on assisted suicide, establishing in 2006 the conditions to be met by these demands (severe suffering caused by a serious illness, the decision should not be impulsive, there should be no external pressure). Society for euthanasia: EXIT (Self-determined living and dying), Dignitas (To live with dignity).

Pro-euthanasia society: EXIT (Self-determined living and dying), Dignitas (To live with dignity - to die with dignity).

In Germany, the term euthanasia is used to designate Nazi horrors, while the term sterbehilfe is the right one for the commonly used meaning. Although suicide is not punishable by law, the physician-assisted or physician-induced euthanasia is not allowed. In 2004 the German Medical Association adopted several principles that were revised in 2011 on assisting suicide of terminally ill patients (these are actually measures aimed at accelerating the death process, not killing a person). In 2009, the Law on Previous Decisions was adopted (Wiesinget al., 2010). The *living will*, known from the American doctrine, designates a document by which the adult people decide on their end. Previous decisions on medical treatment should be complied with regardless of the stage of the disease. According to the German Civil Code, these decisions must be made in written form. The doctor is the one able to determine if the patient's decision can be applied in the particular situation in which they are. However, no medical procedure can be done against the patient's wishes. However, it cannot be equated with assisted suicide.

Pro-euthanasia society: The German Society for Dying with Dignity (Die deutsche Gesellschaftfür den menschlichenTod).

In Israel, passive euthanasia was declared legal by the Supreme Courtand the active one illegal.

In Australia, euthanasia is illegal. However, assisted suicide is practiced. The Rights of the Terminally Ill Act is a law that has recently legalized

[13] LOI n° 2016-87 du 2 février 2016 créant de nouveaux droits en faveur des malades et des personnes en fin de vie, JORF n°0028 du 3 février 2016 on https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000031970253&categorieLien=id.

euthanasia in the Northern Territories of Australia. In 2019 in Victoria the Voluntary Assisted Dying Bill 2017[14] will come into force.

Pro-euthanasia society: SAVES (South Australia Voluntary Euthanasia Society).

In Denmark only passive euthanasia is accepted to patients in vegetative state or coma.

In Japan, although it is illegal, the court has established the conditions under which mercy killing is possible.

In Argentina, passive euthanasia is legal. Same in India.

In Sweden, the assisted suicide is legal, not euthanasia.

In Romania, the Criminal Code of 1936 provided in Art. 468 that "he who kills a man, following his earnest and repeated supplication, commits the crime of murder upon request and is punished with a heavy prison from 3 to 8 years. The same punishment applies to the one, who determines another to commit suicide, or strengthens his decision to commit suicide, or facilitates, in any way, the execution if the suicide has taken place. The penalty is the correctional prison from one to five years, when the act was done under the conditions of the preceding paragraphs, under the impulse of a feeling of mercy in order to end the physical torment of a person suffering from an incurable disease and whose death was inevitable from that cause."

Article 190 of the New Criminal Code states that "the murder committed at the explicit, serious, conscious and repeated request of the victim suffering from an incurable disease or from a serious disability medically confirmed, causing permanent and difficult suffering is punishable by imprisonment from one to five years. " Thus, euthanasia is incriminated as a separate deed and not as a qualified murder. Also, "the act of determining or facilitating the suicide of a person, if the suicide occurred, shall be punished by imprisonment from 3 to 7 years."

The code of medical deontology of the College of Physicians in Romania[15] prohibits in Art. 22 the practice of euthanasia. However, a relatively recent study shows that a fairly high proportion of physicians (35%) believe that euthanasia should be legalized in Romania as well (Deaconescu, 2005).

A study (Moroşanuet al., 2008) carried out at the Faculty of Medicine of Braşov showed that the number of people who disagree with euthanasia is higher than that in favour, but that it is acceptable only if the patient requests it (over 1/3 of the respondents). The biggest obstacle to accepting euthanasia is ethical, following the legal one.

[14] http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/f932b66241ecf1b7ca256e92000e23be/B320E209775D253CCA2581ED00114C60/$FILE/17-061aa%20authorised.pdf.

[15] The Official Gazette, Part I no. 981 of 07.12.2016.

4. Euthanasia cases

In 1976, the Supreme Court of the State of New Jersey allowed the parents of a girl, Karen Ann Quinlan, to disconnect her from the life support device which was keeping her alive, claiming that she would have wanted it (a decision recognizing the right to die yet not establishing a national orientation in this respect, but leaves it to States to determine their own conditions)[16]. The Quinlan case is a prototype of a medical and juridical battle that lasted for eight years. The girl died in 1988.

Another case of the right to die is Cruzan (by her parents and co-guardians) v. Director, Missouri Department of Health of 1990. In the case, the court states that the right to death is not governed by the Constitution. The Court asserts the patient's right to refuse or discontinue the medical treatment that keeps him/her alive. Only one month after the decision of the Supreme Court of Cruzan, the Society for the Right to Die received about 300 000 requests in advance (Lewin, 1990).

In the case of Pretty v. The United Kingdom)[17], on the one hand, asserted that the right to die is a corollary of the right to life. The claimant was paralyzed and suffered from a degenerative disease of the nervous system. Her life expectancy was very low. She has asked the Court not to prosecute her husband, who will help her commit suicide, relying her request on the European Convention on Human Rights, in particular the right to self-regulation provided by Art. 2. In conclusion, the Court decides that the provisions of the Convention have not been violated. It has also been argued in the present case that, in this case, the Court is not prepared to exclude the premise that it constitutes an interference with the person's right to respect for private life.

In 1993 the Bland Case took place. The House of Lords considered that the prolongation of life by artificial feeding was not beneficial to Tony Bland who was in a persistent vegetative state. The removal of the artificial feeding tube was considered to be just an omission - for the patient's best interest.

In 1997, in Scotland, Paul Brady helped his brother to commit suicide and admits the deed of murder. The Scottish Council admonished him but let him go.

In Haas v. Switzerland[18], the court rejected the request of a person suffering from bipolar disorder affirming that the right to one's own death could not be inferred from the provisions of the European Convention on Human Rights (Art. 8).

---

[16] https://www.uta.edu/philosophy/faculty/burgess-jackson/In%20re%20Quinlan,%2070%20N.J. %2010,%20355%20A.2d%20647%20(1976).pdf.

[17] CasePretty v. UK, European Court of Human Rights, 2346/02 of 29 April 2002. https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-60448%22.

[18] Case Hass v. Switzerland, European Court of Human Rights, 31322/07, 20 January 2011, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-102940%22.

In the case Gross v. Switzerland[19], Mrs. Gross requested the Administrative Court of the Canton of Zurich to declare that her rights under the Convention were violated in relation to the decision to die. The Federal Supreme Court rejected the applicant's claims, showing that she did not meet the conditions set out in the guidelines on medical ethics of patient care at the end of life adopted by the Swiss Academy of Medical Sciences, because she was not suffering from a terminal illness, but expressed her desire to die because of her advanced age and increased fragility. Thus, the Court ruled that the assisted suicide of the claimant is not medically justifiable, even though she considers that the concept of private life within the meaning of Art. 8 of the Convention also includes the right to self-determination.

In most cases, the ECHR ruled that there cannot be any discussion on the right to die.

Conclusions

It can be said that both camps are fighting for dignity, humanity.

Against:

It is a violation of the right to life.

If euthanasia is legalized, we cannot help wondering if it were possible to kill some sick people who did not want to die. Elders, people with disabilities, infirm children could be the subject of a death deliberately accelerated (Van der Maas et al., 1996)[20]. This phenomenon could get out of control.

Is compassion for the sufferers a reason that would make us accept this practice more easily? If it is illegal and immoral, what is the place of compassion in this ensemble?

From an economic and social point of view, the slaughter of a person in society, that is, of a part of the whole, cannot have a real justification.

Physicians who should put this solution into practice are primarily aimed at helping the patient, prolonging his life and not shortening it.

Furthermore, it is considered that the patient's decision cannot be a conscious decision because of the strong medications he/she takes for the pain. Most patients in the terminal phase suffer from depression that clearly influences their decision.

There are proposals in the sense of accepting euthanasia in the case of people simply *tired of life*, not necessarily ill in the terminal phase. It is stated that usually the desire to resort to euthanasia comes from people suffering

[19] Case Gross v. Switzerland, European Court of Human Rights, 67810/10, 14 May 2013, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-119703%22.

[20] It was revealed in a report published in the Netherlands that about 0.7, 0.8% of euthanized people did not give their approval to this procedure.

from depression. Moreover, they could use euthanasia precisely to avoid the degrading process of aging (Noje, 2018)[21].

If a criterion were the incurable disease, then any incurable disease allows euthanasia? Then diabetes which is the most well-known would be among these diseases.

If the will of the person were a criterion, then any act of suicide would be considered euthanasia.

The family may commit abuses in this regard either for financial reasons or because they are no longer mentally or physically capable of caring for the patient.

Corruption in the health system can lead to other abuses.

Some patients took enough time to die, even a few days, as death is said to be quick and easy. There have been more problems in the case of doctor-assisted suicide than in euthanasia (the impossibility of inducing a rapid coma, the awakening of the patient) (Groenewoud et al., 2000).

The emergence of palliative medicine makes euthanasia lose its followers.

Once the idea of euthanasia is accepted, there is no way to return.

In favour

The right to dignity, free will must be respected. The finality of an incurable patient is predictable, either over a month or four. Many patients want to make this decision while they are still rational. Life deserves to be lived only as long as you can enjoy it, until the man becomes a burden for others.

The compassion for the patient who suffers and who knows he/she does not have much to live wants to avoid the torment until the end.

The quality of life is very important from the point of view of the teleological approach.

Drugs that make unbearable pain pass, aggressive and invasive treatments often cause other conditions, have many side effects, states of delusions, hallucinations that are as awful as pains.

Even if it is totally forbidden in Romania, some people who have material resources can resort to this procedure in another state, which can give rise to *suicidal tourism*.[22] That is why, within a legal framework, these situations could be more easily controlled.

The specialists have lately used the term "*therapeutic stinginess or stubbornness*" (Stănilă, 2014) that would mean keeping a patient who has no chance of healing artificially alive.

[21] Hedonistic culture, the idolatry of bodily beauty, make people unwilling to take on the burden of suffering, by accepting death more easily through euthanasia.

[22] ARDOR (Asociaţia română de dezbateri, oratorie şi retorică – Romanian Association of Debate, Oratory and Rhetoric N.T.), *Motivation: Legalization of euthanasia in terminally ill patients is justified.* http://www.academiadedezbateri.ro/uploads/dezbatere_demonstrativa.pdf

Once legalized, doctors would no longer be guilty or their alleged offenses incriminated. Moreover, the request would only come from the patient. By administering lethal drugs, it is considered that the physician only acts to the benefit of the patient.

The suicide is not legally incriminated.

Abuses will be easier to control if there were a legal framework.

Innovative treatments that may appear will certainly not be given to those patients who have six months to live.

It is argued that the request not to resuscitate cardio-pulmonary or not to accept dialysis in case of renal insufficiency in terminal stage cannot equate the meaning of euthanasia. It is also considered that in the context of palliative care (stopping treatment, almost permanent sedation), it is no longer possible to talk about passive euthanasia (Materstvedt, 2003)[23].

The system of values different from individual to individual and morality will still make euthanasia a social, political and legislative challenge.

Bibliography

Books

1. Trif, A.B., Astărăstoae, V., Cocora, L., (2002), *Euthanasia, suicidul asistat, eugenia: Pro versus contra: Mari dileme ale* umanităţii. Bucureşti: Infomedica.

Journals

1. Deaconescu, C., (2005), Eutanasia în proiectarea sa multidisciplinară. *Revista română de bioetică*. vol. 3, Issue 4, october –december.
2. Groenewoud, J.H. et al., (2000), Clinical Problems with the Performance of Euthanasia and Physician-Assisted Suicide in the Netherlands, *The New England Journal of Medicine*, vol. 342, Issue 8, Massachusetts Medical Society, 551.
3. Hume, D., (2011), Essays on suicide, and the immortality of the soul. Josef Kuře, *Good Death Within Its Historical Context and as a Contemporary Challenge: A Philosophical Clarification of the Concept of "Euthanasia*, *InTech*, 18.
4. Kuře, J., (2011), Good Death Within Its Historical Context and as a Contemporary Challenge: A Philosophical Clarification of the Concept of Euthanasia. *InTech*, 15.
5. Moroşanu, M., Gherghe, R., Rogozea, L., (2008), Eutanasia - o problemă a lumii moderne...?. *Jurnal Medical Braşovean*. Issue 2, supplement, p. 196-197.
6. Mystakidou, K., Parpa, E., Tsilika, E., Katsouda, E., Vlahos, L., (2005), The Evolution of Euthanasia and Its Perceptions. *Greek Culture and Civilization, Perspectives in Biology and Medicine*, Vol. 48, Issue 1. Johns Hopkins University Press, pp. 95-104.
7. Noje, C., (2018), Eutanasia între legitimare şi contestare. Trei argumente în favoarea eutanasiei şi evaluarea lor din perspectivă teologică. *Tabor*, Issue 9, 51.

[23] Lars Johan Materstvedt et al., *Euthanasia and Physician-Assisted Suicide: A View from An EAPC Ethics Task, European Journal of Palliative Care*, Vol. 10, No. 2, 2003, p. 98, https://journals.sagepub.com/doi/10.1191/0269216303pm673oa.

8. Peter, T., Şamotă, I., (2008), Eutanasia. Pro şi Contra. *Jurnal Medical Braşovean.* Issue 2, supplement, pp. 198-200.
9. Stănilă, L., (2014), Obsesia terapeutică. Pro şi contra eutanasiei – noi provocări ale legislaţiei româneşti. *Analele Universităţii de Vest Timişoara, Seria Drept*, Issue 2, 31.
10. Van Hooff, A.J.L., (2004), Ancient euthanasia: 'good death' and the doctor in the Graeco-Roman world. *Social Science & Medicine*, 58, 976.
11. Van der Maas, P. et al., (1996), Euthanasia, Physician-Assisted Suicide, and Other Medical Practices Involving the End of Life in the Netherlands, 1990–1995. *New England Journal of Medicine*, Vol. 335, 1700.
12. Wiesing, U., Jox R.J., Heßler H.J et al., (2010), A new law on advance directives in Germany, *Journal of Medical Ethics*, 779.

Websites, newspaper articles

1. Tamar Lewin, *Nancy Cruzan Dies, Outlived by a Debate Over the Right to Die***,** The New York Times, 27 Dec. 1990. https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-60448%22
2. ERLC (The Ethics&Religious Liberty Commission), *How the "right to die" came to Europe (Part I)*, 4 sept. 2014. https://erlc.com/resource-library/articles/how-the-right-to-die-came-to-europe-part-i.
3. Eutanasia şi sinuciderea asistată. Raport comun al medicilor. (Euthanasia and assisted suicide. Joint report of physicians. N.T.). https://www.provitabucuresti.ro/docs/bioetica/eutanasia.sinuciderea.asistata.pdf.
4. ARDOR (Asociaţia română de dezbateri, oratorie şi retorică – Romanian Association of Debate, Oratory and Rhetoric N.T.), *Motivation: Legalization of euthanasia in terminally ill patients is justified.*
5. http://www.academiadedezbateri.ro/uploads/dezbatere_demonstrativa.pdf.
6. http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=18064&lang=en.
7. https://en.wikipedia.org/wiki/Bertrand_Dawson,_1st_Viscount_Dawson_of_Penn.
8. http://www.legislation.gov.uk/ukpga/Eliz2/9-10/60.
9. http://www.drze.de/in-focus/euthanasia/legal-regulations.
10. http://www.ejustice.just.fgov.be/eli/wet/2002/05/28/2002009590/staatsblad.
11. http://www.parl.ca/DocumentViewer/en/42-1/bill/C-14/royal-assent.
12. http://legilux.public.lu/eli/etat/leg/loi/2009/03/16/n2/jo.
13. https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000446240&categorieLien=id.
14. http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/f932b66241ecf1b7ca256e92000e23be/B320E209775D253CCA2581ED00114C60/$FILE/17-061aa authorised.pdf.
15. https://journals.sagepub.com/doi/10.1191/0269216303pm673oa.

TACTICAL RULES USED TO HEAR OFFENDERS IN THE CASE OF CYBERCRIMES

Adrian-Cristian MOISE*

Abstract

The paper presents and analyses some of the forensic tactics used by investigators in cybercrimes hearing procedures.

Since cybercrimes have a cross-border character, investigators must use both notions in the field of forensic tactics, as well as notions in the field of information and communication technology.

Keywords: *cybercrimes; forensics; investigator; tactical rules*

JEL Classification: [K 14]

1. Introduction

Given the particularities of committing cybercrime, the hearing of the suspect or defendant person must be carefully prepared, taking into consideration the perspective of a psychological dispute between the investigator and the offender in order to establish the truth, the existence or not of the criminal offence.

The active subject of cybercrime is an individual, often with an advanced training in the field of computer science, which makes it difficult to investigate cybercrime.

2. Prepare the hearing of offenders in the case of cybercrimes

2.1 Studying existing materials or data

The study of the material of the cause, as well as the whole preparation of the hearing, is carried out with maximum *emergency* and *promptness*, the dominant tactical rule in trying to solve cases with cybercriminals.

On the forensic tactical plan, the study of the case materials involves knowing the data on the manner and circumstances in which the deed was committed, the evidence existing at that time on the file, the participants, the

* Associate Professor, PhD., "Spiru Haret" University of Bucharest, Faculty of Juridical, Economic and Administrative Sciences, Craiova, Romania; Attorney-at-law, Dolj Bar, Romania.

injured person, witnesses, data to be completed, confirmed or also verified by the cyberspace offender's statements (Stancu, Moise, 2014, p. 237).

2.2. Knowing the personality of the cybercrime offender

This tactical requirement has a direct, immediate impact on the establishment of listening tactics, serving to further outline the subjective side of cybercrime.

The main elements that lead to defining the personality of the cybercrime offender are the following: the personality traits, such as the character, the temperament and the skills; the factors that have influenced or conditioned the somatic and mental evolution (speech, walking) and social evolution of cybercrime offenders, such as the family or social environment in which he/she evolved and formed, the circle of friends, the level of intelligence, the possible criminal antecedents, relationships with other participants in cybercrimes or with the victim.

All this data can be obtained from the study of the material of the cause, from the information gathered from the workplace, from the domicile, from the witness statements, from the investigation of the criminal record, as well as from the preliminary discussions with the cybercrime offender.

2.3. Drawing up the hearing plan

The preparation to hear the cybercrime offender will materialize in a *hearing plan*, drawn up for each individual offender. It will contain the problems to be clarified and the succession of their approach, the background or detail questions to which the heard offender will have to answer, the materials that will be presented to him/her.

The planning of the hearing must be of a flexible nature, which will also lead to the possibility of adapting, modifying or formulating new questions about the investigated deed and the person of the author of the cybercrime offence (Stancu, Moise, 2014, p. 239).

2.4. Organization of the way to conduct the hearing of cyberspace offenders

The interrogation mode falls within the general criminal prosecution plan drawn up in a particular criminal case and which contains the versions, the problems to be clarified, the tactical methods used, the order of carrying out the various procedural activities, as stated above.

From a tactical point of view, the organization of the hearing involves: accurately establishing the problems to be clarified at the hearing, as well as the data to be verified on this occasion; preparing the evidence material to be used during the hearing, such as, for example, material means of evidence,

photographs, various recordings; determining the order in which the hearing will be made, so that if there are more cybercrime offenders, there will at first be heard those who have more data, or those who make honest and complete statements; establishing the summoning modality, the date, the time and the place where cybercrime offenders are to be present for the hearing; the order and the modality of summoning must be conceived so as to avoid, at least in the first hearing phase, the contact between the various persons concerned, especially in the case of several suspects or defendants, witnesses, injured parties, civil parties.

3. Actual hearing of the cybercrime offenders

According to the provisions of the Articles 107-110 of the Romanian Criminal Procedure Code, the hearing of the cybercrime offender is carried out in three main stages: checking the identity of the cybercrime offender, the hearing of the cybercrime offender in the free account phase and in the asking questions phase, followed by the recording of statements.

At this time, previously prepared, they proceed to the direct application of the forensic tactical rules of hearing, depending on the particularities of each type of cyber offender, on the personality of the person being heard.

It is necessary that all persons on the spot be identified and heard one after the other, whether they are eyewitnesses, perpetrators, injured persons, representatives of injured individuals or legal entities, other persons who know the data of interest for the investigation, in order to clarify certain problems, such as (Moise, 2011, p. 232-233):

- the identity of the owner and of the persons entitled to operate in the information system and with data relevant to the investigation of offenses against data and information systems;
- passwords and other ways of crossing access barriers;
- the purpose in which the information system is used;
- devices, programs, tools used to secure the computer system, for data destruction or hiding, or scheduled self-destruction;
- use of the information system for purposes other than those authorized by law or contract;
- measures taken to secure the space in which IT systems operate;
- persons with tasks related to the prohibition of access to and abuse operation of information systems and how they have performed their tasks;
- the main threats to the security of computer systems and data that have been the subject matter of the illicit activity;
- identifying hidden folders by a special program; these folders are only visible after typing certain keys, entering certain passwords, etc.

- any explanatory documentation relating to the hard disk or software installation system;
- other events or indications of suspicion encountered in the operation of the information system.

During the on-site investigation in the case of cybercrimes or computer search, if the cybercrime offender is present, the prosecution must prevent any access of him/her to the computer system. Especially, if the cybercrime offender has a superior IT training, he may wilfully alter the data on his/her computer system, without the investigators being aware of it.

The suspect's computer system may contain some commands that can cause the data loss, commands that can be concealed under the name of some usual commands of the operating system used.

From people present at the on-site investigation and at the computer search or from other people who are familiar with the operation of the computer system, important information can be obtained. Each witness should be interviewed on how seized computer systems are used (Pintea, 2005: 35). Data entry, sorting and storage methods on the computer, as well as practices related to various aspects of its current use are relevant.

In some special situations, the computer systems of other people located in the same location may have relevant evidence. For example, there are cases where relevant documents were found in the IT systems of the secretaries of the investigated persons.

2. 4. Tactical procedures used in hearing of the cybercrime offenders

The determining role in the choice of tactical procedures is represented by the position of the computer offender against the accusation brought to him, by the attempts to dissimulate the truth and his/her psychic structure.

In the assumption of recognition and of sincere and complete statements, no special tactical problems are raised, the questions referring only to some clarifications or additions. In the case of the cybercrime offender's refusal to make statements, the judicial body must, through the tactical procedures used, find out the reason for the refusal and try to persuade him/her to give up this attitude.

Difficulties arise in the case of false, incomplete, contradictory statements, in the case of rejecting the accusation, persisting in refusing to make statements or returning with new elements to previous statements. In these cases, the hearing tactics acquire a very complex character.

The forensic tactics has developed some tactical hearing procedures, procedures whose effectiveness has been demonstrated by the positive practice of judicial bodies.

The following tactical procedures are known in the literature (Stancu, 2011, p. 234-236):

- Repeated hearing

The tactic of the repeated hearing is used, in particular, for incomplete, contradictory and misleading statements.

This process consists of repeatedly hearing of the cybercrime offender about the same facts and circumstances, about the same details. Taking place at certain time intervals, there will inevitably be contradictions, inconsistencies, inaccuracies between statements of the cybercrime offender, with all the attempts to reproduce those previously reported.

The details cannot always be set, they cannot be repeated, with all the preparations made in this respect by the heard offender. Thus, these contradictions must ultimately be explained by him/her, thus demonstrating the unsubstantiated nature of his/her previous affirmations, being thus determined to recognize the truth.

- Cross-hearing

The tactic of cross-hearing consists in questioning the cybercrime offender by two or more investigators at the same time. This procedure, which aims at breaking down the defence system of the investigated one, which is in the position of total negation of the committed deed. The advantage is that the cybercrime offender is not given the opportunity to prepare false answers, the questions being addressed by each investigator alternately at a sustained and alert pace.

In order for this tactical interrogation procedure to be effective, the position occupied by the two investigators must be front and side left or right and slightly backwards so that they are not visually observed by the cybercrime offender, causing it not only to listen to the question, but to return to the sound source, which contributes to the disorganization of the defence.

A variant of cross-hearing is the successive hearing by two persons. Both tactical procedures are based on the idea that cybercriminals may become more communicative towards one of the investigators.

Through this procedure, the accused person/defendant is asked through the questions to systematically clarify how he conceived and prepared the offence, who were the participants and how they acted, etc. If the suspect/defendant has committed several crimes in relation to his/her personality and psychology, the criminal investigation body will determine whether or not the hearing will begin in relation to the simplest or the most serious crime.

When there are more cybercrime offenders, each should be heard both on their own activity and separately on each participant's activity.

- Systematic hearing

This method is used in the case of the honest cybercrime offender to help clarify all the problems of the cause, especially in complex cases with a high degree of difficulty, as well as in the case of the cybercrime offenders who are insincere, refractory, to compel them to give logical, chronological explanations, successive in all aspects of the offence charged.

Within this procedure, through the questions, cybercrime offenders are asked to systematically clarify how they conceived and prepared the offense, who were the individuals involved, and how each of them acted.

- Tactic of surprise meetings

The tactic of surprise meetings is used in the case of the plurality of cybercrime offenders and becomes effective if it is used in psychic moments of a certain tension, created specifically to obtain sincere statements.

The procedure consists on asking some questions to cybercrime offenders after they saw one of the accomplices being entered in a room next door.

- Using detail questions

As the name implies, this procedure quantifies some aspects of the statements made by free account, nuancing them to be more rigorous, more credible.

From the judicial practice we can conclude on the efficiency of the procedure especially for cybercrime offenders with criminal experience who present themselves before the investigators with the statements previously prepared, in the sense that they repeat until the stereotyping of the statements they will give in the interrogation.

- Using evidence of guilt

It is an investigation strategy almost exclusively distributed to the insincere cybercrime offender who uses all his or her possibilities or those involuntarily offered by the investigator to distort the truth and make it difficult to investigate to escape criminal liability.

This type of cybercrime offender recognizes only the deeds committed when they are convinced of the reasonableness of the evidence that accuses him/her.

Conclusions

In order for the hearing of cybercrime offenders to take place under normal circumstances, the investigators need to know very well the characteristics of the cybercrime offenders' personality.

Knowing the personality of the offender in the cyberspace is important for identifying measures to prevent and combat the cybercrime phenomenon.

The study of the personality of the cybercrime offender involves an approach to all the social factors that determine and influence the criminal

behaviour in the virtual space as well as the psychic characteristics of the offender in cyberspace.

Each offense committed in the cyberspace has a particular peculiarity to be considered, and the possibility of committing a crime is determined by a series of personality traits that are influenced by factors such as the offender's age and sex, certain mental disabilities, etc.

The main components of cybercrime offender's personality structure are the following (Fedushko, Bardyn, 2013, p. 57): biological and hereditary factors; the closest social environment, which refers to the family and socio-economic status of its members, to the particularities of children's education, to school, to attitudes towards learning process, to relationships with teachers and classmates, to the friends and their social status, to the values and the status of the child in a group of friends; personal and psychological characteristics, such as the character traits and the temperament, the sphere of motivational value, the level of claims, self-esteem and possible conflicts in this field, the relation regarding the chosen profession, the understanding of the motivation for choosing the profession, the place of the chosen profession in the system of values of the society, future plans; the level of awareness of the legal regulation on the conduct of activities in the online environment.

Bibliography

1. Fedushko S.; Bardyn, N., (2013), *Algorithm of the cyber criminals identification*, în Global Journal of Engineering, Design & Technology, Global Institute for Research & Education, Volume 2, No. 4, July-August 2013. Retrieved 31st of January 2019 from: http://www.gifre.org/gjedt/gjedtbackissues.aspx.
2. Moise, A.C., (2011), *The forensic investigation methodology of cybercrimes*, Bucharest: Universul Juridic.
3. Pintea, Al., (2005), *Elements of forensic tactics in the investigation of cybercrimes*, Romanian Journal of Forensic Science no. 1.
4. Stancu, E., (2011), *Tactical procedures used in criminal investigations. Developments*, Bucharest: AIT Laboratories SRL.
5. Stancu, E., Moise, A.C., (2014*), Criminalistics. Technical and tactical elements of criminal investigation*, second edition, Bucharest: Universul Juridic.
6. The Romanian Criminal Procedure Code.

REFLECTIONS ON EMPLOYEES' DISCLOSURE OF THEIR HEALTH STATUS AT THE CROSSROADS BETWEEN LABOR LAW REGULATIONS AND THE PROVISIONS CONCERNING PRIVATE LIFE

Dana-Elena MORAR[*]

Abstract

In this article, the author analyzes aspects related to the legal provisions regarding the medical examinations to be performed by the employees, considering also that the health of a person is an element of the person's privacy.

Keywords: *medical examinations, personal data, private life, employee*

JEL Classification*:* [K 31, K 36]

1. Introduction

1. The legal framework concerning the medical examinations of employees

1.1. The medical examination undergone at the time of employment

Beside the general conditions regulated by the lawmaker upon the conclusion of the individual labor agreement, there are also certain specific conditions, among which we will mention the medical examination. Medical examinations are exclusively the expertise of the occupational medic, who is obligated to supervise and assess the health status of the employees from the moment that they have concluded their labor agreement until its end.

According to article 27 paragraph 1 of Law no. 53/2003 republished concerning the Labor Code, "a person can be employed only on the basis of a medical certificate that proves that said person is fit for performing the type of labor that they are employed for," which entails that the failure to heed said provisions will result in the nullity of the individual labor agreement. If the medical certificate is subsequently presented, the nullity shall be covered according to the subsequent fulfillment of the condition imposed by the lawmaker, since the important element here is the health status of the employee when the cause for the non-validity of the contract and the possibility of its being maintained in force was ascertained (Moţiu, 2012, p. 48).

In accordance with paragraph 5 of the same article, upon employment in the fields of healthcare, public food service, education and other domains

[*] Assistant Professor, PhD., ,,Bogdan-Vodă" University, Cluj-Napoca.

established through normative acts, specific medical tests can also be requested. Law no. 319/2006 on health and security at the workplace[1] also obligates employers to employ only persons who, according to the medical exam and, by case, psychological aptitude tests, are suitable for the task that they are to perform, and to ensure periodic medical check-ups and, by case, periodic psychological check-ups after employment.

The medical examination is a specific validity condition for all individual labor agreements, being of general nature because all employees and employers must be subject to the rigors concerning the fulfillment of this specific validity condition of the individual labor agreement (Gidro, 2013, p. 47). If the employer proceeds to employ a person without the prior medical examination, that represents a contravention.[2] On the other hand, if the employee fails to undergo the mandatory periodic medical check-ups, they are committing a disciplinary violation, for which they shall be liable, beside a contravention (Gidro, 2013, p. 47).

Given the general finality, which consists in determining one's capability to work, in relation to a certain workplace or a certain profession or trade (Roşioru, 2017, p. 280), the medical exam carried out prior to employment must be performed for the following categories of people:

a) those who seek employment via an individual labor agreement for an indefinite or definite period of time;
b) employees who already have a job, but are changing their workplace or are posted in other workplaces or performing other activities;
c) employees who are changing their trade or profession.

The medical examination seeks to establish the following:

a) the compatibility / incompatibility between any possible medical conditions found during the examination and the future workplace;
b) the existence / non-existence of a medical condition that can jeopardize the health and safety of other workers from the same workplace;
c) the existence / non-existence of a medical condition that can jeopardize the safety of the work unit and / or the quality of the products or services offered;
d) the existence / non-existence of a risk in what concerns the health of the population that the work unit offers its services to.

[1] Law no. 319/2006, including amendments and additions, was published in the Official Gazette no. 646 of July 26, 2006.

[2] See article 260 paragraph 1 letter m) of the Labor Code, article 39 paragraph 1 letter J of Law no. 319/2006, and article 52 letter a of Government Decision no. 857/2011 on establishing and sanctioning contraventions concerning the norms of public healthcare.

The Labor Code forbids the request for pregnancy tests upon employment, in accordance with the community law and internal law regulations that enshrine the equal opportunities between men and women.[3]

If, upon the conclusion of the medical examination, the employee proves unfit, which shall be noted in the medical certificate, the labor agreement, on the one hand, shall not be concluded, and, on the other hand, if it has been concluded, it shall be terminated by the employer on their own initiative (Roș, 2017, p. 55).

1.2. Other medical examinations provided for in the labor legislation

According to Government Decision no. 355 of 2007 on the supervision of workers' health[4], the medical work adaptation exam shall be performed if requested by the occupational medicine specialist during the first month of employment and will supplement the medical exam carried out upon employment, in the conditions that are specific to new workplaces. The goal of this medical exam is to aid the employee's body in adapting to the new work conditions and to trace certain medical causes behind the failure to adapt to the new workplace, for which the occupational medic shall recommend certain measures to remove said causes.

The periodic medical exam is mandatory for all employees and has the following goals:

a. confirming or denying, at fixed periods of time, the employee's fitness for the profession / position and workplace for which the labor agreement was concluded and for which the certificate of fitness was issued;
b. finding any disease that represents a contraindication for the activities and workplaces that entail exposure to occupational risk factors;
c. diagnosing occupational diseases;
d. diagnosing diseases related to the employee's profession;
e. finding diseases that are a risk for the life and health of the other workers at the same workplace;
f. finding diseases that are a risk for the work unit's safety, for the quality of the products or for the population with which the worker comes into contact due to the nature of their activity.[5]

The Labor Code regulates, in article 28 letter e), f) and g), the categories of employees who must undergo periodic medical exams, whose frequency is

[3] Art. 10 Law no. 202/2002 republished in the Official Gazette no. 326 of June 5, 2013.
[4] Published in the Official Gazette no. 332 of May 17, 2007.
[5] Art. 19 Government Decision 355/2007.

established by the occupational medic under the conditions set forth in art. 21 of Government Decision 355/2007.

In contrast with the hypothesis of failure to perform the medical examination upon employment, which leads to the nullity of the labor agreement, any unjustified refusal and any failure on the part of the employees to undergo the periodic medical exams scheduled by the employer is, as we have shown above, a contravention.[6]

In situations where the employee has interrupted their activity, for medical reasons, and this interruption lasted for a minimum of 90 days, as well as where the interruption was due to other reasons and lasted 6 months, they shall undergo a medical exam upon resuming their activity, as this exam will confirm whether they are fit to work in the profession / position that they had worked in prior to the interruption or in the new profession / position that they are to work in within said workplace; it will also establish certain measures in order to adapt to the workplace and to the activities that are specific to the profession or position, and, wherever this is applicable, reorientation towards a new job, which would ensure the health and capacity to work of the worker.

Regardless of the timing of the medical examination, it shall result in a medical document bearing the following conclusions, which vary from case to case: fit for work, conditionally fit (a situation where the occupational medic will give medical recommendations, as the employee's fitness for work is conditioned by them being carried out), temporarily unfit (having the right to leave due to temporary inability to work) and permanently unfit.[7]

Even if, many times, the examined employees are in good health, there are also people who suffer from different chronic conditions, most of them "invisible." In these situations, the employees need to notify the occupational medic, upon undergoing these medical exams, of the possible medical conditions that they have or that they have developed in the meantime after they were employed. Given that one's health status is a private information, is there a balance in place between the labor law regulations regarding the medical exams that the employees must undergo and their right to respect for their private life?

2. Considerations regarding the person's health status, an aspect related to their private life

Art. 74 of the Civil Code lists, at letter g), the following as prejudice against one's private life, among others that can violate this right: "the

[6] Art. 53 Government Decision no. 857/2011 concerning the establishment and sanctioning of contraventions against public health norms, published in the Official Gazette no. 621 of September 1, 2011.

[7] See art. 9-12 of Government Decision no. 355/2007.

broadcasting of materials containing images of persons who are in treatment at a medical assistance unit, as well as of personal data concerning their health status, issues related to diagnosis, prognosis, treatment, circumstances related to the disease and other various facts, including autopsy results, without the consent of the person in question or, in the cases where they are deceased, without the consent of the family or any other person entitled to do so."

However, the instances of prejudice that are permitted by law or by the international conventions and pacts concerning human rights that Romania is a part of are not considered to be violations of one's private life, according to art. 75 of the Civil Code.

The person's health status is included here, according to point 35 of Regulation (EU) 2016/679 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, in force starting May 25, 2018, of legal protection. Among the personal data benefitting from legal protection is also the person's health status: "35) Personal data concerning health should include all data pertaining to the health status of a data subject which reveal information relating to the past, current or future physical or mental health status of the data subject.

This includes information about the natural person collected in the course of the registration for, or the provision of, health care services as referred to in Directive 2011/24/EU of the European Parliament and of the Council to that natural person; a number, symbol or particular assigned to a natural person to uniquely identify the natural person for health purposes; information derived from the testing or examination of a body part or bodily substance, including from genetic data and biological samples; and any information on, for example, a disease, disability, disease risk, medical history, clinical treatment or the physiological or biomedical state of the data subject independent of its source, for example from a physician or other health professional, a hospital, a medical device or an in vitro diagnostic test."

The issue of whether the right to the protection of personal data should be considered a new fundamental right or just a component of private life was raised, the conclusion being that the right to a private life and the right to the protection of personal data are not identical, even though the right to a private life represents the central value that justifies the protection of personal data, a view shared by the jurisprudence of the European Court of Human Rights, according to which personal data protection is fundamentally important in the exercise of one's right to private and family life, which is regulated in article 8 of the Convention (Ungureanu, O. & Munteanu, C., 2015, p. 104).

Recently, the European Court of Human Rights made a ruling in the case of Mockute v. Lithuania, where it was established that the Lithuanian state had

breached art. 8 and 9 of the European Convention of Human Rights and was forced to pay moral damages totaling 8,000 euros. The plaintiff claimed that her right to a private life, protected by art. 8 of the Convention, was violated by the state psychiatric hospital where she had been admitted for certain mental issues, as they had given both her family and journalists information about her private life (Bogdan, D. & Micu, I. A., 2018).

The European Court of Human Rights believed, that, first of all, it was sufficient for the disclosure of the information related to the plaintiff, made by the psychiatrist employed by the state hospital to the journalists and her mother, to have existed in order to rule in favor of the plaintiff.

They also noted that a disclosure of confidential personal and deeply sensitive information was made to journalists and the plaintiff's mother by the psychiatrist employed by the public hospital with no consent from the plaintiff, and that the transmission of this information represents, in the Court's view, a violation of the right to respect for one's private life (Bogdan, D. & Micu, I. A., 2018).

3. The analysis of the legal provisions on the matter in the light of the right to respect for one's private life

Article 6 of the Labor Code enshrines one of the principles of labor law, namely the principle of "employees' protection." The element of interest for this study is the protection given by the lawmaker to the personal data of employees[8], which means that the lawmaker implicitly guarantees the protection of employees' personal data concerning their health status and ensures confidentiality in regards to any possible medical conditions they may have.

For the employee, the employer's respect for confidentiality is capital, because, as stated, the purpose of confidentiality means the very protection of the former's dignity (Dimitriu, 2016, p. 381).

Any processing by the employer of the personal data related to the health status of their employees must be supported by a legitimate reason, namely the necessity to fulfill the legal obligations that fall within their responsibility, in accordance with the provisions that we have mentioned above.

We are perfectly aware of the fact that an employee who has various different medical conditions is, many times, understandably put in a delicate and uncomfortable position when they have to disclose information related to their health upon undergoing their medical examinations.

However, we believe that they have to submit to the legal provisions on the matter because, at least in what concerns the periodic medical check-ups, if they fail to undergo them, they shall be liable from a contraventional and disciplinary

[8] Art. 6 paragraph 2 of the Labor Code.

point of view. As such, we can assume that, if the employee understands that they have to comply with this obligation, they shall also understand the importance of informing the occupational medic of their health status.

However, the employee's disclosure of their health status is a complex and, at the same time, sensitive issue, and that is because there is a conflict, in this case of employees suffering from certain health problems as well, between the individual's right to a private life and the State's duty to protect public health and the common good (Aluaş, M. & Dulău, A., 2018).

There are situations such as when a person wishes to become a babysitter, where the lawmaker enshrines intrusion into one's private life not for the purposes of protecting the interests of the employer, but those of a vulnerable third party, where certain aspects of the person's private life are relevant (Dimitriu, 2016, p. 376).

The reasons for which the employee is asked to share information about their health status to the occupational medic are diverse. First of all, the individual labor agreement is an *intuitu personae* contract, and, as such, the personal characteristics of the employee reflect on this contract, as their health status in relation to their workplace is among said characteristics, given that the temporary inability to work or physical or psychological unfitness of the employee are legal grounds for suspension or termination of the labor agreement (Dimitriu, 2016, p. 380).

One other reason is to protect employees who have been diagnosed with various chronic diseases. According to article 8 paragraph 1 of G.D. no. 355/2007, the occupational medic is obligated to enact special supervision consisting in a prophylactic medical exam designed to ascertain the fitness for work of certain categories of employees, namely: minors between 15 and 18 years of age, persons over 60 years of age, disabled persons, pregnant women, people suffering from certain addictions, left-handed people, people with monocular sight, people registered with chronic diseases.

On the other hand, according to the law, the medical exams also aim to find diseases that are a risk to the life and health of the other workers at the same workplace as the employee in question.

The doctrine (Dimitriu, 2016, p. 379) has maintained that, if the professional life of the employee affects their private life, it is oftentimes true that this also works the other way around, meaning that a series of the employee's rights is acknowledged only insofar as they reveal certain aspects of their private life: their employer must be made aware of their health status, for example, upon undergoing the medical exam, as well as at any time temporary unfitness for work is invoked. In order to protect the employee disclosing information about their health status, art. 33 of Law no. 418/2004 concerning the specific professional status of the occupational medic provides

for the fact that the occupational medic must keep the professional secret promoted by the code of medical deontology.

As such, the results of the employees' medical exams shall be stated to the employers only in terms of fitness or unfitness, with the exception of the cases provided for in the law, namely when addressing work-related accidents and infectious or parasitic diseases that risk spreading to the entire group of workers. Art. 35 of the law also provides that the medical file of the employee cannot be accessed by other persons with the exception of medical authorities.

It is only when the employee's health status and the type of work that they perform are liable to endanger the safety of the other participants in the labor process that the employer shall also be informed of the situation, and, along with the competent authorities, in cases of particular risk, of the measures necessary to protect the other employees (art. 36 of the law).

Thus, this means that transmitting information regarding the health of a person (in our case, an employee) must be pared down to a certain type of necessary information for a certain requirement (Aluaş, M. & Dulău, A., 2018, p. 72).

The abovementioned legal dispositions guaranteeing the confidentiality of the data regarding the patient's health are also in accordance with the provisions of art. 21 and 22 of Law no. 46/2003 on the patient's rights[9], which states the following: "all information concerning the patient's health status, any results from medical examinations, diagnoses, prognoses, treatments, personal data are confidential even after the patient's death," and "confidential information can only be provided when the patient has given their explicit consent or when the law requires it expressly."

Even if the lawmaker explicitly provides for the fact that the occupational medic must keep the professional secret upheld by the code of medical deontology, we adhere to the opinion (Aluaş, M. & Dulău, A., 2018, p. 75) according to which, in order to enshrine the imperative of keeping the professional secret, the employers should add a confidentiality clause to do so in the contracts that they conclude, in the particular case that we have analyzed, with the occupational medics.

Conclusions

In what concerns the analyzed legal provisions, we believe that the lawmaker ensures a reasonable balance between the legal dispositions that impose the necessity of medical exams both upon employment, as well as periodically afterwards, while the employee is under their labor agreement, and the legal texts that guarantee respect for their private life.

[9] Law no. 46/2003 was published in the Official Gazette no. 51 of January 29, 2003.

As such, the employee's obligation to disclose their health status does not represent, in our opinion, an intrusion by the employer into the private life of the employee, as long as the disclosed information is obtained, used and processed in strict accordance with the legal norms on the matter and not for the purposes of discrimination or prejudice against the employee.

Bibliography

1. Aluaş, M. & Dulău, A., (2018), Relaţia dintre păstrarea secretului medical şi malpraxis (The Relationship Between Keeping a Medical Secret and Malpractice). In: R. D. Apan & E.M. Fodor (coordinators). *Dreptul sănătăţii*. Bucharest: PRO Universitaria, pp. 58-75.
2. Bogdan, D. & Micu, I.A., (2018), *CEDO. Date personale. Sănătate. Divulgare de către medicul psihiatru către jurnalişti şi familie. Cauza Mockute c. Lituaniei*(*ECHR. Personal Data. Health. Medic's Disclosure to the Journalists and Family. The Case of Mockute v. Lithuania*), available at: https://www.juridice.ro /567825/cedo-date-personale-sanatate-divulgare-de-catre-medicul-psihiatru-catre-jurnalisti-si-familie-cauza-mockute-c-lituaniei.html, accessed on March 1, 2019].
3. Dimitriu, R., (2016), *Dreptul muncii. Anxietăţi ale prezentului*. Bucharest: Rentrop&Strat.
4. Gidro, R., (2013), *Dreptul muncii*. Bucharest: Universul Juridic.
5. Moţiu, D., (2012), *Dreptul muncii*. 2 ed. Bucharest: C.H. Beck.
6. Roşioru, F., (2017), *Dreptul individual al muncii*. Bucharest: Universul Juridic.
7. Roş, N., (2017), *Dreptul muncii*. Bucharest: PRO Universitaria.
8. Ungureanu, O., Munteanu, C., (2015), *Drept civil. Persoanele în reglementarea noului Cod civil.* 3 ed. Bucharest: Universul Juridic.

GLOBALIZATION AND MIGRATION

Irina (MOROIANU) ZLĂTESCU[*]
Alexandra BUCUR-IOAN[**]

Abstract

This study presents migration and globalization. International migration is an integral part of globalization. It flows emerge under the influence of different factors. Political repression, human rights abuses, conflicts, poverty, and conflicts push more people from their home countries. The study is looking into process of integration of immigrants in the state of destination and factors that affect this process.

Keywords: *migration, immigration, globalization, human rights*

JEL Classification: [K 37, K 38]

1. Introduction

Globalization is a complex phenomenon and includes a multitude of processes that address diverse areas of society. Globalization does not mean just 'spreading' but also 'interdependence'. One of the most used definitions of the concept presents globalization more as a process by which the geographical distance becomes an ever less important factor in the establishment and development of cross-border relations of economic nature, political and socio-cultural (Stiglitz, 2003).

Globalization is a multicultural process, which is the result of events in a part of the globe, with repercussions on societies and problems in other parts of the globe. It refers to the movement of goods / services; movement of persons (migration); capital movement and technology.

2. Globalization and migration

Migration is one of the significant aspects of globalization. Factors related to global change are very important.

In our opinion, international migration has not been viewed globally until the last few years. It has been traditionally evoked within the specialized

[*] Professor, PhD., National School of Political Studies and Public Administration (SNSPA/NUSPA) Bucharest, member of the Council of the European Law Institute, Vienna.
[**] Associate researcher, member of the European Law Institute, Vienna.

framework of the International Organization for Migration or in other organizations of a universal nature, such as the International Labour Organization or even the United Nations. As a matter of fact, the protection of refugees and asylum seekers with specific rules appears in the 1951 United Nations Geneva Convention and is ensured by the Member States in close liaison with United Nations High Commissioner for Refugees.

But, much more recently, the United Nations has been envisaged to address this issue globally in order to integrate the subject's components following the reports developed at the beginning of our ministry.

We quote as an example, starting with 2007 the Global Forum on Migration and Development that brings together all stakeholders. It is organized in parallel with the United Nations high-level dialogues on migrants and development organized in 2006 or 2013.

Obviously, migratory tensions emerging after 2010 in different parts of the world have given new impetus to the analysis of this theme. They demonstrated that solutions taken by individual states proved to be insufficient in the face of new emerging complex situations. In this context, a global crisis has emerged, we might say, which has led the United Nations member states to launch a collective reflection.

As a result of the New York Declaration on Migrants, a multilateral negotiation process has been implemented with the support of Switzerland and Mexic to reach Resolution 72/L.67 of 4 July 2018 on the World Migration Pact in parallel with a World Pact on Refugees. On 10 and 11 December 2018, the Intergovernmental Conference on the Global Compact for Safe, Orderly and Regular Migrations took place, so the Marrakech Pact of 160 States was adopted.

In the absence of a consensus within the UN General Assembly, with all its efforts, the World Pact in Marrakech was put to the vote and was adopted by Resolution RES / 73/196 on 19 December 2019, with 152 votes in favour. Please note that in the same context, the UNHCR's Refugee World Pact for Refugees was voted by RES/73/151 of 17 December 2018 with 181 votes in favour. Thus, at present, there is a global conceptual framework of a systematic nature, which will favour the cooperation between states.

Citing the Preamble, *"This Global Compact is a milestone in the history of the global dialogue and international cooperation on migration. It is rooted in the 2030 Agenda for Sustainable Development and the Addis Ababa Action Agenda, and informed by the Declaration of the High-level Dialogue on International Migration and Development, adopted in October 2013. It builds on the pioneering work of the former Special Representative of the Secretary-General on Migration, including his report of 3 February 2017*".[1]

[1] See Global Compact for Safe, Orderly and Regular Migration, Preamble, 6, Draft outcome document of the Intergovernmental Conference onthe Global Compact for Migration, 2018 .

The Pact highlights the shared responsibility of all international actors. The focus is on tracking the implementation of the pacts with enhanced coordination by international agencies and the mobilization of financial means in connection with the achievement of the objectives of the Agenda for Sustainable Development 2030. We can talk about a very large work program adapted to the possibility of various situations existing in the world states, pursuing the implementation at both international and regional, bilateral and national level. Some states have therefore put in place a national action plan to establish concrete guidelines.

Also, the role that political, economic or armed conflicts can play in this migration process cannot be overlooked. All historical, geopolitical, cultural, demographic, as well as economic and social factors must be taken into account.

Under the conditions of society's heterogeneity, diversity is a defining element. Migration leads to the meeting of people who carry different religious, linguistic and ethnic cultures. Thus, in recent years, in the context of immigration, we are witnessing a concern regarding the rights of individuals. The situation of those in need of protection undoubtedly illustrates the violations of the human being.

Due to the recent increase in international mobility, society is exposed to a much wider range of living styles and competing attitudes, discontinuities and contradictions. In the context of the growing influx of foreigners in Europe, we are witnessing a concern regarding the rights of individuals.[2] In a democratic society, rights and freedoms are enshrined and declared, the exercise of which is governed by the rule that the limitation of any individual freedom is the need to respect the similar freedoms of others (Zlătescu, 2015).

We appreciate that research into migration in the context of globalization provides an overview of one of the most exciting and dynamic areas of study, all the more so as the composition of the groups is constantly changing. Of course, the condition of the alien has undergone in time many transformations, caused by changes in society or by relations between states.

Human beings constantly report to society, ensuring their development in optimal conditions. Under these circumstances, in Europe today, the issue of foreigners is a sustained and systematic concern.

Society is created on the basis of the diversity of cultures, objections, beliefs.

Based on the principle of sovereignty, the state has the legal status of the different categories of people on its territory: its own citizens, foreign citizens,

[2] See United Nations High Commissioner for Refugees, Global Trends in 2015, UNHCR 2016, p. 3 and next.

refugees, stateless persons, etc. Of course, in this matter, the state is bound to respect the rules of international law to which it is an adhering party. Any individual who is in the territory of a state is subject to the jurisdiction of that state, not only citizens. Obviously, the concept of a foreigner can best be highlighted by reference to the concept of a citizen. Thus, foreigners are considered to have fewer rights and obligations than the citizens of a state (Andreescu, 2017).

Although people leave the territories of their countries of origin following armed conflicts, it is not to be understood that all aliens who come from such an area are potential refugees. It takes an act of persecution of that state directed directly to the individual to become a potential refugee. The protection is achieved through the cumulation of all the activities that arise from the existence of the social relation between the state and the citizen, as well as the safety which he / she feels on the territory of the state. International co-operation and collective efforts are essential to launch an effective response to the current realities of trans-national movement. International protection implies admittance to a safe country, the granting of a form of protection, respect for fundamental human rights. To this is added respect for the principle of non-refoulement.

Diversity is natural through the heterogeneity of society. Society is a community of communities, not the sum of people in the territory, but a network of social interactions. Basically, there is no state that does not include populations belonging to categories other than the majority population.[3]This does not mean, however, that some values cannot be common to many cultures, or even to all, and thus have a universal character. As a foundation, multiculturalism departs from the experience that there are well-defined groups who want to preserve their specifics and differences, considering that recognition, and even observance of diversity, is not incompatible with the political unity of a country; on the contrary, it can be integrated into it (Moldovan, 2004).

In general, aliens are carriers of a culture different from that of host states (Năstase, 1992). The alien, regardless of his status, dissolves in the host country's society, retaining some specific characteristics, although it takes over from the identity of the receiving state. Foreign persons, whether individuals or groups, carry those characteristics that are not shared with the citizens of the

[3] See the Report on Fundamental Rights 2018, p.4 Seventeen years after the adoption of the Racial Equality Directive and nine years after the adoption of the EU Framework Decision on Racism and Xenophobia, immigrants and ethnic minority groups continue to face wide discrimination, harassment and discriminatory ethnic profiling throughout the European Union, according to the findings of the FRA's second EU-MIDIS II survey on minorities and discrimination (EU-MIDIS II).

host state. Minority groups retain their identity and affirm it. Multiculturalism requires a deeper approach than diversity, focusing on inclusion and respect for fundamental rights. It also brings together a diverse set of cultures and ethnic groups (Feischmidt&Margit, 1999).

Alien groups include people of similar origins, customs or cultures, members share a characteristic or basic belief in identity that the person cannot give up, which is why it is often perceived as being different from the majority of society. Thus, there is a need to find effective solutions for a balanced living. Multiculturalism means respect for all groups and cultures existing on the territory of a state, claims respect for human dignity, tolerance to all human beings, and supporting different cultures, recognizing the change and recognition of the values of every individual.

In a multicultural society, for the preservation of distinctive cultural features and models, exclusive rights can be recognized as fundamental to cultural and linguistic minorities. We appreciate that protection against identity erasure is possible by a more active affirmation of distinct features by using freedom rather than by isolation. As regards members of these minority communities, guaranteeing the preservation of cultural and educational rights provides for them more benefits, including financial income.

Generally, people in vulnerable categories are most likely to be discriminated (Zlătescu&Zlătescu, 2018).

Legislation on foreigners' rights is based on the theories of dignity, equality and non-discrimination. Despite the issues highlighted by the wide panoply of international or national rules that have been adopted to strengthen the rights of foreigners, many reports highlight that discrimination continues to be practiced.

In some cases, migrants can access rights through legal provisions, but they cannot exercise them either through lack of knowledge, lack of interest, or other non-judicial factors. Although the provisions of the legal norms against discrimination are well articulated in accordance with various concepts of equality, the tensions that undermine this principle are present. Thus, there is circumstantial evidence of discrimination that offers the opportunity to rethink and restore the objectives of the law, building a more coherent world in which the human being is at the forefront. The main challenge in the future is to identify ways of generating a change of behaviour at the general level to reduce the discrimination of aliens.

Immigrants are often accused and persecuted for high unemployment rates to be a burden on the economy, crime, school overcrowding, illness and undesirable changes in host state culture.

Article 78 of the Treaty on the Functioning of the EU (TFEU) defines the relationship between EU law and the Geneva Convention. This Article

provides that a common policy on asylum, subsidiary protection and temporary protection „must be in accordance with the Geneva Convention, and other relevant treaties".

In the impact with the host state society, the stranger seeks to integrate in order to easily connect to the new community, but without giving up his identity, linguistic, and cultural components. Thus, the new society is an area of becoming, precisely by sharing the individual values of the stranger with those of the state on whose territory he is. The stranger thus goes through a process of general redefinition, which also implies a sense of fusion with the new values encountered.

The communities formed by foreigners retain their own culture, being concerned about the recognition of their specific identity. The individual, regardless of which community he belongs, lives with the feeling of belonging.

Social integration is the process of active participation of aliens who have acquired a form of protection or a right of residence in Romania and citizens of the Member States of the European Union and the European Economic Area in the economic, social and cultural life of the Romanian society, with a view to preventing and combating social marginalization, respectively in order to adapt to the conditions of the Romanian society.[4]

Globalization leads to an increase in integration, but also provides an environment that can favour discrimination and fragmentation. Overall, globalization generates a new international structure. Obviously, globalization must lead to a form that respects the values and interests of all. Globalization should allow less developed countries to reach developed economies. But globalization has brought with it many challenges, and migration is one of them. Globalization also leads to increased interdependence relations.

Social policies on integration must be tailored to the specifics of the population under consideration, as well as local, national conditions, taking into account not only the economic and social aspects of integration, but also those related to culture, citizenship.

Some studies (Schmidt-Catrana, 2016) highlight the fact that native populations become more reluctant to support social protection programs if the proportion of foreigners at the regional level increases. This has an important

[4] See Ordinance No. 44 of 29 January 2004 on the social integration of aliens who have acquired a form of protection or a right of residence in Romania, as well as citizens of the Member States of the European Union and of the European Economic Area, Art. b, published in the Official Gazette no. 93 of 31.01.2004, as subsequently amended and supplemented, including GO 1/2014 for the amendment and completion of the Law no. 122/2006 on asylum in Romania and GO 44/2004 on the social integration of foreigners who have acquired a form of protection or a right of residence in Romania, as well as citizens of the Member States of the European Union and the European Economic Area.

effect on immigration: the higher the unemployment rate, the more negative the attitude among immigrants and the citizens of that state is.

The presence of a large number of illegal residents has a negative impact both on the labour market, working without legal form, and on the process of integration and social cohesion, being excluded from full participation in society, both in terms of contribution and benefit.[5]

Multicultural values that recognize and respect cultural diversity and the rights of minority groups are an important precondition for multicultural society. In this respect, we appreciate that the Romanian authorities are actively involved in the inclusion of foreigners so that they can fully manifest themselves in accordance with national law as well as with international and regional documents in the field. The principle underpinning this inclusion is full equality of rights and chances. It seeks to establish a viable partnership between the structures of the public administration and the foreigners on the territory of Romania.

Conservation of language and culture is a complex and continuous process of manifestation and transmission of cultural features. Culture, as a sense of ultimate value, designates a way of life and profoundly influences human behavior.

On the one hand, multiculturalism aims at recognizing other cultures and building a common ground. On the other hand, multiculturalism means the regular crossing of cultural boundaries. However, both ideas require both the crossing of borders and the preservation of borders. At the same time, the universal social values that people have in relation to equality and social justice make citizens more open to minority groups and support policies for foreigners.

Multiculturalism is a concept that reflects different values, so it is difficult to define it unanimously. However, it usually indicates a system that recognizes and respects different cultures, rather than assimilating them in the dominant culture of the group.

Whatever the legal status of immigrants, they have to face the problems of adapting to a different society. Thus, they face cultural identity issues, and sometimes experience xenophobia or discrimination. On the other hand, the majority of Member States face the difficulties of adapting to cultural and ethnic diversity.

This intrusion into the realities and values of today's society desires to be an invitation to reconsider the import of migration and its influences at the level of states. Minorities of different racial, ethnic, social and cultural origins have become more visible in recent years and require special attention and

[5] See Council Directive 2003/9 / EC of 27 January laying down minimum standards for the reception of asylum seekers

social intervention. Racial and cultural diversity is increasing due to international migration. The conflict between native and host culture can create social contrasts that may lead to newcomers' misunderstanding of social or legal systems. Obviously, effective integration of foreigners into the host states requires not only respecting their rights, but also their compliance with the obligations they have during their residence on the territory of the state.

Conclusions

Obviously, the continuous mobility of people brings opportunities and challenges. An effective and common migration policy, based on solidarity and responsibility, will lead host states to take advantage of these opportunities, while addressing existing challenges (Zlătescu&Marinică, 2007). We also appreciate that, managed in a balanced way, migration will make a notable contribution to the long-term economic development of the host states.

Co-operative and sustained efforts are essential to resolve the present and future situation. This approach must be seen at European, but also universal level.

We appreciate that, without addressing the causes of migration and enhancing cooperation with international partners, a sustainable solution is not possible for society to evolve.

All international and regional instruments must be interpreted in the current context, applied in the present situation. Although internationally stipulated, human rights guarantees have not been applicable in some countries of the world. The denial of fundamental freedoms in certain areas has led to acts that revolt the consciousness of mankind.

In the age of globalization that accelerates personal and cultural exchanges between countries, understanding and respect for other cultures has become more important than ever (Yack, 2002).

Bibliography

1. Andreescu, M., (2017), *Principii şi valori ale dreptului şi culturii*. Bucharest: Universul Juridic.
2. Moldovan, A.T., (2004), *Expulzarea, extrădarea şi readmisia în dreptul internaţional*. Bucharest: All Beck.
3. Moroianu Zlătescu I., (2015), *Human Rights – a dynamic and evolving process*. Bucharest: Pro Universitaria.
4. Moroianu Zlatescu I., Zlatescu P.E., (2018), Is Antidiscrimination Law Enforced, in *Comparative Perspectives on the Enforcement and Effectiveness of Antidiscrimination Law*, Ed. Springer.
5. Moroianu Zlătescu I., Marinică E., (2017), *Dreptul Uniunii Europene*, Bucharest: Universitară, Universul Academic.

6. Năstase, A., (1992), *Drepturile omului - religie a sfârşitului de secol*, I.R.D.O, Bucharest.
7. Stiglitz, E.J., (2003), *Globalization. Hopes and Disillusionments.* Bucharest: Economica.
8. Yack, B., (2002), Multiculturalism and the Political Theorists. *European Journal of Political Theory*, 1.
9. Council Directive 2003/9 / EC of 27 January laying down minimum standards for the reception of asylum seekers.
10. Draft outcome document of the Intergovernmental Conference on the Global Compact for Migration, 2018.
11. Ordinance No. 44 of 29 January 2004 on the social integration of aliens who have acquired a form of protection or a right of residence in Romania, as well as citizens of the Member States of the European Union and of the European Economic Area, Art. b, published in the Official Gazette no. 93 of 31.01.2004.
12. Report on Fundamental Rights 2018, FRA's second EU-MIDIS II survey on minorities and discrimination (EU-MIDIS II).
13. United Nations High Commissioner for Refugees, (2016) Global Trends in 2015, UNHCR.

PEOPLE'S ADVOCATE RECOMMENDATIONS FROM THE CURRENT INTERNATIONAL PERSPECTIVE ON THE OMBUDSMAN INSTITUTION

Violeta NICULESCU[*]

Abstract

This paper aims to contribute to a change in perspective regarding the Ombudsman institution and the legal means at its disposal for the protection of human rights and fundamental freedoms.

In recent years, the international community has shown a growing interest in Ombudsman institutions, seeking joint solutions to support the national Ombudsman in order to strengthen its statute with all the guarantees it needs to effectively exercise its legal powers. As regards the legal framework in which the Ombudsman institutions operate, the Venice Commission has consistently advocated strengthening their constitutional foundation so as to guarantee full independence for Ombudsman. At the same time, the Commission sustained the importance of creating Ombudsman institutions where they are lacking and giving wider powers to the existing ones.

The Commission is currently carrying out a comprehensive codification process of a set of constitutional and legal principles, so-called "Venice Principles", specifically dedicated to the Ombudsman institution. All these developments announce interesting changes in the legal systems where there are Ombudsman institutions.

In this favourable international context and analysing the situation within the People's Advocate-the Romanian Ombudsman institution, we dare to say that we are not far from the moment when the Ombudsman's good practices and mechanisms of action will become instruments with an irrefutable legal force, comparable to legally binding acts.

Keywords: *Ombudsman, Ombudsman Recommendation, Human Rights and Fundamental Freedoms, Venice Comission, Venice Principles*

JEL Classification*:* [K 38, K 40, K 33].

1. Ombudsman institution in its Romanian version - People's Advocate

The People's Advocate is the Romanian version of an iconic institution for the international community, of a concept-institution, involved in combating governmental abuse of power and defending fundamental human rights: the Ombudsman's institution.

[*] PhD. candidate, Faculty of Law, The West University, Timişoara.

Although, in Europe, the first Ombudsman appeared in Sweden in the nineteenth century, in the Romanian constitutional system this institution makes its way along with the adoption of the new Constitution of 1991, under the name of "People's Advocate". That was also the year when the International Workshop regarding National Institutions for the Promotion and Protection of Human Rights took place in Paris, but the Romanian Ombudsman was born before it could benefit from the conclusions of the Workshop, materialized in the resolutions of the United Nations Commission on Human Rights adopted in 1992 and 1993. Moreover, in the Romanian doctrine was reported the lack of an express mandate, of human rights promoter, granted to the People's Advocate (Dragoş & Neamţu, 2011, p. 18).

But today, this legislative shortcoming is overcome, the organic law regulating the organization and operation of the People's Advocate Institution stipulating (following the amendments brought by Law no. 9/2018) the fact that the People's Advocate is a national institution for the protection and promotion of human rights within the meaning of the Paris Principles.[1]

However, the institution shares this role with the specific mission of a classical Ombudsman, appointed by the Parliament[2] and designed to ensure that public administration authorities do not violate constitutional and legal limits in their relations with individuals.

The adoption of the Ombudsman institution was an absolute novelty in the Romanian public authorities system and was due to the imperative of guaranteeing the fundamental rights and freedoms of persons interacting with the public administration.

The functionality of public administration can be consumed by bureaucracy, corruption, abuse of power, or the essence of the activity of an Ombudsman type institution resides precisely in the fight against such diseases. (Vida, 2012, p. 234)

The People's Advocate is a state authority, because its activity is of a public, autonomous nature (with the amendment, in the year of 2002, of the organic organizational and operational law of the institution) acting as a constitutional guarantor of the rights and freedoms of individuals, but also an instrument for controlling the activity of public administration authorities.

In connection with this control, the doctrine believes that through People's Advocate, the Parliament actually exercises its control over public

[1] According to Law no. 35/1997 regarding the organization and operation of the People's Advocate Institution, art. 1, par. (2): "The People's Advocate Institution is a national institution for the promotion and protection of human rights in the sense established by United Nations General Assembly Resolution no. 48/134 of 20 December 1993, which adopted the Paris Principles".

[2] However, there are some Ombudsmen appointed by the Government.

administration, and this aspect makes the institution not to be completely independent from the Parliament.

In the exercise of its legal attributions, the People's Advocate may request information and documents held by the authorities of the concerned public administration; may perform investigations and issue Recommendations based on its own findings, in conjunction with the relevant national and international legislation; may initiate proceedings before the contentious administrative court[3] or, in the case of the Child's Advocate attributions, may notify the criminal prosecution authorities, when there are indications of criminal offenses committed against minors.

Moreover, in the case of this vulnerable category, the People's Advocate formulate writ of summons and may represent them before the court when the children are subjected to physical or mental violence by their parents, guardian or legal representative, or when they are victims of abuse, sexual exploitation, labour exploitation, human trafficking, neglect and any other form of violence against the child, provided for and sanctioned by the domestic and international law.

At the same time, through the *Field of prevention of torture and other cruel, inhuman or degrading treatment or punishment in places of detention*, the People's Advocate fulfils the specific attributions of a national mechanism for the prevention of torture in places of detention within the meaning of the Optional Protocol adopted in New York on 18 December 2002, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted in New York on 10 December 1984, ratified by Law no. 109/2009.

Last but not least, the People's Advocate has attributions in the area of the constitutionality control of the laws, both of the *a priori* control of the laws, before the promulgation and of the *a posteriori* of the laws and ordinances adopted, in relation to which he can raise exceptions of unconstitutionality directly before the Constitutional Court. All these duties strengthen the position of the People's Advocate and, at the same time, represent an effective means of achieving his human rights protection function.

The importance given to this institution therefore lies with the role of the Ombudsman type institution, essentially in a democratic society and a rule of law. It is no coincidence that in Romania, the People's Advocate Institution is legally established through the *Basic* Law - the Romanian Constitution and regulated under its Title II, entitled: *Fundamental* Rights, Freedoms and Duties.

[3] In the case of the right conferred on the People's Advocate to address a contentious administrative court, it should be noted that this attribution is exercised when the claimant lacks the capacity to bring an action in court, the People's advocate introducing it on his behalf. However, after the legal action has been brought, it remains up to the complainant whether or not to continue the proceedings.

Nor the fact that the organization and operation of the People's Advocate Institution is regulated by organic law, or that, for the appointment of the People's Advocate, the two Chambers of the Parliament, the Senate and the Chamber of Deputies meet, which happens for a limited number of events, each of them with particular importance. All these aspects confirm the place that People's Advocate Institution occupies in the state order in Romania.

Similarly, the constitutional provision by which the public authorities are obliged to give the People's Advocate all the necessary support in the exercise of his duties, "gives substance to the quality of the People's Advocate of being a High Dignitary of the Romanian State".

It is important that, in the exercise of his duties, especially with regard to the members of the Government and the heads of central public administration bodies, the People's Advocate to occupy a position equal to them on a hierarchical scale. (Ionescu & Dumitrescu, 2017, p. 671)

In fact, the current international standards on the Ombudsman's institution, crystallized on the basis of the experience of the states that have developed such institutions, qualify the constitutional provision of the institution as guarantee of the functional independence of the Ombudsman.

The constitutional establishment of an Ombudsman institution is preferable to a provision in a law, despite the cumbersome process of eventual constitutional reforms, which may be needed at some point regarding the Ombudsman's institution.

Functional independence is the core of the People's Advocate Institution. In order to carry out his mandate, an Ombudsman must not have bureaucratic obstacles or pressures to be removed, he must be independent of all other state authorities and cannot be subject to any imperative mandate.

Maintaining and strengthening this independence is a permanent desideratum of these institutions, and the discussions in the international legal area converge to the topic of ensuring the independence of ombudsman type institutions.

The independence of the People's Advocate Institution is based on its legal establishment, the manner in which the appointment of the People's Advocate is regulated and its dismissal, the means of action available to the Ombudsman, the limits of its competence which, sometimes, may coincide with the limits of the institution's independence at national level regulations, on its budget regulations, because the material and human resources can be a serious brake on carrying out the activity and the fulfillment of its mission.

Regarding the protection of human rights, the People's Advocate's mission is to identify the discrepancies between existing human rights standards and principles on the one hand, and their implementation, by public administration authorities.

In terms of promoting human rights, the institution's contribution is to spread international values and standards in the field, at national level.

The People's Advocate does not have the authority to make binding decisions for their recipients from a legal point of view, therefore, the Recommendations they address to the investigated public administration authorities are not legally binding instruments. But these Recommendations refer to fundamental rights and freedoms whose observance is guaranteed by the Constitution of Romania, the Universal Declaration of Human Rights, the Charter of Fundamental Rights of the European Union and the pacts and treaties to which Romania is a party [4].

The role of the People's Advocate and the Ombudsman's institution in general, is to protect the rights and freedoms of the individual and to discourage abuse by the administration. Despite its name, the People's Advocate protects individuals from the abuses of public administration authorities, but the legal framework in which it is made is mainly institutional rather than judicial.

The unprecedented development of the Ombudsman's institution in the world, the increase and diversification of his attributions, the interest of the international legal community in the importance and role of the Ombudsman in a democratic society and in a rule of law entitles us to affirm that the institution of the Ombudsman has become almost a legal institution, with its own specific regularities, and we believe that we will soon be able to talk about the right to ombudsman.

2. Recommendation - The legal authority of the People's Advocate acts

The acts by which the People's Advocate exercises authority and expresses his powers are either expressly provided for in the Constitution of Romania, as in the case of *Annual or Special Reports*[5] and *Seize of the Constitutional Court*[6], either resulting from the legislative context, which allows

[4] As stated in the Constitution of Romania in art. 20 on the International Treaties on Human Rights, " *(1) The constitutional provisions regarding citizens' rights and freedoms shall be interpreted and applied in accordance with the Universal Declaration of Human Rights, with the pacts and other treaties to which Romania is a party.*

(2) If there are inconsistencies between the pacts and treaties regarding fundamental human rights to which Romania is a party, and domestic laws, priority is given to international regulations, unless the Constitution or domestic laws contain more favourable provisions.

[5] Provided in art. 60 of the Romanian Constitution: "The People's Advocate presents reports to the two Chambers of Parliament, annually or at their request. Reports may contain recommendations regarding legislation or measures of a different nature in order to protect the rights and freedoms of the citizens".

[6] The People's Advocate may seise the Constitutional Court through an objection of unconstitutionality of the law, before its promulgation, in accordance with Article 146 let. a)

the autochthonous Ombudsman to exercise greater freedom of action.(Muraru, 2004, p. 95)*The Recommendation* addressed to the heads of the public administration authorities, *the Standpoint* formulated at the request of the Constitutional Court when it is seised with the exception of the unconstitutionality of a law or ordinance regarding fundamental rights and freedoms, *the Letter* by which the People's Advocate institution either addresses to the petitioner or to the authority, *the Order* issued by the People's Advocate for regulating the issues related to the proper operation of the institution.

Of all these acts of the People's Advocate, some of them have a particular specificity, which derives from the special legal nature of the institution, including the Recommendation among these. It is known the fact that the People's Advocate arms relate to mediation and dialogue, legality, fundamental principles of law and equity.

An Ombudsman has no power to make legally binding decisions, the effectiveness of his institution being based on moral authority and, ultimately, on publicity and the ability to persuade public opinion, which, in a pluralist democracy, can provide public authorities with an effective incentive to comply with an Ombudsman's recommendations. (Rădulescu, 2011)

Although, in essence, the People's Advocate seeks to protect the individual against arbitrary, unjust, unlawful interference by public administration authorities, his recommendations are not only aimed on abstaining from a particular public authority from a particular interference with a particular person. Nor is it limited to recommending the rectification of the unlawful act, with reinstatement in the previous situation of the injured person, where possible.

Considering its role as a national institution for the protection and promotion of human rights, within the meaning of the Paris Principles, the purpose of the People's Advocate Recommendation must be beyond the precise resolution of the concrete case that led to the formulation of the recommendation from the beginning.

This Act of the People's Advocate may contain indications of observance of the fundamental right violated to the person, but it always aims a general good, such as the efficiency and accountability of the public administration authority in relation to any individual. Therefore, any Recommendation should, as far as possible, take into account that at least the fundamental principles of law applicable to the matter be clearly understood by the authority and the authority will find itself the most appropriate means of acquiring the Recommendation of the People's Advocate.

---

or by an exception of unconstitutionality of a law or ordinance, according to art. 146 let. d) of the Romanian Constitution.

Regarding referral procedure of the People's Advocate by the petitioners, some authors (Dragoş & Neamţu, 2011, p. 17) have considered that the complaint should have a legal, strictly formal basis, in the sense given by the Law concerning the Organization and Operation of the People's Advocate, with the clear indication of the violated rights and freedoms, as well as of the administrative authority or civil servant regarded by the complaint, being inconceivable to receive a petition that signals aspects that are not necessarily illegal, but may be subsumed to a wider concept of maladministration.

We do not share this view, considering that the institution of the Ombudsman can and should valorise in his work legal principles and cannot get stuck into formality when it comes to a referral, all the more so as the institution maybe seized ex officio regardless of the way it finds that it is possible to intervene for the protection or promotion of a fundamental human right.

In fact, the Venice Commission[7] has also addressed this matter, considering that if the Ombudsman is conferred a broad mandate based on the promotion and protection of human rights and fundamental freedoms, given the need for the executive to respect the principles of good administration, the Ombudsman should intervene not only when there are irregularities, i.e. violations of legal norms, but also when legal principles have been ignored (for example: humiliating treatment in relation to individuals, slow processing of files-ostentatiously), being able to control inclusively the objectivity and impartiality of the activity of the administrative bodies.

Whether it is a file that involved an investigation in an ex officio referral, or a case brought before the People's Advocate by a petition, its resolution must follow two components: an individual one, of immediate case application, and a general one, applicable to all such cases.

The purpose of opening the Recommendation to the general is to be a preventive one, so that the violation of the rights questioned by the investigated case is no longer possible and the public authority's conduct to improve starting from that case.

Certainly, it is not always possible to formulate a Recommendation containing the two components that we were referring to above. Sometimes, two Recommendations should be addressed (one of them having the hierarchically superior entity as addressee) considering the attributions of the public administration authorities, as they appear from the incidental legislation. Other times, the petitioner cannot be reinstated in the situation prior to the violation of his fundamental right by the public authority unless he addresses the court.

[7] CDL-AD (2003) 006 - Advice regarding the draft law on the human rights defender in Armenia, adopted by the Venice Commission at its 54th plenary session (14-15 March 2003, Venice), art. 11.

For example, the People's Advocate it seizes ex-officio as a result of media reports broadcast by the media channels according to which a pensioner located on the other side of the country, cannot receive his pension because he is listed as a deceased person in the County House of Pension. Cause:

At the other side of the country, following police investigations of a homeless person who had died in a decommissioned building, the identity of the deceased had been wrongly established as being the living pensioner.

Of course, in this case, the annulment of the document establishing the death and their subsequent acts, as well as the reinstatement of the injured person into the situation prior to the injury, cannot be obtained through a graceful procedure, within the competence limits of the People's Advocate institution, but by the court.

But that does not mean that the People's Advocate is held by the legal limits of the powers conferred to the institution, to remain passive. It goes without saying that somewhere along the path of the erroneous determination of the deceased person's identity, at least one public administration clerkhas had a negligent conduct towards his duties and the legal provisions governing these duties.

And if he had that conduct, it means that this was possible, that something must be changed or improved at the level of that authority, either in the Rules of procedure or in the organization and operation or elsewhere.

This is where the People's Advocate comes in, addressing a Recommendation to the public administration authority guilty of violating some fundamental rights and freedoms of the individual (the concerned pensioner) as a result of that faulty administrative conduct. In his approach, the People's Advocate verifies what fundamental rights have been violated.

Considering that the wrongfully pronounced deceased person cannot be able to collect its pension, following that administrative error, we can ascertain a violation of his private property right over the pension[8] and perhaps the right to a living standard, given that we are talking about leaving a pensioner without financial means.

At the same time, being that he is also listed as a deceased person in the National Health Insurance House, also results the violation of art. 34 of the Romanian Constitution, the right to health protection, because the pensioner injured by the administrative error can no longer benefit from his rights of insurant of the health care system, he no longer benefits from the services or the compensated medicines to which he was entitled.

Not once, the People's Advocate invoked in his acts, especially in the Recommendations, legal principles of European Union law, the role of these

[8] According to Article 44 of the Romanian Constitution, ”claims upon the state are guaranteed”.

principles being that of signaling the public administration authorities to which they are intended, the need to have a certain conduct, consistent with both the constitutional and legal framework in Romania, as well as the law of the European Union.

In the same context, the authorities of the concerned public administration may be made aware of the consequences of violation of those principles, such as violations of fundamental human rights which, through a contest of events, did not occur in relation to that case, but which would be could have taken place if the details of the case had changed only slightly.

In the above-mentioned example, of the casuistry of the People's Advocate, if the person deceased in the decommissioned building would have had a family, the constitutional right of the members of this family to intimate, family and private life[9] would have been violated.

The mere fact that the deceased person was wrongly identified and that, for this reason, no institutional steps were taken in order to identify the true careers, the deceased being buried by the care of a religious establishment, would have made the family aware of this when it could no longer dispose of its right to choose where and how to be buried member of the family.

The authorities in default will therefore be forwarded to the People's Advocate Recommendation to adapt their conduct to legal norms and incidents legal principles, to complete their existing procedures or to implement new ones, in relation to the case of violation that came to the attention of the People's Advocate.

Although the People's Advocate Recommendations do not have the force of binding legal acts, the competence of the People's Advocate Institution to request and receive complete information from the public authorities concerned is indisputable; to examine, from the perspective of national law and European Union law, the acts and facts of the public administration authority in relation to the individual; to find their non-compliance with fundamental legal principles.

Moreover, the People's Advocate has a non-negligible power of "sensitize the hierarchically superior authorities in the public administration system, the Parliament and the public opinion regarding illegal phenomena that would happen inside one of the state powers".(Brânzan, 2001, p. 257)

Undertakings for obtaining information, investigation and, ultimately, the Recommendation addressed by the People's Advocate in order to prevent the recidivism of the illegal or abusive treatment are not sufficient; it is also necessary

[9] "The public authorities observe and protect the intimate, family and private life." according to Article 26 of the Romanian Constitution.

to follow the subsequent conduct of the concerned public administration authority, so as to determine if it has adopted the Recommendation.

It is true that, for the authority of the public administration under examination, there is no legal obligation to follow the People's Advocate Recommendations. However, the addressee of the Recommendation has the obligation to communicate to the People's Advocate the adoption of the Recommendation and the redressing of the situation or, on the contrary, the refusal to accept it, legally explained. However, this obligation is established both by the constitutional text and by Law no. 35/1997 on the organization and operation of the People's Advocate Institution, republished.

The legal term in which a public administration authority can communicate its response to the Recommendation of People's Advocate is of 30 calendar days[10]. For exceptional situations, assessed as either very complex or likely to cause imminent or irreparable damage to human rights, the Ombudsman may, by means of the Recommendation, give the public administration authority a different response period, on a case-by-case basis.

However, considering that the legislation regarding People's Advocate does not provide for these response terms for exceptional circumstances, they should be included in the notion of *reasonable time/period*, in normal cases, with administrative authorities having to receive between one and two months for the response.[11]

If the public administration authority (orthe civil servant) fails to comply with the People's Advocate's Recommendation and does not conform its conduct to constitutional provisions, in cases where the complaint of the individual/or the information is well founded, a "sanction" from the People's Advocate will be applied, in the form of a notification of the authority hierarchically superior, the Government, and, subsequently, the Parliament[12].

---

[10] According to art. 27 of the Law no. 35/1997, "(1) If the public administration or civil servant does not remove the illegalities committed within 30 days from the date of the referral, the institution of People's Advocate shall address to the authorities of the hierarchically superior public administration, who are obliged to communicate, within 45 days at most, the measures taken. (2) If the public authority or civil servant belongs to the local public administration, the People's Advocate institution shall address to the prefect. From the date of filing the complaint to the prefect of the county, a new term of 45 days shall run."

[11] See in this regard CDL-AD (2004) 041 - *Joint Opinion on the Draft Law on the Ombudsman of Serbia* by the Venice Commission, the Commissioner for Human Rights and the Directorate-General for Human Rights of the Council of Europe adopted by the Venice Commission at its 61st Plenary Session (Venice, 3-4 December 2004), para. 32, art. 28.4.

[12] According to art. 28, Law no. 35/1997: "(1) The People's Advocate shall be entitled to notify the Government regarding any illegal administrative act or fact of the central public administration and the prefects. (2) The non-adoption by the Government, within maximum 20 days, of the measures regarding the illegality of administrative acts or deeds signaled by the People's Advocate shall be communicated to the Parliament."

The doctrine (Brânzan, 1996, p. 30) has signaled, even before the law on the organization and operation of the People's Advocate, the need to impose pecuniary sanctions or similar sanctions in labour law for the failure of the public administration clerks to carry out their duties properly in regard to the People's Advocate.

Subsequently, it was proposed even the completion of the legislation on the organization and operation of the People's Advocate with provisions according to which the People's Advocate, directly or indirectly, through the hierarchically superior entity, may sanction the authority of the public administration that does not conform to the Recommendation addressed to it.

Any legal professional knows the fact that a law that does not provide for serious sanctions regarding its non-compliance, is a law that will not be observed. Recommendations of the People's Advocate, because there are no legal provisions to impose their strict observance, could be subject to the same axiom, considering the fact that public administration authorities to whom they are addressed cannot be obliged to modulate their conduct in accordance with the indications.

Nevertheless, the prerequisites for formulating these Recommendations, in a constitutional democracy, in connection with the protection of fundamental rights and freedoms enshrined in the Romanian Constitution, should supplement the lack of legal constraint.

If the reference to all the public administration authorities of the Recommendations of People's Advocate would adequately valorise the legal force and the importance of the fundamental law, then the mere respect owed to the supreme law in the state would require compliance with those provided, through Recommendation, by the Guarantor of Fundamental Rights and Freedoms.

It should also be borne in mind the fact that the unique legal nature of the Romanian Ombudsman's institution is also reflected in his legal acts, involving elements of Administrative Law, European Law, Constitutional Law, and even of Legal Sociology. For the “sanction” applied by the People's Advocate also has a morally imperative social aspect, if we consider that the Recommendations are made public and the cases can be highlighted in the Annual Reports presented to the Joint Chambers of Parliament.

The recommendation issued by the People's Advocate has only an indicative value for the possible conduct of the public administration authority, but its effectiveness, in fact, of any of the means of action at the disposal of the People's Advocate, remains closely related to the social impact of the institution and authority of the person who at one point fulfils the position of People's Advocate.

That is why, in all the countries in which this institution operates, the Ombudsman has proven that the efficiency of the institution depends to a large extent on the "qualities of the person appointed as an ombudsman and of his work". (Muraru & Tănăsescu, 2009, p. 163)

3. The Venice Commission and its role in strengthening the Ombudsman's institution

Through its specific nature and its connection with human rights, the institution of the Ombudsman has always interested the international legal community. Moreover, beyond the national, regional or local ombudsmen, bodies have been set up aid to concentrate the legal culture of this institution and enrich it.

The People's Advocate Institution is affiliated to the International Ombudsman Institute, the European Institute of Ombudsman, the Association of Ombudsmen and Francophone Mediators - and is in connection with all those institutions or bodies concerned with promoting the ombudsman's activity and role at international and regional level.

Through the participation of the People's Advocate to these international and European organizations "a serious and beneficial harmonization of the activity of the People's Advocate with the international and European rules in the field and especially with the acts issued by the European Ombudsman" is achieved. (Iancu, 2003, p. 352).

In addition to these bodies, the European Commission for Democracy through Law, known as *Venice Commission*, the Council of Europe's Consultative Body on constitutional issues, has played a particularly important role in setting up the Ombudsman institutions.

The Ombudsman institution benefits, in the present, from the role the Venice Commission has undertaken, that of providing legal advice to Member States in order to align their legal and institutional structures with the European standards and international experience in the fields of democracy, human rights and the rule of law. (Venice Commission, n.d)

Currently, at the initiative of the International Ombudsman Institute, an extensive Draft of Codification of Legal Principles regarding the Protection and Promotion of Ombudsman Institutions.

The subject matter was debated within the European Assembly of the International Ombudsman Institute, which took place in October 2018 in Brussels. And the set of principles intended to strengthen and defend the Ombudsman's institution was brought to the attention of the Venice Commission, the first statement on this subject being made to the Venice Commission by the European Region of the Institute of the International Ombudsman.

The year 2019, therefore, is announced as an interesting year for the Ombudsman's institution. This is the year when the Venice Commission will adopt the document intended to strengthen the role of the Ombudsman's institution and entitled *The Venice Principles*. (Venice Commission, n.d.)

What the Venice Commission proposes through this international document is to bring together the immense and varied institutional culture of Ombudsmen everywhere (currently, the number of countries that have developed Ombudsman institutions in Europe and the world is over 160), the Studies, Opinions and Recommendations elaborated by the Venice Commission over time, on this subject.

Among the states that have requested the Venice Commission to rule in regard to the establishment or strengthening of the position of the Ombudsman's institution in their country, we mention: Republic of Moldova, Malta, Luxembourg, Armenia, Azerbaijan, Bosnia and Herzegovina, Montenegro, Serbia and "The former Yugoslav Republic of Macedonia" (currently the Republic of North Macedonia), Kazakhstan, Kosovo.

Since the idea of codifying this set of constitutional and legal principles was born, building on the previous acts adopted by the Venice Commission on this matter, the Commission has made a continuous effort to gather information, opinions and proposals from the states in which Ombudsman institutions operate.

Certainly, such information was also requested from the People's Advocate in Romania, and the People's Advocate welcomed the initiative of the International Ombudsman Institute to develop, with the support of the Venice Commission, this set of legal principles which, basically, concern both Ombudsmen, as well as the direct beneficiaries of Ombudsmen's activity, whether natural or legal persons or authorities.

At the same time, he took advantage of the opportunity to consult the principles that have already been outlined and to contribute to the final material to be considered for the coding work.

Given the fact that, in the fight against all forms of violation of human rights and individual freedoms, the Ombudsman's institutions use about the same legal instruments and access the same international programs in the field of promoting and defending human rights, we consider that the completion of this set of legal principles with a set of good practices of the Ombudsman would be necessary.

Such a step could create an Ombudsman's international working instrument, consisting of principles and good practices, to which any Ombudsman could refer to.

This does not mean that the National Ombudsman will be restricted to the possibility of setting up his own mechanisms, where the differences in

legal, cultural and social systems require so, building regulations and means adapted to the specifics of the state form in which he operates, and enriching with the results of his own activity, set of common values.

Regarding the aspects concerning the protection of Ombudsman institutions, we believe that the establishment of a mechanism dedicated to the cross-border support of these institutions could be envisaged, in order to protect the supreme values of the Ombudsman's Institutions when necessary, *exempli grazia,* in the case of the functional independence of an Ombudsman, subjected, at national level, to pressures, attacks and interferences that threaten the Ombudsman's mission itself.

In any part of the world these would occur, the international legal community must make a clear statement that an oppressed ombudsman is no longer an independent Ombudsman, or independence is the essence of the Ombudsman's institution.

At the same time, a suitable method of promoting at national level the need for loyal cooperation between the institution of the National Ombudsman and the rest of the public institutions and authorities must be found.

"An Ombudsman institution without formal power is dependent on the understanding, acceptance and respect of the outside world. Therefore, cooperation is a key word. Cooperation with Parliament. With relevant organisation. With the media. And not least with the administrative authorities. The last thing an Ombudsman institution can do is to barricade itself in standoffishness. It may sound strange to talk about cooperation with the authorities. After all, the Ombudsman oversees the authorities (...). But, if an Ombudsman institution really wishes to influence the public administration, it must make itself available in a constructive way". (Sørensen, 2016, p. 7)

The example of the states that have accomplished this can be particularly valuable for countries where the Ombudsman's institution is at the beginning or encounters political or other nature oppositions that prevent it from carrying out its work properly with the legally conferred role.

Once this set of principles regarding the strengthening and protection of the Ombudsman's institutions has been completed, the constant promotion of this information must be considered, so that it can be received by all those concerned and thus fulfil its purpose.

Conclusions

Although the Ombudsman's institution is a West European creation, it has an unprecedented spread throughout the world.

In the states where it has been legally established, the Ombudsman contributes to strengthening the rule of law and democratic behavior, being an institutional instrument dedicated to completing any gaps would arise from the

vast state institutional system for the protection of human rights and freedoms. (Ignat, 2016, p. 90)

This is the main cause of the increased interest shown for the Ombudsman institution by the international legal community. Therefore, in the present, it seeks common values and joint solutions tostrengthen the national Ombudsman status by giving him all the guarantees he needs to effectively exercise his legal powers.

In this era of globalisation, more than ever, it is necessary to outline a coherent, internationally standardized legal and institutional framework for the protection and promotion of the Ombudsman.

In this context, we look forward for the *Venice Principles*, believing that they will soon enrich not only the Ombudsman institution, but also the common legal patrimony of mankind.

Moreover, this will be reflected directly in the authority of the Ombudsman's Recommendation, which will acquire a force of self-imposition comparable to that of a binding legal act.

Between the Paris Principles and the Venice Principles, the Ombudsman institutions charged with the protection and promotion of human rights, will be able to fulfil their role better by proving that they are a principled institution.

Bibliography

1. Brânzan, C., (1996), Consideraţii asupra instituţiei Avocatul Poporului în România. *Dreptul*, p. 30.
2. Brânzan, C., (2001), *Avocatul Poporului- o instituţie la dispoziţia cetăţeanului.* Bucureşti: Juridică.
3. Dragoş, D.-C. & Neamţu, B.-C., (2011), *Instituţia Ombudsmanului: justiţie alternativă? Studii de drept comparat.* Bucureşti: C.H. Beck.
4. Iancu, G., (2003), *Drepturile, libertăţile şi îndatoririle fundamentale în România.* Bucureşti: All Beck.
5. Ignat, C., (2016), *Forme ale protecţiei şi promovării drepturilor omului. Medierea şi Ombudsmanul.* Bucureşti: Universitară.
6. Ionescu, C. & Dumitrescu, C.A., (2017), *Constituţia României. Comentarii şi explicaţii.* Bucureşti: C.H. Beck.
7. Muraru, I., (2004), *Avocatul Poporului-instituţie de tip ombudsman.* Bucureşti: All Beck.
8. Muraru, I. & Tănăsescu, E.S., (2009), *Drept constitutional şi instituţii politice.* 13-th ed. Bucureşti: C.H. Beck.
9. Radulescu, C., (2011), Aplicarea principiului transparenţei în procesul decizional al instituţiilor publice. Studiu de caz: Ombudsmanul României, Parchetul Public şi Comisia pentru petiţii a Parlamentului României. *ASsee Online series no. 3*, pp. 141-157.
10. Sørensen, J.S., (2016), *The Ombudsman institution in 2016, in The Danish Parliamentary Ombudsman Annual Report,* Copenhagen: Rosendahls a/s.

11. Venice Commission, n.d.. *Ombudsman institutions.* [Online] Available at: https://www.venice.coe.int/WebForms/pages/?p=02_Ombudsmen&lang=EN [Accessed 25 January 2019].
12. VeniceCommission, n.d. *For democracy through law -The Venice Commission of the Council of Europe.*[Online] Available at: https://www.venice.coe.int/Web Forms/pages/?p=02_Ombudsmen&lang=EN [Accessed 25 January 2019].
13. Vida, I., (2012), *Puterea executivă şi administraţia publică.* a 2-a ed. Cluj-Napoca: Cordial Lex.

MOTOR LIABILITY INSURANCE. THE JURIDICAL CONSEQUENCES AND THE LEGAL NATURE OF THE INSURANCE

Tudor ONIGA*

Abstract

This Communication makes a short radiography of Law no. 132 of 31 May 2017 on compulsory insurance against civil liability in respect of third-party damage caused by vehicle and tramway accidents, in conjunction with the relevant European directives. Attention is drawn to the obligations of courts in civil claims from victims of traffic accidents, knowing that national and European legislation on compulsory civil liability insurance, civil process principles and Romanian case law impose an obligation to insure a fair and non-discriminatory treatment for persons harmed by an insured risk.

The objectives and the aim pursued by the European and national regulation, namely the social protection of road accident victims, the extremely disadvantaged social category, the guarantee of comparable treatment of the victims of road accidents and the adequate compensation of the victims of road accidents, have been highlighted. In conclusion, the objectives and the aim pursued by European and national regulation were taken into account.

Keywords: *accidents, insurance, victims, protection, treatment*

JEL Classification: [K 15, K 22]

1. The imperious necessity of social protection of motor accidents victims[1]

The national and European legislation on the subject of mandatory civil liability insurance, the principles of the civil process and the Romanian jurisprudence mandate the obligation of insuring a fair and un-discriminatory treatment for the prejudiced persons following the occurrence of an insured risk.

As a representative of the State and a public institution with attributes conferred by the Law as to provide justice in a dispute regarding the application of the contract's provisions forced by insurance and of the particular law that governs it, Law nr. 132 from the 31th of May, 2017, published in The Romanian Official Journal nr. 431 from the 12th of June, 2017, regarding the civil motor liability insurance for prejudices to third

* Assistant Professor, PhD., Faculty of Law Cluj-Napoca, „Dimitrie Cantemir" Christian University.

[1] The objective of social protection, essentially analyzed as an adequate compensation of the above mentioned victims, must be taken into consideration as an imperious reason of general interest - The decision of CJUE from the 28th of April, 2009, The Commission of European Communities against the Republic of Italy, C-518/06, points 73-74.

parties by accidents involving vehicles and streetcars, the courts have the obligation to insure the social protection proportionate and fair for the victim of an insured risk to guarantee a comparable treatment and an adequate compensation with the purpose of full remedy of the damages the victim underwent. (Jugastru, 2013).

The judiciary endeavors of the victims of traffic accidents exclusively intend to get their rights acknowledged with the sole purpose of full, equitable, proportionate reparation through equivalents and in a reasonable term of the prejudices suffered by the prejudiced persons.

In addressing cases of this type, judges all called upon to give effectiveness to the imperative objective of social protection of the traffic accidents victims to which are subsumed the right to life, the right to private life, the right to health, the right to physical and psychological health, the right to freedom of movement, the right to defend oneself, un-discrimination and the right to full reparations of the suffered prejudice.

In solving of the causes where the accident victims demand for damages, the courts must refer to: a) The general interest imperative of social protection of the traffic accident victims realized by the member states including through the courts, as well as the protection imperative of the liability insurance consumer's interests, b) The European and national special legislation incidence on the subject, c) The necessity of the national court to take great interest in the circumstances of the causes and the negative consequences caused in the lives of the victims.

2. The mixed judicial nature of the insurer – contract and legal liability

The legal proceedings for the compensation of the damages of the victims of traffic accidents either in penal lawsuit or the civil trial, is an action in compensations, based on the contractual civil and legal liability of the insurance company. (Vladu, 2010)

In this respect, the mandatory insurance contract of civil motor liability must be taken into consideration for damages to third parties by traffic accidents and the special law that governs this insurance contract, that is Law nr. 132 from the 31st of May, 2017 regarding the civil motor liability insurance for prejudices to third parties by accidents involving vehicles and streetcars, Directive 2009/103/CE of the European Parliament and the Council from the 16th of September, 2009, published in The Official Journal of the European Union, series L, nr. 263 from the 7th of October, 2009, regarding the civil motor liability and the control over the mandatory character of the liability, as well as the provisions of art. 21 para. (2) and article 181 para. (3) from the Directive 2009/138/CE of the European Parliament and of the

Council from the 25th of November, 2009, published in The Official Journal of the European Union, series L, nr. 335 from the 17th of December, 2009, regarding the access to activity and conducting activities of insurance and reinsurance (The Solvability Directive II).

Consequently, the task of the insurance companies imbed the obligation to fully repair the prejudice through pecuniary equivalent in the established the conditions, terms and limits of the RCA insurance contract and the provisions of the special law regarding the mandatory civil motor liability insurance.

The civil motor liability insurance contract is mandatory through which the insurer undertakes, correlative to charging for the insurance coverage to grant damages for the prejudices the insured persons are liable for, towards third parties damaged in traffic accidents.

The purpose of the mandatory civil motor liability insurance contract is precisely the reparation of the damage through a full and prompt pecuniary equivalent, purpose corresponding to the objectives and the finality intended by both the European regulations and the national one.

According to the European norms, the member states of the European Union must provide the legal frame necessary to all the owners and holders of motor vehicles who are normally on their territory to sign mandatory civil liability insurance contracts with an insurance company, contracts that are to guarantee the civil liability for the damages produced by the mentioned vehicles.

In this respect, art 4 in Law nr. 132/ 2017 stipulates that the civil liability for the damages produced by traffic accidents is a mandatory insurance and mandates the vehicle owners subjected to registration in Romania to get insurance for the cases of civil liability following damages produced through traffic accidents.

Also, the civil motor liability insurance contract is a random and onerous contract where the risk of a damaging deeds passes from the insured to the insurer, is assumed by the latter, who is responsible for the occurrence of the insured risk because he received a sum of money as an insurance coverage established according to the specific of the risk. So, the obligation to repair de damage of the victims by the insurer has its cause in the consideration of the insured, respectively the payment of the insurance coverage. (L. Pop, I. F. Popa, S. I. Vidu, 2012)

So, the insurance operation is characterized by the fact that the insurer undertakes, in exchange for the prepayment of a insurance coverage, to give the insured, in case that the assumed risk occurs, the benefit agreed upon on the occasion of signing the contract, that is the compensation of the damaged third party. (The CPP Decision, C-349/96, EU:C:1999:93, pct. 17, and the Skandia decision, C-240/99, EU:C:2001:140, pct. 15)

Through the insurance contract, the insured undertakes the obligation to pay coverage to the insurer, and the later undertakes the obligation that he must pay compensation to the damaged third party.

The occurrence of the insured risk assumes the existence of an illicit deed that causes prejudices that triggers the in tort civil liability of the author of the deed

In the jurisprudence of the Justice Court of the European Union, whose decisions are mandatory for the national courts, with double jeopardy authority, and constitutes source of law, is to be under a title of principle that "*the analysis of the legal consequences of every fact that causes damages related to the circulation of motor vehicles must be done in two phases*: *In a first stage, the existence of civil liability must be verified. If civil liability exists it is necessary to go the second stage of the analysis that refers to in intervention of the insurance companies. This second stage, as a principle and without prejudice to the obligation to guarantee the useful effect of the directive is covered by the European Union Law*". (The CJUE Decision from the 1st of December 2011, Wilkinson in case C-442/10, point 16)

In this respect the provisions of article 10 para. (2) in Law 132/2017, according to which the RCA insurer awards compensations based on the insurance contract for damages to third parties through traffic accidents and their expenses in the civil lawsuit, the damages are to be paid by the insurer to the damaged natural or legal persons.

The provisions of art. 11 para. (1) in Law nr. 132/2017 stipulates that „*the RCA insurer is mandated to compensate the damaged party for the damages suffered following the accident occurred through the insured vehicle*"

At the same time, para. (2) of art. 11 stipulates the circumstances for awarding compensations on the condition that the limits of compensation provided by the RCA contract are not exceeded.

So, the grounds of the insurer liability are conventional and the one of the insured is in tort.

Based on the abovementioned legal provisions, we can draw the conclusion that the liability of the insurer to the damaged party on the subject of civil motorway liability is a legal and contractual obligation, undertaken through the insurance contract and on the grounds of the special law and, at the same time, a direct liability the insurer taking responsibility for the insured's behavior and undertaking the payment of damages. (I. Albu, 1994).

The approval and the establishing of the insured risks, the evaluation of the damages, the decision upon the amount and payment of the damages is performed under Law nr. 132/2017 and of the Norm nr. 20/2017 regarding the

motor vehicle insurances in Romania adopted under the law by the Financial Supervisory Authority regarding the mandatory insurances.

Assessing and granting compensations are made on the basis of the insurance contract and of the No. 132/2017 Law, in amiable terms, by following the (conventional) administrative norms of the Financial Oversight Authority and in case of failure by court order.

Furthermore, the provisions of art. 1270 from the Civil Code establish the pacta sunt servanda principle and stipulate the biding nature of the valid contract drawn between the contracting parties, whereas the provisions of art. 1280 of the same normative act stipulate that a contract is effective only between the parts, unless the law provides otherwise. However, the provisions of art. 10 from the No. 132/2017 Law make the case for extending the effects of the insurance contract to the benefit of third parties who suffered losses via accidents.

As a consequence, the insurance companies are liable in court for not meeting their obligations stipulated in the mandatory insurance contract, pursuant to the special regulation and the mandatory rules for its application.

Similarly, the Civil Code institutes using art. 1516 para. (1) the premise of the creditor's right to compensations – the right to the enforcement of the contract accordingly: „The creditor has the right to the full, accurate and timely enforcement of the obligation". The definition reunites the three dimensions of successful enforcement: quantitative, qualitative (both covered by the expression „full enforcement" and „accurate enforcement" of the obligation) and temporal (the expression „timely enforcement"). Failure to enforce any of these three dimensions, leads to, in principle, the right to compensations.

Thus, the obligation of the insurer needs to be executed as such, that is, following the contract and all the applicable norms to this enforcement (the Romanian Constitution, the Civil Code, no. 132/2017 Law, ASF Norm no. 20/2017, CEDO, CJUE and national courts jurisprudence).

Failure to comply with this imperative entails contractual liability and, hence, the coercion of the deviant contractor to comply with the contractual provision of the special regulation.

The binding force of the contract is the same for the courts which have the task of ensuring its execution and who are not entitled to intervene in the sense of changing the contract, being called upon to interpret it in the spirit of the parties' will, in the letter and spirit of the special regulation.

Courts cannot modify the terms of the insurance contract, being held to comply with it and cannot override the mandatory legal provisions.

Resolution 75 of the Committee of Ministers of the Council of Europe, adopted on 14 March 1975, stipulates in its first article that the person who has suffered damage has the right to compensation for this damage suffered so that

he is restored to a situation as near as possible to that in which he would have been if the act for which compensation is claimed had not occurred

From the Preamble of the Council Directive 72/166/EEC of 24 April 1972 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability and of the Council Directive 84/5/EEC of 30 December 1983 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles results that it is intended, on the one hand, to ensure the free movement both of vehicles based on the territory of the Union and of the persons aboard and, on the other hand, to ensure that the victims of traffic accidents caused by these vehicles receive the same treatment, irrespective of the place in the territory of the Union where the accident occurred. (CJUE Resolution from 23 October 2012 in case C300/10, Almeida, point 26; CJUE Resolution from 28 March 1996 in case C-129/94, Ruiz Bernáldez, Rec., p. I-1829, point 13; CJUE Resolution from 14 September 2000 in case C-348/98, Mendes Ferreira and Delgado Correia Ferreira, Rec., p. I-6711, point 24; CJUE Resolution from 17 March 2011 in case C-484/09, Carvalho Ferreira Santos, Rep., p. I-1821, point 24; CJUE Resolution from 9 June 2011 in case C-409/09, Ambrósio Lavrador and Olival Ferreira Bonifácio, Rep., p. I-4955, point 23)

The right of victims to full and equitable compensation is stipulated both in Council Directive 2009/103/CE of the European Parliament and o the Council of Europe (references to amended directives should be interpreted as references to Directive 2009/103/CE and are read according to the correlation table from Anexa II of this directive) and in the CJUE jurisprudence.

Thus, Council Directive 2009/103/CE stipulates in the Preamble: *"(12) Member States' obligations to guarantee insurance cover at least in respect of certain minimum amounts constitute an important element in ensuring the protection of victims. The minimum amount of cover for personal injury should be calculated so as to compensate fully and fairly all victims who have suffered very serious injuries, while taking into account the low frequency of accidents involving several victims and the small number of accidents in which several victims suffer very serious injuries in the course of one and the same event*."

The Court of Justice of the European Union has stated that: "*The objective of compulsory motor third party liability insurance is precisely to guarantee the compensation of road accident victims*". (CJEU judgment of 28 April 2009, Commission of the European Communities v Italian Republic, C-518/06, para. 75)

It was also noted that: "*The social protection objective of road accident victims can be considered as an overriding reason in the general interest and*

is essentially analyzed as a guarantee of adequate compensation for the aforementioned victims". (CJEU judgment of 28 April 2009, Commission of the European Communities v Italian Republic, C-518/06, para. 73 to 74).

Conclusions

The objectives and the aim pursued by European and national regulation are the following: social protection of the victims of road accidents, extremely disadvantaged social category; guaranteeing comparable treatment of road accident victims; guaranteeing adequate compensation for road accident victims: "*The objective of compulsory motor third party liability insurance is precisely to guarantee the compensation of road accident victims*" (Judgment of the ECJ of 28 April 2009, Commission of the European Communities v Italian Republic, C-518/06, para. 75); "*The objective of social protection for road accident victims can be considered as an overriding reason of general interest and is essentially dealt with as a guarantee of adequate compensation for the aforementioned victims*". (Judgment of the ECJ of 28 April 2009, Commission of the European Communities v Italian Republic, C-518/06, para. 73-74)

The Court of Justice of the European Union has ruled that the European directives in the field are intended, on the one hand, to ensure the free movement both of vehicles normally based in the territory of the Union and of persons on board and, on the other hand, to ensure that victims of traffic accidents caused by these vehicles will receive comparable treatment irrespective of where in the Union that accident has occurred. (CJEU judgment of 23 October 2012 in Case C300 / 10, Almeida, para. 26; Judgment of the Court of Justice of 28 March 1996 in Case C-129/94 Ruiz Bernáldez [1991] ECR I-1829, para. 13; CJUE judgment of 14 September 2000 in Case C-348/98 Mendes Ferreira and Delgado Correia Ferreira [2000] ECR I-6711, para.; Judgment of the CJEU of 17 March 2011 in Case C-484/09 Carvalho Ferreira Santos, Rep., P. I-1821, para. 24; Judgment of the CJEU of 9 June 2011 in Case C-409/09 Ambrósio Lavrador and Olival Ferreira Bonifácio, Rep., P. I-4955, para. 23)

Bibliography

1. Albu, I., (1994), *Civil law. Contract and civil liability*, Cluj-Napoca: Dacia.
2. Jugastru, C., (2013), *Injury - Romanian landmarks in european context*. Bucureşti: Hamangiu.
3. Pop, L., Popa, I.F., Vidu, S.I., (2012), *Basic Civil law treaty - Obligations under the new Civil Code*, Bucureşti: Universul juridic.
4. Vladu, M, (2010), *Damage caused by offenses against the individual*, Bucureşti: Hamangiu.

THE SCIENTIFIC ANALYSIS OF THE CRIMES AGAINST JUSTICE IN THE LEGISLATION OF THE REPUBLIC OF MOLDOVA

Eugeniu PITERSCHI*

Abstract

In the conditions of declaration by the Republic of Moldova's dedication to the strategic course towards European integration, justice, as the ideal and social value, must follow this vector in close consonance with the universal values, focusing primarily on the idea of respecting the fundamental rights and freedoms of the person.

The protection of legality in the field of justice is indispensably conditioned by ensuring the achievement of the purposes of the criminal process. One of these purposes is that the person who committed an offense is punished according to his guilt. In order to achieve this goal, the legislator offers the possibility to the law enforcement authorities to apply certain coercive measures to these persons, measures that involve a limitation of their legal rights and interests.

The legality of judgments adopted by courts, the effectiveness of law enforcement functions and the enforcement of criminal repression in respect of offenders are the priority issues that justice reform in the Republic of Moldova must address. At the same time, the existence of an independent and impartial judiciary is an inherent attribution of a state without which a democratic society can not be built.

Keywords: *Criminal Code, justice, rule of law, fundamental rights of amulet, constitutional order*

JEL Classification: [K 14]

1. Introduction

Historical practice demonstrates that there is a system of regulators, in every nation and in any period, that results from the material conditions of his life and the psychic elements of the cohabitant, and which designates for each sphere of his own activity, linking one another through a series of bilateral and reciprocal relationships in such a way that claims and obligations correspond and can be converted.

From this point of view, justice is a moral value, an element of social consciousness, through which people, classes, social groups make an appreciative act on the relations established in a particular society, on the

* PhD. candidate, Academy "Ştefan cel Mare", Chisinew, Republic of Moldova.

respective institutions in the light of a certain philosophical view about the social class, and about what the class considers, that society is good, right and moral for man, for society, in relation to equity, justice is proving to be a principle of coordination between subjective beings.

In fact, the Latin "jūstitia" means the right, emerged during the time in the two fundamental meanings that have to be confluent: as an expression of moral appreciation and activity of the courts. The moral sense of justice designates the idea of justice as an appreciation of human actions in relation to a social desideratum, saying that the action is fair or unfair or that it is meant to achieve social justice, whether it is against this right.

The notion of "law", as the notion of "justice", has caused numerous and significant discussions in which the latter is considered sometimes as a synonym or equivalent of the law, and sometimes an element distinct from it and superior. Under a certain aspect, justice consists in the compliance with the law, although, on the other hand, it is stated that the law must be in accordance with justice. The law which recognises, on the one hand, as a criterion of fair and unfair, can in turn be - and thus it appears more like an act of empirical order - subject to a judgment of the same kind. At the same time, in a sense, justice is confused with legality and therefore with the law, since formally, law is always *justi et injusti regula*. However, it is known that between justice and law there is the possibility of antithesis, because once some legal experience can conflict with the absolute requirement that gives expression to a norm of the law. This explains the possibility of adopting rules contrary to objective requirements, in contradiction with the essence of fairness of justice.

2. The purpose of the research

The purpose of the study is the multilateral and complex investigation of antisocial acts against justice provided in Chapter XIV of the Special Part of the Criminal Code of the Republic of Moldova. Similarly, the given study lies in the analysis of the mechanisms of law, in terms of the prevention and combating actions which have as their purpose the attempt on the entire order of law and endangering the activity of the competent bodies, which have as their objective the administration of justice at the highest level.

3. Materials used and applied methods

The object of the scientific analysis was constituted first of all by the Constitution of the Republic of Moldova of 29.07.1994, the latter being followed by the Criminal Code of the Republic of Moldova no. 985-XV of 18 April 2002. Also, in order to achieve the stated objective, in this scientific article I studied and analyzed the specialized legal literature.

The scientific knowledge conveyed through this publication has been acquired predominantly through classical scientific research methods. Therefore, in the process of elaborating the article, we have guided the general method of knowing the scientific dialectics, based on which different scientific methods have been applied: logical-juridical, comparative, systemic analysis, classification, grammar, etc.

4. Scientific support of the work

In the Republic of Moldova the crime of falsification of the evidence was investigated by Sergiu Brînză, Alexandru Borodac, Valeriu Cusnir, Gheorghe Ulianovschi, Vitalie Stati, etc.

Among the scientists from abroad who have contributed to the development of the concept theories of criminal liability for the crime of falsification of evidence lists: V. Dongoroz, A. Boroi, V. Dobrinoiu, A. Galahova, M. Kaufman, A. Amosov, H. Dadadev, M. Mirzabalaev, H. Fashtudinova, A. Fedorov, L. Lobanova, R. Cabulov, etc.

5. The basic content

A careful analysis of legal phenomenology helps us to understand that the criterion of fairness of justice translates into a determined category that is not satisfied with an intersubjective relationship based only on partial misconduct or misconception, subject to limitations, empirical and contingent deviations, but requires equal recognition of the rights and obligations of the subject in all possible interferences with other subjects. In this synthetic expression of equitable action, justice obliges any subject to be recognized and treated by any other as a fundamental principle of his own acts.

In modern society, the role of justice and the state assumed it. The fact that justice is the monopoly of the state involves two consequences:

a) no authority other than the legally established courts may perform justice by issuing judgments which enjoy the authority of the trial and enforceability. In this regard, paragraph (l) of art. 115 of the Constitution of the Republic of Moldova[1] stipulates that the judiciary is implemented through the Supreme Court of Justice, through the courts of appeal and by the judges; for certain categories of cases, specialized courts may operate, according to the law;

b) the other consequence of the principle that justice is the monopoly of the state is that the state is obliged to divide justice when requested to do so. The judge who has been entrusted with the handling of an application can not refuse the judgment. Of course, it is an ideal that the judge solve the case with which he

[1] The Constitution of the Republic of Moldova from 29.07.1994 // Monitorul Oficial al Republici Moldova nr. 1 from 12.08.1994.

was vested on the basis of a text of law whose content is unequivocal and perfectly applicable to the factual situation that characterizes the case, but even if the law presents in conclusions or gaps, the judge is bound to resort to the interpretation of the law and, in the absence of express text, to the analogy of the law or to the analogy of the law and to solve the cause with which it was invested. The concept of justice has several meanings, two of which were directly related to the study of judicial organisation (Comments of the Criminal Code of the Republic of Moldova, 2003, p. 654):

a) in a first sense, justice is a function – the function to judge, to decide on conflicts arising between different subjects of law through the application of the law. In this sense, it is said that the judge administered justice. In such a vision, justice is the prerogative of the sovereign which belongs to the state;

b) in a second sense, justice means all the activities through which the judicial function can be directly or indirectly contributed.

Describing the narrow meaning, Gheorghe Ulianovschi mentions that it promoters understand "justice" only "the activity of solving the cases by the courts". According to this opinion, offenses that are conducive to the execution of court decisions must be included in the group of offenses against the order of administration, not in the case of crimes against justice (Ulianovschi, 1999, p. 23). The last sentence presents a special interest, because the offenses provided in art. 317 - 322 Criminal Code of the Republic of Moldova[2], can be considered as crimes that impinge on the enforcement of judgments.

Critically examining the narrow sense of the definition of the notion of justice, we mention that, if sustained, a good portion of articles of Chapter XIV "Crimes against Justice" of the Special Part of the Criminal Code of the Republic of Moldova should change its location: art. 311 - "False Denunciation"; art. 315 - "Disclosing Data from a Criminal Investigation"; art. 316 - "Disclosing Information on Security Measures for the Judge and Participants in a Criminal Case"; art. 317 - "Escape from Detention"; art. 318 - "Facilitation of Escape"; art. 319 "Evasion from Serving a Sentence of Imprisonment"; art. 320 - "Deliberate Non-Execution of a Court Decision"; art. 321 - "Violent Noncompliance with the Demands of a Penitentiary's Administration"; art. 322 - "Illegal Transmission of Prohibited Objects to Persons Detained in Penitentiaries"; art. 323 - "Supporting a Crime", etc. In fact, none of these items is intended to protect the criminal activity of the administration of justice.

Also, in the event of a limited acceptance of how to define the notion of justice, several articles Chapter XIV of the Special Part of the Criminal Code

[2] The Criminal Code of the Republic of Moldova nr. 985-XV from 18.04.2002 // Republished in Monitorul Oficial of the Republic of Moldova in 2009.

of the Republic of Moldova[3], in order to be considered as criminalizing facts directed only against the activity of performing justice: art. 303 - "Interference with the Dispense of Justice and with Criminal Investigations"; art. 308 - "Illegal Detention or Arrest"; art. 310 - "Falsification of Evidence"; art. 312 - "False Statements, Expert Conclusions, or Incorrect Translations", etc.

In this way, it becomes clear that the activity of the prosecutor's office, criminal prosecution bodies or other organs or persons that contribute to justice is not an end in itself. Prejudicial, prejudicial and post-judicial activity of these organs is an activity that contributes - to some extent - to the achievement of justice. At the same time, such an activity does not mean the realization of justice (Brînză, 2005, p. 577).

The generic legal object of the crimes set forth in Chapter XIV of the Special Part of the Criminal Code is the social relations with regard to the activity of performing the justice and the activity of contributing to the performance of justice.

Each of the offences against justice has an *special legal object*: the social relations with regard to the non-admission of interference in the work of the court, as the sole promoter of the act of justice (in the case of the offence referred to in paragraph.(l) art. 303 of the Criminal Code of the Republic of Moldova)); social relations regarding the non-admission of the interference in the activity of criminal prosecution bodies (in the case of the offense specified in paragraph (2) article 303 of the Criminal Code of the Republic of Moldova); social relations regarding the contribution to the proper conduct of criminal justice by avoiding the repression against innocent persons (in the case of the offense provided by article 306 of the Criminal Code of the Republic of Moldova); social relations regarding the implementation of justice, in terms of law compliance with procedural acts issued by judges (in the case of the offense specified in article 307 of the Criminal Code of the Republic of Moldova); social relations regarding the non-admission of the organization or instigation of torture actions (in the case of the offense provided by paragraph (2) article 309' of the Criminal Code of the Republic of Moldova); social relations regarding the authenticity of the evidence in the civil process (in the case of the offense provided in paragraph (1) of article 310 of the Criminal Code of the Republic of Moldova); the social relations regarding the authenticity of the evidence in the criminal trial (in the case of the offense provided in paragraph (2) article 310 of the Criminal Code of the Republic of Moldova); social relations regarding the good faith that must be manifested during the presentation of the declaration, conclusion, translation or

[3] The Criminal Code of the Republic of Moldova nr. 985-XV from 18.04.2002 // Republished in Monitorul Oficial of the Republic of Moldova in 2009.

interpretation in the criminal prosecution or trial of the case (in the case of the offense stipulated in article 312 of the Criminal Code of the Republic of Moldova); social relations regarding the fulfillment by the witness or injured party of the obligation to make declarations in the framework of the criminal investigation or the judicial investigation (in the case of the offense provided for in article 313 of the Criminal Code of the Republic of Moldova); social relations regarding the non-admission of the disclosure of criminal prosecution data contrary to the prohibition of the persons conducting the criminal investigation (in the case of the offense specified in paragraph (1), article 315 of the Criminal Code of the Republic of Moldova); social relations on preventing the disclosure of data security measures to the judge, bailiff, injured party, witness or other participants in criminal proceedings or to their close relatives (if the offense under art. 316 of the Criminal Code of Republic of Moldova); social relations regarding the prevention of the escape from the places of detention of the executing prisoner or of the person under preventive arrest (in the case of the offense specified in article 317 of the Criminal Code of the Republic of Moldova); social relations regarding the prevention of the facilitation of any escape (in the case of the offense specified in paragraph (1) of article 318 of the Criminal Code of the Republic of Moldova); social relations regarding the prevention of the facilitation of escape by a person with a responsible position (in the case of the offense provided by paragraph (2) article 318 of the Criminal Code of the Republic of Moldova); the social relations regarding the execution of the punishment in full compliance with the law by the convict who has been allowed to leave briefly from the places of detention (in the case of the offense provided for in article 319 of the Criminal Code of the Republic of Moldova); social relations regarding the prevention of non-execution or evasion of the execution of the court decision (in the case of the offense specified in paragraph (1), article 320 of the Criminal Code of the Republic of Moldova); social relations with regard to preventing the non-execution or evasion of the execution by a responsible person of the court's decision or preventing its execution (in the case of the offense provided for in paragraph (2) of article 320 of the Criminal Code of the Republic of Moldova); social relations regarding the lawful transmission of objects to persons held in prisons (in the case of the offense specified in article 322 of the Criminal Code of the Republic of Moldova); social relations regarding the prevention of the favoring of a crime (in the case of the offense provided in article 323 of the Criminal Code of the Republic of Moldova).

There are also cases when offenses against justice have a *special complex legal object*, not a simple special object. For example, in the case of the offense referred to in paragraph (2), art. 315 Criminal Code of the Republic of Moldova, the main legal object is the social relations regarding the

non-admission of the data of the prosecution by the person conducting the criminal investigation or by the person authorized to control the conduct of the criminal prosecution. In turn, the secondary legal object of this offense is to establish relationships with regard to the prevention of causing moral or material damage to the suspect, accused, witness, injured party or their representatives or evasion of the accused. Also, in the case of the offense specified in art. 321 Criminal Code of the Republic of Moldova, the main legal object is the social relations regarding the subjection of a person who executes the punishment in the penitentiary to the legitimate requirements of the penitentiary administration. In turn, the secondary legal object of the offense in question is to form the social relations regarding the bodily integrity or the health of the person (Brînză, 2015, p. 720-721).

As regards the *material object* of the crime, its presence may be attested in the case of crimes against justice. For example, the person's body is the material object in the case of the offenses referred to in letter a) paragraph (2) art. 309 Criminal Code of the Republic of Moldova; (c) paragraph (2) art. 317 Criminal Code of the Republic of Moldova and Art. 321 Criminal Code of the Republic of Moldova.

The person's body may be the material object of the offenses specified in art. 303, paragraph (l) art. 308, letter b) paragraph (2) art. 309, paragraph (l) art. 309' and art. 314 The Criminal Code of the Republic of Moldova, when the corresponding offenses presuppose the direct criminal influence on the person's body.

In the case of the offense provided in art. 322 Criminal Code of the Republic of Moldova, the material object is alcoholic beverages, drugs, drugs or other narcotic drugs, other objects whose transmission to detainees is forbidden (Brînză, 2005, p. 577).

Some crimes against justice have an *immaterial object* - judgment, sentence, decision or conclusion contrary to the law (in the case of the offense specified in Article 307 of the Criminal Code of the Republic of Moldova); the false denunciation (in the case of the offense specified in Article 311 of the Criminal Code of the Republic of Moldova); false statement, false conclusion or incorrect translation or interpretation (in the case of the offense provided in Article 312 of the Criminal Code of the Republic of Moldova); the data of the prosecution (in the case of the offenses specified in Article 315 of the Criminal Code of the Republic of Moldova); the data on the security measures applied to the judge, the bailiff, the injured party, the witness or other participants in the criminal trial, or to their close relatives (in the case of the offense provided for in Article 316 of the Criminal Code of the Republic of Moldova).

In the case of the offense specified in art. 323 The Criminal Code of the Republic of Moldova, the material or immaterial object is, as the case may be,

the means or instruments of committing the offense, the traces of the offense or the objects acquired by criminal activity.

In the case of the offenses provided in art. 310 Penal Code of the Republic of Moldova, as well as in case of artificial creation of the accusatory evidence lit.c) paragraph (2) art. 311 and lit.c) paragraph (2) art. 312 Criminal Code of the Republic of Moldova), in addition to the material object, *the product* of the offense, or rather the object produced as a result of the offense.

The victim of the crime has the special qualities in the case of criminal acts referred to in: in paragraph (l) of art. 303 Criminal Code of the Republic of Moldova - the judge; paragraph (2), art. 303 Criminal Code of the Republic of Moldova - the criminal prosecution officer or the prosecutor; art. 306 Criminal Code of the Republic of Moldova - innocent person; art. 307 Criminal Code of the Republic of Moldova - the person in respect of which a decision, sentence, decision or termination is pronounced contrary to the law; paragraph (l) art. 308 Criminal Code of the Republic of Moldova - person detained illegally; paragraph (2), art. 308 Criminal Code of the Republic of Moldova - the person arrested illegally; art. 309 Criminal Code of the Republic of Moldova - the suspect or accused, the victim or injured party, the witness, the civil party, the civilly responsible party, the expert, the translator or the interpreter; art. 311 Criminal Code of the Republic of Moldova - the person accused of committing a crime; art. 314 Criminal Code of the Republic of Moldova - the witness, the injured party, the expert, the interpreter or the translator; paragraph (2), art. 315 Penal Code of the Republic of Moldova, in the case of causing moral damages or material to the suspect, the accused, the witness, the injured party or their representatives - the suspect, the accused, the witness, the injured party or their representatives; art. 316 Criminal Code of the Republic of Moldova - the judge, the bailiff, the injured party, the witness or other participants in the criminal trial, or their close relatives; art. 321 Criminal Code of the Republic of Moldova - the representative of the administration of the penitentiary, to whom the perpetrator must be subjected.

From the point of view of *the objective side*, crimes against justice are, in the most frequent cases, formal offenses. At the same time, in the hypothesis of these crimes, when they assume the presence of aggravated ways, they will take the form of material crimes (for example, in the case of the aggravated ways recorded under letter c) paragraph (2) art. 306, letter c) paragraph (2) art. 307, paragraph (4) art. 308 and paragraph (2) of art. 316 Criminal Code of the Republic of Moldova). Among the material offenses provided in Chapter XIV of the Special Part of the Criminal Code are the offenses specified in paragraph (2) art. 315 Criminal Code of the Republic of Moldova.

Some crimes against justice committed on the path of the action, for example: the offences referred to in art. 303, 306, 307, 309, para.(2) art. 309',

art. 310-312, 314-318, 322 and 323 of the Criminal Code of the Republic of Moldova. Other crimes of the same group can be committed only on the path of inaction, for example: the offences specified in art. 313, 319, para.(l) art. 320 and art. 321 of the Criminal Code of the Republic of Moldova. By action or inaction committed the offences specified in art. 308, para.(l) art. 309' at para.(2) art. 320 of the Criminal Code of the Republic of Moldova.

In terms of the secondary signs of the objective side, for some of the crimes against justice the existence of the following signs is mandatory:

1. the mode of committing the offense: the systematic way (in the case of the offense specified in Article 322 of the Criminal Code of the Republic of Moldova, when the offense is not committed in large proportions);

2. the means of committing the offense: special instruments of torture or other objects adapted for this purpose (in the case of the offense referred to in let.) Paragraph (3) art. 309 Criminal Code of the Republic of Moldova); weapon or other objects used as weapons (in the case of the offense specified in letter d) paragraph (2) art. 317 Criminal Code of the Republic of Moldova);

3. the environment of the offense: in the criminal prosecution or trial of the case (in the case of the offense stipulated in Article 312 of the Criminal Code of the Republic of Moldova); in the framework of criminal prosecution or judicial investigation (in the case of the offense provided for in Article 313 of the Criminal Code of the Republic of Moldova); the environment for the conclusion of the agreement on the recognition of guilt c) paragraph (2) art. 309 Criminal Code of the Republic of Moldova) etc. (Brînză, 2005, p. 577).

From the point of view of *the subjective aspect* of the offense, it should be noted that almost all the offenses provided in Chapter XIV of the Special Part of the Criminal Code are characterized by direct intent. This does not exclude the perpetrator's manifestation of harmful consequences (for example, in the case of the facts provided by letter c) paragraph (2) art. 306, letter c) paragraph (2) art. 307, paragraph (4) art. 308, paragraph (2) art. 316 Criminal Code of the Republic of Moldova. Only in the case of the offense specified in paragraph (2) art. 315 The Criminal Code of the Republic of Moldova can be direct or indirect. In the case of the offense provided in paragraph (l) art. 309' The Criminal Code of the Republic of Moldova, the intention to commit the offense is a direct intent in those cases when the purpose pursued by the perpetrator is a special purpose. But if the perpetrator does not pursue a particular purpose, the intention is a direct or indirect intent.

It is also important to mention that the data provided by the Information Technology Service to the Ministry of Internal Affairs of the Republic of Moldova, for example, in 2018, have been committed 364 contraventions against the law. This means that more illicit acts are imposed on people who have social relations that deprive them of the authenticity of the evidence in a

judicial process in the northern part of the country - 41%. In the case of the centralised system, 36% of the total number of offences registered was justified for the year 2018. In the South of the Republic, the difference between 23% of the criminal offences of this genus was registered. In comparison with the previous years, in 2018, there was a greater risk of offences of social legislation that deprived the authenticity of the documents in a judicial process (Information Technology Service).

The purpose of the offense is mandatory if it is expressed in: the purpose of preventing the multilateral, full and objective examination of the concrete case or obtaining an unlawful judicial decision (paragraph (l) Article 303 of the Criminal Code of the Republic of Moldova); the purpose of preventing the rapid, complete and objective investigation of the criminal case (paragraph (2) Article 303 of the Criminal Code of the Republic of Moldova); the purpose of accusing the victim of committing a serious, particularly serious or exceptionally serious crime (Article 306 of the Criminal Code of the Republic of Moldova); the purpose of any of the following forms:

1) the purpose of making the victim make statements when questioning (in the case of a person's constraint, by threats or other illegal acts, to make statements at interrogation);

2) the purpose of making the victim make a false conclusion (in the case of a coercive, threatening or other illegal act, to make a false conclusion);

3) the purpose of causing the victim to make improper interpretations or translations in the case of a constraint on the translator or interpreter, through threats or other illegal acts, to make an incorrect translation or interpretation - art. 309 Criminal Code of the Republic of Moldova; the purpose of accusing someone of committing an offense - art. 311 Criminal Code of the Republic of Moldova; the purpose of which may be any of the following three forms:

I. the purpose of making the victim present false declarations or evading the obligation to make statements - in the case of the coercion of the witness or the injured party to make false statements or to evade the obligation to makes statements;

II. the purpose of making the victim make false conclusions or statements or avoiding the obligation to draw conclusions or statements - in the case of the expert's constraint to make false conclusions or statements or to escape the obligation to makes conclusions or statements;

III. the purpose of the victim being to make interpretations or to make incorrect translations or to evade the obligation to interpret or translate - in the case of the interpreter or translators being forced to interpret or translate incorrect or to avoid the obligation to make interpretations or to make translations, art. 314 Criminal Code of the Republic of Moldova).

For the qualification of crimes stipulated in the Chapter XIV of the Criminal Code it is necessary to establish why particular, resulted in the interest of the material point. b) para.(2) art. 311 and lit. b) para. (2) art. 312 of the Criminal Code of the Republic of Moldova), (Brînză, 2005, p. 577).

The subject of crimes against justice is the responsible person who, at the time of committing the offense, usually reached the age of 16 years. As an exception, only in the case of the offense specified in paragraph (2) art. 317 of the Criminal Code of the Republic of Moldova the minimum age of criminal liability is 14 years.

The subject must have a certain special quality in the hypothesis of the offences referred to in: paragraph (3) art. 303 and para. (2) art. 322 Criminal Code of the Republic of Moldova, the person with responsibility or the person managing a commercial, public or other non-governmental organization; art. 306 Criminal Code of the Republic of Moldova - prosecutor, art. 307 and paragraph (2) art. 308 Criminal Code of the Republic of Moldova - Judge; paragraph (l) art. 308 and art. 309 Criminal Code of the Republic of Moldova - the person conducting the criminal investigation; paragraph (2), art. 310 Criminal Code of the Republic of Moldova - the person conducting the prosecution, the prosecutor or the defender admitted in the criminal trial; art. 312 Criminal Code of the Republic of Moldova - the witness, the injured party, the specialist, the expert, the translator or the interpreter; art. 313 Criminal Code of the Republic of Moldova - witness or injured party; paragraph (2), art. 315 Criminal Code of the Republic of Moldova - the person conducting the criminal investigation or the person authorized to control the conduct of the criminal prosecution; art. 316 Criminal Code of the Republic of Moldova - the person to whom, by virtue of his job duties, he was entrusted with the data on the security measures applied to the judge, the bailiff, the injured party, the witness or other participants in the criminal trial; art. 317 Criminal Code of the Republic of Moldova - the person executing the imprisonment or the person under preventive arrest; paragraph (2), art. 318 and paragraph (2), art. 320 Criminal Code of the Republic of Moldova - person with responsibility; art. 319 Criminal Code of the Republic of Moldova - the convict was allowed to leave briefly from the places of detention; art. 321 Criminal Code of the Republic of Moldova - the person who executes the punishment in the penitentiary.

Conclusions

Following the noted, we consider that the fundamental social value, defended against the crimes stipulated in Chapter XIV of the Special Part of the Criminal Code of the Republic of Moldova, includes the following segments:

1) the activity of examining and settling cases by the courts;

2) activities carried out in parallel by persons other than judges, which contribute to the proper settlement of cases (pre-trial activity);

3) the activity preceding the trial (the preliminary activity);

4) post-trial activity, assuming enforcement of the judicial decision (post-judicial activity).

In conclusion to the above, the following definition of the concept of crimes against justice can be formulated: "offenses against justice" are considered harmful intentional acts, which exclusively or mainly affect social relations which are conditioned by the protection of the primary function of jurisdiction exercised by the judiciary, as well as by the complementary functions of criminal prosecution and enforcement of judgments and judicial measures, which as a whole compete with the exercise of justice.

Bibliography

Books

1. Barbăneagră, A., (2003), Comments of the Criminal Code of the Republic of Moldova. Chişinău: ARC.
2. Brânză, S., Ulianovschi, X., and others, (2005), *Criminal law. The special part.* Chişinău: Cartier.
3. Brînză, S., Stati, V., (2015), *Treaty of criminal law. The Special Part. Volume II*, Chişinău: Tipografia Centrală.
4. Ulianovschi, Gh., (1999), *Crimes that prevent the justice*. Chişinău: Garuda-art.

Legislation

1. The Constitution of the Republic of Moldova from 29.07.1994 // Monitorul Oficial al Republicii Moldova nr.1 from 12.08.1994, Chişinău, can be accessed at: http://lex.justice.md/document_rom.php?id=44B9F30E:7AC17731, viewed on 14.12.2018.
2. The Criminal Code of the Republic of Moldova nr. 985-XV from 18.04.2002 // Republished in Monitorul Oficial of the Republic of Moldova in 2009, Chişinău, can be accessed at: http://lex.justice.md/md/331268/, viewed on 21.12.2018.
3. Answer from the Information Technologies Service of the Ministry of Internal Affairs on the submission of statistical data on crimes against justice committed during 2018.

THE IMPACT OF IMPLEMENTING THE NEW REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON THE EU AGENCY FOR ASYLUM ON EU MEMBER STATES' ADMINISTRATIONS

Eleodor PÎRVU*

Abstract

In the European Migration Agenda, the Commission acknowledged the importance of EASO's role in designing and maintaining a Common Asylum Policy, considering that the Agency could become a country-of-origin information centre by encouraging the implementation of a uniform decision-making process by taking basic professional training measures and, of course, could put in place specialized networks of national authorities to enhance operational cooperation on asylum.

This proposal for a legislative amendment aims to provide the EU Agency for Asylum with the necessary tools to make it a powerful institution that can implement and improve the functioning of the CEAS by completing asylum legislative and policy instruments in particular as regards asylum procedures, professional qualification standards, the Dublin system and the resettlement or transfer of asylum seekers.

Keywords: *asylum, agency, refugee, protection, CEAS, EASO*

JEL Classification: [K 37]

1. Introduction

At Union level, there is a Common European Asylum System (CEAS) laying down minimum standards for the treatment of asylum seekers and for the examination of all asylum applications.

The issue of amending the Union's rules on asylum was raised due to the migration crisis that has forced this process.

Currently, asylum seekers in the European Union are treated differently, the rate of positive asylum decisions varying significantly on a case-by-case basis, somehow forcing this category of foreign citizens to move across Europe to seek international protection in countries where they believe they will have the most chances of success.

The European Commission has proposed to the Council a number of seven legislative proposals to improve EU asylum standards.

* PhD. candidate, Faculty of Public Administration, National University of Political Studies and Public Administration, Bucharest, Romania.

The Common European Asylum System is therefore undergoing a reform addressing several aspects: from increased efficiency and major resilience to the great pressure of migration, to the elimination of factors that attract asylum seekers, as well as the elimination of secondary movements, the adoption of measures to combat abuse, and improving the aid given to the Member States most severely affected.

The seven legislative proposals to amend the Community asylum *acquis*, promoted by the Commission, are aimed at the following:

- reforming the Dublin system to improve the manner of distributing asylum requests among Member States and guarantee the quick processing of asylum requests;
- strengthening the Eurodac Regulation, with regard to improving the EU database of digital fingerprints of asylum seekers;
- a true EU agency to manage the asylum phenomenon[1]: the Commission proposed to amend the European Asylum Support Office's mandate so that it could play a new policy-implementing role as well as a strengthened operational role. For instance, EASO will manage the distribution mechanism under a reformed Dublin System, will monitor the compliance of Member States with EU asylum rules, will identify measures to remedy shortcomings, and will take operational measures in emergency situations[2].
- so as to harmonise procedures and reduce gaps between Member States concerning the rates of recognition, the Asylum Procedures Directive must be replaced with a new Regulation.
- with regard to the harmonisation of protection standards, as well as the asylum seekers' rights, it is proposed to amend and complement the Directive on common procedures for granting and withdrawing international protection with a new Regulation;
- so as to guarantee that asylum seekers enjoy dignified, harmonised reception standards, the Reception Conditions Directive must be recast once more;
- the last proposal refers to creating a permanent framework on resettlement and humanitarian admission.

[1] Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No. 439/2010, COM (2016) 271 final, Brussels, 4.5.2016.

[2] Elena Loredana, P. (2018). International Protection Regulations in the European Union. *13th International Conference on European Integration - realities and perspectives, Legal Sciences in the New Millennium*, [online](ISSN: 2067 – 9211), p. 20. Available at: http://proceedings.univ-danubius.ro/index.php/eirp/article/viewFile/1871/1930 [Accessed 10 March 2019].

These recast proposals are considered priorities within the Joint declaration of 2016[3], identified by the European Parliament, the Council and the Commission and currently being analysed by these European institutions.

Currently, after one year and a half, these proposals are at various stages of the legislative process.

Therefore, the proposals aiming to create the European Union Agency for Asylum and the one concerning the reformation of the Eurodac system are close to being adopted, while the proposal on the EU resettlement framework, the one concerning standards for granting international protection and the reception conditions proposal are advancing at a rapid pace.[4]

2. Legal grounds and objectives of the proposed Regulation

At the beginning of 2016 (19 February), the European Council stated it was necessary to reform the current EU asylum framework, by ensuring an effective policy that respects human rights. On 6 April 2016, the Commission claimed that a system that has been improperly designed or implemented, disproportionately attributing responsibility to certain Member States and encouraging uncontrolled movements to other Member States, should be abandoned. Currently, at European level, the goal is that the European Union should have at its disposal a solid, effective system to manage migration sustainably, based on the principles of responsibility and solidarity.

In the European Agenda on Migration[5], the Commission acknowledged the importance of EASO's role in designing and maintaining a Common Asylum Policy, considering that the Agency could become a country-of-origin information centre by encouraging the implementation of a uniform decision-making process by taking basic professional training measures and, of course, could put in place specialized networks of national authorities to enhance operational cooperation on asylum. Thus, the Agency is proposed to function with a strengthened mandate, playing a special role in implementing the asylum policy, and another enhanced operational role, all of these being possibly only through a monitoring mechanism that should assess compliance with the CEAS, as well as various necessary duties, namely reviewing and

[3] Joint declaration of the Presidents of the European Parliament, the Council and the European Commission on the EU's legislative priorities for 2017, 13.12.2016.

[4] Communication from the Commission to the European Parliament, the European Council and the Council - *Commission contribution to the EU Leaders' thematic debate on a way forward on the external and the internal dimension of migration policy*, COM (2017) 820 final, Brussels, 07.12.2017.

[5] 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, COM (2015) 240 final, Brussels, 13.05.2015.

supplying country-of-origin information, managing the Dublin system distribution key and making endeavours to support Member States in emergency situations or if useful corrective measures have not been taken.

This proposal for a legislative amendment aims to provide the EU Agency for Asylum with the necessary tools to make it a powerful institution that can help implement and improve the functioning of the CEAS, by completing asylum legislative and policy instruments, in particular as regards asylum procedures, professional qualification standards, the Dublin system and the resettlement or transfer of asylum seekers.

The Council and the Parliament reached a political consensus ad referendum in June 2017, as regards the chapters in the Regulation on the EU Agency for Asylum (twelve), the technical works concerning this proposal being completed before the end of 2017; the adoption of this proposal is suspended pending progress on the rest of the CEAS package.

In September 2018, the Commission proposed numerous amendments concerning the EU Agency for Asylum, which include an expansion of the technical and operational assistance that the agency may provide to Member States.

3. The impact of the new regulation on Member States' administrations

3.1. The role of the current European asylum support agency

The European Asylum Support Office (EASO) is an EU Agency established under Regulation (EU) No. 439/2010 of the European Parliament and of the Council, which has a particular role to play in the practical implementation of the Common European Asylum System (CEAS), being established with a view to enhancing practical cooperation on asylum issues and supporting EU Member States to fulfiltheir obligations at European and international level and to provide protection to all people in need by giving support to those Member States whose reception and asylum systems are facing particular pressure, acting as a centre of expertise in the field of asylum. EASO's mission is to facilitate the implementation of a Common European Asylum System by acting as an independent centre of expertise on asylum, providing support to all Member States by facilitating, coordinating and strengthening the practical cooperation among them.

EASO's goal is to facilitate, coordinate and perfect the cooperation on asylum among Member States from all points of view.

EASO provides:

1. all evidence-based information required in the process of drafting all EU policies and legislation in all areas with a direct or indirect impact on asylum;

2. operational, technical and practical support to Member States in specific need and those facing various types of pressure on their reception and asylum systems, by providing teams comprised of national asylum experts.

EASO also offers various types of permanent support concerning the existence of a common asylum training programme, supporting and driving the common quality of country-of-origin (COI) information; special support, namely tailor-made assistance, relocation, capacity building and providing specific quality control tools; emergency support by providing temporary support and assistance to Member States under particular pressure to repair or rebuild their asylum and reception systems, sharing and merging information, data, and analyses at EU level, including common EU-wide guidelines; third-country support consisting in supporting partnerships with third countries to reach common solutions by building capacities and creating regional protection programmes, as well as coordinating Member States' measures on resettlement.

Moreover, the EU will set up an Early Warning, Preparedness and Crisis Management Mechanism, allowing Member States to be continuously prepared to manage the alarming evolution of asylum seeker flows, with EASO creating an Early Warning and Preparedness System (EPS) to this end.

Concerning the early warning, EASO constantly provides a general presentation containing a review of the trends and factors influencing asylum, as well as risk scenarios, relying on information provided by Member States, the European Agency for the Management of Operational Cooperation at the External Borders (Frontex), the Office of the United Nations High Commissioner for Refugees (UNHCR), and the International Organisation for Migration, as well as updated COI data generated by EASO.

With regard to training, EASO provides tools to help Member States prepare for the management of the influx of asylum seekers, as well as the uninterrupted change in their number by providing training, COI, quality tools and support for analysis and implementation of EU legislation.

With regard to crisis management, EASO supports Member States facing particular pressure, offering support by deploying asylum support teams (AST).

As for EASO training, the Office relies on the EAC – European Asylum Curriculum, which is in fact a common professional training system aimed at asylum officers, other target groups, and directors and EU law enforcement officers, members of the judiciary; this training focuses on basic aspects of the asylum procedure and practice through interactive modules, while developing training modules in cooperation with other EU agencies in this regard.

Aside from these training courses, EASO organises ad-hoc training sessions (in Bulgaria, Greece, Italy, Luxembourg and Sweden), helping Member States that are facing certain types of pressure[6].

[6] European Asylum Support Office website - https://www.easo.europa.eu/about-us.

3.2. The impact across Europe of implementing the Regulation

The current EU agency currently operating in Malta – EASO – has supported the Member States throughout the process of implementing the European asylum *acquis* and improving the functioning of existing instruments ever since the beginning of its activity in 2011, gaining experience and credibility with regard to its work on the practical cooperation between Member States and supporting them in fulfilling their obligations under the CEAS.

It is considered that, due to its experience and knowledge in the field of asylum, and particularly due to the tasks carried out by EASO that have gradually evolved, it is time for this agency to become a stand-alone centre of expertise.

The Commission believes that due to the massive and uncontrolled arrival of migrants and asylum seekers on the European continent, in particular last year, structural weaknesses of the CEAS have arisen, the Agency being one of the tools that can be used to address these deficiencies effectively. It is necessary to provide the Agency with the necessary means to assist Member States in crisis situations, but it is all the more necessary to build a legal, operational and practically solid framework so that the Agency could strengthen Member States' asylum and reception systems and be able to act in complementarity with them.

Therefore, the purpose of this proposal to amend the Regulation in force is to strengthen the role of EASO and transform it into an Agency that may facilitate the implementation of the CEAS and improve it's functioning, renaming EASO (European Asylum Support Office) the European Union Agency for Asylum, with a mandate to meet the requirements entailed by the reform.

With regard to subsidiarity, the proposed Regulation aims to promote EU legislation and operational standards in order to ensure a high level of uniformity concerning asylum procedures, reception conditions and the assessment of protection needs across the Union, to facilitate the implementation and improvement of its functioning, to strengthen the exchange of information, as well as practical cooperation between Member States in the field of asylum, to monitor the operational and technical implementation of the EU legislation and asylum standards, by providing Member States with reinforced technical and operational assistance for the management of asylum and reception systems, with priority for those Member States dealing with unbalanced pressure on these systems. Therefore, so as ensure that the legal framework on asylum is properly applied, so as to strengthen the stable and orderly functioning of the CEAS, as this is the EU's common interest, the objectives of this proposal can be achieved much better at Union level, which, under Article 5 of the Treaty on European Union, may adopt measures in accordance with the principle of subsidiarity.

With regard to proportionality, the proposal aims to respond to the political realities and challenges that the Union is facing in terms of migration and asylum, ensuring that the operational standards and the asylum legislation are fully and correctly implemented by the Member States, that practical cooperation and exchange of information between Member States and with third countries are strengthened, by taking appropriate measures to maintain the smooth functioning of the CEAS, by providing the EU Agency for Asylum with the necessary tools to address both the disproportionate pressure on Member States' asylum and reception systems, as well as the inherent shortcomings of these systems in the long run.

The Agency may also assist Member States in the process of examining applications for international protection, at the request of the Member States and within a clearly defined operational framework, and if, following a monitoring exercise or in the event of disproportionate pressure on asylum and reception systems, the Member State concerned takes insufficient or no action, thereby endangering the functioning of the CEAS, the Agency may be required to intervene and provide assistance to a Member State in such a situation.

The objectives of this proposal can therefore be achieved much better at Union level, which, under Article 5 of the Treaty on European Union, may adopt measures in accordance with the principle of proportionality.

In order to carry out its mandate, the future European Union Agency for Asylum should work in close cooperation with the asylum authorities of the Member States, with national immigration, asylum and other services, using their capacities and expertise, as well as with the Commission, acting in good faith and exchanging accurate information in a timely manner.

Furthermore, by collecting and reviewing information on the asylum situation in the Union and in third countries, the European Union Agency for Asylum could help Member States better understand the factors favouring asylum-related migration to and within the Union, which is also useful in the context of early warnings and preparing Member States.

Regarding the reform of the Dublin system, the EU Agency for Asylum, by using and managing the correction mechanism, should give Member States the necessary support.

The European Union Agency for Asylum is designed to assist Member States to train experts in all national administrations, courts and national jurisdictions, as well as national asylum services, including with regard to the development of a common basic curriculum. Moreover, the Agency should make sure that all experts belonging to the asylum support teams or the Asylum Intervention Pool receive specialised training prior to participating in the Agency's operational activities.

It is absolutely useful for the Agency to collect information and draw up reports providing country-of-origin information by calling on the European COI networks so as to avoid duplication and create synergies with national reports, thus ensuring a more structured and streamlined production of country-of-origin information at EU level. In addition, the Agency should work with Member States and carry out a joint analysis to provide guidelines on the situation in certain countries of origin, so as to ensure the same purpose in assessing applications for international protection and the nature and quality of the protection granted.

Furthermore, the Agency should organise and coordinate activities to promote Union legislation in order to ensure a high degree of uniformity with regard to asylum procedures, reception conditions and the assessment of protection needs across the Union, supporting Member States by developing operational standards and compliance monitoring indicators for these standards, as well as developing guidelines on asylum, and it should also facilitate the exchange of best practices between Member States.

The European Union Agency for Asylum should establish a mechanism to monitor and assess the implementation of the CEAS, Member States' compliance with the operational standards, guidelines and best practices in the field of asylum, and to verify the functioning of Member States' asylum and reception systems, all in close cooperation with the Commission and without prejudice to the Commission's responsibility as guardian of the Treaties. Monitoring and assessment should be comprehensive and should rely above all on the information provided by the Member States, the analysis of the information on the asylum situation carried out by the Agency, site visits and the checking of a sample of cases.

The EU Agency for Asylum should also provide Member States with operative and technical assistance, particularly when their asylum and reception systems are under disproportionate pressure in order to facilitate and improve the proper functioning of the CEAS and support Member States in fulfilling their obligations under the CEAS. This operational and technical assistance consists in sending asylum support teams comprising experts from the agency's own staff, experts from Member States, or experts seconded by Member States to the Agency, as well as based on an operational plan.

The European Union Agency for Asylum should provide assistance for a better transfer of beneficiaries of international protection between Member States, while ensuring that the asylum and reception systems concerned are not the object of abuse, acting with solidarity towards Member States whose asylum and reception systems are under particular and disproportionate pressure, caused in particular due to their geographical or demographic situation.

With regard to Member States facing disproportionate migration pressure, characterised by massive arrivals of mixed migratory flows, called hotspots (certain areas at the external borders), they should be able to rely on enhanced technical and operative reinforcements from migration support teams, comprising teams of experts from the Member States sent through the European Union Agency for Asylum, the European Agency for the Management of Operational Cooperation at the External Borders and Europol, or other relevant Union agencies, as well as experts from the own staff of the European Union Agency for Asylumand the European Agency for the Management of Operational Cooperation at the External Borders. This will ensure the coordination of the activities carried out by migration support teams with the Commission and the other relevant Union agencies.

The EU Agency for Asylum should cooperate with EU bodies, agencies and offices, particularly with the European Agency for the Management of Operational Cooperation at the External Borders and the European Union Agency for Fundamental Rights, with the objective of fulfilling its mission and tasks. Cooperation should be based on working arrangements, previously approved by the Commission, in accordance with the EU legislation and policies.

It is imperative that the EU Agency for Asylum be an EU body, have legal personality and exercise the implementing powers conferred on it by this Regulation, being independent in terms of operational and technical aspects, and have legal, administrative and financial autonomy.

It should also have its own budget, with revenue mainly from the EU's contribution, and its funding is the object of an agreement of the budget authority, as set out in item 31 of the Interinstitutional Agreement of 2 December 2013 between the European Parliament, the Council and the Commission on budgetary discipline, on cooperation in budgetary matters and on sound financial management, all of this in order to guarantee the autonomy of the European Union Agency for Asylum.

The budgetary procedure of the Union should apply to the Union's contribution and other possible grants from the general budget of the European Union, and the Court of Auditors should check the accounts[7].

3.3. The impact at national level of implementing the Regulation

In view of the above, the draft Regulation, in the proposed form, will lead to a constant and sustained effort on the part of the authorities responsible for managing the asylum situation with regard to the obligation to periodically

[7] Amended proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No. 439/2010, COM (2018) 633 final, Brussels, 12.09.2018.

report data and information to the Agency, to receive asylum seekers from other Member States in accordance with to the quota established at European level for each Member State (on the basis of the reference key included in the draft recasting of the Dublin Regulation), the mandatory secondment of experts to participate in support operations on the territory of the Member States dealing with particular pressure for periods of at least 30 days.

In view of the Agency's new task of monitoring and assessing the implementation of the CEAS, along with the Member States' new obligation to provide and exchange information, I estimate that the authorities responsible for managing the asylum situation will be bound to ensure a greater degree of transparency regarding the periodic reporting of the legislative, institutional or resource-related measures taken for the proper management of the asylum issue in our country. Moreover, the authorities responsible for asylum management will have to take over and implement a series of operational standards and/or guidance elements developed at the Agency level, based on which they are to be evaluated (including through monitoring visits conducted by the Agency) on the manner they are complied with at national level.

Based on a preliminary analysis, the draft Regulation has no impact on the national asylum legislation, but in the medium term, I estimate that there will be a need for additional staffing of the authorities responsible for managing the asylum situation so as to properly manage the relationship with the Agency, in the light of the new mandatory tasks that each Member State will have following the adoption of the Regulation.

From the point of view of professional training, I retain the added value of the proposed Regulation compared to the current version, namely that the authorities responsible for managing the asylum situation will take over and integrate the Common European Asylum Curriculum into their own professional training programmes, which will lead to a unitary interpretation and practice of the legislation in the field.

On 26 September 2016[8], the Romanian Senate found that the proposed Regulation complied with the principles of subsidiarity and proportionality detailed above. Furthermore, it noted the following elements:

1. Romania, along with most Member States, salutes the contribution that the future agency may have to a better implementation of migration and asylum policy through proposals to strengthen the role of the current EASO,

[8] Decision No. 122 of 26 September 2016 on the Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No. 439/2010, COM (2016) 271 final, published in: Official Gazette No. 769 of 30 September 2016.

particularly on the technical dimension, in the support and coordination of operational aspects, as well as the objective of supporting increased convergence in the field.

2. The advancement of the discussions highlighted both for Romania and the other Member States the need to carefully assess the impact of transforming EASO into the Agency on the national migration and asylum model, the role of the future agency in monitoring and assessing the situation in Member States under migratory pressure, as well as with regard to the new financial and administrative obligations arising for Member States in terms of strengthening the human resources of the future agency.

The Romanian Senate has recommended enhancing practical cooperation on asylum between Member States and providing operational support to Member States to turn EASO into a strengthened agency equipped with the necessary tools for the five principles that the new Agency will rely on, i.e. enhancing practical cooperation and exchanging information on asylum – the Agency and the Member States will have the task of cooperating and the obligation to exchange information; ensuring greater convergence in assessing protection needs across the Union; promoting the EU legislation and operational standards to ensure a high degree of uniformity in the implementation of the asylum legal framework; monitoring and assessing the implementation of the CEAS; providing Member States with enhanced operational and technical assistance for the management of their asylum and reception systems, notably in cases of disproportionate pressure.

On 27 September 2018[9], the Chamber of Deputies adopted an opinion concerning the Proposal for a Regulation, indicating the following important aspects:

It supports the objective of providing enhanced operational and technical assistance to Member States for the management of their asylum and reception systems, especially in cases of disproportionate pressure.

The Chamber of Deputies invites the European Commission to take the necessary action to avoid the materialisation of the risk that, in case of disproportionate pressure on its asylum or reception systems, a Member State does not request operational and technical assistance from the Agency, or does not accept an offer of this kind from the Agency, or does not take sufficient measures to deal with the pressure, or fails to comply with the recommendations of the European Commission, thus affecting the

[9] Decision No. 83 of 27 September 2016 on adopting the opinion on the Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No. 439/2010, COM (2016) 271, published in: Official Gazette No. 771 of 3 October 2016.

effectiveness of asylum and reception systems to such an extent that the functioning of the Common European Asylum System (CEAS) would be jeopardised. The European Commission may adopt a decision by means of an implementing act, as this provision potentially entails a conflict.

It welcomes with enthusiasm the idea to include experts with professional profiles relevant to child protection in the assistance teams, given the increase in the number of unaccompanied children among migrants and asylum seekers, as well as the introduction of aspects related to the handling of children's applications for international protection as part of their training activities and it recommends that the protection of children's rights be reflected as much as possible in the tasks and duties of the Agency.

It draws attention to the fact that the task of collecting and gathering information on the asylum situation in the Union and in third countries, within the proposed agency, should only be extended to data and analyses with added value, compared to those from other sources or which are available through other agencies of the Union, in order to avoid an unjustified increase in the spending of European taxpayers' money.

It proposes that the active involvement of the Agency and experts in asylum request screening activities leads to disproportionate risks in terms of data security, considering that there would be too much interference with national asylum systems, and it suggests that such involvement be restricted to well-motivated cases and limited to what is definite added value.

It expresses concern about the Agency's right to initiate on its own initiative a monitoring exercise to assess the asylum or reception systems of a Member State whenever there are serious concerns about the functioning of any aspect of the asylum or reception systems of the Member State concerned, considering that this right could lead to excesses on the part of the Agency, to which it recommends that these monitoring actions be duly justified.

It warns that indicators, guidelines and best practices on asylum also depend on the national economic and social frameworks specific to each Member State, recommending that they be treated with caution with regard to transposition into the Union's practice.

It draws the attention of the European Commission, asking it to explain the operational standards for the implementation of the Union's asylum legislative instruments, which are to be developed by the new Agency, and what safeguards are to be limited to what is strictly necessary, so as not to affect the relevant rights that are the responsibility of the Member States.

It expresses concern about the provision setting forth that the Agency assesses whether Member States are prepared to face the challenges arising from any disproportionate pressure on their asylum and reception systems, considering that the preparation of Member States in this area cannot be

limited to administrative aspects, but also has legitimate cultural and political connotations, which the agency has no capacity to estimate.

It is of the view that this obligation of cooperation should also include the possibility of non-participation of the Member State in those situations in which the State concerned would have an excessive administrative burden if it complied with such obligation, or it would simply be incompatible with national law.

It salutes the attention paid to personal data protection and the detailed management thereof.

Conclusions

Given that EASO, renamed the European Union Agency for Asylum, was set up by a regulation, regulations being the only legal instrument that can ensure the level of efficiency and uniformity needed to implement EU asylum legislation, another regulation is also appropriate for this analysed proposal.

Recently launched, the new amended proposal[10] must be addressed in the context of the interinstitutional negotiations on the Proposal for a Regulation on the European Union Agency for Asylum and repealing Regulation (EU) No. 439/2010, presented by the Commission on 4 May 2016.

The negotiations resulted in a provisional agreement between the European Parliament and the Council, concluded on 28 June 2017, which would, in the Commission's opinion, give durability to the mandate of the EU Agency for Asylum, compared to EASO's current mandate.

This regulation on the EU Agency for Asylum is recognised by the Commission as having added value compared to the regulation in force, considering that this amended proposal should be discussed in the context of the ongoing negotiations on the CEAS reform and should be seen as a complement to these discussions. It also believes that this amended proposal should not delay the adoption of the Regulation on the EU Agency for Asylum even further, which is being adopted in the context of discussions on the entire reform of the CEAS.

The European Council believes the activities must be continued so as to reach a final agreement concerning the package as soon as possible, highlighting the need to find a quick solution to the entire CEAS package.

So as to ensure an appropriate balance between solidarity and accountability, the amendments introduced by this proposal, analysed together with the Proposal for a Regulation on the European Border and Coast Guard and the Proposal for a recast of the Return Directive, are based on a substantial approach.

[10]Amended proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No. 439/2010, COM (2018) 633 final, Brussels, 12.09.2018.

In general terms, the proposed Regulation sets additional tasks for the competent asylum authorities of the Member States, which would require the allocation of human, logistical and financial resources in order to comply with the new obligations.

I also believe that these new tasks, together with the broad mandate of the Monitoring and Assessment Agency, will entail a rethinking of the manner and the internal tools for collecting, organising and disseminating statistical data and information on the processing of asylum claims, organising the professional training activity as a whole, as well as strengthening the capacity to monitor and assess the quality of the asylum procedure.

In the proposed form, I consider that the impact generated by the proposed Regulation will be a considerable one given the need to supplement human, logistic and financial resources to be allocated for the implementation of the new tasks within the Member States' administrations.

Bibliography

1. Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No. 439/2010, COM (2016) 271 final, Brussels, 04.05.2016.
2. Joint declaration of the Presidents of the European Parliament, the Council and the European Commission on the EU's legislative priorities for 2017, 13.12.2016.
3. Communication from the Commission to the European Parliament, the European Council and the Council - *Commission contribution to the EU Leaders' thematic debate on a way forward on the external and the internal dimension of migration policy*, *COM (2017) 820 final*, Brussels, 07.12.2017.
4. 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, COM (2015) 240 final,* Brussels, 13.05.2015.
5. Decision No. 122 of 26 September 2016 on the Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No. 439/2010, COM (2016) 271 final, published in: Official Gazette No. 769 of 30 September 2016.
6. Decision No. 83 of 27 September 2016 on adopting the opinion on the Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No. 439/2010, COM (2016) 271, published in: Official Gazette No. 771 of 3 October 2016.
7. Amended proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No. 439/2010, COM (2018) 633 final, Brussels, 12.09.2018.
8. Elena Loredana Pirvu, *International Protection Regulations in the European Union*. 13th International Conference on European Integration - realities and perspectives, Legal Sciences in the New Millennium, p. 20, ISSN: 2067 – 9211, published on http://proceedings.univ-danubius.ro/index.php/eirp/article/viewFile/1871/1930.
9. European Asylum Support Office website - https://www.easo.europa.eu/about-us.

DISABILITY IN ABANDONED/ORPHANED CHILDREN AND STATE RESPONSIBILITY: THE INDIAN PERSPECTIVE

Shiva PRIYAMVADA*

Abstract

Disability is a condition which needs acceptance and immense support. It becomes even more pronounced when it is in children who have been abandoned/orphaned and have nobody to care for them. Although we have legal protection available to persons with disability at both international and national level, unless there is social ratification of these in the form of removal of stigma attached to the disabled, the purpose of the law cannot be achieved.

The Constitution of India guarantees fundamental rights to all persons (including adults and children, with disabilities).

The Convention on the Rights of Persons with Disabilities ensures that the countries signatory to it, enact legislations for upholding the human rights of persons with disabilities and it must be made mandatory to include homeless children with disabilities who are at the mercy of the State. The reason for the palpable apathy towards the disabled despite the existence of law needs to be examined and removed for good. It is the responsibility of the State to not just enact the law but also assess its impact from time to time.

The definition of "Street Children" needs to be understood in the context of disability and efforts must be taken by the state to identify and ensure that there is proper implementation of the law in order to accomplish its desired goal.

Keywords: *disability, state, child, orphan, abandon, law, human rights*

JEL Classification: [K 38]

1. Introduction

Disability can be defined as a mental or physical condition wherein there is an inadvertent limitation on a person's activities, movement or senses. At times, a form of disability is apparent enough to be recognized by law as one but at times, it is latent and only the disabled understands the difficulty associated with it. Disability needs continuous care and support in most of the cases but with children who are orphaned or homeless need it way more than anyone else. Whether physical or mental, disability in itself is a powerful impediment to leading a normal life but when it comes with being an orphaned or abandoned child, it becomes the duty of the government to take proactive measures to

* Assistant Professor, Faculty of Law, University of Delhi, Delhi.

support the child and help him in all matters essential to his existence as a human being, namely, education, food, housing, health and career.

It is with regard to this consideration that the United Nations Convention on the Rights of Persons with Disabilities (hereinafter, the Convention) was adopted on 13 December 2006 at the United Nations Headquarters in New York. In pursuance of the objectives of this Convention, India too enacted the Rights of Persons with Disabilities Act, 2016 (hereinafter, the 2016 Act) to combat the prevalent situation of stigma and absence of governmental support for the disabled. Although there is no special enactment in India for disabled children *per se* but the aforementioned statute does its bit for such children. There are other laws that govern various aspects of disabilities like the Mental Health Act, 1987, the National Trust for the Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 and the Rehabilitation Council of India Act, 1992. But what we are concerned with here is the state of homeless and abandoned children who also have the limitation of disability.

This paper aims to study how far we have come in the fight against disability and providing the disabled more control over what they deserve.

2. The Highlights of the UN Convention

For a very long time the disabled have been viewed as objects of social charity and sympathy. For the first time the Convention tried to identify them as humans capable of making choices and asserting their rights.

The Convention which entered into force on May 3, 2008 had eighty-two signatories to the full Convention, forty-four signatories to the Optional Protocol, and one ratification to its credit and was the first human rights convention to be open for signature by regional integration organizations.

The Convention is a landmark in the form of a human rights instrument with an unequivocal aspect regarding social development. It identifies a broad categorization of disabled persons and endorses that all persons with any kind of disability must enjoy the rights and fundamental freedoms available to any human being.

The Convention also clarifies and qualifies how all categories of rights apply to persons with disabilities and identifies areas where adaptations have to be made for persons with disabilities to ensure that they effectively exercise their rights and areas where their rights have been violated, and where protection of rights must be reinforced.[1]

[1] Available at http://www.cbm.org/United-Nations-CRPD-256097.php (last visited on 1st March, 2019).

3. The Optional Protocol

The Optional Protocol to the Convention establishes an individual complaints mechanism for the Convention similar to those of the other United Nations Conventions like the International Covenant on Civil and Political Rights (ICCPR), Convention on the Elimination of All Forms of Racial Discrimination and Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

There is also the recognition and acceptance of individual rights on economic, social and cultural rights. There is a Committee on the Rights of Persons with Disabilities which considers complaints from individuals or groups who claim that their rights under the Convention have been violated.

The Committee also has the power to request for information from and make recommendations that it deems fit and proper to a party. The party may also, additionally, permit the Committee to conduct investigation and make reports and recommendations on violations it considers "grave or systematic".

4. Children in Need of Protection

United States Agency for International Development (USAID) has divided Street Children into Four Categories[2]:

a) A 'Child of the Streets': Children who have no home but the streets, and no family support. They move from place to place, living in shelters and abandoned buildings.

b) A 'Child on the street': Children who visit their families regularly and might even return every night to sleep at home, but spend most days and some nights on the street because of poverty, overcrowding, sexual or physical abuse at home.

c) Part of a Street Family: These children live on sidewalks or city squares with the rest of their families. They may be displaced due to poverty, wars, or natural disasters. The families often live a nomadic life, carrying their possessions with them. Children in this case often work on the streets with other members of their families.

d) In Institutionalized Care: Children in this situation come from a situation of homelessness and are at risk of returning to a life on the street.

5. United Nations International Children's Emergency Fund (UNICEF) and the Convention for the Rights of the Child (CRC)

Article 27 of the Convention on the Rights of the Child (CRC) asserts that "States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social

[2] Available at http://yapi.org/childrens-rights/street-children/ (last visited on 13th March, 2019)

development." Homelessness denies each one of those rights. According to an Inter-NGO Program on street children and youth, a street child is "any girl or boy who has not reached adulthood, for whom the street (in the widest sense of the word, including unoccupied dwellings, wasteland, etc.) has become his or her habitual abode and/or source of livelihood, and who is inadequately protected, directed, and supervised by responsible adults."[3]

UNICEF aims to promote the rights of every child, everywhere, in everything the organization does. With its global presence in nearly every country in the world, UNICEF is able to reach places others cannot, and thus is uniquely positioned to make a difference in the lives of children. In advocating to protect children's rights, to help meet their basic needs, and to expand their opportunities to reach their full potential, UNICEF helps to strengthen laws and policies and to improve understanding of the Convention at all levels of society. Among other activities, UNICEF supports countries to ratify and implement the Convention and its Optional Protocols. UNICEF draws attention to the duties of governments, families, communities and individuals to respect those rights and provides support for them to do so. UNICEF also supports the Committee on the Rights of the Child, which monitors implementation of the Convention and Optional Protocols and facilitates broad consultations within countries to maximize the accuracy and impact of reports to the Committee.[4]

The Digest No. 13 of the UNICEF Innocenti Research Centre titled *Promoting the rights of Children with disabilities*[5] states that Preconceptions or lack of open discussion about disability sometimes results in children with disabilities being overlooked in the planning and provision of services. In other cases, the services put in place are inappropriate, poorly conceived or ill-funded. Even in situations where such barriers can be overcome, this means little if children with disabilities are unable to gain physical access to schools, hospitals, public buildings or recreational areas, or to use public transportation to do so. The report lays down how we need to build foundations for inclusion and ensure a supportive environment for children. This needs to be low cost and should consist of persons capable of instilling trust, confidence and a sense of security in children.

Thus together, all of the abovementioned conventions, if followed in letter and spirit by governments all over the world, are capable of emancipating the homeless, disabled children towards a better life. A lot of

[3] *Ibid*.
[4] Available at https://www.unicef.org/crc/ (last visited on 12th March, 2019).
[5] Available at https://www.unicef-irc.org/publications/pdf/digest13-disability.pdf (last visited on 6th March, 2019).

what the digest covers has been incorporated in the Indian Act of 2016 which will be discussed in a while.

6. Legal Position in India

According to the Census of India, 2011, disabled persons accounted for 2.21% of India's population. Of these, 20.3% have a movement-related disability, 18.9% are those with hearing disabilities and 18.8% with vision-related disabilities.[6] This data includes the number of disabled children as well. In a welfare state that India is, the Constitutional provisions, for example, Articles 21A, 24, 39(f), 45, 51A(k) directed towards the benefit of children do not state anything specifically about disability but children in general.[7] But In 2007, India became a signatory to the Convention. The Convention required signatory states to make appropriate changes in law and policy to give effect to rights of disabled persons.[8] Therefore, the need for a new law in furtherance of this arose.

The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) (PWD) Act, 1995 specified seven conditions as disabilities and made special provisions for disabled persons with regard to their rehabilitation, and opportunities for employment and education.[9] In 2010, the Ministry of Social Justice and Empowerment constituted an expert committee under Dr. Sudha Kaul to Draft a new Bill for persons with disabilities.[10] The committee submitted a Draft Bill in 2011 that proposed to replace the PWD Act and addressed rights and entitlements for disabled persons. Subsequently on February 7, 2014, the Rights of Persons with Disabilities Bill, 2014 was introduced in Rajya Sabha and referred to the Standing Committee on Social Justice and Empowerment on September 16, 2014. The problem of disability and absence of any cogent solution resulted in the Parliament's enactment of the 2016 Act which intended to replace the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.

---

[6] Census of India 2011, Ministry of Home Affairs, Government of India.

[7] The Constitution of India available at https://www.india.gov.in/my-government/constitution-india/constitution-india-full-text (last visited on 1st March, 2019).

[8] Convention on the Rights of Persons with Disabilities", United Nations, December 13, 2006, Available at https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html (last visited on 15th March, 2019).

[9] The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 available at http://www.disabilityaffairs.gov.in/upload/uploadfiles/files/PWD_Act.pdf (last visited on 23rd March, 2019).

[10] "The Rights of Persons with Disabilities Bill, 2011", http://www.internationalcentregoa.com/web/pdf/The_Rights_of_Persons_with_Disabilities_Bill2011.pdf (last visited on 4th March, 2019).

7. Legal Provisions for Children under the 2016 Act[11]

The long title of the 2016 Act says that, inter alia, it is an act to give effect to the United Nations Convention fostering respect for the evolving capacities of children with disabilities and respect for the rights of children with disabilities to preserve their identities. Section 4 of the Act states that the government is to take measures so that Women and Children with disabilities may enjoy their rights equally with others and such children have the right and full state-support to freely express their views on all matters affecting them. Section 9 says that a child with disability may only be separated from her or his parents if a competent court has so ordered keeping the best interests of the child in mind.

The government is also to ensure that the disabled child is placed with his near relations or within the community in a family setting or in a shelter home if he or she cannot be cared for by the family due to certain constraints. Section 16 says that the government shall endeavor that educational institutions funded or recognized by them provide inclusive education to children with disabilities.

The government shall also detect specific learning disabilities in children at the earliest and take suitable pedagogical and other measures to overcome them and shall also provide for transportation facilities and attendants for educational purposes. Section 17 ensures that for the purposes of section 16, the government shall conduct survey of school-going children in every five years for identification of children with disabilities ascertaining their special needs and the extent to which they were being met. It also ensures that teachers qualified in sign language and Braille and those trained in teaching children with intellectual disability are employed.

For the purposes of this paper, section 24 is extremely important. It provides that the government shall formulate necessary schemes and programmes to safeguard and promote the rights of persons with disabilities for adequate standard of living so that they can live independently or in community and such assistance by the government would be higher by 25% than similar schemes applicable to others. Section 24(3) ensures that such schemes include schemes for children with disabilities who have no family or who have been abandoned, or are without shelter or livelihood. Children of disabled mothers are also to be provided with support for livelihood and upbringing of their children.

Section 25(2) aims to identify children who are at risk of becoming disabled and prevent the disability from actually arising. For the same purpose,

[11] Available at www.disabilityaffairs.gov.in/upload/uploadfiles/files/RPWD%20ACT%202016.pdf (last visited on 10th March, 2019).

measures are to be taken for pre-natal, perinatal and post-natal care of mother and child. Section 31 provides that every disabled child between the age of six and eighteen years shall have the right to free education in a neighborhood school, or in a special school of his or her choice and the government shall protect this right of the child.

The government, under section 39, shall also conduct awareness programmes to foster respect for the decisions made by persons with disabilities on all matters related to family life, relationships, bearing and raising children. Section 60 and 66 provide for the constitution of Central and State Advisory Boards on Disability to exercise the powers conferred upon and to perform the functions assigned to it under the 2016 Act. Section 92 is in the nature of penalty and provides for a punishment of minimum six months to a person who exploits a child sexually.

Conclusions

Since the UN Convention on Disability caters to all persons with disability and the UNICEF and CRC look into child welfare, a combined effort by both can go a long way in establishing the rights of homeless or abandoned children affected with disability. As already discussed above, the Indian statute of 2016 makes specific provisions for children who are disabled as well as homeless. Since India is a signatory to both the conventions, incorporating the ideals of both in a single statute has been one of the greatest achievements of the Indian Parliament as far as giving effect to an international agreement through domestic legislation is concerned.

But the fight does not end here itself. There is a deep-seated stigma attached to disability which makes it tough for the ones affected to step up and seek help from the government.

Even after the enactment's coming into force, what is needed is awareness amongst the persons in whose interest the whole movement had begun in the first place. Drawing from the theory of evolution, homeless or abandoned children can still fend for themselves and survive (not to mean that this is a good course of action though this is a subject matter of another important discussion) but the ones who are disabled but have nobody to look out for them are generally not able to survive.

It is highly desirable that the state fights tooth and nail to achieve the objectives mentioned in the Act so that it does not end up becoming another piece of ornamental legislation. It is too early to comment upon whether the act is being implemented by the executive in the correct and efficient manner since it has only been a few months since it came into effect and only time will tell whether the children who actually need it have benefitted from it the way it was intended.

For the time-being it is certainly a matter of contentment that our children have something to look forward to in their respective journeys towards becoming self-sufficient adults.

Bibliography

Books

1. Ahmed, Rumi, (2015), *Rights of Persons with Disability in India*, 1st edn, White Falcon Publishing Solutions Llp.
2. Ghai, Anita, (2015), *Rethinking Disability in India*, 1st edn, Routledge.
3. Vostanis, Panos, Cumella, Stuart (eds), (1999), *Homeless Children: Problems and Needs*, London: Jessica Kingsley.

Legislation

1. Convention on the Rights of the Child, 1989.
2. Rights of Persons with Disabilities Act, 2016.
3. The Constitution of India, 1950.
4. United Nations Convention on the Rights of Persons with Disabilities, 2006.

DIGITALISATION OF NOTARIAL ACTIVITY IN ROMANIA IN THE CONTEXT OF GLOBALISATION

Oana RACOLŢA*

Abstract

The notaries' activity in Romania has undergone numerous and significant legislative changes in recent years; most of them have been generated by the need to cope with the imminent globalisation. A quick transition from the classic working tools to the current modern ones (i.e. from typewriter to procedures based on electronic signature) has taken place, aiming mainly at ensuring expeditious procedures and, at the same time, at securing the notary civil circuit and assuring the quality of notary deeds. One of the main factors leading to the globalisation of the notarial activity is the increasing number of cases involving international elements.

Currently, there are two major directions of globalisation in the notarial activity: the use of the digital environment and the internationalisation of legal relations; they are both opportunities and causes of the globalisation process. In this context, the national laws in the notary field and the international rules adopted and implemented over the past few years have greatly contributed to the adjustment of the notarial activity in Romania to the fast-paced globalisation in the legal field.

Keywords*: notary, electronic signature, electronic environment, electronic authentic instrument, globalisation*

JEL Classification: [K24]

1. Digitalisation of Notarial Activity

1.1. General

Legal relations that are specific to notarial activities currently exceed national borders; this is common in all States where notarial activities take place. This phenomenon is mainly caused by the internationalisation of relations involving a notarial activity and, at the same time, by the globalisation in the legal field.

It is well-known that large amounts of information are held, processed, stored and transmitted in almost any type of activity, and this requires continuous development of the information technology field in order to keep up with the information revolution.

Oftentimes, contractual relations go beyond the content of traditional contracts, therefore a wider and more flexible legal framework, adjusted to

* Law and Psychology graduate, public notary within Novalex Professional Notary Office.

new requirements, is needed. Due to the continuous changes on the international market and the fast pace at which they happen, participants often find themselves in the position of having to act quickly and make immediate decisions. This celerity requirement generates the need to simplify operations and rules relating to legal deeds, while ensuring a degree of rigor with regard to the stipulation and enforcement of clauses.

In this context, the legal and, implicitly, the notarial areas had to adjust their legislation, as well as the way they work so as to respond to the current requirements as effectively as possible. Thus, the computerisation of notarial activities has become both an inevitable and an irreversible phenomenon.

In this study, I choose to present the notarial procedures that can be carried out electronically and some of the mechanisms used in the notarial activity that operate based on modern technologies; these are only some of the notarial procedures that have been introduced or recently modified in the national legislation and which represent the Romanian notariat's response to globalisation.

1.2. Regulation and competence of a notary public in the electronic notarial activity

The widespread use of new technologies in the legal field has led to the appearance of electronic authentic instruments; this procedure is used by notaries in some of the States that apply the civil law system. The very first electronic authentic instrument in the world was signed in France, by a French notary and the French Minister of Justice on 28 October 2008. (Popa, 2010)

In Romania, Law no. 589/2004 on the legal status of electronic notarial activity[1] establishes, for the first time in the national law system, the possibility for the notarial activity to be performed in electronic form and outlines the legal status of notarial activities that can be performed in this form by a notary public. This law may be considered a starting point for the development of electronic operations both in and outside Romania. The said law is an innovative regulatory act in the essentially traditional notarial field and supplements the national competence rules set out by Law no. 36/1995 on notaries public and notarial activity[2], giving the Romanian notaries public the possibility to perform certain procedures exclusively in electronic form.

Electronic notarial instruments fall within the competence of notaries public, as well as of diplomatic missions and consular offices that may draw up notarial deeds in the States where they represent Romania.

[1] Published in the Official Journal of Romania, Part I, no. 1227 of 20.12.2004.

[2] Published in the Official Journal of Romania, Part I, no. 92 of 16.05.1995, republished in the Official Journal of Romania, Part I, no. 732 of 18.10.2011, republished in the Official Journal of Romania, Part I, no. 72 of 04.02.2013, republished in the Official Journal of Romania, Part I, no. 237 of 19.03.2018.

Pursuant to Article 3 of this law, "*electronic notarial instruments have the same legal status as notarial instruments drawn up in accordance with Law no. 36/1995 on notaries public and notarial activity*". For this reason, the literature states that "electronic documents drawn up by civil servants receive public authority and high probative force recognised by law; the disadvantages are the impossibility to accurately identify the author, the lack of imputability and confidentiality." (Bercea, 2005)

Such documents have the following recognised characteristics: the ability to bear and convey information; integrity (they are a durable and unalterable medium); imputability (the ability to identify the author of the message and to check the consistency of the message with the author's will); safety of information conveyance without the risk of distortions in the communication process. However, the electronic environment dematerialises a document, and consequently its message will lack the traditional imputability due to the absence of the author's signature on the document, there will be uncertainties regarding the integrity of the document or any possible interception or amendment made by a third party, and it will be difficult to preserve the message and the proof of an electronic instrument, according to B. Reznis and the opinion published in *Professionels du droit et contract electronique*. (Bercea, 2005).

According to Articles 12 and 13 of Law no. 36/1995, the material competence of notaries public is carried out through notarial deeds and procedures, and through legal consultations in the notarial field, other than those regarding the content of the deeds they draw up, and notaries may participate as specialists appointed by the parties in the preparation and drafting of notarial deeds.

Article 5 of Law no. 589/2004 states that notaries public may carry out the following electronic procedures, based on their electronic signature:

e) certify electronic copies of original documents;
f) certify the date of documents which meet the requirements set forth in Article 2(1) and the place where they were signed;
g) receive and safe-keep in their electronic archive documents which meet the requirements set forth in Article 2(1);
h) authenticate electronic translations;
i) issue duplicates;
j) other operations provided for by law.

If we compare the competencies granted to notaries public by the two laws, we see that only notarial activities of minor importance can be performed electronically; the law regulating this possibility offers only an alternative to the procedures related to certain notarial deeds. Thus, customers

may choose to request that their documents be drawn up in the classic form or in electronic form.

The notaries public authorised to draw up electronic notarial deeds have general competence and can therefore handle such documents throughout the country, due to the electronic nature of the procedure; the cases of special territorial jurisdiction of notaries public are expressly stipulated by law.

Electronic notarial instruments must comply with the substantive rules on the notarial instruments' procedure regulated by Law no. 36/1995 on notaries public and notarial activity. Consequently, the common rules on notarial deeds and procedures adjusted to the specifics of the electronic environment will be applicable, in accordance with the laws in the field.

We can see that notarial instruments which can be drawn up electronically under the law are not part of those instruments that require checking whether the parties understand the content of the instrument and whether all requirements regarding the valid manifestation of the parties' will are met. The verification carried out by a notary public in the case of electronic documents consists in certifying the identity of the party requesting the drawing up of an electronic document based on electronic signature, which justifies the mentioning of the requesting party's and the notary public's electronic identification elements in the notary's certification/authentication text.

On the other hand, the legal force of the documents prepared by a notary is considered to be based on the certainty that the notary filters the elements ensuring the identification of the parties, the imputability and integrity of the document's content, which is why the law excludes from the category of documents that can be processed electronically those that necessarily involve the verification of the parties' identity, address and capacity by the notary public, according to the same Reznis, cited above. (Bercea, 2005)

1.3. Requirements of electronic notarial instruments

Pursuant to Article 2(1) of Law no. 589/2004, "*electronic notarial instruments must meet the following requirements, otherwise they will become null and void:*

a) to be processed electronically;

b) to bear the notary public's extensive electronic signature, based on a qualified certificate issued by an accredited certification service provider. Certificates issued to notaries public shall include information about the notary's office, as required by the regulations of the specialised regulatory and supervisory authority in the field;

c) to meet the substantive requirements stipulated by law with regard to the recorded legal transaction."

The same article requires notaries public, diplomatic missions and consular offices to check whether all these requirements are met, while Article 9 of Law no. 36/1995 requires notaries public to check the legality of the notarial instrument before it is signed.

As regards the validity of electronic notarial instruments abroad, the Law on the legal status of the electronic notarial activity stipulates that the electronic notarial activity is regulated by international conventions to which Romania is a party, and electronic documents issued by authorities or notaries from another State may be taken into consideration by notaries public when issuing an electronic notarial instrument only if the foreign electronic signatures are based on a qualified certificate issued by an accredited certification service provider. This requires Romanian notaries public to thoroughly check whether the said requirements are met and to possess knowledge or get informed on how qualified certificates for electronic signatures are issued in the States where such documents come from.

According to the regulations on these types of procedures, Romanian notaries public are required to hold certificates for electronic signature issued by qualified certification service providers.

1.4. Electronic signature - an indispensable mechanism for notarial activities in the context of globalisation

Currently, the electronic notarial activity in Romania is not possible without the use of electronic signatures, which are not scanned handwritten signatures, but a sophisticated mechanism that must enable the signatory to sign in and ensure the authenticity of the signed document, for it is a means of identification and confirmation between the parties. (Vasiu, 2009).

Electronic signatures are regulated by Law no. 455 of 18 July 2001[3], according to which an electronic signature is "*made up of electronic data that is attached to or logically associated with other electronic data, and used as an identification method*."

Article 6 of this law is particularly important, for it lays down the legal status of electronic documents and recognises the authenticity of electronically signed documents; thus, *an electronic document bearing an incorporated, attached or logically associated electronic signature and recognised by the person who signed it has the same effect as an authentic instrument between its signatories and between those representing their rights.*

All electronic signatures are represented digitally, i.e. through series of 1s and 0s, but they can also have other forms created by various other

[3] Published in the Official Journal of Romania, Part I, no. 429 of 31.07.2001, republished in the Official Journal of Romania, Part I, no. 757 of 12.11.2012, republished in the Official Journal of Romania, Part I, no. 316 of 30.04.2014.

technologies, such as: a name added at the end of an electronic message, a digitised image of a handwritten signature, a secret code for credit cards, a biometric identification tool, a digital fingerprint, or a retinal scan, and even a digital signature created through cryptography. (Bocșa, 2008).

An electronic signature has a dual role: it identifies the signatory and expresses his/her will to approve the content of a document; therefore, it is a security element.

In order for an electronic signature to have legal effects, it must meet certain requirements laid down by law, more precisely: the use of signature creation and verification devices and the existence of a valid certificate from a certification service provider, the lack of which renders impossible the assimilation of an electronic document with a private document. (Bocșa, 2008).

In the notarial activity in Romania, electronic signatures are not used for remote signing of documents; however, they are very commonly used for signing documents that require certain registration formalities for enforceability purposes. For example, declarations of inheritance option, which must be signed electronically by the notaries public who draw them up and registered in the National Notarial Register of Inheritance Options; or powers of attorney, which must be signed and registered the same way in the National Notarial Register of Powers of Attorney and their Revocations.

Although currently the electronic notarial activity in Romania does not include a procedure for remote signing of contracts based on electronic signature, such procedure is of major importance if such possibility will be regulated in the future, as well as for relations that go beyond the borders of our country. Currently, the possibility to sign contracts remotely in Romania exists mainly in the e-commerce field.

1.5. Applications of electronic procedures in notarial activities

One of the most important innovations for notarial activities in recent years is the setting up of National Unique Registers by the Union of Romanian Notaries Public in 2007; these registers are kept in both paper and electronic format. I mention this notarial activity because it has significant applicability from the perspective of procedures performed electronically, given that access to, along with each registration and query of these registers, are based only on the notary's electronic signature.

The National Registers have been established mainly to facilitate and secure notarial procedures, and to align the notarial activity in Romania with the notarial activity carried out in the EU Member States. Their purpose is to develop the activity of notaries public, to create centralised records of certain types of documents, and to ensure celerity in the handling of notarial instruments and procedures.

Thus, the National Union of Romanian Notaries Public has set up registers that contribute greatly to securing the civil notarial circuit. This enables notaries public to check whether a power of attorney has been revoked, whether there is a notarised last will and testament, the parties' matrimonial property regime, whether another divorce application has been filed with another notary, and even to obtain a unique national number for a divorce certificate.

Currently, the National Union of Romanian Notaries Public operates the following registers:

- The National Notarial Register of Inheritances (R.N.N.E.S.), which keeps records of inheritance cases involving Romanian, foreign or stateless citizens, whose last home address was abroad or unknown and who owned assets in Romania,
- The National Notarial Register of Inheritance Options (R.N.N.E.O.S.), for the recording and verification of notarial instruments relating to acceptance of inheritance, waiver of inheritance and revocation of waiver, and documents whereby the appointment as will executor is accepted or denied,
- The National Notarial Register of Gifts (R.N.N.E.L.), which keeps records of wills and codicils, declarations of waiver thereof, retractions of will and codicil revocations, will instructions regarding amounts of money, valuables or securities deposited at credit institutions and revocations thereof, donation contracts, acceptance of donation offers, revocation of donations, and declarations removing the effects of debarment,
- The National Notarial Register of Powers of Attorney and their Revocations (R.N.N.E.P.R.), which keeps records of powers of attorney, representation agreements and their revocations, signed before a notary public; management agreements and their revocations, authenticated by notaries in Romania and Romanian diplomatic missions abroad,
- The National Notarial Register of Matrimonial Property Regimes (R.N.N.R.M.), for the recording and checking of matrimonial property regimes adopted by spouses, and of marriage contracts,
- The National Notarial Register of Creditors - Natural Persons and Oppositions to Estate Partition (R.N.N.E.C.), which keeps records of creditors' claims regarding the debts owed to them by natural persons,
- The National Notarial Register of Divorce Applications (R.N.N.E.C.D.), which keeps records of divorce applications filed

with notaries public, in order to avoid double registration, and of notaries' resolutions in divorce procedures.[4]

All these registers may be consulted not only by notaries public, but also by state institutions and natural or legal persons, if they provide proof that they have a right or interest.

Notaries public must provide as soon as possible any information related to such procedures and notarise documents only after consulting these registers; the consulting of such registers is exclusively computer-assisted.

Another important step in electronic notarial activities is the Cooperation Protocol signed on 26.05.2009 by the Ministry of Administration and the Interior[5], the Special Telecommunications Service, and the National Union of Romanian Notaries Public. The purpose of this cooperation is to develop, implement and use a computerised system that enables notaries public to confront the information appearing in Romanian identity documents of the persons requesting notarial documents and procedures with the data in the National Register of Persons, provided by the specialised structures of the Ministry of Internal Affairs, under the law.

This system is functional and undeniably useful, for it enables notaries public to verify whether an identity document presented to him/her is valid and registered in the official records of the Ministry of Internal Affairs. In this case, notaries public sign in based solely on qualified digital certificates held by each of them.

Although there are several applications of electronic systems in the notarial field in Romania, I have chosen to mention only the two most important notarial electronic applications in order to emphasise their importance in the evolution of the notarial activity.

2.Internationalisation of notarial activities

We can notice the increasing tendency of the European Union to computerise the procedures carried out in notary offices. Thus, the European Union has set up the Council of the Notariats of the European Union (CNUE), of which Romania is part as of 1 January 2007; it is an official body representing the notary profession in the relations with European institutions. One of the Council's working groups is e-justice, whose objective is to develop electronic services in the field of justice at the level of the European Union and make them available to all Member States.

In the same direction, as of 1 November 2007, the Council of the Notariats of the European Union has launched the European Notarial Network

[4] http://www.uniuneanotarilor.ro/?p=4.2, accessed on 07.03.2019.
[5] Currently named Minister of Internal Affairs.

which deals with cross-border cases; it is intended for notaries in all Member States of the Council.

This body does not provide legal advice; instead it provides technical support to facilitate certain procedures involving foreign elements, aiming at improving cross-border cooperation among notaries. Thus, each notary may send a written request to his/her national interlocutor, who will process it or contact a foreign interlocutor who is part of the European Notarial Network's partner organisations; the entire procedure is carried out electronically.

Belgium and France had the initiative to set up the European Network of Registers of Wills, under the Basel Convention in 1972, intended to facilite access to information contained in European registers of wills. In addition to the classic ways of sending information by fax or post, another way to send information to the central register of wills is by using an electronic form. (Tocoian, 2006).

In this respect, the ARERT (The European Network of Registers of Wills Association) project has been developed to interconnect the national registers of wills at the continental level, so that every European notary may interrogate this network via the Internet.

In Italy, NotarelSpA, a joint-stock company operating in the Italian notarial field, was set up in 1997 to meet the needs of computerising the notarial activities. This company operates as an "interface between Italian notaries and various public administration institutions, which manages the procedural interdependencies involving the use of computer systems." (Popa & Mihăescu, 2006).

In Belgium, the 10th anniversary of the "e-notariat" was celebrated in 2011, with all IT projects aimed at providing the most efficient service to notary offices and citizens. At the beginning, notary offices were connected with all the notarial and regional institutions via a communication and information exchange platform; later, this exchange of information has taken place electronically with state institutions and public registers as well.

Moreover, tools have been introduced to facilitate the work of notaries, such as software to calculate fees and various pecuniary rights and obligations of the parties. The Bank of Notarial Deeds (NABAN) has been created as a result of the use of electronic authentic instruments; this project is not yet completed, but it will be of significant practical utility.

I have presented a few examples to show the growing interest of the European institutions in developing the activities performed electronically and in improving the existing procedures, which are particularly useful tools in the context of globalisation.

Instead of conclusions - advantages and disadvantages of electronic procedures in notarial activities

The increasing use of electronic procedures in notarial activities has remarkable advantages, especially due to the growing number of legal deeds that the representatives of this profession must handle: electronic procedures facilitate the drawing up and notarisation of documents, the communication between institutions, and the quality and promptness of the offered services.

Over the last 20 years, we went from writing documents using typewriters to writing documents using computers, which are now indispensable to any notary office; now, we even have institutional intercommunication by e-mail, and this was only a desideratum a few years ago.

The development of such procedures is foreseeable in this direction, especially the multiplication of the notaries' competences to cover other electronic documents than those currently regulated, as a result of the computerisation of all activities in any field.

Although currently the notarial activity in Romania is based mainly on hard copies, the involvement of notaries in the field of new technologies is a topical issue and a continuous concern in the EU States, with consequences on the notarial activity in Romania, which constantly adjusts its rules and procedures to the international ones.

The prevailing field where electronic signatures are used in Romania remains e-commerce and the remote signing of certain contracts, but current trends and practice show an increasing use of electronic signatures in notarial activities. A major advantage of electronic activity in the notarial field is that there is a real opportunity to cut red tape and considerably reduce the time needed to carry out notarial procedures.

However, the inconveniences of informational and electronic development in notarial activities should not be neglected. The role of a notary in understanding the true will of the parties in the absence of a real dialogue may be diminished, and this may result in inadequate procedures. On the other hand, the electronic environment is not better protected against its own threats, since the variety of crimes and the rate of specific crimes continue to increase. Therefore, while the electronic environment has undeniable advantages, it has to deal with the vulnerabilities to which computer systems are exposed.

All branches of law will have to respond to the explosion and development of information technology and the Internet; in order for the electronic activity in the notary field and in other similar areas to keep up with this fast-paced development, all the actors involved in such procedures must be kept informed and national systems must be adjusted.

Since it is not a mere exchange of information, but significant legal effects are generated as well, a legal framework must be created and

continuously updated to adjust to the accelerated globalisation and implicitly to the electronic activity, including through amendments or even legislative innovations, so that the Romanian notarial activity may keep up with the globalisation phenomenon.

Are current national and international rules sufficiently developed to cover the current legal effects of the globalisation process? I think the answer is no, if we consider the accelerated pace of globalisation, but there are visible major amendments to the traditional rules in this respect.

Bibliography

1. Bercea R., *Este Legea nr. 589/2004 privind regimul juridic al activităţii electronice notariale un act normativ esenţial inovator pentru profesia de notar public?*, 2005. *Dreptul*. Issue 11.
2. Bocşa M., 2008. *Semnătura electronică – mijloc de exteriorizare a voinţei comercianţilor (II)*. *Revista de Drept Comercial*. Issue 9.
3. Mihăilă, Ş., Bocşa M., 2008. *Semnătura electronică – mijloc de exteriorizare a voinţei comercianţilor (I)*. *Revista de Drept Comercial*. Issue 6.
4. Popa, I., 2010. *Curs de drept notarial,* Bucharest: Universul Juridic.
5. Popa, N. L., Mihăescu I., 2006. *Aspecte privind informatizarea activităţii notariale în Italia*. *Buletinul notarilor publici*. Issue 3.
6. Popa, N. L., Mihăescu, I., Tocoian, I., 2006. *Aspecte privind informatizarea activităţii notariale în* Belgia*. Buletinul notarilor publici*. Issue 3.
7. Vasiu, I., Vasiu L., 2009. *Informatică juridică şi drept informatic*. Cluj-Napoca: Albastră.

POLITICAL PARTIES: PURPOSE, ORGANIZATION, REGISTRATION AND FUNCTIONING

Nicolae ROŞ*

Abstract

The fact that political parties have appeared is the result of a long process of evolution of modern society. The first right granted to Romanians after the Revolution of 1989 was the right to association by Decree-Law no. 8 of 31 December 1989 on the Registration and Functioning of Political Parties and Public Organizations in Romania.

Keywords*: political party, electoral code, Constitution, organization, statute, fiscal register*

JEL Classification: [K 10]

1. Introduction

In the Romanian political space, the parties began to form in the 19th century, so in 1875 was created the National Liberal Party, in 1880 the Conservative Party, in 1881 the Romanian National Party of Transylvania and in 1893 the Social Democratic Party of Romanian Workers, to refer us only to the most significant ones.

Products of modern society, political parties as motors of public life and communication channels between civil and political societies are indispensable institutions for the organization and leadership of modern and contemporary society. (Leicu, 2002)

2. The founding members of a political party

Law of political parties no. 14/2003, published in the Official Gazette of Romania no. 25/17.01.2003)[1] on the exception of the unconstitutionality of the provisions of art. 19 paragraph (1) and (3) of the Law on political parties no. 14/2003[2] was removed the administrative barrier regarding the registration of a political party. The condition that the list of founding members to include at least 25,000 members with residence in at least 18 counties of the country and

* Assistant Professor, PhD., "Dimitrie Cantemir" Christian University Bucharest, Faculty of Law Cluj-Napoca, Romania.

[1] Published in the Official Gazette no. 265/21.04.2015.

[2] Law of political parties no. 14/2003, published in the Official Gazette of Romania no. 25/17.01.2003.

Bucharest, but not less than 700 persons for each of these counties and the municipality of Bucharest, was modified by point 8 of art. I of Law no. 114/2015[3] regarding the modification and completion of the Law on political parties no. 14/2003, respectively the constitutive act of a political party must be signed by at least 3 founding members.

The raising of the barrier was also determined by the arguments of the initiators of the draft law which presented a comparative situation with the countries of the European Union regarding this requirement for the registration of a political party.

In no other country from the European Union no longer exists a requirement for registration a political party (see table no. 1 which is part of the explanatory memorandum of the legislative proposal for amending art. 19 and art. 47 of the Law no. 14/2003 of the political parties):

Table no. 1 - Number of founding members needed to form a political party

Country	Number of founding members needed to form a political party		Country	Number of founding members needed to form a political party
Austria	1		Letonia	**200**
Belgium	3		Lithuania	**1.000**
Bulgaria	50 (with a minimum of 500 participants at the first founding congress and a minimum of 2500 members in total)		Luxembourg	**3**
Czech Republic	3 (supported by 1000 citizens)		Malta	1 11
Cyprus	1		Holland	3
Croatia	**100**		Poland	3 (supported by 1000) citizens)
Denmark	1/175 of the votes validated expressed at the last elections		Portugal	7.500
Estonia	**1000**		U. R. of Great Britain and Northern Ireland	3
Finland	3 (supported by 5000 citizens)		Romania	**25.000**
France	3		Slovakia	3 (supported by 10.000 citizens)
Germany	3		Slovenia	2
Greece	**200**		Spain	2
Ireland	1		Sweden	**1.500**
Italy	3		Hungary	10

[3] Law no. 114/2015 published in the Official Gazette of Romania no. 346/20.05.2015.

In the Member States of the European Union, especially in consolidated democracies, the number of founding members needed to form a political party is reduced precisely to allow for broad freedom of association and participation in public life.

These examples of consolidated democracies that allow a broad freedom of association and participation in public life by establishing a more faithful representation of citizens' interests will lead to an explosion in the number of newly established political parties at both national and local levels because according to art. 4 of the Law no. 14/2003[4], republished, political parties can be organized and function at national level, at local level or at both national and local level, according to their own statute.

In order to have a clear picture of the number of parties existing in Romania, we mention that in the last local elections from June 2012 have participated a number of 2810 electoral competitors, as follows: 30 political parties, 18 minorities, 1 political alliance, 47 electoral alliances and 2714 independent candidates[5].

The Charter of Fundamental Rights of the European Union[6], a legally document obligatory for Member States and annex to the Treaty of Lisbon, provides Freedom of meeting and association (Article 12) as one of the fundamental rights of EU citizens: *"Any person has the right to freedom of peaceful meeting and freedom of association at all levels, especially in the political, trade union and civic spheres".*

The arguments presented in several statements of reasons versions of the draft law to amend the number of members required to form a political party are reasonable and in conformity with the right of association provided for in the Treaty of Lisbon. Political competition must have as its object values and objectives.

The size and power of a party depend on the ability of its members (many or few at the beginning) to convince the electorate. That is why is given the possibility to enter more parties in the political competition, and success of each will depend on the values that it promotes and how the electorate is convinced. Also, by political consensus, were removed the provisions which connects the internal organization of the political parties to the administrative-territorial organization of the country.

[4] Published in the Official Gazette no. 25/17.01.2003.

[5] According to the Report on the organization and conduct of elections for the local public administration authorities from June 2012, elaborated by the Permanent Electoral Authority, p. 59.

[6] The Charter of Fundamental Rights of the European Union was proclaimed by the European Commission, the European Parliament and the Council of the European Union at the Nice European Council from 7 December 2000.

The rules of candidacy rules set out in the Electoral Code Commission aimed not to differentiate the electoral competitors in the sense of their discrimination. These are: campaign rules, funding rules and erase rules. Have been followed, in this respect, the recommendations of the Group of States Against Corruption (GRECO), but, first of all, the transparency of the activity and financing of political parties.

The new rules of functioning of the political parties aim to refresh the Romanian political class, but taking into consideration a fair electoral competition, transparency of financing, facilitating the registration of political parties, correlated with stipulating certain conditions of their activity, in order to fulfil, real, the public mission guaranteed by the Constitution (Roş, 2015).

In the particular case of national youth policies, international reference documents developed in recent years also recommend the formulation of such policies through systematic consultation between the Government and National Youth Organizations, their representation platforms and other actors in the field. In a more extended version, the recommendations go to the suggestion of setting up national youth policy based on a broad consultation process involving representatives of all major political parties and interested NGOs (Roş, 2003).

Both the law from 1996 and the law form 2003 gradually reduced the number of political parties that entered into the electoral race for parliamentary elections. If in 1990 and in 1992, 67 and respectively 140 parties entered the electoral race, their number gradually decreased because the conditions for registering a political party became more and more restrictive. In 1996, the number of political parties that participated in the election was 61 in 2000 was 54, in 2004 was 45, in 2008 was 19, to reach only 16 in 2012.

Law no. 14/2003 has proposed to institutionalize political parties, making them representative institutions for the entire Romanian population, thus putting, to a certain extent, the equal sign between what should be two different types of political participation: adhesion to a party and electoral vote.

The electorate, also called the electoral body, is not confused with the population of the country (Muraru, 2005). The electorate includes a part of the population, its mature political and active part. Electorate is a dynamic segment of the population, always in renewal, a natural phenomenon of human life, the dynamics of generations.

It is obvious that the number of people who form the electorate is lower than that of the people who form the population. Those two digits have different functions in the elections. The population is taken into account when is established electoral districts or when is established the number of mandates.

The particular role of political parties implies the existence of a law for to detail constitutional provisions. Involvement of parties in the elections implies that their legal regime should be established a long time ago.

2. Purpose, organization, registration and function

Political parties are political associates of Romanian citizens with voting rights, who participate freely in the formation and exercise of their political will, fulfilling a public mission guaranteed by the Constitution[7]. They are legal entities of public law.

Through their activity[8], political parties promote national values and interests, political pluralism, contribute to the formation of public opinion, participate with candidates in elections and the establishment of public authorities and stimulate citizens' participation in elections, according to the law.

Political parties which by their status, programs, propaganda of ideas or other activities violate the provisions of art. 30 par. (7), art. 40 par. (2) or (4) of the Romanian Constitution, republished[9] are prohibited. Political parties can be organized at local and national level or both locally and nationally level, according to their own status. Full name of political parties or political alliances and the abbreviated name, as well as the permanent sign can not reproduces or combine the national symbols of the Romanian state, of other states, international bodies or religious cults. Exceptions are political parties that are members of international political organizations, who can use the logo of the respective organization as he is or in a specific combination.

Can be members of political parties the citizens who, according to the Constitution, have the right to vote. Political parties can not include people to whom political association is forbidden by law[10]. A Romanian citizen can not be part of two or more political parties at the same time. If a person wants to be part of another political party they must resign from the party whose member he was previously[11].

No person can not be constrained to be part or not be part of a political party[12]. Each political party must have its own political status and program[13].

---

[7] Art. 1 of the Law no. 114/2015 published in the Official Gazette of Romania no. 346/20.05.2015.
[8] Art. 2 of the Law no. 114/2015 published in the Official Gazette of Romania no. 346/20.05.2015.
[9] See the following articles from the Romanian Constitution: art. 30 paragraph (7), art. 40 paragraph (2) and art. 40 alin (4).
[10] Art. 7 of the Law no. 114/2015 published in the Official Gazette of Romania no. 346/20.05.2015.
[11] Article 8 paragraph (2) of Law no. 114/2015 published in the Official Gazette of Romania no. 346/20.05.2015.
[12] Article 8 paragraph (5) of Law no. 114/2015 published in the Official Gazette of Romania no. 346/20.05.2015.
[13] Art. 9 of the Law no. 114/2015 published in the Official Gazette of Romania no. 346/20.05.2015.

Obligatory, the statute of the political party comprise[14]:

a) full name and abbreviated name;
b) description of the permanent sign;
c) the permanent sign in black- white and color graphic form;
d) headquarters;
e) the express mention that it pursues only political objectives;
f) the rights and obligations of members;
g) disciplinary sanctions and procedures by which can be applied to members;
h) the procedure for the election of the executive bodies and their competencies;
i) the competence of the general meeting of members or their delegates;
j) bodies empowered to submit candidatures in local, parliamentary, European and presidential elections;
k) the competent body to propose the reorganization of the party or to decide the association in a political alliance or other forms of association;
l) the conditions under which they stop their activity;
m) the manner of administration of the patrimony and sources of financing, established according to the law;
n) body representing the party in relations with public authorities and others;
o) other mentions that are obligatory according to this law.

Political parties may have territorial organizations, which have the minimum number of members provided by the statute.

Members have the right to resign from the party at any moment, with immediate effect. The election of members of the leadership of the political party and of the leadership of its territorial organizations is made by secret vote[15].

In order to record a political party the following documents are submitted at the Bucharest Law Court:

a) the request for registration, signed by the head of the executive body of the political party and by at least 2 founding members;
b) the statute of the party, drafted according to the provisions of art. 10;
c) party program;
d) the constitutive act, signed by at least 3 founding members;

[14] Article 10 of Law no. 114/2015 published in the Official Gazette of Romania no. 346/20.05.2015.
[15] Article 17 paragraph (2) of Law no. 114/2015 published in the Official Gazette of Romania no. 346/20.05.2015.

e) a statement regarding the headquarters and the patrimony of the party;
f) the proof that a bank account has been opened.

The request for registration is posted at the Bucharest Law Court for 15 days. Within 3 days from the date of filing the request for registration, the notice about this shall be published by the applicant in a central newspaper of large circulation.

The list of the founding members' signatures must include the first and last name, date of birth, address, type of identity document, series and number and also the signature. Founding members of a political party may only be citizens with voting rights.

The list will be accompanied by a declaration on his own responsibility of the person who drafted it, declaration which attests the authenticity of the signatures, under the sanction provided in art. 326 of the Criminal Code[16]. The list must include at least 3 founding members[17].

The political party has legal personality from the date of the final decision of the court on the admission of the request for registration. The political parties whose requests for registration were admitted will be registered in the Register of Political Parties. Political parties can associate themselves on the basis of an association protocol, constituting a political alliance.

In order to record a political alliance the following documents are submitted at the Bucharest Law Court:

a) a). the request for registration of the political alliance, signed by the executive management of the political parties;
b) b). association protocol;
c) c). full name and abbreviated name of the political alliance;
d) d). description of the permanent sign;
e) e). the permanent sign in black- white and color graphic form.

The political alliances whose requests for registration were admitted will be registered in the Register of Political Alliances. If the political alliance will participate in elections with common lists, the candidates must be part of a political party, member of the alliance.

A political party stops its activity by:

a. dissolution, by a decision pronounced by the Constitutional Court, for violation of art. 30 par. (7) and Art. 40 par. (2) and (4) of the Romanian Constitution, republished;

[16] Article 19 paragraph (2) of Law no. 114/2015 published in the Official Gazette of Romania no. 346/20.05.2015.
[17] Article 19 paragraph (3) of Law no. 114/2015 published in the Official Gazette of Romania no. 346/20.05.2015.

b. dissolution, by a decision pronounced by the Bucharest Court;
c. self-dissolution, decided by the competent bodies provided by the statute;
d. reorganization, in the situations provided by art. 39 par. (3), art. 40 par. (4) or art. 42 para. (2) of the Political Parties Law.

The inactivity of a political party can be ascertained in the following situations:

a. did not take any general meeting for five years;
b. did not nominate candidates, either alone or in alliance, in two successive electoral campaigns.

The Registry of Political Parties is the legal instrument for the record of political parties in Romania[18]. The institution with the right to operate in the Register of Political Parties is only the Bucharest Law Court. Data from the Registry of Political Parties are considered to be information of public interest.

The registration and deletion of political parties, operated in the Register of Political Parties, shall be published in the Official Gazette of Romania, Part I.

Existing political parties at the time of their entry into force continue to operate on the basis of the legal registration documents valid at the time of their establishment.

Citizens of the European Union who do not have Romanian citizenship and are domiciled in Romania have the right to join in political parties under the same conditions as Romanian citizens.

3. Fiscal register of political parties

The Permanent Electoral Authority will keep a fiscal register of political parties in which the following information's will be passed:

a) the first and last names, personal numerical codes, addresses and contact details of the persons responsible for the administration of political party funds, at national and county level;

b) the addresses of the headquarters, of the territorial organizations and of the internal structures of the political parties stipulated in art. 4 par. (4) of the Law no. 14/2003, republished;

c) surname and first name, personal numerical codes, addresses and contact details of persons entitled to represent political parties at central and county level;

d) data on the annual revenues and expenditures of political parties;

e) data on the political parties electoral revenues and expenses;

f) type and amount of sanctions applied.

[18] Article 51 paragraph (1) of the Law no. 114/2015 published in the Official Gazette of Romania no. 346/20.05.2015.

The Permanent Electoral Authority shall also keep a register of independent candidates with the following informations the names and forenames, personal numeric codes, addresses and contact details of the candidates, the financial activity data of the electoral campaigns and the sanctions applied.

Conclusions

The inequality of the candidates' financial resources of which depends largely the success of the campaign and implicitly the success in the elections is combated in the vast majority of modern democracies through the legislative regulation of the public and private financing of the electoral campaign.

Thus, is assured the independence of the political parties which propose candidates in the elections as against to the economic pressure groups as well as the transparency of the use of financial resources during the campaign, in which civil society and, implicitly, the electorate have access to the accounts of political parties and their sources (Nica, 2010)

The principle of transparency in the financing of electoral campaigns is legally guaranteed in the Romanian system[19].

Bibliography

Books

1. Leicu, I., (2002), *Introducere în politologie*. Cluj-Napoca: Risoprint.
2. Muraru, I., (2005); *Alegerile şi corpul electoral.* Bucureşti: All Beck.
3. Nica, E.M., (2010), *Drept electoral.* Craiova: Sitech.
4. Roş, N., (2003), Rolul şi locul tinerilor din România în viaţa politică locală, judeţeană şi naţională în perioada de tranziţie. *Probleme actuale ale cercetării economice, juridice, politice şi sportive*. Cluj-Napoca: Risoprint.
5. Roş, N., (2015), *Îndrumar practic legislativ pentru candidaţii la alegerile locale*. Cluj-Napoca: Risoprint.

Report

Report on the organization and conduct of elections for the local public administration authorities from June 2012, elaborated by the Permanent Electoral Authority.

Legislation

1. Law of political parties no. 14/2003, published in the Official Gazette of Romania no. 25/17.01.2003.
2. The Charter of Fundamental Rights of the European Union was proclaimed by the European Commission, the European Parliament and the Council of the European Union at the Nice European Council from 7 December 2000.
3. Law no. 114/2015 published in the Official Gazette of Romania no. 346 / 20.05.2015.

[19] Article 1 paragraph (2) lit. c) of Law 334/2006 on the financing of the activity of political parties and electoral campaigns, republished in the Official Gazette of Romania no. 446/23.06.2015.

THE TAX ON LEGAL PERSONS' NON-RESIDENTIAL BUILDINGS BETWEEN THE TAX CODE AND REALITY. CASE STUDY

Mircea-Iosif RUS[*]

Abstract

According to the legislation, the buildings, both residential and non-residential, owned by natural and/or legal persons are subject to tax and a part of those taxes provides a share of the budget of the Local Council within the taxation jurisdiction of which the respective buildings are located.

The legislation, in this case, the Taxation Code, suffered important modifications in 2015 which came into force as of 2016 and stipulates that the taxation of buildings is to be done on the basis of a percentage share applied to the value of those buildings obtained subsequent to assessments made by the ANEVAR assessors. The percentage share is stipulated by a value interval and it is applied according to the resolutions of the Local Councils, and it may be higher or lower, in accordance with the economic, social, etc, interests of the respective communities.

In our scientific approach we have made a comparison concerning the percentage share applied by the Mayors' offices of the communities, cities and municipalities of the Cluj County and we have also related to their populations. At the same time, we performed a brief comparative study of the city of Cluj-Napoca and the surrounding localities considered "dormitories" of the city.

A determining element in our scientific approach was that of the resources which may be generated locally by each Mayor's Office to provide from own forces the budget or at least a value as great as possible of it.

Keywords*: tax, non-residential buildings, Tax Code*

JEL Classification: [K 13]

1. Introduction

Taxes are known since old times but they were preceded by charges. Thus, the first charge paid by the people was, as it is assumed, the protection charge which was paid by the members of a tribe to the person who provided them protection both against the members of other tribes as well as against animals.

In time, along with the social development of those tribes, new structures and services appeared which needed certain amounts of money to function. At the same time, those who started gaining properties needed to pay

[*] Scientific Researcher, PhD., NIRD Cluj-Napoca.

the tax on property, besides the charges for the services which were offered to them by the state entities.

„The tax represents that financial, compulsory and non-refundable contribution which is owed – under the law – to the budget by the natural and/or legal persons for the income they make, for the goods they own, respectively for the merchandise they produce and/or distribute or for the services and works they provide or execute (Georoceanu, 2012, p. 17).

"The tax, totally undesirable, he has become so bitterly a daily leitmotif. People perceive it as a frustration, an assault on their income and agonization, an obstacle that many want to circumvent in their laborious journey to the coveted prosperity for them and their close ones (Tulai & Şerbu, 2005, p. 13).

Hence, the legal persons who possess buildings, both residential and non-residential, owe a tax to the local authorities under whose jurisdiction those buildings are.

2. Research methodology

For the achievement of this scientific approach I used the comparative method, in the sense that, after having learned the tax rates of the non-residential buildings owned, I made a comparative study in order to be able to make an analysis related to those rates and if those rates could have a social effect on the population of the localities across the Cluj County which made the object of the scientific approach.

3. About the tax rates and the provisions of the Tax Code (Law no. 227/2015)

The information I used in this scientific approach was collected from a number of 71 localities of the Cluj County, including the municipalities of Cluj-Napoca, Câmpia Turzii, Dej and Turda, as well as the town Huedin. At the same time, we also inserted in this article the population of the previously mentioned places. The data used for the population come from the census of the year 2011.

The tax rates and the number of the population of the Cluj County localities are entered in Table 1:

Table 1

Nr.crt.	Mayor's Office	Tax rate (%)	Population (inhabitants)
1.	Campia Turzii	1,1	22.223
2.	Cluj-Napoca	1,0	324.576
3.	Dej	1,0	33.497
4.	Gherla	0,6	20.203
5.	Turda	1,5	47.744

6.	Huedin	1,0	9.346
7.	Aghiresu	1,65	7.116
8.	Aiton	1,0	1.085
9.	Aluniș	1,0	1.223
10.	Apahida	1,2	10.072
11.	Aşchileu	0,4	1.601
12.	Baciu	0,76	10.317
13.	Băişoara	1,3	1.940
14.	Bobâlna	1,0	1.402
15.	Bonţida	1,25	4.856
16.	Borşa	1,3	1.223
17.	Buzău	0,2	1.264
18.	Căianu	1,3	2.355
19.	Călăraşi	2,0	2.021
20.	Călăţele	1,0	2.243
21.	Cămăraşu	1,01	2.655
22.	Căpuşu Mare	1,05	3.295
23.	Câţcău	1,3	1.371
24.	Cătina	1,3	1.993
25.	Ceanu Mare	1,34	3.531
26.	Chinteni	0,2	3.065
27.	Chiuieşti	0,8	2.332
28.	Ciucea	0,2	3.065
29.	Ciurila	0,5	1.594
30,	Cojocna	1,3	4.194
31.	Cornești	1,3	1.493
32.	Cuzdrioara	1,1	2.733
33.	Dabâca	0,2	667
34.	Feleacu	1,5	3.923
35.	Fizeşu Gherlii	0,3	2.564
36.	Floreşti	1,04	21.832
37.	Frata	1,3	4.242
38.	Gârbău	1,3	2.440
39.	Geaca	1,0	1.626
40.	Gilău	1,0	8.300
41.	Iclod	1,3	4.263
42.	Izvoru Crişului	1,25	1.632
43.	Jucu	1,0	4.270
44.	Luna	1,0	4.268
45.	Mănăstireni	1,3	532
46.	Mărişel	0,4	1.488
47.	Mica	0,4	3.566
48.	Mihai Viteazu	1,3	4.129
49.	Mintiu Gherlii	0,75	1.550
50.	Mociu	1,07	3.313
51.	Moldovenești	0,2	3.317
52.	Negreni	0,8	2.321

53.	Palatca	0,2	1.218
54.	Panticeu	1,3	1.844
55.	Petreştii de Jos	0,2	1.512
56.	Ploscoș	0,2	337
57.	Poieni	0,6	4.842
58.	Recea Cristur	1,0	1.412
59.	Săcuieu	0,8	1.466
60.	Sâncraiu	1,0	1.633
61.	Sănduleşti	1,3	1.798
62.	Sânmărtin	1,3	1.384
63.	Sânpaul	1,0	2.382
64.	Săvădisla	0,2	4.392
65.	Sic	0,2	2.405
66.	Suatu	1,3	1.737
67.	Tureni	1,47	2.278
68.	Unguraș	1,0	2.777
69.	Valea Ierii	1,3	888
70.	Viişoara	1,2	5.493
71.	Vultureni	1,3	1.516

Tax rates and number of population in the Cluj County localities
(Author's processing)

As it can be seen, the interval in which those tax rates frame is from 0,2% to 2%. Law no. 227/2015, art. 457, specifies the interval related to the tax rate as being within the range 0,2-1,3%.

Under certain terms of economic, social, etc nature, these rates may increase by up to 50% (article 460). Subsequently, certain Mayor's Offices made use of that provision and brought the percentage rate up to 2% (it is true that was the case of just one Mayor's Office).

Making a centralization by groups of percentage rate one may notice that:

Table 2

	Percentage rate between 0,2 – 0,9%	**Percentage rate between 1,0 – 1,5 %**	**Percentage rate between 1,6 – 2,0 %**
Number of Mayor's Offices	22	47	2
Mayor's Office percentage	30,99%	66,18%	2,83%

Mayor's Offices distribution according to the tax rate (Author's processing)

From Table 2 it can be seen that the majority of the Local Councils decided that the values of the tax rate frame, as much as possible, within a reasonable interval for legal persons.

4. The taxation of the non-residential buildings of legal persons in the city of Cluj-Napoca and the neighboring localities

In this scientific aproach I wanted to make a small comparison related to the tax rates charged in the city of Cluj-Napoca and the localities which are considered "dormitories" of this city (Table 3):

Table 3

Mayor's Office	Tax rate (%)	Population (inhabitants)
Cluj-Napoca	1,0	324.576
Apahida	1,2	10.072
Chinteni	0,2	3.065
Feleacu	1,5	3.923
Florești	1,04	21.832
Gilău	1,0	8.300

The taxation of the non-residential buildings of legal persons in the city of Cluj-Napoca and the neighboring localities. (Author's processing)

Analyzing the data of the Table 3, some ideas may come off:

1. In the localities where the population number is higher the percentage rate is lower which may mean that the money of the local budget is collected in a larger amount from the population and not from the companies;
2. Chinteni charges a percentage rate at the low limit of the legal provisions which means that their intention is to attract companies within the locality especially since the infrastructure improved;
3. Apahida and Feleacu, which are located on E81 and DN16, could attract companies more easily to move their headquarters and charge them taxes.
4. In exchange, Floreşti, located on E60, relies on the taxes charged from natural persons especially since some of the companies preferred to have their headquarters or secondary offices in Gilau.

5. Comments

In all the places making the object of our scientific approach we noticed the observance of the legislation related to the taxation of the non-residential buildings owned by legal persons.

But, if some of the Local Councils voted to preserve the tax rates at the same level as the preceding year, other Local Councils voted either for the increase of those taxes with the inflation rate or they made use of the provisions of Law no. 227/2015 going up to the admissible upper limit. In what concerns the competence of the Local Councils by categories of assignments, these deliberative entities, in their position of autonomous administrative authorities of the Romanian local public administration, have initiatives and decide, under

the terms of the law, on all the matters of local interest, except for those which are assigned, under the law, to the competence of other authorities of the local or central public administration. (Roş, 2015, p. 50)

The questions coming out are the following: is the attraction of companies in those places really desired or not? Is there the wish to create new jobs for the population of those places or not? Is the infrastructure development really desired in those places or not? Unfortunately, time will offer us a part of the answers to those questions.

Conclusions

The tax on non-residential buildings owned by legal persons makes a part of the budget of a locality. If there is the wish that this tax has a greater weight than this tax rate must not be raised at the maximum admissible level but kept within normal limits.

When a company settles down its headquarters or secondary offices in a locality, such company wishes to pay as low taxes as possible because, by attracting the local labor force and more, it will pay tax on the labor force and, maybe, it will contribute to the infrastructure of that locality and this can only lead to the increase of the living standard of the said locality.

And if the respective locality or localities are closer to a national road, important railway or even airport, this leads to the increase of the degree of civilization and social life in those localities.

And one thing should not be omitted: since 2016, since the introduction of this methodology of taxation, contrary opinions have emerged, as the former President of ANEVAR said: “there are talks about the transition to taxation based on the market value of the buildings by giving up to the current system, which is based on their location.

The contradiction comes from the fact that market value is significantly influenced by the location of the property, and today the tax system does not take into account the location of the building (Vascu, 2016, p. 11).

Bibliography

1. Law no. 227/2015 on the amendment of teh Tax Code, published by the Official Gazette no. 688 of 2015 September 10.
2. Georoceanu, A.M., (2012), *Drept fiscal*, Cluj-Napoca: Argonaut.
3. Roş, N., (2015), *Îndrumar practic legislativ pentru aleşii locali*. Cluj-Napoca: Presa Universitară Clujeană.
4. Vascu, A., (2016), Tax is likely to rise even though the taxable amount decreases. Rev. Value, Q1, pp. 8-11.
5. Tulai, C.I., Şerbu, S.G., (2005), *Fiscalitate comparată şi armonizări fiscale*. Cluj-Napoca: Casa Cărţii de ştiinţă.

THEORETICAL AND PRACTICAL CONSIDERATIONS REGARDING THE ROLE OF THE ROMANIAN LABOR INSPECTION (I)

Violeta SIMIONESCU[*]
Graţian URECHIATU-BURIAN[**]

Abstract

The existence and protection of human rights is, today, a mandatory condition, even indispensable, for the development and evolution of the human society. Any society that has an ideal of justice must first and foremost consider the protection of human rights and freedoms to be a high principle.

The Labor Inspection authority is particularly active in preventing, detecting and sanctioning undeclared work by seeking to combat and reduce this phenomenon of undeclared work. However, as we are going to see, we can consider the Labor Inspection an institution which has the administrative authority to protect the employee`s right by using administrative means in a wide area.

Keywords: *Labor Inspection, administrative actions, human rights*

JEL Classification: [K 22, K 23, K 31, K 32]

1. Introduction

The existence and the protection of the human rights is, today, a mandatory condition, we would say, even indispensable, for the development and evolution of the human society. Any society which has an ideal of justice must first and foremost consider the protection of the human rights and freedoms to be a high principle. However, it is not enough for these rights to be recognized. It is very easy to conceive a law and to impose its *ergaomnes* mandatory character. What is difficult is that these recognized rights are respected in a real way, that monitoring and control mechanisms are being set in place to ensure respect & enforce for the rights both by the state and by others. Moreover, the mechanism for monitoring and controlling the observance of these rights and the prerogatives given by these rights and freedoms must be clear, simple and accessible, so that even a person who is not a legal specialist can understand what rights and freedoms does he/she has and the other members of the society.

[*] Associate Professor, PhD., Technical University for Constructions Bucharest.
[**] PhD. candidate, National School of Political Studies and Public Administration, Bucharest.

In a document developed under the aegis of UNESCO, it was emphasized that "human rights are no new morals, no secular religion; they are much more than a common language of all people. " "There are exigencies that the human person needs to study and integrate in his own culture according to his own rules and methods, regardless of the diversity of his concerns" (Zlătescu-Moroianu, 2008, p. 5).

"*Human rights are the foundation of the human existence and coexistence. Universal, indivisible and interdependent, they define humanity. They embody the principles that form the cornerstone of human dignity*"the United Nations Secretary-General said in the inaugural message on the occasion of the 50th anniversary of the Universal Declaration of Human Rights.

As stated in the preamble to the Universal Declaration of Human Rights, all peoples and nations must strive for the common ideal proclaimed in this solemn document and strive to develop respect and respect for all the rights and freedoms of persons through education and education (Zlătescu-Moroianu, 2008, p. 7).

As a rule, the employee's rights are being protected by the court of law. However, in this respect, the work carried out by the Romanian Labor Inspectorate has a particular importance.

Within the labor relations, in our opinion, the Labor Inspection is the most important authority of the state for designing, stimulating and contributing to the development of a culture of prevention, and among the issues falling within its competence, we mention: industrial relations, wages, general conditions of work, safety and health and safety at work and employment and social security issues (www.ilo.org, 2010).

At the European level, setting up a labor inspection was a consequence of the industrial revolution of the late eighteenth century. In this sense, the first initiative to set up a control body on labor relations had the British Parliament in 1802, which adopted a law on labor protection as well as on the protection of apprentices. This law has an increased applicability in the area of health and safety at work. However, the law enforcement mechanism was not effective. In 1833, the British Government appointed the first labor inspectors with supervisory and control duties, especially in the field of work and leisure time for adults and children (Ellis, 1998).In 1919, the Treaty of Versailles stressed that it was particularly important that "each state should establish an inspection system to ensure the implementation of directives, laws and regulations for the protection of employees" (Kenner, 2003, pp. 57-58).

2. Organization of the Labor Inspection in Romania

The foundation of the Labor Inspection is one of the consequences of the ratification by Romania of the Convention no. 81/1947 on Labor Inspection in

Industry and Trade as well as of Convention no. 129/1969 on labor inspection in agriculture. These conventions have been adopted by the International Labor Organization. Besides these normative acts, we also underline the provisions of art. 237 of the Labor Code stipulating that "the application of the general and special regulations in the field of labor relations, safety and health at work is subject to the control by the Labor Inspection, as a specialized body of the central public administration with legal personality, subordinated to the Ministry of Labor, Social Protection". These normative acts have a general character, establishing principles and procedures.

Nowadays, the normative act regulating the foundation, organization and functioning of the Labor Inspection is the Law no. 108/1999 on the foundation and organization of the Labor Inspection. The Law no. 108/1999 establishes the general framework for the organization and functioning of the Labor Inspection, and the detailed rules for the enforcement of the law were initially laid down in G.D. 767/1999, and are currently provided for in G.D. no. 488/2017 regarding the approval of the Regulation for the organization and functioning of the Labor Inspection. The Labor Inspectorate is the specialized body of the central public administration, with legal personality, subordinated to the Ministry of Labor and Social Justice. The Labor Inspection fulfills the function of state authority, which ensures the exercise of control in the fields of labor relations, security and health at work (Roş, 2018, pp. 93-102) and the supervision of the product market in the field of competence.

In organizational terms, the Labor Inspection is a specialized body of the central administration with legal personality, having the character of a deconcentrated authority (Fodor, 2017) in the territory (Roş, 2016, pg. 178-187). The Labor Inspection management is provided by a State General Inspector which has two Deputy State General Inspectors. The State General Inspector is appointed by order of the Minister of Labor.

The territorial labor inspectorates are subordinated and reporting to the Labor Inspection. They have legal personality and are established at the level of each county and in Bucharest. The territorial inspectorates have a chief inspector appointed by the minister in charge at the proposal of the general state inspector and has under his supervision two deputy chief inspectors. The chief inspector and deputy chief inspectors have the status of labor inspectors.

In the light of the above, we will make brief observations on the procedural capacity to use and the representation in court of the territorial labor inspectorates.

In terms of procedural capacity (Tăbârcă, 2013, pp. 164-168)(Boroi, et al., 2013, pp. 147-152) of the territorial labor inspectorates, we observe that the proof of procedural capacity for use is made by order of the competent

minister, the order being the act of establishment by means of which the legal person is acquired.

As far as the legal representative of the territorial labor inspectorate is concerned, it is done through the chief inspector. As mentioned above, the chief inspector is appointed by order of the minister responsible. The appointment order being an administrative act of an individual character shall not be published in the Official Gazette of Romania.

Therefore, if the exception of the lack of procedural capacity of the territorial labor inspectorate or the lack of legal representative is argued, their proof will be made by presenting the order of the Minister, surely, the corresponding copy.

3. Functions and responsibilities of the Labor Inspection

The functions of the Labor Inspection are regulated by art. 5 of the Law 108/1999 and are the following:

"a) state authority, which ensures the control over the application of the legal provisions in its fields of competence;

b) communication, which ensures the exchange of information with the central and local public administration authorities as well as with the persons subject to the control activity, informing them and the citizens on the way the provisions of the legislation in the field of competence;

c) representation, which ensures, on behalf of the Romanian State and the Government of Romania, the internal and external representation in its fields of competence;

d) training, through which the professional training and professional development of the personnel is carried out, according to the law;

e) cooperation, which ensures joint actions, both internally and internationally, in the fields of competence;

f) administration, which ensures the management of the assets in the public or private domain of the state or, as the case may be, of the administrative-territorial units that it has in administration or in use, the funds allocated for the purpose of functioning under the law, as well and the organization and management of IT systems required for its own activities"[1].

As far as the tasks of the Labor Inspection are concerned, Law no. 108/1999 distinguishes between general tasks and specific tasks[2].

Thus, according to the provisions of art. 6 par. 1 of Law no. 108/1999, the Labor Inspection has the following general duties:

"a) controlling the application of the legal, general and special

[1] Art. 5 let. a)-f) from Law no. 108/1999.
[2] Art. 6 from Law no. 108/1999.

provisions in the fields of labor relations, health and safety at work and market surveillance;

b) providing information to employers and employees on the means of applying the legal provisions in the areas of competence;

c) informing the competent authorities about deficiencies or abuses related to the application of the legal provisions in force;

d) the provision of services specific to its field of activity;

e) to initiate proposals for improving the legislative framework in its fields of activity, which it submits to the Ministry of Labor, Family and Social Protection ".

We note that among the general attributions we also identify the obligation to "*provide information to employers and employees about the means of enforcing the legal provisions in the areas of competence*" (Roş, 2017, p. 374). The legislator did not detail this assignment, but as it turns out, it designates the task of offering/issuing guiding/guidelines by the labor inspectorate to the employees/employers. Regarding the practical application of the guidance function, from the administrative and procedural point of view, the territorial labor inspectorates organize periodically conferences, business guidance sessions on the application of the legal provisions in the field of work relations and labor protection.

Specific duties are provided in art. 6 par. 2 of the Law no. 108/1999 and, as we shall see, the legislator divided them into:

1. Specific attributions in the field of labor relations:

"a) controls the application of the legal, general and special regulations regarding the conclusion, execution, modification, suspension and termination of individual employment contracts;

b) controls the establishment and granting of rights to employees deriving from the law, from the applicable collective labor contract and from the individual labor contracts;

c) controls the implementation of gender mainstreaming measures;

d) ensures at national level the record of the work performed on the basis of the individual labor contracts, through the general register of employees, as well as the records of the day laborers and beneficiaries of their services;

e) controls the use of labor for the purpose of identifying undeclared work (Dimitriu, 2017, pp. 52-61);

f) receives and transmits in the computer system, through the territorial labor inspectorates, the data submitted by employers and beneficiaries regarding employees and day-laborers;

g) ensures the registration of collective labor agreements at the level of units and verifies their provisions, according to the procedure approved by the

general inspector of state, and conciliates the labor conflicts triggered at the employer's level"[3];

2. Specific tasks in the field of health and safety at work and market surveillance:

"a) to control, coordinate and methodologically guide the application of the provisions regarding the safety and health at work, arising from the national and European legislation and from the conventions of the International Labor Organization;

b) investigates events according to their competencies, approves the research, establishes or confirms the character of accidents, cooperates with the institutions involved in the recording and reporting of accidents at work and occupational diseases;

c) controls the training, information and consultation of employees and provides information to improve it;

d) authorizes the operation of natural and legal persons from the point of view of safety and health at work and withdraws or may propose the withdrawal of the authorization, according to the law;

e) analyzes the activity of the external services of prevention and protection and proposes, as the case may be, the commission for authorization of the external services for prevention and protection and approval of the technical information and training documents in the field of security and health at work within the territorial inspectorates' work abstaining;

f) issue opinions and authorizations according to the competences established by the applicable normative acts;

g) orders the termination of the employer`s activity or the decommissioning of the work equipment, if there is a serious and imminent danger of injury or professional illness, and shall notify, as the case may be, the prosecution bodies;

h) orders the employer to carry out measurements, determinations and expertise to prevent events or to determine the causes of the events produced, as well as to check, through competent bodies, the level of harmfulness within the admissible limits at the workplaces, the expenses being borne by the employer;

i) controls compliance with the legal provisions regarding the placing on the market of products for which it carries out market surveillance actions, according to its competencies;

j) restricts, through the legal measures established by the legislation in force, the marketing of non-compliant products and measures to eliminate the non-compliances found;

[3] Art. 6, paragraph 2, point A, from Law no. 108/1999.

(k) take samples and perform tests to identify products suspected of non-compliance;

(l) cooperate with the customs authorities and other bodies responsible for border controls to exchange information on products presenting risks of use;

m) collaborates with national competent authorities and within the European Union on all market surveillance issues, including the notification of the safeguard clause for non-compliant products"[4].

The Labor Inspectorate carries out other duties set in its responsibility according to the legislation in force. According to the provisions of art. 6 par. 4 of the Law no. 108/1999, the central and local public administration authorities, as well as the institutions under their subordination, coordination or under their authority are obliged to provide the Labor Inspectorate and the territorial labor inspectorates at their request with the necessary information and documents, operative and free of charge, for the fulfillment of the duties established by law.

An important role of the Labor Inspectorate is in founding and preventing undeclared work (black work - *Author's Note*) (Dimitriu, 2017) (Radu, 2011, pp. 29-30). In this respect, by G.D. 1024/2010 it has been established that the Labor Inspection acts mainly for the prevention, detection and sanctioning of undeclared work, aiming by own means to combat and diminish this phenomenon[5]undeclared work. In this respect, by G.D. 488/2017 is mentioned among the attributions of the Labor Inspection and the fact that it controls the employers' use of the labor force in order to identify the cases of undeclared work, and notifies, as the case may be, according to the legal provisions, the criminal prosecution bodies. In order to combat undeclared work, the control is carried out at the workplace where the persons performing the activity are identified, on the basis of the identification cards, the data in the general register of the employees sent to the labor inspectorate, as well as any other documents requested by the labor inspector[6].

Undeclared work can be defined as the work done by a person for and under the authority of an employer for a sum of money or other benefits in kind but in the absence of an individual employment contract concluded in written form under the terms of the law. In our opinion, undeclared work has a negative impact on the economy and national competition is a true social parasite. The effects of undeclared work are seen both in the short and long term for the individual, society and the state budget. Failure to pay social contributions and taxes affects social security systems, and people who work

[4] Art. 6 paragraph 2, point B, from Law no 108/1999.
[5] Point. 2 paragraph 2.
[6] Art 12 pct. B let. b) from G.D. 488/2017.

"on the black" do not benefit from any of the forms of social protection provided by legal rules(Roş, 2003, pp. 380-384). Moreover, the competition between economic operators must start from the premise that the economic activity is carried out legally, including by observing the legal provisions applicable to the labor relations and the protection of the employees' rights.

In this context, for example, the protection of employees' rights is also relevant in relation to the legislation governing the transactions carried out in the public procurement market. Specifically, through Community legislation - the 2014 generation of public procurement directives7mechanisms are created to strengthen the role of labor relations in the procurement market. The Procurement Directives include in the preamble, in addition to the objectives of the direct contribution to the achievement of the Europe 2020 strategy, "a strategy for smart, sustainable and inclusive growth" (Directive 2014/24) / EU)[8] (40) / Directive 2014/24 / EU and subparagraph (55) / Directive 2014/25 / EU) and objectives related to the promotion of adequate standards in labor relations[9]. Also, Directive 2014/23 / EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts distinguishes the same issues (paragraphs 3 and 58 respectively).

National procurement legislation[10]has established mechanisms for compliance with applicable obligations, including in the field of work, pursuant to Article 18 (2) of Directive 2014/24 / EU and Article 36 (2) of Directive

[7] Directive 2014/24 EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18 / EC and Directive 2014/25 / EU of the European Parliament and of the Council of 26 February 2014 on procurement (Text with EEA relevance) THE COMMISSION OF THE EUROPEAN COMMUNITIES, Having regard to the Treaty establishing the European Community, Having regard to the Treaty establishing the European Community, Having regard to the Treaty establishing the European Community, Having regard to Directive 2004/17 /.

[8] "*Public procurement plays a key role in the Europe 2020 strategy set out in the Commission Communication of 3 March 2010 entitled 'Europe 2020 - A strategy for smart, sustainable and inclusive growth' (hereinafter the 'Europe 2020 strategy' for smart growth , environmentally friendly and inclusive), representing one of the market instruments to be used for smart, sustainable and inclusive growth, while ensuring the most efficient use of public funds. (...)*".

[9] "*The enforcement of environmental, social and labor law provisions should be enforced at the relevant stages of the procurement procedure when applying the general principles governing the selection of participants and the award of contracts when applying the exclusion criteria and at the time application of the provisions on abnormally low tenders. The necessary verification for this purpose should be carried out in accordance with the relevant provisions of this Directive, in particular those governing evidence and declarations on their own responsibility.*"

[10] Law no. 98/2016 on public procurement, Law no. 99/2016 on sector acquisitions and Law no. 100/2016 on concessions of works and concessions of services, published in the Official Gazette no. 390 of 23 May 2016 - amended and completed later.

2014/25 / EU[11]taking into account each Annex as appropriate (Annex X / Directive 2014/24 / EU and Annex XIV / Directive 2014/25 / EU - List of international environmental and social conventions referred to in the Articles - with a number of 8 ILO conventions out of a total of 12 nominated international conventions and paragraph 37 of the preamble to Directive 2014/24 / EU and paragraph 52 of the preamble to Directive 2014/25 / EU[12], this approach is also reflected in paragraph (55) of the preamble to Directive 2014/23 / EU.

Thus, if an economic operator fails to comply with his obligations in relation to employment relationships, an authority or a contracting entity acting in the role of a buyer must:

a. exclude the economic operator from the procedure (taking into account and subject to the rehabilitation mechanism presented and a time limit), according to the provisions of art. 164-165 of Law 98/2016, of the provisions of art. 177-178 of Law 99/2016 or the provisions of art. 79-80 of Law 100/2016;

b. reject an offer that does not show compliance with labor law in accordance with art. 143 of GD 394/2016, art. 137 of GD 395/2016 or art. 89 of the HG. 867/2016.

c. reject an offer that has an unusually low price due to non-compliance with the obligations in the field of labor relations, by reference to what is to be executed, provided or rendered under the contract, according to art. 210 of Law 98/2016, art. 222 of Law 99/2016 or Art. 89 of Law 100/2016.

The current legislation in the field of public procurement also expressly establishes (Article 51 of Law 98/2016 and Article 64 of Law 99/2016, as subsequently amended and supplemented)[13], the fact that a contracting

---

[11] "*The Member States shall take appropriate measures to ensure that economic operators comply with the applicable environmental, social and labor law obligations laid down by Union law, national law, collective agreements or international law in the execution of public contracts environmental, social and labor domain listed in Annex (...) ".*

[12] *"In order to adequately integrate environmental, social and labor requirements in public procurement procedures, it is of particular importance that Member States and contracting authorities take appropriate measures to ensure the fulfillment of their obligations under environmental, social and labor law of the work that applies in the place where the works are performed or the services are provided, and derives from laws, regulations, decrees and decisions, both at national and Union level, as well as from collective agreements, provided that these rules and their application comply with Union law. Similarly, obligations arising from international agreements ratified by all Member States and listed in Annex X should apply during the performance of the contract. On the other hand, this should not prejudice the application of more favorable working and employment conditions for workers."*

[13] *"(1) The contracting authority shall specify in the awarding documentation the mandatory regulations in the fields of environment, social and labor relations established by legislation adopted at European Union level, national legislation, by collective agreements or by international treaties, conventions and agreements in these fields , to be observed during the*

authority or a contracting entity has the obligation to specify in the awarding documents, from the outset, the labor relations regulations as applicable in the procedure, the participating economic operators being "kept to the applicable obligations (Article 38 of Law 100/2016)[14]. Moreover, in the implementing rules of Laws 98 and 99 (in Article 137 of GD 395/2016 and Article 143 of GD 394/2016)[15], it is even established that the tender, which does not comply with the legal provisions established as mandatory, must be declared by the evaluation committee to be unacceptable and inappropriate as a result of non-compliance with Articles 51 of Laws 98/2016 and 64 of Law 99/2016 respectively. Also, in the implementing rules of Law 100/2016 (in Article 20, paragraph (1), letter f) of GD 867/2016)[16], the legislator states that where the nature of the activities covered by the public procurement contract determines the need for certain special conditions, including labor protection, the contracting authority / entity is required to enter these conditions in the contract documents.

Thus, the contracting authority or entity establishes in a competition the obligation to demonstrate compliance with the rules in the field of employment relationships and for subcontractors or for economic operators that play the role of third-party supporters (in accordance with Article 55 of Law 98/2016, Article 68 of Law 99/2016 or Article 94 of Law 100/2016). Where economic operators acting as a subcontractor or a supportive third party do not demonstrate compliance with the rules on labor relations, the contracting authority or entity requires their replacement (Article 183 of Law 98/2016, Article 197 of Law 99/2016 or Article 78 of Law 100/2016)[17], prior to awarding the contract. And,

---

execution of the public procurement contract or to indicate to the competent institutions from which the economic operators can obtain detailed information on the respective regulations.
(2) In the case provided in par. (1), the contracting authority also has the obligation to require economic operators to indicate in the tender that they have taken into account relevant obligations in the fields of the environment, social and labor relations."

[14] *"In the execution of concession contracts, economic operators are compelled to comply with the applicable environmental, social and labor relations obligations established by legislation adopted at European Union level, by national law, by collective agreements or by international treaties, agreements and agreements these areas."*

[15] *"(...) does not ensure compliance with mandatory regulations on specific employment and labor protection conditions, when this requirement is formulated under (...) Law (...)".*

[16] *"(...) (1) The specification shall contain: (f) if any, the special conditions imposed by the nature of the activities to be covered by the concession contract, such as safety conditions in operation, occupational safety, the use and preservation of heritage or the protection and enhancement of the national heritage, the conditions for the protection of the state secret, the use of special-purpose materials, the special conditions imposed by the conventions and conventions to which Romania is a party (...)".*

[17] "*The relevant measures should be applied in accordance with the basic principles of Union law, in particular with a view to ensuring equal treatment. These relevant measures should be*

just as it could not otherwise have been, in the implementing rules of Law 100/2016, as approved by GD 867/2016, even the allocation of risks in the case of works concessions (Annex 1 to the GD), point 8 with "labor disputes / inadequately qualified personnel "*being mentioned as a risk that could have consequences in "delay in implementation and rising costs*".

Moreover, among other things, in the National Strategy for Public Procurement, approved by GD 901/2015, reference is made to the need to "professionalize" staff carrying out planning, running, public procurement management as one of the problems identified and analyzes it extensively, proposing appropriate remedies. It is clear that the approach to this problem must be kept in close connection with the regulations in the field of activity of the authorities with general and specific responsibilities in the control, monitoring, and working relations. Given this example of public procurement law, apparently unrelated to labor relations, health and safety at work, it is clear that the impact of the importance of compliance with labor law is essential and its scope be general and under the control of the competentauthority.

Conclusions

From our point of view, Labor Inspection now plays a particularly important role in ensuring compliance with labor law legislation as well as occupational health and safety legislation. As we have shown, the Labor Inspectorate's functions and duties allow it to intervene with administrative measures, including coercion, to respect the rights of employees. Practically, Labor Inspection, on the basis of the competences established by law, carries out administrative justice in order to apply the legislation in concrete terms.

Also, the issues identified above in relation to transactions on the procurement market reflect the materialization of employee protection policies, which both contribute to strengthening the role of the Labor Inspectorate and to meeting the objectives set out in the Agenda 2030 for Sustainable Development established at the Summit the United Nations on September 2015, when Romania joined the leaders of the 193 UN member states in the global action program in the field of universal development and promoted the balance between the three dimensions of sustainable economic, environment.

---

applied in accordance with Directive 96/71 / EC of the European Parliament and of the Council (11), in a manner which ensures equal treatment and does not discriminate directly or indirectly against economic operators or workers from other Member States."

Bibliography

1. Boroi, G., Spineanu-Matei, O. & Constanda, A., (2013), *Noul cod de procedura civilă: comentariu pe articole, vol. I.* Bucureşti: Hamangiu, pp. 147-152.
2. Dimitriu, R., (2017), *http://tribunajuridica.eu; The new Romanian regulation of undeclared labour, Tribuna juridică.* 7(2). [Online] Available at: http://tribunajuridica.eu/arhiva/An7v2/6.%20Dimitriu.pdf [Accessed 02 07 2018].
3. Ellis, A., (1998), *www.ilo.org/.* [Online] Available at: www.ilo.org/labadmin/info /WCMS_111334/lang--en/index.htm [Accessed 04 05 2018].
4. Fodor, E.-M., (2017), *Drept administrativ.* Cluj-Napoca: Albastră.
5. Kenner, J., (2003), *EU Employment Law: From Rome to Amsterdam and Beyond.* Oregon: Hart Publishing, Oxford and Portland.
6. Radu, M., (2011), Modificări recente ale legislaţiei muncii. *Fiat Iustitia,* Issue 2, pp. 30-46.
7. Roş, N., (2003), Definiţie şi scurtă istorie a protecţiei sociale. *Simpozitionul Internaţional Specializare, integrare şi dezvoltare, Universitatea "Babeş Bolyai" din Cluj-Napoca, Facultatea de Ştiinţe Economice.* Cluj-Napoca: Sincron, pp. 380-384.
8. Roş, N., (2016), Principles of local public administration. *Fiat Iustitia,* Issue 1, pp. 178-187.
9. Roş, N., (2017) *Dreptul muncii. Curs universitar*. Bucuresti: Pro Universitaria.
10. Roş, N., (2018), *Dreptul securităţii sociale. Curs universitar.* Bucureşti: Pro Universitaria.
11. Tăbârcă, M., (2013) *Drept procesual civil, vol I.* Bucureşti: Universul Juridic.
12. www.ilo.org, (2010), *Labour Inspection. What it is and what it does. A guide for workers, International Labour Office, Geneva,* [Online] Available at: www.ilo.org/labadmin/info/inst/WCMS_141403/lang--en/index.htm [Accessed 02 06 2018].
13. Zlătescu-Moroianu, I., (2008), *Drepturile omului – un sistem în evoluţie -ed. 5.* Bucureşti: IRDO.

EFFECTS OF THE INHERITANCE UNWORTHINESS

Ilie URS*

Abstract

The inheritance unworthiness is the civil sanction of forfeiting the inheritance right, which applies to the heir/person having inheritance capacity and vocation, guilty of a serious deed against de cujus or against a heir of them.

The inheritance unworthiness sanction operates either by law, under the law, either based on a court order, and not on the will of the deceased.

The inheritance unworthiness sanction applies only to the perpetrator of the deed, not to other persons summoned to the deceased's inheritance.

The inheritance unworthiness effects consist in the retroactive cancellation of the title of heir of the unworthy heir. Practically, the heir unworthy of the inheritance loses the right to the portion of the inheritance that they would have been due to, including the right to forced heir ship.

The inheritance unworthiness effects may be removed by the person who leaves the inheritance either by will or by authenticated notary's deed, though only by express affidavit.

Keywords: *civil sanction, inheritance capacity, vocation, perpetrator, heir, intent, guilt*

JEL Classification: [K 11, K 12]

1. Notion

For a person to inherit, they have to meet a negative condition as well, along with the requirements of the inheritance capacity and vocation, namely *not to be unworthy to inherit*.

The inheritance unworthiness is the *civil sanction*[1] (Deak, 2013, p. 96) of forfeiting a person from their right to inherit, which applies to a person with

* PhD., Associate Professor, The Faculty of Law of Cluj-Napoca, "Dimitrie Cantemir" Christian University Bucharest.

[1] In the same way, the recent literature appreciates that since the decision of the civil court finds the inheritance unworthiness facts declarative, as it operates retrospectively and not constitutively, the unworthiness consequences are qualified as a *civil sanction* and not as a punishment, which implies a constitutive decision to enforce the punishment. Likewise, as mentioned before, the *civil sanction* nature of the inheritance unworthiness confers it a *personal* nature (it applies only to the perpetrator of the deed) and a *relative* nature (the unworthiness exists only in respect of the deceased or their successor in respect of which the deed was committed and must imply the existence of discernment and of criminal responsibility of the unworthy heir at the moment of the deed According to another opinion, in

inheritance capacity and vocation (Florescu, 2012, p. 31), guilty of a serious deed against *de cujus* or against a heir of them (Boroi, 2012, p. 526).

In compliance with art. 958 and 959 of the Civil code, the inheritance unworthiness sanction operates either *by law*, under the law, or based on a court order, and not on the will of the deceased.

According to art. 958 and 959 of the Criminal Code, the non-compliance sanction is either lawful, under the law, either based on a judicial decision and not on the will of the deceased (Chirică, 2014, p. 31).

Being a sanction, it applies only to the perpetrator of the deed, not to other persons summoned to the deceased's inheritance, on their own behalf or by inheritance representation. Furthermore, this sanction applies only in case of the deeds expressly and restrictively specified by the law, whereas the perpetrator must have acted with discernment, as in the absence of discernment we cannot talk about guilt.

We further on mention that, according to the new Civil Code, the inheritance unworthiness sanction operates both in case of legal inheritance and in case of testamentary inheritance.[2]

2. Effects of the Inheritance unworthiness

Based on art. 960 paragr. 1 of the Civil code, the unworthy heir is removed both from the legal inheritance and from the testamentary inheritance.

The specialty literature has specified that unworthiness/misdemeanour always produces effects from the date the inheritance proceedings are opened, regardless of whether the conditions required by the law are already met at this date or will only be met in the future (Chirică, 2014, p. 30).

2.1. Unworthiness effects against the unworthy heir

The main effect of inheritance unworthiness is the deprivation of the unworthy heir of their right to inherit, respectively their removal from the inheritance of the deceased (Chirică, 2014, p. 29).

---

the light of the new Civil Code provisions, inheritance unworthiness is a *civil punishment* based on reasons of public morality.

[2] In the old Civil Code system of 1864 Art. 655 respectively, the inheritance unworthiness was improperly regulated. Thus, if the heir perpetrator, guilty of the offense of killing the inheritor had committed suicide before his conviction, he could not be considered unworthy, therefore he could finally inherit the patrimony of his victim. Such a legal anomaly was sanctioned by the European Court of Human Rights by the Judgment of 1 December 2009 (published in the Official Gazette no. 373 of June 7, 2010), in the case of Velcea and Mazare v. Romania as contrary to Article 8 of the European Convention on Human Rights (right to respect family life).

Since the title of heir of the unworthy heir is abolished as of the date of the inheritance, he loses the right to the portion of the inheritance that would have been due to him, including the right to forced heir ship. The other heirs will inherit his portion of the inheritance. For example, the unworthy heir's removal from the inheritance will bring advantage to his legal co-heirs, even to legatees or donors in case the unworthy heir was a forced heir (Boroi, Stănciulescu, 2012, p. 529).

Whether between the inheritance opening moment and the moment when all the requirements provided under the law are met to declare, ascertain and pronounce the inheritance unworthiness, the unworthy heir has inherited the assets of the inheritance, he must give them back to the persons entitled to inherit them (Macovei, Dobrilă, 2012, p. 1011). Possession thus exercised by the unworthy heir over the inheritance assets is considered *a mala fide possession* (art. 960 paragr. 2 of the Civil code).

Restitution of the inheritance assets is done, as a matter of principle, *in-kind*, and in case such restitution is possible (for example, the assets have disappeared, regardless the reason, or have been alienated, expropriated etc.), restitution is made *by equivalent*, at the highest value, reported either at the moment when the unworthy heir took possession of those goods, or at the time of their alienation or disposition (Art. 1641 of the Civil code.).

As for natural, industrial or civil fruits, being considered a mala fide possessor/owner, the heir unworthy of the inheritance must return them *in kind*, and in case in-kind restitution is not possible, as the unworthy heir has already consumed them or failed to harvest them, he must give back their value.

Likewise, the person unworthy of the inheritance must return to those entitled the amounts of money that he has received from the inheritance debtors, together with the related interest, which flows from the day on which the unworthy heir received the amounts of money.

Nonetheless, the heir unworthy of the inheritance has the right to be reimbursed the amounts spent to pay the inheritance debt (with interest) as well as the necessary and useful expenses incurred in respect of the assets of the inheritance, including the expenses incurred by the fruit receipt.

We shall also mention that the rights and obligations of the heir unworthy of the inheritance, considered extinguished by confusion, will be reborn.

2.2. Effects of the inheritance unworthiness against the offspring of the unworthy heir

In the old Civil Code system of 1864, the unworthiness sanction had effects on the descendants of the unworthy heir as well, in the sense that they could not inherit by representation their unworthy ascendant. The descendants of the unworthy heir could come to the inheritance of the *de cujus* only on

their behalf. But under the new Civil Code, art. 967 paragr.1 stipulates that: "*a person lacking the capacity to inherit can be represented, the same as the unworthy heir, even alive on the inheritance opening date".*

Consequently, the unworthiness sanction does not currently have effects on the descendants of the unworthy heir who will be able to come to the inheritance both on their own behalf and by the representation of their unworthy ascendant.

2.3. The unworthiness effects against third parties

In relation to third parties with whom the unworthy heir has entered contracts, in the period between the inheritance opening and the unworthiness acknowledge mentor pronunciation, art. 960 paragr. 3 of the Civil Code stipulates that the *conservation and managementdeeds* remain valid insofar as they bring profit to the heirs. It is irrelevant whether the contracting third party acted in good or in bad faith as the law makes no distinction in this respect.

The *onerous or gratuitous legal deeds/legal deeds for pecuniary interests* entered between the unworthy heir and a bona fide third-party are maintained as well, but the rules of the land book are nevertheless enforceable. With respect to movable goods, the person who, in good faith, enters with a non-proprietor (ie, with a non-owner) a translative property deed for pecuniary interests in a movable asset becomes the owner of that good from the time of its effective possession (art. 937 paragraph 1 of the Civil code). The acquiring third party is considered in good faith if, at the time of the effective possession of the good, they did not know and should not, under the circumstances, know the lack of ownership of the unworthy heir (Deak, Popescu, 2013, p. 122).

Reported to the immovable property, the principle of material advertising, enshrined under art. 901 of the civil Code applies, according to which any person who has acquired in good faith any real right entered in the land book based on a legal deed for pecuniary interest shall be considered the holder of the registered right even if, at the request of the real owner, the right of its author is removed from the land book.

The acquiring third party is considered to be in good faith only if the following conditions are met at the time of registering the application for registration of the right for his benefit:

a) no action was registered against the content of the land book;

b) the content of the land book does not mention any cause justifying its rectification in favour of another person;

c) did not otherwise know the inaccuracy of the land book (Deak, Popescu, 2013, pp. 123-126). For the rest of the cases the principle *resoluto iure dantis resolvitur ius accipientis* applies.

3. Removal of the inheritance unworthiness effects

Based on art. 961 paragraph 1 of the civil Code, the inheritance unworthiness effects or its legal effects may be *expressly* removed by will or by an authenticated notary's deed entered by the person who leaves the inheritance. Without *an express statement*, the legacy left to the unworthy heir after committing the inheritance unworthiness deed does not eliminate the unworthiness effects.

Although a matter of committing serious deeds, that attract the inheritance unworthiness sanction, our legislator has considered it possible for the person who leaves the inheritance to forgive the perpetrator, given the close relationship between them. As a result, the legislator has regulated the possibility of removing the unworthiness effects by his will of *de cujus*, option which can only be achieved *expressly*, based on a last will/testament (any form of testament: authentic, handwritten testament, privileged, etc.) or by an authenticated notary's deed (express authenticated affidavit, an expression of the will which may be included in another notary's deed, such as a sales contract, donation, maintenance etc.)[3]. However, the requirement which must be thus met is that the person who leaves the inheritance should forgive the unworthy heir, by being *fully aware of the situation* (Deak, Popescu, 2013, p.130).

We further on mention that the removal of the inheritance unworthiness effects can only take place subsequent to committing deeds which effect in inheritance unworthiness. An eventual declaration for the removal of the unworthiness effects for future deeds would fall under absolute nullity, as it contravenes public order and good morals.

The unworthiness effects removal belongs exclusively to the person who leaves the inheritance, as it is a purely personal deed. Forgiveness on the part of the *de cujus* does not remove the criminal responsibility of the unworthy heir.

Likewise, the unworthiness effects cannot be eliminated through the rehabilitation of the unworthy heir, by amnesty after conviction, by clemency, or by the prescription of the criminal punishment execution (Article 961 paragraph 2 of the Civil Code).

To the question whether the provisions of art. 961 of the new Civil Code, referring to the removal of the unworthiness effects, can be applied or not in case of deeds committed before the enforcement of the new Civil Code, the answer was positive. It has been appreciated that unworthiness becomes effective only from the inheritance opening date, therefore, if before the occurrence of such effects the *de cujus* forgives the perpetrator, the provisions of art. 961 become incidental (Chirică, 2014, p. 33).

[3] The removal of the inheritance unworthiness effects by testament or by authenticated notary' deed is subject to the registration into the National Notarial Registry for Liberalities (RNNEL), based on art. 95 of Law no. 71/2011 for the enforcement of the civil Code.

4. Invoking the inheritance unworthiness

As for the *unworthiness by law,* it can be called forth by any concerned person who is to take advantage from the removal from the inheritance of the unworthy heir, namely:

- co-heirs or subsequent heirs;
- the legatees or donators, if the unworthy heir would have been a legitimate forced heir, and thus his presence could have attracted the reduction of the liberality;
- the creditors of the above-mentioned persons, by the derivative action, provided that the requirements for exercising such action are met (Article 1560 - 1561 of the civil code) (Pop, Popa, Vidu, 2012, pp. 764-766);
- the court of law or the public notary ex officio, based on the court judgment resulting in the lack of dignity (art. 958 paragr. 3 of the civil code);
- the prosecutor, under the provisions of art. 92 of the civil procedure code;
- the district, town or municipality on the territory of which the assets are at the inheritance opening date, if by removing the unworthy heir from the inheritance the inheritance becomes vacant; in the same way, the Romanian state by the Ministry of Public Finances, in case the inheritance which would become vacant by the removal of the unworthy heir is abroad (Deak, Popescu, 2013, p. 127);
- the unworthy heir himself, in case they justify legitimate interests (Macovei, Dobrilă, 2012, p. 1007).

As unworthiness operates by law, by the civil action the court of law is requested to ascertain the unworthiness, which operates by virtue of the law at the time of the inheritance.

As far as the *judicial unworthiness,* is concerned, it can be invoked by

- any of the deceased person's heirs, in case they justify legitimate interests (Chirică, 2014, p. 28);
- by a prosecutor (in case minor children are involved, the same as people under interdiction or missing persons, etc.);
- by the district, town or municipality on the territory of which the assets are at the inheritance opening date, if the only heir is the unworthy heir; under the same terms, in relation with vacant inheritances from abroad, the Romanian state can ask the court of law to rule on the unworthiness of the only heir (Deak, Popescu, 2013, p. 129);
- the unworthy heir himself, in case they justify legitimate interests.

In all cases, the inheritance unworthiness can be ascertained or ruled by the court only as soon as the inheritance has been opened and only in case the inheritance vocation of the unworthy heir is undoubted, not being removed from the inheritance by the presence of preferential heirs.

Bibliography

1. Boroi, G., Stănciulescu, L., (2012), *Instituţii de drept civil în reglementarea noului Cod civil*, Bucureşti: Hamangiu.
2. Chirică, D., (2014), *Tratat de drept civil. Succesiunile şi liberalităţile,* Bucureşti: C.H. Beck.
3. Deak, F., Popescu, R., (2013), *Tratat de drept succesoral. Vol. 1. Moştenirea legală,* Bucureşti: Universul Juridic.
4. Florescu, D.C., (2012), *Dreptul succesoral în noul Cod civil,* ediţia a II-a, revăzută şi adăugită, Bucureşti: Universul Juridic.
5. Genoiu, I., *Dreptul la moştenire în Noul Cod civil,* Bucureşti: C.H. Beck.
6. Macovei, C., Dobrilă, M.C., (2012), *Noul Cod civil. Comentariu pe articole*, Bucureşti: C.H. Beck.
7. Pop, L., Popa, I.F., Vidu, S.I., (2012), *Tratat elementar de drept civil. Obligaţiile,* Bucureşti: Universul Juridic.

JURIDICAL EDUCATION BETWEEN STANDARDS AND PRACTICE

Roxana-Elena VIŞAN*

Abstract

The exigencies and transformations imposed by the current society determine reforming changes in the act of education, with innovative aspects, to contemporary disciplines. One of these is juridical education, a foundation of human stability in modern society, a guarantor of the promotion and protection of human rights, social cohesion and respect for the law.

It transmits in a transdisciplinary manner the undisputed force of law, the legal culture that opens up professionalism to young people and to a liberal democracy.

Keywords: *juridical education, curricula, competence social and civic, juridical culture, public policy*

JEL Classification: [K 38, K 10]

1. Introduction

The dynamics of the Community and the placing of education in the center of the national and international public present policies, determine us to acknowledge that the man becomes an educator of reason and maintaining the balance at the societal level only by recognizing the "biological and symbolic size of the substance of the human being, whose social life shall be carried out at the same time on the land of "to be" and "a should be," where the right meet our mental universe with the physical vastness of our experience (...), fulfilling an anthropological function when establishing rationality" (Supiot, 2005, pp. 12-27).

Therefore, cooperation by the work of the human legal rationale emerges from a clear vision of policymakers who must to assume „an ideal consciousness that keeps a civil war" (Supiot, 2005).

In this way, the right is called to examine the attitude and behavior of individuals, to impose a variant of conduct and to observe (Buzdugan, 2015, p. 38), for this to be effective and positively assessed by members of society (Boboş, Buzdugan, Rebreanu, 2008, p. 327).

* PhD. candidate, National School of Political Studies and Public Administration, Romania, Faculty of Public Administration, Bucharest.

Outlining the prospect of this kind of social order is supported, promoted by social norm defined as a „behavior shared by two or more persons on the conduct to be regarded as socially acceptable", (Theodorson & Theodorson, 1970, p. 276), but also by educational policies that found to ensure at all levels of education learning programs with legal-administrative character.

Part of social thinking, legal thinking wants to promote the image of a company to have human resources „able to act according to moral norms and laws of the political community" (Hatos, 2006, p. 65) clear evidence of promoting the common good, participating beneficially in society and political community. In this common good correlation with moral norms, refer to the teaching of moral education concept, where „morality is a summation of social virtues: justice, altruism, respect, dignity, (...), based on personal conscience, where its motive is primarily due to the self and the other members of the human community (Buzdugan, 2015, pp. 41-42). While ensuring the moral good is reflected in the rules of justice, socially validated, nationally and internationally, in terms of: civil justice, criminal justice (Bordaş, 1989, p.36). Analyzing the meaning of moral and legal norms, we see a link dominant once moral and legal consciousness, and the tripartite structure of social consciousness which directs us to „the rational nature, emotional and volitional" (Buzdugan, 2015, p. 44) human being.

As shown in the literature, social justice is distinguished by a number of features such as (Buzdugan, 2015, p. 44): *objectiveness*, supported by laws, codes, procedures, determined the need functioning of society in all its structures (economic, political, cultural, community, natural) *impartiality* in legal decisions, direct expression and apparent objectivity, *representativeness*, as a "public service" stated in modern states, *accessibility* provided by the simplicity and clarity of rules and speed of their implementation, opposite bureaucratic trends of "perpetuation of dilated processes", unity and adaptability performed in mitigating or aggravating circumstantial limits. An effective correlation between the characteristics of the social justice, adapted educational process, found in today's reform, a rethinking of the curriculum with precise steering to the adoption of a European education, equity, social cohesion, active citizenship. New intervention policy reform mediates learning content skills training proper use of moral norms and legal contexts in which the individual operates, thus promoting the respect for the law (Vişan, 2016) the new discipline of study, *legal education.*

Legal education leads us to cultivate respect for the legal norm, promoting affordability and binding thereof so as to enable citizens to have sufficient as to be able to enjoy legal equality, but also to provide a reasonable way in dealing with imminent consequences that may occur if the law is disregarded.

2. The Mission of the Juridical Education

In the present context of the educational process, legal education training activity and development of student's personality being achieved by building on the good moral, legal, good redeeming (Cristea, 2015, p. 55) performed by appropriating concepts legal and administrative provisions by adopting some specific practical actions the legal domain.

Treated from the perspective of pedagogical and social significance, juridical education aimed at training legal consciousness development, assimilating the legal standard employed cognitive-formative (Plano, Riggs, Robin, 1993, pp. 102-103) relationships between citizens, adjusts and authorities, the criteria for achieving socially desirable value distinction between right and wrong, moral and immoral, legally and illegally (Vişan, 2016).

In the process of teaching and learning discipline legal education, noted that the formation of a legal consciousness is supported by two pillars, namely: pillar of theoretical and practical-applicative. Theoretical concepts as a whole include the cases dealt in court, which provides legal rationales used for reporting cognitive and non- cognitive (motivational, affective, volitional) of human personality to the rules of law, integrated into a regulatory framework determined social-historical and the practical-applicative constitute human behaviors/assembly of the cerebral, expressed through different skills/ attitudes, customs, legal, engaged at all levels of human existence (community, cultural, economic, political, etc.), (Cristea, 2015, p. 55).

Transmission of moral and legal foundations takes us without enclosure by all branches of law: constitutional, international, public, administrative, criminal, civil, presented in the science of human rights. "Even in language, that fundamental rights and freedoms are expressed, is legal, they are above all notions of constitutional law and international law, responding to each with its own characteristics requirements of protection the human being" (Moroianu-Zlătescu, 2007, pp. 22-23). Thus, one can specify the intervention of the state in guaranteeing and protecting the constitutional laws on human rights, rights to subscribe to the relationship between the citizen and the State, and the creation of a legal framework, promoted and implemented by law, necessary social cohabitation between individuals.

Contextually speaking, a democratic society places the education system to a legitimized process through educational public policies and issued by the public administration authorities, but also through a modern vision that John Dewey has formulated: legitimate schooling, formal education, based on highlighting innovative functions: the integrative function of the school, the equal opportunities function, the school's development function (Hatos, 2006, p. 60). In our case, the school, the young students are oriented towards the profession of legal-administrative theories, subject to professional ethics,

which offers the possibility to carry out a service of public interest, to ensure the legality of legal acts, to defend the rights and legitimate interests of the State, to guarantee citizens a fair and impartial trial, in compliance with the Constitution and national laws, while ensuring the existence of the rule of law and the formation of a culture legal.

Equal opportunities function is ensured by the European education policy provided for in the Strategic framework for European cooperation in education and vocational training (ET-2020)[1] that seeks affirmation of strategic objective promoting equity, social cohesion and active citizenship, which allows all citizens, regardless of their socio-economic circumstances to acquire, update and develop throughout life, so specific powers of the trade and key competencies necessary to enable employment and continuing learning, active citizenship and intercultural dialogue (O.J. of E.U., 2009, C 119/4). The same document through its European provisions refer to the position of school development, a prerequisite for safeguarding personal evolution by stimulating lifelong learning effect on the ability of inset professional mobility and social integration on the labor market in the social sciences. In doing so it creates a dominant element, which supports the formation of a democratic cultures provided by formal learning, non-formal education.

These functions are included in a systemic organization of the school, which aims to facilitate the development of the capacity to adapt to change not only from the perspective of legislative, educational practices, but also of social manners, in the acquisition of social and civic competences among the younger generation, skills of learning throughout the entire life - "key competences for lifelong learning"[2].

3. Legal education in the national education system

Considering that a liberal democracy builds through the existence of members informed, trained, aware of the role that you hold as a nation's citizens and noting that the involvement and participation in the public space of the citizens, requires deep knowledge on the part of their moral and legal norms, acquiring proper competences and civic culture of legal acquisition must be a priority in a state of law (O. J. of E.U., 2009 C 119/4).[3] Also, being aware of the impact of increased of law on society and on the individual, that people need to learn how to become democratic citizens, policy makers from

[1] Council conclusions of 12 May 2009 on a strategic framework for European cooperation in education and training - ET 2020 in the Official Journal of the European Union 2009 / C 119/02.

[2] Recommendation of the European Parliament and of the Council of 18 December 2006 on key competences for lifelong learning, 2006/962/EC, p. 10–18.

[3] Official Journal of the European Union, C119/4/2009.

the member states of the European Union have adopted the Charter of Council of Europe education for democratic citizenship and human rights education (EDC/HRE).

The content of the Charter stated that education plays an essential role in promoting fundamental values: democracy, human rights and rule of law as a shield against the growth of violence, extremism, racism, xenophobia, discrimination and intolerance[4]. Therefore States were guided to draw public policies aiming to implement one of the objectives set out in this Charter: every person, to be given the opportunity to form in the field of *Education for democratic citizenship, Human rights education*, an integral part of the process of lifelong learning[5].

At the same time, European education policy aim in this regard, a strategic goal of promoting equity, social cohesion and active citizenship, which allows all citizens, regardless of their socio-economic circumstances to acquire, to Update and develop throughout life, so specific powers of his trade, and key competencies necessary to enable employment and continuing learning, active citizenship and intercultural dialogue[6]. Active citizenship paradigms, as foreshadowed in the European area, focuses primarily on the rights, responsibilities and active participation in relation to the size of the civic, political, social, economic, legal and cultural society[7], exercised at the societal level.

At the national level, Romania was concerned about reforming education, introducing educational policies and practices, supported by reference to specific principles concerning: linking education with the evolution of the legal system, optimizing relationships between the citizen and the legal norm, ensuring equal legal rights and freedoms, acceptance of diversity and the defense of the rule of law. The above-mentioned principles have been incorporated into the process of education, from early '90s, when a democratic regime is situated in an early form in our country.

The debut of real *Juridical education* in our country was achieved after Romania became a member state of the E.U., at the level of the education system reform of curricula at all educational levels, forming a uniform, continuous and innovative concerning legal culture, which runs on four fundamental stages.

The first stage is that of civic assimilation of knowledge content, a custom set of minimal discipline for *Civic Education* classes III and IV, a first

[4] Recommendations of the Committee of Ministers, 2010.
[5] *Idem*.
[6] Official Journal of the European Union, C119/4/2009.
[7] Available at: https://rm.coe.int/1680487883.

step in the cycle and the years of study materials that tend to fill the civic knowledge of the student. Scope of disciplines in this regard, it is continued by the second phase, through compulsory *Civic Culture* discipline, part of the common trunk of *Man and society* curriculum, as provided for in the framework plan in grades VII and VIII. Note, therefore, that the values they take concrete form cultivates civism of civic behavior, deeply, but above all moral: accountability, freedom, solidarity, equality, dignity, respect for others, respect for law etc. Inevitably, when talking about the philosophical issues, citizen, civic behavior, about the competence of the legislative, policy, governance system, can't speak except in connection with moral implication (Vişan, 2014).

The causal link between the moral and the legal rule a citizen realizes that unlike a politician cannot be punished by the voters, he is subjected to moral judgment, however, the community in which it participates, at the local community level up to that of the nation. It cannot be truly politically competent only to the extent that it is competent and morally (Bălan & Chiriţescu, 2009, pp. 97-114).

Teaching-learning concepts with legal content promotes lifelong learning, through which students learn to be receptive to the changes demanded by political-economic factors, to actively and responsibly participate in life as a " the fortress ", to access and use often terms like: democracy, representativeness, legislative, executive, judicial, government, voters, voting, etc., involving subjects such as direct social progress through their cognitive, social and moral-civic autonomy.

Civic Culture discipline involves understanding the priority function of rule of law in a democratic society-lawmaking function, demonstration of principles that structure the value process of lawmaking in the rule of law: the law's recognition that overview of rules binding on all citizens, separation of powers, which emphasizes that "the law is the work of the legislature (Parliament)," applied by the Executive (the Government, Central public administration, local), the grant of judicial power judges, "which condemns those who do not comply with the rules laid down by law" (Bordas, 1989, p. 25). Curriculum content and references to the legislative process, where they are transmitted and in-depth knowledge about: laws, citizens ' participation in drafting them, the importance of compliance with the principle of separation powers, thus covering the fundamental aspects of the organization and functioning of the institutions, but also to relations between citizens (Bălan & Chiriţescu, 2009, pp. 70-77).

European directives concerning Romania answering performance standards in education and training guidance, adopted legislative measures determining the nationwide implementation of strategies geared towards

relaunching education Romanian, through the adoption of new curricula. Analyzing the present framework for the attainment of professional education, we find that the main purpose, skills training, understood as the all-in-one overview and transferable knowledge, skills/abilities and attitudes necessary for integration (VET Strategy): active social and civic participation in society, forming a living concept, based on humanistic and scientific values, national and universal culture and on fostering intercultural dialogue, in the spirit of dignity, tolerance and respect for human rights and fundamental freedoms, the cultivation of sensitivity towards the issue of human moral civic values.

Thus, beginning with the school year 2017-2018, school programs on gymnasium education were modified and adapted to the European framework in force, through the introduction of a new humanistic disciplines entitled: *Social Education* for grades V- VIII. This educational program is aimed at training the powers on the profile of the eighth grade, contributing to the progressive formation of key powers for education throughout life; This contribution is intended both to direct support to civic and social powers, the power key of initiative and entrepreneurship and raising awareness with regard to other key skills[8].

Social education is structured in four modules, each with different but also interdisciplinary content, thus ensuring the acquisition of multidisciplinary knowledge, forming not a human profile capable of knowledge, attitudes and emotions, found in social and civic competences. Among the new modules, integrated into the social education discipline, we recall: *Critical thinking and the Rights of the child* (grade V), *Intercultural education* (grade VI), *Education for Democratic citizenship* (grade VII), *Economic and financial education* (grade VIII).

Therefore, knowledge in *Juridical education* is found dispersed in modular contents, which can be completed in the last decade by non-formal actions. In this respect, a special, interdisciplinary place of the third stage is opened, through the adoption at the lower and upper secondary education cycle, of optional juridical disciplines, such as: *Education for Democratic citizenship, Legislation in administration, Institutions of the European Union, International Humanitarian Law, Juridical education, Human rights* etc., the purpose of which is to educate young people in order to participate in the political, economic and social development of Community, the application of the principles of democracy, equality before law, law enforcement and obviously by related matters and interdisciplinary approaches. The aforementioned disciplines are part of the category of social disciplines, provided for in the upper secondary education framework plan as differentiated curriculum disciplines or curriculum

[8] School Scheme for Social Education, Annex no. 2 at O.M. no. 3393/2017.

at the school decision (DC, CSD), benefiting from a time budget One hour a week and responding to the requirements formulated in the text of the National Education Act No. 1/2011, concerning the educational ideal and the finalities of the pre-university education.

The optional nature of these disciplines, makes the valorization process, their implementation difficult, most of the time, given that not all managers of school institutions realize the major importance of social evolution in among young people, but also by the mere fact that there are no disciplines concerning national exams. Defending and guaranteeing a legal culture among young people must be motivated by an intrinsic, based on the assertion: a strong democracy needs well-informed and active citizens, able and willing to participate in the life society (Deme & Borovic Ivanov, 2003, p. 7). The need for a quality *Juridical education* must emphasize the interdisciplinary nature of global education, focusing on the active side of *Social education*, by practices in different contexts of competences, attitudes and moral-civic behavior, juridical-administrative activities acquired by pupils, contributing in this way to guaranteeing the practicality of the teaching-learning-evaluation process.

Participation in actions with a public dimension or decision-making process is important indicators of civic behavior as well as participation in community life, which implies skills that need to be formed and developed. To this end, the school must prepare young people in the spirit of participation in community life, responsible and effective assumption of their own actions and their effects. Their preparation for direct or mediated public participation implies, fundamentally, the involvement of pupils in learning situations in and through experience (Deme & Borovic Ivanov, 2003, p. 13).

4. Juridical education in school, curriculum project

The right to education manifested by the learning act arises in order to train the skills of correct use of the legal norms in the contexts in which the individual operates, thereby promoting respect to the law (Vișan, 2016).

We find in this framework the intervention of the state by creating complex tools for the application of educational policies on juridical education. One of them is the cooperation protocol on Juridical Education concluded between the Ministry of Justice, the Ministry of National Education, the Superior Council of Magistracy, the Public ministry, the High Court of Cassation and Justice in July 2017, aiming to promote the rule of law by forming a juridical culture, necessary for social cohabitation between individuals (Vișan, 2016).

We reaffirm, therefore, the need to respect and protect the constitutional laws that subscribe to human rights, rights that relate to relations between the citizen and the state, thereby ensuring the improvement of transparency in the

administration of justice and increasing public credibility in the quality of the act of justice.

The initiative of introducing legal education, as an integrated discipline, optional in the framework plan of the pre-university education system, appeared, following the requests of the Council of the European Union on a strategic framework for cooperation

In the field of vocational education and training (ET 2020), the Doha Declaration on Crime Prevention and Criminal Justice, the Strategy for the development of the judicial system 2015-2020, on guaranteeing free access to justice, improving the means of external communication of the judicial system.

The genesis of the Protocol represents the effort made by state actors in the legal field, partners of justice, volunteers, representatives of civil society, school inspectors, teachers, who considered it necessary to study legal education that by introducing some, basic "notions of law, ethics and civic education in the curriculum, of disciplines aimed at developing and diversifying social and civic competences"[9], a way of affirmation the desideratum of the Governance program 2017-2020: "Promoting the fundamental values of the rule of law and democracy by promoting Juridical education in schools".

The content of the Protocol lays down issues relating to the way in which legal education is carried out at the level of educational establishments: the participation of practitioners of the right to open sessions, debates, roundtables with pupils and teachers, distributing legal information materials, organizing events devoted to Juridical education, visiting public institutions with relevance in the field of justice.

We note in this way that the provision of legal education by the authorities designated to concern themselves, is carried out through the manifestation of non-formal education, which prepares the educators to participate in public-dimension actions, to take stock of the achievement the decision making process, important indicators of civic behavior.

Concerned with ensuring a quality legal education, the aforementioned Protocol representatives make the year reports on the degree of application and the depth of the actions at national level. In this respect, in the year 2017 a research report on the provision of legal education in the pre-university training was drawn up, noting that a number of 729 pre-university education units were involved, of which 42% schools and 58% of lyceums and colleges, over 336 teachers and over 24,000 pupils, of the VII-a and VIII, and XI-a and

[9] National Anticorruption Strategy 2016-2020 adopted by G.H. nr. 5831/2016, http://dpaps.gov.ro/docs/pdf/

XII grades[10]. Following the analysis of the contribution, I note that a hierarchy can be identified in terms of the degree of participation in formal and non-formal actions on legal education carried out in the year 2017, respectively from 13-17 November 2017, as it follows:

Fig. 1. The level of participation and county level regarding the juridical education in schools

Counties involved	***Recorded results***
Timiş	*8,95%.*
Dâmboviţa, Suceava, Teleorman, Caraş-Severin	*5- 7,5%*
Cluj, Sălaj, Argeş, Brăila, Arad, Braşov, Neamţ, Tulcea, Bihor	*2,5-5%*
Iaşi, Constanţa, Ialomiţa, Ilfov, Galaţi, Satu mare, Sibiu, Bucureşti, Botoşani, Olt, Covasna, Alba, Hunedoara, Bacău, Vrancea, Călăraşi Buzău, Mureş, Dolj, Giurgiu, Gorj, Harghita, Mehedinţi, Prahova, Vaslui.	*0,41-2,48%*

The Monitoring Committee of the report found that pupils were interested in topics such as domestic violence and violence in the school environment, fundamental human rights and freedoms, the Romanian Constitution, volunteering, the responsibility of the minor, democracy and society, juvenile delinquency, communication and virtual public space, organization and exercise of legal professions, particularly the professions of: lawyer, judge, prosecutor[11].

Considering that respect for human rights, fundamental freedoms for all, the rule of law, the elimination of any multiple forms of discrimination and to prevent crimes of any kind, can only be achieved through the formation of a juridical culture aimed at the young generation.

Thus representatives of the public authorities in the field of education and the judiciary requested the introduction of this discipline as an integral part of the compulsory framework plan at the level of higher secondary education.

The proposal was in the public debate on the process of public consultation on the proposals for the framework plan for high school, theoretical affiliation. We look forward to whether the future will give us the chance to have a stand-alone discipline that encompasses a specific *Juridical Education* content.

[10] Annual Report on the Collaborative Protocol on Legal Education in Schools http://www.just.ro/wpcontent/uploads/2017/11/Raport-anual-2017-protocolul-de-colaborare-privind-educatia-juridica-in-scoli.pdf.
[11] *Idem.*

Conclusions

Legal education in the school, configures the necessary report between future citizens and the institution of justice, by linking with representatives of the judiciary and understanding how the effectiveness of an independent judiciary must be a major concern of every democratic state (Vişan, 2014).

To guarantee the discipline legal education at the level of pre-university education will be the sum of the unanimous efforts of those representing the education and legal institution, with a role in the interplay of the new generations the possibility of affirmations as citizens Active, responsible, prepared to abide by the law and the rule of law, thus ensuring the social equilibrium that the entire human community needs.

We identify as extremely important one of the characteristics of legal education, namely, that the right, today, cannot be linked only to national space, it must aim at both European and international space, which sends us to "the need to internationalize the faculty programs of law" (Upham, 2014, p. 97). Thus, the training system for future juridical professions must be represented by the European juridical formation (Moroianu-Zlătescu, 2016, p. 228) in relation to which we are currently witnessing the emergence of a true European union strategy (Payan, 2014, pp. 39-71).

Therefore, globalisation has opened international opportunities to a profession in a historical aspect (Moroianu-Zlătescu, 2016, p. 226), giving the possibility of young generations to form in a legal profession that can handle all jurisdictions (...) By acquiring Skills In relation to the global problem and practice and thereby become "universal lawyers" (Upham, 2014, pp. 97-98).

Bibliography

Books

1. Buzdugan, C., (2015). Corelaţia normelor juridice cu alte norme sociale. *Efficiency of the rule of law*. Buzdugan C., Georoceanu A. M, Fodor E. M. (edit.). Bucureşti: Universul Juridic.
2. Boboş, G., Buzdugan, C., Rebreanu, V., (2008), *Teoria generală a statului şi dreptului*, Cluj-Napoca: Argonaut.
3. Bordas, (1989), *Education civique*, Paris.
4. Bălan, E., Chiriţescu, D., (2009), *Educaţie pentru democraţie*, Bucureşti: Alcris.
5. Deme, C., Borovic-Ivanov, D., (2003), *Ghidul profesorului*, Timişoara: Mirton.
6. Hatos, A., (2006), *Sociologia Educaţiei*, Iaşi: Polirom.
7. Moroianu-Zlătescu, I., (2007), *Drepturile omului - un sistem în evoluţie*, Bucureşti: IRDO.
8. Plano, J.C., Riggs, R.E., Robin, H.S., (1993), *Dicţionar de analiză politică*, Bucureşti: Ecce Homo.
9. Supiot, A., (2005), *Homo Juridicus*, Bucureşti: Rosetti Educational.

10. Theodorson, G., Theodorson A., (1970), *Modern dictionary of sociology,* N.J: Apollo Editions.
11. Vişan, E.R., (2014), Necesitatea studierii drepturilor şi libertăţilor fundamentale ale omului din perspectiva educaţiei europene, Codiţă D.,Vişan E.R. (coord), *Drepturile omului - o problemă mereu actuală*. Ploieşti: Karta Graphic.

Journals

1. Cristea, S., (2015), Dicţionar, *Journal Didactica Pro*. Issue 2/90.
2. Moroianu-Zlătescu I., (2016), Dreptul comparat: Tradiţie şi inovaţie în învăţământul juridic superior transsistemic. *Education and Law Interferences*, Bucureşti: Pro Universitaria.
3. Payan, G., (2014), Emergence d'un strategie, europeenne en matiere de formation judiciaire. *Revue trimestrielle de droit europeen*. Janiver-mars.
4. Upham, U. K., (2014), The internationalization of Legal Education: National Report for the United States of America for XIX in Comparative Law Congress, Vienna. *American Journal of Comparative Law*.
5. Vişan, E. R., (2016), The right to education- a sine qua non condition in the training of respect for the law. *International Journal of Law and jurisprudence Online Semiannually Publication*, Romania: Universul Juridic.

Legislation

1. Annual Report on the Collaborative Protocol on Juridical Education in Schools.
2. Council conclusions of 12 May 2009 on a strategic framework for European cooperation in education and training - ET 2020 in the Official Journal of the European Union 2009 / C 119/02.
3. National Anticorruption Strategy 2016-2020 adopted by G.H. nr. 5831/2016.
4. Official Journal of the European Union, C119/4/2009.
5. Recommendation of the European Parliament and of the Council of 18 December 2006 on key competences for lifelong learning, 2006/962/EC.
6. Recommendations of the Committee of Ministers, 2010.
7. School Scheme for Social Education, Annex no. 2 at O.M. no. 3393/2017.

Web sources

1. http://dpaps.gov.ro/docs/pdf/.
2. http://www.prodidactica.md/revista.
3. https://rm.coe.int/1680487883.
4. https://www.edu.ro/sites/default/files/fisiere%20articole/Strategia_VET%2027%2004%202016.pdf.
5. http://dpaps.gov.ro/docs/pdf/diverse/strategia_nationala_anticoruptie_2016-2020.
6. http://www.just.ro/wp-content/uploads/2017/11/Raport-anual-2017-protocolul-de-colaborare-privind-educatia-juridica-in-scoli.pdf.

COMPLEMENTARY FORMS OF INTERNATIONAL PROTECTION IN THE EUROPEAN UNION AND IN SWITZERLAND

Petru-Emanuel ZLĂTESCU*

Abstract

The subsidiary protection under EU law and the temporary admission under the Swiss Federal Act on Foreign Nationals and Integration complete a legal gap in the field of international protection.

They introduce a system of protection for persons threatened by the most grave human rights infringements but who do not meet the strict requirements of the Geneva Refugee Convention for granting refugee status. At the core of international protection lays the refoulement prohibition.

There are two main pillars of protection against refoulement in public international law, which are of great importance: the refoulement prohibition under Art. 33 of the 1951 Geneva Convention and the human rights refoulement prohibition, derived from Art. 3 ECHR. Despite the common roots of complementary forms of protection, important differences can be noticed both in the nature of the two institutions and in their interpretation by the courts.

Aim of this paper is to portray the conditions under which complementary protection is granted and to emphasize their different embedment within the legal system.

Keywords: *Subsidiary Protection, Temporary Admission, Switzerland, Complementary Protection*

JEL Classification: [K 37]

1. Introduction

The main international instruments in the field of refugee law, the 1951 Geneva Convention and the 1967 New York Protocol, stipulated refugee status as the only form of international protection. (Epiney et al., 2008; Progin-Theuerkauf, 2014) According to the narrow refugee concept of the Convention, a refugee in the legal sense is only a person who meets the strict requirements of Article 1 of the Refugee Convention. (Lehnert, 2015, p. 3)

The grounds for inclusion in Art. 1 A No. 2 of the Refugee Convention is particularly restrictive. According to this article, a person must have left his or her home state due to well-founded fear of persecution based on certain personal characteristics, such as race, religion, nationality, membership of a particular social group or political conviction. Furthermore, this person must

* Research assistant, Institute for European Law.

not be able or willing to avail himself of the protection of his country of origin.

The protection of the Refugee Convention is thus based on an individual concept of refugee and leaves a large number of victims of the most serious human rights violations outside its scope. (Epiney et al., 2015; Lafrai, 2013, p. 27) For instance, persons fleeing war zones without being able to prove an individual persecution are not protected by Convention.

Although the EU is not a party to the Refugee Convention, the latter is of great importance for the Union's asylum system.

The transfer of asylum policy to the first pillar under the Amsterdam Treaty gave rise to the EU's first competences in the field of asylum law. (Velluti, 2014, 13) It was stipulated that a Common European Asylum System (CEAS) should be established on the ground of the Geneva Convention. This also led to the elimination of many ambiguities that arose in the interpretation of the Convention. (Bast, 2016)

The Treaty of Lisbon and the abolition of the three-pillar structure also extended the Union's powers in the field of asylum. The resulting second phase[1] of the CEAS intended to guarantee a uniform and efficient asylum procedure and a uniform protection status for asylum seekers, refugees and other persons in need of protection. (Rosenau & Petrus, 2018).

The Qualifications Directive[2] (QD) is one of the most important CEAS enactments. It is also regarded as the first instrument of international law which, in addition to refugee status, also establishes a complementary form of international protection under positive law. (Mc Adam, 2005) With the adoption of the first version of the QD in 2004, the international protection status at EU level was extended in accordance with the Tampere conclusions. The refugee status of the Geneva Convention was supplemented by a subsidiary protection status on the basis of ECtHR jurisprudence. (Marx, 2012, p. 495)

This is based on the principle of non-refoulement and serves to protect asylum seekers who, although do not fulfil the conditions for refugee recognition, would be seriously harmed if they were returned to their country of origin. (Bauloz & Ruiz, 2016, p. 240) Subsidiary protection is intended to supplement refugee status if the latter cannot be granted. (Progin-Theuerkauf & Hruschka, 2012).

It covers persons who are threatened by serious human rights violations but who cannot invoke any grounds for persecution within the meaning of the Refugee Convention. (Progin-Theuerkauf, 2014) With the revision of the QD, the legal status of persons eligible for subsidiary protection has been

[1] Recast version of the CEAS Acts 2011/2013.
[2] Directive 2011/95/EU.

significantly improved and largely aligned with the legal status of refugees. (Progin-Theuerkauf & Hruschka, 2012)

Although Switzerland is not a Member State (MS) of the EU, they are associated in many areas. Switzerland has also incorporated numerous legal acts of the Union in its national legal order.

The Dublin Association Treaty (DAT) is one of the most important association agreements between Switzerland and the EU. As part of the Bilateral Agreements II, the DAT is an international law agreement under which Switzerland is committed to adopt the existing and future Dublin acquis. (Art. 1 para. 3 DAT) This includes the Dublin III Regulation and the EURODAC Regulation, as well as their implementing regulations. However, the obligation to take over only covers procedural norms and not also substantive EU law, such as the Qualification Directive. (Caroni et al., 2014, p. 377) Thus, the Swiss legal system does not comprise the concept of subsidiary protection status in the sense of the QD. Certain difficulties could arise if a procedural norm refers to a substantive provision of the CEAS. (Progin-Theuerkauf & Hruschka, 2012).

For instance the Dublin III Regulations also applicable to applications for subsidiary protection, unlike the previous versions of the directive. (Lehnert. 2015) Despite these differences, Switzerland has a complementary form of international protection in the form of the temporary admission, which is based on the human rights refoulement prohibition. However, temporary admission does not represent an independent legal status, but a substitute measure for the unenforceable execution of the removal order. (Trummer, 2012)

2. The Non-refoulement Principle – The origins of subsidiary protection forms

2.1. Non-refoulement under international refugee law

The prohibition of refoulement lays at the heart of international protection. (Zlătescu, 2016) This principle restricts the sovereign right of the host country to determine the entry and residence conditions for aliens.

In international law, two main pillars of protection against refoulement are of great importance: the refoulement prohibition under Art. 33 Refugee Convention and the human rights refoulement prohibition, which is derived primarily from Art. 3 ECHR. (Fröhlich, 2011) Other convention guarantees also contain return prohibitions, but these do not enjoy the absolute character of Art. 3 ECHR. (Gordzielik, 2015, p. 248) Other international human rights instruments, such as the ICCPR[3] or the UN Convention against Torture[4] (CAT) also contain return prohibitions.

[3] Art. 7 ICCPR.

The refoulement prohibition under Art. 33 Refugee Convention is one of the most important guarantees of international refugee law. Part of the doctrine regards the prohibition of refoulement as a norm with ius cogens character. (Allain, 2001, p. 557) Article 33 of the Refugee Convention, however, has several limitations. First, its application is limited in personal terms to (potential) refugees within the meaning of Article 1 of the Refugee Convention. (Gordzielik, 2015, p. 242).

An individual threat to life or freedom on the basis of race, religion, nationality, membership of a particular social group or political conviction is required by Convention. (Nguyen, 2003, p. 418) Secondly, Article 33 of the Refugee Convention does not have an absolute nature. According to para. 2 of the same article, a refugee does not enjoy protection against expulsion if he or she constitutes a danger to the security of the country or to the general public.

2.2. Non-refoulement under international human rights law

A more comprehensive protection than art. 33 of the Geneva Convention is guaranteed by the refoulement prohibition of the international law of human rights. (Progin-Theuerkauf, 2014) Although neither the ECHR itself nor its protocols contain an explicit prohibition of deportation, such a prohibition was developed by the case-law of the Strasbourg courts to Art. 3 ECHR.[5]

The ECHR states that a violation of the prohibition of torture always occurs when a person is extradited or deported, although there are serious reasons to believe that the person is exposed to a substantial and real risk of being subjected to torture or another prohibited act in the country of destination.[6] In contrast to the Refugee Convention, the human rights prohibition of return does not imply an individual persecution. Even if a current and concrete danger must be made credible, it is sufficient if the person belongs to a group that is subject to systematic ill-treatment. (Fröhlich, 2011, p. 19)

In this case, the person concerned does no longer have to prove any personal factors.[7] In comparison to Art. 33 Geneva Convention, the personal scope of application of Art. 3 ECHR covers all persons and is not limited to refugees. Art. 3 ECHR also represents an absolute guarantee, from which the member states cannot derogate in times of emergency. (Reneman, 2012, p. 3; Saccucci, 2014) As a norm of mandatory international law, the human rights

[4] Art. 3 para. 2 CAT.
[5] ECtHR, No. 14038/88, *Soering v. UK*, 7.7.1989.
[6] ECtHR, No. 15576/89, *Cruz and others v Sweden*, 20.3.1991, marginal 69; ECtHR, No. 13163/87, *Vilvarajah and others v. UK*, 30.10.1991, marginal 107 et seq.; ECtHR, No. 22414/93, *Chahal v. UK*, 15.11.1996, marginal. 96 et seq.
[7] ECtHR, No. 70073/10 and 44539/11, *H. and B. v. UK*, 9.4.2013, marginal 91; FRA Handbook, 78.

prohibition of deportation protects all persons, irrespective of the commission of a criminal offence in the host state. (Spescha et al., 2015, p. 375) Extradition or expulsion is prohibited if a punishment or treatment incompatible with Article 3 ECHR is imminent in the country of destination. Furthermore, chain deportations are also prohibited.[8]

Indirect deportations or chain deportations are deportations to a third country which subsequently deports the person concerned to the persecuting country.[9] According to Art. 19 para. 2 of the Charter of Fundamental Rights of the EU, the prohibition of deportation is also a fundamental right of the Union. (Reneman, 2012, 3)

2.2.1. The Concretization of the human rights refoulement ban in the CEAS

Although the European Court of Human Rights has developed a comprehensive prohibition of refoulement in its case-law, the legal status of the person who may not be deported derives neither from the Convention nor from the jurisprudence. (Saccucci, 2014) There is therefore a protection gap for persons who are allowed to remain in the host state on the basis of the human rights prohibition of deportation, but who do not fulfil the conditions for refugee status. (Trummer, 2012) In order to solve this problem, the Tampere Programme established a subsidiary protection status. Designed in accordance with the most important international legal norms in the area of the prohibition of torture,[10] subsidiary protection status is intended to supplement refugee status so that there are no longer any legal gaps in international protection status.[11] According to the first version of the QD, subsidiary protection status was originally not treated as equivalent to refugee status. Due to its subsidiary character, the subsidiary status should preserve the primacy of the Geneva Convention and provide temporary protection.[12] (Progin-Theuerkauf& Hruschka, 2014) The legal status established by subsidiary protection was less favourable than that of refugee status. (Bauloz &Ruiz, 2016)

It was not until 2010 that the Stockholm Programme stipulated that the two forms of international protection, refugee status and subsidiary protection, should guarantee a uniform legal status. Although the new version of the QD from 2011 did not completely standardize the legal status of the two forms of protection, it did bring a significant improvement in the legal status of those eligible for

[8] SFH, Handbuch zum Asyl- und Wegweisungsverfahren, 242.
[9] ECtHR, No. 27765/09, *Hirsi Jamaa and others v. Italy*, 23.2.2012, marginal 146.
[10] Recital 34 Directive 2011/95/EU.
[11] Recital 6 Directive 2011/95/EU.
[12] COM(2001)510 final, no. 2.

subsidiary protection. (Progin-Theuerkauf & Hruschka, 2012; Balleix, 2013, p. 198) This improvement is reflected in all legal acts of the CEAS.

2.2.2. Concretization of the human rights refoulement ban in the Swiss legal system

As the Swiss legal order does not provide for subsidiary protection in the sense of the QD, persons whose asylum application has been rejected or who have been excluded from asylum must in principle be expelled. (Trummer, 2012) In the removal procedure, however, it must be officially examined whether the execution of this measure is not impossible, impermissible or unreasonable.[13] (Gordzielik, 2015, p. 239)

If technical, international law or humanitarian barriers stand in the way of enforcement, the persons concerned are temporary admitted until these obstacles have been overcome. (Caroni et al., 2014, p. 328)

It remains to be mentioned that only one of the three impediments, the impermissibility of removal, constitutes a concretization of the prohibition of refoulement within the meaning of the international law. Thus, temporary admission in the case of impermissibility of the enforcement is also ordered if the person concerned is a criminal offender or if he or she has caused the impossibility of removal himself or herself. (Spescha et al., 2015, p. 382) In this case the exclusion from the temporary admission would infringe the absolute prohibition of refoulement. (Gordzielik, 2015, p. 239) Contrary to the recognition of refugee status, in this case no individual danger to the person concerned must be proven. (Trummer, 2012) However, temporary admission is not a special legal institution under asylum law, but a figure of the general procedure under alien's law. (Spescha et al., 2015, p. 378)

In contrast to the subsidiary protection status of Union law, temporary admission does not represent a specific legal status of its own, but rather a mere substitute measure for the execution of a removal order. (Nguyen, 2003, p. 463)

3. Conditions for protection

3.1. EU Law

According to the legal definition[14], beneficiaries of subsidiary protection are third-country nationals or stateless persons who do not fulfil the conditions for refugee status but who have serious reasons to believe that they would be at real risk of suffering serious harm in case of a return to their country of

[13] Art. 88 para. 1 FNIA.
[14] Art. 2 (f) QD.

origin. (Thym, 2015) In addition, beneficiaries should not be able or willing to avail themselves of the protection of their country of origin.

The conditions for claiming subsidiary protection status are primarily determined by the international obligations of the Member States in the field of refugee law and by the case-law of the European Court of Human Rights. (Balleix, 2013, p. 195) In addition to the three alternative forms of serious harm within the meaning of Article 15 of the QD, the primacy of the Refugee Convention is another positive condition for an application for subsidiary protection. The absence of grounds for exclusion and termination according to Art. 17 or Art. 16 QD is regarded as a negative condition for granting protection.

3.1.1. Primacy of the Geneva Convention

Given the complementary nature of subsidiary protection status, the first condition for its granting is the inability to apply for refugee status.[15] (Progin-Theuerkauf & Hruschka, 2014) Although this condition is not explicitly mentioned in Art. 15 QD, it is part of the legal definition of subsidiary protection status according to Art. 2 lit. f of the latter.

The Executive Committee of the UNHCR also recommends that all forms of complementary protection be designed in such a way that they preserve the primacy of the Refugee Convention and strengthen international protection as a whole. If a person fulfils the conditions for refugee status and is granted subsidiary protection instead, this could lead to a violation of the MS' obligations under international law.

This would also give a less advantageous legal status to the person entitled to international protection, since the subsidiary protection still confers less rights despite the alignment of the two forms of protection by the revised QD. (Marx, 2012, p. 498) The subsidiary protection status thus also covers cases in which elementary human rights guarantees are seriously violated, but which have no connection with the persecution grounds of the Refugee Convention. (Tiedemann, 2015, p. 70)

3.1.2. Imposition or enforcement of the death penalty

The imposition or execution of the death penalty is one of the three circumstances entitling to the protection provided for in Article 15 of the QD. Even if the three forms of serious damage are generally applied as alternatives, an applicant may also invoke two or three bases of claim simultaneously. (Storey, 2016)

As in the case of Art. 15 lit. b of the QD, the serious damage in the form of the imposition or execution of the death penalty is inspired by the case law

[15] ECJ, C-604/12, N., 8.5.2014, marginal 30.

of the ECHR on Art. 2 and 3 ECHR and by the 6th Additional Protocol to the ECHR. (Cherubini, 2015, p. 205)

However, the way in which the death penalty is prepared and carried out may also constitute a violation of the prohibition of torture due to the disproportionality between the punishment and the act, the conditions of imprisonment or the personal circumstances of the person concerned, so that a cumulation of claims might arise between lit. a and lit. b of Art. 15 QD.[16]

3.1.3. Torture and inhuman or degrading treatment or punishment

This form of serious harm covers the most important cases of application of the refoulement ban under Article 3 ECHR. (Lafrai, 2013, p. 203) The protection of the ECHR, however, goes in certain respects further than that of the Qualification Directive and also covers cases of humanitarian protection[17] which are explicitly excluded from the scope of application of the QD.[18]

The ECJ also confirmed in its case law that inhuman or degrading treatment as a result of the lack of suitable medical treatment options in the country of origin does not fall under the protection of Art. 15 lit. b QD as long as the person concerned is not arbitrarily excluded from treatment.[19]

3.1.4. Serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict

Unlike the first two alternatives of Article 15 QD, the scope of Article 15 lit. c QD does not correspond to the one of Article 3 ECHR. For this reason, lit. c must be interpreted autonomously and not in the light of the Convention.[20] The harm within the meaning of lit. c generally consists in the serious individual threat to the life or integrity of the applicant as a result of arbitrary violence and not in a specific act of aggression.[21] Thus, the risk of damage is of a general nature. The threat is considered serious if a certain degree of violence is achieved. (Storey, 2016) The use of force is arbitrary if it extends to persons, irrespective of their personal circumstances and identity.[22] The threat to the life or integrity of a civilian is sufficient to qualify for the protection of the provision. The threat is individual if a civil person would be

[16] ECtHR, No. 14038/88, *Soering v. UK*, 7.7.1989, marginal 104; UN HRC, no. 469/1991, *Chitat NG v. Canada*, 5.11.1993, marginal 16.1.
[17] ECtHR, No. 30240/96, *D. v. UK*, 2.5.1997, marginal 53.
[18] Recital (15) QD.
[19] ECJ, C-542/13, *M´Bodj*, 18.12.2014, marginal 41.
[20] ECJ, C-465/07, *Elgafaji*, 17.2. 2009, marginal 28.
[21] ECJ, C-465/07, *Elgafaji*, 17.2. 2009, marginal 33.
[22] ECJ, C-465/07, *Elgafaji*, 17.2. 2009, marginal 34.

at risk solely because of his or her presence in the territory of that State. (Ousmane & Progin-Theuerkauf, 2014)

In such a situation, it would be sufficient for the applicant to prove that he is a civilian. This gives Art. 15 lit. c QD its own scope of application. In contrast to Art. 15 lit. a and b of the QD, the danger is not a specific one, but rather a damage of a general nature. (Keller&Schnell, 2010) It should be mentioned, however, that dangers to which the population of a state is generally exposed can only constitute a serious harm in exceptional cases. (McAdam, 2005) Nonetheless, if the severity of the violence does not reach the required level, a specific danger can still be proven if the person concerned is exposed to this risk because of personal characteristics and is more affected than other civilians. (Velluti, 2015, p. 89)

The personal scope of application of Art. 15 lit. c QD is also limited to civilians. Furthermore, questions have arisen in the jurisprudence regarding the meaning of a domestic armed conflict. The concept of armed domestic conflict within the meaning of the QD deviates from the definitions of international humanitarian law and must be interpreted autonomously in EU law. (Progin-Theuerkauf & Hruschka, 2014) A precondition for its application is either a conflict between the regular armed forces of a state and one or more armed groups, or a conflict between armed groups.[23] However, the use of force by a single armed group is not sufficient to apply this provision.

A certain degree of organization of the armed forces or a minimum duration of the conflict are not prerequisites for the application of Art. 15 lit. c QD. Yet the level of violence must have reached such a degree that the person concerned would be exposed to a serious and individual threat to his life or integrity solely through his presence in the state if he were to return.

3.1.5. Lack of exclusion and termination grounds

Even if international human rights treaties such as the ECHR or the ICCPR have served as the most important source of inspiration for the development of the of Subsidiary Protection, the European legislator assumed that the subsidiary protection should not enjoy the same absolute character as the prohibition of torture under Article 3 ECHR.

If a ground for exclusion is applied, but at the same time torture or another prohibited act within the meaning of Art. 3 ECHR is imminent, the human rights prohibition of refoulement stands in the way of deportation and the person concerned can invoke the rights of Art. 14 (6) QD. (Progin-Theuerkauf, 2017) With the recast version of the QD, the grounds for exclusion from refugee status are also applied to subsidiary protection.

[23] ECJ, C-285/12, *Diakité*, 30.1.2014, marginal 28.

The grounds for exclusion from subsidiary protection are much more extensive than those of the refugee status. Art. 17 lit. b QD provides that the commission of a serious offence results in exclusion from subsidiary protection. However, in refugee law, where only non-political crimes lead to exclusion from protection, there is no such restriction for subsidiary status.

In comparison to the parallel provision in the field of refugee status, which gives the MS a margin of appreciation, Art. 17 para. 1 lit. d QD stipulates that a person must be excluded from subsidiary protection if he or she represents a danger to the society or to the security of the MS. (Marx, 2012, p. 605)

According to Art. 16 QD, the right to subsidiary protection lapses if the grounds for granting protection status have ceased to exist or have changed to such an extent that such status no longer appears necessary. The circumstances must have changed substantially and permanently.

In contrast to refugees, permanent settlement in the country of origin is not expressly provided for as a reason for extinction, but can serve as an indication of changed circumstances within the meaning of Art. 16 QD. On the other hand, mere entry and a short-term stay in the country of origin are not sufficient to qualify as grounds for extinction. (Marx, 2012, p. 613)

The MS are obliged to revoke the subsidiary protection even if the person entitled commits an act which would lead to exclusion from protection after his status has been granted. This refers to cases of subsequent delinquency that occurred after the date on which the right was granted.

The same legal consequence also threatens in the event that the person entitled makes false statements about facts which are decisive for the granting of his status, if he conceals such facts or if he uses false documents.

3.2. Prerequisites for temporary admission under Swiss law

Unlike Union law, temporary admission does not constitute a specific figure of asylum law. Rather, its scope of application extends to the entire field of aliens law. (Gattiker, 2018) Temporary admission serves to protect expelled foreigners. If it is determined during the asylum procedure that the applicant does not fulfill the requirements for granting refugee status, the competent authority issues a removal order. Thereby the person concerned is formally requested to leave the territory of Switzerland.

In the removal procedure, however, it is officially checked whether the removal is not impossible, inadmissible or unreasonable. (Trummer, 2018) If the answer to this question is in the affirmative, the State Secretariat for Migration (SEM) must take the alternative measure of temporary admission within the meaning of Art. 83 et seq. of the Federal Act on Foreign Nationals and Integration (FNIA). (Epiney et al., 2008)

This institution has the role of a complementary protection (but not of a subsidiary protection status) and grants the beneficiary a right of residence until the obstacle to enforcement expires. Due to the nature of temporary admission as a substitute measure, the person concerned cannot apply for temporary admission. He can only apply for the existence of the obstacles to enforcement to be established. (Illes, 2010) According to Art. 83 (1) FNIA, obstacles to enforcement are the impossibility, inadmissibility and unreasonableness of removal.

In the case of impossibility and unreasonableness, there must also be no grounds for exclusion from protection and no grounds for termination. In the case of the inadmissibility of the removal, this negative condition does not arise because it is an outflow of the human rights prohibition of refoulement, which has absolute validity. (Bolzli, 2015)

3.2.1. Impossibility of the removal

According to the legal definition of the removal impossibility, this occurs if the expelled foreigner cannot leave or be taken to his or her home country or a third country. This impossibility is to be understood as a technical obstacle to the enforcement of the expulsion. (Trummer, 2012) High demands are placed on the level of necessary impossibility.

These must be objective reasons of impossibility and not the lack of cooperation of the person concerned or bureaucratic difficulties. If, in addition, the person concerned makes it more difficult to enforce the removal order, no temporary admission should be ordered. In terms of time, the impossibility must have a certain duration in order to be recognized as such by the authorities. At the time the temporary admission is ordered, it must be clear that it will not be possible to enforce the removal order for the foreseeable future. (Nguyen, 2003, p. 467) Accordingly, the cases of impossibility are very rare in practice. (Gattiker, 2018) EU law does not recognize impossibility as a ground for protection.

This could also be due to the fact that the QD excludes humanitarian protection situations from its scope.

3.2.2. Inadmissibility of the removal

Pursuant to Art. 88 para. 3 FNIA, removal is not permitted if Switzerland's obligations under international law conflict with it. This means that, on the one hand, the refugee refoulement prohibition under Art. 33 Refugee Convention and, on the other hand, the human rights refoulement prohibition are anchored in domestic law. (Nguyen, 2003, p. 469)

These can be asserted at any stage of the procedure. Because of the merely declaratory effect of refugee recognition, not only recognized refugees

who have been granted asylum can invoke the prohibition of deportation, but also asylum seekers and refugees who have not been granted asylum. (Caroni et al., 2014, p. 329)

Refugees who have not been granted asylum are persons who meet the requirements for refugee status, but who are affected by an asylum exclusion reason pursuant to Articles 53 and 54 FNIA (e.g. criminal offences). Temporarily admitted refugees enjoy all the rights of the Refugee Convention.[24] In the light of Article 3 of the ECHR, any person on Swiss territory who is a potential refugee is protected by Article 88 para 3 FNIA, irrespective of status and thus irrespective of individual persecution. (Bolzli, 2015) Inadmissibility may also result from other guarantees under international law. Due to its practical relevance, the right to a fair trial and the right to private and family life should also be mentioned in this context.

A refoulement ban derived from Art. 6 ECHR could be applied if criminal proceedings are imminent in the home country which do not comply with the procedural guarantees of Art. 6 ECHR.[25] Within the scope of protection of Art. 8 ECHR, the claim must primarily be asserted in the administrative procedure under aliens law for the granting of a residence permit. (Caroni et al., 2014, p. 330)

3.2.3. Unreasonable removal

In contrast to the two other alternatives of Article 83 para. 1 FNIA, this expulsion impediment is strongly motivated by humanitarian considerations. (Bolzli, 2015) The wording of Art. 83 para. 4 FNIA as an optional provision further shows that, in comparison to the cases of inadmissibility, there is no claim under international law to the assumption of unreasonableness. (Nguyen, 2003, p. 472) The discretion of the authority, however, relates only to the facts of the case and not also to the legal consequence. If the specific threat was affirmed and there are no grounds for exclusion, temporary admission must be ordered. (Illes, 2010) According to Art. 83 para. 4 FNIA, unreasonableness exists if the foreigner concerned is exposed to a situation such as (civil) war, general violence or medical emergency in the country of origin and would thus be specifically endangered. (Gattiker, 2018) However, an individual threat does not have to be proven. Serious violence's in the country of origin may be sufficient to assume a concrete danger. (Trummer, 2012) Only serious cases in which special medical assistance is so necessary that without it a considerable deterioration of the health situation would occur are classified as medical emergencies.[26]

[24] SFH, Handbuch zum Asyl- und Wegweisungsverfahren, 388.

[25] Ruling of theSwiss Federal Administrative Court, BVGE 2014/28, 3.7.2014, recital 11.5.

[26] Ruling oft he Swiss Federal Administrative Court, BVGer D-4612/2009, 19.12.2013, recital 4.2.3.

According to the Swiss Federal Administrative Court, the urgently needed therapy must be indispensable to guarantee a dignified existence.[27] The safeguarding of the best interests of the child can also constitute an obstacle to enforcement in this sense. In assessing the best interests of the child, it is above all the personality of the child and of the circumstances, such as, his degree of integration, that are decisive. (Illes, 2010) Other situations not expressly mentioned in the law may also lead to a relevant endangerment and thus to the unacceptability of the execution of the removal order. In practice, combinations of different and, in part, social and economic reasons are also important.

The prospects for integration in the home state and the existing relationships there must be taken into account. Unreasonableness is thus a humanitarian reason in the broader sense and thus a general clause. Despite these humanitarian reasons and the fact that the QD does not grant subsidiary protection on humanitarian grounds, situations are thinkable which could be subsumed under both Art. 15 lit. c QD and Art. 83 para. 4 FNIA. An example of this could be refugees who flee violence and whose mere presence in the territory of their home state would lead to the actual danger of suffering serious harm. Under Art. 83 para. 4 FNIA this would be regarded as a general unreasonableness of the removal execution, so that the temporary admission would have to be ordered. (Caroni et al., 2014, p. 331)

In Union law, dangers of a general nature according to the *Elgafaji* jurisprudence of the European Court of Justice may also entitle a person to subsidiary protection according to Art. 15 lit. c QD.[28]

3.2.4. Exclusion grounds

Even if the positive preconditions for granting temporary admission are met, the person to be admitted may be affected by a ground for exclusion and thus not be entitled to protection pursuant to Art. 83 et seq. FNIA. However, grounds for exclusion can only be applied in the case of unreasonableness and impossibility and not also in the case of inadmissibility, because this constitutes an implementation of the absolute human rights prohibition of refoulement of Art. 3 ECHR into national law.

Pursuant to Art. 83 para. 7 FNIA, the following are considered obstacles to execution: a conviction for a long-term prison sentence in Switzerland or abroad, the order of a criminal measure pursuant to Art. 59-61 or Art. 64 Swiss Criminal Code, the violation or threat of public safety and order in Switzerland or abroad in a substantial and repeated manner, the endangerment of security as well as the self-inflicted impossibility of enforcing removal due to one's

[27] Ruling of theSwiss Federal Administrative Court, BVGE 2011/50, 1.5.2011, recital 8.3.
[28] ECJ, C-465/07, *Elgafaji*, 17.2.2009, marginal 33.

own conduct. Pursuant to Art. 83 para. 7 FNIA, the following are considered obstacles to execution: a sentence of long-term imprisonment in Switzerland or abroad, the ordering of a criminal measure pursuant to Art. 59-61 or Art. 64 of the Swiss Criminal Code, the violation or threat of public safety and order in Switzerland or abroad in a substantial and repeated manner, the endangerment of security as well as the self-inflicted impossibility of enforcing removal due to one's own conduct.

Any imprisonment for more than one year shall be considered a long-term imprisonment.[29] Shorter sentences may not be added together.[30] Even if there is a longer-term penalty or another reason for exclusion, the exclusion from temporary admission and the removal order are not automatically issued. Rather, a proportionality check must be carried out taking into account the constitutional principles of the rule of law.

This consists of a weighing of interests in which the public interest in the removal is balanced against the private interest of the person concerned. (Bolzli, 2015) In addition to the nature and severity of the offence and fault, the proportionality test must primarily include the degree of integration of the person concerned and the disadvantages that his family would face in the event of removal. (Caroni et al., 2014, p. 337)

Conclusions

It is thus to emphasize, that both analyzed forms of complementary protection fill a legal gap in the field of international protection.

They introduce a system of protection for persons who do not meet the strict requirements for granting refugee status in the sense of the Geneva Convention, but who are still threatened by a serious danger in their country of origin. The two institutions share the same source of inspiration - the human rights prohibition of refoulement under Art. 3 ECHR.

However, both go further than the ECHR and grant a broader scope of protection. In the case of EU law, this was stated by the ECJ in its *Elgafaji* judgment on Art. 15 lit. c QD. Also in Swiss law, the scope of application of the inadmissibility of the enforcement of a removal decision according to Art. 83 para. 3 FNIA is much more comprehensive than the protection of Art. 3 ECHR and also covers the scope of application of other convention guarantees.

In addition to the inadmissibility of the execution of the removal order, however, Swiss law, unlike Union law, also contains the grounds of impossibility and unreasonableness.

[29] Ruling of the Swiss Federal Court, 135 II 377, E. 4.2.
[30] Ruling of the Swiss Federal Court, BGE 137 II 297, recital 2.3.

These are usually applied on the basis of humanitarian considerations. In contrast, under EU law, humanitarian considerations do not entitle to subsidiary protection.

In this sense, the protection of Art. 83 FNIA goes further than that of the QD.

Even if subsidiary protection has a narrower scope of application, it also grants benefits that are not foreseen by the Swiss Law. Above all, the subsidiary protection status represents a legal status itself, which has been aligned with the refugee status since the revision of the CEAS in 2011/2013. Temporary admission, in contrast, is merely a substitute measure for unenforceable removal decisions.

For this reason, the subsidiary protection status not only establishes a much stronger legal status for the person concerned, but also contributes to increased legal certainty.

Bibliography

1. Allain, J., (2001), The jus cogens Nature of non-refoulement. *International Journal of Refugee Law*, Issue 13, 4, pp. 533-558.
2. Balleix, C., (2013), *La politique migratoire de l'Union européene*. Paris: Reflexeurope.
3. Bast, J., (2016), Die Flüchtlingskrise und das Recht: Chancen der Europäisierung. *Vorgänge Nr. 214: Deutsche Flüchtlingspolitik zwischen Willkommenskultur und Politik der Abschottung*, Issue 2, pp. 34–37.
4. Bauloz, C., G., Ruiz, (2016), Refugee Status and Subsidiary Protection: Towards a Uniform Content of International Protection?. V. Chetail Vincent, Ph. De Bruycker Philippe, F. Maiani (eds.). *Reforming the Common European Asylum System – The New European Refugee Law*. Leiden: Brill, pp- 240-270.
5. Bolzli, P., (2015), Kommentar zu Art. 83-88a AuG. Spescha M., Thür, H., Zünd, A., Bolzli, P., Hruschka, C. (eds.), *Kommentar Migrationsrecht – Schweizerisches Ausländergesetz (AuG), Asylgesetz (AsylG) und Freizügigkeitsabkommen (FZA) mit weiteren Erlassen*. Zürich: Orell Füssli.
6. Caroni, M., Grassdorf-Meyer, T., Ott L. & Scheiber, N., (2014), *Migrationsrecht*, 3rd edition. Bern: Stämpfli Verlag.
7. Cherubini, F., (2015), *Asylum Law in the European Union*. New York: Routledge.
8. Epiney, A., Waldmann, B., Egbuna-Joss, A. & Oeschger, M., (2008), Die Anerkennung als Flüchtling im europäischen und schweizerischen Recht, ein Vergleich unter Berücksichtigung des völkerrechtlichen Rahmens`. *Cahiers fribourgeois de droit européen,* Issue 4.
9. FRA, (2014), *Handbuch zu den europarechtlichen Grundlagen im Bereich Asyl, Grenzen und Migration*, Luxembourg.
10. Fröhlich, D., (2011), *Das Asylrecht im Rahmen des Unionsrechts*, Tübingen: Mohr Siebeck.

11. Gattiker, M., (2018), Die Reform der vorläufigen Aufnahme. *Schweizerische Zeitschrift für Asylrecht und -Praxis, Asyl*. Issue 1/18, pp. 28-31.
12. Gordzielik, T., (2015), Wegweisungsvollzugshindernisse`. Schweizer Flüchtlingshilfe SFH (ed.), *Handbuch zum Asyl- und Wegweisungsverfahren*. Bern: Haupt Verlag, pp. 239-294.
13. Illes, R., (2010), Kommentar zu Art. 83 AuG. Caroni, M., Gächter, Th., Turnheer, D. (eds.), *Bundesgesetz über die Ausländerinnen und Ausländer (AuG)*. Bern: Stämpfli Verlag.
14. Keller, H., Schnell, C., (2010), International Human Rights Standards in the EU - A Tightrope Walk between Reception and Parochialism. *Zeitschrift für internationales und europäisches Recht*, pp. 3-37.
15. Lafrai, C., (2013), *Die EU-Qualifikationsrichtlinie und ihre Auswirkungen auf das deutsche Flüchtlingsrecht*. Bremen: Europäischer Hochschulverlag.
16. Lehnert, M., (2015), Kämpfe ums Recht. *Movements. Journal für kritische Migrations- und Grenzregimeforschung*, 1/2015, viewed 1.4.2019 from https://movements-journal.org/issues/01.grenzregime/06.lehnert--kaempfe-ums-recht.html.
17. Marx, R., (2012), *Handbuch zum Flüchtlingsschutz – Erläuterungen zur Qualifikationsrichtlinie*. 2nd ed. Köln: Luchterhand.
18. Mc Adam, J., (2005), The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime. *International Journal of Refugee Law*. Issue 17/3, pp. 461–516.
19. Nguyen, M. S., (2003), *Droit public des étrangers – Présence, activité économique et statut politique*. Bern: Stämpfli Verlag.
20. Ousmane, S., Progin-Theuerkauf, S., (2014), Interprétation de la notion de «conflit armé interne» (art. 15 let. c de la directive 2004/83/CE). *Schweizerische Zeitschrift für Asylrecht und -Praxis – Asyl*. Issue 2/14, 24.
21. Progin-Theuerkauf, S., Hruschka, C., (2014), Die Rechtsprechung des EuGH zum Europäischen Asylrecht, zur migrationsrechtlichen Rechtsstellung Drittstaatsangehöriger und zu ausgewählten Aspekten des Schengen-Rechts. *Annuaire du droit de la migration.* Issue 2013/2014, pp. 363-398.
22. Progin-Theuerkauf, S., Hruschka, C., (2012), Das Gemeinsame Europäische Asylsystem im Wandel. *Annuaire du droit de la migration.* Issue 2011/2012, pp. 125-146.
23. Progin-Theuerkauf, S., (2014), Asylrechtliche Überlegungen zur Schutzbedürftigkeit Edward Snowdens`, *sui generis*, 22-31, viewed 1.4.2019 from https://sui-generis.ch/article/view/sg.2/634.
24. Progin-Theuerkauf, S., (2017), Zur Ablehnung des Asylantrags eines Antragstellers, der an den Aktivitäten einer terroristischen Vereinigung beteiligt war. *Schweizerische Zeitschrift für Asylrecht und -Praxis – Asyl*. Issue 1/17, pp. 28-30.
25. Reneman, A.M., (2012), *EU asylum procedures and the right to an effective remedy*, Leiden.
26. Rosenau, H., Petrus, S., (2018), Kommentar zu Art. 78 AEUV. C. Vedder, W. Heintschel von Heinegg Wolff (eds.), *Europäisches Unionsrecht – Handkommentar*, 2nded. Baden-Baden: Nomos.
27. Saccucci, A., (2014), The Protection from Removal to Unsafe Countries Under the ECHR: Not All That Glitters Is Gold. *Questions of International Law*. Issue 5, pp. 3-24.

28. Spescha, M., Kerland, A., Bolzli, P., (2015), *Handbuch zum Migrationsrecht*. Zürich: Orell Füssli.
29. Storey, H., (2016), Commentary to art. 15-19 der Qualification Directive. K. Hailbronner, D. Thym (eds.), *EU Immigration and Asylum Law – A Commentary*. München: C.H. Beck.
30. Thym, D., (2015), Kommentar zu Art. 78 AEUV. M. Nettesheim (ed.), *Das Recht der Europäischen Union*, München: C.H. Beck.
31. Tiedemann, P., (2015), *Flüchtlingsrecht – Die materiellen und verfahrensrechtlichen Grundlagen,* Heidelberg: Springer.
32. Trummer, M., (2012), Entwicklungen im Bereich des komplementären Schutzes in der Schweiz und in der Europäischen Union. *Asyl*. Issue 2, pp. 10-24.
33. Velluti, S., (2014), *Reforming the Common European Asylum System - Legislative Developments and Judicial Activism of the European Courts*, Heidelberg: Springer.
34. Zlătescu, P.E., (2016), Legal Protection Of Refugees in Public International Law. *Law Review - International Journal of Law and Jurisprudence*. Issue 6, pp. 148-156.

II. VARIA

1."TREATISE ON COMMERCIAL LAW" - BOOK REVIEW

Rodica-Diana APAN [*]

Stanciu D. CĂRPENARU, Universul Juridic Publishing House, Bucharest, 2019, 822 pages

6th jubilee edition, 2009-2019, 10 years since its first issue

We are honored to host in our publication, the review of the "*Treatise on Romanian Commercial Law*" (hereinafter referred to as the Treatise), the work of Professor PhD. Stanciu D. Cărpenaru, published in 2019 at the Universul Juridic Publishing House, as the 6th jubilee edition, 2009-2019, respectively 10 years since its first issue.

From the first edition it has been obvious that we have before us a Treatise of reference in the Romanian commercial law landscape, from at least two perspectives: from the perspective of the author, professor PhD. Stanciu D. Cărpenaru being a distinguished personality of Romanian law; secondly from the perspective of the content and amplitude of the paper, developing on the relevant institutions of commercial law, in a total of 824 pages, updated with the regulations in force at the time of each edition.

The 6th edition of the Treatise comprises eight chapters which deal in an exhaustive manner with the main institutions of commercial law as they result from the regulation of legal relations involving the professionals, included in the Civil Code, Law no. 287 of 2009 and mainly in special laws, namely Law no. 26 of 1990 on the trade register, Law no. 31 of 1990 on trading companies, Law no. 85 of 2014 on insolvency and insolvency prevention procedures, as set out below:

[*] Assoc. Prof. PhD., Faculty of Law Cluj-Napoca, Christian University „Dimitrie Cantemir" Bucharest

(i).The first chapter deals with the theme of *"Introductory notions of commercial law",* namely: a historical look at commercial law; the notion, the object, the definition, the regulatory system, the normative and interpretative sources of law and the modern trends of commercial law. It is indicated in this chapter of the paper that under the empire of the system established by the new Civil Code, the legal trade relations continue to exist "rebaptized as relations between professionals (art. 3)". "Following the research on the historical perspective and the present-day perspective on the concept of "commercial law", we note a grounded plea for a new Commercial Code, based on the unitary system of regulations, contained in the Civil Code, a type of Commercial Code as "legislative consolidation" of European Inspiration, a code that would include "the special laws in force concerning the legal relations involving those carrying out professional type of activities."

(ii). In the second chapter it is developed the theme of the *"Enterprise - the legal form of carrying out the activity of a professional character"* and the notions and concepts regarding the enterprise, the forms of the enterprise and the economic (commercial) enterprise - legal form under which commercial activity is carried out. The reforming concept of the Civil Code "has generalized the notion of enterprise", which represents the legal form of carrying out a professional activity, while the exploitation of an enterprise consists in the systematic exercise by one or more persons of organized activities consisting in the production, the administration or the sale of goods or the provision of services, whether or not for profit.

In this chapter of the paper, it is outlined the distinction, with relevance in practice, between the forms of the enterprise, namely the economic (commercial) enterprise whose purpose is profit making and the civil enterprise, with a non-economic object (non-commercial), and the characteristics of each are the object of a comparative analysis.

(iii). The topic of "*Traders as professionals of the economic enterprise"* is dealt with in the third chapter, starting from the premise that although the Civil Code enshrines the unitary concept for patrimonial relations, it also makes a distinction between the participants in these legal relations, respectively "between mere private persons and professionals". As a consequence, this chapter deals mainly with the concepts of professional traders, namely: notion, categories and the quality of professional trader; the conditions for the exercise of the commercial activity and the obligations of the professional traders before

and during the exercise of this activity. Defining the notion of "professional trader" presents a practical interest, because this quality "implies a certain legal status, different from that of professionals non-traders and non-traders." The categories of professionals traders subjected to analysis are the well-known ones: professionals traders natural persons, in the form of authorized natural persons, the entrepreneur holding an individual enterprise, member of a family enterprise; professionals traders as legal entities under the forms of the company carrying out commercial activity, commercial companies, autonomous companies, economic interest groups, cooperative companies, cooperative organizations, European cooperative companies, as well as the more recent categories, having a European character, European companies and European economic interest grouping.

The matter of the obligations of the professionals traders is focused on those obligations that are imposed on the trade professionals, obligations "closely related to the exercise of the commercial profession" namely: publicity through the trade register, organizing and keeping the commercial activity accounting books, and exercising the trade within the limits of the licit competition. As for the latter obligation, considering its relevance in the commercial activity, its components are investigated, namely: protection against anti-competitive practices and economic concentrations, protection against unfair competition and protection against unfair practices in relation to consumers, by laying out the definitions of the related notions, as well from the perspective of the bodies that ensure market surveillance, the protection of competitors and consumers against illicit practices and apply sanctions, such as the Competition Council and the National Authority for Consumer Protection.

The Trade Fund, both the definition of the concept as well as a special look at its constituent elements, namely, intangible assets -the company name, the logo, the industrial property rights, the copyright and the tangible assets - the immovable assets, the tangible movable assets also analyzed *in extenso* in Chapter **III.** By treating *hic et nunc* the theme of "the auxiliaries of the professionals traders" the commercial agents are classified and their relatively new categories in the business activity are listed: financial investment services companies authorized by the Financial Supervisory Authority and credit institutions authorized by the National Bank of Romania acting on the capital market; brokerage companies and brokers acting on the commodity exchange market; insurance agents and insurance brokers operating on the insurance market.

(iv) Chapter IV handles the topic of *"Companies carrying out commercial activity (Law no. 31 of 1990)",* laying out a review of the causes that led to the creation, origin and evolution of companies in the commercial activity; the legal regulation and their forms, the rules common to any company and the specific ones applicable in relation to the form of each company from the perspective of its set-up, functioning, modification, dissolution and liquidation. An even more detailed development is granted, in this fourth chapter, to the "Specific elements of the company contract that is at the basis of the company carrying out commercial activity ", namely: the contributions of the associates and their legal regime; the share capital and the patrimony of the company, the intention of the associates to cooperate in carrying-out the activity of the company *(affectio societatis*), the split of the profit. In relation to the practical relevance of the moment when the companies are set-up, the work discusses *in concreto* the constitutive acts and formalities necessary for setting-up, respectively registering in the trade register and authorizing the functioning of the company carrying-out commercial activity, as well as the requirements regarding the legal acts concluded during the setting-up of the company and the consequences of inobserving these requirements.

Chapter IV copes also with the legal regime and the functioning of the company carrying-out commercial activity, as a private legal person, with a special regard to the deliberative body-the general assembly, as the "trustee of the will of the company ", which was established in the decision of the general assembly, "sui-generis legal act", " expressing the will of the associates in a collegial framework and in accordance with the majority principle, in the sense of achieving a common goal, which corresponds to both the personal interests of the associates and the interests of the company." Or, "the will of any trading company expressed in the general assembly is fulfilled through the actions of the persons or bodies that are invested, who carry out the administration and the leadership of the company", is therefore well grounded the continuation of the doctrinal undertaking, by researching the administration and the leadership of commercial companies, both from the perspective of the legal status of the administrators, having as central subject the legal nature of the relationship between the administrator and the company - as mandate relation, as well as the obligations and liability of the administrators.

Researching the subject of the joint stock company, the aspects regarding the simultaneous setting-up and the setting-up through public subscription are

detailed, indicating the elements expressly regulated from the content of the shares prospectus, "which must be well-known by those interested in subscribing the shares of the company", as well as the applicability of the sanction of nullity in the case of share prospectus that does not include all these elements. The single tier and the two tier system of management and administration of the joint-stock company are developed with a special regard to the responsibilities and functioning of the administrative board, as well as the board of directors and the supervisory board. Regarding the limited liability company, the subject of the transfer of the equity shares and the conditions under which it operates: between associates, between associates and individuals outside of the company and by way of inheritance; as well as the withdrawal of the associate from the company, with the remark that "According to the law, the rights of the withdrawn partner concern the equity shares. In reality, these rights refer to the dividends from the profit obtained in the financial year, as well as to the company's patrimony, which includes the profit and the assets of the company."

(v) The theme of "*Economic Interest Groups"* is dealt with in Chapter V, in terms of notions, characteristics, constitution, functioning, modification, dissolution and liquidation.

(vi). Chapter VI deals with the topic of *"Business Contracts",* namely, *ab initio*, the definition, characteristics and legal regime, general and special rules for drawing-up the contracts regarding the commercial activity, including setting-up through electronic means; rules on the performance of contracts and debtor's liability for non-compliance with contractual obligations in business contracts. Within the same chapter are examined in an exhaustive manner the issues related to special contracts, from the perspective of the notion, characteristics and legal nature, content, form, effects of their termination. The research is extended to the following categories of relevant contracts for the commercial activity, namely: the sale-purchase contract; the supply contract, the simple partnership contract, and joint-venture contract; mandate contract - with representation and without representation; agency agreement, brokerage contract, leasing contract, franchise contract, loan-to-use (commodate) and consumer contract; current account contract, bank account contracts - current bank account contract, bank deposit contract, credit facility agreement, contract for the rental of safety deposit boxes.

A special relevance for this chapter is the presentation of business-specific contracts, such as the leasing "the legal technique based on the complementarity of interests of the three persons involved in the operation" and the franchise, if we consider that the latter "represents a modern contractual technique, for the sale of products and services based on the collaboration between traders."

(vii). Chapter VII deals with the topic of "*Credit bonds*", namely the bill of exchange, the promissory note and the cheque, the research being targeted at each of them: the notion and the characteristics, the conditions of validity, the endorsement, guarantee and payment and the consequences of non-payment. Because "a modern legal form of movement of goods is the transfer of documents (bonds) that incorporate certain patrimonial values", credit bonds have a major importance in the commercial activity, therefore, discussing them, including aspects regarding the endorsement, "as a specific legal instrument for the transfer of the rights arising from bills of exchange" and guarantee, which has evolved "becoming an autonomous and independent guarantee", complement the theme specific to commercial law.

(viii). Chapter VIII is devoted to investigating insolvency and insolvency prevention procedures and *prima facie* analyzes the legal treatment applied to traders in difficulty, the regulatory field and the basic principles of insolvency and insolvency prevention procedures, namely the ad-hoc mandate and the arrangement with creditors, "preventive procedures aimed at saving the debtor in financial difficulty, in order to avoid the application of the insolvency procedure".

The insolvency procedure is dealt with *in extenso*, starting with the notion and the characteristics of the insolvency procedure and continuing with the details of the necessary conditions for the application of the insolvency procedure and with the participants in this procedure. Established as a collective action applicable to "traders in financial difficulties", insolvency represents "that state of the debtor's patrimony characterized by insufficient funds available for the payment of certain, liquid and exigible debts." The content and the conduct of the insolvency proceedings are analyzed from the perspective of the introductory applications, the opening, the first measures and the effects of opening the insolvency proceedings. The judicial reorganization procedure, respectively the bankruptcy procedure, as well as the liability for the insolvency of the debtor legal person and the closure of insolvency proceedings are also analyzed. The reorganization plan, as a *sui generis* legal act, "comprises the expressed will of the legally empowered

persons, which give expression to the measures necessary for the recovery of the debtor's activity in order to pay the creditors' claims" and subject to a thorough analysis, which includes: the object, content, duration, formalities and the modification. Even more so as "according to the new regulation, the desideratum of covering the debtor's liabilities must be achieved, when possible, by the recovery of the debtor's activity, that is by reorganization."

Taking into consideration all the aspects mentioned above, including the relevant national and European doctrine and case law, the Treatise proves its undisputable value and usefulness to theoreticians, practitioners, doctoral students, master students and students alike. It outlines, in exceptional graphic presentation, the history, evolution, mobility and timeliness of regulations in the field of commercial law.

Independently of the intrinsic value of this Treatise work, as *"Books have their own destiny"* - *"Habentsua face libelli" (Terentianus Maurus),* we consider that the destiny of this monumental work, *de facto,* and the destiny of each individual edition was and remains that of determinig generations of legal practitioners and theorist to sink into the knowlegde of commercial law.

2. „HEALTH LAW" UNIVERSITY COURSE - BOOK REVIEW

Irina (MOROIANU) ZLĂTESCU[*]

Coordinators: Assoc. Prof. PhD. Rodica-Diana Apan & Assoc. Prof. PhD. Elena-Mihaela Fodor

Pro Universitaria Publishing House, Bucharest, 2018, 370 pages

University course "Health Law", published in Romanian and English, coordinated by PhD. Associate Professor Rodica-Diana Apan and PhD. Associate Professor Elena-Mihaela Fodor, is part of those works whose title is too modest to highlight their true importance. The book which has scientific value both through the subject-matter and the way of dealing with the subjects under analysis – often implying comparative law, is written by consecrated authors and could easily be entitled "Treatise" on health law.

The book contains six chapters, elaborated by different authors. The first chapter, written by PhD Associate Professor Rodica Diana Apan, from the Faculty of Law from Cluj-Napoca of "Dimitrie Cantemir" Christian University, is dedicated to advertising medical services. From the beginning of the article, the author draws attention to the fact that the theme has multiple social and, of course, economic implications. The rules in question are obviously intended to protect consumers and competitors, those being persons who may be harmed by the consequences of incorrect advertising. Mrs. Rodica Diana Apan then highlights the purpose of advertising in the field, emphasizing the importance of ensuring the protection of human rights. In this chapter, the concepts of "medical services", "healthcare providers" and "patient" are presented in the light of the doctrine of comparative law. The classification of medical services that are considered by referring to the typology of packages that appear based on the definitions given is interesting. In this context, medical service providers appear as natural or legal persons, organizational typologies including the hospital and the medical cabinet (doctor's office). As mentioned above, one of the concepts on which the author focuses is that of the "patient", considered a species of the consumer concept: the healthcare consumer. The definition is based on the text of Law number 46/2003 regarding the patient's rights.

---

[*] Titular Member of the International Academy of Comparative Law, Titular member of the Romanian Academy of Legal Sciences.

The same study presents the concept of "advertising" and analyses the applicable principles in accordance with the provisions contained in the regulations of the European Union. Next, the concepts of "misleading advertising", "comparative advertising" are illustrated as well as the advertising responsibility. A special point in Mrs. Apan's study is the publicity of medical services covered by Romanian regulations.

A sub-section demonstrating the outstanding qualities of the author is the one dedicated to the case-law of the European Court of Justice in the field of medical services. The cases chosen as an example are, we hope, particularly useful to those who are dealing with poor healthcare. The chapter ends with useful conclusions both for health care providers and patients, and not least for the legislator and, of course, those working in the administration of the health public service. It is worth noting the bibliography that includes the latest papers in the national and international doctrine.

The next chapter is elaborated by PhD. Assistant Professor Maria Aluaş from "Iuliu Haţieganu" University of Medicine and Pharmacy and the Bioethics Center at "Babeş-Bolyai" University Cluj-Napoca and Ana Dulău, legal adviser at the College of Physicians of Alba County. It refers to the "The relationship between medical professional secrecy and malpractice". After looking into the definition of professional secrecy in its evolution, the medical secret is presented as an expression of the special relationship between physician and patient. Then, the fundamentals of medical secrecy are illustrated, starting with the historical foundations and continuing with the legal foundations - the contractual one, the one considering public order and the one considering private life. Further on, the authors refer to the importance of keeping medical secrecy and ensuring its protection within certain limits. We appreciate the importance given in the chapter to deontological provisions and the presentation of both criminal and civil legislation that sanctions the disclosure of professional secrecy. The authors were also preoccupied about the presentation of the exceptions from the requirement of professional secrecy. Last but not least, the study also includes ethical considerations relating to the conflict between the individual's right to private life and the duty of the state to protect public health and the common good. The authors emphasize the fact that confidentiality about the patient's state of health and the privacy of the patient are two different things. The conclusions reached by the authors are of great interest, both for the legislator and law practitioners, medical stuff, those working in the public administration ensuring the health care public service and, last but not least, for each of us.

A chapter of particular interest is the one elaborated by Phd. Elena-Mihaela Fodor, Associate Professor of the Faculty of Law from Cluj-Napoca, of the "Dimitrie Cantemir" Christian University. It concerns "Contracts concluded

between health insurance houses and medical services providers." This contract is presented as belonging to a group of contracts linking the health insurance company, the health care providers and the beneficiary of the health service, through which the public health service is ensured. We note how the main specific legal provisions in the field are outlined, highlighting that the contract between the health insurance house and the medical service supplier is a civil contract and drawing attention to the relevant issues in this respect. In the chapter regarding the conclusion of contracts particular attention is paid by Mrs. Fodor to the eligibility conditions for medical services suppliers. Also, the key obligations and contractual rights of health care providers and health insurance houses are analysed. Eligibility, rights and obligations are mentioned separately for different categories of healthcare providers, as mentioned in the frame-contract adopted by Government Decision in accordance with Law. No. 95/2006 reforming the public health-care system. A separate sub-chapter concerns the sanctions that may be applied for noncomplying with contractual provisions, the terms of suspension of contracts, amendments and termination of contracts. In particular, we note the concern of the author that each statement should be accompanied by case-law, mostly of the High Court of Cassation and Justice and Appeal Courts, as well as of the European Court of Human Rights and the Court of Justice of the European Union. As many aspects of the law proved debatable, the excellent and extensive selection of case-law comes to strengthen the statements made in the chapter.

A special study is devoted to the physician-patient legal relationship. It is elaborated by PhD. Assistant Professor Adrian-Gabriel Năsui also from the Faculty of Law Cluj-Napoca of the "Dimitrie Cantemir" Christian University. It refers to national legislation regarding medical care, the characteristics of the doctor-patient legal relationship, the obligations of the medical stuff according to the national law and the grounds for medical civil liability in Romania.

The study guides us and helps us to find some answers to delicate questions that search to establish the conditions for malpractice. The author concludes that medical responsibility is subjected to the particular characteristics of the medical practice and type of medical acts performed. In the closure of the chapter the author is dealing with the security obligation towards the patient, the safety requirement and the basis of medical civil liability. The legal nature of these obligations is debated. The author uses a large bibliography, both national and international for sustaining his comments and manages to fix landmarks that may be extremely useful for practitioners in medicine and law.

The following chapter concerns the legal bases of medical practice and is realized by PhD. Professor Dan Perju-Dumbravă from the "Iuliu Haţieganu" University of Medicine and Pharmacy from Cluj-Napoca. After the

introductory notions referring to health law, its sources and the object of regulations, the author presents the specific medical legislation in our country. Thus, he analyses Law no. 95/2006 on health reform in all aspects. We note the attention paid to patients' rights, informed consent, medical responsibility and medical malpractice, according to the Romanian legislation in force.

The last chapter in the volume refers to patients' rights - the right to give informed consent to medical treatments from European and Belgian perspectives. It is elaborated by PhD. Professor Ludo M. Veny of the University of Ghent, Belgium and the Free University of Brussels, Belgium. Since the beginning of the chapter, the author points out that patients' rights vary from one state to another and in different jurisdictions, often according to the social and cultural norms existing in the respective areas. The legislative framework, both international and national in some Western European countries, is presented, highlighting the fact that some provisions on patient rights and informed consent are connected to the issue of fundamental rights such as the right to self-determination or the right to physical and mental integrity. International instruments such as the European Convention on Human Rights, the Convention on Human Rights and Biomedicine, the European Charter on Patients' Rights, as well as national legal instruments are considered. We find the approach to the legal relationship between the patient and the doctor to be presented in a very interesting manner. One remarkable aspect is the presentation of the right to information and the right to informed consent from a Belgian perspective.

We also note the conclusions reached by the author in the sense that, in spite of international regulations, national legislations are different in respect with the recognition of patients' rights in general and the right to information and informed consent in particular.

Closing the book, we find that it remains a benchmark of the legal-medical literature in our country. Overall, the work, with the help of elements of philosophical, legal, sociological, economic and, last but not least, medical considerations, addresses particularly acute problems for both medical stuff and patients, each of us being a potential patient.

We appreciate the way the authors approached the theme, often from the perspective of human rights, reflecting the fact that a suffering person can decide for himself with great difficulty and that his or her rights must prevail over those around him. Each individual has the right, given by society as a whole, to the respect of the dignity inherent to human beings and to equal and inalienable rights according to the Universal Declaration of Human Rights, adopted 70 years previous to the publication of the volume presented above.