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THE CIVILIZATION CRITERION IN THE TYPOLOGY OF LEGAL SYSTEMS

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This article is dedicated to the study of the civilizational approach in the typology of contemporary legal systems, according to which there are many civilizations that develop according to their own legalities, and the originality of each family of national legal systems is largely determined by the particularities of the way the law is formed. The article deals with the approach of the most prominent representative of the civilization current – the French doctrinaire Rene David, who proposed the typology of national systems according to their belonging to a pool of legal civilization, as well as the classification of the Arminjon-Nolde-Wolff scholars, who based the taxonomy on a combination of legal history, sources of law, technique, terms, concepts and culture.

Keywords: *civilization, typology, typology of law, legal systems, legal classification.*

CRITERIUL CIVILIZAȚIONAL ÎN TIPOLOGIA SISTEMELOR JURIDICE

Prezentul articol este dedicat studiului abordării civilizaționale în tipologia sistemelor juridice contemporane, conform căreia există multe civilizații care se dezvoltă după propriile legități, iar originalitatea fiecărei familii de sisteme juridice naționale este determinată în mare măsură de particularitățile modului de formare a dreptului. În articol este tratată abordarea celui mai de vază reprezentant al curentului civilizațional – doctrinarul francez Rene David, care a propus tipologizarea sistemelor naționale în funcție de apartenența acestora la un bazin de civilizație juridică, precum și clasificarea savanților Arminjon-Nolde-Wolff, care și-au bazat taxonomia pe o combinație de istorie juridică, izvoare ale dreptului, tehnică, termeni, concepte și cultură.

Cuvinte-cheie: *civilizație, tipologie, tipologia dreptului, sisteme juridice, clasificare juridică.*

CRITÈRE CIVILISATIONNEL DANS LA TYPOLOGIE DES SYSTÈMES JURIDIQU*ES*

Cet article est consacré à l’étude de l’approche civilisationnelle dans la typologie des systèmes juridiques contemporains, selon laquelle de nombreuses civilisations se développent selon leurs propres légalités, et l’originalité de chaque famille de systèmes juridiques nationaux est largement déterminée par les particularités de la manière dont le droit est formé. L’article traite de l’approche du représentant le plus éminent du courant civilisationnel-le doctrinaire français René David, qui a proposé la typologisation des systèmes nationaux en fonction de leur appartenance à un bassin de civilisation juridique, ainsi que la classification des érudits d’Arminjon-Nolde-Wolff, qui ont basé leur taxonomie sur une combinaison d’histoire juridique, de sources de droit, de technique, de termes, de concepts et de culture.

Mots-clés: *civilisation, typologie, typologie du droit, systèmes juridiques, classification juridique.*

ЦИВИЛИЗАЦИОННЫЙ КРИТЕРИЙ В ТИПОЛОГИИ ПРАВОВЫХ СИСТЕМ

Настоящая статья посвящена исследованию цивилизационного подхода в типологии современных правовых систем, согласно которому существует множество цивилизаций, развивающихся по своим закономерностям, а своеобразие каждой семьи национальных правовых систем во многом определяет особенности формирования права. В статье рассматривается подход видного представителя цивилизационного течения — французского доктринера Рене Давида, который предложил типологию национальных систем по принадлежности к пулу правовой цивилизации, а также классификацию Арминджона-Нольде-Вольфа ученые, которые основывали таксономию на сочетании истории права, источников права, техники, терминов, концепций и культуры.

Ключевые слова: *цивилизация, типология, типология права, правовые системы, правовая классификация.*

Introduction

In modern conditions, the issue of typology and modern legal coats of arms is of particular importance. The need and importance of classification is caused by the following. First, in the 20th century the number of national legal systems almost tripled; with the destruction of the colonial system, the legal systems of the liberated countries appeared and are developing; and with the destruction of the socialist political system, new legal systems appear on the legal map of the world.

In the history of human civilization, there are more than 40 thousand varieties of legal systems, of which 4 thousand are modern [18, p. 47]. Many of these systems show similar features, usually due to social similarities or similar historical conditions of development, or similar religions, or other characteristics. The classification of legal systems suggests, first of all, a comparison, inviting the search for similarities and differences between legal systems.

Today there are around 200 state formations, which, in addition to the political, cultural or economic specifics, also present distinctions from the point of view of legal regulations, so it is opportune to methodologically substantiate and analyze the possibilities of the typology in relation to the national legal systems, which would allow the highlighting of similar systems and the construction of a realistic taxonomy.

Research methods used. In order to achieve the stated goal, a series of methods were applied in the present scientific approach, among which: the systemic, comparative, logical method.

Basic research content

In the typology of law, there is a distinct - civilizational approach, which is based not on form, but on content, i.e. unique characteristics, value orientations of society. This approach takes into account not so much the specifics of relationships, but spiritual and cultural factors, forms of consciousness, including religion, worldview, customs and traditions, historical development and territorial location. Together, these factors determine the ways of being of a certain human community, forming a special, original socio-cultural system - *civilization* [22, p. 26].

The concept of "civilization" expresses the general socio-cultural differences between historically emerged societies, the interaction of which forms the content of the historical development of human civilization. It is used as a characterization of the level and characteristics of the cultural and historical development of a certain region of the world or a super-ethnic group. According to its genesis and internal organization, civilization is a collective and polysemantic phenomenon. It is formed as a result of the combination of various qualitatively heterogeneous factors into a certain whole, such as the economic

mode of production and the system of socio-political relations, the ethnic and national composition of society, cultural, historical and moral originality, spiritual values and religious beliefs, the nature and degree of development of techniques and technologies, the level reached by a person's needs, abilities, knowledge and skills, the characteristics of the natural environment, climatic conditions, geographical and demographic factors, etc. [13, p. 133].

At the origins of the doctrine of civilizations were the German idealist philosopher and culturologist Oswald Spengler, who developed the doctrine of culture as a set of closed organisms of certain regions, expressing the collective "soul" of people and passing through a certain life cycle, and also another German philosopher Karl Jaspers, who developed the civilization scheme, and the English philosopher and historian Arnold Joseph Toynbee, who proposed the theory of the cycle of successive local civilizations, each of which goes through similar stages of emergence, growth, decay and degradation [19, p. 67].

Arnold Toynbee defines civilization as "the smallest block of historical material to which one turns when attempting to study the history of one's own country". Giving priority to the cultural principle in the typology of civilizations, Toynbee believes that there are currently five main civilizations - Western, Christian, Islamic, Hindu and Far Eastern - and considers them all equivalent in their values [14, p. 7].

The civilizational theory makes it possible to isolate the uniqueness of a certain society, thanks to the consolidation in it of an equally safe culture, since civilizations are certain types of human communities, and each of them is a culture that has reached the limits of self-identification. Civilization is directly defined as a relatively closed state of society, characterized by the community of both cultural and economic, geographical, religious, psychological and other factors [19, p. 68].

Civilization is primarily a sphere of spiritual construction, and territory is practically one of the prerequisites for such construction. Therefore, the territorial determination of civilization is revealed primarily in relation to the borders between the actual civilizational formations [15, p. 95].

Civilizations can be classified by combining them into appropriate units - types of development. As criteria for the classification of civilizations, the following can be highlighted: the community and interdependence of economic destiny and historical and political development, the intertwining of cultures, the existence of a sphere of common interests and common tasks from the point of view of development perspectives [21, p. 54].

The differences between civilizations are the result of choosing different paths of historical development.

In legal science, legal systems are usually typified according to socio-economic or spiritual and technical-legal factors. In the first case, the classification of law is based on the theory of historical materialism, according to which slave, feudal, bourgeois and socialist types are distinguished. Namely, the base (the type of production relations) is the decisive factor in social development, which also determines the corresponding type of superstructural elements: the state and law. But this classification has practically lost its relevance because it did not adequately take into account the dominant historical, cultural, national and special juridical character of law. Therefore, it was replaced by the so-called civilizational approach, which takes into account specific geographical, national-historical, religious, special legal and other characteristics. Based on technical, legal and spiritual factors, legal families are usually distinguished: Romano-Germanic, Anglo-

Saxon and religious, as well as the family of traditional law [18, p. 47].

In historical sciences, the so-called civilizational approach is very popular, which can be effectively used in the classification of legal systems. According to the civilizational approach, there are many civilizations in the world that develop according to their own laws. According to this approach, the history of mankind is the history of the development of civilizations [20, p. 140].

The task of the typology of legal systems operating in parallel in a certain historical period is solved by the historical-cultural (or civilizational) approach.

The inter-civilizational comparative analysis of law starts from the fact that any civilization is characterized to some extent by continuity in law, the inheritance of what has historically developed within it (the diachronic plan), as well as the exchange of values, the borrowing of the best legal achievements, ideas, institutions and norms of other civilizations and cultures (the synchronous plan) [23, p. 16].

The civilizational approach makes it possible to present and compare the diversity of state legal systems on multifactorial criteria. Of course, this classification cannot be recognized as universal or unique, it is rather subjective. His critics rightly draw attention to this, emphasizing, in particular, the insufficient development of the typology itself, the existence of various grounds for distinguishing both civilizations and types of states and their legal systems. But other attempts to present certain typologies as universal are not so complete, since the factors, principles, indicators or parameters invented by researchers are also conditional and cannot be recognized as satisfying all and sundry, or admitted as a classification generally accepted [19, p. 69].

The criterion of the right belonging to a pool of legal civilization led the specialists in comparative law to recognize the existence of some families of law, which are differentiated by legal language, legal concepts, legal institutions and philosophical peculiarities; thus, René David considers the following families of law (which also represent the great systems of contemporary law): Romano-Germanic, Anglo-Saxon, socialist law, Muslim law, Hindu, Chinese, Japanese (of the Far East) and the law of Black Africa and Madagascar [9, p. 54].

According to the civilizational approach, the originality of each family of national legal systems is largely determined by the particularities of the way law is formed: in the Romano-Germanic family, by the dominant position of the law itself; in the common law family – legal (judicial) practice; in the religious-philosophical family – by legal ideology, in the family of socialist law – by legal norms inspired by legal ideology [13, p. 134].

Emphasizing the socio-cultural, spiritual and moral differences between civilizations of various types, the civilizational approach somewhat exaggerates the uniqueness and originality of civilizations of various types. Civilization as a community that has reached the limits of socio-cultural self-identification turns out to be closed in on itself, and humanity separates into autonomous, opposing communities. Thus, a conflicting perspective is established for the understanding of civilizational phenomena [13, p. 134].

The author L. P. Rasskazov believes that, from the point of view of the civilizational approach, all states can be conditionally divided into two types: Eastern and Western, each of which has its own characteristics. In turn, each of these types has its own legal families. The defining basis for the classification of legal systems is the normative element of the system, which includes law, legal principles, sources of law, system of law, system of legislation and legal technique. However, we emphasize that this criterion can be applied within the

same type of civilizations. According to this criterion, Western-type countries can be divided into two large families: Romano-Germanic and Anglo-Saxon [20, p. 143-144].

If law is seen as a facet of a certain type of civilization, as a condition for a certain form of social organization based on a certain conception of justice, then the phrase “Western law” expresses the fundamental unity that exists between civil law and legal systems common. The jurist who emphasizes the legal concepts and techniques of interpretation and application of legal rules perceives only the differences between civil law and common law systems. On the other hand, the observer who sees law from the perspective of a political scientist, philosopher, or cultural historian will discern the connecting links between these systems: both civil law and common law systems are underpinned by individualism , rationalism and the liberal conception of social order; in both systems the ideal is a society governed by the “rule of law”; finally, both systems place primary importance on the autonomy of law, that is, understanding law as relatively distinct from morality, politics, and religion. These characteristics are so familiar that it is tempting to see them as universal. This is not true, however. If such ideas become universal, it is only because of the pervasive influence of Western values and concepts throughout the world. In turn, the Western legal tradition has been affected, to a certain extent, by the values of other legal orders [5, p. 154].

Unlike Western culture and its inherent legal systems, in those types of culture where religion, traditions, customs have priority, in particular, this refers to the so-called Eastern type states, law is not a determining social regulator . For example, one of the main postulates of Western ideas about the democratic structure of society, which proclaims the priority of individual human rights, is not shared by many Asian states [16, p. 400].

Today, we believe that the civilizational criterion can be used to classify contemporary legal systems as follows:

- Eastern (China, India, Inc Empire, etc.);
- Western, or progressive (primarily, European states).

We can observe the common features inherent in the Western way of forming states, i.e. the features of Western (European) civilization:

- availability of private property, market relations;
- the pronounced class structure of society;
- the presence of democratic principles [21, p. 55].

M. N. Marcenko drew attention to a disadvantage of the civilizational approach, stating that “the ambiguity of the term (and concept) “civilization”, its internal inconsistency and diversity, together with the amorphousness of its content and uncertainty, make it very problematic at the current level of research to use it as criterion for the typology of states and legal systems” [17, p. 184].

In this regard, however, M. A. Supataev mentions that upon initial knowledge of the civilizational approach, jurists usually have a common and hard-to-overcome suspicion that this approach is vague due to the presence of dozens of definitions of civilization, from which one can choose [24, p. 101]. Without going into a detailed discussion of this issue, we note that in science, as some researchers reasonably point out, there are not so many definitions and basic understandings of civilization that are subject to revision and heuristic typology.

We cannot agree either with the argument that the civilizational approach cannot be used for any historical typology (of the state and law), because, on the contrary, it minimizes the importance of a highly developed (European) civilization, since it starts from the multivariate process of historical development and denies that thus, the principle of freedom as a principle

of historically developed civilizations [24, p. 113]. But the ideas of freedom and justice are present in all cultures and civilizations, where one can find an unlimited variety of ideas about them.

The formal criteria for classifying the legal systems of different states are based on the unity of the sources of law, presentation techniques, systematization of legal norms and legal terminology.

Substantial criteria for the classification of legal systems can be expressed in the fundamental ideas, principles, moral and spiritual values of the society. These can be ideas of freedom, formal equality, religious, socialist principles, etc. [22, p. 27].

The most prominent representative of the civilization current is the French doctrinaire Rene David, who proposed the typology of national systems according to their belonging to a ***pool of legal civilization***.

Rene David believes that legal orders can be reduced to a few *fundamental types* , like religions. He uses two criteria in his analysis, to ascertain typological affinity or incompatibility: the *ideological point of view and the technical* point of view [9, p. 49].

The division into "great systems of law" or legal families proposed by him underwent changes during the editions of his work.

Initially, economic, political, philosophical and religious similarities were seen as the main criteria. This led to a major distinction between Western and Soviet law, supplemented by chapters on Islamic, Hindu and Chinese legal systems. More recent editions place more emphasis on legal technique. This is not meant to refer to specific legal rules, but to the "constant and more fundamental elements" that can determine whether "someone educated in the study and practice of one law will then be able, without much difficulty, to deal with another" . As a result, the distinction between Romano-Germanic civil law and English common law became more prominent, with later chapters on socialist law and other legal systems. After the fall of communism, a new edition of David's book replaced socialist law with Russian law [8, p. 90].

In writing this book, the author set himself a very simple objective: to provide a guide to a first examination of the many laws existing in the contemporary world for those who wish to be initiated into a foreign law [10, p. 18]. David is aware of the complexity of this objective and to make it manageable, he focuses only on the general characteristics of legal systems.

In his opinion, "the grouping of laws into families, thus establishing a limited number of types, simplifies the presentation and facilitates the understanding of the contemporary laws of the world" [1, p. 20], all the contemporary legal systems of the world possess similar features and, based on them , legal systems can be easily divided into a small number of legal families or " *grands systèmes"*.

Rene David stated that in law, as in other sciences, one can detect the existence of a limited number of types or categories within which the diversity of law can be organized. Just as the theologian or the political scientist recognizes types of religions or governmental regimes, so the comparatist can classify laws by reducing them to a limited number of families [ibid, p. 8].

In the same year that Rene David's first volume appeared, a trio of Egyptian, Russian, and German scholars – ***Pierre Arminjon, Boris Nolde***, and ***Martin Wolff***, respectively – joined to publish a competing treatise on comparative law. Their treatise appreciated the formulation of taxonomies of legal families to an even greater extent than David himself [6, p. 1054].

They divided the world map explicitly into "parent tree systems" and "derivative systems", which together constituted seven different legal families: (i) French, (ii) German, (iii) Scandinavian, (iv) English, (v) Russian, (vi) Islamic and (vii) Hindu.

Arminjon-Nolde-Wolff based their taxonomy on a combination of legal history, sources of law, technique, terms, concepts and culture, focusing on private law subjects [8, p. 90], thus making the transition from the extrinsic approach to classification criteria (race, geography) to an approximately substantial one, based on elements intrinsic to legal systems [2, p. 77].

The basis of the distinction of family groups was not ideological, but represented an approach based on genealogy and history. Models were distinguished both for metropolitan states and for dominions (colonies), which necessarily adopted certain foundations of the legal family for their legislation. Consequently, the structure of the metropolitan legal family is adopted not only by the countries under the government, but also by the neighboring countries, which largely depend on the metropolises [11, p. 6].

A variety of the civilizational approach was also represented by the socialist legal system.

As we have seen, the approaches of researchers, until 1990 (and in some cases, even until recently), distinguish a separate category of socialist law, to which the Russian Federation and some of the neighboring countries are undoubtedly attributed.

In Soviet doctrine, for many years, priority was given to the so-called intra-typical classification, reflected in the division of legal systems into socialist, bourgeois and “fluctuating” between two antipodal types of law. This classification could only answer the question about the will of which social group the law could reflect, but did not explain why, for example, within the bourgeois type it is possible to have common and continental legal systems, which determines the differences between northern law - American and South American, between German and Roman law, between Indian and Japanese law [19, p. 63].

In the days of the Soviet Union, this could be justified by the impact of the political system on the law. It is not entirely clear what the basis for this type of right might be today. Most frequently, reference is made to the socialist heritage of these countries, with a vision of a “socialist legal tradition without socialism”.

Thus, V. Cirkin refers to a virtual “post-socialist” law, stating that a special position is occupied by “the legal family of the post-socialist states, in which the new is intertwined with the remains of the old (organization of the economy, regulation of power, the role public associations, etc.)” [25, p. 834].

There are also authors who believe that at present all the objective premises have been created to justify the appearance on the legal map of the world of a new phenomenal formation – the Eurasian legal family., stating that the socio-political movement, called “Eurasianism”, appeared at the beginning last century, and in modern legal doctrine, the concept of Eurasianism revived and gained popularity. The creation of the Eurasian Economic Union (EEU) served as a new strong impetus for the development of the Eurasian legal system The EEU Treaty, signed on May 29, 2014 [26, p. 223].

Mathias Siems believes that since the use of law as an instrument of economic and social policy is the typical feature of socialist law, it can exist in any political system. One can also point to the continuity of legal institutions and traditions after the fall of communism, for example in the judiciary and in legal education, with a preference for a “mechanical” and “hyperpositive” application of the law. Others point out that it is not only the socialist heritage that may be relevant: for example, it may be typical of a Slavic legal culture that there is a continuing influence of custom. Considering the difficult period of transition, another common point may be a “deep institutional skepticism” but also “high expectations regarding social justice” [8, p. 93].

We must say that before the dissolution of the USSR, some Western scholars considered [7, p. 808] that socialist law contains features that distinguish it from the legal systems of other countries in the civil law family, but these points of difference did not remove socialist law from the tradition civil law, but it continues to use civil law rules, methods, institutions and procedures.

Socialist law contains features that distinguish it from the legal systems of other states in the civil law family. But those points of difference did not remove socialist law from the civil law tradition. To draw this conclusion is to overlook the historical connection of socialist law with civil law and the continuing relevance in socialist law of civil law rules, methods, institutions and procedures.

We agree with the opinion of Prof. Ioan Vida, who considers that "Soviet law" no longer constitutes a legal system incorporated in universal law, its disappearance is marked by the disappearance of the Soviet Union, its place being taken by a traditional Russian law, of European inspiration [12, p. 192].

The collapse of the socialist legal system represents, in Jaakko Husa's opinion, "one of the most obvious examples of the relativistic feature of classifications" [3, p. 15] of contemporary legal systems, but, unfortunately, even the collapse of socialist law does not seem to been sufficient to really cause a change in the criteria and methods of classification applied in previous decades.

The historical reasoning of classification by "real types" does not mean that legal typologies are permanent. It is clear that "legal systems never *are* , they always *become* " [4, p. 14] or, as Jaakko Husa also expresses, "another obvious problem was the *static nature* of classifications" [3, p. 17] .

Conclusions

We can conclude that after the Second World War, with the decolonization process, the emergence of new states with distinct jurisdictions, a new legal typology trend is developing, with renowned exponents such as Rene David or Zweigert-Kötz.

We believe that socialist law can easily be already considered a historical type of law and researched from a theoretical-didactic perspective, with exclusively scientific implications, without any practical applicability at the contemporary stage. From our point of view, the states that declared their independence from the Soviet Union can be assigned to any of the other types of law analyzed and can even evolve so that a new assignment of them is necessary.

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THE RESTRICTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER INTERNATIONAL HUMAN RIGHTS LAW

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Human rights are those rights inherent in people simply by the mere fact of being human. Human rights are an essential feature of a democratic society, an expression of the state's respect for its citizens, enshrined in constitutions and national laws. Thus, the indestructible association relationship between the notions of human rights and democratic society becomes apparent, because in the absence of a democratic regime, human rights do not have effectiveness. Another characteristic of society concerns the responsibility to determine what are the restrictions to be imposed on fundamental human rights. By using a research methodology based on legislative and doctrinal analysis, this article aims to argumentatively present that the margin of appreciation of states regarding the restriction of human rights is not absolute, since these limitations have limits that are provided for by international human rights law.

***Keywords**: human rights, fundamental rights, fundamental freedoms, restrictions on rights, exceptional situations, security.*

RESTRÂNGEREA DREPTURILOR ȘI LIBERTĂȚILOR FUNDAMENTALE CONFORM DREPTULUI INTERNAȚIONAL AL DREPTURILOR OMULUI

Drepturile omului sunt acele drepturi inerente persoanelor prin simplul fapt de a fi om. Drepturile omului reprezintă o caracteristică esențială a unei societăți democratice, expresie a respectului statului față de cetățenii săi, înscrise în constituții și în legi naționale. Astfel, devine evidentă relația de asociere indestructibilă dintre noțiunile de drepturile omului și societatea democratică, deoarece, în absența unui regim democratic, drepturile omului nu au efectivitate. O altă caracteristică a societății privește responsabilitatea de a determina care sunt restrângerile ce trebuie impuse drepturilor fundamentale ale omului. Prin utilizarea unei metodologii de cercetare bazate pe analiza legislativă și doctrinară, acest articol are scopul de a prezenta argumentativ că marja de apreciere a statelor în privința restrângerii drepturilor omului nu este absolută, deoarece aceste restrângeri au limite care sunt prevăzute de dreptul internațional al drepturilor omului.

***Cuvinte-cheie**: drepturile omului, drepturi fundamentale, libertăți fundamentale, restrângeri ale drepturilor, situații excepționale, securitate.*

RESTRICTION DES DROITS ET LIBERTÉS FONDAMENTAUX EN CONFORMITE DU DROIT INTERNATIONAL RELATIF AUX DROITS DE L'HOMME

Les droits de l'homme sont les droits inhérents aux personnes du simple fait d'être humain. Les droits de l'homme sont une caractéristique essentielle d'une société démocratique, une expression du respect de l'État pour ses citoyens, inscrit dans les constitutions et les lois nationales. Ainsi, la relation d'association indestructible entre les notions de droits de l'homme et de société démocratique devient évidente, car, en l'absence d'un régime démocratique, les droits de l'homme n'ont pas d'efficacité. Une autre caractéristique de la société concerne la responsabilité de déterminer quelles sont les restrictions à imposer aux droits fondamentaux de l'homme. En utilisant une méthodologie de recherche basée sur l'analyse législative et doctrinale, cet article vise à présenter de manière argumentative que le pouvoir

discrétionnaire des États concernant la restriction des droits de l'homme n'est pas absolu, puisque ces limitations ont des limites qui sont prévues par le droit international des droits de l'homme.

***Mots-clés**: droits de l'homme, droits fondamentaux, libertés fondamentales, restrictions des droits, situations exceptionnelles, sécurité.*

ОГРАНИЧЕНИЕ ОСНОВНЫХ ПРАВ И СВОБОД В СООТВЕТСТВИИ С МЕЖДУНАРОДНЫМ ЗАКОНОДАТЕЛЬСТВОМ О ПРАВАХ ЧЕЛОВЕКА

Права человека — это те права, которые присущи людям в силу того простого факта, что они люди. Права человека являются неотъемлемой характеристикой демократического общества, выражением уважения государства к своим гражданам, закрепленным в национальных конституциях и законах. Таким образом, связь между понятиями прав человека и демократическим обществом становится очевидной, потому что в отсутствие демократического режима права человека не действуют. Другая характеристика общества касается ответственности за определение того, какие ограничения должны быть наложены на основные права человека. С помощью методологии исследования, основанной на законодательном и доктринальном анализе, в данной статье ставится задача доказать, что свобода усмотрения государств в отношении ограничения прав человека не является абсолютной, поскольку эти ограничения имеют пределы, предусмотренные международным законодательством в области прав человека.

***Ключевые слова:** права человека, основные права, основные свободы, ограничения прав, исключительные ситуации, безопасность.*

Introduction

Fundamental human rights and freedoms are considered " *essential rights for the life, freedom, dignity and development of the human being, whose universal and effective respect must be encouraged and promoted through international cooperation"* [1, p. 388].

Human rights are of particular importance in the contemporary world, being omnipresent in the political discourse of state authorities. The definition of international human rights law was necessary after the Second World War and the extent of human rights constituted a real political, social, legal phenomenon, with implications in all areas of human existence. This phenomenon presupposes deep knowledge of creation and the historical evolution of human rights, of the situation in which they are currently evolving, as well as discerning their perspectives.

The emergence and promotion of democracy worldwide contributed to the reformation of state institutions, the adoption of constitutions and numerous international legal instruments that regulated the protection of people's fundamental rights, as well as the establishment of international security organizations with peacekeeping duties. International instruments in the field of human rights expressly provide for the obligation to be disseminated, appreciating that this is part of the imperative measures that must be taken to ensure the guarantee of respect for fundamental rights. They oblige, in general, the elaboration of an internal implementing legislation.

The protection of human rights imperatively calls for measures in all areas of life, social, economic, political, legal, both at the national and international level, measures aimed at developing the protection of fundamental rights.

The field of human rights was constituted by successive contributions made by researching the great principles in the matter, the normative provisions and the institutions. This science of human rights has progressed, thus reaching the individualization of an independent discipline, with its own language and methodology, for interpreting and clarifying information, with statistical analysis techniques. From the international

documents, the idea emerges that human rights include different aspects and have an extensive area of applicability. In this sense, in their exercise, the principle of equal treatment and non-discrimination on any criterion, such as race, nationality, sex, language, or social origin, is applied.

The science of human rights is a science whose objectivity and rigor is guaranteed by the independence of human rights in relation to any school of thought or any interpretation of reality that is the basis of the rule of law. International pacts and treaties in the field of fundamental rights and freedoms give all people a right to equality before the law and protection against any form of discrimination. The ideas of freedom, equality, non-discrimination promoted with the value of principles unanimously recognized by international documents are enshrined in legislation. The idea is thus seen that " *natural equality represents an individual predisposition, being devoid of finality and meaning within a society, if it is not doubled by the guarantee of equality established from a legal point of view"* [2, p. 126].

The Charter of the United Nations recognizes the possibility for all people to enjoy the exercise of equal rights. The Charter declares human dignity and equal rights as inalienable intrinsic values for all people on which freedom, justice and peace in the world are based [3].

The science of human rights crystallized according to the current of natural law in the adoption of *the Universal Declaration of Human Rights* [4]. Thus, Article 1 provides that all people are born free and have the right to equality in terms of their dignity. Everyone is entitled to the equal exercise of all rights and freedoms as provided herein, without distinction of any kind, such as race, colour, sex, language, religion, politics, opinion, national or social origin, birth or other status. *The United Nations (UN)* has reiterated in international conventions on human rights that every person is entitled to the exercise of all the rights and freedoms included in these documents, without distinction of any kind. Thus, the UN requests the signatory states to take all possible measures to ensure equal treatment and eliminate discrimination in the exercise of all human rights.

Principles applicable to the restriction of fundamental rights

The general interest causes the state to restrict the exercise of some human rights " *in order to ensure an optimal balance in the development of legal relations between the state and the natural person. This balance must ensure both the manifestation of human personality and the observance of the general values of the rule of law, focused on the general interest"* [2, p. 263].

The exceptional character of the restriction of some fundamental rights and freedoms results from *the Universal Declaration of Human Rights*, from international pacts as well as from other international legal documents. It is generally accepted that there may be restrictions in relation to the exercise of fundamental human rights and freedoms, subject to certain conditions: they are expressly provided by law, are necessary in a democratic society and are proportional to the cause that determined them.

The protection of integral rights against arbitrariness of restrictions is recognized by universal human rights law and state constitutions. So most human rights are influenced by restrictions that are necessary and rational in a democratic society to achieve specific common benefits, such as social justice, public order and ensuring the protection of the rights of others.

So, the interests of society and the scope of fundamental rights and freedoms are included in an integrated legal structure. They create a regulatory framework in which cumulative

conditions are provided that allow justifications for restricting human rights. Thus, a relationship of proportionality between the rights and freedoms of citizens and the general interest of society is outlined. Globally, no generally accepted system has been established to define the measure of this proportionality, so that each society has regulated this understanding differently according to its own circumstances, shaped by its own distinct problems and historical events.

Human rights restriction clauses therefore allow for a balance between the protection of society as a whole and the rights of people. These means are determined nationally through the application and observance of international provisions in the matter, represented by pacts and treaties. Clauses restricting human rights are appropriate to the principles of international human rights law while, on the other hand, the scope of the right cannot be limited. Likewise, restrictions on human rights are not equivalent to a derogation from these rights, but become necessary to allow a balance in the achievement of community objectives.

The requirement of proportionality gives the necessary legitimacy to restrictions on human rights. In a state of law, the application of the rule according to which legislation could restrict fundamental rights only to make conflicting rights compatible or to protect the rights of other people or the important interests of the community is paramount. Consequently, any restriction of human rights needs not only a constitutionally valid reason, but also one proportionate to the concrete situation. We find that *“the application of the principle of proportionality has a double importance: state guarantees regarding human rights become effective in concrete situations; the arbitrary interference of public authorities in the exercise of these rights or the application of measures to restrict their exercise, measures that represent an excess of power, is removed”* [5, p. 30].

The restriction of fundamental rights must be authorized by law, which means that it must be in accordance with law and expressly and implicitly provided for by law. A legal restriction must be clear, accessible, predictable and precise and must not reveal excessive rigidity. However, a general clause stating that the right may be limited *by law* is not an open invitation to the legislature to restrict that right because, in addition to the condition of legality, the restriction must be proportionate and serve the purpose. This means that it should be necessary and rational in a democratic society.

The principle of necessity is significant in this context because it must be analyzed if the interference with the fundamental right corresponds to a determined social need, if it was proportionate to the legitimate aim pursued and if the reasons invoked by the national authority to justify it are relevant and sufficient. As a result, the existence of limits in the exercise of human rights is justified by “ *the need to protect important human or state values, but it is not admissible that in the name of these values, the state authorities limit the exercise of constitutionally guaranteed rights in an abusive and discretionary manner”* [6, p. 56].

Provisions of international documents regarding the restriction of human rights

The possibility of restricting the exercise of certain rights and human liberties is specified in several international acts/regulations/norms that have as their object the protection of human rights. Thus, *the Universal Declaration of Human Rights* provides that in the exercise of his/her rights and freedoms, each person is subject only to the restrictions established by law for the sole purpose of ensuring the recognition and respect of the rights and freedoms of others and for the satisfaction of the just requirements of morality, public order and general welfare, in a democratic society.

Through this provision, some fundamental rights are given a relative character, which means that the rights can be restricted in such a way as to prevent the abuse of rights and, at the same time, to preserve the democratic character of the society.

International Covenant on Civil and Political Rights stipulates that in the event of an exceptional public danger thet threatens the existence of the nation and is proclaimed by an official act, the party states may, within the strict limits of the requirements of the situation, to take derogatory measures from their obligations, provided that these measures are not incompatible with the other obligations they have according to international law and that they do not result in discrimination based only on race, color, sex, language, religion, or social origin [7].

International pact on economic, social and cultural rights stipulates that the state parties can only subject the rights to limitations established by law, only to the extent compatible with the nature of these rights and exclusively with a view to promoting the general well-being in a democratic society. The pact regulates the fact that no provision can be interpreted as implying for a state, a group or an individual any right to engage in an activity or to perform an act aimed at suppressing recognized rights or freedoms or limiting them more wider than those provided for in the Pact. No restriction or derogation from fundamental human rights, recognized or in force in any country by virtue of laws, conventions, regulations or customs, can be admitted, under the pretext that the Covenant does not recognize these rights or recognizes them to a lesser extent [8].

European Convention for the Protection of Human Rights and Fundamental Freedoms establishes that no provision of the Convention can be interpreted as *implying*, for a state, a group or an individual, any right to carry out an activity or perform an act aimed at the destruction of rights or of the recognized freedoms or to bring broader limitations than those provided by the Convention [9]. The European Convention, based on the jurisprudence *of the European Court of Human Rights,* allowed the definition of an important delimitation of the articles on which restrictions can be made, namely Article 8 (protection of private and family life), Article 9 (freedom of thought, conscience and religion), Article 10 (freedom of expression) and Article 11 (right to assembly and association).

The Convention provides in Article 18 that the restrictions that are brought to certain rights can only be applied for the purpose for which they were provided. This article is not " *a general clause of public order applicable to all the rights and freedoms guaranteed by the Convention, nor in the sense that it would establish a general authorization that would allow states to bring restrictions on these rights and freedoms, other than those already provided for in the Convention texts "* [10, p. 1016].

The Charter of Fundamental Rights of the European Union establishes that any limitation in the exercise of certain rights must be included in the law and no provision of the Charter limits or affects the rights recognized at the European or international level, especially those provided by the European Convention as well as by the constitutions of the member states. The Charter prohibits the abuse of rights, so in accordance with Article 54 no provision of the Charter entitles someone to engage in an activity or commit an act aimed at violating the rights and freedoms recognized by the Charter or wider limitations thereof [11].

Restriction of fundamental rights in exceptional situations in relation to the concept of security

The institution of the restriction of certain rights becomes all the more important as, in certain circumstances, it can even determine

the survival of states, the restrictions on them becoming obvious. When the life of the nation is at stake, this concept gives a special authority to a state to limit or restrict the scope of its obligations. While applying restrictions it is obvious that the core of the right cannot be affected nor the purpose of the protective instrument must be distorted. According to *the 1948 Universal Declaration of Human Rights*, general restriction clauses can be used to limit a person's rights and freedoms by the state when states of emergency are instituted.

According to Art. 15 para. 1 of *the European Convention*, states can take measures derogating from their obligations, in case of war or other public danger that threatens the life of the nation, if the situation requires it and the measures are not in contradiction with other obligations arising from international law. At the same time, no derogation from art. 2 (right to life), except in the case of death resulting from lawful acts of war, nor from art. 3 (prohibition of torture) and art. 4 (prohibition of slavery and forced labour).

European Social Charter contains, in art. F, provisions regarding exemptions in case of war or public danger. Thus, in the event of a public danger that threatens the life of the nation, any contracting party may take measures that derogate from the obligations set out in the Charter, to the strict extent that the situation demands it and provided that these measures are not in contradiction with the other obligations that derive from international law [12]. In Art. G of *the European Social Charter* provides that the rights and principles enunciated in the Charter cannot be subject to restrictions, except for those listed in the law and which are democratically necessary to guarantee respect for the rights and freedoms of other people or to protect public order, national security, public health or good morals. The restrictions assumed by virtue of the charter and the obligations recognized by it can only be applied for the purpose for which they were provided.

Consequently, restricting the exercise of certain rights or freedoms is permitted by law for one of the following reasons: ensuring national security, order, public health or morals, citizens' rights and freedoms; conduct of criminal investigation; preventing the consequences of a natural calamity or a disaster. The measure of restriction must be proportional to the situation that generated it, be applied non-discriminatory and not affect the existence of the right or freedom. Derogations from some international obligations in emergency situations are clearly different from the limitations allowed even in normal times. However, the obligation to limit any derogations to those strictly imposed by the exigencies of the situation reflects the application of the principle of proportionality in any situation [13].

Therefore, the establishment of exceptional states to protect the homeland and the nation was seen as a tool to ensure security. At the present time, the concept of *security* is not interpreted in a narrow sense, limited to the security of the territory against external aggression and the protection of national interests. Personal security is indivisible and universally applicable to any citizen, without discrimination. *Human Development Report*, elaborated in 1994 by the United Nations Development Program, devoted exclusively to human security, highlights that human development and human security are as important as territorial security [14] and identifies the seven categories of human security, as follows: *economic*, *food*, *sanitary*, *personal*, *community*, *political* and *environmental*.

Security analyzes focus on the protection of all vital aspects that are meant to enhance human freedoms and fulfillment. Human security interconnects with fundamental human rights. From its narrow perspective,

human security is a human right. In order to protect human security, institutions responsible for political measures must identify effective solutions for managing risks and limiting the causes of insecurity. Consequently, human security associates the sovereignty of the state with the duty to protect its own citizens under the state umbrella.

Conclusions

The considerations made so far are intended to underline the fact that international law has defined certain circumstances that confer legitimacy on the restriction of human rights. The actions of states that fall under the margin of appreciation doctrine must be examined in detail. Therefore, it is appropriate to analyze meticulously those conditions in which the state can derogate from its responsibilities with ensuring a balance of legitimate interest, necessary in a democratic society, and the margin of appreciation must be used in a democratic way. The interpretation of this recital does not only refer to a proportionality of the interference in relation to a legitimate aim but also to the responsibility to use minimal interference to secure the objective and achieve the objective. From another perspective, the very structure of the international documents that regulate these clauses imposes the rule that any restriction on recognized rights requires a legal provision. In other words, the restrictions are governed by the principle of legality aimed at avoiding the discretionary power of states. Furthermore, laws must be clear, accessible to citizens and accurate.

Second, the measure of restriction of rights must be necessary in a democratic society, that is, respond to a pressing and intense social need. This requirement seems to serve a clear objective: to guarantee the protection of non-derogable legal rights and to ensure the democratic functioning of society as a whole.

Finally, all these articles include a list of legitimate purposes that argue for the application of a restriction of fundamental rights. But this list of purposes is not an exhaustive one so that, according to international documents, the state can be exempted from its duties in exceptional or emergency situations that affect the entire population and constitute a threat to the organization of life in the community of which the state is composed. The crisis or danger must be exceptional, in the sense that the normal measures or restrictions, permitted by law to maintain safety, health and public order, are clearly inadequate and the main criteria for rationalizing the exemption must justify that they threaten the life of the nation. In such situations, ensuring the security of the state and citizens, viewed in an extinguishing way, through all aspects of human existence, becomes a priority over human rights.

In conclusion, the principles and criteria established by international human rights law draw admissible limits that states must take into account in order to restrict some fundamental rights of citizens, in a non-discriminatory manner, without affecting their essence and existence. However, the effectiveness of these international guarantees depends substantially on the adequate development of constitutional provisions and national legislative provisions.

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ENSURING THE RIGHT TO A FAIR TRIAL WITHIN THE DOCUMENTATION OF THE CONTRAVENTION THROUGH THE LENS OF THE PROVISIONS OF THE ECHR

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Indisputably the right to a fair trial is one of the basic rights enjoyed by any person involved in a contravention process. Even if it is not directly enshrined in the contravention law, it is still found in the content of the law, its application being an obligation of the state authorities involved in carrying out the contravention process. Both the national jurisprudence and the ECtHR jurisprudence denote the role that this principle has in the administration of justice, its non-compliance having the consequence of harming the principles and fundamental rights guaranteed. Although the contravention presents a social danger that is reduced in relation to the crime, that fact must not influence the smooth progress of the contravention process, so that the investigating agent ignores the observance of all the principles established by law in the process of examining the contravention.

Keywords: *misdemeanor, finding agent, principles, misdemeanor process, fair trial, penalty.*

ASIGURAREA DREPTULUI LA UN PROCES ECHITABIL ÎN CADRUL DOCUMENTĂRII CONTRAVENȚIEI PRIN PRISMA PREVEDERILOR CEDO

Indiscutabil, dreptul la un proces echitabil este unul din drepturile de bază de care beneficiază orice persoană implicată într-un proces contravențional. Chiar dacă nu este consfințit direct în legea contravențională, totuși el se regăsește în conținutul legii, aplicarea acestuia fiind o obligație a autorităților statului implicate în realizarea procesului contravențional. Atât jurisprudența națională, cât și jurisprudența CtEDO, denotă rolul pe care îl are acest principiu în efectuarea justiției, nerespectarea acestuia având ca consecință lezarea principiilor și drepturilor fundamentale garantate. Cu toate că contravenția prezintă un pericol social redus în coraport cu infracțiunea, faptul respectiv însă nu trebuie să influențeze asupra bunei desfășurări al procesului contravențional, astfel încât agentul constatator să ignore respectarea tuturor principiilor stabilite de lege în procesul de examinare al contravenției.

Cuvinte-cheie*: contravenție, agent constatator, principii, proces contravențional, proces echitabil, sancțiune.*

GARANTIR LE DROIT À UN PROCÈS ÉQUITABLE DANS LE CADRE DE LA DOCUMENTATION DE LA CONTRAVENTION AU REGARD DES DISPOSITIONS DE LA CEDH

Incontestablement, le droit à un procès équitable fait partie des droits fondamentaux dont jouit toute personne impliquée dans une procédure de contravention. Même si elle n'est pas directement inscrite dans le droit de la contravention, elle se retrouve tout de même dans le contenu de la loi, son application étant une obligation des autorités étatiques impliquées dans la conduite de la procédure de contravention. Tant la jurisprudence nationale que la jurisprudence de la Cour européenne des droits de l'homme témoignent du rôle que ce principe a dans l'administration de la justice, son non-respect ayant pour conséquence de porter atteinte aux principes et droits fondamentaux garantis. Bien que la contravention présente un danger social réduit par rapport au crime, ce fait ne doit pas influencer le bon déroulement du processus de contravention, de sorte que l'enquêteur méconnaît le respect de tous les principes établis par la loi dans le processus d'examen de la violation.

Mots-clés. *délit, agent de recherche, principes, procédure de délit, procédure équitable, peine.*

ОБЕСПЕЧЕНИЕ ПРАВА НА СПРАВЕДЛИВОЕ СУДЕБНОЕ РАЗБИРАТЕЛЬСТВО В РАМКАХ ДОКУМЕНТИРОВАНИЯ ПРАВОНАРУШЕНИЯ СКВОЗЬ ПРИЗМУ ПОЛОЖЕНИЙ ЕСПЧ

Бесспорно, право на справедливое судебное разбирательство является одним из основных прав, которым обладает любое лицо, участвующее в процессе о правонарушении. Даже если это прямо не закреплено в законе о правонарушениях, оно все же включено в содержании закона, его применение является обязанностью государственных органов, участвующих в осуществлении процесса о правонарушениях. Как национальная судебная практика, так и судебная практика ЕСПЧ указывают на роль, которую этот принцип играет в отправлении правосудия, а его несоблюдение приводит к нарушению гарантированных основных принципов и прав. Несмотря на то, что правонарушение представляет собой уменьшенную по отношению к преступлению общественную опасность, этот факт не должен влиять на беспрепятственное течение процесса о правонарушении, чтобы следственный деятель игнорировал соблюдение всех установленных законом принципов в процессе рассмотрения дела.

Ключевые слова: *правонарушение, фиксирующий правонарушение агент, принципы, процесс по правонарушению, справедливый процесс, наказание.*

Introduction

In its essence, the right to a fair trial is a fundamental right of the individual, to which corresponds the correlative obligation of the state, which consists in refraining from any means or forms of restricting the exercise of this right. The specific ways of manifesting the state's general obligation to abstain are multiple, but they are not equivalent to the measures that the state must undertake in order to achieve fair justice [1 p.35].

Ideas and discussions

Art. 20 of the Constitution of the Republic of Moldova establishes: " *Every person has the right to effective satisfaction from the competent courts against acts that violate rights and freedoms and his/her legitimate interests. No law can limit access to justice* ", followed by art. 21 which states: " *Any person accused of a crime is presumed innocent until his/her guilt is legally proven, in the course of a public judicial process, during which he/she was provided with all the necessary guarantees for his/her defense* " [2] , generally enshrines the right of all citizens to a fair procedure in a trial.

However, as in the Constitution of Romania, the Constitution of the Republic of Moldova does not expressly define the right to a fair trial, nor does it provide in detail its guarantees, making express reference only to the guarantee of access to justice [3].

According to art. 7 of the Contraventional

Code: " *the person can be sanctioned only for the contravention in respect of which his/her guilt is proven , in compliance with the rules of this code*", and art. 375 of the aforementioned code states: "*the person accused of committing a misdemeanor is considered innocent as long as his/her guilt is not proven in the manner provided by this code* " [4].

As the main procedural guarantee of the right to defense, the presumption of innocence, initially enshrined internationally in art. 9 of *the Universal Declaration of the Rights of Man and of the Citizen* of 1789 and later in art. 6 par. 2 of *the European Convention on Human Rights*, essentially regulates a person's right to be presumed innocent until proven guilty.

It is important to remember that, in principle, compliance with it requires the meeting of 3 cumulative conditions, respectively - the authorities must not start from the prejudice of the guilt of the beneficiary of this presumption, - the burden of proof must fall on the accuser, i.e. the state bodies, so it always rests with the authorities the obligation to establish guilt, the accused not having the duty to provide evidence to prove his own innocence, as well as that - *any* doubt or reasonable doubt benefits the passive subject of the prosecution procedure [5].

The presumption of innocence is the central element of the right to a fair trial, only under the conditions of its observance can effectively ensure the respect of the other components of the right to a fair trial [6 p.36].

In the light of the jurisprudence of the European Court of Human Rights, it was ruled, at the level of principle, that the contraventional acts can be assimilated to some " *accusations in criminal matters"*, (*Ziliberberg v. Moldova, judgment of 01.02.2005, §35 and Anghel v. Romania, judgment of 04.10.2007, §52*) [7], the European Court of Human Rights noted that in these cases the elements that suggest that there were criminal charges prevail. Thus, in contraventional matters, the procedural guarantees specific to criminal matters were recognized.

In this sense, the criteria constantly used by the ECtHR to establish the criminal or non-criminal nature of a contravention are represented by the classification of the deed in domestic law, the nature of the illegal deed and the nature of the domestic norm that sanctions it, respectively the nature and severity of the sanction to which the active subject of the offense is exposed. It must be specified that the three criteria should not be analyzed cumulatively except in the situation where a distinct analysis of them would not be useful in order to establish the concrete nature of the fact [8].

We reiterate that respect for the principle of innocence is an essential factor in the process of documenting a contravention, a principle that is inextricably linked with the right to a fair trial. Although the text of art. 6, point 1, states that any person has the right to have his/her case examined fairly, publicly and within a reasonable time, by an independent tribunal and impartial, established by law, which will decide either on the violation of rights and obligations of a civil nature, or on the merits of any accusation in criminal matters directed against him/her, a rule that must be respected both in the process of examining the case by a court and throughout the documentation process (in our case) of the contravention.

The condition of "fairness" is different from all other elements of Article 6 mainly because it covers proceedings as a whole, and the question of whether a person has had a "fair" trial is examined by looking cumulatively at all stages, not just one incident particular or of a single procedural defect; consequently, errors at one level can be corrected at later stages (*Monnell and Morris v. the United Kingdom, §§ 55-70*).

The notion of "fairness" is also autonomous from how the domestic procedure interprets a violation of the relevant norms and codes

(*Khan, §§ 34-40*), so that a procedural error that constitutes a violation of the domestic procedure, even and a flagrant one, cannot lead, in itself, to an “unfair” trial (*Gäfgen v. Germanyiei [MC], §§ 162-188*); and, conversely, a violation under Article 6 may be found even where domestic law has been observed.

On the other hand, in the rather exceptional case of *Barberà, Messegué and Jabardo v. Spain (§§ 67-89*), domestic proceedings were held to be unfair because of the cumulative effect of various procedural errors, despite the fact that each error, taken separately, would not have convinced the Court that the proceedings were “unfair”.

In accordance with the principle of subsidiarity, Article 6 does not allow the European Court of Human Rights to act as a fourth instance, namely to re-examine the case in fact or to re-evaluate alleged violations of national law (Bernard, §§ *37-41*), or to rule on the admissibility of the evidence (*Schenk, §§ 45-49*). At the same time, the manner in which the evidence was obtained and used by the national authorities could be relevant to the conclusion regarding the overall fairness of a trial, in particular, when a violation of Article 3 is involved (Jalloh v. Germany*, Othman v. the United Kingdom*) [9 p.63].

In turn, art. 47 of the Charter of Fundamental Rights of the EU, guarantees the right to a fair trial and an effective remedy, according to the interpretation given by the European Court of Human Rights (ECHR) and, respectively, by the Court of Justice of the European Union (CJEU).

As mentioned above, these rights are also provided for in international instruments, such as articles 2 (3) and 14 of the International Covenant on Civil and Political Rights (ICCPR) [10] of the United Nations (UN) and Articles 8 and 10 of the Universal Declaration of Human Rights (UDHR) [11] of the UN. The core elements of these rights include effective access to a dispute resolution body, the right to a fair trial and timely resolution of disputes, the right to adequate compensation, as well as the general application of principles relating to the efficiency and effectiveness of the performance of the act of justice.

Although according to the social danger of the committed illegal act classified as a misdemeanor is lower than the illegal act classified as a crime, this should not condition the competent authority to ascertain and document a contravention to ignore the full compliance with the requirements of the legal framework.

It is necessary to mention the fact that by respecting the right to a fair trial within the contravention process, we must not only refer to the examination stage of the case in the court of law, but primarily to the entire process of accumulating evidence by the ascertaining agent regarding the fact of committing the contravention. Ignoring by the ascertaining agent the respect of the right to a fair trial only on the grounds that in relation to the crime, the contravention has a lower social danger, and the violator in most cases does not dispute the decision applied by the ascertaining agent, essentially affects the quality of justice, a circumstance that it does not have to be agreed.

According to art. 440 para. (1) from the Criminal Code, the detection of the criminal act means the activity, carried out by the detecting agent, of collecting and administering the evidence regarding the existence of the contravention, of concluding the minutes regarding the contravention, of applying the sanction contravention or referral, of the file, as the case may be, to the official authorized to examine the contravention case, within the authority of which the ascertaining agent is a part, in the court or in another body for resolution. In accordance with art. 442 para. (1) of the Contravention Code, the minutes regarding the contravention is an act by

which the illegal act is individualized and the perpetrator is identified. The report is concluded by the ascertaining agent based on personal findings and accumulated evidence, in the presence of the perpetrator or in his absence.

The importance of ensuring respect for the right to a fair trial in the process of documenting a contravention carried out by the investigating agent, is motivated by the fact that out of the total number of contraventions committed and recorded, less than half of them were contested in court.

Thus, according to NBS (National Bureau of Statistics) data, in 2021 in the Republic of Moldova, 629.2 thousand contraventions were found, or 221.4 thousand contraventions more compared to 2020. Of the total number of decisions taken on contravention cases, in most cases decisions were adopted to apply the contraventional sanction (97.2% or in 610.6 thousand cases). In 4.9 thousand cases (0.8%) decisions were taken to submit to preliminary (criminal) investigation bodies, given the fact that in the actions contraventions contained the indication of the crime, and in 12.4 thousand cases the contravention process was terminated for other reasons (2.0%). On average, 235 decisions to apply the contraventional sanction were returned to 1000 inhabitants [12].

In the Report on the examination of files in the courts during 2021, we find that 24,391 contravention cases were registered in the country's courts and 21,881 contravention cases were resolved [13].

We agree with the statement of the authors Tofimov Ig. and Crețu A., according to which the issue related to the examination of the contravention case by the investigating agent is a particularly controversial subject. This is related to the fact that article 114 of the Constitution of the Republic of Moldova [2] establishes that justice is administered in the name of the law only by the courts judicial. Justice is to be understood as one of the fundamental forms of the state's activity, which consists in judging civil, contraventional, criminal and other causes in the application of the penalties provided by law. In this way, once the Contraventional Code identifies specific powers for the authorities provided by articles 400 - 423 [10] of the Contraventional Code [4], namely powers of examination and application of the sanction, it should be noted that, in fact, the act of justice is carried out not only by the courts, but also by other authorities [14, p. 216].

However, regarding this statement, the Constitutional Court of the Republic of Moldova rules that, unlike criminal cases, in contravention cases the person accused of committing a contravention can be sanctioned even by the authority that has the competence to investigate the imputed act. Depending on the competence of the authority, the sanction can be imposed through an administrative act that takes the form of a decision, a report, etc. The contraventional decisions (decisions), including those issued by the ascertaining agents within the limits of the competence assigned by law, constitute enforceable documents [article 11 letter. c) from the Enforcement Code].

In the light of the above and we want to emphasize the importance of respecting the right to a fair trial in the documentation of contraventions, because first of all in the vast majority of cases the decision received by the investigating officer as a result of the examination of a contravention is not contested by any of the parties, and secondly, analyzing the judicial practice, we establish the fact that in the appeals filed by the violators it is stipulated that the contravention process took place without ensuring a fair trial [15].

From the mentioned it follows that, although the administrative act by which the contraventional act is established and a contraventional sanction is applied is an enforceable document, it cannot be considered

definitive from the moment it is drawn up, considering the fact that the feature of “definitiveness” is characteristic only for jurisdictional decisions [16].

In turn, the ascertaining agent has the role of administering evidence in the order provided by law, necessary in order to verify the legality and validity of the minutes. Therefore, the simple finding *ex propriis sensibus* of the ascertaining agent is not sufficient for the court to establish the guilt of a person on whose name a contravention report was drawn up. Respectively, as long as the facts described in the content of the act are unconfirmed by other means of proof, in the given sense, a series of doubts can be raised, being applicable the principle of law *in dubio pro reo* [17].

In judicial practice, it is ruled that although the report on the contravention is an administrative act emanating from a public authority equipped with the competence to ascertain and sanction contraventional facts and enjoys the presumption of legality, authenticity and truthfulness, the contravention sanctioning of the person must be supported by substantial evidence, from which the composition of the contravention would result.

In accordance with the relevant jurisprudence of the European Court of Human Rights, courts are obliged to prove the guilt of the accused by adopting reasoned solutions.

The lack of reasons is a violation of the right to a fair trial, where national courts refrain from giving a specific and explicit answer to the most important questions, without giving the party who formulated them the opportunity to know whether a certain support was neglected or rejected, this fact will be considered a violation of the right to a fair trial (*Ruiz Torija against Spain, 09.12.1994, §29; Papon against France (no.2), dec., 15.12.2001; Boldea against Romania, 15.02.2007, §30*).

Thus, the ascertaining agent has the role of administering evidence in the order provided by law, necessary in order to verify the legality and validity of the minutes. Therefore, the simple finding *ex propriis sensibus* of the ascertaining agent is not sufficient for the court to establish the guilt of a person on whose name a contravention report was drawn up. Respectively, as long as the facts described in the content of the act are unconfirmed by other means of proof, in the given sense, a series of doubts can be raised, being applicable the principle of law *in dubio pro reo* [18].

Using the statements of Romanian doctrinaires and adjusting them to the rules of the contravention process, beforehand for practitioners, the influence the European jurisprudence on the contravention procedure is no longer just a formal guarantee, it has by itself a fundamental importance. Reference procedural norms contained in the contravention procedure continue to guarantee the formal regularity of the procedure, so that the process is carried out in a fair manner. But it is important to state that the contravention procedure has acquired a fundamental importance today, a right that prevails over any other consideration, thus, the right to a fair trial, which is the core of the contravention procedure, becomes a criterion for assessing the respect by the courts of the rights substantial, becoming itself a genuine substantial right [19 p. 535-536].

Returning to art. 6 of the ECHR, in the order of the idea set out above, it involves the examination of the fairness of the procedures taken as a whole - that is, from the perspective of all the procedural stages and the possibilities granted to the applicant - and aims at the evaluation of an isolated procedural error. However, in recent years the Court has begun to give greater importance to certain key moments in the proceedings – in particular, the first questioning of a suspect in criminal proceedings (*Imbrioscia v. Switzerland, §§ 39-44; Salduz v. Turkey [MC], §§ 56-62; Panovits v. Cyprus, §§ 66-77; Dayanan v. Turkey, §§ 31-43; Pishchalnikov v. Russia, §§ 72-91*).

When defining Article 6 as a limited right, the Court stated that what constitutes a fair trial cannot be determined by a single invariable principle, but must depend on the circumstances of a particular case. Consequently, a *sui generis* proportionality test, under Article 6, has been applied on several occasions, also known as the "essence of the right" test for example, when a different degree of protection of the privilege against self-incrimination has been established regarding minor criminal acts (contraventions or so-called "contraventions, administrative offences" in some European legal systems), as opposed to the rules that apply to the investigation of more serious acts (*O'Halloran and Francis v. the United Kingdom [MC], §§ 43-6* 3); or when a reduced degree of the guarantee of equality of arms, applicable in civil cases compared to criminal ones, was confirmed (*Foucher v. France, §§ 29-38; unlike Menet v. France, §§ 43-53*) [9 p. 14-15].

Conclusions

In conclusion, we mention that emerging from the jurisprudence of the ECtHR, in cases including against the Republic of Moldova, contraventional acts, as a type of illegality, belong to the criminal matter, implicitly contraventional cases are assimilated to criminal ones, so for this reason, the representatives of the state in the person of the ascertaining agents are obliged to respect in their activity the rights and guarantees of the persons against whom the contravention process has been initiated, or who have been brought to contraventional liability, including those provided for by the European Convention of Human Rights.

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CIVIL COURT DECISIONS IN THE REPUBLIC OF MOLDOVA: ESSENCE, DISTINCTIVE FEATURES AND SEPARATE TYPES

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In this article, the authors conduct a scientific study of the distinctive features and highlight certain types of judgment in civil cases. In particular, the authors draw a distinction between other decisions issued in the framework of civil proceedings, and also highlight certain types of court decisions inherent exclusively in civil proceedings. The authors give specific features of the court decision that distinguish it from other acts of the court, namely, the court decision is a procedural document that resolves the case and restores violated rights, issued by the court in the procedural form established by law on the basis of consideration of the case on the merits. Separately, a characteristic is given to each type of court order and the requirements that each court order must comply with are characterized.

Keywords: *court decision, act of justice, civil procedure, court order, Republic of Moldova.*

HOTĂRÂRI PRIVIND CAUZELE CIVILE ÎN REPUBLICA MOLDOVA: ESENȚĂ, CARACTERISTICI DISTINCTIVE ȘI TIPURI SEPARATE

În prezentul articol autorii efectuează un studiu științific al trăsăturilor distinctive și evidențiază anumite tipuri de judecată în cauzele civile. În special, autorii fac o distincție între alte hotărâri pronunțate în cadrul procedurilor civile și, de asemenea, evidențiază anumite tipuri de hotărâri judecătorești inerente exclusiv procesului civil. Autorii dau trăsături specifice ale hotărârii judecătorești care o deosebesc de alte acte ale instanței și anume, hotărârea judecătorească este un act de procedură care soluționează cauza și restabilește drepturile încălcate, emisă de instanță în forma procesuală stabilită de legea privind baza de examinare a cauzei pe fond. Separat, fiecărui tip de hotărâre judecătorească i se acordă o caracteristică și sunt caracterizate cerințele pe care trebuie să le respecte fiecare hotărâre judecătorească.

Cuvinte-cheie: *hotărâre judecătorească, act de justiție, procedură civilă, ordin judecătoresc, Republica Moldova.*

DÉCISIONS DES TRIBUNAUX CIVILS EN RÉPUBLIQUE DE MOLDOVA: ESSENCE, PARTICULARITÉS ET TYPES SÉPARÉS

Dans cet article, les auteurs mènent une étude scientifique des particularités et mettent en lumière certains types de jugements en matière civile. En particulier, les auteurs établissent une distinction entre les autres décisions rendues dans le cadre de procédures civiles et mettent également en évidence certains types de décisions de justice inhérentes exclusivement aux procédures civiles. Les auteurs donnent des

caractéristiques spécifiques de la décision de justice qui la distinguent des autres actes de justice, à savoir que la décision de justice est un document de procédure qui résout l'affaire et rétablit les droits violés, délivré par le tribunal sous la forme procédurale établie par la loi sur la base de l'examen de l'affaire au fond. Séparément, une caractéristique est donnée à chaque type d'ordonnance du tribunal et les exigences auxquelles chaque ordonnance du tribunal doit se conformer sont caractérisées.

Mots-clés: *décision de justice, acte de justice, procédure civile, ordonnance de justice, Republique de Moldova.*

РЕШЕНИЯ СУДА ПО ГРАЖДАНСКИМ ДЕЛАМ В РЕСПУБЛИКЕ МОЛДОВА: СУЩНОСТЬ, ОТЛИЧИТЕЛЬНЫЕ ЧЕРТЫ И ОТДЕЛЬНЫЕ ВИДЫ

В данной статье авторы проводят научное исследование отличительных черт, и выделяют отдельные категории судебного решения по гражданским делам. В частности, авторы проводят разграничения между другими постановлениями, выносимыми в рамках гражданского судопроизводства, а также определяют отдельные виды решений суда, присущих исключительно гражданскому процессу. Авторами приведены конкретные особенности судебного решения, которые отличают его от других актов суда, а именно судебное решение - это процессуальный документ, разрешающий дело и восстанавливающий нарушенные права, вынесенный судом в установленной законом процессуальной форме на основе рассмотрения дела по существу. Отдельно дается характеристика каждому виду постановления суда и характеризуются требования, которым должно соответствовать каждое постановление суда.

Ключевые слова: *решение суда, акт правосудия, гражданский процесс, постановление суда, Республика Молдова.*

Introduction

Judgment, as A. F. Kleinman, is, first of all, an act of protecting the law [18, p. 83]. Therefore, the adoption by the court of a decision - an act of protecting the right - implements not only the purely sectoral targets of civil proceedings, but is also aimed at the implementation of constitutional provisions, primarily the prescription for the absoluteness of judicial protection of rights and freedoms. The parties apply to the court for the resolution of the dispute and, as a result, for the issuance of a lawful and reasonable court decision. Of course, in the process of considering the case, the parties, exercising the administrative rights granted to them by law, can conclude an amicable agreement, the plaintiff can refuse the claim, and the defendant can recognize the claim. However, the issuance of an appropriate ruling only indicates the elimination of the controversial principle from the process and the performance by the judiciary of one of its functions - to mediate in disputes between subjects of law. the right of the party is disputed by the other party, the issuance of a court decision actually remains the only legal way to resolve the dispute on the merits .

Gradually, this discussion came to naught, since most authors agreed that “the presence in the court decision of two points - declarative and imperative - is a necessary consequence of the peculiarities of the court decision as an act of justice” [3, p. 16-17]. In one form or another, most scientists now agree with this thesis. Some authors link the presence of both declarative and imperative moments in a court decision with the fact that the latter is an act of protecting the right. In their opinion, the very concept of “protection of rights” consists of two points - the establishment (recognition) of the existence of those rights, for the protection of which the plaintiff applied to the court, and the promotion of the implementation of the established rights [16, p. 20]. The stated positions are, in fact, identical, because justice and the protection of rights are largely intersecting concepts. N. T. Arapov correctly noted that the term “protection” can also be used to refer to the procedural activities of the court. In such a procedural understanding,

the term "protection" is on the same plane as justice [5, p. 31].

With these points of view, one can agree with some reservations. Indeed, any court decision contains an imperative statement of certain circumstances, legal facts, and legal relations. The imperativeness of this statement is the basis for the application of state coercion, expressed in an order to the persons participating in the case to perform certain actions or refrain from certain actions. However, the presence of declarative and imperative moments, in our opinion, follows from the peculiarities of a court decision not just as an act of justice, but as a special law enforcement act, since justice is a special case of law enforcement. Law enforcement activity is always the solution of legal cases and issues, i.e., in whatever form it is carried out, it is always characterized by the establishment of certain circumstances and the creation of individual prescriptions [4, p. 182]. Justice, being a special kind of law enforcement, brings these imperative and declarative moments to a qualitatively new level, allowing justice itself to become a regulator of civil circulation through the resolution of individual cases.

Thus, extrapolating the characteristics of law enforcement activities to law enforcement acts, which are court decisions, is certainly justified. However, the essence of a judicial decision cannot, in our opinion, be reduced only to the presence of declarative and imperative moments in it. This is due to the special position of the court decision in a number of other law enforcement acts.

Presentation of the main material

Judgment - the final judicial act by which the case is resolved on the merits. However, the protection of rights, freedoms and legitimate interests, being the purpose of a court decision, still cannot be considered as the essence of a court decision without regard to some of its other characteristics. When analyzing the essence of a court decision, of course, it is necessary to take into account the objectives of civil proceedings, but one should also not forget about the nature of the activities carried out by the courts, within which a court decision is made, i.e. proper justice.

Any human activity, and justice in this regard is no exception, is dynamic. This means that any activity has a beginning and an end, and is also characterized by a certain length in time. Achieving the goals of justice is the end point of the activity of the court, however, in order to achieve it, this activity must be initiated and carried out through a series of successive stages. Therefore, in our opinion, the essence of a court decision should include not only the protection of rights, freedoms and legitimate interests, but also the moments preceding it that characterize the activities of the court.

As for the initiation of the judicial activities of the court, here it is necessary to note the "passivity" of the court, which consists in the impossibility of initiating civil cases and cases from administrative and other public legal relations on its own initiative. Without applying in the appropriate manner to the court of the plaintiff or the applicant, it is impossible not only to consider a civil case, but even to initiate it: the court should not act out of duty (ne procedat judex ex officio). This circumstance reflects the principle of optionality in civil and arbitration proceedings [2, p. 83-84; 25, p. 236; 27, p. 244].

The next point that characterizes the essence of a judicial decision is that justice is carried out according to certain rules in a certain sequence. In this case, we are talking about the procedural form. Quite a lot has been said in the literature about the need to take into account the fact that a court decision is a procedural act rendered in strict accordance with the procedural form. The point of view is generally accepted, according to which the observance of the procedural form is a

necessary condition for the issuance of a lawful and justified court decision [26, p .7-14].

However, not only the application of the rules of procedural law characterizes the activities of the court. The court, considering and resolving legal cases, also applies the norms of substantive law, which is a consequence of the law enforcement nature of its activities.

So, the essence of the court decision lies in the fact that this procedural act is issued as a result of consideration and resolution by the court of a specific legal case initiated by the parties, who thereby seek to protect their disputed or violated rights, freedoms or legally protected interests. At the same time, the activity of the court, which is inherently law enforcement, should be clothed in a procedural form.

All these points are typical for a court decision, but even in the aggregate they do not fully reflect its essence.

The parties do not apply to the court in order to get their hands on a document reflecting the opinion of the court on the existence or absence of certain legal relations, legal facts. The parties need real protection of their rights, freedoms and legally protected interests. And from this point of view, even the imperative moment contained in this document is unrealizable without the presence of certain circumstances. Such a legally significant circumstance is the legal force of the judgment.

Thus, the essence of a judgment in civil proceedings lies in the fact that it is a volitional act of a judicial body to which the relevant powers are delegated by the state. Resolving a civil case on the merits on behalf of the state, the court confirms a certain legal relationship (or its absence), the existence of subjective material rights and obligations, or certain legal facts.

However, in some cases, just confirmation of the legal relationship of a right or fact is not enough for the decision to provide real judicial protection, therefore, the imperious nature of the court decision is necessary, manifested in the order to perform certain actions (or refrain from actions) in accordance with the law.

A court decision in a civil process is a law enforcement act, since the resolution of a civil case is based on the application by the court to the established circumstances of the norms of substantive law. Consequently, each court decision is a certain rule of law, which, being specified by the court, becomes undoubted in its content and in the final decision receives the utmost certainty.

In civil procedural legislation, these features of a court decision are expressed and reflected in the following definition: a court decision is an act of expression of the will of a public authority, which is expressed in the qualification and in the authoritative resolution of a disputed legal relationship between the persons participating in the case.

Therefore, the decision of the court has the following features of acts of application of law:

1) in general, it has a one-time value.

2) it is an official act - a document expressing the will of the state and adopted by the competent authority.

3) it causes certain legal consequences of an individual nature, being the final link in a certain legal structure.

4) is an order of the court, on the basis of general norms, to individually determine the measure of possible and proper behavior for specific persons.

5) is an external formal confirmation of the result of law enforcement in each civil case.

6) it is a way of real implementation of state coercion.

7) it must meet the requirements enshrined in civil procedural legislation.

Since the court decision completes the consideration of the case and eliminates the existing dispute between the parties, the significance of the court decision is related to the tasks that the law sets before the court.

The most important task of legal proceedings is jurisdictional, i.e. correct and timely consideration and resolution of civil cases.

Therefore, the significance of the court decision, first of all, is that it resolves the considered civil case. The court decision in this regard restores the violated rights, specifies the rights and obligations of the parties. At the same time, a court decision is a legal fact, which is associated with the emergence, change, termination of legal relations. After the entry into force of the decision, it can be executed, including forcibly.

The next task of legal proceedings is to strengthen law and order, prevent offenses and form a respectful attitude towards law and court. A judicial decision, restoring violated rights, restores and, therefore, strengthens the rule of law in the state, contributes to the prevention of offenses, and educates citizens in the spirit of respect for the law.

In order for the decision to really contribute to the fulfillment of the tasks set by the state for justice, it must meet all the requirements that apply to it.

As for the significance of a court decision, in the theory of civil procedure, a distinction is made between the socio-political and legal significance of this decision.

The socio-political significance of the decision is manifested in the fact that it ensures the protection of personal, public and state interests, is a means of educating individuals and legal entities, and has a preventive effect on real and potential offenders.

The legal significance of the court decision lies in the fact that this act resolves the disputed legal relationship, and the decision that has entered into legal force is mandatory for execution by all institutions, organizations, officials and citizens throughout the territory of the Republic of Moldova [9, p. 87].

Summarizing the above, we can conclude that the essence of the decision lies in the fact that it is a volitional act of the state body, resolving a civil case on the merits on behalf of the state, the court confirms a certain legal relationship or its absence, subjective material rights and obligations or certain facts.

Thus, through the issuance of a decision, the correct and timely consideration and resolution of civil cases is carried out in order to protect the violated or disputed rights, freedoms and legitimate interests of individuals and legal entities, as well as the rights and interests of the state, administrative-territorial units, other persons who are subjects of civil , labor or other legal relations, and moreover, the tasks of strengthening law and order, preventing offenses, forming a respectful attitude towards law and court are resolved.

In order to protect the subjective rights, freedoms and legitimate interests of citizens and organizations, the court, in the process of administering justice, resolves a particular issue through written acts called court rulings [11, p. 415].

Depending on the content of the issue being resolved, the court of first instance adopts decisions in the form court orders, court decisions, definitions .

Thus, the decision of the court of first instance, by which the case is resolved on the merits, is issued in the form solutions . Along with decisions, the court of first instance also makes other decisions, referred to as definitions.

Under Chapter XXXV The Code of Civil Procedure of the Republic of Moldova provides for a special type of judicial act - a court order, which is issued by a judge under certain conditions before the initiation of civil proceedings [1, p. 91].

A court order is similar to a court decision. Both of these acts are issued by the court, they liquidate the dispute and are subject to execution (including forced) [6, p. 7].

But along with similarities, a court order also contains a number of fundamental differences from a court decision. These differences in the

scientific literature drew the attention of V.I. Reshetnyak:

- the decision can be made by the court in any civil case, it can set out the authoritative judgment of the court on any claim made by the plaintiff or defendant. In the order of writ proceedings, the court allows a strictly defined range of requirements [7, p . 28].

- the decision is decided by the court as a result of the competition of the parties in the framework of a public hearing of the case, during which the parties give arguments designed to confirm their correctness, to refute the arguments of the opposing party. A court order is issued without a trial, without summoning the debtor and the recovered to a court session, without hearing their explanations.

- the decision is based on the explanations of the parties, the evidence presented by the parties, examined during the trial. The court order is based on the documents submitted by the applicant, on the arguments communicated by him, designed to convince the court that the grounds of the claim cannot be refuted by the defendant and the claims of the defendant cannot be challenged, as well as on the fact of the absence of objections from the defendant, which is of procedural significance, or his failure to appear in court on a summons.

- the decision of the court is motivated. The court is obliged to indicate in its decision the circumstances that it established and which influenced its decision, to explain for what reasons it did not take into account other circumstances (if the claim is recognized by the defendant, the reasoning part can only indicate the recognition of the claim and the acceptance his court). The court order is not motivated in any way, in addition to the order of the court to the obligated person to perform certain actions, it does not contain any explanations.

- the procedure for making decisions and is regulated in detail by law. The decision is decided by the court in the deliberation room, secretly, with regard to the issuance of a court order, the law is not so categorical.

– these institutions have different subject composition. It is not the plaintiff and the defendant who participate in writ proceedings, but the creditor (collector) - the person who applied to the court, and the debtor - the person from whom the creditor asks to collect. At the same time, the order is always based on the requirements presented to the court only by a financially interested person.

- with a judicial decision and a court order differ in the order of their appeal. The decision may be appealed on the grounds in the manner prescribed by law. The order can only be challenged, after which it is subject to mandatory cancellation. That does not prevent the further movement of the case, so the legislator did not provide for the possibility of appealing it. The dispute that has arisen is considered according to the general rules of action proceedings [14, p. 15].

- a court decision and a court order differ in the execution procedure. The decision is subject to execution only after its entry into legal force, with the exception of cases when it is applied for immediate execution. The basis for execution is a writ of execution issued on the basis of the decision. The court order itself is an executive document, no other documents are required for its execution [23, p. 51].

In accordance with Art. 269 of the Code of Civil Procedure of the Republic of Moldova, decisions of the first instance or judges that do not resolve the case on the merits are issued in the form of rulings in the deliberation room in accordance with the rules provided for in Article 48 of the Code of Civil Procedure of the Republic of Moldova [10].

Judicial solution different from judicial definitions by the fact that the decision carries out an act of justice, i.e. the violated or disputed subjective rights or legitimate interests are

protected. Therefore, satisfying the claim or refusing to satisfy it, the judge (court) protects the rights and legitimate interests of the plaintiff or the defendant, and with the adoption of a court decision, the disputed right (interest) becomes indisputable.

The definition as a judicial act does not resolve the merits of the case (the subject of the dispute). A court decision always ends the proceedings. However, civil procedural legislation provides for two exceptions to this general rule. For example, the proceedings in the court of first instance end with a decision to terminate the proceedings and a decision to leave the application without consideration [13, p. 73].

Determinations can be made not only by a full court, but also by a judge, for example, in the process of preparing a case for a hearing.

The court may issue rulings both in the deliberation room and during the court session, having consulted on the spot. It depends on the degree of complexity of the issue and the need for a detailed or brief argument.

By analogy with a court decision, it distinguishes between introductory, descriptive, motivational and resolutive parts.

Court rulings are announced immediately after they are issued.

The ruling does not end the trial, except for the issuance of a ruling to terminate the proceedings and a ruling to leave the application without consideration. These two cases of issuing a ruling take place at the end of the trial, but without a court decision, since in these cases the process ends without resolving the case on the merits, therefore, there are no grounds for issuing a court decision. Thus, the definition as a decision of the court of first instance does not affect the essence of the case under consideration [12, p. 205].

The decision of the court gives the conclusion of the court in the case an authoritative, indisputable and binding character not only for the persons participating in the case, but also for all subjects of law. Violation of a court order may entail certain legal consequences - enforcement, administrative or criminal punishment. The authoritative and binding nature of a judicial decision is a very essential feature of it, but it is not it that ultimately determines the essence of this act. The main, basic, determining factor is that the decision is the most important act of justice.

Certain types of court decisions in civil cases

According to the legal consequences, there are three categories of judgments recognized by the legislator: 1) non-final judgments; 2) final judicial; 3) court decisions that have entered into legal force [17, p. 46-50].

Inconclusive judgments have the following consequences:

- release the court, which has considered and resolved the civil case, from re-examination of the case, thus, the judges who have ruled on the dispute cannot return to this decision:
- open to the participants of the process the statutory way of appeal;
- indicate the moment of commencement of the execution of the decision, if the law or the court has established immediate execution.

Final judgments have the following consequences:

- obligatory property, which applies, first of all, to the participants in the process, and secondly, to all public authorities, public associations, officials, organizations and individuals;
- feasibility - performed strictly throughout the territory of the Republic of Moldova.

Judicial decisions that have entered into force have the following consequences:

- prejudice, that is, the obligation for all courts considering the case to accept, without verification and evidence, the facts previously

established by a court decision that has entered into legal force in accordance with part (2) of article 123 and part (3) of article 254 of the Code of Civil Procedure of the Republic of Moldova case;

- exclusivity determines the impossibility of re-applying to the court of the same parties on the same subject and on the same grounds in accordance with paragraph b) of paragraph (1) of Article 169 and n . b) Article 265 of the Code of Civil Procedure of the Republic of Moldova;

- indisputability, that is, the impossibility of appealing them in cassation [22, p. 28].

In the science of civil procedural law, six types of decisions are usually distinguished: 1) ordinary (main); 2) absentee; 3) intermediate; 4) additional; 5) partial; 6) conditional.

An ordinary (basic) decision is a judicial act by which the case is resolved on the merits in the court of first instance and which fully meets the requirements for such kind of judicial decisions [19, p. 201-208].

An absentee decision is an act adopted in the absence of at least one of the parties. In addition, a decision in absentia is understood as a decision rendered by the court in the absence of the defendant, duly notified of the time and place of the trial of the case, but who did not appear and did not submit a written request for the consideration of the case in his absence (absentee decision in the narrow sense). An absentee decision is an act taken in the absence of at least one of the parties. The court makes a decision in absentia on the basis of the evidence examined by the court, which were presented by the parties before the start of the trial (the plaintiff, under the current civil procedural legislation, is deprived of the opportunity to present new evidence if a decision is made to consider the case in absentia, and also cannot change the basis or the subject of the claim, increase the amount of claims). This decision is made subject to the following conditions:

1) the plaintiff agreed to consider the case in absentia;

2) failure to appear at the court session only of the defendant;

The decision in absentia comes into force after the expiration of the period for cancellation and cassation or appeal [15, p. 35].

An intermediate decision is one that resolves the claim in principle (i.e., resolves the issue of law), but the issue of the amount of the amount awarded, the property to be transferred, and so on. left open and installed by a separate (additional) solution [20, p. 46-47].

An additional decision is a decision made by the court to fill in the gaps in the main decision. The incompleteness of a judicial act means the presence in its content of a gap about such information, which, due to the requirements of the procedural law, is subject to mandatory inclusion in the judicial act. An additional decision is aimed exclusively at resolving those issues that for some reason were not resolved at the meeting, with the obligatory leaving unchanged those provisions of the judicial act on which the decision was made and announced. The issue of making an additional decision can be raised before the entry into force of the main decision [24, p. 34].

A partial decision is made on the part of the claims, which are considered to be sufficiently fully and comprehensively investigated. The issue of other requirements is postponed until the necessary circumstances are clarified, the presentation, examination and evaluation of the relevant evidence in the case. For example, such decisions could be made in relation to that part of the plaintiff’s claims, which is recognized by the defendant. According to the contested requirements, the process continued [21, p. 112].

A conditional decision is called when it is made regarding the right of the plaintiff, which depends (does not depend) on the occurrence

(non-occurrence) of a certain circumstance or on the commission (non-commission) of one of the parties of any actions. The procedural law, as a general rule, does not allow for the possibility of a conditional decision by the court. The question of the place of such a decision is not resolved. It has the features of both a conditional decision and a court order - in terms of form, but differs from it in the presence of a dispute about the law [8, p. 103-108].

It should also be noted that the current Code of Civil Procedure of the Republic of Moldova also provides for other types of court decisions, such as: 1) Decision on the recovery of a sum of money; 2) The decision to invalidate the executive document; 3) The decision to conclude or amend the contract; 4) Decision on the award of property or its value; 5) A decision obliging the defendant to take certain actions; 6) Decision in favor of several plaintiffs or against several defendants.

Conclusions

The study of the essence and content of the decision of the court in civil cases made it possible to formulate the following conclusions:

Firstly, a judicial decision is a special act of the body administering justice. This provision is typical for all decisions of the court of first instance, but in relation to the court decision, it should be especially noted that the court decision is not just an act of the court, it is a procedural act that ends the consideration of the case on the merits.

Secondly, the court decision as a law enforcement act completes the trial, restoring the violated rights. Like any law enforcement act, a court decision is made on the basis of legislation and does not create new rules of law. It is important that the court decision ends the process of the trial, in connection with this, the court decision contains a specification of the rights and obligations of specific persons (persons participating in the case). The court decision eliminates the existing dispute between the parties, restores violated rights and legality.

Thirdly, the court decision is made as a result of consideration of the case on the merits and in the procedural form. The court itself, directly establishes the circumstances of the case in court proceedings, and ultimately resolves the dispute. Civil procedural legislation determines the procedure for issuing a judgment and its content. The law determines the content of the judgment, establishes the procedure for amending the judgment, determines the time period for the issuance of the judgment and its entry into force, etc.

Fourthly, a court decision is a procedural document that resolves a case and restores violated rights, issued by a court in the procedural form established by law on the basis of consideration of the case on the merits.

Fifthly, the decision is made by the court at the end of the trial for all three types of legal proceedings: claim, special proceedings and proceedings arising from public legal relations. When making decisions in any type of legal proceedings, the court is guided by the general rules established by the Code of Civil Procedure for making a decision. At the same time, the legislation governing the production of certain types of legal proceedings may establish some exceptions or additional provisions.

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ENSURING THE RIGHT TO DEFENSE IN THE CRIMINAL PROCESS [1)]

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The right to defense is one of the essential principles of the criminal process. Violation of this right affects the fairness of the process and leads to procedural sanctions. In this article, the role of international and national legislation and practice will be analyzed regarding the application and observance of the principle of ensuring the right to defense, the role of the Constitutional Court and other legal institutions in this regard. Or, states are obliged to effectively guarantee the accused persons the right to defense, as this is a condition for the realization of the act of justice in a democratic state. Following the analysis carried out, we come with recommendations and explanations regarding the content of this principle, because it should not be seen as simple legal assistance, but has a more complex content.

Keywords: *principle, the right to defense, legal assistance, defender, attorney, procedural sanctions.*

ASIGURAREA DREPTULUI LA APĂRARE ÎN PROCESUL PENAL

Dreptul la apărare este unul din principiile esențiale ale procesului penal. Încălcarea acestui drept afectează echitatea procesului și duce la sancțiuni procesuale. În articolul respectiv se va analiza rolul legislației și practicii internaționale și a celei naționale cu privire la aplicarea și respectarea principiului asigurării dreptului la apărare, rolul Curții Constituționale și a altor instituții juridice în acest sens. Or, statele sunt obligate să garanteze efectiv persoanelor acuzate dreptul la apărare, întrucât aceasta este o condiție de realizare a actului de justiție într-un stat democratic. În urma analizei efectuate venim cu recomandări și explicații privind conținutul acestui principiu, deoarece acesta nu trebuie privit ca o simplă asistență juridică, ci are un conținut mai complex.

Cuvinte-cheie: *principiu, dreptul la apărare, asistență juridică, apărător, avocat, sancțiuni procesuale.*

GARANTIR LE DROIT DE LA DÉFENSE DANS LES PROCÉDURES PÉNALES

Le droit de la défense est l'un des principes essentiels de la procédure pénale. La violation de ce droit affecte l'équité du processus et entraîne des sanctions procédurales. L'article analysera le rôle de la législation et de la pratique internationales et nationales concernant l'application et le respect du principe de garantie du droit à la défense, le rôle de la Cour Constitutionnelle et d'autres institutions juridiques à cet égard. Les États sont tenus de garantir effectivement aux accusés le droit de la défense, car c'est une condition pour réaliser l'acte de justice dans un État démocratique. Suite à l'analyse effectuée, nous formulons des recommandations et des explications sur le contenu de ce principe, car il ne doit pas être considéré comme une simple aide juridictionnelle, mais a un contenu plus complexe.

Mots-clés: *principe, droit à la défense, aide légale, défenseur, avocat, sanctions procédurales.*

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ОБЕСПЕЧЕНИЕ ПРАВА НА ЗАЩИТУ В УГОЛОВНОМ ПРОЦЕССЕ

Право на защиту является одним из неотъемлемых принципов уголовного процесса. Нарушение этого права влияет на справедливость процесса и влечет за собой процессуальные санкции. В данной статье будет проанализирована роль международного и национального законодательства и практики в области применения и соблюдения принципа обеспечения права на защиту, роль Конституционного Суда и других правовых институтов в этом отношении. Однако, государства обязаны эффективно гарантировать обвиняемым право на защиту, поскольку это является условием осуществления акта правосудия в демократическом государстве. По итогам проведенного анализа мы приходим с рекомендациями и разъяснениями относительно содержания данного принципа, поскольку его следует рассматривать не как простую юридическую помощь, а имеет более сложное содержание.
Ключевые слова: *принцип, право на защиту, юридическая помощь, защитник, адвокат, процессуальные санкции.*

Introduction

Ensuring the right to defense is a principle of criminal procedure, which is regulated and guaranteed by both international and national acts. States are obliged to effectively ensure the guarantee of this right, because, otherwise, the right to a fair trial is violated. At the same time, this is a condition for the realization of the act of justice in a democratic state.

Methods and materials. Theoretical, normative and empirical material was used in the development of this publication. Also, the research of the respective subject was possible by applying several scientific investigation methods specific to the criminal procedural theory and doctrine: the logical method, the comparative analysis method, the systemic analysis, etc.

The purpose of the research. Research and analysis of the internal regulatory framework, jurisprudence and doctrine regarding the provision of the right to defense and the effect of its non-compliance in the context of ensuring and guaranteeing the rights and freedoms of the parties in the criminal process.

Results obtained and discussions

According to paragraph 11 (1) of the Universal Declaration of Human Rights[1], "*Any person accused of a crime is presumed innocent until his guilt has been legally proven in a public trial in which he has been provided with all the necessary guarantees for his defense*."

The International Covenant on the Civil and Political Rights[2] of Man provides in the content of art. 14 para. (3) lit. b) and d) that, "*Any person accused of committing a criminal offense has the right, under conditions of full equality, to at least the following guarantees: to have the time and the necessary facilities to prepare his defense and to communicate with the defender that he - choose it; to be present at the trial and defend herself or have the assistance of a defense attorney chosen by her; if she does not have a defense attorney, to be informed about the right to have one and whenever the interest of justice requires her to be assigned a defense attorney ex officio, without payment, if she does not have the means, to remunerate him.*"

[1] The Universal Declaration of Human Rights, *adopted and proclaimed by the UN General Assembly through Resolution 217 A (III) of December 10, 1948*. Available: https://www.legis.md/cautare/getResults?doc_id=115540&lang=ro [accessed: 10.08.2022].

[2] The International Covenant on Civil and Political Rights, *adopted and opened for signature by the General Assembly of the United Nations on December 16, 1966. Entered into force on March 23, 1967, cf. art. 49, for the provisions except those of art. 41 ; on March 28 for the provisions of art. 41. Ratified by Parliament Decision no. 217-XII of 28.07.90, in force for the Republic of Moldova from 25.02.1993*. Available: https://www.legis.md/cautare/getResults?doc_id=115567&lang=ro [accessed: 10.08.2022].

The Convention for the Defense of Human Rights and Fundamental Freedoms[3] comes with effective guarantees regarding ensuring the right to defense. Thus, in accordance with the provisions of art. 6 para. (3) lit. b) and c) ECHR, "*Any accused person has, above all, the right: to have the time and facilities necessary to prepare his defense; to defend himself or to be assisted by a defender chosen by him and, if he does not have the necessary means to pay a defender, to be assisted free of charge by an ex officio lawyer, when the interests of justice require it*."

"The norm in question (art. 6 para. (3) letter b) ECHR) is closely related to the right to be fully informed, guaranteed by art. 6 para. (3) lit. a) and the right to be represented by a lawyer guaranteed by art. 6 para. (3) lit. c)."[4]

The Constitution of the Republic of Moldova ensures the right to defense. Thus, in accordance with art. 26 of the Constitution, " *The right to defense is guaranteed. Every person has the right to react independently, by legitimate means, to the violation of rights and his liberties. Throughout the process, the parties have the right to be assisted by a lawyer, elected or appointed ex officio. Interference in the activity of persons exercising defense within the prescribed limits is punishable by law*."

The right to defense is an essential element of the right to a fair trial. According to art. 26 of the Constitution, the person's right to defense is guaranteed. Every person has the right ***to react independently,*** by legitimate means, to the violation of rights and his liberties; the parties have the right to be assisted by a lawyer, chosen or appointed ex officio throughout the process. Thus, the right to defense is a fundamental, guaranteed right that can be exercised by any person independently and freely. The same interpretation results from the ECtHR jurisprudence regarding the application of art. 6 of the Convention, by which it was established that the freedom of the person to exercise his own defense is guaranteed. Enshrining the fundamental desire regarding the right to defense, the state guarantees all persons professional legal assistance under the law. The standards developed by the ECtHR include the freedom of the person to choose the form of defense, and the obligation to provide the defender rests with the state, being exercised only in the interest of justice.[5]

Regarding the incidence of Article 26 of the Constitution, the Court emphasizes that the right to defense represents all the prerogatives and possibilities that, according to the law, individuals have in order to defend their interests. This right is restricted in the situation where the person cannot use all the procedural means necessary for his defense (HCC no. 31 of September 23, 2021, § 32; DCC no. 40 of March 29, 2022, § 27).[6]

Art. 17 CPC resumes the constitutional idea of guaranteeing the right of defense of the parties in the criminal process. According to art. 17 para. (1) CPP, "*During the entire criminal process, the parties (the suspect, the accused, the defendant, the injured party, the civil party, the civilly responsible party) have the right to be assisted or, as the case may be, represented by a chosen defender or*

[3] Convention for the Defense of Human Rights and Fundamental Freedoms, signed in Rome, 4.11.1950. Available: https://www.echr.coe.int/documents/convention_ron.pdf [accessed: 10.08.2022].

[4] Gomien Donna, Guide (Vade-mecum) of the European Convention on Human Rights, Chisinau, 3rd Edition, 2006, p. 69.

[5] HCC of 29.07.2005 Regarding the control of the constitutionality of some provisions of art. 421, 433 par. (1), art. 452 para. (1) and art. 455 para. (3) from the Criminal Procedure Code of the Republic of Moldova (point 5). Available: https://www.legis.md/cautare/getResults?doc_id=16022&lang=ro [accessed: 10.08.2022].

[6] DCC no. 83 of 17.06.2022 on the inadmissibility of notification no. 56g/2022 regarding the exception of unconstitutionality of the text "is invited" from article 127 para. (2) of the Criminal Procedure Code (inviting the representative of the executive authority of the local public administration to conduct the search) (point 24). Available: https://www.constcourt.md/ccdocview.php?tip=decizii&docid=1199&l=ro [accessed: 11.08.2022].

a lawyer who provide assistance legal status guaranteed by the state. "That provision guarantees the right to defense for accused persons (suspect, accused, defendant) and, at the same time, guarantees the right to legal assistance for other participants in the criminal process, which denotes a "mature" and correct regulation in this regard. However, most of the parties in the process do not possess legal knowledge and, respectively, do not know their rights and cannot fully exercise them. Practice proves this. For example, the injured party in the criminal process, in most cases, is not assisted by a defense attorney, his interests are ensured by the criminal investigation body. However, if this party does not agree with the decisions made (for example, the suspect was removed from criminal prosecution), in order to ensure his right to challenge the decisions, there is a need to seek qualified legal advice, even for the simple complaint, which must meet certain form and content requirements.

In another vein, we would like to analyze the provisions of art. 6 point 3) CPC, which regulates that, "*defense - procedural activity carried out by the defense for the purpose of combating, in whole or in part, the accusation or mitigating the punishment, defending the rights and interests of persons suspected or accused of committing a crime, as well as the rehabilitation of persons illegally subject to criminal prosecution*." From the analysis of the concerned norm, it can be deduced that the benefit of the defense is only available to persons under criminal charges (suspect, accused), as well as those rehabilitated when they were illegally subjected to criminal prosecution. Thus, the idea would be created that this definition would be contrary to the provisions of art. 26 of the Constitution, because the right to defense must be guaranteed not only to the mentioned persons, but to all parties in the process.

However, we consider that the respective definition is correct and does not contravene art. 6 para. (3) lit. b) and c) of the ECHR, which specifically refer to persons under criminal charges. The effective guarantees for the other parts of the criminal process are stipulated in art. 17 para. (1) CPP. Analyzing the respective criminal procedure norm, we note that, the legislator by indicating the provision "... *to be assisted or, as the case may be, represented by a chosen defender or a lawyer who provides legal assistance guaranteed by the state*", distinguishes between assistance and representation, which in our view is correct and logical. Therefore, we consider that ensuring the right to defense rests with the person under criminal charges, and the other parties have the right to legal assistance and/or to be represented in the criminal process according to art. 79 CPP. In that order of ideas, procedural norms correspond to constitutional and international norms.

Another important aspect in our view emerges from the provisions of art. 6 point 30) CPC, which regulates that, "*the defense party - persons authorized by law to carry out defense activity (the suspect, the accused, the defendant, the civilly responsible party and their representatives)*". Analyzing the respective norm, we deduce that the legislator gave the notion of the defense party, and later, in parentheses, indicated concretely who these persons are. Regrettably, this rule does not also refer to the defender, who, in fact, carries out the defense activity. That is why we are intervening with the proposal to complete and modify the analyzed procedural rule, as it should also indicate the defender as part of the defense.

Once we referred to the notion of defense, it should be mentioned that, "The right to defense consists of all the means established by law for invoking and ascertaining the circumstances that support the defense, as well as for the application of legal provisions favorable to the party that supports its interests. These means of defense consist of procedural rights

granted to the parties in the process, procedural guarantees for the exercise of these rights and the provision of quality legal assistance."[7]

At the same time, "*the Court emphasizes that the right to defense, as a guarantee of the right to a fair trial, includes all the rights and procedural rules, which give the person the opportunity to defend himself against the accusations brought against him and to contest the accusations, in order to prove his innocence. The right to defense must be ensured throughout the criminal process.*" [8]

As for ***the procedural rights,*** they are legal means by which the parties in the process support their positions and interests before the judicial bodies (detection body, criminal investigation body, prosecutor, court of law). These rights are regulated in different procedural rules depending on the procedural quality of the party (the rights of the victim are regulated in art. 58 of the CPP, of the injured party in art. 60 of the CPP, of the civil party in art. 62 of the CPP, of the accused in art. 66 CPP etc.). Next, we want to give an example of the means by which the suspect supports his positions and interests before the criminal investigation body. Thus, the suspect has the right: to know why he is suspected (art. 64 par. (2) point 1) CPP); in case of detention, to receive legal advice, under conditions confidential, from the defender until the beginning of the first hearing as a suspect (art. 64 par. (2) point 4) CPP); from the moment when he was informed of the procedural document assigning the quality of being a suspect, to have the assistance of a defender chosen by him, and if he does not have the means to pay the defender, to be assisted free of charge by a lawyer who provides legal assistance guaranteed by the state, as well as, in the cases allowed by law, to waive the defender and defend himself (art. 64 par. (2) point 5) CPP); to have meetings with his defender under the conditions confidential, without limiting their number and duration (art. 64 par. (2) point 6) CPP); And so on.

It should be noted that the regulation of certain rights in criminal procedural legislation does not ensure an effective defense until the law provides guarantees in this regard. Otherwise, this position would be limited to merely presenting a list of rights, which would become only theoretical. These ***procedural guarantees*** are legal means thanks to which the parties are given the full possibility to benefit from these rights, by imposing the judicial bodies to ensure and respect the rights of the parties in the process. For example, the criminal investigation body provides the suspect with the opportunity to exercise his right to defense by all means and methods that are not prohibited by law (art. 64 para. (1) CPP); the suspect has the right to receive explanations of all his rights from the criminal investigation body (art. 64 par. (2) point 2) CPP); the accused has the right to be informed by the criminal investigation body about all the decisions adopted that refer to his rights and interests, to receive, at his request, copies of these decisions, as well as copies of the enforcement ordinances regarding him of preventive measures and other coercive procedural measures, copies of the indictment or of another act of completion of the criminal investigation, of the civil action, of the sentence, appeal and appeal, of the decision by which the sentence became final, from the final decision of the court that judged the case by way of extraordinary appeal (art. 66 par. (2) point 26) CPP) etc.

In this sense, the Constitutional Court has expressed itself, stating that, "*In order to exercise his right to defense, the accused person must be allowed to effectively benefit*

[7] Grigore Gr. Theodoru, Criminal Procedural Law Treaty, 3rd Edition, Hamangiu Publishing House, 2013, p. 72.

[8] HCC no. 30 of 22.11.2018 regarding the exception of unconstitutionality of some provisions of article 521 para. (2) of the Criminal Procedure Code (point 41).Available: https://www.constcourt.md/ccdocview.php?l=ro&tip=hotariri&docid=677 [accessed: 11.08.2022].

from legal assistance from the initial stages of the proceedings, which can prove decisive for the chances of the defense in any subsequent criminal proceedings.” [9]

ECtHR case, Artico v Italy[10], “*The Court recalls that the Convention is intended to guarantee not theoretical or illusory rights, but practical and effective rights; this is especially true of defense rights, given the prominent place in a democratic society the right to a fair trial, from which it derives* .”

The judicial bodies have the obligation to notify the accused or the defendant, before the first statement is taken about the right to be assisted by a defense attorney elected or appointed ex officio, this being recorded in the hearing report.

“The non-fulfillment of this obligation by the judicial bodies seriously affects the right of defense of the accused or the defendant, which leads to the absolute nullity of the criminal prosecution, which can be invoked throughout the criminal process even ex officio.”[11]

At the same time, as procedural guarantees are the obligations imposed on the criminal investigation bodies and the prosecutor to act based on art. 100 para. (1) CPP, i.e. to administer evidence also in favor of the accused or the defendant. The criminal procedural law also provides other guarantees, for example: explaining the rights of the parties in the process; the complete, objective investigation and under all aspects of the circumstances of the case; the conditions and forms of carrying out the criminal investigation and trial of the case; compliance with the principles of the criminal process; the right to contest the decisions of the criminal investigation body and the prosecutor; the right to file complaints in accordance with art. 298, 299/1 and 313 of the CPP; cancellation of procedural documents by the prosecutor, etc.

Effective guarantees in order to ensure the right to defense are also regulated in art. 17 para. (2) CPP, whereas, “*The criminal prosecution body and the court is obliged to ensure the participants in the criminal trial the full exercise of their procedural rights, under the conditions of this code.* “From the analysis of the respective norm, we observe that the criminal procedural law obliges only the criminal investigation body and the court to ensure the exercise of rights. Therefore, it is necessary to modify and complete the relevant rule, so as to oblige the prosecutor in this regard.

As procedural guarantees regarding ensuring the right to defense, the rules oblige or forbid not only the judicial bodies to act or limit themselves in some actions, but even defenders and lawyers. Thus, in accordance with the provisions of art. 68 para. (3) CPC, “*The defender is not entitled to undertake any actions against the interests of the person he is defending and to prevent him from realizing his rights. The defender cannot, contrary to the position of the person he is defending, admit his participation in the crime and the guilt of committing the crime. The defender is not entitled to disclose the information that was communicated to him in connection with the exercise of the defense if this information can be used to the detriment of the person he is defending*.” And in accordance with art. 68 para. (4) CPP, “*The lawyer is not entitled to give up the defense without reason. The defender is not entitled to independently terminate his powers as a defender, to prevent the invitation of another defender or his participation in this case. The defender is not entitled to transfer*

[9] HCC no. 30 of 22.11.2018 regarding the exception of unconstitutionality of some provisions of article 521 para. (2) of the Criminal Procedure Code (point 43). Available: https://www.constcourt.md/ccdocview.php?l=ro&tip=hotariri&docid=677 [accessed: 11.08.2022].

[10] ECtHR decision, Artico v. Italy case, dated 13.05.1980 (§33). Available: https://hudoc.echr.coe.int/eng?i=001-57424 [accessed: 11.08.2022].

[11] V. Mihoci, Obligations of judicial bodies in the Romanian criminal process regarding the granting of legal assistance to the accused or the defendant // National Law Review, 2005, no. 1, p. 31.

to another person his powers to participate in that case." In this regulatory manner, the criminal procedural rules come to fully ensure the right to defense and impose effective guarantees in this regard even on the part of those who defend their rights and interests in the process.

If the defender or the lawyer does not honor their obligations provided by the law, they bear liability in accordance with the law, implicitly their activity can be suspended or even the lawyer's license withdrawn under the terms of the Law on Advocacy[12].

Ensuring the right to defense must be viewed much more broadly. An effective defense tool is the exception of unconstitutionality of the rules. Thus, according to point 54) of the CC Decision of 09.02.2016[13], "*The exception of unconstitutionality is a means of defense, by which the party summoned before a court invokes the unconstitutionality of a legal norm." The exception of unconstitutionality, with its particularities, represents a means of indirect access for people to the constitutional court through the court.*"

In another ruling[14], the CC emphasized that, "... *the exception of unconstitutionality represents a procedural defense action, through which the Constitutional Court is referred to the inconsistency with the provisions of the Constitution of some legal provisions applicable in the case brought before the court.*"

As mentioned, the right to defense is not only ensured to the suspect, the accused or the defendant, but also to the other parties. A guarantee in this sense is the provision of art. 17 para. (4) CPP, which obliges the criminal investigation body not to prohibit the presence of the lawyer as a representative invited to the hearing by the injured party and the witness. Although it is an effective insurance, we still believe that this provision limits the procedural guarantee to other participants, such as for example the victim. From this point of view, we consider it appropriate to amend and supplement art. 17 para. (4) CPP, so as to oblige the criminal investigation body, the prosecutor and the court not to prohibit the presence of the lawyer as an invited representative at the hearing of the parties.

At the same time, the parties have the right to ensure their ***legal assistance qualified***. This implies the guarantee that the parties can be assisted by an elected or appointed defender, who, being qualified by law, gives these parties appropriate legal advice. Regardless of whether the party in the process knows the laws or not, the state guarantees them this right anyway, as the parties benefit from quality legal assistance.

According to art. 17 para. (3) CPP, "*The criminal prosecution body and the court is obliged to ensure the suspect, the accused, the defendant the right to qualified legal assistance from a defender chosen by him or a lawyer who provides legal assistance guaranteed by the state, independently of these bodies*."

In accordance with Art. 2 of the Law on state-guaranteed legal assistance [15], "Qualified legal *assistance is the provision of legal consulting services, representation and /or defense in the criminal investigation bodies, in the courts courts on criminal cases ....*".

[12] Law no. 1260 of 19.07.2002 regarding the legal profession. Available: https://www.legis.md/cautare/getResults?doc_id=129643&lang=ro# [accessed: 11.08.2022].

[13] H CC no. 2 of 09.02.2016 for the interpretation of article 135 para. (1) lit. a) and g) of the Constitution of the Republic of Moldova (point 54) (exception of unconstitutionality) (Referral no. 55b/2015). Available: https://www.constcourt.md/ccdocview.php?tip=hotariri&docid=556&l=ro [accessed: 09.08.2022].

[14] HCC of 23.02.2016 regarding the exception of unconstitutionality of paragraphs (3), (5), (8) and (9) of article 186 of the Code of Criminal Procedure (pre-trial detention term) (Report no. 7g/2016) (pt. 29). Available: https://www.constcourt.md/public/ccdoc/hotariri/ro-h323022016ro2aa9d.pdf [accessed: 09.08.2022].

[15] Law no. 198 of 26.07.2007 regarding legal assistance guaranteed by the state. Available:https://www.legis.md/cautare/getResults?doc_id=132474&lang=ro# [accessed: 11.08.2022].

“*The criminal investigation body or the court is not entitled to recommend to someone the invitation of a certain defense attorney* (art. 70 para. (2) CPP). At the same time, *the suspect, the accused, the defendant can have several defenders.* It should be noted that “procedural *actions that require the participation of the defender cannot be considered as having been carried out in violation of the rules of criminal procedure if all the defenders of the party in question did not participate in their performance*“ (art. 70 par. (6) CPP).

An important aspect is the waiver of the defender, which “*means the will of the suspect, the accused, the defendant to exercise his own defense, without resorting to the legal assistance of a defender. The request to waive the defense counsel is attached to the case materials* (art. 71 para. (1) CPP). According to art. 71 para. (2) CPC, “*The prosecutor or the court has the right not to accept the waiver of the suspect, the accused, the defendant to the defense in the cases provided for in art. 69 para. (1) point 2)-13), as well as in other cases where the interests of justice require it.*“

Determining the fact that the interests of justice require the mandatory assistance of the defense attorney is within the competence of the prosecutor or the court and depends on:

1) the complexity of the case;

2) the capacity of the suspect, the accused, the defendant to defend himself;

3) the seriousness of the act, the commission of which the person is suspected or accused, and the sanction provided by law for its commission.

In the ECtHR case, Benham v. United Kingdom[16], the Court held that, “*The only issue before the Court is, therefore, whether the interests of justice required that Mr. Benham benefit from free legal representation at the hearing before the magistrates.”To answer this question, one must take into account the gravity of the punishment at stake and the complexity of the case (see Quaranta v. Switzerland judgment of 24 May 1991, Series A no. 205, p. 17-18, para. 32- 38)*.” At the same time, in that case, the Court mentioned that, *where deprivation of liberty is at stake, the interests of justice in principle require legal representation*.”

In the ECtHR case, Quaranta v. Switzerland[17], the Court stipulated that, “*An additional factor is the complexity of the case. ... The participation of a lawyer in the trial would have created the best conditions for the defense of the accused, especially considering the fact that the Court had a wide range of measures at its disposal.* In that case, the Court also noted the fact that *such questions, which are complicated in themselves, were all the more ... because of his personal situation: a young adult of foreign origin, from a disadvantaged background, did not have a real professional training and had a long criminal record ...*” Therefore, the Court also draws special attention to the personal situation, implicitly the possibility and ability to defend oneself.

Analyzing what has been exposed and emerging from the practice of the ECHR, we consider that art. 71 para. (2), the CPP must be amended and supplemented, so that as a criterion for establishing cases when the interests of justice require it, the mandatory assistance of the defender must also depend on the preventive measure of freedom. Otherwise, in the mentioned chapter, the CPP corresponds to international norms, guaranteeing qualified legal assistance.

In accordance with Art. 17 para. (4) and (5) CPC, “*From the moment of acceptance of the waiver of defense counsel, it is considered that the suspect, the accused, the defendant exercises his defense independently. The*

[16] ECtHR judgment, Benham v. the United Kingdom, dated 10.06.1996 (§ 60, 61). Available: https://hudoc.echr.coe.int/eng?i=001-57990 [accessed: 11.08.2022].

[17] ECtHR decision, Quaranta v. Switzerland, dated 24.05.1991 (§ 34). Available: https://hudoc.echr.coe.int/eng?i=001-57677 [accessed: 11.08.2022].

suspect, the accused, the defendant who waived the defense attorney has the right, at any moment of the criminal process, to revert to the waiver and invite a defense attorney or request the appointment of a lawyer who provides legal assistance guaranteed by the state, who will be admitted from the moment he was invited or requested."

"The European Court emphasized that one of the most important "facilities" for preparing one's own defense is the possibility to consult a legal advisor (*Campbell and Fell v. the United Kingdom*)."[18]

"It has been shown in the specialized literature that the necessary facilities for preparing the defense include a varied range of facts and actions such as: access of the investigated or judged person to the file, the possibility of an expertise, the possibility to communicate freely with his lawyer, etc."[19]

"If legal problems arise in the given case that require the application of a certain level of professional experience, the State cannot ask the accused to solve such problems by himself (Pakelli v. Germaniei, 1983)[20] and Artico v. Italy, 1980)."[21]

"The principle of guaranteeing the right to defense correlates with the legality of the process, which sets its limits and sanctions in case of violation, with finding out the truth, which ensures the requirement of establishing innocence or favorable circumstances, with the active role of obliging the criminal investigation bodies and the court of the court to act in favor of the defense, with the presumption of innocence on which the defendant's procedural position as a party to the trial is based."[22]

From the content of the legal texts that regulate legal assistance in the criminal process, we can distinguish that it can be optional or mandatory.

Optional legal assistance. "This category of assistance constitutes the rule in the matter of legal assistance, because the right to defense, conceived as a fundamental right of the person in the criminal process, is exercised by the interested party in the way he deems appropriate."[23]

The expression used by the legislator in art. 26 para. (1) from the Constitution of the Republic of Moldova[24] *Throughout the process, the parties have the right to be assisted by a lawyer, chosen or appointed...* - must be understood as a possibility for the parties to request legal assistance in cases where they cannot defend themselves directly and personally.

"When one or more parties to the criminal legal relationship request legal assistance, the judicial bodies are obliged to grant the interested party or parties the opportunity to hire a defense attorney and allow him to fully exercise the rights conferred on him by the criminal procedure law. In such cases, those interested are left to decide whether or not to choose a lawyer to support their interests.[25]

[18] Gomien Donna, Guide (Vade-mecum) of the European Convention on Human Rights, Chisinau, 3rd Edition, 2006, p. 69.

[19] C. Dima, G. Positutu, The right to defense. In: Law, 2003, no. 3, p. 169.

[20] European Court of Human Rights. Selected solutions. Том 1, Изд. NORMA. Moscow. 2001, p. 422-429.

[21] European Court of Human Rights, Selected Decisions, Volume 1, Edition. NORMA, Moscow, 2001, p. 318-327.

[22] Grigore Gr. Theodoru, Criminal Procedural Law Treaty, 3rd Edition, Hamangiu Publishing House, 2013, p. 74.

[23] Tudor Osoianu, Ivan Vesco, The normative and doctrinal consecration of the right to defense. People's Advocate, no. 12, 2008, p. 8. Available: http://www.uam.md/media/files/files/consacrarea_noramtiva_si_doctrinara_a_dreptului_la_aparare_6361553.pdf [accessed: 07.09.2022].

[24] Adopted on July 29, 1994, published in the Official Gazette of the Republic of Moldova no. 1 of 18.08.1994.

[25] "*The waiver of defense counsel can be accepted by the court only if it is submitted by the defendant voluntarily, on his own initiative, in the presence of the lawyer who provides legal assistance guaranteed by the state. The admission or non-admission of the waiver of the defense counsel is decided by the court through a reasoned decision. The defendant's exercise of the rights at his disposal or his renunciation of these rights cannot be interpreted to his detriment and cannot have unfavorable consequences for him. During the examination of the appeal, the presence of the defender is mandatory. If the appellate court judged the case in the absence of the defense counsel, its decision is quashed with*

Assistance being optional, not requesting it and not granting it by the judicial bodies does not prevent the normal and legal development of the criminal process."[26]

"*The European Court has consistently held that national authorities must take into account the grievances of the accused person relative to his legal representation, as well as that these grievances can be overridden when there are relevant and sufficient reasons to establish that they are necessary in the interests of justice (Meftah and others v. France [MC], 26 July 2002, § 45, Mayzit v. Russia, 20 January 2005, § 66; Vitan v. Romania, 25 March 2008, § 59; Zagorodniy v. Ukraine, 24 November 2011, § 52). Where these reasons are absent, the restriction of the free choice of counsel amounts to a violation of Article 6 § 1 in conjunction with paragraph 3 (c), if the applicant's defense is adversely affected, considering the proceedings as a whole.*" [27]

Mandatory legal assistance. "In certain cases provided by law, in order to ensure a real defense of some persons who, due to the situations in which they find themselves, cannot defend themselves, the right of defense is no longer optional, but becomes a necessary legal condition for the normal development of the process criminal, legal assistance becoming mandatory."[28]

Art. 69 CPP regulates the cases when the participation of the defender is mandatory. From the analysis of the respective norm, we deduce the fact that it corresponds to international requirements and largely ensures the right to defense.

"So, in such situations, the parties no longer have the right to be assisted by a defense attorney, but, if they have not chosen a lawyer, one will be appointed ex officio. The legal provisions that impose the obligation of legal assistance for the given cases, are imperative conditions for the validity of the acts performed and any deviation from these rules is sanctioned by absolute nullity."[29]

"Mandatory legal assistance of the suspect, the accused and the defendant is the direct consequence of the concept that the defense is an institution of social interest, which is carried out not only in the interest of the suspect or accused, but also in the interest of a good conduct of the criminal process."[30]

According to art. 17 para. (5) CPP, "*If the suspect, the accused, the defendant do not have the means to pay the defender, they are assisted free of charge by a lawyer who provides legal assistance guaranteed by the state*."

"The ECtHR *recognized the requirement the intervention of a lawyer during certain procedural phases as an adequate and proportionate means that states can have to ensure more guarantees and more rigor in the defense of the accused. In all the cases*

the referral of the case for retrial in the same court. Ignoring these legal provisions, the appellate court did not resolve, through a reasoned conclusion, the defendant's approach regarding the matter concerning the participation of the defense counsel and examined the defendant's appeal in the absence of an elected defense counsel or who provides legal assistance guaranteed by the state. It follows that the appellate court clearly violated the defendant's right to defense. "(Extract from DCP CSJ no. 1ra-122/2010 of 02.03. 2010. In: Jurisprudence of the Supreme Court of Justice in criminal matters (2008-2010). Collection. Ch., 2012, p. 530, 531).

[26] Tudor Osoianu, Ivan Vesco, The normative and doctrinal consecration of the right to defense. People's Advocate, no. 12, 2008, p. 8. Available: http://www.uam.md/media/files/files/consacrarea_noramtiva_si_doctrinara_a_dreptului_la_aparare_6361553.pdf [accessed: 07.09.2022].

[27] HCC no. 30 of 22.11.2018 regarding the exception of unconstitutionality of some provisions of article 521 para. (2) of the Criminal Procedure Code (point 48).

[28] Tudor Osoianu, Ivan Vesco, The normative and doctrinal consecration of the right to defense. People's Advocate, no. 12, 2008, p. 8. Available: http://www.uam.md/media/files/files/consacrarea_noramtiva_si_doctrinara_a_dreptului_la_aparare_6361553.pdf [accessed: 07.09.2022].

[29] Tudor Osoianu, Ivan Vesco, The normative and doctrinal consecration of the right to defense. People's Advocate, no. 12, 2008, p. 8. Available: http://www.uam.md/media/files/files/consacrarea_noramtiva_si_doctrinara_a_dreptului_la_aparare_6361553.pdf [accessed: 07.09.2022].

[30] Dolea I., collective, Criminal Procedure Code. Comment. ed. Neighborhood. Chisinau. 2005. p. 131.

examined by the ECHR in the issue of the monopoly of lawyers' pleadings specialize in the face The Court of Cassation in France has been constantly mentioned that any person can call on the services of these lawyers, regardless of their financial status, because needy people enjoy a viable system of ex officio legal assistance." [31]

The Court notes that in the jurisprudence of the European Court it was held that, beyond the importance of the relationship of trust between lawyer and client, the right to choose one's own lawyer cannot be considered absolute (Karpyuk and others v. Ukraine, October 6, 2015, § 144). Thus, the state authorities must take into account the will of the accused to choose his own lawyer, but they can go beyond the will of the accused when there are convincing and sufficient reasons to consider that the interests of justice require such a measure (Correia de Matos v. Portugal [MC], 4 April 2018, § 126).[32]

The ECtHR clearly states repeatedly that the lack or non-qualitative assistance (theoretical and illusory) raises doubts about the fair process.

In the ECtHR case, Artico v Italy[33], the Court mentioned that, "*Article 6 par. 3 (c) (art. 6-3-c) speaks of "assistance" and not of "nomination". Again, mere appointment does not ensure effective assistance, as the lawyer appointed for legal aid may die, become seriously ill, be prevented from acting for a long period of time, or evade his duties. If the situation is brought to their notice, the authorities must either replace him or make him fulfill his obligations. Adopting the Government's restrictive interpretation would lead to unreasonable and incompatible results both with the wording of paragraph (c) (art. 6-3-c) and with the structure of article 6 (art. 6) taken as a whole; In many cases, free legal aid could prove to be worthless*."

Thus, the state's obligation to provide state-guaranteed legal assistance is not fulfilled by simply appointing a lawyer. It is necessary to take additional measures to ensure that this right is practical and effective. If a particular lawyer is ineffective, the state is obliged to provide the suspect with another lawyer.

An important issue is the effectiveness of the defendant's defense in absentia at trial. Thus, at the trial of Sannino 's criminal case by the Italian court, the defender declared abstention from participating in the trial, along the way Sannino's defense was carried out by various lawyers appointed by the court, who during the trial in absentia never filed requests for postponing the trial of the case in order to get acquainted with the materials of the case, they did not try to establish contacts with the defendant. As a result, the witnesses whose hearing was previously requested by the defendant were not heard. The European Court, considering that the state cannot be held liable for unqualified legal assistance, nevertheless concluded that, in cases where the omissions of the defense are obvious, the court must take appropriate measures." [34]

"Regarding the provision of inappropriate legal assistance, as well as the failure of the court to get involved in resolving such behavior, we could invoke the ECtHR case Ananiev v. Russia, according to which a person accused of a crime does not lose the

[31] HCC of 29.07.2005 Regarding the control of the constitutionality of some provisions of art. 421, 433 par. (1), art. 452 para. (1) and art. 455 para. (3) from the Criminal Procedure Code of the Republic of Moldova (point 5).

[32] DCC no. 59 of 25.04.2019 on inadmissibility of notification no. 55g/2019 regarding the exception of unconstitutionality of some provisions contained in articles 52, 53 [1,] 67 paragraphs (5) point 5) and (6) point 3) and article 72 paragraph (4) of the Criminal Procedure Code (removal of the defense attorney from the trial) (pt. 21).

[33] ECtHR ruling Artico v. Italy, dated 13.05.1980, (§ 33). Available: https://hudoc.echr.coe.int/eng?i=001-57424 (accessed: 15.08.2022); ECtHR ruling Daud v. Portugal, dated 21.04.1998, [§ 38]. Available: https://hudoc.echr.coe.int/eng?i=001-58154 (accessed: 15.08.2022).

[34] ECtHR judgment, Sannino v. Italy, dated 27.04.2006, final on 13.09.2006. Available: http://hudoc.echr.coe.int/eng?i=001-75213 (accessed: 15.08.2022).

advantages of the right to a defense merely because of his absence from the hearing. The Court reiterated that during the trial the applicant was removed from the courtroom for his conduct and returned to give the last word, but the evidence was examined in his absence and in the absence of counsel, as he refused his services on the grounds that the way of defense did not coincide, but the court was going to explain to him the consequences of his behavior and of giving up the defender." [35]

The presence of a lawyer who has no opportunity to intervene to ensure the respect of the defendant's or suspect's rights does not bring him any benefit.[36]

For example, the authorities have the obligation to replace the lawyer who provides free legal assistance when he is *clearly ineffective* (in this case, the suspect must not take any action) or when the authorities are informed about his inefficiency and this fact is demonstrated by the suspect.[37]

ECtHR, in the case of Beuze v. Belgium[38], states that "art. 6 par. 3 lit. c) of the ECHR does not specify the conditions for exercising or the content of the right of access to a lawyer. Or, leaving it up to the states to choose the means to ensure that their legal system contains the necessary guarantees, they (the states) should define the contours and normative content based on the purpose of the ECHR, in particular to protect concrete rights and efficient (...). (...). It is most worrying that this disappointing radical change is taking place in the sphere of procedural rights – the heart of the rule of law. As we know from Plutarch, a garden that is often replanted will not bear fruit.

In that case, the Court explained that, "the purpose pursued by guaranteeing the right to be assisted by a lawyer involves: preventing miscarriages of justice, equality of arms between prosecution and defense, counterbalancing the vulnerabilities of suspects in police custody, protection against coercion and evil treatment of suspects, ensuring respect for the suspect's right not to incriminate himself and the right to remain silent. At the same time, the European Court of Human Rights also showed that immediate access to legal assistance can prevent unfairness that could arise from the lack of adequate information of the accused about his rights."[39]

Also in this case, the Court ruled two minimum conditions regarding the right of the suspects (the suspect, the accused and the defendant) to be assisted by a lawyer, namely:

"*Suspects must be able to contact a lawyer from the moment they are taken into custody. It must therefore be possible for a suspect to consult with his lawyer before an interview (see Brusco, cited above, § 54, and AT v. Luxembourg, cited above, §§ 86-87), or even if there is no interview (see Simeonovi, cited above, §§ 111 and 121). The lawyer must be able to speak with his client in private and*

[35] ECtHR decision, Ananyev v. Russia, dated 30.07.2009 (§ 41). Available: http://hudoc.echr.coe.int/eng?i=001-150432 (accessed: 15.08.2022).

[36] ECtHR decision, Aras v. Turkey (no. 2), judgment of 18.11.2014, final on 18.02.2015 (§ 41): " *Only when the applicant detained and questioned by the police was brought before the investigating judge, the judge allowed the lawyer to enter the hearing room without being allowed to speak or advise the applicant. The ECtHR held that the "mere presence" of the lawyer was not sufficient for the right under Article 6 (3) (c) to be an effective one. The applicant should have been given access to a lawyer right from the first questioning. The passive presence of the applicant's lawyer in the hearing room could not be considered sufficient according to Convention standards*. " Available: https://hudoc.echr.coe.int/eng?i=001-148095(accessed: 15.08.2022).

[37] ECtHR decision, Imbrioscia v. Switzerland, dated 24.11.1993 (§ 41). Available: https://hudoc.echr.coe.int/eng?i=001-57852 (accessed: 15.08.2022); ECtHR, Judgment of Daud v. Portugal, judgment of 21.04.1998 (§ 38). Available: https://hudoc.echr.coe.int/eng?i=001-58154 (accessed: 15.08.2022).

[38] ECtHR decision, Beuze v. Belgium, dated 09.09. 2019. Separate opinion of judges: Yudkivska, Vučinić, Turković and Hüseynov [§ 28]. Available: https://hudoc.echr.coe.int/eng?i=001-187802 (accessed: 15.08.2022).

[39] Anca Ioana Negru, Administration and evaluation of evidence in criminal proceedings, Universul Juridic, Bucharest, 2022, p. 90. ECtHR judgment, Beuze v. Belgium, (§ 125-130). Available: https://hudoc.echr.coe.int/eng?i=001-187802 (accessed: 15.08.2022).

receive confidential instructions (see Lanz v. Austria, no. 24430/94, § 50, 31 January 2002; Öcalan, cited above, § 135; Rybacki v. Poland, no. .52479/99, § 56, 13 January 2009; Sakhnovskiy, cited above, § 97; and M v. the Netherlands, cited above, § 85);" [40]

Suspects *have the right to have their lawyer physically present during initial police interviews and whenever they are questioned in subsequent preliminary proceedings (see Adamkiewicz v. Poland, no. 54729). /00, § 87, March 2, 2010; Brusco, cited above, § 54; Mađer v. Croatia, no. 56185/07, §§ 151 and 153, 21 June 2011; Šebalj v. Croatia, no. 4429/09, §§ 256-57, 28 June 2011 and Erkapić v. Croatia, no. 51198/08, § 80, 25 April 2013). Such physical presence must enable the lawyer to provide effective and practical, rather than merely abstract, assistance (see AT v. Luxembourg, cited above, § 87), and in particular ensure that the rights of the defense of the interviewed suspect are not prejudiced (see John Murray, cited above, § 66, and Öcalan, cited above, § 131).*" [41]

Although in that case it was unanimously found that there had been a violation of the right to the defense, however, judges Yudkivska, Vučinić, Turković and Hüseynov had a separate opinion. They consider " *that it is essential to distinguish between systematic defects and particular defects that are found in individual cases as a result of specific and context-specific restrictions (for example, in cases of terrorism) or as a result of mistakes and deficiencies in individual cases. It is not right for the Court to consider the general fairness of an individual applicant's case when there is a systematic prohibition, which affects anyone else in the position of the applicant and in the absence of any assessment by the competent national authorities (§ 22). The wording of the exception is extremely clear: any derogation must be justified by compelling reasons relating to an urgent need to avoid danger to the life or physical integrity of one or more persons. In addition, any derogation must respect the principle of proportionality, which implies that the competent authority must always choose the alternative that least restricts the right of access to a lawyer and must limit the duration of the restriction as much as possible. According to the Court's jurisprudence, no derogation may be based solely on the type or seriousness of the offense and any derogation decision requires a case-by-case assessment by the competent authority. Finally, exemptions can only be authorized by a reasoned decision of a judicial authority* (§ 23).

The Court must apply a strict approach to the general prohibition of the right to legal aid; otherwise, we will come into conflict with the general direction of both the Court's jurisprudence and EU law (§ 24)."

"The *Salduz judgment led to a revolution for due process rights, firmly stating that any restriction of the right of access to a lawyer must be exceptional and capable of justification: "Article 6 § 1 requires that, as a general rule, access to a lawyer. He should be provided with a lawyer from the first questioning of the suspect by the police' and that, as further clarified in Ibrahim and others, 'restrictions on access to legal advice are permitted only in exceptional circumstances, must be of temporary nature and must be based on an individual assessment of the particular circumstances of the case". The* ***Beuze judgment in this sense represents a regrettable counter-revolution*** *: it annulled the requirement "as a rule" - already repeated in over a hundred judgments widely known as the " Salduz jurisprudence" - and dramatically relativized it to the detriment of the procedural guarantee* (§ 25)."

However, even serious deficiencies in the conduct of a fair procedure cannot constitute

[40] ECtHR judgment, Beuze v. Belgium, (§ 133). Available: https://hudoc.echr.coe.int/eng?i=001-187802 (accessed: 15.08.2022).

[41] ECtHR judgment, Beuze v. Belgium, dated 09.10.2019 (§ 134). Available: https://hudoc.echr.coe.int/eng?i=001-187802 (accessed: 15.08.2022).

a violation of the procedural provisions, if the suspect or defendant does not raise this aspect in the appeal.

It was found that the guarantees provided by Article 6 regarding access to a lawyer are applicable to *habeas corpus procedures* (see, for example, the ECtHR Decision Winterwerp v. the Netherlands, from 24.10. 1979, § 60). In the ECtHR Decision Bouamar v. Belgium of 29.02.1988, § 60), the Court found that it is essential not only that the person in question has the possibility to be heard in person, but also that he benefits from the effective assistance of his lawyer.

"*The Court emphasizes that Article 26 of the Constitution guarantees the right to defense. The right to defense presupposes the possibility of each person to react independently, by legitimate means before a court, to the violation of his rights and freedoms. Thus, the Court emphasizes that the right to defense, as a guarantee of the right to a fair trial, includes all the rights and procedural rules that give the person the opportunity to defend himself against the accusations brought against him and to contest them, in order to demonstrate his innocence. Therefore, the right to defense must be ensured throughout the criminal process.*" [42]

"*The Court held that the right to defense represents all the prerogatives and possibilities that people have, according to the law, in order to defend their interests. When the person does not have the opportunity to present all his legitimate evidence and prove his innocence, he cannot use all the procedural means necessary for his defense.*" [43]

"*There is a connection between letters a) and b) of Article 6 § 3 of the European Convention: the right to be informed about the nature and cause of the accusation must be analyzed through the prism of the right of the accused to prepare his defense (see Drassich v. Italy (No. 2), 22 February 2018, § 65 and § 66). Therefore, the right of a person to effectively prepare his defense is inextricably linked with the right to be informed both about the imputed facts and their legal framework (see DCC no. 63 of June 11 2020, §§ 23-24).*" [44]

"The right to defense is considered as a model of guarantee, necessary to achieve a harmonious balance between the interests of the person and society."[45]

Based on the above, we support the opinion that "... legal assistance is conceived as an important component of the right to defense, which consists in defending, assisting and representing the parties in the process."[46]

Conclusions

From the above, we will conclude that the right of defense has a complex content and is manifested under the following aspects:

Ex officio administration by judicial bodies of defense evidence;

Self-defense of the suspect, the accused and the defendant;

assistance granted to the suspect, the accused and the defendant.

From the analysis of what has been invoked, we note that, "the right to defense should not be understood and confused with the right to legal assistance from the lawyer, it being a complex right, including all the prerogatives granted to the people involved in the process to defend their rights."[47]

[42] HCC no. 22 of 06.08.2020 regarding the exception of unconstitutionality of some provisions of article 226 [16] para. (11) of the Fiscal Code, adopted by Law no. 1163 of April 24, 1997 (presentation of tax information to courts and criminal investigation bodies as evidence) [pt. 44].

[43] HCC no. 22 of 06.08.2020 [pt. 29].

[44] DCC no. 63 of 11.06.2020 on the inadmissibility of notification no. 39g/2020 regarding the exception of unconstitutionality of some provisions from articles 332 para. (2) and 391 para. (2) of the Criminal Procedure Code (termination of the criminal process when the act constitutes a misdemeanor and the resolution of the case according to the provisions of the Misdemeanor Code) (pt. 23-24).

[45] Iurie Mărgineanu, The principles of criminal justice in the Republic of Moldova, Comparative exegesis of criminal procedural law, Chișinău, 2006, p. 89.

[46] Nicu Jidovu, The right to defense of the accused and the accused, ROSETTI, Bucharest, 2004, p. 22.

[47] V. Dongoroz and others, Theoretical explanations of the

We support that position and infer that the right to defense includes:

The procedural rights of the parties in the process, which are means by which they support their positions and interests before the judicial bodies;

Procedural guarantees, which allow the parties to effectively and genuinely benefit from their procedural rights, in particular legal assistance;

Consultancy services, representation and / or defense in the criminal investigation bodies, prosecutor's office and in the courts courts on criminal cases.

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ANALYSIS OF CRIMINAL PROCEDURAL PRINCIPLES IN FIRST INSTANCE COURTS IN THE REPUBLIC OF MOLDOVA

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Within a democratic state and the rule of law a separate and very important role is played by the courts. The judiciary is the third power in the state, whose duty is to determine cases of violation of the rules of social coexistence, to resolve disputes arising between the subjects of the law, as well as other duties provided by the legislation in force. The courts are the main subject of the criminal process, because they fulfill the duties of judging and resolving criminal cases. The trial in the first instance is a stage that takes place after the criminal investigation stage and is the most important for the simple reason that it decides whether the person will be limited in certain of his rights or not. The basic purpose of this paper is the study regarding the presentation of evidence in court, focusing on the judicial analysis of the principles of the criminal process.

Keywords: *judicial power, subjects of the law, procedural activity, trial in the first instance, evidence.*

ANALIZA PRINCIPIILOR DE PROCEDURĂ PENALĂ ÎN TRIBUNALELE DE PRIMĂ INSTANTĂ DIN REPUBLICA MOLDOVA

În cadrul unui stat democratic și de drept un rol separat și foarte important îl ocupă instanțele judecătorești. Puterea judecătorească este a treia putere în stat, datoria căreia este de a constata cazurile de încălcare a regulilor de conviețuire socială, de soluționarea litigiilor apărute între subiecții legii precum și alte atribuții prevăzute de legislație în vigoare. Instanțele judecătorești reprezintă subiectul principal al procesului penal, deoarece îndeplinesc atribuții de judecare și soluționare a cauzelor penale. Judecata în prima instanţă este o etapă care se efectuează după etapa de urmărire penală şi este cea mai importantă din simplu motiv că această instanță hotărăște dacă persoana va fi limitată în anumite drepturi ale sale sau nu. Scopul de bază al prezentei lucrări este studiul referitor prezentarea probelor în instanța de judecată, accentuându-se pe analiza de judecată a principiilor de procedură penală.

Cuvinte-cheie: *puterea judecătorească, subiecții legii, activitate procesuală, judecată în prima instanţă, probe.*

ANALYSE DES PRINCIPES DE PROCÉDURE PÉNALE DANS LES TRIBUNAUX DE PREMIÈRE INSTANCE DE LA RÉPUBLIQUE DE MOLDOVA

Dans le cadre d'un État démocratique et légal, les tribunaux jouent un rôle distinct et très important. Le pouvoir judiciaire est le troisième pouvoir de l'État, dont le devoir est de constater les cas de violation des règles de cohabitation sociale, de régler les différends survenant entre les sujets de droit, ainsi que d'autres devoirs prévus par la législation en vigueur. Les tribunaux sont le principal sujet de la procédure pénale, car ils exercent les fonctions de statuer et de résoudre les affaires pénales. Le jugement de première instance est une étape qui se déroule après l'étape de l'enquête pénale et est la plus importante pour la simple raison que ce tribunal décide si la personne sera limitée dans certains de ses droits ou non. L'objectif principal de cet article est l'étude de la présentation des preuves devant les tribunaux, en se concentrant sur l'analyse des principes de procédure pénale.

Mots-clés: *pouvoir judiciaire, sujets de droit, activité procédurale, procès en première instance, preuves.*

АНАЛИЗ УГОЛОВНО-ПРОЦЕССУАЛЬНЫХ ПРИНЦИПОВ В СУДАХ ПЕРВОЙ ИНСТАНЦИИ В РЕСПУБЛИКЕ МОЛДОВА

В демократическом и правовом государстве отдельную и очень важную роль играют суды. Судебная власть является третьей властью в государстве, в обязанности которой входит определение случаев нарушения правил общежития, разрешение споров, возникающих между субъектами права, а также другие обязанности, предусмотренные действующим законодательством. Суды являются основным субъектом уголовного процесса, поскольку выполняют функции по рассмотрению и разрешению уголовных дел. Судебное разбирательство в первой инстанции является стадией, которая осуществляется после завершения уголовного преследования и остается наиболее важной по той простой причине, что именно данная инстанция решает, будет ли лицо ограничено в определенных его правах или нет. Основной целью данной статьи является исследование представления доказательств в суде с упором на судебный анализ принципов уголовного судопроизводства.

Ключевые слова: *судебная власть, субъекты права, процессуальная деятельность, судебное разбирательство в первой инстанции, доказательства.*

Introduction

Consideration of a criminal case in the first instance is a stage of the criminal process that occurs after the completion of the criminal prosecution and the appointment of the case for trial, that is, it involves the study of the materials of the criminal case in court. In order to most correctly resolve cases in the court of first instance, it is necessary to comply with the stages of the criminal process, especially in the study of all circumstances based on the materials of the criminal case, taking into account the analysis of the principles of the criminal process.

Only if the stages of the criminal process are observed at all stages (the beginning of criminal proceedings, criminal prosecution (charge stage) and trial), can the defendant be found guilty of a crime. Without the completion of the previous stages of the criminal process, the trial cannot proceed. By resolving these issues, the court dispenses justice. Thus, confirming the legality and validity of the actions of the conclusions and decisions of the prosecution.

It is the judicial investigation that is the most important and complex part of the trial on the merits, and the establishment of the truth largely depends on its correct conduct. Undoubtedly, the principles of the criminal process are manifested here.

Main ideas of the research

Analyzing the concept of the system of principles of the criminal process, two aspects should be borne in mind: knowledge of its constituent elements and interdependence in the implementation of criminal proceedings.

At first glance, the system of principles of criminal proceedings should be considered the one that is considered by the legislator, in particular, the provision of the Code of Criminal Procedure of the Republic of Moldova (hereinafter - CPC RM), art. 7 - 28. In fact, the system of principles in the science of criminal procedure law cannot and should not be different from the system of procedural law.

The principles of the criminal process never appear in isolation in a trial. At the stage of accusation and trial, the principles of the criminal process are applied in constant interaction and interdependence. The content of each principle is determined by the presence of basic rules, just as the consistent application of one of them is impossible without strict adherence to all [1, p. 960].

The basic principles of the criminal process are understood as general rules, in accordance with which the entire course of the criminal process is regulated [2, p. 73].

The principles specific to the stage of trial

are the basic rules enshrined in law that govern all activities carried out in court from the moment criminal proceedings begin to end, ensuring the consistent implementation of the principle of criminal procedure.

The general conditions for the trial of the case are set out in Art. 314-343 of the Code of Criminal Procedure of the Republic of Moldova and are the general rules for trial in the first instance and appeal proceedings.

The doctrine of criminal procedure law notes that in the perimeter of the trial of a case on the merits, in an appeal and in cassation, there can be no deviations from these general rules, unless a special rule provides for a deviation [3, p. 134].

Oral trial of the case, provided for by Article 314 of the Code of Criminal Procedure of the Republic of Moldova, is opposed to the accusation, which is carried out in writing. The principle of oral proceedings is that the entire stage of the trial is conducted orally. This principle indirectly guarantees that both the persons involved in the case and the public in the courtroom are aware of the progress of the trial by direct perception.

The judicial duel itself is an oral duel, the purpose of which is to convince the court of the validity of the arguments and statements presented. Orality is necessary for the discursive essence of judicial (conventional) truth, judicial truth is the result of litigation [4, p. 324].

In this direction, one should agree with the opinion that orality implies a constant and lively discussion and dialogue on all aspects of a criminal case.

It follows from the content of the principle of orality that it is necessary to hear orally the accused, the victim (injured party), the civil party, the party bearing civil liability, witnesses and experts, and all other evidence is subject to examination and verification in the same manner. Participants in a criminal case are always given the opportunity to verbally express their opinion on any issue that arises in the course of the trial, as well as to make representations.

If any of the persons summoned is unable to express his own thoughts orally, he is invited, if possible, to put his thoughts in writing, and written statements are read out at the hearing. With the participation of an interpreter, translations are made orally.

In addition to the direct provision of Article 314 of the Criminal Procedure Code of the Republic of Moldova, oral presentation during the trial is also provided for by other criminal procedural norms: Articles 367-371 of the Criminal Procedure Code of the Republic of Moldova, hearing and reading statements in a court session; Article 380 of the Criminal Procedure Code of the Republic of Moldova, giving the last word to the accused; Article 340 of the Code of Criminal Procedure of the Republic of Moldova, pronouncement of the verdict in open court. The principle of oral proceedings is interconnected with the principle of publicity and lies in the fact that the perception of all evidence in the courtroom occurs orally, as mentioned above. During the trial of a case, a witness may use written materials when giving testimony only in exceptional cases. A witness may use written materials when giving evidence in cases where the testimony is related to some digital or other hard-to-remember data. These materials are submitted to the court, to the persons participating in the trial, and may be attached to the case on the basis of a court ruling.

Orality is a separate and independent principle of the process and extends its effect to both original and derivative evidence. In accordance with paragraph (2) of Article 25 of the Civil Procedure Code of the Republic of Moldova (hereinafter referred to as CPC RM), the hearing of the case is held orally and in the same judicial composition. In case of replacement of one of the judges during the consideration of the case, the trial is carried

out from the very beginning. This process is called the removal of a judge [5].

Orality in the process of considering a case allows you to fulfill the tasks facing the judge: to correctly consider and resolve cases, since thanks to orality it is easier to assess the reliability of evidence, ask the necessary questions and get answers. The oral process has an educational and preventive effect on the citizens present in the court session [6, p. 24].

Consistency as a general condition for the trial of a case means that procedural actions must be performed directly before a judge or, if necessary, a collegium. The principle of indivisibility is the obligation of the court to directly perform all procedural and procedural actions that fill the content of the trial. The Court is in direct contact with all the evidence and on all aspects of the case.

In accordance with the principle of non-disclosure, the court re-examines the evidence obtained at the prosecution stage and, at the request of the parties, may order the receipt of new evidence. As noted in the literature, the conviction of a judge can be based only on the direct perception of evidence and only on “what is directly seen and heard” [7, p. 214].

Immediacy lies in the obligation of the court to directly perform all procedural and procedural actions that give substance to the hearing. This principle is enshrined in Article 289 of the Criminal Procedure Code of the Republic of Moldova and requires that all actions and procedures carried out at this stage be performed directly before the court. This is necessary in order for the court to have direct contact with all the evidentiary materials for the most correct resolution of the case.

The absence of a trial means that the decision is made solely on the basis of the evidence examined in court. According to the Code of Civil Procedure of the Republic of Moldova and the Code of Criminal Procedure of the Republic of Moldova, the court must base its decision only on evidence examined in court. If there is evidence or enforcement of the court decision by another court, the evidence obtained must be made public. Otherwise, they cannot be relied upon in making a decision. There are several exceptions to the immediacy of criminal proceedings, some of which have already been mentioned: court order, provision of evidence, examination of witnesses in court. In the case of a court decision, another court (not the one that hears the case) conducts certain procedural actions (for example, examination of material evidence, interrogation of witnesses, etc.).

The investigating officer and the prosecutor collect evidence before the start of the trial and send it to the court where the case will be heard. During the consideration of the case, in general, all collected materials that serve as evidence, and during the trial, must be read out in the courtroom. When the case is adjourned, the court has the right to cross-examine the witnesses present. When the hearing of the case is resumed, these testimony shall be read out at the court session. At the same time, it is not excluded that, for example, a witness who testified during the taking of evidence or during the adjournment of the case may appear in court to give oral testimony [8, p. 49].

Under the effect of immediacy, there is a general rule for obtaining evidence in the trial of cases, according to which the court investigating a criminal case is personally obliged to take note of the evidence in court. Evidence in the trial consists in the correct study of all the circumstances of the criminal case, on the basis of which the case will be resolved on the merits and the information contained in the sources of information will be taken into account.

The beginning of the production of the effect of immediacy, its consistent application during the trial of the case, in particular, ensures the elimination of distortions at the time the court receives the information necessary to resolve the case and ensures that the judge forms a firm and strong inner conviction regarding the guilt

of the defendant and the establishment of other facts in the case. Therefore, the significance of the commencement of proceedings, considered as an essential condition, one of the guarantees for establishing these facts and obtaining material truth in this case, is obvious and generally recognized.

Taking into account the essence of the principle of non-discrimination, its restriction should be allowed only in exceptional cases provided for by law and justified, as a rule, by the impossibility of applying this principle in certain situations. Meanwhile, the Code of Criminal Procedure of the Republic of Moldova allows such restrictions in a number of cases, not all of which can reasonably be considered exceptional.

First of all, the announcement of the testimony previously received from the victim, the witness is carried out in the event of the following reasons for the non-participation of the victim or witness (death, serious illness preventing the appearance in court, etc.) - this is a completely justified restriction on the commencement of the production of the effect of non-involvement in connection with impossibility of its implementation in such a situation. A ban on the use of available sources of information about the facts of the case, even indirect ones (the protocol of the previous interrogation or confrontation), in a situation where the primary source of information is unavailable (the inability to obtain evidence directly from the person) would be an even greater obstacle to the true establishment of the facts of the case.

In several complaints, the Court defined the principle of adversarial process as follows: the duty of the judge is to ensure that all elements that can affect the outcome of the dispute on the merits become the subject of adversarial discussion between the parties [9].

In the criminal process, the contradictory interests and positions of the prosecution and the defense are usually obvious and manifest themselves in the confrontation of opinions and arguments about how the conflict of the criminal law on the merits should be resolved before the court. Inconsistency puts the court before the need to perceive evidence through a filter of opinions expressed orally in the court session by all parties that have conflicting interests in resolving a criminal case. Thus, the proof takes place in the presence of the parties, under their control and as a result of their direct participation.

The judge, assessing the circumstances of the case, is not obliged to refer to their plausibility or improbability. He must assess their credibility on the basis of the evidence presented. No decision in a criminal case can be based on assumptions. All doubts about the proof of the accusation, which cannot be eliminated under the conditions of the criminal procedure law, must be interpreted in favor of the suspect, the accused or the defendant [10, p. 64].

Article 24 (2) of the Criminal Procedure Code of the Republic of Moldova states that the court should not speak in favor of the prosecution or the defense and should not express interests other than the interests of the law. This means that in adversarial proceedings the court is impartial. Another legal provision (art. 26 (2) of the Code of Criminal Procedure) states that the judge examines materials and criminal cases in accordance with the law and his own conviction, based on evidence examined in the relevant judicial procedure. Therefore, when resolving the case, the court will take into account the evidence presented by the parties. Establishing the truth will depend on the ability of the prosecution and defense to present evidence. The parties in criminal proceedings are free to choose their position, ways and means of maintaining it. Since the court is not a body charged with solving a crime, exposing the offender and collecting evidence of guilt, it cannot act in any way for or against one of the parties to

the process. The only interest promoted by the court is the interest of the law. If necessary, the court is obliged to assist either party in obtaining the necessary evidence, if asked to do so in an application or petition.

As a condition of a fair trial, the Court has always been and continues to be interested in how contracting states enforce the adversarial principle. In a number of cases, the European Court of Justice has ruled on situations and conditions that require certain behavior from the authorities in order for the proceedings to be truly adversarial.

So, in the case of *Popovich v. Moldova* [11], the European Court established the need to examine evidence in the presence of both parties. In a broader sense, the principle of equality of arms in an adversarial process, guaranteed by the ECtHR, applies both at the pre-trial stage (with a wider or narrower application) and at the trial stage of the criminal process.

The European Convention on Human Rights provides for two types of guarantees: on the one hand, substantive rights and, on the other hand, procedural rights designed to ensure the realization of rights of the first category. Article 6 is such a provision, its main purpose is to indicate how the trial should be conducted in the event of a challenge to civil rights or a criminal charge [12, p. 227].

In addition, in the case of *Popović v. Moldova,* the European Court also raised the question of whether Art. 6 substantive right, that is, the right of access to a court. The Court stated that if the case file were to be interpreted as relating only to proceedings already pending in court, the State party could, without violating the basic principles of criminal procedure, remove from their jurisdiction the resolution of certain categories of disputes of a personal nature in order to transfer their organs dependent on the government. That is, according to the European Court, the presence in Article 6 of the European Convention on Human Rights, a detailed description of procedural guarantees protects the only thing that actually allows you to exercise the right of access to a court. Thus, Article 6 of the European Convention on Human Rights guarantees the right of every person to have access to a court. However, this right is limited to the right to a fair trial, that is, to the challenge of criminal charges. Moreover, its content is not the same in civil and criminal cases.

If in civil cases the content of the right of access to a court does not cause any particular problems, then in criminal cases a number of clarifications need to be made. According to the case law of the European Courts, it follows that the right of access to a court has two fundamental characteristics: it must be an effective, but not an absolute right, and the establishment by the state of a system of free legal aid, both in civil and criminal cases.

For example, in *Airey v. Ireland* [13], the European Court found that the right of every person to have access to a court is complemented by the duty of the state to facilitate access, so that it is not enough to have a negative obligation not to interfere with access to court in any way to comply with this requirement, but sometimes states are obliged to provide genuine social and economic rights.

And in the case of *Silver v. Great Britain* [14], the European Court provided that the right to effective access to a court may imply the right to contact and communicate confidentially with a lawyer in order to prepare a legal action (especially in the case of persons deprived of their liberty). To the extent that access to a lawyer is unreasonably denied or restricted, this may amount to a de facto barrier to access to a court. Thus, the European Court accepts restrictions on contacts between a detainee and his lawyer only in exceptional cases.

Although Art. 6 of the European Convention on Human Rights does not guarantee access to justice for free (high costs of legal proceedings, high fees for the subject of proceedings, or

other legal costs that are disproportionate to the financial capabilities of the applicant), may de facto be a deterrent to free access to justice [15].

The complexity of procedures and the lack of clarity as to the legal nature of certain actions can also be barriers to effective access to court. Non-execution of a court decision may indirectly deprive the right of access to a court of meaning [16].

Following similar reasoning, we came to the conclusion that the annulment of a final and irrevocable judgment, which may prejudice the right of access to a court.

The quality of the public defender's services may also raise questions about access to justice. Indeed, the state cannot be held responsible for all the shortcomings in the protection of the public defender, but according to Art. 6 para. 3 lit. (c) of the European Convention on Human Rights, the state is obliged to provide "assistance" through a public defender to persons who do not have the means to hire one [17].

In some cases, a person may be restricted in their right to access to justice. Restrictions may be placed on the exercise of this right, since the right of access, by its very nature, requires regulation by the state, which may vary in time and space depending on society's resources and human needs [18].

Such restrictions must comply with several principles. They must pursue a legitimate aim and not affect the very essence of the right. It is also necessary to ensure reasonable proportionality between the aim pursued and the means chosen [19].

The first category of restrictions under the European Convention on Human Rights is: in the case of mentally alienated persons; in the case of persons convicted of abusing the right to apply to the court; in the case of minors or in bankruptcy proceedings. In each case, the authorization must come from a judicial authority and in accordance with certain objective and predetermined criteria.

As for the Republic of Moldova, it should be noted that the Constitution in Article 54, paragraph (3) does not allow the restriction of this right, directly indicating that: "... the restriction of the rights proclaimed in Art. 20-24 is not allowed" [20].

Similarly, the Constitutional Court of the Republic of Moldova, in one of its decisions, also stated that free access to justice as a fundamental right is undeniable, absolute, since no law can restrict access to justice, as indicated in Art. 20 par. (2) of the Constitution RM [21].

Subsequently, the court revised its position, ruling: "To the extent permitted by Article 4 of the Constitution of the Republic of Moldova, apply and interpret the constitutional provisions on human rights and freedoms in accordance with international acts to which the Republic of Moldova is a party, in the light of Article 6 (1) of the European Convention on human rights, and in the light of the case law of the European Court of Justice, the right of access to a court cannot be an absolute right, but may be subject to restrictions, including those of a procedural nature, if they are reasonable and proportionate to the aim pursued" [22].

For our part, we support the point of view that allows for the restriction of access to justice, but at the same time we believe that restrictions on this fundamental right should be based on general principles, and therefore pursue a legitimate aim and not affect the essence of the right itself. It is also necessary to ensure a reasonable balance of proportionality between the aim pursued and the means chosen.

A clear explanation of the restrictions can also be found in the case-law of the European Court of Justice, which provides for permissible restrictions on free access to justice. In this regard, one of the acceptable forms of restriction of access to justice are: the condition of prior permission to initiate

proceedings in court; procedural conditions for filing a claim; terms of commission of various procedural actions; limitation periods [23]; statute of limitations or penalties for non-compliance, the obligation to be represented by a lawyer in higher courts [24].

Access to justice can also be limited by establishing barriers to unfair appeal. In particular, restrictions on the permission to file an appeal and the permission to file a claim in a court of first instance under certain circumstances, that is, the establishment of additional procedures and due process requirements. The same applies to the imposition of a fine for filing a dubious claim, which is completely devoid of the possibility of appeal [25, p. 234].

Along with the establishment of certain restrictive Berbers, restrictions may also be established for reasons of national security. An example of a permissible restriction, this time for reasons of national security, is the case of *Klass v. Germany* ” [26]. The subject of debate was the law on wiretapping of persons suspected of terrorist activities, which provided that the person who was the target of wiretapping was not notified of this and therefore could not apply to the competent authorities to check the legality of this measure. However, the right of access to justice was not violated, since the person concerned should have been immediately informed of the national security reasons that prevented notification.

In the Republic of Moldova, in this context, the Constitutional Court ruled that the establishment by law of special rules of procedure and the procedure for exercising procedural rights when considering disputes of a certain category of officials does not contradict the principle established by Article 20 of the Constitution of the Republic of Moldova - free access to justice, since these rules arise from the need to exercise exclusively political actions [27].

Taking into account that certain economic and social circumstances may affect access to justice and the position of the parties in the process (since the initiation and conduct of the process requires costs and special knowledge), we believe that the state should provide a coherent system of legal assistance that can provide persons with low income access to justice and successful participation in all stages of the process.

Free access to justice cannot be considered to be limited by the collection of fees, and it is quite normal that citizens who directly benefit from the work of the courts should share in covering their costs. However, high court fees, bail, the cost of the subject matter of the proceedings and other legal costs that are disproportionate to the financial capabilities of the applicant may actually be a deterrent to free access to justice.

In general, the right to access to justice imposes obligations on the legislative and executive authorities, as well as on the judge [28, p. 15]. To achieve a fair and full guarantee of effective access to justice [29, p. 357], the state has three obligations: the obligation to create courts; competently consider the case both factually and legally; providing reasonable conditions for access to court (at least in criminal cases). In short, in order to ensure strict observance of the right of access to justice, the state must endow the courts with two qualities: efficiency and accessibility [30, p. 157].

That is, in terms of providing reasonable conditions for access to a court, the obligation of the state is to ensure the effectiveness of the procedure (which implies access to a court that recognizes itself as competent to decide, avoid denial of justice, consider the complaint from all aspects of fact and law), as well as actual access to court services, in terms of time (the physical time available to initiate a case) and bringing to the attention of the content of the harmful act. And finally, through the provision of free legal aid in certain situations (when

the cases are complex, involve complex legal issues, or have strong emotional consequences for the parties).

According to some researchers, with whose opinion one should agree, effective access to justice implies, first of all, that access to justice must be effective.

That is, the state must grant access to justice to any person so that he can satisfy his interests, which he pursued by referring the dispute to the judge. A procedure in which the person in question would not be able to fully hear his case before a judge is not a procedure that meets the condition of effective access to court. Secondly, effective access to justice implies the obligation of states to give the court full jurisdiction so that it can consider the case on the merits, both on questions of fact and on questions of law [31, p. 181].

In this context, the Constitutional Court of the Republic of Moldova ruled: "Since, according to Article 114 of the Constitution, justice is carried out in the name of the law only by the courts, they must have all procedural prerogatives for a fair resolution of the case, without unjustified restrictions on actions, so that when the final goal is reached, the court decision does not became illusory".

Effective access to justice is lacking in the first place when a person is not allowed to take a case to a judge on a non-criminal matter and justice is denied. For example, the ECtHR has held in numerous judgments that the case law of national courts, which states that the courts do not have jurisdiction to rule on certain land claims against the state, is a gross violation of the right of access to justice, since it is not effective until the person concerned unable to achieve satisfaction of their interests before the judge.

At the same time, the European Court recognized that the right to appeal to a court is only one of the aspects of the right to access to justice. The absence of such a right would become illusory, and the legal order of the state would not allow the execution of a court decision. Therefore, the European Court unconditionally recognized that the right to access to justice also entails the right to seek enforcement, where necessary, of judgments.

Moreover, the European Court recognizes the possibility of a temporary suspension of the execution of judgments in cases, but only if such a suspension is based on considerations of public policy, and the period of time for which it is valid is reasonable and proportionate reasons.

Thus, effective access to justice undoubtedly implies not only the possibility for the judge to resolve the dispute by decision, on the merits, but also the possibility of enforcing the decision to the extent that it is favorable. If the decision is not executed, it cannot be said that the case of this person was resolved, since an unexecuted decision is just a piece of paper that has no value in terms of actually resolving his interests. Therefore, in order to be able to speak about respect for the right of access to justice, it is important that the person concerned has the opportunity to satisfy his legitimate interests before a judge.

The right to access to justice is an integral element of the whole complex of procedural guarantees. In other words, in the absence of effective access to justice, all other procedural guarantees are useless and devoid of legal meaning, since they flow from free access to a court.

That is why the trial in the first instance is aimed at verifying the legality and validity of the act of transferring the case to the court and making one of the decisions that can be taken in a criminal case: a guilty verdict, an acquittal, termination of criminal prosecution.

Moreover, the trial is the main stage of the criminal process and includes two procedural phases, in which the prosecution prepares for trial, and the execution of the judgment enforces what the court has decided. The resolution of the case consists of procedural activities carried

out by the court with the active participation of the prosecutor and the parties in order to ascertain the truth about the crime and the defendant referred to it for consideration. The purpose of the trial coincides with the purpose of the criminal process (art. 1 of the Criminal Procedure Code of the Republic of Moldova).

Conclusions

Criminal procedure is an activity regulated by law, carried out in a criminal case by judicial authorities with the participation of parties and other persons as bearers of rights and obligations, in order to timely and fully establish crimes and bring the perpetrators to criminal responsibility, to ensure the rule of law and protect legal the interests of the individual. The judicial investigation is the most important part of the judicial stage, during which the court, in accordance with the principles of adversarial criminal procedure, examines all the evidence available in the case file in order to establish all the circumstances of the crime. The work of the court and the parties during the investigation and obtaining evidence constitutes the content of the judicial investigation and creates the basis for other subsequent stages of the trial, depending on the legality and validity of the verdict.

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PROCEDURAL PECULIARITIES REGARDING THE APPLICATION OF CONTRAVENTIONAL DETENTION AND CRIMINAL PROCEDURAL DETENTION

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Ensuring respect for human rights is an imperative for societies that strive for well-being, peace and the strengthening of the rule of law. The Republic of Moldova has shown interest in fundamental human rights values when it ratified most international treaties in the field. In this scientific approach, it is proposed the scientific approach of the institute of detention regulated by the national contravention and criminal procedure law, by identifying the particularities and notion of contravention detention and criminal procedural detention, assessing the moment from which the person considers himself/herself to be detained, which in itself represents this measure, By whom and under what conditions it can be applied, as well as the brief analysis of the legal framework and the case-law of the ECtHR regarding the specificity of the application of the given measure in case of a contravention process and in case of a criminal trial.

***Keywords**: detention, criminal trial, contravention process, coercion measure, fundamental rights and freedoms of the person.*

PARTICULARITĂȚI PROCESUALE PRIVIND APLICAREA REȚINERII CONTRAVENȚIONALE ȘI REȚINERII PROCESUAL PENALE

Asigurarea respectării drepturilor omului constituie un imperativ al societăților care tind spre bunăstare, pace și consolidarea statului de drept. Republica Moldova și-a manifestat interesul pentru valorile fundamentale care vizează drepturile omului atunci când a ratificat majoritatea tratatelor internaționale în domeniu. În prezentul demers științific se propune abordarea științifică al institutului reținerii reglementat de legea națională contravențională și procesual penală, prin identificarea particularităților şi noţiunii reținerii contravenționale și reținerii procesual penale, aprecierea momentului din care persoana se consideră a fi reținută, ce reprezintă în sine această măsură, de către cine și în ce condiții poate fi aplicată, cât și analiza succintă a cadrului legal și jurisprudenței CtEDO referitor la specificul aplicării măsurii date în cazul unui proces contravențional și în cazul unui proces penal.

***Cuvinte-cheie**: reținere, proces penal, proces contravențional, măsură de constrângere, drepturile și libertățile fundamentale ale persoanei.*

PARTICULARITÉS PROCÉDURALES CONCERNANT LA DÉTENTION DE CONTRAVENTION POUR INFRACTION ET LA DÉTENTION PROCÉDURALE PÉNALE

Assurer le respect des droits de l'homme est un impératif des sociétés qui aspirent au bien-être, à la paix et au renforcement de l'État de droit. La République de Moldova a montré de l'intérêt pour les valeurs fondamentales des droits de l'homme lorsqu'elle a ratifié la plupart des traités internationaux dans ce domaine. Cette approche propose l'approche scientifique de l'Institut de détention réglementé par le droit national de la contravention et de la procédure pénale, en identifiant les particularités et la notion de détention de contravention et de détention de procédure pénale, en évaluant le moment à partir duquel la personne est considérée comme détenue, ce que représente en soi cette mesure, par qui et dans quelles conditions elle peut être appliquée, ainsi que la brève analyse du cadre juridique et de la jurisprudence de la CEDH concernant les spécificités de l'application de cette mesure en cas de procès de contravention et en cas de procès pénal.

Mots-clés: *détention, procès pénal, procès de contravention, mesure de contrainte, droits et libertés fondamentaux de la personne.*

ПРОЦЕССУАЛЬНЫЕ ОСОБЕННОСТИ ПРИМЕНЕНИЯ АДМИНИСТРАТИВНОГО ЗАДЕРЖАНИЯ И УГОЛОВНО-ПРОЦЕССУАЛЬНОГО ЗАДЕРЖАНИЯ

Обеспечение соблюдения прав человека является императивом для обществ, стремящихся к благополучию, миру и укреплению правового государства. Республика Молдова проявила интерес к фундаментальным ценностям, направленным на соблюдение прав человека, когда ратифицировала большинство международных договоров в этой области. В данной статье предлагается научный подход к институту задержания, регулируемому национальным уголовно-процессуальным законодательством путем выявления особенностей и понятия противоправного задержания и уголовно-процессуального задержания, оценки момента, с которого лицо находится под стражей. задержанным, что само по себе представляет собой данная мера, кем и при каких условиях она может быть применена, а также краткий анализ правовой базы и судебной практики ЕСПЧ в части особенностей применения данной меры по делу о процессах о правонарушении и в случае уголовного процесса.

Ключевые слова: *задержание, уголовный процесс, производство по делу о правонарушении, мера принуждения, основные права и свободы человека.*

Introduction

Ensuring respect for human rights is an imperative for societies that aim for well-being, peace and the consolidation of the rule of law. The Republic of Moldova showed its interest in the fundamental values aimed at human rights when it ratified most of the international treaties in the field. The alignment of national legislation with international standards constitutes a primary direction aimed at achieving the goals outlined in the process of ratification of international treaties. Achieving these objectives is possible in the case of the existence not only of studies and scientific approaches aimed at the analysis of the coercive measure - detention, but also the presence of a fair judicial practice and corresponding to international treaties in the field.

Materials used and applied methods. In the preparation of this article, the national normative framework, the international doctrine that studies the institution of detention in the criminal or contravention process was studied and used. The following methods were used: logical, comparative, analysis and synthesis, systemic.

Discussions and basic content

The adequate regulation of coercive measures capable of affecting the inviolability of the person is no less important than the consecration of this inviolability itself. The opinions of the authors I. Neagu, N. Volonciu,

Th. Mrejeru, M. Apetrei, C. S. Parsaschiv, L. Nae, Gh. Nistoreanu, A. L. Lorincz, A. Boroi, N. Jidovu , I. Măgureanu, Ş. G. Ungureanu, etc. regarding the nature of preventive coercive measures are generally uniform, specifying that by preventive coercive measure we understand that category of procedural measures provided by law, by taking which the judicial bodies seek to deprive the person of liberty or restrict the freedom of movement of the person brought before criminal justice, in order to ensure the smooth conduct of the criminal process or to prevent its evasion from the criminal investigation, trial or execution of the criminal penalty.

Regarding the determination of the legal nature of detention, we can say referring to the same authors, we specify that by detention we should understand a measure of coercion that threatens the person's freedom in the lightest way - due to its duration.

C. S. Paraschiv proposes to delimit detention as a procedural measure of coercion from some similar entities such as: the arrest or capture of the criminal, the detention carried out by the police for the purpose of identity verification, the prohibition to leave the courtroom until the end of the judicial investigation, ordered by the court on the trial participants [1, p. 81].

Local doctrinaires Tudor Osoianu and Victor Orindas identifies by criminal procedural detention "...deprivation of the person's liberty, for a short period of time, but not more than 72 hours, in the places and under the conditions established by law" [2, p. 189].

Detention is also defined as a procedural measure of coercion applied within a criminal case and which is manifested by the temporary isolation from society of the person suspected or accused of committing a crime, and in some cases - already convicted, with their detention in institutions specialized for a term strictly determined by law [3, p. 59].

The detention of the suspect has a preventive and urgent nature, and therefore does not require the intervention of the prosecutor or the authorization of the investigating judge. The purposes of detention are derived from the grounds for the application of preventive measures. Detention is applied only in situations where there are sufficient grounds to assume that the suspect will evade prosecution, from the trial or that he/she will continue his/her criminal activity, will influence witnesses or other participants in the criminal trial, will destroy or falsify the evidence, will prevent the establishment of the truth in the criminal trial or evade the execution of the sentence. Also, the purposes of detention are also attributed such moments as the need to establish the personal data of the suspect (identity) and to exclude his/her attempts to hide [4, p. 48].

The apprehension of the suspect appears to be a complex procedural-criminal institution, consisting of procedural criminal and other actions. Detention includes a totality of procedural criminal and administrative actions, as well as other actions of a changing legal nature [5, p. 125].

Detention is the measure taken by the competent body to deprive a person of liberty for a period of up to 72 hours (art. 6 p. 40 of the Criminal Procedure Code of the Republic of Moldova, hereinafter CPC). Detention is a deprivation of liberty of a person, for a short period of time but not more than 72 hours (art. 165 para. (1) CPC), which is applied until the decision is made regarding the application of the preventive measure or of the decision regarding the application of a sanction or other measures provided for by the criminal or contravention procedural law (e.g. expulsion of foreigners). Deprivation of liberty is considered any situation in which a person cannot move freely either because force has been applied to him/her in this sense (e.g. confinement in a cell, etc.) or due to a legal obligation to obey to some instructions given by a law enforcement officer (e.g. the order by

a police officer not to leave a place or to go to a specific place) [6, p. 5].

Disposing of the criminal procedural detention of the person is not a broad competence and can only occur in the base:

a) to the minutes, in the case of the immediate appearance of plausible reasons to suspect that the person has committed the crime. The report is drawn up by the criminal investigation body.

b) ordinance of the criminal prosecution body;

c) the decision of the court regarding the detention of the convicted person until the resolution of the issue regarding the cancellation of the conviction with the conditional suspension of the execution of the sentence or the cancellation of the conditional release from the punishment before the term or, as the case may be, regarding the detention of the person for committing an audience offence.

The existence of a purpose to bring the person before the court must be considered independently of the hypothesis of its realization. The standard set forth in letter (c) of Article 5 §1 does not require the accumulation of sufficient evidence to bring charges, either at the time of apprehension or while in custody [7].

Therefore, the official subjects of the criminal process who are empowered to order the detention of the person are: the criminal prosecution body and the court of law. It is appropriate to indicate these subjects exhaustively, because any restriction of rights and of the fundamental freedoms of the person must be absolutely legal and well-founded, with possible abuses being reduced to a minimum [1, p. 82].

Regarding the application of criminal procedural detention, the minimum requirements for the reasonableness of the suspicions that justify the detention of a person must be met, taking into account the general context of a particular case, the status of the applicant, the consecutiveness of events, the conduct of the authorities and the way in which the criminal investigation was carried out [8].

The scientific analysis of the legal literature dedicated to contraventional detention showed that legal researchers in their works quite often approach the topic of contraventional detention. Thus, we note the works of national authors such as V. Gutuleac, S. Furdui, who exposed themselves on the institution of contraventional detention.

Prof. V. Gutuleac appreciates the detention as a forced, short-term limitation of the citizen in his rights, the limitation in the freedom of action and movement of the person who committed a contravention, in order to ensure public order and public security [9, p. 16].

Para. (1) art. 433 Contravention Code [10] (hereinafter CC), identifies by detention: " *short-term limitation of the freedom of the natural person"* and applies in the case of:

a) flagrant contraventions for which this code provides for the sanction of contraventional arrest;

b) the impossibility of identifying the person in respect of whom contravention proceedings are initiated if all identification measures have been exhausted;

c) execution of the court decision regarding the expulsion of the person;

d) violation of the regime of the state border, the regime of the border area or the regime of the crossing points of the state border.

In the case of the contravention process, para. (2) art. 433 CC provides the exhaustive list of those subjects participants in the contravention process who have the competence to apply the detention contravention namely:

a) the police;

b) the border police, in cases of violation of the state border regime, the border zone regime or the regime of state border crossing points;

c) the customs service, in the case

of contraventions falling within its jurisdiction;

d) migration office and asylum of the Ministry of Internal Affairs, in case of contraventions related to its competence.

Thus, the legislator, in the aforementioned norm of the Code of Criminal Procedure and the Code of Contravention, presented the purpose and grounds on the basis of which the representative of the above-mentioned authorities has the competence to apply the coercive measure.

So under this aspect, the application of detention has the role of ensuring the smooth running of the process (criminal or contraventional). From these explanations given to the institution of detention, some particularities related to its essence are outlined: - it is a procedural measure of coercion (not being a measure of contraventional liability; - it consists in the deprivation of the person's freedom; - the duration of the deprivation is determined, as a rule , very short; - the purpose of the application resides in ensuring order and public security, but also the smooth running of the process (criminal or contravention) [11, p. 72].

Para. (2) art. 25 of the Constitution, provides that: "*The search, detention or arrest of a person is allowed only in the cases and with the procedure provided by law* ", paragraph (5) of the same article establishes: "*The detained or arrested person is immediately informed of the reasons for the detention or arrest, and the accusation - in the shortest possible time; the reasons for the detention and accusations are made known only in the presence of a lawyer, elected or appointed ex officio*".

Even if the legislation of the European Union does not contain rules of contraventional law [12], the European Court mentioned that contraventional proceedings must be assimilated to criminal proceedings, in the autonomous sense of the term "criminal" in the Convention, from which consideration the contraventional process is assimilated to the criminal process.

In the doctrine of Russian criminal procedural law, the opinion is found according to which "... the arrest (immobilization) and bringing, transportation of the person suspected of committing the crime, if they are not carried out on the basis of a reasoned ordinance regarding the detention, does not constitute a component of the procedural-criminal detention and in this case they have an administrative character".

The presented opinion arouses certain disagreements on the part of local researchers V.Rusu and M.Sorbala, an opinion that we fully support. In the legal doctrine, the notion of *"de facto detention"* is elaborated and substantiated, which includes both the moments of catching and immobilizing the person, as well as those of bringing and transporting them. Factual detention can be a component of criminal procedural detention. However, not in all cases the actual detention leads to the initiation of criminal prosecution, but it always has the effect of perfecting, drawing up the minutes of detention [13, p. 126].

The given justification has its source in the provisions of art. 166 para. (6) CPC, which indirectly distinguishes between actual detention/ de facto detention and de jure detention. In the content of IGP order no. 129 of 27.07.2020 [20], the notion of de facto detention and de jure detention is presented, with the subsequent presentation of the application procedure. Thus: *"De facto detention - is a criminal procedural action undertaken by a police employee, which consists in the physical deprivation of liberty of the person suspected or accused of committing a crime, until the arrest report is drawn up, a period that cannot exceed 3 hours. Persons against whom a final prison sentence has been pronounced or an arrest warrant has been issued may be detained de facto.*

Detention by law - is a criminal procedural

action carried out by the criminal investigation body which is manifested by drawing up the detention minutes. The police officer, by virtue of his/her status and position, can order the detention of a person from a criminal or contravention point of view. The detention of the person implies the person being in the custody of the police and, implicitly, the restriction of his/her freedoms and rights under the law. The detained person must have all his/her procedural rights respected and receive treatment that cannot harm his/her self-respect and dignity. Depriving a person of his/her freedom in other cases or conditions, than those provided by law, affects the normal performance of the activity of administering justice, which makes this act clearly a danger to society".

However, referring to the normative provisions aimed at the practical activity of police employees, the reports on the preventive visits of the representatives of the Lawyer's Office find that the majority of detentions are carried out in criminal cases in which the criminal process has already been started, being ordered regarding the persons whose identity is known. Under this aspect, it can be stated that the detention decision is taken considering the circumstances of the case that confirm the reasonable suspicion regarding the commission of the crime and, therefore, should support a legal and well-founded detention.

However, from the statistical data presented by the Police Inspectorates, by the OAP, it follows that the decision regarding the de facto detention was not always followed by a legal detention, or by a deprivation of liberty through the application of the arrest ordered by the court. Although this fact does not expressly indicate the illegality of the detention or its lack of grounds, it is, nevertheless , an indicator of an inopportune deprivation of liberty [21, p. 22].

The period of criminal and pre-trial detention is unique and continuous. The course of this term is not interrupted by drawing up the arrest report or by starting the criminal process. The express establishment in the law of the moment of the de facto detention of the person is of particular importance for ensuring the rights of the person detained. Directly, the actual detention term is to be established based on the report or explanation of the person who caught the person and based on the direct explanations of the suspect. It is totally incorrect the opinion according to which the moment of the actual arrest of the person is considered to be that of bringing him/her before the criminal investigation body, except for the cases of the person's detention directly based on the order of the criminal investigation body [13, p. 126].

The de jure detention takes place immediately when the minutes regarding the detention are drawn up, in compliance with all the conditions provided by the criminal procedural law. It is quite important to indicate the time of the de facto detention and the time of the de jure detention in the case of drawing up the report on the suspect's detention. It will be considered a violation not to record the time of the person's de facto detention in the detention report, within the framework of an initiated criminal process. It is only debatable the situation when the arrested person voluntarily accepts to follow the investigating body to the headquarters, in which case it cannot be considered a de facto detention, for the reason that he voluntarily accepted, although the investigating body must communicate to him/her the reason why the person must to follow him/her, however we consider that even in this case it will be necessary to indicate the time of de facto detention.

Apprehension in the misdemeanor process differs from apprehension in the criminal process. This fact is motivated by the violation for which the person is detained, as well as by the fact that in some cases the detention of the person can also be applied

outside the contravention process. That is, the elementary stop by the police employee of the person driving the means of transport already constitutes an action to limit the possibility of movement of the person, respectively he/she is already considered to be detained.

In this obvious case, no contravention process is initiated, and the police employee does not draw up any minutes regarding the arrest, although he/she stopped the means of transport to document the contravention found by him/her. Art. 434 Contravention Code in para. (1) stipulates: "*When the person is detained , a report on the detention is completed within 3 hours at most, in which the date and place of completion, the position, the name and surname of the person who completed the report, data regarding to the detained person, the date, time, place and reason for detention*".

Above-mentioned norm does not expressly require the drawing up of the minutes regarding the detention in the event that the person is detained, but is released until the expiration of the three-hour period. This fact does not mean that the person is not considered to be detained, but only that in this case no record of the detention is drawn up. Already at the expiration of the three-hour period, the police employee is obliged to either release the person, or draw up a verbal arrest warrant, according to the rules established by the Contravention Code.

It should be noted that the erroneous detention of the person based on invalid grounds, even for a short period of time, reveals a violation of Article 5 of the Convention if it results from administrative deficiencies in the transmission of documents between different state bodies [14].

Both in the case of contravention and criminal procedural detention, Article 5 § 2 of the Convention contains a fundamental guarantee that every person must know the reasons for his/her detention, this being an integral part of the whole scheme of protection offered by Article 5 [15].

Once a person has been informed of the reasons for his/her detention or arrest, he/she may, if he/she deems it appropriate, challenge the legality of the detention before a court, as provided for in Article 5 § 4 [16].

Everyone has the right to file an appeal in order to promptly verify the legality of his/her detention, and this right cannot be effectively realized without prompt and adequate information about the reasons for the deprivation of liberty [17].

The reasons for detention may be brought to light or may become apparent from the content of interrogations or questions subsequent to this measure [14, 15].

The person cannot claim that he/she did not understand the reasons for his/her detention if he/she was detained immediately after the commission of an intentional crime (*Dikme v. Turkey, § 54*) or if the details of the imputed facts were known to him/her from the content of arrest decisions and extradition requests made previously (*Öcalan v. Turkey (dec.)*).

Persons detained regardless of whether it takes place within the framework of the criminal or contravention process, are to be informed, in simple and accessible language, about the legal and factual reasons for their deprivation of liberty, so that they can challenge the legality of the detention in court according to article 5 § 4 [18]. However, Article 5 § 2 does not require that this information contain a complete list of the charges brought against the detained person [19].

Subsequently, the detained person, in the event that the ascertaining body decides to apply a preventive measure depriving of liberty, it is obliged until the expiration of the detention term to present the person before the court, which will decide on the admission or refusal to apply a preventive measure depriving of liberty freedom.

Conclusions

Obviously, the study carried out is quite laconic and does not contain all the particularities specific to the detention institution. If in the case of criminal procedural detention there is a sufficient number of doctrinal studies and there is a formed judicial practice, we cannot say the same about contraventional detention.

Even if by itself the contravention presents the deed - action or inaction - illegal, committed with guilt, with a lower degree of social danger than the crime, this fact must not influence the legality and correctness of the actions carried out in the contravention process.

As it was mentioned in the text of the given article, ECtHR jurisprudence equates the contravention process with the criminal process, a condition that requires the body authorized to examine the contravention, including the application of detention, to respect and apply the rules of the contravention law equally to the criminal procedural law, a fact that does not leave room for omissions and neglects in the process of applying contraventional detention.

The integration of the Republic of Moldova into European structures, as well as receiving the status of a candidate for EU accession, must not leave without due attention the assurance of respect for human rights in the case of the application of detention as a coercive measure of a contraventional or criminal nature. For these reasons, we support the trend of improving not only the normative and legislative framework, but also raising the professional level of the subjects empowered with the right to apply this coercive measure.

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THE IMPACT OF THE FAMILY ON CRIMINAL BEHAVIOR

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There are still families, the climate of which creates premises for the formation of criminal personality, such as: conflictual families, hyperauthoritarian families or hyperpermissive, etc. The family environment can present very diverse deficiencies of a legal, social, moral, pedagogical order, related to situations such as: infidelity, abandonment, divorce, cohabitation, death, drug addicts, sexual vices, etc., not to mention the absence of the family environment itself, as in the case of orphaned, abandoned children in the care of public assistance. Parents often educate children empirically, relying on intuition and habit. The family's educational deficiencies are manifested by: the total lack of interest in the child's education; the excess of care, the indulgence of exaggerated affection; inability to provide the child with positive human models through their own example of behavior; lack of understanding and affection due to selfishness and indifference towards the child; excessive severity, unconscious or intentional, which creates an anxious family climate; the use of acts of violence as educational means.

Keywords: *murder of a close relative, murder of a family member, aggravating circumstances, conflicting families, delinquency, deviance, criminality.*

IMPACTUL FAMILIEI ASUPRA COMPORTAMENTULUI CRIMINAL

Există familii, climatul cărora creează premise pentru formarea personalității infracționale - familii conflictuale, familii hiperautoritare sau hiperpermisive etc. Mediul familial poate prezenta carențe foarte diverse de ordin juridic, social, moral, pedagogic, legate de situații ca: infidelitate, părăsire, divorț, concubinaj, deces, narcomanii, vicii sexuale etc., fără a mai aminti de însăși absența mediului familial, ca în cazul copiilor orfani, abandonati, aflați în seama asistenței publice. Părinții ades educă copiii în mod empiric, bazându-se pe intuiție și obișnuință. Carențele educative ale familiei se manifesta prin: lipsa totala de interes pentru educația copilului; excesul de grijă, răsfățul din afecțiune exagerată; neputință de a oferi copilului modele umane pozitive prin propriul lor exemplu de comportare; lipsa de înțelegere și afectivitate datorita egoismului și indiferenței față de copil; severitatea excesivă, inconștientă sau voită, care creează un climat familial anxios; folosirea actelor de violență ca mijloace educative.

Cuvinte-cheie*: omorul unei rude apropiate, omor comis asupra unui membru de familie, circumstanțe agravante, familii conflictuale, delincvență, devianță, criminalitate.*

L'IMPACT DE LA FAMILLE SUR LE COMPORTEMENT CRIMINEL

Il existe encore des familles dont le climat crée des prémisses à la formation de la personnalité criminelle, telles que les familles conflictuelles, les familles hyperautoritaires et les familles hyperpermissives, etc. Le milieu familial peut présenter des carences très diverses d'ordre juridique, social, moral, pédagogique, liées à des situations telles que: infidélité, abandon, divorce, concubinage, décès, toxicomanie, vices sexuels, etc., sans compter l'absence de le milieu familial lui-même, comme dans le cas des enfants orphelins, abandonnés sous la garde de l'assistance publique. Les parents éduquent souvent leurs enfants de manière empirique, en s'appuyant sur l'intuition et l'habitude. Les carences éducatives de la famille se manifestent par le désintérêt total pour l'éducation de l'enfant; l'excès de soin, l'indulgence d'une affection exagérée; incapacité à fournir à l'enfant des modèles humains positifs

à travers son propre exemple de comportement; manque de compréhension et d'affection dû à l'égoïsme et à l'indifférence envers l'enfant; une sévérité excessive, inconsciente ou intentionnelle, qui crée un climat familial anxieux; l'utilisation d'actes de violence comme moyen éducatif.

Mots-clés: *meurtre d'un proche, meurtre d'un membre de la famille, circonstances aggravantes, conflits familiaux, délinquance, déviance, criminalité.*

ВЛИЯНИЕ СЕМЬИ НА ПРЕСТУПНОЕ ПОВЕДЕНИЕ

До сих пор существуют семьи, климат которых создает предпосылки для формирования личности преступника. Среди них: конфликтные семьи, гиперавторитарные, гиперпозволительные и др. Семейная среда может представлять самые разнообразные недостатки правового, социального, нравственного, педагогического порядка, связанные с такими ситуациями, как неверность, оставление, развод, сожительство, смерть, наркомания, половые пороки и т. д., не говоря уже об отсутствии самого семейного окружения, как и в случае с осиротевшими, брошенными детьми, находящимися на попечении государственных органов. Родители часто воспитывают детей опытным путем, полагаясь на интуицию и привычку. Воспитательные недостатки семьи проявляются полным отсутствием интереса к воспитанию ребенка, излишней заботой, снисходительностью к преувеличенной привязанности, неумением дать ребенку положительные человеческие модели через собственный пример поведения, отсутствием понимания и привязанности из-за эгоизма и безразличия к ребенку, чрезмерной суровостью, неосознанной или преднамеренной, что создает тревожный семейный климат, применением насилия в качестве воспитательного средства.

Ключевые слова: *убийство близкого родственника, убийство члена семьи, отягчающие обстоятельства, конфликтные семьи, правонарушение, девиантность, преступность.*

Introduction

Every social group, since ancient times, has been concerned with ensuring by all means the protection of the lives of individuals, whether it has appealed to traditional (customary) rules, to religious rules, to moral rules, or to legal ones. Among the legal means of defense, the criminal law had, from early on, an increasingly important role, the criminal law being the most energetic form of influencing social relations and protecting the fundamental values of society. In all laws, starting with the Code of Hammurabi (18th century BC), the Chinese codes (13th century), the Egyptian sacred books, the laws of Manu (11th century), the laws of Lycurgus, Solon, Draco (7th -9th century), the Roman laws, the laws of the German peoples, and up to the laws of the modern age, the concern for the protection of human life is at the center of the legislator's attention.

The first act of the American people was the Declaration of Independence of July 4, 1776, which solemnly proclaims the right to life of all people: people are made by the Creator, it is stated in the declaration, with certain inalienable rights, among these rights there is also life, protection they give expression to the noblest aspirations of mankind. The same ideas were also expressed by the Universal Declaration of Human Rights, adopted by the UN General Assembly on December 10, 1948 [3].

In art. 3 of this Declaration is stated: "Every human being has the right to life, liberty and the inviolability of the person", and the Pact on Civil and Political Rights provides in art. 6 point 1, that "The right to life is inherent to the human person. This right must be protected by law. No one can be deprived of his/her life arbitrarily". This right also appears in other important international documents, namely, the European Convention for the Protection of Human Rights and Fundamental Freedoms (art. 2), as well as in the Document of the Copenhagen Meeting of the Conference for the Human Dimension of the CSCE, the

Constitution of the Republic of Moldova (adopted by the Parliament of the R. Moldova on 29. 04. 1994), also regulates the right to life in art. 24. "The state guarantees the person's right to life and physical and mental integrity".

Human life is protected by the rules of law and, in particular, of criminal law, i.e. the Criminal Code of the Republic of Moldova, it being an absolute right of the individual, but also a social value that the law protects in the interest of the whole society.

Carrying out this study, we notice that the role of the family in the formation of the personality is considerable. We say this because children are born in the family, then in the same family they grow up and are educated, acquire some skills, habits, thus forming certain personalities.

As a result of the study, it was found that the disorganized family has a special influence on the formation of the deviant behavior of the personality, which is the family that loses its integrity as a result of the separation of the parties due to reasons such as: the dissolution of the marriage through divorce, the death of one of the parents, etc.

The following classifications of disorganized families were identified:

a) incompletely united or illegitimate family;

b) the family dismembered by the removal of one of the spouses as a result of the annulment of the marriage, separation, divorce or abandonment;

c) the "empty home" type family in which the partners live together, but communication and relationships are minimal, without being an emotional support for each other;

d) the family in crisis due to causes that determine the temporary or permanent absence of one of the spouses, death, imprisonment, war;

e) the existence in some families of some situations that determine the foundation of the young person's behavior failures: the child's or the spouse's psychosis or chronically incurable physical conditions.

Moreover, it was established that a disorganized family produces negative effects in the context of social relations, of the personality of the members, and through its appearance of "honorability" or "normality" it often prevents the active intervention of social protection and social control institutions. Highlighting the negative role of these family deficiencies on the process of human personality development, we list the following defense reactions:

- affective reactions: anxiety, depression, states of excitement, obsessions, phobias, insecurity;
- characterological reactions: aggressiveness, immaturity of affective processes;
- cognitive reactions: school performance failures;
- psychosocial reactions: conflicts with family, community, negative identification.

Thus we determine that a dysfunctional family, by structure, by climate, by the educational style, by abuses of all kinds, generates dysfunctions at the psychological and structuring level of the personality starting from the period of minors, these constituting, more or less, as premises for a deviant or delinquent behavior of the child and adolescent, becoming a criminal at the age of majority. As we mentioned, children are educated according to the family situation, that is, they assimilate everything they see in the family. Thus, if violence prevails in the family, then when they become adults, they will also apply violence to their children.

As it was mentioned before, a way to supplement the family's income has become a rule nowadays, temporary or permanent emigration to Western countries, where work is a way of earning higher than in the country. As a consequence, a new risk factor appeared for children, being most often left in the care

of grandparents or even neighbors, simple acquaintances, they are deprived of resources, abandoned, thrown into the street. Annually, 1300-1500 children pass through the Youth Center for Minors. This state of affairs requires the creation of asylums for “street children”, family education centers.

In the process of creating this work, it was highlighted what is the system of criminogenic factors in the family sphere and what is the negative impact of these factors on the family sphere.

Thus it was established that there are still families, the climate of which creates premises for the formation of criminal personality, such as: conflictual families, hyperauthoritarian families and hyperpermissive families, etc. So, the family environment can be appreciated in terms of structure, economic-social conditions and educational deficit. The family environment can present very diverse deficiencies of a legal, social, moral, pedagogical order, related to situations such as: infidelity, abandonment, divorce, cohabitation, death, drug addicts, sexual vices, etc., not to mention the absence of the family environment itself, as in the case of orphaned, abandoned children in the care of public assistance.

The family educational regime proved to be the main cause of failure in the integration process and, implicitly, the essential cause of minors’ behavioral deviance. Parents often educate children empirically, relying on intuition and habit. The family’s educational deficiencies are manifested by: the total lack of interest in the child’s education; the excess of care, the indulgence of exaggerated affection; lack of unity of opinion in the educational measures of the family members; the parents’ lack of moral authority due to character deficiencies, vices, etc.; inability to provide the child with positive human models through their own example of behavior; lack of understanding and affection due to selfishness and indifference towards the child; excessive severity, unconscious or intentional, which creates an anxious family climate; the use of acts of violence as educational means.

As a result of the study, it was identified that the most frequent form of manifestation of children’s maladjustment, having as the cause the deficiencies of the family environment, is vagrancy, 20% of minors left the family or school before committing the crimes; of these, 18% come from behaviorally deficient families. The forms with family structure deficiencies are multiple. In 20% of cases, the family had only one parent, due to its disorganization through divorce, 18% through abandonment and 3% through death; in 5% of cases the family had been reconstituted through marriage, having a step-parent, 88% of these families had a conflict environment. The shock produced by the separation of the parents constituted the decisive moment that marked the evolution towards behavioral deviance.

The age and maturity of parents is also a sign of risk, which does not mean that all children whose parents are very young (between 16-20 years old) suffer or are neglected. At the same time, it is necessary to mention that the lack of maturity and responsibility, especially of young mothers, puts the family unit at risk, to difficulties such as: separation, divorce, violence, abandonment, single-parent family, etc. Births out of wedlock register a high percentage for the category of teenage mothers, and for young married mothers the divorce rate is also extremely high.

A pressing problem in the Republic of Moldova is family violence. As a rule, few people subjected to violence turn to law enforcement. It is worrying that the victims of violence are women and children. The phenomenon of aggression knows no socio-economic, racial, ethnic, religious or age limits.

However, there are also situations that prove in one way or another that a family

with two parents is not absolutely necessary for the child to be happy. Children are much happier if the two parents who have permanent disagreements divorce. So, even if the family is complete, but the moral climate in it leaves something to be desired, it cannot constitute a good educational environment.

As a result of this research, the following were concluded:

Home characteristics that were examined included household wealth status, urban versus rural location of residence.

The state of household wealth was determined using a wealth index constructed separately for each country. Specifically, the wealth index was constructed based on data on family assets, including ownership of a number of consumer items ranging from a television to a bicycle or car, as well as housing characteristics such as the source of drinking water, sanitary installations, but also the type of flooring material. Each good was assigned a weighting by principal component analysis. The results of the item scores were standardized against a normal distribution with a mean of zero and a standard deviation of one [4]. Each household was then assigned a score for each good, and the scores were summed for each household. The people were ordered according to the score for the home where they were interviewed. In each country the results were divided into categories from one (lowest) to five (highest). This index is consistent with expenditure and income measures and has been validated in a large number of countries [4].

The results of the analysis indicate that in 8 of the 10 countries, home well-being was associated with women's experience of physical or sexual violence. In the Republic of Moldova, women from the poorest 40% of households were the most likely to experience violence from their husbands/partners, while women from the richest 20% of households were the least likely to deal with such treatments. Finally, home composition was associated with women's risk of violence in five countries.

In most countries, husbands/partners' education is associated with women's experience of physical or sexual violence, and the direction of this association is consistent for all but one of these countries. In the Republic of Moldova, the years of education of the husband/partner were lower on average for women who reported acts of violence than for women who did not report violence.

Finally, the attitudes of husbands/partners towards wife beating are associated with women's risk of being subjected to acts of violence in several countries. In the Republic of Moldova, women with husbands/partners who agreed that hitting the wife is justified in at least one circumstance were more likely to experience violence than women who live with husbands/partners who do not agree with any of the situations presented in the table.

Women from the Republic of Moldova were asked if they remember if their fathers ever beat their mothers. Where this question was asked, there was a statistically significant association between women reporting acts of physical or sexual violence by husbands/partners and exposure to parental violence. Thus, women who reported parental violence were significantly more likely to be exposed to violence from husbands/partners than women who did not report such violence. Rates of intimate partner violence are about twice as high among women who reported that their father beat their mother as among women who did not report such violence.

Alcohol use by the husband/partner was also strongly associated with women reporting acts of physical or sexual violence. In Moldova, the rates of violence are lower for both groups of women, although the difference remains large: 9% for women whose partners do not drink and 59% for women whose partners get drunk often.

Women from middle-class backgrounds were more likely to experience violence than women from the wealthiest households. In Moldova, women from the wealthiest homes, 20% compared to women from the poorest, 40%, as well as from the middle homes, 40%, were much more likely to be exposed to violence.

Materials used and applied methods. During the elaboration of this research, a historical, regional and national normative framework was studied and used, which ensures the legal protection of people with alcoholic deviance, drug addiction in terms of legal history, criminal law, legal medicine, psychology and criminology. The following methods were used: historical, comparative, logical, analysis and synthesis, systemic.

Results obtained and discussions

Speaking about the family criminogenic state, we attest that in the UNESCO Dictionary *the family* is defined as *the form of human community based on marriage, which unites spouses and their descendants through close biological, economic, psychological, spiritual relationships.*

The family is a *social group formed through marriage, made up of people who live together, have a common household, are linked by certain natural-biological, psychological, moral, legal relationships and who answer for each other in front of society.*

Multiple researches confirm the role and importance of the criminogenic family situation in committing violent crimes.

The content of the criminogenic family situation consists in the contradictions that lead to the formation of family conflicts. The situation can be viewed at three levels:

- social level - the objective conflict existing in the sphere of family relations between different population groups: husbands and wives, daughters-in-law and mothers-in-law, parents and children, etc.;

- group level - conflicts in concrete families;

- individual level - the subjective reflection of the conflict in the psyche of the participants in the conflict, concentrated in relives, decision-making.

Following some research, we can say that every third or fourth crime committed against the husband can be explained by the fact that the wife had a provocative behavior [6, p. 112].

The analysis of the criminogenic family situation involves the determination of the accumulation of factors that influence the commission of the crime, their spread, the classification of the situations: the results of such an analysis are necessary for the differentiated substantiation of the prophylaxis on conflicting families.

At the current stage, the main criminogenic factors can be mentioned, which are the basis of serious crimes committed ***against spouses***. These are the conflicts:

- of domination;
- infidelity of spouses;
- the tendency towards liberation;
- avarice.

Of course, in real life these factors often appear not in isolation, but overlap with each other.

The dominance conflict. At the basis of the conflict were mutual claims, arising in connection with the consumption of alcohol by the husband or wife, or both, disagreements regarding domestic and family obligations, arguments with the parents of the husband or wife, disagreements regarding the education of the children, the distribution of financial means, the tendency towards authority in the family, the quarrels of one of the spouses with the friends of the other spouse.

The use of alcohol by one of the family members in correlation with the inability of others to form interpersonal relationships with this family member, as sociological research shows, not infrequently leads to the

appearance of harshness, most often directed against the husband. It is known that alcohol is a catalyst that influences the commission of violent crimes.

Many criminals interviewed mentioned that they do not agree with how family obligations were carried out in their families. It also irritates the other husband's tendency to burden him with some or other matters. The fight for the division of obligations, but most often for the right not to execute them, in the genesis of crimes against the husband, takes the third place, following the offender's alcoholism and the first place being his confidence in the role of head of the family.

The investigated intra-family disagreements, which lead to the commission of crimes against one of the spouses, ultimately come down to the tendency to dominate, to disobey the rights acquired by the spouse and also to the possibility of acquiring new rights in front of the spouse.

So, the dominance conflict is based on the opposite positions of the man and the woman regarding the most important issues within the family, the inability to agree with the interests of the partner, to cooperate in his/her activity with him/her, and the reliance on other people close to him/her.

The conflict of spouses' infidelity, which manifests itself by committing violent crimes against one of the spouses, develops under the influence of such factors as: detection of infidelity, doubts regarding fidelity, the presence of relationships with the husband or wife before marriage. As an individual factor, the "disordered" intimate life can also be highlighted, which in itself presents the next step after simple impermanence, which consists in the frequent change of partners. A more important situation is the already established infidelity itself, and above all the infidelity of the injured party.

The so-called disordered intimate life, which leads to the aggressiveness of the husband, is present in 6.7% of all criminogenic family situations.

The conflict of the tendency towards liberation is found in every fourth case of violence against the husband or wife. This is the situation, in which, after a while, one of the spouses becomes unbearable for the other, a fact that is related to the illness, pregnancy, bad character of the victim, with the difference in the psychological thinking of the parties and also with the appearance of interest or plans to remarry.

The conflict of cupidity is present in an inconsiderable part of crimes between spouses. Here we are talking about murder for the purpose of receiving inheritance, insurance, evading the obligation to pay alimony. Part of the intrafamilial cupidic murders are part of the so-called conjugal affairs.

Sometimes such crimes cross the boundaries of family relationships, for example the person who wants to receive some advantages faster, resorts to the services of a professional killer.

The family environment can be appreciated from the aspect of structure, economic-social conditions and educational deficit. The family environment can present very diverse deficiencies of a legal, social, moral, pedagogical nature, related to situations such as: infidelity, abandonment, divorce, cohabitation, death, drug addicts, sexual vices, etc., not to mention the absence of the family environment itself, as in the case of orphaned, abandoned children, in the care of public assistance.

The family educational regime proved to be the main cause of failure in the integration process and, implicitly, the essential cause of minors' behavioral deviance. The researched parents did education in an empirical way, based on intuition and habit. The family's educational deficiencies are manifested by: total lack of interest in the child's education; the excess of care, the indulgence of exaggerated affection; lack of unity of opinion in the

educational measures of the family members; the parents' lack of moral authority due to character deficiencies, vices, etc.; the inability to provide the child with positive human models through their own example of behavior; lack of understanding and affection due to selfishness and indifference towards the child; excessive severity, unconscious or intentional, which creates an anxious family climate; the use of acts of violence as educational means.

The most frequent manifestation of children's maladjustment, due to the deficiencies of the family environment, is vagrancy, 20% of minors left their family or school before committing crimes; among them, 18% come from behaviorally deficient families. There are multiple forms of family structure deficiencies. In 20% of cases, the family had only one parent, due to its disorganization through divorce, 18% through abandonment and 3% through death; in 5% of cases the family had been reconstituted through marriage, having a stepparent, 88% of these families had a conflict environment.

The shock produced by the parents' separation was the decisive moment that marked the evolution towards behavioral deviance. The general deterioration of living conditions leads some people to look for solutions to obtain compensatory income by which they can improve their living conditions, using illegal means. There is a decrease in the authority and social control function of the family. The emergence of accentuated permissive states towards the deviant behaviors of minors is taking shape more and more.

Permissiveness in association with indifference towards the future of one's own children, negatively influences their personality, even causing them to commit criminal acts. The precarious living conditions of some families have contributed to the emergence of the social phenomenon known as "street children", who take shelter in train stations, bus stations, basements of buildings, heating networks and whose source of existence is begging, theft, etc. frequently becoming victims of pedophiles.

Among the external factors, the family plays an overwhelming role.

The family influences the formation of the child's behavior primarily through the relations between the parents. When one of the parents is a stepfather, he will generate in the child's soul a certain affective reserve and maybe even a feeling of rejection. The attachment to the real parent, who has left the family (through divorce or death) creates this affective state of rejection or indifference for the child and leads some to acts of vagrancy. There are situations where the family consists of both natural parents, but the atmosphere is negative, either because they are alcoholics or because they are criminals themselves. These extreme attitudes generate either an exaggerated demand pushed to the point of terror, or an impermissibly great indulgence, with the child tolerating any kind of behavior. The child terrorized by beatings will look outside the family for a development through aggressive behavior towards younger peers. The one who is spoiled too much in the family will easily become a criminal by appropriating goods that do not belong to him, knowing that his parents will defend him. Parents will have to be concerned with providing the child with a model of behavior that he/she can then imitate as an adult citizen [5, p. 154].

According to its functionality, the family environment can be analyzed according to several indicators, the most important of which are considered:

1) the interpersonal reporting model of the parents, meaning the level of closeness and understanding, agreement or disagreement in relation to various issues;

2) the degree of cohesion of the family members;

3) the way the child is perceived and considered;

4) the set of attitudes of the members in relation to different norms and social values;

5) the manner of manifestation of parental authority;

6) the degree of acceptance of various children's behaviors;

7) the level of satisfaction felt by the members of the family group;

8) the dynamics of the emergence of tense and conflictual states;

9) the model of application of rewards and sanctions;

10) the degree of openness and sincerity shown by the members of the family group [5, p. 154].

The child's choice of a pro-social or pro-delinquent behavior is influenced by the education styles and the relationships between the family members and the child:

1) authority-liberalism or coercion-permissiveness and

2) love-hostility or attachment-rejection [5, p. 154].

Analyzing the criminogenic family as a factor in the formation of the cupid goal, we attest that the differentiation of social classes determines the existence of contradictory relationships between them. In this sphere of relations, estrangement appears mainly due to the contradiction between the equality of people, which is only declarative. In reality, there is enormous inequality in the distribution of the social product. This inequality determines the appearance of some forms of social inequity, makes some social groups occupy a materially and socially disadvantaged position, manifesting, as a consequence, negative attitudes. Due to these states of affairs, aggravated by the economic crisis in our country, possibilities of enrichment and enrichment without work have appeared, generating enormous social parasitism. Individualistic attitudes, disdain for work, ignoring or even violating the rights of other members of society appeared in terms of personality structures.

The unequal destruction of knowledge, in turn, leads to the separation of physical work from intellectual work, making certain social groups occupy a socially disadvantaged situation.

Greedy crime can be characterized as a subsystem, which is part of the "criminality" system. The "greedy crime" subsystem includes both the plurality of greedy crimes and the multitude of greedy factors.

Within these factors, at the social level, three contradictions play an important role:

- between different social groups with different levels of material development;
- between material needs and the possibilities related to their realization;
- between the official norms and the de facto behavior of a part of the population.

For the formation of the cupid goal, an important role is played by the difference in material development of different social strata. Thus, the disproportions that establish personal incomes impose moral requirements on the members of society, especially those with a low income, the importance of which cannot be ignored. As long as there are people who prosper from a material point of view, there will appear individuals from among the others, who will claim to equalize the situation, or at least to get closer to the desired ideal.

The greedy orientation of criminals to a large extent is determined by family relationships, which activate misunderstandings between the needs of the material state and the possibilities of their realization and also the birth of the desire not to be left behind by other families.

The institution of the family contains its own determinants in the quality of which three misunderstandings arise: between the interests of the material order; between material and spiritual beginnings; between the professional and family role of the woman. In the absence of soul understanding and also the disturbance of stability, selfishness, ignorance of the interests of those close to you, lack of

mutual understanding can appear. As a result of this situation, conflicts related to wealth, in some cases, take on a fierce character. This is most often observed in the settlement of civil cases related to the division of wealth between spouses.

The absence of one of the parents reflects negatively on the character and intensity of family control over children's behavior. In this way, the absence of grandparents in the family also influences, which is more noticeable in families where one of the parents is missing.

For adult criminals, a characteristic violation of family relationships is that most of them do not have families of their own. Not infrequently, the greedy criminals themselves consider relationships with relatives as a factor that can hold them back from committing a crime for fear of causing them to suffer.

Mutual understanding and mutual control decrease in alcohol-consuming families, and the members of such families, especially minors, are prone to criminogenic-covetous action.

A particular person's cupid orientation is usually formed gradually. Its appearance is largely related to the unfavorable correlation in the individual consciousness of three dominant types of behavior:

- material enrichment needs,
- the needs in spiritual enrichment,
- respect for property.

Conclusions

Analyzing what was previously reported, we believe that highlighting some moments would be welcome:

Cruel behavior towards children is a social phenomenon, specific to any society. The social-economic crisis relived by our state conditions the increased actuality of the problem in question.

For a long time, the efforts of the state and society were aimed at placing children left without parents in orphanages and not at annihilating the causes of this negative phenomenon - preventing degrading and cruel behavior.

Protecting children from violence within the family, applying traditional legal-civil and criminal measures, is not enough. This help given to the victims takes place only when the violence has caused bad consequences and it is impossible to keep the family. We believe that corrective and rehabilitative measures that should be undertaken at the initial stage of the family crisis would have a greater effect. But the legislation in force does not provide grounds for carrying out other measures in a mandatory manner.

The mass media, in order to raise the rating of the show or the newspaper, publish situations with luxury details, which causes additional psychological trauma to the victim. We believe that the mass media should publicize more prophylactic and legal programs, in order to raise the level of legal culture of the population.

The criminal laws of all times and in all social arrangements have recognized the particularly high degree of social danger presented by crimes against life, killing a human being one of the most serious acts. Violating the right to live creates a state of social insecurity, a dangerous imbalance for the very existence of society.

That is why it is natural that such acts of violation of the criminal law aimed at the social relations that protect life, the most precious asset of man, should be in the attention of the entire community, first of all the judicial bodies, which have the task of acting against antisocial acts in order to provide physical protection and legal protection of life.

The experience accumulated in the daily activity gives us the opportunity to state that in combating antisocial acts and those directed against life, bodily integrity and health, an important role is played by legal means, our criminal law being an effective means of

defending the legitimate interests of citizens, to ensure the security of the person.

We would like to mention that an important role in criminal practice is occupied by the sanctioning of criminals. The fair individualization of the punishment and, implicitly, the success of the fight against anti-social acts obliges the courts to examine with particular attention the social danger of the act and the person of the defendant of a premeditated death committed with the aggravating circumstance of material interest committed on the husband (wife) or a close relative.

When solving the cases, it is necessary to clarify all aspects related to the concrete content of the committed crime and the circumstances of its commission, as well as the consequences and the intended purpose, and the thorough examination of the perpetrator is likely to help establish sanctions that correspond to the correction requirements of the defendant.

We can say that by studying this theme, we found out what are the pluses and minuses of a family in the process of personality formation in general and the criminal's personality formation in particular, which allow us to make the following ***recommendations*:**

- therefore, knowing what is the negative impact of criminogenic factors on the family sphere, what are the reasons for criminal behavior in the family, what are the consequences of family conflict, we believe that it is necessary to *introduce a family education course in the school program for high school students*;

- although in the specialized literature it is mentioned about the role of the family in the formation of the child's personality and that the contemporary family faces a lot of difficulties and distortions, having an enormous need for psychological intervention, studies on the conditions in which the family could function with greater efficiency, adapting to society's requirements, are insufficient. and considering that *there are few services developed specifically for the family, especially for complete and young families* , it would be very important *to open of centers where the psychologist works with each family member* .

- the entire action of supervising family relations, of the exercise of parental obligations towards the child, the adoption of children left without parents or unable to raise them, the guardianship of those lacking abilities, whether minors or adults and the elderly - all these problems require the services of social assistance. *For the prosperity of a society with "healthy" families, the network of social assistance services needs to be implemented both at the national and local level.*

In conclusion, we could mention the fact that murder is one of the serious crimes of humanity, because only as a result of committing this act, the most important social relationship, namely human life, is damaged. Life is a complex phenomenon, a social phenomenon, a social value which, regulated from a legal point of view, constitutes the absolute right to life of the person, especially in the case of premeditated murder committed against the husband (wife) or a close relative.

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ABUSE OF THE MINOR. FORMS OF ITS MANIFESTATION AND EFFECTS ON THE PERSONALITY

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Parents who apply violence towards minors consider that physical punishments are the main means of disciplining the minor to comply with the rules of behavior imposed by the family. In the practice of many states, these punishments necessarily accompany the primary socialization process, being applied even in the first year after the birth of the minor, continuing during the preschool and school period, until the teenage years. These punishments often go beyond the permitted limits, resulting in serious injuries, up to fractures and trauma.

Evidence shows that most of the parents who resort to these violent means grew up and were, themselves, educated in a family environment characterized by violence, being subjected to abuse themselves. In turn, an important part of the minors assaulted by these parents will become aggressors themselves, if violence as a means of discipline was supported by the existing beliefs and norms in the family.

Keywords: *violence, minor, family, punishment, adolescence, trauma.*

ABUZUL ASUPRA MINORULUI. FORME DE MANIFESTARE ȘI EFECTE ASUPRA PERSONALITĂȚII

Părinții care aplică violența față de minori consideră că pedepsele fizice sunt niște mijloace principale de disciplinare a minorului pentru a se conforma regulilor de comportare impuse de familie, În practica multor state, aceste pedepse însoțesc, în mod obligatoriu, procesul de socializare primară, fiind aplicate chiar în primul an după nașterea minorului, continuând în timpul perioadei preșcolare și școlare, până în anii adolescenței. Aceste pedepse depășesc, de multe ori, granițele permise, soldându-se cu răniri grave, mergând până la fracturi și traumatisme.

Evidențele arată că cea mai mare parte dintre părinții care recurg la aceste mijloace violente au crescut și au fost, ei înșiși, educați într-un mediu familial caracterizat de violență, fiind supuși chiar ei maltratărilor. La rândul lor, o parte importantă dintre minorii agresați de către astfel de părinți, vor deveni, ei înșiși, agresori, dacă violența ca mijloc de disciplinare a fost sprijinită de convingerile și normele existente în familie.

Cuvinte-cheie: *violență, minor, familie*, *pedeapsă, adolescență, traumatism.*

L'ABUS DU MINEUR. FORMES DE MANIFESTATION ET EFFETS SUR LA PERSONNALITÉ

Les parents qui appliquent la violence envers les mineurs considèrent que les châtiments corporels sont le principal moyen de discipliner le mineur pour qu'il se conforme aux règles de comportement imposées par la famille. Dans la pratique de nombreux États, ces peines accompagnent nécessairement le processus de socialisation primaire, étant appliquées même dans la première année après la naissance du mineur, se poursuivant pendant la période préscolaire et scolaire, jusqu'à l'adolescence. Ces punitions vont souvent au-delà des limites autorisées, entraînant des blessures graves, pouvant aller jusqu'à des fractures et des traumatismes.

Les preuves montrent que la plupart des parents qui recourent à ces moyens violents ont grandi et ont eux-mêmes été éduqués dans un environnement familial caractérisé par la violence, subissant eux-mêmes des abus. À leur tour, une partie importante des mineurs agressés par ces parents deviendront eux-mêmes des agresseurs, si la violence comme moyen de discipline était soutenue par les croyances et les normes existantes dans la famille.

Mots-clés: *violence, mineur, famille, punition, adolescence, traumatisme.*

НАСИЛИЕ НАД НЕСОВЕРШЕННОЛЕТНИМ. ФОРМЫ ПРОЯВЛЕНИЯ И ВЛИЯНИЕ НА ЛИЧНОСТЬ

Родители, применяющие насилие по отношению к несовершеннолетним, считают, что физические наказания являются основным средством дисциплинирования несовершеннолетнего к соблюдению правил поведения, установленных семьей. В практике многих государств, эти наказания обязательно сопровождают процесс первичной социализации, применяясь уже в первый год после рождения несовершеннолетнего, продолжаясь в дошкольный и школьный период, вплоть до подросткового возраста. Эти наказания часто выходят за дозволенные пределы, приводя к тяжелым ранениям, вплоть до переломов и травм.

Имеющиеся данные свидетельствуют о том, что большинство родителей, которые прибегают к этим насильственным средствам, сами выросли и получили образование в семейной среде, характеризующейся насилием, и сами подвергались жестокому обращению. В свою очередь, значительная часть несовершеннолетних, подвергшихся насилию со стороны таких родителей, сами в будущем станут агрессорами, если насилие как средство дисциплины поддерживалось существующими в семье убеждениями и нормами.

Ключевые слова: *насилие, несовершеннолетний, семья, наказание, травма.*

Introduction

Placing the minor at the center of a society's concerns must be a priority of all the factors and actors involved and responsible for his protection.

Thus, protecting the minor from birth against any form of abuse or exploitation by the adults of their own family is one of the basic priorities of

Convention on the Rights of the Minor, signed on November 20, 1989 [7].

Due to the specificity of age, the lack of social experiences and especially due to the total dependence on adults, minors represent the most vulnerable social category. The increase in violence against minors represents one of the most serious social problems facing contemporary societies. The number of minors who are maltreated even by their parents according to studies undertaken and published statistics indicate that this number is increasing [1, p. 18].

These evidences are, moreover, consistent with the theory of learned aggression (Bandura A., 1973) and with those concepts that consider that the aggression of minors is determined, most often, by an authoritarian style of education, based on severe punishments.

At the same time, the data of the various researches undertaken indicate that family

violence is closely related to various structural characteristics of the family, including its way of organization, relations between members, income, occupational status of parents, gender of parents and minors, level of education and patterns of parental authority.

Although violence against minors is not limited to a single social class, it seems to be more prevalent, however, among the classes and strata defined by a lower economic status, being more characteristic of those families where the parents have a low level of education, occupations modest and low income. In general, these families are defined by norms and values that seem more favorable to solving the difficulties and problems of existence through aggressive and violent means. Within them, the relationships between family members, between parents and minors, have a lower cultural content, the emphasis being primarily on practical values and norms of immediate utility.

Materials used and applied methods. In the preparation of this article, the normative, juridical -normative, comparative -historical, regional and national that ensures the legal protection of minors from abuse in the family. The following methods were used: historical, comparative, logical, analysis and synthesis, systemic.

Results obtained and discussions

Violence against minors in the family appears, at the same time, to be linked to the problem of poverty, to the difficulties faced by families with an income below the poverty line. Families that are characterized by tendencies of violence against their own members and, in particular, against minors, are typically families that have to face numerous existential problems [18, p. 155-157].

In this context, articles 19, 32, 33, 34, 35 and 36 of the Convention on the Rights of the Minor enshrine the minor’s equal rights to physical and personal integrity. They come to detail the minor’s right to be protected from what has been arbitrarily called “abuse” in different societies.

Physical, mental and emotional abuse of the minor violates the provisions of art. 19 of the Convention to be “protected against any form of violence, injury or physical or mental abuse, but also the minor’s right to life, survival and development (art. 6), to honor and dignity (art. 16), to rest and vacation, to practice recreational activities appropriate to his age (art. 31), the right to the best possible state of health (art. 24) [4, p. 50].

As a type of physical sanction applied by parents to their minors, the notion of maltreatment involves numerous definitions and interpretations of a moral, legal or educational nature.

In the English language, these notions are equivalent to that of abuse (*abuse*) which designates a series of deliberate actions (hits, injuries, outrages, insults, etc.) intended to bring damage, from a physical and emotional point of view, to the victim, actions that they are contrary to the social norms that require the protection of minors. The notion of abuse against the minor refers, in fact, to any behavior of the adult that has a negative impact on the former.

Other researchers also consider that the abuse of the minor can be defined as the intentional causing of an injury that affects the physical and/or mental health of the minor,

Child abuse takes place by taking advantage of the power difference between an adult and a child by disregarding the personality of the latter.

The abuse of the minor is always done with destructive intent, and the neglect usually occurs against a background of parental indifference and ignorance vis-à-vis the minor’s needs [1, p. 18].

In general, social (informal) norms, as well as legal (formal) ones, prohibit the use of aggression and violence against any member

of society, but none of them specify from what point the beating of a child by a parent becomes reprehensible and punishable aggression from a legal point of view. What some consider the abusive behavior of the parent or educator as something abnormal, others appreciate it as acceptable behavior, even necessary for disciplining the minor." In general, no one defines an act of mistreatment as violent if that act is permitted or required by a social role.

That's why most parents don't define slapping a child as an act of violence, because they see it as a necessary part of parenting. From this perspective, family violence in general, that against minors in particular, is neither defined nor sanctioned, as such, by outsiders, because family roles allow the use of violence within limits that are always subject to interpretation" [22, p. 133-148].

For some specialists, physical punishment applied to minors by their own parents is a permissible and even legitimate solution. In most countries, with some exceptions, parents and, often, teachers who teach small classes, are recognized with the legal right to apply these sanctions. The same physical sanctions applied by foreign persons, who do not have guardianship or educational relations with minors, are considered criminal offences. Some countries, including Sweden, instead prohibit corporal punishment by parents or educators. The purpose of the legislation in this area is not to penalize those who violate these regulations, which is why this law is not incorporated into the criminal codes of the respective countries. Such legislation actually pursues two main objectives:

1. Ensuring a unitary regulation, with a unitary character, in this field;

2. Identifying those parents who need help in the education of their minors, through specialized services.

For example, in the Penal Code of the State of Texas (USA) it is stipulated that the use of force, except that which may bring the death of the victim, against a minor under the age of 18, is justified under the following two conditions:

When the author is the parent of the minor, a step-parent or his guardian; o When the author honestly believes that force is necessary to discipline the child or to protect or ensure his education.

Thus, in the specialized literature there are different opinions regarding the type of behavior that can be considered abuse of the minor. The difficulties lie in the fact that the idea of child abuse is closely related to the sociocultural context and can vary considerably in time and space [21, p. 134].

According to the general understanding, abuse constitutes endangering, in intentional or unintentional forms, the physical and emotional development of the minor [3, p. 238].

The United Nations Global Study on Violence Against Violence (UN Global Study on Violence Against Violcnce) uses as a definition of the concept of violence any form of physical or mental violence, injury and abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse [18.05.2014].

According to the legislation in force [14] and specialized literature, the forms of abuse of minors could be classified into several categories:

- *physical abuse* - acts of physical violence practiced intentionally or the failure to prevent such acts directed at the minor, which affects his physical integrity. Other specialists believe that physical abuse is the action or lack of action by a parent or person in a position of responsibility, power, or trust that results in actual or potential physical harm. It involves punishments such as: tying up the minor, hitting, wounding, poisoning, scratching , etc.

- *emotional abuse* - the serious effect, actual or potential, on the emotional and behavioral development of the minor, caused by subjecting

him to persistent and severe forms of emotional ill-treatment or abandonment, other opinions present emotional abuse as a behavior committed intentionally by a deprived adult of emotional warmth, which offends, mocks, devalues, wrongs or verbally humiliates the child, thus affecting his development and emotional balance [1, p. 19].

- *sexual abuse* - engaging minors and adolescents in sexual activities, which their level of development does not allow them to understand and give their informed consent or which violates the social prohibitions of family roles, as well as other specialists are of the opinion that sexual abuse of a minor would be forcing or urging him, by an adult, to participate in sexual activities that serve the adult's pleasure. Sexual abuse includes: enticing, persuading, corrupting, forcing and compelling the minor to participate in activities of a sexual nature or assisting another person during activities that serve to obtain pleasure for adults.

In a comparative aspect, analyzing Romanian legislation, we find another classification according to which sexual abuse includes the following forms:

1. sexual molestation, exposure of the minor to insults or language with a sexual connotation;

2. as well as touching the minor in the orogenic zones with the hand or by kissing, regardless of the age of the minor;

3. situations that lead to the satisfaction of the sexual needs of an adult or another child who is in a position of responsibility, power or in a relationship of trust with the child victim;

4. attracting or forcing the minor to commit obscene actions; exposing the minor to obscene materials or providing such materials to him, etc.;

5. early marriage or engagement of minors involving sexual relations (especially in Roma communities);

6. genital mutilation;

7. sexual harassment;

8. lack of care and protection of the minor or neglect in the family - lasting absence of the care and protection due to the minor or failure to fulfill the obligation to protect the child from any kind of dangers, including cold or hunger, which have the effect of serious deterioration of health or development the minor.

A more detailed specification regarding the forms of neglect of minors in the family can be found in Romanian legislation, namely:

1. food neglect - deprivation of food, the absence of several essential foods for growth, irregular meals, inappropriate or inappropriately administered food for the minor's age;

2. clothing neglect - inappropriate clothes for the season, clothes that are too small;

3. dirty, lack of clothes;

4. neglect of hygiene - lack of body hygiene, repulsive smells, parasites; medical negligence, absence of necessary care, omission of vaccinations and control visits, failure to apply the treatments prescribed by the doctor, failure to attend recovery programs;

5. educational neglect, the instability of the system of punishments and rewards, the lack of tracking of school progress;

6. emotional neglect - lack of attention, physical contacts, signs of affection, words of appreciation [11].

Forced domestic labor - forcing minors to do various household activities that prevent them from going out to play, meet friends or even do their homework. According to studies carried out in the given field, about 7% of minors are very often subjected to such abuse and 36% of minors are sometimes subjected to forced domestic work.

Violence in school by teachers - involves all acts of discrimination, accompanied by verbal or physical violence by teachers on students. According to the experts'

opinions, discrimination is manifested by disproportionate criticism of a particular student, physical violence is manifested by the use of blows or other forms of violence by teachers towards students and verbal violence is manifested by shouting and humiliating the student during teaching activities [22, p. 31].

In the specialized literature we find opinions regarding other forms of violence or abuse of minors, namely, infanticide, abandonment and incest.

Infanticide as a form of extreme violence against minors. Throughout the centuries, minors were denied their identity, they were subjected to countless humiliations, they were the victims of countless abuses committed by parents, educators or other people, in such a way that the social history of childhood includes a long line of violence, mistreatment, bad treatments, which often took on downright dramatic forms.

The most serious of them is infanticide, widespread in many pre-industrial societies, forced to contend with extremely low levels of food resources.

Infanticide has been known since ancient times, especially in East Asian societies. In most cases, infanticide has a specific female character, being directed against newborns, in order to ensure, in this way, the labor force necessary for the survival of the collective and the necessary defense capacity against external enemies.

In Sparta (Ancient Greece), such practices were "normal", encouraged, even by official regulations.

In China and Japan, where the frequency of infanticide was extremely high, it did not occur, however, except in extreme conditions, when the succession of female births exceeded the permissible limits and when the age of the mother or the amplitude of the intergenerational intervals (the period of time separating two consecutive births of a woman - *author's note*), made the possibility of a male birth unlikely.

Currently, in the same way, our society is aware of such illegal acts as infanticide, and respectively they are considered as crimes that are regulated by the criminal law, in which it is provided that: "The murder of the newborn minor, committed during the birth or immediately after the birth by the mother who is in a state of physical or mental disorder, with diminished discernment, caused by the birth is punishable by imprisonment for up to 5 years [6].

Family abandonment as a form of violence against the minor is particularly frequent in agrarian societies, infanticide has also experienced a great spread in industrializing societies, due to the lack of adequate economic conditions, but also due to the absence of contraception and legislation to authorize it. Along with infanticide, as such, the abandonment of the minor was practiced, also a form of infanticide, however, disguised, representing a common practice. Beginning in the 19th century, rates of infanticide have gradually ceased to decline, in relatively modest proportions, consistent with changing attitudes toward the child and its economic or emotional value. The development of the family feeling towards the child, Jean-Claude Chesnais (1981, p. 107) appreciated, is a characteristic phenomenon of the urban bourgeoisie, and this feeling only spread later in the popular media [2, p. 108].

The sociological studies carried out in recent years have highlighted the frequency of the stabilized environment of tension and conflict, of physical and moral suffering in family coexistence relationships, this environment being called by Roger Muchielli and other psychologists family desertism [18, p. 110].

Desertion can present itself in mild forms in disorganized families (having as the main causes the impossibility of respecting family duties and the refusal to fulfill these

duties) the consequences being borne by each member of the family and minors especially due to the tense atmosphere, the conflicts that sometimes determine neglect or abandonment of minors. In a tense family atmosphere, the child is agitated, unstable, nervous, due to which his psycho-behavioral development and maturation is delayed or deviated. The child is confused by the conflicting relations between the parents, is timid and complex in the collective due to the family situation.

A severe form of family desertion is family abandonment, which from a psychosociological point of view is present in two situations: real abandonment and apparent abandonment.

Real abandonment occurs in: divorce, non-recognition and abandonment of the minor, by adoption.

Apparent abandonment is present in situations of willful or forced neglect of family relationships. This phenomenon of family desertion and family abandonment affects its unity and balance, both materially and morally, generating tensions included in the “abandonment neurosis” syndrome.

Reuben Hill called the phenomenon of parents’ voluntary and forced renunciation of the obligations of raising and educating the minor - deparentization .

This parent-child relational breakdown always involves an emotional response, which can take various forms and degrees of manifestation, as well as the two poles of the equation - the abandoned and the abandoner - which can be equally discussed.

Having a motivation (correct or incorrect) the one who produces the abandonment can have the feeling - momentary or lasting - of satisfaction (relief) or dissatisfaction (regret) in general it is not frequent to reach the clinical thresholds in this category, in the case of regret there is the variant correcting the fact and returning to the old situation. The same thing does not happen with those abandoned, in whom psychic manifestations of variable intensity and duration can be highlighted, with an infinite color depending on the structure and necessity of each personality, the age at which this abandonment occurs, the existence of a latent psychopathological situation and the degree of adaptation to the new situation.

The particular problem is actually that of the abandoned one, who will be faced with emotional deficiencies, all the more intense, the younger the age at which the abandonment occurred.

The most common forms of abandonment are the following:

- total abandonment - usually practiced in premarital relationships , by young girls, abandoned by their partners immediately after the birth of the child, by prostituted, delinquent or divorced mothers. In all these cases, the lack of opportunities for raising a child and social stigma are the main determinants of abandonment;

- semi-abandonment - practiced by one or the other of the parents, after a divorce situation. in this case, the task of raising and educating the child is felt as a burden, and his existence is recognized as a obstacle [to] the formation of a new life as a couple;

- covert or cryptic abandonment - consisting in the emotional rejection of the child by the mother, in her lack of interest in his elementary needs and in the adoption of indifferent or violent behaviors, going up to the daily mistreatment of the child.

Incest, violence against minors

Some authors [18, p. 53] appreciate that, along with maltreatment, incest is also a distinct form of violence directed against minors, which has been manifested in recent times, including in our country, in increasing proportions. Such a form of violence, which is most hidden from public opinion, seems unnatural and unusual, but studies show that it is characteristic of many families in which the mother is either absent from the home or

unable to perform her marital duties. Incest involves, however, not only sexual relations between father and daughter, but also sexual relations between other categories of relatives. 20 Erich Goode distinguished, in this sense, between incest initiated by older people on younger ones and incest that takes place between equals in age [8, p. 53].

Due to the social condemnation associated with this particular form of deviance, representative statistics in this area are lacking. Robert Geiser (1979) believes, for example, that for every reported case of incest, there are twenty other unreported cases. Rough estimates show, however, that over 90% of incest cases involve father and daughter, stepfather and stepdaughter, grandfather and granddaughter, with the remaining 10% involving homosexual relationships between fathers and their sons (Herman J., Hirschman L., 1981). A sociological study, carried out in the USA, revealed that 19% of investigated women and 9% of investigated men stated that they were victims of sexual abuse, initiated by their parents, and one in five women and one in eleven men were victimized sexually either by members of the family group or by family friends (Finkelhor D., 1979).

The most common cases are cases of incest between stepfather and daughter.

Any act of incest between parents and minors is an act of violence or abuse directed against the latter. "Sexual child abuse is, in fact, the involvement of dependent and immaturely developed minors and adolescents in sexual activities that they do not fully understand and in relation to which they cannot express full consent. It is an act that violates the social taboos of family roles".

Lack of power, knowledge and discernment are the main elements that distinguish a sexual relationship between an adult and a child from natural sexual relationships, between partners who decide, knowingly, about their own sexual options.

A series of American research has shown that the average age of girls who are victims of incest acts varies around the age of 10.2 years, that is, a very young age, at which the child has neither the ability to discern nor the power to oppose.

But incest is not limited only to sexual relations between father and daughter, there can also be more isolated cases of sexual relations between a mother and her own son, between a brother-sister, uncle, niece, etc.. On the other hand, unlike rape, sexual abuse of one's own children does not necessarily involve penetration or the use of physical force. While rape is a more isolated case that manifests brutally, child sexual victimization (incest) can go on for months or years, without anyone knowing what is really happening in the family.

In its entirety, any act of incest, any sexual relationship between an adult and a child, between a father and a daughter, between a mother and a son, between minors and other relatives in the family, represents an act of victimization, abuse or violence, sanctioned by law . Sexual intercourse between relatives on the direct line up to the third degree inclusive, as well as between relatives on the collateral line (brothers, sisters), is punishable by up to 5 years in prison and for the same actions they are not liable to criminal liability if, at the time of their commission in fact, they have not reached the age of 18 and the age difference between them is not greater than 2 years [6].

Given these sanctions, incest constitutes one of the most "secret" and intimate deviant acts. Some studies show that only a small proportion of incest cases involve actual sexual relations between father and daughter, with most cases involving exhibitionism (exposing the genitals to the minor), manual sexual stimulation, or oral sex. inevitably, the attention of the authorities. That is why, even if they largely coincide, incest itself must

be differentiated from sexual victimization, which has different forms of manifestation. The most frequent

The main reason why these forms do not develop into a genuine sexual relationship is the father's fears that, once she has been devirginized, her daughter will need to be cared for by a doctor, which will attract incest and victimization. sexual relations occur between a natural or stepfather and his daughter (natural or step), which manifests itself with an intensity more than 30 times higher than in the other forms.

It should be noted that all these estimates are developed by the research undertaken in the USA, in Moldova there is no sufficient data in this field, except for some cases reported by the press. The cases presented in the statistics of the Internal Affairs Bodies are completely insignificant, unable to reflect the real extent of this phenomenon.

As for the main causes of incest, they are multiple, with numerous explanations. Traditionally, incest has been explained as a form of aberrant manifestation of male authority and dominance in society and in the family. Some researchers believe that as long as, as an instrumental leader, the father dominates his family, he will be able to sexually abuse his own minors. The vast majority of fathers do not decide to use this authority, but to the extent that this "prerogative" is implicitly guaranteed to all men, some will use it as such. in conditions where "fathers exercise leadership roles, raising and educating their minors, and to the extent that mothers raise and educate their minors but do not own the leading swarm, the circumstances favoring the commission of incest between father and daughter will prevail (in society - subl. ns.) [9, p. 204].

Other factors involved in father-daughter incest are as follows:

- the father's alcoholism and the mother's physical or mental incapacity, which determines the assumption of the role of "surrogate wife" by the oldest or only daughter; behavioral and personality disorders that characterize some fathers,
- dominated by pedophilia tendencies and who no longer show any sexual or emotional interest in their own wives. These disorders should not be absolutized, as several researches show, in this sense, there are numerous cases in which none of the perpetrators of incest are psychotic .
- the mother's absence from the home, which causes the daughter to assume her roles, including the role of the father's sex partner (so-called role confusion). A broken home, a deceased or abandoned mother, an alcoholic or deranged father are the most favorable conditions for cases of incest involving father and daughter;
- the inability of some men to find suitable sex partners, which is a fact
- causes him to turn his eyes on his own daughter;
- other factors, including existing crowding in the home (insufficient space), isolation of the family and its autonomy from social controls, existing opportunities (in the case of the unemployed, for example, who have the necessary conditions and time to choose their own sex partners daughters) etc. [18, p. 56].

Regardless of the forms in which it manifests (being accepted, tolerated or obtained through violence, intimidation and terror) any act of incest has multiple traumatic effects on the minor, especially in terms of his future development as an adult. The loss of self-esteem, personal and elderly trust, physical and emotional frigidity, the inability to develop normal relationships with friends of the same age, the subsequent tendencies towards abuse, suicide, alcoholism, drug use and prostitution, are only some of these effects with particularly dramatic implications. Added to all this is the attitude of stigmatization adopted by those around, constituting a secondary form of victimization.

As a finality of the analysis of the given compartment, which is based on national and international legal provisions, as well as different treatments of different scientific studies, we can deduce a broad definition of violence against the minor, namely this phenomenon represents forms of ill treatment characterized by a a series of deliberative actions produced by the parents or any other person in a position of responsibility, power or in a relationship of trust with the child, which are contrary to the rules regarding the protection of minors and which cause or could cause injury or damage from a physical point of view or emotional, and endanger his life, health, physical development, intellectuality, honor, dignity and morality.

The given study confirms that theoretically there are different forms of violence against the minor, but in reality a combination of. For example, physical abuse is accompanied by emotional abuse, sexual abuse usually involves physical and emotional abuse, etc.

Thus, depending on the types of combined violence, the characteristics and the gravity of the act, violence against minors entails disciplinary, civil, contraventional or criminal liability of the perpetrator/aggressor.

As a phenomenon, violence or abuse against minors occurs when adults apply harmful treatments to minors manifested both physically and spiritually, causing them organic injuries or mental disorders.

In some situations, the abuse may have only one manifestation or dimension, while in others the child may be exposed to several or even all forms of abuse combined. Abuse is a complex phenomenon, always generating physical and moral pain, and determined by certain causes.

Various studies have shown that the dependencies and social limits to which minors are subjected in an adult world create a series of situations that predispose them to the risk of being victims of violence. Besides these situations, there are also factors that act in favor of the minor, in a protective sense. Also, the areas where the risks are manifested can constitute as many areas of intervention, and the risk situations can also be factors that trigger the signaling. The risk and protective factors listed below apply to both child and family violence.

Indeed, the production of acts of abuse against minors is catalyzed by risk factors, in addition to the general risk factors of family violence, we also distinguish some specific factors directly related to violence against minors, divided into three categories:

a) *Parental or abusive adult characteristics:*

Abusive adults themselves suffered from abuse or had an unhappy childhood.

Abusive adults have suffered and been affected, in turn, having experienced episodes of physical or mental abuse and had an unhappy childhood, thus conforming to the behavioral pattern of their childhood victims. The abusers or the respective adults need support and help in psychologically solving the problems that left their imprint from childhood;

- Excessively consumes alcohol, drugs.

Parents who abuse alcohol or drugs cause both physical and moral damage to their minors. Drunkenness causes adults to various immoral actions, which demeans the dignity and honor of a person. Accordingly, the child growing up in such an environment, in addition to the fact that he can become a victim of physical abuse, can also learn this model of immoral and degrading behavior from his parents.

- They have mental illness, depression, including suicidal or psychotic behavior .

Abusive adults are emotionally unstable or have poor health that does not allow them to secure the minor's life, they are mentally or emotionally immature, with a low threshold for tolerance of frustrations and with adaptation difficulties, lacking relational

empathy. They cannot delay their own gratification and release their stress on the spot. They are hostile and dismissive because they lack confidence in their own abilities. They look for protective " parental" support in their own child, whom they emotionally burden with personal problems;

They have limited knowledge of the minor's development, do not appreciate him correctly, have unrealistic expectations from him (regarding reactions, performances.

Abusive adults do not have the relevant skills, namely in the field of educating a child. This is a consequence of a phenomenon that today destroys the moral and spiritual aspect of society, determined by citizens going abroad to earn a living, leaving their minors with some close relatives or friends. Thus, the child does not receive the necessary education from the parents, not having the opportunity to understand what parental affection consists of. Regarding minors who did not have parental affection, when they become parents themselves they end up in a situation where they do not know how to properly educate their minors, a fact that causes the appearance of a form of violence or abuse towards minors.

They have a conflictual educational style (either authoritarian, critical, intolerant, hostile, restrictive, or hyperprotective, anxious or perfectionist, or indolent, whatever).

When parents are too authoritarian, it is a sign that the presence of minors is overwhelming (and sometimes unwanted). And they can only manage it through strict rules designed to give minors a well-defined space, a kind of quarantine. So that the little ones do not invade the parents' existence. Such parents believe that the appearance of minors means a long list of privations and hardships and too few gains. They are tempted to think that they could have done something more with their lives if there were no minors in their lives.

- They have relational rigidity and an increased rate of aggression,

The communication of aggressor adults is ambiguous, they do not know how to express their feelings towards those close to them, they cannot separate the positive feeling towards the child from the negative feeling towards what the child has committed. They have relational rigidity and an increased rate of aggression;

b) *Characteristics of the minor:*

- unstable child, difficult to discipline;

Such minors have poor sustainment of attention and low persistence of effort on some task. Minors affected by this disorder are disinterested, quickly bored with repetitive, monotonous tasks, jump from one unfinished activity to another, lose concentration during tasks, and make mistakes in routine tasks when unsupervised.

- low birth weight;

One in four children born prematurely (with a gestational age of 23-30 weeks) and with a very low birth weight (less than 1500 grams) have signs of autism if they are examined after the age of 3-4 years. Autism is a complex condition that appears in the first 3 years of life. The disease stems from a neurological dysfunction that makes social interaction and communication skills difficult. Thus, minors and adults suffering from autism have difficulties in verbal and non-verbal communication, social interactions or relaxation activities, which determines their victimization in cases of family violence.

- parental problems;

The given phenomenon relates to the problems related to some circumstances related to the birth of a child. Thus, a newborn can become the victim of abandonment immediately after birth or of infanticide by the mother who may be in a state of affection or under the influence of mental disorders.

- Tattachment disorders;

Reactive attachment disorder is a rare but

severe condition in which minors do not form healthy bonds with parents or caregivers. Minors with reactive attachment disorder have often been neglected or abused in early childhood, passed through multiple foster families, or come from orphanages where their emotional needs were not met. Because their basic needs for affection, comfort, and stimulation were not met, these minors did not learn how to achieve affectionate attachment to other people. They cannot receive or give affection.

- behavioral problems or disorders;

Conduct disorder refers to a group of behavioral and emotional problems in young people. Minors and adolescents with this disorder have difficulty following rules and behaving in an acceptable manner in society. They are often seen by other minors and adults as bad or delinquent, without them realizing that it is a mental condition.

- sick child, with a disability;

Sick minors and those with disabilities always need special care and increased social assistance. Currently, from a financial point of view, it is very expensive to maintain such institutions where disabled minors are admitted, respectively due to lack of finances, employees in the given field determine the victimization of disabled minors. Within a family, a child with a disability can also be a victim of violence against the minor, being neglected or not receiving due attention and support [1, p. 19].

- the status of the minor (from other relationships, child out of wedlock, adulterous...).

The child as a result of an unwanted pregnancy or as a result of a relationship outside of marriage can also easily become a victim, because his parents can refuse to him which will lead to a potential incorrect education with the lack of due affection.

Socio-economic conditions:

- social isolation of the family or marital conflicts. The social isolation of a family acquires a stigma in the eyes of others and at the same time a sense of stigma and guilt that makes them isolate themselves. The violent husband does not want his wife to maintain social relationships in which she can confess her suffering and possibly be able to receive support;

- divorce is another traumatic time for the child that can lead to emotional abuse. Thus, the minors see themselves thrown into the middle of a chronic conflict in which one of the parents accuses the other, and they are forced to "take the side of one of them". The child becomes anxious and often has confused feelings. He loses a parent without being allowed to grieve or ask for and receive help. The minor's associated anger and despair are often not expressed directly, and the minor becomes depressed and/or difficult. He is going through a process that can affect his relationships with those close to him, in a negative and long-term way;

- single parent or in a cohabiting relationship. The growth and development of the minor in such an environment often leaves deep traces in his mental evolution and the absence of one of the parents is felt at high altitudes, the single parent is forced to assume a double role trying to substitute the absence of the other, thus affecting and fulfilling own obligations;

- crowding in the home space. The presence in a residential space of a large number of inhabitants, a fact that affects or creates discomfort, leads to the appearance of domestic conflicts that in turn can result in some consequences or consequences that negatively influence the coexistence or good development of minors;

- economic stress, poverty. A child's needs are different in type and structure from those of an adult. In the case of the minor, poverty refers to the entire range of resources necessary for his development into an adult person with the necessary opportunities for normal social

functioning. Thus, minors from poor families face the highest risk of abandonment, of being placed in the care of the minor's protection services;

- professional stress, situational losses (unemployment, deaths, frequent moves, fires, accidents). A neglect of minors can be determined by some problems related to the service, which indirectly affects the condition necessary for a child. Professional stress or other negative professional circumstances can lead to violent manifestations on family members who, in turn, victimize them, taking over the hyperauthoritarian or violent educational model.

A mother who is a victim of her husband's violence is less able to provide the basic care needed for the minor (food, house, hygiene, clothes, physical health) or to protect him from injuries.

Accidents, physical or social dangers, overwhelmed by shame for what is happening to her, by sentimental failure in the most important interpersonal relationship, by terror from her husband, by self-accusations, the woman is no longer able to play any of the roles imposed by family life.

Finally, we come to the conclusion that all these causes that determine violence against minors cannot exist independently. Likewise, in some combination the given causes intersect, which, in turn, determines some of the forms of violence or abuse towards minors mentioned in the previous chapter.

Child abuse is a situation that lasts over time. The directly or indirectly affected child usually goes through different stages that gradually influence the course of his physical, mental and emotional development. They are not limited only to the actual period of abuse, but also to the moments following the ill-treatment. The intervention of various authorities and agencies investigating the case, not infrequently, has the effect of further victimizing and traumatizing the minor [14, p. 73].

Violence can have immediate and/or long-term consequences for the child's health, development and well-being. In the long term, the consequences also affect adult life, being reflected in the difficulty to develop or maintain intimate relationships with the opposite sex or even social relationships in general, to find a stable job, to have the attitudes and skills needed to be a good enough parent, etc.

Not only the act of violence itself has consequences, but also the context in which it occurs. Usually there is an interaction between several risk factors that lead to the emergence of consequences and increased impact. Repeated interviewing/hearing of the minor after the discovery of the act of violence can also revictimize the child.

Conclusions

Therefore, the negative treatment applied to minors has a series of negative consequences for their life and future. The various sociological researches undertaken in the West on mistreated or abused minors have shown that mistreatment or abuse as a social problem determines and maintains a series of consequences, namely:

- Aggressive behavior of the minor;
- Isolation, passivity, emotionality;
- Pseudo mental deficiency;
- Insufficient structuring of the personality;
- Lack of behavioral control with emotional outbursts and aggression;
- Psychomotor instability;
- Disruption of emotional bonds;
- Inconsistency of feelings;
- Aggressivity;
- Antisocial conduct;
- Delinquency and the contouring of a psychopathic personality [15, p. 96].
- School difficulties: low performance, absenteeism, indiscipline;
- Role reversal: the child tutors the adult;

- Nocturnal disturbances: insomnia, nightmares, pollution, restlessness during sleep;
- Somatic pains such as headaches, stomach aches, chronic cough, allergies;
- Self-destructive behavior, prone to accidents;
- Unexplained injuries or incompatible with the history of the accident;
- Fear of physical contact initiated by parents or other people;
- Desperate crying or almost complete absence of crying;
- He seems to seek safety, adapting to the situation rather than relying on his parents;
- He seems constantly on the alert for potential danger, asking through words and actions what will happen next;
- They are constantly in search of food, things, advantages, services;
- Persistent escapist and deviant behaviors (especially in adolescents), such as: vagrancy; alcohol or drug abuse; prostitution; early marriage; the existence of a pregnancy [16, p. 37].

From this point of view, the consequences of any act of violence are extremely harmful, because:

> The existence of a family environment where there are chronic or violent conflicts is extremely harmful for the minor, even if he, personally, is not mistreated or abused;

> An abused child can learn to stop trusting adults and to fear any of their actions;

> Any maltreated or abused minor will later have problems with health and the image of himself, coming to believe that he has no value and deserves no one's esteem;

> A minor subjected to sexual abuse will later face the confusion of his own sexuality or its normal expression;

> Abused or maltreated minors will end up either withdrawn people, who will hide their feelings, or aggressive people, who will act explosively and aggressively.

Such categories of minors will most likely learn that hitting or injuring close or loved ones is appropriate behavior, which is why they will become aggressors in their turn.

According to other specialists, they can be distinguished: direct consequences of the abuse, consequences on the minor's development and long-term consequences.

Direct consequences: burns, contusions, wounds, multiple fractures, psychosomatic, eating, sleep, behavioral disorders, depression, neurotic disorders (phobias), etc.

Consequences on the minor's development: behavioral disorders, decreased school performance, decreased cognitive ability, emergence of antisocial behaviors (criminal tendencies).

Long-term consequences: disoriented attachment type D, blockages in relationships with others, negative affective behaviors, emotional and social isolation, difficult communication, deficient adult personality, resort to marital violence [1, p. 15].

Another opinion regarding the classification of consequences is reflected in Romanian legislation [11], namely:

> on the affective level: atypical attachment (disorganized, type D), affective deficiencies, negative affects, aggressiveness, low self-esteem, etc.;

> in terms of other aspects of development: growth retardation, delays in motor, cognitive and language development, reduced social skills, etc.;

> in terms of school adaptation: low school performance, learning difficulties, etc. Similarly, in the same source we find a classification of the consequences depending on the type or form of abuse shown towards minors:

The consequences of physical abuse

Physical abuse can have physical, neurological consequences and can lead to disease, fractures, disability and even death. It also frequently leads to aggressive behavior, emotional and behavioral problems, learning

difficulties and reduced school performance. The context in which physical abuse occurs can be in the family, in various institutions (eg school, re-education center, foster care), in the community (eg on the street) and even societal.

The consequences of emotional abuse

Sustained emotional abuse especially has long-term consequences for the child's development, mental health, behavior and self-esteem. The contexts of this type of abuse are usually those related to domestic/family violence, adults with mental health problems and parents with low parenting skills.

The consequences of sexual abuse

Sexual abuse is often recognized by self-aggressive behaviors, depression, loss of self-esteem, and sexual behavior inappropriate for the minor's age. The severity of the impact is greater the longer and more intense the abuse, the older the child , if there is a component of premeditation, threat, coercion, sadism, etc. In the case of sexual abuse, once the child has recognized and disclosed it, the presence of an adult, especially a protective parent or a caregiver, in whom the child can trust and who can help him face this dramatic experience, is vital and to understand what happened to him, offering him support and protection.

The consequences of neglect

Severe neglect, especially of young minors, greatly affects the growth and physical and intellectual development of the minor, and in extreme cases it can lead to hospitalization, the installation of a disability and/or the death of the minor [11].

As a whole, violence begets violence, and this is nothing but the reflection of a certain social and family climate, where aggressive patterns dominate and where harshness and brutality constitute specific ways of resolving conflicts.

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ARGUMENTS REGARDING THE INTRODUCTION OF MANDATORY MEDIATION IN CERTAIN CATEGORIES OF DISPUTES

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In the Republic of Moldova, we believe that the institution of mandatory mediation in certain categories of disputes could be given a chance of success because, in the current crisis that European states are going through due to the armed conflict in Ukraine, it is justified, all the more, for it to it is given a real chance to prove itself, this time from the position of compulsory mediation for a series of minor disputes carried out by mediators and not by other legal professionals. In our opinion, the obligation of mediation can be instituted in all categories of disputes listed in art. 25-30 of the mediation law, but in order to help the Moldovan society through the institution of mediation to overcome these prolonged crises, we propose the legislator to be inspired by the experience of the Italian legislator who found a way to penetrate the national and European legislation.
Keywords: *mediation, conciliation, conflict, mediation law, commercial mediation.*

ARGUMENTE PRIVIND INTRODUCEREA MEDIERII OBLIGATORII ÎN ANUMITE CATEGORII DE LITIGII

În Republica Moldova, considerăm că instituției medierii obligatorii în anumite categorii de litigii i s-ar putea da șanse de reușită întrucât, în actuala criză prin care trec statele europene datorită și conflictului armat din Ucraina se justifică, cu atât mai mult, ca acesteia să i se dea o șansă reală de a se manifesta, de data aceasta de pe poziția de mediere obligatorie pentru o serie de litigii minore realizată de mediatori și nu de alți profesioniști ai dreptului. În opinia noastră, obligativitatea medierii poate fi instituită în toate categoriile de litigii enumerate în art. 25 – 30 din legea medierii, însă pentru a ajuta societatea moldovenească prin intermediul instituției medierii să treacă cu bine peste aceste crize prelungite propunem legiuitorului să se inspire și din experiența legiuitorului italian care a găsit o cale de a penetra legislația națională şi europeană.
Cuvinte-cheie: *mediere, conciliere, conflict, legea medierii, mediere comercială.*

ARGUMENTS SUR L'INTRODUCTION DE LA MÉDIATION OBLIGATOIRE DANS CERTAINES CATÉGORIES DE LITIGES

En République de Moldova, nous pensons que l'institution de la médiation obligatoire dans certaines catégories de litiges pourrait avoir des chances de succès car, dans la crise actuelle que traversent les États européens en raison du conflit armé en Ukraine, il est justifié, d'autant plus, qu'il devrait avoir une réelle chance de se manifester, cette fois à partir de la position de médiation obligatoire pour une série de litiges mineurs menés par des médiateurs et non par d'autres professionnels du droit. À notre avis, l'obligation de médiation peut être établie dans toutes les catégories de litiges énumérées à l'art. 25-30 de la loi sur la médiation, mais afin d'aider la société moldave à travers l'institution de médiation à surmonter ces crises prolongées, nous proposons au législateur de s'inspirer de l'expérience du législateur italien qui a trouvé un moyen de pénétrer la législation nationale et européenne.
Mots-clés: *médiation, conciliation, conflit, droit de la médiation, médiation commerciale.*

АРГУМЕНТЫ ОТНОСИТЕЛЬНО ВВЕДЕНИЯ ОБЯЗАТЕЛЬНОЙ МЕДИАЦИИ В ОТДЕЛЬНЫХ КАТЕГОРИЯХ СПОРОВ

В Республике Молдова мы считаем, что институту обязательной медиации в определенных категориях споров можно было бы дать шанс на успех, потому что в нынешнем кризисе, который европейские государства переживают из-за вооруженного конфликта в Украине, это оправдано, тем более, что ему дается реальный шанс проявить себя, на этот раз с позиций обязательного посредничества по ряду мелких споров, осуществляемого посредниками, а не другими профессиональными юристами. На наш взгляд, обязанность медиации может быть установлена во всех категориях споров, перечисленных в ст. 25-30 закона о медиации, а для того, чтобы через институт медиации помочь молдавскому обществу преодолеть эти затянувшиеся кризисы, мы предлагаем законодателю вдохновиться опытом итальянского законодателя, который нашел способ проникнуть в национальный и Европейское законодательство.

Ключевые слова: *медиация, примирение, конфликт, закон о медиации, коммерческая медиация.*

Introduction

The evolution of the institution of mediation in the Republic of Moldova, compared to the expectations of the experts gathered in the "*Consultative working group in the field of mediation"* [8], who proposed and discussed the opportunities to establish mandatory mediation in certain categories of disputes, could have chances of successful because, in the current crisis that the European states are going through due to the armed conflict in Ukraine, it is justified, all the more, that the institution of mediation be given a real chance to manifest itself, this time from the position of mandatory mediation for a series of small claims made by mediators and not other legal professionals.

This approach, in our opinion, should be started from the current regulation of mediation in the Republic of Moldova, which involves the investigation of the institution of mediation starting from its regulatory sphere, revealed by art.1 of the law which provides: "This law determines the status of the *mediator, the forms of organization of the mediator activity and the requirements for the registration of mediation organizations, the principles of the mediation process and its effects, the particularities of mediation in specific areas, as well as the competence of the authorities and state institutions in the field of mediation."*

Regarding these arguments, we consider that the aspects included in the regulatory sphere are general aspects, universally valid, for the institution of mediation. Therefore, we must bear in mind that these aspects must be addressed to both specialists and non-specialists, i.e. litigants, and the general descriptions addressed could be those of a review of specialized literature in relation to the research topic addressed.

Other universally valid aspects that are worth remembering come from the provisions of art. 4 of Law no. 137/2015 on mediation [16] - *The basic principles of mediation,* and from *the mediation process* regulated by art. 21-24 of the law.

The obligation to mediate can be instituted in all categories of disputes listed in art. 25-30 of the law, but to help the Moldovan society through the institution of mediation to overcome these prolonged crises, with the recommendation to be inspired by the experience of the Italian legislator who found a way to penetrate the legislation Nation and European, in the sense that, according to the Impact Study [27] launched in April 2013 by the European Parliament in relation to the implementation of the Framework Directive 2008/52/EC on mediation, with the title "Restarting the directive on mediation: evaluating the limited impact of *its implementation and proposing*

measures to increase the number of mediations in the EU", Italy, by Decree no. 69/2013 - the so-called "*Compulsory Mediation Decree"* reintroduced mandatory mediation, the motivation being" urgent *provisions for the relaunch of the economy"*. However, the Resolution of the European Parliament dated September 12, 2017 [25], although it includes assessments of the Italian mediation law, does not recommend to the member states the introduction of mandatory mediation, but only considers *"recommendations that will be sent to the governments and parliaments of the member states, looking:*

- the request to the member states to intensify their efforts to encourage the use of mediation in civil and commercial disputes, especially through appropriate information campaigns;

- the need to develop quality standards at the EU level for the provision of mediation services;

- identifying solutions for expanding the scope of mediation to other civil or administrative matters;

- taking additional measures to ensure the execution of mediated agreements in a fast and accessible way , with full respect for fundamental rights, Union legislation and legislation national."

Practically, through this resolution, the European institution leaves it to the discretion of the governments and parliaments of the member states to identify the ways through which the institution of mediation can function.

Under these conditions, I believe that the Italian model of the mediation law could be implemented in Romania and the Republic of Moldova, especially since neither in Romania nor in the Republic of Moldova the real economy can show signs of recovery.

This idea was also reinforced by the Report on the state of mediation in the member states published on 21.11.2018 by the European Parliament [23] in which it is mentioned *that "although mediation is praised and promoted everywhere and by everyone, it is very little used by European citizens and very little encouraged by the member states"*. The same Report praises the progress achieved by Italy in terms of the mediation procedure by using the mandatory *easy -out mediation*, a procedure that passed the constitutionality tests, unlike Romania, given as a negative example of the implementation of mediation because it did not pass the two constitutionality examinations from 2014 and 2018. The Report also notes the fact that if Romania had introduced an Italian-style mediation procedure, *"with a mandatory mediation on the background of the conflict (not just for informing or probing the conflict) with the possibility of the parties to withdraw from the mediation at any time, then the mandatory mediation would have passed the constitutionality test.* The motivation of the Italian legislator "*urgent provisions* for the relaunch of the economy", could also resonate with the Moldovan legislator if it were to start with the treatment of the mediation process from the perspective of the obligation of mediation in civil disputes and between professionals as parties to a commercial or administrative contract that involves a intervention in this process simultaneously with the intervention in the articles contained in Chapter V of the law – Mediation in specific areas, respectively art. 25-34.

In all these specific areas we would recommend that the mediators who will be accredited to carry out mandatory mediations should mainly specialize in the basic specializations.

Thus, mediators specialized in civil, labor, commercial and administrative disputes should mainly be legal professionals and/or economists.

In the case of complex disputes, on the recommendation of a mediation organization, specialized panels could be formed.

In our opinion, after the recommended and proposed interventions, with the involvement of the Ministry of Justice, the Mediation Council and the mediation organizations, the successful implementation of mandatory mediation in the Republic of Moldova could be reached.

Thus, the institution of mediation in the case of the transaction can be used in all the specific areas regulated by the mediation law of the Republic of Moldova, both civil: with or without elements of foreignness , family, consumer protection, labor, commercial and administrative litigation, as well as regarding disputes arising from criminal and contravention cases.

Research methodology used

Starting from a retrospective, historical approach to the researched field, the article offers the possibility of understanding the importance of disputes in the specific fields listed by the mediation legislation and the loopholes and traps hidden in this legislation.

At the same time, the article outlines the perspectives of this issue and helps to acquire its theoretical foundations and the practical applicability of this obtained theoretical knowledge.

Mediation legislation as a distinct special legislation belonging, in particular, to civil law is regulated by legal norms that have as a substitute the same methods of application to knowledge and the legal action as of any branch of law.

The same methods used in the study of any branch of law were used.

Mediation legislation, by nature and its destination is a phenomenon with many and deep connections and social and human interferences.

The research of the phenomenon part of civil law, in this case, aspects regarding the possibility of establishing mandatory mediation in certain specific fields, part of the research of the legal phenomenon, is carried out by using the same methods used in the study of law: general methods and concrete methods. Different general methods could be used in the article, such as: the generalization and abstraction method, the logical method, the historical method, the comparison method, the sociological method, the systemic analysis method and the prospective or forecasting method.

Ideas and discussions

Therefore, the rule is that any conflict stemming from the violation of a subjective right that can be transacted can be submitted to mediation, and the prohibition refers to strictly personal rights, or to rights that the parties cannot dispose of through conventions.

The ban, in general, applies to fundamental rights, related to existence and the integrity of the person, of identification elements or of the non-patrimonial side of intellectual creation rights, as well as of all other rights regulated imperatively by the legal provisions, for which the law prohibits trading [13].

Non-patrimonial personal rights (*jus in personam*) are those subjective rights, which, devoid of pecuniary content, express attributes inseparable from the person of the subject of law [26]. Three categories of personal non-patrimonial rights were classified in the doctrine.

The first category includes rights regarding existence and the physical and moral integrity of the person, such as the right to life, the right to physical integrity, the right to freedom and the freedom of private life, the right to honor, the right to health, i.e. rights that the holder of these rights cannot dispose of, in the second category we have rights regarding the individualization of the natural and legal person, such as the right to the name, the right to the domicile, the right to marital status, and in the case of the legal person, the right to the name, the right to the company or the right to the seat.

Finally, the third category of non-patrimonial rights refers to rights regarding the non-patrimonial side of intellectual creation rights , such as copyright and related rights, inventor's right and the right to industrial designs and models.

All these non-patrimonial rights are of particular importance due to their specific intrinsic characteristics:

- they are rights intimately related to existence human beings, intransmissible, inseparable from individualized persons within the family and society by name, domicile or marital status;

- they are absolute rights, opposable *erga omnes*, against which the general negative obligation of the indeterminate passive subject is imposed not to do anything likely to reach one of these values;

- they are imprescriptible rights under the extinguishing and acquisitive aspect; they are strictly personal in the sense that, as a rule, they are not likely to be exercised by representation [26].

At a first analysis, it would seem that the institution of mediation could not be involved in the settlement of a dispute stemming from the violation of such rights, but the doctrine and judicial practice have ruled that the damage stemming from the violation of a non-patrimonial personal right, classified as moral damage, is subject to a regime of compensation or reparation through non-patrimonial measures, in which case, this new legal relationship may be subject to settlement through mediation even if we are dealing with a possible moral injury.

With regard to civil disputes involving foreign nationals, we remind you that any private law legal relationship with foreign national elements that derives its legal force from the provisions of art. 8 para. (1) of the Constitution [10] which provides that: "*(1) The Republic of Moldova undertakes to respect the Charter of the Organization of the United Nations and the treaties to which it is a party, to base its relations with other states on the unanimously recognized principles and norms of international law",* and from those of the provisions of art. 2576 – 2671 of the Civil Code - Book Five – Private International Law [7].

The mediation of civil disputes with foreign elements based on Law no. 137/2015 on mediation is subject to the same rules and principles.

Thus, art. 26 of the mediation law provides:

"(1) Civil disputes with an extraneous element may be subject to mediation under the terms of this law.

(2) For the purposes of the present law, a dispute in which at least one of the parties has its domicile or headquarters outside the Republic of Moldova on the date on which:

a) the parties concluded a mediation agreement under the conditions of art. 31;

b) the parties were obliged, by the court in the state where the summons was filed, to resort to mediation according to the legal provisions of the respective state.

(3) A civil litigation is, equally, with an extraneous element if, on the date mentioned in par. (2) lit. a) or b), the parties have their domicile or headquarters in the Republic of Moldova, but:

a) the judicial proceedings for the settlement of the dispute are to be initiated in another state;

b) the object of the dispute refers to obligations to be executed in another state or the goods that constitute the object of the dispute are located on the territory of another state;

c) place of performance the basic activity of one of the parties is in another state".

If the execution of the transaction, partially or fully, is to be done on the territory of the Republic of Moldova, the competence to examine and confirm civil and commercial

transactions with extraneous elements resulting from mediation rests with the civil court according to art . 487 para. (2) Civil procedure code which provides: ***"(2) Transactions concluded in civil and commercial disputes with an element of extraneousness*** *is confirmed under the conditions of this chapter if the examination of the dispute settled by transaction is within the competence COURTS courts of the Republic of Moldova and the execution of the transaction, in whole or in part, is to be carried out on the territory of the Republic of Moldova".*

Indisputably, the provisions of para. (2) lit. (b) from art. 26 of the mediation law is worth analyzing in terms of the qualification and competence of the mediators in approaching the mediation styles used in another state.

However, Moldovan and Romanian legislation only regulates the facilitative mediation style.

By ferenda law, in such situations art. should be amended. 26 of the mediation law, in such a way that the Moldovan mediator can also address other styles of mediation, such as the evaluative one, practiced in states where mediation is mandatory.

For a pertinent analysis of the procedure mediation in administrative disputes, we consider the Recommendation of the Committee of Ministers of the Council of Europe no. 9/2001 regarding alternative ways of resolving disputes between administrative authorities and natural persons - arbitration, mediation, conciliation [24], Law no. 793/2000 on administrative litigation from the Republic of Moldova [15], the Administrative Code of the Republic of Moldova [5], Law on administrative litigation no. 554/2004 from Romania [14] since, according to the Moldovan authors Ion Guceac and Victor Balmus [12, page 2 -10], the theories governing administrative contracts in Romania are also valid for the Republic of Moldova, and art. 30 of the Mediation Law regarding administrative litigation disputes, which states*:*

"(1) In disputes arising from administrative litigation reports, the provisions of this law are applied to the extent that they do not contravene the legislation that regulates the negotiation of transactions with the participation of legal entities under public law and the conditions for concluding these transactions. (2) Public authorities and mediation organizations that organize mediation services in the field of administrative litigation may establish additional criteria regarding the qualification of mediators to be trained in the mediation of these disputes and may approve lists of mediators".

Art. 14 para. (1) and (2) of Law no. 793/2000 on administrative litigation requires that:

"*(1) The person who considers himself injured in his right, recognized by law, by an administrative act shall request, through a prior request, the issuing public authority, within 30 days from the date of communication of the act, its revocation, in whole or in part, if the law does not provide otherwise.*

(2) If the issuing body has a higher hierarchical body, the prior request can be addressed, at the petitioner's choice, either to the issuing body or to the higher hierarchical body if the legislation does not provide otherwise.", and if in disputes arising from contentious reports administrative situations are found that do not contravene the legislation that regulates the negotiation and conclusion of transactions with the participation of persons under public law, then mediation is possible.

So, first of all, through points 8-13 of the Recommendation of the Committee of Ministers of the Council of Europe no. 9/2001 regarding the alternative ways of resolving disputes between administrative authorities and natural persons - arbitration, mediation, conciliation, the guidelines of this procedure are drawn:

"pt. 8. Bearing in mind that the main advantages of alternative ways of resolving administrative disputes consist, depending on the case, in: simpler and more flexible

procedures that are faster and less expensive, amicable resolution, involvement of specialists, recourse to the principle of equity and not just to the letter of the law, as well as greater discretion;

Therefore taking into account, where appropriate, the possibility of resolving administrative disputes through other means than by resorting to the courts;

10. Taking into account the fact that the use of alternative ways must not serve the administrative authorities or private individuals as a means to evade their obligations or to violate the principle of legality;

11. Considering that, in all cases, the alternative ways must allow a control by the courts, as this represents the last guarantee both for the rights of the person who appeals to the administration and for those of the administrative body;

12. Considering that the alternative ways of resolving disputes must respect the principles of equality and impartiality, as well as the rights of the parties;

13. Recommends that the governments of the member states promote the use of alternative ways of resolving disputes between administrative authorities and private individuals following, in the legislation and in practice, the principles found in the annex to this recommendation.

Also, in the chapter reserved for the specific features of each alternative method in the Annex to Recommendation no. 9 (2001) relating to conciliation, mediation and transaction, provides:

I. *“**2. Conciliation and mediation***

i. Conciliation and mediation may be initiated by the parties involved, by a judge or may be declared mandatory by law.

ii. Conciliators and mediators must set up separate meetings with each party or simultaneously, with the aim of finding a solution.

iii. Conciliators and mediators can invite the administrative authority to cancel, withdraw or modify the administrative act, for reasons of opportunity or legality.

II**.** ***3. The transaction***

i. The administrative authorities will not resort to the transaction to evade their obligations, unless the law allows it.

ii. Under the law, public officials who take part in a proceeding to negotiate an agreement must be vested with the necessary authority to reach a compromise”.

Comparing and analyzing the Moldovan legislation through the lens of the principles established by this Recommendation, we find that conciliation and mediation can be declared mandatory by law, and conciliators and mediators can invite the administrative authority to cancel, withdraw or modify the administrative act, for reasons of expediency or legality.

The phrase *of opportunity* introduced in the Recommendation can give the mediator a sufficient range of manifestation to manifest and achieve a successful mediation in this specific field, especially if such a mediator would meet the criteria established under para. (2) of art. 30 of the mediation law.

De lege ferenda, the Moldovan legislator could analyze a bill inspired by this Recommendation and approve mandatory mediation in this type of litigation, and the administrative court, based on art. 24 para. (1) from Law no. 793/2000 on administrative litigation, which provides:

“(1) The administrative litigation court examines the application with the participation of the plaintiff and defendant and /or their representatives, under the terms of the Civil Procedure Code, with some exceptions provided by this law”, could reject the request as inadmissible if this preliminary procedure was not carried out, i.e. the attempt to resolve the dispute through conciliation or mediation.

It should be noted that in Romania, according to art. 7 para. (6) from Law no. 554/2004 in

its original form in the case of actions with administrative contracts, the prior procedure had the meaning of conciliation in the case of commercial disputes, with the appropriate application of the Code of Civil Procedure. As an expression of a monistic approach to civil law, and to eliminate the distinction between the legal regime of civil obligations and that of commercial obligations, the procedure of direct conciliation or mediation as it existed in the Code of Civil Procedure from 1865 updated by Law no. 202/2010 – The Small Reform Law [17], and, in which art. 42 provided: "*Article 720^1, paragraph 1 is amended and will have the following content:*

"Art. 720^1 In the lawsuits and claims in commercial matter that can be assessed in money, before the introduction of the summons, the plaintiff will try resolving the dispute either through mediation or through direct conciliation" was removed.

In the Republic of Moldova, neither art.14 of Law no. 793/2000 nor art. 19 of the Administrative Code no. 116/2018 of do not contain references or procedures by which the conciliation or mediation procedure can be carried out.

This legal institution could still show its effectiveness, both in Romania and in the Republic of Moldova [22].

The monistic approach of civil law [6] whereby the prior procedure is provided for by art.193 NCPC, in the case of Romania "***1)*** *Referral to the court can only be made after the fulfillment of a prior procedure, if the law expressly provides for this. Proof of completion of the preliminary procedure will be attached to the summons application.* ***(2)*** *The non-fulfilment of the preliminary procedure can only be invoked by the defendant through a response, under the penalty of forfeiture",* does not give a sufficient guarantee to the holder of the right to action in the matter of the administrative dispute, and, in particular, of a merchant party to an administrative contract.

The current wording of art. 7 of the Administrative Litigation Law no. 554/2004, does not include any reference to the possibility of the parties to meet and negotiate those aspects that could prevent the initiation of litigation regarding the execution of an administrative contract, a similar situation in the case of the legislation of the Republic of Moldova.

The current form of art. 7 of the Administrative Litigation Law no. 554/2004, in the case of Romania, or art. 14 and 15 of Law no. 793/2000 in the case of the Republic of Moldova, allows the injured person, within 30 days, to request the issuing public authority or the hierarchically superior public authority, the revocation in whole or in part, of the contested administrative act [2, p. 258], and in practice there are few cases when such an enterprise is successful.

Civil servants from the hierarchically superior public authority are, as a rule, in solidarity with those of the issuing public authority. In the spirit of conservation, they sacrifice the entrepreneurial spirit of the merchant in favor of preserving the benefits resulting from membership in the bureaucratic body of the public authority.

In this way, the lack of real reform in the public authorities will be replaced by burdening the small entrepreneur without any real justification, part of an administrative contract.

Public entities are obliged to have efficient management, to secure the necessary money from their own sources and, in addition, from allocations from the local budget, within the limits of the amounts approved for this purpose.

In this context, it is much easier to procure the necessary income from the over-indebtedness of tenants, in the conditions where the current ambiguous legislation allows them to achieve their goals [22].

In our opinion, reaching the merchant

in this situation, cannot be in line with the general interest of society, nor with the letter and spirit of the law and the Constitution [9] as stipulated in point 8 of the above-mentioned Recommendation by the phrase “recourse to the principle *of equity and not just by the letter of the law”*.

In the matter of administrative litigation, in Romania, the ÎCCJ by Decision 75/2018 [11] regarding the pronouncement of a preliminary decision to resolve the following legal issue: *“Regarding the express repeal of the provisions* of art. 720^1 of the old Civil Procedure Code*, it is mandatory to go through the preliminary procedure,* regulated by art. 7 para. (6) from the Administrative Litigation Law no. 554/2004*, with subsequent amendments and additions, in the case of actions having as their object the nullity, annulment, execution, termination or resolution of an administrative contract, including in the situation where the action is formulated by a public authority, as well as in the situation where the action is formulated by a public authority on the recommendation/proposal of an internal or international control body?”*, the Court decided that: *”Regarding the express repeal of the provisions of art. 720^1 of the old Code of Civil Procedure, it is mandatory to go through the preliminary procedure, regulated by art. 7 para. (6) from the Administrative Litigation Law no. 554/2004, with subsequent amendments, in the case of actions having as their object the nullity, annulment, execution, termination or resolution of an administrative contract, including in the situation where the action is formulated by a public authority, the recommendation/proposal of an internal or international control body”.*

In the Republic of Moldova, legislation and commercial conflicts are regulated by the Civil Code, Law no. 135/2007 on limited liability companies [18], Law no. 93/1998 regarding the entrepreneur patent [19], *Law no. 220/2007* ***regarding the state registration of persons and of individual entrepreneurs [20], of other laws that are based on legal relationships in which professionals (entrepreneurs) are involved,*** respectively the transaction through the slides of art. 1917 - 1925, and the method by which a dispute is resolved amicably through the mediation procedure is regulated by Law no. 137/2015 regarding mediation.

In such disputes, it is not enough for the role of a mediator to be reduced to the quality of being an agreeable, diplomatic, skilled person, capable only of facilitating the dialogue between the parties.

A successful commercial mediation can be achieved if the mediator, in addition to the qualities listed above, possesses commercial legislation, so that, in the eventuality of concluding an agreement, it is within the limits of the law, that is, it does not violate the rules that concern public order and good morals.

The complexity of commercial relations existing in today’s society cannot be understood unless the mediator in question is able to understand commercial legislation.

The legislation in force recognizes the following categories of legal entities: legal entity under public law, legal entity under private law.

Legal entities under public law are represented by the state and its departments and are created by the will of the legislator.

Legal entities under private law, according to art. 175 Civil Code, includes two categories:

- the first is represented by non-profit legal entities.

- the second category is formed by profit-making legal entities where we meet companies governed by the Civil Code.

- profit legal entities, i.e. both associations and the foundations aim to achieve an ideal, cultural, religious or social goal, the former for the benefit of the members or the community, the latter exclusively for the benefit of the community. Heritage, and therefore the contribution of associations, does not play

an essential role in associations. Their characteristic element is the collaboration of associations. This last element is absent in foundations, while, on the contrary, the heritage factor is essential.

In the case of the second category, the creation of a society is no longer done for altruistic purposes, to achieve some moral goals, but for the acquisition of a material gain, concretely for the benefit of the members who compose it.

The commercial or civil character of the company depends mainly on the object of the company. A company will be commercial if it meets the requirements provided by law for one of the forms of commercial company, provided that the object of the activity is commercial. Traders, unlike non-traders, have a series of commercial obligations such as: the obligation to register with the Trade Register, the obligation to keep accounting records and not to practice unfair competition. In addition, the company may be subject to insolvency proceedings.

Based on these elements, the commercial company can be defined as a group of persons established on the basis of a company contract and benefiting from legal personality in which the associates agree to pool certain assets, for the execution of commercial acts in order to achieve and sharing the benefits achieved.

It is expected that the Republic of Moldova will also have to make some changes and harmonizations in its commercial legislation [21], since, in the framework of the European Council of June 23, 2022, the EU leaders granted the Republic of Moldova the status of a candidate country for the EU, and in this context, they invited the European Commission to submit a report to the Council regarding the fulfillment of the conditions set out in the Commission's opinion regarding the accession application of the Republic of Moldova.

Romania's accession to the EU has imposed and will impose new changes and additions to commercial regulations, in order to be able to meet the demands commercial activity on the scale of the extended European market [4, p.16]. In this context, one of the objectives of the reform strategy of the judicial system in Romania within the *"business environment" chapter* was the revision of the legislation commercial companies in the sense of their alignment with the standards imposed by the community acquis [3] in the matter of corporate governance [1, p. 104], which is expected to take place in the case of the Republic of Moldova. The mediator, professionally trained, employed on the basis of a contract, flexible and able by his qualities to facilitate the dialogue between the parties in conflict, through specific techniques and methods, is able to manage the process of amicable resolution of the conflict. Therefore, before discerning an understanding potential between the parties, must ascertain, in the case of commercial disputes, when the object of the dispute is, for example, a commercial contract, whether or not the conditions have been respected essential for the validity of the convention provided for in art. 199-207 of the Civil Code of the Republic of Moldova.

Therefore, a mediator who has, in addition to the personal qualities inherent in any type of mediation, qualities complemented by a solid education and a qualification in the field of current commercial relations, will certainly be able to successfully resolve a commercial dispute, since the field of application of the mediation institution in this field, it goes beyond the resolution of interpersonal differences in the conditions where social groups or enterprises appear in these types of conflicts. Moreover, the commercial mediator can be called to resolve cross-border conflicts. In such conflicts, difficulties may arise in assessing the validity conditions of the conventions from the perspective of assessing the rules established by art. 171 of the Civil Code, according to which *"(1) The legal person is the subject of*

law constituted under the conditions of the law, having an independent organization and a separate and distinct patrimony, affected by the achievement of a certain purpose in accordance with the law, public order and good morals”.

The practice of mediation, however, has shown that the parties avoid, most of the time, using a mediator whom they know is not specialized in the field related to their dispute.

This inconvenient is not specific only to Romania and/or the Republic of Moldova, being also notified by litigants from other states of the European Union.

Under these conditions, it is understandable reluctance litigants to use the services offered by SAL entities that offer services regarding the alternative resolution of disputes.

Based on these arguments, I believe that, *by law, mediation* in commercial transactions should be mandatory.

Conclusions

The contractual legal nature of mediation led the legislator to delimit the scope of this institution only to those conflicts that concern the subjective rights that the parties can dispose of.

Therefore, mediation can be used in conflicts from all fields, but practice offers us a palette of relevant fields in which it displays its possibilities.

In our opinion, after the recommended and proposed interventions, with the involvement of the Ministry of Justice, the Mediation Council and mediation organizations, the successful implementation of mandatory mediation in these specific areas could be reached.

From the in-depth analysis of the data of the Study [27] it is shown that a minimal form of mandatory mediation would be more appropriate. Two forms of mandatory mediation are considered: mandatory participation in information sessions and mandatory mediation with the possibility of opt - *out*, if the parties do not wish to continue the procedure. The second alternative recorded, as expected, the most positive reactions from the respondents, especially since the option of later withdrawal would at the same time ensure unlimited free access to justice, an idea to which we rally.

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CONSIDERATIONS REGARDING THE OBJECT OF THE JUDICIAL ACTION IN ORDER TO RESOLVE DISPUTES ARISING FROM EXECUTION OF ADMINISTRATIVE CONTRACTS

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Disputes arising from the execution of administrative contracts constitute a continuous challenge to the social actors involved. The Republic of Moldova could take advantage of Romanian legislation if it started from the assumption that the theories and principles that govern administrative contracts in Romania are valid for it. In the case of Romania, the reconsideration of art. 8 para. (2) of the Administrative Litigation Law no. 554/2004 which requires a legislative intervention in order to cancel the negative consequences for the private entrepreneur, part of an administrative contract, as a result of the procedural defect of not invoking, ex officio, by the court, at the first term, of functional material competence. After such an approach, the legislature of the Republic of Moldova could also be inspired, and could improve and harmonize the provisions of the Administrative Litigation Law no. 793 of 10.02.2000 and the Administrative Code no. 116/2018. Anyway, in The Republic of Moldova, by virtue of its status as a candidate country for the EU, many legislative harmonizations will take place, and Romania's experience would help.

Keywords*: administrative contract, administrative dispute, law enforcement professionals, conflict, conciliation, litigation, commercial mediation.*

CONSIDERAȚII PRIVIND OBIECTUL ACȚIUNII JUDICIARE ÎN VEDEREA SOLUȚIONĂRII LITIGIILOR PROVENITE DIN EXECUTAREA CONTRACTELOR ADMINISTRATIVE

Litigiile provenite din executarea contractelor administrative constituie o provocare continuă la adresa actorilor sociali implicați. Republica Moldova ar putea profita de legislația românească dacă ar pleca de la ipoteza că teoriile și principiile care guvernează contractele administrative din România îi sunt valabile. În cazul României se impune reconsiderarea art. 8 alin. (2)al Legii contenciosului administrativ nr.554/2004 ce necesită o intervenție legislativă în vederea anulării consecințelor negative pentru întreprinzătorul privat, parte a unui contract administrativ, urmare a viciului procedural al neinvocării, din oficiu, de către instanță, la primul termen, a competenței material funcționale. După un astfel de demers și legislativul din Republica Moldova s-ar putea inspira, și, și-ar putea îmbunătăți și armoniza și dispozițiile Legii contenciosului administrativ nr.793 din 10.02.2000 și a Codului administrativ nr.116/2018. Oricum, în Republica Moldova, în virtutea statutului ei de țară candidată la UE, vor avea loc multe armonizări legislative, iar experiența României ar ajuta.

Cuvinte-cheie: *contract administrativ, litigiu administrativ, profesioniști ai dreptului, conflict, conciliere, litigiu, mediere comercială.*

CONSIDÉRATIONS SUR L'OBJET DE L'ACTION EN JUSTICE POUR RÉSOUDRE LES LITIGES DÉCOULANT DE L'EXÉCUTION DES CONTRATS ADMINISTRATIFS

Les litiges découlant de l'exécution des contrats administratifs constituent un défi permanent pour les

acteurs sociaux impliqués. La République de Moldova pourrait tirer parti de la législation roumaine si elle partait de l'hypothèse que les théories et principes régissant les contrats administratifs en Roumanie lui sont valables. Dans le cas de la Roumanie, il est nécessaire de reconsidérer l'art. 8 par. (2) de la loi sur le contentieux administratif n° 554/2004 CE exige une intervention législative afin d'annuler les conséquences négatives pour l'entrepreneur privé, faisant partie d'un contrat administratif, du fait du vice de procédure de la non-invocation, d'office, par le tribunal, au premier terme, de la compétence matériellement fonctionnelle. Après une telle approche, le Législateur moldave pourrait s'en inspirer et pourrait améliorer et harmoniser les dispositions de la loi sur le contentieux administratif n° 793 du 10.02.2000 et du Code administratif n° 116/2018. Cependant, en République de Moldova, en raison de son statut de pays candidat à l'Union européenne, de nombreuses harmonisations législatives auront lieu, et l'expérience de la Roumanie aiderait dans ce processus.

Mots-clés: *contrat administratif, conflit, conciliation, litige, médiation commerciale.*

РАЗМЫШЛЕНИЯ ОБ ОБЪЕКТЕ СУДЕБНЫХ ДЕЙСТВИЙ ПО РАЗРЕШЕНИЮ СПОРОВ, ВОЗНИКАЮЩИХ ПРИ ИСПОЛНЕНИИ АДМИНИСТРАТИВНЫХ ДОГОВОРОВ

Споры, возникающие в связи с выполнением административных контрактов, представляют собой постоянную проблему для вовлеченных социальных субъектов. Республика Молдова могла бы воспользоваться преимуществами румынского законодательства, если бы исходила из того, что теории и принципы, регулирующие административные договоры в Румынии, действительны для нее. В случае с Румынией пересмотр ст. 8 абз. (2) Закона об административных спорах № 554/2004, который требует законодательного вмешательства для отмены негативных последствий для частного предпринимателя, части административного договора, в результате процессуального недостатка, заключающегося в неиспользовании ex officio, судом, на первый срок, функционально-материальной компетенции. Такой подход мог бы вдохновить и законодательные органы Республики Молдова, которые могли бы улучшить и гармонизировать положения Закона об административных спорах № 793 от 10.02.2000 г. и Кодекса об административных правонарушениях № 116/2018. Республика Молдова, в силу своего статуса страны-кандидата в ЕС, может использовать опыт Румынии для гармонизации законодательства.

Ключевые слова: *административный договор, административный спор, юристы, конфликт, примирение, судебный процесс, коммерческое посредничество.*

Introduction

In Romania, in art. 8 para. (2) and para. (3) of the Administrative Litigation Law no. 554/2004 [13] provides: (2) *The administrative litigation court is competent to resolve the disputes that arise in the phases preceding the conclusion of an administrative contract, as well as any disputes related to the conclusion of the administrative contract, including disputes with the object of canceling an administrative contract. Disputes arising from the execution of administrative contracts are under the jurisdiction of the common law civil courts.* (3) *When resolving disputes provided for in para. (2) the rule according to which the principle of contractual freedom is subordinated to the principle of priority of the public interest is taken into account.*

In view of this situation, the courts notified in the matter of administrative litigation in Romania are obliged to retain for resolution the disputes that arise according to the thesis a-I-a. *in the phases preceding the conclusion of an administrative contract, as well as any disputes related to the conclusion of the administrative contract, including disputes having as its object the cancellation of an administrative contract.*

Instead, according to thesis II, *the disputes arising from the execution of administrative contracts are under the jurisdiction of the civil courts of common law.*

In the Republic of Moldova, for the first time the term *“administrative contract”* was used by the legislature in the Administrative Litigation Law no. 793 of 10.02.2000 [14], and from the provisions of art. 13 of this law we understand that the administrative contract “ *is the contract that can create, modify or extinguish a legal relationship under public law, if the law does not provide otherwise”.*

It is also worth remembering that Romania as the first state to recognize the independence of the Republic of Moldova and committed to constantly and actively support it, both through diplomatic efforts and through concrete assistance, in order to follow the irreversible European path, committed, at the same time, to give it assistance in the creation of democratic institutions compatible with the demands imposed by European legislation or transitional institutions with the perspective of a gradual harmonization, to the extent that reality will allow it [15, p. 62-80].

At the same time, according to the Moldovan authors Ion Guceac and Victor Balmus [7, pp. 2-10], the theories that govern administrative contracts in Romania are also valid for the Republic of Moldova, “ *because only after the consecration in art. 1, 2 of the Law on property, no. 459 of 22.01.91, and then in art. 9 and 126 of the Constitution of the Republic of Moldova, adopted on July 29, 1994, of public and private property, of the assurance by the state of the administration of “ the public property that belongs to it, under the conditions of the law and of the inviolability of “ investments of natural and legal persons, including foreigners”, in the Republic of Moldova a new stage of development of the theory of public* and civil contracts began [7, p. 2-10].

Research methodology

Starting from a retrospective, historical approach to the researched field, the article offers the possibility of understanding the importance of disputes arising from the execution of administrative contracts and the loopholes and traps hidden in this legislation.

At the same time, the article outlines the perspectives of this issue and helps to acquire its theoretical foundations and the practical applicability of this obtained theoretical knowledge.

Administrative law as a distinct branch of law is regulated by legal norms that substitute the same methods of application to knowledge and the legal action as of any branch of law.

The same methods used in the study of any branch of law were used.

Administrative law, by nature and its destination is a phenomenon with many and deep connections and social and human interferences.

The research of the phenomenon part of administrative law, in this case, aspects regarding the execution of the administrative contract, part of the research of the legal phenomenon, is carried out by using the same methods used in the study of law: general methods and concrete methods.

In this article, different general methods could be used, such as: the generalization and abstraction method, the logical method, the historical method, the comparison method, the sociological method, the systemic analysis method and the prospective or forecasting method.

Aspects of Romanian court practice

It should be noted that according to art. 7 para. (6) from Law no. 554/2004 in its original form [18] in the case of actions with administrative contracts, the prior procedure had the significance of conciliation in the case of commercial disputes, with the appropriate application of the Code of Civil Procedure.

As an expression of a monistic approach to civil law, and to eliminate the distinction between the legal regime of civil obligations and that of commercial obligations, the direct

conciliation procedure as it existed in the Code of Civil Procedure from 1865 updated by Law no. 202/2010 – The Small Reform Law, and, in which art. 42 provided: " *Article 720^1, paragraph 1 is amended and will have the following content:*

"Art. 720^1 In the lawsuits and claims in commercial matter that can be assessed in money, before the introduction of the summons, the plaintiff will try resolving the dispute either through mediation or through direct conciliation" [19], was removed.

This legal institution could still show its effectiveness [16].

The monistic approach of civil law whereby the prior procedure is provided for by art.193 NCPC [20] "***1*** *The referral to the court can only be made after the completion of a prior procedure, if the law expressly provides for this. Proof of completion of the preliminary procedure will be attached to the summons application.*

(2) *The non-fulfilment of the preliminary procedure can only be invoked by the defendant through a response, under the penalty of forfeiture",* does not give a sufficient guarantee to the holder of the right to action in the matter of the administrative dispute, and, in particular, of a merchant party to an administrative contract.

The current wording of art. 7 of the Administrative Litigation Law no. 554/2004, does not contain any reference to the possibility of the parties to meet and negotiate those aspects that could prevent the initiation of litigation regarding the execution of an administrative contract.

The current form of art. 7 of the Administrative Litigation Law no. 554/2004 allows the injured person, within 30 days, to request the issuing public authority or the hierarchically superior public authority, the revocation in whole or in part, of the contested administrative act, and in practice there are few cases when such an enterprise has success.

In the Republic of Moldova, art. 19 of the Administrative Code [3], provides that: "*The prior request is the institution that offers a way of prejudicial resolution of administrative disputes"*, and according to art. 60 para. (1) *"The general term in which an administrative procedure must be completed is 30 days, unless the law provides otherwise",* and it can be according to para. (4) *"For justified reasons related to the complexity of the object of the administrative procedure, the general term can be extended by no more than 15 days. This extension is effective only if it is communicated in writing to the participants in the administrative procedure within 30 days, along with the reasons for the extension",* and according to para. (5) can be extended" *Exceptionally, when cases of particular complexity are registered in the administrative procedure that require time for the processing of documents, the public authority can establish a longer term for the completion of the administrative procedure, which will not exceed 90 days".*

Art. 14 para. (1) and (2) of Law no. 793/2000 on administrative litigation in the Republic of Moldova requires that: "(1) The person who *considers himself/herself injured in a right of his/her own, recognized by law, through an administrative act shall request, through a prior request, the issuing public authority, within 30 days from the date of communication of the act, its revocation, in whole or in part, if the law does not provide otherwise.*

(2) If the issuing body has a higher hierarchical body, the prior request can be addressed, at the petitioner's choice, either to the issuing body or to the higher hierarchical body if the legislation does not provide otherwise", and if in disputes arising from contentious reports administrative situations are found that do not contravene the legislation that regulates the negotiation and conclusion of transactions with the participation of persons under public law, then, in our opinion,

conciliation or mediation would be possible. This possibility should, in our opinion, *expresis verbis*.

Civil servants from the hierarchically superior public authority act according to a *customary practice* from the period of the Phanariot regimes and are, as a rule, joint with those of the issuing public authority. In the spirit of conservation, they sacrifice the entrepreneurial spirit of the merchant in favor of preserving the benefits resulting from membership in the bureaucratic body of the public authority.

In this way, the lack of real reform in the public authorities will be supplemented by burdening the small entrepreneur without any real justification, part of an administrative contract.

Public entities, of local interest, are obliged to have efficient management, to secure the necessary money from their own sources and, in addition, from allocations from the local budget, within the limits of the amounts approved for this purpose.

In this context, it is much easier to procure the necessary income from the over-indebtedness of tenants, in the conditions where the current ambiguous legislation allows them to achieve their goals [16].

In our opinion, reaching the merchant in this situation cannot be in line with the general interest of society, nor with the letter and spirit of the law. However, the legislation in force allows such a trader to legally retaliate against such a situation.

The legal foundation, in the case of Romania, derives its strength from the Romanian Constitution [5] - *art. 1 paragraph "(3) Romania* ***is a state of law*** *, democratic and social, in which human dignity, citizens' rights and freedoms, the free development of the human personality, justice and political pluralism represent supreme values, in the spirit of the democratic traditions of the Romanian people and the ideals of the Revolution of December 1989, and are guaranteed...*

(5) In Romania, compliance with the Constitution, its supremacy and laws is mandatory".

Therefore, ***the rule of law*** presupposes, on the one hand, ***the principle of legality***, without being reduced to it, and, on the other hand, it allows the public administration, implicitly the local or county one, to exercise its discretionary power, namely *"that margin of freedom left to the discretion of an authority so that, in order to achieve the goal indicated by the legislator, it can resort to any means of action within the limits of its competence".*

However, this discretionary power, or right of appreciation, or opportunity, as it is also called in the specialized literature, is not unlimited, its *"censorship"* can intervene when the very legality is affected and when, in practice, one acts with excess power, no longer being able to talk about good administration.

Specifically, the contracting public authority can unilaterally modify or terminate the administrative contract [1, page 130] only with prior notification to the contractor and only when the public interest requires it.

If the unilateral modification of the administrative contract damages him/her, the contractor has the right to promptly receive adequate and effective compensation. In case of disagreement between the public authority and the contractor regarding the amount of the compensation, it will be determined by the competent court. This disagreement may not, under any circumstances, allow the contractor to evade its contractual obligations.

The right of the contracting public authority to modify unilaterally concerns only the regulatory part of the contract and is based on its exclusive right to ascertain the modification of the public interest and to adapt accordingly to the public service. The contractor will not be able to dispute the appropriateness of the measure. This right of the administration

cannot be exercised discretionarily, but only if the respective modification is required by a better adaptation of the contract to the needs of satisfying the public interest.

Competent public authorities organize public services, under public law, in order to satisfy a public interest. To the extent that the contracting authority finds a change in the public interest, it can, through administrative acts of the authority, modify the conditions for the performance of the public service or even abolish the public service, modifying or, as the case may be, ending the contract.

Within an administrative contract there are contractual clauses as well as regulatory clauses.

The contractual clauses can be changed by the agreement of the parties, and the regulatory clauses can be changed unilaterally by the public authority for reasons related to the national or local interest, as the case may be.

Therefore, the disputes arising from the execution of an administrative contract are under the jurisdiction of the common law civil courts.

Art. converges in the same sense. 53 para. 1^1 of Law no. 101/2016 [11] which has the following content: *"Litigation and claims arising from the execution of administrative contracts and those arising from the termination, resolution, unilateral denunciation or early termination of public procurement contracts for reasons independent of the contracting authority are settled first court, emergency and above all, by the civil section of the court in whose jurisdiction the contracting authority is located or in the jurisdiction where the applicant has its registered office/domicile."*

The current economic crises have certainly captured the entire public agenda, and the commercial issue has aroused the interest of commercial actors, and the fragile limits of the commercial regulations included in the New Civil Code are already showing their weaknesses.

Indisputably, the actors in the local business market and beyond, face, as is natural, an avalanche of conflicts of a commercial nature, and the number of insolvencies is constantly increasing [22].

These conflicts can only be resolved extrajudicially and judicially. Out-of-court disputes can be resolved quickly through negotiation, mediation and arbitration.

The judicial way, through the medium of the Civil Code, monistic, anachronistic and considered a failed experiment by the majority of commercial law practitioners should be avoided, the speedy resolution of the dispute in a reasonable time will certainly be preferred. It could also be the case for conflicts resulting from the conclusion, execution or modification of administrative contracts, if the law opted for a less rigid system.

In the face of these waves of commercial conflicts, it is preferable that they be resolved quickly, amicably, with low costs and a high degree of compliance with the agreements that will be concluded.

The situation of suffocation of the civil courts through the adoption of the current monist system was also foreseen by the late professor Stanciu Carpenaru in the work Romanian Commercial Law [2, page 16], when he referred to the conclusions regarding the importance of commercial law in contemporary society. The renowned professor considered that *"Commercial law, as a particular right and as a sub-branch of private law, must find its source in the Commercial Code and special commercial laws, and not in a single regulation, that of the Civil Code", and "*The *Role of commercial law in the regulation of commercial relations, during the formation of the market economy in our country, calls for the improvement of the Commercial Code, at the level of modern standards existing in other countries".*

The opinions of commercial law specialists, such as that of the renowned professor,

converge towards the idea that the inclusion of commercial law in the New Civil Code [21] was a step back in the commercial matter, thus generating through the effect of this approach a regression in terms of the commercial issue, an effect fully felt by our society.

In another vein, the High Court of Cassation and Justice has ruled countless times on the importance of going through the prior conciliation or mediation procedure in the old civil legislation.

Thus, in a Guidance Decision it was established that: *It should also be mentioned that, from the entire regulation, it follows that, by establishing the prior conciliation procedure, the legislator sought to put into practice the principle of speed the settlement of disputes between the parties - more important in commercial matters - and to relieve the activity of the courts. Thus, the role of the criticized procedural rule is to regulate an extrajudicial procedure that gives the parties the opportunity to agree on the possible claims of the plaintiff, without the involvement of the authority competent courts* [9].

High Court of Cassation and Justice also ruled in the sense that *“the procedure developed for the purpose of speed settlement of disputes, takes into account legal certainty and the stability of the commercial circuit* [9].

Summing up, we can say that, by establishing the prior conciliation procedure, the legislator sought the rapid resolution of misunderstandings between traders without resorting to the more complex and slower judicial procedure, and the relief of the activity of the judicial courts.

As it was said above, we consider this last point of view correct and legal, which we support and with the following arguments: Not only are the provisions of art. 131 and 720^7 different from those of art. 720^1, but also the purpose pursued is different, respectively, in the case of art. 720^1, the resolution of misunderstandings between traders before court notification and therefore the prevention of disputes and the relief of the courts. Against this, we believe that the necessity and, above all, the usefulness of prior conciliation is obvious and , as a result, it cannot be regarded as a procedure whose completion can be left to the free discretion of the plaintiff [10].

In the matter of the administrative dispute, ÎCCJ (High Court of Cassation and Justice) by Decision 75/2018 [23] regarding the pronouncement of a preliminary decision for the resolution of the following legal issue: *“Concerning the express repeal of the provisions of art. 720^1 of the old Civil Procedure Code, it is mandatory to go through the preliminary procedure, regulated by art. 7 para. (6) from the Administrative Litigation Law no. 554/2004, with subsequent amendments and additions, in the case of actions having as their object the nullity, annulment, execution, termination or resolution of an administrative contract, including in the situation where the action is formulated by a public authority, as well as in the situation where the action is formulated by a public authority on the recommendation/proposal of an internal or international control body?”*, the Court decided that*:”Regarding the express repeal of the provisions of art. 720^1 of the old Code of Civil Procedure, it is mandatory to go through the preliminary procedure, regulated by art. 7 para. (6) from the Administrative Litigation Law no. 554/2004, as subsequently amended, in the case of actions having as their object the nullity, annulment, execution, termination or resolution of an administrative contract, including in the situation where the action is formulated by a public authority, the recommendation/proposal of an internal or international control body”.*

In Romania, according to the provisions of art. 36 paragraph (3) which regulates the organization of appeal courts, tribunals, specialized tribunals and courts of law from

Law no. 304/2004 on the judicial organization [12] provides: (*3) Within the courts, there are sections or, as the case may be, specialized sets for civil cases, criminal cases, commercial cases, cases with minors and family cases, administrative and tax litigation cases, cases regarding labor disputes and social insurance, as well as, in relation to the nature and number causes, maritime and fluvial sections or for other matters.*

By RIL (The decisions pronounced in the appeal in the interest of the law) Decision no. 17/2018 [24] it was ruled that: "*In the interpretation and uniform application of the provisions of art. 129 para. (2) point 2, art. 129 para. (3), art. 130 para. (2) and (3), art. 131, art. 136 para. (1), art. 200 para. (2) of the Code of Civil Procedure and of art. 35 para. (2) and art. 36 para. (3) from Law no. 304/2004, the procedural material incompetence of the specialized section /completion is of public order".*

The material procedural incompetence of the court can be successfully invoked in the matter of the appeal, since the provisions of art. 489 para. (3) C.proc.civ (Code of Civil Procedure) [4] provide that: *3) If the law does not provide otherwise, the grounds for annulment that are of public order can be raised ex officio by the court, even after the expiry of the appeal's motivation term, either in the filtering procedure, either in public session.,* and if we consider the provisions of art. 488 para. (2) Civil Procedure Code. which disposes: *2) The reasons provided for in para. (1) cannot be received unless they could not be invoked during the appeal or during the appeal trial or, although they were invoked within the deadline, they were rejected or the court failed to rule on them.,* it can be stated that is in contradiction with the provisions of art. 178 Civil Procedure Code para. (1) in the matter of the appeal because: *(1) Absolute nullity can be invoked by any party to the process, by the judge or, as the case may be, by the prosecutor, in any state of the trial of the case, unless the law provides otherwise.*

As a consequence, invoking the absolute nullity of public order ex officio is a possibility and not an obligation that belongs only to the court, not to the parties, who must also invoke the public order cancellation grounds within the deadline.

The reasons for annulment can be invoked directly in the appeal when the decision is not amenable to appeal, this being the hypothesis in which the absolute nullities could not be invoked by way of appeal.

In the case of the Republic of Moldova, the theories that govern the administrative contracts in Romania, as well as the principles according to which these contracts are implemented, are similar [7, p. 2-10].

Conclusions

In the case of Romania, a plausible opportunity to counteract the effects of the current prolonged crises and help to simplify and expedite the resolution of disputes arising from the execution of administrative contracts would be: reconsideration, art.7, art. 8 para. (2) and para. (3) of the Administrative Litigation Law no. 554/2004, of Law no. 101/2016 which transposes two European directives into Romanian domestic law and art. 131 Civil Procedure Code. Romanian, in which we consider that a legislative intervention is required in order to clarify and cancel the negative consequences for the private entrepreneur, part of an administrative contract, as a result of the procedural defect of not invoking, ex officio, by the court, at the first term, the functional material competence , or the opportunity offered by the platform of the organization of the Romanian Institute of Commercial Law [8] whose main objectives are: *"to carry out scientific research in the field of commercial law and matters related to commercial law; encouraging and facilitating debates on major topics of commercial law,*

topical for doctrine, jurisprudence, for the European Union and for Romania; promoting and supporting the increase in the quality of legal training in the field of commercial law; the development of legal sciences, with priority in the field of commercial law and its related subjects; proposing and supporting the theses of the new Romanian Commercial Code to the competent bodies of the Romanian state, scientific bodies, the business environment and any interested entities and institutions - with a view to adopting the new Commercial Code; supporting a project of a new Commercial Code - appropriate to the current and future requirements of Romanian society”.

In the case of the Republic of Moldova , a solution would be the implementation of points 8-13 of the Recommendation of the Committee of Ministers of the Council of Europe no. 9/2001 [17] regarding alternative ways of resolving disputes between administrative authorities and natural persons - arbitration, mediation, conciliation, the guidelines of this procedure are drawn.

De lege ferenda, the obligation to try to amicably resolve commercial conflicts and those resulting from the conclusion, execution or modification of administrative contracts should be introduced into Romanian and Moldovan legislation, since there may be situations in which the parties can communicate and de-tension on their own, instantly, any conflict.

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LEGAL AND ACCOUNTING ASPECTS OF CONSTRUCTION CONTRACTS

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This article examines the legal and accounting aspects specific to construction contracts based on the provisions of the legislation of the Republic of Moldova, which mainly refer to: the classification and composition of construction contracts, the object of the contracts, the value of the contract, and the method of settlements. The construction contract is drawn up on the basis of the Civil Code of the Republic of Moldova, the National Accounting Standard "Construction Contracts," and the Regulation on the contracting of public investments.

In order to solve the aforementioned issues and correctly implement national regulations related to construction contracts, it is recommended to: revise the composition of construction contracts based on the advantages and disadvantages of construction contracts according to their type; specify the object of the contracts; specify the method for determining the value of the contract, taking into account possible cases of contractual price modification; establish clauses in the contracts regarding the settlement organization for the construction and installation works performed, either after the completion of all the works specified in the contract or at the completion of certain construction elements and types of works; establish clauses in the contracts allowing for modification of the initial construction contracts.

Keywords*: construction, contract, construction contract, fixed-price contract, cost-plus contract, mixed contract.*

ASPECTE JURIDICE ȘI CONTABILE ALE CONTRACTELOR DE CONSTRUCȚII

În prezentul articol sunt examinate aspectele juridice și contabile specifice contractelor de construcții, pornind de la prevederile legislației Republicii Moldova, care se referă în principal, la: clasificarea și componența contractelor de construcții, obiectul contractelor de antrepriză, valoarea contractului, modalitatea decontărilor. Contractul de construcții se întocmește în baza Codului Civil al Republicii Moldova, Standardului Național de Contabilitate „Contracte de construcții", Regulamentului cu privire la contractarea investițiilor publice.

În scopul soluționării problemelor sus-menționate şi al implementării corecte a reglementărilor naționale aferente contractelor de construcții, se recomandă: revizuirea componenței contractelor de construcții, pornind de la avantajele și dezavantajele contractelor de construcții în funcție de tipul acestora, concretizarea obiectului contractelor de antrepriză; concretizarea modului de determinare a valorii contractului, ținând cont de cazurile posibile de modificare a prețului contractual; stabilirea în contractele de antrepriză a clauzelor privind organizarea decontărilor aferente lucrărilor de construcții-montaj executate; după finalizarea tuturor lucrărilor prevăzute în contractul de antrepriză sau la

finalizarea unor elemente constructive şi genuri de lucrări; stabilirea în contractele de antrepriză a clauzelor modificării contractelor de construcţii iniţiale.

Cuvinte-cheie: *constructii, contract, contract de construcţii, contract cu preţ fix, contract "cost plus", contract mixt.*

ASPECTS JURIDIQUES ET COMPTABLES DES CONTRATS DE CONSTRUCTION

Cet article examine les aspects juridiques et comptables spécifiques des contrats de construction en se basant sur les dispositions de la législation de la République de Moldavie, qui se réfèrent principalement à la classification et à la composition des contrats de construction, à l'objet des contrats d'entreprise, à la valeur du contrat et aux modalités de paiement. Le contrat de construction est établi sur la base du Code civil de la République de Moldavie, de la Norme comptable nationale "Contrats de construction" et du Règlement relatif à la passation des marchés publics.

Afin de résoudre les problèmes susmentionnés et de mettre en њuvre correctement les réglementations nationales relatives aux contrats de construction, il est recommandé de: réviser la composition des contrats de construction en fonction des avantages et des inconvénients de chaque type de contrat; préciser l'objet des contrats d'entreprise; préciser la manière de déterminer la valeur du contrat, en tenant compte des cas possibles de modification du prix contractuel; établir dans les contrats d'entreprise des clauses relatives à l'organisation des paiements pour les travaux de construction et d'installation effectués: après l'achèvement de tous les travaux prévus dans le contrat d'entreprise ou après l'achèvement d'éléments constructifs et de types de travaux spécifiques; établir dans les contrats d'entreprise des clauses relatives à la modification des contrats de construction initiaux.

Mots-clés: *construction, contrat, contrat de construction, contrat à prix fixe, contrat "coût plus", contrat mixte.*

ЮРИДИЧЕСКИЕ И БУХГАЛТЕРСКИЕ АСПЕКТЫ ДОГОВОРОВ НА СТРОИТЕЛЬСТВО

В данной статье рассматриваются юридические и бухгалтерские аспекты, характерные для договоров на строительство, исходя из положений законодательства Республики Молдова, которые относятся в основном к классификации и составу строительных договоров, предмету договоров подряда, стоимости договора, способу расчетов. Договор на строительство составляется на основе Гражданского кодекса Республики Молдова, Национального Стандарта Бухгалтерского Учета «Договоры на строительство», Положения о заключении государственных инвестиционных контрактов.

Для решения вышеупомянутых проблем и правильной реализации национальных норм связанных со строительными подрядами, рекомендуется: пересмотр состава договоров на строительство, исходя из преимуществ и недостатков таких договоров в зависимости от их типа; конкретизация предмета договоров подряда; конкретизация способа определения стоимости договора, учитывая возможные случаи изменения договорной цены; установление в договорах подряда условий, касающихся организации расчетов, связанных с выполнением строительно-монтажных работ: после завершения всех работ, предусмотренных в договоре подряда, или после завершения отдельных строительных элементов и видов работ; установление в договорах подряда условий изменения первоначальных договоров на строительство.

Ключевые слова*: строительство, договор, договор на строительство, договор на строительство с фиксированной ценой, договор на строительство «затраты плюс», смешанный договор на строительство.*

Introduction

Constructions represent one of the fundamental branches of the economy of the Republic of Moldova, at the level of which activities are carried out aimed at the technical and material organization of the preparation and execution of works, carried out with the aim of completing the works under the conditions of maximum effectiveness of the new objectives, but also the improvement

and repair of objects already existing. Thus, the pace of the country's exit from the global crisis and the degree of competitiveness of the national economy largely depend on the effectiveness of the operation of this field of activity.

The main works carried out by the entities operating in the field of construction are the construction-assembly works (LCM): the construction works of the foundation, the foundation and the supporting constructions, the works regarding the construction of external and internal water supply networks, sewage, heat supply, gas, electricity, etc., technical and sanitary equipment installation works, works regarding the construction of oil and gas pipelines, overhead lines, telecommunications lines, etc., engineering works to prevent land erosion, landslides, avalanches; works aimed at the construction, expansion, reconstruction, repair, technical reuse of permanent and temporary construction objects.

In the process of execution of LCM by specialized organizations, two parties participate - *the beneficiary* (client) and the construction organization - *the contractor*. The activity of construction companies begins, as a rule, by establishing legal relations between these two parties, which are based on an act, the most often used being the contract.

The undertaking contract is drawn up based on the legislation in force of the Republic of Moldova: the Civil Code of the Republic of Moldova, the National Accounting Standard (SNC) "Construction contracts", the Regulation on the contracting of public investments. We specify that the SNC "Construction contracts" was implemented on 01.01.2014 and developed based on the provisions of the EU Directive and the International Accounting Standard (IAS) 11 "Construction contracts" [12]. On January 1, 2020, the changes made in the SNC [7], including those related to construction contracts, entered into force. These changes were developed based on the provisions of Directive 2013/34/EU of 26.06.2013 [4].

The joint venture contract regulates the mutual relations between the beneficiary and the entrepreneur [1, art.377]. According to the Civil Code, *the contract* is "the agreement of will made between two or more persons by which legal relations are established, modified or extinguished" [1, art.666]. In this context, the SNC "Contracte de construction" defines *the construction contract* as an act concluded between the beneficiary and the contractor for the purpose of building, repairing, modernizing and reconstructing an asset or a group of assets that are in a close interrelationship or interdependence in terms of concerns their design, technology and operation [13].

National normative framework of accounting with the *acquis* communautaire, multiple problems arise regarding the correct application of European regulations in practice. In this article, the legal and accounting aspects specific to construction contracts are examined, mainly, which refer to: *the classification and composition of construction contracts, the object of joint venture contracts, the value of the contract and the method of settlements.*

Research methods used. In the framework of the research, the national legislative and normative acts, the results of the investigations of local and foreign scientists were used. The research is based on a deductive approach from the general to the particular, starting from the current state of knowledge of the theoretical and practical aspects of construction contracts. The study is based on the dialectical method with its fundamental elements: analysis, synthesis, induction, deduction, as well as on the methods related to economic disciplines - observation, comparison, selection, grouping, etc.

Obtained results and discussions

The construction process involves going through three stages:

1. Preparation for construction (technical -economic justification and technological design of the object);

2. Construction (execution of construction works);

3. Commissioning of finished construction objects.

These three stages involve the realization of different types of construction works, already mentioned. The basic participants in the construction investment activity are: *the investor, the beneficiary, the general contractor, the subcontractors, the users of the capital investment objects (natural or legal persons including non-residents, the state, administrative-territorial units, etc.), design entities, others (intermediary organizations, banks, insurance companies, etc.)*. At the same time, suppliers of machinery and equipment necessary for the construction of the object, suppliers of construction materials, etc. participate indirectly in the creation of production.

The investor is the natural or legal person who finances the construction of one or more objects from his/her own or borrowed sources. Therefore, *the joint venture contract* is the document that regulates the legal relations between the administration and the investor. The investor can fulfill the role of beneficiary, creditor, buyer of the built object. The investor is the subject of the investment activity on which depends the volume, the direction of the construction, the value of the investment, its organizational forms, etc.

The beneficiary represents the subject of the investment activity authorized by the investor to carry out the investment project. He/she, as a rule, takes over the function of organization and financial administration of the project from the stage of the feasibility study of capital investments to the commissioning of the built object and the achievement of the project's objectives.

The contractor represents the natural or legal person who performs the construction works, and who must have a license to carry out this type of activity. Therefore, *the enterprise contract* is the document that regulates, in the given case, the relations between the entrepreneur and the beneficiary.

Thus, based on the concluded construction contract, the contractor undertakes to perform certain works stipulated in the contract and to deliver the object to the beneficiary in accordance with the project and the construction estimate in the established terms. The beneficiary undertakes to make available to the contractor the plot of land related to the construction, the project and the approved construction estimate in the established order, to ensure the financing of the construction works on time, to receive and pay for the executed works.

In order to perform the contractual obligations more operatively and efficiently, the contractor can call on organizations specialized in the field of construction - subcontractors. Likewise, in cases where the construction organization cannot perform all the necessary works with its own forces, it can assume the performance of concrete works to other specialized organizations on the basis of subcontracts. In this case, the contractual relations are established by signing *the subcontract*, the subjects of these legal relations being the general contractor and the subcontractor.

The general contractor is the construction company that is responsible to the beneficiary for the works performed, for the estimate documentation, as well as for the quality of the works performed by the subcontractors. In such situations, the beneficiary concludes a contract with the main executor, called the general contractor, who is entrusted with the coordination of all works and the latter is responsible, in accordance with the legislation in force [1, art. 378] for the qualitative fulfillment and within the established terms of

the works stipulated in the contract. As a rule, the general contractor performs the general construction works:

- embankments, foundations;
- structure (pillars, retaining walls, beams, slabs, brackets);
- non-structural closures (closing walls, windows and doors);
- roof (coverings, thermal insulation, skylights, etc.).

The subcontractor is a construction organization that undertakes to perform certain works in accordance with the instructions provided by the general contractor, and upon their completion, to hand over the results obtained to the general contractor. Thus, the execution of separate works (for example: thermal, sanitary, electrical, refrigeration, automated, etc.) installations takes place by *subcontractors* - based on the subcontracts concluded between the general contractor and the respective subcontractor. Therefore, the accounting is influenced by the fact, whether or not the execution of some works by subcontractors is foreseen in the contract.

The designer is represented by a natural or legal person who performs research and design work on the object. He is responsible for the quality of the project, the technical -economic indicators of the object being built, as well as for the correctness of the execution of the works by the contractor.

The object of the joint venture contract represents the content of the agreed legal will of the participants of the legal relationship. This can be: *the construction of a single object* (construction of a building, a bridge, highways, etc.), *the construction of a group of objects* (housing complex), *reutilization works* (to improve the entity's potential), *production expansion works, capital repair works* etc.

According to the provisions of the SNC "Construction contracts", there are several criteria for classifying construction contracts. Depending on the method of setting the price, construction contracts are classified into: *fixed price contracts, "cost plus" contracts and mixed construction contracts* [13].

The fixed-price contract is an agreement between the parties in accordance with which the contractor undertakes to carry out the construction work for a fixed amount that, as a rule, does not change in the event of an increase in costs, but there are exceptions. The fixed price contract is concluded if, at the time of signing, all project documentation has been drawn up with high precision and the beneficiary pays a significant part of the contract price in advance.

This type of contract has both advantages and disadvantages. One of the favorable aspects of this type of contract is the determination of the final value of the construction contract before work begins. This fact gives the entrepreneur the possibility of more efficient cash management. Also, in the case of the fixed-price contract, the contractor has incentives to reduce the cost of the construction work, which contributes to the increase in the overall profit margin on the contract. Another significant advantage of the fixed-price contract is the definition and nomination of the term of completion of the construction works. This facilitates the standardization of the LCM execution process and contributes to increasing the effectiveness of their execution.

As previously mentioned, the fixed price contract also has disadvantages. One of them is the high risk to which the contractor is exposed, because any deviation from the clauses stipulated in the contract will influence the costs, in most cases in the unfavorable direction, and arguing and obtaining the agreement of the beneficiary aiming to increase the price of the previously agreed contract is an arduous process. Another disadvantage of this type of contract is the difficulty of determining the final price of the contract before the start of the work, since this depends first of all on the accurate elaboration of the documentation

related to the project, a fact that requires the possession of a high qualification of the specialists who will work on the project, but also significant time costs. Establishing the final price of the contract becomes more verbose if it will run for several years, since the current economic instability does not allow making long-term forecasts regarding, for example, the prices of construction materials, machines and equipment, etc. - aspects that directly influence contractual costs. In this context, the reduced flexibility regarding changes to the design of the object of the construction contract should not be overlooked. After analyzing the favorable and unfavorable aspects of the fixed-price contract, it can be ascertained with certainty that the usefulness of this type of contract becomes practical only in the case of projects planned to be executed only in the short term.

The "cost plus" contract involves the recovery by the beneficiary of the contractual costs actually incurred and accepted by him/her and the granting of a compensatory payment in a fixed amount or a percentage agreed by both parties of the costs incurred. This type of contract is applied in the situation where the documentation on the project has not been drawn up thoroughly enough to be able to determine the final price of the contract before the start of construction work.

One of the advantages of this type of contract is the fact that the contractor can start the construction works even if the entire documentation related to the project is not finished. In this way, there is more effective management of time - a notable resource in this field of activity. Another favorable aspect of the cost plus contract is the lower risk of the contractor, given that deviations from the arrangements specified in the contract are more easily remedied. From here derives another positive characteristic of the given type of contract, in particular, the greater flexibility in the contractor's actions, due to the development of the construction work execution process before the design stage is finished. A significant disadvantage of the "cost plus" contract is the higher risk of the beneficiary's inability to pay, due to the difficulty of estimating the final cost of the contract, and respectively the prolixity of the corresponding budgeting of the beneficiary's costs. The process of controlling contractual costs is also more difficult. The flexibility specific to this type of contract influences the speed of execution of construction works. This can be undermined, since, as a rule, any amendment introduced in the contract increases the deadline for the completion of the works. However, it is necessary to mention the fact that in economic practice the "cost plus" contract is applicable most often in the case of long-term projects.

The mixed construction contract combines the provisions of the "cost plus" contract and the fixed price contract. An example can be the "cost plus" contract with a maximum value negotiated in advance. The mixed contact is applicable in case of obscurity regarding the amount of unplanned costs, and the contractor expresses his agreement to perform the works at the maximum price, but agreed with the beneficiary. In practice, construction contracts with a fixed price per unit of work volume can be encountered. Thus, provisions created to cover unforeseen costs are factored into the price of a unit of work volume.

Another criterion for classifying construction contracts is that according to the way of segmentation and combination, according to which construction contracts are classified into: *object contracts and combined contracts.* There are several types of object contracts: contracts involving the construction *of a single object, multiple assets, and the construction of a related asset* [13].

In the case of *the contract on objects,* its value is established for each asset, and the recognition and accounting of the income

and expenses related to the contract is kept separately for each object.

According to the SNC “Construction contracts”, *the contract for the construction of several assets* requires compliance with a series of conditions on each object, namely [13]:

- presentation of separate offers for each asset;
- the existence of the beneficiary’s agreement to accept a distinct object;
- the possibility of identifying costs and revenues is for each individual object.

In the case of the construction contract of a *related asset* , the related works are treated as a separate contract if:

- there are notable differences regarding project documentation, technology and the way the asset is built;
- the price of the related asset is negotiated without taking into account the initial contract value.

The combined contract joins several contracts with one or more beneficiaries. The viability of this contract is possible if the following conditions are met [13]:

- negotiation of several construction contracts in one package;
- the existence of a connection between them and the recognition of a common amount of income and expenses;
- execution of construction contracts concurrently or in a continuous sequence.

It should be noted that the contract stipulates: *the value of the contract, the date of the start of the works, the deadline for their completion, the rights and obligations of the contractor and the beneficiary, settlement method.*

In the joint venture contracts, in addition to other important indicators, the total amount to be recovered by the beneficiary is reflected, i.e. the amount to be received by the contractor upon fulfillment of the contract (upon completion of the works).

This amount consists of two parts:

- the value of the contract;
- value added tax (VAT).

For the contractor, the value of the contract is nothing but the income related to the contract after the execution of the works. However, this indicator depends primarily on the type of contract concluded between the beneficiary and the entrepreneur: fixed price contract, “cost plus” contract or mixed contract.

The previously mentioned aspects denote the fact that the contract price cannot be established without determining the value of the construction works, the initial stage of which is the design. Currently, the basic norms in constructions that regulate this stage indicate the fact that the basis of the contract price is the estimate value made up of the value of construction works, assembly works, expenses related to the purchase of equipment, inventory, etc. [8, 9]. The estimate value represents, de facto, the amount of money established on the basis of the design documentation and the normative basis of the estimate. The estimate documentation, in turn, consists of lists of work quantities, local estimates, estimates per object, estimate calculations for certain categories of expenses, general construction estimate, etc. [10]. Lists of quantities of works serve for the preparation of local budgets by categories of works and expenses through the resource method. This involves the calculation in prices and tariffs of the elements of expenses necessary for the fulfillment of the project. Later, the information from the local currencies is systematized in the object-based currencies that are elaborated in current prices. Estimate calculations for certain categories of expenses are also included in the estimate documentation and are drawn up analogously to local estimates. The next stage consists in drawing up the general estimate of the value of the constructions by objects and the estimates by distinct expenditure categories, in current or planned prices. The information in the annex to the general estimate is relevant, and this, as

a rule, is taken into account when deciding on the financial capacity to execute the works [8, 9, 10].

Initial construction contracts may be subject to changes to clauses previously accepted by contractors and beneficiaries. These can result in:

- increasing or decreasing the quantity of any work included in the contract;
- abandonment of a work or part of a work;
- changing the nature or quality of the work;
- execution of additional works of any kind, etc.

Any changes will not void the contract and the value of all such changes will be taken into account in determining the price.

The contractual price can be changed by the parties only by mutual agreement and during the validity period of the contract. The frequent cases in which one of the parties can request a change in the price of the joint venture contract are:

Contractual price increase:

- The use of more qualitative and expensive materials;
- Execution of larger construction works than those provided for in the estimate documentation;
- Submission of complaints;
- Receipt of incentive payments.

Decrease in contract price:

> Non-execution of some works provided for in the technical documentation, amendment carried out at the request of the beneficiary;

> Improper execution of construction works by the contractor.

The submission of complaints can condition the increase of the contract price only if this is done by the contractor. Thus, the contractor can request in the respective manner the recovery of the expenses omitted in the estimate, incurred due to the beneficiary, but also in the case of the removal by the contractor of the deficiencies of the technical documentation in the situation where it was developed by a design organization, but not by a subdivision of the company that performs the construction works. Providing incentive payments also increases the contract price. Usually, they are granted for the execution of the works before the deadline or the delivery of the works within the term specified in the contract, but also for the performance of the works with a higher quality than this was provided for in the technical documentation.

The joint venture agreement establishes the organization of settlements and the methods of accounting for completed and paid LCM settlement operations.

Settlements can be made in two ways:

- after the completion of all LCM provided in the joint venture contract;
- according to some stages of execution of the works, i.e. at the completion of some constructive elements and types of works at the presentation of payment invoices and documents of completion of the respective works.

Thus, one of the forms of settlement is the granting of advances by the beneficiary with the subsequent extinguishment of the debt following the reception of the works, the frequency, amount and consecutiveness of the granting of advances being expressly specified in the contract of employment. Another method of settlement is payment for the works performed after the receipt of the works on the contract as a whole or according to the stage of its completion.

Another important clause of the contract is *the reception of the works*. The Civil Code treats this process as a statement documented through the act of acceptance by which the beneficiary accepts the constructed asset or the works performed with or without reservations, and the contractor assumes responsibility for the completed works [1]. The reception of constructions is regulated by regulations

specific to the construction branch, according to which the process of reception of works is carried out in two stages [2, 3]. The first stage involves the reception at the completion of the works, which is carried out by a reception commission appointed by the investor or beneficiary, in the composition of which there are at least 5 people, whose task is to detect deviations and defects. The second stage is the final reception, which is carried out no later than 15 days after the expiry of the warranty period, in which the committee nominated by the investor, the designer and the contractor participate in turn. Thus, the construction contract must specify the time of reception, as well as the responsibilities of the parties participating in the process.

There are some situations in which several joint venture contracts were concluded for each object or group of objects, which, later, were brought together and are considered a single contract. This happens if a unique project documentation and estimate (general estimate) is drawn up for the group of contracts, the contracts are closely related to each other and constitute a part of a project, their execution takes place simultaneously in a continuous sequence.

Specialists in the field must be able to distinguish between these types of contracts in order to correctly choose the method of determining and ascertaining the results of concluded construction contracts.

The construction contract may contain *complaints (claims)* - the amount that the contractor intends to collect from the beneficiary as a recovery of the contracting costs not included in the value of the construction contract.

According to the general procedure for drawing up contracts, construction contracts contain clauses regarding the resolution of disputes between the parties, the termination of the contract at the initiative of one of the parties, as well as additional contracting conditions (by adding new articles to the existing ones) or by referring to articles in the chapters existing in case of changes through special conditions). The additional contract conditions prevail over the general contract conditions.

We emphasize that in construction organizations, there are no clauses for *remediation of waste (deficiencies) stipulated in the joint venture contracts*. In our opinion, such ambiguities can have unpredictable repercussions on the reception of the executed works, on the settlements regarding the final payments, as well as on the remediation of the scraps that occurred after the handover-reception of the completed works. From here derives the proposal regarding the necessity of stipulating in the undertaking contract the clauses regarding the remedy of deficiencies and a penalty in the event of their detection.

Conclusions

The field of construction is one of the most exuberant sectors of the national economy. The scope of activity of this branch has particular aspects that influence the way of recording the patrimonial elements of the construction entity. The correct determination of the results of the activity of these entities depends on the concluded construction contracts.

The construction contract is drawn up based on national regulations. Thus, according to SNC “Construction contracts” there are several criteria for classifying construction contracts:

- depending on the method of setting the price: *fixed price contracts, “cost plus” contracts and mixed construction contracts;*

- according to the mode of segmentation and combination: *contracts on objects and combined contracts*. Object contracts involve the construction *of a single object, multiple assets, and the construction of a related asset.*

We mention that construction specialists must be able to distinguish the types of

contracts, know their advantages and disadvantages.

In the construction contract are stipulated: the value of the contract, the date of the start of the works, the deadline for their completion, the rights and obligations of the contractor and the beneficiary, the settlement method.

Our research highlighted the legal and accounting issues specific to construction contracts. *In order to solve these problems and to correctly implement the national accounting regulations, it is recommended:*

- reviewing the composition of construction contracts starting from the advantages and disadvantages of construction contracts according to their type;
- concretization of the object of the joint venture contracts;
- specifying the method of determining the value of the contract, taking into account the possible cases of changes in the contract price;
- establishing in the contracting contracts the clauses regarding the organization of settlements related to the executed construction-assembly works: after the completion of all the works provided for in the contracting contract or upon the completion of some constructive elements and types of works;
- the establishment in the joint venture contracts of the clauses for the modification of the initial construction contracts, of the clauses for the remediation of scraps, as well as a penalty in the event of their detection.

The practical application of the above-mentioned recommendations will ensure construction specialists to stipulate in the contract of employment specific clauses for the type of contract concluded in order to correctly recognize contractual income, costs and expenses, the correct choice of the method of determining the results of construction contracts and, as therefore, their successful completion.

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THE PROBLEM OF ACCESS TO PRIVATELY OWNED LANDS DURING THE EXERCISE OF THE RIGHT TO HUNTING

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It has always been known to each of us that since the appearance of the human being, the most important and first source of existence for the primitive people was the food acquired by hunting. What is true, it has turned with time out of human necessity into their occupation, an activity called - hunting, and nowadays it has reduced to the status of a leisure occupation, a hobby, a fashionable occupation of rich people. Obviously, taking into account the importance of the fauna of hunting interest for the environment and society, the need for legal regulation of the hunting field was felt, where clear rules are established for the subjects interested in this activity, and as a consequence, also specific competences for those who were to supervise the observance of the legislation in hunting matters. Although initially, regarding the lands that are the object of the hunting fund, the issue of ownership over them was not discussed, later it was found by some that passing through privately owned lands for the purpose of hunting, is a violation of the rights and interests of the owners. Respectively, whether or not this is a violation of the rights of the land owners or maybe it is an obstruction of the rights of the hunters, remains an open problem in front of doctrinaires and practitioners who require complex research.

Keywords: *environment, game fund, hunting, property right, economic activity, authorization, wildlife.*

PROBLEMATICA ACCESULUI PE TERENURILE PROPRIETATE PRIVATĂ ÎN TIMPUL EXERCITĂRII DREPTULUI LA VÂNĂTOARE

Pentru fiecare din noi este cunoscut faptul că de la apariția ființei umane, cea mai importantă și primă sursă de existență pentru omul primitiv a fost hrana dobândită pe calea vânatului. Aceasta s-a transformat cu timpul din necesitate a omului într-o îndeletnicire, o activitate numită - vânătoare, iar în zilele noastre ea s-a redus la statutul de ocupație în timpul liber, un hobby. În mod evident, ținând cont de importanța faunei de interes cinegetic pentru mediu și societate, s-a resimțit necesitatea reglementării juridice a domeniul vânătorii, unde să fie stabilite reguli clare pentru subiecții interesați de această activitate, iar pe cale de consecință, și competențe specifice pentru cei ce urmau să supravegheze modul de respectare a legislației în materie cinegetică. Ulterior s-a constatat că trecerea prin terenurile proprietate privată în scopul vânătorii, este o încălcare a drepturilor și intereselor proprietarilor. Respectiv, dacă este sau nu aceasta o încălcare a drepturilor proprietarilor de terenuri ori poate este o obstrucționare a drepturilor vânătorilor, rămâne o problemă deschisă în fața doctrinarilor și practicienilor ce solicită cercetări complexe.

Cuvinte-cheie: *mediu, fond cinegetic, vânătoare, drept de proprietate, activitate economică, autorizație, fauna sălbatică.*

LE PROBLÈME D'ACCÈS AUX TERRES PRIVÉES LORS DE L'EXERCICE DU DROIT DE CHASSE

Il a toujours été connu de chacun de nous que depuis l'apparition de l'être humain, la plus importante et première source d'existence pour l'homme primitif était la nourriture acquise par la chasse. Ce qui

est vrai, il s’est transformé avec le temps hors de la nécessité humaine en son occupation, une activité appelée - la chasse, et de nos jours il s’est réduit au statut d’une occupation de loisir, d’un passe-temps, d’une occupation à la mode des gens s’enrichissent. De toute évidence, compte tenu de l’importance de la faune d’intérêt cynégétique pour l’environnement et la société, le besoin d’une réglementation légale du domaine de chasse s’est fait sentir, où des règles claires sont établies pour les sujets intéressés par cette activité, et par conséquent, également des compétences spécifiques pour ceux qui devaient veiller au respect de la législation en matière de chasse. Bien qu’initialement, en ce qui concerne les terres qui font l’objet du fonds de chasse, la question de la propriété de celles-ci n’ait pas été discutée, plus tard, il a été constaté par certains que le fait de traverser des terres privées à des fins de chasse est une violation des droits et intérêts des propriétaires. Respectivement, qu’il s’agisse ou non d’une violation des droits des propriétaires terriens ou peut-être d’une entrave aux droits des chasseurs, reste un problème ouvert devant les doctrinaires et les praticiens qui nécessitent des recherches complexes.

Mots-clés : *environnement, fonds de chasse, chasse, droit de propriété, activité économique, autorisation, faune.*

ПРОБЛЕМА ДОСТУПА К ЗЕМЛЯМ, НАХОДЯЩИХСЯ В ЧАСТНОЙ СОБСТВЕННОСТИ, ПРИ ОСУЩЕСТВЛЕНИИ ПРАВА НА ОХОТУ

Всем известно, что с момента появления человека важнейшим и первым источником существования для первобытного человека была пища, добытая охотой. Со временем оно превратилось по необходимости человека в его занятие, деятельность под названием - охота, а в наши дни низведено до статуса досугового занятия, хобби. Естественно, принимая во внимание значение фауны охотничьего интереса для окружающей среды и общества, ощущалась необходимость правового регулирования охотничьей сферы, где устанавливаются четкие правила для субъектов, заинтересованных в этой деятельности, и, как следствие, также особые полномочия для тех, кто должен был контролировать соблюдение законодательства в охотничьих делах. Хотя изначально в отношении земель, являющихся объектом охотничьего фонда, вопрос о собственности на них не обсуждался, позже некоторыми было установлено, что пропуск через частновладельческие угодья в целях охоты является нарушением прав и интересы собственников. Соответственно, является ли это нарушением прав землевладельцев или ущемлением прав охотников, остается открытой проблемой перед учеными и практиками, требующей комплексного исследования.

Ключевые слова: *окружающая среда, охотничий фонд, охота, право собственности, экономическая деятельность, разрешение, животный мир.*

Introduction

Initially, for the Republic of Moldova, the legal framework for the regulation of hunting was found in the content of Law no. 439/1995 [5] in the form of an annex forming the Regulation of hunting households. After a long period of application, together with the diversification of the regulatory requirements generated by the need to connect the national legislation in the field to the requirements of the European Union legislation, in 2018 the Law on hunting and the hunting fund was adopted [4], which aimed to the consolidation of the relations that were to be established between the state as the owner of the elements of the animal kingdom, on the one hand, and, on the other, the management of the hunting fund, including the beneficiaries of these resources in their capacity as hunters.

After only a few years of applicability of the new regulations, the first indignant reactions of some foreign subjects appeared, but whose goods are used in the process of hunting. Here we are talking about the owners of the lands where the animals intended for hunting take shelter or pass, privately owned lands, whether they are intended for constructions located on the edge of the inner city, lands of the forest fund or of the water fund.

Although their reaction was initially

almost unnoticed, the problem began to gain momentum against the background of the involvement of some public organizations active in the field of wildlife protection, which would insinuate that by admitting the access of hunters to private property without their consent, it would constitute an infringement of property rights.

Also, in the circumstances shown, the interested subjects need visions, complex research and arguments that, in a possible amendment to the legislation, would ensure fairness to both categories, but also an overall vision that would take into account the entire legislative framework , namely that of environmental legislation in relation to the rules according to which the civil legislation in matters of property operates, also having in mind the regulations on the segment of society's access to public domain goods of public interest.

Research methodology. In order to achieve the predetermined goal, within the research of the present subject, it was necessary and extensive to use different research methods, among which we mention the most relevant ones, such as: the analysis method, the synthesis method, the deduction method, the historical method, the comparative method, the systemic method and the empirical method.

Basic research content

So, the problem under discussion is to be researched starting with the recognition of the reality in which the key element of the hunting activity is the hunting fund, and it is made up of two indivisible components[1]: *the fauna of hunting interest* and *the land it inhabits,* the first being public property [5], and the second, being part of both the public and the private domain.

Taking into account these circumstances, the legislator chose to formulate the content of the current regulations according to the idea that once the fauna of hunting interest is part of the public domain, any person holding the status of hunter (direct beneficiary of the resources of the animal kingdom) [10, p. 295] to have free and open access to privately owned lands, as does the owner of the resources of the animal kingdom (the state), only during the exercise of the hunting right assigned on the basis of a special authorization. Among other things, this position of the legislator is also supported by us. Or, from the notion given *to the hunting fund* in art. 2 of Law no. 298/2018 it is unequivocally understood that this represents a *unit of hunting management, consisting of* ***fauna of hunting interest*** *and* ***the surface of the land, regardless of the category and form of property****, on which the respective fauna inhabits, delimited in such a way as to ensure optimal stability of wildlife inside.* Moreover, art. 4 of Law no. 298/2018 clearly states that *the hunting fund is constituted by order of the Administrator and includes lands of the forest fund, agricultural lands, pastures, basins and bodies of water, other lands in public or private ownership.*

Also, pursuant to art. 12 of Law no. 298/2018, the owners of the lands covered by a hunting fund ***are obliged to allow hunting*** and other hunting activities if the respective activities do not harm the basic use of the lands.

However, being on the side of the legislator, we believe that in the matter of the use of the hunting fund, clearer regulations are required that would indicate, emerging from the specifics of the field, that the owners of the land with any destination have the obligation to admit the access of the state to the use of the elements of fauna of hunting interest as the owner of them, and with this also of the persons to whom, by a special act, the state has permitted their use for the purpose of hunting.

[1] In accordance with Art. 3 of Law no. 298/2018, the hunting fund is a public good, a unique and indivisible complex, of national and international interest, which is not subject to privatization or transfer to another form of property other than public.

Of course, before moving on to the arguments, we must recognize that to understand the true meaning of the current regulations, more effort is needed for those who are not initiated in the matter of law, while the law must be understandable to everyone. But, with regret, we notice that those who are obliged to apply it still have uncertainties, especially the so-called specialists who believe that the current concept of Law no. 298/2018 does not take into account the interest of the owners of the lands where the hunting activity is carried out. For this, we will expose ourselves to the problem by dividing the text into several compartments, as follows:

Clarification of some confusions

The right to use another's land and *the right of access to another's land*

In fact, the problem that makes some people think that hunting on the land belonging to another person with private property right, infringes his property right once he/she uses it for personal purposes without the prior consent of the owner, is the cause of a qualification wrongness of the actions carried out on them. Namely, there is confusion between *the institution of use* as an attribute of the property right and *the institution of access to another's land,* these being totally different according to the method of realization, according to the effects produced, according to the interference in the exercise of the right of ownership and finally, according to their essence legal - the premium being regulated in the content of art. 600 of the Civil Code[2] and the last one in art. 500 para. 3 and 4 of the Civil Code. Or, hunters' access to privately owned land does not fall into the category of attributes of use and possession that belong to the right of ownership, respectively by the action of crossing/accessing another's land the right of ownership is not violated, it being liable to damage only in case of use the land without the will of the owner, which does not happen in the hunting activity.

Specifically, the presence of hunters on privately owned land for the purpose of exercising the right to hunt, conferred by authorization, is attributed to the category of access to another's land and not to the use of the land, because, effectively, through the actions specific to the hunting activity, no use is made of the land. However, according to the legislation and the civil doctrine, the use as an attribute of the right of ownership presupposes the ability of the owner or another person authorized by him to use the asset at will and according to his needs, wasting its substance [8, p. 82], which does not occur in the case of hunters' access to privately owned lands. Or, as stated in Romanian specialized literature [11, p. 18], [12, p. 36], use is the faculty conferred on the owner to value the thing by exploiting it in his own interest, acquiring the fruits that can get from it. Therefore, we consider that the animals located on privately owned lands do not constitute their fruits, respectively hunting does not make use of the lands in the sense of extracting the fruits.

In the context described, we note that in accordance with the mentioned, the correct legislator expressed himself in the content of art. 12 para. 1 of Law no. 298/2018 when it was said that the owners of the lands included in a hunting fund are obliged to allow *hunting* and other hunting activities.....avoiding to talk about *the use of the lands .....*

In the respective consecutiveness of the exposition, it should be noted and emphasized that the legislator speaks about the use of privately owned lands only lightly. 3 of art. 12 of the same law where it mentions, and rightly

[2] According to paragraph 3 of art. 600 CC, if, due to a natural force or force majeure, an asset has entered a foreign land or has been transported there, the owner of the land must allow the search and removal of the asset, if he has not himself carried out the search or not return it. The asset continues to belong to its owner, unless he renounces it. The owner of the land can request the removal of the foreign property and the return of the land to the previous situation.

so , that *in order not to affect the basic **use** of the land, the managers have the obligation to coordinate with the owners of the agricultural land covered by the hunting funds the location of temporary hunting facilities.* In fact, precisely by placing the hunting facilities, there is a real use of the land of another, which, normally, by law, requires the manager to conclude an agreement with the owners of the land they are going to place.

So, only this intervention of the managers in private lands requires their use, not the access of hunters in hunting and picking up captured animals on these lands, a matter that is carried out under art. 600 of the Civil Code without the need for a prior agreement between the owner and the manager.

Confusion between the right to prohibit hunting on privately owned land and ***the obligation to seek the consent of the landowner***

Many times, due to the fact that the legislation in the field (Law no. 298/2018, art. 12 para. 2) grants the owner the right to request the stopping of hunting on his/her land, some are led to think that in order to hunt on privately owned land - would require the need to obtain an agreement. According to us, these are two issues that must be addressed in totally different ways. However, if the owner does not request the cessation of hunting on his/her land, it is assumed that he/she has tacitly given his/her consent. Therefore, the passage of hunters through privately owned lands for the purpose of exercising the right to hunt acquired under the law, cannot be qualified as a violation of the owner's right and interest, respectively it does not fall under the scope of contraventional, criminal or civil liability, unless this took place contrary to the owner's directly expressed will or patrimonial damages were brought to him [3].

Thus, as long as the owner of the land does not fence it, does not request a ban on hunting on his land or does not expressly prohibit access to his land, the presumption of tacit consent on the part of the owner operates. Moreover, access to another's land is guaranteed by civil legislation, and several institutions operate based on this concept, such as; usufruct (art. 524-535, art. 53 of the Civil Code); real estate acquisition (art. 521 CC); business management (art. 1966 Civil Code).

Confusion between the essence of the hunting license **and** ***the authorization of access to the lands of the hunting fund***

Many times, some try to make a difference between the authorization of the hunting activity and the authorization of the access to the game fund, when in essence they presuppose a whole. In fact, once you receive a permit to hunt for the purpose of acquiring specimens of hunting fauna, naturally, you also receive the right to access their habitat area to hunt them. Because the resources of the animal kingdom are the property of the state, it through the authorities that represent it or the subjects empowered by authorization (hunters) have free access to the management, extraction of any categories of resources, including those of the animal kingdom through hunting activities. For owners, this issue is a limitation imposed on the right to property.

In the same sense, according to Romanian legislation, the hunting authorization also implies (absorbs) the existence of the agreement to access the lands of the hunting fund regardless of the regime under which the right of ownership is exercised. That is, if the hunter received the hunting permit, then it is assumed that he also received the right to access the lands included in the hunting fund, regardless of whether they are public or private property. However, according to art. 4 of the Romanian Law, no. 407/2006, *no one has the right to hunt on the land owned by another without having **the hunting permit,***

[3] For more details, see the civil law manual (author G. Ardelean). Civil law. Real rights. General theory of obligations. Chisinau, 2020 p. 153-155.

which proves, under the terms of this law, the consent of the owner, *the association of owners or the person mandated by them for this purpose* [6].

Indeed, taking into account the fact that the animal kingdom is an environmental asset, a natural resource that belongs to the public domain, access to them should be based on the rules of using public domain assets once they are of general interest. Hunting, in turn, is also an activity of general interest. However, based on the provisions of art. 1 of Law no. 298/2018, hunting activity is regulated for the purpose of protection, conservation and rational use of fauna of hunting interest, this being a matter aimed at guaranteeing a ***public interest***, namely the right to a healthy environment. On the same regulatory wave comes the norm from art. 501 para. 3 of the Civil Code where it is clearly stated that for works of ***general interest***, *the public authority can use the soil of any real* ***estate*** *with the obligation to compensate the owner for the damage caused to the soil, plantations or constructions, as well as for other damages attributable to it.* The content of art. 463 para. 2 sentence II of the Civil Code, according to which ***the owner is required to respect,*** under the conditions and within the limits determined by law, ***the rights of third parties over mineral resources*** of subsoil, springs and underground water, underground works and installations and the like. True, the law refers more to underground resources, while it would be necessary to refer to all categories of natural resources, which would also include the resources of the animal reindeer.

Examination of international legislative experience in the matter of access to another’s land for the purpose of hunting

Based on thorough examinations of the legislation of many states (Poland, Germany, France, Italy, Norway, Finland, Great Britain, USA, Canada) we found the presence of the regulation of the relationship between the manager of the hunting fund and the land owners established by various legal acts (contracts of lease, agreements, authorizations, etc.), but it was not possible to identify the idea of guaranteeing the property right through the legislation of these categories of relationships.

To be more explicit, perhaps in the Scandinavian countries (Sweden, Denmark, Iceland), but also in the countries of the Germanic system (Germany, Austria), the land owners can lease them to hunting associations when they themselves do not use them for hunting. From here we derive the idea that the legislator of these countries foresaw the need for an agreement between owners and managers of hunting resources in order to guarantee the priority of hunters who own land over hunters who do not own land for hunting. Therefore, the rationale behind such a style of regulation is to protect the interests of hunters on their own lands against hunters who do not own those lands, and not to guarantee ownership. Moreover, the legislation of some European countries allows hunting on privately owned land without it being included in the hunting fund, which is not specific to the legislation of the Republic of Moldova.

Also, the legislation of these countries admits the formation of private hunting funds on lands that have an area of more than 1000 ha, which cannot really be done on the territory of our country. Respectively, in these countries, as is normal, if a land is not included in the hunting fund, the hunter is to access another’s land or place hunting facilities only with the consent of the owner. However, when the privately owned land is included in the perimeter of the hunting fund under the conditions of the law, a matter specific to the Republic of Moldova, an additional consent of the owner is no longer necessary.

The legislation of Norway [13, p. 87], for example, admits hunting on publicly owned

land without prior consent from the public authorities. Moreover, hunters are not obliged to have an agreement with the owners of the lands covered by the waters, because they are public property, a matter expressly provided for in the legislation of the Republic of Moldova[4].

Based on this legislative model, we would argue that the access of hunters to lands owned by the state or territorial administrative units is to be admitted without an authorization from them once they are assets of the public domain for public use. This rule should also be taken into account in the case of hunting carried out on water surfaces, regardless of whether they are located on public or private land, once the water is declared a public domain asset by law.

According to Italian legislation, all lands are included in the hunting fund except for those whose owners have requested their exclusion, but they will present guarantees that this fact will not hinder the authorities' activity in carrying out measures to protect the animal kingdom.

Arguments that regulating the current concept of access to another's land while hunting does not affect property rights

So, in the content of this section, we will present arguments regarding the fact that, by imposing the obligation of landowners to allow free and unconditional access of hunters, their property rights are not violated, namely:

The presence of hunters on the lands of the privately owned hunting fund does not affect the interests of the owners, just as the access of specimens of the hunting fauna to their land does not prevent the owner from exercising the attributes of the right of ownership. Or, once the hunters receive the authorization to carry out the hunting activity, by default they also receive the right to access the place of shelter, the area where they live or pass, a matter dependent on the actions of the animals during the hunt, not being dependent on the will of man, the hunter in our case.

Another aspect showing the legislator's care to guarantee the property rights of the owners of lands included in the hunting fund is that of regulating their possibility to request at any time the prohibition or stop of hunting on their lands. Not in vain, by the content of art. 12 para. 2 of Law no. 298/2018, at the request of the owners, based on a notification that takes effect after 15 days from the moment of submission, hunting can be stopped by the Administrator on agricultural lands with processed multi-year plantations. In this case, the respective lands are considered quiet zones, and their owners are obliged to take the protective measures provided by the legislation in the field of hunting and environmental protection. And here the right to prohibit hunting on privately owned land should not and cannot lead to the thought that hunting on another's land requires prior agreement. However, if the owner does not prohibit hunting on his land, it is assumed that he allows hunters to pass through his land, provided that it does not cause damage or hinder its use.

In order to respect the interests of the owners and, in particular, not to admit the violation of the fundamental right to property, the legislator imposes additional guarantees by obliging the manager to repair the damages caused to the owners during hunting, a matter worthy of appreciation and less common in the legislation of other states.

So, in case of damage to the landowner, he has the possibility to collect the damage directly from the hunter or the manager, the latter having the right of recourse against the one who is guilty of causing the damage. Moreover, for the determination and evaluation of the damage, the legislator creates a simplified mechanism involving in this process the local

[4] According to art. 4 para. 3 of the Water Law no. 272/2011. Official Gazette No. 81 of 26-04-2012, water is part of the public domain of the state.

mayor’s office and a representative of the manager of the hunting fund.

In the process of regulating property relations in terms of environmental protection, it must be recognized that the field of hunting, but in general also the requirements of environmental legislation require a distinct approach, a special regulation derogating from the principles of property rights. Moreover, this reality is also enshrined in the content of the Land Code [3], where it is mentioned that ***relations*** *in the sphere of the use and protection of other natural resources (subsoil, forests, waters, plant* ***and animal kingdom****, atmospheric air)* ***are regulated by special legislation*****.**

Thus, to consolidate this idea, but also to ensure the continuity of the rule from art. 1 of the Land Code, we propose that in the text of art. 1 paragraph 2 of Law no. 298/2018 ***the phrase “fauna of hunting interest”*** to be replaced with the phrase ***“hunting fund”,*** because according to the notion of hunting background, it includes both the field of regulation of fauna of hunting interest and of lands, an element inseparable from the object of hunting which, in fact, needs to be recognized, also a distinct field with distinct regulatory principles, especially access to privately owned lands.

The institution of property rights has operated for centuries in the presence of limits imposed on the owner, whether they are imposed regarding the right to use the property, or regarding the right of disposal, or they are imposed regarding the access of others to the owner’s land. Here we give an example of the institution of the right of servitude (art. 639 CC)[5]; access to another’s land (art. 600 CC); passing through foreign property (art. 601 CC). In addition to all this, a series of limitations of the right of ownership also arise from the need to comply with the rules regarding the protection of the environment (the animal kingdom being a biotic component of the environment). This issue is expressly enshrined in the content of the fundamental law itself. However, according to art. 46 para. 4 of the Constitution of the Republic of Moldova, ***the right to private property obliges to comply with the tasks regarding the protection of the environment*** *and ensuring good neighborliness, as well as complying with* ***the other duties*** *that, according to the law, belong to the owner*

Regarding the other tasks, we would also include the right of access of the beneficiaries of the animal kingdom (including hunters), respectively invested with skills in maintaining the balance, protection and ensuring the sustainability of the animal kingdom, a fact that is also achieved through the hunting activity. In the same sense, with limits and obligations expressly imposed on the owners comes the norm from art. 18 of Law no. 439/1995 according to which *agricultural, forestry, transport, etc. who transport, store and apply chemicals, as well* ***as citizens are obliged*** *to comply with the rules for the application of chemicals in order to prevent the destruction of animals and the degradation of their habitat.*

Conclusions

As a result of the study, we present some possible difficulties of changing the concept of regulating access to someone else’s land for the purpose of exercising the right to hunt. As noted in the text of the paper, we are supporters of the current concept of regulating access to privately owned lands, included in the state hunting fund, by subjects empowered with the right to practice hunting. Respectively, we consider that the adoption of another concept, namely that of contracting privately with land owners, would create the ***following difficulties***, both for the environment, plant

[5] Easement is the encumbrance of an immovable (the enslaved immovable) for the use or utility of the immovable of another owner (the dominant immovable). The utility can consist in increasing the comfort of the dominant building or it can result from its economic destination.

and animal kingdom, and for those practicing hunting activity:

- It will become difficult to carry out the activities of protection of the animal kingdom, in particular the activities of the environmental authorities will become difficult in order to regulate the numbers of predatory animal herds, as well as those intended for hunting;

- It becomes impossible to form hunting areas and the hunting fund in general on extended areas, as required by the legislation, due to the parceling of agricultural land into rather small parts whose owners cannot be identified. However, this is happening because of the emigration of our fellow citizens and the establishment of living outside the borders of the Republic of Moldova. Moreover, a large part of the land does not have a state registration in the immovable property register. As evidence, we present statistical data according to which, in 2020, 30% of real estate in the territory of the Republic of Moldova has no cadastral registration [9, p. 98];

- It will be difficult to determine the subjects to whom the responsibility of concluding the agreements with the owners will be placed, because the question will arise: who will conclude these agreements, who will keep their records...the administrator, the manager or the hunters? And even if the problem is clarified, it is enough that only one owner of a massif of land cannot be identified or does not agree to pass through his land for the purpose of hunting;

- It will be complicated to establish the legal regime of the relationship between the land owner and the manager. The deed will be in the form of a lease agreement, an agreement with onerous title or free of charge?, under the conditions that the hunters' access to the owner's land does not constitute a use as an attribute of the property right;

- A possible regime of authorizing the right of access to someone else's land for the purpose of carrying out hunting activities will not only contravene the rules of application of the environmental protection rules which are completely specific in application, but will also contradict the legal-civil concept of access to the land another for the purpose of exercising certain rights.

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PROGRAM-TARGET METHOD IN CRIMINALISTICS

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The article investigates the theoretical foundations of the modern forensic doctrine regarding the methods of crime investigation, in particular, a number of controversial issues related to the concept and content of the programmed target method in forensic science are touched upon. By the method of the programmed target is meant the scientific analysis and the organization of the activity in order to obtain new knowledge by means of the standard forensic programs, elaborated in time which are systems of recommendations to give help to the law enforcement bodies in terms of the organization of the research and obtaining of new knowledge, with a view to the correct and timely solution of the tasks that stand before the criminal process, at the initial stage. The authors investigated the possibilities and the contribution of the programmed target method to the detection and investigation of crimes, emphasizing the features and the algorithm of the activities that need to be followed when applying this method, in order to find the truth in a criminal case.

Keywords: *programming, investigation, criminalistics, criminal process, knowledge method, criminal case.*

METODA ȚINTEI PROGRAMATE ÎN CRIMINALISTICĂ

Articolul efectuează o analiză a fundamentelor teoretice ale doctrinei criminalistice moderne privitor la metodele de investigare a infracțiunilor. În special, sunt abordate o serie de probleme controversate legate de conceptul și conținutului metodei țintei programate în știința criminalistică. Prin metoda țintei programate se subînțelege analiza științifică și organizarea activității în vederea obținerii de noi cunoștințe prin intermediul programelor criminalistice tip, elaborate din timp care reprezintă sisteme de recomandări pentru a acorda ajutor organelor de ocrotire a normelor de drept în ceea ce privește organizarea cercetării și obținerea de noi cunoștințe, în vederea soluționării corecte și în timp a sarcinilor care stau în fața procesului penal, la etapa inițială. Autorii au examinat posibilitățile și aportul metodei țintei programate la constatarea și cercetarea infracțiunilor, accentuând trăsăturile și algoritmul activităților ce necesită a fi respectate la aplicarea acestei metode, în vederea aflării adevărului într-o cauză penală.

Cuvinte-cheie*: programare, investigare, criminalistic, proces penal, metodă de cunoaștere, cauză penală.*

LA MÉTHODE DE LA CIBLE PROGRAMMÉE EN CRIMINALISTIQUE

L'article étudie les fondements théoriques de la doctrine médico-légale moderne concernant les méthodes d'enquête criminelle, en particulier, un certain nombre de questions controversées liées au concept et au contenu de la méthode de la cible programmée en science médico-légale sont abordées. Par la méthode de la cible programmée, on entend l'analyse scientifique et l'organisation de l'activité afin d'obtenir de nouvelles connaissances au moyen des programmes médico-légaux standard, élaborés dans le temps, qui sont des systèmes de recommandations pour aider les forces de l'ordre en termes de l'organisation de la recherche et de l'obtention de nouvelles connaissances, afin de résoudre correctement et à temps les tâches auxquelles est confronté le processus pénal, au stade initial. Les auteurs ont enquêté les possibilités et la contribution de la méthode des cibles programmées à la détection et à l'investigation des crimes, en mettant l'accent sur les caractéristiques et l'algorithme des activités qui doivent être suivies lors de l'application de cette méthode, afin de découvrir la vérité dans une affaire pénale. .

Mots-clés: *programmation, enquête, criminalistique, processus pénal, méthode de connaissance, affaire pénale.*

ПРОГРАММНО-ЦЕЛЕВОЙ МЕТОД В КРИМИНАЛИСТИКЕ

В данной статье исследуются теоретические основы современной криминалистической доктрины относительно методов расследования преступлений. В частности затрагивается ряд дискуссионных вопросов, связанных с понятием и содержанием метода программируемой цели в криминалистике. Под методом программной цели понимается научный анализ и организация деятельности по получению новых знаний с помощью разработанных в свое время типовых криминалистических программ, представляющих собой комплекс системных рекомендаций для оказания помощи правоохранительным органам в условиях организации исследования и получения новых знаний, с целью правильного и своевременного решения задач, стоящих перед уголовным процессом на начальной его стадии. Авторы проанализировали возможности и вклад метода программной цели в раскрытие и расследование преступлений, акцентируя внимание на особенностях и алгоритме действий, которые необходимо соблюдать при применении данного метода для установления истины по уголовному делу. .

Ключевые слова: *программирование, расследование, криминалистика, уголовный процесс, метод познания, уголовное дело.*

Introduction

Over time, legal sciences in general, and forensic science in particular, have developed and put into practice a wide arsenal of tools (means, techniques and methods) for the detection, investigation and prevention of crimes. In this arsenal, a significant role is given to crime research methods.

The problem of investigation methods occupies a special place in forensic research. Many works have raised questions about the concept and content of forensic methods, a number of works are devoted to the development of individual methods of crime investigation (modelling, programmed target, complex approach, etc.). There is practically no scientific forensic publication in which the author does not address investigative methods to one degree or another.

Some scientists believe that the method of investigation is the main qualitative characteristic of the activity of the subject of investigation.

Unfortunately, the issue of the concept and content of the investigative method has not been fully resolved in the forensic scientific literature. Forensic theory regarding investigative methods is only taking the first steps towards its formation. In this regard, it should be specified that there is no common opinion that would define this category of methods, the differences from similar concepts have not been clarified and there is no unified system of investigation methods. The question

of identifying a general, universal method of investigating crimes remains open.

The purpose of the article is to highlight the desirability of the programmed target method in criminalistics, so that its application, within the criminal process, has the purpose of finding out the truth.

Applied methods and materials . In order to achieve the proposed goal, taking into account the specificity and the complex nature of the investigated topic, the logical, systematic and comparison method was used as research methods. The researches carried out are based on the study of the specialized doctrine.

Results obtained and discussions

The task of the programmed target method is the accumulation, analysis and synthesis of information based on the formulated conclusions, making decisions regarding the organization and management of the activity.

By the method of the programmed target is meant the scientific analysis and the organization of the activity in order to obtain new knowledge by means of the standard forensic programs, elaborated in time. In order for there to be the possibility of using the programmed target method, there must be carefully developed programs, which represent the tool that organizes the activity and the technology of applying the standard program, in a concrete case [7].

A typical forensic programming - represents a system of recommendations whose purpose is to assist law enforcement bodies in organizing the investigation and obtaining, within the criminal case, new knowledge, as well as the correct and timely resolution of the tasks facing the criminal process, at the initial stage.

The accumulated programs, the research results of criminal investigation practice and forensic investigations represent a source of tasks, methods, means, typical research procedures and their solutions. They contribute to the appreciation of existing and incoming information, offering optimal solutions for existing tasks.

The programmed target methods can be used by different subjects of knowledge activity [7].

The methodological basis of forensic programming is represented by the legalities of the criminal act and the criminal investigation activity carried out in relation to the crime committed.

The programmed target method used in prosecution is nothing more than scheduling prosecution to solve existing tasks.

Type forensics programs are classified according to several criteria.

Depending on the degree of generalization:

- programs intended for the organization of the criminal investigation activity for all types of crimes, for certain types of crimes, for a specific crime.

Depending on the object of the research, there are programs aimed at:

- organizing the investigation of the general crime;
- solving concrete research tasks (discovering the crime, preventing the crime, verifying concrete versions, investigating circumstances, etc.);
- carrying out certain criminal investigation actions and special investigative measures (on-site investigation, search, identification of witnesses, etc.);
- examination and description of certain objects (traces, objects, processes).

Depending on the volume, the programs can be general and additional (which concretize the general recommendations).

Depending on the structure, they can be: extended and reduced [8].

A reduced program - represents by itself a system of typical tasks, logically ordered, which are recommended for the research of a certain object. They represent a “bank”

of questions that help the subjects of the investigation (criminal investigation officer, prosecutor) to determine what is necessary to ascertain during the investigation, studying the concrete circumstances, solving certain tasks, in order to carry out a criminal prosecution action.

This group includes:

1. Programs in which only the general typical tasks recommended to achieve the purpose of the program are specified.

Their application facilitates: the organization of information analysis criminal; grouping, systematization, use of information held; determining the main tasks, the action strategy; obtaining new conclusive data and discovering hidden (camouflaged, encrypted) information.

2. Programs in which, in addition to general tasks, transitional and special ones are specified. These programs, starting from the initial stage of work in the criminal case, help to identify all the tasks that are or will be solved in the process of investigating the crime. Which significantly relieves and simplifies the organization of the work at the same time favoring simultaneous action in different directions (criminal investigation officer, expert, specialist, investigation officer).

3. Programs in which standard tasks (general, transitional, special) are formulated according to a specific criminal investigation situation. Such programs simplify the organization of activities in concrete conditions.

Extended programs – represent a system of typical tasks, research activity and typical, ordered and recommended logical solutions for the research of a concrete object.

These programs, in addition to the "bank" of questions, also contain a "bank" of solutions. Using the respective type of programs, the criminal investigation officer, the prosecutor, the investigating officer has the opportunity to determine what needs to be established in the criminal case, what criminal investigation actions and special investigative measures for this need to be carried out.

Extended programs can be: non-prognostic and prognostic [8].

Non-prognostic programs are created according to the scheme - general typical task - typical solution means.

They list typical tasks and criminal investigation actions, special investigative measures, recommended procedures and methods for their resolution. These programs can be used in certain situations, but they do not contain the possible results that can be obtained, they do not indicate how to act (subsequently) after taking the recommended measures.

Non-prognostic programs carried out allow, starting from the initial research stage, to notify all the activities that need to be carried out within the case, to choose the concrete tasks of the criminal investigation, to determine the optimal strategy and tactics of the research activity of the criminal case. The shortcoming of these programs lies in the fact that they do not reflect the process of solving the tasks, but only reflect the recommendations that can be fulfilled. Precisely this fact determines that the respective programs are on secondary roles in the activity of organizing the investigation of the case. This shortcoming is compensated by the prognostic programs unfolded.

Prognostic programs carried out, in addition to the tasks and typical solutions, contain and the possible results that can be obtained as a result of the activity carried out, as well as indicating the new fields of activity in which the obtained data can be used . Depending on its structure, these programs are the most complex. They are created according to the scheme: typical task - means, typical methods - probable results - further criminal prosecution actions

Prognostic programs simplify the assessment, analysis, systematization of the existing and arriving information related to the

investigated case. They allow the organization of the activity not only at the initial stage, but also at a later stage, offering the possibility to follow imaginary, and in some cases to forecast, all the curves that may appear in the research and judgment process.

The development of programs must be structured in compliance with certain principles [7], otherwise the results obtained will represent a simple list of questions that require answers or a list of actions that need to be carried out, in the best case - a complex of tasks, criminal investigation actions, special investigative measures or organizational -tactical measures.

In order not to reach such results, in addition to the general principles of forensics and criminal procedure [1, p. 718], the following rules must be observed:

- *The rule of consecutiveness* imposes the logical ordering of the points in the program so that each preceding point offers the possibility or simplifies the achievement of the subsequent point.

- *The rule of finality* assumes that the achievement of all points of the program will determine the result, which is the object of the use of the respective program. In other words, after completing the program there will be no need to carry out additional activities. And if no result will be obtained , it is necessary to choose or create another program, to modify or repeat the program.

- *The tenacity rule* presupposes the existence of a goal that needs to be achieved by the program, including and the existence of a complex of tasks, which need to be solved in order to achieve the stated goal.

- *The rule of complexity* assumes that the program includes certain interdependent tasks in terms of achieving the goal, including such tasks, for the solution of which separate programs can be created.

- *The systematization rule* points to the fact that the curriculum is made up of certain elements, interdependent and logically consecutive, to which individual transitional goals are advanced. The main complexes, which follow one after the other and have different tasks, are: the accumulation of information initials, simultaneously highlighting the one that does not have a forensic character; analysis of accumulated information and formulation of primary conclusions; the detailed investigation of the elements of the criminal act, the search for traces and evidence, the synthesis of information.

- *The verification rule* requires that the questions contained in the program be developed in such a way that there is the possibility to verify the information related to any question and their solutions.

- *The rule of periodicity* determines the fact that not only the answer given for each previous question simplifies the solution of the next question, but also each answer given to the subsequent questions, supplements, concretizes and possibly completely changes the information regarding the previous questions. In other words, after obtaining the answers to the questions, each time, we have to review the previous questions to check if the information has not changed, what is related to these questions and if the answers to these questions have not changed. Thus, after each answer, it is necessary to carry out a cycle of operations that allow increasing the volume of information regarding the object of the program.

In contrast to the subjective approach, when the subject of the evidential activity of knowledge in order to solve the problems, for the most part, is based on his knowledge and own experience, the programmed target method proposes to carry out the analytical activity based on typical programming that allows the successive study of the circumstances reflected in it: the selection of the data held, the assessment of the data and the formulation of conclusions, the

forwarding of the versions, the determination of the tasks of the means and the methods of their solution.

The analysis begins with the use of typical reduced programs that determine the selection directions and processing of existing information. It is recommended to resort to the typical programs carried out for the purpose of self-control, in cases where there are difficulties regarding the accumulation of information in order to formulate truthful conclusions within the reduced program or difficulties regarding the determination of transitional tasks and the choice of means for their solution.

Typical programs contain only general tasks, they do not reflect individuality. Using the method of the programmed target as a result of the information analysis, it is necessary to determine, for the researched fact, the individual tasks and the solutions.

The method of the programmed target requires a more detailed study of the data held and based on the conclusions reached, if possible, to submit certain solutions based on other circumstances as well [7].

All the tasks of the typical programs are interdependent, the solution of one contributes to the solution of the other. Therefore, when analyzing each task, the information must be used contained in the solutions for the previous tasks.

- the solutions for the previous tasks do not change, if they offer the possibility to solve other tasks, which were not previously solved.

Taking into account the fact that an objective of the analysis is the elaboration of the knowledge evidentiary activity plan, it is important to analyze, in addition to the existing materials on the case, all the circumstances and circumstances in which the crime was committed, including all the circumstances that influence the criminal prosecution activity, in especially: the behavior of the perpetrator, the injured part, the witness, etc.

The analysis of the materials according to the typical programs is completed with the synthesis of the obtained data [7]. The synthesis represents a mandatory element of the organizational technology of crime investigation with the help of typical programs.

The following are subject to synthesis:

- the data regarding the criminal act, as a result the overall picture of the criminal act will be obtained (the general model of the committed act);

- assessments regarding the qualities (traits) of the victim, as a result the forensic characteristics of the victim will be obtained;

- assessments regarding the qualities (traits) of the perpetrator, as a result the criminalistic characteristics of the perpetrator will be obtained;

- the tasks of the existing criminal investigation activity in the criminal case - as a result, a reduced work program will be obtained regarding the evidentiary knowledge activity;

- the assessments regarding criminal investigation actions , special investigative measures and other activities, operations, tactical combinations necessary to carry out in order to solve the research tasks, as a result the model of the criminal investigation activity is obtained;

- the questions (tasks) that need to be ascertained and resolved during the execution of the planned criminal prosecution actions, as a result a reduced work program of the criminal prosecution action will be obtained.

Typical programs need to be applied from the time the criminal process begins.

The typical programs are not only a tool of the method, but also an effective means of controlling the objective and multilateral investigation of the circumstances of the fact and of the criminal investigation activity itself.

The technology of the programmed target method can be described by the following ***algorithm*** [8]:

1. Choosing the reduced typical program that corresponds to the situation or the tasks that need to be solved within the criminal process. If such a program does not exist - it must be created.

2. Perceiving the essence of the chosen program, focusing on the researched fact.

3. Finding the existing data regarding the question that needs to be solved, in the content primary information.

4. If there is:

- determination of known data, their memorization;
- assessing and making a decision about whether the existing data are sufficient to make reliable conclusions;
- formulating conclusions;
- probing the possibility of obtaining more knowledge regarding the investigated case:

a. asking questions, which concretize the formulated conclusions;

b. rendering all possible theoretical assumptions;

c. verifying all the assumptions presented, carrying out an imaginary experiment, using imaginary modeling, factor analysis;

d. the use of the data found in order to carry out the criminal investigation: the submission of the versions, the perception of the tasks, the choice of the means and methods of their solution;

e. moving on to research the next question of the reduced typical program.

5. If there is no information for researching the question or it is insufficient to formulate viable conclusions, the analysis carried out by means of the extended typical program is checked. In case of failure, the unsolved questions for the identified problems are noted.

6. Analogously, all the questions of the reduced typical program are researched. Solving each task, use information obtained within the solution of the previous tasks. And if it succeeds solving the question, it is mandatory to check if the result obtained does not change the solutions for the previous questions or if it offers the possibility to solve the tasks that remained unsolved.

7. Determination of individual tasks, their analysis.

8. Synthesizing the results of the analysis: try to reconstruct the committed deed in your imagination, elaborate the forensic characteristics of the perpetrator, the injured part of other people. If necessary, use other auxiliary tools.

9. Using the synthesized knowledge to organize the research activity, drawing up plans, making decisions.

10. Realizing the programmed measures, the path taken and the results obtained need to be appreciated; use the knowledge obtained for the organization of the subsequent research activity and solving the tasks of the criminal process. If necessary repeat the cycle using empirical methods and scientific knowledge.

Conclusions

The analysis of some trends in the development of science in general and criminology in particular, the problems of criminal investigation practice is extremely important for the further improvement of the programmed target method, because it indicates the shortcomings of the traditional (descriptive) investigative methodology and offers the desired must meet the method of the programmed target in forensics. In this sense, the results of the study play to a certain extent the role of a meta-theory, which makes it possible to approach the selection of information from various fields of knowledge more appropriately, passing them through the prism of practical needs.

The author notes that the application of the programmed target method, unlike the

recommendations of other crime research methods, ensures, by laconicizing and semantically compressing the information and eliminating descriptive text, the existence of useful, clear and complete practical recommendations. It is also noted that all programs can only be a guide at a certain (often initial) stage of the investigation.

Thus, the general conclusion is that the main task of the programmed target method is to develop an individualized plan to investigate a specific crime.

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PRACTICAL ANALYSIS OF THE CRIME OF MERCENARY ACTIVITY. CASE STUDY OF THE LIBYAN STATE

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The mercenary phenomenon took on a particularly large scale of manifestation in the contemporary stage. Currently, their presence on the battlefield is no longer a secret. They can appear at various stages of the evolution of the military conflict, military actions or other violent actions aimed at overthrowing or undermining the constitutional order or violating the territorial integrity of the state. The activity of mercenaries is dictated either by the need of the people participating in these actions to benefit from some remuneration according to expectations, or by subjects who are in the shadows and pursue some goals and objectives to be achieved. Therefore, in the following order, we propose, as desired, to carry out an analysis of the presence of mercenaries in the State of Libya, as well as to study their role on the Libyan territory.

Keywords: *mercenary, violence, military, financial remuneration, external support, lack of norms of conduct.*

ANALIZĂ PRACTICĂ A INFRACŢIUNII DE ACTIVITATEA MERCENARILOR. STUDIU CAZUISTIC AL STATULUI LIBIAN

Fenomenul mercenariatului a luat o amploare de manifestare în etapa contemporană deosebit de mare. Actualmente prezenţa acestora pe câmpul de luptă, nu mai este un secret. Aceştia pot apărea la diverse etape ale evoluţiei conflictului militar, acţiunilor militare sau a altor acţiuni violente orientate spre răsturnarea sau subminarea orânduirii constituţionale ori violarea integrităţii teritoriale a statului. Activitatea mercenarilor este dictată fie de necesitatea persoanelor participante la aceste acţiuni de-a beneficia de careva remuneraţii pe măsura aşteptărilor, fie de subiecţii care se află în umbră şi urmăresc careva scopuri şi obiective de atins. Prin urmare, în ordinea care succede, ne propunem ca deziderat, de-a efectua o analiză a prezenţei mercenarilor în Statul Libia, precum şi studierea rolului acestora pe teritoriul libian.

Cuvinte-cheie: *mercenar, violenţă, militar, remuneraţie financiară, susţinere exterioară, lipsa normelor de conduită.*

ANALYSE PRATIQUE DU CRIME D'ACTIVITÉ MERCENAIRE. ÉTUDE DE CAS DE L'ÉTAT LIBYEN

Le phénomène mercenaire a pris une ampleur particulièrement importante de manifestation dans la scène contemporaine. Actuellement, leur présence sur le champ de bataille n'est plus un secret. Ils peuvent apparaître à divers stades de l'évolution du conflit militaire, des actions militaires ou d'autres actions violentes visant à renverser ou à saper l'ordre constitutionnel ou à violer l'intégrité territoriale de l'État. L'activité des mercenaires est dictée soit par le besoin des personnes participant à ces actions de bénéficier d'une certaine rémunération en fonction des attentes, soit par des sujets qui sont dans l'ombre et poursuivent certains buts et objectifs à atteindre. Par conséquent, dans l'ordre suivant, nous proposons, comme souhaité, de procéder à une analyse de la présence de mercenaires dans l'État libyen, ainsi que d'étudier leur rôle sur le territoire libyen.

Mots-clés: *mercenaire, violence, militaire, rémunération financière, soutien extérieur, absence de normes de conduite.*

ПРАКТИЧЕСКИЙ АНАЛИЗ ПРЕСТУПЛЕНИЯ НАЕМНИЧЕСТВА. ТЕМАТИЧЕСКОЕ ИССЛЕДОВАНИЕ ЛИВИЙСКОГО ГОСУДАРСТВА

Феномен наемничества принял особенно широкие масштабы проявления на современном этапе. В настоящее время их присутствие на поле боя уже не секрет. Они могут возникать на различных этапах развития военного конфликта, военных действий или иных насильственных действий, направленных на свержение или подрыв конституционного строя либо нарушение территориальной целостности государства. Деятельность наемников диктуется либо потребностью лиц, участвующих в этих действиях, в получении определенного вознаграждения в соответствии с ожиданиями, либо субъектами, находящимися в тени и преследующими какие-то цели и задачи, которые необходимо достичь. Поэтому в следующем порядке предлагаем по желанию провести анализ присутствия наемников в Государстве Ливия, а также изучить их роль на ливийской территории.

Ключевые слова: *наемник, насилие, военнослужащий, материальное вознаграждение, внешняя поддержка, отсутствие норм поведения.*

Introduction

Today, it is no longer a military secret that, in the case of armed conflicts, third parties also participate on the battlefield, in specialized literature they have the quality of mercenaries. A mercenary is a person specially recruited at home or abroad to fight in an armed conflict, who takes part in hostilities, especially intending to obtain a personal advantage and to whom it is promised, by or on behalf of a party to the conflict them, remuneration superior to that promised or paid to combatants, having an analogous rank and position in the armed forces of this Party; who is neither a national of a party to the conflict nor a resident of the territory controlled by a party to the conflict; who is not a member of the armed forces of a party to the conflict and who has not been sent by a state other than a party to the conflict on an official mission as a member of the armed forces of that state [5, p. 16-17].

It is notable that, on June 10, 1977, additional protocol no. 1 to the Geneva Conventions of August 12, 1949, regarding the protection of victims of international armed conflicts entered into force.

In the preamble of this international act, the High Contracting Parties proclaim their ardent desire to see peace prevail between peoples and consistently remind that every state must refrain, in its international relations, from resorting to the threat of force or the use of force. Likewise, the High Contracting Parties express their conviction that no provision of the Protocol or the Geneva Conventions of August 12, 1949, can be interpreted as legitimizing or authorizing any act of aggression or any other use of force. At the same time, these provisions must be fully applied, in all circumstances, without any unfavourable differentiation based on the nature or origin of the armed conflict or the causes supported by the parties to the conflict or attributed to them [1].

More than that, within the limits of this international act, the High Contracting Parties expressly provided for the terminological definition of the mercenary *concept*.

Thus, the term *mercenary* means any person:

a) who is specially recruited in the country or abroad to fight in an armed conflict;

b) who takes part in the hostilities;

c) who takes part in hostilities, especially intending to obtain a personal advantage and who is effectively promised, by a party to the conflict or on its behalf, a remuneration higher

than that promised or paid to combatants having a similar rank and position in the forces armies of this party;

d) who is neither a national of a party to the conflict nor a resident of the territory controlled by a party to the conflict;

e) who is not a member of the armed forces of a party to the conflict;

f) who was not sent by a state, other than a party to the conflict, on an official mission as a member of the armed forces of that state. At the same time, the High Contracting Parties of additional protocol no.1 to the Geneva Conventions of August 12, 1949, regarding the protection of victims of international armed conflicts, also provided for the fact that a mercenary does not have the right to the status of combatant or prisoner of war [1, art. 47].

The degree of investigation of the problem at present, the purpose of the research. At the present moment, the importance and the purpose of developing this scientific approach appear from the author's intention to reveal in the foreground the aspect related to the place and role of the mercenaries in Libya.

Materials used and methods applied. In the process of elaborating the scientific article, we were guided by several various scientific research methods that made it possible to properly investigate the titular subject, among which we can list: the analysis method, the synthesis method, the deduction method, the systemic method, the historical method, as well as the comparative method.

The theoretical-legal basis of the scientific approach includes relevant local literature, the international normative framework and online sources - which directly or indirectly address the essence and generic content of the topic under analysis.

The results were obtained based on the scientific analyzes carried out

Libya has become an almost completely failed state, after approximately more than 10 years of civil war. What is left of this country risks being, simply, divided in two between the Russian Federation and the Republic of Turkey, which are the states that are currently acting in the region from the position of the dominant players. The final goal of the two countries is to control a large area of Libya's rich oil and gas reserves.

Ships and transport planes bring tons of ammunition, equipment and military equipment to Libya every day, ranging from bullets, and anti-personnel mines to fighter jets, drones, anti-aircraft missiles or armoured cars.

Entered into chaos after the fall of Muammar Gaddafi's regime in 2011[1], Libya is divided between two rival powers: the Government of National Unity/National Accord (GNA), recognized by the United Nations Organization and based in Tripoli) led by Fayez Serraj, and the authorities from the East allied with Marshal Khalifa Haftar, supported by a part of the elected parliament and its president, Aguila Saleh. Most of the oil reserves are located in the eastern region of the country, currently controlled by Marshal Haftar.

In the south of Libya, at the Jufra air base, the Russians are building airstrips, hangars and communication centres to bring more MiG-29 military aircraft here. Practically, almost all the Russian soldiers in Libya are military contractors employed by the famous Wagner group.

Since 2018, more and more weapons and specialists from Russia have arrived to support Haftar's forces: from snipers to 14 military aircraft, including modern surface-to-air missile systems such as the Pantsir S-1, which is also in the Russian army's equipment.

[1] Protests against the Libyan regime began in the city of Benghazi on 15 February 2011 and spread across the country, reaching Al Bayda, Al-Quba, Darnah and Az Zintan, and demonstrators took control of a significant number of cities, especially in eastern Libya.

On the other hand, Turkey intends to further increase its military presence: the Turks are also building new airstrips, hangars and various facilities at the al-Watiya air base, located west of Tripoli, where Ankara is supposed to will bring F-16 aircraft, as a counterpart to the Russian MiG-19s in the region. Turkey's interest is related to the recovery of billion-dollar contracts that Ankara had with Libya before the outbreak of the civil war in this country [8].

The 2011 Libyan Civil War was a conflict between Libyan revolutionaries and the Libyan Arab People's Socialist Grand Jamahiriya. It began as a series of protests and clashes that took place in the North African state against Muammar Gaddafi, the ruler of Libya for 42 years. At the same time, several militias are fighting for power and influence, and in recent years, other countries have also become involved in the conflict, including Russia and Turkey. The United Nations estimated that there were around 20,000 foreign fighters and mercenaries in Libya by the end of 2020 [6].

From online public sources, it was revealed that ,,many of Gaddafi's security forces refused to fight civilians and significant parts joined the protesters. Gaddafi employed large masses of foreign mercenaries from several African countries to attack the protesters. Gaddafi well controlled the army, the Khamis Brigade and a large mass of mercenaries. Some of Gaddafi's officials sided with the protesters and called for the help of the international community to end the massacres of civilians, many of whom are non-combatants" [11].

The President of the Republic of Zimbabwe, Robert Mugabe, has sent mercenary troops to Libya in support of his longtime ally, Colonel Muammar al-Gaddafi. several hundred soldiers from the Republic of Zimbabwe as well as air force pilots flew from Harare to Libya in a chartered plane to join Gaddafi's forces. The Zimbabweans have joined other mercenaries from Ivory Coast, Chad and Mauritius fighting those who have revolted against the colonel's regime in eastern Libya. The mercenary force from the Republic of Zimbabwe, which includes members of a special commando, was sent thanks to a secret agreement between Gaddafi, Mugabe and General Constantine Chiwemga, the head of the Armed Forces of the Republic of Zimbabwe. The agreement to send troops from the Republic of Zimbabwe to support Gaddafi was so secretive that not even the powerful defence minister, 87-year-old Emmerson Mnangagwa, who is seen as one of the contenders to succeed Mugabe, was involved in the decision [10].

The protesters were the targets of unprecedented violence by the Gaddafi regime, which used the armed forces, militias and Libyan and foreign mercenaries to violently repress the protests, including the indiscriminate use of machine guns, snipers, aircraft and war helicopters against the civilian population. This resulted in a drastic increase in the number of deaths, injuries and arrests of a large number of people [3].

In Libya, the Wagner Group has been involved in logistical support and combat operations for Libyan rebel general Khalifa Haftar since at least 2018. The Wagner Group has been involved in war crimes, including summary executions of civilians and prisoners, slavery, planting internationally banned anti-personnel mines and the killing or maiming of civilians, including children, for example in the village of al-Sbeaa, south of Tripoli. At the same time, it should be noted that multiple and repeated violations of the United Nations arms embargo occurred in Libya and that the Wagner Group used Russian military cargo aircraft. The support given by Russian mercenaries and military trainers to radical armed groups has further destabilized the southern neighbourhood of the European Union.

On November 12, 2021, countries participating in the Paris Conference on Libya expressed their position against any foreign interference in Libyan affairs and supported the implementation of the action plan for the withdrawal of mercenaries, foreign fighters and foreign forces from Libyan territory. In early November 2021, Turkey sent approximately 150 Syrian mercenaries to Libya, in addition to the 7,000 mercenaries already present in the country and loyal to Turkey, despite local and international calls for the withdrawal of all foreign forces before parliamentary elections and presidential elections scheduled for December 24, 2021 [4].

Libya, fallen into chaos and disputed between two rival administrations, has become a favourite target for arms trafficking and the involvement of state entities with interests in the region.

Another clue to Wagner's operations in Libya was provided by a security source in Tripoli, namely a ”shopping list” the contents of which suggest that the Wagner group is supported at the highest level of the Russian state government, although Russia has always denied these links.

Fighters of the organization were filmed in Libya by the soldiers of the Government of the National Union of Libya, recognized by the United Nations. Witnesses and soldiers say they killed civilians and prisoners during the conflict between the two camps.

The mercenaries are not recruited on behalf of Wagner, but for several front companies, for short periods as oil rig workers or security personnel, after passing physical tests and background checks. Then they go through training at the unofficial training base near Krasnodar, southern Russia, next to a Russian military base. They sign a contract in which they assume that they may die abroad and their bodies may not be repatriated. Most of those who accept this job come from small towns, where job opportunities are lacking. They receive a salary 10 times higher than the average in Russia. The Wagner soldiers discuss armed conflicts in the world and say: ,,we could go there, it could be for us. Any contract and any travel means money”. Most Wagner agents have criminal records, so they can't easily join the military [7].

Likewise, from online public sources, it was revealed that in Libya, Wagner fighters appeared in April 2019, when they joined the forces of rebel general Khalifa Haftar after he launched an attack on the capital Tripoli. There was the union government supported by the United Nations. The conflict in Libya ended with a ceasefire in October 2020. It is estimated that around 1,000 Wagner mercenaries fought alongside General Khalifa Haftar in 2019 and 2020. A former fighter of Wagner describes the group as ”a structure designed to promote the interests of the state outside the borders of our country”. As for the combatants, he said they are ”war professionals, people looking for work or romantics who want to serve their country”. Another former fighter of Wagner's claimed that there is no clear code of conduct. If a captured fighter does not have information or cannot work as a slave, then ,,the result is obvious” [9].

In 2011, the United Nations Security Council adopted a Resolution because of its serious concern about the situation in Libya and introduced some restrictive measures against Libya. Likewise, the Security Council adopted several other resolutions on Libya that extended or modified United Nations restrictive measures against Libya, including the Security Council's commitment to the sovereignty, independence, territorial integrity and national unity of Libya. Thus, on this basis, the Council of the European Union, adopted a historic decision that prohibits the provision, directly or indirectly, to any natural or legal person, entity or body in Libya or

for use in Libya, of technical assistance, training or other assistance, including the provision of mercenary armed personnel, in connection with military activities or the supply, maintenance and use of weapons and ammunition, military vehicles and equipment, paramilitary equipment and spare parts, as well as equipment that could be used for repression internal [2, art.1].

Conclusions

The activity of mercenaries is an antisocial act that manifests itself through the illegal actions committed in the objective reality by the perpetrator, manifested by participation in an armed conflict, in military actions or in other violent actions aimed at overthrowing or undermining the constitutional order or violating the territorial integrity of a state, without being a citizen of a party involved in such illicit activity. The presence of mercenaries on the battlefield, as we have observed, also took place in the territorial-administrative space of the Libyan State. They came to support both sides fighting in Libya, on the one hand the mercenaries fought in support of the Government of National Union led by Fayez Serraj, and on the other hand the mercenaries found themselves in support of the Eastern authorities, allied with Marshal Khalifa Haftar, supported by a part of the elected parliament and its president, Aguila Saleh. At the same time, the mercenary phenomenon in Libya was also observed in support of the former Libyan leadership.

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STRUCTURE AND PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS

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The presented article describes in detail the main conditions, content, obligations of the seller and the buyer, according to the concluded international commercial contracts. International commercial agreements mediate the international business activities of the parties and differ from similar internal transactions, as well as transactions that, although complicated by a foreign element, are concluded with the participation of the consumer.The first stage refers to the period of the emergence of medieval law as a law merchant, representing a set of international trade customs that regulated the political community of merchants who traveled from port to port and from fair to fair. The second stage was marked by the emergence of national legal systems under the influence of the understanding of law as a national phenomenon and the approval of the idea of national sovereignty. The modern thirdstage, was marked by a movement from national isolation to universal unification, which allowed, on the basis of multilateral negotiations, to develop and adopt uniform legal norms.

Keywords*: international commercial contracts, participants in civil law transactions, entrepreneurial activity, trade custom, national sovereignty, foreign economic activity.*

STRUCTURA ŞI PRINCIPIILE CONTRACTELOR COMERCIALE INTERNAŢIONALE

Articolul prezentat descrie în detaliu principalele condiții, conținutul, obligațiile vânzătorului și cumpărătorului, conform contractelor comerciale internaționale încheiate. Acordurile comerciale internaționale mediază activitățile de afaceri internaționale ale părților și diferă de tranzacțiile interne similare, precum și de tranzacțiile carese încheie cu participarea consumatorului. Prima etapă se referă la perioada apariției dreptului medieval ca negustor de drept, reprezentând un ansamblu de obiceiuri comerciale internaționale, ce reglementau comunitatea politică a comercianților, care circulau din port în port și din târg în târg. A doua etapă a fost marcată de apariția sistemelor juridice naționale, sub influența înțelegerii dreptului ca fenomen național și de aprobarea ideii de suveranitate națională. A treia etapă - cea modernă, a fost marcată de o mișcare de la izolarea națională la unificaregenerală, care a permis, pe baza negocierilor multilaterale, dezvoltarea și adoptarea normelor juridice unice.

Cuvinte-cheie: *contracte comerciale internaționale, participanți la tranzacții de drept civil, activitate antreprenorială, obiceiuri comerciale, suveranitate națională, activitate economică externă.*

STRUCTURE ET PRINCIPES DES CONTRATS COMMERCIAUX INTERNATIONAUX

L'article présenté décrit en détail les principales conditions, contenus, obligations du vendeur et de l'acheteur, conformément aux contrats commerciaux internationaux conclus. Les accords commerciaux internationaux assurent la médiation des activités commerciales internationales des parties et diffèrent des transactions nationales similaires, ainsi que des transactions conclues avec la participation du consommateur. La première étape se réfère à la période de l'émergence du droit médiéval en tant que marchand de droit, représentant un ensemble de coutumes commerciales internationales qui régulaient la communauté politique des marchands qui circulaient de port en port et de foire en foire. La deuxième étape a été marquée par l'émergence de systèmes juridiques nationaux sous l'influence de la compréhension

du droit en tant que phénomène national et de l’approbation de l’idée de souveraineté nationale. La troisième étape-la moderne, a été marquée par un passage de l’isolement national à l’unification générale, qui a permis, sur la base de négociations multilatérales, d’élaborer et d’adopter des normes juridiques uniques.

Mots-clés: *contrats commerciaux internationaux, participants à des transactions de droit civil, activité entrepreneuriale, coutumes commerciales, souveraineté nationale, activité économique étrangère.*

СТРУКТУРА И ПРИНЦИПЫ МЕЖДУНАРОДНЫХ КОММЕРЧЕСКИХ ДОГОВОРОВ

В представленной статье подробно описаны основные условия, содержание, обязанности продавца и покупателя по заключенным международным коммерческим договорам. Международные коммерческие договоры опосредуют внешнеэкономическую деятельность сторон и отличаются от аналогичных внутренних сделок, а также сделок, заключаемых с участием потребителя. Первый этап относится к периоду становления средневекового права как права купеческого, представляющего собой совокупность международных торговых обычаев, регламентировавших политическое сообщество купцов, путешествовавших из порта в порт и с ярмарки на ярмарку. Второй этап ознаменовался возникновением национальных правовых систем под влиянием понимания права как национального явления и утверждения идеи национального суверенитета. Третий этап - современный, ознаменовался движением от национальной обособленности к всеобщей унификации, что позволило, на основе многосторонних переговоров, выработать и принять единые правовые нормы.

Ключевые слова: *международные коммерческие договоры, участники гражданско-правовых сделок, предпринимательская деятельность, торговые обычаи, национальный суверенитет, внешнеэкономическая деятельность.*

Introduction

In Ch. II part III of the Vienna Convention deals with the obligations of the seller. According to Art. 30 of the Vienna Convention [7], ***the seller is obliged to deliver the goods, hand over the documents relating to them and transfer the ownership of the goods in accordance with the requirements of the contract***. If the quality of the goods does not correspond to the contract, and it was delivered at the wrong time and in the wrong place when and where the delivery under the contract was provided, delivery still takes place.

If the seller is obliged to deliver the goods to a place other than a certain place, then in the case of carriage of the goods, the place of delivery is the place where the goods were handed over to the first carrier. If, in cases not covered by the previous sub-clause, the contract concerns a product with individual characteristics or a non-individual product that must be taken from certain stocks or manufactured or produced, and the parties at the time of the conclusion of the contract knew that the product was either must be manufactured or produced at a specific place, delivery consists in placing the goods at the disposal of the buyer at that place. Finally, in the absence of the above two conditions, the place of delivery is the place where the seller’s business was located at the time of the conclusion of the contract, based on Art. 31 of the Vienna Convention. Thus, the last is the main rule. It should be noted that the second of the above rules applies to the goods sold during the period of their transit, that is, the delivery is carried out where the goods are located at that time. The rule that the delivery takes place where the goods are at the time of the conclusion of the contract applies only if both parties really knew about this place, so it is not enough if only one of the parties knew about it, and the other should have known.

Main ideas of the research

The delivery date is the date that the contract establishes or allows to define. If such a date or such period is not provided for in the contract, then the delivery must be made within a

reasonable time, in accordance with Art. 33 of the Vienna Convention. ***A reasonable period*** is understood to be such a period which, under the given conditions, is usually acceptable. The rules for the transfer of documents are determined by the provisions of the contract. If the seller handed over the documents earlier than the deadline specified in the contract and there are inconsistencies in them, he may, before the expiration of this period, eliminate any inconsistency in the documents, provided that the exercise of this right by him does not cause unreasonable inconvenience or unreasonable costs to the buyer, based on Art. 34 of the Vienna Convention. It is obvious that the scope of the seller's obligations in structure corresponds to the practice of the states of the Romano-Germanic system of law. The only element of the Anglo-Saxon legal system is the concept of a reasonable time. The item must comply with the contract in terms of quantity, quality, description, containers and packaging, in accordance with Art. 35 of the Vienna Convention. The seller is responsible for the non-compliance of the goods with the terms of the contract at the time of transfer of risk, even if this non-compliance becomes evident only later, as provided for in art. 36 of the Vienna Convention.

The next important issue is related to ***the buyer's right to file a complaint with the seller*** in the event that the goods do not meet the quality requirements of the contract. According to the convention, the buyer loses the right to refer to the non-compliance of the goods with the terms of the contract if he does not give notice to the seller within a reasonable time after it was or should have been discovered by the buyer, in accordance with Art. 43 of the Vienna Convention. If the buyer has not given notice within a reasonable time, he is not deprived of the opportunity to reduce the price or claim compensation for losses, with the exception of lost profits, if he has a reasonable justification for why he did not give the required notice, as stated in Art. 44 of the Vienna Convention. The Convention establishes that in any case, the buyer loses the right to rely on the non-compliance of the goods with the terms of the contract, if he does not give the seller a notice of it no later than within two years from the date of the actual transfer of the goods to the buyer, insofar as this period does not contradict the contractual period of the guarantee. according to paragraph (2) of Art. 39 of the Vienna Convention.

In the event of a breach of contract by the seller, ***the buyer may file a claim*** and no deferral can be granted to the seller by court or arbitration. The buyer can first of all require the seller to fulfill his obligations, based on Art. 45 of the Vienna Convention. This provision, which came from the Romano-Germanic system of law, is mitigated by the requirement of Art. 28 of the Vienna Convention, according to which, if, in accordance with the provisions of this Convention, one of the parties has the right to require the performance of an obligation by the other party, the court will not be obliged to order the performance in kind, unless it would have done so on the basis of its own law in relation to similar sales contracts not governed by this convention. Thus, in the countries of the Anglo-Saxon system of law, the court will not make a decision binding on the fulfillment of obligations. Enforcement can be carried out by replacement or correction, which is the usual solution for the states of the Romano-Germanic system of law, however, the requirements for replacement or correction have significant restrictions.

A replacement can only be requested if the contract is materially violated. ***A breach of contract by one of the parties is material*** if it entails such harm for the other party that the latter is largely deprived of what it was entitled to count on according to the contract, unless the breaching party did not foresee such result and a reasonable person acting in the same capacity under similar

circumstances would not have foreseen it, according to Art. 25 Vienna Convention. Thus, the buyer may not require the seller to rectify the nonconformity under any conditions, but only if this requirement is reasonable in the given situation. It is also difficult to correct and replace the goods and the fact that the claim must be made within a reasonable time. The buyer has the right to demand a price concession. He can reduce the price in the same proportion in which the value that the goods actually delivered had at the time of delivery is correlated with the value that the goods corresponding to the contract would have at the same time, based on Art. 50 of the Vienna Convention. ***Finally, if the contract is materially violated, then the buyer has the right to terminate it.*** A declaration of termination of the contract is valid only if it is made to the other party by means of notice. This means that the Vienna Convention has abandoned the structure of automatic termination of the contract, which creates a lot of uncertainty in the relationship between the seller and the buyer. In addition to the above rights, the buyer may also (subject to the conditions mentioned in Articles 74-77 of the Vienna Convention) claim damages provided for in paragraph (1) of Art. 45 of the Vienna Convention.

The buyer must pay the price for the goods and take delivery of the goods. In cases where the contract was legally concluded, but it does not directly or indirectly establish a price or does not provide for the procedure for determining it, it is considered that the parties, in the absence of any indication to the contrary, implied a reference to the price, which at the time of the conclusion of the contract was usually charged for such goods sold under comparable circumstances in the relevant field of trade, in accordance with Art. 55 of the Vienna Convention. However, you should pay attention to the fact that according to paragraph (1) of Art. 14 of the Vienna Convention, in the absence of a price setting procedure, the contract is invalid. If the buyer is not obliged to pay the price in any other definite place, he must pay it to the seller:

a) at the location of the seller’s place of business; or

b) if payment is to be made against the transfer of the goods or documents - at the place of their transfer, in accordance with Art. 57 of the Vienna Convention.

Do not forget that the unlimited number of contracts devoid of legal consolidation is not an indicator of productive regulation of various kinds of joint relations, but only a clearly built system of chain links of certain types of contracts, where their legal regulation will give an effective result in regulating various kinds of relations. For this, such a principle as freedom of contract was envisaged, representing the freedom to conclude various types of contractual structures regulating public relations that meet the needs of society [5, p. 20].

Content and Structure of International Commercial Agreements

International commercial practice has developed a number of requirements usually imposed on the content and structure of international commercial agreements. International commercial agreements usually contain several sections located in a certain logical sequence, although the content and structure of agreements may vary depending on the specifics of the product and a number of other conditions [2, p. 86].

a) Determination of the parties to the contract

The definition of the parties to the agreement, indicating their full official name and addresses, is located on the first page of the agreement, which indicates its registration number, place and date of signing. The indication of the place of signature is of great importance from the point of view of determining which country’s

law is applicable to the treaty, if any issue is not directly settled therein. In practice, taking this into account, when concluding contracts, for example, with Russian enterprises, Moscow is often indicated as the place of signing, even if the contract was actually signed abroad (as a result, the chances increase in favor of the fact that the jurisdictional body will recognize the Russian right).

b) Subject of the contract

This section indicates that the seller sold, and the buyer bought a certain product, that is, the name of the product, its quantity, completeness, technical characteristics and quality are indicated. The basic conditions are also indicated in the same section. The name of the goods is given, as a rule, in accordance with the customs classification of the country of destination or in accordance with international standards. Quantity is specified in metric units or in other systems and units (for example, bags, bales, barrels, etc.).

Contracts provide for the following ***methods of quality coordination***:

1) conformity of the goods to a certain standard prevailing in international trade;

2) conformity of the quality of the goods to a specific sample

3) using the faq ("fair average quality") indicator.

One cannot ignore such a question as the country of origin of the goods. In Russia, which is a member of the Customs Union, this issue is regulated by the *Customs Code of the Customs Union* 2009 [1](Hereinafter referred to as the CC CU), adopted as an annex to the Agreement on the Customs Code of the Customs Union dated November 27, 2009 as amended by of April 16, 2010 According to paragraphs (1) - (3) of Art. 58 of the Customs Code of the CU, ***the country of origin of goods*** is considered to be the country in which the goods have been fully produced or have undergone sufficient processing (processing) in accordance with the criteria established by the customs legislation of the Customs Union. In this case, the country of origin of goods can be understood as a group of countries, or customs unions of countries, or a region or part of a country, if there is a need to separate them for the purpose of determining the country of origin of goods. The country of origin of goods is determined in all cases when the application of measures of customs tariff and non-tariff regulation depends on the country of origin of goods. Determination of the country of origin of goods is carried out in accordance with international treaties of the member states of the Customs Union, which regulate the rules for determining the country of origin of goods. The determination of the country of origin of goods originating from the territory of a member state of the Customs Union is carried out in accordance with the legislation of such a member state, unless otherwise provided by international treaties.

In confirmation of the country of origin of goods, the customs authority has the right to require the submission of certain documents, which are a ***declaration of origin of goods*** and a certificate of origin of goods in accordance with Art. 59 CC CU. According to paragraphs (1) - (2) of Art. 60 of the Customs Code of the CU, a declaration of origin of goods is a declaration of the country of origin of goods made by a manufacturer, seller or sender in connection with the export of goods, provided that it contains information that makes it possible to determine the country of origin of goods. Commercial or any other documents related to goods are used as such a declaration. If in the declaration of origin of goods information about the country of origin of goods is based on criteria other than those envisaged by international treaties of the Customs Union member states regulating the rules for determining the country of origin of goods, the country of origin of goods is determined in accordance with the criteria defined by these international treaties.

According to paragraphs (1) - (5) of Art. 61 CC CU ***certificate of origin of goods*** is a document that unambiguously indicates the country of origin of goods and issued by authorized bodies or organizations of this country or country of export, if the certificate is issued in the country of export based on information received from the country of origin of goods. If the information on the country of origin of goods in the certificate of origin of goods is based on criteria other than those stipulated by international treaties of the Customs Union member states regulating the rules for determining the country of origin of goods, the country of origin of goods is determined in accordance with the criteria defined by these international contracts. When exporting goods from the customs territory of the Customs Union, a certificate of origin of goods is issued by authorized bodies or organizations of the Member States of the Customs Union, if the specified certificate is required under the terms of the contract, according to the national rules of the country of import of goods, or if the presence of the specified certificate is provided for by international treaties. Authorized bodies and organizations that issued a certificate of origin of goods are obliged to keep a copy of it and other documents on the basis of which the origin of goods is certified for at least three years from the date of its issue.

To determine the country of origin of the goods, ***bar coding*** is used, which is carried out within the framework of the ***International Association of the European Coding System - the EAN Association*** [6].This Association assigns two- or three-digit codes to member states. Thus, the first two or three digits in the 13-digit digital designation of the goods (EAN-13) usually indicate the country of origin of the goods (for Russia, these are the numbers 460–469). The next five or four digits, respectively, designate the manufacturer’s code and are assigned by national authorities, usually represented by the Chamber of Commerce of a particular country. In Russia, these functions are performed by **UNISCAN** (Association for Automatic Identification) at the Chamber of Commerce and Industry of the Republic of Moldova. Five more digits are assigned to the product directly by the manufacturer itself, taking into account its consumer properties, dimensions, design, packaging, color, etc. Finally, the last digit is a check (check number) and is used to check the correctness of reading the bar code by a special device (scanner). Small items may have a special eight-digit shortcode.

c) Product price

The price of the goods is an essential condition of the contract and can be in several forms:

1) ***a fixed price***, which is indicated in the contract and is not subject to change during the entire term of the contract;

2) ***a sliding price***, which is specified in the contract, but may be subject to appropriate adjustments in the event of changes in pricing factors (wages, cost of raw materials and equipment for the production of goods) during the period of the contract. The contract usually stipulates the limits of deviation of the actual price from the contract in one direction or another (for example, ± 15%);

3) ***the price with subsequent fixation***, which is not indicated in the contract, but is determined by the corresponding quoted price of the goods at the time of execution of the contract. Quoted prices are:

• *reference prices,* which are published in price lists, bulletins and other periodicals (real prices are lower than reference prices);

• *prices of international trade statistics*, which are calculated as the total proceeds from the sale of individual goods, divided by their quantity;

• *exchange prices,* which act as real prices of transactions made on the exchange at one time or another;

• *prices of auctions*, which act as real prices of transactions concluded at international auctions [3, p. 87].

d) Terms of delivery of goods

The delivery times of the goods are indicated either in the form of specific dates, or as quarterly, semi-annual, annual, or in the form of a period of time from the date of signing the contract. To avoid disputes, the contract usually includes a clear wording of what is considered the date of delivery of the goods, for example: "The date of delivery is the date of the stamp on the railway consignment note of the border station where the goods are transferred by the railway of the Seller's country to the railway of the Buyer's country".

It is also necessary to make a reservation about whether early delivery is allowed. It is important for the buyer to know the time of the actual shipment of the goods, so that he can take care of the acceptance of the goods. To this end, the contract usually provides for the seller's obligation to notify the buyer of the shipment of the goods. The obligation to send a notice of shipment arises in a number of cases from the trade customs, that is, even when it is not provided for in the contract. International commercial practice also knows such a way of designating a term as immediate delivery. In fact, this means that the delivery must be made within 14 calendar days from the date of the contract. In addition, the Vienna Convention also indicates the possibility of delivery within a reasonable time.

e) Terms of payment

The provisions of the contract on the terms of settlements are drawn up taking into account the prescriptions of international treaties and the current norms of national legislation. The form of insurance of currency risk, the form of settlement (bank transfer, collection, documentary credit) and the form of credit (bank in the form of a check or commercial in the form of a bill), if provided, are indicated. The terms of payment for the loan must be clearly stated in the contract. It also indicates against which set of documents the payment is made (this issue is discussed in detail in Chapter 10 "International Settlement Law" of this textbook).

f) Container, packaging and labeling of goods

The contract should regulate the requirements for packaging, packaging and labeling, the procedure for determining the quantity and quality of goods when they are accepted by the buyer (participation of competent independent bodies or a representative of the seller, forms of documents, etc.), quality guarantees, as well as the timing and procedure for submission and consideration of claims for quantity, quality and delivery time (claims for quality and quantity, for example, must be confirmed by acts of competent and independent organizations or bodies). ***Container*** - external packaging of goods (boxes, barrels, bags, containers). It differs from the direct packaging, in which the goods are packed and which is inseparable from the goods themselves in the trade turnover. ***The marking*** is placed on a container, a tag or the product itself. The following types of markings are used in international trade:

• *commodity* - contains the name of the product, gross and net weight;

• *cargo* - contains the name of the states and points of departure and destination, the name of the recipient, the route, the number of the cargo and its weight;

• *special* - contains the name of the product, instructions on handling it during loading, unloading, transportation and storage (for example, "glass", "do not turn over");

• *transport* - presented as a fraction, the numerator of which denotes the serial number of the package in the lot transported according to one transportation document, and the denominator - the total number of packages in this lot (this marking is applied not by the shipper, but by the carrier).

Marking is applied with indelible paint on opposite sides of the container in the language of the seller’s country with translation into the language of the buyer’s country.

g) Guarantee of performance of the contract.

The guarantees of proper performance of the contract are provided by the seller and serve as a means of ensuring that they fulfill their obligations under the contract. Typically, such guarantees take the form of bank guarantees issued on the instructions of the seller-principal by the issuing bank in favor of the buyer-beneficiary.

h) Responsibility of the parties to the contract for non-performance or improper performance

To increase the responsibility of the parties for the fulfillment of their obligations, the terms of contracts usually provide for penalties. Penalties by their size and order should stimulate the fulfillment of obligations. For example, the penalty for late delivery may be progressive, that is, increase as the delay increases. At the same time, the penalties should not be ruinous (usually the total amount of the fine is limited to 8-10% of the value of the expired consignment). Unjustified tightening of penalties by buyers often provokes a response from sellers: they include possible penalties in prices. Penalty clauses are usually formed on a mutual liability basis such that, for example, a penalty for late payment by the buyer is included in addition to the seller’s late delivery penalties. The inclusion of provisions on penalties in the contract does not remove the issue of compensation for losses (including the issue of the ratio of penalties and losses), which is decided in accordance with the law of a particular country applicable to this contract [4, p. 95].

i) Goods insurance

The problem of indemnification is closely related to insurance. The indication in the contract of the basic conditions (FOB, CIF, etc.) also determines the obligations of the parties for insurance. So, under the terms of FOB, the exporter insures the cargo during transportation to the port of loading and in the port before loading it on board the vessel. Further insurance concerns are the responsibility of the purchaser. In contracts, there are also special detailed provisions on insurance (what is insured, against what risks, who insures and for whom).

j) Dispute Resolution Procedure and Applicable Law

The procedure for resolving disputes between the parties is governed by the ***arbitration clause*** containing the agreement of the parties on the transfer of the disputes for consideration in arbitration, or a ***propheticagreement*** expressing the will of the parties to refer disputes to a court of any state. The applicable law is determined by the parties by pointing to the relevant legal system, and this circumstance serves as the implementation of the principle of autonomy of will in international law, according to which the parties to an international commercial agreement have the right to independently determine the legal statute of their contractual obligations.

Conclusions

In the science of international law, there is no unified definition of the concept of “international commercial agreement”. The historical development of the unification of the law of international commercial agreements, which began several centuries ago, encompasses the following stages:

- ***The first stage*** refers to the period of the emergence of medieval law as a law merchant, representing a set of international trade customs that regulated the political community of merchants who traveled from port to port and from fair to fair.

- ***The second stage*** was marked by the emergence of national legal systems under the influence of the understanding of law as a

national phenomenon and the approval of the idea ofnational sovereignty.

- ***The third stage***, the modern stage, was marked by a movement from national isolation to universal unification, which allowed, on the basis of multilateral negotiations, to develop and adopt uniform conflict of laws and substantive legal norms. It is to the third stage in the development of international legal unification of commercial law that the emergence of a uniform understanding of the category of international commercial agreements is assigned.

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