ANNALES UNIVERSITATIS APULENSIS

SERIES JURISPRUDENTIA

24/2021

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SERIES JURISPRUDENTIA
24/2021

MINISTERUL EDUCAȚIEI NAȚIONALE
UNIVERSITATEA „1 DECEMBRIE 1918” ALBA IULIA
FACULTATEA DE DREPT ŞI ŞTIINȚE SOCIALE
DEPARTAMENTUL DE ŞTIINȚE JURIDICE ŞI ADMINISTRATIVE

ANNALES UNIVERSITATIS APULENSIS

Series
Jurisprudentia

24/2021

PRO UNIVERSITARIA 2021
BUCUREŞTI

ISSN 1454-4075

RO - 510009 ALBA IULIA STR. UNIRII, NR. 15-17, COD POŞTAL: 510009
TEL. 00-40-258- 813994; FAX: 00-40-258-812630
E-MAIL: CATEDRA.DREPT@YAHOO.RO

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PARALLEL RECOURSE ON ASSIMILATED ADMINISTRATIVE ACTS ACCORDING TO LAW NO.119/1996 REGARDING CIVIL STATUS ACTS

Emilia Lucia CĂTANĂ[1]

Abstract

This study aims to analyze the parallel recourse on assimilated administrative acts, according ro Law no.119/1996 regarding civil status acts, in the context of Romanian Constitutional provisions, Law of administrative contentious no. 554/2004. Civil Code and Administrative Code, respectively of the other legal provisions incident in the analyzed topic. Also, the research is based on the decisions of the Constitutional Court and on the relevant doctrine in the matter.

The conclusions of the study, also grounded on our previous research, prove, in our opinion, that requests provided by article 9 or Law no.119/1996 on civil status acts, having as their object the refusal to draw up an civil status act, is a form of exercising parallel recourse/ motion to dismiss regulated by Law of administrative contentious no. 554/2004.

Keywords: *the parallel recourse, civil status acts, assimilated administrative acts.*

1. INTRODUCTION

Parallel recourse theory took shape in the context of exceptions from legality control exercised by courts, regulated by the Law of administrative contentious no. 554/2004[2].

Specialised literature[3] has expressed the thesis according to which exceptions from legality control exercised by administrative contentious courts include **three categories of acts:**

a) *common law acts* (civil, commercial, employment law) by the public administration, regardless of their title and their unilateral or bilateral nature;

[1] Professor at "Dimitrie Cantemir" University from Târgu Mureş, Faculty of Law, Lawyer at Mures Bar, email luciacatana@yahoo.fr

[2] In order to analyse this issue, which underlies the present study as well, see Emilia Lucia Cătană, *Contenciosul actelor administrative asimilate*, ediția 2, Bucureşti, Ed. C.H. Beck, 2019, 228-234; Emilia Lucia Cătană, *Drept administrativ*, ediția 2, Bucureşti, Ed. C.H.Beck, 2021,365-368.

[3] Anton Trăilescu, *Controverse în legătură cu controlul judecătoresc special al actelor administrative*, Dreptul nr. 11/2009, p. 123.

b) *administrative acts which do not fall under any form of judicial control* (government acts and military commandment acts);

c) *administrative acts indicated by art. 5 par. (2) of Law no. 554/ 2004*, which are subject to a special judicial control procedure, other than the administrative contentious procedure regulated by this law.

Therefore, distinctly from the absolute exceptions regulated by article 126 of the Constitution of Romania, revised, and article 5 paragraph (1) of Law 554/2004, the doctrine also analyses as relative exception the hypothesis of "parallel recourse", regulated by par. (2) of art. 5 of Law no.554/2004, both **absolute exceptions** and **relative exceptions** being included in the category of **motions to dismiss**[4], grouped into two categories:

1. **motions to dismiss deduced from the nature of the act**, these being the absolute exceptions regulated by art. 5 par. (1) of Law no.554/2004;
2. **motions to dismiss determined by the existence of a parallel recourse**, expressly regulated by art. 5 par. (2) of Law no.554/2004, which stipulated that *administrative acts for the revision or annulment of which organic law provides another legal procedure cannot be attacked by way of administrative contentious*. This regulation is the legal reflection of the **theory of parallel recourse**, which states that "*it applies to acts which cannot be censored in an administrative contentious court, but can be censored in a common law court*"[5].

In this context, the specialised legal literature[6] claims that, in order to be in the presence of a motion to dismiss deduced from the existence of parallel recourse, several conditions need to be met, as follows:

- an organic law must provide a different attack procedure, which the author finds natural, taking into account that *„Law no.554/2004 is an organic law, and exemption from its provisions can also be done through an organic law"*;
- the special remedy at law must be exercised before a court of law, therefore it must still be a judicial procedure, i.e. not to be exercised before an authority with jurisdictional attributions, a case in which we are not in the presence of parallel recourse;

[4] See Antonie Iorgovan, *Noua lege a contenciosului administrativ. Geneză, explicaţii şi jurisprudenţă*, ed. 2, Bucureşti:Ed. Kullusys,2006, 169.

[5] Dana Apostol Tofan, *Drept administrativ*, vol. II, ediția 4, Bucureşti:Ed. C.H. Beck. 2017, 189.

[6] Verginia Vedinaş, *Tratat teoretic şi practic de drept administrativ*, vol. II., Bucureşti:Ed. Universul Juridic,2018, 253.

- the special remedy at law *„must obtain the same satisfaction as if it had been carried out before an administrative contentious court”*.

As we have stated before[7], there also are:

- **laws which, although they establish a competence of exemption from common law, do not define parallel recourse**, an example to this end being Law no.33/1994 regarding expropriation for a cause of public utility, republished[8], which, under article 20, stipulates that after the precursory expropriation measures have been performed, if the new proposals are also rejected by the committee specially formed in accordance with article 15 of the law, the expropriator, as well as the owners and other persons with real rights over the property proposed for expropriation may challenge the committee's decision in the court of appeal in the area in which the property is located, within 15 days from notification, as per the Law of administrative contentious no. 554/2004, with its subsequent alterations and completions;

- **laws which explicitly or implicitly refer to the general law in the matter**; an example to this end is Law no. 213/1998 regarding public property goods[9] which, under article 23, provides that litigation regarding the delimitation of the state, county or township public domain fall under the competence of administrative contentious courts, and according to art. 8 par. (1) and (2) of the same law, a decision by the Government, county council, local council or the General Council of Bucharest regarding transfer of goods from the private to the public domain belonging to the state or the administrative-territorial units "*can be challenged, under the law, before the administrative contentious court on the territory of which the goods are located”*. We must note however that litigation founded on article 6 of the law **fall under the competence of common law courts.**

2. THE SPECIAL REGULATIONS INSTITUTED BY LAW NR. 119/1996-DEFINITION OF PARALLEL RECOURSE IN THE MATTER OF CIVIL STATUS ACTS

From the point of view of parallel recourse exercised in the matter of assimilated administrative acts, our attention is drawn by special regulations instituted by Law no. 119/1996 regarding civil status acts,

[7] Emilia Lucia Cătană, *Contenciosul actelor administrative asimilate*, 228-229.

[8] Law 33/1994 regarding expropriation for a cause of public utility (M.Of. nr. 472 of July 5, 2011).

[9] Law 213/1998 regarding public property goods, with subsequent alterations and completions (M.Of. nr. 448 of November 24, 1998).

republished, with subsequent anterations and completions[10], which has formed the object of previous research[11].

Conceptually, as per art. 1 of Law no.119/1996, civil status acts are *"authentic acts which prove a person's birth, marriage or death. They are drawn up in the interest of the state and of the person and serve to know the number and structure of the population, the demographic situation, the defence of the citizens' fundamental rights and liberties"*.

At the same time, art. 99 par. (2) of the Civil Code defines civil status acts as *"authentic documents"* which "*provide proof, until a statement of forgery, for what represents the civil status officer's ascertainment and, until provided otherwise, for the other mentions"*. The function of civil status officer is carried out by the mayor as representative of the state, according to the provisions of art.156 of the Administrative Code, approved by EGO no. 57/2019, with subsequent alterations and completions[12].

Taking into consideration these legal definitions, the doctrine defines civil status acts as *"those acts inscribed in civil status registries, in which the elements of civil status are recorded by authorities with civil status attributions, under the law"*[13] , which have a double significance: *„that of proof of the individual administrative act which is the civil status registry entry (instrumentum), and a means of maintaining population records*[14]*"*.

On the other hand, we must remember that there are civil status acts which must meet the substantive and formal requirements of an administrative act, to which end we mention **the model-framework of the mayor's decision on recording a child's name and surname if the mother's birth is not recorded**, approved by annex no. 6 to G.D. no.801/2016[15], decision issued in accordance with the provisions of art. 14 par. (2^2) of Law no.119/1996, republished, with subsequent alterations and completions, and of EGO no.57/2019 regarding the Administrative Code, with subsequent alterations and completions.

According to the provisions of article 9 of Law no.119/1996 on civil status acts: *„If the civil status officer refuses to draw up a document or to record a mention which falls under his responsibility, the displeased*

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[10] Law 119/1996 regarding civil status acts, with subsequent alterations and completions (M.Of. nr. 339 of May 18, 2012).

[11] Emilia Lucia Cătană, *Contenciosul actelor administrative asimilate*, 229-234.

[12] For details, see, Emilia Lucia Cătană, *Drept administrativ*, 151.

[13] Eugen Chelaru, în Flavius-Antoniu Baias, Eugen Chelaru, Rodica Constantinovici, Ioan Macovei *(coord.), Noul Cod Civil. Comentariu pe articole*, Bucureşti:Ed. C.H. Beck, 2012, 109.

[14] *Ibidem*.

[15] GD no. 801/2016 for establishing the procedures for the collection and deletion of the data on persons with declared identity, as well as for altering and completing certain normative acts regarding the unified application of dispositions on civil status and population records (M.Of. no. 883 of November 3, 2016).

person may notify the court in their area of residence". This law text regulates the possibility that a disgruntled person challenge an assimilated administrative act consisting of **a public authority's refusal to issue a civil status act to the court of law in the disgruntled person's area of residence.** As a matter of fact, **by the changes brought to the Code of Civil Procedure by Law no.310/2018**[16], article 94 point 1 letter b) provides the court's material competence to judge requests regarding civil status registry records, *"given by law to the competence of judicial courts"*. We specify that article 94 point 1 letter b), in its previous form, before the changes brought along by Law no.310/2018, provided the court's competence to process requests regarding civil status registry records, *"in accordance with the law"*; the current form imposes that, by law, the court's competence to process such requests be provided. If, according to the Code of Civil Procedure, the court is competent to judge requests regarding recording births, given by law to the competence of these courts, we consider it natural that courts also judge a public authority's refusal to issue a civil status act, especially since judging such a refusal is given to the material competence of the court by Law no. 119/1996. Such an interpretation also takes into account the provisions of article 94 point 3 of the Code of Civil Procedure, which states that courts judge *"any other requests given by law to their competence"*.

As the doctrine also states[17], the judicial norm contained in art. 9 of Law no. 119/1996 defines a form of exercising parallel recourse, regulating a competence to exempt from common law in the matter of the administrative contentious of the refusal to draw up a civil status act, competence which belongs to the court in the residence area of the displeased person. We support this opinion and we consider that the requirement that a distinct judicial procedure be regulated **by organic law**, imposed by art. 5 par. (2) of Law no. 554/2004 in the matter of parallel recourse, is met.

Therefore, with regard to Law 119/1996's nature as organic or ordinary law, it is relevant to take into consideration **DCC no. 470 of June 6, 2006**[18] in which, being notified of the constitutional challenge of the provisions of article 43 paragraph (3) of this law, is stated the following: *"The court ascertains that, on the whole, regulations regarding civil status*

[16] Law 310/2018 for the alteration and completion of Law 134/2010 regarding the Code of Civil Procedure, as well as for the alteration and completion of other normative acts (M.of. no. 1074 of December 18, 2018).

[17] Dacian Cosmin Dragoş, *Legea contenciosului administrativ. Comentarii şi explicaţii*, ed. 2, Bucureşti:Ed. C.H. Beck, 2009, 261,265.

[18] DCC no. 470 of June 6, 2006 refering to the constitutional challenge of the provisions of art. 43 par. (3) of Law 119/1996 on civil status acts (M.Of. no. 580 of July 5, 2006).

acts do not form part of the field of organic law. However, the criticised law does contain norms belonging to this field. Such is the case of 72 par. (2), which provides a new attribution in the prefect's responsibility… which is in accordance with art. 123 of the Constitution, according to which the prefect's attributions are established by an organic law. Therefore, in this case, such norms have imposed the passing of Law119/1996 with the majority provided by the Constitution for organic laws. Consequently, the Court ascertains that the norms of this law which are not organic are and remain the object of regulation of ordinary law".

As a consequence, **at least a part of the norms of Law no. 119/1996 fall into the field of organic law.** But, respecting the argumentative logic of the Constitutional Court with regard to categorising some norms of Law 119/1996 as being in the field of organic law, **we believe that the stipulations of art. 9 of the law can also be interpreted as belonging to the field of organic law**.

Thus, given that the constitutional norm does not refer in the content of article 52 to contentious administrative courts, the regulation provided by article 9 of Law no.119/1996, which gives a disgruntled person the right to challenge an assimilated administrative act consisting of a public authority's refusal to issue a civil status act to the court in the person's area of residence **can be considered to be a judicial norm belonging to the field of organic law, by relating it to the provisions of article 52 paragraphs (1) and (2) of the Constitution**. As a matter of fact, by Decree no. 267 of May 7, 2014[19], although criticisable from the point of view of the validity of the constitutional nature of the provisions of article 4 of Law no. 554/2004[20], the Constitutional Court holds that „the phrase **administrative contantious** in the content of the constitutional norms invoked cannot be defined strictly by relating to the provisions of Law *554/2004* [respectively to its definition given by article 2 paragraph (1) *letter f)*...], since the law indicated is subsequent to the 2003 revision of the Constitution. Paragraph (6) of article 126 was introduced with this occasion, so that the phrase under discussion is an autonomous notion, and Law *554/2004* reflects and develops, as organic law in the matter of administrative contentious, the constitutionally defined principles and notions ... it is therefore essential to increase the guarantees of judicial control on the administrative acts of public authorities" (our emphasis).

[19] DCC no. 267 of May 7, 2014 refering to the denial of the contitutional challenge of the provisions of art. 4 par. (2) and (3) of the Law of Administrative Contentious no. 554/2004 (M.Of. no. 538 of July 21, 2014).

[20] See Cătălin Silviu Săraru, *Legea contenciosului administrativ nr. 554/2004. Examen critic al deciziilor Curţii Constituţionale*, Bucureşti:Ed. C.H. Beck, 2015, 111-112.

3. CONCLUSIONS

In the framework of exceptions from legality control exercised by administrative contentious courts of law, exceptions regulated by Law of administrative contentious no. 554/2004, a certain distinct category distinguishes itself, i.e. the motion to dismiss determined by the existence of a parallel recourse.

The conclusions of the study, also grounded on our previous research, prove, in our opinion, that requests provided by article 9 or Law no.119/1996 on civil status acts, having as their object the refusal to draw up an civil status act, is a form of exercising parallel recourse/ motion to dismiss regulated by Law of administrative contentious no. 554/2004.

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RESPECT FOR THE PRINCIPLE OF LEGALITY IN THE MATTER OF INSURANCE MEASURES DISPOSED IN THE CRIMINAL PROCESS

Angela TATU[1]

Abstract

This article aims to evoke the current problems in the matter of taking or maintaining precautionary measures by the prosecutor in the criminal process, showing some situations of violation of the principle of legality of the criminal process by the prosecutor. These violations attract procedural sanctions such as absolute or relative nullity, revocation, etc.

Keywords: *prosecutor, precautionary measures, seizure, verification, term, principle of legality-violation, nullity, revocation, sanctions, criminal trial, right to a fair trial*

One of the current problems that have arisen in judicial practice concerns the practical applicability of the provisions regarding the taking, maintenance, revocation or termination of precautionary measures by the prosecutor in the criminal process.

According to art. 249 of the Criminal Procedure Code "The prosecutor, during the criminal investigation, the judge of the preliminary chamber or the court, ex officio or at the request of the prosecutor, in the preliminary chamber procedure or during the trial, motivated, in order to avoid the concealment, destruction, alienation or evasion of the pursuit of goods that may be subject to special confiscation or extended confiscation or that may serve to guarantee the execution of the fine or legal costs or to repair the damage caused by the crime. (2) The precautionary measures consist in the unavailability of some movable or immovable goods, by instituting a seizure on them".

According to art. 250 Cpp "Against the precautionary measure taken by the prosecutor or the manner of carrying it out, the suspect or defendant or any other interested person may file an appeal, within 3 days from the date of communication of the order of taking the measure or from the date of bringing fulfillment, to the judge of rights and freedoms from the court which would have the competence to judge the case on the merits. "

[1], Lect. Dr., ,1 Decembrie 1918 " University from Alba Iulia.

The current Code of Criminal Procedure has undergone changes, being introduced art. 250/2 according to which: “Throughout the criminal process, the prosecutor, the judge of the preliminary chamber or, as the case may be, the court periodically verifies, but not later than 6 months during the criminal investigation, respectively one year during the trial, if the grounds that determined the taking or maintenance of the precautionary measure subsist, ordering, as the case may be, the maintenance, restriction or extension of the ordered measure, respectively the lifting of the ordered measure, the provisions of art. 250 and 250 ^1 applying accordingly. "

Regardless of the situation we are in, the one provided by art. 249 of the Criminal Procedure Code - when the prosecutor takes for the first time the precautionary measure in a criminal case or the one provided by art. 250/2 Cpp - when it maintains or not, following the periodic verification, if the grounds that determined the taking or maintenance of the precautionary measure subsist, it must communicate to the suspect, defendant or any interested person if it maintains or not, if it extends or restricts or lifts the precautionary measure during the criminal investigation. By fulfilling this judicial obligation, the suspect, the defendant or the interested person is given the possibility to contest the ones ordered by the prosecutor, if they are dissatisfied with the measures taken by the prosecutor.

The problems arising in practice refer to the prosecutor's obligation to comply with the provisions of art. 268-270 of the Criminal Procedure Code, and especially of art. 270 para. 3 of the Criminal Procedure Code, in order to be able to verify whether the act issued by the prosecutor or the measure taken are fulfilled within the legal term. According to these legal provisions ”when for the exercise of a procedural right the law provides a certain term, its non-observance entails the revocation of the exercise of the right and the nullity of the act made over the term. When a procedural measure can only be taken within a certain period, its expiry shall automatically entail the cessation of the effect of the measure. For the other procedural time limits, in the event of non-compliance, the provisions on nullity shall apply.”

They are considered as acts performed on time, according to art. 270 of the Criminal Procedure Code, the documents submitted within the term provided by law to the administration of the place of detention or to the military unit or to the post office by registered letter shall be considered as done within the term. The registration or attestation made by the administration of the place of detention on the filed deed, the receipt of the post office, as well as the registration or attestation made by the military unit on the filed deed serve as proof of the date of filing the deed. If an act

which had to be done within a certain period of time was communicated or transmitted, through ignorance or manifest error of the sender, before the expiry of the period, to a judicial body which has no jurisdiction, it shall be deemed to have been filed within the period, even if the act reaches the competent judicial body after the expiry of the fixed term.

As for the prosecutor, the legislator expressly regulated the obligations he has in the criminal process. Thus, "except for appeals, the act performed by the prosecutor is considered to be done on time if the date on which it was entered in the exit register of the prosecutor's office is within the term required by law to perform the act."

In the case under analysis, in file no. .../2021 of the Cluj Court, having as object the contestation of the seizure measure, the prosecutor, in the procedure of periodic ex officio verification within 6 months of the precautionary measure, did not register for maintaining and extending the measure of insurance seizure, with the motivation that the ordinance was not sent by correspondence, but was personally collected by the criminal investigation body in order to carry out the measure. It was also alleged that the case prosecutor was on rest leave and interrupted his leave in order to be able to issue the ordinance by which he maintained the measure of insurance seizure. Moreover, the representative of the Prosecutor's Office claimed that he did not have the obligation to periodically verify the seizure measure within 6 months, as the seizure measure was taken prior to the amendments to the Code of Criminal Procedure, ie before February 28, 2021, and the provisions of art. 250/2 Cpp applies only to precautionary measures ordered after the date shown.

Of course, we cannot share this opinion, being erroneous, for the following arguments. First of all, it should be mentioned that the legislation on insurance measures ordered in the criminal process has undergone changes, the last being by Law no. 6/18 February 2021, published in the Official Gazette on 167/18 February 2021. This law entered into force 10 days after the date of publication in the Official Gazette of Romania, Part I, ie on 28 February 2021.

In the criminal investigation file, the precautionary measure of seizure was ordered during 2020 both on the goods that may form the object of special confiscation, and on the goods that may form the object of extended confiscation belonging to other persons. The measure was contested both by the defendants and by the interested persons, other than the parties, as the insurance seizure was also instituted on the property belonging to other persons in view of the extended confiscation.

According to art. 15 para. 2 The revised Romanian Constitution "the law provides only for the future, except for the more favorable criminal or contraventional law." It is without a doubt that the provisions of art. 250/2

Cpp produce effects from the date of entry into force, ie from February 28, 2021, and does not retroactively prior to this date. We mention that art. 250/2 CPC constitutes a norm of criminal procedure with imperative character and of strict interpretation and establishes a new obligation in charge of the prosecutor, to verify once every 6 months the subsistence of the conditions for taking or maintaining the precautionary measures ordered during the criminal investigation. In the same way, the preventive measures that can be taken within the criminal process are regulated, according to art. 207 and 208 Cpp.

In this context, it is necessary to respect the principle of legality of the criminal process, a principle regulated by art. 2 of the Criminal Procedure Code, according to which the criminal trial is carried out according to the provisions provided by law. To disregard any provision inscribed in the Code of Criminal Procedure, is equivalent to a violation of the principle of legality of the criminal process, which leads to the operation of one of the sanctions provided by law: nullity, revocation, etc. The motivation of the Prosecutor's Office violates the provisions of art. 2 CPC, motivation that blatantly contradicts the provisions of art. 56 and art. 300 Cpp, the prosecutor being the guarantor of the observance of the law within the criminal process.[2] In this case, not only was the prosecutor not the guarantor of compliance with the law, but he himself violated the law.

On the other hand, we cannot agree with the claim that the prosecutor was not obliged to periodically verify the measure of seizure within 6 months, as the measure of seizure was taken prior to the amendments to the Code of Criminal Procedure, ie before the date of 28 February 2021, and the provisions of art. 250/2 Cpp applies only to precautionary measures ordered after the date shown. This is because art. 250/2 CPC does not distinguish depending on the precautionary measures taken before or after February 28, 2021. And consequently, where the law does not distinguish, by interpreting a law we can not distinguish, according to the Latin adage "Ubi lex non distinguit, nec nos we must distinguish". So, the prosecutor's obligation is incumbent from the date of amending the Code of Criminal Procedure, respectively February 28, 2021, the date from which he must periodically check, but not later than 6 months during the criminal investigation, if the conditions for taking or maintaining measures are maintained insurers. To proceed in the opposite direction, ie not to fulfill this obligation within the imperative term, is equivalent to a violation of the principle of legality of the criminal process, with the consequence of the legal termination of the precautionary measure. Moreover, the changes brought by the new

[2] https://rm.coe.int/opinion-13-ccpe-2018-2ro-avizul-ccpe-nr-13-2018-independenta-responsab/1680931a7c

regulation provided by art. 250/2 of the Criminal Procedure Code, introduced this new obligation of the prosecutor, precisely because the precautionary measures are restrictive of rights and must be checked periodically during the criminal trial.[3]

Moreover, in the literature it is shown as regarding the moment from which the term of 6 months (for the prosecutor) or one year (for the judge of the preliminary chamber or the court), for the precautionary measures that were or will be taken after the date. of February 28, 2021 (the date of entry into force of the law), the term is calculated from the moment they were taken (for a precautionary measure taken on March 15, 2021, during the criminal investigation will have to be verified by the prosecutor no later than September 15, 2021).[4]

For the precautionary measures that were already in place at the time of the entry into force of Law no. 6/2021, as is our case, several opinions were expressed. In a first opinion, it was stated that, since no transitional provisions were laid down, being a procedural law, it is immediately applicable, which means that, if the deadline has already been met, the verification should be made by the immediately. In another opinion, the term runs from the date of entry into force of the law. Finally, in a third, more nuanced interpretation, for the preliminary ruling procedure or the trial phase, the verification should be made at the first time-limit set in that case. We agree with the first opinion, in the spirit of respecting the principle of legality.

In conclusion, if during the criminal investigation, if the 6-month period was already met, the prosecutor should proceed to verify the measure as soon as possible, depending on the complexity of the case and the burden it has. The judge of the preliminary chamber or the court should carry out this verification at the first deadline granted during the settlement of the case.

We cannot agree with the claim that the prosecutor did not have the obligation to register the order to maintain the seizure in the exit register of the prosecutor's office because the order was not sent by mail and

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[3] https://www.universuljuridic.ro/verificarea-masurilor-asiguratorii-in-cursul-procesului-penal/ - The rule is immediately applicable once it enters into force and is incidental in all cases pending before the courts and prosecutor's offices, where precautionary measures have been ordered. Therefore, insofar as 6 months have elapsed since the precautionary measure was taken, if the case is in the criminal investigation phase, or one year, if the case is in the preliminary chamber phase or in the trial phase, the prosecutor, the preliminary chamber judge, respectively the court, ex officio, must proceed to verify the precautionary measures. Following the verification, they will issue an ordinance, respectively a conclusion, by which they will maintain or lift the precautionary measure previously ordered.

[4] https://www.juridice.ro/729837/verificarea-periodica-a-masurilor-asiguratorii-in-cursul-procesului - penal.html.

therefore never left the institution, but was personally picked up by the criminal investigation body in order to carry out the measure. We mention that the legislator for the prosecutor provided special provisions in the matter, in the sense of disp. art. 270 paragraph 3 of the Criminal Procedure Code, the registration of the documents in the exit register, equivalent to obtaining the certain date of the document, in order to remove any doubt in the activity carried out by the prosecutors and in order not to generate abuses.

Only respecting the procedure described in art. 270 para. 3 of the Criminal Procedure Code, the prosecutor's act is considered to have been made on time, but on the contrary, the act is not on time, with the consequence of revoking the right to draw up the act or with the sanction of nullity of the act issued in violation of legal provisions. If this were not done, there would always be a doubt as to the date of release of the documents from the prosecutor's office. Of course, this obligation is not removed by the personal collection of documents by the criminal investigation bodies, this confirming once again the internal way of working of the prosecutor with the subordinate criminal investigation body. After entering the documents in the exit register, they must be handed over to other bodies and not otherwise. From this perspective, the acts and measures of the prosecutor are liable, as for any other party, for ineffectiveness, in the sense of not producing the legal effects for which they were issued or taken, the legislator placing the prosecutor on the same position with the parties in criminal proceedings, the principle of equality of arms specific to the trial phase, which in this component is also present during the criminal investigation.

In conclusion, respect for the principle of legality is an essential requirement in any criminal trial, a requirement deriving from both domestic regulations and the Universal Declaration of Human Rights, the European Convention on Human Rights and the Protocols to the European Convention on Human Rights, which aimed to maintain and strengthen the effectiveness of the defense of human rights and fundamental freedoms. Only in this way the criminal process will be able to confer the legal guarantees to those involved in each stage that composes it, this ensuring the right to a fair trial, according to art. 8 Cpp.

DECLINE OF PARENTAL RIGHTS AND EXERCISE OF PARENTAL AUTHORITY BY A SINGLE PARENT

Laura CETEAN-VOICULESCU[1]

Abstract

In the professional activity can appear different controversial aspects, non-unitary solutions, different interpretations of legal norms, gaps in normative acts, etc. In addition to personal reasons (professional training, employee mentalities, experience in professional activity) there is also a motivation related to the legal regulation in the field. Thus, sometimes the law is unclear, giving rise to interpretations, other times the law does not regulate a legal situation at all, or it regulates it incompletely or criticizable. As the practical activity of the civil status directorates / services revealed confusions between the situation of exercising parental authority by a single parent and the sanction of decline of parental rights, we propose an analysis of the differences between the two legal situations.

The confusion of the two legal situations: the exercise of parental authority by a single parent and the decline of a parent's parental rights derives from the recognition by law of similar effects: this is the case of consent to adoption, which is retained both as part of "residual rights" belonging to the parent who is removed from the exercise of parental rights, but also in the case of the parent deprived of parental rights.

Keywords: *parental authority, decline of parental rights, protection of a child in difficulty, parental rights, parental duties.*

The notion and content of parental authority

Following the entry into force of the Civil Code in 1st of October 2011, the regulation of parental authority has undergone a radical change. In the explanatory memorandum to the current Civil Code, parental authority provides the general framework for parental rights and duties regarding the person and property of the minor child, the exercise of parental authority and the decline of parental rights.

Parents have the right and duty to raise their child, ensuring a harmonious physical, mental, spiritual, moral, and social development.

Parental authority is exercised jointly and equally by both parents, in principle even if they are divorced.

The parental authority thus represents the set of rights and duties that a parent has regarding his child, both as regards the person of the child and as regards his property. Parental authority includes:

- Entrusting the child

[1] Associate Professor PhD"1 Decembrie 1918" University from Alba Iulia, Faculty of Law and Social Sciences.

- Child's growth
- Establishing the child's home
- Child maintenance
- Child supervision
- Cooperation with the child and respect for his or her intimate, private life and dignity.
- Informing the child about all acts and facts that could affect him and considering his opinion.
- Taking all necessary measures to realize the rights of their child.
- Cooperation with individuals and legal entities exercising responsibilities in the field of childcare, education, and training.
- Decisions regarding the child's religion, medical interventions (complex medical treatments or surgeries), the child's maintenance and education (type of education or professional training), the child's residence or administration of property, etc.

Parental authority is the power assigned to parents that allows them to decide on the maintenance, supervision, education, housing of the child.

Period of exercising parental authority

The child is under the authority of the parents until he or she reaches the age of majority, which is acquired either when he or she reaches the age of 18, or when he or she acquires full capacity in advance (by marriage or in court).

In principle, parental authority is exercised jointly, the child's parents being equal in rights and duties in the exercise of this power. Exceptionally, parental authority may be assigned to a single parent or even to a person other than the child's parents.

From the analysis of the definition presented above, it results that the relationship between parental authority and the exercise of parental rights and duties, respectively the decline of parental rights, is one from general to particular.

The parents are those who, according to the parental authority exercised, supervise the child, raise him, protect him, take care of his harmonious physical and mental development, make decisions regarding the child's health, religion, child maintenance, education, teaching and professional training of the child, and in cases provided by law, if on the background of alcohol or drug use, abuse, ill-treatment of a minor or injury to his/her higher interest, endanger life, health, harmonious physical or mental development, are deprived of parental rights.

The parental authority of the child born during the marriage appears with the birth of the child. In this situation, for both the mother and the

father (operating the presumption of paternity) the appearance of parental authority takes place at the birth of the child.

In the case of civil parentage, parental authority appears at the end of the adoption procedure.

In the case of a child born out of wedlock, parental authority arises at birth about the mother, and related to father, on the date of establishing paternity (by recognition or by action in establishing filiation with the father).

If the parents are divorced, the way parental authority is exercised is decided, even *ex officio*, by the guardianship court.

In the case of a child out of wedlock whose parentage has been established at the same time or successively with both parents, parental authority is exercised jointly and equally by the parents, if they live together. If the parents of the child out of wedlock do not live together, the manner of exercising parental authority shall be determined by the guardianship court, the divorce provisions being similarly applicable.

When unmarried parents live together, they are assimilated to married people in connection with the exercise of parental authority. This assimilation concerns only the personal and patrimonial relations between parents and children, and not related to other aspects, because cohabitation is not legally recognized in Romania. When the parents do not live together and there are disagreements between them regarding the manner of exercising parental authority, this is established by the guardianship court, the divorce provisions being similarly applicable.

Protection of bona fide third parties

The law also establishes a presumption that protects third parties in good faith (those who do not know that there is a circumstance that has led to the exercise of parental authority by a single parent). In relation to them, any of the parents, who alone performs a current act for the exercise of parental rights and duties, is presumed to have the consent of the other parent. Therefore, third parties, including state authorities, are not required to seek and obtain the consent of the other parent when one parent performs any routine act for the exercise of parental rights or duties, as the consent of the other parent is presumed. The current acts to which the presumption of the law refers are those acts for which the consent of both parents is not expressly requested.

As shown in the specialty literature, this regulation emphasizes the idea of the existence of a tacit mandate granted to the other parent, exclusively in the context in which one parent concludes a current act

necessary to exercise parental rights and duties, having as co-contractor a bona fide third party[2].

Freedom of parents to agree on the exercise of parental authority versus the decision-making power of the guardianship court

The court notified with a divorce application is competent to resolve the accessory and incidental requests, according to art. 919 Civil Procedure Code. Thus, in the field covered by this domain, the divorce court is also competent to decide on:

- Exercise of parental authority (if carried out jointly, according to the general rule, or by one of the parents, or even by a third party)
- The parents' contribution to the expenses for raising and educating the children (how the maintenance obligation of the child will be divided, how it will be fulfilled: in kind or in the form of a monetary equivalent, etc.)
- The child's home (if it will be established with the mother, father or a third party)
- The right of the parent to whom he / she does not live or who will not exercise parental authority to have personal relations with him/her.

If the two spouses in the divorce process have minor children resulting from the marriage or assimilated to those resulting from the marriage (born before the conclusion of the marriage or adopted by both spouses), even in the absence of an express request, the guardianship court will rule *ex officio* on the exercise of parental authority and on the contribution of parents to the expenses of raising and educating children.

The court notified with a request regarding the establishment of parentage is obliged to rule on the manner of exercising the parental authority, being applicable by similarity the provisions regarding divorce.

With the consent of the guardianship court, the parents can agree on the exercise of parental authority or on taking a measure to protect the child, if the best interests of the minor are respected and with his obedience. As I have shown in another article[3], the court is not bound by the agreement of the parents, it must even censor these agreements,

[2] For more details regarding the tacit mandate between the parents, see URECHE Lazar-Ciprian, MOLOMAN Bogdan Dumitru, PARENTAL AUTHORITY, Studia Jurisprudentia no. 1/2016, also published on sintact.ro.

[3] Laura Cetean-Voiculescu, "Exercising parental authority in the best interests of the child - the right of the guardianship court to censor the understanding of the parties", in *Revista de Dreptul Familiei*, supplement 2021, Universul Juridic Publishing House, Bucharest, pp. 32-41;

deciding in the best interests of the child, after hearing them, the child, considering the best interests of the child and the psychosocial investigation report.

With the pronouncement of the divorce, when the guardianship court finds that the best interests of the minor child presuppose that the parental authority be exercised jointly by both his parents, when the psychosocial investigation drawn up by the guardianship authority also shows that parental authority returns jointly to both parents, the general rule will be applied, respectively the exercise of joint parental authority by both parents, not requiring, as highlighted in the special literature[4], the consent of the parents.

The provisions regarding the hearing of the minor opinion are applicable, the one who has reached the age of 10 will be compulsorily heard, the one under the age of 10, will be able to be heard, when the court deems it necessary.

Rule and exceptions to the exercise of parental authority

The exercise of parental authority belongs, as a rule, to both parents who will exercise it together and equally.

The rule is established by the Civil Code which introduced the concept of parental authority (non-existent as such in the previous regulation contained in the Family Code), which encompasses the rights and duties of the person and property of the minor, and which belong equally to both parents.

The rule is also regulated in matters of divorce, art. 397 of the Civil Code stipulating that after divorce, "parental authority belongs jointly with both parents, unless the court decides otherwise". It is very clear from the wording of the legal norm that joint parental authority is the rule, the other situations having an obvious exceptional character, with all that results from this qualification (for example, exceptions are strictly interpretable, they cannot be extended to other situations than those expressly provided by law).

The rule of co-parenthood is in harmony with the provisions of Law no. 272/2004 on the protection and promotion of the rights of the child which states that the best interests of the child require the participation of both parents in their upbringing and education. When both parents exercise parental authority, they must reach an agreement on the child. If they fail to do so, the misunderstandings between them can be resolved judicially according to art. 486 of the Civil Code, which stipulates:

[4] G.C. Frențiu, Comments and doctrine (at art. 397), in the collective work "The new Civil Code. Comments. Doctrine and jurisprudence", Vol. I, art. 1-952, Hamangiu Publishing House, Bucharest, 2012, p. 572.

"Whenever there are disagreements between parents regarding the exercise of rights or the fulfilment of parental duties, the guardianship court, after hearing the parents and considering the conclusions of the report on psychosocial investigation, decides accordingly the best interests of the child. Listening to the child shall be compulsory, and the provisions of article 264 shall apply. "

If both parents exercise parental authority but do not live together, important decisions, such as the choice of education or training, complex medical treatment or surgery, the child's residence, or property management, are made only with the consent of both parents.

Both parents, regardless of whether they exercise parental authority, have the right to request and receive information about the child from schools, health facilities or any other institution that comes into contact with the child.

There are two categories of exceptions to the joint and equal exercise of parental authority by both parents:

- The situation of the exercise of parental authority by a single parent
- The situation of the exercise of parental authority by other persons.
- Parental authority will be exercised by a single parent, in the following circumstances:
- There are good reasons, given the best interests of the child. In this case, the other parent retains certain rights, called in the literature "residual rights"[5]: to watch over the child's upbringing and education and to consent to his adoption. These well-founded reasons are set out in part by Law 272/2004 on the protection and promotion of children's rights, art. 36: alcoholism, mental illness, drug addiction of the other parent, violence against the child or against the other parent, convictions for human trafficking offenses, drug trafficking, sex offenses, violent offenses, and any another reason related to the risks to the child, which would derive from the exercise by that parent of parental authority. According to art. 36 (6) of this law, which was introduced by Law 257/2013, “a parent may not waive parental authority, but may agree with the other parent on how to exercise parental authority, under the conditions of art. 506 of the Civil Code". This legislative amendment was introduced in order to enshrine the principle of common parental authority as a child's right, to put an end to controversies in legal doctrine and practice related to a parent's renunciation of authority, and to prevent situations abusive coercion of a parent to relinquish authority by coercion, money, or

[5] Marieta Avram, “Civil law. The Family ”, Hamangiu Publishing House, Bucharest, 2013, page 159;

other unlawful means, so that parental authority exercised by a single parent can be disposed of only by the court, for good cause related to the child's development. The parent cannot relinquish parental authority but can agree with the other parent on how to exercise parental authority.

- The exercise of parental authority is carried out by one parent, if the other is deceased, declared dead by court decision, placed under judicial interdiction, deprived of the exercise of parental rights or if, for any reason, is unable to express his will. In the presence of these circumstances, the authority is exercised by a single parent for obvious reasons, the guardianship court is no longer called to assess the validity of the reasons invoked in the exercise of parental authority by a single parent, respectively to assess the existence of the best interests of the child. The exercise of parental authority by one of the divorced parents, under the conditions of art. 398 of the Civil Code, should not be confused with the situations provided in art. 507 Civil Code, when the exercise of parental authority is done by one parent, because the other is deceased, declared dead by court decision, placed under interdiction, deprived of the exercise of parental rights, or, for any reason, is unable to -express his will. In all these hypotheses provided by art. 507, the exercise of parental authority is made only by one of the parents, without the other retaining any right, even if it is included under the name of “residual”, while in the case provided in art. 398 of the Civil Code, the exercise of parental authority is entrusted to one of the parents, not both jointly and equally, but in an unequal manner, because there is a "split", in the sense that parental rights are exercised by one of the parents, but the other parent does not completely lose the exercise of parental authority, because he retains certain "residual" rights, such as the right to watch over the child's upbringing and education and the right to consent to his adoption.
- The exercise of parental authority by other persons is done after the establishment of the alternative measure for child protection - placement, which can be done to a relative or another person / family or even to a care institution. In this case, the parental rights and duties pass from the parent to these persons, but in a split way. Parental rights and duties regarding the person, respectively regarding the child's property. The first category of rights and duties will revert to the person to whom the child is placed, and those relating to the child's property will revert to both parents or one of them, according to the decision of the guardianship court.

> If a minor is deprived of the protection of both parents, guardianship is established, in which case parental authority will be exercised by the guardian. If guardianship is exercised by two spouses, they shall be jointly responsible for the exercise of guardianship duties, the provisions on parental authority being applicable accordingly.

The exercise of parental authority by a single parent lead, regarding the legal acts of the minor, to the representation / approval / assistance of the minor by this parent. For example, art. 272 The Civil Code, which regulates the minimum age for marriage, stipulates the legal norm according to which the consent of the parent exercising parental authority is sufficient for the validity of the early marriage, not being necessary the consent of the other parent the impossibility of manifesting his will. On the contrary, if both parents are alive, could express their will and exercise joint and equal parental authority, it is necessary to approve both at the conclusion of the marriage before the age of 18 by their minor child.

The exercise of parental authority by one parent should not be confused with the situation of separation of a child from a parent by establishing the child's residence with the other parent. The child's home is with the parent where he or she lives permanently. If the child lived with both parents, they would decide what the child's home will be after the separation (whether they divorced or were not married but lived together and separated). If the parents do not agree, the child's home will be established by the court of guardianship, according to the best interests of the child, to one of the parents or even to another person, according to the rules regarding placement.

The rights of the parent separated from the child by establishing his residence with the other parent or another person, but who still exercise parental authority over the child, are wider than the "residual rights" belonging to the parent who does not exercise parental authority, established exclusively by the other parent. or a third party. This time, the parent / parents have the right to have personal ties with the child, not just to watch over the child's upbringing and education or to give his consent to his adoption. Both parents will represent / approve the documents / will assist him / her, together and equally.

All the analysed measures are mutable, they can change if the circumstances underlying their taking have changed, by the decision of the guardianship court, at the request of the parents, a relative, the child, the care institution, the specialized public institution for the protection of the child or the prosecutor.

Peculiarities of the forfeiture of parental rights

Parental rights may be withdrawn from the parent, either as a specific sanction of family law or as a complementary punishment for the prohibition of the exercise of certain rights in criminal matters.

According to art. 67 The Criminal Code, the complementary punishment of prohibition of parental rights can be applied if the main punishment established is imprisonment or a fine[6] and the court finds that, given the nature and gravity of the crime, the circumstances of the case and the person of the offender, this punishment is necessary. The application of the penalty of prohibition of certain rights is mandatory when the law provides for this punishment for the crime committed.

The revocation of the parent's parental rights is within the competence of the same court of guardianship. Referral to the court by the public administration authorities with responsibilities in the field of child protection.

Cases in which the court decides to deprive the parent of parental rights are endangering the life, health, or development of the child through ill-treatment, alcohol or narcotics, abusive behaviour, gross negligence in fulfilling parental obligations or serious harm to the child. The best interests of the child.

The public administration authorities with responsibilities in the field of child protection will draw up the psychosocial investigation report.

The forfeiture of the exercise of parental rights is total and extends to all children born on the date of the judgment, as a rule, but the court may order the forfeiture only of certain parental rights or certain children, but only if, in this way, they are not endangered. Raising, educating, teaching, and training children.

This forfeiture must be regarded as one of the parental rights, not out of obligations, the law expressly providing that forfeiture of the exercise of parental rights does not relieve the parent of his obligation to provide maintenance for the child.

If, as a result of the decay, the child remains without protection, guardianship will be instituted.

The parent deprived of parental rights may request the guardianship court to restore the exercise of these rights.

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[6] See also the HCCJ Decision admitting the appeal in the interest of the law, formulated by the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice and, consequently: in the unitary interpretation and application of the provisions of art. 65 para. 3 of the Criminal Code, establishes that: the application of accessory punishments consisting in the prohibition of the rights provided in art. 66 para. 1 lit. a and d of the Criminal Code (the prohibition of parental rights is regulated in letter e), the exercise of which was prohibited by the court as a complementary punishment, is not possible in the case of ordering solutions to the penalty of a fine.

During the period of forfeiture of parental rights, the personal ties of the parent in question with the child cease, unlike the situation of exercising parental authority by one parent, when the other retains the right to watch over the child's upbringing and education. These rights cannot be exercised by the deceased parent until the exercise of parental rights is restored, due to the fact that the reasons for revocation are different, and much more serious than the exercise of parental rights by a single parent (endangering the life, health and development of the child, versus even an objective reason). By way of exception, if the parent has applied to the court for reconsideration of the exercise of parental rights, the court may allow him or her to have personal ties with the child if he or she considers that it is in the best interests of the child.

Regarding the right to consent to the adoption of their minor child, this right shall be retained both in the person of the parent who has been removed from the exercise of parental authority and of the parent deprived of parental rights, on the grounds that such child protection measures may suffer. Changes: if the circumstances considered when establishing the measure of exercising parental authority by a single parent have changed, respectively if the fallen parent is restored to parental rights.

The rules regarding the obligation to maintain the child by both parents remain unchanged, and the parent removed from the exercise of parental authority, as well as the parent to whom the complementary punishment of prohibition of parental rights was applied, respectively the parent deprived of parental rights still have the obligation to contribute to the maintenance of the minor child.

Parental authority in the case of legal relations with an element of foreignness

According to the provisions of the Civil Code on legal relations under private international law, in matters of parental authority and child protection, the law provided for in the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Child Protection Measures in The Hague on October 17, 1996, ratified by Law no. 361/2007.

These applicable legal rules make it easier to exercise the rights, in particular where the holders of parental responsibility and the child do not all live in the same country.

Thus, in the event of a dispute between the holders of this right - most often, it is the parents - the rules are those that determine which court will be competent to deal with the case: the purpose is mainly to avoid, if both parents live in different countries, for each of them to address the court in his country and for two judgments to be handed down

for the same case. The principle is that the competent court is that of the state in which the child has his habitual residence.

In addition, to ensure the practical application of the judgment in the other countries of the European Union, a mechanism for the recognition and enforcement of judgments has been provided, which facilitates the exercise of parental responsibility by its holders. In particular, the right of a parent to visit will be easily recognized in another Member State of the European Union, to foster relations between the child and both parents.

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2. Law no. 272/2004 on the protection and promotion of children's rights, published in the OFFICIAL GAZETTE no. 159 of March 5, 2014
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4. Marieta Avram, “Civil law. The Family”, Hamangiu Publishing House, Bucharest, 2013, page 159.
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PERSONS ENTITLED TO APPLY FOR THE RELEASE OF DEATH CERTIFICATES

Laura CETEAN-VOICULESCU[1]

Abstract

Public officials are often called upon to apply legal rules in their professional work, but these are unclear, incomplete, or absent. Regarding civil status documents, especially death certificates, the question arises as to who is entitled to have them issued. However, the law does not specify who these categories of persons are, what kind of entitlement they have, what kind of interest must be justified and other issues arising from the poor wording of the legal rule, so that divergent solutions may arise in professional work.

Keywords: *death certificate, civil status document, duplicate, entitled person, issuance of civil status documents*

Legal regulation:

The legal rule in the Act on Civil Status Documents (Act No 119/1996) governing the issue of death certificates is contained in Article 10, according to which death certificates are issued to family members or other entitled persons.

An exception to this rule is that death certificates may also be issued to other persons authorised by special power of attorney and to lawyers authorised by the entitled persons or their legal representatives based on a document of power of attorney.

The provisions of Law No 119/1996 must be corroborated with those contained in the Methodological Norms (Methodology on the uniform application of the provisions on civil status, approved by Government Decision No 64/2011, which was amended and supplemented by Decision No 913 of 10 December 2019). Chapter VIII entitled Issuance of civil status certificates provides in Article 147 that they "shall be issued, upon request, to the person entitled, in person, by a proxy with special power of attorney, authenticated in accordance with the provisions of Article 72 para. (6), on the basis of the records and entries in the civil status registers, including those kept by parishes, town halls and the National Archives".

[1] Associate Proferssor PhD., ”1 Decembrie 1918” University from Alba Iulia, Faculty of Law and Social Sciences.

General rules on the issue of civil status documents

Civil status certificates are issued to persons entitled to them when a document is drawn up in the civil status registers - of birth, marriage or death - or subsequently on the basis of an application submitted by the holder or other entitled persons.

Persons who are domiciled in other localities in Romania than those where the civil status registers are kept and who cannot travel in person to obtain the civil status certificates may submit the application to the town hall in whose area they are domiciled or reside, indicating the town hall where the document in question is located and the civil status data for its identification.

Arrested or detained persons shall apply to the civil status office in whose district the place of detention is located for the issue of civil status certificates, through the administration of the place of detention, which shall also certify the identity of the applicant.

Requirement of entitlement or interest

It should be noted that the general rule for all civil-status documents is that they are issued only to persons entitled to them on request. However, the Methodology also contains a special rule, expressly relating to death certificates, in Article 160, according to which they are issued to: family members or other persons entitled.

The questions arising from the analysis of these two legal rules could be: which categories of relatives are entitled, i.e. close relatives or any category of relatives who can prove the existence of a family relationship with the deceased; must proof of entitlement be provided or must an interest be justified, must proof of entitlement to the death certificate be provided or must justification of interest be provided only by other persons entitled or by members of the deceased's family; how is proof of a justified interest or entitlement to be provided; how is it assessed by the civil servant whether or not a particular interest, claimed by a natural or legal person, is justified? These are questions which the law does not answer, which is why divergent solutions may arise in professional activity.

We note that the legal rule on who is issued with a death certificate is unclear. There are two categories of persons:

- Family members
- Other entitled persons.

We therefore deduce that those entitled to be issued with a death certificate are family members, but also persons other than family members.

If the law does not specify to which category of family members the legal rule refers, nor which persons are entitled, the civil servant will issue the death certificate to those persons he considers entitled.

In order to determine the scope of the persons entitled, we start by analysing this word: entitled. The person entitled is the person who can justify a right or interest. Therefore, in order to find out who the entitled persons are, we need to find out what rights a person holding a death certificate obtains. This question needs to be answered in order to find a rule that we can apply by analogy.

The quickest thing to think of is the death grant and the survivor's pension or funeral grant. Why? Because they are rights for the exercise of which the holders - entitled persons or their authorised representatives by authenticated power of attorney - must submit an application accompanied by a death certificate.

The deceased's close relatives do not even need to prove their interest, as in their case it is obvious, both from an ethical, moral, and social point of view - they are the persons closest to the deceased - and from the point of view of the numerous legal rules governing the rights of the surviving spouse or the heirs of a person. For example, in the event of an employee's death, the salary rights due up to the date of death are paid, in order, to the surviving spouse, the deceased's adult children or the deceased's parents. If none of these persons exist, the salary rights are paid to other heirs under the conditions of ordinary law[2]. In addition, employees in the public administration, autonomous companies with special characteristics and budgetary units are entitled to paid leave in the event of special family events, including the death of the spouse or a relative up to the second degree of the employee (3 days)[3].

For employees in the private sector, such special paid days off are granted in accordance with the company's internal regulations or the collective labour agreement applicable at unit level. Depending on this, the employee will have to complete a request for special leave. In addition to completing this request, a copy of the certificate proving the family event in question, in the case under consideration here - the death certificate - must be attached. Obviously, the list of examples could go on.

Of the family members who would be entitled to apply for a death certificate, it is those who are entitled to inherit. The death certificate is one of the documents required at the notary's office to discuss the inheritance. According to the Civil Code, the right to inherit is vested:

- The surviving spouse

[2] According to Article 167 paragraph. 2 Labour Code.

[3] DECISION No.250 of 8 May 1992 on rest leave and other leave of employees in the public administration, in autonomous special purpose companies and in budgetary units.

- Relatives in the direct line - ascendants or descendants, regardless of degree, but in order of degree
- Relatives in the collateral line - up to and including the fourth degree.

The order in which these persons come to inherit is given by the classes of heirs, except for the surviving spouse, who comes to inherit in competition with any class of heirs.

The testator can also justify such an interest, as a duplicate death certificate is required for the probate debate.

In the absence of legal or testamentary heirs, the inheritance becomes vacant and reverts to the municipality, town or city in whose territorial area the property was located at the time of the inheritance.

Any of these persons can therefore justify an interest in the estate and are therefore entitled to request the death certificate.

According to Article 48 of Law 39/2020[4] on the pension system and other social security rights of notaries public in Romania, the persons who benefit from the death grant in the event of the death of the insured or pensioner notary public are (one person):

- Surviving spouse
- Child
- Parent
- Their legal representative
- Any other person who proves that he/she has borne the expenses arising from the death.

According to Article 83 of Law No. 263/2010 on the unified public pension system, the survivor's pension is due to the children and the surviving spouse, if the deceased breadwinner was a pensioner or met the conditions for obtaining a pension.

But the death certificate is required both for persons entitled to these pensions and for persons entitled to claim the pension on behalf of another person. The pension is granted at the request of the person entitled, his guardian or curator, or the person to whom a minor child has been entrusted or placed in care, and the request must be submitted in person or by a person appointed by special power of attorney.

According to Article 121 in conjunction with Article 125 of the Pensions Act, in the event of the death of the insured person or pensioner, only one person shall be entitled to death grants, namely the person who

[4] Law no. 39/2020 on the pension system and other social security rights of notaries public in Romania, published in the Official Gazette no. 281/3.04.2020.

provides proof that he/she has borne the expenses incurred as a result of the death, which may be the surviving spouse, child, parent, guardian, curator or, failing that, any person who provides such proof.

Which of the persons entitled will be issued with the death certificate?

As there is no hierarchy in the legislation, the rule of the order of arrival of the beneficiaries will apply[5].

If a person entitled to apply for a death certificate presents themselves after the death certificate has already been issued, a duplicate will be issued.

There was even discussion about the possibility for any person - natural or legal - to justify an interest. For example, it has been said that a representative of a bank or a creditor institution can justify such an interest if the deceased was in debt to it, in order to use it for the succession proceedings.

The phrase "other persons entitled" must also include the following persons representing incapable persons:

- the parents of the child up to the age of 14
- legal representatives in the case of those placed under a court injunction.

The person who has contracted to take care of the funeral or the executor of the will is also an entitled person.

Persons who have a maintenance contract, life annuity contract or sale and purchase contract with a life usufruct clause may also have an interest in obtaining a death certificate.

Justification of entitlement or interest

We note that the list of persons who may have an interest or are entitled to apply for the death certificate is quite extensive. However, this entitlement or interest must be justified by documents to be submitted by the person requesting the civil status document.

The application contains information on the degree of kinship with the holder of the certificate and the reason for requesting the certificate. In practice, there are even different applications for the issue of a death certificate and for the issue of a death certificate by proxy.

Death certificates are issued on the basis of death certificates on the basis of proof of family relationship, proof of interest, special power of attorney or power of attorney, as appropriate.

[5] For example, on the official website of the Local Community Public Service for Personal Records, Municipality of Oradea, it is mentioned under the heading "Issuance of certificate, fees", that the rule of service is carried out according to the principle "first come = first served", namely the order of arrival of the relatives (https://new.evp-oradea.ro/decese/inregistarea-decesului);

Both on receipt of the application and on issue of the civil status certificate, the civil status officer is obliged to verify the identity of the person who applied for it, on the basis of the identity card. In the case where the S.P.C.L.E.P. that holds the civil status certificate is the same as the one in whose district the person is domiciled, the person shall submit the application for both the civil status certificate and the identity card to the personal records structure of the S.P.C.L.E.P. The application for the issuance of the civil status certificate shall be forwarded to the civil status structure for competent processing. The civil status certificate, sent within 3 days to the S.P.C.L.E.P.'s personnel registration structure, will be handed to the applicant together with the identity card. In all cases, the number and number of the document by which the declarant/applicant was identified shall be written on the application and on the side of the civil status certificate.

In the absence of proof of entitlement, the civil servant will refuse to issue the death certificate, in which case the applicant will have recourse to the courts.

We illustrate with the following case[6] in which the court rejected the plaintiff's request to oblige the defendant to issue the death certificate on the grounds of lack of justification of entitlement:

The civil case of the plaintiff PV against the defendant UATB, concerning the obligation to do. The following appeared on the roll call in open court: the applicant, assisted by lawyer NG, and legal adviser TD for the defendant. The proceedings are complete.

The documents and the file were read out, after which:

The applicant's representative submits the hearing notes to the file and states that she maintains the head of claim concerning the issue of the death certificate for the deceased PC in order for the applicant to benefit from the burial aid, and in the evidence she requests the admission of testimonial evidence to prove that the applicant took care of the deceased and that the burial expenses were borne by the applicant.

The defendant's representative opposes the admission of the witness evidence.

The Court considers that the testimonial evidence requested by the applicant's representative is not useful evidence in the case in relation to the subject-matter of the application and therefore rejects it.

The applicant's representative and the defendant's representative stated that they had no further requests and asked for the case to be heard.

[6] CIVIL JUDGMENT No. 993/2012, PUBLIC SITTING OF 19.09.2012, Court B, Hunedoara County, published on https://sintact.ro/#/jurisprudence/526198433/1/decizie-nr-993-2012-din-19-sept-2012-judecatoria-brad-obligatie-de-a-face-civil.

The Court finds that the case is ready for judgment and gives the floor to the parties.

The applicant's representative requests that the action be allowed, that the defendant be ordered to issue a death certificate for the deceased PC in order for the applicant to obtain burial assistance, since the applicant has borne all the funeral expenses, with costs.

The defendant's representative requests that the action be dismissed, since the applicant has not proved that she is the person entitled to the funeral allowance and that she is the heir of the deceased PC.

JUDGMENT,

In the present civil case, finds:

By civil action registered with this court under no. XXXXXXX/18.05.2012 the plaintiff PV sued the defendant UATB, requesting that by the judgment to be delivered, the defendant be ordered to issue the plaintiff with a death certificate after the deceased PC.

In the grounds of the action, it was stated that the applicant had cared for and buried the deceased PC, who died on 5 April 2012, but had failed to draw up any legal document with him to prove that she had cared for him or that she was the beneficiary of the property remaining after him, that the applicant had buried him, spending the coffin and other funeral expenses, but could not receive the funeral allowance, since the defendant had not issued him with a death certificate.

The defendant, by way of a statement of defence, requested that the action be dismissed, on the grounds that on 26 April 2012 the applicant submitted an application to the Municipality of B - Civil Status, requesting the issue of a death certificate for the deceased PC, but was informed that she had not provided proof of her status as an entitled person within the meaning of the law.

Having analysed the documents and the file, the Court notes the following:

On 23.04.2012, the claimant PV addressed a request to the Municipality of B, requesting the issuance of the death certificate for the named PC, who died on 05.04.2012, to which request she was informed, with address no. xxxxx/27.04.2012 (tab 5) to the effect that the requested certificate could not be issued to her, as she did not justify the quality of "entitled person".

It is noted that, according to Article 147 of HGR no. 64 of 26 January 2011 for the approval of the Methodology on the uniform application of the provisions on civil status (1) Civil status certificates are issued, upon request, to the entitled person, personally, through a proxy with special power of attorney, authenticated in accordance with the provisions of Article 72 para. (6), on the basis of the records and entries

entered in the civil status registers, including the registers drawn up by parishes, those held by town halls and the National Archives.

And, according to Article 160 of the same normative act (1) The death certificate is issued to family members or other entitled persons.

However, from the very content of the present action, it appears that the plaintiff, although she claims to have voluntarily borne some expenses for the burial of the deceased - does not have any document justifying her status as a person entitled (maintenance contract, will - since she is not related to the deceased), to be issued with the death certificate for the deceased PC.

Therefore, in view of the above-mentioned legal provisions, as well as the provisions of Law 119/1996 republished, the present civil action is dismissed as unfounded.

In view of the provisions of Article 274 of the Code of Civil Procedure, the costs requested by the applicant will not be awarded.

FOR THESE REASONS, IN ACCORDANCE WITH THE LAW, RESOLVES: To dismiss the civil action brought by the plaintiff PV, residing in __, _____, Hunedoara County, against the defendant UATB, residing in B____, ____, Hunedoara County, having as object the issue of a document. No costs between the parties. With right of appeal within 15 days of communication. Delivered in public sitting on 19.09.2012.

Competence to issue the death certificate

The death certificate is a civil status document which is issued by the local community public service of personal records based on the death certificate drawn up in the corresponding civil status register, upon the death of the natural person.

If the death has already been registered and a death certificate has already been issued to a family member, interested persons may apply to the civil status service of the town hall for a duplicate to be issued.

A duplicate death certificate is issued on request to any family member or other entitled person who must enclose supporting documents with the request.

The request for a duplicate assumes that the death has already been registered and a death certificate has already been issued.

The application shall be submitted to the local community public service for the registration of persons or, where appropriate, to the town hall of the administrative-territorial unit holding the civil status register or of the applicant's domicile or residence.

Requests for the issuance of civil status certificates to foreign citizens whose civil status acts or facts occurred and were registered in Romania, as well as to Romanian citizens domiciled or residing abroad shall be

processed by the C.L.P.S. or, where applicable, by the town hall of the administrative-territorial unit which keeps the respective registers.

Persons who are domiciled in localities other than those in which the civil status registers are kept and who are unable to travel in person to obtain civil status certificates may submit their application to the S.P.C.L.E.P. or, where appropriate, to the town hall of the administrative-territorial unit within whose radius they are domiciled or resident, indicating the administrative-territorial unit where the document in question is located and the civil status data for its identification.

Conclusions

The persons entitled to apply for the issue of death certificates or duplicates thereof are primarily the relatives entitled to inherit, but other family members or strangers may also have an interest. Since the law does not specify who these persons are, any person who can show an interest may apply for the death certificate or a duplicate thereof. These persons will submit documentary evidence of their interest with their application for the death certificate and the civil servant will assess whether this interest is justified by issuing or refusing to issue the death certificate or its duplicate.

References:

1. Law 119/1996
2. Labour Code
3. Government Decision No 64/2011 approving the Methodology on the uniform application of civil status provisions
4. DECISION No 913 of 10 December 2019 on amending and supplementing the Methodology on the uniform application of civil status provisions, approved by Government Decision No 64/2011
5. Civil Code
6. Law 39/2020 on the pension system and other social security rights of notaries public in Romania
7. Law No 263/2010 on the unitary system of public pensions
8. DECISION No 250 of 8 May 1992 on rest leave and other leave for employees in the public administration, special autonomous regions, and budgetary units.
9. CIVIL JUDGMENT No. 993/2012, PUBLIC SITTING OF 19.09.2012, Court B, Hunedoara County, published on https://sintact.ro/#/jurisprudence/5261984 33/ 1/decizie-nr-993-2012-din-19-sept-2012-judecatoria-brad-obligatie-de-a-face-civil.
10. Law no. 39/2020 on the pension system and other social security rights of notaries public in Romania, published in the Official Gazette no. 281/3.04.2020.

CONSEQUENCES OF NON-DECLARATION OF THE CHILD'S BIRTH BY HIS MINOR PARENT

Alexandra TUDOR-TODORAN[1]

Abstract

The timing of the child's declaration by the parent is essential both for the minor himself and for his mother and father and also for establishing his place in society of which he is a part. In this article, we presented the situation of declaring the child, otherwise, the legal of not registering a child in the National Register of Persons, depriving the child of all his civil rights.

Keywords: *consequences, non-declaration, child, parents, birth certificate, National Register of Persons, civil rights*

With the birth of a child, the parent's life takes on a different shape. New horizons are automatically opening up, in which the role of decision-making is crucial. From that moment, the child's best interests take precedence, all other aspects being to complete the set of rights and duties that are limited to the notion of parental authority. The protection of the minor, first of all, is done through his parents[2].

The rights and duties that form the content of parental authority concern, on the one hand, the person of the child and on the other hand, his goods, as stated in art. 483 para (1) Civil Code[3].

The doctrine[4] stated that the distinction between the two levels in which parental authority is exercised is relevant for exceptional situations in which parental authority is delegated based on a court decision to another person, natural or legal.

The rights of the minor parent are established in the provisions of art. 490 Civil Code. Depending on his age, the minor parent can exercise his rights towards his child in this way:

- the minor parent under the age of 14 - cannot exercise parental authority either over the person or over the child's property[5];

[1] Teacing Assistant PhD.

[2] As stated in the provisions of art. 106 paragraph (1) thesis I Civil Code.

[3] Art. 483 paragraph (1) of the Civil Code provides: "Parental authority is the set of rights and duties that concern both the person and the child's property and belong equally to both parents".

[4] Adina R. Motica, „Fişa nr. 26. Categorii de drepturi şi îndatoriri părinteşti", in Emese Florian, Marieta Avram (coord.), *Fişe de drept civil. Dreptul familiei*, Bucureşti, Editura Universul Juridic, 2018, p. 236.

[5] Because it has no exercise capacity.

- the minor parent who is between 14 and 18 years old - can exercise parental authority only over the person of the child[6], the rights and duties regarding the child's property, in this case, belongs either to the other parent [7], or to the guardian or another person, in accordance with the law.
- the parent over 16 years of age and is married or emancipated - acquires a total exercise capacity, thus being able to exercise his parental rights and duties both concerning the person and the property of his child.

According to art. 417 Civil Code, the unmarried minor parent can recognize his child alone if he has discernment at the time of recognition. Proof of discernment at the time of recognition is made by performing psychiatric expertise.

The recognition can be made by declaration to the civil status service, by an authentic document[8] or, by will, as stated in the provisions of art. 416 para (1) Civil Code.

The recognition of filiation is irrevocable, whatever form it takes.

In accordance with those expressed in the doctrine[9], affiliation recognition[10] it is a personal act of the person claiming to be the mother or, as the case may be, the child's father. The validity of the manifestation of will is conditioned only by the existence of the conscious will, i.e. of the discernment at the moment of recognition, the stage of the capacity of exercise being irrelevant. As such, the unmarried minor, who cannot exercise or has limited capacity to exercise, may recognize his child personally and alone, without the need for any consent. Regarding this

[6] Because it has limited exercise capacity.

[7] In the context in which she/he is major (considered being adult).

[8] According to the provisions of art. 269 of the New Code of Civil Procedure, the authentic document is the document drawn up and authenticated by a public authority, by the notary public or by another person invested by the state with public authority, in the form and conditions established by law. The authenticity of the document refers to the establishment of the identity of the parties, the expression of their consent regarding the content, their signature, and the document's date. Also, authentic is any other document issued by a public authority and to which the law confers this character.

[9] Flavius-Antoniu Baias, Eugen Chelaru, Rodica Constantinovici, Ioan Macovei (coord.), *Noul Cod civil. Comentariu pe articole*, Bucureşti, Editura C.H.Beck, 2014, p. 505.

[10] In the doctrine, a distinction was made between "proof of parentage" and "establishment of parentage". Thus, in order to consider the established parentage, it must have previously been proved, by the means of proof permitted by law, that there is any objective link between the child and his mother, arising from the fact of the birth and the child's identity. Neither the birth certificate nor the court decision can be issued without this prior proof. However, it is true that, once the birth certificate has been issued or the court decision has been adopted, they also constitute evidence of the affiliation. For more details see Al. Bacaci, V-C Dumitrache, C-C Hageanu, *Dreptul familiei în reglementarea Noului Cod Civil*, Bucureşti, Editura C.H.Beck 2012, p. 186.

aspect, it is essential to emphasize that the doctrinaires[11] appreciate that the provision of art. 417 of the Civil Code is of strict interpretation, so that it cannot be extended to the incapable person in a moment of lucidity since the legal text explicitly refers to the minor author of the recognition.

It has been claimed[12] that maternal parentage results from the material fact of the child's birth by a certain woman. Two elements of fact are of interest: the fact that a certain woman gave birth to a child; the identity of the child that claims the maternity with that of the child delivered of that woman, that is, the fact that this particular child and no other was delivered of that woman.

The paternity or legal connection between the child and his father results from the child's procreation. The married or unmarried status of the mother, at the date of birth or conception of the child, is the decisive criterion of the way its paternal filiation is established (ascertained).

According to art. 1 of Law no. 119/1996 regarding the civil status documents[13], civil status documents are authentic documents proving the birth, marriage or death of a person. They are drawn up in the interest of the state and the individual and serve to know the number and structure of the population, the demographic situation, to defend the fundamental rights and freedoms of citizens.

The legislator defined marital status as the person's right to individualize, in the family, in society, through the strictly personal qualities derived from marital status acts and deeds[14]. The doctrine[15] stated that this definition of marital status refers, first of all, to the legal nature of non-patrimonial personal law of this means of individualization of the natural person. However, at the same time, the complex content of the marital status is highlighted, which consists of a sum of personal qualities[16]. As a subjective right of individualization, marital status confers the following prerogatives on any natural person:

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[11] Coord. Flavius-Antoniu Baias, Eugen Chelaru, Rodica Constantinovici, Ioan Macovei, *Noul Cod civil. Comentariu pe articole*, ediția a doua, revizuită şi adăugită, Bucureşti, Editura C.H.Beck, 2014, p. 505.

[12] Emese Florian, *Dreptul familiei. Căsătoria. Regimuri matrimoniale. Filiaţia*, Bucureşti,Editura C.H.Beck, 2018, p. 369.

[13] Law no. 119 of 16 October 1996 (republished) regarding the civil status documents, published in Off. M. Nr. 339 of 18 May 2012. Available on-line at LEGE (A) 119 16/10/1996 - Portal Legislativ (just.ro), site accessed on 29.09.2021, at 12:56 AM.

[14] Article 98 Civil Code.

[15] Flavius-Antoniu Baias, Eugen Chelaru, Rodica Constantinovici, Ioan Macovei (coord.), *Noul Cod civil. Comentariu pe articole*, p. 118.

[16] The author states that the content of marital status, as a sum of personal qualities, is determined by significant events that occur in human life: legal facts (especially birth and death) and legal acts (recognition of parentage, adoption, marriage, court decisions settles civil status actions). It is the law that determines the personal qualities that are part of marital status: born out of wedlock, out

- ✓ the possibility to individualize, in the family and the society, through his marital status.
- ✓ the possibility to claim to be individualized, by others, through his marital status.
- ✓ the possibility to resort, in case of violation of this right, to the force of coercion of the state.

It was stated[17] that "use of marital status" or "state possession" is the legal status resulting from the cumulative meeting of three elements: nomen (means individualization by bearing the name corresponding to the marital status claimed by a natural person), tractatus (consists of treatment, consideration by those close to him, as the person to whom the civil status used belongs), fame (means the recognition, in the family and society, as the person to whom the marital status belongs).

It was also stated[18] that the use of marital status proves both the fact of birth and the fact of identity[19].

According to the provisions contained in art. 10 paragraphs (1) and (2) of Law no. 119/1996, the birth certificate is issued on the basis of civil status documents to the holders or their legal representatives. If the birth certificate is not released on its elaboration date, its release is made at the written request of the entitled person.

After birth, the child has the right to establish and preserve his identity, according to art. 9 subsection (1) of Law no. 272/2004 on the protection and promotion of children's rights[20]. As stated by the legislator in the provisions of paragraph (2) art. 9 of the law mentioned above, the child is registered immediately after birth and has from this date, the right to a name, the right to acquire citizenship and, if possible, to know his parents and to be cared for, raised and educated by them. According to the provisions of art. 59 Civil Code, any person has the right to name, domicile[21], residence, and marital status acquired under the law.

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of wedlock or from unknown parents; age; sex; unmarried; married; divorced etc. For more details see (coord) Flavius-Antoniu Baias, Eugen Chelaru, Rodica Constantinovici, Ioan Macovei, *Noul Cod civil. Comentariu pe articole*, p. 118.

[17] Gheorghe Beleiu, *Drept civil român*. Introducere în dreptul civil. Subiectele dreptului civil, ediție revăzută și adăugită, București, Casa de editură și presă „Șansa" SRL, 1995, p. 336.

[18] Ion P. Filipescu, Andrei I Filipescu, *Tratat de dreptul familiei*, ediția a VII-a revăzută și completată. In elaborating this paper, the doctrine, legislation and jurisprudence published until 1.09.2002 were taken into account, București, Editura ALL Beck, 2002, p. 299.

[19] For a similar opinion, see Emese Florian, *Dreptul familiei. Căsătoria. Regimuri matrimoniale. Filiaţia,* ediția 6 – revizuită și adăugită, p. 379.

[20] Law no. 272 of 21 June 2004 on the protection and promotion of children's rights (republished), published in M. Of. Nr. 159 of 5 March 2014. Available on-line at LEGE (R) 272 21/06/2004 - Portal Legislativ (just.ro), site accessed on 29.09.2021, at 9:07 PM.

[21] Similar the name situation, the domicile is an identifying attribute of the natural person, which has the legal nature of non-patrimonial personal right.

It has been stated in the doctrine[22] that the way of establishing the affiliation of a person determines the way he will acquire his name, and the name can contribute to proving the affiliation since he is a constituent element of state possession, which can be proof of affiliation.

If a child is found to be illegally deprived of the constitutive elements of his identity or of some of them, public institutions and authorities are obliged to take urgently all necessary measures in order to restore the child's identity. Thus, the mayor of the locality where the birth is registered is the one who, by disposition, will establish the surname and the first name of the child[23].

If there is no medical certificate confirming the child's birth, forensic expertise is required regarding the date of birth, in the format year, month, day and sex of the person. In the case of the child who does not have the established parentage towards any of the parents, the attribution of the surname and the first name cannot be conditioned by this element of the civil status, according to the provisions of art. 84 para (3) Civil Code[24].

Art. 28 of GD. no. 64/2011[25], orders that the birth registration is made by the civil status structure within Local Community Public Service For The Registration of Persons or, as the case may be, by the civil status officer within the mayor's office of the administrative-territorial unit in whose area the event occurred, respectively the birth of the child. It is also provided that both the live child and the stillborn child are registered in the birth register. In the case of the twins' registration and the Siamese's registration, the registration is made by drawing up the birth certificate, separately, for each child.

What can be observed from the legal regulations is that the deadline for declaring the birth of the child[26] it is different, depending on his condition at birth, respectively if he is born alive or dead. If he is born alive, two situations are representative:

- if he is born alive and is alive, the deadline for declaring and registering the birth is 15 days from the date of birth;

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[22] Eugen Chelaru, *Drept civil. Persoanele,* Bucureşti, Editura C.H.Beck, 2020, pp. 102-103.

[23] Afterward, the mayor's disposition can be challenged in court.

[24] Art. 84 paragraph (3) of the Civil Code provides: "The last name and first name of the child found, born of unknown parents, as well as those of the child who is abandoned by the mother in the hospital, and his identity was not established within the term provided by law, are established by order of the mayor of the commune, city, municipality or sector of the municipality of Bucharest in whose territorial area the child was found or, as the case may be, he was found to have left, in accordance with the law".

[25] Decision no. 64 of 26 January 2011 for the approval of the Methodology on the uniform application of the provisions on civil status, published in Off. M. No. 151 of 2 March 2011. Available on-line at HG 64 26/01/2011 - Portal Legislativ (just.ro), site accessed on 28.09.2021, at 7:35 PM.

[26] The deadline for declaring the birth of the child is calculated from the date of his birth.

- if the child is born alive and dies within 15 days, the period for declaring and registering the child's birth is 24 hours from the date of death.

In the case of a stillborn child, the deadline for declaration and registration is 3 days from the date of birth.

In the case of a child up to one year old, found or abandoned by his mother in the maternity ward or in the health units, the term for declaring his birth is 30 days[27].

According to the provisions contained in art. 19 paragraph (1) of Law no. 119/1996, any person who has found a child whose identification data are not known is obliged to notify the nearest police unit within 24 hours. In this case, the birth certificate is drawn up within 30 days from the date of its finding by the community public service to register persons in whose administrative-territorial area the child was found. The birth certificate is issued based on a report drawn up and signed by the representative of the public social assistance service, the representative of the competent police unit, and the doctor. The obligation to take steps to register the birth of the child, in this situation, falls to the public social assistance service in whose area the child was found[28].

We must not omit the situation of the child abandoned by the mother in health facilities, in which case, the birth certificate is made immediately after the deadline of 30 days from the preparation of the report on the abandonment of the child, signed by the representative of the General Directorate for Social Assistance and Child Protection, by the representative of the police and by the health unit representative[29]. If the identity of the mother has not been established within 30 days, the public social assistance service in whose administrative-territorial area the child was found, based on the documentation sent by the General Directorate for Social Assistance and Child Protection, must request, within 48 hours, the competent mayor to draw up the birth certificate providing for the establishment of the name and surname of the child and for making the declaration of registration of the birth at the community public service of registration of persons. Thus, within 5 days from the requested date, the

[27] Parental desinterest in the newborn child could be one of the reasons why the child is abandoned in the maternity ward or in health facilities. The Romanian legislator ruled that by disinterest is meant the imputable termination of any ties between parents and child, ties that prove the existence of normal parental relationships. See art. 1 of Law no. 47 of 7 July 1993 on the judicial declaration of child abandonment, published in the Official Monitor, No. 153 of 8 July 1993, available on-line at LEGE 47 07/07/1993 - Portal Legislativ (just.ro), site accessed on 3.10.2021, at 10:35 PM.

[28] As stated in the provisions of art. 19 paragraph (4) of Law no. 119/2006.

[29] As regulated by the legislator in the provisions of art. 20 paragraph (1) of Law nr. 119/2006.

mayor must issue the provision regarding establishing the child's name and surname. At the same time, the birth certificate is drawn up based on the report on the abandonment of the child, the medical certificate confirming the birth, the authorization of the guardianship court in whose district the child was found, regarding the measure of an emergency placement, the police response to the result of the checks on the identity of the mother, the provision establishing the child´s name and surname and the birth registration declaration.

We mention the fact that, when registering the child´s birth, the civil status officer assigns and enters the personal numerical code, which is mentioned in the birth certificate, as well as all other documents concerning the person concerned, as stated in the provisions of art. 22 of Law no. 119/1996.

According to art. 16 of Law no. 119/1996, any of the parents have the obligation to make the birth declaration, and if, for various reasons, they cannot do so, the obligation to declare falls on the doctor, to the persons who were present at birth, the staff designated by the unit in which the birth took place or to any person who became aware of the birth of the child.

The child's declaration can be made both through an administrative procedure and through a judicial procedure, the action having as object the late registration of the birth of a minor.

- Late registration of the birth of children up to 14 years of age - the registration is made based on the medical certificate confirming the birth; identity card of the mother and the declarant (if the mother does not declare the birth); the marriage certificate of the child's parents (if they have a different surname, the written declaration regarding the name that the child will acquire, signed by both parents in front of the civil status officer or the notary public) is attached to the file; the declaration of recognition of the child born out of wedlock (given by the father to the civil registrar who registers the birth, from which should result in the surname that the child acquires, to which the mother's consent is attached); the minor father can recognize his child alone if he shows discernment at the time of recognition;
- Late registration of the birth of children aged between 14 and 18 years - the documents necessary for the registration of the birth of a child up to 14 years of age are presented, as well as the declaration of the person whose birth was not registered and, if applicable, of the parents, guardian legal status of the person.
- Late registration of the birth of the adult - written request of the declarant; birth certificate; the statement of the person whose birth was not registered given before the registration; the

statement of two family members or, in their absence, of two persons who know her, given before the registration.

Thus, by the application registered under no. 320 of 3.03.2017, submitted to the Ibăneşti City Hall (Mureş County) requested the registration over the 30 days of the child, born on 31.05.2009, in Timişoara (Timiş County). The reason for not declaring the child at birth was that the mother had left the locality, at the date of filing the application being separated from the child's father. Following the request, steps were taken to verify the child's registration in the National Register of Persons. Following the verifications, it was found that the minor was not registered in the National Register of Persons. Therefore, in accordance with the provisions of art. 14 ^ 2 of Law no. 119/1996, it was proposed to register in the civil status registers of the Timişoara City Hall (Timiş County) the birth of the child, with the data from the ascertaining medical certificate no. 395 / E[30].

The Râmnicu Vâlcea District Court pronounced civil sentence no. 2321 of 19 March 2009[31]. It admitted the action brought by the applicants and ordered the late registration of the birth of the male minor G.E. of Romanian citizenship, born on 16 August 2003. In the motivation of the request for late registration of the birth of the minor G.E., the plaintiffs stated that they din not register the child at birth, due to negligence.

Regarding the plaintiffs' argument that they did not register the child "through negligence", we believe that it should be sanctioned since, according to the provisions of art. 488 paragraph (3) of the Civil Code, parents are obliged to take all necessary measures to protect and realize the child's rights. As such, even if the parents are minors, they must take the necessary measures so that the birth of their child is declared. All the more so, as the declaration of the birth of the child is also a right of the child himself.

As well, a consequence of the child's non-declaration to the civil status service[32] is related to the fact that he has access to free medical services only under certain conditions. Thus, children up to the age of 18 are exempted from co-payment and benefit from insurance without paying the

[30] Unpublished documents.

[31] Available on-line at 2321 înregistrare tardiva a nasterii - ROLII, site accessed on 29.09.2021, at 11:38 AM.

[32] In 2016, the Ministry of Foreign Affairs estimated that there were over 160,000 people without identity documents in Romania, of which about 10,000 never had a birth certificate. The causes are multiple: either there are children whose parents do not have identity documents, abandoned children, or the parents have identity documents, but they do not take the necessary steps. Available on-line at Acces gratuit la servicii medicale pentru copiii fara CNP (formaremedicala.ro), site accessed on 4.10.2021, at 10:40 PM.

contribution, under the conditions of art. 224 of Law no. 95/2006[33] and if they do not have a personal numerical code, within a maximum of one year from the date of the first presentation to the medical service provider[34].

Another consequence of not registering the birth of a minor is including not receiving the state allowance for children. According to art. 1 paragraph (1) and (2) of Law no. 61/1993 on the state allowance for children[35], the allowance is established as a form of state protection and is granted to all children, without discrimination. Therefore, all children up to the age of 18 receive a state child allowance. In the situation where young people who have reached the age of 18 and are continuing their studies, continue to benefit from a state allowance for children in accordance with the law. The state allowance for children is paid to one of the parents based on their agreement, or, in case of misunderstanding, based on the decision of the guardianship authority or the court decision, the parent to whom the child was entrusted for upbringing and education, according to art. 4 paragraph (1) of Law no. 61/1993.

The establishment of the state allowance for children is made on the basis of the application and the documents resulting from the fulfilling of the conditions for granting this right. It is stated by the Romanian legislator that if the application for the state allowance for children is registered after the month in which the child was born, the payment of the state allowance for children can be made for previous periods, but not more than 12 months. In this regard, for example, the question arises of what happens to the state allowance for children of a minor who is 17 years old. Based on the current legal text, after the late registration of his birth, he can be retroactively granted the state allowance only "not more than 12 months". Or, we believe, the child should not be sanctioned due to the late registration of his birth. We, therefore, propose *by law lata*, the extension of the limit from "not more than 12 months" to "not more than three years"[36], as the state allowance for children is a right of the child himself and should be granted to him from his birth until the age of 18, or more, as long as he attends the courses of education, according to the legal provisions in effect.

[33] Law no. 95 of 14 April 2006 on health care reform, published in the Official Gazette. Nr. 652 of 28 August 2015. Available on-line at LEGE 95 14/04/2006 - Portal Legislativ (just.ro), site accessed on 4.10.2021, at 10:24 PM.

[34] According to the provisions of art. 224 paragraph (2) of Law no. 95/2006 on health care reform.

[35] Law no. 61 of 22 September 1993 on the state allowance for children (republished), published in M. Of. Nr. 767 of 14 November 2012. Available on-line at LEGE 61 22/09/1993 - Portal Legislativ (just.ro), site accessed on 3.10.2021, at 9:40 PM.

[36] This being the general term of the extinctive prescription.

Instead of conclusions

We have tried in the present paper to present the child's rights that he has since birth, rights that should be respected primarily by those who gave birth to him, respectively, by his biological parents. The consequences of not declaring the minor to the public population registration service are: non-registration of the minor in the population, non-establishment of his legal identity, non-establishment of filiation relations (both maternal and paternal), and the effects resulting from them, non-receipt of state allowance for children, etc.

There are exceptional situations, for example, the situation of children born in areas that are very difficult to access, or those in which the biological parents refuse to declare the child "running away" from the responsibility they have towards him. Whether we are referring to the situation of the abandoned child in the health units or to the situation of the child found in the family or in a public place, as we noted, these were provided by the legislator. In these cases, the obligation to carry out the steps provided by law for the registration of the child's birth rests with the public social assistance service in whose administrative-territorial area the minor was found or left.

We appreciate that these exceptional situations should be prevented. In this sense, *by law ferenda*, we propose that every mother who gave birth in the health unit be informed about the importance of declaring the child in the civil status service. Following the information, she could sign an undertaking to make every effort to register the child, otherwise, sanctions could be imposed. Also, *by law ferenda*, we propose the establishment of a collaboration protocol between the health unit and the mayor's office within its administrative-territorial area, on basis of which, the maternity, ex officio, to inform the civil status service within the mayor's office about the names of patients who gave birth in their unit. This report shall be communicated ex officio at the end of each calendar month. If it is found that within three months from the child's birth, he has not been registered in the National Register of Population, those from the civil status service to take the necessary steps to declare the minor, contacting at least one of the parents. Thus, the employee of the civil status service within the mayor's office informs the parents that they have the obligation to register the child in the National Register of Population within 15 days, otherwise, a contravention fine will be applied.

Therefore, the legislature should lead to an even greater involvement of state institutions with responsibilities in respecting the child's rights, ensuring the realization of the rights and fulfilling the duties of parents to their child.

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SOME PROBLEMS POSED BY THE INTRODUCTION OF DIGITAL SUSTAINABILITY IN THE CURRENT SOCIAL AND WORK CLIMATE

Manole Decebal BOGDAN[1]

Valeria Alisa TOMA[2]

Abstract:

This paper aims to point out some current issues that affect in a positive or negative way the implementation of a digital governance platform in different areas across the world and how the future public workforce may need to change in order to remain relevant and to be of use in a digital work environment.

Keywords: *digital sustainability, emerging technologies, future workforce*

Introduction

Gradually, society evolved with the use of computers from writing texts, calculating matrices to computer programs that are used in all areas of daily life, economic, social, professional. The importance of computer applications rises on a scale from general use to special use in the field of security and defense of cosmic communications and coordination of satellites attached to the Earth's atmosphere.

In this context, an approach to the digital economy in terms of normative acts is quite complex. One can question the liability of software manufacturers, the liability of machine manufacturers (hardware) that are set in motion by software.

It is also possible to question the liability of the trader, the service provider, the manufacturer of tangible goods who offer these items to the consumer market, but benefit from the support of artificial intelligence. Through artificial intelligence we consider that the reference is ambivalent - the car plus the computer program that sets the car in motion. We cannot remove the database stored on the machine (servers) from the equation. These databases have a real-life counterpart as the data itself systematizes society's footprint of the real-world finance economy.

We ask ourselves how the digital economy is different from the real economy - so that separate normative acts are needed.

[1] Lect. univ. dr. Universitatea ”1 Decembrie 1918 din Alba Iulia”, decebal.bogdan@uab.ro

[2] Asist. Univ. Dr.Universitatea ”1 Decembrie 1918 din Alba Iulia”, alisavaleria.toma@yahoo.com

The answer involves an understanding of the mechanisms and relationships that make up the digital economy. If in the real economy we have customer suppliers as a subject of law individuals, authorized individuals or companies or NGOs all private persons, in the digital economy the relations between them are based on virtual information captured from reality, encoded in binary system, stored, decoded when used by the customer and used in legal relationships.

Therefore, in legal relations, the rights and obligations of the parties may be vitiated by the use of artificial intelligence infrastructure which the parties cannot directly control. Often software programs are commissioned and designed by third parties specializing in programming or information support such as computer platforms, the information storage medium is managed by specialized third party companies.

For example:

Failure of a supplier to fulfill a contractual obligation to call the customer due to the fact that the e-mail did not reach the request from the offer. The error of programming and transmitting data from one email server to another server does not result in direct liability of the parties. In the equation is a liability of the internet provider that will have mitigating commercial circumstances under a contract other than that of the parties. From this simple example we can draw situations on increasingly important levels that can affect important business relationships can affect people's lives their relationship with employers and other relationships.

In the following we try to identify an area of knowledge at international level after which we will point out in concrete terms the right of the digital economy in the Romanian society integrated quite well to the European Law of the digital economy.

In 2015, 193 countries agreed on 17 sustainable development goals, the nations' delegates signed a challenging agenda aimed to render this planet functional for the next generations within the timeline towards 2030 including the usage of emerging technologies and the digitalization of the public sector (Seele and Lock 2017).

Romania started implementing its own digitalization projects following this agreement. Several digitalization projects involving emerging technologies such as big data, cloud computing, machine learning, blockchain technology and augmented reality were started in the nest years. These projects aim to reduce bureaucracy, while authorities will have direct access, according to the legal competences, to certain information like birth certificates or ID's, that, at this moment, the Romanian citizens are obliged to present personally when requesting the provision of a certain type of service (StiriRomania24 2019). Such projects, in addition to the implementation of the electronic services platform based

on civil status information, will also involve the computerization of internal flows specific to all institutions involved, thus making it possible to access online the data and information regarding the procedures or forms, to download and upload the forms online, to pay the related fees on the internet, as well as to schedule online access to the services. (Agerpress 2019). Similar well written projects have been made in the past but they still face a wide range of problems and opportunities that may remain untapped and the present article tries to point out some of them.

Main Text

Focusing on some of the researches that deal with the impact of digitalization on sustainability in various ways we point out an analysis of the e-participation of citizens in environmentally sensitive projects through ICT[3]s.

For example, He and his team, (Guizhen He 2017) explored the potentials of digital communication technology in a Chinese setting. Their article "E-participation for environmental sustainability in transitional urban China" investigated how ICTs can facilitate e-participation and governance from the citizens' and the governments' perspectives. This provided particularly interesting insight by embedding analysis into the context of the rapidly evolving and changing Chinese economy and a political system that is vulnerable to civil unrest. The team's conclusion was that **e-participation bears potential in urban China and elsewhere, because it allows effective mobilization of citizens**.

Another point made was by Gliedt, Widener, and Hartman's study called "Visualizing dynamic capabilities as adaptive capacity for municipal water governance" (Jeffrey M. Widener 2017) that was set in Oklahoma, US. It studied how local communities have or have not adapted and innovated their water systems to mitigate climate change. Using a mixed methods approach composed of a geographic information system technology combined with interviews and observations, the authors present drivers and barriers of the adaptation and innovation of water resource infrastructure. Through digitalization of these data, a **"diverging perspective on the historical lack of innovation in the public sector"** was provided, outlining certain implications for public policy beyond the investigated context. The conclusion of the study was that **dynamic capabilities influence innovation and adaptation rates directly. Population size, income level, and the educational backgrounds of decision makers relate indirectly to the adaptation and innovation in municipal water governance**.

[3] Internet and communication technology.

On another point of interest, Tabira and Francis's article "Integration and implementation of sustainable ICT-based education in developing countries: low-cost, en masse methodology in Kenya" (Tabira 2017) airs at the use of ICTs in education in developing countries, more precisely Kenya. Because of the deficiency of basic digital infrastructure and varying electric supplies, this setting is of certain interest but seems to be rarely investigated. The authors considered the efficacy (in its results) of the use of digital content in school lessons compared to lessons taught using traditional content. The team found that because of the power outages and other technical malfunctions, teachers couldn't manage the switch between digital lessons and traditional methods of teaching, which resulted in diminished interest and lowered concentration of students. Thus, **the sustainable development goal of 'quality education for all' is not necessarily facilitated through ICT-based teaching in developing countries, because of insufficient ICT infrastructures**.

The team of Lock and Seele (L. I. Seele 2017) outlined 10 stakeholders of sustainability in the digital age in their article "Theorizing stakeholders of sustainability in the digital age". They looked at sustainability as a normative concept, positioning it as the center of a stakeholder map. The authors operationalized 10 stakeholders of sustainability describing the complex interplay between stakeholders with special concern on Big Data. The team structured the sustainability stakeholders along 3 types: Big Data Collectors, Big Data Utilizers, and Big Data Generators. The conclusion was that **a common vision of all stakeholders involved to engage in the advancement of sustainability and to aim for transformation of the state of affairs is required.**

In a 2019 Dell funded research (DELL Technologies 2019) the authors found out that there are 3 problems that today's employees will face in a digital work environment: Algorithmic Bias, Digital Skills Gap and Workers' Rights and Protections.

The team defined the concept of Algorithmic Bias, challenging the supposition that hiring managers know what constitutes an ideal employee, proposing that many organizations don't actually know what type of person with which mix of skills excels in their environment. To generate large, robust models, data is needed not only about potential hires but also data about how past hires have performed. The data, generally considered proprietary, will advance the machine-learning systems, and help expose biases and unseen hiring practices of organizations. For human-machine partnerships to enable more inclusive talent practices, more is needed to be done in understanding algorithmic bias. Future employees must be capable to comprehend how their profiles

are being interpreted by the machine-learning tools used by employers while organizations will need to be steadfast in ensuring that their systems' decision-making algorithms align with their core values. **Ethical practices, including full visibility to the factors informing algorithmic hiring models, will be essential to prevent biases and for these tools to promote a shift toward inclusive talent.**

Digital Skills Gap is viewed as worker evaluation practices transform and new means of discovering talent emerge. By 2030, older generations may feel shut out of certain parts of the economy by the usage of gamification in systems to test applicants' or employees' aptitudes. This may give a bigger reward to younger people who have grown up with gaming. A lack of familiarity with collaborative platforms and networks may also hinder some workers' ability to take full advantage of the 2030 human machine partnerships. As new workers habituated to gaming and to the quick pace of change arrive in the workforce and rise at the office, seniority may count for less. **Organizations may need to be prepared to upskill seasoned, experienced workers in new ways of working and learning through cross-generational or reverse mentoring**, where younger colleagues advise on topics such as technology and change management.

Workers' Rights and Protections will have to change following the shift toward empowered workers and local law oversight over work arrangements. Especially over decentralized public sectors. If one of the objectives of a distributed organization is to decentralize opportunity such that anyone qualified to accomplish a task can do so irrespective of where they live, then labor policy variations would be needed to be put into place. If people will be compensated for their contributions and not for a fixed amount of time than full-time employment will have to change as the only way that people receive financial protections for their individual and family's healthcare. **In an emerging technology such as secure distributed ledgers may allow people the ability to flawlessly create work/legal agreements then attention will need to shift to the way that these future contracts navigate the different laws and regulations associated to work**.

Conclusion

Considering the future for the individual who fills all the public forms online, acquires a job via machine-learning systems based on gameplay and then votes in a similar manner, certain issues have to be taken into account such as the irregular access to digital infrastructure or the public school system being unprepared for the acquisition of digital qualification for all of its students. Technological advancement is one undeniable force

that will shape the future of work. It is already happening in advanced countries and AI is entering the workplace today at a rapid clip, offloading certain tasks and displacing workers from jobs. This type of system will have to be replicated by governments in a way that still offers equality of chance. Without a deliberate effort to apply emerging technologies to encourage a more inclusive and just work environment in 2030, the advances in technology may not yield as positive a future for Romania.

We can question the right of the digital economy which is asserted in all economic areas of state administration (union of states) implicitly of public administration at all levels of decision.

As we have seen above, the statement comes from the fact that social relations, economic, administrative, cultural, sports, medical relationships are based on the use of increasingly high-performance and autonomous software. Software has learned continuous improvement and ends up deciding instead of human intelligence.

Robotization is a reality on all levels of everyday life. We feel the need for regulation by adopting normative acts only in situations where non-compliance occurs. We exemplify: the autonomous car was accepted in society and appreciated by almost the entire population on social levels, regions, racial identities, sex, age, etc.

The need for regulation or more precisely the lack of regulation was felt when the first accidents with loss of life occurred due to the fact that the software with which the car was equipped did not have an important feature: that of prevention (the decision should not be based on 0 and 1, true / false, but also in halves: it can be / can happen / if it is not so...)

Starting from this simple example, we must accept that legal relationships must also introduce the liability of software and robot manufacturers. With the delivery of artificial intelligence platforms, manufacturers must warn users about possible events, actions or inactions that may affect to some extent the final service for which the software or robot was created.

Connecting society to European society and other international markets provides ample space for exchanges of experience, data transmission. Basically, the cause of an error with significant damage or even bodily injury can be located on one continent and the effect in a locality on another continent. This means that the law of the digital economy has valences of international law and because the relations to which it refers are vast it has valences at the same time of public law and private law.

These complex elements make it impossible to draft a code of law that is unanimously accepted by all legal systems and all authorities.

A car produced in a robotic factory in Asia is used in Europe. The legislation on passive and active safety of the driver of the resistance of

materials, of regulation of traffic on public roads, is different. The responsibilities in the domestic law of each state are regulated by law at different values. In this context, legislation in the digital economy must harmonize with the rules where the effect and liability occur and not in the states where the machine is produced or is the command point in the supervision and maintenance of the computer system.

Artificial intelligence is also found in state administrations and local public administration in various forms. It is practically impossible to discuss a decision-making autonomy in public administration. The public procurement system is an example of the use of the car in the public economy. Thus, we can discuss the law of the digital economy in the public sphere, not only in the private sphere.

Based on these considerations, we consider that it is necessary to supplement the existing legislative norms also in terms of influences in the legal relationship of the action or inaction of artificial intelligence.

It is also necessary to specialize current legislation and harmonize it with relevant European legislation and directives, so that legal relations between legal entities in different states are easily resolved when it comes to legal liability manifested in known forms (criminal, civil, civil tort, material and others...)

National legislation must take into account the evolution of multinational companies operating in a physical multistate territory and in a virtual domain sometimes labeled under state authority (domeniu.ro).

Even if the law of the digital economy is a notion with which one operates academically, in the future this right regarding the legal relations influenced by the use of artificial intelligence both in the sphere of private law and in the sphere of public law becomes a certainty and a functional reality. There will be situations where the courts have to specialize and understand the mechanisms that control the robot machine and the responsibility for programming defects, data manipulation errors that can lead to result errors and so on.

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HISTORY OF CADASTRE AND REAL ESTATE ADVERTISING SYSTEMS IN ROMANIA - REGISTERS OF TRANSCRIPTIONS AND INSCRIPTIONS

Dan-Adrian DOȚIU[1]

Abstract

In Romania, due to historical conditions, there have been several real estate advertising systems. In this material we will make a review of only the system of transcriptions and inscriptions. This presentation currently has only a theoretical, historical role, we can say, because, through Law no. 7/1996, a new regulation of land books was given, constituting a unitary system of real estate advertising throughout the country.

The civil laws that followed Napoleon's civil code adopted the personal system of real estate advertising of transcription and inscription registers. This is also the case of the Romanian Civil Code of 1864, which regulates in its very content and then also in the Code of Civil Procedure this system of real estate advertising based on the registers of transcriptions and inscriptions of real estate. That system of immovable property disclosure comprised two registers in which particulars of separate legal transactions were entered, but which may relate to the same immovable property.

Keywords: *real estate advertising systems, the system of transcriptions and inscriptions, personal real estate advertising system, Romanian Civil Code of 1864, Code of Civil Procedure*

Introductory notions

In Romania, due to historical conditions, there have been several real estate advertising systems. In this material we will make a review of only the system of transcriptions and inscriptions. This presentation currently has only a theoretical, historical role, we can say, because, through Law no. 7/1996, a new regulation of land books was given, constituting a unitary system of real estate advertising throughout the country.

The Geto-Dacians, detached from the great Indo-European people of the Thracians, occupied the territory of today's Romania. The existing historical data do not bring many clarifications about the form of ownership adopted in ancient Dacia. The social-economic formation was of the type of village community, of the collective property of the lands. Along with the common land ownership of the comates (common people), there was the private property of the king, the nobles and the priests.

[1] Public notary dr., University lecturer at the University „1 December 1918", Alba Iulia, Faculty of Law and Social Sciences, www.dotiu.ro

The comatians were required to pay the taxes to the state, to participate in public works and to satisfy the military obligations. An incipient cadastre has existed in our country since the time of the Roman occupation, proof being some problems of bordering between properties, reported throughout Dacia, including dobrogea and in the area of Sibiu II-III century p.Chr. (N.Boş, O.Iacobescu, p. 10).

During the period of the feudal states there were some regulations regarding the delimitation of the estates by "public commissions" or/or by "royal charter", which established the border points according to the "custom of the earth", which they marked on the trees and on the stones. For the elaboration of sketches, only the lengths were measured, using the rope with knots of 10 or 20 fathoms, the decision of the estates belonging, in fact, to the civil law.

Gradually the central power of the state consolidated, cities appeared, the tax system was regulated, new fortresses were built, the army was increased and better equipped. But still during this period and until the dry. XIX began the struggles for the reign and the conflicts between the opposing parties of the boyars. The ruler considered himself the master and owner of the country, being able to dispose of the entire "superior property" of the monarchical feudal rule.

He gave to anyone who saw fit to strengthen his political position and to assert his suzerainty, lands, goods and privileges into which the desolate, unworked or abandoned lands entered, the lands of the deceased boyars without descendants, of those convicted and punished for high treason, of the villages punished for crimes committed on their territory, or of the villages that had not paid their due tax to the state.

In the Romanian Principalities, the first works related to the records of real estate appeared successively in the Condica of Al.Ipsilanti, the Code of Calimah and the Legiuirea Caragea, which required, among others, the measurement of the estate. For example, through the methodological norms for the application of the Caragea Law, the measurements on the spot were made by the decision, and the local courts had the obligation to make "... calling on all the neighbors, putting themselves in a righteous manner and as long as possible, so that each of them can prepare the discovering documents of his own right and to ease himself from the other occupations to go to the spot..."

The works for the introduction of the cadastre and the land books were carried out in a differentiated manner in the Romanian provinces, depending on the historical circumstances, starting with the XIXth century.

After the establishment of the communist regime in Romania, the lands were removed from the civil circuit. The land registry was important

only from the point of view of the use of the land, and not from the point of view of the land ownership.

Taking into account the fact that for a large part of the country's territory there were no cadastral measurements, and where they were carried out, verification and updating works were required, in 1954, the communist authorities raised the issue of drawing up a socialist cadastral record. A year later, Decree No. 281 of 15 July 1955 on the establishment of the land register regime.

After the fall of communism following the events of December 1989, a series of legislative changes were required in the field of cadastre and real estate advertising. The result of the steps in this regard was materialized by the Law no.7 of March 13, 1996 of the cadastre and real estate advertising, a law that will be the object of a separate chapter of the present work.

In Romania, before the entry into force of Law no. 7/1996, four real estate advertising systems were known:

a) the system of registers of transcriptions and inscriptions, applied in the old Kingdom (Oltenia, Muntenia, Moldova and Dobrogea), that is, in the Pre-1918 Romania, being regulated by the Civil Code and the Code of Civil Procedure. It was a personal system of publicity of real rights, because the registers are in the names of people and not on real estate, and it is also an incomplete system.

b) the land register system, applied in the Romanian provinces annexed by the former Austro-Hungarian Empire (Transylvania, Banat, Crişana, Maramureş and Bucovina), being regulated in the second half of the nineteenth century by the Austrian and Hungarian legislation, and then by the Decree-Law no.115/1938 for the unification of the provisions regarding the land books implemented by Law no. 241/1947. It was a real system of real estate advertising, based on the topographical identity of the real estate, the registrations being made on real estate and not on the owners.

c) the real estate advertising book system, also called the "intermediate system of publicity", applied in Bucharest and in some neighboring communes, being regulated by Decree no.242/1947 and by some provisions of decree-law no.115/1938. It constituted an intermediary system that had similarities but also differences from the land books, starting the works of drawing up the provisional land books which, on the basis of the Law no. 242/1947 were transformed into land advertising books.

d) the system of land registers, applied in the localities of Transylvania where the land registers were destroyed, stolen or lost due to the war, being regulated by Law no. 163/1946 for the temporary replacement by land registers of the destroyed land registers stolen or lost.

Initially, the real estate advertising registers were kept in the courts, then in the courts, and later, after 1960, by the state notaries. With the

transformation of the notarial activity into an autonomous public service, through the advent of Law no. 36/1995 of notaries public and of the notarial activity, the duties of real estate advertising passed to the courts in whose district the state notaries were located.

Transcription and inscription register system

The civil laws that followed Napoleon's civil code adopted the personal system of real estate advertising of transcription and inscription registers. This is also the case of the Romanian Civil Code of 1864, which regulates in its very content and then also in the Code of Civil Procedure this system of real estate advertising based on the registers of transcriptions and inscriptions of real estate.

That system of immovable property disclosure comprised two registers in which particulars of separate legal transactions were entered, but which may relate to the same immovable property.

By circular no. 1035/28 April 1950, the Ministry of Justice ordered the replacement of the two advertising registers kept until then with a single one, called a register of transcriptions and inscriptions, a good measure from a practical point of view, but which had no legal support, as long as an administrative act amended a legal text.

1. Transcription Register

In the register of transcriptions (transcriptions or transcriptions) were transcribed, that is, the entire legal acts translative or constitutive of real estate rights or the deeds extinguishing such a right were copied. The transcript was made in the order of submission of the transcription requests.

It should be pointed out that the term 'legal act' can have two meanings: the first meaning is that of a legal operation, that is to say, *negotium iuris* or, more simply, *negotium*, and the second designates the document ascertaining the manifestation of will, that is to say, the material medium which records or renders the legal operation, the *instrumentum probationis* or, more simply, the *instrumentum*.

When we talk about the transcription operation, we refer to this second meaning, whether it is authentic deeds (deeds) – notarial deeds, court decisions – or acts under private signature.

The documents provided for in the Code of Civil Procedure, the Civil Code, and certain special laws were subject to transcription. Thus, Art. 711 para. 1 of the Code of Civil Procedure mentioned "They shall be transcribed in the transcription register of the court where the immovable property is placed:

1. all acts of disposal of moving property or of rights in rem that can be mortgaged;
2. all acts by which these rights are waived;

3. all acts constituting an easement, a right of usufruct, use or dwelling;
4. all acts by which these rights are waived;
5. transactions in rights in rem;
6. award orders;
7. judgments given on expropriation for the public interest;
8. disposals of income for more than two years;
9. extract from lease or rental contracts for a period longer than three years."

The Civil Code provided, in separate articles regulating particular operations, the transcription of legal acts, such as in the case of donation, sale, or of acts or judgments that found an assignment of rent or lease for a period longer than two years.

There were other special normative acts in which it was stipulated the obligation to transcribe in the transcription registers of some legal acts (concession contract, contract of sale of dwellings built from state funds, etc.).

As mentioned above, this system of real estate advertising, was an incomplete system because a series of legal acts and deeds by which a right in rem was transmitted, constituted or extinguished were not regulated. Thus, the declarative acts of real estate rights, the acts by which the rights *in rem mortis causa* were transmitted (regardless of whether they were universal, on a universal or private basis), the transmissions made *ex-lege* (the taking over of the stray property), the usucapsion, the access to the estate, the actions for annulment or termination and the judgments given in this field were not subject to transcription. Moreover, the procedure for deregistration of transcriptions which were null and void or which ceased their legal effects was also not regulated, which was liable to mislead any person as to the existence and effectiveness of a particular transcription. (M.Nicolae, p.223-225).

2. Register of inscriptions

In the register of inscriptions (inscriptions or inscriptions) were reproduced, in excerpts, some parts or clauses of the legal acts that related to special real estate privileges and mortgages.

The Civil Code of 1864 was largely concerned with the preservation of real estate privileges and mortgages.

3. Procedure for entry in transcription and inscription registers and effects of entry and transcription

3.1. Registration procedure

In the following we will present the procedure for registration in the registers of transcriptions and inscriptions.

Both procedures, and the transcriptions and inscriptions, were made at the court in whose district the buildings are located, being a non-contentious procedure. The advertising services were organized and directed by a judge delegated by the president of the court, both real estate advertising operations being carried out by the clerks in charge. As for the obligations of the clerks, these were regulated by the provisions of art. 1916-1920 of the Civil Code.

We also show that in the period 1960-1995, the real estate advertising activity was carried out by the state notaries.

The rule was that applications for transcription or registration were made at the court registry by the interested party, either in his own name or by proxy on the basis of an authentic power of attorney, even on the basis of private titles. By way of exception, in the case of registration of the conventional mortgage, the legislator provided that, in order to be able to operate the inscription, the creditor and the debtor, so both parties, in person or through agents with authentic proxies, will present the authentic act of the convention.

The applications, once registered, were to be dealt with by a judge in the council chamber. The order by which the application was filed was enforceable. An appeal may be lodged against the order granting or rejecting the application by any interested party. The deadline for appeal was 15 days and flowed from the pronouncement for those who were present and from the communication, for those who were absent.The appeal shall be heard in the council chamber.

After the application was granted, the two real estate advertising operations were carried out.

As we have indicated above, the transcription consisted in copying in full in the register of real estate displacements of the act by which the property or other real rights are displaced by the acts provided by the legislator in principle in art. 711 para. 1 para. 1-9 of the Code of Civil Procedure.

In the case of registration, it consisted in making mentions regarding the acts of constitution of privileges and mortgages. When it was agreed to register the deed of privilege or the mortgage, investigations were made in the registers of registration, transcription and prosecution (provided for by art. 713 Code of Civil Procedure), by a judge, assisted by the clerk, to see if there are any tasks or other rights over the same asset; about these investigations were made in the act of registration of the mortgage or privilege, the parties having the possibility to give up the research in the registers. Also, on the original document – in the case of conventional mortgages – in addition to certifying the date and number under which it was entered in the registers, it was transcribed the conclusion by which the

registration was ordered, as it was entered in the register (art. 1782 Civil code; art. 716-718 Code of Civil Procedure).

The difference between transcription and writing was that the transcription involved copying the entire act, a difficult task, very demanding and requiring a great expense of time, but it was justified for an extremely simple reason. Third parties were interested in knowing the clauses of the acts of sale, partition or lease, and since it was not possible to determine a priori to which of these clauses their interest was limited, it was necessary to order their full copying.

On the contrary, in the case of inscriptions, it was very easy to specify what is of interest to third parties, namely the fact that a certain property is encumbered, the amount of the secured claim and the names of the parties, being therefore useless or even frustrating, to copy in full the documents that were the basis for ordering the mortgage inscription or other mentions to be taken. A mere mention of the registration of the privilege or mortgage was sufficient to warn third parties and to notify them of what they needed to know.

As we have already mentioned, by circular no.1035 / April 28, 1950, the Ministry of Justice ordered the replacement of the two advertising registers kept until then with a single one, called a register of transcriptions and inscriptions, in which both transcriptions and inscriptions were made.

The registration procedure was as follows:

- the requests for transcription and registration were registered in numerical order;
- the entry is made by indicating their kind, transcription inscription;
- the parties and the document on the basis of which the entry was made were shown;
- the stamp duty collected and some entries to be entered in the "Remarks" box were indicated;
- the applications thus registered and numbered, accompanied by the supporting documents, were then submitted, in the same numerical order from the registers, in the folders of transcripts or entries reserved for these applications and documents.

After 1950, in practice, transcriptions and inscriptions were performed in the same way, and they continued to be distinguished only by different names and object. The registers of transcriptions and real estate inscriptions were public and could be consulted by any interested person. Registrars were held to issue to all those who ask for a copy of the documents transcribed in their registers and of the existing inscriptions, or certificate that there was no inscription.

3.2. Effects of transcription and registration

The effect of the entries in the registers of inscriptions and transcriptions was that it made the legal act of translation or constitution of rights opposable to third parties.

In the following I shall analyse the effects of the two real estate advertising operations that occur both between the parties and vis-à-vis third parties.

- *Effects of transcription*

Between the parties and their successors, the legal act was effective from the date of its conclusion. The transcript does not matter, it does not produce any legal effect. The transfer of ownership or the acquisition of another right in rem operates automatically by the mere agreement of wills of the parties validly expressed, regardless of whether the act was transcribed or not.

It is about the principle of consensualism – *solus consensus*, according to which the mere manifestation of will is not only necessary, but also sufficient for the civil legal act to arise validly in terms of the form that takes the manifestation of will made in order to produce legal effects. In other words, in order to produce civil legal effects, the manifestation of will must not take a special form, and the transcription, not being an attribute of property, cannot validate an act that is not valid by itself.

To third parties, the transcription makes the act opposable to them. Portivit art.1802 C.civ. "Any act of alienation of the rights mentioned in the previous article may not be opposed to the third persons by the transcription required by that article" and according to Art. 712 Code of Civil Procedure." Pending transcription, the rights resulting from the acts referred to in the above article shall not preclude the third, who have rights over the immovable property even if they are aware of the existence of the above acts."

In conclusion, I can argue that the transcription produced limited effects: between the parties what the property transfers is the convention, and to third parties the property was not acquired in the absence of transcription. As has been observed, "the transcript fixes the date of transfer of the property" to the third (G. Plastara, p. 452).

- *Effects of inclusion*

Among creditors, the privileges do not produce any effect, in respect of real estate, except when they have been made public, by inscription, and only from the date of that inscription in the registers intended for this article 1738 Civil Code), and the mortgage, either legal or conventional, has no rank until the day of its inscription in the registers (art. 1778 Civil Code). The mortgages entered in the registers on the same day have the

same rank (Art. 1779 Civil Code). These texts govern the effects of privileges or mortgages between the parties.

The effects of privileges or mortgages between third parties result from the provisions of art. 1790 Civil Code, according to which "Creditors who have a privilege or mortgage registered on a real estate pursue it in whatever hand it passes".

The lack of transcription or registration was sanctioned with undosability towards third parties. If the act has not been transcribed, the third parties have no way of knowing it and the legal operation to which the act refers, so that it cannot be opposed to them, being considered by law unusable.

Instead of conclusions

This system of real estate advertising, as we have seen, was a personal one, because the registers are in the names of the persons and not on the real estate, that is, the visa of the holder of the right (whatever this right was) and not at all the real estate, being also an incomplete system. It was an incomplete system and one that practically presented difficulties. We list below some shortcomings of this system:

- the publicity of the rights is partial, because a series of acts and ways of acquiring were not subject to registration, creating uncertainty over the owner of the building. We were talking about a full publicity of all the translative or constituent legal acts and deeds of real estate rights. Thus, the *mortis causa* transmissions, the usucapsion, the real estate access and the court decisions that had a declarative character of rights were not subject to transcription, as we have seen
- secondly, the system was a non-unitary system because it included two registers, but also two advertising formalities – transcription and registration
- thirdly, from a functional point of view, being a personal right, that is, being records that were made on behalf of the owners and not on the real estate, it was very difficult to know the legal situation of each building at a certain time and to establish who was the real owner at that time. In these conditions, in order to know the exact legal situation of the building, all successive owners of the building had to be known for a period of at least 30 years and investigated, on their behalf, the transmissions made and the tasks set up by them for a period of at least 15 years. Such a research was not easy nor certain, because the omission of a single previous owner had the effect of an erroneous knowledge of the situation of the building. That is why no acquirer could be sure that the right he acquired was unassailable.

- fourthly, because the sanction of failure to comply with the formalities of real estate advertising consisted in the uneampability to third parties of the translative or rights constitutive rights, the transcription or registration produced relative effects not absolute: the act produced translative or constituent effects of rights in rem between the parties, but it is not enforceable against third parties. The lack of sanctions against the parties was one of the most serious drawbacks of this advertising system. Many times the parties did not request the transcription of documents or the registration of clauses, either because of fairly high tax fees, or negligence or indifference. The transcription is often waived, preferring the risk, less, of the unoliableness of the act towards third parties.

- in the last row, since the judge was not obliged to verify the validity and legality of the act, nor the existence of the right in the patrimony of the transmitter, the records had a relative value, that is, they brought to the attention of third parties a certain legal act without guaranteeing, however, the validity and existence of the acquired right. It was a shaky system, devoid of coherence and practical utility.

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THEORETICAL AND JURISPRUDENTIAL PREMISES OF THE FUNCTIONING REPRESENTATION MECHANISM

Vasile LUHA sr.[1]

Abstract

The study did not intend to offer solutions now. It only asks questions, noticing the diversity of doctrinal expression and the contradictions of the guiding jurisprudence.

In a context of legal uncertainty provided by the inconsistencies of the jurisprudence which interpreted the regulations of the representation, the practitioner - bearer of responsibility - feels the need to substantiate its mechanism. Which means, it should be established who the representative really is in relation to the personality of the representative: a legal fiction that would legally provide effects on the latter, a substitute of his (of the representative) in his relationships with others, a bearer of limited power and exclusively from the represented or a true bearer of autonomous will, with or without the possibility of intrusion into the very sphere of the positive freedom of the represented.

The theoretical statement could set in principle a pattern for interpreting civil norms with a higher potential by weighting the interests at stake.

Keywords: *representation, mandate, power of representation, special power of representation*

The regulation and the mechanism of representation

Representation is a regulated operation[2]. But the civil norm does not define the operation; it indicates only the sources - the law, the contract or the court decision - the conditions and consequences[3].

The conceptual framework of representation is clearly set out in the doctrine: "a technical-legal procedure by which a person, called a representative, concludes a legal act in the name and on behalf of another person, called representee, so that the effects of the act occur directly and directly in the person of the representative"[4].

The pattern placed under the regime of relativity of legal acts is analysed as an exception to the effects produced only between the parties of a contract: although the act is made between two contractual subjects

[1] Professor at Faculty of Law and Social Sciences of "1 Decembrie 1918" University from Alba Iulia; prosecutor from the Prosecutor's Office attached to the Alba Iulia Court of Appeal.

[2] Article 1295 of the Civil Code: "*the power to represent may result either from the law, or from a legal act or from a court decision, by the case*".

[3] H. Dumitrescu, *Reprezentarea* în Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, *Noul Cod civil. Comentariu pe articole,* Editura C. H. Beck, Bucureşti, 2012, p. 1368.

[4] A. Pop, Gh. Beleiu, *Drept civil. Teoria generală a dreptului civil*, Universitatea Bucureşti, 1980, p. 337.

(representative and contractual partner), the effects are collected by others (the representative and the representative's partner at subscription)[5].

The civil doctrine, in general, outlines the substantiation of the representation only under technical expressions: the representation is a procedure with legal effects[6]; or representation is a mechanism[7] or, by the case, a technique[8]. Afterwards, the doctrine - following the purviews of the positive norm - details and explains the regulations or needs, following the effects of the legal act obtained by representation between the three subjects - represented, representative and partner - as well as the responsibilities for non-compliant, excessive behaviours.

The expressions with reference to non-legal concepts by their nature - procedure, mechanism, technique - encourage us to locate the substantiation of the representation in an instrumental framework with legal consequences[9]. Which means we have a specific, atypical mechanism - a virtual and abstract one[10] - enunciated by law, fixed by the details of the norm, by the parties or by the judge - which provides certain powers - of course, well determined - to the representative, powers that give him the power to express the will of another - of the representative - and to dispose on his behalf. The mechanism, in itself, produces a certain level of autonomy, the autonomy of what is expressed, what is manifested, for others: on the one hand, there is a subject who does not participate in making an act or executing an operation - the representative - but who has both interests and the will to fulfil them; on the other hand, the

[5] L. Pop, I.Fl. Popa, S.I. Vidu, *Curs de drept civil. Obligaţiile*, Editura Universul Juridic, Bucureştii, 2015, p. 141.

[6] A. Pop, Gh. Beleiu, *Drept civil. Teoria generală a dreptului civil.... op.cit.*, p. 337.

[7] H. Dumitrescu, Reprezentarea.... *op.cit.*, p. 1369.

[8] L. Pop, I. Fl. Popa, S. I. Vidu, Curs de drept civil. Obligaţiile..., *op.cit.*, p. 142.

[9] It should be emphasized that the concept of instrument - legal instrument - is also challenged by civil doctrine; representative, for such an approach is the thesis from: Louis Josserand, *Cours de droit civil positif francais*, vol. II, 3-eme edition, *Theorie generale des obligations*, Sirey, Paris, 1939, p. 2. We insist, however, upon the idea of instrument, of instrumentation, with some caution, being aware of the methodological risks of the legal imprecision that usually characterizes technical expressions. So, the purpose of using the concept is methodological: by comparing to other commercial institutions - tools generally accepted by their legal utility and efficiency - such as bills of exchange or balance - to find perspectives where the interpretation of the positive rule of representation has failed and fails.

[10] The description of the mechanism of representation as virtual and abstract aims to capture its features in opposition, for example, with generally accepted instruments in commercial matters - such as, for instance, bill of exchange or balance - which although potential (virtual) are inevitably concrete (and not abstract): the commercial mechanisms, which were followed initially, are related to a certain support with concrete composition (a document, an element, a technique, of evidence); in the last case - of commercial instruments - the subjective rights pursued at birth and in realization take on a different meaning - of course, the expected legal regime - in relation to their formal attachment to instrumental support, to the carrier of a mechanism

representative manifests himself precisely for the realization of the interests of another (of the representative); the meaning of the autonomy provided by the mechanism consists precisely in the fact that the representative is not the bearer of the will of another; he has and expresses his own will, but only to become operational for the interests of another.

In practical terms, whoever uses this mechanism either receives to operate through such a procedure or to harvest its effects, going through it - initially existing procedure as a possibility of option - knows from the beginning that the representative, in the obligatory relationship with third parties, although expresses one's own will (obviously, totally autonomous will), however, fulfils the interests of another; this, the effect of the existence of the effective and prior expression - possibly, of the recognition of its existence by law or by the judge - of the will of the represented (technical element)[11]; The mechanism exists beforehand, through its virtuality, especially through its technicality, regardless of what options those interested will make; from here, the legal consequences follow, so we enter the legal sphere: the effects of the act done by representation will be reaped by another; that is, only when the parties use the mechanism (not when the person declaring himself a representative operates, in fact, of his own free will and in a strictly personal interest).

Therefore, we note, in this preliminary theoretical analysis, on behalf of representation, two essential components: **a)** the technical mechanism - everything is being made on behalf of another, in the interest of another and **b)** the power of the representative as a legal element that gives, then, by making the legal act, by carrying out an operation, the rights and obligations of the subjects involved by the mechanism in a technical assembly that produces legal effects, other than those that would produce the own-account relationship of the one who declares himself representative (and it can be discussed the source, its limits and consequences)[12].

The mechanism is offered in its abstraction by objective law. Its power, obtaining and expression - therefore, the production of the subjective situation - is usually provided by the parties - in a contractual manner - and sometimes, in certain domains, the law or the judge.

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[11] The autonomy of the mechanism is asserted, even if it is not analysed, by H. Dumitrescu in *Reprezentarea... op.cit.*, p. 1369.

[12] Emphasizing the two components - the mechanism and the power - which together would describe the assembly, we do - again - and methodologically interested - in opposition to trade instruments, where we distinguish three components: **a)** support, **b)** mechanism and **c)** subjective rights produced in specific manner; for details, see: V. Luha sr., *Titluri de credit. Cambia*, ediția a II-a, Editura Universul Juridic, București, 2020, pp. 16-21; V. Luha sr., *Efectul de cont curent în contractul de cont bancar curent*, Revista Facultății de Drept din Oradea, 2019, pp. 125-138.

The idea of the power of the representative - and not of his capacity - is provided, first, by article 1295 of the Civil Code: "the power to represent..." can be provided by the legal act, law or court.

Expressing the positive norm - article 1295 of the Civil Code - the power to represent - captures, indirectly, the effect of the historical evolution of the institution of representation, of its need to exist, of the functioning of society through it[13].

For instance, the legal entity - a necessary abstraction[14] - it cannot function without such a possibility, general prerogative, to dispose of the property of another, on the rights of another (the representative disposes or assumes on behalf of the legal person and in its interest); or one can talk about the need to develop legal activities for people who are not, or cannot be, or do not want to be present, and do not care about the reasons[15]. Basically, we locate, from the perspective of the representative in the sphere of the possibility to exercise the subjective rights of another, of the prerogative to exercise them, to express a certain power, all in the interest of the representative.

Such a premise - the exercise of another's rights - the special power of representation, however, calls into question something else: whether or not the autonomous will of the representative interferes - through intrusion - even "in the sphere of another person's positive freedom"?[16]

The question, possibly the answer to the question, shows us that we are dealing with another perspective in substantiating the representation: it - the representation - would not be linearly explained only by the will of the representative - with or without the fiction of replacing it with his person - not even by the will of the law or of the judge, who would take into account his (the representative's) interests.

We are trying to see if the effects of this recent and profound approach are found in significant case law.

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[13] There is a whole debate - with historical content, and not only - about the existence of a fiction that sprang from necessity, through which - in essence - it is accepted, it is declared, that the representative is, legally, the very representative; for the historical meaning of the representation, for its evolutionary observation, see: Vl. Hanga, *Drept privat roman*, Editura ştiinţifică şi pedagogică, Bucureşti, 1978, p. 420-424; Malaurie Ph., Aynes L., Stoffel Munck Ph., *Droit civil. Obligations*, 3é édition, Defrenois, Paris, 2007, în traducerea D. Dănişor, *Drept civil. Obligaţiile*, Editura Wolters Kluwer, Bucureşti, 2009, p. 440, as well as the cited bibliography; the idea of fiction in and through representation is also taken up in more recent studies: S. V. Bodu, *Organul administrativ şi reprezentarea legală a societăţii*, Revista română de dreptul afacerilor nr. 6/2017, p. 33, pct. 2. Autonomia reprezentării ar da o altă perspectivă fundamentării acestei instituții; for explanations, see: V. Stoica, *Despre puterea de reprezentare*, Revista română de drept privat, nr. 2/2019.

[14] I. Deleanu, *Ficţiunile juridice*, Editura All Beck, Bucureşti, 2005, pp. 438-442.

[15] Malaurie Ph., Aynes L., Stoffel Munck Ph., *Droit civil. Obligations*, ... *op.cit.*, pp. 440-441.

[16] For developments, see: V. Stoica, *Despre puterea de reprezentare*,... *op.cit.*, p. 29.

Practitioners' issues and debates

The mechanism of representation was of particular concern to the doctrine of commercial law. It is obvious that a company - a legal entity - can manifest itself only through its statutory representatives, who have the legal status of legal and, as the case may be, conventional, through executives, through boards of executives or managing executives. Representation basically means the legal manifestation of someone - a representative - with the intention of acquiring rights and assuming obligations on behalf of the company[17]. The mechanism is applied with such a high frequency that it can be said without exaggeration that the pattern of commercial representation supports the very economic life of a community.

Therefore, the pursuit of the representation regime in the matter of companies becomes representative, both by the frequency of operations and by their stake, patrimonial and legal.

It is no coincidence that the inconsistencies of doctrinal statements related to the explanation and application of representation have been illustrated by this type of case law (commercial).

Through a decision with guiding effects[18] it was ordered that "the executive director of the joint stock company whose term of office has expired, without an act of appointment of a new executive director and an express acceptance by him, has the prerogatives of representation as long as the termination of office has not been published in accordance with the law"[19]

In other words, in a context in which the mandate of the representative executive director of the company ceased and was not extended - a situation that would exclude by its nature the power of representation - the court - assuming the leading judicial performance - accepted that, however, he - executive director - holds the power of representation, to the extent that she herself stated it: until the termination was advertised. The exercise of representation - by its limited nature in time – it is fixed - by the will of

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[17] See developments and bibliography in: S.V. Bodu, *Organul administrativ şi reprezentarea legală a societăţii*, Revista română de dreptul afacerilor nr. 6/2017, p. 56

[18] Decision of the High Court of Cassation and Justice no. 24 of November 6, 2017 by which the panel competent Panel to **judge the appeal in the interest of the law** resolved the appeals in the interest of the law formulated by the Board of the Court of Appeal Constanța and the Public Ministry, published in Monitorul Oficial, Partea I, nr. 153 din 19 februarie 2018 (hereinafter referred to as RIL Decision No 24/2017 or Decision).

[19] The disposition from the decision's record: "in the unitary interpretation and application of article 72 and article 15312 of Law no. 31/1990, reported to article 1552 of the Civil Code from 1864, respectively to article 2.030 of Law no. 287/2009 regarding the Civil Code, with the application of article 54 paragraph (2) of Law no. 31/1990, the executive director of the joint stock company whose term has expired, without an act of appointment of a new executive director and an express acceptance from him, holds the prerogatives of representation as long as the termination of office has not been published in accordance with the law".

judgment - a resolutive condition that was not taken into account when granting this power. Basically, does the judge add to the contract, to the company contract, what indicates the attributions of the executive director? Or does the judge note that the executive director has a legal mandate and has the right to interpret the meaning of the law?

The court motivated the Decision from another perspective, without following the possible shades of potential powers explicitly or exclusively conventional.

The decision was motivated only by the interpretation of the positive norm that describes the legal regime of the mandate. On the one hand, the specifications from article 2030 paragraph (1) letter. c) of the Civil Code[20] which regulates one of the situations of termination of the mandate, on the other hand, the provisions of article 1309 paragraph (2) of the Civil Code[21].

Although, according to the court's motivation, it was observed that a continuation of the mandate for "activities with a character of continuity" would be possible only in the case of termination registered in article 2030 paragraph (1) letter c) of the Civil Code "death, incapacity or bankruptcy of the principal or agent", the operative part decides that the administrator "holds the prerogatives of representation as long as the termination of office has not been published in accordance with the law". Therefore, there is a contradiction between the court's motivation and operative party **a)** by motivation is accepted the de facto extension of the mandate in activities with continuity only for "death, incapacity or bankruptcy of the principal or agent"; **b)** such an extension shall also be received by the device in case of fulfilment of the term of office of the mandate.

And there is another logical inaccuracy. By interpreting article 1309 paragraph (2) of the Civil Code is expressed, in practice, the theory of the apparent act: in relations with third parties, as long as the agent appears to have the power of representation, the act is made at the expense of the representative and he - the representative - cannot prevail against him lack of power to represent (the trustee). The formula has logic, it is supported by the norm - article 1309 paragraph (2) of the Civil Code - but starting from this premise - and only from this premise - the appearance of the power to

[20] Article 2030 of the Civil Code: "in addition to the general causes of termination of contracts, the mandate ends in any of the following ways: a) its revocation by the principal; b) resignation of the agent; c) death, incapacity or bankruptcy of the principal or agent. **However, where it is the subject of the conclusion of successive acts in the course of an activity of a continuing nature, the mandate shall not cease if that activity is in progress, with respect for the right of revocation or renunciation of the parties or their heirs.**

[21] Article 1309 paragraph (2) of the Civil Code: "if, however, by his conduct, the representative determined the contracting third party to reasonably believe that the representative has the power to represent him and that he acts within the powers conferred, the representative cannot prevail over the third party contractor for lack of power to represent".

represent the good faith of the third party - there is no justification for extending by Decision the entire term beyond its expiration.

The mechanism of apparent mandate - of apparent representation - is - in principle - welcomed for practitioners. It is difficult to understand, then, what is the explanation for the removal by motivating the decision to apply the provisions of article 2030 paragraph (1) letter c) of the Civil Code, the credible basis of appearance in the mandate. All after, previously, "the High Court of Cassation and Justice noted that the requirement of express acceptance of the appointment as administrator removes the theory of silent mandate, as express acceptance involves an explicit act by which the agent agrees with the mandate, silent acceptance by continuing the mandate being excluded".[22]

The doctrine insisted upon these contradictions and not by chance[23]. There are very frequent situations in which the extension of the mandates of the representatives is delayed or the procedures for publishing their names are blocked administratively - for objective reasons. High stakes business can be compromised as an effect of the uncertainty of the existence of the power of representation.

The commercial doctrine offered a solution: the text of thesis II of article 2030 paragraph (1) letter c) of the Civil Code - "however, when it has as its object the conclusion of successive acts in an activity of a continuity character, the mandate does not end if this activity is in progress, respecting the right of revocation or renunciation of the parties or of their heirs"- would have general applicability.

Upon the expiration of time represents "a general cause for termination of any contract, and therefore of the mandate contract." As long as the exception of extension of the mandate due to the need to carry

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[22]I. Sferdian, *Mandatul expirat al administratorului şi administrarea societăţii. O altă perspectivă*, în https://www.juridice.ro/619445/mandatul-expirat-al-administratorului-siadministrarea-societatii-o-alta-perspectiva.html, accessed at 10.11. 2021; the debate on the extension of the power of representation under the civil code regime is even wider; also see: şi Daghie Dragos-Mihail, *Consideraţii cu privire la expirarea mandatului şi posibilitatea prelungirii de drept a puterii de reprezentare a mandatarului potrivit noului Cod civil*, Universul Juridic Premium, nr. 5/2016 from 10/05/2016, in https://www.universuljuridic.ro/consideratii-cu-privire-la-expirarea-mandatului-si-posibilitatea-prelungirii-de-drept-puterii-de-reprezentare-mandatarului-potrivit-noului-cod-civil/, accessed at 10.11. 2021; or P. Piperea, R. Dan, *Expirarea mandatului administratorului are ca efect încetarea prerogativei reprezentării*, available at https://www.juridice.ro/405829/expirarea-mandatului-administratorului-are-ca-efectincetarea-prerogativei-reprezentarii.html

[23] In order to capture the implications that would result for the exercise of the regulated legal professions, from the application of the Decision, see: B. Dumitrache, *Decizia RIL nr. 24/2017: mandatul (administratorului) fără de sfârşit*, Revista Romana de Drept Privat nr. 3/2019, p. 22; or D. Chirică, *Consideraţii critice referitoare la Decizia ÎCCJ nr. 24/2017 de soluţionare a recursului în interesul legii formând obiectul dosarului nr. 1699/1/2017*, în https://www.juridice.ro/essentials/2332/consideratii-critice-referitoare-la-decizia-iccjnr-24-2017-de-solutionare-a-recursului-in-interesul-legii-formand-obiectul-dosaruluinr-1699-1-2017, accessed at 10.11. 2021.

out the activities with continuity is included in the text regarding general causes of termination of the mandate, such exception would be applicable also for the hypothesis of the expiring mandate. There is, however, no justification for the wording adopted by the Decision - not even the argument of legislative technique developed in the statement of reasons - which does not consider such an exception - of extension of representation - as an exception of general comprehensive significance. If interpreted differently, the company - the representative - would risk harming the interests for which it has given the power of representation[24].

Instead of conclusions

I have observed and - in part - I have presented - from the point of view of the practitioner - a number of premises: a regulation - at the level of principle - which states a mechanism whose foundation the doctrine disputes and still develops[25]; several rules that sanction the lack or exceeding the representation[26]; the principled perspective according to which the misconduct in the practice of profession by misconduct is liable[27]; a case law - by its nature - obligatory, pragmatic but contradictory by motivation and disposition[28]; doctrinal statements that describe the dysfunctions that it can produce in daily practice the case law of guidance presented[29]; an optimistic theory that offers - in principle - a solution in the project that interests us[30]; and, finally, the exposition of the project of a substantiation of the representation, based on the idea of its autonomy and, possibly, on the possibility of intrusion of the representative in the sphere of positive freedom of the representative, forms in which we foresee certain solutions for the problem that worries us.[31]

The dispersion of the premises inevitably produces the variety of approaches followed by the lack of unity of interpretation, of understanding. After all, what effect does the lack of representation between the parties and, possibly, on third parties have? Who are the parties and who has a third-

[24] I. Sferdian, *Mandatul expirat al administratorului şi administrarea societăţii..., op.cit.,* pct. 3.
[25] Article 1295 of the Civil Code, supra, note no. 1.
[26] Article 1309 paraph (1) of the Civil Code: "(1) The contract concluded by the person acting as a representative, but without having power of attorney or exceeding the powers conferred, does not produce effects between the represented and the third party"; see also L. Tec, *Examenul jurisprudenţei în materia reprezentării societăţii şi răspunderii civile a administratorilor faţă de societate*, Revista Română de Dreptul Afacerilor nr. 4/2016, p. 20-22.
[27] V. Luha sr., *Probleme privind răspunderea civilă pentru vină profesională în activitatea de consultanţă juridică*, Revista română de dreptul afacerilor, nr. 4/2020.
[28] RIL Decision nr. 24/2017, see also supra note nr. 17.
[29] B. Dumitrache, *Decizia RIL nr. 24/2017: mandatul (administratorului..., op.cit.*, supra, note nr. 22.
[30] I. Sferdian, *Mandatul expirat al administratorului şi administrarea societăţii....., op.cit.,* supra, note nr. 23.
[31] V. Stoica, *Despre puterea de reprezentare..., op.cit.,* supra, note nr. 12.

party position and in relation to which reference system? What is the source of representation? The law or the will of the associates, how and when exactly?

Schematically, we have a simple inapplicability, when, how much and to whom?[32] There remains a potential relative nullity based on the lack of capacity of the representative[33] or fraud - excess, abuse – in representation[34]? Or we could invoke absolute nullity by lack of consent[35] or just an effect of absolute nullity[36]? The latter should be observed between the representative and the representee with the collection of consequences: how and to what extent would the provided solutions influence subsequent third-party contractors or others?[37]

The doctrine is very rich and comprehensive of reasoning of great refinement. Sequentially, there is also case law related to the manner of disobeying by those involved defective in the mechanism of representation. Therefore, it would be the appearance of certainty in the operationalization of the mechanism.

However, for a practitioner who works on the basis of the legal system – a clerk responsible for the slightest fault or a notary responsible for the harmful consequences of all legal acts affected by nullities - decision-making has been and remains difficult.

The diversity of doctrinal expressions and, especially, the inconsistencies of the case law result from the preoccupation to obtain the valid solution by interpreting the positive norms. The pattern produces consequences: different interpretations offer non-unitary solutions and, inevitably, uncertainty.

For this reason, there is an urgent need for a credible substantiation of the phenomenon of representation.

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[32] Article 1309 paragraph (1) of the Civil Code; I. Popa, *Forma împuternicirii în cadrul reprezentării convenţionale*, Universul Juridic Premium nr. 1/2021, în https://lege5.ro/gratuit/gm4tomzyg 44a/forma-imputernicirii-in-cadrul-reprezentarii-conventionale, accessed at 11.11.2021.

[33] In the sense of article 44 paragraph (1) of the Civil Code: "acts made by the person lacking the capacity to exercise or with restricted capacity to exercise, other than those provided in article 41 paragraph (3) and to article 43 paragraph (3), as well as the acts made by the guardian without the authorization of the court of guardianship, when this authorization is required by law, are annulable, even without proving a prejudice"? The statement of the existence of the premise in: M. Stork, *Essai sur la representation dans les actes juridiques*, LGDJ, 1982, p. 91; ipoteza este evocată şi în: A. Pop, Gh. Beleiu, *Drept civil. Teoria generală a dreptului civil..., op.cit.*, p. 431.

[34] I. Fl. Popa, *Ipoteza falsus procurator*, în Revista de drept privat, nr. 2/2019, p. 218.

[35] P. Filip, *Nulitatea actului juridic civil prin prisma interesului ocrotit*, Editura Hamangiu, Bucureşti, 2016, p. 315-316.

[36] For the meaning of the idea of the effect of absolute nullity, see: V. Luha sr., *Probleme teoretice şi practice privind exerciţiul nulităţilor absolute în dreptul civil*, Dreptul nr. 12/2020, pp. 11-35.

[37] For documented developments and shades, see: R. Rizoiu, *Este puterea de reprezentare o veritabilă putere?* in Revista de drept privat, nr. 2/2.

COMMERCIAL INSTRUMENTS AND THE PRACTICAL NEED TO DETERMINE THE CONCEPT OF LEGAL INSTRUMENT

Vasile LUHA jr.[1]

Abstract

The study would like to provide a preparatory analysis, a methodological premise, for a broader development that would aim to determine - from the perspective of the practitioner in the legal space - the idea of legal instrument, conceptualization that in civil law doctrine is seen - always and with some consistency - with reservations: the notion of instrument has no clear legal content and if used can be confusing.

The author summarizes the theory and then follows the beneficial legal consequences, undisputed and validated by the older and more recent practice, regarding two commercial instruments: the bill of exchange and the account. From this, a simple question would arise: if commercial law uses the concept with maximum efficiency, could other areas follow suit? Is such an approach practical?

The answer is affirmative, but with clarifications: beforehand, there are necessary substantiations and, then, corresponding nuances, for each of the legal institutions that would claim to function in a particular way, as an auxiliary legal instrument. Although, in general, the doctrine is reserved, the jurisprudence would outline - even if it does not express it explicitly - the need for legal conceptualization of the instruments.

Keywords: *bill of exchange, bank account, subjective law, guarantee, probative instrument, notarial instrument, legal instrument*

The civil doctrinal premise

The idea of contract - legal instrument (contractual assembly - instrument) is not agreed by the civil legal doctrine. But, equally, it cannot be disregarded.

In certain areas, in the commercial sphere with special reference to the doctrine of credit securities, securities, it has been and is successfully capitalized.

Thus, on this topic, the doctrine of civil law stated: an obligation may receive - in addition to its understanding as a subjective right in a legal relationship[2] - a special meaning too, common in notarial practice[3], but

[1] Public notary with individual office in Alba Iulia; PhD. student at the Faculty of Law of the University of Craiova; email: vasile.luhajr@gmail.com

[2] Legal relationship that in its dynamics ensures to one or more subjects the position of debtor face to face with another or more who collect the position of creditor. For a vehement critique of the idea of legal relationship seeP. Vasilescu, Raportul de drept civil – mostră de nostalgie ideologică analitică, Studia Universitatis Babeş Bolyai, Jurisprudentia, nr. 1/2020, pp. 5-29; for detailing the

not recommended in the current application of the rule civil. "The obligation becomes the document itself, the instrument prepared to ascertain the birth of the contract and the relations arising from it."[4] The civil doctrine insists on emphasizing the imprecision and legal non-specificity of the concept, as well as the potential for confusion. However, the wording is not completely denied. We therefore note the existence of reserves and, equally, the need for caution, as well as the risks in use.

The commercial tool, its creation and advantages

1. Commercial law does not recognize and therefore does not theorize a genre of legal instruments. Only the species are presented and then capitalized on.

The bill of exchange theory has always insisted on the analysis of the bill of exchange as a tool, reaping the practical advantages of the model.

Theorizing in the field of bills of exchange had two premises expressly recorded in the positive norms. On the one hand, the rules of procedure have regulated and regulate documents as means - instruments - of evidence. On the other hand, the bill of exchange law explicitly produces, for the birth and circulation of the bill of exchange, an atypical regime that had to be credibly doctrinally explained.

The need to substantiate the bill of exchange circulation and to explain the original explanation of its legal product - of the bill of exchange - a product expressed under the formula of "autonomous subjective law"[5] - then provided the theses of the bill of exchange instrument. In practical terms, the doctrine had to explain credibly why the issuer of a bill of exchange and, in the same way, the holder of a right of claim could transfer to the successive acquirers a right which he did not have. That is, the issuer, the beneficiary or the guarantor can transmit to the acquirer, the guarantor, a subjective right with an extension that he, the constituent, did not have. That is, the issuer, the beneficiary or the guarantor can transmit to the

meanings of the concept of subjective law, both statically and dynamically, the last formula - the dynamics of law - involving the assembly of rights and obligations in a legal report, for the practical significance of these analyzes followed by deep nuances, see: I. Dogaru, N. Popa, D.C. Dănişor, S. Cercel, *Bazele dreptului civil*, vol. I, Teoria generală, Editura C.H. Beck, Bucureşti, 2008, pp. 386-390; Sevastian Cercel, *Consideraţii privind dreptul subiectiv civil*, Revista de ştiințe juridice, 58 (2005), Craiova.

[3] See also: Mirela Moise, *Încetarea convenţională a contractelor*, Buletinul notarilor publici, (17) nr. 4/2013, pp. 8-16, p. 13.

[4] Louis Josserand, *Cours de dreoit civil positif francais*, vol. II, 3-eme edition, Theorie generale des obligations, Sirey, Paris, 1939, p. 2.

[5] For developments on this topic, the meaning of the concept of autonomous law: G. Oppo, *Profilli della interpretazione oggetiva del negozio giuridica*, Padova, 1943, p. 133; P.V. Pătrăşcanu, *Titlurile de credit şi importanţa lor în comerţul internaţional*, Studii şi cercetări juridice, 1973, p. 240.

acquirer, to the guarantor, a subjective right with an extension that did not have itself, the constituent. Through this mechanism, a right is transmitted against which the exceptions that the transmitter himself was obliged to accept could not be invoked. That is, the sender gives the acquirer more than he had, the traders projecting - obviously out of economic need - a legal institution out of nature, impossible to explain through a classical vision of civil order. Obviously, the need for substantiation determined theorists to go beyond the positivist formula: everything works like this because the law indicates so. In this way the concept of bill of exchange instrument[6] - species - produced by incorporation[7] was provided and the idea of a legal instrument - the genre - a criticizable model was outlined for later, but, nevertheless, in the methodological sense that we follow, it is useful and protective of liability in notarial practice.

2. **What are the premises of this approach?**

It all starts from the idea that a document that bears an intelligible writing, once signed - the document, the support - produces the presumption that the writing fully expresses the will of the signatory. The model is taken from the doctrine of evidence - procedural or, as the case may be, civil - which discerns and fixes in advance the probative value of the documents. However, the debate moves away from the evidentiary framework and aims at the unity that is built between the correlative obligation of a certain subjective right assumed through writing and the material support, the document, usually made of a piece of paper (other supports are not excluded). So the premises of the theory of legal instruments are, on the one hand, the manifestation of will that would assume the obligation, provider of the subjective right, and on the other hand the recording support.

Following this assembly between the subjective right and the recording support by the fact of associating the expression of wills by recording on a document, three phases are distinguished: a) the document is produced only for evidentiary purposes. Subjective law is born and exists independently of the existence of the document. Therefore, the document, the instrument, is

[6] G. Ferri, *Titoli di credita*, Torino, 1958, p. 133; V. Luha sr., *Titluri de credit. Cambia*, ediția a II-a, Editura Universul Juridic, București, 2020, p. 16.

[7] The incorporation as a phenomenon - in a metaphorical but precise and applied expression - presupposes a voluntary union - through the express manifestation of the will of those interested - of a subjective right with a support, a union that would later give the law other qualities, other prerogatives, than the ones he had initially. For details on the idea of incorporation see: G.L. Pellizzi, *Principii di dirito cartolare*, Bologna, 1967, p. 92; A. Fiorentino, *De titoli di credito*, in Comentario del codice civile, Bologna, Roma, 1974; C. Negrea, *Drept civil. Raporturi de obligaţiuni*, vol. III, Cluj, 1923, p. 145; D. Gălăşescu Pyk, *Cambia şi biletul la ordin*, vol. 1, Bucureşti, 1939, p. 96; E. Cristoforeanu, *Tratat de drept cambial*, vol. I, Bucureşti, 1936, p. 86.

used only to prove the right. If the debtor recognizes the debt and pays it, the instrument has only an accounting significance; b) the document is constituted ad validitatem. It will be issued formally and the right is born only through the production of it (the document). Apart from this document, the right does not exist. The document therefore has a constitutive function. However, once the support is produced, it - the act - no longer conditions the exercise of the right. In this mechanism we find the current notarial model: in order to constitute, modify and extinguish all real real estate rights, it is necessary to produce an authentic notarial deed[8]; and, finally, c) the formula of the document constituting rights always necessary for their exercise: the right exists only if the document is produced and, further, the right can be exercised only by presenting the supporting document. In this last hypothesis, we are dealing with the bill of exchange model[9].

Basically, the bill of exchange instrumental model produces a union of subjective law with the supporting medium - incorporation - able to give the incorporated law a different legal regime than the regime of the right intended for incorporation: the incorporated claim receives - by simple fact support - the legal regime of real rights. The bill of exchange bearing a right of claim will circulate - obviously in the relationship with third parties - and it can be discussed who the third party will be - as a movable asset following the rules of movement of movable property and not of assignment of claim[10]. And traders can reap the economic and legal benefits of this complex and atypical instrumental situation.

This is, therefore, the model of the instrument - unchallenged by doctrine or legal and economic practice - that the bill of exchange has provided and explained: the instrument is irreplaceable in the exercise of the rights of bills of exchange creditors and in the placement of economic assets. As the bill of exchange is a security, the formula has been extended theoretically and explicitly - as a specific model of operation with tools - for the whole field operating - on paper or computer - with securities, with trade effects or real estates[11].

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[8] Art. 1244 Civil Code: "apart from other cases provided by law, the agreements that relocate or constitute real rights to be registered in the register must be concluded by authentic document, under the sanction of absolute nullity".

[9] For the development of the theory see: S. Ionescu, P. Demetrescu, I.L. Georgescu, *Noua lege asupra cambiei şi biletului la ordin*, Bucureşti, 1934, pp. 88-89.

[10] M. Foschini, *Uzucapione dei titoli di credita*, Riv. dir. comm., I, 1961, p. 38; E. Otulescu, V. Veniamin, *Problema titlului la purtător în dreptul românesc*, Revista de drept comercial, 1936, p. 323; problematica este abordată şi analizată, însă în altă exprimare şi cu alte consecinţe şi de: M.N. Costin, *Actul juridic unilateral ca izvor de obligaţii*, Studia Universitaris „Babeş Bolyai", S. jurisprudenţia, 1/1980, p. 50.

[11] Georges Ripert, *Traite elementaire de droit comercial*, LGDJ, paris, 1954, pp. 640-697.

3. The Civil Code regulates the account contract[12] and the banking law develops and puts into operation the operations account - the current account, the deposit account, the payments account - instruments adapted to the needs of the activities, first, with cash and, then, with units of account[13]. The model was generalized in the entire activity - not only the banking one - which would involve typologies of operations with financial assets.

A technical instrument, of accounting records, becomes an effect of banking technology and a legally binding relationship in which the receivables of the partners, once entered in the account mechanism - whatever it is - lose - in principle - individuality, the regime under which it falls acquiring another legal status essentially different from that of the receivables that make up the premises of the instrumental merger of account[14]. It will count and follow the regime of the legal product of the account: the balance. And the balance is presented in the form of a synoptic support on which the result of some arithmetic operations is recorded: a sum of the columns made up of receivables inflows and outflows. Under this presentation we will be faced with an abstraction, which captures the object of a preconstituted working mechanism to which the partners have vented and in which claims are received according to their free will.It will count and follow the regime of the legal product of the account: the balance. And the balance is presented in the form of a synoptic support on which the result of some arithmetic operations is recorded: a sum of the columns made up of receivables inflows and outflows. Under this presentation we will be faced with an abstraction, which captures the object of a preconstituted working mechanism to which the partners have succeeded_and in which claims are received according to their free will.

The effects and mechanisms of the instrument are complex[15] but not interesting from the perspective of this theoretical enterprise. It is only interesting the theoretical model captured under the idea of a tool that, in turn, could provide credible solutions to practitioners who too often face the uncertainties offered by the standards of civil law.

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[12] The current account contract (art. 2171-2183 Civil Code), current bank account contract (art. 2184-2190 C.Civ) and the bank deposit contract (art. 2191-2192 Civil Code). For theoretical developments:Gh. Piperea, în Fl.A. Baias, E. Chelaru, I. Macovei, R. Constantinovici ș.a., *Noul cod civil. Comentariu pe articole*, ediția a II-a, Editura C.H. Beck, București, 2014, p. 2160; I.L. Georgescu, *Contul curent*, Revista de drept comercial nr. 2/1996, p. 8-9.

[13] Lucian Săuleanu, Lavinia Smarandache, Alina Dodocioiu, *Drept bancar*, Editura Universul Juridic, București, 2009, p. 318; Stephane Piedelievre, Emmanuel Putman, *Droit bancaire*, Economica, Paris, 2011, p. 267; Jerome Lassere Capdeville, Michel Stork, Richard Routier, Marc Mignot, Jean Philippe Kovar, Nicolas Ereseo, *Droit bancaire*, Dalloz, Paris, 2017, p. 389.

[14] Rene Rodiere, Jean Louis Rives-Lange, *Droit bancaire*, Dalloz, Paris, 1980, p. 151.

[15] For developments and distinctions see: Paul I. Demetrescu, *Contractul de cont curent şi operaţiunile cu care se confundă*, Revista de drept comercial, 1934, p. 192.

4. The bill of exchange and the account are not the only instruments with general legal content of general law recognized for their effectiveness. The doctrine recognizes them as such, explains them and substantiates them: the bill of exchange is an institution regulated by law and the account is the product of the technique, of the banking record technique and, finally, in Romanian law, of the generic regulation[16].

Being illustrative models, we look for their defining components.

Both - bill of exchange and account - from a legal perspective give expression to the autonomy of will of the parties wishing to obtain certain effects in fulfilling their economic and legal interests. No one forces them to make options for a certain bill of exchange or account species. However, if the choice is made, on their own initiative or imposed by the context of economic organization, the parties have the possibility to adhere to one of the operational mechanisms provided by the instrument and the market. However, the instrument - beyond the conjuncture in which the subject operates - is chosen by the parties by agreement of will. In legal terms, there is, therefore, a preliminary agreement of will - a fundamental relationship - on which the mechanisms of the previously known instrument are fixed and then unfolded.

The instrument has a certain composition that presupposes subjective rights of the parties - correlative or not - over which they (the parties) trade. For example, in the case of a bill of exchange: the debtor draws to accept that the debt to the creditor drawer be subject to a stricter enforcement regime, to interested third parties, now or in the future; or, moreover, the drawer (issuer) - also in the relationship with third parties - gives their guarantees that if the main debtor does not perform the task he will perform it himself.

Moreover, these obligatory relationships are attached to a certain support (usually a paper support; computer support is not excluded either) which must meet certain conditions minimally and rigidly; the lack of shape removes the value of the instrument: the model can be anything but never change.

The existence of the subjective right, the expression of the preliminary will - the agreement of the debtor for the issuance of the title - the inclusion of the right of claim in a formal support provides a

[16] Art. 2171 Civil Code: (1) the current account contract is the one by which the parties, called current account holders, undertake to enter in an account the receivables deriving from mutual remittances, considering them non-exigible and unavailable until the account is closed. (2) the credit balance of the account at its closing constitutes a receivable. If its payment is not required, the balance is the first remittance from a new account and the contract is considered renewed for an indefinite period; art. 2184 Civil Code: "if the bank deposit, credit or any other banking operation is made through the current account, the account holder may at any time dispose of the credit balance of the account, subject to the notice period, if agreed by part".

mechanism with particularities that only the instrument offers; the bill of exchange mechanism describes the circulation of the title, its execution and the position of autonomous principle of third parties in relation to any of the bill debtors. Hence the consequence: the product of the manifestations of will of the subjects - the rights of claim - circulate materialized as movable goods. The relative opposability of the rights of claim and the civil liability that the mechanism implies operate with the guarantee and security specific to the relationship specific to real rights.

We find a similar scheme - not identical - in the operation of an account, of any kind.

An account agreement is concluded between the banker and the client by which the client receives - in numerical expression - receivables or makes payments (in the performance of a correlative task of a receivable). The model does not in any way exclude direct obligations between the banker and the client. In front of the two partners - the banker and the client - is presented on a medium - paper or computer - a synoptic picture of the entries (receivables) and exits (payments) agreed to be brought into the account. Each category transposed into columns - on one entry, on another exit - provides at any time a preliminary arithmetic sum: on the one hand, the amount of receivables entered in the account (receipts) and next to it and at the same time, the amount of payments made (debts, exits). The summed columns give a balance: if the entries are higher we will have a positive balance, creditor in relations with the bank and third parties; if the debts are higher, the balance will be debit; the successive and permanent inflows and outflows, which follow the client's current commercial operations, make up a constantly moving balance, becoming from the perspective of the active form of the balance.

What is illustrative for this instrument - from the methodological perspective we follow - is that the debt rights that come into account - in a negative or, as the case may be, positive sense - lose their individuality, both in the direct relationship - banker and client - and to third parties. In principle, what matters is only the timeliness, meaning and value of the balance. That is, in principle, no creditor of the account holder will be able to seize the individual claim once entered in the account. The object of the seizure, effect of the account mechanism, will be only the balance that can be analyzed as a movable asset with particularities.

Therefore, the instrument with legal content would imply: a) a premise: subjective rights of the holders intended, inter alia, for processing through an instrument; b) an instrumental composition consisting, first, of a convention (s) of accession to the integrative model of subjective rights of interest and, essentially, a bearing of the rights intended for instrumentation; when we emphasize the idea of integration we have in mind the predetermined and complex ensemble: an amount fixed in a

succession of determined obligatory relations, placed on a technical support under the control of one or more of the subjects participating in the legal relation which, by conception and then , by operation - technical and legal - would be able to offer additional guarantees - which are limited - for the fulfillment of the interests of those involved; c) a functioning mechanism that gives particularizing effects both between the subjects that adhere to the mechanism and, especially, for interested or potentially interested third parties; d) by its function the instrument offers a certain level of prediction and, inevitably, of safety of the third parties interested in the obligatory relation that gives the subjective right the premise; safety with regard to the enforceability of the convention produces the premissed subjective right and, possibly, the legal liability of the subjects with non-compliant behavior related to this right.

Basically, what would count - beyond the voluntary assembly of subjective rights for the production of the mechanism - is the effect of this instrumental composition - contracts and operations[17] -, an opposability effect that indirectly produces the conditions of civil liability of the subjects involved on more precise benchmarks, additionally guaranteed by the instrument itself[18]. That is, if in the direct contractual relationship the parties are guaranteed by the contract itself, the subjective legal situation produced by the contract does not have - observing its constitutive relativity - sufficient credibility with third parties. The instrument provides something in addition to third parties in connection with the existence and, in particular, with the performance of the obligations arising from the contracts subject to the instrument.

Instead of conclusions

The topic under attention - although viewed with doctrinal reservations - has, from the beginning, a stated methodological purpose[19]. We would like it as a theoretical premise for substantiating other developments that could follow.

We summarized the usefulness of two tools that are operational in the commercial (banking) space, tools that are not disputed by operation and, especially, by utility (both for parties and for third parties).

We ask ourselves another question: in other civil, commercial or administrative fields are there no other mechanisms-instruments with real legal potential for construction?

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[17] Philippe Malauire, Laurent Aynes, Pliippe Stofrel Munck, *Droit civil. Les obligations*, Defrenois, Paris, 2007, în traducerea Diana Dănişor, *Drept civil. Obligaţiile*, Wolters Kluwer, Bucureşti, p. 195.

[18] France Castres Saint Martin-Drummont, *Le contract comme instrument financier*, in L'avenir du droit, Mélanges en hommage à François Terré, Dalloz, Paris, 1999, p. 661-676.

[19] See supra note no. 2.

A brief examination of some case law confirms our assumption[20]. For example, for practical reasons and applied to notarial activities, we consider ourselves entitled to support the thesis according to which, in performing his defining professional service - authentication - the notary produces - among others - a notarial instrument that would be more than a probative instrument as indicated by the law on notarial organization[21] and enshrined in notarial doctrine[22], as well as civil procedural[23].

[20] For example, the issue was approached and debated, surprisingly, by the criminal jurisprudence (see the criminal sentence no. 91/26. 02. 2021 of the Alba Iulia Court, final, unpublished: a subject that had to make a unilateral notarial declaration in who - in the given administrative context - had to state only the truth, lied; in the ensuing criminal action, the question was asked - among other things - whether the defendant committed the crime of false statements - Article 326 Criminal Code - or participation - possibly, improper - when committing the crime of forgery in official documents - Article 321 of the Criminal Code); if the notary's intellectual product is considered an instrument, the legal framework should have been fixed in the area of participation in the production of a false (false) instrument; and conversely, if this product boils down to a simple notarial record - and there is no altered instrument - but only a false statement - the classification should have captured only this deposition of the subject, the false of his claims. For our study, the solution is not interesting, but the debate: the observation of the ensemble - by defining the instrument built by the notary - directs the interpretation towards the content surprised by the definition of forgery in documents; the location of the premises of interpretation only in the area of the recorded statements, obviously also notarial, would justify another classification: the crime would be described only by the activity of the subject, not by the notarial service. For details on criminal legal frameworks see: for the examination of participation I. Kuglay, for developments related to the classification of forgery offenses I. Nedelcu, în *Codul penal. Comentariu pe articole*, ediția a III-a, Editura C.H. Beck, Bucureşti, 2020, pp. 265 – 267; 1491-1522.

[21] Art. no. 9 al. (1) from Legea nr. 36/1995, Legea notarilor publici şi a activității notariale republicată în Monitorul Oficial al României, Partea I, nr. 237 din 19 martie 2018 „Public notaries and institutions provided in art. 8 who carry out notarial activity have the obligation to verify, in order to prevent disputes, that the documents they authorize do not include clauses contrary to the law and good morals .... ”

[22] I. Popa, *Curs de drept notarial*, Editura Universul Juridic, Bucureşti, 2010, p. 50; sau în I. Popa, Contracte civile de la teorie la practică, Universul Juridic, Bucureşti, 2020, pp. 27-45; 216-217; although the wording "tool" is avoided, we catch the idea in developments, in explanations; or in ori în Jean-Luc Aubert, La responsabilite civile des notaires, Defrenois, Paris, 2008, p. 19; in this last work - very visible in the French specialized space - some reservations are expressed in weighting in relation to the collection of meanings from the idea of notarial probative instrument: “we must not exaggerate its practical importance”. Equally, it is observed that if the notary produces an evidentiary instrument, his professional task is one of result and not one of means; the theoretical approach would implicitly change the legal regime of the civil liability of the instrumental notary; detailed description of notarial instruments - without a preparatory theoretical development- we meet in Carmen Nicoleta Bărbieru, Codrin Macovei, Activitatea notarială de la teorie la practică, Editura Universul Juridic, Bucureşti, 2018.

[23] For example, I. Leş, *Noul cod de procedură civilă. Comentariu pe articole*, ediția- a II-a, Editura C.H. Beck, Bucureşti, 2015, pp. 540-546.

SOME THOUGHTS ON THE IMPORTANCE OF NATIONAL CULTURAL HERITAGE AND THE NEED TO PROTECT IT[1]

Tiberiu-Nicolae TEGLAŞ[2]

Abstract

The first part of the article will present some aspects concerning the importance of cultural heritage, and after listing some of the main threats and some solutions for its protection, there will be presented some effects of the protection of these priceless assets.

Keywords*: cultural heritage, etymology, threat, protection, effect*

Introduction

Cultural heritage - an expression with deep meaning for some but unfortunately meaningless for others. What causes this discrepancy? Perhaps there is no single cause, but a multitude of causes that tip the balance in one direction. Those who recognize its value and importance also have a moral obligation to protect it. What are the threats, what its protection consists of and what effects can we expect? These are the questions we would like to answer.

Main Text

This expression encompasses different categories of goods. The Law on the Protection of Movable National Cultural Heritage defines these assets in the very first article: "National cultural heritage comprises all assets identified as such, regardless of their ownership, which are a testimony and expression of values, beliefs, knowledge and traditions in continuous evolution; it comprises all elements resulting from the interaction, over time, between human and natural factors."[3] This definition refers to the essence of these properties in a general way.

First of all, we will present some etymological aspects, because they also underline the importance of cultural heritage and the need to protect it.

First we will take a closer look at the notion *heritage (*in romanian *patrimoniu)*. It reffers to what we own (rights and obligations).

[1] Some of the ideas presented in this article will be part of my PhD thesis.

[2] Drd., student teaching assistant "1 Decembrie 1918" Univeristy Alba Iulia, Faculty of Law and Social Sciences, tiberiu.teglas@uab.ro.

[3] Law 182/2000 on the protection of national mobile cultural heritage, art 1, paragraph (2).

The etymology of the term heritage also reminds us on the one hand that these assets are inherited from our ancestors (inheritance), and on the other hand that it is our moral duty to pass them on to posterity together with all the values, principles and historical significance they carry. In other words, rights and obligations, as we are already used to. It is important not to forget the obligations.

If we refer to the matter of succession (in fact of inheritance[4]), we can consider the term heritage to be an appropriate term, since it is what is passed on after the death of the deceased to his successors. If we focus on the economic value, sometimes even priceless (for example the famous Codex Aureus)[5] of these assets, we also consider the term appropriate. The appropriateness of this term is also underlined by the non-economic aspects, because after all the true value of these goods derives from what goes beyond the economic side. Assets inherited by the successors of the deceased also have a sentimental, spiritual side, since they are based on the bond of kinship, of common belonging. Even when an inheritance is sold, certain assets benefit from a different legal regime precisely because of this spiritual charge.[6] The appropriateness of the concept is also supported by this aspect. We agree with Vlad Vieriu's statement that when we speak about heritage, we can also use this term in the sense of goods belonging to a community and representing a legacy left by our ancestors.[7] Related to this aspect the ownership of these assets is irrelevant. Even if some are in the private ownership of natural or legal persons or in the ownership of the State, they benefit from a distinct legal regime because, regardless of ownership, they are representative of entire communities. We are talking about assets with value for a smaller or larger community or even assets with global value. And this has an impact, and we agree with these aspects, on how these assets can be used, restored[8], conserved.

In some European languages the same notion is used both in the sense of inheritance and in the sense of cultural heritage - for example: heritage (English), héritage (French), örökség (Hungarian).[9] If we look at the notions in English and French, we recognise the similarities with the Latin hereditas, which also means succession, inheritance, i.e. "succession

[4] The term succession has a broader meaning than inheritance, encompassing both acts inter vivos and mortis causa. For details see Adam Drăgoi, Miruna Tudoraşcu, *Dreptul asupra moştenirii. Explicaţii teoretice şi aspecte practice*. Editura Pro Universitaria. Bucureşti, 2016, p. 15.

[5] For details see for example http://www.bibnat.ro/Codex-Aureus-s109-expo1-ro.htm - 21.04.2021

[6] Civil Code, art. 1752, paragraph (1).

[7] Vlad Vieriu, *Protecţia juridică a patrimoniului cultural în dreptul comparat*, Editura Universul Juridic, Bucureşti, 2021, p. 16.

[8] For example the state's right of pre-emption.

[9] https://patrimoniu100.ro/abc-ul-patrimoniului/patrimoniu-cultural/ - 30.03.2021.

to all the rights that the deceased had".[10] And even if this wording seems vague, we know that the reasoning behind the transmission of the inheritance is actually the continuation of the personality of the deceased, an aspect which entails both the taking over of the rights and the debts (obligations) of the deceased. And we take every opportunity to stress the importance and necessity of assuming obligations in respect of this inheritance. Perhaps it would sometimes be more comfortable not to take on obligations in relation to cultural heritage, but on the one hand we would not express our gratitude to past generations, on the other hand we would deny our past and identity, and last but not least we would harm the generations that follow us. The assumption of obligations, for real protection, must take place on several levels.

It is interesting to follow the etymological analysis made by Vlad Vieriu where he concludes that the notion of heritage (in romanian *patrimoniu*) and the term to protect are semantically related notions.[11] According to this we cannot fail to note the etymological aspects of Roman law, relating to the pater familias, which encompasses both the values relating to the transmission of inheritance and those relating to the protection of those under his power.[12] If we look at things from a different angle, we can clearly see the mutual nature of protection, in that it is not only we who protect this heritage acquired from our ancestors, but the heritage also protects us. It prevents us from dissolving culturally, and above all in terms of identity, into the trend towards uniformity with the risk of uprooting, effects which we assimilate to the effects of the decontextualisation of archaeological assets. And the risks and irreversible consequences of the decontextualisation of these assets are well known.

The construction of *cultural heritage* also calls for an analysis of the notion of *cultural*. What is culture? The explanatory dictionary of the Romanian language distinguishes between several meanings, but the following meanings are relevant to our study: "The totality of the material and spiritual values created by mankind and the institutions necessary for the communication of these values," respectively "The totality of the vestiges of material and spiritual life through which the image of a human community in the past is reconstructed."[13] We can easily see that in addition to the material aspects, reference is also made to the spiritual. This fact is also underlined by the dimension of the etymological analysis.

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[10] Vladimir Hanga, Mircea Dan Bob, *Curs de drept privat roman*, Ediția a III-a revizuită și adăugită, Editura Universul Juridic, București, 2009, p. 219.

[11] For details see Vlad Vieriu: *Protecţia juridică a patrimoniului cultural în dreptul comparat*, Editura Universul Juridic, București, 2021, p. 15.

[12] *Ibidem.*

[13] https://dexonline.ro/definitie/cultura – 09.04.2021.

If we also briefly examine the etymological dimension of the term culture, in addition to finding the Latin source *colere*, which means to cultivate, or to take care of, we find quite quickly the similarities concerning agriculture, or simply the cultivation of certain plants. The primary meaning of cultivating the land expands to include the meaning of cultivating the spirit. But it is imperative not to confuse culture with civilisation. The academician Simion Mehedinţi makes a clear distinction, associating civilisation with technological progress and culture with spiritual progress.[14] Cultural heritage has this spiritual dimension. But if we want to be objective, we cannot ignore the technological aspects either, because many of the elements of cultural heritage are also true testimonies to technological progress or regression, regardless of the field we are referring to: architectural, craft, numismatic, heraldic, etc. The fact that we must also take account of the latter is also underlined by the inclusion among heritage goods of "technical importance, such as: a) unique technical creations;b) rarities, irrespective of brand;c) prototypes of apparatus, devices and machines of current creation;d) technical creations of memorial value;e) achievements of folk technology;f) compact-disc, CD-ROM, DVD and similar masters".[15] On the other hand, the well-being of a nation, also facilitated by technological aspects, opens new horizons for the protection of cultural heritage.

So, *cultural heritage* encompasses the above aspects, but if we want to transpose the analysis of this construction on different levels, we come to the conclusion that cultural heritage has a different load on different levels (local, national, world cultural heritage), or even on the same level, but related to different geographical areas. Obviously, the smaller the geographical area, the stronger the cohesion of cultural heritage, but the value of a given objective is directly proportional to its representativeness. At the macro level it also enhances the sense of common belonging, the sense of unity. In this case, it is not only similarities, common or similar heritage that are important, but also differences or even uniqueness that contribute to the diversity of cultural heritage in a given area or on a given level. At this point we would like to point out a reality that will influence the composition of the national cultural heritage, especially in relation to immovable cultural heritage, in the periods to come: standardisation. Uniformity is encouraged, among other things, by the desire to copy and align with foreign standards. Of course, in past centuries there were also common elements, for example in different European countries. Artistic currents, even if not simultaneously, made their presence felt in most

[14] Simion Mehedinţi, *Civilizaţie şi Cultură, Concepte, definiţii, rezonanţe*, Editura Trei, 1999, p. 23-37.
[15] Law 182/2000 182/2000 on the protection of national mobile cultural heritage, art 5, paragraph (2), point. 5.

European countries, but in addition there were those elements which were characteristic only of certain territories and which are slowly becoming more and more rare. Even in the extremely conservative arab world, the effects of globalisation and interaction with the west can be seen.[16] Uniformisation and globalisation, to some extent also under the umbrella of EU regulations, are an increasingly striking reality, a result which will lead to a narrowing of diversity in terms of cultural heritage. In support of this idea, we also cite as an example the intangible heritage, which is in danger due to the forgetting of traditions, the non-practice of ancient crafts, and other similar causes. There are also many causes of this loss and oblivion: technological progress, lack of interest, the trend towards increasing individualisation, convenience and, in the context of the pandemic, the obvious restrictions that will most probably lead to the loss of certain practices or, who knows, maybe even the opposite, the revival of those practices out of a desire for socialisation or out of necessity.

An idea which we embrace and which also reinforces what we have already pointed out earlier, but which we paraphrase a little, is also found at Vlad Vieriu, and shows that when we refer to cultural heritage we must also take into account, in addition to the „end product", some aspects of a non-heritage nature thanks to which it exists, such as rights and freedoms: freedom of expression, freedom of thought, freedom of religion, etc.[17] Freedom of expression, freedom of thought and freedom of religion have provided fertile ground for diversity in cultural goods. But let us not forget the other side of the coin, in the sense that sometimes the very restrictions on the freedoms mentioned earlier have led to a search for new models of expression that do not contravene, or appear not to contravene, the prohibitions.

If we have just presented somewhat negatively the copying tendencies of other people, we must not forget that the reverse is also true, in that many of the assets that are part of the national cultural heritage have emerged precisely because of the „copying" of expressions by artists from other countries. If we take classicism as an example, the very essence of this movement is a return to the values and ideals of the ancient world (ancient Rome and ancient Greece).

A paradox that derives from the name is that heritage refers to rights and obligations that can be valued in money, but on the one hand cultural heritage also contains goods that have inestimable value, on the other hand non-heritage value gives the true value of these goods, without denying or diminishing their heritage value.

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[16] For details see: Vlad Vieriu, *Protecţia juridică a patrimoniului cultural în dreptul comparat*, Editura Universul Juridic, Bucureşti, 2021, p. 76-77.
[17] *Ibidem*, p. 19.

National heritage assets have intrinsic value (e.g. a coin because of the material from which it is minted, a painting, etc.) and aesthetic value, but beyond this, they have spiritual and historical value. Often their value derives not only from what is visible, but from everything that is connected to what we see, from the „story" that the asset we see tells. They are testimonies to a time that has already passed, to what we call history, but they are also an aid to connect with the past, to understand it and to reap the legacy left by our ancestors, a legacy that helps us to find ourselves, to realise who we are. As we move rapidly towards standardisation and globalisation, it is imperative not to give up national values, which also keep alive the sense of common belonging and are factors of social cohesion. On the other hand, contributing to the world's heritage offers a sense of satisfaction, pride and usefulness. The motto „unity in diversity", which is one of the basic principles of the European Union and a motto of the ecumenical weeks of prayer for Christian unity, is also valid in the field of cultural heritage, whether we refer to local values as part of the national cultural heritage or to national heritage as part of the European or even world heritage.

If we narrow down the definition a little in the sense of referring to Romania's national cultural heritage, we agree with the following statement: "Romania's national cultural heritage - the totality of cultural values consisting of the vestiges of history and civilisations created over millennia on the territory of Romania, of literary, artistic, scientific and technical creations of established value over time and of values belonging to the universal cultural treasure existing on the territory of Romania".[18].

The existence of these heritage objects obliges us first of all morally to protect them, their protection being equivalent to the protection of our identity, and secondly because it is "perhaps the most valuable resource that feeds culture, civilization and the happy existence of the human being in time".[19]

What does protecting cultural heritage actually mean? "Protection means a set of legal, scientific, technical, administrative and financial measures to prevent the loss, destruction and degradation of cultural heritage."[20] We will list some examples.

For real protection, a first step is to identify those objects that are already part of the national cultural heritage or are likely to become part of it. In a world where forgeries are increasingly easy to make thanks to easy

[18] http://www.alazar.ro/wp-content/uploads/2019/02/GHID-DE-PATRIMONIU.pdf - 21.04.2021.
[19] Vlad Vieriu, *Protecţia juridică a patrimoniului cultural în dreptul comparat*, Editura Universul Juridic, Bucureşti, 2021, p. 10.
[20] https://unece.org/DAM/hlm/projects/UNDA-9th_tranche/Documents/Moldova/Sep_2015__Presentation_Day_1/1.4._C-Andrusceac.pdf - 23.04.2021

access to information and modern equipment, it is imperative to pay more attention to the methodology and process of identification. Very often, goods disappear or appear for which it is necessary to establish identity and therefore value. These realities call for keeping abreast, even anticipating possible directions in the use of technology for these purposes. Technological and scientific progress can be, and indeed is, a real help when it is necessary to identify these assets or carry out forensic, archaeological, etc. research into them, but let us not forget that this progress has also facilitated archaeological poaching, along with numerous other crimes, obviously with all the harmful consequences that such activities entail.

After the identification of the representative goods, the classification of the goods follows. "Classification means the procedure of nominating those movable cultural objects that meet the conditions (criteria) on the basis of which they can form part of the national movable cultural heritage".[21] The inclusion of movable property in the categories of fonds or treasure gives it better protection. "Once classified, the assets enjoy a special regime in terms of recording, research, preservation, security, conservation, restoration... regime provided for in the legislation on national movable cultural heritage."[22]

"For immovable heritage, the classification criteria (which determine the legal category and value group of the immovable national cultural heritage to which these assets belong, i.e. group A or B of historical monuments) are the following: a) the criterion of age; b) the criterion of architectural, artistic and urban value; c) the criterion of frequency (rarity and uniqueness); d) the criterion of memorial-symbolic value."[23]

Their conservation and restoration are also values to which we must pay greater attention. Given that many cultural assets (e.g. a number of architectural monuments) are still in use, it is of interest how they are used and how they are restored. We consider this issue to be topical, as there are a large number of monuments that require both conservation and restoration work.

A legitimate question is: what are the causes of the destruction of heritage sites? If we consider, for example, immovable heritage, the most relevant causes, apart from crimes, because we will talk about those a little below, are obviously meteorological factors such as rainfall, frost, heat, or even large fluctuations in temperature, landslides, etc., factors which, combined with a lack of intervention at the right time, or prioritising other aspects, lead to unfortunate consequences for heritage.

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[21] http://www.alazar.ro/wp-content/uploads/2019/02/GHID-DE-PATRIMONIU.pdf - 21.04.2021.
[22] *Ibidem.*
[23] http://cdclio.spiruharet.ro/images/2016/biblioteca-virtuala/1-discipline/Evaluarea% 20patrimoniului.pdf – 23.04.2021.

Another cause of destruction is armed conflict (wars, terrorism, etc.), although sometimes various targets are destroyed unintentionally, but in other cases unfortunately with intent. This intention in turn may have various causes, such as the destruction of certain strategic points, or religious considerations, etc. "In 1954, in the event of armed conflict, the Convention for the Protection of Cultural Property, also known as the Hague Convention, was adopted. It was a response to the many destructions caused by the Second World War. It is the first international treaty of universal scope dedicated to the protection of cultural heritage in the event of armed conflict."[24]

Also in the category of causes of degradation and destruction we can include the policy of urbanisation or lack of it. Sometimes building is done haphazardly without taking into account considerations of the inherent aspects of cultural heritage. When financial and economic interests prevail, cultural heritage suffers.

Another aspect worth discussing is the concept of adaptive re-use, which has become increasingly popular in recent times, and obviously the presentation of both the positive and negative aspects of this trend, i.e. looking at the current state of these practices at national level, and obviously drawing guidelines for this trend and setting limits. It is also possible to use the practices of other countries in this respect in a positive way.

Devastation is also a danger, and this reality requires a study of the psychological aspects of different behaviours and attitudes towards cultural heritage. Obviously not only the causes need to be found, but highlighting those causes helps us to develop and implement effective strategies and measures to prevent damaging behaviour. Bearing in mind that heritage objectives are non-renewable resources, it is all the more necessary to focus on prevention measures and only subsidiarily on measures to repair damage.

The nature of the offences determine accountability of those who commit crimes against cultural heritage.[25] Anti-social behaviour which causes damage to cultural heritage attracts the liability of the perpetrators. Accountability is effective if it takes place in accordance with a well-developed methodology. In the process of holding perpetrators of offences against cultural heritage accountable, in the process of identifying cultural heritage assets and whenever necessary, an expert examination of heritage objects, together with the investigation of the crime scene, is of paramount importance. Scientific and technological developments and the

[24] https://patrimoniu100.ro/abc-ul-patrimoniului/patrimoniul-intre-protejare-si-distrugere/- 25.04.2021.

[25] Theft of works of art and objects of worship, theft from archaeological sites, destruction of movable and immovable property of cultural value, unauthorised excavation of archaeological sites, forgery of works of art, etc.

collaboration of judicial agencies in different countries are some of the key elements for effective prosecution.[26]

In addition to the criminal law aspects, the question of how to repair the damage caused is also of interest. The ultimate aim is not to punish offenders but to repair the damage, and especially to prevent anti-social behaviour in relation to cultural heritage. Unfortunately, many of the consequences of crimes are irreversible, which makes us all the more cautious. Also in everyday life we protect more intensively those „things" which are unique, rare, compared to those we can easily replace. We should be more cautious about these goods.

The result of some crimes is the disappearance, the theft of movable goods, of goods from archaeological sites, or even components of real estate. Recovering them both from criminals and from private collections requires human, material and financial resources. The internationalisation of crime makes it necessary to internationalise recovery activities. The problem of recovering missing property must also be divided into recovery and prevention activities.

When we speak of the deliberate destruction of heritage objects, concepts such as vandalism, poaching and the like come to mind. Vandalism is a sad reality that can be attributed mostly to young people out of a desire for affirmation or externalisation without realising the seriousness of the consequences. Archaeological poaching, on the other hand, is the result of the actions of more knowledgeable people who resort to such activities for the well-known financial reasons. The reality is that the two concepts are often linked. Archaeological poaching often leads to vandalism precisely because of illicit considerations. Crimes are committed at night, on the run, without paying attention to the context, with parts of sites often remaining uncovered for long periods of time. And obviously vandalism is also linked to terrorism. By way of example, we mention the vandalism of the ISIS group, which for religious reasons destroyed the historic city of Nimrud in northern Iraq about 5-6 years ago, obviously along with all the archaeological values that were there.

In addition to theft and destruction another danger is the making of forgeries, facsimiles, reproductions of existing ones, with the sad consequence, among others, of diminishing the value of the authentic ones.[27]

We could mention among the means of protecting these goods the presentation of them in museums, at exhibitions, openings, etc. We believe

[26] For some details on the complexity of the issues see for example Emilian Stancu, *Tratat de criminalistică,* ed. a VI-a, revăzută, Editura Universul Juridic, Bucureşti, 2015, p. 357-371, sau Jay A. Siegel, *Encyclopedia of forensic science*, Academic Press, 2000, p. 409-462.

[27] For details see: Augustin Lazăr, Sorin Alămoreanu, *Expertiza criminalistică a documentelor, Aspecte tehnice şi tactice*, Editura Lumina Lex, Bucureşti, 2008.

that in the process of becoming aware of the responsibility we have towards this heritage, it is sometimes necessary to give it a boost, a reminder that it is our responsibility to protect and present it. Objectivity, however, calls for the fact that we are holding a double-edged sword. The presentation of these goods obviously leads to their knowledge and subsequent identification, i.e. to facilitating their recovery in the event of their disappearance, but it can also arouse the interest of those who would like to have them in their private collections, or even to make use of them. When considering the presentation of these goods, we cannot leave out the issue of laundering of heritage goods, which is also achieved by presenting goods of illegal origin.

One factor which may facilitate or, on the contrary, hinder or even prevent the implementation of the various measures needed to protect, recover, conserve, restore, etc. the assets in question is the financial factor. The allocation of resources, in addition to being proportional to the level of protection of these assets, also points to the way in which the state relates to these national values. At this point it is imperative to make the point that we cannot always do everything needed, but we must always do what we can.[28] "Postponing measures to protect monuments until the future, when we have more money and can restore what is being destroyed today, is an illusion."[29]

The fire on 15 April 2019 at Notre-Dame Cathedral in Paris, a historic monument inscribed on the UNESCO World Heritage List, is a notorious example of the fact that it can be done, of the fact that if there is the will, resources to restore and protect these values can be found not just in the wake of disasters.[30] However, we must note that the mobilisation to raise the necessary funds to restore this cathedral is exceptional. In war-torn areas much more cultural property is destroyed, yet we do not hear of interventions on the scale of this case.[31]

One aspect we would like to point out is the possibility of application within the framework of various national or European projects. European projects are resources that it would be a pity to leave untapped, and the amounts for which is possible to apply are usually significant.

The legal regulation is a framework that covers all the aspects discussed above. Knowledge, actualisation and application of the law must

[28] Saying attributed to the former prince of Transylvania, Gabriel Bethlen.

[29] https://unece.org/DAM/hlm/projects/UNDA9th_tranche/Documents/Moldova/Sep_2015__Presentation_Day_1/1.4._C-Andrusceac.pdf - 23.04.2021.

[30] According to media reports very few pledgers have pledged to donate to the restoration of the cathedral. See for example https://www.mediafax.ro/externe/doar-9-dintre-promisiunile-de-donatii-pentru-catedrala-notre-dame-au-fost-concretizate-18170152 - 27.04.2021.

[31] For details see Vlad Vieriu, *Protecția juridică a patrimoniului cultural în dreptul comparat*, Editura Universul Juridic, București, 2021, p. 87-89.

be the priority alongside the last element to be discussed, without diminishing the importance of the others: education.

Perhaps education, and specifically education in relation to cultural heritage values, is the element that should be put at the top of the list, as it could have a decisive influence on all the aspects mentioned above. Education can change destinies. Both people's destinies and the destinies of heritage sites. If proper emphasis is placed on education, we are sure that the problems related to cultural heritage will be visibly reduced. Education shapes a way of thinking that also appreciates common values in this world increasingly characterised by individualism.

Another valence of education is the training of specialists in different fields. Whether we are talking about lawyers, historians, architects, archaeologists, craftsmen, etc. it is extremely important that they to be well trained. Unpreparedness paves the way for irreversible mistakes, and we must not forget that we are often dealing with unique elements. If we take into account technological and IT developments[32], we are probably not wrong in thinking that even continuous training is needed to keep up, because criminals will certainly take advantage of all these opportunities.

The effects of protecting national cultural heritage, first and foremost, and obviously also global heritage, are many and varied: cultural, social, spiritual, architectural, historical, economic, etc. The desire to protect cultural heritage and make it a reality is nothing new in relation to these assets, as this concern has existed since ancient times, obviously in a more or less primitive form, but in recent decades it has benefited from a qualitative leap. Even if it is only since the 19th century that we can speak of cultural heritage in the strict sense of the term, or of an awareness of cultural heritage, this does not mean that man has not been concerned since ancient times to raise, create and leave certain objects for posterity and to preserve existing ones. If we take the people of Israel and the Old Testament as an example, we can see that not once, after certain important events, stones were placed in a certain place to bear witness to what happened there and to „proclaim" to their successors those events and obviously the divine help they received. The reasoning was that when the children would ask what the role of those stones was, the parents would be given the opportunity to tell them about those events that were related to that place, and obviously, implicitly, have the opportunity to tell them about divine providence and God. For the sake of illustration we have chosen to include a short passage from the book of Joshua:

[32] See also Augustin Lazăr, Marius Mihai Ciută, *Cooperarea europeană în combaterea traficului cu bunuri culturale pe internet,* Seria Patrimonium, Editura Universul Juridic, Bucureşti, 2015, p. 455-462.

„When the whole nation had finished crossing the Jordan, the LORD said to Joshua, “Choose twelve men from among the people, one from each tribe, and tell them to take up twelve stones from the middle of the Jordan, from right where the priests are standing, and carry them over with you and put them down at the place where you stay tonight.”So Joshua called together the twelve men he had appointed from the Israelites, one from each tribe, and said to them, “Go over before the ark of the LORD your God into the middle of the Jordan. Each of you is to take up a stone on his shoulder, according to the number of the tribes of the Israelites, to serve as a sign among you. In the future, when your children ask you, ‘What do these stones mean?’ tell them that the flow of the Jordan was cut off before the ark of the covenant of the LORD. When it crossed the Jordan, the waters of the Jordan were cut off. These stones are to be a memorial to the people of Israel forever.” So the Israelites did as Joshua commanded them. They took twelve stones from the middle of the Jordan, according to the number of the tribes of the Israelites, as the LORD had told Joshua; and they carried them over with them to their camp, where they put them down. Joshua set up the twelve stones that had been in the middle of the Jordan at the spot where the priests who carried the ark of the covenant had stood. And they are there to this day.”[33]

The cultural effects are undeniable through the prism of the goods themselves and their related aspects. How we relate to cultural values is an indicator of the level of a society.

The social effects of cultural heritage protection are among the most valuable, as they are the way to make the spiritual values of heritage come alive. Heritage has this power to remind us of the past, to connect us with our fellow human beings in the present, and to open up prospects for the future. Even ruins have the power to enliven communities, amplifying the sense of common belonging, the desire to affirm, to not give up. And if we look at it from a different angle, some buildings, monuments of architecture, archaeology, etc. provide the framework in which socialisation takes place. Often it is the monuments themselves, or various heritage objects, that gather crowds, and the social effects are obvious. A case in point is the restoration of the Alba Carolina Fortress in Alba Iulia. After its restoration, this fortress was the venue for numerous cultural and social events, not to mention the waves of tourists it attracted.

Another effect we are discussing is the historical effect. An idea that we found by chance and that highlights the relevance of heritage sites in terms of knowledge of history is the following: "The most tangible knowledge of the history of the locality we receive through the historical monuments that we have and that we can see every day without any effort,

[33] NIV Bible, Book of Joshua, 4, 1-9.

just walking down the street. This knowledge is an excellent tool for community cohesion and education of national consciousness;"[34] The same reasoning behind the building of stone mounds by the Israelites in Old Testament times can be seen.

Cultural goods connect us with the past, help us to understand it, to learn from it, avoid making the same mistakes and not infrequently the appearance of archaeological or even artistic objects strengthens or, on the contrary, changes our perception of the past. These testimonies also generate that feeling of being part of a historical continuity, of being part of something that goes beyond the time span we have been given.

A final effect we would like to point out, obviously with the mention that the effects of cultural heritage are not limited to those presented, is the economic effect. Here too we must look outwards, to other countries with a tradition of cultural heritage. We can see the material consequences of the existence of heritage assets, obviously if these assets are properly preserved, maintained and presented. If we take countries such as Italy or Israel as examples, it is easy to understand what we are trying to point out. It is obvious that the economic effects are closely linked to tourism considerations.

All the effects highlighted are somehow connected. This interconnection motivates us, because even if we act in one niche, the effects can be felt in others.

Conclusion

The ideas presented above show us how complex, how serious, how urgent the issue of cultural heritage is. The value and importance of this heritage, given by what we see and what lies beyond what we see, should motivate us, encourage us to act to protect and enhance this heritage, because it is ours. We must bear in mind that in many cases we are dealing with unique elements. Protection means prevention, restoration, recovery, allocation of resources, etc. If we protect cultural heritage, cultural heritage protects us.

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THE CURRENT LEGAL FRAMEWORK OF THE DISCIPLINARY AND CIVIL LIABILITY OF MAGISTRATES

George Marius MARA[1]

Abstract

The liability of the judiciary for the way in which they perform their professional duties, and the new rules on liability for judicial error were designed to ensure respect for the legitimate rights and interests of the individual and to ensure that any damage caused by a judicial error is repaired.

The present study gives an overview of the connection between civil liability and professional liability of magistrates, the link being precisely represented by causing a judicial error as a result of the performance by the magistrate of his or her duties in bad faith or in serious negligence.

Of course, in line with the constitutional provisions, the State's liability for the damage caused by the judicial error is an objective one, and the magistrate's liability will only be subsidiary, provided that the conditions required by law are met.

Keywords: *judicial error, liability, tort, disciplinary liability, prejudice*

Taking into account the specificity of the profession of magistrate and the status of representatives of the judiciary as the third power in the state, the rules of conduct enshrining their professional deontology aim to regulate both the interaction of magistrates with the participants in the act of justice, as well as the intra-professional interaction or with representatives of other institutions, in a manner that ensures a high standard of prestige and professional dignity.[2]

This is because the magistrate must prove a high degree of professional ethics, dignity and honor both in the exercise of his office and in social interactions.[3]

The forms of legal liability of the magistrate are the same as we find in the situation of any other citizen. Thus, the magistrate may be liable to disciplinary action, when disregarding the rules of conduct specific to the profession, may be civilly liable when it causes a damage that needs to be

[1] 1 Decembrie 1918 Alba Iulia University.

[2] S. Luca, D. M. Bulancea, in *Deontologia profesiei de magistrat. Repere contemporane,* colective, M-M Pivniceru, C. Luca, coordinators, Editura Hamangiu, Bucureşti, 2008, p. 65-67.

[3] F. Costiniu, coordinator *Codul Deontologic al magistraților. Ghid de aplicare* Asociația Magistraților din România, Editura Hamangiu, Bucureşti, 2007, p. 11.

repaired or may be criminally liable when he commits with the guilt required by law facts that fall within the scope of this branch of law.

The present study aims to analyze the issues of civil and disciplinary and professional liability of the magistrate and the correlation between these forms of legal liability.

1. Disciplinary liability of magistrates[4]

Moreover, in article 12 of Chapter 5, the Code of Ethics for Judges and Prosecutors regulates, in the content of Article 12 of Chapter 5, the notion of exercising professional duties, respectively the obligation of magistrates to perform with competence and fairness the professional obligations, to comply with the duties of an administrative nature established by laws, regulations and service orders.

The judicial power, through the creative role it manifests, but also by virtue of the place it holds in the constitutional architecture of the state, is in fact a genuine third power in the state. However, the members of the judicial authority must act guided by ethical and deontological principles transposed, including at the legislative level, which, together with other mechanisms, are intended to guarantee the respect for the independence of the judiciary.[5]

When the magistrates do not meet the criteria of competence and fairness and thus violate the norms of substantive or procedural law, out of bad faith or gross negligence, their disciplinary responsibility for committing the misconduct provided for by the provisions of art. 99 lit. t of Law no. 303/2004 on the status of judges and prosecutors is enacted, consisting in the exercise of their office in ***bad faith or gross negligence.***

By adopting Law no. 242 of 2018 on the amendment of Law no. 303 of 2004 on the status of judges and prosecutors, the legislator also carried out a redefinition of the notion of judicial error, even though article 99 index 1 containing the definitions of bad faith and gross negligence remained unchanged.

Thus, there is bad faith when the judge or prosecutor knowingly violates the norms of substantive or procedural law, seeking or accepting the injury of a person. There is serious negligence when the judge or prosecutor disregards, seriously, unquestionably and inadvertently, the norms of substantive or procedural law.

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[4] For details, G.M. Mara, *Prejudiciul nepatrimonial cauzat prin eroarea judiciară*, Editura Universul Juridic, Bucureşti, 2020.

[5] For details regarding the limits and the manner by which the judicial power interfers with other powers of the State, see G.M. Mara, *op.cit.*, p. 112 and following.

Thus are outlined the two forms of guilt of the magistrate in the exercise of his duties, namely bad faith and serious negligence, the first of which represents an intentional manifestation and the second, one of fault.

Of course, the object of the disciplinary investigation cannot be constituted by the logical-legal reasoning of the magistrate, as the analysis of its correctness can be carried out only within the framework of the remedies provided by the law, otherwise the constitutional principle of the judge's independence being irretrievable and seriously harmed.

As it was held under the old regulation, in order to meet the constituent elements of the disciplinary misconduct provided for in letter t of Article 99, the actions committed by the magistrate must seriously harm the act of justice, the rights and interests of the parties or lead to an excessive duration of the proceedings.[6] Moreover, the new regulation of Article 96 of Law No. 303 of 2004 provides that judicial error is a case of serious violation of the rights, freedoms and interests of individuals by ***manifestly*** violating the rules of substantive or procedural law or by issuing a final court decision contrary to the law or the factual situation arising from the whole of evidence. Therefore, neither before nor after the recent legislative amendments could and cannot be considered that any form of failure to perform professional duties is liable to give rise to the disciplinary misconduct provided for in letter t of Article 99 of the Law, but only the acts, actions or inactions, of a greater gravity, which have the consequence of seriously harming the rights, the freedoms or interests of citizens.

The necessary definition of a clear manner, in compliance with the conventional standards of accessibility and predictability of the jurisprudence of the European Convention on Human Rights in the field of Article 6, lies in the fact that bad faith or serious negligence, as prerequisite factors of the judicial error caused by the magistrate, may lead, in this case, also to the involvement of his civil responsibility, not only of the disciplinary one.

Judicial error is thus a binder between the two forms of liability, disciplinary of magistrates and civil of the State, respectively, for the latter acting as a component element, in the form of tort[7].

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[6] It was assessed that it brought together the constituent elements of the disciplinary misconduct provided for by article 99(t) of Law No 303/2004 the act of the judge who, with the intention of redirecting a material error in the record of a decision, altered the amount of the penal fine imposed on an defendant as well as that of civil pardons, by adding the figure "0"– din *Deontologia profesiei de magistrat. Repere contemporane*, coordonatori M-M Pivniceru, C. Luca, Editura Hamangiu, Bucureşti, 2008, p. 196.

[7] G.M. Mara, *op.cit.*, p. 121.

2. *Civil liability of the magistrate*

As subjects of civil law, judges and prosecutors are responsible for any action or inaction causing damage, regardless of the source of the obligation to dissent.

As regards the civil liability of magistrates for acts that are at the same time disciplinary misconduct, it is to be pointed out that, at present, national law limits this form of legal liability with regard to the magistrate, strictly for the case of causing damage as a result of a judicial error.

In the form prior to the modification, following the parameters established at the level of the fundamental law[8], article 96 para. 4 of Law no. 303 of 2004 provided that the State is liable pecuniary for the damages caused by judicial errors and the liability of the state is established under the law and does not remove the liability of judges and prosecutors who exercised their function in bad faith or gross negligence (thus the hypothesis of disciplinary misconduct provided for in point t of Article 99), a regulation currently taken over in paragraphs 1 and 2 of Article 96, following the adoption and entry into force of Law No. 242 of 2018.

Therefore, distinct from the essentially patrimonial character of the form of liability of the State for the damage caused by judicial errors, the same form is to be taken by the subsidiary civil liability of the magistrate, this being limited by the imperative that that damage was caused by the exercise of the function in bad faith or by gross negligence. These two theses represent, in fact, the two ways of manifesting the disciplinary misconduct regulated by letter t of Article 99 of Law No. 303 of 2004.

The civil liability of the magistrate intervenes in a subsidiary manner, after the conviction of the State for the damage caused by the judicial error, following a recourse action that is not mandatory, but will be promoted only if, after the analysis carried out by the Ministry of Public Finance and the drawing up of an advisory report by the Judicial Inspection, the representative of the executive power comes to the conclusion that the magistrate acted in bad faith or gross negligence.

In order to better understand the major consequences of that limiting legislation as regards the civil liability of the magistrate, account must be taken of the concept of judicial error as an act of civil tort entailing, on the one hand, the liability of the State towards the victim who has suffered damage and, on the other, subsidiary and indirectly (by way of recourse), the civil liability of the magistrate, but only when he/she has exercised his/her function in bad faith or gross negligence[9].

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[8] Art 52 (3) of the Romanian Constituion states that *"The State shall be liable for damage caused by legal errors. The liability of the State shall be determined in accordance with the law and shall not detract from the liability of magistrates who have exercised their duties in bad faith or in serious negligence."*

[9] For details on judicial error, G.M. Mara, *op.cit.*

The new regulation enshrines the dual nature of civil liability for the damage caused by the judicial error, respectively the objective liability of the State, as a guarantor of an act of justice carried out according to the rules of the fair trial, and, in the alternative, the liability of the magistrate who acted in bad faith or through gross negligence and thus caused the judicial error.

If, in essence, the new regulation retains the previous legal framework regarding the disciplinary responsibility of the magistrate, as well as a good part of the regulation of the facts that constitute disciplinary misconduct, new actions or inactions have been instituted either to form the object of the disciplinary investigation, or changes have been made with regard to the sanctioning regime or even to the disciplinary proceedings.

At the doctrinal level[10] it was considered that the limits of the disciplinary responsibility of magistrates are given, on the one hand, by the principle of the independence of judges, including independence from the executive power, the principle of the authority of *res judicata* and the principle of legal certainty.

Article 96 of Law No. 303 of 2004, which is the basic regulation on the liability of magistrates for damage caused by a judicial error, has undergone extensive reformulation.

Thus, on the one hand, the text provides that there is a judicial error when a procedural act was ordered in obvious violation of the provisions of substantive and procedural law, an act by which the rights, freedoms and legitimate interests of the person were seriously violated, causing a damage that could not be remedied by an ordinary or extraordinary appeal.

On the other hand, there is a judicial error, as regulated by paragraph 3 of article 96 of Law no. 303/2004, also in a situation where, by a final court decision, contrary to the law or the factual situation resulting from the evidence administered, the rights, freedoms and legitimate interests of the person have been seriously affected, a prejudice that could not be remedied by an ordinary or extraordinary appeal. [11]

Subjected to several criticisms of unconstitutionality, the text has undergone changes, the final form being established following the pronouncement of several decisions[12] by the constitutional court by which it ruled that the judicial error must be clearly defined, given that not every mistake of judgment constitutes a judicial error, but only serious violations, "*manifest, undoubted, gross, coarse, absurd or which have*

[10] I. Gârbuleț, *Abaterile disciplinare ale magistraților*, Editura Universul Juridic, București, 2016, p. 482-489.
[11] G.M. Mara, *op.cit.*, p. 124-125.
[12] Decisions no 45/2018 and no 252/2018, at www.ccr.ro

provoked illogical or irrational factual or legal conclusions", and simple judicial misinterpretations will be corrected only by means of appeals.[13]

Therefore, not every professional error of the magistrate is capable of attracting his civil liability for the exercise in bad faith or gross negligence of the office, but only those that are serious, undoubted, manifest, gross, absurd and which represent interpretations of the law that no diligent magistrate would have approached.

Similarly, but with regard to another area of professional civil liability, the medical one, the courts[14] have ruled that the responsibility of the doctor for the way in which he performs his professional duties will not be entailed if he acted in accordance with common practices accepted as appropriate by a body of responsible, reasonable doctors, respectable, and if the concrete medical act is validated by the members of such a body, there will be no civil liability for negligence.

*3. **Professional liability of the magistrate***

The very origin of the term malpractice *(mal* – sick, defect, and *praxis* – practice, profession) entails the scope of the coverage of this notion: the faulty, wrong exercise of the profession, and which is capable of causing damages that require reparation.

It has been stated[15] that the civil liability of professionals for the damage caused by malpractice is a distinct form of legal liability that cannot be framed in the typology of either one of the two already known types, civil tort and contractual liability.

The basis of that third-type liability is professional ethics and deontology, which require compensation for any damage caused to a third person by the incorrect way in which the professional obligations are fulfilled, whether or not we are in the presence of a contract.

Freedom to exercise a profession must necessarily be linked to responsibility, diligence and competence, mastery of risks and prevention of harm to other persons. Various rules of deontological but also disciplinary character regulate the responsibility of professionals in numerous fields, establishing a framework for the proper exercise of their activity.

It is considered that the professional's liability is an aggravated one, in relation to the specialized knowledge he has and which is meant to give him the possibility to ensure the observance of the rights and interests of the non-professional, of the third person with whom he comes into

[13] Decizia nr. 45/2018 a Curții Constituționale, paragraf 216.

[14] Civil sentence no 11163 of October 15, 2013 of Craiova Courthouse, *apud* L.B. Luntraru, *Răspunderea civilă pentru malpraxisul profesional*, Editura Universul Juridic, Bucureşti, 2018, pp. 177-178.

[15] L.B. Luntraru, *op.cit.*, p 11-13.

contact; it thus protects the more "*weak*" part, the beneficiary of the service, a layman of the domain.

The obligations of the professional being circumscribed to the competence, respect and scientific probity, his civil liability implies the establishment of special evaluation criteria that will allow the establishment of the legal nature, the conditions and the foundations of this responsibility.

Even if the concept of fault retains its status as an element of that liability, it no longer holds the central position, which is occupied by the damage, the civil liability of the professional being engaged in the purpose of repairing in full the material or non-pecuniary damage caused by the abnormality in the professional conduct, which has thus become injurious. Taking precedence of its objective form, liability for this type of injury often results even in the absence of proof of fault.[16]

Various arguments have been made[17] to justify the civil liability of the professional as a *sui generis* form of civil liability.

Thus, on the one hand, even if many types of damage occur within the framework of contractual legal relations between the professional and the recipient of the service, it is not always necessary to have a contract in order for the professional's liability to repair the damage caused by the improper exercise of the profession to be entailed.

At the same time, the professional and the recipient of the benefit, the non-professional, are not on an equal footing, but the former enjoys specialist knowledge that gives him a superior positioning in this legal relationship.

Also, the non-professional cannot always and freely choose his professional with whom to collaborate, due to administrative, legal, institutional barriers. For example, the patient cannot always choose the doctor who is going to treat him (for example, in the hypothesis of the non-existence of discernment due to the disease).

The legal relationship between professional and non-professional is based precisely on the qualification, the mastery of the former, its specialization in a certain field (medical, legal, technical, etc.), so that the professional's conduct will be analyzed according to the deontological norms of its exercise. Always, the commitment of civil liability of the professional will, in these cases, involve proving that he does not comply with the rules and obligations specific to the exercise of his profession. The specialist, at the time when he chose to practice a profession that involves risks to the rights and interests of third parties, also accepted that he can

[16] *Idem*, p. 15-16.
[17] *Idem*, p. 23-27.

be held liable for the damages caused by the way of performing these professional duties.

The obligations of the professional must be fulfilled in conditions of normality, prudence, safety for others, in compliance with the legal norms that enshrine these rules of professional conduct. Therefore, failure to comply with these legal rules of conduct may cause damage that will give rise to the civil liability of the professional after proving the causal relationship between this conduct of his and the negative result produced.

All professional obligations are important and there is often a close connection between them, which gives the responsible exercise of the profession a certain algorithm for compliance with professional duties.[18]

The purpose of the professional's civil liability, that is to say, the full compensation for all the damage caused by the failure to perform his professional duties properly, is of particular importance, along with the basis of that liability.

Including both elements that represent obligations of means, but also elements that include obligations of result, the civil liability of the professional is one of subjective type, based on the notion of fault, of professional mistake, non-compliant fulfillment of the obligations specific to the profession. Sometimes the liability is an objective one, being also involved in the absence of fault, and based on the idea of guaranteeing the risk of activity.[19]

Thus, the functions of the civil liability of the professional are common to that of civil liability in general: the reparative function (with a predominant role, in relation to the principle of reparation in its entirety of the damage – central element and measure of civil liability, taking into account also the forms of objective civil liability), the sanctioning function (aiming also at sanctioning the culpable behavior of the guilty one) but also the preventive-educational function (meant to prevent the repetition of the undesirable conduct in the future).

Trying to define the notion of malpractice, we can say that it represents the defective exercise of professional duties, of a profession, with guilt (in the form of fault, negligence or recklessness) and which is capable of causing a person a prejudice in the form of harm to his rights or interests, an act that may entail the legal liability of the guilty person. It is therefore incorrect to use the phrase 'professional responsibility for malpractice', which contains, in fact, a pleonasm.

Judicial error is thus a binder between the two forms of liability, disciplinary of magistrates and civil, of the State, for the latter acting as a component element, in the form of tort.

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[18] *Idem*, p. 27-28.

[19] *Idem*, p. 29-31.

Conclusions

The current regulatory framework applicable in Romania allows the liability of magistrates for the defective way in which they exercise their professional activity, the liability being able to take several forms, namely criminal, disciplinary or civil liability, depending on the consequences it generates.

In the event of judicial error, and especially of the civil liability of the magistrate for the damage that has been remedied by the State, the judicial error involves more than serious negligence, it may also involve the intention (either direct or indirect) of the magistrate, who pursued or although he did not pursue, accepted the possibility of causing the harmful result (serious damage to rights, the interests or freedoms of the person), providing for the consequences of his actions.

Bad faith or serious negligence, as a prerequisite of the judicial error caused by the magistrate, can also lead to the entailment of his civil responsibility, not only of the disciplinary one.

As regards the civil liability of magistrates for acts that represent at the same time disciplinary misconduct, we note that, at present, national legislation limits this form of legal liability in respect of the magistrate, strictly for the case of causing damage as a result of a judicial error, the latter institution being the link between the two forms of liability of the magistrate, the civil one respectively the disciplinary one.

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NON-PATRIMONIAL PREJUDICE CAUSED BY THE VIOLATION OF THE RIGHTS OF THE CHILD

George Marius MARA[1]

Paul-Augustin PUŞCAŞ[2]

Abstract

The principle of observance of the best interest of the child is often infringed when conflicts between the child`s parents culminate into verbal, emotional or even physical abuse.

This study aims to highlight the risk of causing a non-patrimonial prejudice to the child, by a violation of the child`s right to a harmonious psycho-affective development in a sheltered environment.

The case-law analysed offers a perspective on several situations where a neglecting parental behaviour at the time of a family crisis seriously affects the child, generating a prejudice that is not only unrestored but more often it is not even acknowledged.

Keywords: *rights of the child; damage to rights; non-patrimonial prejudice; biological prejudice; moral prejudice; social prejudice; child; minor*

I. Prolegomena

The subjective civil rights - *patrimonial and non-patrimonial* - of natural persons and legal persons are protected and guaranteed by law. The exercise of the subjective civil right can take place only insofar as it is recognized by a legal norm, and the recognition is not, in turn, sufficient, unless it is accompanied by the full protection and guarantee of rights. In cases where the subjective right is violated, the holder - not having his/her own means of coercion - must have the legal possibility to appeal to the coercive force of the State. Any subjective civil right is accompanied by the right to bring actions to court, this being the most important legal means of protection by judicial coercion not only of subjective civil rights, but also of the interests protected by law.[3]

[1] Judge Mara George Marius, Ph.D., Assistant Professor - Faculty of Law and Social Sciences within "1 Decembrie 1918" University of Alba Iulia, email georgemara2006@yahoo.com
Contribution to the analysis of non-patrimonial prejudice, its forms and judicial practice.

[2] Puşcaş Paul-Augustin, Ph.D. student of "Lucian Blaga" University of Sibiu, doctoral field - Law, by profession Legal Adviser - active member in Cluj College of Legal Advisers, email paulpuscas_cj@yahoo.com

[3] C.T. Ungureanu, M. Afrasinie, et al., *Noul Cod Civil - Comentarii, doctrină şi jurisprudenţă [The New Civil Code - Comments, Doctrine and Jurisprudence]*, Vol. I, Hamangiu Publishing, Bucharest, 2012, p. 51-52.

This study aims to analyse the non-patrimonial prejudice caused by the violation of certain rights of the child.

II. Brief Legal Considerations on the Rights of the Child

Defined as the natural and fundamental element of society, generated by the legal act of marriage, concluded, under the law, between a man and a woman, consisting of spouses, their children and other persons expressly provided by law, whose relations are legally regulated and governed by the principle of solidarity[4], the family has the main role of constituting in the child authentic values, concentrating the common aspirations and needs of the entire humanity and thus marking the progress of humankind and dignity of every human being.

The post-war period, with the particular advancement of human rights in general, was also reflected in terms of the attention given from a legal point of view and extent to the specific rights of the child. The child is no longer seen as the *"property"* of his/her parents, is no longer a "small adult", but s/he is a subject of law as distinct as possible, whose legal situation concerns society as a whole, having extensive rights and benefiting from legal protection specific to his/her age.[5]

At international level, the UN Convention on the Rights of the Child[6] is the first normative document with a general vocation that presents a complete catalogue of children's civil, political, economic, social and cultural rights and freedoms, with binding legal force.[7]

At domestic level, by appropriating and using the terminology of the Convention on the Rights of the Child, the Law no. 272/2004 on the protection and promotion of the rights of the child[8] includes the effective

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[4] Prof. Habil. T. Bodoaşcă, Ph.D., *Dreptul familiei - Curs universitar [Family Law - University Course]*, Fifth Edition, Revised and Enlarged, Universul Juridic Publishing, Bucharest, 2021, p. 13.

[5] M. Floare, *Figura juridică a copilului în istoria dreptului privat European [The Legal Figure of the Child in the History of European Private Law]*, in the Journal of Family Law / Supplement 2021 – *Interesul superior al copilului [Best Interests of the Child]*, Universul Juridic Publishing, 2021, p. 117.

[6] Adopted and proclaimed by the General Assembly of the United Nations by the Resolution 217A (III) of December 10th, 1948, ratified by Romania by the Law no. 18/1990 [published in the Official Gazette of Romania no. 109 of September 28th, 1990] and republished as a result of the finding of differences in translation from English into Romanian in the content of the Convention, in the Official Gazette of Romania no. 314 of June 13th, 2001.

[7] M. Avram, *Drept Civil: Familia [Civil Law: The Family]*, Hamangiu Publishing, Bucharest, 2016, p. 475.

[8] The Law no. 272/2004 on the protection and promotion of the rights of the child was initially published in the Official Gazette of Romania, Part I, no. 557 of June 23rd, 2004, being subsequently republished in the Official Gazette no. 159 of March 5th, 2014, pursuant to art. V of the Law no. 257/2013 for the amendment and completion of the Law no. 272/2004 on the protection and promotion of the rights of the child, published in the Official Gazette of Romania, Part I, no. 607 of September 30th, 2013, giving the texts a new numbering.

rights of the minor and the principles according to which they will be observed and guaranteed by parents, State, public authorities, private bodies, or by any other entity, natural or legal person.

From the analysis of the provisions of the Law no. 272/2004, the following are kept in mind with priority:

- *The child has the right to maintain personal relationships and direct contacts with his/her parents, relatives, as well as with other persons to whom the child has developed attachment ties,* [Art. 17 point (1)];
- *The child has the right to be raised in conditions that allow his/her physical, mental, spiritual, moral and social development,* [Art. 37];
- *The child has the right to enjoy the best possible health he/she can reach,* [Art. 46 point (1)];
- *The child has the right to benefit from a standard of living that allows his/her physical, mental, spiritual, moral and social development,* [Art. 47 point (1)]; and,
- *The child has the right to rest and vacation.* [Art. 53 point (1)].

The orientation of the study takes into account these rights, the beneficiaries being, in a non-discriminatory way:

- children, Romanian citizens, located on the territory of Romania;
- children, Romanian citizens, located abroad;
- children without citizenship located on the territory of Romania;
- children who request or benefit from a form of protection under the conditions of the legal regulations regarding the status and regime of refugees in Romania; and,
- children, foreign citizens, located on the territory of Romania, in situations of emergency found, under the conditions of the Law no. 272/2004, by the competent Romanian public authorities.

The child's right to maintain personal relationships and direct contacts with his/her parents, relatives, as well as with other persons to whom the child has developed attachment ties, as well as ***the child's right to be raised in conditions that allow his/her physical, mental, spiritual, moral and social development***, are fundamental in a democratic society and provide the child, who has become an adult, the necessary training to live independently in society and to establish, in turn, a family.

Respect for family life imposes on the State the obligation to act in such a way as to allow those interested to lead a normal family life and to develop emotional relationships within it. Family life covers the

relationships between spouses, between parents and children, between siblings, between grandparents and grandchildren, between the adopted and the adopter.[9]

The Committee on the Rights of the Child within the United Nations interprets in its general commentary[10] CRC/C/GC/15, ***the right of children to health***, as defined in art. 24 of the UN Convention on the rights of the child, as a right favourable to inclusion, which refers not only to prevention, adequate prophylaxis, health promotion, curative, rehabilitation and palliative services in a timely or adequate manner, but also to the right of children to develop to their full potential and to live in conditions that enable them to achieve the highest standard of health, through the implementation of programmes that enable them to achieve this high standard, in conjunction with the exercise of programmes that address the underlying determinants of health. In the same paragraph, CRC/C/GC/15 emphasizes that a holistic approach to health places the achievement of children's right to health within the broader framework of international human rights obligations [para. 2].

The Convention recognizes the interdependence and equal importance of all rights (civil, political, economic, social and cultural) that enable all children to develop their mental and physical abilities, personalities and talents to the greatest extent possible. Not only is the right of children to health important in itself, but also the achievement of the right to health is indispensable for the enjoyment of all other rights in the Convention. In addition, the achievement of the right to health of children depends on the achievement of many other rights provided for in the Convention [para. 7].

From the analysis of para. 23 of the CRC/C/GC/15, we note that the concept of "*the highest achievable health standard*" takes into account both the biological, social, cultural and economic preconditions of the child and the available State resources, supplemented by the resources made available from other sources, including by non-governmental organizations, the international community and the private sector.

In guaranteeing the effective right of the child to health, the State has a positive obligation to take measures to ensure hygiene and public health, such as: elimination of the causes of poor health; provision of counselling

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[9] B. Selejan-Gutan, *Protecţia europeană… [European Protection…],* p. 160-161, *apud.* C.T. Ungureanu, M. Afrasinie, et al., *Noul Cod Civil - Comentarii, doctrină şi jurisprudenţă [The New Civil Code - Comments, Doctrine and Jurisprudence]*, Vol. I, Hamangiu Publishing, Bucharest, 2012, p. 110.

[10] CRC/C/GC/15 - Committee on the Rights of the Child - General Comment no. 15 (2013) on the *Right of the child to benefit from the highest achievable health standard (art. 24)*, April 17th, 2013, available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f15&Lang=en, accessed on 10.11.2021.

and education services to improve health and develop the sense of individual responsibility for health; prevention of epidemic, endemic and other diseases, as well as accidents; creation of conditions for ensuring adequate medical care, including for disadvantaged people.[11]

With regard to the ***right of the child to rest and vacation***, the UN Committee on the Rights of the Child rules in para. 1 of their general comment[12] CRC/C/GC/17 the importance of play and recreation in the life of every child, showing that it has long been recognized by the international community, according to the proclamation of the 1959 Declaration on the Rights of the Child – *"The child shall have full opportunity for play and recreation [...]; society and the public authorities shall endeavour to promote the enjoyment of this right"* (art. 7). This proclamation was further strengthened in the UN Convention on the Rights of the Child [1989], which explicitly provides in art. 31 that *"States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts"*.

Relevant for this study we find the stipulations of the Committee included in para. 9-10 [CRC/C/GC/17] according to which play and recreation are essential for the health and well-being of children because they promote the development of creativity, imagination, self-confidence, the development of their own forces and physical, social, cognitive and emotional skills. They contribute to all aspects of learning as a form of participation in everyday life; at the same time they are of intrinsic value to the child, simply in terms of the pleasure it allows.

Research evidence in CRC/C/GC/17 highlights that play is also essential for the spontaneous developmental drive of children and that it plays a significant role in brain development, especially in the early years. Play and recreation facilitate children's abilities to negotiate, regain emotional balance, resolve conflicts and make decisions. By involving them in play and recreation, children learn by doing; explore and experience the world around them; experiment with new ideas, roles and experiences and thus learn to understand and build their social position in the world.

Both play and recreation can take place when children are on their own, with their peers or with adults in whom they find support. Children's

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[11] B. Selejan-Gutan, *Drept constituțional și instituții politice [Constitutional Law and Political Institutions]*, Hamangiu Publishing, Bucharest, 2008, p. 153.

[12] CRC/C/GC/17 - Committee on the Rights of the Child - General Comment No. 17 (2013) on the *Right of the child to rest, leisure, play, recreational activities, cultural life and the arts (art. 31)*, April 17th, 2013, available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f17&Lang=en, accessed on 10.11.2021.

development can be supported by loving and caring adults, as they relate to children through play. Participating with children in play offers adults a unique perspective and also provides an understanding of the child's horizon of interests.

Child development builds respect between generations, contributes to effective understanding and communication between children and adults, and provides opportunities to provide guidance and encouragement. Children benefit from recreational activities involving adults, including voluntary participation in organized sports, games and other recreational activities.

However, CRC/C/GC/17 emphasizes that the benefits are diminished, especially in the development of creativity, leadership and team spirit, if adult control is so pervasive that it undermines the child's own efforts to carry out play activities.

Both parents are responsible for upbringing and educating the child, and the exercise and fulfilment of parental obligations must take into account, first of all, the best interests of the child[13], to ensure the material and spiritual well-being of the child by caring for him/her, by maintaining personal relationship with him/her, by ensuring his/her growth, education, maintenance, by legal representation and administration of his/her patrimony.

All these rights are non-patrimonial rights that belong to the child, they are likely to be damaged, thus causing the child a non-patrimonial prejudice, which we will further analyse, both in doctrinal and jurisprudential terms.

III. Concept and Forms of Non-Patrimonial Prejudice

The disregard of a social value protected by a legal norm will produce a negative consequence, a socially harmful result represented by the disturbance of the rule of law and which will generate the obligation of the party in charge of restoring the previous situation, when possible, or of repairing in another way the negative consequence caused.

The provisions of art. 1349-1395 of the Civil Code include regulations regarding both the legal regime of tortious civil liability and its forms (liability for one's own act as well as assumptions of liability for the act of another person) but also the way to remedy the prejudices caused.

[13] See P.-A. Puşcaş, *Repere accesorii şi incidentale interesului superior al copilului [Accessory and Incidental Landmarks for the Best Interests of the Child]*, scientific study published in the proceedings of the International Conference of Doctoral Students in Law, 13th Edition, with the theme *Dreptul crizei. Crizele dreptului [The Law of Crisis / Crises in Law]*, organized by the West University of Timişoara, on June 25th, 2021, Universul Juridic Publishing, Bucharest, 2021, p. 521-528.

The elements of tortious civil liability result from the content of art. 1349 of the Civil Code, namely the unlawful act, the prejudice, the causal relationship between the act and the prejudice and the guilt.[14]

In the doctrine, the non-patrimonial prejudice was seen as the direct, non-patrimonial harmful consequence, generated by the commission of a tortious unlawful act by which the values with non-economic content that define the human personality and that can be object of remedy are damaged, following the mechanism of incurrence of the tortious civil liability.[15]

It was appreciated that by violating fundamental human rights, personality rights, a non-patrimonial prejudice of a moral, biological or social (existential) nature can be caused, given that they represent autonomous and different categories of non-patrimonial prejudice.[16]

Biological prejudice, as a form of non-patrimonial prejudice, represents the damage of the psycho-physical integrity of the person, being thus seen as a negative consequence, distinct from the moral prejudice.

The biological prejudice, characterized by the damage to the psycho-physical integrity of the person with forensic assessable negative consequences, is distinct from the suffering that represents the moral prejudice, and can be evaluated separately.

A main source of protection at legislative level of the values representing the life and physical and mental integrity of the person is found in the Civil Code, a normative act which, resuming in part the content of inherent human rights enunciated by art. 58 of the Civil Code, provides in art. 61 that the right to the life, health, physical and mental integrity of any being are equally guaranteed and protected by law.

At the same time, the provisions of art. 1387-1395 of the Civil Code provide for the remedy of damages (economic or non-patrimonial) incurred by both direct and indirect victims of the unlawful act (in the case of non-patrimonial prejudice caused by ricochet and proof of the existence of an emotional relationship to the direct victim).[17]

The negative consequences produced by the unlawful act and which can represent ***biological prejudice*** consist in the physical or mental

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[14] For details on the conditions of tortious civil liability, see L. Pop, I. F. Popa, S. Vidu, *Tratat elementar de drept civil. Obligaţiile [Elementary Civil Law Treaty. Obligations]*, Universul Juridic Publishing, Bucharest, 2012.

[15] I. Albu, V. Ursa, *Răspunderea civilă pentru daunele morale [Civil Liability for Moral Damages]*, Dacia Publishing, Cluj-Napoca, 1979, p. 61.

[16] See, for further details, G. M. Mara, *Prejudiciul nepatrimonial cauzat prin eroarea judiciară [Non-Patrimonial Prejudice Caused by Judicial Error]*, Universul Juridic Publishing, Bucharest, 2020.

[17] C. Jugastru, *Prejudiciul – repere româneşti în context European [Prejudice - Romanian Landmarks in a European Context]*, Hamangiu Publishing, Bucharest, 2013, p. 254.

pains that a person, victim of an unlawful act, experiences. Psychologically, they can be represented by a state of depression or an inferiority complex generated, for example, by a disability acquired as a result of the unlawful act. Specific means of proof will be used to determine these physical or mental suffering, such as forensic examination, and various criteria will be taken into account to determine mental suffering, such as the person's age, health or emotional condition prior to the commission of the act.

Moral prejudice is in fact an unjust disorder of the psycho-emotional condition of the victim, as a result of the unlawful act, this disorder taking the form of anguish, of strong inner suffering. The disorder that forms the content of the moral prejudice must not be a lasting one, it must not be permanent, otherwise it will fall under the category of biological prejudice, in the form of damage to the mental integrity of the victim.[18]

In the field of rights of the child, the occurrence of non-patrimonial prejudice of a moral nature is most often encountered. Thus, a conflicted family state, which can ultimately lead to the physical and/or legal separation of the parents, quasi-unanimously affects the cases of psycho-emotional balance of the children.

Unfortunately, verbal or even physical violence between parents often occurs in the presence of children. Such irresponsible conduct of the parents, or of one of them, cannot but lead to negative consequences in the life of the minor, and the law courts are often called upon to intervene in order to protect the child's right to a harmonious life, to mental integrity (with its emotional component), by delivering restrictive measures against the violent parent.

Thus, in a case judgment[19] delivered in the matter of restraining order, the court held that the violence committed by the defendant against the minor's mother took place in the presence of the latter. Thus, the existence of physical violence against the plaintiff, caused by the defendant, was confirmed by the evidence, the witness heard showing that the defendant slapped the plaintiff twice, in the same circumstance, because she threatened him with a jimmy bar, on the grounds that he would have hit the minor. From the evidence it resulted that the defendant threatened the plaintiff, but also the witness, the minor, the child of the parties being present at these events. The court noted that these conflicts are frequent, amid alcohol consumption by the defendant, the plaintiff asking the defendant to keep his mouth shut because she can no longer bear him.

We notice from the analysis of this state of affairs that the scenes of domestic violence, which involve not only verbal and psycho-emotional

[18] See G.M. Mara, *Prejudiciul nepatrimonial cauzat prin eroarea judiciară [Non-Patrimonial Prejudice Caused by Judicial Error]*, Universul Juridic Publishing, Bucharest, 2020, p. 211.
[19] Civil Judgment no. 2834/2020 of August 25th, 2020 of Alba Iulia Local Court, unpublished.

violence (threats) but even physical violence, occurred in the presence of the minor, the son of the parties, certainly producing negative consequences on the psycho-emotional balance of the minor, on his harmonious development within a favourable family environment. The behaviour of the parents is, in concrete terms, a psycho-emotional aggression against the minor, a civil unlawful act, most likely committed not intentionally, but through unintentional guilt, an act of tortious civil unlawful act that is capable of producing serious negative consequences on the minor, respectively a non-patrimonial prejudice of a moral nature.

We therefore note that verbal, emotional or even physical violence between parents will cause trauma to children. The harmonious development of minors is called into question when their parents fail to manage the crisis situation that has arisen in their lives and whose culmination is the divorce[20].

In an unpublished court decision[21], the court held, regarding the way in which the conflict between the parents affected the life of the minor, aged 9 at the date of initiating the legal action, that *"the deficient relationship between the parents had and still has a strong negative effect on the minor. These conclusions can also be deduced from the content of the psychological expertise report, which shows that the parental abilities of both of them were strongly vitiated by the conflict in which they find themselves. The father denotes a lax behaviour towards the girl, much more permissive than the one shown by the mother, without too many rules and conditions, the father failing to exploit the windows of opportunity generated by offering the desired objects to the girl, to stimulate her to high performance. On the other hand, the expert report also concludes that the mother has an anxiety-generating, severe, demanding, punitive behaviour, which deepens the girl's lack of interest and motivation".*

The court also held that *"no signs of abuse or neglect on the part of either parent can be detected, that both parties did their best to provide the girl with the best conditions for upbringing and education. As the expert report revealed that different parenting styles (which, however, do not impinge on the behaviour involved on the part of both parents towards the minor) are complementary, depriving the minor of the presence of one of the parents for a longer period of time (including by establishing her home only at one of the parties) is not, at this time, in the best interests of the minor. This is because such a measure would present the risk of serious damage to the relationship with the other parent and consequently, would lead to the deprivation of the child from the parent's*

[20] For details on the consequences of divorce, see L. Cetean Voiculescu, *Dreptul familiei şi actele de stare civilă [Family law and acts of civil status]*, Lumen Publishing Bucharest 2019.
[21] Civil Judgment no. 2402/2018 of November 23rd, 2018 of Alba Iulia Local Court, unpublished.

presence, a presence necessary in relation to the girl's age (10 years), her needs, the complementary nature of parenting styles".

The court also held that *"it is obvious that the simple establishment of the minor's home cannot ensure the fulfilment of the parental mission by the parties, in the absence of proof of the responsibility assumed by them. Both parents have the ability and willingness to offer affection to the little girl, in different ways, but this aspect cannot be labelled 'good' or 'bad'. The obvious state of conflict in which the parties find themselves must be overcome, as they are called to assume the failure of the couple's relationship, which does not mean and must not lead to the failure of the parental mission assumed by mutual agreement, whose sole objective is to ensure the harmonious development of the minor girl, in the current state of affairs, so that the parents' problems affect as little as possible the relationship with the child and her development".*

The judgment therefore contains a broad motivation, based on the conclusions of a psychological expert report on the minor regarding the way in which her life and her psycho-affective development were affected by the trauma represented by the divorce of her parents. The emotional link between the minor and both parents is very close, so that the parenting styles of the father and mother, although different, are complementary, and both necessary for the harmonious development of the minor. That is why the court found that the permanent establishment of the minor's home at only one of the two parents was not, at the time of the judgment, in the best interests of the minor, who needed the presence of both mother and father in her life, for equal periods of time. And, in the conditions in which the parents can no longer live together, the measure was taken to establish the minor's home for two weeks at the mother's domicile and for another two weeks at the father's domicile, alternatively.

In this way, an attempt was made to avoid the development of a moral or even social prejudice on the girl, through the serious consequences that the deprivation of the relationship with one of the parents, for a longer period of time, would have on the minor.

At the same time, the conflicting attitude between the parents and their separation results in an alienation of the child from the parent with whom s/he no longer lives permanently. Unfortunately, children are often used by their parents in the legal duel they have during their divorce or later, in terms of subsequent requests for the establishment of the minor's home, the exercise of parental authority or the contribution to the upbringing and education expenses.

By a court decision[22] it was established that the exercise of parental authority, regarding which art. 397 of the Civil Code stipulates that it

[22] Civil Judgment no. 1700/2020 of September 23rd, 2020 of Alba Iulia Local Court, unpublished.

belongs to both parents, jointly, was to be exercised only by the mother, by reference to the defendant father's attitude towards the minor. Thus, the court considered that the evidence shows the abandonment of the minor by the defendant father, without maintaining ties with her for a very long period of time, respectively a period of several years, which is a good reason to justify the exercise of parental authority exclusively by the mother, taking into account the fact that the father has not actually fulfilled his parental duties during this period. In fact, the minor showed during the hearing in the council chamber that her father had not kept in touch with her for 4-5 years, no longer looking for her and not even talking to her on the phone.

It is obvious that such an attitude of one of the parents, in this case the father of the minor, will produce a non-patrimonial, moral prejudice on the minor, the lack of involvement of the father, the complete absence from the child's life depriving the minor of the right to grow up and to develop in a psycho-affective healthy environment. At the same time, this conduct of the defendant represents a disregard for the principle of the best interests of the minor, a breach of the duty to ensure the upbringing and education of the minor and to contribute materially in achieving this goal.

Children become deeply affected by the poor relationships between their parents, by the inability to look after the best interests of minors - an obligation that falls not only to the law court but also to parents and any public authorities that have duties in the field of protection of children's rights.

The disintegration of the family, often following a difficult divorce process, leaves traces in terms of the psycho-affective development of minors, their ability to integrate in a positive way in social life. Often children will withdraw from their age-specific social life, break off friendship ties, feel ashamed and often guilty of their parents' divorce. This traumatic episode can have lifelong consequences and can significantly damage their ability to engage in fruitful interpersonal relationships.

We therefore come to the third form of non-patrimonial prejudice, namely social or existential prejudice, which is a consequence that affects the daily life of the victim, his/her interpersonal relationships, habits and way of life, in such a way that s/he is deprived of the possibility of fully manifesting one's personality in the outside world. The social or existential prejudice implies a change in the living conditions of the victim, who is obliged to take other decisions than the ones s/he would have taken if an act causing prejudice had not taken place, respectively to change his/her daily habits, his/her right to a peaceful life being affected[23].

[23] For more details on biological prejudice, as a form of manifestation of non-patrimonial prejudice, see G.M. Mara, *op.cit.*

Depending on the peculiarities of each case, the existential prejudice will also be analysed by reference to the duration and severity of the consequences, to their perpetuation, consequences with restrictive effects on the further development of interpersonal and professional relationships.

As we have found, in practice we will most often find not only one of these three forms of manifestation of the non-patrimonial prejudice, the prevention of negative consequences in the lives of minors representing the factual and legal basis for taking coercive measures against those who disregard the rights of the child. Parents have a duty not to transfer the traumatic consequences of the conflict they end up in on the minors, their behaviour must be one of child protection and not of involvement or use of minors in the judicial duel.

IV. Conclusions

From the analysis of the presented case situations, we note that the deficient relationships between the parents invariably affect the minors, being likely to infringe the principle of observance of their best interests and to cause a specific non-patrimonial prejudice, by harming the child's rights to a harmonious psycho-affective development, to mental or even physical integrity. When this type of consequence occurs, the law courts as well as other public authorities are called upon to intervene to ensure that the best interests and rights of the child are observed, in the event that the parents fail to achieve this goal.

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8) M. Floare, *Figura juridică a copilului în istoria dreptului privat European [The Legal Figure of the Child in the History of European Private Law]*, in the Journal of Family Law / Supplement 2021 – *Interesul superior al copilului [Best Interests of the Child]*, Universul Juridic Publishing, p.117.
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11) T. Bodoaşcă, *Dreptul familiei - Curs universitar [Family Law - University Course],* Fifth Edition, Revised and Enlarged, Universul Juridic Publishing, Bucharest, 2021, p. 13.

DEAD OR ALIVE – TAXPAYER IS WANTED

Bogdan FLOREA[1]

Abstract

Progressive taxation and taxation of luxury goods are ideas that appeal to those living on the poverty line.

But it may be that such ideas perpetuate poverty and the lack of private initiative that generates economic wealth.

***Keywords**: progressive taxation, wealth taxation, luxury goods tax*

Introduction

These days in Romania, opinions have emerged in favor of switching to a new taxation system, namely progressive taxation. Progressive taxation would target the income and wealth of taxpayers.

The main target is the wealth held, as inheritances are currently not taxed unless the heirs do not settle and finalize the inheritance procedure within 2 years from the date of the inherited's death.[2] If heirs fail to do so within this time limit, they will owe 1% of the value of the inherited estate as tax.[3]

Currently, in Romania, the purpose of the inheritance tax is different from that of capital taxation, as it penalizes the negligent behavior of heirs who, through their passive attitude, may cause uncertainty in civil relations by not clarifying the legal situation of the assets composing the inherited estate.

The state is in a constant search for new sources of revenue for the budget to cover the increases in pensions, wages and social benefits for

[1] Assistant Professor at "1 Decembrie 1918" University of Alba Iulia, e-mail: bogdan.florea@uab.ro

[2] For an analysis of the notarial succession procedure, please see: M. Tudoraşcu, A. Drăgoi, *Dreptul asupra moştenirii. Explicaţii teoretice şi aspecte practice, ediţie revizuită[Inheritance Law. Theoretical explanations and practical aspects, revised edition]*. Bucureşti, Pro Universitaria, 2019, pp.187-239.

[3] Please see the provisions of Art. 111 para. (3) of Law no. 227/2015 on the Tax Code published in M.Of. no. 688 of 10.09.2015, with subsequent amendments and additions, hereinafter referred to as the Tax Code.

avoiding an excessive budget deficit,[4] so, it is possible that, in the future, the transfer of inheritance assets to be subject to taxation and heirs to lose the benefit of the two-year period during which they can acquire the inheritance without paying any tax.

Progressive and proportional taxation

Progressive income taxation would mean a tax on the taxpayer's overall income. In Romania, the tax is levied at a flat rate on personal income, with each source of income earned by the taxpayer being taxed. Thus, regardless of the individual's sources of income, the tax rate is the same - 10% of taxable income. There are also exceptions to this rule, such as the dividend tax (5%) and the tax on income whose source has not been identified (16% applied to the adjusted tax base).

Legal persons are subject either to a flat rate corporate income tax of 16%, or to a tax on the income of micro-enterprises payable at the rate of 3% of the total income of the micro-enterprise which has no employees or 1% of the income of the micro-enterprise which has at least one employee.

The purpose of the tax on specific incomes is to reach as many people as possible, but it is not likely to be progressive because there is no overall view of the taxpayer's total income. Taxing specific categories of income differently would lead to a violation of the principles of tax neutrality and fairness of taxation.

The principle of neutrality must ensure equal treatment of taxpayers, meaning that tax measures cannot create advantages for some taxpayers depending on the type of investors and capital, the form of ownership or the nationality of the taxpayer. Tax equity or fairness of taxation is the principle whereby the tax burden on each taxpayer is determined based on of his or her ability to pay, i.e., according to the size of his or her income or property.[5] The exception to the principle of taxing income and property based on their size is minimum contributions or flat-rate taxation.

The choice of one of the two taxation techniques - taxation of overall income or separate taxation of specific categories of income - is left to the legislator, but they are often used together.

Taxation on overall income allows the taxpayer's entire situation to be covered, so that he can be taxed according to his ability to pay, but it is

[4] The current economic realities involving accelerated growth in public expenditure, slower growth in public revenue, fluctuations in the exchange rate and interest rates lead to the emergence of budget deficits, which can be covered either by state borrowing or by temporarily using the cash on the general account of the State Treasury. In this regard, please see I. Lazăr. *Dreptul finanţelor publice, Volumul I. Drept bugetar[Public Finance Law, Volume I. Budgetary Law]*. Bucureşti, Editura Universul Juridic, 2016, pp. 207-208.

[5] Please see Article 3(a) and (c) of the Tax Code, approved by Law No 227/2015, published in M.Of. No 688 of 10 September 2015, as subsequently amended and supplemented.

also possible to apply progressive taxation, which is more in line with overall income taxation. However, the overall income tax does not allow for a distinction to be made between taxation according to the nature of the income.[6]

Separate taxes on categories of income are levied on certain types of income considered liable to tax (income from securities, industrial and commercial profits, etc.). This system has the advantage of distinguishing taxation according to the nature of the income, allowing different types of income to be taxed separately, which makes it possible to use different assessment methods adapted to the nature of the taxable matter. Thus, the real income declaration system may be suitable for wages which are easy to assess, while the flat-rate system may be preferable for taxing agricultural profits which are more difficult to assess.[7]

While taxing different categories of income through specific income taxes has the merit of allowing for distinction, it does not allow tax customization, as it only retains a specific category of the taxpayer's income and thus chooses a tax base detached from the taxpayer's contributory power. This taxation technique does not allow progressivity because of the lack of a global vision of the taxpayer's situation. Combining the overall income tax with the tax on specific incomes or introducing a certain distinction between the various categories of income subject to a single overall income tax makes it possible to combine the advantages of the two taxation techniques and achieve specificity, customization and progressivity of the tax.[8]

The theories that led to the emergence of progressive taxation show, for example, that a tenth taken from a small income is a heavier burden than the same fraction deducted from a much larger one. John Stuart Mill said that it would be appropriate the exemption from taxation for a minimum amount of income, sufficient to provide the necessities of life, but a progressive tax, used for mitigating wealth inequality, would favor the profligate at the expense of the savers and punish the savers who worked harder.[9]

Discussions on a return to progressive income taxation in Romania should be analyzed in the context of differentiated taxation by type of income in a proportional system is practiced since 2005.

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[6] P.M. Gaudemet, J. Molinier, *Finances Publiques. Fiscalité, Tome 2, 6e édition*. Paris: Éditions Montchrestien, 1997, p. 94.

[7] P.M. Gaudemet, J. Molinier, *Finances Publiques. Fiscalité, op.cit.*, pp. 94-95.

[8] P.M. Gaudemet, J. Molinier, *Finances Publiques. Fiscalité, op.cit.*, p. 95.

[9] J.S. Mill, *Principles of Political Economy.* New York: D. Appleton and Company1885, Book V, Chapter 1, § 3.

Thus, over the last 16 years, taxpayers have become accustomed to giving up a share of every type of income obtained proportionally to the income obtained, without there being any distinction between taxpayers in terms of the size of their income.

The differences between taxpayers arising from their personal circumstances have been mitigated by a system of personal deductions granted to taxpayers earning income from wages according to the number of dependents.[10]

Without analyzing the real benefit of personal deductions, which over time have been strongly affected by the inflation phenomenon, we consider that the deduction system is only used in the case of income from salaries because the Romanian legislator considers that for the employees, work is the main means used to support themselves and their family,[11] so, the employees should be protected in addition to taxpayers who obtain other categories of income and who are generally professionals who run a business (self-employed activities, farmers, etc.) or holders of capital (rental income). Thus, the Romanian legislator considers that all those who earn income, other than wages and salaries, carry out income-generating activities at their own risk and do not need any protection from the State.[12]

This philosophy can also be attributed to the fact that for almost half a century, Romania had a communist system of government. In this system, capitalists were seen as enemies of the proletariat, claiming that the latters' labor contributed to the former's capital.

According to this philosophy[13], the capital owned by the bourgeoisie would actually belong to the proletariat, who had created it by working for the benefit of the capitalists, and so a number of ideas arose, such as:

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[10] Please see Article 77 et seq. of the Tax Code. For a particular situation of granting the personal deduction, please see: I. Lazăr, B. Florea, Discuții referitoare la beneficiarii deducerii personale în cazul recăsătoriei soțului împreună cu care locuiește minorul provenit dintr-o căsătorie anterioară [Discussions on the beneficiaries of the personal deduction in the case of remarriage of the spouse with whom the minor from a previous marriage lives]. In *Revista Română de Drept al Afacerilor* nr. 4/2019, pp. 80-83.

[11] For a study on the legal obligation of maintenance, please see L. Cetean-Voiculescu, *Dreptul familiei şi actele de stare civilă. Note de curs şi manual de seminar* [Family Law and Civil Status Documents. Course notes and seminar manual]. Iaşi, Editura Lumen, 2019, pp. 218-236.

[12] Moreover, in the case of employees, the Labour Code expressly provides for a number of incomes that are not subject to taxation. Sometimes, even between employees, discrimination is created as a result of misalignment between the provisions of the Labour Code and the Tax Code. Please see A. Hurbean, B. Florea. Working from home and teleworking from a fiscal perspective, in *Revue Européenne du Droit Social*, no. 3/2021, pp. 58-67.

[13] These ideas were synthetically expressed by Karl Marx and Friedrich Engels in the "Manifesto of the Communist Party", available at: https://www.marxists.org/romana/m-e/1848/manifest/c01.htm, accessed on 20 November 2021.

expropriation of land ownership and the use of land rent to cover state expenditure, a highly progressive tax, the abolition of the right of inheritance, the confiscation of the property of all emigrants and rebels, the centralization of credit in the hands of the state with the help of a national bank with state capital and an exclusive monopoly, the centralization of all means of transport in the hands of the state.

In countries where the tax system discourages the ownership of capital, the taxation of capital, as a corrective measure to the 'unequal distribution' of capital, is a political option, accepted by vote of a majority - that of the wage-earners, who end up appropriating the assets of a minority - that of the owners of capital, through politicians whose only objective is to win the sympathy of the majority of the electorate.[14]

A reasonable tax system would require the population to accept the principle that the majority that decides on the general level of taxes must contribute to these levies, bearing the maximum tax rate, while it is possible for the same majority to decide to protect a poor minority through proportionately lower taxation.[15] In other words, since income and capital are not 'distributed' among the members of a society by some superior will, but are created by those who own them,[16] it is questionable whether a majority which has not participated in the creation of wealth belonging to a minority has the right to decide how much that minority's wealth will be amputated.

It has been pointed out in the literature that tax progressivity is based on ideas that cannot be defended by recourse to rules of law, and most people would reject these ideas if they were expressed in the abstract. The abstraction of these ideas would lead to the following statements: a majority should be free to impose a discriminatory tax burden on a minority; identical services should be remunerated differently; or that the usual incentives of an entire class should be eliminated simply because the incomes of its members are not of the same order as those of the majority.[17]

Capital Taxation

One of the solutions proposed as an alternative to the progressive tax was that of severely taxing inherited or freely acquired wealth, which would be a way of preventing the accumulation of large fortunes in the hands of

[14] P. Salin, *La Tyrannie fiscale*. Iași: "Alexandru Ioan Cuza" University Publishing House, 2015, pp. 82-87.
[15] F.A. von Hayek, *Constituția libertății* (1960) *[The Constitution of Liberty*]. Iași: Institutul European, 1998, p. 334.
[16] P. Salin, *op.cit.*, p. 78.
[17] F.A. von Hayek, *op.cit.*, p. 334.

those who have not earned them through effort. Inheritances and gifts above a certain amount are very suitable subjects for taxation, without giving rise to evasion through *inter vivos* gifts or concealment of assets.[18]

Professor Pascal Salin makes a reasoned criticism of both capital taxation and especially progressive taxation, which he considers to be simple choices made by political decision-makers, with no rational justification, but only electoral.[19] He also speaks out against the taxation of inheritances, which he considers to be another form of capital taxation that is immoral and harmful and which in no way represents a form of equal opportunities for individuals.[20]

Proponents of the capital tax argue that it is more equitable to tax valuable collections, building land or yachts owned by wealthy capitalists than a worker's modest salary. This argument can be countered by saying that there is no reason to tax the piece of land farmed by a peasant or the flat bought by a civil servant, which is capital, rather than the fees of a film star or a sports star, which are nothing more than income.[21]

Opponents of the capital taxation, point out that capital taxation destroys capital because capital, unlike income, is not automatically renewable. Since the capital represents the economic equipment of countries (factories, agricultural facilities, commercial equipment) reducing capital means compromising the economic potential of the nation. This argument can also be countered by the fact that although the capital tax diminishes the scale of private capital, if levied at a high level, it does not necessarily compromise the equipment of countries, as it can be used to finance public investment and can lead to a transfer of private investment to public investment, and there is no economic evidence that such a transfer would be wrong.[22]

The taxation of capital is a theme derived from the utopian ideas of Karl Marx and Friederich Engels. In 2021, this theme returns to Romania after 16 years of proportional taxation based on the single rate.

In Romania, for almost 50 years, the population has been subjected to these ideas of taxing the rich just because they are rich and redistributing their wealth to the poor just because they are poor.

These ideas return periodically and the part of the population which, after the fall of the communist regime, was accustomed to receiving social

[18]J.S. Mill, *op.cit.*, Book V, Chapter 1, § 3.

[19] P. Salin, *op.cit.*, pp. 35-103.

[20] P. Salin, *op.cit.*, pp. 103-114. The most often put forward argument in favour of inheritance taxation, in addition to the general arguments in favour of capital taxation, is the equal opportunities argument, which this author rejects on the grounds that individuals do not receive inheritance 'at birth', but much later, especially given the increase in life expectancy in the modern era.

[21] P.M. Gaudemet, J. Molinier, *Finances Publiques. Fiscalité, op.cit.*, p. 113.

[22] P.M. Gaudemet, J. Molinier, *Finances Publiques. Fiscalité, op.cit.*, p. 113.

benefits, embraces without any qualms the possibility to feed itself with the work of others. This part of the population is in favor of amputating the wealth it did not created, due to a lack of appetite for work. State aid is thus no longer understood in its proper sense, i.e., as temporarily providing a person or family with the means of subsistence until such time as those who can work and earn a legitimate income. State aid has been distorted in its meaning, being perceived as a right by its beneficiaries, a right which depends to a large extent on the goodwill of the person elected by a community to represent it (mayor or parliamentarian). The latter use these mentalities for electoral purposes.

Socialist parties, which recruit their voters from among the poorest members of society, whom they can ask to vote for them in return for an increase in state benefits, know that they cannot rely on the votes of people who work hard for their income and wealth. These people (middle class and rich) do not expect any help from the state but prefer to work to secure the desired comforts of life. The socialist philosophy therefore seeks to tax those who work hard for a comfortable living, to redistribute income from their work to those who are thus encouraged not to work.

The expectation of the population to receive a smaller amount from the 'benefactor' state, rather than to make efforts for obtaining a higher amount and a higher standard of living, is thus encouraged.

In Romania, it is easy to exploit such an idea when the ghosts of the communist past still haunt us and a large part of the population, now in their senior years, has been educated to despise private initiative and to expect and accept benefits from the state.

Nor is the young population particularly workaholic. Against the backdrop of the deterioration of the education system, young people are tempted to choose as their role models people who do not excel by personal merit, but who have become known and have become wealthy on the spur of the moment. Such role models display a carefree life and give the impression that wealth is not the result of hard work combined with a thorough education, but of natural personal qualities that give them a status of superiority over others. Excessive promotion of such models destroys the value system and the initiative of young people, who are no longer aware of the need for sustained effort to achieve professional results.

Under these circumstances, discussions about introducing a progressive income tax and about more severe taxation of wealth, by taxing luxury goods, must necessarily be linked to the effort made to obtain the income or capital in question. We must also ask ourselves what we want to reward: hard work and prudence or inactivity and waste? The answer to this question tells us what kind of society we are seeking to promote: a society financially independent of the state and aware of its

own status, or one dependent on the goodwill of the state and with no reference to its own role in society.

Also, before we set a tax on luxury goods, we need to ask ourselves what is the value threshold above which we can consider a person to own luxury goods and what are the criteria by which we determine whether a good is luxury or not? For example, Art. 291 para. (3) letter c) point 3 of the Tax Code establishes that the supply to individuals of dwellings with a maximum surface area of 120 m² not exceeding the value of 450,000 lei[23] is considered to be part of the state's social policy and is therefore taxed at a reduced VAT rate of 5%.

Based on the text of the Tax Code, it is debatable whether a house of more than 120 m² can be considered a luxury good for a single person, but for a family with 3 or 4 children, it is more of a necessity.

Also, dwellings needs have changed with the development of society, so that a house of 120 m² which might have been considered a luxury 50 years ago is now considered not only a normality, but even part of the state's social policy. Exceeding the floor area that the state considers to be part of its social policy does not automatically make all other dwellings exceeding this area to be considered luxury.

Thus, the housing area considered a luxury or necessity must be related to economic development[24] of today's society. If economic development allows a large part of the population to own residential buildings with a surface area of more than 120 square meters, then they can no longer be considered a luxury.

It should also be noted that every dwelling bears a building tax which is calculated according to the building's built-up area, so the resulting tax will be proportional to the size of the building, adjusted according to

[23] From 1 January 2022 the text of Art. 291 para. (3) letter c) item 3 of the Tax Code, referring to the dwellings considered to be part of the state's social, will be amended and will have the following content: "the supply of dwellings having a useful surface of not more than 120 m², excluding household annexes, whose value, including the land on which they are built, does not exceed the amount of 140,000 euro, whose equivalent in lei is established at the exchange rate communicated by the National Bank of Romania, valid on 1 January of each year, excluding value added tax, purchased by individuals". In this respect, see Article VII(2)(a) of the Treaty. (1) lit. f) of Law 296/2020 amending and supplementing Law no. 227/2015 on the Fiscal Code, published in M.Of. no. 1269 of 21.12.2020.

[24] Economic development is achieved through real competition in the market. For a study on competition in the EU market, please see I. Lazăr. *Dreptul Uniunii Europene în domeniul concurenței* [*European Union Competition Law]*. Bucureşti, Editura Universul Juridic, 2016] and also I. Lazăr. Înțelegerile anticoncurențiale între întreprinderi în dreptul european al concurenței, Partea I şi a II-a [Anti-competitive agreements between undertakings in European competition law, Part I and II]. In *Pandectele Române,* no. 5/2015, pp. 15-50 and no. 6/2015, pp. 19-60.

certain specific correction coefficients laid down by law.[25] Thus, a person who owns a dwelling with a larger surface area will pay a tax proportional to the built-up area of his dwelling.

Another problem with setting a luxury property tax is the number of taxpayers who actually own luxury property.

Adam Smith, a key contributor to the study of economics as a modern academic discipline, argued, among other things, that taxation should be carried out in such a way as to collect from the taxpayer as little as possible besides what comes into the treasury,[26] which today could be translated as the principle of tax efficiency.

For a tax to justify its existence, it must provide more revenue than the expenditure required to establish and collect it. If the benefits of the tax are less than its costs, then such a tax cannot be considered efficient.

An efficient tax must therefore be targeted at a relatively large group of taxpayers who contribute enough to support the costs of identifying, assessing and collecting the tax.

Conclusion

A tax on so-called luxuries might in fact target the middle class of society, who, because of their efforts, can afford to live comfortably and who will have to pay yet another tax on wealth to support the expenditure of the state.

It is debatable whether a tax on luxury goods, which really affects luxury, would be effective, since the percentage of those who have access to truly luxury products is very small.

Otherwise, we might find ourselves in a situation where the introduction of a tax on goods considered luxury is just a new tax on the most industrious members of society who, thanks to their hard work and dedication, can afford to pay yet another tax.

Also, a progressive tax on overall income could affect those who are working hard to obtain a comfortable living for them and their families, and reward those working less and waste a lot.

[25] For the calculation of the tax on residential buildings owned by individuals, please see Article 457 of the Tax Code.

[26] A. Smith, *Inquiry into the Nature and Causes of the Wealth of Nations, 5th edition* (1789) translated by the Romanian Academy of the People's Republic, 1965, Vol. II, Book 5, Chapter 2, Part II - On Taxes, pp. 242-244.

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CONSIDERATIONS ABOUT MOBBING, AS A PSYCHOLOGICAL AND SOCIAL PHENOMENON, IN WORK RELATIONSHIP

Ada HURBEAN[1]

Abstract

The paper analyzes the notion of mobbing from am psychological point of view, starting to the perception of this behavior regarding the employee and extented to the context of work relationship. But mobbing has grater conations the work relationships, has also social and even interpersonal effects. That is the reason why, we consider the study of this phenomenon, from all points of view, very important. Also, is important to be able to make de differences between mobbing and other forms of working and social pressures, in order to identify correctly, each incident which may appear in this area.

Keywords: *mobbing, discrimination, bulling, work relationship*

1. Considerations about the phenomenon of mobbing

For starters, it should be noted that, there is no unitary term worldwide that defines the phenomenon of mobbing. Even in the English literature there is no such thing as. In the United States this phenomenon is often referred to as "employee abuse" or "workplace terrorism", with American experts also familiar with the term "mobbing", which is used in Germany, Italy and Sweden, for example. In the UK, the phenomenon is known as 'workplace bullying' or simply bullying, and in France, the more psychological nature of the phenomenon is indicated by the expression 'moral harassment'. Moral harassment at work can be defined as any form of abusive conduct, manifested by gestures, words, attitudes that affect by their systematic character or by repeating the dignity or physical or mental integrity of a person, endangering his work or by deteriorating the working climate.[2,3]

The notion of mobbing has as its root the English word "mob" which in translation means "disorganized crowd, mob", engaged in a process of violence without rules.

The term mobbing was first used by Konrad Lorenz, Austrian scientist, founder of modern ethology (a branch of zoology that studies the

[1] Associate Professor PhD., "1 Decembrie 1918" University from Alba Iulia, Faculty of Law and Social Sciences.

[2] European Parliament, Directorate-General for Research, Bullying at work, 2001, Terminology, p. 7.

[3] Marie-France Hirigoyen, *Malaise dans le travail, harselement moral:demeler le vrai du faux*, Editions Syros, Paris, 2001, p. 290.

behavior and way of life of animals), winner of the Nobel Prize in 1973. He used this term to describe the animal's aggressive behavior to fight individuals of its own species, of a group of smaller animals on a larger animal perceived as a threat.

The introduction of the this notion in work psychology and organizational psychology is due to Heinz Leymann, a Swedish researcher who pioneered the study of mobbing in the 80s, his initial research in this area was based on suicide case studies or suicide attempts by nurses due to certain events in the workplace. The results of his lengthy research, carried out in Sweden on mobbing, were made public in early 1990 at a conference on occupational safety in Hamburg. In the same year, Leymann made known the term mobbing in the United States through the magazine Vilonce and Victims. In 1993, Leymann published in German the work entitled "Mobbing", which will be translated into French under the title "Mobbing.La persecution au travail" and published in 1996.

Mobbing or psychological terror in the workplace involves a hostile and unethical communication, systematically directed by one or more persons on a single individual in general, who is therefore pushed into a situation of helplessness and in which he cannot defend himself; the victim is kept in this situation for months (maybe years), during which the attackers continue mobbing (at least once a week and at least 6 consecutive

According to the theory of Professor H. Leymann, there were four important phases during the mobbing phenomenon: 1. The critical incident – triggering the mobbing phenomenon – usually has to do with work (differences of opinion, conflicts, power struggle) 2. Mobbing and stigmatization – constant and systematic harassment over a long period of time, with the aim of seriously harming the person. 3. Management intervention – when the mob person officially becomes a "case". 4. Stigmatization, social isolation, even expulsion of the person from the company.

German psychiatrist Harald Ege, PhD in work psychology compares mobbing to "a war at work, where, through psychological, physical and/or moral violence, one/more victims are forced to submit to the will of one or more aggressors."

Ege was the one who approached the phenomenon of mobbing according to the cultural implications, conducting studies in Sweden, Germany and Italy. He published his first book on the subject in 1996 and founded the non-profit organization PRIMA in Italy, which offered support to the victims of mobbing. He classified mobbing as follows: Vertical mobbing – being found in two forms: Top-down mobbing - the mobber is a superior who takes advantage of his privileged position to bully employees Bottom -up mobbing – less often encountered – is when the authority of the

superior is not recognized by the employees, they become in this case the mobbers. Horizontal mobbing – less common, occurs between people in similar positions at work. Most of the time, the aggressors act in groups of 2-4 people or more than 4 people on a single person, the initial reason for the aggression being envy, the person concerned being usually more creative, more qualified, smarter than the aggressors, but who ends up being discredited and isolated by the coalition colleagues.

Depending on the number of people to whom the aggression is directed, this phenomenon can be clasified in: Individual mobbing – when aggression manifests itself only on one person Collective mobbing – when aggression is directed against a group of people, being rather an organizational policy meant to hide a reduction in personnel / collective dismissal.

Also, psyhologists identified other formes of mobbing, Depending on the effects on the target person, as follow: Mobbing that affects communication (especially with the superior, occurs verbal aggression, threat related to dismissal) Mobbing that affects socialization (the victim is isolated, colleagues are forbidden to communicate with the victim) Mobbing that affects the reputation of the person concerned (the victim is ridiculed, maligned, gossip is invented) Mobbing that affects the professional activity (the victim receives humiliating tasks or does not receive at all) Mobbing that affects physical health (assignment of dangerous work tasks, isolation in a space unsuitable for maintaining health: the presence of mold, rodents, cockroaches, etc.)

In this context, appeared the concept of "double-mobbing" defined by Harald Ege in 2000 refers to the fact that the devastating effects of mobbing have an impact not only on the mobbing person, but also on the victim's family, which at first supports the family member, but with the passage of time, unconsciously, as a result of mental exhaustion, it can withdraw its support and hostilities occur between family members and the mobbized person. In the end, the victim will suffer hostilities both at work and within the family.

The first countries where the phenomenon of mobbing was studied and which took measures against this phenomenon were the Nordic countries: Sweden, Norway, Denmark, Finland; the researches are then spread in the rest of Europe, but also in the USA, South Africa, Australia

Among the Member States of the European Union, Sweden was the first member country to introduce into law in 1993 the notion of "moral harassment of employees at work". In France, the concept was introduced into use by the courts in 1960, before this concept acquired a legalized character, which subsequently led to the legal regulation of this concept, the French legislature introducing on 17 January 2002 articles

criminalising the actions of moral harassment of employees at the workplace, both in the Labour Code and in the Criminal Code, being the first state to penalise this phenomenon.

France considered mobbing a crime, being added to the criminal code by law no. 73/2002 – art.222-33-2 which provides that the act of harassing through repeated acts having as object or effect a degradation of the working conditions liable to prejudice the rights and dignity of the employee, to alter his physical or mental health or to compromise his professional future is punishable by imprisonment up to one year and a fine up to 15,000 euros.

Recently, France has shown that it has understood the importance of the mobbing phenomenon and the seriousness of the consequences arising from its manifestation, which is why it has not only increased the applicable punishments for moral harassment, but has doubled them: two years in prison and a fine of 30,000 euros.[4]

2. Differences

In the context of psychological research of this phenomenon, some differentiations must be made between mobbing and other similar forms of pressure. Thus, Mobbing should not be confused with the stress assimilated to the workplace, it is temporary, impersonal and is correlated with the duties and responsibilities of each job.

Not every conflicting communicative situation falls within the sphere of mobbing, but only hostile, aggressive situations, which involve confrontations, moral mistreatment, despise of personality, vexation, mocking. But even these do not fall into the incidence of mobbing, if they are rare, accidental, fleeting. Contradictory discussions, annoyances, ironic remarks, sarcastic aftershocks, ridicules are part of the daily life of a working day, sometimes even stimulating and can lead to better results obtained at work.

By referring to the notion of stress at work we refer, in fact, to "occupational or organizational stress", translated by the tension and pressure of employees at work, resentment about superiors, fatigue, difficulties in adapting to the workplace. Sometimes, job stress can generate burnout syndrome - an acute condition that appears as a reaction to occupational stress, characterized by exhaustion as a result of overwork at work, which end up creating medical problems, such as insomnia, anxiety, depression, etc.

Regarding the relationship between mobbing and stress, German research approaches mobbing as an extensive and dangerous form of

[4] Penal Code - Last modification on January 01, 2020 - Document generated on February 04, 2020 Copyright (C) 2007-2020 Legifrance.

social stress. The controversy over the difference between stress and mobbing stems from the fact that it is not clear whether mobbing is a cause or a result of stress (Leymann, 1993). Frustrated people can blame others, becoming stressors for other employees by initiating mobbing behavior, thus creating a vicious circle.[5]

Mobbing and discrimination

Classical discrimination is a type of unequal or unjust treatment of a person due to differences in gender, ethnicity, age, wealth, nationality, religion, sexual orientation, disability, etc. Specific to classical discrimination is the fact that what is imputed to the victim is not related to her personality traits, but to the characteristics of the group to which she belongs. However, the etiology (a science that studies the causes of things) of some mobbing-type manifestations – may also involve the presence of manifestations of classical type of discimination.

The phenomenon of mobbing is different from that of discrimination, but it can have as a substrate values of discriminatory type of the one who exercises the mobbization action.[6]

Mobbing is a phenomenon that is found on the border with the phenomenon of discrimination and can only be partially considered a type of discrimination. Mobbing can also be linked to the classic phenomenon of discrimination, the employer's management aiming to remove an employee whom it cannot remove directly, on discriminatory grounds (for example, sexual orientation) without incurring certain repercussions, and can be sued for discrimination. This is why he resorts to the phenomenon of mobbing, as he can create a series of major inconveniences for the victim, putting psychological pressure to get him to leave the workplace voluntarily.

Mobbing and bullying

Considered by some authors, especially in the UK, synonymous words, however, mobbing should not be confused with bullying. While mobbing is characterized by a certain frequency and a systematic attack directed at the mobbized person over a long period of time, bullying usually has a singular appearance, manifested by physical aggression with the obvious purpose of instilling fear in the victim.

The term bullying comes from the English word "bully" which means bully, hooligan. As is also understood from the translation of the term, the

[5] Mobbing or psychological harassment in the workplace. Good Practice Guide, p. 20.

[6] Study on mobbing and some forms of discrimination at work in Romania, 2011, p. 15. https://sindicatsinpen.files.wordpress.com/2016/11/studiu-asupra-fenomenului-de-mobbing-c899i-a-unor-forme-de-discriminare-la-locul-de-muncc483.pdf

phenomenon of bullying is a form of emotional and physical abuse, intentionally directed against the victim who cannot defend himself or herself. The imbalance of forces between the agressor and the victim occurs predominantly as a result of economic, racial, religious, cultural, age, sexual orientation, etc. differences.[7]

Bullying is considered a form of aggression common in the school environment and manifests itself mainly among adolescents, while mobbing is considered a phenomenon specific to the organizational environment, to a working environment, where there is an organizational structure with a well-established hierarchy.

Lately, there has been an increase in the number of cases of ***cyberbullying*** aggression – a form of bullying that manifests itself through the mediating of digital technology.

The form of emotional bullying is more common among girls, while the form of physical bullying is found among boys.

The major importance given by the Romanian state to the phenomenon of bullying, which is increasing in schools in Romania, is undoubtedly proved by the prohibition of behaviors consisting of psychological violence, a ban recently introduced in the current legislation – art.1. Law no.221/18.11.2019 amending and supplementing the National Educational Law no. 1/2011. Art. 6 of the same law clearly defines Psychological violence – or bullying.[8]

In Anglo-Saxon literature the phrase "workplace bullying" is often used. From the point of view of the target persons, mobbing has targets qualified persons, while in the phenomenon of bullying are sought "easy targets" that are victims that do not oppose resistance to attacks. In terms of harassment activities, mobbing targets actions disguised as normal, usual interactions, while bullying targets obviously abnormal, inappropriate interactions.[9]

Mobbing and stalking

The term **stalking – singular intimidation –** has gained notoriety since the 90's, and means a threatening behavior of great expressive, symbolic value of a true attack, but without risk or bodily damage.

Stalking is an unwanted or obsessive attention by an individual or group towards another person. The conditions of the prosecution are related to harassment and intimidation and may include the pursuit of the victim in person or monitoring the victim.

[7] https://ro.wikipedia.org/wiki/Bullying
[8] http://legislatie.just.ro/Public/DetaliiDocumentAfis/219895
[9] Mobbing or psychological harassment in the workplace. Good Practice Guide, p. 19.

Examples of behaviors specific to stalking phone calls, letters, internet messages, unwanted gifts by the person concerned, shouldering the victim, supervising them, approaching them, ordering goods or services on behalf of the victim, spreading rumors, threats, destruction of property of the victim or pets, physical attack.[10]

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[10] Mobbing or psychological harassment in the workplace. Good Practice Guide, p. 20.

THE RELEVANCE OF THE SUCCESSION RESEARCH – A BIBLIOMETRIC ANALYSIS

Miruna TUDORASCU[1]
Raluca IVAN[2]

Abstract

The aim of our study is to present an overview of the inheritance rights, testament and successions research field through its performance and science. In term of performance analysis our bibliometric study examines the prolific research constituents in terms of authors, institutions, countries, and journals / editors. In term of science mapping, our study examines the structure of networks amongst different research constituents in terms of research topics, clustering identified for the research topics, the importance of the key issues identified and how they relate in different contexts (clusters). The study's scope if to analyse the complete information regarding the inheritance rights, testament and successions research field published in the Web of Science Platform.

Keywords: *bibliometric analysis, bibliometric mapping, inheritances, succession, testament*

Theoretical frame

The first step of our research is to present a theoretical frame of what inheritance legal institution is. The present Romanian legislation adopted the notion of "inheritance" making a difference by the Civil Code from 1864, that oscillated between the notions of succession and inheritance.

In connection with the Law no. 71/2011[3], in art. 213, we find: "*At the date of entry into force of the Civil Code, the terms and expressions of applicable civil and commercial law, shall be replaced by the corresponding terms and expressions of the Civil Code*". Despite of this text, also now we find in the doctrine, both terms, being used alternatively, so inheritance is a synonym with succession. Most of the authors consider that is no mistake in using the term of succession as an equivalent for inheritance.

By all means, we would make the following specification: the notion of succession has a larger understanding, because it means also the patrimony, pieces of patrimony or individual rights transmissions,

[1] Associate Professor, "1st of December 1918" University of Alba Iulia, e-mail: miruna.tudorascu@uab.ro
[2] Associate Professor, "1st of December 1918" University of Alba Iulia, e-mail: raluca.ivan@uab.ro
[3] For the implementation of Law No. 287/2009 on the Civil Code.

between live persons, or for death cause (*mortis causa*); so there is a succession in connection with the property right owners, not just for *mortis causa,* but also for property translation contracts, which are legal acts between alive persons (e.g. the buyer from a Sale Contract is a successor of the seller rights).

In Romanian legislation, in Romanian Civil Code, we find the rules specific for the inheritance field in Book No. IV, called "About inheritance and liberalities" which is structured like this: Title I – General rules in connection with inheritances; Title II – Legal inheritance; Title III – Liberalities; Title IV – The transmission and partition of inheritance (art. 953-1163 Civil Code).

"Inheritance law – sometimes called wills and probate – is concerned with the distribution of a person's property after his (her) death. This may occur either in accordance with the provisions of a will which that person has made, or under the applicable rules relating to intestacy - if a person dies without having made a will. Almost all civil law jurisdictions of the world distinguish two major types of succession: intestate succession (i.e. the legal inheritance) and testate succession (i.e. the inheritance established through the last will or testament)[4].

So, the legal inheritance in our legal system is the rule. We are in the presence of legal inheritance when the deceased person didn't make a will (testament); the deceased made a testament, but this legal act is void (null) – that means that the testament is not fulfilling the basic and formal conditions; the deceased made a testament, but these testaments do not have legacies[5], it has just dispositions about funerals, testament executor etc.; the deceased made a testament, but has ignored the successive reserve.

What is a testate succession? When the will of the deceased person is expressed by an unilateral legal act – the testament, that is a legal act made for *mortis causa* (death cause) that determines the rules of succession for the persons who will be successors (beneficiaries of the testament). To keep in attention is that, according to art. 1102 Civil Code, the two types of successions can co-exist.

To understand this institution in accordance with the whole frame, we must determine all the terminologies next to those that we already discussed, such as: ***deceased person*** – the person of whom inheritance we are talking about, person that in the doctrine can be found also as *de*

[4] Irina Gvelesiani, *Romanian and Georgian Legal Systems (Terminological Similarities and Differences),* Conference: The 7th International Conference "Challenges of the Knowledge Society", Titu Maiorescu University, Bucharest, Mai 2013.

[5] Legacies – The Legate is the testamentary disposition by which the testator stipulates that, upon his death, one or more legatees shall acquire his entire estate, a fraction thereof, or certain specified property.

cujus (Latin name), author, testator[6]; ***heirs*** – the persons who are getting the deceased patrimony, called also successors, inheritors; ***an inheritance opening date*** – the inheritance of a person will be considered opened in the same day when the person is dying; ***an inheritance opening place*** – the last domicile of the deceased, no matter if this is the same as the place of death.[7]

At European level, Since 17 August 2015, the European Succession Regulation (otherwise known as Brussels IV)[8] has been applicable in every EU Member State except for the United Kingdom, Ireland and Denmark. The Regulation contains provisions on succession cases with a transnational component.[9]

"In particular, the European Succession Regulation deals with the following issues related to transnational succession cases:

1. It regulates which national law of succession is applicable to successions with a transnational component (Articles 20 et seqq. of Brussels IV) if no special international treaties exist (such as those with Turkey and Iran).
2. It stipulates which court or other authority has jurisdiction in such cases (so-called international jurisdiction, Articles 4 et seqq. of Brussels IV).
3. It defines the European Certificate of Succession (Articles 62 et seqq. of Brussels IV). The newly created European Certificate of Succession is applicable in almost the entire EU. It is primarily used to verify an heir's status and is designed to serve alongside the existing national inheritance certificates (such as the German Erbschein), making it easier for heirs to settle inheritance matters abroad. This EU Succession Regulation does not, however, affect the provisions of individual Member States in the areas of substantive inheritance law (e. g. the question of who is a legal heir) and inheritance tax law"[10].

[6] Art. 78 Romanian Civil Code.
[7] Art. 954, al. 2 Romanian Civil Code.
[8] Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (original version: OJ 2012, L 201/107).
[9] The EU Succession Regulation - Federal Ministry of Justice and Consumer Protection Division for Publicity and Digital Communication 11015 Berlin, last revised in July 2019, Printed by MKL Druck GmbH & Co. KG, Ostbevern, Germany.
[10] *Idem.*

Methods and research

Technics for the bibliometric analysis

The second step of our research is to define the chosen technics, respectively, according to our study's' aim, we will use a combination of co-word analysis for the identification of networks amongst different research constituents and for future direction of research in terms of research topics, the importance of the key issues identified and how they relate in different contexts (clusters).

Collecting the data for the bibliometric analysis

We identified one objective of this study the presentation of a bibliometric analysis for the published scientific papers regarding ***the inheritance rights, testament and successions research field*** using data retrieved from the Web of Science database and to explore the relationships among the most frequently used terms regarding ***the inheritance rights, testament and successions research field*** by using relational techniques. In order to be able to identify the scientific interest in the field of ***the inheritance rights, testament and successions research field*** and to be able to determine its evolution, a bibliometric analysis was elaborated on the papers published in the above-mentioned field.

The analysis was carried out with the help of information obtained from the query of the existing database in the Web of Science Core Collection (WOSCC), which includes more than 21,894 journals, books and conference proceedings and it covers over 82 million records, more than 126,000 books and over 226,000 conferences covered. Through all its scientific resources, WOS provides users with a database that can form the basis for designing quantitative analyses on the progress of research in the most diverse fields, including ***the inheritance rights, testament and successions research field***.

The database query available in the WOS platform was performed on October 29, 2021 and had the following protocol:

Database selected: Web of Science Core Collection.

Advanced search on the group of words: ("inheritance" in Topic ***OR*** "testament*" in Topic) ***AND*** "successions*" in Topic.

Timespan: All years.

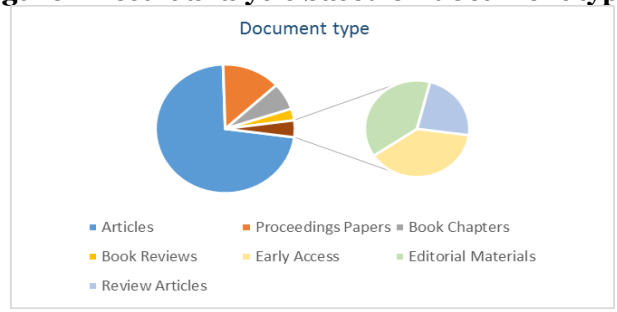
The global literature about ***the inheritance rights, testament and successions research field***, published between 1975 to 2021, were scanned in the WOSCC. After querying the database, 520 publications on the topic searched were identified. Then, the primary results were filtered by the WOSCC domains (Law, Social Science Interdisciplinary, Economics, Business, Industrial Relations Labour, Family Studies, Behavioural

Studies, Business Finance, Criminology Penology, Cultural Studies, History) thus the result was 291 records of the most relevant publications.

Results and discussion

The final result consists of 223 articles (79,9%), 42 proceedings papers (15%), respectively 21 book chapters (7,5%) and other forms of publications including book review, editorial materials, review articles etc. Consequently, we may state that the vast majority of research published that includes the topic of ***the inheritance rights, testament and successions research field*** are research articles, and just a small part book chapters.

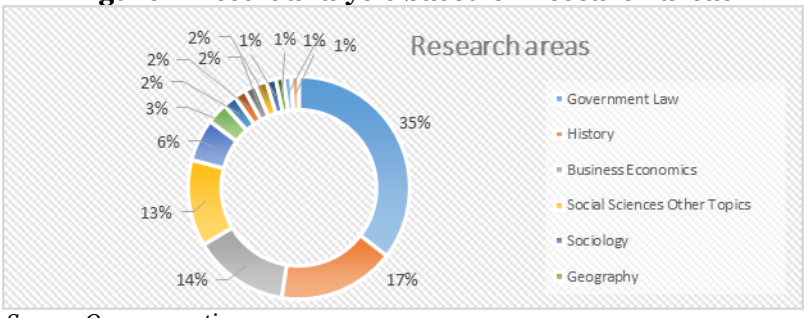
Figure 1 Result analysis based on document types



Source: Own generation

The research found that the main research areas of the published papers were the following, consequently the interdisciplinarity of ***the inheritance rights, testament and successions research field*** is evident, it is however identified a new direction for further research: why so many papers that touches the issue present are declared in the main research area as pertaining to Government law.

Figure 2 Result analysis based on research areas



Source: Own generation

It is remarkable to acknowledge the early onset of reference for the researched item as 1975. Among the records, the years with most

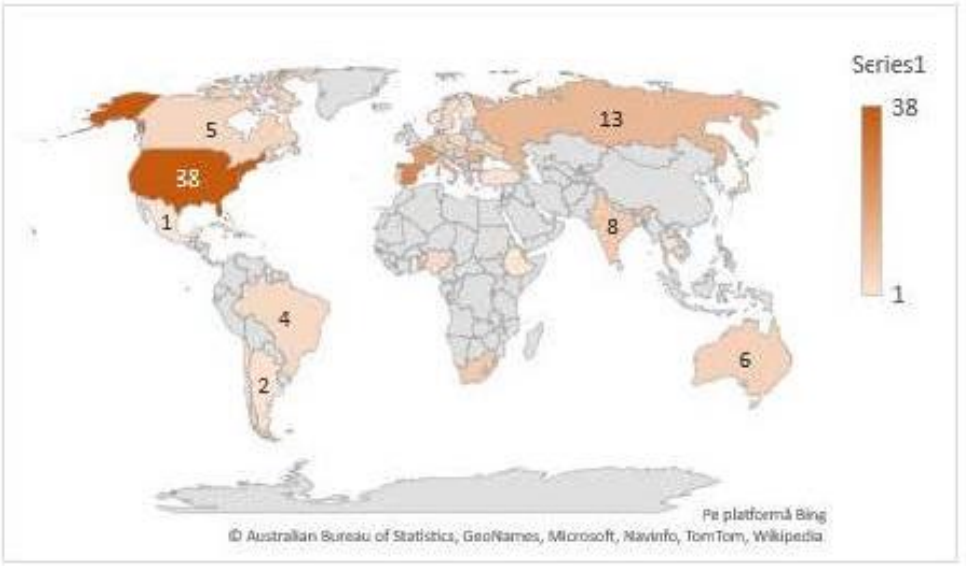
published articles are 2018 (33), 2019 (31) and 2020 (36). Looking at the ascending trend of publications over the last few years, it can be noted that there is a growth of interest in the discussed issues, especially in the last 10 years. The implementation of the Directive 95/2014/EU. We can visualize that the number of publications has increased 6 times (35 publications in time span 2001-2010, compared to 225 in the time span 2011-2021).

Figure 1 Result analysis based on publication's year

Source: Own generation

Analysis of the publications placed in a geographical system showed that the authors writing ***the inheritance rights, testament and successions research field*** come mainly from the USA (38), Spain (26), England (25), PR China (21), France (20) and 15 records from Romania. Also, majority of publications (194 records, 69%) were written in English, followed by 37 in Spanish (13.2%) and 13 in Russian (4,7%) followed by 9 in French, 6 in German and several others in twelve other languages.

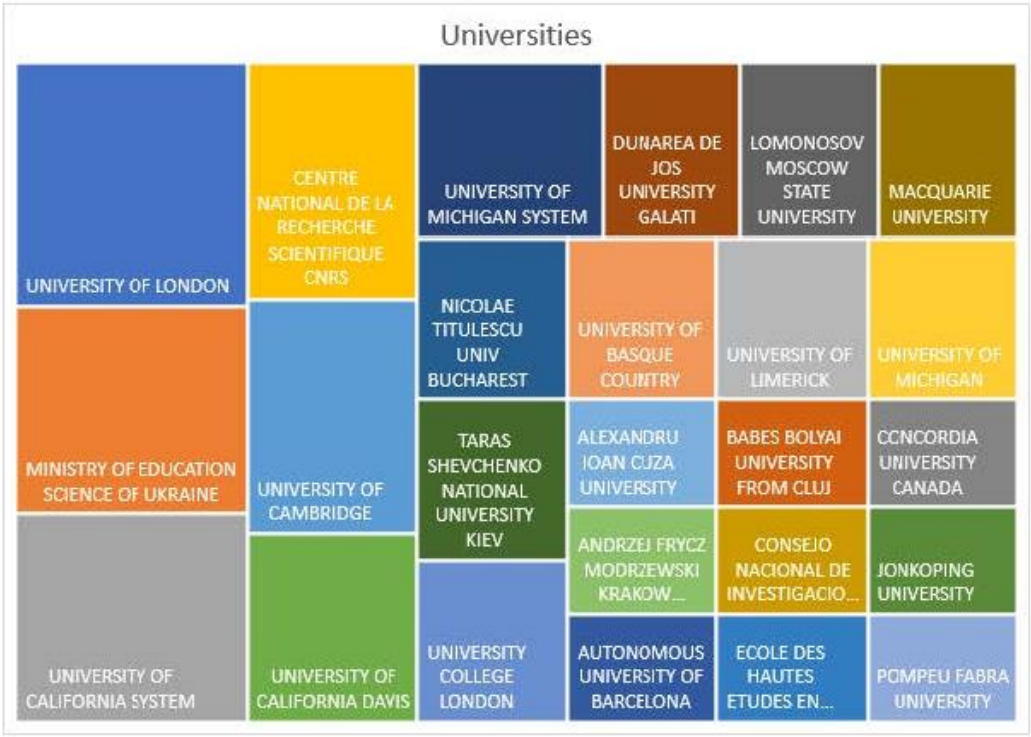
Figure 2 Result analysis based on countries/regions



Source: Own generation

We also consider of interest to present a part of the most important inputs in this research classified by university as we may encounter three Romanian Universities in the top 25, Dunarea de Jos University of Galati, Romania (3 research studies), Nicolae Titulescu University of Bucharest (3 research studies), Alexandru Ioan Cuza University (2 research studies), UBB(2 research studies).

Figure 5 Result analysis based on Universities



Source: Own generation

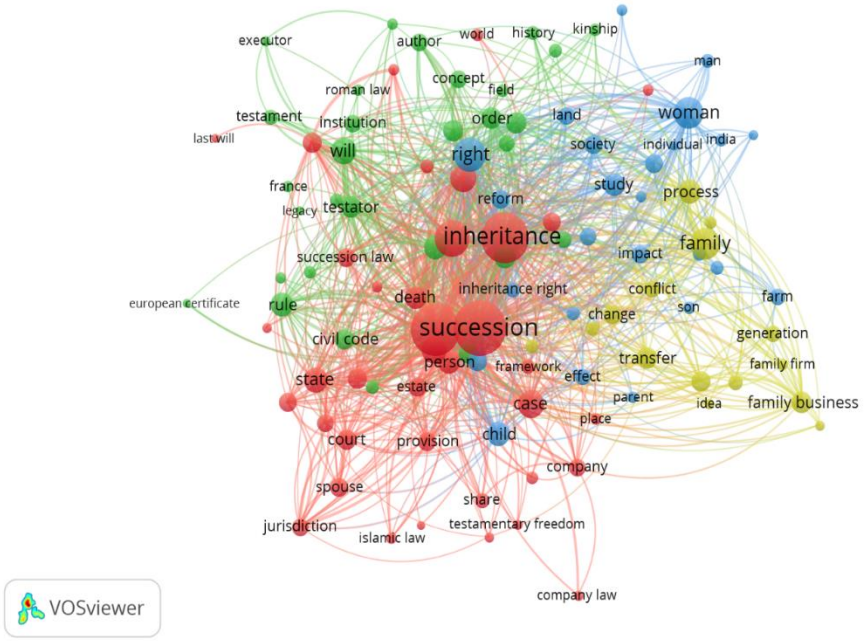
In terms of science mapping, we have undergone a summarized analysis of the bibliometric structure and intellectual structure using special technics for science mapping (co-word analysis) and bibliometric analysis enhancement technics (network metrics, clustering and visualization) using the VOSviewer software. Thus, to elaborate the quantitative analysis of the scientific interest in terms of ***inheritance rights, testament and successions research field*** we use the VOSviewer software (version 1.16.17), carried out by Nees Jan van Eck and Ludo Waltman. VOSviewer allows the analysis of the keywords in the documents existing in the WOS database, one of the purposes of this analysis being to highlight the links between these keywords. VOSviewer offers the possibility of making a map that graphically represents the links

between the words that appear most frequently in the documents for which the query was made in the WOS database. The workflow used in order to carry the bibliometric analysis was centred first on data retrieval, afterwards on pre-processing, then on network extraction, mapping, analysis and finally visualization (Cobo et al., 2011).

Afterwards, 291 retrieved records were exported into a plain text format (txt) containing the following information: author, title, source and abstract, in the VOSviewer software for further analysis. By using VOSviewer software we created a co-occurrence map based on the text data exported from the bibliographic database files (WOSCC). We extracted the keywords with minimum 25 occurrences in the titles and abstract fields using full counting method (van Eck & Waltman, 2011).

Out of the 291 publications, the software retrieved 121 terms that met the threshold at least 25 occurrences. From the 128 list of terms, only the most relevant 60% terms in our research were enrolled in the final analysis, many terms have been eliminated because they were common words such as article, author, data, model, paper, study, theory, value, year.

Figure 3 VOSviewer network visualization map – inheritance rights, testament and successions research
Association strength of on WOS platform.



Source: Own generation

In the figure no.5 we have a co-word (keyword co-occurrence) network visualization map using VOSviewer; according to the Manual of the software each node in network represent an entity, respectively in this case a keyword, where (i) *the size of the node* represents the occurrence of the keyword (the number of times that the keyword occurs), (ii) the *link between the nodes* represents the co-occurrence between keywords (keyword that co-occur together in multiple situations in different settings (studies), (iii) t*he width of the link* indicates the occurrence of co-occurrence between keywords (namely the number of times that co-occur or occur together), (iv) *the bigger the node* the bigger the larger the occurrence of the keyword, and (v) *the thicker the link between the nodes* the greater the occurrence of the co-occurrence between keywords. Each colour represents a thematic cluster, wherein the nodes and links in that cluster can be used to explain the them's (cluster) coverage of topics (nodes) and the relationships (links) between the topics (nodes-keywords) manifesting under that theme (cluster).

Conclusions

Accordingly, we have identified the biggest sized node: inheritance, succession and testament, in the timespan 1975-2021, and the generated map contains 4 clusters and it groups the 27 terms as follows; *Cluster number 1 (the red one)*, 38 items with the most important in terms of co-occurrence being: account, addition, asset, company law, contract, control, country, death, digital asset, estate, framework, inheritance, interest, jurisdiction, provision, share, spouse, succession, testamentary freedom. *Cluster number 2 (green one)*, 30 items, approach, civil code, concept, development, Europe, European certificate, executor, testator, roman law, legacy, transmission, will. *The third cluster (the blue one)*, 25 items, includes: act, child, daughter, effect, father, gender, child, household, inheritance rights, land, marriage, reform, relationship, woman, strategy. Finally, the f*ourth cluster identified (yellow one)* includes 15 items, and the relevant ones are: business, change, conflict, family business succession, family firm, generation, ownership, transfer, successor.

Thus, by means of network analysis there can be found structure. The ***inheritance rights, testament, and successions research field*** as per the WOS platform, timespan 1975 – 2021, retrieved a co-occurrence network of 108 terms grouped into 4 clusters by their relevance. Each cluster may be seen as a topic/ theme (van Eck & Waltman, 2011). In this case, the first cluster can be on the topic of successions; the second one on the topic of the inheritance; the third one on the succession law; and the fourth one will (testament).

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ADMINISTRATIVE AUTHORITY AND SELECTED MARRIAGE REGIME IN SEVERAL EUROPEAN STATES

Maria ALBU[1]

Abstract

The marriage agreement is an agreement on the property of the spouses, the admissibility and acceptance of which vary among the Member States of the European Union. In order to make it easier for property rights acquired as a result of a matrimonial agreement to be accepted in the Member States, the formal conditions of such an agreement should be defined. As a minimum condition, the marriage agreement should be concluded in writing, dated and signed by both parties. However, the matrimonial agreement must also meet the additional formal conditions laid down in the law applicable to the matrimonial property regime. The administrative authorities take note of these matrimonial agreements in which the parties establish their chosen matrimonial regime.

Keywords: *administrative authority, matrimonial regime, European states*

1 Introduction

In the analysis of the matrimonial regime[2], we caught aspects regarding this regime in several European states. The administrative authority but also the notary or the Court[3], plays a decisive role, a role conferred by the incidental legal provisions.[4]

In view of its general objective, which is the mutual recognition of judgments given in the Member States on matrimonial property regimes, we need to know the applicable legal rules, competent authorities and rules on the recognition, enforceability and enforcement of judgments similar to those of matrimonial property regimes. From other Union instruments in the field of judicial cooperation in civil matters.

[1] PhD., Senior lecturer, Faculty of Law and Social Sciences, "1 Decembrie 1918" University, Alba Iulia, Romania.

[2] *Matrimonial property regime* means a set of rules concerning the patrimonial relations between spouses and between spouses and third parties as a result of marriage or its dissolution.

[3] Regarding Romania see Mihaela Simion, *Romania and the right to individual liberty in the recent case-law of the European Court of Human Rights,* in Supplement of Valahia University Law Study, 2016, Bibliotheca Publishing House, 2016.

[4] Regarding Romania see Nadia Cerasela Anitei, *Regimurile matrimoniale potrivit noului Cod civil*, Hamangiu Publishing House, Bucharest, 2012.

2. The matrimonial regime in Germany

The German matrimonial property regime provides that the persons who own the property acquired during the marriage and the manner in which these property is distributed after the termination of the marriage are always determined according to the specific matrimonial property regime provided for by family law. The effects of marriage on property rights are governed by the regulations on matrimonial property regimes in the German Civil Code. It recognizes the following matrimonial regimes: the purchasing community[5], separation of goods[6] and the optional purchasing community.[7]

If the spouses consider that the legal matrimonial regime - the purchasing community - is not appropriate for their marriage, they can conclude a notarial matrimonial agreement. In this convention, the spouses may choose the separation of property or community of property or include provisions other than legal provisions in a specific matrimonial property regime. The convention may also include provisions on pension sharing or maintenance obligations. However, when concluding a

[5] The purchasing community shall apply unless the married couple agrees otherwise by means of a notarial matrimonial agreement. Community of acquisitions means the separation of assets during marriage and the compensation of the increase in assets during marriage, after the termination of the matrimonial regime.

[6] The separation of property must be agreed by the spouses through a notarial contract. Separation of assets means the complete separation of the respective assets of the spouses, without any compensation for the increase in assets upon termination of the marriage. Each spouse keeps as his or her own property the property he or she acquired before and during the marriage. Separation of property may also occur in the absence of an explicit agreement between the spouses, for example if the matrimonial property regime is revoked or excluded under the matrimonial agreement, without agreeing on another matrimonial property regime at the same time. The community of property must also be agreed by the spouses through a notarial contract. Under the community of property, property held before marriage and property acquired during marriage usually become the common property of the couple (Gesamtgut - property owned jointly). In addition, each spouse may own his or her own property, which is not part of the spouses' common property. These are things that cannot be transferred by legal acts, for example receivables that cannot be seized or a participation in a general partnership. Finally, each of the spouses may reserve certain items as a separate estate. Spouses can also establish a special form of community of property, namely the legal community regime. To this end, the spouses must declare in the matrimonial agreement that all property acquired before marriage is to be reserved property.

[7] The optional purchasing community is a Franco-German matrimonial regime designed to avoid potential problems in the legal relationship between French and German citizens due to differences between matrimonial regimes. If the spouses opt for this type of matrimonial regime, their assets will remain separate during the marriage, as in the case of the German acquisitive regime. The increase of the value of the couple's patrimony is compensated between the two spouses only at the end of the matrimonial regime. Despite the similarity of the content with the German purchasing community regime, the optional purchasing community has a number of special features.

marriage agreement, it should be ensured that the provisions set out therein are in fact valid.[8]

According to the legal matrimonial regime - the purchasing community - the compensation of the patrimonial growth takes place if the matrimonial regime ends (for example, as a result of the death of one of the spouses, by divorce or by a contractual agreement regarding a different matrimonial regime). Compensation for the increase in assets means that the spouse who has acquired more assets during the marriage than the other spouse must offer him or her half of the increase in assets in cash.

Under the community property regime, the common property is divided in case of divorce, after the payment of any debts. Generally, each spouse is entitled to half of the surplus. On the other hand, if the spouses have agreed on the separation of property, after the termination of the matrimonial regime, due to the complete separation of the property of the two spouses, no compensation will take place.

The right to maintenance is independent of the matrimonial property regime. If the spouses live separately, without having divorced, the spouse who needs this is generally entitled to maintenance from the economically capable spouse. The maintenance claim will exist only until the divorce is declared. However, following a divorce, the spouse who needs it may, in certain circumstances, request maintenance even after the dissolution of the marriage. The legislation recognizes the following maintenance rights: maintenance for childcare, maintenance for old age, illness or infirmity, maintenance for unemployment, supplementary maintenance, maintenance for education, continuing training and professional conversion and maintenance for reasons of equity.

If there are grounds for annulment of a marriage, there may be rights to compensation and maintenance in individual cases, even after annulment.

If one of the spouses dies under the acquisitive community scheme, the increase in assets is offset by the death of one of the spouses in the form of a flat-rate increase of one quarter, whether or not the deceased spouse actually had an increase in assets during the marriage. If the surviving spouse is not an heir or rejects the inheritance, he may claim compensation for the increase in assets that actually took place and may also claim a mandatory minimum share.

[8] For example, if a marriage agreement unilaterally disadvantages one of the spouses and there are certain other circumstances, it can be considered that it is contrary to good morals and is therefore null and void. In this case, the legal regulations, which are theoretically excluded from the matrimonial agreement, continue to apply. The jurisprudence in this field is extremely diverse. Whether a provision is contrary to morality and therefore void and unenforceable or whether it needs to be corrected can ultimately be decided only on a case-by-case basis.

If the spouses have agreed on the separation of assets, there will be no flat-rate compensation for the increase in assets upon termination of the marriage. The generally applicable legal order of succession is applied and according to the matrimonial regime of the community of property, the succession patrimony comprises half of the common property, the reserved property and the own property of the deceased spouse. The inheritance of the surviving spouse shall be determined in accordance with the general provisions. The family law court is the court competent for matters involving property law, namely for proceedings relating to claims made under the law applicable to matrimonial property regimes, in particular to compensate for the increase in the assets of the spouses.

Usually, a married person is liable only for his own debts, which he can cover exclusively from his own assets. This excludes transactions for the reasonable coverage of the daily needs of the family. However, under a procurement community regime, there are exceptions to the principle that a spouse is free to transfer his or her own property. If one of the spouses wants to cede (sell, give away for free, etc.) all or almost all of his own property, he needs the consent of the other spouse. The same applies if a married person wishes to transfer the objects that he owns exclusively, but which are part of the married couple's household. On the other hand, under the property separation regime, each spouse is free to transfer all his or her property and does not need the consent of the other spouse to transfer the property that is part of the household.[9]

Spousal domicile and household assets can be shared while the spouses live separately or after the divorce. If the co-ownership appears in another way, and the spouses cannot reach an agreement, a good will be put up for auction, and the income resulting from it will be divided.

If the spouses opt for the community of property as a matrimonial regime, for the registration of real estate, they must present the notarial matrimonial agreement to the land register and request the revision of the registration in the land register. In all other cases, ie if the spouses do not opt for the community of property as a matrimonial regime, the entry in the land register does not need to be revised.[10]

[9] If the spouses have agreed on the property regime, they will usually manage their common property together, unless, according to the matrimonial agreement, it is the responsibility of one of the spouses. Common property is subject to an obligation arising from a legal act which one of the spouses entered during the community of property only if the other spouse has agreed to the legal act in question or if the legal act produces effects for the common property even without his consent.

[10] Emese Florian, *Regimuri matrimoniale*, CH Beck Publishing House, Bucharest, 2015, pag.66

2. The matrimonial regime in Austria

Under Austrian law, the default matrimonial property regime is that of separation of property. Each spouse retains the property he or she has brought in marriage and becomes the sole owner of the property he or she has acquired[11]. Also, each of the spouses is the sole creditor for his debtors and the sole debtor for his creditors.

Spouses can opt for a different matrimonial regime than the default one, through a matrimonial agreement. In order to be valid, matrimonial agreements must be drawn up by a notarial deed.[12]

The legal effects of divorce, separation or marriage annulment are felt on the matrimonial regime. Full legal separation of property applies only until the declaration of nullity or annulment of the marriage or divorce, because at that time a division must take place in which the status of ownership is not the decisive criterion.[13]

If one of the spouses who is subject to the community of property regime (rarely encountered in practice) dies, the common property is divided. The net assets remaining after deduction of all debts are allocated, depending on the agreed percentage, to the surviving spouse and the estate of the deceased. In the standard case of the property separation regime, the legal quota received by the surviving spouse is determined by the number of relatives of the deceased who are also heirs. The surviving spouse is entitled to one third of the estate if the surviving partner remains a surviving or descending child; two-thirds of the estate, if the surviving partner remains a surviving partner; otherwise, at the entire succession table. The spouse is one of the obligatory heirs who is entitled to a succession reserve. The husband's estate reserve is half of what he would receive in a legal inheritance.

In the case of divorce, marriage annulment or declaration of marriage annulment, pursuant to section 81 et seq. Of the Marriage Act, the assets are managed either by mutual agreement or in accordance with a court decision.

In relation to third parties, in principle, one of the spouses can neither confer special rights nor impose obligations on third parties without the cooperation of the other spouse. The husband who manages

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[11] Articolele 1233 şi 1237 din Codul civil austriac.

[12] In principle, spouses are free to adopt a matrimonial regime of their choice. However, a matrimonial agreement cannot, for example, provide for a complete mutual waiver of maintenance in a marriage in force.

[13] The dissolution of the marriage is governed by the principle of division of the patrimony of the spouses. Spouses 'assets, items that have been used by both spouses, for example, the marital home, a car or household goods, are shared, and the spouses' savings are also shared. The latter include assets of any kind which the spouses acquired during the marriage and which, depending on their nature, are intended for capitalization.

the common household and has no income may represent the other spouse in legal acts of daily life that are performed for the common household and do not exceed a certain standard corresponding to the standard of living of the spouses only by virtue of an implied mandate.[14]

The property regime - when specifically agreed in place of the property separation regime - only creates a commitment in the relationship between the spouses that one spouse cannot dispose of his or her share of the common property without the consent of the other spouse. There is a real effect with regard to property only if there is a prohibition on sale and encumbrance under Article 364c of the Civil Code or a restriction under Article 1236 of the Civil Code, which provides that during the application of the Community regime of goods, neither party may unilaterally dispose of its half or its share.

The division of property in the event of divorce, annulment or declaration of nullity of the marriage under section 81 et seq. Of the Marriage Act is independent of the fault of the spouses, although guilt may be taken into account for reasons of fairness. The assets are divided either on the basis of the mutual agreement of the parties or on the basis of a court decision requested by one of the parties. Otherwise, the property separation regime still applies, ie each spouse keeps his or her own property. The application must be submitted within one year of the entry into force of the divorce decision. Both the property of the spouses and their savings are shared. According to Article 82 of the Law on Marriage, the following elements are excluded from the division of property: objects that one of the spouses brought in marriage or inherited, objects donated by third parties, objects used only by one of the spouses for personal purposes or professional, as well as objects belonging to a company or shares held in a company, unless they are only investments.

For the registration of the real estate, respectively for the registration of the property right in the land book, an application must be submitted to the district court in whose territorial radius the real estate to be registered is located. The application must be submitted in writing and signed by the applicant[15]. In principle, the signature does not have to be certified, unless the application includes a declaration of registration. The application must be accompanied by a public or private document containing the legal basis

[14] This is not the case if the other spouse has stated to a third party that he or she does not wish to be represented by his or her spouse. If the third party cannot establish on the basis of the circumstances that the spouse in question is acting as a representative, then both spouses are jointly and severally liable.

[15] If the application is made by a lawyer or a notary, it must be submitted by electronic means. In this case, the accompanying documents must be placed in an archive of electronic documents. Then, the tax attestation certificate issued by the tax authority can be replaced by a self-tax return prepared by a lawyer or notary.

for the purchase of the good (for example, a purchase contract) and bearing the certified signatures of the parties. In addition to the exact details of the property, private documents must include the registration statement.[16]

3 The matrimonial regime in Italy

The matrimonial regime in Italy is the legal regime of the community of property, as provided for in Article 177 et seq. Of the Civil Code. The legal regime of the community of property establishes that the acquisitions made by the spouses either jointly or separately during the marriage, with the exception of the acquisitions of personal goods, fall under the regime of the community of goods.[17]

The personal property of the spouse is considered:

- property that already belonged to the spouse before the date of marriage;
- goods received as a donation or inheritance after the date of marriage;
- goods intended for the strictly personal use of one of the spouses;
- the goods that the spouse needs to practice his / her profession;
- the goods received as compensation for damages, as well as the allowances received in the event of partial or total loss of work capacity;
- goods purchased at the price of the transfer or exchange of personal property, provided that this is explicitly stated at the time of purchase.

The following assets are also covered by the Community property regime:

- the profits obtained by the spouse, received and not used when the community of goods was dissolved;
- the proceeds from the activities carried out by each spouse separately, if they are not spent at the time of dissolution of the community;

[16] The declaration of registration is an explicit declaration of consent to the registration in the land book, given by the person whose right is restricted, encumbered, canceled, or transferred to another person. The declaration of registration must be certified by a court or a notary and signed by the contracting parties. Also, the declaration of registration can be presented as part of the application for registration of the property right in the land book. In this case, the signatures on the application must be certified by a court or a notary. The application must be accompanied by a certificate of tax compliance in accordance with Article 160 of the Federal Tax Code. The certificate is a confirmation by the tax authority that there are no obstacles to entry in the land register in respect of taxes due.

[17] Oana Ravas, *Studiu comparativ privind regimurile matrimoniale. Privire speciala asupra reglementarii uniunii libere – concubinajului,* Pro University Publishing House, Bucharest, 2020, p. 87.

- any enterprise jointly managed by the spouses and established after the date of marriage.

The administration of common property and representation in court proceedings in respect of acts relating to common property shall be the responsibility of both spouses separately, while they shall be jointly and severally liable for acts of extraordinary administration. Assets falling under the legal regime of the community of assets are divided by dividing assets and liabilities into equal parts.

Spouses who choose a marital status may enter into a different agreement, which must take the form of an authentic public deed in order to be valid. If the separation of property regime is chosen, this decision may also be stated in the marriage certificate.[18]

Spouses cannot decide, in general, that their matrimonial property regime should be governed, in whole or in part, by laws that do not apply to them or by custom, but must specifically state the content of the agreements intended to govern that regime (Article 161 of Civil Code). Any agreement to establish a dowry is void (Article 166-bis of the Civil Code).

If the spouses choose to amend the legal regime of the community of property by agreement, the following elements may not be included in that regime:

1) goods intended for strictly personal use;
2) the goods that the spouse needs to exercise his / her profession;
3) the goods received as compensation for damages;
4) the allowances received in the event of partial or total loss of work capacity.

In addition, there can be no exceptions to the rules on the legal regime of the community of property as regards the administration of property and equality of arms.

Divorce, separation or annulment of marriage will lead to the dissolution of the legal regime of the community of property. Death will also lead to the dissolution of the legal regime of the community of property.[19]

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[18] Spouses can agree to create a capital fund by allocating certain movable or immovable property entered in public registers or credit instruments to meet the needs of their family (Article 167 of the Civil Code). The fund can be created by a single spouse or by both spouses through a public deed. The fund may also be set up by a third party by public deed or will. Ownership and administration of the fund are subject to the rules on the legal regime of the community of property (Article 168 of the Civil Code).

[19] Assets falling under the legal regime of the community of assets are divided by dividing assets and liabilities equally. In view of the needs of the dependents, as well as their entrustment, the court carrying out this division may grant a spouse a right of usufruct over a part of the property belonging to the other spouse (Article 194 of the Civil Code). During the sharing operations, the spouses have the right to take over the movable property that belonged to them before the date of

Obligations assumed by one of the spouses before the date of marriage do not apply to property falling under the legal regime of the community of property, just as obligations related to donations and inheritances received by spouses during marriage not falling under the community of property regime (Articles 187 and 188 of the Civil Code). Obligations assumed by one of the spouses after the date of marriage for the performance of acts that go beyond the ordinary administration without the necessary consent of the other spouse, if the amounts due to creditors cannot be covered by personal property, apply to property under the legal regime of community of property (Article 189 of the Civil Code).[20]

All contracts transferring ownership of immovable property and, more generally, all deeds of incorporation, transfer or modification of property rights over immovable property must be transcribed in the relevant Land Book. Acquisitions of immovable property falling under the legal regime of the community of property are not exempted from this rule. Any person requesting the transcript must provide a copy of the title and notify the Cadastre Office, in duplicate, of the property regime of the parties - if married - in accordance with the statement made in the deed or certificate of the registrar who registered the patrimonial regime on the margin of the marriage certificate. Other matrimonial conventions, by which, for example, certain immovable property belonging to only one of the spouses are subject to a regime of the community of property or by which a capital fund for immovable property is established, are also subject to registration in Land Registry.

4. Matrimonial regime in Sweden

In Sweden, there is a matrimonial regime governing the maintenance obligation that applies between spouses during and after marriage. This regime also regulates the rights and obligations of spouses during and after marriage with regard to the different types of assets and liabilities, the marital home and the goods that furnish or decorate it, as well as gifts between spouses. There are two types of matrimonial regimes: legal community and separation of property. The legal community is the most common matrimonial regime and is applied implicitly, if the spouses have

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the community or that they obtained through an inheritance or a donation during the period when the respective goods were part of the community. If the movable goods to be seized cannot be found, the spouses may request an amount equivalent to the value of the goods, providing proof of their value, including notoriety, unless the lack of such goods is due to their consumption because of use or obsolescence or for any other reason that cannot be attributed to the other spouse (Article 196 of the Civil Code).

[20] If the common property is not sufficient to cover the amounts due, the creditors may, in the alternative, act on the personal property of each spouse, up to an amount representing half of the claim (Article 190 of the Civil Code).

not taken another decision beforehand. As a general rule, property in the legal community must be divided in the event of the death of one of the spouses or in the event of divorce. In the case of the property separation regime, they are not divided. The assets may be the property of only one of the spouses, without them having opted for the regime of separation of assets, in the following cases:

a) a matrimonial agreement has been concluded in writing and has been registered with the tax administration;
b) the goods are acquired through a deed of donation which expressly provides for this condition;
c) the goods are acquired through a will that expressly provides for this condition;
d) the spouse in question has been expressly designated as a beneficiary in a life insurance policy, an accident insurance policy, a health insurance policy or in an individual pension savings plan.

There are restrictions on the freedom to choose a marital status. For example, there are rules that protect the marital home and the property that furnishes or decorates it during the marriage. One spouse may not sell, rent or otherwise alienate the home without the consent of the other spouse. These rules apply even in the case of a separation of property regime. If the patrimony is to be divided between the spouses, the conjugal dwelling and the goods that furnish or decorate it belong to the husband who needs them most. This is true even if the property is the exclusive property of the other spouse. If the value of the assets thus attributed to one spouse exceeds his share of the estate, the spouse concerned shall nevertheless be entitled to benefit from those assets, provided that he pays the difference to the other spouse. Another example is that the surviving spouse is entitled to a certain minimum amount of money from the common patrimony. This is true even if the deceased spouse's property was in his exclusive ownership or if the deceased spouse bequeathed all the property to another person.

With regard to the legal effects of divorce, separation or marriage annulment on matrimonial property regimes, Swedish law only provides for divorce. The legal effect of divorce is the liquidation of the matrimonial regime. The spouse may also be entitled to a maintenance pension, at least for a transitional period. If one of the spouses dies, the estate is divided between the heirs of the deceased and the surviving spouse. The direct descendants of the spouses can receive their inheritance only after the death of both spouses.

The matrimonial regime can be liquidated even by the parties who concluded it. If the parties reach an agreement, the only formal requirement

is that the liquidation be done in writing and signed by both parties. If the parties do not reach an agreement, the court may appoint a bailiff. Decisions taken by the bailiff can be challenged by the parties in court.[21]

The general rule of liquidation of the matrimonial regime is that the common goods are divided, but there are several exceptions. Each spouse may deduct from the value of the common property the amount of his or her own debts. Each spouse may also exclude from the shareable table clothing and other items that he or she uses personally, as well as personal gifts. Neither the pension rights to be paid by public sector or public fund employers nor, to a certain extent, private fund pensions are covered by the division. In principle, the value of the rest of the common property is divided equally between the spouses, based on the criterion of ownership of the asset in question. As mentioned above, there are also special rules on marital housing and the goods that furnish or decorate it.

Each transfer of real estate must be registered by submitting an application for property registration to the National Cadastre Agency. Usually, the buyer requests registration. The original documents must be submitted with the application.

5. Conclusions

Given that there is currently a great deal of freedom of movement for persons, the administrative authorities must apply the relevant legislation of the matrimonial regime accordingly. A couple can decide to choose a certain matrimonial regime when they start a family. We can discuss a couple with different citizens but also with a mobility to settle in different European states (for example due to the job) with effective registration with the authority administrative. There are thus needs related to the following aspects: how the chosen matrimonial regime is characterized, whether or not it is legally recognized by the administrative authority of another state if the couple settled in that state, how and if it can be changed. The court competent to resolve disputes concerning this sensitive issue for the spouses but also for the administrative authority because the situations in practice are diverse.

[21] Each spouse is responsible for their own debts. The creditor of one of the spouses cannot request to be paid from the patrimony of the other spouse, regardless of the type of matrimonial regime. There are also rules that ensure the protection of creditors in case the spouses want to evade the payment obligations by evading the assets from the pursuit by the creditors. For example, a spouse cannot decide that his or her private property should be included in the community of property if his or her intention is to evade it from pursuit by creditors.

THE RIGHT TO MARRY IN CASE LAW OF CONSTITUTIONAL COURT ROMANIA

Mihaela SIMION[1]

Abstract

The article aims to analyse from the perspective of the jurisprudence of the Constitutional Court of Romania the right to marry, provided by Article 48 of the Romanian Constitution.

The right to marry is a first-generation fundamental right, part of the category of social rights. According to the case law of the Constitutional Court of Romania, certain substantive or formal conditions may be imposed by law for the exercise of this right, but they may not affect the very substance of the right. However, it can be seen that the Romanian constitutional and legal provisions governing this right are strongly influenced by national traditions and culture, especially as regards the issue of recognition of same-sex marriages. This situation often places the constitutional judge in a delicate situation, sometimes forcing him to take decisions on matters that would normally fall within the competence of the legislator.

Keywords: *Right, marriage, freedom of marriage, Constitution, Constitutional Court*

The right to marriage is a right granted by the state, its existence being conditioned by the existence of a state regulation. More specifically, if a person is naturally free, he is not naturally free to marry, and there is no right to marry without the existence of a regulation established by the State. Moreover, this right to marry is not an absolute right and can only be exercised within the limits set by national laws, without being possible for them to restrict or reduce the very substance of the right.

The essential role of the right to marry in the survival of the State and in the establishment of the family is widely recognised, and it is considered one of the essential civil rights of man, fundamental to the existence and survival of human society[2].

Today, most of the world's states recognise the institution of marriage and the freedom of individuals to marry, through domestic and international legal acts. The European Convention on Human Rights has

[1] Lecturer PhD, "1 Decembrie 1918" University of Alba Iulia, Faculty of Law and Social Sciences

[2] See, Mihai Constantinescu, Antonie Iorgovan, Ioan Muraru, Elena Simina Tănăsescu, *Constituţia României revizuită,* comentarii şi explicații, All Beck Publishing House, 2004, p. 99; Louis Favoreu, Patrick Gaïa, Richard Ghevontian, Ferdinand Mélin-Soucramanien, Annabelle Pena, Otto Pfersmann, Joseph Pini, André Roux, Guy Scoffoni, Jérôme Tremeau, *Droit des libertés fondamentales, 6e édition,* Dalloz, 2012, pp. 247-248.

taken note of this general trend in Article 12, by enshrining in general and measured terms the right to marry "men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right". The International Covenant on Civil and Political Rights is much more precise in regulating this right. Thus, Article 23 of this treaty stipulates that: "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State"; „the right of men and women of marriageable age to marry and to found a family shall be recognized" and „no marriage shall be entered into without the free and full consent of the intending spouses". The Charter of Fundamental Rights of the European Union also recognises that "the right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights".

One can therefore observe a wide range of legal acts regulating and guaranteeing the right of any person to marry and found a family. This right is a fundamental right which belongs to the first generation of rights and it is a social right in terms of its content, given the large number of its recipients[3].

1. Constitutional regulation of the right to marry

Carefully analyzing of the provisions of the Romanian Constitution, we can see that the right to marriage does not have an autonomous regulation, but a derived one, this right included in Article 48 regarding the family, a circumstance that confirms the vision according to which marriage is the "founding act" of the family: „the family is founded on the freely consented marriage of the spouses, their full equality, as well as the right and duty of the parents to ensure the upbringing, education and instruction of their children". Then, in paragraph 2 of the same article, the constitutional text specifies that "the terms for entering into marriage dissolution and nullity of marriage shall be established by law", as well as the fact that "religious wedding may be celebrated only after the civil marriage".

Thus, the constitutional text outlines the content of this right by mentioning several principles related to the exercise of the right to marry, namely:

- freedom of marriage, which requires the full and freely expressed consent of both spouses to the conclusion of the marriage;
- regulation by special law of the conditions for concluding, dissolution and nullity of marriage;
- equality of spouses, both at the conclusion of marriage and in personal and property relations between spouses, in relations between parents and children, etc.

[3] Marian Enache, Ştefan Deaconu, *Drepturile şi libertăţile fundamentale în jurisprudenţa Curţii Constituţionale*, vol. II, C.H. Beck Publishing House, 2019, pp. 49-50.

2. Constitutional protection of the freedom of marriage

The principle of freedom of marriage is generally defined as the freedom of a person to marry or not to marry. However, this approach is obviously simplistic, given that national legal systems provide in a non-unitary way limitations – in substance or form - on this freedom which is a matter of public policy specific to that State (e.g.; the attainment of a certain age by the future spouses[4]; the prohibition of polygamy [5], marriage between relatives up to a certain degree or marriage between persons of the same sex; the celebration of marriage in accordance with national procedural rules for the conclusion of civil marriage[6] etc.). Thus, we can state that the freedom of marriage enjoys relative protection, which authorises the national legislator to impose restrictions on it, in certain objective situations, without prejudice to the guarantees laid down in the constitutional text.

As we have shown, in Romania, in application of the constitutional principle of freedom of marriage, the concrete conditions for the conclusion, dissolution and nullity of marriage are established by law. Thus, under the Civil Code (Articles 271-289), the basic conditions required for the conclusion of marriage can be classified into positive conditions, namely consent to marriage, age at marriage, difference in sex, and negative conditions which refer to the lack of impediments to marriage, namely the status of married person, kinship, mental alienation or debility, guardianship. With regard to formal conditions, the final sentence of Article 48(2) of the Constitution enshrines the principle of the civil and solemn nature of the marriage ceremony. Under the constitutional principle of freedom of marriage, there is no prohibition of marriages between Romanian citizens and foreign citizens or stateless persons. However, this circumstance does not preclude the legislator from regulating mechanisms to prevent or combat marriages concluded for other purposes than those legally provided for marital unions. This applies in particular to marriages of convenience concluded to facilitate the immigration of non-EU citizens into the European Union. In this regard, the Constitutional Court has established that the administrative sanctioning of a marriage of convenience, by refusing to grant the right of residence to the foreigner, does not affect in any way the right to respect for private and family life and the principle of the foundation of the family

[4] See, ECHR, *Z.H.* and R.H. v. Switzerland, 8 December 2015; Comission decision, *Khan v. the United Kingdom*, 7 July 1986.

[5] See, ECHR, *Johnston and Others v. Ireland*, 18 December 1986; Comission Decision, *X v. the United Kingdom*, 22 July 1970.

[6] See, Comission decision, *X v. Federal Republic of Germany*, 18 December 1974.

on freely consented marriage between spouses[7], all the more so as the declaration of a marriage as a marriage of convenience does not automatically lead to the declaration of absolute nullity of that marriage, but produces effects exclusively on the right of residence of foreigners in Romania, and not on the civil status of the persons concerned[8]. Moreover, precisely as an expression of respect for the rights estabilised by Articles 26 and 48 of the Romanian Constitution, the legislator has provided for the reduction by half of the period for which a foreigner married to a Romanian citizen whose legal right of residence on Romanian territory has expired is prohibited from entering the country.

On the other hand, the conditioning of the right to request for family reunification by the pre-existence of a marriage concluded prior to obtaining the form of protection granted by the Romanian state to foreign citizens and stateless persons is not likely to contravene the constitutional guarantees concerning the freedom to conclude the marriage, the equality of spouses, and the right and obligation of parents to ensure the upbringing, education and training of children, as they are provided in Article 48 of the Constitution. On the contrary, by granting the benefit of family reunification, the Romanian legislator offers recognition and protection to pre-existing marriages, in order to ensure, on the territory of the Romanian State, the cohabitation of spouses in the spirit of the moral values that the institution of marriage generates within the family[9].

Equally, according to constitutional case law, the legal provisions that stipulate the obligation of the Romanian citizen to request the transcription in Romania of their marriage certificate issued by the foreign authorities are constitutional, because the transcription is necessary both to ensure the certainty of the person's marital status, given that the document in question was issued by a foreign authority, as well as to ascertain whether all the substantive requirements imposed by Romanian law on marriage have been complied with.[10]

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[7] The *Decision of Constitutional Court of Romania no.350/2 May 2006*, on the exception of unconstitutionality of the provisions of Articles 64(1) and 82(1) of Government Emergency Ordinance No 194/2002 on the regime of foreigners in Romania, published in Official Gazette no.461/2006.

[8] The *Decision of Constitutional Court of Romania no.132/21 February 2006*, on the objection of unconstitutionality of the provisions of Article 64(2) and (3) of Government Emergency Ordinance No 194/2002 on the regime of foreigners in Romania, published in Official Gazette no.229/2006.

[9] The *Decision of Constitutional Court of Romania no.699/31 May 2011,* on the objection of unconstitutionality of the provisions of Article 46(5) and Article 84(1), final sentence, of Government Emergency Ordinance No 194/2002 on the regime of foreigners in Romania, published in Official Gazette no.537/2011.

[10] The *Decision of Constitutional Court of Romania no.470/6 June 2006,* on the objection of unconstitutionality of Article 43(3) of Law 119/1996 on civil status documents, published in Official Gazette no.580/2006.

3. The principle of freedom of marriage and same-sex marriages

At present, Romania does not offer any form of official and legal recognition of same-sex relationships.[11] The removal of the gender impediment to marriage in the Romanian legal system is still a controversial issue, involving numerous cultural, moral and religious connotations, despite the general European[12] and global trend[13], towards the recognition of same-sex marriages or at least alternative legal regimes (such as civil partnership).

Moreover, contrary to this predominant trend at European level, in 2015, a citizens' initiative to revise the fundamental law aimed to replace the phrase "between spouses" in Article 48(1) of the Constitution with a more restrictive one, "between a man and a woman". According to the explanatory memorandum in the draft law, it "aims to remove any ambiguity that the use of the term «spouses» (...) might create in the definition of the notion of «family», the relationship between «family» and the fundamental right of men and women to marry and found a family". At that time, marriage was already regulated in Article 277 of the Civil Code, which prohibits other forms of cohabitation equivalent to marriage (same-sex marriages and civil partnerships). However, this revision aimed at the constitutional prohibition of same-sex marriages, given that the Civil Code can be changed much more easily by a not very large parliamentary majority and without consulting the population.[14]

The Constitutional Court gave its opinion on the proposed revision on 20 July 2016, holding that it did not interfere with any individual right, but "makes only a clarification regarding the exercise of the fundamental right to marriage, in the sense of expressly establishing that it is concluded between partners of different biological sex, which is, in fact, the original meaning of the text enshrined in the 1991 Constitution."[15] Adopted in both

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[11] Only five EU Member States remain in the same situation: Bulgaria, Latvia, Lithuania, Poland and Slovakia.

[12] Fourteen EU Member States have recognized same-sex marriage, in chronological order: the Kingdom of the Netherlands, Belgium, Spain, Sweden, Portugal, Denmark, France, United Kingdom, Luxembourg, Ireland, Finland, Germany, Malta and Austria; eight other states recognize civil partnership: Czech Republic, Estonia, Greece, Croatia, Italy, Cyprus, Hungary and Slovenia.

[13] The United States of America, Mexico, Colombia or Taiwan have indirectly recognised same-sex marriages through case law, by removing discrimination between heterosexual and homosexual persons, while Canada, New Zealand, South Africa, Argentina or Brazil have authorised them through legislation.

[14] In 2013, similarly, Croatia constitutionally banned same-sex marriage, following a citizens' initiative validated by referendum.

[15] See, the *Decision of Constitutional Court of Romania no.580/20 July 2016*, on the citizens' legislative initiative entitled "Law on the Revision of the Romanian Constitution", published in Official Gazette no.857/2016.

chambers of Parliament[16], the draft revision did not pass the test of approval by the Romanian people, as the mandatory referendum called on the subject was not validated. According to the Central Electoral Office, only 21.1% of Romanians with the right to vote went to the polls in the two days dedicated to the consultation, whereas in Romania, according to the law, a referendum is valid if at least 30% of the people registered on the permanent electoral rolls participate and if the valid options expressed represent at least 25% of those registered on the permanent electoral rolls.[17]

As far as the European Court of Human Rights is concerned, it has evolved from preserving a wide margin of appreciation in favour of States in this matter, to consistently confirming the freedom of States to offer the possibility of same-sex marriage[18]. In this regard, the Court has held, since 2010, that it is artificial to continue to consider that, unlike a heterosexual couple, a homosexual couple cannot experience 'family life' within the meaning of Article 8 of the European Convention.[19]

Also, in *Taddeucci şi McCall c. Italiei*[20], the Strasbourg Court held that it was precisely the lack of possibility for same-sex couples to have access to a form of legal recognition (a situation similar to that in Romania) that placed the applicants in a different situation from that of an unmarried heterosexual couple. Even supposing that at the relevant time the Convention did not require the member State to make provision for same-sex persons in a stable and committed relationship to enter into a civil union or registered partnership certifying their status and guaranteeing them certain essential rights, that does not in any way affect the finding that, unlike a heterosexual couple, the second applicant had no legal means in Italy of obtaining recognition of his status as "family member" of the first applicant and accordingly obtaining a residence permit for family reasons. In the Court's view, the restrictive interpretation of the concept of 'family member' applied to the second applicant did not take into account the applicants' personal situation and, in particular, their inability to obtain legal recognition of their relationship in Italy. In the light of the foregoing, the Court considered that, at the material time, by deciding to treat homosexual couples – for the purposes of granting a residence permit for family reasons – in the same way as heterosexual couples who had not regularised their situation (although they had the

[16] See, Maria Ureche, Autoritățile publice în dreptul statelor europene, Altip Publishing House, 2011, pp.122-126.

[17] Article 5 paragraph 2 of the Law no.3/2000 on the organization and conduct of the referendum, published in Official Gazette no.84/2000.

[18] ECHR, *Chapin and Charpentier v. France,* 9 June 2016.

[19] ECHR, *Schalk and Kopf v. Austria,* 24 June 2010.

[20] ECHR, *Taddeucci and McCall v. Italy,* 30 June 2016.

opportunity to legalize their situation), the State infringed the applicants' right not to be discriminated against on grounds of sexual orientation in the enjoyment of their rights under Article 8 of the Convention.

For its part, the Court of Justice of the European Union has approached same-sex marriage with particular regard to the right to free movement of persons and less with regard to other possible consequences that may result from social relations of partnership or marriage. Thus, the Court has held that the concept of 'spouse' is gender-neutral and is therefore capable of encompassing the same-sex spouse of a citizen of the European Union. The Court also found in case *Coman and Hamilton* that in a situation in which a Union citizen has made use of his freedom of movement by moving to and taking up genuine residence in a Member State other than that of which he is a national, and, whilst there, has created or strengthened a family life with a third-country national of the same sex to whom he is joined by a marriage lawfully concluded in the host Member State, Article 21(1) TFEU must be interpreted as precluding the competent authorities of the Member State of which the Union citizen is a national from refusing to grant that third-country national a right of residence in the territory of that Member State on the ground that the law of that Member State does not recognize marriage between persons of the same sex.[21]

Following this judgment of the CJEU, the Constitutional Court of Romania found that Article 277(2) of the Civil Code, which did not allow the recognition in Romania of same-sex marriages concluded or contracted abroad either by Romanian citizens or by foreign citizens, is unconstitutional so far as it prevents the free movement of European citizens on the territory of Romania in both its components, namely the right of residence and the right of movement.[22].

4. Equality of spouses

The equality of spouses is another principle of the right to marry, which reconfirms, also at family level, the great constitutional principle of equality in rights of citizens regardless of sex.

The equality of spouses is manifested in several areas: the conclusion of marriage, personal and property relations between spouses, relations between parents and children, the dissolution of marriage through divorce, etc.

With regard to the conclusion of marriage, in its original form the Family Code contained discriminatory provisions concerning the age at

[21] CJEU, *Coman and Hamilton*, C-673/16.

[22] The *Decision of Constitutional Court of Romania no.534/18 July 2018, on the objection of unconstitutionality of Article 277(2) and (4) of the Civil Code,* published in Official Gazette no. 842/2018.

which a woman (16) and a man (18) could marry, and the fact that only a woman could marry with a dispensation, for good cause, if she had reached the age of 15. Article 272 of the Civil Code restores formal equality between the spouses by stating that, for good cause, a minor who has reached the age of 16 may marry on the basis of a medical opinion, with the consent of his parents or, where appropriate, his guardian and with the authorisation of the guardianship court in whose district the minor is domiciled. If one of the parents refuses to consent to the marriage, the guardianship court shall also decide on this difference, taking into account the best interests of the child.[23].

Conclusions

The right to marry has recently been the subject of several decisions of the Romanian Constitutional Court. All these decisions have stressed the importance of the principle of freedom of marriage, the equality of spouses, and the need to protect family relationships resulting from both traditional marriages between a man and a woman and those concluded between persons of the same sex. In the latter respect, there is a strong influence of European case law on the subject, which suggests the need to protect family life and same-sex couples by legislating same-sex marriages/civil partnerships.

In this context, it would be desirable for Romania to take a step forward in this regard, at least by officially and legally recognising same-sex relationships established through civil partnerships, given that Romanian society and politicians do not yet seem to be ready to legalise same-sex marriages.

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[23] Elena Simina Tănăsescu, Milena Tomescu in *Constituţia României. Comentariu pe articole*, 2nd edition, coordinators I. Muraru, E.S. Tănăsescu, C.H. Beck Publishing House, p. 425.

ASPECTS REGARDING THE NOTIFICATION OF THE ADMINISTRATIVE DISPUTE COURT IN THE LIGHT OF THE PROVISIONS OF NCPC AND LAW 554/2004

Ioana-Andra PLEŞA[1]

Abstract

At the moment we cannot discuss the existence of "administrative procedural law", this notion is a chimera. In the content of Law 554/2004, references are made to the Code of Civil Procedure because it provides the aspects that regulate the conduct of a trial before the administrative contentious court.

In order to refer the matter to the administrative court, an introductory request is required, this request is made according to the rules stipulated in the NCPC.

From the moment of publishing a law in the Official Gazette, any person on the territory of the Romanian state has the obligation to know the law. By virtue of the legal provisions, if I am injured by an individual administrative act, and after going through a preliminary procedure I am dissatisfied with the answer or I have not received an answer, I have the possibility to notify the administrative court within the term and conditions provided by law.

Keywords: *court notification, introductory act of court, counterclaim, administrative contentious court*

1. Notification of the court in the regulation of the NCPC. Aspects regarding the civil process.

As the legislator states in art. 192 NCPC "for the defense of his legitimate rights and interests, any person can go to court by notifying the competent court with a request for a summons. Also, in the specific cases provided by law, the notification of the court may be made by other persons or bodies. "

According to the provisions of the NCPC, the civil process is triggered by the registration of the request in court under the law. The summons is the factor that triggers the civil process, having in this sense a primordial importance, being that impulse generating the civil process.

This is expressly stated in the legislation of European states, according to which any legal action is made by filing a request with the competent court, which reveals the importance of the preparatory written stage of the civil process, the other stages being expressly conditioned by it.[2]

[1] Lecturer PhD., "1 Decembrie 1918" University from Alba Iulia, Faculty of Law and Social Sciences.
[2] To be seen article 399 of Civil procedure code, nsmed „The request".

According to the current regulations, the court can be notified only after a preliminary procedure has been completed, if the law expressly provides for it. Hence the conclusion that if the law does not expressly provide for the fulfillment of a preliminary procedure, the court may be notified in the absence of this procedure. Another important aspect of the current regulation is that failure to comply with the preliminary procedure can be invoked only by defendant, by objection under penalty of forfeiture.[3]

The summons is defined in the doctrine as "the procedural act by which the interested party addresses the court to invoke the application of the law in a particular case, initiating civil action".[4]

The importance of the summons lies in the fact that this is the trigger for the trial.

In the current procedural regulations, the act by which the court invests is called an application, but in some cases the appeal is different, determined by the specifics of the matter in which they are applicable (referral to the court by order of the prosecutor's office, HCCJ, Commercial Section, decision No. 1242 of March 23, 2011, in RRDJ No. 3/2012, pp. 60-63). In the sphere of contravention or in the matter of the land fund, the request for summons is called a complaint, in the matter of pensions or in the electoral sphere the request for summons is called an appeal.[5]

By introducing the summons followed by its admission or rejection, after submitting it to the regularization procedure, the conflict between the parties is brought before the competent court according to law, and by applying the legal provisions to a particular case, the administration of justice is achieved. According to the same pattern, but with specific aspects, the administration of justice is also carried out in cases submitted for trial to the administrative contentious courts.

2. Aspects regarding the notification of the contentious court in the light of law 554/2004

Administrative litigation is a fundamental institution of any rule of law and democracy, representing, at the same time, a guarantee of the citizen against possible abuses of the administration.[6]

Regarding the administrative litigation [7], according to the provisions of Law no. 554/2004, any person who considers himself injured in his

[3]To be seen article 193 NCPC.

[4] V.M. Ciobanu, G. Boroi, Civ. Selective Course., III Edition, All Beck, Bucharest, 2005, p. 199.

[5] Tabacu A., *Civil procedural law. New Code of Civil procedure*, Universul Juridic, Bucharest, 2013, p. 211.

[6] Laurențiu Şoneriu, *Administrative Contentious. Course and seminar notes*,"Lucian Blaga" University of Sibiu, 2020, p. 13.

[7] Chapter I was completed by Point 2, Article I of LAW no. 212 of July 25, 2018, published in the OFFICIAL GAZETTE no. 658 of July 30, 2018.

right or in a legitimate interest, by a public authority[8], by an administrative act or by not resolving a request within the legal term, it can address the competent administrative contentious court, for annulment of the act, recognition of the claimed right or legitimate interest and reparation of the damage caused to it.[9]

At the same time, the injured person may be addressed to the administrative contentious court in a right of his or in a legitimate interest through an individual administrative act, addressed to another subject of law. As a rule, before going to the competent administrative court, that person must go through a preliminary procedure[10], which consists in requesting the issuing public authority or the hierarchically superior authority, if it exists, within a certain term, the revocation, in whole or in part, of the administrative act.

The referral to the court is made through an application that must comply with the requirements for introductory court applications, so the provisions of the Code of Civil Procedure apply.

The aspects that regulate the request for summons as a fundamental act of notification of the court, the aspects regarding the objection and the counterclaim are applicable having as source the provisions of NCPC. Despite an express regulation in the doctrine, the opinion is outlined according to which the provisions of art. 200 of the NCPC regarding the verification and regularization of the summons are also applicable in the matter of administrative litigations, except for those regulated by Law no. 101/2016, the legislator expressly ruling in par. (3) in art. 50 the fact that "the provisions of art. 200 of Law no. 134/2010, republished, with subsequent amendments, are not applicable within the procedure for resolving appeals in court provided by this law. "The reason for this measure is to ensure the speedy resolution of these types of disputes in the

[8] The notion of "public authority", as defined by art. 2 para. (1) lit. b) of the Law on administrative litigation no. 554/2004, with subsequent amendments and completions, is not similar to that of "public institution", as provided by art. 2 para. (1) point 39 of Law no. 273/2006 on local finances, with subsequent amendments and completions. C) administrative act - the unilateral act of individual or normative character issued by a public authority, in regime of public power, in order to organize the execution of the law or the concrete execution of the law, which gives rise to, amends or extinguishes legal relationships.

[9] RIL no. 8/2020, published in the Official Gazette no. 580 of July 2, 2020: In the unitary interpretation and application of the provisions of art. 1 para. (1), art. 2 para. (1) lit. a), r) and s) and art. 8 para. (1^ 1) and (1^ 2) of the Law on administrative litigation no. 554/2004, as subsequently amended and supplemented, establishes that: In order to exercise legality control over administrative acts at the request of associations, as interested social bodies, the invocation of the legitimate public interest must be subsidiary to the invocation of a legitimate private interest, the latter deriving from the direct link between the administrative act subject to legality control and the direct purpose and objectives of the association, according to the statute.

[10] Article 7 from the Law nr. 554/2004.

field of public procurement, which also results from the establishment of very short procedural deadlines.[11]

According to art. 28 paragraph (1) of Law 554/2004 (1) The provisions of this law shall be supplemented with the provisions of the Code of Civil Procedure, insofar as they are not incompatible with the specifics of authority relations between public authorities, on the one hand, and injured persons in their legitimate rights or interests, on the other hand, as well as with the procedure regulated by this law. The compatibility of the application of some norms of the Code of Civil Procedure is established by the court, on the occasion of solving the exceptions.

An important remark is made in para. (2), namely the actions introduced by the People's Advocate, the Public Ministry, the prefect and the National Agency of Civil Servants, as well as those introduced against the normative administrative acts can no longer be withdrawn.

Art. 7 of Law 554/2204 details the preliminary procedure that is mandatory to be followed before the notification of the administrative contentious court.

Art 7. paragraph (1) stipulates that before addressing the competent administrative contentious court, the person who considers himself injured in his right or in a legitimate interest by an individual administrative act addressed to him must request the public authority issuer or the hierarchically superior authority, if it exists, within 30 days from the date of communication of the act, its revocation, in whole or in part.

For good reasons, the injured person, addressee of the act, may introduce the preliminary complaint, in the case of unilateral administrative acts, and beyond the term provided in par. (1), but not later than 6 months from the date of issuance of the act. There are exceptions to this rule.[12]

According to paragraph (3), the injured person is also entitled to file a prior complaint in his / her right or in a legitimate interest, through an individual administrative act, addressed to another subject of law.

The preliminary complaint, in the case of unilateral administrative acts, will be introduced within 30 days from the moment when the injured person became aware, in any way, of the content of the act. For good reasons, the prior complaint may be filed within 30 days, but not later than 6 months from the date on which he became aware, in any way, of its contents. The term of 6 months provided in this paragraph, as well as the one provided in par. (1) are statute of limitations.

[11] Laurențiu Șoneriu, *op.cit.*, p. 103

[12] http://legislatie.just.ro/Public/DetaliiDocument/134066

3. Aspects of comparative law regarding the referral to the court in the civil process, respectively the referral to the administrative contentious court in the French legislation.

According to art. 56 of the The French Code of Civil Procedure, the request contains under the penalty of nullity in addition to the prescriptions prescribed for the introductory acts of the court: indication of the jurisdiction (court) before which the request is brought; the object of the request with a statement of the means / reasons of fact and law; the indication of the modalities appeared before the jurisdiction and the specification that, in order to defend himself (the defendant), he must be subjected to a judgment directed against him, being based on the elements provided by his opponent.

The request also includes an indication of the reasons on which it is based, and another fundamental element of the request is the conclusions.

These elements are essentially found in the regulations of the Romanian NCPC, in a presentation that is intended to be more detailed, exhaustive.

French law provides that the "judicial jurisdiction" is competent to adjudicate civil or commercial disputes concerning individuals and to penalize criminal offenses.

The administrative jurisdiction is competent to judge disputes that arise between individuals and the state, a territorial authority, or in certain cases a private body with a public service mission. It can also be notified regarding disputes between legal entities.[13]

Conclusions

It is eminently necessary to distinguish between the notions of “administrative contentious” and “contentious court”.

According to art. 2 letter e) of Law 554/2004, administrative contentious[14] is defined as the activity of solving, by the competent administrative contentious courts according to the law, the litigations in which at least one of the parties is a public authority, and the conflict was born either from the issuance or conclusion, as the case may be, of an administrative act, within the meaning of the present law, either from the non-settlement within the legal term or from the unjustified refusal to resolve a request regarding a right or a legitimate interest;

According to the provisions of art.2 of law 554/2004 letter f) the administrative contentious court, is represented by the Administrative and

[13] https://www.conseil-etat.fr/demarches-services/les-fiches-pratiques-de-la-justice-administrative/decouvrir-la-justice-administrative

[14] For details concerning administrative contentios control to be seen Ureche Maria, *European states reglementation in what concerns public authorities,* Altip, Alba Iulia, 2011, p. 198.

fiscal contentious section of the High Court of Cassation and Justice, the administrative and fiscal contentious sections of the courts of appeal and the administrative-fiscal courts.

We consider that the referral to the court regulated by NCPC is the fundamental source that governs the referral to the administrative contentious court. Law 554/2004 makes references to the Code of Civil Procedure, because it contains all the notions regarding the conduct of a trial: introductory request, the objection and the response to the objection, the aspects regarding the summoning and communication of the procedural documents, court decision, appeals.

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Abbreviation

NCPC - New Civil Procedure Code
Art. - article

DATA PROTECTION IN THE FIELD OF CIVIL STATUS

Daniel-Mihail ŞANDRU[1], Marius Cătălin MITREA[2], Daniela DUȚĂ[3], Alexandra PINTILIE[4], Alexandru GEORGESCU[5], Nicoale-Dragoș PLOEȘTEANU[6]

Abstract

The identity of a person is one of the essential parameters in the General Data Protection Regulation (GDPR). The data of the identified or identifiable persons are protected, and from the enumeration of the European legislation the first is the "name". The article aims to discuss aspects of it from the meaning of the "name" of the data subject to actions that data controllers can or must perform for data compliance and security. Secondly, the concept of identifiable is analyzed from the perspective of marital events, namely birth, marriage, death. The article analyzes case law, from the practice of the European authorities and from the jurisprudence in which the "civil status" as a central element of the analysis.

Keywords: *Data protection, personal data security, marital status, name; identity, case studies, jurisprudence, data protection authorities*

[1] Daniel-Mihail Şandru is professor and senior researcher. He is the founder and coordinator the Center for European Law Studies of the Institute for Legal Research "Acad. Andrei Rădulescu" of the Romanian Academy. Contact details: contact@mihaisandru.ro. Website: www.mihaisandru.ro. The article was prepared for the International Congress „*Civil status documents in Romanian and foreign public administration. Present and future outlook"*, organized by the 1 Decembrie University of Alba Iulia. On November 15, 2021, the web submissions were last checked and / or accessed. He drafted point I of this article. The author would like to thank Mr. Marius Mitrea for the support offered in translating of this part of the article in English. The Romanian version of this article will be published in Pandectele române (6/2021).

[2] Marius Cătălin Mitrea is a PhD student at the Institute of Legal Research „Acad. Andrei Rădulescu" of the Romanian Academy and president of the European Association for International Studies - AESI. He can be contacted at marius@mitrea.org.ro. He drafted point V.1. and V.2. of this article.

[3] Daniela Duță is a PhD student at the Institute of Legal Research „Acad. Andrei Rădulescu" of the Romanian Academy. She can be contacted at ghituleasad@yahoo.com. She drafted point IV of this article.

[4] Alexandra Pintilie is Legal Advisor focused on data protection. She drafted point III of this article.

[5] Alexandru Georgescu is a PhD student at the Institute of Legal Research „Acad. Andrei Rădulescu" of the Romanian Academy and executive president of the Romanian Association of Law and European Affairs (ARDAE). He can be contacted at dpoalexandrugeorgescu@gmail.com. He drafted point II of this article.

[6] Nicolae-Dragoș Ploeșteanu, is conf, univ. PhD at the "George Emil Palade" University of Medicine, Pharmacy, Science and Technology in Târgu Mureș. He prepared point V.3. of this article.

I. The link between civil status documents and data protection

According to art. 1 of *Law no. 119/1996*[7], "civil status documents are authentic documents proving the birth, marriage or death of a person". The purpose of drafting civil status documents refers both to "the interest of the state and the person and serve to know the number and structure of the population, the demographic situation, to defend the fundamental rights and freedoms of citizens". The intersection of this area with personal data protection legislation seems to be removed: on the one hand, data controllers and institutions in which civil registrars operate must comply with generally applicable law, including data protection, and on the other hand, the observance of the principles is ensured by the fact that the data processing is based on art. 6 para. 1 lit. c) – "the processing is necessary in order to fulfill a legal obligation incumbent on the data controller". Within the *Government Decision no. 727/2013*[8] by which the Methodological Norms of 2013 for the implementation of the provisions of Convention no. 16 of the International Commission on Civil Status regarding the issuance of multilingual extracts of civil status documents, signed in Vienna on September 8, 1976, a general reference is made to the observance of personal data. The General Data Protection Regulation (GDPR) does not expressly refer to civil status documents[9]. Specific technical and

[7] Law no. 119/1996 regarding the civil status documents, M.Of. no 339/18 May 2012.

[8] M. Of. Nr. *608 / 30.09.2013*. See: Art. 5 of the *Methodological Norms*:
"(1) The processing of personal data in the exercise of the civil status attributions regarding the issuance of multilingual extracts is done in compliance with the provisions of *Law no. 677/2001* for the protection of individuals about the processing of personal data and the free movement of such data, as subsequently amended and supplemented.
(2) The authorities and institutions that process personal data in the field of these methodological norms have the obligation to ensure the protection of personal data and documents against accidental or illegal destruction, loss, modification, disclosure or unauthorized access and against any form of processing. illegal."

[9] It is easy to see that there is a European regulation (GDPR) with an area that is part of the purely internal regulation of the Member States (civil status) as well as with international law. The field of "civil status" applies to data protection regulations, but not directly related to Union law. For example, for problems concerning a national regulation requiring the transcription of the names and surnames of natural persons in civil status documents in a form which complies with the spelling rules of the national official language, Directive 2000/43 / EC of Council Decision of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, p. 22, Special Edition, 20 / vol. 1, p. 19. See, C-391/09, Runevič-Vardyn and Wardyn, Judgment of 12 May 2011, ECR 2011 p. I-3787, ECLI: EU: C: 2011: 291. In Case C-673/16, Coman and others, Judgment of 5 June 2018, ECLI: EU: C: 2018: 385, § 37), the Court emphasized: "It is certain that the marital status of persons it contains rules on marriage, is a matter which falls within the competence of the Member States, and Union law is without prejudice to that competence (see, to that effect, Case C-148/02 Garcia Avello [2003] ECR I-0000). 2003: 539, paragraph 25, Judgment of 1 April 2008, Maruko, C ‑ 267/06, EU: C: 2008:

organizational measures must be taken within the institutions / data controllers that issue civil status documents. We must distinguish between the content of civil status documents and the processing of such data in a context other than the conduct of civil status operations. The effects of civil status documents, as a category of personal data, can take place on data subjects and outside the institutions that issue them. It should also be noted that although deceased persons are not protected by the General Data Protection Regulation, still civil status documents relating to death may constitute personal data on living persons and may lead to their identification under art. 4 para. 1, point 1.

Regarding the expression "defense of the fundamental rights and freedoms of citizens", we will mention here the jurisprudence of the European Court of Human Rights[10] which established that the right to have a name and surname falls under the incidence of art. 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms.[11] A person's first name is protected by the Convention being a part of privacy[12] and, we might add, being an identifying element of a person[13], in a certain context and by reference to other identifying elements.

II. Identified and identifiable persons from the perspective of civil status documents

We are taking about processing of personal data when processing information that identifies (directly or indirectly a natural person) or that makes him identifiable. To analyze the processing of personal data through

179, paragraph 59, and Judgment of 14 October 2008, Grunkin and Paul, C ‑ 353/06, EU: C: 2008: 559, paragraph 16). Member States are thus free to provide or not to provide for same-sex marriage (Case C-443/15 Parris [2016] ECR I-0000, paragraph 59).

[10] See in detail, European Court of Human Rights, Guide on Article 8 of the European Convention on Human Rights Right to respect for private and family life, home and correspondence, 2020, available at https://www.echr.coe.int /documents/guide_art_8_eng.pdf.

[11] As a matter of principle, see ECHR, Admissibility Decision, application no. 71074/01 Mentzen (also known as Mencena) v. Latvia or Henry Kismoun v. France, Application no. 32265/10, Decision of December 5, 2013.

[12] ECHR, Guillot v. France, application no. 22500/93, decision of October 24, 1993, points 21-22.

[13] For an analysis of the amendments introduced in the Civil Code of Romania, regarding the civil status, see **Irina Alexe**, *Elements of novelty brought by Law no. 287/2009 on the Civil Code on civil status*, in the volume Strengthening administrative capacity in the context of good administration, coord. Emil Bălan, Cristi Iftene, Marius Văcărelu, Comunicare.ro, 2011, pp. 218-227. The civil status includes elements of identification of a natural person, which has consequences in both public and private law; on this competition of applicable regimes. See Nicolae Ploeşteanu, Daniel Vale, "The correlation between the public law regime and the private law regime in the matter of the domicile of the natural person (national regulation and solutions of the European court)" in *Public law magazine*, no. 3, 2012, pp. 89-113.

civil status documents, we appreciate that we must first clarify the concepts regarding the identified / identifiable natural person.

In general, an individual can be considered as identified when in the community (both in the broad sense of a social group and in the narrow sense of a group of people) is distinguished from other members by an element of identification. The General Data Protection Regulation, in art. 4 point 1 defining personal data, presents an example of identifiers through which a person can be identified (name, identification number, location data, an online identifier or one or more specific elements, specific to his identity physical, physiological, genetic, mental, economic, cultural, or social). We therefore observe that the person is identifiable in the situation where, although he was not directly identified, this possibility exists and can be realized by reference to one of the identifiers, i.e., to an element that has a very close connection with the person in question. For identified or directly identifiable persons, the name is a frequently used personal date. However, for a direct identification, the name of the person, in most cases it is necessary to be associated with other information (date of birth, father's initial, parents' name, domicile, etc.) to avoid situations in which the homonymy would carry out the process identification. We appreciate, however, that among the identifiers listed above, in the civil status documents, the name is one of the identifiers that ensure the provision of most information about a person. A natural person therefore becomes at least identifiable when his name is registered in the civil status documents and becomes directly identified when, in addition to his name, other information is registered (parents' first name, initial / last surname, etc.).

Indirect identification of the person in civil status documents is achieved by referring to an identifier of physical, physiological, mental, genetic, economic, cultural, or social identity but remains important the context of processing and the quality of the data controller. In the processing of data in civil status documents, the main legal basis for processing is and should remain the legal obligation of the controller as civil status documents contain comprehensive information about a natural person throughout his life. In this context, the processing of data from civil status documents as well as any other processing of personal data must comply with the principles of data processing in particular the principle of data minimization because violation of this principle or its incorrect application may directly harm persons whose data are processed or may generate data security incidents with very serious effects on data subjects, especially in the event of loss of control over the data (i.e. unauthorized access and publication in the virtual space of data from civil status registers).

III. Civil status - category of personal data

As mentioned in the introductory section, Law No 119/1996 defines civil status documents, which, according to Article 12 of that law, prove the civil status of the person. In this context, 'civil status' becomes an attribute of the person, an information about an unidentified or identifiable natural person.

Civil status records are the documents that accompany a person throughout his or her life, being an instrument that primarily ensures the exercise of rights and obligations, and are processed, from the perspective of personal data, on a large scale, both at institutional level, by public authorities, and in the private sector.

The birth certificate and death certificate attest the registration of a person in the state records, for the purposes defined in the Law no. 119/1996: to know the number and structure of the population, the demographic situation, to protect the rights and fundamental freedoms of citizens.

However, we cannot consider that these civil status documents are the ones that determine the person's attribute, i.e., that of a person born or a person deceased.

In the following, we will analyze the person's attribute, resulting from the drawing up and completion of the Marriage Certificate. This civil status document does indeed provide an attribute - of a married, divorced or widowed person - which becomes personal data, even in the absence of the civil status document attesting to the attribute.

In practice, there are a multitude of situations in which a person's marital status is processed by private personal data controllers, both in a systematic way, as information requested and processed by them in connection with a defined purpose, and in cases where the information is not requested by the data controller but ends up in its records incidentally.

In the first situation are the banking institutions, which, in most cases, when entering into a contractual relationship with a person, ask him/her for information on his/her "marital status", information which they process even in the absence of a civil status document proving the attribute communicated by the bank's client.

Another situation is represented by contracts for the sale and purchase of immovable property, concluded under the formal conditions required by the applicable legislation, where the civil status attribute resulting from the civil status act of the contracting parties is mentioned. In this case, although there is a legal framework for processing 'marital status' for the sale contract, the document stating whether or not a person was married at the time of purchase or sale of a property enters the civil circuit and is made available to various data controllers, such as: utility

providers for the property in question, owners' associations, valuers, estate agents, etc.

Also, with the progress made in the field of policies to prevent money laundering, conflicts of interest, etc., in the private sector the processes of verification of counterparties have become detailed and information related to the marital status of a person, and the interests that person may have, deriving from the "marital status" are systematically processed, included in reports, transferred to other countries, etc. [14]

There are also cases where data controllers end up processing information derived from marital status, even without following such processing, and most of them are found in correspondence in the form of requests or complaints from data subjects to data controllers, such as: a person requests a travel agency for an offer for a holiday to be enjoyed with his/her spouse, a person requests a postponement of payment of a bill because he/she has divorced and his/her financial situation has changed.

Personal data controllers have to recognize that the attribute resulting from the marriage certificate is a category of personal data for which they have an obligation to ensure all the rights under the GDPR.

IV. Civil status and the obligation to update the personal data

The data controller has the obligation to process update and accurate[15] personal data, according to GDPR, as a result of the periodic steps taken by him to update the personal data of data subjects or as a result of informing the data subject in case of changes resulting from marriage or her divorce.

4.1 Obligation of the data subject to update personal data

The natural person has the obligation[16] to update the identity data by request to the Community Public Services for the registration of persons not later than 180 days before the end of the validity term of the identity document to be exchanged and within 15 days from the production if the data are no longer in line with reality.

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[14] Sanction Scanner, *Customer Due Diligence. What is CDD?* available at https://sanctionscanner.com/knowledge-base/customer-due-diligence-cdd-15; Alessa, *Customer Due Diligence: Meeting Regulatory Expectations*, available at https://tier1fin.com/alessa/blog/customer-due-diligence-meeting-regulatory-expectations/

[15] GDPR art 5. lit.d) the personal data shall be accurate and, where necessary, kept up to date; every reazonable step must be ensure that personal data that are inaccurate, having regard to the purpose for which they are processed, are erased or rectified without delay ("accuracy").

[16] Art. 19 (2) of the Ordinance no.97/2005 regarding the evidence, domicile, residence and identity documents of Romanian citizens, republished; Published in the Official Gazette no. 719 of October 12, 2011.

The term of 15 days applies if the name or surname of the holder, the date or place of birth has changed, and in the case of the holder of an electronic identity card and the surname of the parents; in case of change of address; the name or rank of the localities and streets, the renumbering of the buildings or their redevelopment, the establishment of the localities or streets; in the case of assigning a new personal identification number[17]; in case of damage to the identity document; in case of loss, theft or destruction of the identity document;

Failure to comply with the provisions of art. 19 para. (2) by the holders to request the issuance of a new identity document shall be sanctioned with a fine from 40 lei to 80 lei[18].

The updating of the identity document leads to the modification of documents such as: passport, driving license, health card, banking cards and the data subject may request the controllers with whom they have concluded various contracts to rectify inaccurate personal data concerning them[19] and to delete data no longer up to date.

Changing the name as a result of marriage or divorce can also change the handwritten signature[20] of the data subject and change the electronic signature. The electronic signature based on a qualified[21] certificate offers the possibility to identify the signatory with his name or pseudonym, identified as such, as well as with other specific attributes, if relevant depending on the purpose for which the qualified certificate is issued, personal identification code and signature verification data, which correspond to the date of its creation. The electronic signature based on a qualified certificate corresponds to the handwritten signature in terms of

[17] Art. 6 paragraph 2) of the Ordinance no. 97/2005 regarding the evidence, domicile, residence and identity documents of the Romanian citizens, republished; Published in the OFFICIAL GAZETTE no. 719 of October 12, 2011 Personal identification number represents a significant number that uniquely individualizes a natural person and is a tool for verifying its civil status data and identification in certain computer systems by authorized persons.

[18] Art. 43 (b) of the Ordinance no 97/2005 regarding the evidence, domicile, residence and identity documents of the Romanian citizens, republished; Published in the OFFICIAL GAZETTE no. 719 of October 12, 2011.

[19] See also Silviu-Dorin Şchiopu, *Considerations on the rectification and restriction of personal data processing*, Romanian Review of European Law no. 3/2018, p. 44-47.

[20] Code of Civil Procedure, M.Of. 247 of 10.04.2015, Art. 268 (1) The signature of a document makes full faith, until proven otherwise, about the existence of the consent of the party that signed it regarding its content.

[21] Art 18. (1) Law no. 455/2001 regarding the electronic signature, M.Of. 316 of 2014.04.3; According to 910/23-July-2014 Regulation on electronic identification and reliable services for electronic transactions on the internal market and repealing Directive 1999/93 / EC Official Journal 257L of 2014.08.28, art. 3.14 electronic signature certificate means an electronic attestation that links the validation data of the electronic signature to a natural person and confirms at least the name or pseudonym of that person.

legal value, in addition the electronic signature shows the date and time of signing the document.

For example, in the case of a document representing a credit agreement signed with a handwritten signature, the Court will only verify the existence of a handwritten signature next to the name of the borrower, based practically on the identification procedure made by the bank regarding his client. The Court will not require the client's signature specimen to verify the correspondence between the reference specimen and the graphic element on the credit agreement. It will not require a confirmation of the signature of the signatory, nor a statement from a witness that the document has been signed.[22]

Along with Law no. 58/1934[23], the signature specimen of the guarantor granted in the bank, had to include according to art. 8 (1) in clear, the name and surname (...), the handwritten signature of the natural person (...) who undertakes or of the representatives of other categories of entities that use such instruments.

The updating of personal data must be performed by the data subject and in the situation where he owns real estate properties with a request submitted to the Land Registry, by the public notary, which submits: i) marriage certificate / divorce certificate / the court sentence resulting from the change of name and requesting the updating of data, ii) the act of the issuing authority in case of change of name or rank of localities and streets, renumbering of buildings or their rounding, establishment of localities or streets.

4.2 Obligation of the controller to update the personal data of the data subjects

The obligation to update also results from Law 129/2019 which provides for the identification of individual clients and real beneficiaries and includes all civil status data provided in the identity documents provided by law. The customer awareness measures apply to both the new customers of the controller and the existing customers during the contract.

The importance of Law 129/2019 is given by the broad framework of applicability, respectively it applies[24] to all reporting entities supervised

[22] Ioana Regenbogen, *The Adventures and Challenges of Electronic Signatures in the Digital Age*, Romanian Journal of Private Law, no. 1/2019, sintact.ro

[23] Law no. 58/1934 on Bills of exchange and promissory note, M.Of. 100/1934.

[24] National Office for Prevention and Combating Money Laundering - ONPCSB, Norms for applying the provisions of Law no. 129/2019 for preventing and combating money laundering and terrorist financing, as well as for amending and supplementing some normative acts, for the reporting entities supervised and controlled by the National Office for Prevention and Combating Money Laundering, from 02.03.2021 Order 37/2021 Published text in the Official Gazette, Part I no. 240 of March 9, 2021.

and controlled by the National Office for Prevention and Combating Money Laundering and they have the obligation to store in letter or electronic format, in a form allowed in court proceedings, all records obtained by applying measures of knowledge of the clientele, for a period of 5 years from the date of termination of business contract with the client or from the date of the occasional transaction.

For violations of the principle of accuracy provided in art. 5 of the GDPR, administrative fines are applied pursuant to art. 83 (5) respectively 20,000,000 Euro or up to 4% of the total worldwide turnover corresponding to the previous financial year, whichever is higher.

Regarding the accuracy of the personal data, the National Supervisory Authority completed on 25.11.2019 an investigation at the controller Telekom Romania Mobile Communications SA[25], finding the violation of art. 5 para. (1) lit. d) of the GDPR. The sanctions were applied as a result of a complaint alleging that the petitioner received invoices addressed to another person at his home address, the controller's client, and that he had reported the situation to the data controller but had not received a reply.

During the investigation, Telekom Romania Mobile Communications SA could not prove the accuracy of the processed data, which led to the violation of the basic principle for data processing provided by art. 5 para. (1) lit. d) of the GDPR. The data controller was sanctioned with a fine in the amount of 9,544.40 lei, the equivalent of the amount of 2000 EURO for violating art. 5 para. (1) lit. d) of the GDPR.

V. The practice of courts, institutions and public authorities

V.1. General Aspects

In the general practice of courts, authorities and public institutions, given the overlap of *Regulation (EU) 2016/679*, as a general normative instrument, with the provisions of *Law no. 119/1996 regarding the civil status documents*, republished, with the subsequent amendments and completions, respectively with those of *Law no. 544/2001 on free access to information of public interest*, with subsequent amendments and completions, a number of approaches were highlighted:

- In principle, public institutions and authorities have the predisposition to solve unfavorably the requests formulated by natural or legal persons of private law, based on *Law no. 544/2001*, by which it requests documents containing civil status data of the

[25] The National Supervisory Authority for the Processing of Personal Data, „O nouă amendă pentru încălcarea RGPD", 18.12.2019, https://www.dataprotection.ro/?page=O_noua_amenda_pentru_incalcarea_RGPD_comunicat_decembrie&lang=ro

employees or of other natural persons for which the petitioners are not entitled to access (art. 12, paragraph 1, letter d).[26]

- In principle, the courts have a predisposition to resolve favorably the lawsuits filed by natural or legal persons under private law, which require documents containing civil status data of employees of public institutions and authorities (with or without anonymization).
- In principle, the courts have the predisposition to resolve unfavorably the requests for summons by which documents containing status data of some persons concerned are requested in relation to which the plaintiff does not have the right of access, within the meaning of art. 15 of *Regulation (EU) 2016/679*.
- The processing (including disclosure) of personal data of civil status must meet at least one basis of legality provided by art. 6 of *Regulation (EU) 2016/679* (the data subject has given his or her consent; it is necessary for the performance of a contract; it is necessary in order to fulfill a legal obligation of the data controller; it is necessary to protect the vital interests of the data subject or another is necessary for the performance of a task which serves a public interest or results from the exercise of public authority vested in the data controller, or is necessary for the legitimate interests of the data controller or a third party, unless the interests prevail or the fundamental rights and freedoms of the data subject, which require the protection of personal data, especially when the data subject is a child).

V.2 Case study: transfer of civil status data between state authorities

Even though the name and surname of the data subject, in their capacity as civil status data, are almost present in cases relevant to the field of personal data protection, we consider exemplary the case C-207/16, *Ministerio Fiscal*[27], both in terms of data availability marital status as well as the application of the principle of proportionality.

[26] Alexandru Georgescu, Irina Alexe, Daniel-Mihail Şandru, *The clash of values: the Romanian law on free access to information of public interest and the protection of personal data*, *Romanian Journal for the Protection and Security of Personal Data (RRPSDCP)*, n. 2/2020, p. 24-33.

[27] *C-207/16, Ministerio Fiscal, Judgment of 2 October 2018, ECLI:EU:C:2018:788;* Also see: Xavier Tracol, *Ministerio Fiscal: Access of public authorities to personal data retained by providers of electronic communications services,* European Data Protection Law Review Vol.5 N°1/2019, p.127-135; Antonio Caiola, *À la recherche de la juste pondération entre ingérence dans la vie privée et nécessité de lutte contre la criminalité*, Revue des affaires européennes 2018 N°4 p. 719-728.

a) The subject-matter of the proceedings and the dispute in the main proceedings

The order of events leading to the introduction of the case to the CJEU is set out below.

- Mr. Hernández Sierra (Spanish), as a natural person, lodged a complaint with the police about a robbery which took place on 16 February 2015, during which he was injured, and his wallet and cell phone were stolen.
- On 27 February 2015, the judicial police notified the investigating judge with a request requesting the obligation of various providers of electronic communications services to transmit the activated telephone numbers between 16 February and 27 February 2015, with the code relating to the international identifier of the mobile equipment (IMEI code) of the stolen mobile phone, ***as well as personal data relating to the civil identity of the holders or users of the SIM card-activated telephone numbers, such as name, surname and, where applicable, address them.***
- By order of 5 May 2015, the investigating judge rejected that request. On the one hand, he considered that the measure requested was not useful for identifying the perpetrators of the crime. On the other hand, he refused to admit the request on the grounds that Law no. 25/2007 limits the transmission of data kept by providers of electronic communications services to serious crimes. According to the Criminal Code, serious offenses are punishable by up to five years' imprisonment, while the facts at issue in the main proceedings did not appear to constitute such an offense.
- The Public Prosecutor's Office appealed against that order to the referring court, holding that the disclosure of the data in question should have been granted because of the nature of the facts and pursuant to a judgment of the Spanish Supreme Court of 26 July 2010 in a similar case.
- The referring court stated that, following that order, the Spanish Parliament amended the Code of Criminal Procedure by adopting Organic Law no. 13/2015. That law, which is relevant to the resolution of the main proceedings, introduces two new alternative criteria for deciding the gravity of an offense. In that regard, that court considered that, in the main proceedings, Directive 95/46 and Directive 2002/58 established a link with the *Charter of Fundamental Rights of the European Union Charter*. Therefore, the national regulation at issue in the main proceedings would enter, according to art. 51 para. (1) of the Charter, in its scope, despite the

invalidation of Directive 2006/24 / EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or public communications networks and amending Directive 2002/58 / EC. In this judgment, the Court acknowledged that the storage and communication of transfer data constitute particularly serious interference with the rights guaranteed by art. 7 and 8 of the Charter and identified the criteria for assessing compliance with the principle of proportionality, including the seriousness of the offenses which justify the retention of such data and access to them for investigative purposes.

- In those circumstances, the Provincial Court of Tarragona decided to stay the proceedings and to refer the following questions to the Court of Justice of the European Union for a preliminary ruling:
  - *The sufficiently serious nature of the offenses, as a criterion justifying interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter, may be determined only by taking into account the punishment which may be applied to the offense being prosecuted or is necessary, in in addition, to identify, in the context of criminal conduct, a particularly prejudicial character in relation to individual or collective legal interests?*
  - *Where appropriate, if the determination of the gravity of the offense solely on the basis of the applicable penalty would be in line with the fundamental principles of the Union applied by the Court in its judgment [of 8 April 2014, Digital Rights Ireland and Others, C - 293/12 and C - 594/12 EU: C: 2014: 238] as strict control standards of Directive [2002/58], what should be this minimum gravity threshold? Would it be compatible with a general provision setting a minimum of three years 'imprisonment?'*

b) Summary of the decision

The Grand Chamber stated that Article 15 (1) of *Directive 2002/58/EC*, as amended by *Directive 2009/136/EC*, read in the light of Art. 7 and 8 of the *Charter of Fundamental Rights of the European Union*, must be interpreted as meaning that ***public authorities have access to data aimed at identifying holders of SIM cards activated with a stolen mobile phone, such as name, surname and, where applicable, address of such holders, involves an interference with the fundamental rights of the latter, enshrined in the articles mentioned in the Charter of Fundamental Rights, which***

is not so serious as to require that such access be restricted in terms of prevention, investigation, detection and detection, criminal prosecution of crimes, to combat serious crime.

The recitals in the preamble to the CJEU are based on the provisions of *Directive 2002/58/EC*, as amended by *Directive 2009/136/EC* and the *Charter of Fundamental Rights of the European Union*. The Court reaffirmed the principle of proportionality between the aim pursued and the means used in the field of personal data processing, and emphasized the relationship, based on necessity, between the general social interest and fundamental human rights.

V.3. Case study: the noble title as an element of identification of civil status

Wittgenstein case was one of the interesting cases in which the *CJEU* ruled by way of a reference for a *preliminary ruling*, without calling into question the *GDPR*, but if that were the case, it would have fallen within the exception provided for in Article 2 (2) (a)[28]. In that case, the Court should essentially consider whether Article 21 *TFEU* (freedom of movement) could be interpreted as eliminating the possibility for the authorities of a Member State to refuse, in circumstances such as those in the main proceedings, to recognize, in all its elements, the surname of *Princess Fürstin von Sayn - Wittgenstein*, a citizen of that State, as established in a second Member State in which the national resides, on the occasion of his adoption in adulthood by a national of that second Member State Member State (if this surname contains a title of nobility which is not permitted in the first Member State under constitutional law). The Court referred exclusively to the question referred, which did not at any time call into question the impact of Article 8 *CDFUE* on the right to the protection of personal data. Although it found that Austria's failure to recognize the legally acquired name in Germany, which included the particle of nobility *Fürstin von*, constitutes a restriction of the right to privacy protected by Article 7 *CDFUE* and Article 8 of the *European Convention on human rights*, the Court held that the restriction was justified, as incidental to public policy under Austrian law. Austrian law provided by a constitutional law for the elimination of all forms of noble titles on behalf of its citizens, in order to ensure equality before the law. It is important to point out two findings of the Court which are apparently contradictory: on the one hand, the Court states that the rules governing a person's surname and the bearing of titles of nobility fall within the competence of the Member States[29] and, on the other, claims that the applicant's situation in the main proceedings falls

[28] C-208/09, Wittgenstein, judgment of 22 December 2010, ECLI: EU: C: 2010: 806, paragraph 35.
[29] C-208/09, Wittgenstein, § 38.

within the material scope of European Union law[30], in particular that the applicant in her capacity as a citizen of the Union has exercised her right of free movement and residence, so that she can invoke the freedoms recognized by Article 21 *TFEU*. Both findings are correct. However, it would have been interesting - and that is why I have referred the *Wittgenstein* case in this context - if, for a similar reason, but without calling into question the link between free movement between Member States, a litigation in which the issue of the prohibition by national law to bear a name as it was assigned several decades ago, containing a particle of noble title, is or is not in line with the right to the protection of personal data. Finally, noble titles, even those introduced as part of a name, are accepted in many other Member States and, in addition, their discriminatory value is nowadays relative. Another aspect to consider for the purposes of this analysis is that some aspects of the public order of private international law of the Member States may include activities that do not fall within the scope of EU law, within the meaning of Article 2 paragraph 2 (a) GDPR.

Conclusions

Civil status documents are "authentic documents proving the birth, marriage or death of a person" and are also issued in order to protect the fundamental rights of a person. Its identity, the right to have a first and last name, is protected by the *European Convention on Human Rights* or by the *Charter of Fundamental Rights of the European Union* but also by specific rules in the *General Data Protection Regulation*. In this sense, the processing of civil status data is carried out under the law. Situations are analyzed in which the civil status of the person is processed by private personal data controllers, both in a systematic way, being information requested and processed by them, in connection with a defined purpose, but also in cases where the information it is not requested by the data controller but reaches its records incidentally. It also analyzes situations in which civil status data are processed by data controllers without their request, being transmitted by data subjects. The analysis of the obligation of the data subject to update personal data takes into account several categories of data controllers: community services for the registration of persons and the change of handwritten or electronic signature, following the change of civil status (for example, through marriage). Regarding the practice of courts, institutions and public authorities, aspects regarding public access to documents containing civil status documents are analyzed and judgments of the Court of Justice of the European Union are analyzed.

[30] C-208/09, Wittgenstein, § 37.

CONSIDERATIONS REGARDING THE DATA SUBJECT'S RIGHT TO EXPLANATION IN THE CONTEXT OF THE AUTOMATIC PROCESSING OF PERSONAL DATA BY AN ARTIFICIAL INTELLIGENCE SYSTEM

Maria DUMITRU-NICA[1]

Rezumat

În privința proceselor decizionale individuale automatizate, Regulamentul general privind protecția datelor încearcă să instituie un sistem de protecție a persoanei vizate. În acest sens, regula stabilită de Regulament este aceea a interzicerii proceselor prin care sistemele de inteligență artificială iau decizii ce privesc persoana vizată, prin prelucrarea datelor cu caracter personal ale acesteia, fără implicare umană. În situațiile în care are loc, totuși, o prelucrare automată a datelor, iar decizia la care a ajuns algoritmul folosit de sistemul de inteligență nemulțumește persoana vizată, rămâne de stabilit dacă acesteia îi este recunoscut un drept la explicație, iar în caz afirmativ, dacă exercițiul acestui drept poate fi transpus în practică în mod eficient.

Cuvinte cheie: *Date cu caracter personal, proces decizional individual automatizat, dreptul la explicație, sistem de inteligență artificială*

Abstract

With regard to automated individual decision-making processes, the General Data Protection Regulation seeks to institute a protection system for the data subject. In this sense, the rule established by the Regulation is that of prohibiting the processes by which artificial intelligence systems make decisions regarding the data subject, by processing data subject's personal data, without human intervention. In situations where, however, an automated individual decision-making process takes place and the decision reached by the algorithm used by the artificial intelligence system displeases the data subject, it remains to be determined whether the data subject is granted with a right to explanation and, if so, whether the exercise of this right can be effectively transposed into practice.

Keywords: *Personal data, automated individual decision making-process, the right to explanation, artificial intelligence system*

[1] Conf. univ. dr., Facultatea de Drept şi Ştiințe Administrative, Universitatea „Ştefan cel Mare", Suceava; Avocat, Baroul Iaşi.

I. Introduction

Areas governed by digital services, such as those involving profiling, must be uncompromisingly aligned with the General Data Protection Regulation[2] (hereinafter „*GDPR/The Regulation*") requirements. This is because, although the usefulness of artificial intelligence undoubtedly exists, it is possible to be processed a massive amount of personal data. Thus, in automated decision-making processes, the artificial intelligence system (hereinafter „*AI system*") can generate cases of bias and discrimination that will make the data subject to want to receive explanations about the reasoning used by the AI system and the reasons behind the decision taken by this system. However, before determining whether or not the data subject can be granted with a right to explanation, it is necessary to determine whether and in what situations automated individual decision-making processes are allowed. By determining the rule, exceptions will also can be analyzed.

II. The rule

The rule established by the GDPR regarding the AI systems that take decisions on the data subject, by processing him or her personal data, consists in prohibiting such decision-making processes, without human intervention, regardless of the conduct adopted by the data subject. In this sense, art. 22 para. (1) of the GDPR provides that „the data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her".

Analyzing the first part of the text, it can be ascertained that the GDPR first establishes that „the data subject shall have the right not to be subject to a decision based solely on automated processing". At first reading, an inverse interpretation could be given to the above rule, in the sense that the reader could interpret that decision-making processes based exclusively on automatic data processing would generally be allowed, but if the data subject adopts an active position and refuses to be the subject of such a decision, this right must be recognized by the data controller. Such an interpretation would be in contrast with the data protection legislation requirements, which impose that „natural persons should have control of their own personal data"[3], but also with the specific principles of this legislation, such as the

[2] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), published in OJ L 119, 4.5.2016, pp. 1-88.

[3] See recital 7 of the GDPR.

principles of fairness and transparency towards the data subject[4] or the principle of minimizing the amount of collected data[5]. This was also the key to the interpretation adopted by the „Article 29" Working Party on Data Protection (hereinafter „*Art. 29 WP*") in the Guidelines on automated individual decision-making and profiling for the purposes of Regulation (EU) 2016/679[6] (hereinafter „*The Art. 29 WP Guidelines*").

But how much automated this decision-making process must be, so as to fall under the protection granted to data subjects by art. 22 para. (1) of the GDPR? In other words, does any kind of human intervention, even the insignificant one for the final result, make this protection inapplicable? Part of the legal doctrine[7] considers that the answer to this question is affirmative. However, Art. 29 WP, in its Guidelines, qualifies these situations as „fabricating human involvement", in order to avoid the provisions of art. 22 of the GDPR[8]. In accordance with the opinion of Art. 29 WP, the majority doctrinal opinion[9] considers that, however, certain distinctions must be made. Thus, when human intervention consists only in the implementation of the decision taken by the algorithm used by the AI system, without exerting any influence on the result, it will be about still an exclusively automated decision-making process. For there to be real human involvement, a „symbolic gesture" is not enough, but effective control over the decision must be carried out by a person with competence in this regard[10].

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[4] According to art. 5 para. (1) letter (a) of the GDPR: „(1) Personal data shall be: (a) processed lawfully, fairly and in a transparent manner in relation to the data subject ('lawfulness, fairness and transparency')".

[5] According to art. 5 para. (1) letter (c) of the GDPR: „(1) Personal data shall be: (...) adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed ('data minimisation')".

[6] The Guidelines of the „Article 29" Working Party on Data Protection on automated individual decision-making and profiling for the purposes of Regulation (EU) 2016/679 adopted on 3 October 2017, p. 21. ThGuidelines can be found at: https://www.dataprotection.ro/ servlet/ ViewDocument?id=1602, accessed on August 30, 2021.

[7] S. Wachter, B. Mittelstadt, L. Floridi, *Why a Right to Explanation of Automated Decision-Making Does Not Exist in the General Data Protection Regulation*, article available at the following internet address: https://academic.oup.com/idpl/article/7/2/76/3860948, accessed on August 31, 2021.

[8] The Art. 29 WP Guidelines, p. 22.

[9] A.D. Selbst, J. Powles, *Meaningful information and the right to explanation*, article available at the following internet address: https://academic.oup.com/idpl/article/7/4/233/4762325, accessed on August 29, 2021; M. Veale, L. Edwards, *Clarity, surprises, and further questions in the Article 29 Working Party draf guidance on automated decision-making and profiling*, article available at the following internet address: https://www.sciencedirect.com/science/article/pii/S0267364917 30376X, accessed on August 31, 2021.

[10] The Art. 29 WP Guidelines, p. 23.

In completion to para. (1) of art. 22 of the GDPR is attached the phrase „including profiling". According to art. 4 point 4 of the GDPR, profiling means „any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements". The word „including" suggests that there cannot be a sign of equality between the meaning of the notion of automated decision-making process and that of profiling, but rather it can be a genus-species relationship between the two.

The AI system can take decisions with or without profiling, just as profiling can be done without automated decisions being made, but an action that started with an automated decision-making process could become one based on profiling, depending on how personal data is used[11]. For example[12], when a driver is fined for exceeding the speed limit purely on the basis of evidence from speed cameras, he is subject to an automated decision-making process, but which does not necessarily involve profiling. If, subsequently, the driver's driving habits would be monitored over time and the amount of the fine applied woud be the result of an assessment involving other factors, such as recidivism in speeding or non-compliance with other traffic rules in the last period, the simple automated decision-making process from the beginning will turn into one based on profiling.

The last part of the analyzed text shows that the automated individual decision-making process, in order to be banned, must be able to produce legal effects concerning the data subject or similarly affects him or her in a significant measure. The legal effect may consists in jeopardizing the rights which the law provides for a natural person, him or her legal status or the rights of that natural person under a contract[13]. In regard to the similar way in which the data subject may be significantly affected, recital 71 of the GDPR indicates that it may consists of an „automatic refusal of an online credit application or e-recruiting practices without any human intervention". Art. 29 WP speaks, in this case, about a certain „threshold" that must be exceeded in order for there to be a „significant measure", in the sense that the repercussions of the processing „must be sufficiently great or important to be worthy of attention"[14].

[11] The Art. 29 WP Guidelines, p. 8.

[12] *Idem*, p. 9.

[13] The Art. 29 WP Guidelines provide as examples: „cancellation of a contract", „entitlement to or denial of a particular social benefit granted by law, such as child or housing benefit", „refused admission to a country or denial of citizenship" (p. 23).

[14] The Art. 29 WP Guidelines provide as examples: „decisions that affect someone's access to health services", „decisions that deny someone an employment opportunity or put them at a

III. Exceptions from the rule

Because in the field of law, in almost all cases, nothing can be either white or black, para. (2) of art. 22 of the GDPR offers some shades of gray by regulating some exceptions from the previously analyzed rule. According to this text of law: „paragraph 1 shall not apply if the decision: (a) is necessary for entering into, or performance of, a contract between the data subject and a data controller; (b) is authorised by Union or Member State law to which the controller is subject and which also lays down suitable measures to safeguard the data subject's rights and freedoms and legitimate interests; or (c) is based on the data subject's explicit consent".

In regard to the first exception, in order to conclude that the automated individual decision-making process is „necessary", the data controller must prove that it is the most appropriate method by which the objective of the contract can be achieved[15]. In other words, the data controller must demonstrate that the objective of the contract would be impossible to achieve only through the intervention of the human factor, as there are no less intrusive alternatives. Art. 29 WP exemplifies[16], as a situation in which automated decisions would be „necessary", but in a pre-contractual stage, the case when a company launches a job offer and receives tens of thousands of applications. As a first step, irrelevant applications can be eliminated much more easily by using AI systems, optimizing and streamlining the whole process. However, at a later stage, automated decision-making process should cease as soon as the list of candidates has been reduced to a manageable number.

To illustrate the situations in which the second exception would be applicable, recital 71 of the GDPR provides that decisions may be taken on the basis of exclusively automatic processing „for fraud and tax-evasion monitoring and prevention purposes conducted in accordance with the regulations, standards and recommendations of Union institutions or national oversight bodies and to ensure the security and reliability of a service provided by the controller".

Regarding the third exception, we expressed, in a previous study[17], the opinion according to which consent, as a legal basis for processing personal data, can be presented in the form of a chameleon that changes its colors depending on the evolution of a situation. Thus, this legal basis is generally distinguished by fragility and the need for a high degree of

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serious disadvantage", „decisions that affect someone's access to education", differentiated application of prices according to personal data or personal characteristics, etc. (p. 24).

[15] The Art. 29 WP Guidelines, p. 25.

[16] *Idem*, p. 26.

[17] M. Dumitru, C.-Ş. Pristavu, *Consent - a Chameleon among the Legal Grounds of Personal Data Processing*, in the Romanian Journal of Business Law no. 1/2021, pp. 26-49.

responsibility and caution[18]. Moreover, in situations as delicate as those involving decisions based solely on automatic data processing, consent should not be seen as an appropriate legal basis for processing.

IV. The right to explanation

According to art. 22 para. (3) of the GDPR: „In the cases referred to in points (a) and (c) of paragraph 2, the data controller shall implement suitable measures to safeguard the data subject's rights and freedoms and legitimate interests, at least the right to obtain human intervention on the part of the controller, to express his or her point of view and to contest the decision". Specifically, in cases where the decision based purely on automatic processing would be necessary for the conclusion or performance of a contract between the data subject and the data controller or if the automatic decision-making process would be based on the data subject's explicit consent, the controller will have an additional obligation to ensure the protection of the rights, freedoms and legitimate interests of the data subject by one of the punctual indicated measures or by another ones.

For example, imagine the situation in which the data subject has expressed him or her consent to be the subject of a decision based exclusively on the automatic processing of him or her personal data in order to obtain a credit for personal needs. The data subject is displeased by the decision taken by the AI system which established that he or she does not meet the necessary criteria to fit the profile of the borrower approved by the bank - the personal data controller. Therefore, the data subject wants an explanation as to how/why this decision has been reached. Can this right be granted to the data subject?

Article 22 para. (3) of the GDPR does not explicitly refer, when listing the measures that the data controller must take, to a possible right to explanation of the data subject. Such a right is expressly mentioned only in the content of recital 71 of the GDPR which provides that the decision-making process based solely on automated processing of personal data „should be subject to suitable safeguards, which should include specific information to the data subject and the right to obtain human intervention, to express his or her point of view, to obtain an explanation of the decision reached after such assessment and to challenge the decision". Given this aspect, together with the fact that in the legal order of the European Union (hereinafter „*EU*") the recitals are not of a normative nature, but a descriptive one, not having an independent legal value[19], it

[18] *Idem*, p. 49.

[19] See the judgment of the Court of Justice of the European Union of 19 November 1998 in Case C 162/97 Nilsson and Others, recital 54; See the Opinion of the General Advocate Ruiz Jarabo Colomer in Case C 192/08 Telia Sonera Finland, recitals 87-89.

can be considered that the data controller will not be obliged to provide the data subject explanations as to why the AI system has taken a particular decision as a consequence of processing him or her personal data[20]. Such an interpretation would not be safe from criticism.

First of all, art. 22 para. (3) of the GDPR does not provide an exhaustive list of the measures that the data controller must take in order to protect the rights, freedoms and legitimate interests of the data subject, but is only an exemplary one. This conclusion comes out from the legislator's use of the adverbial phrase „at least" before setting out, by way of example, the protection measures. Therefore, other measures may be included, and as long as the recitals „may shed a light on the interpretation that can be given to a legal rule"[21], such a measure may be represented, by reference to recital 71 of the GDPR, by ensuring a right to explanation of the data subject.

Secondly, art. 22 para. (3) of the GDPR gives the data subject, expressly, the right to contest the decision. However, this prerogative should also involve obtaining explanations from the data controller in order to be effectively covered, and not devoid of content. Without understanding what criteria, factors, reasons the decision of the AI system was based on, the right to contest the decision cannot be exercised in practice.

Thirdly, art. 13 para. (2) letter (f) of the GDPR regulates an *ex ante* right to explanation, before the decision is based purely on automatic data processing. Thus, art. 13 para. (2) letter (f) of the GDPR provides that „at the time when personal data are obtained", the controller shall inform the data subject about „the existence of automated decision-making, including profiling", but also about „meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject". However, since the law recognizes an *ex ante* right to explanation, in the event that, for example, following a decision based exclusively on automatic data processing, the data subject is exposed to consequences other than those „envisaged", even more an *ex post* right to explanation should be recognized under art. 22 para. (3) of the GDPR. Such an interpretation is in line with the legislation on the protection of personal data for which transparency is an imperative element, being necessary to ensure the avoidance of possible prejudices arising from an algorithm over which the data subject has no control and about which he or she does not know the reasons which formed the basis of the decision taken by this algorithm.

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[20] S. Wachter, B. Mittelstadt, L. Floridi, *Why a Right to Explanation of Automated Decision-Making Does Not Exist in the General Data Protection Regulation*, article available at the following internet address: https://academic.oup.com/idpl/article/7/2/76/3860948, accessed on September 3, 2021.

[21] See the judgment of the Court of Justice of the European Union of 13 July 1989 in Case 215/88 Casa Fleischhandels-GmbH v Bundesanstalt für landwirtschaftliche Marktordnung, recital 31.

Therefore, whether we are talking about an *ex ante* right to explanation, or whether we are talking about an *ex post* right to explanation, the two moments do not exclude each other, but each presupposes its own effects. The legal doctrine considered, on the one hand, that the controller must offer the data subject only a general description of the data provided to the algorithm in order for it to take the decision and must fulfill his obligation to offer explanations to the data subject only before the algorithm has taken the decision[22]. On the other hand, it has also been expressed the opinion according to which article 22 para. (3) of the GDPR also implies the obligation of the data controller to provide *ex post* specific explanations on the reasons and the reasoning on the basis of which the AI system took a certain decision[23]. As we motivated above, we consider that in the discussion can be included both an *ex ante* right to explanation, enshrined by art. 13 para. (2) letter (f) of the GDPR and an *ex post* right to explanation, the legal basis of which can be extracted from art. 22 para. (3) of the GDPR.

Although the right to explanation of the data subject may exist, at a theoretical level, it appears to remain problematic its practical applicability (or even its practical existence), given especially the opacity of the functioning of the algorithm - the problem of the so-called „black boxes". Following the decision taken by the algorithm used by the AI system, there may appear cases of bias and discrimination, for which it is difficult, or even impossible, to find an explanation.

For example, in the field of criminal justice, the Northpointe company has created a popular tool that uses an algorithm that is based on a combination of static and dynamic factors[24] and allows the assessment of the risk of recidivism, but can also be programmed for other use cases[25].

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[22] S. Wachter, B. Mittelstadt, L. Floridi, *cit. op.*

[23] I. Mendoza, L.A. Bygrave, *The Right Not to Be Subject to Automated Decisions Based on Profiling*, article available at the following internet address: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2964855, accessed on September 3, 2021; T.W. Kim, B. Routledge, *Algorithmic Transparency, a Right to Explanation and Trust*, article available at the following internet address: https://static1.squarespace.com/static/592ee286d482e908d35b8494/t/59552415579fb30c014cd06c/1498752022120/Algorithmic+transparency%2C+a+right+to+explanation+and+trust+%28TWK%26BR%29.pdf, accessed on September 3, 2021.

[24] The algorithm used by COMPAS evaluates the variables from five main areas: criminal involvement, relationships/lifestyles, personality/attitudes, family and social exclusion (D. Kehl, P. Guo, S. Kessler, *Algorithms in the Criminal Justice System: Assessing the Use of Risk Assessments in Sentencing*, article available at the following internet address: https://dash.harvard.edu/bitstream/handle/1/33746041/2017-07_responsivecommunities_2.pdf, accessed on September 1, 2021).

[25] Another risk assessment tool used in process of the conviction of defendants [„The Level of Service Inventory" - Revised (LSI-R)], which was also among the first and most popular ones, was created by the Canadian company Multi- Health Systems. It also extracts informations from a wide range of static and dynamic factors. Specifically, the instrument focuses on ten areas of interest

Regarding this tool, it was subject to testing through an investigation conducted in 2016 by the New York editorial office ProPublica, using the same benchmark, namely the probability of recidivism in two years. ProPublica found that the algorithm used by COMPAS was likely to incorrectly label black defendants compared to white defendants as having a higher risk of recidivism, while white defendants were labeled as having a lower risk of recidivism than black defendants. It was also found that only 20% of those considered to be prone to violent crime continued to do so. When the full range of possible offenses/crimes - including contraventions - was taken into account, the algorithm was somewhat more accurate in the sense that 61% of those considered likely to recidivate were indeed arrested for any subsequent offenses/crimes within the time limit of two years[26]. However, the Northpointe company criticized the methodology used by ProPublica, considering that the results of the performed analysis and the statements made based on this analysis are not correct[27].

It has also been expressed the opinion[28] according to which it cannot be associated a real usefulness to the right to explanation of the data subject in a world of AI systems based on machine learning because the way these systems work makes it difficult (or even impossible) to present the criteria used by an algorithm when solving a certain case, and for the analysis and evaluation of the complex results of the operations performed by the algorithms, strictly specialized knowledge is required. Even in the case of an expert, in order to establish the correctness of a decision, he should learn the logic of the algorithm, follow the previous decisions and become familiar with the learning process of the system[29]. In such a

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which, in order from highest to lowest, are as follows: criminal record; education/employment; alcohol/drug problems; companions; emotional/personal field; family/marital status; attitudes/orientation; adaptation; free time/recreation; finance field (article available at the following internet address: https://www.rothdavies.com/criminal-defense/step-step-guide/step-15-the-lsi-r-level-of-service-inventory-revised/, accessed on September 1, 2021). The factors are used to determine a person's risk of recidivism, as well as the most appropriate options for sentencing. The tool was originally developed to be used only in rehabilitation processes.

[26] J. Larson, S. Mattu, L. Kirchner, J. Angwin, *How We Analyzed the COMPAS Recidivism Algorithm*, article available at the following internet address: https://www.propublica.org/article/how-we-analyzed-the-compas-recidivism-algorithm, accessed on September 1, 2021.

[27] J. Angwin, J. Larson, S. Mattu, L. Kirchner, *Machine Bias*, article available at the following internet address: https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing, accessed on September 1, 2021.

[28] M. Krishnan, *Against Interpretability: A Critical Examination of the Interpretability Problem in Machine Learning*, article available at the following internet address: https://doi.org/10.1007/s13347-019-00372-9, accessed on September 6, 2021.

[29] J. Gryz, M. Rojszczak, *Black box algorithms and the rights of individuals: no easy solution to the „explainability" problem*, article available at the following internet address: https://policyreview.info/pdf/policyreview-2021-2-1564.pdf, accessed on September 6, 2021.

context, the obligation of the data controller to provide the data subject the information in a „concise, transparent, intelligible and easily accessible form, using clear and plain language" seems an insurmountable task[30].

In addition to these barriers to the effective exercise of the right to explanation, it was also considered that another one may be that relating to information secrecy as a measure of self-protection taken by corporations[31]. When trade secrets are at stake, the existence of the right to explanation may appear to be uncertain. Thus, according to recital 63 of the GDPR: „A data subject should have the right of access to personal data which have been collected concerning him or her (...) That right should not adversely affect the rights or freedoms of others, including trade secrets or intellectual property and in particular the copyright protecting the software". Art. 29 WP specifies, however, that the controllers cannot invoke the protection of trade secrets as an excuse to refuse access or not provide information to the data subject[32]. Recital 63 of the GDPR also states that „(...) where possible, the controller should be able to provide remote access to a secure system which would provide the data subject with direct access to his or her personal data".

V. Conclusions

In conclusion, it must be taken into the account that, in the field of IA systems, algorithms and automatic processing of personal data, there will be situations characterized by complexity and innovative elements, which require vast experience and thorough specialized knowledge. Even in these cases, transparency must remain an essential condition in order for the data subject to have effective control over his or her personal data, but also a condition of fairness. Ensuring transparency may, however, prove to be an objective whose feasibility is called into question, especially in the case of algorithms with a low degree of predictability or difficult to explain. As a consequence, the conclusion that can be drawn at this time is that it will up to technology and experts in the field to find the most appropriate and effective methods by which this right to explanation, existing at a theoretical level, to can be put into practice too in an effectively manner.

[30] See Article 12 para. (1) of the GDPR.

[31] J. Burrell, *How the machine 'thinks': Understanding opacity in machine learning algorithms*, article available at the following internet address: https://journals.sagepub.com/doi/full/10.1177/2053951715622512, accessed on September 3, 2021.

[32] The Art. 29 WP Guidelines, p. 19.

CONSIDERATION ON ELECTRONIC IDENTITY IN THE LIGHT OF EUROPEAN DIGITAL PASSPORT

Raul-Felix HODOŞ[1],
Daniela MICU[2]

Abstract

The paper aims at a brief analysis of identity in a world where digitization can no longer be ignored. Digital identity is regulated at European level and the next step is to implement the digital wallet should include all the data necessary for the use of services that can be accessed only as a result of identity verification, public or private. Will e-identity remain an option or will it become mandatory, despite assurances from the European Commission?

Keywords: *identity; identity card; electronic commerce; e-IDAS regulation; European Digital Identity Wallet*

1. Electronic identity is an essential element of the digital environment and represents an integral part of the notion of "identity" from an administrative perspective, as this concept is widely known and accepted. Thus, for a better understanding of the concept of “electronic identity”, we consider it appropriate to define the notion of “identity” in a extensive point of view.

From a broad perspective, identity is the way in which individuals and groups of people define themselves according to their own criteria and, in the same time, are defined by third parties in relation to criteria agreed by the community or, in some cases, by competent public authorities and institutions. Thus, the individual identity represents a combination between the personal experiences lived within the community, on the one hand, and the elements conferred by the social affiliation of the individual.[3]

From an administrative point of view, the natural person' identity represents the set of information elements whose processing allows the identification of the individual in relation to public authorities and institutions. This led to the emergence of the identity card in the twentieth century, as a durable medium containing the main identification data of a

[1] PhD., associate professor ,DATIA Research Center, „1 Decembrie 1918” University, Alba Iulia.
[2] DATIA Research Center, „1 Decembrie 1918” University, Alba Iulia.
[3] See in this regard the website https://ses.webclass.fr/notions/identites/, accessed on 17.11.2021.

citizen, these data being needed at the beginning of the last century especially in public services such as voter lists, payment of taxes, imposition of military service or education.

In that regard, it should be noted that, on 12th of September 1921, the national identity card appeared in France, following the adoption of a circular by Robert Leullier, the prefect of the Paris police. The application of the identity card was motivated, among other things, by the increase in the mobility of individuals, which led to a problem for bureaucratic authorities: the need to identify the population. This circular, applicable to citizens living in the Seine Department (Paris and the inner suburbs), remained optional, being generalized nationally at the end of the twentieth century[4].

In Romania, the identity card was regulated for the first time by Decree no. 334/1957 regarding the population registration regime, modified by Decree no. 346/1959 and repealed in 1971. The identity card aimed to improve the population registration system at the national level, given that the data obtained by public authorities following the preparation of this document were particularly useful to the communist state in the process of industrialization and the collectivization of Romania. Subsequently, this field was successively regulated by several normative acts: Law no. 5/1971[5], Law no. 105/2006[6], Government Emergency Ordinance no. 97/2005, republished[7], Government Ordinance no. 69/2002 republished[8], Government Decision no. 1982/2004[9]. Depending on the specific needs of each period of development of the

[4] See in this regard the websites: https://www.lefigaro.fr/histoire/archives/il-y-a-100-ans-les-premiers-pas-de-la-carte-d-identite-en-france-20210320 and https://www.certeurope.fr/blog/identite-numerique-la-base-de-la-confiance-en-ligne/, accessed on 22.11.2021.

[5] Law no. 5/1971 on the identity documents of Romanian citizens, as well as on the procedure for changing the domicile and residence, published in the Official Journal of Romania no. 34/24.04.1978, repealed by Law no. 105/1996.

[6] Law no. 105/1996 on population records and identity card, published in the Official Journal of Romania, Part I, no. 237/30.09.1996, repealed by Government Emergency Ordinance no. 97/2005.

[7] Government Emergency Ordinance no. 97/2005 on the record, domicile, residence, and identity documents for the Romanian citizens, republished (r1) in the Official Journal of Romania, Part I, no. 719/12.10.2011, with subsequent amendments.

[8] Government Ordinance no. 69/2002 on some measures for the operationalization of the computer system for issuing and putting into circulation the electronic identity and residence documents, approved by Law no. 285/2003, republished in the Official Journal of Romania, Part I, no. 844/15.09.2004, with subsequent amendments.

[9] Government Decision no. 1982/2004 on the approval of the Methodological Norms for the application of the Government Ordinance no. 69/2002 on the legal regime of the electronic identity card, republished, as well as the form and content of the electronic identity card, published in the Official Journal of Romania, Part I, no. 1113/27.11.2004, with subsequent amendments brought by Government Decision no. 1436/2005.

Romanian society, the identity cards regulated by the normative acts mentioned above contained, depending on the situation, the name and surname, domicile or residence, personal numerical code, place of birth, name and surname of parents, citizenship, etc.

2. Although initially the role of the identity card was to identify the holder in relation to state authorities, the development of the private environment especially because of the recovery of the world economy after World War II led to the development of interactions between both citizens and businesses, on the one hand, and public authorities, on the other hand, as well as between the representatives of the private environment, regardless of their legal status, either citizens or representatives of the business environment.

The increase in trade relations had, among other things, the need to know, before concluding these legal relations, the minimum identity data of the other party, to ensure its identification in the event of a dispute concerning the implementation of the agreement of will[10].

Thus, changes in the world, especially because of the intensification of interstate economic relations, regardless of the quality of the parties involved in this trade, coupled with the emergence and development of the Internet as an international network of interconnected computers[11], have accentuated the globalization of the economy and of different types of products and services´ markets, and therefore led to the emergence of a new form of commerce, e-commerce. Without presenting a comprehensive definition of this notion[12], it should be emphasized that one of the key features of e-commerce is the conduct of at least one of the operations in the virtual environment.[13]

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[10] Stephen Mason, *Electronic Signatures in Law*, second edition, Tottel Publishing, Haywards Heath, West Sussex, 2007, p. 2;

[11] See in this regard Dan Cimpoeru, *Dreptul internetului*, CH Beck Publishing House, Bucharest, 2012, p. 3.

[12] For further details on the definition and regulation of e-commerce, as well as the main notions associated with this matter, see Raul-Felix Hodoş, Daniela Micu, *Drept comercial. Curs universitar*, Editura Universitară Publishing House, Bucharest, 2021, p. 125-136.

[13] In order to regulate the field of electronic commerce, several directives have been successively adopted at European level, subsequently transposed into Romanian legislation, as following: a) Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures, published in Official Journal L 013/19.01.2000, repelead by Regulation (EU) no. 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC, published in Official Journal L 257/1 of 28.08.2014.
b) Directive 2000/31/CE of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), published in Official Journal L 178/1 of 17.07.2000.

3. The development of e-commerce which is recognized at the legislative level has led to the need to develop technologies capable of guaranteeing the identity of participants in online trade relations, taking into account that the use of cyberspace through the Internet involves not only communication between two or more interconnected computers, but

c) Directive 2002/58/CE of the European Parliament and of the Council concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), published in Official Journal L 201/37 of 31.07.2002, with the with subsequent amendments brought by Directive 2006/24/CE, published in Official Journal L 105/54 of 13.04.2006 and by Directive no. 2009/136/CE, published in Official Journal L 337/11 of 18.12.2009;

d) Commission Directive 2002/77/EC on competition in the markets for electronic communications networks and services, published in Official Journal L 249/21 of 17.09.2002.

At national level, electronic commerce is regulated by special normative acts (which are completed, insofar as they are compatible, with the provisions of the Civil Code and the Code of Civil Procedure):

a) Law no. 455/2001 on electronic signature, republished (r1) in the Official Journal of Romania, Part I, no. 316/30.04.2014, with subsequent amendments brought by Government Emergency Ordinance no. 39/2020 şi Law no. 127/2020.

b) Technical and methodological norms for the application of the Law no. 455/2001, published in the Official Journal of Romania, Part I, no. 847/28.12.2001, approved by Government Decision no. 1259/2001, with subsequent amendments brought by Government Decision no. 2303/2004.

c) Law no. 365/2002 on electronic commerce, republished (r1) in the Official Journal of Romania, Part I, no. 959/29.11.2006, with subsequent amendments brought by Law no. 187/2012.

d) Methodological norms for the application of the Law no. 365/2002, published in the Official Journal of Romania, Part I, no. 877/5.12.2002, approved by Government Decision no. 1308/2002.

e) Law no. 589/2004 on the legal regime of electronic notarial activity, published in the Official Journal of Romania, Part I, no. 1227/20.12.2004, law implemented by the Order no. 500/2009 on Technical and Methodological Norms for the application of Law no. 589/2004, issued by the Minister of Communications and Information Society.

f) Technical and methodological norms of 18th of June 2009 for the application of Law no. 589/2004, published in the Official Journal of Romania, Part I, no. 487/14.07.2009, approved by Order no. 500/2009 issued by the Minister of Communications and Information Society.

g) Law no. 135/2007 on archiving documents in electronic form, published in the Official Journal of Romania, Part I, no. 345/22.05.2007, republished (r1) in the Official Journal of Romania, Part I, no. 138/25.02.2014.

h) Law no. 451/2004 on time stamps, published in the Official Journal of Romania, Part I, no. 1021/05.11.2004, law implemented by the Order no. 492/2004 on the technical and methodological norms for the application of the Law no. 451/2004, issued by the Minister of Communications and Information Society and published in the Official Journal of Romania, Part I, no. 433/25.06.2009.

i) Regulation no. 3/2018 of National Bank of Romania on financial market infrastructures and payment instruments oversight, published in the Official Journal of Romania, Part I, no. 713/ 16.08.2018, with subsequent amendments brought by Regulation no. 2/2020 of National Bank of Romania.

j) Order no. 389/2007 on the procedure for approving remote access payment instruments, such as internet-banking, home-banking or mobile-banking applications, issued by the Minister of Communications and Information Technology, and published in the Official Journal of Romania, Part I, no. 485/19.07.2007.

also the production of legal effects in areas directly applicable to a person's privacy, such as: the individual's fundamental rights and freedoms, the processing of personal data, the conclusion of online contracts.

In this context, the notion of "*identity*" gets a new meaning, that of "*electronic identity*", which is regulated at both Community and national level, by reference to the essential role of identity in relationships established online. Defining the notion of "electronic identity" involves several challenges, starting from the scope of its elements and continuing with the diversity and complexity of legal relations in which knowledge of party identification data is essential, but not sufficient *per se*, to prove the conclusion and execution of these reports and, if necessary, the damage caused to one legal subject by an act attributable to the other party[14].

4. Electronic identity can be defined as the use of personal data whose processing allows the identification of their holder in the online authentication procedure.

In order to establish the electronic identity, this procedure involves the fulfillment of two requirements[15]:

a) First, the identification of the online service´ user, which requires the establishment of the user´ identity. Thus, the individual wishing to connect to an online service uses data (which may be called, for example, "access account" or "username") which makes it possible to identify the data subject, taking into consideration that this data is allocated by the online service provider to a single holder.

b) Second, authentication[16], which allows the online service´ user to prove his identity. This phase is possible if the user provides the correct code (password), which may consist of alphanumeric characters and, at least in theory, is known only to the person concerned.

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[14] See in this regard Stephen Mason, *op.cit.*, p. 2-4.

[15] See in this regard Marie - Charlotte Roques - Bonnet, *Le droit peut-il ignorer la révolution numérique*, Michalon Edition, Paris, 2010, p. 375.

[16] *Authentication* - electronic process that allows the confirmation of electronic identification of a natural person, legal entity, or other entity without legal personality, through electronic identification techniques and means, to obtain certain rights in the computer system, based on the identity of the natural person, legal person, or another entity without legal personality. This definition of the notion of *authentication* is provided by art. 5 lit. a) of Procedure of communication by electronic means of remote transmission between the Ministry of Public Finance / central fiscal body and natural persons, legal persons, and other entities without legal personality, approved by Order no. 660/2017, issued by the Minister of Public Finance, and published in the Official Journal of Romania, Part I, no. 368/17.05.2017, with subsequent amendments.

If the online authentication code by persons other than the person to whom the identity is assigned by using the code, it may represent a security breach of the account or electronic service to which the digital identification data of the data subject is assigned.

Therefore, the ownership and the implementation of technical means of digital identity protection are the necessary guarantees to ensure mutual trust between the parties who provide / use an online service, respectively, between persons conducting an electronic transaction, such as an information´ exchange, a commercial act, or an administrative procedure. Digital trust is an essential element of new technologies, as their use produces multiple legal effects and is difficult to verify, including in the electronic identity´ matter.

5. Digital trust is possible only if there is certainty about the parties´ identity, which implies that each party to the legal relationship established online must have an identity that can be verified or recognized by the other party.

In order to guarantee digital trust, it is advisory to use an electronic signature[17] in the online identification and authentication procedure, in the completion of a document, as well as in any other similar situations, in which the use of the electronic signature is recognized, from a legislative point of view, as a method of establishing a person's identity. In other words, the purpose of the electronic signature is to enable the identification of the individual who has assumed, in his / her own name or on behalf of the person he / she represents, certain obligations as a result of the use of the electronic signature, respectively to provide a document with a probative value (*instrumentum*)[18].

Due to the possibility of identifying the holder of the electronic signature, this notion differs in relation to cryptography: although both notions meet the condition of ensuring public security of personal data and other identification data, the main feature of electronic signature is the secure digital identification, unlike cryptography, whose technologies converge to anonymize data[19].

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[17] For details on the electronic signature and the probative value of the documents to which an electronic signature has been attached, see Raul-Felix Hodoş, *Plata electronică,* Editura Universitară Publishing House, Bucharest, 2020, p. 137-154.

[18] In certain situations, the documents have probative value even without a signature and are opposable to the debtor, e.g. the synallagmatic contracts in which the other party has voluntarily performed its obligations. In this case, see D. Veux, Martin Oudin, *Actes sous seing privé. Règles générales*, in „*Juris-Classeur Civil Code". Art.1322 à 1324, Contrats et obligations*, 11, 2004, p. 7, and the cases quoted by the authors.

[19] Marie - Charlotte Roques - Bonnet, *op.cit.,* p. 377.

These concepts apply not only to legal relationships established online between private individuals (whether individuals or legal entities), but also to digital relationships between representatives of the private environment and state' authorities and institutions, taking into consideration the fact that more and more legal relations developed with the state take place online[20].

Therefore, this legal matter is at the crossroads between public law and private law, respectively between the interests of individuals and legal persons under private law, on the one hand, and public services due to new technologies, to which citizens have access as a result of electronic identification and authentication, on the other hand[21].

6. All these features of the field of e-commerce security and electronic identity of the participants in the online transactions are currently regulated at Community level by Regulation (EU) no. 910/2014 of the European Parliament and of the Council[22] (further Regulation e-IDAS[23]), which is in force since 1st of July 2016. The role of adopting the Regulation, which is applied toghether with the provisions of Commission Implementing Regulation (EU) 2015/1501[24], is to implement new technologies and systems needed for electronic interactions between businesses, citizens, and public authorities across the EU, in order to increase confidence in electronic transactions at Community level.[25]

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[20] See in this regard: Sergiu Popovici, *Identificarea electronică şi serviciile de încredere: de la eIDAS la alte preocupări în dreptul internaţional al comerţului electronic*, article published in Romanian Review of Private Law no. 4/2017 (Universul Juridic Publishing House, Bucharest, 2017) and available online, on the legislation and jurisprudence´ website: https://sintact.ro/ .

[21] For more details on new technologies' legal effects, see Soraya Amrani-Mekki, *Efficacité et nouvelles technologies*, in Andrés de la Oliva Santos, Fernando Gascón Inchausti, Marien Aguilera Morales (coordinators), *La e-Justicia en la Unión Europea. Desarrollos en el Ambito Europeo y en los Ordenamientos Nacionales*, Editorial Aranzadi, Pamplona (Spain), 2012, p. 256.

[22] Regulation (EU) no 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC, published in Official Journal of the European Union L 257/73 of 28.08.2014.

[23] e-IDAS = Electronic IDentification Authentication and Signature.

[24] Commission Implementing Regulation (EU) 2015/1501 of 8 September 2015 on the interoperability framework pursuant to Article 12(8) of Regulation (EU) No 910/2014 of the European Parliament and of the Council on electronic identification and trust services for electronic transactions in the internal market, published in Official Journal of the European Union J.O.U.E. nr. L 235/1 of 09.09.2015;

[25] For more information on the main new features of the e-IDAS Regulation, see the summary on Regulation (EU) no. 910/2014, available on the website of European Union legislation (https://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=LEGISSUM:310603_1), accessed on 23.11.2021.
In this regard see also Ioana Regenbogen, *Aventurile şi provocările semnăturilor electronice în era digitală,* article published in Romanian Review of Private Law no. 1/2019 (Universul Juridic

The entry into force of the e-IDAS Regulation' provisions has remedied, from the point of view of EU law, several problems arising from the different interpretation that the EU Member States brought to previous legal provisions (especially Directive no. 1999/93/EC). Furthermore, it has created the necessary legal framework for the development of a single market for digital services[26].

The e-IDAS Regulation establishes, at Community level, guidelines, criteria, and key notions about the digital trust:

a) Electronic identification[27];
b) Electronic identification means[28];
c) Person identification data[29];
d) Electronic identification scheme[30];
e) Trust service[31];
f) Qualified trust service[32];
g) Electronic seal[33].

Considering the three directions indicated by art. 1 of Regulation (EU) no. 910/2014[34], it is structured as follows:

Publishing House, Bucharest, 2017) and available online, on the legislation and jurisprudence´ website https://sintact.ro/.

[26] Andrew Murray, *Information Technology Law. The Law and Society*, Third Edition, Oxford University Press, Oxford, 2016, p. 512.

[27] „*Electronic identification*" means the process of using person identification data in electronic form uniquely representing either a natural or legal person, or a natural person representing a legal person - art. 3 (1) of Regulation (EU) no. 910/2014.

[28] „*Electronic identification means*" means a material and/or immaterial unit containing person identification data and which is used for authentication for an online service - art. 3 (2) of Regulation (EU) no. 910/2014.

[29] „*Person identification data*" means a set of data enabling the identity of a natural or legal person, or a natural person representing a legal person to be established - art. 3 (3) of Regulation (EU) no. 910/2014.

[30] „*Electronic identification scheme*" means a system for electronic identification under which electronic identification means are issued to natural or legal persons, or natural persons representing legal persons - art. 3 (4) of Regulation (EU) no. 910/2014.

[31] According to art. 3 (16) of Regulation (EU) no. 910/2014, the notion of „*trust service*" means an electronic service normally provided for remuneration which consists of:
(a) the creation, verification, and validation of electronic signatures, electronic seals or electronic time stamps, electronic registered delivery services and certificates related to those services, or
(b) the creation, verification and validation of certificates for website authentication; or
(c) the preservation of electronic signatures, seals or certificates related to those services.

[32] According to art. 3 (17) of Regulation (EU) no. 910/2014, the notion of „*qualified trust service*" means a trust service that meets the applicable requirements laid down in this Regulation.

[33] „*Electronic seal*" means data in electronic form, which is attached to or logically associated with other data in electronic form to ensure the latter's origin and integrity - art. 3 (25) of Regulation (EU) no. 910/2014.

(1) Regulations on the electronic identification and authentication of individuals and legal entities (eID);
(2) The legal framework applicable to trusted service providers based in the EU (legal obligations, authorization, etc.);
(3) Specific rules on concrete trusted services: electronic signature, electronic seals, electronic time stamp, registered electronic distribution services, certification services for website authentication.

7. The adoption and direct implementation of the eIDAS Regulation has led to the emergence at Community level of a new concept, European electronic identity. In the view of the European Commission, it is necessary to make European electronic identity available to all European Union' citizens, residents and businesses who wish to identify themselves in this way or to prove certain personal information by digital means. From the perspective of the European Commission, it is necessary that the European electronic identity can be used in obtaining public and private services online or offline, in the EU countries. This goal is justified by the current status quo applicable at EU level:

a) Nowadays only about 60% of the population of 14 EU Member States can use national means of electronic identification in another country.
b) Only 14% of essential public service providers in all Member States allow cross-border authentication with an electronic identification system, for example to prove a person's identity on the internet, without requesting a password.[35].

8. Based on all these reasons, The European Commission has launched on 3rd of June 2021 in Brussels, the proposal to set up an European digital wallet, intended to be available free of charge to all 450 million EU citizens. According to preliminary documents published on the

[34] Art. 1 of Regulation (EU) no. 910/2014: With a view to ensuring the proper functioning of the internal market while aiming at an adequate level of security of electronic identification means and trust services this Regulation: (a) lays down the conditions under which Member States recognise electronic identification means of natural and legal persons falling under a notified electronic identification scheme of another Member State; (b) lays down rules for trust services, in particular for electronic transactions; and (c) establishes a legal framework for electronic signatures, electronic seals, electronic time stamps, electronic documents, electronic registered delivery services and certificate services for website authentication.

[35] See the information about „*European Digital Identity*", published on the European Commission website (https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/european-digital-identity_en), accessed on 22.11.2021.

Commission's website[36], the European digital wallet will be an application available for smartphones after October 2022, which will allow EU citizens: (1) to identify themselves digitally, (2) to store and to use identification data and official documents in electronic format, such as the identity card, driving license, study documents or medical prescriptions.

The European Digital Identity Wallet will work in a similar way to an electronic identity card, so that the holder of such a wallet will be able to prove one's identity when the access online services is required.

Also, the European Executive intends the European Digital Identity to be used for any number of cases, for example:

- Access to public services such as requesting birth certificates, medical certificates, reporting a change of address.
- Opening a bank account.
- Filing tax returns.
- Applying for a university, at home or in another Member State.
- Storing a medical prescription that can be used anywhere in Europe.
- Proving one's age, without implying the disclosure of the petitioner's first and last name or other personal data;
- Renting a car using a digital driving license.
- Checking in to a hotel etc[37].

According to the documents and information published on the European Commission website which present details on the European Digital Identity Wallet' role and implementation' procedure, the installation of this application is, for the citizens of the EU Member States, a right and by no means an obligation. Thus, the EU citizens will have the possibility to choose if they want to utilize the European Digital Identity Wallet or not, and in the affirmative case, they will be free to decide the way to use the application[38]. According to the European Commission, the Member States are the ones that have obligations towards the proper implementation and ensuring the optimal use of the European digital

[36] See the section: *Questions and answers: Commission proposes trusted and secure Digital Identity for all Europeans*, available at: https://ec.europa.eu/commission/presscorner/detail/en/QANDA_21_2664, accessed on 22.11.2021.

[37] See the information about „*European Digital Identity*", published on the European Commission website (https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/european-digital-identity_en), accessed on 22.11.2021.

[38] According to the answers offered by the European Commission at the section: *Questions and answers: Commission proposes trusted and secure Digital Identity for all Europeans* (available at: https://ec.europa.eu/commission/presscorner/detail/en/QANDA_21_2664, accessed on 22.11.2021), „*Citizens will at all times have full control of the data they share. [...] Users will be able to control what personal data they want to share with online services*".

wallet within the deadlines set by the Commission. The main justification for the urgency of adopting the European Digital Identity Wallet is the current socio-economic context, in which COVID-19 pandemic has revealed the existence of limitations regarding the use of digital services, that need to be remedied urgently.

To increase the identity' security in the procedure of digital services' use and, at the same time, to improve the reliable electronic services currently provided to citizens, businesses and public authorities in EU Member States, the European Commission considers that the proper implementation of the European Digital Identity Wallet implies certain amendments of the e-IDAS Regulation. In this regard, the European Commission has also published on the institution's website[39] the proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) no. 910/2014 as regards establishing a framework for a European Digital Identity.

Among the reasons to amend the Regulation (UE) no. 910/2014, the European Commission includes the necessity to extend the current e-IDAS list of trust services with three new qualified trust services:

a) the provision of electronic archiving services.
b) electronic ledgers.
c) the management of remote electronic signature and seal creation device.

Regarding the electronic identity' security in the digital services' use at EU level, the European Commission emphasizes in its explanatory memorandum that the implementation of the European Digital Identity Wallet would determine an unified approach to security, since the proposal on amending the e-IDAS Regulation establishes a common technical architecture and reference framework for all Member States.

9. The Covid 19 pandemic changed human society forever. Returning to the previous world is impossible, not only because of changes in people's mentality, but also because the impetus given to technological development can no longer be reversed. In conclusion, we can say that electronic identity and its forms of use can no longer be just an option, even if the European Commission assures us that we are facing a right and not an obligation. The development of trade in a form in which the use of new technologies can no longer be avoided, the increase of administrative capacity through the widespread use of the Internet, the need to eliminate

[39] See website: https://op.europa.eu/en/publication-detail/-/publication/5d88943a-c458-11eb-a925-01aa75ed71a1/language-ro/format-PDF, accessed on 22.11.2021.

uncertainty in the exchange of information, all lead us to the widespread assumption of electronic identity.

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GOOD FAITH AND ABUSE OF LAW IN CIVIL LEGAL ACTS

Călin BUDA[1]

Abstract

Good faith is a principle that must underlie both legal relationships and the exercise of civil rights. Starting from the notion of principle, which means a constitutive element of a phenomenon or of a social relationship, determining a certain rule of conduct, good faith includes in its content the moral values of honesty such as loyalty, prudence, etc. These moral values are elevated to the rank of legal principle "principle of good faith" when they enter the field of legal relations.

Keywords: *good faith, subjective law, postulate of good faith, abuse of law*

1. Etymology and origins

As an institution of law, good faith has its origins in Roman law, appearing at the end of the Republic, with the praetorian property, when the development of trade, especially in slaves, made it necessary to protect buyers who were acting in good faith in transactions that were concluded without the formalities and solemnities required by law in the case of *mancipi*.

If, in such cases, the price was received by the seller and the thing was handed over to the buyer, and the seller subsequently demanded the return of the slave on the grounds that the solemnities had not been complied with, his bad faith was punished, and the exception of *exceptio rei venditate et traditae*, which he could invoke before the praetor, was available to the bona fide buyer. The exception allowed the bona fide purchaser to keep the slave, on the grounds that such a return would have been against the rules of equity.

Subsequently, the state of good faith in which some of the participants in civil legal relations arising from the possession of things or the transfer of property found themselves was also invoked to protect other institutions of Roman law.

Thus, the state of fact consisting in the material possession of a thing by those who believed themselves to be owners, by bona fide possessors, was protected alongside the possession of the true owners, of which the

[1] Teaching Assistant PhD., "1 Decembrie 1918" University of Alba Iulia.

category of privileged possessors *beati possidenies* included long-term tenants, pledgees and usurping landowners. The fact that the possession of all these elements met both the corpus element (the material possession of the thing) and the *animus possidendi* element (the will to possess the thing for oneself in the power of the law) allowed the praetor to defend it by means of interdicts, which is why such possession is also called interdictory or praetorian possession[2].

2 Formation of good faith

There can be no question (it is out of the question to find that...) good faith is a state of mind, characterized by the sincerity with which the person in error affirms that he had a correct representation - characterized by conviction, faith, certainty, - of a state of fact or law existing at a given moment, a vision which enabled him to make a decision or to take an attitude in a given circumstance, because man can distinguish between truth and falsehood, justice and injustice, right and wrong, equity and inequity, lawful and unlawful.

The state which we say is good faith arises at the level of the individual's psyche, because the expression of the will to transmit or acquire a right or to exercise the attributes which a right confers in consideration of a certain quality presupposes a psychological process of forming an attitude which enables him to act. Attitude has been defined as the orientation established by a continuous selective evaluation of the situation, which determines one's own behavior towards a social object[3]. In turn, behavior is the conduct of a given subject considered in a given environment and time unit[4].

The expression of consent to the performance of a legal act or the commission of a legal act is a process that evolves from confusion to certainty, from ideal and motivation to concrete action, from the mental activity of processing information to decision-making. Action is therefore the result, the projection of a deliberation, a thought process, at which, through the filter of moral and legal norms, which the individual has acquired in the form of social values, information already known to him or coming from outside is processed, thus leading to a decision, which may be legal or moral or the opposite.

Bearing in mind what has been said above, and taking into account Cicero's statement that good faith is sincerity in words and fidelity in commitments, we can say that achieving such a state involves two stages.

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[2] V. Hanga, *Roman Private Law*, Editura Didactica and Pedagogica, Bucharest. 1978. p. 247-248.

[3] A. Gavreliuc, *From interpersonal relationships to social communication*, Editura Polirom, Iaşi, 2006.

[4] N. Sillamy. *Psychological Dictionary*, Editura Univers Enciclopedic, Bucharest, 1998, p. 74.

The process of making a decision to express one's will or to commit a legal act involves a first stage, characterized by a mental analysis, based on the range of moral and legal values that the subject has adopted. Starting from a specific reason, the reason which triggers this process, the processing of information at the level of consciousness, under the auspices of error, ends with the crystallization of a project of action, which in legal language is called purpose. This stage, which is an internal one, takes place only at the level of the psyche and is evidenced by the formation, based on moral perceptions and knowledge of legal norms, of the mistaken belief that what one wishes to do is possibly right but also lawful.

The second stage, the external stage, is marked by the passage to action, the expression of the agreement of will, in the form of consent to the conclusion of a legal act, or the performance of a legal act, both representing the materialization of the mediated purpose. In the external stage, the decision taken as a result of the thought process under the patronage of moral and legal rules is translated into factual and legal reality, it materializes in the action that the subject will undertake. The action may consist in the transmission or acquisition of a right, one such moment being when the subject concludes a legal act in the belief that he is transmitting something that belongs to him, that he is acquiring something from a true owner, an operation that will not create any problems in the exercise of the right acquired.

Good faith is therefore a certificate of good behavior which the person in error invokes and receives from the company in the form of the expressions 'I acted in good faith' and 'acted in good faith'.

Therefore, the formation of a mental state presupposes the existence of landmarks, rules, canons, precepts, which, within the framework of genetic aptitudes, through reason, shape the human conscience, including its forms, known as moral conscience and legal conscience[5].

Psychological facts that fall within the sphere of good faith

a) What are the determining psychological facts of good faith? Good faith is a very complex concept. It originates in certain psychological facts, is part of moral rules and operates in social relations, constituting the basis of legal relations. At the heart of conscious elaboration are those facts which constitute the objectives or focus of our activity, involving a contribution of the individual which is achieved through the selection of phenomena.

Psychological facts in accordance with the specific moral norms of the society of each social-economic order, constituting the source of good faith, are those which refer to honesty, loyalty or probity, prudence.

[5] F.S. Cotea, *Good Faith. Implications for property law*, Editura Hamangiu, Bucharest, 2007, p. 4.

b) How psychological facts act in the formation of good faith. Cicero called good faith sincerity in words (veritas) and fidelity (constantia) in commitments[6]. Based on this definition, it can be said that the psychological facts generating good faith create two states of concordance or conformity: on the one hand, conformity between what a man thinks and what he affirms, and on the other hand, conformity between his words and his acts.

The psychological facts related to the two conformities are presented in the form of the belief of the duty to be fulfilled based on the right conduct in pursuit of the goal.

Although good faith results from the two states of conformity, it must be assessed from a single point of view, since both sincerity in words and fidelity in commitments presuppose or imply the existence of a right intention, falling within the sphere of probity.

Intrinsic elements of good faith

Honesty as the foundation of good faith. It is known that in Roman law, one of the main precepts was "to live honestly". This means to live in accordance with nature, in accordance with morality and in accordance with reason. Roman law in its early phase did not distinguish between moral and legal rules. Honesty, therefore, was enshrined as a legal concept. Later, even in the period of kingship, as a result of the demarcation between law and morality, Roman law separated the legal notion of good faith from the notion of honesty, although in terms of moral content the two notions are equivalent, and the demarcation between morality and law was never clear-cut.

Honesty, although in its content it has the same moral values that enter into the content of the concept of good faith, its action is circumscribed to the life of the individual and his moral behavior in society, without being linked to legal relations with other people.

The moral values that make up honesty. Honesty is a complex of virtues, virtue being understood as a moral attribute of a person who constantly pursues the ethical ideal, the good. A number of four component virtues of honesty have been defined, which we will call moral values, to distinguish them from the constituent elements of good faith. This, in turn, derives from the four virtues. The moral values of honesty are: loyalty or probity, prudence, order and temperance[7].

a) Loyalty, synonymous with probity, is a psychological fact of conscience which refers to the rigorous observance of moral

[6] G. Dimitrie, *Good Faith in Civil Legal Relations*, Academy of the Socialist Republic of Romania, Bucharest, 1981. p. 3.
[7] G. Dimitrie, *op.cit.*, p. 5.

duties, as well as the observance of upright conduct, both of which lead to mutual trust between members of society.

b) Prudence consists of that psychological fact of conscience which causes the human person to foresee and avoid mistakes and dangers.
c) Order, as a psychological fact, implies the channeling of human actions within the limits of the norms established in social life.
d) Temperance is a trait of human conscience that shapes desires and passions, limiting them to what is permitted by ethical principles.

Elements of good faith:

a) Right intention-resulting from loyalty or probity, always implies the absence of deceit, fraud and violence, as well as fidelity in commitments; also, probity or loyalty entails the absence of doubt, correct and justified ignorance, which in law is called excusable error.
b) Diligence - corresponding to the moral value of prudence, determines the commission of acts or deeds with the foresight of their result circumscribed within the limits of the law.
c) Lawfulness, the performance of lawful acts, is the legal facet of order as a moral value.
d) Refraining from harming or harming another person in the course of legal action is the last constituent element of good faith and derives from the moral value of temperance. It is equivalent to the Roman precept*: alteram non laedere*.

Law, in order to know the real will of the subjects of a legal relationship, always starts from the external aspect. That is to say, from the concrete act committed or from the legal act concluded, which is the product of declarations of will expressed through consent. But when the subject expresses his will, it is the result of a thought process, of a complex of psychological facts whose place is in human consciousness. Therefore, the law, in order to know the reality of the legal will, must also investigate the psychological facts that determined the consent of the will. Psychological facts are infinitely numerous, but only certain psychological facts are absolutely necessary for the declaration of will required to conclude a legal act or to commit an act that falls under the legal rules, which constitute moral values and without which the legal relationship does not have the necessary consistency and ethical basis to be recognized as a legally valid legal relationship.

When the declaration of will is made through consent, the moral values that form part of the legal relationship are converted into legal

values that the law incorporates into its sphere and make up the legal concept of good faith.

All four values making up honesty can be found as the foundation or substratum of a multitude of social relations without always converting into good faith, which is an exclusively legal concept with a moral foundation, although in everyday language the expression 'someone is in good faith' is often used, even if the facts referred to do not fall within the scope of legal rules but remain within the exclusive sphere of morality and ethics.

Theories defining good faith

The theory of the mandatory regime from "strict law" This theory essentially argues that good faith is an exception to the rules of common law which is "strict law". It states that, in principle, it is the common law that is primarily to be applied and, in this case, the effects of good faith and bad faith constitute a list of exceptions or derogations from the common law.

The tripartite theory embraced by several authors has been called tripartite because all those who developed it highlighted three essential aspects of the concept of good faith, namely:

- in a first sense, good faith is a neighbor of equity;
- in the second sense, good faith is based on the general idea of loyalty in contractual relations. In this case, good faith is the antithesis of fraud and violence in the conclusion of agreements and the antithesis of fraud in their execution.
- in the third sense, good faith is the erroneous belief in which a person finds himself, due to a defect in subjective law or an objective rule of law.

The bipartite theory which highlights two aspects of good faith, namely:

- Objective good faith is synonymous with objectively assessed loyalty, according to established custom among honest people. Its existence is necessary to the conclusion and execution of agreements, and as such is opposed to fraud and deceit. By means of this form of good faith "the judge interprets the agreement in order to mitigate its rigor or to make it applicable to new circumstances.
- Subjective good faith is mistaken belief, sincerity, the antithesis of dissimulation and falsehood. It rests in a large number of cases on apparent situations, which make up what has been called in civil law "the theory of appearance".

Theory of the unity of the concept of good faith. In general, most authors who have dealt closely with good faith in legal science are inclined to maintain that this concept is in fact a unitary concept, with all its complexity. It has been said that this thesis has not been developed by its authors "in a direct and absolute way, but has been asserted by them in a mitigated way". Thus, it has been shown that the notion of good faith is both complex and unique, a comprehensive and living notion that deeply links law to psychology and especially to morality. In this unitary but at the same time complex interest, good faith encompasses the psychological concepts of intention and belief; it has a moral foundation, in the sense that intention must be right and belief must be conscientious; and finally, having passed from the realm of morality to that of law, it takes on the character of a legal principle.

The theory of good faith with effects in the field of liability and nullity of legal acts belongs to Robert Vouin. He confines himself to stating that he cannot study good faith from the angle of obvious notions and distinctions. As such - he says - in defining the notion of good faith, it is necessary to investigate, on the one hand, the extent to which good faith can found or, conversely, suppress or restrict liability and what its nature is in the various hypotheses in which it manifests itself in this role; on the other hand, the extent to which good faith can cover, in whole or in part, the irregularity of a legal act and, if so, it always takes the form of ignorance or error[8].

German legal literature theory of good faith. The German legal literature of the last century has developed its own theory of good faith; it is based on the Roman conception of bona fides, which is not surprising, if we consider the extent and depth of classical studies in Germany in the last century, and in particular the study of Roman law, its sources and Roman political and social institutions, both in their legal aspect and in their historical development.

The presumption of good faith in legal acts

The postulate of good faith. The whole edifice of civil obligations and the exercise of civil rights is based on a postulate of good faith, which, if it did not exist, would undermine social relations themselves. The postulate of good faith is based on the assumption that people, in their relations with each other, are motivated by sincere and loyal intentions and that they therefore behave honestly, in good faith. Within this assumption, good faith plays the main role as a criterion for judging legal relationships that are based on right intention and not on distrust or deceit.

[8] G. Dimitrie, *op.cit.*, p. 16.

Presumption of good faith. In most civil legislation, the presumption of good faith is enshrined in the form of a relative legal presumption valid until proven otherwise. This presumption is old, having existed in Roman law. In some civil codes, the presumption of good faith appears as a general rule, inserted in the chapter on the general principles of civil law, a logical and necessary system as a legislative technique. It is important to examine how this presumption operates in different situations, thus constituting a main criterion for assessing willfulness in legal acts.

In acts of a subjective nature, unilateral legal acts, where the intention of the declarant forms the basis of the assessment, the presumption of good faith applies exclusively to the author of the unilateral act, whose just and lawful intention is presumed until proven otherwise.

In the case of bilateral and multilateral legal acts, also referred to as 'objective acts', the presumption of good faith applies primarily to the person who receives the declaration of intent which produces legal effects.

The presumption of good faith operates only in normal absolute circumstances and produces effects only in the state of good faith itself. It is necessary to clarify this situation. It is known that a putative title is one which has no real existence, but the beneficiary nevertheless believes in its existence.

The presumption of good faith is rebuttable in the absence of proof to the contrary, which means that it may be rebutted by any means of proof, including mere presumptions which may arise from the factual circumstances of the case and which may prove bad faith or abuse of rights. In this situation, the person concerned, the person in whose favor the presumption has operated, may in turn prove by any kind of evidence that he is acting in good faith.

The role of good faith in the assessment of legal acts in cases of simulation. It is well known that simulation is an operation by virtue of which, by means of an apparent contract, a legal situation is created which is different from the true one contained in the hidden or real act concluded between the same parties. It should be pointed out that the hidden act is not always embodied in a written contract and is concluded at the same time as the act it modifies. This is usually the case when the aim is to disguise the legal nature of an act. It has therefore been rightly argued that the necessity of the counter-registration is not of the essence of the simulation, but of its nature. In such a situation, the secret act, which is only verbally consented to but proved by witnesses, acquires full legal effectiveness and replaces the act apparently drawn up in writing.

Abuse of rights as a form of breach of good faith

Abuse of rights can cover a very wide range of acts committed in the exercise of civil rights, whether intentional or negligent, and can even be confused with bad faith. But it can also be committed through negligence, ordinary negligence, and in this case, as in the first, abuse of rights is contrary to good faith. Bad faith and abuse of rights are therefore the two forms of good faith, each of which has its own sphere: bad faith means vice, deceit, fraud, intentional omission; abuse of rights means to damage, negligence and levity in the exercise of a right committed in order to divert this right from its economic and social purpose.

In Roman law there was the maxim that no one is liable when he misses his right. This principle is no longer applicable in Roman law to its full extent.

The theory of abuse of rights as created and developed in modern civil law, with the special characteristics conferred on it by the bourgeois and socialist systems of law, has a developed moral sense. One of the authors in French legal literature, Louis Josserand, said that it would be intolerable that legal prerogatives could serve as evidence of malice, wickedness and bad faith. The fraud which vitiates all acts is that which puts an end to the application of all legal rules, and must not be allowed to continue unchecked under the too benevolent aegis of civil rights; it must be ruthlessly combated, for thus the law itself - being placed at the service of antisocial ends - is unworthily parodied by those who use it without risking succumbing to the blow of this desecration.

The moral idea of the theory of abuse of rights, as highlighted above, has as its main meaning that every subjective right is not absolute, but, on the contrary, it confers on the holder a limited power in its exercise. The fact of being the holder of a subjective right does not necessarily make the person have an honest will; moral conscience can never be removed, because there are duties towards other people that no right allows us to violate.

Thus, we come to the contact on the moral ground between good faith and the fight against abuse of rights, because the moral exercise of subjective rights in acts conferred by law and by the rules of social coexistence, by avoiding abuse in any form, implies the exercise of these rights in good faith, which means right intention, diligence, all of which are moral values.

ABUSE OF CONTRACTUAL LAW

1. Abuse of law consisting in the refusal to contract.

In principle, since the conclusion of contracts is at the free will of the persons concerned, refusing to conclude a contract does not constitute an abuse of rights, whatever the reasons for the refusal. However, this feature

was seen in the light of the theory of autonomy of will and freedom of contract developed in bourgeois legal literature.

The conclusion of contracts cannot be refused whenever they constitute an obligation laid down in normative acts. Nor can the conclusion of contracts be refused when planning acts constitute the source of the obligation to contract. The contract therefore becomes a condition for the achievement of the planning tasks.

There are many other situations in which the conclusion of contracts is obligatory. Thus in the case of communal household services (water, sewerage, sanitation, electricity), the person becomes a subscriber, i.e. a party to the contract for the provision of these services at the very moment when he establishes his domicile and becomes the main tenant.

Refusal to enter into economic contracts may in some cases constitute an abuse of rights when, by refusing, the contracting is removed from the social and economic purpose of the contractual discipline. Failure to comply with this obligation will first of all result in the failure to carry out the plan tasks. In the case of the other contracts, the consequences of refusing to conclude them depend on the nature of each obligation: refusal to become a subscriber to the communal household services results firstly in the non-provision of these services and then in other administrative consequences. Refusal to conclude a tenancy agreement leads to loss of the status of tenant and therefore to loss of the right to the accommodation, which is equivalent to the lack of right found in all cases of unlawful occupation of the accommodation.

If we turn to the issue of contracts concluded between individuals in the most varied areas of activity (sale and purchase, exchange, storage, etc.), it is clear that no one can agree to conclude a contract against his free will and against his interest. No one can be obliged to dispose of goods, his personal property or to buy, exchange, receive in deposit, outside only such operations constitute obligations established by law.

Abuse of rights at the conclusion of the contract.

The right to contract is exercised abnormally - and therefore by abuse - when one of the parties has the sole purpose of causing harm to the other party, for example when one of the parties wanted to use the contract to achieve an unfair advantage.

Abuse of contract performance.

In matters of contracts, it would seem that the act of abuse of rights would not find application. However, all deviations contrary to either party's contractual obligations or those laid down by law are in reality abuses of the rights that the party has under the terms of the contract. In this matter, breach of law and abuse of rights overlap to a greater extent.

Thus, the misuse of contractual rights by both the creditor and the debtor during the performance of the contract manifests itself above all in the interpretation of the contractual terms. This interpretation must be neither tendentious nor abusive. The parties must act in good faith in their interpretation, always taking into account the economic purpose for which the contract was concluded, and ensuring that, in performing the contract, each party does not cause damage to the other through a misinterpretation of the contract, and does not cause damage.

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