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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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MINOR'S LABOUR RIGHT

Associate professor PhD. Ada HURBEAN1

Abstract

The study is researching the person's legal capacity to conclude a labour contract and the legal limits of his capacity, in Romanian and international law. In this area of research, there are exceptional rules in place. The aim of this rules is a double one-first, it gives the person an anticipated legal capacity if they choose to exercise the right to work and second, imposes very strict rules to protect the mental and physical development of the minors.

Keywords: *minor, labour, labor contract, legal capacity, limitations*

The minor labor right in Romanian labor law

The person under 18 years old has in Romanian labour law an anticipated juridical capacity, limited by his/her mental and physical development.

Therefore, according to Art. 13 para. 1 of the Labor Code, a person acquires the capacity of work and full capacity to conclude an individual employment contract, the moment the person reaches the age of 16. Exceptionally, it is admitted that the minor can conclude an individual employment contract as an employee, upon reaching the age of 15, but only with the consent of the parents or the legal representative. Between 15 and 16 years old, we are in the presence of a limited capacity of employment and only for activities appropriate to his physical development, skills and knowledge, so as not to endanger his health, development and professional training.

Two issues need to be discussed at this point. First of all, the consent of the parents or legal representative must be an express one, prior or at most simultaneously to the conclusion of the individual employment contract. This is because, we are in the presence of a condition of validity at the conclusion of this contract, and its absence attracts the absolute nullity of the contract. Obviously, the nullity of the individual employment contract has a special legal regime, it can be covered, by the minor's fulfillment of the age of 16 years. In which case the agreement is no longer required. In the specialized legal literature, there is also the contrary

[1] University "1 Decembrie 1918" from Alba Iulia .Law and Social Sciences Faculty.

opinion, according to which the nullity of the individual employment contract due to the employment of the minor under 16 years old, jeopardizing in this way his professional training, cannot be covered. The reason given is that this ground for invalidity cannot be remedied and the only solution would be to terminate the contract, so that the young person could continue his professional training.[2]. Also, consent must be given by both parents, except when one of them is deceased, placed under interdiction, deprived of parental rights or unable to express his will. In case the parents do not get along in regards of this decision, the decision on the consent of the conclusion by the minor of the employment contract is taken by the guardianship authority [3]. If the 15-year-old wants to become a member of the trade union, he will need another express autorization from the parents or the legal representative, under the same conditions set out above.

The 15-year-old minor may also conclude an apprenticeship contract at the workplace, as an apprentice, with the consent of his/her parents or legal representative, for activities appropriate to his/her physical development, skills and knowledge, if his/her health, development and professional training are not endangered. The individual aged 16 years, up to 25 years, can conclude the only apprenticeship contract.

Finally, when hiring the minor who has not reached the age of 16, a special medical opinion is required confirming that he can cope with the activity involved in the position he will occupy.[4].

The exceptions regarding the employment of minors are provided by the Government Decision 75/2015, which establishes the areas where payment is allowed for the activities of children under the age of 15. They refer strictly to cultural, artistic, sports, advertising and modeling. The payment is made on the basis of a contract that is concluded with the parents or with the legal representatives of the minor and all the specific provisions for the provision of certain activities, as stipulated in the Civil Code, must be observed.

Children younger than 15 years old can receive money for the following activities: acting, figuration, musical activities (voice and instruments), as well as for dance, music or performance contests, but also for any other contests or activities held on stage, in movies, radio and television shows or for advertising purposes. Professional athletes can also be remunerated if they are less than 15 years old.

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[2] Al. Athanasiu, M. Volonciu, L. Dima, O. Cazan, *Codul muncii. Comentariu pe articole*, Editura C. H. Beck, 2007, p. 57.

[3] I.T Ştefănescu, L. Georgescu, *Tratat de dreptul muncii*, Editura Universul Juridic, 2021, p. 197.

[4] Al. Athanasiu, M. Volonciu, L. Dima, O. Cazan, *Codul muncii. Comentariu pe articole*, p. 56.

The second important aspect relates to activities prohibited to the minor, i.e. those which exceed their physical or psychological capabilities, involve exposure to harmful, toxic, carcinogenic, radiation factors, which present the risk of injury and which endanger health due to extreme cold or heat, or because of noise or vibrations. In this context, H. G. No. 867/2009 on the prohibition of dangerous work for children, defines dangerous work as dangerous work - all activities in the formal and informal sectors, carried out by the child or carried out through the direct involvement of the child, which, by their nature or by the conditions in which it is exercised, harm the health, safety, development or morality of children. All these activities have the following characteristics: it takes place in dangerous economic sectors or in dangerous occupations where child labour is prohibited by law; have a frequency, duration and/or intensity which prevents the attendance of compulsory education, participation in vocational guidance or training programmes approved by the competent authority, or the child's ability to receive instruction. Intolerable work is defined as those - activities carried out by the child or carried out through the direct involvement of the child, which, by their nature or the conditions under which it is exercised, harm the health, safety, development or morality of children, namely: all forms of slavery or similar practices - the sale of or trade in children, the easement of debts and the work of a servant - as well as forced or compulsory labor, including the forced or compulsory recruitment of children for use in armed conflict; the use, recruitment or offering of a child for the purpose of engaging in prostitution, producing pornographic material or pornographic performances; the use, recruitment or offering of a child for the purpose of illicit activities, in particular for the production and trafficking of narcotic drugs, as defined by international conventions; a certain professional qualification, and which can be organized together or during mixed weeks: theory, technological laboratory and practical training; economic.

International and European legislation regarding the minor's labor right

In this context, we believe that it would be useful to review the most important international documents in the field of age from which a person can be employed, documents to which Romania is a party. We would like to mention that ILO has issued since 1919 a Convention on the night work of children in industry, ratified by Romania in 1921, Convention no. 6/1919, which prohibited night work for children under 18 years of age. Then, by ILO Convention No. 59/1937, ratified by Romania in 1973, was established the minimum age for the admission of children to industrial

work at 15 years. Only one exception has been provided for, namely that national legislation may authorise the use of child labour under the age of 15 in cases where they are members of the family of the person who employs and uses as a labour force only his own family, with the exception of work which, by its nature or the conditions under which they are fulfilled, endangers life, the health or morality of those who execute.

Further, ILO Convention No. 138/1973 regarding the minimum age of employment in the mumca, ratified by Romania in 1975, establishes for the first time the connection between the need to complete the minor's schooling and the inclusion in the bite, stating that the minimum age will not be lower than the age at which the compulsory schooling ceases and, in any case, the age of 15 years. All these International Conventions relating to the field under investigation are reinstated by ILO Convention No. 182/1999, ratified by Romania in 2000, which prohibits the worst forms of child labour and establishes immediate actions to eliminate them. According to Article 3 of this Convention, the expression of the most serious forms of child labour includes:

a) all forms of slavery or similar practices, such as: the sale of or trade in children, the easement of debts and the work of a servant, as well as forced or compulsory labor, including forced or compulsory recruitment of children for use in armed conflicts;

b) the use, recruitment or offering of a child for the purpose of prostitution, the production of pornographic material or pornographic performances;

(c) the use, recruitment or offering of a child for the purpose of illicit activities, in particular for the production and trafficking of narcotic drugs, as defined by the relevant international conventions;

(d) work which, by reason of its nature or by the conditions in which it is exercised, is liable to harm the health, safety or morality of the child.

In EU law, the specific legislation is represented by the European Social Charter of 1996, ratified by Romania through Law no. 74/1999 which outlines clear limits in the field of employment of minors, namely the age of 15 years as an age limit of employment, with derogations for light work that do not affect their morality, health and education, the principle of fair wages and other social protection measures[5].

[5] Accordingly to art. 7 which regulates the right of young people and children to protection, all the parties have to follow and respect the next main rules: 1 to provide that the minimum age of admission to employment shall be 15 years, subject to exceptions for children employed in prescribed light work without harm to their health, morals or education; 2 to provide that the minimum age of admission to employment shall be 18 years with respect to prescribed occupations regarded as dangerous or unhealthy; 3 to provide that persons who are still subject to compulsory education shall not be employed in such work as would deprive them of the full benefit of their education; 4 to provide that

Also, Council Directive 94/33/EC of 22 June 1994 on the protection of young people at work, establishes the connection with the relevant ILO documents, allowing the work of minors only in so far as it does not prejudice their compulsory education, but also establishes the definition of territory in this field**.**

However, even under these circumstances, official international data on child labour is worrying. Thus, Unicef released a study (Child Labour: Global estimates 2020) according to which the number of children in child labour has risen to 160 million worldwide – an increase of 8.4 million children in the last four years – with millions more at risk due to the impacts of COVID-19, according to a new report by the International Labour Organization (ILO) and UNICEF.

The report points to a significant rise in the number of children aged 5 to 11 years in child labour, who now account for just over half of the total global figure. The number of children aged 5 to 17 years in hazardous work – defined as work that is likely to harm their health, safety or morals – has risen by 6.5 million to 79 million since 2016.

In sub-Saharan Africa, population growth, recurrent crises, extreme poverty, and inadequate social protection measures have led to an additional 16.6 million children in child labour over the past four years.

Even in regions where there has been some headway since 2016, such as Asia and the Pacific, and Latin America and the Caribbean, COVID-19 is endangering that progress.

The report warns that globally, 9 million additional children are at risk of being pushed into child labour by the end of 2022 as a result of the pandemic. A simulation model shows this number could rise to 46 million if they don't have access to critical social protection coverage.

Other key findings in the report include: The agriculture sector accounts for 70 per cent of children in child labour (112 million) followed by 20 per cent in services (31.4 million) and 10 per cent in industry (16.5 million). Nearly 28 per cent of children aged 5 to 11 years and 35 per cent

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the working hours of persons under 18 years of age shall be limited in accordance with the needs of their development, and particularly with their need for vocational training; 5 to recognise the right of young workers and apprentices to a fair wage or other appropriate allowances; 6 to provide that the time spent by young persons in vocational training during the normal working hours with the consent of the employer shall be treated as forming part of the working day; 7 to provide that employed persons of under 18 years of age shall be entitled to a minimum of four weeks' annual holiday with pay; 8 to provide that persons under 18 years of age shall not be employed in night work with the exception of certain occupations provided for by national laws or regulations; 9 to provide that persons under 18 years of age employed in occupations prescribed by national laws or regulations shall be subject to regular medical control; 10 to ensure special protection against physical and moral dangers to which children and young persons are exposed, and particularly against those resulting directly or indirectly from their work.

of children aged 12 to 14 years in child labour are out of school. Child labour is more prevalent among boys than girls at every age. When household chores performed for at least 21 hours per week are taken into account, the gender gap in child labour narrows. The prevalence of child labour in rural areas (14 per cent) is close to three times higher than in urban areas (5 per cent).

Children in child labour are at risk of physical and mental harm. Child labour compromises children's education, restricting their rights and limiting their future opportunities, and leads to vicious inter-generational cycles of poverty and child labour.

As part of the International Year for the Elimination of Child Labour, the global partnership Alliance 8.7, of which UNICEF and ILO are partners, is encouraging member States, business, trade unions, civil society, and regional and international organizations to redouble their efforts in the global fight against child labour by making concrete action pledges[6]

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CONSIDERATIONS REGARDING THE AMENDMENT AND COMPLETION OF LAW NO. 286/2009 ON THE CRIMINAL CODE BY EMERGENCY ORDINANCE NO. 28/2020. PRACTICE AND COMMENTS ON ART. 352 CRIMINAL CODE

PhD. Lecturer, Decebal-Manole BOGDAN[1]
PhD. associate professor, Alisa-Valeria TOMA[2]

Abstract

The medical world, the law system, daily life, have undergone overwhelming changes at the international and implicitly national level, following the outbreak of SARS -CoV-2 in 2020.

Taking into account the attempts to prevent and combat the COVID-19 virus, the most non-specific human reactions have been triggered in society (some based on medical effects generated by the fear produced), often by citizens committing actions inconsistent with the criminal norms in force.

In view of these aspects, we conclude that most such behaviors cannot be framed in the patterns established by the legislator for meeting the type of crime of preventing the fight against diseases – in the manner provided by Article 352 of the Convention

It requires a thorough, just analysis, in which each action of this kind is particularly regarded, a study of the individual's behavior in a certain context and determined by a certain state of fact.

Keywords: *quarantine, isolation, infectious diseases; emergency ordinance, Criminal Code, more favorable criminal law, preventing the fight against diseases*

Following the publication in the Official Gazette of Romania of O.U.G. no. 28/2020 amending and supplementing Law no. 286/2009 on the Criminal Code, the offense described in Art. 352 of the Criminal Code has undergone content changes.

Among the main controversies that arose after the appearance of these ordinances was also its uncertain character: *Can it be considered a temporary criminal law or on the contrary*?

In accordance with the provisions of the Criminal Code Article 7 paragraph 2, *the temporary criminal law i*s the one that clearly specifies the date of its exit from force (GEO no. 28/2020 does not provide for such a provision) or whose applicability is limited by the transitional character that determined its adoption.

[1] "1 Decembrie 1918" University of Alba-Iulia, decebal.bogdan@uab.ro
[2] "1 Decembrie 1918" University of Alba-Iulia, alisa.toma@uab.ro

Consequently, GEO No. 28/2020 cannot be regarded as a temporary criminal law (since its validity is not explicitly mentioned), but the situation also becomes uncertain because it is not clearly indicated that it is not of a temporary nature.

In support of the previous statements, we bring into attention *the provisions of Art. 7 C.C.* on the application of the temporary criminal law:

(1) the temporary criminal law shall apply to the offense committed during its time in force, even if the act was not prosecuted or tried during that time;

(2) the temporary criminal law is the criminal law that provides for the date of its exit from force or whose application is limited by the temporary nature of the situation that imposed its adoption.

The following are *the amendments made to Article 352 of the C.C. by GEO no. 28/2020:*

(1) failure to comply with quarantine or hospitalization measures ordered to prevent or combat infectious diseases shall be punished by imprisonment from 6 months to 3 years or by a fine.

(2) failure to comply with the measures regarding the prevention or control of infectious diseases, if the act resulted in the spread of such a disease, shall be punished by imprisonment from one to 5 years

(3) the transmission, by any means, of an infectious disease by a person who knows that he is suffering from this disease shall be punished by imprisonment from 2 to 7 years and the prohibition of the exercise of certain rights.

(4) If the act referred to in paragraph (2) is committed by fault, the punishment shall be imprisonment from 6 months to 3 years or a fine.

(5) If by the acts referred to in paragraphs (1) and (2) the personal injury of one or more persons occurred, the punishment shall be imprisonment from 2 to 7 years and the prohibition of the exercise of certain rights, and if the death of one or more persons occurred, the penalty is imprisonment from 5 to 12 years and prohibition of the exercise of rights.

(6) If by the act referred to in paragraph (3) there has been the bodily harm of one or more persons, the punishment is imprisonment from 3 to 10 years and the prohibition of the exercise of certain rights, and if the death of one or more persons has occurred, the penalty is imprisonment from 7 to 15 years and prohibition of the exercise of rights.

(7) If by the act referred to in paragraph (4) there has been the bodily harm of one or more persons, the punishment is imprisonment from one to 5 years and the prohibition of the exercise of certain rights, and if the death of one or more persons has occurred, the penalty is imprisonment from 2 to 7 years and prohibition of the exercise of rights.

(8) the attempt at the offense referred to in paragraph (3) shall be punished.

(9) quarantine means the restriction of activities and the separation from other persons, in specially arranged spaces, of sick or suspicious persons, in a manner that prevents the possible spread of infection or contamination.

As we can see, paragraph 1 of Article 352 enriches its legal content. Thus, compared to the previous provision:

"Failure to comply with the measures regarding the prevention or control of infectious diseases, if it has resulted in the spread of such a disease, shall be punished by imprisonment from 6 months to 2 years or by a fine."

It changes and will have the content:

"Failure to comply with quarantine or hospitalization measures ordered to prevent or combat infectious diseases shall be punished by imprisonment from 6 months to 3 years or by a fine."

It can be seen the increase of the special maximum penalty: from 2 to 3 years.

It is considered an offense under the above provisions and if it is not mentioned that it would give rise to an immediate consequence or any danger to public health – only non-compliance with the measures is sufficient.

G.O. no. 28/2020 defines the term "quarantine" as: "Restriction of activities and separation from other persons, in specially arranged spaces, of persons who are sick or who are suspect, in a manner that prevents the possible spread of infection or contamination".

However, the action considered an offense under paragraph 1 concerns the violation of quarantine or hospitalization measures.

Another remark is that the persons considered to be the perpetrators of the crime are: On the one hand the sick, on the other the suspects.

It should be stressed that GEO no. 28/2020 is in opposition to the provisions of the Order of the Ministry of Health No. 414/2020 regarding the understanding of the term quarantine: "for the purposes of this order, quarantine means both the institution of the institutionalized quarantine measure (in specially arranged spaces) and the institution of the home isolation measure." Comparing the two regulations in force**, Order of the Ministry of Health No. 414/2020 refers *stricto sensu* only to the field concerned (of this order), resulting in the meaning of the term in criminal matters not having the same applicability.**

The criminalization of unlawful action by Article 352 paragraph (1) refers only to non-compliance with the institutionalized quarantine measures; in other words, paragraph 9 defines quarantine as "restriction

of activities and separation from other persons, in specially arranged spaces". The explanation of the term "quarantine" in paragraph 9 does not include isolation at home, as provided for in who No 414/2020.

The conclusion regarding the non-compliance with the home isolation measure is that: If it has not produced any ill effect of another person, it does not fall within the scope of the violation of the norms of criminal law.

The clarification comes later, through Law no. 136/2020 republished on the establishment of measures in the field of public health in situations of epidemiological and biological risk that have the following significance:

- "quarantine of persons - a measure to prevent the spread of infectious diseases, consisting of the physical separation of persons suspected of being infected or carriers of a highly pathogenic agent from other persons, in premises specially designated by the authorities, at home or at the location declared by the quarantine person, established by a reasoned individual decision of the public health directorate, which shall contain particulars of the date and issuer of the act, the name and identification details of the person quarantined, the duration of the measure and the legal remedy.

As we can see, paragraph 2 of Article 352 enriches its legal content. Compared to the previous provision, we note that the similarity is approximately total, except for the penalty limits; thus, the new regulation is:

Art. 352 paragraph 2: "Failure to comply with the measures regarding the prevention or combating of infectious diseases, if the act resulted in the spread of such a disease, shall be punished by imprisonment from one to 5 years" (is practically the text previously existing in the Criminal Code).

Versus the previous provisions:

Art. 352 paragraph 1: "Failure to comply with the measures regarding the prevention or control of infectious diseases, if it has resulted in the spread of such a disease, shall be punished by imprisonment from 6 months to 2 years or by a fine"

The criminal penalty is more widespread this time. this is all about the prevention or control of infectious diseases.

This category also includes non-compliance with the measures provided by the Military Ordinance no. 1/2020.

A special condition is that of the legal consequence provided by the incrimination text: Whether it has resulted in the spread of the disease.

Controversies in the doctrine have arisen regarding the notion of "spreading" (the disease has been spread in several parts) versus "transmission" (the disease has been propagated/taken only once).

Regarding immediate follow-up: The bodies with attributions of criminal liability are obliged to provide evidence demonstrating that the

person with whom the person who has been in contact has evaded quarantine or isolation at home, has been infected or has contacted the virus.

In the following we will present paragraph 3 of Article 352 C.C.:

"*The transmission by any means of an infectious disease by a person who knows that he is suffering from this disease shall be punished by imprisonment from 2 to 7 years and the prohibition of the exercise of certain rights*."

The condition is clear: The perpetrator knows that he is a carrier of disease and it is confirmed that he is ill. Otherwise, the person may not be held liable for criminal offenses in the form of the Commission of Article 252(3), but the classification may be made in the variant provided for in paragraph 2 of Article 352.

Further attention shall be paid to the *form of guilt* with which the acts referred to in paragraphs 2 and 3 are committed.

Thus, as regards the normative version provided for in paragraph 3, we are talking about direct intention or indirect intention.

Regarding the wording "had as a result" leads to the conclusion that the crime was committed with outdated intention (the term being specific in criminal law for praeterintentionality): The non-observance of the measure is intentional, and the spread of the disease is done by fault, as a result of a negligent attitude of the author.

The active subject differs from the variant provided in paragraph 2 (it is not necessary here for the perpetrators to know that they have the disease) compared to the variant provided in paragraph 3 (it assumes that people know that they have the disease).

Because of this difference, **a problem arises with those who are suspected of the disease and have manifestations that show that they want to pass it on, if they have it, to another** (for example, deliberately touching other people, intentionally coughing in front of them). On the one hand, their act does not fall under paragraph (3), because they do not know themselves sick (being suspects, it is only possible to have the disease). On the other hand, by not complying with the preventive measures, they aim to transmit the virus, if they would be infected objectively, even if they do not know it yet (for example, they have not yet been notified of the test result). Such attitudes characterize the intention, not the overdone intention.

There is a technical problem of framing here. In paragraph (3) this is not possible, since it is not about people who know they have the disease. In paragraph (2), if we look at the law as imposing outdated intent, it does not fall again, because they wanted to transmit the virus, they did not do it out of negligence. Moreover, if these persons are of the category of those who have fled from isolation at home, their act does not fall under Article 352 paragraph (1). Basically, the hypothesis is dangerous, but unregulated.

One can, however, draw upon an interpretation by argument a fortiori: if paragraph (2) criminalizes the intentional non-observance by any person of the prevention or control measures, which generated the culpable spread of the disease, the more criminalizes the non-observance by any person of the control measures with the intention of spreading the disease. This would also cover the hypothesis of suspects seeking to infect others (for the hypothesis that they are later confirmed to have the disease).

But, in the absence of a clear indictment, an interpretation like the one above is exactly what should not be done in criminal matters.

Art. 352 paragraph (4) C.C. Provides that the Commission of the crime incriminated in paragraph (2), by fault, shall be sanctioned with imprisonment from 6 months to 3 years or with a fine.

Aggravated forms according to the consequences:

Art. 352 paragraph (5) C.C. regulates aggravated forms, depending on the result produced. They relate to the forms of committing the offense in the first 2 paragraphs, and impose the punishment of imprisonment from 2 to 7 years and the prohibition of the exercise of rights, if the acts have resulted in the bodily harm of one or more persons, that is the punishment of imprisonment from 5 to 12 years and the prohibition of the exercise of some rights, if the deeds have caused the death of several persons.

Art. 352 paragraph (6) C.C. provides for aggravated forms for the option of committing the offense under paragraph (3), when the result is the bodily injury of one or more persons the punishment being imprisonment from 3 to 10 years and the prohibition of the exercise of certain rights, and when the result is the death of one or more persons, the punishment is imprisonment from 7 to 15 years and the prohibition of the exercise of certain rights.

According to Article 352 paragraph (7) C.C., if by the act provided in paragraph (4) the personal injury of one or more persons occurred, the punishment is imprisonment from one to 5 years and the prohibition of the exercise of certain rights, and if the death of one or more persons occurred, the penalty is imprisonment from 2 to 7 years and prohibition of the exercise of rights.

As far as we are concerned, we believe that it would be more appropriate to opt for the solution on non-compliance with prevention and combating measures and crimes against the person, by means of an express reference in a single paragraph. This would probably respect the internal legal coherence of our criminal law system and achieve a progressive penalty based on the outcome, particularly relevant when the facts are intentional.

Case text

Sentence No. 235/2021 of 16th of December, 2021, Court Feteşti, failure to combat diseases (art. 352 C.C.)

Criminal Sentence from December 16, 2021

vs Individual, Individual

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ECLI code ECLI:RO:JDFET:2021:002._____

Personal data operator 4043

This document contains personal data

File no. _____

ROMANIA

FETEŞTI COURT OF IALOMIŢA COUNTY

CIVIL JUDGMENT NO. 235

meeting of December 16, 2021

The court consisting of:

President: C_____ R____ C_____

Clerk: P_____ M_____

PUBLIC MINISTRY – The Prosecutor's Office attached to the Court represented by

Prosecutor: D_____ D _____

The pending resolution of the criminal case regarding the defendants A_____ A _____ A ____ and P_____ M_____ sent to court for committing the crime of thwarting the fight against diseases prev. of art. 352 para. 1 C.pen. amended by GEO no. 28/2020.

The debates on the merits of the case took place in the public session on May 20, 2021, being recorded in the conclusion of the session from that date, which is an integral part of this, and the court, needing time for deliberation, postponed the pronouncement to this date, when in the same composition, ordered the following:

INSTANCE

Deliberating on the present criminal case, it notes the following:

1. The factual situation and the legal framework retained by the indictment

Through the indictment no. 514/P/2020 of the Prosecutor's Office attached to the Feteşti Court, it was ordered to send the defendants A_____ A _____ A ____ and P_____ M_____ to court, in a state of freedom, for committing the crime of thwarting the fight against diseases provided for by art. 352 para. 1 Criminal Code.

In the reporting act, the following factual situation was noted:

In the evening of 11.04.2020, around 19:00, the defendants A_____ A _____ A ____ and P_____ M_____ violated the provisions of Military Ordinance no. 7 of 04.04.2020, by which quarantine was instituted in the

city Tăndărei during the entire period of the state of emergency, leaving the locality through a point other than those established by the ordinance and unjustifiably, with the aim of moving to the municipality of Slobozia, although they knew that a quarantine had been established in the city Tăndărei, Ialomiţa county.

2. Procedure of the preliminary chamber

The case was registered in Feteşti Court on 11.05.2020 under file number _____.

By conclusion no. 93 pronounced on 21.08.2020 the judge of the preliminary chamber found the legality of the notification to the court with the indictment no. 514/P/2020 dated 05.05.2020 of the Prosecutor's Office attached to the Feteşti Court and it was ordered to start the trial of the case regarding the defendants A_____ A _____ A ___ and P_____ M_____.

3. Relevant aspects related to the judicial investigation

Following the court 's request, on 02.12.2020, the criminal record sheets of the defendants were submitted to the case file (tab 9, 10 of the file).

At the court date of 26.10.2021, the court informed the defendant A_____ A _____ A ___ of the provisions of art. 374 para. 4 of the Criminal Code, according to which he can request that the judgment of the case be based on the evidence administered during the criminal investigation and the documents submitted by the parties, if he fully recognizes the facts held in his charge, in which case he benefits from the reduction of the prescribed punishment limits by law for the crimes held in his charge by 1/3 in the case of conviction or postponement of the application of the penalty, respectively by 1/4 in the case of the penalty of a criminal fine, according to disp. Art. 396 para. 10 of the Civil Code, and showing that he fully recognizes the facts contained in the court 's report.

The court proceeded to listen to the defendant A_____ A _____ A ___, by videoconference according to art. 375 para. 1 Cpp. *(*declaration from pages 97-98).

The defendant P_____ M_____ did not appear at any court date, from the minutes of the execution of the arrest warrants, it appears that he is abroad.

Analyzing the documents and works of the file, respectively the evidentiary material administered during the criminal investigation, the court remember the following:

The actual situation

In the indictment no. 514/P/2020 of the Prosecutor's Office attached to the Feteşti Court, the following factual situation was observed:

On 11.04.2020, around 20:00, the workers of the County Gendarmerie Inspectorate Ialomiţa, are in the exercise of service duties regarding compliance with the provisions of Military Ordinance no. 7/2020, were officially informed about the fact that, on the east side of the Strachina forest, in the area of the road near the forester's canton, from the SPE 2A station, a black car, later identified as a Ford Mondeo and registered with the number _____, avoided the road filter and left the territorial constituency of the city Tăndărei, Ialomiţa county.

Giving efficiency provisions of art. 61C.pr.pen., the gendarmerie workers followed the car, which they stopped in order to carry out the control, in the area of the exit from the Strachina forest, on the stone road that connects with DN2A, near the town of Ograda, county. Ialomita.

In that circumstance, the gendarmerie workers established that the car was driven by the defendant A_____ A _____ A ___ and the passenger seat was occupied by the defendant P_____ M_____.

After detection, the defendants verbally declared to the investigative bodies that they avoided the road filters because they were aiming to move to the municipality of Slobozia in order to meet their girlfriends, although they were aware of the provisions of Military Ordinance no. 7/2020 according to which they were obliged not to unjustifiably leave the quarantined town of Tăndărei.

From the checks that were carried out shortly after through the County Center for Management and Coordination of Intervention, it emerged that the two defendants did not appear in the records with the mention of isolation at home.

By order dated 11.04.2020, the Ford Mondeo car with the registration number _____, used by the defendants to travel out of the city Tăndărei, Ialomiţa county, was raised in order to continue investigations according to art. 169 Criminal Procedure Code.

Being heard, the defendants A_____ A _____ A ___ and P_____ M_____, admitted to committing the acts held against them, declaring in essence that, on 11.04.2020, they decided to leave the town of Tăndărei, knowing the ban imposed by the quarantine measure.

Thus, the two defendants got into the Ford Mondeo car, driven by the defendant A_____ A _____ A ___, around 19:00, bypassing the police filter through the field area located on the west side of the city, next to Pădurea Strachina, crossing an earth embankment, then a farm and a sewage treatment plant, until the DN2A exit.

The two defendants then reported that when they arrived in the DN2A area, at around 19:45, they were stopped by the control bodies.

Regarding the car used, the defendant A_____ A _____ A ___ showed that it was purchased approximately 2 months ago and he was going to register it in his name.

The two defendants left the town of Tăndărei, Ialomiţa county, in order to meet their girlfriends.

According to Military Ordinance no. 7/2020 regarding measures to prevent the spread of Covid-19 from 04.04.2020, within Chapter I, the quarantine measure was instituted in the city Tăndărei, Ialomiţa county, starting from 05.03.2020 at 23:00 (Romanian time).

In the content of art. 2, in the locality of Tăndărei, Ialomiţa county, entry and exit respectively are allowed for:

a) freight transport, regardless of its nature, of raw materials and resources necessary for development economic activities in the locality, as well as population supply ;

b) people who do not live in the quarantined area *(*the city Tăndărei, Ialomiţa county) but which carries out economic activities or in the field of defense, public order, security national, sanitary, emergency situations, local public administration, assistance and social protection, judiciary, public utility services, energy, agriculture, public food, water supply, communications and transports.

Art. 4 – In the quarantined locality according to art. 1, all prohibitions apply accordingly and the restrictions established by the military ordinances issued during the state of emergency.

Art. 5 – The County Center for Coordination and Management of the Intervention is empowered Ialomiţa in order to establish additions and derogations regarding the provisions provided for in art. 2, with the agreement of the County Committee for Emergency Situations.

Art. 6 – (1) Bodies with attributions in the field of defense, public order and SAFETY national authorities will establish specific measures to prevent and limit the entry and exit of people in/from the town of Tăndărei.

(2) The authorities local public administration and counties will inform the obligations of individuals, regarding travel and access to/from the town of Tăndărei, Ialomiţa county.

(3) The application of verification, control and access measures in/from the town of Tăndărei, Ialomiţa county is carried out by the staff of the structures of the Ministry of Internal Affairs in collaboration with those of the Ministry of National Defense.

Art. 7 – County Council Ialomiţa, the mayor and the City Council Tăndărei, Ialomiţa county, will take measures to ensure the functioning of the protection services and social assistance, the proper functioning of public utility services, as well as the supply of basic food for people without supporters or other forms of help and who cannot move from their home /household.

exit to/from the city is strictly prohibited Tăndărei, Ialomiţa county, through other areas and access roads than those open to public traffic on European, national, county roads and communal.

In conclusion, according to the measures ordered by Military Ordinance no. 7/2020 (pages 32-35), correlative to those ordered by Decision no. 13 of the County Committee for Emergency Situations Ialomiţa from 04.04.2020 at 20:00 (pages 36-38), the defendants A_____ A _____ A ___ and P_____ M_____ could not justify their departure from the quarantined town of Tăndărei, on 04/11/2020.

The means of evidence can be administered in all phases of the criminal process, the law not making any distinction regarding their probative force in relation to the circumstance if they were administered during the criminal investigation or judicial investigation.

Being heard during the trial, the defendant A_____ A _____ A ____ admitted the commission of the act as it was apprehended by the criminal investigation bodies (files 97-98 di).

Against these considerations, the court finds that the administered evidence proves beyond any reasonable doubt that the two defendants unjustifiably left the quarantined area of the City Tăndărei on 11.04.2020.

Regarding the normative framework applicable to the factual situation, the court remember the following:

On 30.01.2020, the World Health Organization declared a public health emergency at the international level, due to infections with the new Coronavirus.

In view of this situation, on 04.02.2020 GEO 11/2020 was adopted regarding medical emergency stocks, as well as some measures related to the establishment of quarantine.

According to art. 8 paragraph (1) of this normative act, in the case of epidemics/pandemics or international public health emergencies declared by the World Health Organization, if there is an imminent risk to public health, in compliance with the International Health Regulations (2005), upon the proposal To the technical group of experts of the Ministry of Health, the Minister of Health institutes quarantine for people who _____ from the affected areas, as a measure to prevent and limit illnesses.

Pursuant to art. 8 paragraph (1) of GEO 11/2020, on 11.03.2020 issued Order of the Minister of Health no. 414/2020 regarding the establishment of the quarantine measure for persons in the situation of international public health emergency determined by the infection with COVID-19 and the establishment of measures to prevent and limit the effects of the epidemic.

According to art. 1 paragraph (1) from Order 414/2020, within the meaning of this order, quarantine means:

a) institutionalized quarantine in specially arranged spaces ;

b) home quarantine;

c) isolation at home;

d) the quarantine of a community represents quarantine at a declared location, as a result of the establishment of the quarantine measure of some buildings, localities or geographical areas, according to the law.

On 04.04.2020, Military Ordinance no. 7/2020 by which the quarantine measure in the city was established during the state of emergency Tăndărei, Ialomiţa county.

Later, by Decision no. 458/2020, published in M. Of. no. 581 of July 2, 2020, the Constitutional Court found that the provisions of art. 25 para. (2) the second sentence of Law no. 95/2006 and of art. 8 para. (1) from Government Emergency Ordinance no. 11/2020 are unconstitutional.

In the justification of the Decision, the constitutional court held in paragraph § 71 that, although the examination of the provisions of the orders issued by the Minister of Health does not fall within the competence Court Constitutional, the regulations of the Order of the Minister of Health no. 414/2020 are relevant to establish that the quarantine measure ordered in Romania in the context of the epidemic determined by the infection with COVID-19 could be qualified, in certain situations, as a genuine deprivation of liberty, as well as an implicit restriction of exercise fundamental rights provided by art. 25 and art. 26 of the Constitution, so it is imperative to regulate it at the level of primary legislation, respecting all conditions constitutionally and international agreements in the matter, which the Court retained and in terms of compulsory hospitalization.

Therefore, it is required to establish through a law, in the sense of art. 53 of the Constitution, of the conditions for establishing the quarantine, of the forms that this measure can take, depending on the needs, and of a procedure, even if it is more general, so that it represents a flexible framework for an adequate intervention of administrative authorities.

Also, the Court considers it imperative to ensure an effective right of access to justice, especially when the quarantine acquires all the characteristics of a deprivation of liberty.

In this sense, the Court recalls that the quarantine measure can be ordered in several forms, implying different degrees of restriction of the exercise of the rights of the persons to whom this measure was applied, and the judicial control must ensure not only the possibility of verifying the compliance of the administrative act with the legal provisions and constitutional, but also analyzing the proportionality of the measure ordered, in relation to the concrete situation considered.

As can be seen from the documents and papers of the file, the court finds that although there was an escape of the defendants A_____ A _____ A ___ and P_____ M_____ from the quarantine measure of a community established by Military Ordinance no. 7/2020, this act cannot be given a criminal character, since in the situation inferred to the judgment, the conditions of objective typicality of the crime of thwarting the fight against diseases provided for by art. 352 para. (1) of the Criminal Code.

The term "quarantine" is defined by para. (9) of art. 352 Criminal Code, respectively the restriction activity and the separation from other people, in specially designed spaces, of people who are sick or who are suspected of being sick.

Thus, the persons who can be subject to quarantine, in the sense of the criminal law, are sick persons or persons suspected of being sick.

Therefore, in the sense of the criminal law, in order for the quarantine measure to have been ordered regarding the defendants A_____ A _____ A ___ and P_____ M_____, they had to be sick or suspected of being sick, or there is no evidence in the case file to attest to this fact.

The court finds that the provisions of the criminal law regarding quarantine are different from the provisions of Order 414/2020, which defines several types of quarantine, including the quarantine of some communities by establishing the quarantine measure of some buildings, localities or geographical areas.

The definition in the Order is applicable only in the matter that the order regulates; in criminal matters, the definition of quarantine is different. Comparing the provisions of art. 352 para. 9 C.pen. with those of art. 1 of MS Order 414/2020, regarding the quarantine of some communities, the court finds that the scope of the two regulations is different.

Moreover, analyzing the provisions of art. 352 para. 1 Penal Code, the court finds that neither the premise situation to be detained the crime of thwarting the fight against diseases is not fulfilled in the case.

Thus, for the existence of the crime, the pre- existence of mandatory provisions in terms of prevention and, on the other hand, the violation of these provisions by the defendants is necessary.

In relation to the normative considerations and previously exposed jurisprudence, the court notes that on the date the defendants left the quarantined area of the city Tăndărei (11.04.2020), at the level of the primary legislation, the measures for the prevention and management of emergency situations generated by the COVID-19 pandemic were not drawn up, regulation to complement the already existing secondary legislation and

there was no primary legal framework in force on which to base the restriction or deprivation of liberty of the person for reasons of public health.

Although the legislator aligned himself with the requirements constitutionally and international and Law no. 136/2020 regarding the establishment of measures in the field of public health in situations of epidemiological and biological risk, which entered into force on 21.07.2020, the court remembers that on the date of adoption of the conduct that is criticized to the defendants by indictment (11.04.2020), the conditions for establishing and terminating the quarantine, the forms that this measure can take and the procedure that had to be followed depending on the situation in which the person subject to this measure was, were not established through a law that respects the requirements of clarity and predictability.

Against the arguments presented, the court appreciates that the concrete fact inferred to the judgment does not correspond to the standards of objective typicality of the crime of thwarting the fight against diseases provided by art. 352 para. (1) of the Criminal Code, context in which it will order the acquittal of the defendants A_____ A _____ A ____ and P_____ M_____ based on disp. Art. 16 para. (1) lit. b) sentence I of the Code of Criminal Procedure, because the deed inferred to the judgment is not provided for by the criminal law.

In relation to the solution of acquittal ordered on the merits of the case, the court will reject as unfounded the request of the Prosecutor's Office based on prev. Art. 112 para. 1 lit. b) from C.pen., regarding the disposition of the security measure of the special confiscation of the Ford Mondeo car with no. _____, no. identification number ACFR2G0013T17E, used by the defendants, and pursuant to art. 255 C.pr.pen. will order the return of the property to the owner.

FOR THESE REASONS

IN THE NAME OF THE LAW

RULES:

Pursuant to art. 396 para. 5 reps. to art. 16 para. 1 lit. b) thesis I C.pr.pen. acquits the defendant A_____ A _____ A ____, son of D_____ and I_____, born on 25.08.2001 in Slobozia municipality, Ialomiţa county, domiciled in the city Tăndărei, go away. Bucharest, _____, apartment 17, CNP _____, holder of CI _____, no. _____, issued by the Tăndărei SPC on 19.07.2019, unknown criminal record, in terms of committing the crime of thwarting the fight against diseases, prev. of art. Art. 352 para. 1 Penal Code, act committed on 11.04.2020.

Pursuant to art. 396 para. 5 reps. to art. 16 para. 1 lit. b) thesis I C.pr.pen. acquits the defendant P_____ M_____, son of A_____ and

A_____, born on 19.05.2000 in Slobozia municipality, Ialomiţa county, domiciled in the city Tăndărei, _____. 7, the county Ialomiţa, CNP _____, holder of CI _____, no. _____, issued by the Tăndărei SPC on 17.05.2018, without criminal record, under the aspect of committing the crime of thwarting the fight against diseases, prev. of art. Art. 352 para. 1 Penal Code, act committed on 11.04.2020.

It rejects as unfounded the request of the Prosecutor's Office based on prev. Art. 112 para. 1 lit. b) from C.pen., regarding the disposition of the security measure of the special confiscation of the Ford Mondeo car with no. of registration _____, no. identification number ACFR2G0013T17E, used by the defendants, and pursuant to art. 255C.pr.pen. orders the return of the property to the owner.

Pursuant to art. 275 para. 3 C.pr.pen. Legal costs remain the responsibility of the state.

With an appeal within 10 days from the communication, which is submitted to the Feteşti Court.

Pronounced by making the solution available to the parties and the prosecutor through the mediation of the court registry, today December 16, 2021.

PRESIDENT, REGISTRAR,

C_____ R____ C_____ P_____ M_____

Ed./ CRC/PM, 16.12.2021

Bibliography

1. The Criminal Code of Romania
2. Law No. 136/2020 republished, on the establishment of measures in the field of public health in situations of epidemiological and biological risk
3. Emergency Ordinance no. 28/2020 amending and supplementing Law no. 286/2009 on the Criminal Code
4. Order of the Minister of Health no. 414/2020 on the establishment of the quarantine measure for persons in a public health emergency International caused by COVID-19 infection and establishing measures to prevent and limit the effects of the outbreak
5. Sentence No. 235/2021 of 16th of December, 2021 issued by the Fetesti Court, regarding the prevention of disease fighting
6. www.rolii.ro

CHANGES BROUGHT BY LAW NO. 265/2022 REGARDING THE TRADE REGISTER

Amelia-Veronica GHEOCULESCU[1]

Abstract

According to the current regulations, the registration of companies will also be done online, and the registration deadline is 3 days from the date of submission of the application. The publication in the Official Gazette of the documents related to the establishment of commercial companies and the changes made within them will be waived.

An electronic platform will be created through which interested persons can have access to the respective database. All changes brought to the companies must be included in this database within 3 days from the moment of registration.

The legislative changes adopted by the new law of the trade register bring simplifications both in terms of the registration of companies, as well as in terms of the procedure regarding the merger, division and cessation of the activity of a commercial company. All the attributions related to the registration of commercial companies have been taken over by a new category of persons, the commercial registrars, who are officials within the Trade Registry, invested with the power of public authority.

Keywords: *trade register, new regulations, commercial registrar, commercial companies' registration.*

Introduction

After the change of the communist regime, the national legislation began to be modified according to the new era that had entered. This also happened in the commercial field, as Law no. 26/1990 on the commercial register, which - over time - has undergone changes brought about by laws, ordinances and emergency ordinances of the government. In commercial matters, there were major changes in the legislation and after this moment, the year 2011, the year in which the New Civil Code came into force, by which the Commercial Code was repealed, being historic in the matter.

In the field of commercial companies, Law no. 31 adopted in 1990 was maintained, with multiple amendments, the last ones being brought even through the new law of the commercial register.

[1] University of Pitesti, Romania.

Novelty of Law No. 265/2022

One of the obligations of professionals[2] provided by the law of commercial companies is the obligation to publish them through the Trade Register[3]. Everything related to this obligation is to be carried out under the governance of the provisions of the new law of the Trade Register, respectively Law no. 265/2022[4], which will enter into force on November 26, 2022.

Law 265/2022 integrates the primary legislation related to the procedure for registration[5] in the trade register and authorization of the operation/performance of the activity. At the same time, it correlates and standardizes the registration procedures for all categories of natural and legal persons registered in the commercial register and contains specific provisions regarding public access to personal data registered in the commercial register and in the Register of real beneficiaries.

Among the most important changes brought by the new law is the regulation of the procedure for setting up a company[6] online and the simplification of the submission of documents. Several documents will be able to be sent in electronic format, signed with the qualified electronic signature[7]. This involves an advanced electronic signature that is created by a qualified electronic signature creation device and is based on a qualified electronic signature certificate, recognized in all member countries and issued by a qualified trusted service provider.

Thus, the constitutive act[8] can be drawn up online, by completing a standard form, with predefined options, which will be available on the ONRC website; the form-type constitutive act or, as the case may be, the

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[2] Tabacu, A. and Drăghici, A. 2013. *Dreptul afacerilor*. Craiova: Sitech, p. 54; Piperea, Gh.. *Drept comercial. Întreprinderea în reglementarea NCC.* 2012. Bucharest: C.H. Beck, p. 32.

[3] Didea, I. 2015. *Drept comercial. Curs universitar*. Bucharest: Universul Juridic, p. 63.

[4] http://www.cdep. ro/pls/legis/legis_pck.frame, Published in the Official Gazette of Romania
no. 750/26 July 2022.

[5] For the procedure for establishing companies and registration according to Law 26/1990, see Piperea, Gh. *Drept comercial. Întreprinderea în reglementarea NCC,* p. 154.

[6] Baias, Fl., Chelaru, E., Constantinovici, R. and Macovei, I. 2012. *Noul Cod Civil comentariu pe articole*. Bucharest: C.H.Beck, p. 1471.

[7] EU Regulation no. 910/2014, https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX% 3A32014R0910 . It is also used in electronic commerce, considering that it is a faster and more efficient way of concluding contracts; in this sense, see Tudorascu, M. 2013, *Electronic Commerce - Variety of Sale?, „Efficiency of Legal Norms" Review,* Cluj Napoca: Hamangiu.

[8] Cărpenaru, St.D., David, S., Predoiu, C. and Piperea, Gh. 2014, *Legea societăților comerciale. Comentariu pe articole,* Bucharest: C.H. Beck, p. 82.

individualized one[9], is signed by all the founders or their representatives with the qualified electronic signature; registration applications and the documents submitted in support of them, drawn up by lawyers or public notaries, can be signed by them with a qualified electronic signature and can be transmitted by electronic means.

Based on the documents submitted for the registration of a company, the registrars carry out the prior control procedure. If there are suspicions of forgery regarding the identity of the applicant, his representative or any person whose identity is verified in the registration process, the registrar may request their physical presence. The new regulations eliminate the possibility of formulating requests for intervention in the registration procedure, third parties, such as the applicant for registration, having a remedy after the settlement of the registration request - the complaint against the conclusion of the registrar.

The new law provides for the generalization of the resolution authority of the registrar by including other procedures which are not contentious (e.g. mergers[10], including cross-border, divisions). At the same time, the dissolution and radiation of the company, for certain cases that do not have a contentious nature, is ordered by the registrar, with the possibility of contesting the registrar's decision in court.

Another change brought by the new law refers to the procedure for registering branches of companies with their main headquarters in an EU member state, which is simplified by eliminating the documents and information that are, respectively can be obtained or verified through the system of interconnection of registers trade – BRIS[11]. Thus, the use of a central electronic platform, maintained by the commercial register, is required for the publication of acts and facts registered, mentioned, submitted or referred to in, at or by the commercial register, namely the electronic Bulletin of the commercial register.

In considering the interconnection of trade registers in the Member States, the effect of registration in all registers is standardized as that from which the acts, deeds of registered natural and legal persons become opposable to third parties in order to provide a general reference point for both national users and those cross-border. Member States shall ensure

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[9] Gheoculescu, Amelia, 2013. *Contractul de societate civilă – teză de doctorat nepublicată,* p. 36.

[10] Şerban-Barbu, Sorina, 2006. La fusion des sociétés commerciales et l`acquis communautaire. In *The International Conference – The "Acquis Communautaire" A Need For The European Integration*, Universitatea din Piteşti.

[11] EU Directive no. 17/2012 amending Directive no. 89/666/EEC of the Council and Directives no. 2005/56/EC and no. 2009/101/EC of of the European Parliament and of the Council regarding the interconnection central registers of trade and companies, published in the Official Journal of the European Union L156/1/2012.

that companies have a unique identifier[12], which allows their unequivocal identification in communication between registers through the system of interconnection of central, trade and company registers. This unique identifier shall at least include elements to identify the member state of the register, the national register of origin, the company number in that register and, if applicable, elements to avoid identification errors[13].

Registration certificates and ascertaining certificates may also be issued in electronic format, signed with the qualified electronic signature or the qualified electronic seal.

At the same time, according to Law no. 265/2022, the fiscal registration is also carried out, which is the taking into account of the fiscal bodies of the professionals subject to the obligation to register in the trade register, by assigning the unique registration code. For the assignment of the unique registration code by ANAF, the trade register offices transmit, directly or via ONRC, electronically, the data related to the entries made in the trade register and those contained in the tax registration application, which is an annex to the registration application.

The format of the application for fiscal registration is established by joint order of the ANAF president and of the Minister of Justice president, to be included in the application for registration in the trade register.

In this context, the new draft normative act was promoted, approving the model and content of the "Fiscal registration application" form, as well as the instructions for completing it, to ensure the possibility for entities subject to the obligation to register in the trade register to request, together with the registration in the trade register, also the fiscal registration in the tax authority's records.

Another change brought by the new law in this area is related to the personnel of the trade register, respectively the status of the registrar of the trade register. This must have a legal specialty and is appointed to exercise a public service of general interest. Access to the profession is based on an exam or competition, and the registrar is appointed and released from office by the general director of the trade register; in the exercise of the office is not subject to hierarchical control, with regard to the decisions made. The registrar is subject to certain prohibitions and incompatibilities in order to ensure impartiality in the exercise of pre-registration control. The registrar is liable disciplinary, civil and criminal, the prior disciplinary procedure

[12] Each professional registered in the trade register will carry a serial number from the trade register, starting from number 1 every year, granted at the national level from the central trade register.

[13] EU Directive no. 17/2012, provisions transposed into national legislation in the provisions of Law no. 152/2015 for the modification and completion of some normative acts in the field of registration in the trade register, published in the Official Gazette of Romania, Part I, no. 519/13.07.2015.

being provided by this law of the trade register. Remuneration is carried out in accordance with the provisions of Law no. 153/2017 regarding the remuneration of staff paid from public funds.

The trade register is structured on the following register categories:

a) a register for the registration of companies, national companies, national associations, autonomous governments, economic interest groups, European companies, European economic interest groups, other legal entities expressly provided for by law, with their head office in Romania, their branches and, as the case may be, of the branches of legal entities with their main headquarters abroad;

b) a register for the registration of cooperative societies and European cooperative societies with their main headquarters in Romania, their branches and, as the case may be, branches of cooperative societies or European cooperative societies with their main headquarters abroad;

c) a register for the registration of authorized natural persons, individual businesses and family businesses, with professional headquarters and, as the case may be, workplaces in Romania.

The manner of keeping registers, making records, providing services by the ONRC and the offices of the trade register is established by order of the Minister of Justice. The trade register office keeps a file with the applications for registration in the trade register, the documents supporting them, the documents on the basis of which the entries in the trade register are made and the documents certifying the registration, for each registered professional.

Conclusions

The law on the trade register brings as a novelty the regulation of online access to information on companies, including information on companies registered in other member states of the European Union and, in order to improve the accessibility of the public service of the trade register, ensures the availability of extensive and updated information on the establishment and the functioning of societies.

In considering the interconnection of trade registers in the Member States, the effect of registration in all registers is standardized as that from which the acts, deeds of registered natural and legal persons become opposable to third parties in order to provide a general reference point for both national users and those cross-border.

The new law integrates the primary legislation related to the procedure of registration in the trade register and authorization of the operation/performance of the activity. At the same time, it correlates and standardizes the registration procedures for all categories of natural and legal persons registered in the trade register and contains specific

provisions regarding public access to personal data registered in the trade register and in the register of real beneficiaries.

By adopting this law, Romania achieves one of the objectives imposed by the European Union on the member states, namely the one regulated by EU Directive no. 17/2012 regarding the interconnection central registers of trade and companies.

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THE ARBITRARINESS OF THE TAXATION OF THE NATURAL PERSON WHO OWNS NON-RESIDENTIAL BUILDINGS IN PROPERTY

Ph.D. Bogdan FLOREA[1]

Abstract

The methodological norms for the application of the Fiscal Code, norms that are an administrative act having the role of implementing the provisions of the law, qualify ab initio non-residential buildings owned by individuals as being used for non-residential purposes. This qualification is doubtful if we apply the principles of taxation certainty and fiscal equity, or the principles of legal security and legitimate trust enshrined in European Union law.

Also, the retroactive and penalizing taxation of the taxpayer violates the principle of proportionality.

Keywords: *taxation on non-residential buildings, certainty of taxation, fiscal equity, proportionality.*

Starting from 2016, with the entry into force of the Romanian Tax Code approved by Law no. 227/2015, the distinction between residential and non-residential buildings became relevant for taxation. After 2016, the situation became complicated for the building owners - natural persons, whose buildings had a non-residential destination in the building permits (i.e. commercial space, hairdresser, offices, etc.) but which, for various reasons, were used in residential purpose.

The Methodological Norms for the application of the Tax Code give priority to the destination established in the cadastral documentation as being relevant for taxation, regardless of the real use of the space. However, art. 453 letters e) and f) of the Tax Code[2] make an express

[1] Assistant Professor at "1 Decembrie 1918" University of Alba Iulia, e-mail: bogdan.florea@uab.ro

[2] We reproduce the provisions of art. 453 letters e) and f) of the Tax Code:
Definitions
Within the meaning of this Title, the phrases below have the following meanings:
(...)
e) *non-residential building* - any building that is not for residential purposes;
f) *residential building* - construction formed of one or several rooms used for housing purposes, with the dependencies, endowments and necessary utilities, that satisfies the housing requirements of a person or a family;

mention of the use of the building and not about its destination from the cadastral documentation.

The Tax Code does not establish *per se*, the taxation of goods according to the destination from the cadastral documentation. This interpretation is given by the Methodological Norms for the application of the Tax Code, which is an administrative act with a normative character. Through the Methodological Norms for the application of the Tax Code, non-residential buildings owned by the natural person are considered *ab initio* as being used for non-residential purposes, which may be in opposition with the principle of certainty of taxation. The natural person could not prevent legislative changes that could significantly affect his financial management decisions at the time he applied for the building permit (for example, the natural person can no longer exploit the building for non-residential purposes due to illness, but he will be taxed in the same way as another who exploits for non-residential an identical building).

The principle of certainty of taxation requires that the tax legal rules be clear enough not to rise arbitrary interpretations of them, neither by the taxpayer nor by the tax authority. Also, each payer must have the benefit that all payment terms, methods and amounts are precisely established and, at the same time, the payer must have the opportunity to follow and understand the fiscal burden that falls on him. The payer should also be able to determine to what extent his decisions of financial management will influence the fiscal burdens incumbent upon him. In other words, clear fiscal rules, easy to understand and follow, allow the taxpayer to become aware of his fiscal tasks, when he decides to make a certain financial management decision.

The principle of certainty of taxation in the Tax Code is seriously questioned by the significant difference in taxation between residential and non-residential buildings when the last ones are not used in non-residential purpose.

The Constitutional Court of Romania has shown that "*the legal system of taxation must ensure the fair settlement of fiscal burdens, which necessarily implies subordination to a principle of equity and social justice, in order to correspond to the social character of the state, provided by art. 1 paragraph (3) of the Constitution*"[3]. Therefore, "*the fair placement of tax burdens must reflect the very principle of equality of citizens before the law, by imposing identical treatment for identical situations and at the same time, be aware of the contributory capacity of taxpayers, taking into consideration the elements of their individual*

[3] Please see: Decision of the Constitutional Court of Romania no. 176 of May 6, 2003, published in M.Of. no. 400 of June 9, 2003.

situation and social tasks"[4]. "*The constitutional principle of the fair settlement of fiscal burdens to cover public expenses, provided for by art. 56 para. (2)* (our note: of the Romanian Constitution), *also requires the differentiation of the contribution of people who achieve higher incomes. The contribution rate, expressed as a percentage, is unique, having no progressive character, the difference in value of the contribution being determined by the different level of income*"[5].

Also, "*the setting of fiscal burdens must take into account the contributory capacity of the taxpayers, namely the need to protect the most disadvantaged social categories, being aware of the elements that characterize the individual situation and the social burdens of the taxpayers concerned*"[6].

The principle of certainty of taxation regulated by the Romanian Tax Code and the principle of equality before the law through the fair setting of fiscal burdens enshrined at the constitutional level are linked, in our opinion, of two of the basic principles of European Union law, namely the principle of legal security and the principle of legitimate trust.

These principles are specific to national administrative law, but are also applicable internally as an effect of the principles of European Union law. Trust and predictability of administrative action, also known as safety or legal security, include and are supported by a wide range of other principles and mechanisms of administrative law. Although "legal security" was not defined in European legislation, the Court of Justice of the European Union considered itself entitled to examine the compatibility of national rules with "*superior rules of Community law, in particular with [the principle of] legal security*" (Case 77/81, Zuckerfabrik Franken v. Germany, prg. 22), showing that the application of the legislation must be foreseeable, so that people can reasonably foresee the consequences of not complying with the legal provisions and know "*precisely the extent of the obligations*" imposed on them (Case C-209/96, United Kingdom of Great Britain and Northern Ireland former Commission [1998] ECR I-5690, para. 35; Case 348/85, Denmark former Commission [1987] ECR 5248, para. 19). Moreover, the protection of the legitimate expectations of individuals constitutes a central element of legal security, a true principle of the European legal order (Case 112/77, Töpfer & Co. the old Commission

[4] Please see: Decision of the Constitutional Court of Romania no. 1394 of October 26, 2010, published in M. Of. no. 863 of December 23, 2010.

[5] Please see: Decision of the Constitutional Court of Romania no. 452 of September 15, 2005, published in M. Of. no. 917 of October 13, 2005, as well as Decision of the Constitutional Court of Romania no. 56 of January 26, 2006, published in M. Of. no. 164 of February 21, 2006.

[6] Please see: Decision of the Constitutional Court of Romania no. 258 of March 16, 2010, published in M. Of. no. 338 of May 21, 2010.

[1978] ECR 1033, para. 19; Case 127/80, Grogan the old Commission [1982] ECR 884, para. 26; Case T-336/94, Efisol SA the old Commission [1996] ECR II-1356, para. 31)[7].

The Court of Justice of the European Communities ruled that the principle of legal security is part of the community legal order and must be respected by both the community institutions and the member states, when they exercise the prerogatives conferred by the community directives[8].

The principle of legal security correlates with another principle, developed in Community law, namely the principle of legitimate trust. According to the jurisprudence of the Court of Justice of the European Communities (for example the cases Facini Dori v Recre, 1994[9], Foto-Frost v Hauptzollant Lübeck.Ost, 1987[10]), the principle of legitimate trust requires that the legislation be clear and predictable, unitary and coherent and, at the same time, imposes the limitation of the possibilities of modification of the legal norms and the stability of the rules established by them[11].

In this case, one may ask if the principle of legitimate trust is violated or not, as long as the tax body created a legitimate hope for the taxpayer, taxing him based on his declaration for a long period of time (five years) even though it had all the elements (excerpts from the land deed and authorization of constructions attached to the declaration) that allowed the tax body to notice such an "error".

It should also be stated that as long as the building was used in accordance with the tax declarations, namely for residential purposes, the tax body did not suffer any loss of tax revenue, since the taxation was carried out in accordance with the actual use of the property.

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[7] Please see, Decision no. 3021/2019 of High Court of Cassation and Justice, Administrative and Fiscal Litigation Section from 04.06.2019 available at: https://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=155755#highlight=##, accessed on 07.11.2022.

[8] Please see, I. Predescu, M. Safta*, Principiul securităţii juridice, fundament al statului de drept repere jurisprudenţiale*, available at: https://www.ccr.ro/wp-content/uploads/2021/01/predescu.pdf, accessed on 07.11.2022.

[9] Case C-91/92, in Takis Tridimas, „The General Principles of EU Law", Oxford EC LawLibrary, p. 244 *apud*. I. Predescu, M. Safta*, Principiul securităţii juridice, fundament al statului de drept repere jurisprudenţiale*, available at: https://www.ccr.ro/wp-content/uploads/2021/01/predescu.pdf, p. 8, accessed on 07.11.2022.

[10] Case 314/85, in Takis Tridimas, „The General Principles of EU Law", Oxford EC LawLibrary, p. 248 *apud*. I. Predescu, M. Safta*, Principiul securităţii juridice, fundament al statului de drept repere jurisprudenţiale*, available at: https://www.ccr.ro/wp-content/uploads/2021/01/predescu.pdf, p. 8, accessed on 07.11.2022.

[11] Please see, I. Predescu, M. Safta*, Principiul securităţii juridice, fundament al statului de drept repere jurisprudenţiale*, available at: https://www.ccr.ro/wp-content/uploads/2021/01/predescu.pdf, pp. 8-9, accessed at 07.11.2022.

The Tax Code's philosophy is focused on the effective use of a building and not on the scriptural purpose of the building for taxation. The contrary interpretation given by the Methodological Norms for the application of the Tax Code represents an impermissible addition to the law.

Under these conditions, it is not fair to recalculate the tax and penalize the bona fide taxpayer who does not seek to avoid paying taxes, but interprets the tax law provisions of the Tax Code in their logical sense (interpretation different from that of the executive power, established by the Methodological Norms of Application of the Fiscal Code). The tax declaration, in accordance with the reality of the building's use, has been validated by the tax authority, and the payer was taxed in accordance with those declared. He was never notified about the "non-conformities" between the declaration and the documents attached to the declaration (such as the mentions in the cadastral documentation regarding the non-residential destination of the space declared and used for residential purposes).

Art. 14 of Tax Procedure Code establishes the principle of the prevalence of the economic content of fiscally relevant situations, so the tax body (as well as the executive power that issues methodological norms of application) must interpret the factual situations relevant from a fiscal point of view in accordance with their economic reality, determined on the basis of evidence administered according to the Tax Procedure Code. According to this principle, the fiscal body must take into account only the provisions of the fiscal legislation, without taking into account the fact that a certain operation meets or not the requirements of other legal provisions. In this case, the destination in the cadastral documents is irrelevant, as long as it is proven, without any doubt, that the building was used for residential purposes, and the fiscal body did not produce evidence to the contrary.

The addition to the law of the Methodological Norms for the application of the Tax Code can be considered as violating the very constitutional principle of the legality of taxes and fees, enshrined in art. 139 para. (1) of the Romanian Constitution, a practice also found in the matter of transfer prices, where Order of the ANAF President no. 442/2016 illegally intervenes in the powers of the legislator and regulates, primarily, in the matter of profit tax, establishing the benchmarks according to which taxable income is calculated in relations with affiliated entities[12].

[12] Please see, R. Bufan, *Sursele (izvoarele) dreptului fiscal român. Poziția reglementărilor OCDE. Forța juridică a dispozițiilor OPANAF nr. 442/2016 privind prețurile de transfer*, in *Revista Consultant Fiscal*, no. 75/2022, pp. 12-13.

We also note that, similar to Order no. 442/2016, there is a contradiction between the law (the only level of normative act through which taxes and fees can be imposed) and the administrative act with a normative nature subordinate to the law[13]. The Methodological Norms of application of the Tax Code completely ignore the factual economic reality when they absolutely assume that a building given a non-residential purpose in the building permit may only be taxed as non-residential one.

Compliance with the principle of fiscal equity to establish the fiscal burden of each taxpayer based on his contributory power, implies the taxation of the actual use and not of the destination of the buildings owned by natural persons. That is why the taxation of the building by referring only to the non-residential destination registered in the cadastral documentation and not to the actual use of the building owned by natural persons (who in most cases are not professionals) cannot be fair or equitable. There is no equity as long as the citizen is forced to pay the amount established for non-residential buildings even if he does not use the building for non-residential purposes, while another natural person, who owns an identical building, which he uses entirely for non-residential purposes, will pay a lower or similar tax, although it is obvious that the contributive power of the latter is higher.

Retroactive and punitive taxation violates the principle of proportionality established by the Tax Procedure Code regarding the discretion of the tax body in assessing the relevance of fiscal facts. Tax body must produce evidence and adopt the solution based on the legal provisions, as well as on complete findings on all the edifying circumstances in question when making a decision. The fiscal body can exercise its right of appreciation within the limits of reasonableness and equity, ensuring a fair proportion between the goal pursued and the means used to achieve it. Retroactive imposition at the maximum penalty level provided by law[14] appears in this context as disproportionate, especially

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[13] Please see, R. Bufan, *Sursele (izvoarele) dreptului fiscal român. Poziția reglementărilor OCDE. Forța juridică a dispozițiilor OPANAF nr. 442/2016 privind prețurile de transfer*, in *Revista Consultant Fiscal*, nr. 75/2022, p. 13.

[14] We reproduce the provision of Art. 458 of the Tax Code

"Calculation of tax on non-residential buildings owned by the natural persons

(1) For non-residential buildings owned by the natural persons, the tax on buildings shall be calculated by applying a quota between 0.2 to 1.3% on the value that can be:

a) the amount resulting from an valuation report prepared by an authorised evaluator in the last 5 years preceding the reference year, submitted to the tax body until the first payment time limit in the reference year. If the valuation report is submitted after the first payment time limit in the reference year, it takes effect starting on January 1 of the following fiscal year;

b) the final value of construction works, in case of new buildings, built in the last 5 years prior to the reference year;

since it was the fiscal body itself that maintained this error, by confirming over several years the taxpayer's declaration and by determining the tax according to that declaration even though it had all the elements (excerpts from the land register and the technical documents attached to the declaration) that allowed it to notice such an "error".

The Tax Code's philosophy is that the payment of taxes is a legal obligation of the citizen, which occurs when the conditions for its enforceability are met and should not be seen as a right of the fiscal body to establish a tax based on the public power with which is vested. In other words, the relationship between the fiscal body and the citizen is not one of power, but of fulfilling fiscal obligations only on the basis and conditions of the law[15].

Conclusions

The provisions of the Methodological Norms of application of the Tax Code establishing that non-residential buildings owned by the natural person are to be considered *ab initio* as being used for non-residential purposes, oppose to:

(i) the principle of the fair settlement of fiscal burdens for public expenditure, provided for by art. 56 para. (2) of the Romanian Constitution;

(ii) the principle of fiscal equity provided by art. 3 letter c) of the Tax Code and also to the residential and non-residential building definitions found in art. 453 letters e) and f) of the Tax Code;

(iii) the principle of the prevalence of the economic content of the fiscally relevant situations provided by art. 14 of the Tax Procedure Code;

(iv) the principle of proportionality between the goal pursued and the means used to achieve it when it comes to the tax authority's right of appreciation provided for by art. 6 para. (2) of the Tax Procedure Cod. According to this principle the measures established by the national legislation in the field of taxation (including sanctions) cannot exceed what

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c) the value of buildings resulting from the act of transfer of ownership, in case of the buildings acquired in the last 5 years preceding the reference years. If the value is not specified, the last value recorded in the database of the fiscal body is used.

(2) The quota of the tax on buildings is to be set by decision of the local council. In Bucharest, this power lies with the General Council of Bucharest.

(3) For non-residential buildings owned by natural persons, used for activities in agriculture, the tax on buildings is calculated by applying a quota of 0.4% on the taxable value of the building.

(4) In case the value of the building can not be calculated according to paragraph (1), the tax shall be calculated by applying the rate of 2% on the taxable value determined under Article 457."

[15] Please see, B. Florea, I. Lazăr, *Fiscal obligation's establishment in Romania: power relationship or legal obligation?* in Annales Universitas Apulensis, Series Jurisprudentia, no. 23/2020, pp. 93-102.

is proportional to achieve the purpose for which those measures were enacted.

The provisions of the Methodological Norms for the application of the Tax Code not only violate the principles established by the Constitution and internal legislation of Romania, but also harm the principles of legal security and legitimate trust enshrined in European Union law.

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ENVIRONMENTAL LAW AND SUSTAINABLE DEVELOPMENT IN THE CONTEXT OF THE USE OF ARTIFICIAL INTELLIGENCE PROCESSES

Univ. lect. dr. Bogdan Decebal MANOLE [1]

Abstract

The evolution of society demonstrates not only at the level of the academic society of researchers, but at the basic social level that global warming, environmental degradation and the dangers generated by climate change are becoming a reality. The concept of sustainable development associated with the circular economy and the strategy to improve the balance of the biosphere through the Green Deal (European Green Agreement) are priority elements both in the political and economic fields. Environmental legislation, long relegated to "and others" is becoming a priority, and the trend is to be of much greater importance than in the past. We estimate that in the next period it will be discussed that civil law, commercial law should be subordinated to international environmental law. The lack of borders in terms of pollution, the uneven distribution of water and fertile soil resources, as well as the launched concept from which we deduce that the resources belong to humanity, regardless of geographical and state location, determine an innovative approach to the environmental issue. In this context, our research paper discusses the connection between environmental law, the sustainable development of society and the premises of the future regarding the intervention of artificial intelligence.

Keywords: *Sustainable Development; artificial intelligence; environmental law; digitized public administration; circular economy; European Green Deal;*

JEL Classification: *K32 Energy, Environmental, Health, and Safety Law; K24 Cyber Law; H83 Public Administration; Public Sector Accounting and Audit; Q01 Sustainable Development*

Introductory Section

The issue of sustainable development

The evolution of society, industrialization, the intensification of international trade and the use of exhaustible mineral and material resources in production processes have inevitably led to crises. Among the "crises" we can identify the effects of the meteorological process of global warming. Global warming, drought and climate change are radically changing people's lives. The planet has limited environmental resources from which many resources have been extracted and used uncontrollably,

[1] University "1 Decembrie 1918" of Alba Iulia, Faculty of Law and Social Sciences, decebal.bogdan@uab.ro

building a stock-based economy. In practical terms, the environmental resource has been consumed unjustifiably, with no demand for the surplus products.

Another important basis for analyzing sustainable development and the need for this concept in today's society refers to the fact that the resources on the planet are constant and over time have been reduced by use and transformation into products of immediate need or goods of mass consumption, which, inevitably, in a time horizon, end up as waste. Another use of environmental resources is devoted to the food and water needed by the population, both directly and for the food and comfort of domestic animals or raised in an industrial environment, also to cover the food requirement.

At the same time, with the reduction of the environmental resource, the population has grown exponentially, exceeding the number of 8 billion people in the month of November 2022. We observe a growing gap between the resource of food, mineral matter, drinking water and the population that needs this resource for decent to superior living conditions.

The first measure to cover the created gap refers to a construction of the future, which affects as little as possible the abiotic factors of the environment (water, atmosphere, soil) and resources that support the comfort of life on earth. These processes are part of the concept of sustainable development. In history, the ruler Ştefan cel Mare is attributed the phrase "*Moldova did not belong to my ancestors, it was not mine and it is not ours, but to the descendants of our descendants forever and ever!"*[2]. We do not go into details of historical veracity, but we believe that after five hundred years, the problem is very topical in terms of the construction of the future with its furnishing with public and private goods. From the improvement of technologies regarding the construction of infrastructure objectives to urban mobility, the elements accessed are based on environmentally friendly, biodegradable, and ecological properties. This aspect leads to a slightly more complex behavior of society in terms of the degree of involvement of people and public authorities, but it results in appreciable comfort regarding sustainability and moderate degradation of the environment.

Sustainable development is found at the intersection of economic development, societal development, and the biosphere. The collision between these three factors creates imbalances, which can be resolved by future-building measures and actions now.

[2] Barbu Ştefănescu Delavrancea, „Sunset".

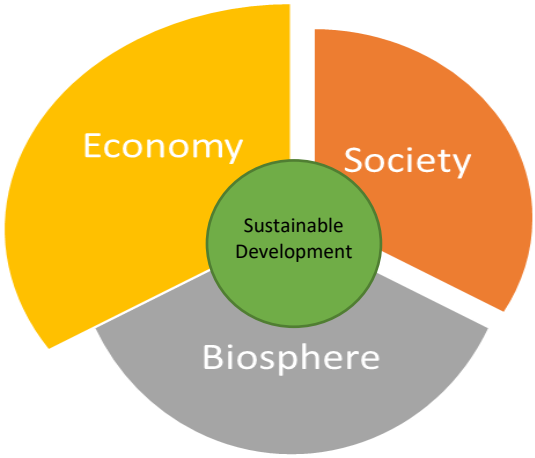

Fig. 1 Sustainable development – space for the impact of society, the economy, and the environment

Fig. 1 shows the space where sustainable development is manifested. A strong economy consumes environmental resources to meet society's demands. The comfort of modern society requires the economy to transform mineral resources, water resources, soil resources and others to ensure modern, mostly disposable products that complement the comfort of urban life.

The problem of "Artificial Intelligence"

Recently, everyday comfort is ensured by a digitized economy. Along with computers in the digital competition we use smart phones. Digitization is based on a combination of machine - program - wire or radio communication networks - physical or virtual data and program storage spaces. So, in this complex, we find programs from the simplest to those that are self-learning or ready-learned and support human needs, simplifying and shortening the chain of activities that society was used to. These programs raised to a higher level with decision instruction, outline the artificial intelligence complex. Computers aided by software process and perform certain activities for and instead of humans. In some situations, the machine that performs the tasks is physically visible and we define it as a robot. In other situations, the machine that executes the activities is not visible, but we can observe the purpose, the results, and define it as a "bot", that is, an application of the program. A third stage is when this system "machine - program - communication medium - storage medium" is raised to a higher technological level in which certain three-dimensional parameters are introduced, and the machine works with increased efficiency, and we define it as " augmented reality".

The collision between the classic society and the digitized society

Before computers, activities were either human or through mechanical technologies, which contributed to increased productivity in industrial-economic activities. The impact of these technologies from the period of the industrial revolution was significant, negative in relation to the environment. The technologies relied on energy produced from burning coal and using crude oil for energy, both of which had a devastating impact on the environment. These technologies were used in all industries (extractive, processing, energy), but also in agriculture, transport, trade. Service sectors have used the classic concept car based on mechanical technology for a long time.

The digitization revolution has reduced human and mechanized activities significantly. Unjustified impact on the environment is welcome. The engines were manufactured with higher pollution standards. Classic postal services, banking services, courier services have been replaced by digital programs, a fact that impacts the environment as little as possible. Through digitalization, the public administration knows a higher dynamic in relation to the needs of the citizen. Digitization introduces us to a world that humanity has not known due to lack of time, the impossibility of mobility and lack of financial resources. The impact of digitization on society in recent, classical history is well-known and we do not insist on it anymore.

Section - Horizon of knowledge

The question arises: To what extent does the digital revolution support the evolution of society?

The answer can be only one but nuanced: the digital revolution is part of the evolution of society and cannot be removed. Digitization makes all the processes and actual states of people and around them more efficient. The use of smart phones of computer programs increases the ability to have an informed population, actively involved in everyday life and build the new man, who is informed only from open sources. We pass over the aspect of misinformation, manipulation, isolation of individuals, which is a reality that is not the subject of this study but has profound negative effects in society.

We will refer to the sustainable development of society, a concept supported by the digitalization of society. Digital tools currently provide real-time information on environmental factors, both from the perspective of weather, climate change, but also from the perspective of the economy and habitat destruction, deterioration of water resources, forest resources, fauna, and flora. Through the predictions that the digital society issues, we

can have a picture of the future and we can act or not in a desired direction or another. Sustainable development allows us to analyze the needs of society and the possibilities to produce goods and services to meet these needs. We can affirm that sustainable development is an objective of society and public administration, which by software and artificial intelligence is easier to achieve and more visible to society. To explain: the use of the Internet to access information from all national and international public institutions, from non-profit organizations and debate forums leads us to an information coming from different environments, which outline a given situation more clearly and in our understanding. All this happens in real time without excessive energy consumption and without pollution. The speed of propagation of news is in real time, a fact that reduces the gaps between societies, continents, and countries. The decision is a "click" away from complete information.

Section – Analysis and Evolution

Sustainable development can no longer be analyzed without a digitized matrix. All processes, all concepts, all elements of knowledge are in large, digitized databases (big data). The use of the elements of interest from these databases leads to multiple efficiency in terms of utility, necessity, and performance of the objectives to be achieved. At the same time, strategic planning times are optimized along with cost optimization. These optimizations lead to correct consumption of matter and materials as well as energy in achieving the objectives. Once operational, economic, cultural, architectural, and other objectives are effectively served by society and public administration or entrepreneurship at maximum efficiency using computer programs and the digital society. Today we can no longer ignore the digitized society and we can no longer afford economic and social development in unsustainable conditions. The legacy will cost us a lot in terms of decontamination, giving up energy resources that have a high carbon footprint. According to the Green Deal strategy, issued by the European Commission, under optimal application conditions, the journey is minimal until the moment when we ensure the energy neutrality of the European continent.

Environmental law is imposed as a branch of international law, in addition to the results of scientific research, the entire population feels and observes the effects of pollution and climate change. In the horizon of the science of law, the law of climate change, the law of space is emerging as resources for the legal regulation of some exploitation components in which the subjects of law are pioneers and have no rules of behavior. Regarding public administration and society, regulations will be self-imposed in the digitization sector. Thus, we will have regulated legal

relations between the manufacturers of robots, software, artificial intelligence solutions in relation to society and the public administration. These regulations in the law of artificial intelligence, the law of the digital economy is necessary to raise cyber security to another level, the gendarme of ensuring fundamental human rights.

Crossing the line of acceptability regarding the use of artificial intelligence in processes, procedures and everyday life will also affect the right in constitutional matters. The tools used by the digital society have no limits and territorial boundaries. The internationalization of any problem without a control, even of state compliance, leads to an economic and not least social anarchy. By using IT resources on a large scale, the state cannot apply coherent policies and will have to accept the phenomena as they come, since society wants to be a society without rules with selective principles and subordinated to group interests. Within the group interests we can highlight the platforms or the administrators of the digital social media platforms, which through the regulations and policies imposed on joining with an account and password on the social media platform create a large social group and very easy to manipulate on a psychological level.

These elements with theoretical notions, at this time, will impact the society of the future and the economy of tomorrow in a slightly different concept of understanding sustainable development. Even if a series of material, visible processes will translate into the digital spectrum based on a binary language (0 and 1), society will need horizons and hopes regarding the civilization of the future. This civilization of the future if it does not have references in the civilization of tangible and intangible heritage, it will be a form without a foundation, which will not have sustainability and durability.

The modern, digital society constantly accumulates large volumes of information about traditions, customs, human evolutions, impact conjunctures with cosmic phenomena, recipes, food habits, solutions to health problems, etc., centralized in huge databases and archived in the electronic environment. Knowing the future requires knowing where to look for the information and knowing that it exists. This search is based on a minimum education that people must have. If they need something, they need to know where to find it, what to look for, when to look for it, and how to integrate the information with cognitive knowledge. Here is a starting point for other research in which the sciences must relate to sustainable development through the virtual space of the digital age that is looming on the horizon.

There are some elements of analysis and reflection on the connection between sustainable development and artificial intelligence, which in the

future will be inextricably linked. We must specify the fact that these two elements, even if they exist or co-exist, do not lead to sustainable development if the human factor, society, does not limit the intervention of artificial intelligence in everyday life at a given moment. This artificial intelligence, much desired and admired these days, undermines human intelligence in that cognitive thought processes are suspended by the fact that the robot or software returns the result to us without showing us the way to the result. By finding out the result of a question, we no longer practice viable solutions out of a total of solutions. The ability to react becomes retarded with short-term effects on the individual, but also in the long-term on the human species that will be procreated.

Sustainable development must produce more optimistic answers regarding the future of society, the economy, the environment in relation to the gloomy information revealed in scientific research on the prediction of the environment.

Conclusions

Sustainable development must become a borderline science between the evolution of society, the possibilities, and optimizations of the economy without disregarding the conservation of environmental resources, the most important of which are: drinking water, the atmosphere, the soil with biological load for vegetation, the animal world and plant that provides food for the population.

Sustainable development must be applied in the administrative-economic decision through the knowledge of the digital society. The multitude of electronically archived information and processes can constitute mathematical models of optimal evolution with efficiency and yield in building the sustainable society of the future.

Artificial intelligence, augmented reality, technologies based on computer processes support human society, but an intensive and extensive use without limits leads to the exclusion of man from everyday life. A man who lacks the social definition of doing something, of contributing to the well-being of things, the well-being of the economy and the well-being of his fellowmen will feel withdrawn, depressed, and involved. These elements must be a motivating factor for which the public authorities, at the international level, must regulate and set the space for expression and visibility of the digital society in human society. These elements can be considered as elements of fiction, but a deep knowledge of the force that the digital society can develop puts such a theme on the public agenda. We can extrapolate through the following example: in classical wars, people would fight one to one. That “one individual” was the reset factor for society. The lack of human resources creates conditions for ending the

conflict. The digital society contributes to hybrid wars where machines driven by digital programs kill people. See the capabilities of a drone (unmanned aerial vehicle). These machines can destroy humanity with no possibility of reset or recreation.

The connection between sustainable development and artificial intelligence is natural in everyday context. The benefits are real and support society, the economy, and the biosphere. The administrative decision problem will be to create the optimum at the intersection of the three factors. The society of the future must benefit from the measures and decisions of the present.

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CONSIDERATIONS ON THE LEGISLATIVE CHANGES IN THE MATTER OF THE COMPETENCE TO RESOLVE THE APPEALS REGARDING THE PROCRASTINATION OF THE TRIAL AND THE COURT PROCEDURE

Assistant Monica-Cristina COSTEA[1]

Abstract

The appeal regarding the procrastination of the process, in the initial form provided by art. 522 – 526 of the Civil Procedure Code, although it provided an effective tool for controlling the reasonable duration of a certain process, it was not immune to criticism regarding the competence to resolve such requests, criticisms that were validated by Decision no. 604 of July 16, 2020 of the Constitutional Court. It retained the unconstitutionality of art. 524 paragr. 3 Civil Procedure Code. It was considered that, although it is obvious that the judge of the case knows best the situation of a specific file and the explicit and implicit reasons why the requests of the parties or other third parties to the trial received a certain release, establishing the competence in favour of the same judge to resolve the appeals regarding the procrastination of the process does not meet the requirements of impartiality, imposed by national and European legislation.

The appearance of Law no. 199 of July 7, 2022 confirmed the need for appeals to be judged by an impartial panel, the competence being recognized in favour of the higher court and made important changes to the applicable court procedure, eliminating, among other things, the appeal against the appeal rejection solution, which competes for the achievement of an accelerated judgment both in the associated procedure of the appeal regarding the procrastination of the trial, as well as in the main one, of the file in connection with which it was promoted.

Keywords: *the appeal regarding the procrastination of the process, jurisdiction, Decision no. 604 of July 16, 2020 of the Constitutional Court, Law no. 199 of July 7, 2022*

The appearance of the new Civil Procedure Code brought into the legal environment, among other new institutions, that of appeals regarding the procrastination of the process.

The creation of this type of requests was determined by the need to provide the litigants, as well as the prosecutor, when participating in the trial of a civil case, with an effective tool, through which they can criticize in the four cases regulated by art. 522 of the Civil Procedure Code, aspects related to the conduct of the process that determine its unjustified extension, in violation of the right to resolve the case within a reasonable time.

[1] 1 Decembrie 1918" University of Alba Iulia, Faculty of Law and Social Sciences, Department of juridical and administrative sciences, Romania

When the new Civil Procedure Code entered into force, the competence to resolve this type of requests was recognized, according to Article 525 of the Civil Procedure Code, to the judge of the case. The legislator's option from that moment was criticizable, as it obliged the judge charged with solving the case to control his own documents and procedural measures, which he had previously validated by admitting, for example, a request for postponement and establishing a new deadline for submitting the a judicial expert report, a document, data or information by the person who owns them, etc. The way in which the cases in which an appeal can be made against the procrastination of the process are regulated outlines the idea of a fault on the part of the judge in managing the case, so that the latter, to the extent that the appeal would have been admissible and well-founded, would have been put in the situation of to invalidate his own previous considerations, and by way of consequence to recognize, implicitly, his guilt regarding the manner of settling some prior requests or of violating the obligation to complete the procedure, to pronounce or justify the decision within the legal term applicable imperative. it should be noted that the very notion of procrastination, compared to its unanimously known definition, implies the idea of a fault.

Although at a theoretical level, the judge of the case had at hand the levers made available to him by art. 42 paragr. 1 point 13 of the Code of Civil Procedure [2], namely to refrain from judging because there were "elements that give rise to reasonable doubts about his impartiality" [1], judicial practice has invalidated this possibility, there being no unanimous favorable practice in this matter.

Starting from the general principle established by art. 6 ECHR, taken over in art. 6 of the new Civil Procedure Code, namely to ensure each party "the right to judge his case in a fair manner, in an optimal and predictable time, by an independent, impartial court established by law", the appearance of Decision [3]no. 604 of July 16, 2020 of the Constitutional Court, regarding the exception of unconstitutionality of the provisions of art. 524 paragr. (3) of the Civil Procedure Code.

The constituent legislator admitted that the assignment of the competence to resolve the appeals regarding the procrastination of the process responds to those who wish "to quickly and efficiently remedy the situations in which the trial of the case stagnates either for reasons not attributable to the court, but in respect of which it did not take the necessary legal measures to energize to the process, either for reasons imputable to the court that did not carry out the work of the case within the deadline stipulated by law or had a procedural conduct that denotes

[2] Art. 42 para. 1 point 13 Civil Procedure Code.
[3] Art. 6 Civil Procedure Code.

slowness"[4], these motivations cannot invalidate even in the situation of this incidental request the need to be judged by a court unbiased, both objectively and subjectively. In other words, although it is obvious that the judge of the case knows best the situation of a specific file and the explicit and implicit reasons why the requests of the parties or other third parties to the trial received a certain release, the establishment of the competence in favor of the same judge to resolve the appeals regarding the delay the process does not meet the requirements of impartiality, imposed by national and European legislation.

In this sense, the practice of the ECHR is convergent.

The notion of impartiality, established by the European Convention on Human Rights and jurisprudentially interpreted by the European Court of Human Rights, must be interpreted in a double sense:

1. subjective impartiality - the personal conviction of a judge in a certain circumstance is taken into account;
2. objective impartiality – the ability of the judge to offer all the guarantees, in order to exclude, regarding his person, any legitimate suspicion that the parties might have

The bipartite interpretation of the notion of impartiality was made by the Court for the first time in the case of Hauschildt v. Denmark[5] and has been consistently continued in case decisions, among which we mention the case of Micallef v. Malta, Nicholas v. Cyprus, Meznaric v. Croatia, McGonnell against the United Kingdom.

Regarding subjective impartiality, given the fact that it calls into question the "internal forum" of the judge, the European Court[6] established the principle according to which it is "presumed until proven otherwise, regardless of whether it is professional magistrates or persons specialized in certain fields of activity participating in the process."

Regarding the objective impartiality of the tribunal, the Court showed that it "consists of determining whether, independently of the personal conduct of its members, some verifiable circumstances or facts may call into question their impartiality".[7] In this matter, even appearances have a special role, because in a democratic society, the courts must inspire full confidence in the litigants. Therefore, any judge or prosecutor who might be thought not to be fully impartial during the resolution of a case, is obliged to refrain from examining it.

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[4] Decision no. 604 of July 16, 2020 of the Constitutional Court published in the Official Gazette of Romania no. 796 of October 22, 2020.

[5] European Court of Human Rights, Hauschildt v. Denmark case, decision of 24 May 1989.

[6] Corneliu Bârsan - *European Convention on Human Rights*.

[7] Corneliu Bârsan - *European Convention on Human Rights*.

Appearances have, however, certain natural limitations. Thus, the European Court of Human Rights established that "the simple fact, for a judge, of having taken a certain decision before the trial, cannot always be considered as justifying a suspicion of impartiality in his regard. What must be taken into account is the importance and extent of this measure."

In the present situation, considering that the duration of a procedure, taken as a whole, can have serious consequences regarding the litigious rights, which may risk in certain particular situations not being able to be realized anymore (eg. the destruction or irremediable degradation of the property on to which there is a litigious right), it is important that the censoring of the duration of the process is done by a panel other than the one charged with judging the case.

Consequently, after the appearance of Decision no. 604 of July 16, 2020 of the Constitutional Court, which found the unconstitutionality of art. 524 of 3 of the new Code of Civil Procedure, this article ceased to have effect on December 6, 2020, since within 45 days of the publication of the decision of the Constitutional Court, the agreement of the criticized article with the relevant constitutional provisions did not take place.

Nevertheless, the objections regarding the procrastination of the trial continued to be formulated, so it was necessary to establish the competent court to judge them. Considering the general binding character of the decisions of the Constitutional Court from the moment of their publication, according to art. 147 para. 4 of the Romanian Constitution, after the date of 06.12.2020, the legitimate problem of establishing the competent court arose. As the court judging the trial was excluded, considering Decision no. 604 of July 16, 2020 of the Constitutional Court, jurisdiction was assigned to a court corresponding to the one hearing the case. thus, if the trial was in the course of the first-instance trial, the appeal regarding the procrastination of the trial was randomly assigned to another substantive panel of the court, with the exclusion of the panel that judges the merits of the request, and if the trial was in the course of the appeal or appeal trial, similar, the appeal regarding the procrastination of the trial is assigned randomly to another panel of appeal or appeal of the court, with the exclusion of the panel that judges either the ordinary appeal or the extraordinary appeal.

Although the new way of resolving appeals regarding trial delays represented an important step forward in terms of the need to judge cases by an impartial court, the new system was not immune to any criticism either. It is true that this type of incidental claims ended up being resolved by another panel of judges, in a different composition, but one cannot ignore the personal relationships that develop between those who have been colleagues for a long period of time, which affects the presumption of

impartiality at least in an objective sense, from the perspective of the litigant's perception. As a result, the maintenance of jurisdiction over appeals regarding the procrastination of the trial on the same jurisdictional level was still open to criticism.

The explicit intervention of the legislator, subsequent to Decision no. 604 of July 16, 2020 of the Constitutional Court, materialized through the appearance of Law no. 199 of July 7, 2022.

This time, the legislator's approach differed from the practice of the courts, in the sense that the jurisdiction of the appeals regarding the delay of the trial was recognized in favor of the superior court.

Thus, in addition to the express establishment of competence, the legislator opted for a different configuration of the entire institution in question.

In the current version, in art. 525 of the Civil Procedure Code, it was provided: " The contestation is within the jurisdiction of the hierarchically superior court, which resolves it in full form of 3 judges." When the case is tried at the High Court of Cassation and Justice, the appeal is resolved in the panel of 5 judges. When the trial is judged by the panel of 5 judges, the appeal is resolved by another panel of 5 judges."

Therefore, from the point of view of material competence, the competence of the superior court was recognized in the case of this type of requests, as well as in the case of appeals.

Although the appeal of the parties or of the prosecutor, when participating in the trial of the case, cannot consider aspects concerning the substance of the disputed right, nevertheless the reasons stipulated in points 2, 3 and 4 of art. 522 of the Civil Procedure Code concern irregularities regarding the judgment, which can be criticized through appeals, but for which, compared to the efficiency of a possible admission solution, it is optimal to be attacked during the trial of the case, for its clarification in all aspects. Regarding the first reason, namely that when" when the law establishes a term for completing a procedure, for pronouncing or justifying a decision, but this term has been fulfilled without result", although it can be formally shown within a appeals, the approach is ineffective, regarding the reasonable duration of the resolution within a reasonable term of the procedure that was exhausted with non-compliance with the mandatory legal deadlines.

Regarding the composition of the court panel, however, the legislator departed from the typical configuration of appeals. Thus, regardless of the degree of jurisdiction in which the case is located, the appeal regarding the procrastination of the trial is judged by a panel consisting of 3 judges. The exception is the appeals regarding the procrastination of the trial submitted to the High Court of Cassation and Justice, which is at the top of

the pyramid of courts. In this case, in the absence of a higher court, regardless of the degree of jurisdiction in which the trial is judged in connection with which the appeal is formulated, it is resolved in the panel of 5 judges. When the trial is judged by the panel of 5 judges, the appeal is resolved by another panel of 5 judges.

The new legislative amendment provided, similar to the system of appeals, the obligation to formulate the appeal in writing or orally, a situation in which it is recorded in the conclusion of the meeting; the appeal "is submitted to the court charged with judging the trial in connection with which the postponement of the trial is invoked."[8]

No mention was made regarding the stamp, namely the fact that no stamp duty is due. As the exemptions from the obligation to properly stamp the requests addressed to the courts must be explicitly provided by law, we are going to conclude that for such requests a judicial stamp fee of 20 lei is due, according to art. 27 of GEO 80/2013.[9]

According to art. 525 of 3 of the Civil Code, "The court charged with judging the case will immediately submit the appeal to the competent court, together with a certified copy of the case file. When possible, they are sent to the hierarchically superior court in electronic format."

Regarding the way of registering the appeal, in judicial practice there have been divergences regarding this aspect. Thus, there is the possibility of creating an associated file or creating a new file, in a similar way to the way of registering appeals regarding the duration of the criminal investigation. Compared to the express provisions of the Internal Order Regulation of the courts of December 17, 2015, the updated form, the first option was chosen, considering that in civil matters the possibility of creating new files with the sole object of the appeal regarding the delay of the trial is excluded.[10]

Law no. 199 of July 7, 2022 kept the express consecration of the non-existence of a case of suspension in the event of an appeal being filed, a natural option, since otherwise the reasonable time for solving the case would have been increased even more, which was assumed, anyway, to have been exceeded.

Regarding the duration of the settlement of the request, the legislator opted for its extension, from 5 days to 10 days, but if previously the trial took place without summoning the parties, now summoning them is

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[8] Art. 525 of 2 Cpc . in modified form.

[9] Art. 27 of GEO 80/2013: "Any other actions or requests that cannot be evaluated in money, except for those exempted from paying the judicial stamp duty according to the law, are charged with 20 lei."

[10] Art. 97 para. 1 point 6: Newly submitted requests regarding a file already registered in ECRIS will not be registered with a new file number, if they have one of the following objects: (...) 6. the appeal regarding the delay of the process.

mandatory, according to art. 525 of 5 Civil Procedure Code. In this way, the principles of adversariality, immediacy, orality and the right to defense, fundamental principles of the civil process, are respected. Doubling the time for resolving the request does not impinge on the reasonable term, considering the need to summon the parties, which will be done, in order to comply with the 10-day term, not through the Romanian Post, but through procedural agents or other alternative methods described by art. 154 paragr. 6 Civil Procedure Code: "telefax, e-mail or by other means that ensure the transmission of the text of the act and confirmation of its receipt" or by telephone, to the extent that the party or its defender has opted for this option and provided a telephone number to be contacted.

The trial takes place in the Council Chamber and ends with the pronouncement of a decision that is not subject to any appeal, just like in the previous regulation, in relation to appeals that ended with an admission solution.

The existence of the double degree of jurisdiction in civil matters is not mandatory from the perspective of the jurisprudence outlined around art. 6 of the European Convention on Human Rights, which enshrines the right to a fair trial. What is necessary, however, and is achieved through the new regulation of the appeal regarding the postponement of the trial of the case, is for the trial to be performed by an impartial court.

In addition to the finalization of appeals based on a procedural incident, such as based on an exception - lack of active procedural quality or as a result of a waiver of judgment, the typical solutions are those of admission or rejection.

In the case of admission solutions, it is currently expressly provided as follows:

„If the court finds the appeal justified, it will order that the court that hears the case fulfill the procedural act or take the necessary legal measures, showing what they are and establishing, when necessary, a term for their fulfillment.

In all cases, the court that resolves the appeal will not be able to give instructions or offer resolutions on factual or legal issues that anticipate the way the case will be resolved or that would affect the freedom of the judge of the case to decide, according to the law, regarding the solution to be given to the process."[11]

The text cited above confirms the fact that the procedural acts and legal measures in relation to a certain case, specific to the jurisdiction fence in which it is located, can only be taken by the materially competent judge to resolve the case. However, just as in the system of appeals, the

[11] Art. 525 of 6 and 7 Cpc . – modified form.

panel charged with resolving the appeal will explicitly show which procedural documents and which legal measures must be carried out by the judge or judges who resolve the case in connection with which the appeal is formulated. In order to respond to the desire for a reasonable deadline for resolving the trial of the case, specific deadlines may also be imposed, but these will have the role of recommendation deadlines.

The procedural documents and the legal measures and possibly the deadlines established by the panel entrusted with the settlement of the appeal can only, limitedly, look at the grounds of appeal described in art. 522 paragr. 2 Cpc.

It is forbidden to give instructions or impose resolutions on essential factual or legal issues, which are capable of predicting the way to resolve the case. The legal provision is natural and is able to ensure the necessary levers to respect the independence of the judge of the case. The reasons for appeal are related to the judge's actions or inactions that do not at all allow us to see the solution he will adopt or are subsequent to the closing of the debates. As a consequence, even the instructions received from the panel that resolves the appeal must not refer to the way of resolving the case, but take into account exclusively the criticisms of the appellant referred to art. 522 paragr. 2 Cpc.

In addition to the decision to admit the appeal, the panel charged with resolving the appeal may opt for a solution to reject it, thus validating the manner of judgment of the judge who was assigned to judge the case. Optionally, a judicial fine can be applied to the appellant, the special limits of which are from 500 lei to 2000 lei, but only in the situation where the bad faith of the author is proven with evidence, respectively when it is proven that the promotion of the appeal was carried out for another purpose than the legally recognized one or when the request is clearly unfounded (for example, when although an expert report was not submitted by the judicial expert, the court did not fine him, but having well-grounded reasons brought to the attention of the parties, such as those related to the complexity of the work, the weather conditions, the state of health of the expert, etc.).

Also, the court that hears the appeal, to the extent that it is vested with such a request, may oblige the appellant to pay compensation for the reparation of the damage determined by formulating the appeal, to the extent that, regarding the author, the training conditions are verified tortious civil liability regarding the illegal act, damage, the causal link between them and the appellant's guilt.

Therefore, compared to the above, the legislative adaptation of the institution of the appeal regarding the procrastination of the process to the considerations of the decision of the aforementioned Constitutional Court,

carried out by Law no. 199 of July 7, 2022 agreed on the fundamental incident principles, i.e. succeeded in the legislative consecration of the appeal so that the case can be resolved within a reasonable time and appeals are offered to control this aspect, by a court impartial, but respecting the independence of the judge of the case. Also for the achievement of an accelerated judgment of appeals regarding the procrastination of the process, the amendments brought by Law no. 199 of July 7, 2022 are auspicious from the perspective of eliminating the appeal against the solution to reject the appeal, which was apt, by itself, to unjustifiably prolong the duration of the process in connection with which it was formulated.

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ASSISTANCE FOR THE CONCLUSION OF LEGAL ACTS - PRIMARY MECHANISM OF PROTECTION OF THE PERSON WITH DISABILITIES - THE APPOINTMENT PROCEDURE -

Notary public dr. Dan-Adrian DOȚIU[1]

Abstract

Since by Decision No. 601/2020 on the rejection of the exception of unconstitutionality of the provisions of art.164 para. (1) of Law no. 287/2009 on the Civil Code, republished, with subsequent amendments, published in the Official Gazette of Romania, Part I, no. 88 of 27 January 2021, the court Romanian of constitutional disputes found the non-compliance of the provisions of art. 164 para. (1) of the Civil Code which established that the person who does not have the necessary discernment to take care of his interests, due to alienation or mental debility, was to be placed under judicial interdiction, with the constitutional provisions contained also in the light of Article 12 of the Convention on the Rights of Persons with Disabilities, The Parliament of Romania adopted Law no. 140/2022 which entered into force starting with 18.08.2022. Through this law, major changes were made regarding the measures of protection, civil law, of persons with intellectual and psychosocial disabilities, while imposing the adaptation of some normative acts.

The mechanism of protection of the person with disabilities includes taking measures in steps and for certain periods of time, but which can be extended. The key to the mechanism is the periodic reassessment of the protection regime, so that it is permanently adequate to the needs of the protected person.

The first protection mechanism, gradually regarded, created by law no.140/2002 is assistance for the conclusion of legal acts. Primary support measure, within the competence of the notary public in the notary's office located in the district court where the major has his domicile or residence, represents the least intrusive measure, does not imply any limitation of the civil capacity to exercise the protected person, does not imply any obligation of the assistant to represent/assist the major at the conclusion of an act.

Keywords: *assistance for the conclusion of legal acts, judicial interdiction, person with disabilities, protection mechanism*

Law no.140/2022 on some protection measures for persons with intellectual and psychosocial disabilities and amending and supplementing some normative acts (*published in the Official Monitor of Romania, Part I no. 500 of 20 May 2022*) which made major changes regarding the measures of protection (of civil law) of persons with intellectual and

[1] University lecturer at the "1 Decembrie 1918" University, Alba Iulia, Faculty of Law and Social Sciences, www.dotiu.ro

psychosocial disabilities, entered into force on August 18, 2022. Through this normative act, the support and protection measures that can benefit the targeted persons have been diversified, focusing on the autonomy of the person with disabilities and on the observance of his will, preferences and needs.

Considering that by decision no.601/2020 on the rejection of the exception of unconstitutionality of the provisions of art.164 para.1 of the Law no. 287/2009 on the Civil Code, republished, with subsequent amendments, published in the Official Monitor of Romania, Part I, no. 88 of 27 January 2021, the court Romanian of constitutional litigation found the non-compliance of the provisions of Article 164 paragraph 1 of the Civil Code which established that the person who does not have the necessary discernment to take care of his interests, due to alienation or mental debility, was to be placed under judicial interdiction, with the constitutional provisions contained in it and in the light of art.12 of the Convention on the Rights of Persons with Disabilities, the Romanian Parliament adopted Law no. 140/2022. (*According to art. 9 of the Order of the Minister of Foreign Affairs no.333/2011, on March 2, 2011, entered into force, for Romania, the Convention on the Rights of Persons with Disabilities, adopted in New York by the General Assembly of the United Nations on December 13, 2006, opened for signature on March 30, 2007 and signed by Romania on September 26, 2007, ratified by Law no. 221/2010, published in the Official Monitor of Romania, Part I, no.792 of November 26, 2010. The UN Convention on the Rights of Persons with Disabilities is the main international legal instrument for combating discrimination against persons with disabilities.*)

The Parliament of Romania has adopted Law no. 140/2022. This law creates a gradual mechanism of protection and amends, among others, the Civil Code, the Code of Civil Procedure and the Law no. 36/1995 of notaries public and of the notarial activity.

The mechanism of protection of the person with disabilities includes taking measures in steps and for certain periods of time, but which can be extended. The key to the mechanism is the periodic reassessment of the protection regime, so that it is permanently adequate to the needs of the protected person.

The first protection mechanism, gradually regarded, created by law no.140/2002 is assistance for the conclusion of legal acts. This is a voluntary support measure that does not affect the legal capacity of the person to exercise and which is to be carried out by notary, based on the freely expressed will of the person with disabilities before the notary public. The primary support measure, within the competence of the notary public in the notary office located in the district court where the major has

his domicile or residence, represents the least intrusive measure, does not imply any limitation of the civil capacity to exercise the protected person, does not imply any obligation of the assistant to represent / assist the major at the conclusion of an act.

The major who, due to an intellectual or psychosocial disability, needs support to care for his person, to manage his/her patrimony and to exercise, in general, his/her civil rights and freedoms, may ask the notary public to appoint an assistant for a maximum of 2 years.

One can the natural question be asked what is the role of the assistant, since the protected person has full exercise capacity? The key word that defines the role of the assistant is that of intermediary between the staff receiving assistance and the third persons, being presumed to be acting, in the provision of assistance, with the consent of the major. The appointment of the assistant shall be without prejudice to the ability of a major to exercise. The person designated as assistant does not represent the major, that is, he does not conclude legal acts on behalf of the major, nor does he approve of the acts which he concludes himself. In carrying out his task, in relations with third parties, the assistant must act according to the preferences and wishes expressed by the major to whom he/she provides support.

In the authentication or in the performance of any other notarial procedure, it must be shown whether the assistant participated or not. The person in favour of whom the measure of assistance has been instituted has the right to request that certain documents, especially personal acts, be concluded in the absence of the assistant, either because they involve discretion or are of a secret nature, or because the assistant cannot go, for a justified reason, to the notary's office on that day.

The following persons may not be an assistant: *(see the provision contained in art. 113 - Persons who cannot be appointed guardian - letters a)-d), f) and paragraph 2 of Law no. 287/2009 on the Civil Code, republished, with subsequent amendments)*

a) the minor, the person who benefits from special guardianship or judicial counseling, the person in respect of whom the measure of assistance for the conclusion of legal acts was established, the person in respect of whom a protection mandate has been approved or the person placed under trusteeship;

b) the one who has been deprived of the exercise of parental rights or declared incapable of being a guardian;

c) the one to whom the exercise of civil rights has been restricted, either under the law or by a court decision, as well as the one with ill-behaviors retained as such by a court of law;

d) the one who, exercising a guardianship, has been removed from it;

e) the one who, because of the interests contrary to those of the assisted person, could not perform the task of guardianship;

If one of the circumstances mentioned above occurs or is discovered during the exercise of the protective measure, the assistant will be removed, following the same procedure as when appointing him.

The appointment of the assistant is within the competence of the notary public from the notary's office located in the district court where the major has his domicile or residence.

With a view to appointing an assistant for the conclusion of legal acts, the major shall, together with the person to be appointed in that capacity, make a request to the competent notary public. The application includes the identification data of the persons (the staff with intellectual or psychosocial disabilities and the assistant) and the reasons on which they are based. It also includes the clarifications that the major has no relatives, that he cohabits or not with another person and, as the case may be, that he wants or not another person to participate in the procedure for appointing the assistant. A summary inventory of the major's assets and, where appropriate, any other documents relevant to its settlement shall also be attached to the request. The inventory shall not be required if the request for assistance relates only to the drawing up of a single legal operation or procedure.

The notary public has the obligation to give the applicants the necessary guidance for the preparation of the application, if they do not submit an application already made. Upon receipt of a request made, the notary public verifies that the major understands its meaning and is able to express his wishes and preferences.

Upon receipt of the application, by resolution on the application, the notary fixes the deadline for its settlement and, as the case may be, orders the completion of the application with the necessary documents, after which he summons the relative indicated in the application and the person with whom he cohabits so that any of them can raise objections. The notary may also order the summoning of the persons who have made oppositions regarding the one who is to be appointed as an assistant or regarding the circumstances related to the institution of the protection measure, unless the major expressly opposes the summoning of the persons who made the opposition.

Within the fixed term, the notary public settles the application by reasoned conclusion. The application shall be dealt with by hearing the major, in the presence of the person to be appointed as an assistant. She must declare before the notary, on her own responsibility, that she meets the conditions laid down in the Civil Code to be appointed as an assistant.

The notary public has the possibility to reject or grant the application.

The notary public rejects the application in the following situations:

a) there are serious doubts as to the major's understanding of the significance of the request made;

b) there are serious doubts as to the possibility of expressing, by the major, his wishes and preferences;

c) there are elements which give rise seriously to the fear that the major will suffer harm by the appointment of the assistant;

d) a member of the family of the majority or another interested person raises objections to the appointment of the assistant;

e) the assistant does not meet the conditions laid down by law for his/her appointment.

Against the conclusion of rejection of the application, the major or the one indicated in the application to be appointed as an assistant may lodge a complaint with the guardianship court in whose territorial district the major who requested the appointment of the assistant has his domicile or residence, within 30 days from the communication of the conclusion of rejection. The complaint shall be settled by way of a decision, which shall not be subject to any appeal.

The notary public admits the application, and the conclusion of admission includes the identification data of the major and the assistant, the legal operation or the procedure for which the assistant was appointed and the duration of the protection measure taken. The measure of appointment of the assistant, before its termination, may be renewed, following the same procedure, for another period, which may not exceed 2 years.

The order shall be compulsorily communicated to the major and his assistant, as well as to the guardianship authority, at the latest on the day following the conclusion of the procedure.

Although the assistance is a free task, the major is obliged to reimburse the assistant for the reasonable expenses advanced by the latter in the performance of his task.

The assistant shall be obliged to submit to the supervising authority an annual report or, where appropriate, on expiry of the period for which he has been appointed, on the performance of his or her duties. The guardianship authority shall verify the report and ensure that the assistant carries out his or her task properly. A copy of the report drawn up by the assistant will be sent for information to the notary public who appointed him.

Any person may lodge a complaint with the guardianship court in whose territorial district the major receiving assistance with assistance with regard to the activity of the assistant, which is harmful to the major, has his domicile or residence. The complaint shall be resolved urgently, by an enforceable decision, by the guardianship court, summoning the parties and hearing the staff receiving assistance. The conclusion shall also be communicated to the notary public as well as to the guardianship authority.

With regard to the publicity of the appointment of the assistant, but also the termination of the assistance for any reason, including at the request of the major, it is recorded in the National Register of Records of the support and protection measures taken by the notary public and the guardianship court - RNEMSO. It also enrolls in the RNEMSO and the replacement of the assistant. *(RNEMSO is established and held by the National Union of Notaries Public in Romania; The national register of support and protection measures taken by the notary public and the guardianship court shall include the following data: a) the registration number of the application and the date of its receipt; b) the name and surname of the disabled major, cnp and his domicile / residence; c) the name and surname of the assistant or the protector, cnp and his domicile / residence (note: in this box will be written: the assistant, curator or guardian, as the case may be, depending on the measure ordered); d) the name of the notary and the registered office of the office/company; the guardianship court (name) or the court that pronounced the measure; e) the number and date of the conclusion/decision ordering the measure f) the date from which the measure becomes effective; g) the duration of the support or protection measure, including its prolongation; (h) the cessation of the measure and the cause of termination as well as the date on which it becomes effective; i) Observations (various; the eventual individualization, by the guardianship court, of the protection measure.)*

Assistance shall cease in the following situations:

- on expiry of the period for which it was ordered;
- at the request of the major benefiting from the measure, addressed to the notary public;
- following the taking, in respect of the major or assistant, of a protection measure provided for by the Civil Code;
- as a result of the admission of the complaint lodged with the guardianship court in whose territorial district the major receiving assistance with regard to the activity of the assistant, which is harmful to the major, has his domicile or residence.
- on the date of death of the major or of the assistant or by the express renunciation of the assistant.

RESPONSABILIDAD DEL ESTADO INFRACTOR EN EL RÉGIMEN SANCIONATORIO AMBIENTAL COLOMBIANO

Elkin Emir CABRERA BARRERA[1]

Abstract

This article investigates the responsibility of the Colombian State in the face of the planetary crisis and environmental conflicts, that become traces and environmental debts as a hermeneutic criterion of regional courts in the defense of collective environmental rights for interpretation and application of the principles of prevention and precaution in local and cross-border terms, in order to adopt legal mechanisms to achieve environmental justice. Consequently, it is demonstrated how the Colombian State is an infringer in the Colombian Environmental Sanctioning Regime, because it incurs in typically unlawful and culpable actions based on its conduct by action and omission, since it is a precursor of environmental damage, it does not apply the principles of precaution and prevention. The research analyzes the antecedents that from the liberal State establish a clear civil responsibility product of the developmentalist economic model, extractivist and technocratic, which under market regulation rethought economic development policies. In this connection, the Brundtland report, signed in Oslo in 1987, establishes sustainable development as a principle to meet the needs of the present without compromising the capacity of future generations which tends to internalize environmental costs, insufficient in the face of the margin of use, access, distribution and management of nature and its elements, and that at present, legitimizes the administrative power. The Colombian State serves as the superior expression of the legal order, therefore, it must assume the sanctioning imputations, its personality denotes rights and obligations in the perspective of a unitary State and supreme protector, challenge to strengthen as much as to migrate towards the model of the Environmental Rule of Law enriching the discursive analysis from the legislation, in search of its unavoidable application.

Keywords: *Environmental Collective Rights; internalization of environmental costs; precautionary principle; prevention principle; Environmental Sanctioning Regime*

1. Introducción

La responsabilidad estatal por infracciones ambientales se instaura de manera particular a partir de la implementación del principio "el que contamina paga", aforismo que nace desde las ciencias económicas en

[1] Abogado, Profesor de Legislación ambiental en la Facultad de Medio Ambiente y Recursos Naturales de la Universidad Distrital Francisco José de Caldas, perteneciente al Grupo de Investigación en Derechos Colectivos y Ambientales – GIDCA, adscrito a la Facultad de Derecho, Ciencias Políticas y Sociales de la Universidad Nacional de Colombia, Bogotá D.C, Colombia. eecabrerab@unal.edu.co

búsqueda de imputar sobre el contaminador las externalidades negativas de los impactos y perjuicios acaecidos sobre el ambiente y asignar un rubro económico, a las medidas de prevención y control del daño ambiental. Desde el año 1974, los Estados miembros de la Organización para la Cooperación y el Desarrollo Económico - OCDE, sugieren dicho principio como mecanismo para la consolidación de una base común para la asignación de responsabilidad ambiental y orienta las políticas ambientales de sus miembros con el objeto de incrementar el uso racional de los recursos naturales[2] (García, 2001). En 1987, la Comisión de Brundtland establece el informe "Nuestro futuro común" en el cual se presenta el concepto "Desarrollo sostenible", principio que pretende orientar las políticas económicas, sociales y ambientales en vías de satisfacer las necesidades actuales sin comprometer las implicaciones futuras. Recomendaciones incorporadas al Régimen Sancionador colombiano como parte de las medidas orientadas a prevenir y, eventualmente, a regular las acciones contaminantes ocasionadas por los actores económicos privados y públicos. Punto en el cual se debe enfatizar que, la incorporación de este principio al ordenamiento jurídico ha tenido como finalidad generar un efecto disuasivo.

Es así cómo se articulan diversas vertientes del derecho; el Ambiental en perspectiva del contaminador-pagador, el Derecho tributario el cual instaura sobre la capacidad contributiva del contaminador un gravamen y el Procesal el cual indaga sobre la efectividad del método jurídico. Posterior a las Declaraciones de Río sobre el Medio Ambiente y Desarrollo que en 1992 estableció el principio 16, hizo hincapié en la internalización de los costes ambientales, en correspondencia con el interés colectivo. Por Colombia, se gestaron múltiples disposiciones normativas bajo dicho enfoque. Los cambios en el ordenamiento jurídico colombiano, impulsados, de una parte por la Carta Magna y de otra por los acuerdos internacionales, acogen el principio de "el que contamina paga" para hacerle frente a las demandas ambientales en sintonía con la responsabilidad civil por hechos generadores de daño. La Ley 1333 de 2009, mediante la cual se instaura el Procedimiento Sancionatorio Ambiental, contempla la presunción de culpa y dolo, estableciendo en un Régimen administrativo de responsabilidad objetiva las prerrogativas del debido proceso conforme lo contencioso administrativo, unido al Decreto 3678 de 2010, por medio de cual define los criterios para la imposición de sanciones, articulada con la Resolución 2086 de 2010, la cual adopta la metodología para la tasación de multas, como medida de integración de ciertas variables dentro de un modelo matemático para el establecimiento

[2] Término que defiende el Derecho de Propiedad y objetiviza la naturaleza sus relaciones y elementos, sometiendola mediante procesos de explotación y consumo.

de la sanción pecuniaria. Recientemente, la Corte Constitucional de Colombia en su Sentencia T-080 de 2015, ratifica la finalidad preventiva y restaurativa del principio a favor del restablecimiento del interés público y los derechos colectivos, aseverando lo prescrito por dicha ley.

No obstante, en búsqueda de indagar sobre la falta de pautas especiales en la asignación de responsabilidad la cual exhortar la conducta precursora de daño ambiental, los postulados de solidaridad, responsabilidad y justicia ambiental, hacen que sea necesario analizar la responsabilidad del Estado colombiano en materia ambiental, en perspectiva de su construcción histórica y conceptual, que han incidido sobre los criterios ambientales que promueven por la independencia e imparcialidad de los funcionarios públicos cuando el Estado instructor es al mismo tiempo infractor pues en su ejercicio administrativo supremo contamina y juzga.

El principal objetivo del artículo que aquí se plantea, se encuentra dirigido a efectuar un análisis reflexivo, que parte del Estado Liberal hacia el Régimen Sancionatorio Ambiental colombiano con miramientos al Estado Ambiental de Derecho, fundamentado en el ambientalismo popular, la ecología política, la economía ecológica, la justicia ambiental dados los conflictos ambientales y deudas ecológicas suscitadas por el modelo capitalista en sus prácticas ilimitadas de depredación, contaminación, explotación y sobreconsumo a merced del mercado, adicional a que no se asumen los costos sociales y ambientales reales.

La reflexión se desarrolla a través de fuentes primarias representadas de una parte, por los pronunciamientos normativos nacionales y de corte internacional como aquellos proferidos por las altas cortes, y de otra parte, por los tratados y acuerdos transfronterizos. Asimismo, como referentes secundarios se acude a la doctrina e investigaciones sobre temas relacionados.

Así las cosas, el artículo desarrolla en primer lugar, los antecedentes del Estado Liberal como precursor del modelo desarrollista que involucra, bajo la regulación del mercado, la internalización de los costos ambientales, en segundo lugar, profundiza el principio economicista de contaminador-pagador. En tercer lugar, el artículo aborda las diversas formas de ecologismo, en aras de poner en perspectiva los asideros de los actuales conflictos ambientales y así promover un adecuado criterio protector y conservador del ambiente y sus elementos. Y, finalmente, como cuarto aspecto analiza el Régimen Sancionatorio Ambiental el cual discurre sobre las responsabilidades y obligatoriedades del Estado colombiano como protector y figura unitaria, defensor de los derechos colectivos ambientales y administrador de la justicia ambiental.

2. Modelo liberal precursor de la crisis ambiental planetaria, derechos de propiedad en contraposición a los derechos colectivos ambientales

La concepción primigenia del Liberalismo llega a Colombia a mediados del siglo XIX bajo dos perspectivas históricas, la noción francesa y la inglesa. La primera, traía consigo la visión fisiocrática, esto es, una escuela de pensamiento de carácter económico que establece las bases del modelo de producción capitalista a partir de instaurar un orden social, conformado por la separación de clases, que aludían a un carácter diferenciador y funcional dentro de la sociedad. La segunda, fundamentada en la experiencia de la Revolución Industrial, generalizó una economía mecanizada, en la que la figura del Estado se esboza fundamental para la distribución equitativa de la economía (Moreno, 2010).

El modelo liberal, que considera a los sistemas sociales y naturales como un medio, no como un fin en sí mismos, se extiende y crece el culto por la institucionalidad, tornándose más importante que la construcción de idearios sobre la responsabilidad ambiental. Es así como se gesta el inicio de una visión a corto plazo, desconociendo las obligaciones intergeneracionales que subyacen al Estado y a la humanidad misma. En últimas, lo aquí expuesto significa que el modelo liberal crea y fortalece tendencias consumistas mientras impulsa la desigualdad (Mesa, 2007).

Son en esencia cuatro los ejes que desarrolla el Estado Liberal: el primero, la reestructuración del poder en cabeza de figuras de autoridad elegidas por acción mayoritaria, representativa de las necesidades, aspiraciones y visiones de la sociedad que para organizarse, creó los grandes órganos del Estado, como sus cortes y tribunales de justicia, independientes respecto del poder ejecutivo, con una administración pública formalizada y profesionalizada. En segundo lugar, la ley como mecanismo generalizado para la regulación de las libertades. En un tercer y cuarto aspecto, el gasto y el impuesto, constructos del modelo económico. Coincide, bajo dichas circunstancias, el Derecho que funciona espontáneamente movido por la toma de decisiones individuales, fiel al marco jurídico (Schwartz, 1987).

Las ideas fundacionales del Estado Liberal imperaba una intención ecuánime sobre la organización social institucionalizada, las libertades jurídicas y los derechos individuales en respuesta a las opresiones del absolutismo monárquico, para luego sufrir una transformación producto de las emergentes posturas políticas y filosóficas, amparadas bajo un marco jurídico que materializó la concepción moderna de la separación de poderes, la propiedad privada y su capacidad adquisitiva y dio lugar a lo que se conoce como Estado Liberal de Derecho en el que se reconoce expresamente la existencia de los Derechos Humanos y también enfatizó el carácter del Estado revelando sus obligaciones y competencias (Cárdenas, 2017).

En América Latina, germinaba con ímpetu el modelo mercantilista impulsado por la Comisión Económica para América Latina y el Caribe - CEPAL. En este sentido, transcurría el cambio de paradigmas establecidos hasta el momento, cabe señalar que el modelo liberal con aspiraciones hacia un Estado Social de Derecho establecía directrices claras para facilitar cambios sustanciales. No será sino hasta mediados de mitad del siglo XIX que en Colombia se instauró una serie de mecanismos como el intervencionismo del Estado, que promulgó y motivó la libertad de culto, conciencia y de expresión mediante la reforma política de Lopéz Pumarejo que hacia 1936, fortaleció la organización social y la economía en el país. El neoliberalismo como distorsión del sistema Liberal tiene por objeto la defensa del capital, lo que, para el caso colombiano, condujo a la exacerbación del desequilibrio económico respecto a la distribución del poder adquisitivo. El neoliberalismo y su libre economía en Colombia se hicieron evidentes cuando el 80% de la riqueza del país fue acaparada por tan solo el 10% de la población (Moreno, 2010). En ese sentido, se instauró el arquetipo del hombre al servicio del poder, dotando formalmente de soberanía y legitimidad, junto a un Estado con directrices constitucionales, regido bajo principios de legalidad y derechos (Martínez, 2006).

Sin embargo, el derecho a gozar de un ambiente sano y obtener el mejoramiento de la calidad de vida de la población, no está relacionado con los derechos fundamentales subjetivos de los Estados liberales de derecho, pues se basan en la protección del derecho de propiedad, derecho especialmente individual que fue protegido por normas civiles y penales (Valencia, 2007).

En la actualidad, la civilización se halla inmersa en un estado de crisis multidimensional que compromete sus aspectos paradigmáticos políticos, sociales, intelectual, moral, económico, y jurídico. El neoliberalismo sostiene planteamientos contrarios, ya que en su plano de pensamiento no intenta perseguir fines morales universales, sino que pretende encontrar los medios para satisfacer las preferencias individuales. Dentro de los cuestionamientos modernos, se increpa su perspectiva ambientalista y como intenta aproximarse mediante una tradición política a los ideales y principios que puedan estar en una sociedad post-liberal ecológica. Dudar de su compatibilidad depende por completo de los términos de referencia que se utilicen; el medioambientalismo y el neoliberalismo, son compatibles en esa dirección y sentido, pero no lo son cuando el punto de partida se desarrolla desde el Ecologismo, por esta razón, la teoría política desde una perspectiva “verde” no está en condición de crear una nueva teoría política (Dobson, 1999).

3. Internalización de los costos ambientales como instrumento que perpetúa el establecimiento económico liberal

La crisis climática reconocida por Colombia ha conllevado la ratificación de tratados internacionales que se desarrollan en el plano interno mediante la adopción de políticas públicas acordes con la Constitución. Los impactos ambientales de carácter transfronterizo vinculan el discurso ambientalista a la voluntad política internacional, razón por la cual es indispensable establecer un escenario jurisdiccional para indagar sobre las responsabilidades de la acción contaminadora en el planeta y cuestionar el derecho privado del modelo neoliberal.

Bajo ese marco de referencia, la Conferencia de las Naciones Unidas sobre el Medio Humano celebrada en Estocolmo, Suecia, en 1972, fue la primera conferencia internacional en hacer del ambiente un tema de relevancia. Los Estados Miembros, acordaron la adopción de principios para la gestión racional del medio ambiente, incluida la Declaración y el Plan de acción de Estocolmo para el medio humano, que establece como prioridad expedir códigos de derecho internacional y nuevos instrumentos para resolver los conflictos ambientales, administrar los recursos que son patrimonio común de todas las naciones. Así mismo, propende por el diseño de una política para financiar los programas de cooperación internacional, incluida la aplicación de impuestos y gravámenes sobre el consumo de determinados recursos no renovables; lo anterior marcó el inicio de un diálogo entre los países industrializados, sobre el vínculo entre el crecimiento económico, la contaminación del aire, el agua, los océanos y el bienestar de las personas de todo el mundo (ONU, 1972).

Hacia la segunda mitad de los años ochenta, el principio "Desarrollo Sostenible" se generalizó como eje orientador de las políticas públicas en sus dimensiones económica, social y ambiental, una vez se dio a conocer el informe "Nuestro futuro común" expedido por Comisión Mundial para el Medio Ambiente y el Desarrollo. El documento en mención establece la necesidad de no comprometer los medios de vida de las generaciones próximas, mediante la regulación económica del crecimiento sostenido (Riechmann, 1995).

El desarrollo sostenible, pretende la protección del ambiente en simultáneo al aseguramiento del desarrollo de los países con menor nivel de desarrollo, esto es, desde una perspectiva eurocéntrica. Es así como las políticas estructuradas bajo este principio tiene prioridad de satisfacer los requerimientos esenciales de los pobres bajo una perspectiva tecnocrática y cientificista ignorando las razones reales de desigualdad que devienen en una crisis ecológica como la transformación química (contaminación), biológica (pérdida de biodiversidad) y climática a nivel local y escala planetaria que perpetúa el modelo económico.

Décadas después, la Conferencia de las Naciones Unidas sobre el Medio Ambiente y el Desarrollo - CNUMAD, celebrada en Río de Janeiro, Brasil, con motivo del 20 aniversario de la primera Conferencia sobre el Medio Ambiente Humano, reunió a líderes políticos, diplomáticos, científicos, representantes de los medios de comunicación y organizaciones no gubernamentales - ONG de 179 países, para centrar esfuerzos sobre las políticas para hacerle frente al impacto de las actividades socioeconómicas humanas que recaen sobre el ambiente (ONU, 1992).

Precedentes que en el marco legal Colombiano se adoptaron mediante mecanismos como la Ley 164 de 1994, mediante la cual se aprobó la Convención y en consecuencia sus objetivos, principios y compromisos en: educación, investigación, formación, sensibilización del público sobre el cambio climático y de observación sistemática para identificar tempranamente los cambios junto a la Ley 165 de 1994, por la cual aprueba el "Convenio sobre la Diversidad Biológica", realizado en Río de Janeiro 1992 que se refiere a los valores ecológicos, genéticos, sociales, económicos, científicos, educativos, culturales, recreativos y estéticos de la diversidad biológica y su importancia en el mantenimiento de los sistemas vitales en biosfera. Estos mecanismos impulsaron la internalización de los costos ambientales fundados en las diferentes dimensiones planetarias, establecidas bajo la pretensión de una perspectiva conservacionista y patrimonial, estas últimas, como agregados significativos que impulsaron las nociones preventivas, correctivas y de reparación del daño en el marco jurídico Colombiano como única vía de intervención sustancial.

Sin duda la Organización Mundial del Comercio - OMC como organismo internacional que se ocupa de las normas mundiales en la regulación del comercio entre las naciones, refleja la lógica tecnocrática procurando el mantenimiento del flujo de mercado libre, establece medidas de "economía verde" como un intento de aproximación ambiental que defiende el derecho al desarrollo argumentando que "la apertura del comercio conduce a una utilización más eficiente de los recursos y estimula el crecimiento y los niveles de ingresos, apoyando así la conservación de los recursos, la sostenibilidad y los esfuerzos por erradicar la pobreza" (OMC, 2011).

En correspondencia, el Fondo Mundial Internacional - FMI fomenta el desarrollo económico sostenible de sus países miembros, para lo cual supervisa sus políticas económicas y les ofrece respaldo financiero a través de programas de estabilización y ajuste que involucran reformas estructurales así como asistencia técnica para que corrijan sus desequilibrios financieros macroeconómicos. En materia ambiental y sobre la regulación del mercado, el FMI señala que:

> Es evidente que los precios de mercado no siempre tienen en cuenta adecuadamente el impacto de la actividad económica en el medio ambiente

> y, por lo tanto, se requieren ajustes. (...) No obstante, es difícil corregir los precios del mercado para tener en cuenta las externalidades negativas dado que, por ejemplo, la aplicación de impuestos sobre las emisiones de gases exige material de supervisión muy complejo y una gran capacidad administrativa. Por consiguiente, en muchos países se aplican medidas de política tributaria menos complejas, como los impuestos sobre los productos, que suponen una relación más indirecta entre los niveles de contaminación y las tasas de los impuestos. (...) incluso las políticas de estabilización correctamente concebidas pueden tener un impacto negativo en el medio ambiente cuando existen carencias institucionales, problemas de gobierno y fallas en los mercados (FMI, 2000).

La imposición de sanciones económicas ha sido la manera por la cual se busca prevenir y corregir el daño ambiental. No obstante, dichas sanciones no producen los efectos esperados porque basta con que la personería jurídica, la cual se le inviste de infractor bajo el Régimen Sancionatorio Ambiental colombiano, pague la sanción pecuniaria por sus acciones y omisiones, lo que puede entenderse como una autorización a contaminar dada a posteriori a cambio de dinero sin ningún tipo de incidencia representativa sobre su actividad contaminadora.

Es así como por efectos de las lógicas de regulación, se crean tensiones entre las nociones "derecho negociado[3]„ y el "derecho ambiental". Lo anterior por cuanto el contaminador negocia la norma y finalmente resulta artífice de la misma es decir, el Estado expide la norma y en simultáneo es destinatario de ella, o para efectos de diferentes personerías jurídicas infractoras, su capacidad de pago controvierte la directriz preventiva y del daño, en la medida en que debe pagar por los daños ambientales que él mismo ocasiona con el agravante de reincidir y no inducir un cambio conductual en la realización del daño ambiental desconociendo sus impactos actuales e intergeneracionales.

La premisa se clarifica de forma concreta con los sumideros de carbono, en el cual las multinacionales tienen el poder adquisitivo para bordear las nociones jurisdiccionales y trasladarse a países pobres donde su deuda ecológica se vende. Su derrotero no pretende contribuir a una justicia ambiental, su búsqueda es evadir sus responsabilidades mediante los mecanismos transfronterizos (Mesa, 2007).

Las teorías económicas circundantes al ambiente distan de sus concepciones filosóficas, éticas, morales, políticas y sociales, que comienzan a plantearse desde la década de los años 60 y 70 del siglo pasado, manifestando un imperante deterioro ambiental relacionado con

[3] Establecido como aquel que el precursor del daño ambiental pretende instaurar en defensa de sus prácticas contaminadoras, con motivo de su capacidad económica para asumir los costos ambientales producto de la explotación y sobreconsumo del ambiente que deviene en su deterioro y pérdida.

procesos hegemónicos del capital sobre los sistemas naturales y la conservación de los ecosistemas. producto del crecimiento económico, creando presión sobre el entramado ecológico por efectos de la asignación de valor a los recursos naturales, los cuales fluctúan conforme al comportamiento del sistema económico-ecológico de predominancia cambiante (Toledo, 1998). Es así como surge la necesidad de establecer puentes metodológicos que reconcilien desde su noción exegética las relaciones entre la economía y la ecología consolidando una hermenéutica del conjunto de las ciencias vinculadas encargadas de asignar una valoración a los recursos naturales transliteradas al marco jurídico. Como menciona (Rodriguez y Cubillos, 2012):

> La teoría del valor en la que se enmarcan las valoraciones de los bienes y servicios ecosistémicos - BSE desde la corriente de la Economía Ambiental - EA, corresponde a los postulados sobre el valor subjetivo. El valor subjetivo de un bien o servicio, ya sea natural o manufacturado, está determinado por la utilidad que genera el consumo para la satisfacción de una necesidad en particular y para un individuo en particular, lo que se conoce como las preferencias del consumidor. (..) La utilidad que obtiene de un bien un individuo se refleja en las cantidades de demandas de este bien en el mercado que, junto con la información de escasez (cantidades ofertadas), determinan el valor de cambio traducido a precios en el sistema de mercado (p. 230)

Para vincular las nociones naturales al sistema económico es necesario que los denominados BSE, objetos mercadeables sean apropiables y reproducibles (Fernández, 1995), ideal que desde la teoría ambiental económica excluye una serie de BSE transferidos al grupo de externalidades los cuales, debido a la indiferencia de consumo, son susceptibles a la degradación. Dicha disociación complejiza la asignación de un valor absoluto. Sin embargo, su designación indistintamente es antropocéntrica y su equivalencia en términos pecuniarios resultan en una cuestión utópica e incompleta (Rodriguez y Cubillos, 2012).

Por objeto de los métodos de valoración de la EA se encuentra en la internalización de costos ambientales como un mecanismo dentro del sistema de mercado, en el cual los diferentes valores constitutivos de los activos ecosistémicos, pueden aislarse para su análisis y sumarse para la identificación del valor total, siempre y cuando no se excluyan entre sí. Así, para identificar el valor total de los mal llamados bienes o servicios ecosistémicos, los cuales reconocen los valores parciales del uso tangible o intangible de este BSE o indirectamente mediante la intervención de otros bienes o atributos de un bien, respecto a su valor para el futuro y otros valores de no uso como el inmanente o el valor del recurso en términos intergeneracional como recurso de las generaciones futuras. La identificación de estos valores constituye un paso previo para desarrollar y seleccionar posteriormente cualquier método de valoración (Lomas et al., 2005).

4 El Estado Ambiental de Derecho, emancipación de la teoría liberal hacia el ecologismo

La peculiaridad de las realidades contextuales en las que se moldea la teoría crítica moderna son producto del cuestionamiento de cánones, dinámicas de dominación, opresión y discrinimacion de carácter individual y colectivos, los cuales evidencian las innumerables resistencias llevadas a cabo históricamente, mientras a su vez son condenadas al amparo de un único precepto de "integralidad" inhibiendo su singularidad, manifestada mediante mecanismos de traducción intercultural que hacen inteligible la crisis ambiental, la vulnerabilidad contemporánea y exhorta la perspectiva moral y el constructo ciudadano en la sociedad.

Desde elementos traídos de la filosofía y su repercusión sobre los fundamentos éticos contemporáneos, se gestan los Derechos Ambientales como una extensión de la moralidad que alcanza y compromete el ecosistema global interpelando a una justicia prospectiva en sus inicios expuesta por Juan Luis Vives, español humanista que vivió durante la época renacentista quien aduce que la humanidad no finaliza dentro de los límites de la realidad tal como la conocemos, sino que trasciende las nociones temporales y espaciales, como si los vivos estuvieran bajo la protección de los muertos (Vives J., Xirau J., & Sánchez G. 1944). En correspondencia, Federico Mayor Zaragoza, director de UNESCO entre los años 1987 y 1999 menciona el carácter universal de los Derechos Humanos y la responsabilidad que implica no transformarlos en un nuevo dogma, intangible y dominante:

> Si los derechos humanos se atribuyen a una época, una región, una clase social, una forma determinada de civilización, su universalidad queda reducida a la nada y asoma la amenaza del sometimiento. Esa amenaza reaparece cada vez que alguien se persuade de que esos derechos universales reflejan una concepción particular del mundo, limitada, que se puede abandonar en provecho de perspectivas más modernas, mejor adaptadas. Por ello, hay que defender continuamente esos derechos y los principios en que se basan. El consejo es válido ahora y para el futuro [...] Por eso debemos rechazar todo aquello que restrinja los derechos humanos. Defender los derechos humanos es negarse a reducirlos con pretextos de reordenación o adaptación. Es buscar su aplicación en los diferentes contextos culturales y sociales. Es no rehusar a la policromía de lo universal, que es la del arco iris. Sólo hay que recelar del silencio o de la indiferencia. Algunas personas que los cuestionan pueden argumentar: «Imponen los derechos humanos, os negáis a adaptarlos y ante la propuesta de reordenarlos aludís al despotismo. Quizá cabría replantearse, dado que se trata de las complejas relaciones entre los derechos humanos y el mundo actual, variable, multicultural, amenazado por nuevos riesgos (1998. p. 9-10).

Por su parte, la ética ecológica, producto de un planteamiento moral y filosófico, establece responsabilidades sobre las problemáticas

contemporáneas y aquellas que emergen producto de la intemperancia propia del modelo económico y sus paradigmas. La justicia distributiva en el marco de los derechos colectivos ambientales busca establecer límites y resignificar la valoración del ambiente y sus constitutivos, crear criterios de juzgamiento diferenciados conforme a las formas de opresión y lucha, múltiples y singulares.

Desde el biocentrismo y su universalización moral se gestan perspectivas jurídicas y filosóficas que permean la adopción de normas para asegurar el bienestar de lo no humano en vías de satisfacer las necesidades propias del valor intrínseco de cada especie, elemento y proceso. Los postulados son cercanos a la noción de Justicia fundamento del Estado, "entendida la Justicia en sentido amplio como criterio inspirador de todas las actividades públicas, no sólo de la judicial, sino también de la legislativa y de la gubernativa" como lo sostiene Alejandro Nieto en su obra Balada de la justicia y de la ley (2002. p. 24-26). Sin embargo, en sus postulados el autor establece ciertas limitaciones del Estado moderno en lo que respecta al concepto de justicia de lo no humano, ya que en su entendimiento textual lo convierte en un bien jurídico protegido, esa incapacidad de garantizar justicia a plenitud, la sustituye por la Ley.

Estado de Derecho y no un Estado de Justicia. El carácter variable, subjetivo y contradictorio de la Justicia le impide que sea un parámetro objetivo para regular la actuación pública. El compromiso será, por tanto, no solo realizar la justicia, sino también aplicar las Leyes que aseguran una certeza objetiva que todos pueden conocer. Estamos, en suma, ante una retirada estratégica del Estado con la que se gana en precisión lo que se pierde en ambición (2002. p. 32-35).

De acuerdo con lo expuesto, para lograr una justificación del juzgamiento en el marco del Derecho Ambiental, es necesario establecer un relacionamiento más allá de lo fáctico (precedentes del principio de prevención y precaución), de tal manera que consolide los lineamientos de objetividad y certeza que cumplen con una función estabilizadora y conciliadora, así como también, de reivindicación, emancipación y el aseguramiento de forjar un futuro como un cometido del Estado. Sin duda alguna, la estructuración de Políticas de Estado expresadas mediante actos legislativos objeto de reordenamiento, también se consolida como mecanismo de aseguramiento del imperativo ambiental que inspira la ley y su aplicación con miras a obedecer al recurso de interpretación propia del entendimiento invistiendo la personalidad jurídica del ambiente como un fin en sí mismo, símbolo de las responsabilidades, deberes y obligaciones de los seres humanos hacia el ambiente, siendo así como el interrelacionamiento de la ética y la política se consolidan las nociones del Derecho Ambiental.

Las diversas tendencias ecologistas y ambientalistas pretenden asumir una actitud distinta subyacente del cuestionamiento antropocéntrico, que permite establecer diferentes perspectivas. Algunas, desde el igualitarismo biótico extendido en los ámbitos natural, social y cultural inherentes del medio, juzgados conforme a un espectro teórico, técnico, ético, filosófico, ideológico y político, dispuestas como respuestas a la defensa de derecho y la satisfacción de necesidades de bienestar (Mesa, 2013).

4.1 La ecología política

La ecología política nace como producto de los conflictos ambientales, primero suscitados a partir de la extracción de materiales y energía, pugna sobre temas como la minería el agua, la extracción de petróleo, la degradación y erosión del suelo, las expansiones de plantaciones, biopiratería, la degradación de los manglares y los derechos de pesca.

Existe una variedad de conflictos ambientales, algunos, por ejemplo, relacionados con el transporte de materias primas relacionados con el transporte producto del envío de materias y de residuos, otros por acciones contaminantes propiamente dichas. Los conflictos ambientales se solucionan por diferentes vías entre ellas; la parte más débil fenece, por la criminalización de los activistas o finalmente por su encarcelación. La ecología política indaga sobre los movimientos políticos y sociales que luchan por alcanzar una justicia ambiental desde un enfoque interdisciplinario para entender los problemas socio ambientales que se generen a partir del ejercicio de poder económico y político que producen beneficios hacia los generadores de la afectación y relegan los impactos negativos hacia la naturaleza y grupos humanos.

Esta disciplina tiene mayor preponderancia en América Latina ya que permite desdeñar la naturalidad de los eventos que se desarrollan a nivel local de incidencia sobre el equilibrio planetario. La génesis de los conflictos ambientales deriva de la llegada de proyectos a territorios de antecedentes y prácticas tradicionales, en las cuales se otorgan títulos de extracción de subsuelo, situaciones en las cuales generalmente se ven involucrados los habitantes locales como una forma de exclusión o despojo, en donde el medio es degradado.

De esta manera, la ecología política gira alrededor de los principios de justicia, inequidad y distribución del poder, con el objeto de efectuar la transformación social y ofrecer mecanismos democráticos. La resolución del conflicto ambiental que nace a partir del conocimiento racional de las formas estatales, el cual brinda nuevos asideros frente a la metodología de juzgamiento reafirmando el Estado como garante en la defensa de

derechos. Estos últimos, direccionados bajo los principios de precaución, procurando la prevención de conflicto ambiental, por sobre la mitigación y la sanción de los mismos (Martínez, 2015).

4.2 La economía ecológica

El enfoque de la economía ecológica tomó fuerza en los años 70 como producto de establecer su interrelación con los flujos de materia, energía y la biología, inspirando a Georgescu Roegen quien desarrolló postulados sobre la ley de la entropía y el proceso económico. En su obra se establecen contradicciones entre los términos de la economía del crecimiento y los conceptos de la termodinámica a partir de cuestionamientos sobre la pérdida de energía (Georgescu-Roegen, 1986).

En los años 90 se consolidan las concepciones de límites al crecimiento, Daly Herman comenta que, si el desarrollo sustentable significa algo, requiere que la economía sea considerada parte del ecosistema y en consecuencia debe abandonar la idea de crecimiento económico. Esta teoría sostiene que las consecuencias del crecimiento, involucra la satisfacción de necesidades cada vez más insignificantes generando externalidades (impactos producto de acción financiera hacia el medio) de mayor preponderancia que destruyen aspectos cada vez más importantes relacionados con el metabolismo social. A esto se le conoce como la nueva teoría socioecológica (Daly, 2007).

Dichos límites al desarrollo, se asocian con el uso masivo de recursos, materiales de la biosfera y litosfera, evaluando su correlación sobre los flujos de desecho y emisiones. El crecimiento biofísico se ha acelerado considerablemente desde comienzos del siglo XXI, con tasas de crecimiento de flujos de materiales comparables a los decenios posteriores a la Segunda Guerra Mundial, periodo designado como la -gran aceleración- (Rockström, et al., 2009).

En el marco de la globalización y el flujo de mercados, establecer mecanismos de acción de carácter monetario por las afectaciones en el equilibrio en los sistemas planetarios de perjuicio local, establece un precedente contundente en el accionar del Estado en la búsqueda de regular el metabolismo propio de las actividades económicas.

4.3 Las ciencias ambientales

El marco jurídico Colombiano de juzgamiento posee el imperativo ambiental de corte conservacionista de repercusión sobre el futuro mientras intenta desarrollarse en la esfera preservacionista que en principio por lo menos teóricamente, permite mantener inalterado su forma primigenia. No obstante, una vez finalizadas las actividades generadoras de impactos, estos seguirán repercutiendo sobre los sistemas

incidentes por efectos de mecanismos de acumulación, concentración etc, que intervienen sobre la interacción de cada ciclo natural. Inevitablemente, dichos impactos han alterado paulatinamente, quizá de forma irreversible, los sistemas planetarios que habían mantenido una relativa estabilidad por miles de años.

Los cambios se viven en forma de crisis y conflictos en especial donde se extrae materia y energía para mantener el modelo económico extractivista, comprender las dimensiones de la crisis ambiental permite conmensurar la problemática que enfrentamos como especie. Desde el norte global se establece el Antropoceno, como término de connotación científica que denota una era preponderante en la alteración de los ciclos naturales de la ecosfera hasta el punto de traspasar los umbrales de permisibilidad que crea condiciones de mayor incertidumbre, donde los riesgos aumentan en proporción a los impactos que repercuten sobre la vida misma y en donde es fundamental asignar responsabilidades.

Una propuesta adelantada por científicos del Instituto de Resiliencia de Estocolmo (Stockholm Resilience Center) junto a miembros de la Universidad Nacional Australiana (Australian National University), establecen el concepto de límites planetarios el cual relaciona los diferentes procesos del sistema de la Tierra los cuales contienen límites ambientales. Dicho umbral operativo para la humanidad permite realizar un monitoreo al efecto de esta era geológica sobre la esfera terrestre a partir del establecimiento de indicadores como: la contaminación química, crisis climática, acidificación de los océanos, agujero de ozono, ciclo del nitrogeno, ciclo del fósforo, el uso del agua, deforestación - otras cambio de suelo, pérdida de biodiversidad y la contaminación atmosférica. Los cuales, bajo unos parámetros de monitoreo establecen una valoración frontera, que compara el estado actual versus su estimación preindustrial (Carabias, 2019). Bajo esa perspectiva, transgredir uno o más de los límites planetarios establecidos, puede ser catastrófico producto de los cambios ambientales abruptos, impredecibles y no lineales dentro del conjunto de los múltiples sistemas continentales a escala del planeta.

Gracias a este tipo de adelantos, se ha consolidado la ciencia de alerta temprana que advierte cuándo las prácticas humanas se acercan a un umbral en donde los ecosistemas pierden los caracteres que les mantienen estables, dichas fluctuaciones definen la variabilidad climática. El método de límites planetarios es útil en un contexto político, cuando sus advertencias son instauradas con antelación en una agenda política, pues permite que la sociedad pueda adaptarse y alejarse del umbral mucho antes de llegar a él. No obstante, un atributo de los sistemas planetarios es la inercia, propia de las relaciones físico-químicas con el medio, aludiendo que aún finalizadas las acciones contaminantes, permanecen con el paso del tiempo.

Si bien desde la ciencia misma no emana ningún tipo de inclinación moral puede sugerir límites para establecer no sólo nociones éticas sino también jurídicas, que se establecen como puntos de referencia del marco normativo a nivel mundial, regional y local.

5. Régimen Sancionatorio Ambiental colombiano

La normativa ambiental colombiana ha reconocido que una vez generado el daño nace la responsabilidad de repararlo. Así se estableció, por ejemplo, en la Ley 23 de 1973, en la que se señalaba que los particulares eran civilmente responsables por los daños ocasionados a los recursos naturales de propiedad pública o privada, como consecuencia de las acciones que generan contaminación o daño ambiental (García, 2017).

Posteriormente, la Ley 1333 de 2009, por la cual se establece el Procedimiento Sancionatorio Ambiental (21 de julio de 2009. D.O. No. 47413, en su artículo 1°, determina los principios generales ambientales que sigue la política ambiental colombiana. En el numeral 7º de la precitada norma indica que se fomentará desde el Estado "La incorporación de los costes ambientales y el uso de instrumentos económicos para la prevención, corrección y restauración del deterioro ambiental y para la conservación de los recursos naturales renovables" (García, 2017, p. 348).

En ese sentido, se considera que el principio de quien contamina paga es uno de los pilares de la tributación ambiental en Colombia. La Corte Constitucional de Colombia ha interpretado este principio señalando que su objetivo principal es el de la prevención del daño al ambiente, y en donde se pretende que los responsables de la contaminación o de la afectación paguen los costos de las medidas de prevención, mitigación y reducción. Adicionalmente, se quiere incentivar la generación de tecnologías ecológicas y que controlen el impacto ambiental de las actividades a través de diferentes mecanismos como informes, inspecciones, vigilancia, multas y sanciones económicas, apuntando a que se respete y proteja el entorno, con el fin de evitar la generación de daños sobre el mismo o sobre la población (cfr. Sentencia T-080 de 2015. Magistrado Ponente: Jorge Iván Palacio Palacio).

No obstante, como lo menciona (Mesa, 2013), respecto de las máximas investigativas y tecnocráticas que pretenden brindar solución a la crisis planetaria, desestimando incluso los campos difusos sobre los cuales existe huella ecológica:

> La principal causa de los problemas ambientales radica en las prácticas ilimitadas de depredación, explotación y sobreconsumo que el modelo de desarrollo hegemónico prefigura y promueve como la fórmula básica del desarrollo de la "libertad" humana, libertad asociada además a la fe ciega en la tecnociencia y a la ilimitada capacidad de la razón humana para justificar la depredación y la contaminación (p. 77).

El régimen especial unificado, permite individualizar las conductas precursoras de daño ambiental con propósito de garantizar la conservación, preservación, protección y uso de elementos de la naturaleza en el país a la luz de la sostenibilidad ambiental. Por consiguiente, el Estado como responsable supremo delega titularidades preventivas y sancionatorias a diferentes autoridades ambientales en el país. Así las cosas, a los departamentos, municipios y distritos dentro de su jurisdicción, adicional a la Armada Nacional, en lo que respecta a sus zonas marítimas, fluviales y algunas áreas terrestres al interior del territorio colombiano, el Estado concede atribuciones preventivas. Sin embargo, las sanciones son de aplicación exclusiva de los entes que otorgan licencias, permisos o autorizaciones sobre la actividad interpelada; recaen sobre el Ministerio de Ambiente y Desarrollo Sostenible, con jurisdicción total en el territorio nacional, Corporaciones Autónomas Regionales y Corporaciones de Desarrollo Sostenible, incluyendo las áreas del Sistema de Parques Nacionales Naturales, Autoridades Ambientales Urbanas, con idiosincrasia exclusiva dentro del perímetro urbano, Unidad Administrativa Especial de Parques Nacionales Naturales.

Dentro de las competencias ejercidas por la autoridad ambiental, se encuentran las medidas preventivas, instauradas cuando se verifica la ocurrencia de un hecho que causa daño ambiental, con motivo de impedir o evitar su la continuación y ocurrencia, el cual culmina con la imposición de sanciones toda vez son establecidas las responsabilidades del infractor por efectos del daño ambiental.

Bajo las debidas garantías legales y procesales se ampara el Procedimiento Sancionatorio Ambiental colombiano, que en el marco de las competencias públicas, ratifica su interés colectivo, en el ejercicio de los fines del Estado y en correspondencia de sus preeminencias constitucionales, su artículo 209 menciona:

> La función administrativa está al servicio de los intereses generales y se desarrolla con fundamento en los principios de igualdad, moralidad, eficacia, economía, celeridad, imparcialidad y publicidad, mediante la descentralización, la delegación y la desconcentración de funciones. Las autoridades administrativas deben coordinar sus actuaciones para el adecuado cumplimiento de los fines del Estado. La administración pública, en todos sus órdenes, tendrá un control interno que se ejercerá en los términos que señale la ley.

En este sentido, puede evidenciarse que el régimen se articula con el Código de Procedimiento Administrativo y de lo Contencioso Administrativo, no solo auscultar las responsabilidades precursoras de daño sino también, pretende brindar las garantías procesales. Reglamentado por la Ley 1437 de 2011, en su artículo 3° establece los principios rectores en la interpelación de los entes ambientales “Las

actuaciones administrativas se desarrollarán, especialmente, con arreglo a los principios del debido proceso, igualdad, imparcialidad, buena fe, moralidad, participación, responsabilidad, transparencia, publicidad, coordinación, eficacia, economía y celeridad".

Finalmente, conviene subrayar que las infracciones en materia ambiental están supeditadas a dos categorizaciones; la violación de la legislación ambiental vigente, y el daño al ambiente que bajo el debido proceso se debate entre las etapas de; indagación preliminar, iniciación del procedimiento sancionatorio, intervenciones, remisión a otras autoridades, verificación de los hechos, cesación del procedimiento sancionatorio, formulación de cargos, descargos, práctica de pruebas, determinación de la responsabilidad y sanción, juntos a las respectivas notificaciones y publicaciones a lo largo del proceso (Arias, 2020).

6. Estado unitario y protector

Las delegaciones y servicios auxiliares son responsabilidad del Estado, sobre su concepto unitario recae la titularidad del poder público, la ciudadanía obedece a una sola autoridad en el marco del establecimiento Constitucional, pauta suprema que ordena cada una de las leyes orientadas y controladas por los entes centrales (Penagos, 2003). En cabeza del Presidente de la República recae la máxima autoridad en la delegación de actividades dentro de los organismos y entidades administrativas, así como también la obligatoriedad en la dirección y control del accionar, ideado para auspiciar el poder, los recursos fiscales y sus compromisos, desde una perspectiva central a manos de las autoridades de carácter nacional. Como lo menciona la Corte Constitucional en su sentencia C-004/93, la autonomía territorial no es ajena a la figura unitaria estatal:

> La introducción del concepto de autonomía, implica un cambio sustancial en las relaciones centro - periferia y deben ser entendidas dentro del marco del Estado unitario. [...] A la ley le corresponde definir y defender los intereses nacionales, puede intervenir en los asuntos locales, siempre que no se trate de materias de competencia exclusiva de las entidades territoriales. [...] Se trata de armonizar los distintos intereses y no simplemente delimitarlos y separarlos. [...] las competencias, como lo señala la propia Constitución, deben ejercerse dentro de los principios de coordinación, concurrencia y subsidiariedad.

En el marco sancionatorio, la conducta del infractor es valorada a partir de diferentes circunstancias que el Estado unitario, suprema autoridad ambiental de conformidad a la Constitución Política del 1991, considera para la determinación de la sanción; la violación de la legislación ambiental vigente, y hecho factico de daño al ambiente. Las circunstancias en términos de la tasación de la multa pueden acrecentar o disminuir conforme a los antecedentes sujetos a la actuación reprochable

denominados agravantes o atenuantes respectivamente. Sin duda, para efectos de la reincidencia, dentro del ordenamiento punitivo el prontuario permite tipificar la severidad de las medidas en proporción al comportamiento, desempeño, disposición en el incumplimiento de sus obligaciones con base en los procesos sancionatorios iniciados en el pasado.

Si bien la Constitución política colombiana establece el alcance en las competencias administrativas y su regulación, es el legislador quien finalmente cierne la ley para regular la conducta del infractor junto a la autoridad ambiental regional o local a la cual le compete investigar el hecho. Indagar sobre la reincidencia, uno de los agravantes establecidos en la metodología para la tasación de multas, implica reconsiderar su aplicación respecto del sujeto sobre el cual recae el concepto y evaluar la necesidad de primero, aseverar el agravante sobre el cual se internaliza el costo ambiental para el infractor y en segunda instancia formular otro que acompañe la condición infractora en este caso, para el Estado colombiano. Este miramiento permite dilucidar la responsabilidad estatal, toda vez que aun con la potestad absoluta conferida por la Carta Magna, su adhesión a los tratados internacionales en términos ambientales y en defensa de los derechos humanos no garantiza la protección del compendio ecológico fungiendo finalmente como sufragante del agravio ambiental, no asegura la modificación irrefutable de la conducta, se verifica entonces una insuficiencia producto del antecedente de infracción ambiental.

Indudablemente, la figura del Estado colombiano como infractor recrea una variable adicional al ejercicio del ius puniendi, esta noción a modo de agravante maximiza los alcances y las responsabilidades de todos y cada uno de los eslabones en el ejercicio sancionatorio, de tal modo que recrea una política represiva para la salvaguardar el ambiente.

El Estado colombiano en sus facultades constitucionales debe esencialmente como principio rector, procurar la prevención del daño, detectar en los proyectos, obras y actividades, sus antecedentes de daño y conjugar sus particulares respecto a su consumo, extracción, uso, aprovechamiento, explotación en el marco de la planificación de los recursos naturales (Rodríguez & Vargas, 2015).

En perspectiva, es así como la regulación colombiana se fundamenta en términos del régimen internacional el cual establece una clara responsabilidad civil, atribuida a la transgresión de derechos previamente establecidos y posteriormente tipificados dentro del sistema de derecho civil para imputar obligatoriedad. El Derecho Ambiental Internacional se desarrolla en la medida que se van gestando las múltiples declaraciones ambientales, sus máximas no son de obligatoriedad pero por voluntad política, son instauradas en el marco jurídico conforme a los intereses

particulares de cada país, estableciéndose de manera parcial, definidas como instrumentos internacionales vinculantes, y no vinculantes, expedidas mediante la acción de los tribunales especializados. Para el caso del marco normativo colombiano, se inscribe dentro de su ordenamiento el daño ambiental transfronterizo, enmarcado dentro de la protección del ambiente y su adherencia a los derechos humanos. A partir de 1972 con la declaración de Estocolmo, soft law, toma en consideración los temas entorno al ambiente que incluyen consecuentemente, el derecho a un ambiente sano, el cual debe dejar su connotación conexa a derechos como la salud y la vida y orientarse como derecho autónomo para unirse a los categorizados dentro del marco de la defensa de los derechos civiles, económicos, políticos, sociales y culturales consagrados a nivel mundial y amparados por los diferentes mecanismos internacionales.

Entre tanto, la Comunidad Andina de Naciones - CAN asevera que los Estados deben hacerse cargo de los daños transfronterizos que perjudiquen los recursos naturales fronterizos (Mesa, 2021). En paralelo, la Organización de Estados Americanos - OEA, establece la Opinión Consultiva OC-23/17 en la cual el medio ambiente es un bien jurídico que debe salvaguardarse no solo por los efectos perjudiciales incidentes sobre la salud pública sino además por su importancia de cara al compendio vivo. En ese sentido, el medio ambiente es justiciable dentro del establecimiento interamericano. El dictamen tribunal sobre la naturaleza de las conductas extraterritoriales menciona que debe existir una correlación directa entre los derechos vulnerados y una relación causal, para así establecer responsabilidades internacionales y atribuirlas a la jurisdicción donde se originó la violación de derechos, los Estados deben prevenir el agravio, actuando conforme al principio de precaución en cooperación entre ellos (Buitrago, 2022).

El Estado colombiano figura administrativa suprema, con la prerrogativa máxima para prevenir y evitar los multidimensionales daños ambientales procurando a nivel supranacional la conservación, preservación de la biodiversidad, sumado al mantenimiento de la riqueza, pluralidad étnica y cultural en términos de un contexto global o regional según el caso, conforme lo establece la Carta de las Naciones Unidas firmada el 26 de junio de 1945 exponiendo de entre sus principios y propósitos:

> Mantener la paz y la seguridad internacionales, y con tal fin: tomar medidas colectivas eficaces para prevenir y eliminar amenazas a la paz [...] realizar la cooperación internacional en la solución de problemas internacionales de carácter económico, social, cultural o humanitario, y en el desarrollo y estímulo del respeto a los derechos humanos [...] servir de centro que armonice los esfuerzos de las naciones por alcanzar estos propósitos comunes [...]

Adicionalmente, acorde a lo pactado en la conferencia de Río de Janeiro en 1992 en su principio número dos, los Estado debe asumir los agravios transfronterizos:

> [...] los Estados tienen el derecho soberano de aprovechar sus propios recursos según sus propias políticas ambientales y de desarrollo, y la responsabilidad de velar por que las actividades realizadas dentro de su jurisdicción o bajo su control no causen daños al medio ambiente de otros Estados o de zonas que estén fuera de los límites de la jurisdicción nacional.

De esta manera, el Estado Colombiano se encuentra vinculado no sólo a establecer los hotspots de la biodiversidad mundial, sino adicional a dar garantía de las dinámicas dentro del territorio nacional con un enfoque ecológico integral. El Acuerdo de París establece para las partes lo imprescindible en tomar a consideración medidas para la protección de derechos humanos, en el marco de la convención de la Naciones Unidas sobre el Cambio Climático, que data sobre la reducción de emisiones atmosféricas, los daños ambientales, y la participación en la toma de decisiones. En el artículo 8° de la convención en París, precisa la importancia de evitar y reducir los daños, mientras se asumen pérdidas que desde la perspectiva de los derechos humanos se encuentran relacionadas con el derecho de acceso y uso de los recursos pero también con los principios de reparación para la restitución, indemnización y rehabilitación. El informe proferido luego de la convención, recoge las recomendaciones importantes respecto a bajar a la mitad las emisiones de gases efecto invernadero, con recomendación especial a la Corte Penal Internacional de tipificar el ecocidio como delito, la creación de mecanismo para la financiación de pérdidas y daños con una comisión específica para su estudio bajo el dominio del principio "contaminador-pagador" lo que deriva en un instrumento para permitir la reclamación por daños proferidos con responsabilidad civil, penal y administrativa con garantía de no repetición (Organización de las Naciones Unidas [ONU], 2022).

En correspondencia, la sentencia C-259 de 2016, de la Corte Constitucional Colombiana dictamina que desde la óptica ambiental, el Estado adquiere obligaciones en perspectiva de la Constitución. Evitar el daño se encuentra sujeto a la toma de medidas anticipadas, recreando políticas pertinentes para desincentivar el agravio. No obstante, una vez efectuado el daño, mitigarlo es esencial en términos de sus consecuencias, sin duda para aminorar el impacto ambiental, son legítimos los permisos y/o concesiones ambientales en términos de licencias ambientales, los planes de manejo ambiental y las autorizaciones. Así las cosas, la indemnización ambiental, es inherente a la responsabilidad del Estado que en su artículo 90° la Constitución política consagra "El Estado responderá patrimonialmente por los daños antijurídicos que le sean imputables,

causados por la acción o la omisión de las autoridades públicas" y que además puede otorgarle una responsabilidad civil por efectos de prejuicio sobre el bienestar colectivo:

> La ley regulará las acciones populares para la protección de los derechos e intereses colectivos, relacionados con el patrimonio, el espacio, la seguridad y la salubridad públicos, la moral administrativa, el ambiente, la libre competencia económica y otros de similar naturaleza que se definen en ella. También regulará las acciones originadas en los daños ocasionados a un número plural de personas, sin perjuicio de las correspondientes acciones particulares. Así mismo, definirá los casos de responsabilidad civil objetiva por el daño inferido a los derechos e intereses colectivos (CP art 88).

Como se evidencia, el detrimento ambiental puede incluso ser originado por actividades legítimamente amparadas por la ley. En el ámbito internacional una vez se identifica un fallo o en su defecto la ausencia de las medidas preventivas, restaurativas o compensatorias al daño, se llevan a término unos rubros / costos, con el fin de sopesar el vínculo contractual o extracontractual a modo de pasivos ambientales; como formas de coerción de los activos de la nación, producto de la suma de externalidades y las deudas ambientales; como aquellas que se presuponen pero que no se pagan y crean injusticia ambiental, en ambos casos establecidas en vista de una situación de riesgo el cual crea un juicio de responsabilidad asociado a un nexo causal.

El debate contemporáneo respecto a la resolución del déficit de financiación en materia de pérdidas y daños ambientales, fruto de la transgresión de varias disposiciones por parte del Estado colombiano obedece principalmente, al desconocimiento de la jurisprudencia y sus alcances durante el ejercicio público sumado a la ineficiencia en el control de las medidas para el manejo ambiental y por consiguiente al seguimiento que debe realizar las autoridades ambientales. En materia internacional se debe a que los países contaminantes renuncian a sus obligatoriedad de cooperación internacional. No obstante, como lo expresa Rodríguez & Vargas, mencionando a Rodas (1995):

> Es necesario superar esa 'visión civilista' parcial, divisible y dependiente de los derechos y bienes ambientales, pues en realidad el ambiente comporte características de bien y derecho 'inmaterial, unitario y autónomo', que, por sus múltiples repercusiones, no puede reducirse a la responsabilidad entre dos sujetos que se disputan un derecho de carácter individual.

7. Conclusiones

7.1 Desafíos del Estado social de derecho frente a la crisis planetaria

El artículo expone el contexto histórico enmarcado por el Estado liberal en el cual se ha gestado el paulatino, pero significativo deterioro ambiental, ligado a procesos de deforestación, erosión del suelo, pérdida

del recurso hídrico respecto de su calidad, caza y pesca excesiva, pérdida del endemismo y biodiversidad, impactos antrópicos, la crisis energética y el aceleramiento del cambio climático, evidencia de los límites ecológicos planetarios que pone en perspectiva los miramientos económicos, social, político, filosófico y cultural que erigen los estamentos normativos que actualmente regulan de manera elemental y fragmentaria. En el marco del colapso civilizatorio, el ejercicio investigativo demuestra el desafío del derecho ambiental contemporáneo en abrir la senda hacia un enfoque sistémico inter- y transdisciplinario, su paso hacia el horizonte poscapitalista en vías de superar las nociones tecnocráticas y cientificistas que moldean el ejercicio del Estado neoliberal y su visión dualista moderna evidenciados en las prerrogativas jurídicas ambientales, las cuales indirectamente han promovido un sin número de diversas formas de resistencia antisistémica, como llamado colectivo hacia la búsqueda de integralidad jurídica y justicia redistributiva.

7.2 Más allá de la teoría ecológica, una praxis de-constructivista

En resumen, la ecología política que derivada de la economía ecológica, si bien integra nuevas doctrinas disciplinares, no establece un paradigma cognoscitivo inédito, su constructo se deriva del préstamo metafórico de los conceptos provenientes de otras disciplinas que, por su naturaleza sectorial, controvierte entre sí sus alcances, desplazando su enfoque hacia la racionalidad económica que deviene luego en asimetrías distributivas en términos de costos de los efectos por los daños ambientales. El análisis deduce que en vías de una transformación epistemológica, es menester desestimar el discurso de adaptabilidad y manipulación ambiental que se establecen desde la economía ambiental para la internalización de los costos ambientales. Lo anterior, se desprende de la dialéctica de la sostenibilidad que aduce a reciclar el proyecto económico desarrollista, falsas soluciones que suscita dilemas éticos y geopolíticos. Se evidencia la necesidad de crear una narrativa post-extractivista y de decrecimiento en el ámbito político-ambiental el cual asocia los derechos de la naturaleza, los bienes colectivos y la ética del cuidado, fundados en el principio de impartir nuevos vínculos con la naturaleza.

7.3 Limitaciones del modelo sancionatorio ambiental

En síntesis, el ejercicio administrativo del Estado colombiano debe como primera medida propender la evitación del daño antes que su mitigación y reparo, pues la vocación del Régimen Sancionador Ambiental es preventivo, su objetivo deriva en la protección de los derechos de sus concomitantes, la regulación jurídica integral para la preservación y conservación ambiental.

Si bien la internalización de los costos ambientales es una forma de reparo ante el daño, se puede concluir que su derrotero se desarrolla en una lógica de compensación económica, la cual, desde un horizonte monetario, permanece implícito una deuda ecológica que en su auditoría alude los alcances y las responsabilidades del Estado colombiano.

7.4 Estado "macro infractor"

En síntesis, en perspectiva de los derechos humanos, los principios de precaución y prevención permiten una ampliación de la protección de derechos en el marco del Procedimiento Sancionatorio Ambiental colombiano. Sin embargo, cuando el Estado como suprema autoridad administrativa, adquiere el adjetivo de infractor posterior a una indagación por daño ambiental, su potestad queda en entredicho, toda vez que actúa como juez y parte. Por consiguiente, se considera el Estado colombiano infractor, como el origen del incumplimiento de la una norma de carácter ambiental y, en consecuencia se le atribuyen responsabilidades por su repercusión sobre la norma superior de prevención de daños ambientales amparadas por el marco normativo local, regional e internacional que auspicia el deterioro ambiental y en consecuencia la crisis planetaria.

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THE RIGHTS AND OBLIGATIONS OF NON-PROFIT ORGANIZATIONS IN FREE CONTRACTS AS WELL AS THE TAX BENEFITS OF LEGAL ENTITIES PARTY TO THE CONTRACT

Gabriel TAMAS-SZORA[1]

Abstract

This article deals with the comparative analysis of free contracts concluded in favor of NGOs according to their nature as well as the fiscal benefits of the companies in relation to the taxes owed to the state according to the tax law in force.

Keywords: *tax deductions, tax, donation, patronage, sponsorship*

1. Brief Introduction

Starting from the social-economic context that began with the declaration of the state of emergency as a result of the spread of the SARS COV 2 virus, the measure instituted by the President of Romania based on the provisions of art. 93 para. (1), of art. 100 of the Constitution of Romania, republished and of art. 3 and art. 10 of the Government Emergency Ordinance no. 1/1999 regarding the regime of the state of siege and the regime of the state of emergency, approved with amendments and additions by Law no. 453/2004, with the subsequent amendments and additions, and until now, a high level of involvement on the part of society could be observed in an attempt to limit the negative impact of the spread of the SARS COV 2 virus, but also to help disadvantaged communities in the context of the economic recession as an effect of the pandemic.

2. **Associations and Foundations** - parties to various contracts concluded with professionals

As of October 31, 2022, there were approximately 129,919 associations and foundations operating in Romania[2]. It is realistic to assume that at least one third of them are actually active and carrying out

[1] Dr. Tamas-Szora Gabriel, PhD. student at the Doctoral School of the "Lucian Blaga" University in Sibiu, Assistant Professor at the Faculty of Law of the "1 Decembrie 1918" University in Alba Iulia.

[2] According to the National NGO Register https://www.just.ro/registrul-national-ong/

activities in accordance with the stated purpose. Furthermore, we can assume the fact that they concluded legal acts with legal entities with profit-making legal entities through which the latter financially support the activities of non-governmental organizations such as associations and foundations, hereinafter referred to as NGOs.

To continue, it is essential to mention their definition, which according to art.1 of Ordinance no. 26/2000 with the amendments introduced by Law no. 246/2005 is: "(1) Individuals and legal entities that pursue activities of general interest or in the interest of some collectives or, as the case may be, in their personal non-patrimonial interest may constitute associations or foundations under the conditions of this ordinance. (2) Associations and foundations established according to this ordinance are legal entities under private law without patrimonial purpose. (3) Political parties, trade unions and religious cults do not fall under the scope of this ordinance."

We note that unlike other legal entities, their purpose is a non-patrimonial one, they operate in the general interest, in the interest of some collectives or, as the case may be, in their personal non-patrimonial interest, thus serving a public utility.

The non-patrimonial purpose is of the nature of non-profit associations, obtaining profit not being of interest, they are nevertheless financed by various entities that have a patrimonial purpose in order to support the activities carried out by the previous ones.

These elements that characterize an association or a foundation are essential through the lens of law 32/1994 that regulates the legal regime of sponsorship contracts because in art. 4, the rule is established by which "Any legal entity of public utility, based in Romania, which carries out or will carry out an activity with a direct humanitarian, philanthropic, cultural, artistic, educational, scientific, religious, sports or which is intended for the protection of human rights and civic education or the quality of the environment[3]„. Article 4 shows us the development areas of a community that we can overlap with the areas of interest of the state. It is a social reality that currently the state enjoys the support of these organizations and the business environment that supports them and for which it has created a legal framework through which it has regulated

[3] MUSTANG PAWS ASSOCIATION - LABUTE MUSTANG established in 2020 whose purpose is to "ensure the protection and defense of animals, the rescue, shelter and adoption of abandoned or needy animals, especially the rescue of stray dogs and cats" or AB AUTISM association, founded in 2013, whose purpose is "Improving the quality of life, defending and promoting the rights and interests of people with pervasive developmental disorders, language disorders, motor retardation, mental retardation and any other developmental disorders, as well as families to them." According to the National NGO Register https://www.just.ro/registrul-national-ong/

fiscal benefits for the latter through which advantages with direct impact are created on the activities carried out by non-profit legal entities.

3. Tax facilities granted to legal entities that pursue a profitable scope

In accordance with Art. 25 para. 4, letter (i) Fiscal Code, the following expenses are not deductible when calculating the profit tax:

- sponsorship and/or patronage expenses, expenses regarding private scholarships, granted according to the law; taxpayers who carry out sponsorships and/or acts of patronage, according to the provisions of Law no. 32/1994 regarding the sponsorship, with subsequent amendments and additions, of the Law no. 334/2002, republished, with subsequent amendments and additions, and the provisions of art. 25 para. (4) lit. c) from the National Education Law no. 1/2011, with subsequent amendments and additions, as well as those who grant private scholarships, according to the law, reduce the related amounts from the profit tax due at the level of the minimum value of the following:
  1. the value calculated by applying 0.75% to the turnover; for situations where the applicable accounting regulations do not define the turnover indicator, this limit is determined according to the rules;
  2. the amount representing 20% of the profit tax due[4].

In the case of sponsorships made to non-profit legal entities, including cult units, the amounts related to them are deducted from the profit tax due, within the limits provided by this letter, only if the beneficiary of the sponsorship is registered, on the date of the conclusion of the contract, in the Registry of Entities / cult units for which tax deductions are granted.

According to art. 25 para. 41, Fiscal Code, with reference to that register the following is mentioned[5]:

The register of religious entities / units for which tax deductions are granted is organized by A.N.A.F., as established by order of the president of A.N.A.F. The register is public and is displayed on the A.N.A.F. website. Enrollment in the Register of religious entities/units for which tax deductions are granted is carried out based on the request of the entity, if the following conditions are fulfilled cumulatively, on the date of submission of the request:

[4] OG 11/2022 for the modification and completion of some normative acts, as well as for the modification of some deadlines, Monitorul Oficial NO. 97 of January 31, 2022.
[5] *Idem*.

a) carries out activity in the field for which it was established, based on the self-responsible declaration;
b) has fulfilled all its tax reporting obligations provided by law;
c) has no outstanding tax obligations to the general consolidated budget, older than 90 days;
d) submitted the annual financial statements, provided by law;
e) was not declared inactive, according to art. 92 of the Fiscal Procedure Code.

Similarly, for microenterprise income tax payers, we have the following facilities for the payer, respectively advantages for the beneficiaries of the sponsorship, according to art. 56 para. 11 of the fiscal code:

Microenterprises that carry out sponsorships, according to the provisions of Law no. 32/1994, with the subsequent amendments and additions, for the support of non-profit entities and cult units, which at the date of conclusion of the contract are registered in the Register of cult entities/units for which tax deductions are granted according to art. 25 para. (41), as well as the micro-enterprises that grant scholarships to students enrolled in dual professional education in accordance with the provisions of art. 25 para. (4) lit. c) from Law no. 1/2011, with the subsequent amendments and additions, reduce the related amounts from the micro-enterprise income tax up to the value representing 20% of the micro-enterprise income tax due for the quarter in which the respective expenses were recorded.

The provisions mentioned above, applicable to profit tax payers and microenterprise income tax payers, also apply to the sponsorships carried out, according to the provisions of Law no. 32/1994, with subsequent amendments and additions, to public institutions and authorities, including specialized public administration bodies.

In this case, the deduction of the amounts representing sponsorships from the income tax of micro-enterprises, within the stipulated limits, is carried out on the basis of the sponsorship contract, without the obligation to register the respective beneficiary entities in the Register of religious entities/units for which tax deductions are granted provided for in art. 25 para. (41) Fiscal code.

If the mentioned limits have not been used in full, taxpayers can order the redirection of the profit tax/income of micro-enterprises, within the limit of the difference thus calculated for the entire fiscal year, for sponsorship activities, respectively for the awarding of scholarships, within 6 months from on the date of submission of the profit tax return for the previous year, respectively of the declaration related to the fourth quarter (for the income tax of micro-enterprises), by submitting a redirection form(s).

4. Legal instruments *used for the purpose of using tax advantages*

From a legal point of view, these mechanisms are applied through a series of legal documents, the most used of which are the donation contract, the sponsorship contract and the patronage contract.

The mentioned free contracts are legal documents through which a for-profit/non-profit legal person can transfer sums of money, tangible or intangible movable assets and real estate to other legal or natural persons, each of these documents having certain particularities and facilitating a certain exchange of goods.

In principle, through the donation contract, receivables and real rights over tangible/intangible movable or immovable goods can be transferred in favor of a natural or legal person without the latter offering anything in return. This contract must be analyzed a little in terms of the purpose of the contract but also of the legal entity that concludes this type of contract.

In principle, the purpose of the donation contract is to make a liberality in favor of the other party without it being subject to an obligation to the donor, so it is done to gratify the donee. Of course, there are exceptions to this principle, the exception being the donation with a charge in favor of the donee or a third party. However, in order to be able to discuss the existence of a genuine donation, the value of the donor's benefit must not exceed that of the donee, in the case of a donation with a charge. Therefore, we can say that the purpose of this type of contract is to make a liberality that increases the patrimonial value of the donee, but analyzing this definition from the point of view of a legal entity with a profit-making purpose, we notice that a particular situation is created. From a legal point of view, analyzing art. 206 of the Civil Code, which regulates the content of the capacity of legal entities, we note that legal entities can have civil rights and obligations, except for those that can only belong to a natural person, therefore we can state that a legal entity, for example a commercial company, will be able to conclude contracts free of charge in favor of other legal or natural persons, the law not specifying the existence of such a right only in the case of natural persons, an assertion also supported by art. 984 of the Civil Code which states that "Liberality is a legal act by which a person freely disposes of his assets [...] in favor of another person." However, the possibility of concluding such contracts could lead to a commercial abuse[6] through which the management bodies of a company would in practice conclude such contracts that could harm it.

[6] Dr. Cătălin Oroviceanu, article "*Purpose, object of activity, social interest. How does it still correlate?*" published on 29.08.2013, https://www.juridice.ro/280683/scop-obiect-de-activitatie-interes-social-cum-se-mai-coreleaza

From a fiscal point of view, the donation is not of interest in terms of the facilities granted by the state to companies, as is the case with the sponsorship contract, which is similar to the first one only that it is not concluded out of the desire to gratify a person, this being similar to the donation only from the perspective of the fact that the patrimonial increase of the other party is pursued, the sponsorship being done with a specific purpose and to benefit, in turn, the commercial company, from the tax facilities provided by law. More than that, sponsorship is a legal act by which two people agree on the transfer of the ownership of movable material goods or financial means to support non-profit activities carried out by one of the parties, called the beneficiary of the sponsorship. Being a legal act concluded between two persons (either a natural person and a legal person, or two legal persons), the sponsorship must be carried out on the basis of a contract in written form, specifying the object, value and duration of the sponsorship, as well as the rights and obligations of the parties.

Instead, the legal act by which goods or money are made available to a natural person free of charge by another natural or legal person is called patronage, not sponsorship.

Patronage is an act of generosity or when a natural person called a patron transfers, without obligation of direct or indirect counterpart, his right of ownership over some material goods or financial means to a natural person as a philanthropic activity with a humanitarian character, for carrying out activities in the field cultural, artistic, medico-sanitary, or scientific - fundamental and applied research.

The act of patronage is similar to the donation contract in that it must be concluded in the authentic form, in which its object, duration and value will be specified. Even if in the Civil Code there is no value limit up to which such a legal act must not be authenticated, in order to benefit from tax deductions it will be authenticated regardless of its value[7].

According to the above, it should be mentioned that the law does not present a value ceiling up to which a sponsorship contract can be concluded in the form of a document under a private signature, as is the case with the conclusion of a donation contract in authentic form if the value of the good donated movable property exceeds 25,000 lei[8]. It should also be mentioned that the sponsor or the beneficiary has the right to make the sponsorship known to the public by promoting the sponsor's name, brand or image in a way that does not harm the sponsored activity, good morals or public order and peace;

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[7] Art. 1 paragraph (2) - paragraph (4) of Law no. 32/1994 on sponsorship.

[8] Art 1011, paragraph (4) Civil Code "Movable tangible goods with a value of up to 25,000 lei can be the object of a manual gift, except for the cases provided by law. The manual gift is concluded validly by the agreement of will of the parties, accompanied by the tradition of the good."

One of the most important obligations resulting from the sponsorship contract, in addition to making the expenses according to the object and purpose of the sponsorship contract, is the reporting obligation which represents a means of verifying the beneficiary of the sponsorship.

The report is assimilated to a self-responsibility declaration that is drawn up after the fulfillment of the obligations of the beneficiary of the sponsorship and has the role of informing the sponsor about how the sponsored project was carried out, the number of participants in the project on whom the activity had a direct or indirect impact carried out, the manner of spending or use of the sponsorship as well as the manner in which other secondary obligations of the beneficiary were fulfilled (e.g. the obligation to promote the sponsor).

Brief conclusions

Although there is a diversity of legal acts through which the gratification of the other party is sought, the law regulates only two contracts through which legal companies, as sponsors or patrons, benefit from tax facilities. However, we cannot fail to highlight the fact that the donation with charge, an important contract, expressly regulated by the Civil Code, and which is often used in practice, does not benefit from the same legal regime, being similar in this form to a sponsorship contract, both of which are able to transmit sums of money or movable goods. By law, the ferenda would be useful in the case of a donation concluded by a legal entity, preferred by the latter because it offers certainty, security and confidence regarding the manner of its conclusion and execution, so that the legal entity can benefit from the same fiscal facilities regulated in the case of the sponsorship and patronage contract.

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PUBLIC ADMINISTRATION AND CRITICAL INFRASTRUCTURE PROTECTION

Petrișor PĂTRAȘCU[1],
Gabriela NICOARĂ[2]

Abstract

Generally, essential products and services ensure the basic needs for the people and the normal functioning of a state. These are carried out through certain infrastructures defined as critical infrastructure by the most countries in the world. Moreover, at the national level of these countries, the protection of critical infrastructures is implemented within a regulatory framework, which in turn supports an integrative and dynamic operational framework. Thus, a series of essential services such as those related to public health, transportation, food, drinking water supply, energy and heating, safety and security are provided through the critical infrastructure sectors that are assigned to national critical infrastructure. Every national critical infrastructure sector is therefore represented by one or more responsible public authorities. The number of critical infrastructure sectors and sub-sectors designated by law varies from country to country. Therefore, for reasons of legal security, the identity of critical infrastructures is established by law. Public administration sector is among these critical national infrastructure sectors. In this respect, public administration addresses society's needs providing essential services for people. The role of public administration is particularly important for achieving economic growth, social well-being and citizen security. At the same time, the quality of the provision of essential public services is an important indicator that reflects the proper functioning of a state. The purpose of this article consists, on one side, in identifying the states that have established public administration as a critical infrastructure sector, the legislative framework that consolidates the critical infrastructure sectors and the specific peculiarities of each country, and on the other side, in the analysis of the relationship between the two areas highlighted above: public administration and critical infrastructure protection.

Keywords: *public administration, critical infrastructures protection, essential services, sectors and subsectors, legislative framework*

JEL Classification: H 38; K10; K38

Introduction

Several countries of the world have established by law the matters related to the identification, designation and critical infrastructure protection. Depending on their essential products and services, they have

[1] National Defense University "CAROL I", patrascupetrisor@yahoo.com
[2] National Defense University "CAROL I", gabriela.nicoara.cj@gmail.com

been classified into sectors that were assigned to one or more responsible public authorities. The number of sectors varies from one State to another, being under different names, or being divided into several sub-sectors. In the same context, national critical infrastructures are designated by law, without being made public, following a process of identification and designation of national critical infrastructures based on the application of certain sectoral and intersectoral criteria. According to the authors Rehak, Senovsky and Slivkova (2018), critical infrastructure is a complex system designed to facilitate the continuous provision of essential services, and the components of the infrastructure are constantly exposed to the effects of various threats that can generate disruptive events that could lead to the interruption or even stopping the services provided. Therewith, in times of uncertainty or crisis caused by anticipated or unpredictable threats, the continuity of essential services becomes crucial (Tomalska, 2020). From the perspective of the EU and Member States, at the level of a critical infrastructure, the main person responsible for protection of critical infrastructures is the liaison officer whose duties are to develop, update and evaluate the security plan of the operator. Also, at the level of the responsible public authorities, the liaison officer is the head of the compartment specializing in national critical infrastructure protection.

Aspects regarding public administration

Public administration represents one of the sectors mentioned in the legislation of certain countries. In this sense, starting from one of the semantic valences of *administration*, in the broad sense of the word, administration is "*an activity that consists in leading, steering, managing a company, an institution, an entity"* (1998). Therefore, relating this meaning to the power prerogatives of a state, we intend to review some of the institutional solutions found by different countries regarding their own administration. Afterwards, considering the existing legislation and specialized literature, we intend to identify how some of the countries of the world approach the relationship between their own administration and the critical infrastructures.

We know that the interface that a state uses to ensure the demands of its citizens relies on the administrative (institutional) apparatus that it has at its disposal. At the same time, the administration aims to satisfy the interests of its own collective and from an organizational point of view, the states are the ones that transpose, in practice, this objective, by creating or identifying specialized entities with assigned responsibilities in the field of public administration.

From an evolutionary point of view, the contemporary forms of administrations of the states of the world are the product of a long process

of formation, transformation and differentiation. The models used depend on a number of defining factors. On the one hand, the political regime and its degree of involvement at the institutional level form the main basis on which the institutional network establishes its relations (of power, influence, ordering, subordination). On the other hand, the influence that an economic or political alliance or a strategic partnership can have on the state can lead to the modification of the internal legislation and the drawing of the institutional prerogatives in the predetermined sense. Legislative recommendations or impositions, economic limitations or ensuring a broad framework for accessing financial resources can become decision points in the reorganization of a country's public administration. For example, the accession and, subsequently, the integration into the European Union lead to a decentralization process in several European states (Alba, Navarro, 2011).

France, known as a country with one of the richest traditions in public administration research and the substantiation of administration science, has benefited from an autonomous administrative science since the second half of the 20th century (Tomescu, 2020). The creation of educational systems intended for the training of civil servants (including at university education level) along with the intensification of research in the field of administration materialized in a prestigious literature including monographs, treatises (Auby, Bandet, Drago, Eisenmann, 1966) and various university courses resulted in a high development of administrative science in this country.

Germany also has a significant tradition in this field. The development of administrative law and the involvement of prestigious jurists contributed to the development of the administrative science seen as a majestic piece of political sciences (Toma, 1947). Thus, nowadays we refer to this country as a rule of law that has decentralized coordination systems with a strong local emphasis (Funck, Karlsson, 2019).

In Spain, the centralized administrative model that was inspired by the Napoleonic tradition underwent changes over time that materialized in different institutional structures. Under the influence of joining the European Union, it renounced the centralized bureaucratic system by adopting a governance model based on many levels: 17 decentralized regions directed by the central government. A significant part of the responsibilities and tasks previously carried out by the central government have been reassigned to local institutions in the 17 regions. Despite the political instabilities, the administrative apparatus of the state maintained its independence in relation to the extreme changes that occurred. Moreover, it managed to maintain a strategic position within the political-administrative apparatus of the state, the regional and local governmental structures

benefiting from administrative and organizational autonomy in key areas such as: education, health, justice, police, culture, industry and agriculture.

Poland, as a unitary parliamentary representative democratic republic, also benefits from decentralization and delegation of responsibilities at the level of local administration to self-governing authorities in voivodeships, municipalities and counties (Banas, 2010).

Overall, decentralization of the public sector of the states had as its main reason the improvement of the efficiency of services offered to citizens through the gradual transfer towards self-governance. In order to strengthen democracy within the states, the transfer of powers and responsibilities from the central government level to local self-governing institutions was needed. In Romania there have been also important changes at the institutional level and an obvious tendency *to consecrate local autonomies*.

China, Japan and South Korea are considered centers of economic growth in the general context of globalization. The origins of the public administration of these countries are common (Berman, Moon, Choi, 2010), having at the base of each administrative organization a centralized power responsible for the entire decision-making spectrum, as well as for the administration of all financial resources intended to ensure public goods and services. The transition towards decentralization of public administration was marked by the culture and traditions of the states (example: administrative systems in which military and even martial law existed until not long ago), in the sense that the restrictions and rigid attitude in relation to the needs of the citizens led to the establishment of local government entities that are ruled by a political obedience towards the central government.

Methodological approach

The present investigation was based on a series of articles focused on the following terms, respectively public administration and critical infrastructures. Also, the analyzed bibliography was correlated with the normative acts in force identified at the level of each country. This approach is aimed at analyzing the national legislative framework of six states (Poland, Sweden, Czech Republic, Romania, Spain and Japan) that have designated public administration as a critical infrastructure sector. Moreover, this study also contains a review of the specialized literature regarding certain articles that refer to the public administration in the context of the critical infrastructure sectors of each analyzed country.

Table no. 1. Representative normative acts

Country	Law/Act
Poland	Act on crisis management of 26 April 2007 [Ustawa z dn. 26 kwietnia 2007 r. o zarządzaniu kryzysowym] The National Critical Infrastructure Protection Program (Narodowy Program Ochrony Infrastruktury Krytycznej) Rezoluţii: 210/2015, 121/2018, 116/2020
Sweden	Action Plan for the Protection of Vital Societal Functions & Critical Infrastructure, Order No: MSB695/2014
Czech R	Crisis management act N. 240/2000, amended by Governmental order No: 432/2010
Romania	Government Emergency Ordinance NO 98/2010 regarding the identification, designation and the protection of critical infrastructures, approved with changes through Law no. 18/2011, modified and completed by Law 225/2018
Spain	- Law no.8/ 2011 for establishing the measures for the protection of critical infrastructure. - Real Decree no. 704/2011, 20 May, which approves therRegulation of protection of critical infrastructuresNational Cyber Security Strategy adopted on December 5, 2013 by the National Security Council
Japan	- The second plan regarding the informational security measures for critical infrastructures, 2010; - The Cybersecurity Policy for Critical Infrastructure Protection, 2022;

Source: authors

Relevant results of the research

In *Poland* a particular attention has been paid the critical infrastructure sector and the continuity of public administration mentioned in the Act on Crisis Management since 2007. Several studies (Grzywna, 2014; Morawski, 2022; Piekarski and Wojtasik, 2022) emphasize the importance of this legislative act and point out that critical infrastructure and all its constituent elements are essential for national security and ensure the efficient functioning of public administration. Based on this document, the National Program for Critical Infrastructure Protection was issued in 2013. Through this Program, an operational framework is outlined in order to ensure the continuity of critical infrastructures and to achieve cooperation between the public administration and operators of critical infrastructures, through partnerships (Pellowski, 2013). Later, the Program was updated by resolutions issued by the Polish Government (table no. 1). According to the current Resolution no. 116 of 2020, Poland is represented with 11 critical infrastructure sectors and their corresponding responsible authorities, alongside with the steps identified to critical infrastructure protection.

Sweden, through the Action Plan for the Protection of Vital Societal Functions & Critical Infrastructure, set up measures and activities specific

to the operation and protection of national critical infrastructures, as well as social sectors that include a number of the mentioned vital services. Thus, one of the 11 social sectors is public administration that fulfill the following vital societal functions: local, regional, national management, funeral services, diplomatic and consular services. From the perspective of scientific research, the authors Arvidsson, Johansson and Guldaker (2021) show that some of the less technological sectors, including public administration, have a lower representation compared to the transport, energy or information and communication sectors. Therefore, this situation represents a challenge for the management of critical infrastructures and implicitly for potential cross-sectoral risks that can lead to an underestimation of the consequences and a distortion of the resilience of critical infrastructures. For that matter, Sweden, along with several other European countries, faced in 2017 a cybersecurity breach scandal where foreign private companies had access to classified data of people (Newlove-Eriksson, Giacomello and Eriksson, 2018). This case illustrates public-private governance deficiencies, caused, to some extent, by the transfer of owners and operators of critical infrastructure from the government sector to the private sector, through the outsourcing of public services.

The Czech Republic implemented EU Directive 114 of 2018 into national law by amending the Crisis Act (2000) with Order 432 of 2010, in which the protection of critical infrastructures became part of the crisis management. In this context, public administration was designated as one of the 9 critical infrastructure sectors, comprising of 4 sub-sectors: Public finance; Social protection and employment; Other government and Intelligence services. An approach similar to the one presented in the section addressed to Sweden regarding the division of critical infrastructure systems according to its functional specificities: technical and socio-economic infrastructures is also found in the study carried out by Rehak, Hromada and Lovecek (2020). This article highlights the considerable interdependence between these two critical infrastructure sectors, where the socio-economic infrastructure sectors need to provide services to the technical infrastructure sectors. At the same time, the technical infrastructure sectors are dependent on the services of the socio-economic infrastructure sectors, especially in case of crisis situations. Furthermore, according to the authors, the cascading effects produced by power grid disruptions can seriously affect many critical infrastructure sectors, implicitly the public administration. At the same time, maintaining this interdependence requires a large range of technical, organizational or other support elements from the involved economic operators and Czech public administration bodies (Vašková, 2015).

In 2010, *Romania* transposed EU Directive 114/2008 into national law through Government Emergency Ordinance No. 98 regarding the

identification, designation and the protection of critical infrastructures. In the first annex of the document, there are mentioned the sectors and sub-sectors of national and European critical infrastructures. Among the 10 critical infrastructure sectors there is also the Administration sector with only one subsector, and that is public administration. This legislative act was amended and supplemented by Law no. 225/2018, and although the number of critical infrastructure sectors increases to 12, it does not affect the administration sector. The Ministry of Regional Development and Public Administration is designated by Government's Decision no. 35/2019, for designation of public authorities responsible for National and European Critical Infrastructures Protection domain. The studies that analyze the administration sector, respectively the public administration sub-sector highlight several aspects related to people. An important role of this sector is to ensure the precise implementation of the law in order to protect the citizens' rights and freedoms (Potcovaru, 2020; Mancaş and Nedelcu, 2021). The first author makes a connection of each of the 12 critical infrastructure sectors in Romania with the fundamental human rights and freedoms recognized nationally and internationally. Thus, in the legislation regarding the administration sector, there are mentioned the right of the person injured by a public authority and equality in rights. The other authors emphasize the fact that the human factor represents the main resource, but also the most vulnerable element of the administration sector. At the same time, classified information on public administration is considered critical elements from the perspective of threats, risks and vulnerabilities, and the human factor is the key to ensuring the protection and security of classified information. Last but not least, an essential attribute of public administration is national security which ensures, through its public authorities, the legality, balance and social, economic and political stability necessary for the existence and development of the country.

In Spain, the category of essential services for the population refers to those basic activities for the maintenance of social functions (Ledo, 2019) including the health, security, social and economic well-being of citizens. Also in this country, in the national legislation (Law no. 8/2011), critical infrastructures are mentioned as representing facilities, networks, systems, physical equipment and specific information technologies that support the functioning of essential services. Moreover, in accordance with this legal framework, the main objective of Decree no. 704/2011 is the detailing of certain aspects regulated by the framework law on ensuring the protection of critical infrastructures by an interdepartmental system composed of organizational entities from the public administration and the private sector. The two documents also set out different strategic instruments on the protection of the main critical infrastructure sectors:

administration, chemical industry, energy, taxation and the tax system, food and water supply, health, information technology, nuclear industry, research laboratories, airspace, transport (ENISA, 2015).

In terms of public administration, Japan is a country whose system of government is considered to be a parliamentary cabinet system, with a government composed of ministries and agencies to undergo the budgeting process to secure funds for use in carrying out their mandated functions, programs and activities. In this country, the concept of critical infrastructures is defined by an administrative act, thus marking the importance of the administrative apparatus and also the way in which it defines the critical infrastructure. Along with the fundamental elements that laid the foundation for the partnership between the public sector and private, this document set the elements of security culture bringing into focus the need for awareness and common understanding of information security measures. Also, the Government of Japan approved this year the cybersecurity policy for critical infrastructures (2022), in order to request increased involvement of the private sector in ensuring the protection of critical infrastructures as well as in strengthening the ties between the Government and private organizations.

Conclusions

This paper represents an overview of public administration as a critical infrastructure sector. Following the analysis of the 6 countries (Poland, Sweden, Czech Republic, Romania, Spain and Japan), there are noted, on the one hand, several common elements such as the existence of a national legislative framework, responsible public authorities etc., and on the other hand, distinct elements, such as different vital services associated with the administration sector, relative number of critical infrastructure sectors, including distinct approaches of this topic in the studies of several authors. At the same time, in Spain, Japan and Romania, it is used the term administration by comparison with the other 3 states that use the term public administration. This difference between the two terms may be a topic for future research. In the same vein, the dependence among critical infrastructure sectors and the administration sector should be emphasized. Therefore, critical infrastructure owners or operators actively cooperate with public administration institutions to ensure an effective operational framework for the protection and security of critical infrastructure sectors in normal and crisis situations or their defense in a state of warfare.

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THE MAGISTRATES' LIABILITY FROM THE PERSPECTIVE OF THE DRAFT NEW REGULATIONS

PhD. Lecturer. George Marius MARA[1]

Abstract

The legislative drafts amending the law on judicial organization, the statute of judges and prosecutors, and the Superior Council of Magistracy have raised many opinions, some being situates in diametrically opposed positions.

We try to provide an analysis of the changes of major importance regarding the civil and disciplinary liability of the magistrate, from an objective perspective.

18 years after the approval of the legislation in the field of organizing the Romanian justice system that facilitated the accession to the European Union, the recent amendments are meant to strengthen an independent justice system, able to generate an act of justice at high standards and in favor of the citizen, and the changes regarding the magistrate's liability are to be connected to this objective.

Keywords: *justice system, liability, magistrate, legislation, change, act of justice*

The magistrate is liable civilly, disciplinarily, contraventionally or criminally for his actions or inactions, the forms of legal liability being the same as for all citizens. However, in relation to the specifics of the profession and its status, the professional conduct of magistrates is regulated by reference to higher standards that ensure prestige and professional dignity[2].

In accordance with the explanatory memorandum presented by the initiator of the legislative proposal to amend Law no. 303 of 2004 on the status of judges and prosecutors (draft Law no. 612/2022), namely the Ministry of Justice, the necessity of this approach results from the imperative of harmonizing the legislation on the functioning and organization of the justice system in accordance with the principles of the national instruments ratified by Romania, but also taking into account the recommendations formulated within the MCV as well as the Decisions of the Constitutional Court in this field.

[1] University "1 Decembrie 1918" from Alba Iulia.Law and Social Sciences Faculty.

[2] S. Luca, D. M. Bulancea, in *the Deontology of the profession of magistrate. Repere contemporane,* colectiv de autori, M-M Pivniceru, C. Luca, coorondatori, Editura Hamangiu, Bucureşti, 2008, p. 65-67.

The judgments of the European Court of Human Rights were also envisaged by the initiator of the legislative proposal, especially with regard to access to justice related to actions relevant to the career of magistrates and on which there was no remedy before a court (*Kovesi v. Romania*, application No 3594/19).

At the same time, the jurisprudence of the Constitutional Court of Romania, especially decision no. 121/2020 published in the Official Journal of Romania, Part I, no. 487 of June 9, 2020, was taken into account by the amendments made regarding the way of organizing the contest for admission to magistracy. It was considered, in accordance with the decision of the constitutional court, that it is necessary for the organic law to provide for the stages and tests of the competition, the establishment of the results and the modality of contestation, not being sufficient for these hypotheses to be established by the competition regulation adopted by the Superior Council of Magistracy. The same provisions were included in the law on the status of judges and prosecutors and on filling the posts of trainee judge or final judge following the promotion of the graduation contests of the National Institute of Magistracy, respectively following the completion of the internship.

Similar considerations were taken into account for the insertion of some detailed provisions related to the procedure of transfer of judges and prosecutors, especially regarding the criteria envisaged and the order of priority of these criteria.

Thus, all the aspects concerning the career of magistrates have been regulated at primary level, namely: concerning the career of magistrates in accordance with the decisions of the Constitutional Court in the field: admission to magistracy, internship and examination of capacity, appointment of magistrates, their promotion, effective or on the spot, evaluation and professional training, appointment to management positions, revocation from this position, delegation, secondment, transfer, appointment of judges as prosecutor and prosecutors as judges. At the same time, the procedure of professional evaluation of magistrates was stipulated in the law.

Regarding the possibility or necessity of concluding professional civil liability insurance policies for magistrates, the draft adopted by the Senate as a decision-making chamber maintains the possibility of concluding this type of policy, but only for assuming the risk in the event of a deed caused with gross negligence, and not for those in bad faith. It is a natural change, as long as the insurer does not take the risk for intentional acts, and bad faith implies this form of guilt.

Even if in the explanatory memorandum the initiator considered that it is not necessary to maintain a regulation in this regard, as long as the

insurance would not cover the damages caused intentionally (thus bad faith), dol or serious fault, considering that it is assimilated to intent and serious fault, we believe that maintaining the possibility of concluding this type of insurance is welcome, as it is not possible to equate serious fault with intention.

The elimination of the disciplinary misconduct referring to the non-observance of the jurisprudence of the Constitutional Court, intensely debated in the public space, is based, in the legislator's opinion, on the need to respect the case-law of the Court of Justice of the European Union, in particular the judgment delivered on 21 December 2021 in joined cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, *Euro Box Promotion and others*. The CJEU held that *'the principle of the primacy of Union law must be interpreted as precluding a national rule or practice according to which the ordinary national courts are bound by the decisions of the national constitutional court and cannot, for that reason and at the risk of disciplinary misconduct, leave the case-law resulting from those decisions unapplied of their own motion, even if they consider, in the light of a judgment of the Court, that that case-law is contrary to the second subparagraph of Article 19(1) TEU or to Article 325(1) TFEU or to Decision 2006/9282'*.

The elimination of this disciplinary misconduct does not lead to the loss of the generally binding character of the Decisions of the Constitutional Court, a character conferred by the fundamental law itself, by the provision of art. 145 para. 2, resumed also at the level of the infraconstitutional legislation, respectively in the law on the organization and functioning of the Court (Law no. 47 of 1992).

Therefore, the decisions of the Constitutional Court, the decisions pronounced by the High Court of Cassation and Justice in solving the appeal in the interest of the law or for the unraveling of some legal issues are binding on all courts of law.

However, in relation to the practice of the CJEU invoked by the initiator of the legislative proposal to amend the laws of justice, we note that it would not be compatible with the European legislation, thus interpreted by the Court, a provision of the national law that creates the possibility of sanctioning the magistrate judge who directly applied the European law, removing from application, in a specific case, the jurisprudence of the constitutional court. The primacy of the European law, invoked by the CJEU in its case-law, imposes such a legislative solution, even if the national court will have to exercise the utmost prudence and diligence by choosing to remove from application a text of national law or the jurisprudence of the constitutional court, considering that they would not be in conformity with the European Union legislation, as interpreted by the CJEU.

At the same time, it was decided to eliminate the disciplinary misconduct aimed at: "*manifestations that affect the honor or professional probity or the prestige of justice, committed in the exercise or outside the exercise of their duties*", taking into account the invoked criticisms regarding the unclear, general and unpredictable character of the legal text, which would not allow the magistrate to know the conduct he has to adopt, it may give rise to difficulties in the application and non-unitary practice in disciplinary matters.

In relation to the jurisprudence of the Sections of the Superior Council of Magistracy, analyzed in conjunction with the jurisprudence of the courts that solved the appeals against these judgments, we can observe the existence of a non-unitary vision regarding the content of this misconduct. It remains the responsibility of the magistrates to reserve and good conduct both at work and in society, in accordance with the high standards of professional probity specific to this profession.

The draft normative act stipulates that the magistrates are liable civilly, disciplinarily, contraventionally and criminally, according to the law. The contravention liability was expressly indicated, even if even previously the magistrates did not benefit from a derogatory regime regarding this form of legal liability.

With regard to the liability for judicial errors, in accordance with the provisions of Article 52 of the Constitution, the text of the amended law enunciates the liability of the state for the damages caused by the judicial error, and the judges will be liable only for the exercise in bad faith or gross negligence of the office, an aspect that determined the judicial error. It should be noted that not every judicial error is caused by the culpable conduct of the magistrate.

The new regulation defines bad faith and gross negligence, respectively.

Thus, there will be bad faith when the judge or prosecutor knowingly violates the rules of substantive or procedural law, pursuing or accepting the injury of a person.

There will be gross negligence when the judge or the prosecutor negligently disregards, in a serious, unquestionable way, the norms of substantive or procedural law.

A new paragraph was introduced regarding the criteria envisaged for establishing the serious fault, these being stated by way of example by the legislator: the degree of clarity and precision of the violated norms, the novelty and difficulty of the legal problem by reference to the jurisprudence and doctrine in the field, the seriousness of the non-observance, as well as other objective professional circumstances.

In accordance with the jurisprudence of the Constitutional Court[3], the criteria allow an individualization of the liability in relation to objective elements, including the consequences of non-compliance with the norms as well as their clear and precise character.

The amendment is one of substance compared to the text of the law currently in force, as it was adopted by Law no. 242/2018, and the hypotheses of serious fault are to be outlined within the jurisprudence of the sections for judges, respectively prosecutors of the SCM and courts of law that settle the promoted appeals.

The return to the exonerating hypothesis of liability in relation to the conduct of the injured person, who contributed in any way during the trial to the commission of the judicial error, is well founded. In the absence of such a regulation, which enshrines the principle that no person can rely on his own fault, the person responsible for the judicial error could request the conviction of the state and could obtain compensation, an aspect of inequity directed by the proposed amendment, an amendment that restores, moreover, the text of the law to the form prior to that generated by Law No. 242 of 2018.

The text of the new law allows the regulation of distinct hypotheses of judicial error through the Code of Criminal Procedure, not through the Code of Civil Procedure or other special laws. It is an amendment that, on the one hand, confirms the present situation, in which the criminal procedural legislation regulates specific hypotheses of judicial error (for example, art. 538 C Proc Pen), and on the other hand does not allow the establishment of distinct cases of state liability for judicial error.

If by the regulation in force the judge or the prosecutor were not a party to the process by which the allegedly aggrieved person seeks to establish the case of judicial error and to entail the patrimonial liability of the state, the legislative amendment allows the magistrate to make an application for intervention.

The aspect is of increased importance, because establishing the existence or not of the judicial error, when it would have been produced by a fault of the magistrate, without him having been a party to the trial, would have entailed consequences in the regressive action promoted by the State against the magistrate. Invoking the power of *res judicata* of the initial judgment, a process in which the magistrate was not a party, could not have been successfully opposed to him or her, because it would have violated the right to defense and, implicitly, the right to a fair trial. Thus, there was a risk of contradictory solutions regarding the magistrate's guilt in causing the judicial error, in the case of the two separate judicial proceedings.

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[3] Decision no. 45/2018 of the Constitutional Court, paragraph 216 published on the website of the www.ccr.ro

With regard to the regressive action promoted by the State, prior to this action, but after the final conviction of the State for the judicial error, the Ministry of Finance will notify the appropriate section of the Superior Council of Magistracy in order to establish whether or not the judicial error was caused by the magistrate through the exercise of the office in bad faith or gross negligence. The checks will be carried out by the Judicial Inspection.

Therefore, it was reverted to the previous form of the law, adopted in 2018, and by which the Ministry of Public Finance, following an advisory report of the Judicial Inspection, established whether the judicial error was caused in bad faith or gross negligence by the magistrate. Thus, there was an interference of the Ministry of Finance in the disciplinary procedure regarding the acts committed by a magistrate, as long as the finding of disciplinary misconduct rests exclusively with the Judicial Inspection.

Following the decision of the appropriate section within the Council through which the inspection report is validated, the State, through the Ministry of Public Finance, will exercise the regress action.

Conclusions

The legislative changes are intended to outline a clearer framework regarding the civil and disciplinary liability of the magistrate, especially with regard to facts that can generate hypotheses of judicial error.

The mention of some criteria according to which the serious fault of the judge or prosecutor will be analyzed is in line with the jurisprudential standards of the Constitutional Court.

The new regulations are meant to outline the premises of a modern justice system, which would guarantee respect for citizens' rights and freedoms and provide guarantees for a fair trial.

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ORDER OF THE HEAD OF THE TRAFFIC POLICE TO SUSPEND THE RIGHT TO DRIVE, THE PROCEEDING, LEGAL NATURE AND JURISDICTION TO RESOLVE THE REQUEST FOR ITS ANNULMENT, THE APPLICABLE SUBSTANTIVE LAW

Gheorghe Cosmin BĂIEȘ[1]

Abstract

The Court of First Instance and not the County Court, has the authority to judge the action to annul the order of the head of the traffic police, as a judicial practice has erroneously been created.

According to art. 103 para. 3 of the G.E.O. no. 195/2002, by the order it is ordered a complementary penalty, as defined and according to the provisions of GD no. 2/2001. Therefore, regardless of the deed by which it is applied, according to art. 32 para. 2 of the G.O. no. 2/2001, in the matter of complementary legal penalties, the control over their application is the exclusive jurisdiction of the court.

The complementary penalty cannot be applied in the absence of a main penalty, art. 67 of the Criminal Code being applicable in this case, as provided by the provisions of art. 47 of the G.O. no. 2/2001.

The applicable material law is the one from the date of the commission of the deed and not the one from the date of issuance of the provision, according to art. 15 para. 2 of the Romanian Constitution and art. 12 para. 2 of G.O. no. 2/2001.

Keywords: *jurisdiction, annulment, order of the head of the traffic police, legal penalty*

1. General provisions

The legal provision is found in art. 103 para. 1 of the G.E.O no. 195/ 2002, regarding traffic on public roads. It provides that the suspension of the right to drive motor vehicles is ordered:

„c) for a period of 180 days, when the deed of the motor vehicle or tram driver was prosecuted, as a crime against traffic safety on public roads, and the prosecutor or the court ordered the classification under the conditions of art. 16 para. (1) letter b) sentence II of the Code of Criminal Procedure, the waiver of the criminal prosecution, the waiver of the application of the penalty or the postponement of the application of the

[1] PhD. Student The Bucharest University ”Nicolae Titulescu” Romania, PhD. Area of study – Contravention Law and Proceedings in Public Law, Corresponding author: cosminbaies@gmail.com

penalty if the obligation provided for in art. 85 para. (2) letter g) from the Criminal Code;

d) for a period of 180 days, in the case of a traffic accident resulting in the death or bodily injury of a person, if a traffic rule was violated for which this emergency ordinance provides for the suspension of the exercise of the right to drive, and the court or the prosecutor ordered the classification under the conditions of art. 16 para. (1) letters b), e) and g) of the Code of Criminal Procedure, the waiver of the criminal prosecution, the waiver of the application of the penalty or the postponement of the application of the penalty, if the obligation provided for in art. 85 para. (2) lit. g) from the Criminal Code or termination of the criminal trial under the terms of art. 16 para. (1) letters e) and g) from the Criminal Procedure Code;

e) for a period of 180 days, when the holder of the driving license has been convicted by a final court judgment for the crimes provided for in art. 334 para. (1) and (3) of the Criminal Code.

Paragraph 1^1 of the previously mentioned article, provides that in the situation provided for in para. (1) letters c), d) and e), the suspension of the exercise of the right to drive motor vehicles, agricultural or forestry tractors or trams is ordered by the head of the traffic police in the area where the deed was committed, starting with the day immediately following the expiration of the extension of the validity of the substitution proof. In the situation where the validity of the replacement driving license proof has not been extended or has been issued without the right to drive, from the suspension period provided for in para. (1) letters c), d) and e) is deduced the period during which holder of the driving license did not have the right to drive, according to art. 97 para. (3).

The provision regarding the suspension of the exercise of the right to drive motor vehicles, agricultural or forestry tractors or trams is issued within 5 days from the date on which the head of the traffic police within the area of which the offense was committed became aware of the resolution of the criminal case and is communicated to the holder of the driving license within 15 days of its issuance."

The aforementioned article was amended by the G.O. no. 1/2022 entered into force on 27.01.2022, in the extent in which the period of suspension of the right to drive motor vehicles is 180 days, previously it was 90 days.

2. The penalty ordered by the head of the traffic police - legal penalty, the jurisdiction to resolve the action in its annulment

By order of the chief of police, the penalty of suspension of the right to drive is ordered, which is a complementary legal penalty, defined as such

according to art. 5 of G.O. no. 2/2001 on the legal regime of contraventions, which expressly provides, which are the main legal penalties and which are complementary. Therefore, regardless of the deed by which it is applied, i.e. minutes or order, this is a complementary legal penalty.

Art. 5 para. 2 of G.O. no. 2/2001 expressly provides which are the main legal penalties, these penalties cannot be derogated from by adding another main penalty except by another law, and paragraph 3 of this article, provides which are the complementary legal penalties.

Although other main or complementary penalties may be added or established by special laws, this is not the case in this situation. The penalty of suspension of the right to drive is a complementary one, the provisions of the G.E.O no. 195/2002 not establishing this penalty as the main one. Chapter VII of the G.E.O. no. 195/2002 provides as the main applicable penalty, to the contraventions provided in this normative deed, the fine, the suspension of the right to drive, being a complementary penalty applicable alongside the main penalty.

Also, art. 103 of the G.E.O no. 195/2002 is included in chapter VII entitled "Legal Liability", therefore certainly in this situation the penalty of suspension of the right to drive is a complementary legal penalty.

For the situations provided in art. 103 para. 1 letters c) d) and e), namely when the suspension of the right to drive is ordered as an effect of the solution in the criminal case, the legislator, although he did not specifically provide for an act by which such a penalty can be ordered, refers in the content para. 1^1 of art. 103 to the fact that the suspension of the exercise of the right to drive motor vehicles is ordered by the head of the traffic police in the area where the act was committed, and it is also provided that the provision regarding the suspension of the exercise of the right to drive motor vehicles is issued within 5 days of on the date on which the head of the traffic police within the area of which the act was committed became aware of the resolution of the criminal case and communicates it to the holder of the driving license within 15 days of its issuance.

In practice, it was erroneously defined that the head of the traffic police applies the suspension of the right to drive through a deed entitled "order" and not through a Record of Penalties and Findings of the Contravention. According to art. 15 para. 1 of the G.O. no. 2/2001 regarding the legal regime of contraventions, in fact, the "contravention code", the detection and sanctioning of contraventions is ordered by a record, so implicitly the suspension of the right to drive should also be carried out by a Record of Penalties and not through an act entitled "Order".

According to art. 15 para. 1 of the G.O. no. 2/2001 regarding the legal regime of contraventions, the contravention is ascertained through a report concluded by the specific persons provided for in the normative act that determines and penalties the contravention.

Regardless of the name of the deed, by which the suspension of the right to drive is ordered, it has the legal frame of a Record of Penalties and Findings of the Contravention within the meaning of art. 16 of the G.O. no. 2/2001.

Another aspect of legality of the deed by which the suspension of the right to drive is applied, is the possibility or not of the head of the traffic police, to apply only the complementary penalty without it being applied alongside the main penalty.

Although the provisions of art. 103 paragraph 1 letters c), d) and e) of the O.E.G no. 195/2002 provide for the possibility of applying only the complementary penalty of suspension of the right to drive, these cannot be derogatory from the general rule, namely that any complementary penalty must accompany a main penalty. In this sense, the provisions of art. 67 para. 1 of the Criminal Code, which provides that the complementary penalty of the prohibition of the exercise of certain rights, can be applied if the main penalty established is imprisonment or a fine. This article is applicable in the case, in relation with the provisions of art. 47 of the G.O. no. 2/2001, which expressly provides that the provisions of G.O. no. 2/2001 is supplemented with the provisions of the Criminal Code.

Interpreting the aforementioned legal provisions, it is certain that a complementary penalty cannot be applied without it being applied alongside a main penalty.

With regard, to the competence to resolve the action requesting the annulment of the order of the head of the traffic police, erroneously and contrary to the legal provisions, in practice the opinion has been drawn according to which the order is an administrative deed, the appeal against it, namely the action for annulment, belonging from a material point of view, in substance, to the County Court, the provisions of Law no. 544/2004, being applicable.

According to art. 32 para. 2 of the G.O. no. 2/2001, the general rule in the matter of complementary legal penalty is that according to which the control over its application is the exclusive competence of the court and not of the County Court. Article 32 of the G.O. no. 2/2001 provides that:

(1) The complaint is filed and resolved based on the alternative jurisdiction at the court in whose district the contravention was committed or at the court in whose territorial jurisdiction the offender has his domicile or headquarters.

(2) The control of the application and execution of the main and complementary legal penalties is the exclusive jurisdiction of the court provided for in paragraph 1.

That by the contested provision, was applied a legal complementary penalty results from the contents of art. 103 letters c) and d) of the G.E.O.

no. 195/2002, which expressly provides that the suspension is applied in the extent where a traffic regulation has been violated for which the suspension of the exercise of the right to drive is provided. For all the rules for which the suspension of the right to drive is provided, there are also main legal penalties, the suspension being a complementary penalty. No legal provision contained in the G.E.O. no. 195/2002 does not provide the jurisdiction to resolve the annulment of the provision, so the general rule provided for in art. 32 para. 2 of G.O. no. 2/2001, there being no special or derogatory provision from this regulation.

In the absence of a special derogatory regulation, that would establish another jurisdiction for the resolution of the action in annulment of the order of the head of the traffic police, the general rule must be applied by reference to the penalty ruled by the order, namely that on the verification of the legality and grounds of the application of legal penalties, even only being complementary, the competence belongs, from a material point of view, to the court.

3. The law applicable to the ordering by the head of the traffic police, of the suspension of the right to drive motor vehicles

Regarding the application of the law, with reference to the period for which the suspension of the right to drive is ordered, from my point of view, this is the one from the date the deed was committed and not the one from the date the order was issued.

In practice, countless provisions were issued ordering the suspension of the right to drive, for a period of 180 days, although the act that would have caused the suspension of the right to drive was committed before the amendment of the G.E.O no. 195/2002 by G.O. no. 1/2022, which changed the suspension period from 90 days to 180 days.

From the provisions of the G.E.O no. 195/2002, it does not appear that there is any provision that provides that the changes made as a result of the entry into force of the G.O. no. 1/27.01.2022 are immediately applicable, regardless of the date the act was committed.

The committed act is an act of a legal nature, which cannot be sanctioned by a law entered into force after the act was committed, according to art. 15 para. 2 of the Romanian Constitution.

If we consider that a criminal penalty is applied for the committed act, considering that it is applied following the classification ordered in a criminal file, the more favorable law must be applied, according to art. 12 para. 2 of the G.O. no. 2/2001 or by reference to art. 5 of the Criminal Code.

So the applicable law is the one in force on the date the act was committed, being even more favorable compared to the new legislative changes.

4. Issuance term and term of communication of the order, statute of limitations?

Article 103 of the G.E.O. no. 195/2002, does not provide for a limitation period in which the penalty of suspension of the right to drive can be applied, it only provides that the provision regarding the suspension of the exercise of the right to drive motor vehicles, agricultural or forestry tractors or trams is **issued within 5 days** from the date at which the head of the traffic police in the area of which the act was committed became aware of the resolution of the criminal case and **communicates it to the holder** of the driving license within 15 days of its issuance.

The question that arises is whether the penalty can be applied at any time, regardless of the elapsed time or whether the 5-day and 15-day terms are statutes of limitation.

In this situation, we must refer to the general rule comprised in art. 13 para. 3 of the G.O. no. 2/2001, namely when the deed was prosecuted as a crime and it was later established that it would constitute a contravention, the prescription operates if the penalty was not applied within one year from the date of the commission of the deed, unless the law provides otherwise. It would be contrary to the law and contrary to the interpretation in favor of the offender, and namely the former suspect or defendant, an interpretation according to which, after the completion of the criminal file, the complementary penalty can be applied regardless of the date of the commission, even after a long time has passed.

Art. 13 para. 3 does not make any distinction between the application, only of the complementary penalty and the application of the main penalty, so in this situation, even the complementary penalty can no longer be applied if the term provided for in this paragraph is fulfilled.

Another issue that has not been discussed so far is the statute of limitations for the application of the penalty and the statute of limitations for its execution.

Art. 103 para. 1^1 of G.E.O no. 195/2002 expressly provides that the provision regarding the suspension of the exercise of the right to drive motor vehicles, is issued within 5 days from the date on which the head of the traffic police, within the area in which the deed was committed, became aware of the resolution of the criminal trial and is communicated to the holder of the driving license within 15 days of its issuance.

I previously mentioned the provisions of art. 15 para. 3 of the G.O. no. 2/2001, especially because the aforementioned provisions do not make any reference to any term in which the head of the traffic police found out or could find out about the settlement of the criminal case. Acknowledgment cannot be carried out at any time, in an infinite term, but

it is necessary and mandatory to circumscribe the general provisions contained in art. 13 para. 3 of the G.O. no. 2/2001, these being the applicable general provisions, no other law providing by way of exception any limitation period.

Regarding the application of the penalty within 5 days and its communication within 15 days of issuance, in GEO no. 195/2002 no penalty is provided for the situation in which the head of the traffic police would not draw up the deed within 5 days and namely would not communicate it within 15 days.

By referring to the provisions of art. 13 and 14 of the G.O. no. 2/2001, which refer to the application of the legal penalty, as well as to its execution, I appreciate that the 5-day period must be interpreted as a prescription for the application of the penalty, according to art. 13 paragraph 3 of the G.O. no. 2/2001, and the term of 15 days must be interpreted in the extent of prescription of the execution of the legal penalty, in compliance with the provisions of art. 14 of the G.O. no. 2/2001.

The terms of 5 days and namely 15 days, cannot be regarded as recommendation terms because, if they were like this, it would give the traffic police chief the opportunity to apply and communicate the disposition of the driving license holder at any time, regardless of the passage of any time interval and would not give effect to the imperative provisions of art. 103 para. 1^1 of G.E.O. 195/2002. These provisions are imperative and mandatory, an aspect resulting from the content of the regulation, namely from the phrases “issued” and “communicated”. Failure to comply with a mandatory legal regulation, cannot fail to attract any penalty.

Conclusion

Although apparently the order of the head of the traffic police is an administrative deed, in the meaning of art. 2 para. 1 letter c from Law no. 554/2004, actually, given its content, it is nothing more than a deed having the same substance as the Record of Penalties and Findings of the Contravention, by means of which a complementary legal penalty is ordered.

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PREVENTION OF CRIMINAL PHENOMENON

PhD. Ioana-Andra PLEȘA[1]
Prof. PhD. Habil. Raysa CHIRINO[2]
Associate prof. PhD. Habil. Sidart RODRIGUEZ[3]

Abstract

Preventing and fighting crime has concerned society since ancient times. Criminal behavior was not, is not and cannot be tolerated. That is why, since ancient times, different ways of stopping or at least limiting this phenomenon have been tried.

Initially, the law of Talion known by the motto "an eye for an eye and a tooth for a tooth" was applied, because it was believed that the fear of a punishment - which most often consisted in torture or even death - would limit criminal behavior because it would serve as a lesson for evrery member of society.

The punishments were also applied in public in order to submit the perpetrator to the masses "judgment"., but also this kind of public judgement was preferred to inoculate among civil society the fear of adopting a behavior which was against the laws or common law.

Passing from antiquity and the Middle Ages to the modern era can be observed especially in developed contries a trend towards a limitation of punishments this being supported by the criminologist Caesare Becaria considered one of the greatest thinkers of 18th century.

Although there are countries in which we still discuss the existence and application of torture, of inhuman or degrading treatments, in modern society the states have adapted the punishments in order to respect human rights, because, yes, a criminal remains a human being, even if his behavior was inhuman.

Of course, states are free to choose their criminal policy and for this reason there are different laws that provide different punishments. In some states there is regulate the death penalty and paradoxically some of this are states that are a symbol of freedom and respect for human rights.

This research theme is accompanied by rhetorical questions: can the criminal phenomenon be prevented? Can this phenomenon be fought? Or can it just be limited?

Keywords: *crime, criminality, historical view of crime, methods of prevention, criminological theories*

Introduction

Criminality represent the set of criminally relevant acts committed on a certain territory/area in a certain period of time (months, years, decades).

[1] "1 Decembrie 1918" University of Alba Iulia, Faculty of Law and Social Sciences, Department of juridical and administrative sciences, Romania.
[2] Private University "Dr. Rafael Belloso Chacín" Venezuela.
[3] Private University "Dr. Rafael Belloso Chacín" Venezuela.

Beyond being a legal phenomenon, crime is also a social phenomenon which is influenced by many factors, including the time factor. Criminality it is influenced by the evolution of society, appearing crimes that did not exist before. eg: IT crimes.

As it is unanimously decided in the doctrine from a criminological point of view, by crime we do not understand as in common language only criminal acts directed against life, nor as in criminal language - all those serious acts (crimes) criminalized by the criminal legislation of each state, but we understand all these and more because there are added the deviant behaviors which generate legal consequences.

Although a preoccupation with the prevention of crime has been identified since ancient times, in the 18th century there is an increased attention paid to this phenomenon, followed by the establishment of criminology as a science in the 19th century.

Prevention of the criminal phenomenon-historical view.

The theories regarding crime/the criminal phenomenon are countless, but we consider it appropriate to present them in a manner that is not meant to be exhaustive.

In the 18th century Caesare Becaria, also considered the father of modern criminal law, formulated some principles that even today are guiding ideas in the field of criminal sciences.

He argued that punishments must be proportionate to the offence. "Therefore, the obstacles that remove people from committing crimes must be stronger according to the impact they bring to the public good and the inducement that drives them to crime."[4]Cesare Beccaria is the first to discuss, in a public work, the contestation of the death penalty, proving that the death penalty is "neither necessary nor useful."[5]

Caesare Beccaria sustained the abolition of torture as a method of obtaining evidence during a trial, because in his opinion a criminal was called guilty before he was given a court decision in this regard, a fact that illustrates its legal inefficiency. One thing is clear from this torture, the fact that both guilty and innocent people are subjected to torture. But the most successful among them turns out to be the guilty one, who once passed the torments of the pain caused, is acquitted as innocent, as the philosopher reports in his work: "he exchanged a greater punishment for a lesser one", but the innocent suffered the inhuman, degrading punishment.[6]

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[4] Cesare Beccaria, *About crimes and Punishments*, Editura Humanitas, Bucharest 2007, p. 67.

[5] Valerian Cioclei, *Handbook of Criminology,* 4th ed., Editura C.H.Beck, Bucharest, 2007, p. 79.

[6] Cesare Beccaria, *op. cit*, p. 125.

Cesare Lombroso laid the foundations of the theory of the "born criminal" which states that,,criminals are a lower form of life, nearer to their apelike ancestors than non-criminals in traits and dispositions. They are distinguishable from non-criminals by various atavistic stigmata - physical features of creatures at an earlier stage of development, before they became fully human.He argued that criminals frequently have huge jaws and strong canine teeth, characteristics com- mon to carnivores who tear and devour meat raw. The arm span of criminals is often greater than their height, just like that of apes, who use their forearms to propel themselves along the ground. An individual born with any five of the stigmata is a born criminal.But the fact that Lombroso measured thousands of live and dead prisoners and compared these measurements with those obtained from control groups (however imperfectly derived) in his search for determinants of crime changed the nature of the questions asked by the generations of scholars who came after him."[7]

The Lyonese School, has Alexandre Lacassagne as its main representative figure. Professor Lacassagne's work can be summarized in a few aphorisms, namely: "Any act harmful to the existence of a community is a crime", "Any crime is an obstacle to progress", "Societies have the criminals they deserve".[8]

The interpsychological school has as its leading representative the French criminologist Gabriel Tarde, who laid the foundations of French criminology and psychology. Tarde believes that a crime is not only "an evil" in itself but, at the same time, a source of "new evils", his theory is based on the finding that the relations between people are governed by a fundamental social fact, namely imitation. Thus "criminal behavior is also imitative behavior".[9]

The sociological school has the sociologist Emile Durkheim as its main representative. His theory was a reaction to the classical assumption that individuals were considered free and rational beings in a contractual society, based mainly on researching suicide rather than actually studying the phenomenon of crime.[10] Although he did not deal directly with criminology, he is among the first to give a definition to criminology, a fact for which his opinion cannot be neglected. He considers crime to be a "phenomenon of social normality", a "public health factor", sees crime as something normal, which comes from culture itself.[11]

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[7] Adler-Mueller-Laufer-Grekul: I © The McGraw-Hill *Criminology*, Canadian Criminology throughout History Companies, 2009, p. 77.
[8] To be seen V.Cioclei, *op. cit.,* Editura C.H.Beck, Bucharest, 2021, p. 76.
[9] To be seen Augustin Lazăr, C*riminology*, Editura Risoprint, Cluj-Napoca, 2008, p. 42.
[10] Anamaria Cristina Cercel, *Criminology*, Editura Hamangiu, Bucharest, 2005, p. 42.
[11] Valerian Cioclei, *op. cit,* Bucharest, p. 93-94.

J. Pinatel, contributed essentially to the development of criminology, for him, taking action appears as a response of the personality to a concrete situation. He is a supporter of the criminal personality theory, according to which the moral traits often found in criminals (aggression, affective indifference, mental lability, egocentrism) found in the individual way, not being specific only to criminals, but only if they come together in an articulated ensemble it could represent the central core of the criminal personality.[12]

E.H. Sutherland, developer of the theory of differentiated associations, according to which criminal behavior is learned and not inherited, learning is carried out in contact with other people, the criminal formation is not acquired only through imitation, as a more complex process is needed in this situation.[13]

Concrete ways to prevent/combat the criminal phenomenon

The formal and informal social reaction to crime cannot be excluded from the present subject of study, as it is oriented towards identifying the ways in which this criminal phenomenon can be controlled and prevented. The social reaction intervenes both ante-factum, through prevention programs and measures, and post-factum, through the execution of justice, through the treatment, resocialization and social reinsertion of criminals.[14]

The notion of prevention can be defined as a set of measures used to prevent the initiation of criminal behavior, the instrument used by the state for a more useful mastery of the criminal phenomenon by limiting or even eliminating the criminogenic factors that favor the commission of crimes[15].

In the doctrine, the conclusion was reached that we are discussing two categories of important means in preventing the criminal phenomenon, namely: legal means and empirical means.

Legal means represent all those legal norms that could contribute to the prevention of committing new criminal acts.

Empirical means represent the practices that are applied within institutions with a role in prevention.[16]

„Social prevention is designed to bring about lasting change in young people who are at risk of harm. The main goal is to avoid maladjustment by developing positive skills, increasing resistance to the temptations of

[12] Sergiu Bogdan, *Criminology*, SYLLABUS, Editura Sfera Juridică, Cluj-Napoca, 2005, p. 42; Anamaria Cristina, *op. cit.*, p. 40.
[13] *Idem*.
[14] Visea Liviu, *Criminology*, Sibiu, 2000, p. 51.
[15] Sergiu Bogdan, *op. cit*, p. 101.
[16] To be seen V. Cioclei, *op. cit.*, C.H.Beck, Bucureşti, 2021, p. 30.

delinquency, interventions at the family, school, group of friends or neighborhood level.

Social prevention has two main forms:

a) prevention through mental development (developpentale), specially oriented towards the individual and his family and

b) community prevention, through actions at the neighborhood or locality level, but whose finality should be the whole individual."[17]

Regarding situational prevention, "Any ordinary place in modern society can represent a criminogenic situation: dimly lit streets, shops, parks, means of public transport, casinos, museums. "The more or less criminogenic status of them - as hot spots of crime or as safe areas with a low crime rate - is established on the basis of local police statistics, victim studies and analyzes of criminal patterns. Their fundamental dynamics can be represented by a few simple parameters - the presence of valuable targets and individuals with criminal inclinations, as well as the absence of effective guards or situational control".[18]

Conclusions

The criminal phenomenon can be more or less prevented, it depends a lot on which is/are the cause /causes of the criminal behavior.

If we give credit to the sociological theory of A. Lacassagne,[19]: "Human societies have only the criminals they deserve", "Any man harmful to the existence of a collective is a crime", "Any crime is an obstacle to progress", "The environment social is the culture soup of crime, the microbe is the crime, an element that has no importance until the day it finds the soup that makes it ferment", then crime and implicitly crime could be prevented by the general conduct of everything from the state to citizen.

If we adhere to Lombroso's opinion, an opinion supported by research studies, we can conclude that the only chance to prevent crime would be to detect those who have criminal potential, which would be a utopia, a flagrant violation of legal and moral norms, because we can not accuse/study/analyze/isolate a person who have certain atavistic traits. A such idea would be inhuman, it would be abnormal and unthinkable, so in this case a criminal action of the atavic person could not be prevented in our society.

Correlating the theoretical aspects with the practice, it is opportune to reveal the existing opinion in standard specialist writings in Romanian

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[17] Dr. Gheorghe Florian http://criminologie.org.ro/wp-content/uploads/2015/08/Prevenirea-criminalitatii-teorie-si-practica-Rezumat.pdf

[18] *Idem*.

[19] To be seen Augustin Lazăr, *op. cit*, p. 41; Anamaria Cristina Cercel, *op. cit*, p. 41; Sergiu Bogdan, *op. cit.,* 2005, p. 44.

criminology, which has as its source of inspiration the work of Dr. R. Gassin.

Thus, the opinion of the criminologist R. Gassin is invoked, regarding the three fields of combating the criminal phenomenon: the field of criminal law and concrete application, the field of treatment of delinquents and the field of delinquency prevention. It was also highlighted that the interest and vocation to master the criminal phenomenon belong to the state, the system being applied through a state will, through an anti-criminal political decision. In this context, anti-criminal practice (social reaction against crime) as an object of criminology is defined as the system of means applied by the state in order to control the criminal phenomenon.[20]

We consider that dealing with the criminal phenomenon depends on the origin of the phenomenon.

From the perspective of situational prevention, public policies are extremely important considering that the State is a true guarantor for the reeducation and reintegration of the individual.

This public policis which have as objective prevencion or at least reduction of criminal phenomenon can truly reduce criminality if they are efficient or increase it in otherways.

A solution in prevention is identifying and attacking the cause even if it is an endogenous or exogenous cause.

Identifying the cause that could generate the criminal phenomenon as well as the consequences determined by this phenomenon, it had to be proced to correlate three important elements:the *criminal field* (prosecution of the individual with application of penalties)-*psychosocial treatment of the inmate* (to prevent relapse) and also extremely important are the action of *civil society and organizations* (NGO or others) which have as main purpose prevention of crime via programs, projects for prevention and intervention in families, the community and educational centers etc.

Unfortunately, not all crimes can be prevented, but their number can be reduced by means previously mentioned.

Of course, even if it is hard to prevent or at least reduce the crimes of organized crime it is extremely difficult to prevent the crime whose idea appears spontaneously in the mind of the perpetrator.

Even if the therm “spontaneously” indicates no premeditation, it does not means that there were not some signs in the person behavior which had to be seen by people around them.

We like it or not, but not every time the state, or the authorites are guilty of not preventing criminality, sometimes people have more guilty than they thought by adopting a passive attitude.

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[20] *Idem*.

How do we define passive attitude? it does not exist a standard definition but it takes on different forms. From the passivity with which we look at the child being bullied on the street by his "friends" to the acts of aggression between two people that we pass by saying, "It's not my problem, it is their problem".

Regardless of whether we are talking about murder, theft, deviant behavior generating legal consequences, when the criminal idea sprouts in the mind of the individual and he puts it into practice, no matter how effective public policies are, in this situation they do not have the expected result.

In the case that the crime is spontaneous, the only chance was that those close to them had noticed a deviant behavior of the criminal and to take the necessary measures on time.

Likewise, the victim (for example in the case of family violence) by tolerating the abusive behavior, creates for the criminal optimal conditions for committing the act (even if we talk about the act of murder, aggression, abuse). In the previously stated situation, the solution would be for the victim to leave his passive attitude on time and bring the act to the attention of the authorities.

The treating doctor of the person suffering from mental illness - which can cause aggressive behavior, has an important role in prevention. That person could commit a criminal act, if not properly supervised.

The absolute prevention of criminality is utopic, but the reduction it is possible and it is in the power of everyone of us - *from the individual - to the state/authorities* and vice versa with only one condition, namely the condition of the person's exit from passivity, as well as the adoption of a policy effective prevention measures from the state, which is what is happening today.

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MASS MURDER OVERVIEW. ULVADE SCHOOL SHOOTING.

PhD. Lecturer Ioana-Andra PLEȘA[1]

Abstract

Similar to the term "crime" also the term "criminal" has several meanings. According to the common understanding of the term and without having specialized knowledge, by criminal we mean the person who suppresses another person life, so we use the term criminal in the case of criminals who commit crimes followed by the death of the victim and in this context we can also use synonymously terms as killer or murderer.

In criminal language, by criminal we mean that criminal who commits acts with a high degree of social danger, serious acts and not only crimes directed against life. Murder, robbery, rape, they are all crimes.

According to criminology, when this notion is analyzed, the commission of any criminalized antisocial act is taken into account, including deviance generating legal consequences.

The notion of serial/mass criminal also includes the notion of mass/serial killer/murderer, but is more comprehensive.

The serial criminal is that person who, at different time intervals, commits acts criminalized by the law or by the rules of social coexistence (in this case we talk about deviance), similar by means but consisting in distinct material acts. The condition for that/these facts/acts is to be committed in different places and at certain time intervals.

The mass criminal is that person who commits an act criminalized by the law or by the rules of social coexistence consisting of a material act or several material acts which are committed over a short period of time (hours, rarely days) and which affects a value protected by the lawor by the rules of social coexistence. An example of a mass crime (the term has more meanings that mass murder) can also be considered the robbery committed against more passive subjects in a short period of time or even unauthorized access to several computer systems at the same time, which generates multiple victims and damages.

It is important to define the notions of serial murder and mass murder as follows:

In 2005, "The National Center for the Analysis of Violent Crime"-FBI- defined serial murder as: "The unlawful killing of two or more victims by the same criminal/criminals, in separate events and at different times." [2]*, by analogy in the content of the article mass murder will also be defined.*

Keywords: *criminal, murderer, serial killer/murderer, mass murderer, armed attack Ulvade Texas school*

[1] "1 Decembrie 1918" University of Alba Iulia, Faculty of Law and Social Sciences, Department of juridical and administrative sciences, Romania.

[2] A. Oprea-Popescu, Adriana Oprea-Popescu, Criminali în serie din România, Vol. I, Editura Tritonic, 2014., p. 10.

Introduction

The criminal-object of criminological research. The mass criminal/mass murderer

,,The word "crime" conjures up many images: mugging and murder, cheating on taxes, and selling crack. The Criminal Code defines hundreds of different crimes. These crimes are grouped into convenient and comprehensive categories for access and understanding."[3]

Starting from the definition of crime, we can define the criminal as the author of that action or inaction through which the crime is committed.

As stated in specialized writings: "the study of the criminal cannot be separated from the study of the crime, and the crime cannot be conceived in isolation - as an abstract act - but only as a conscious act of man".[4]

If by criminal we define the active subject of an act directed against a value protected by criminal law, in criminology by criminal we understand more. If, after it is proven that the active subject of the crime did not commit the act with discernment (he is a minor, or suffers from a mental illness that deprives him of it), he can no longer be categorized as a criminal, because he lacks guilt.

From a criminological point of view, the criminal exonerated from criminal responsibility by the laws present for research equal interest as the criminal who is criminally liable. Thus, the one who kills in self-defense and the one who has no discernment are also considered criminals. Even if they are not guilty, somewhere a social value has been damaged and even if there is justification, it is interesting to identify which are the factors that led to that event and how another similar one might be prevented.

The mass murderer is that killer who kills a large number of people on the same occasion, at the same time or "on the basis of a single criminal resolution, implemented in a very short period of time".[5]

As unanimously stated in the doctrine: "The specificity of the criminal/mass murderer is the simultaneous plurality of victims and the unrepeatability of his acts, given the fact that most of the time the moment of committing the crime overlaps with the end of his criminal activity. This type of criminal either takes his own life after or during the commission of the act, or immediately surrenders to the authorities. The mass murderer

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[3] F. Adler, W. Laufer, O. Mueller, J. Grekul: I © The McGraw-Hill *Criminology*, Canadian Criminology throughout History Companies, 2009, p. 235.

[4] Florin Sandu, Gheorghe-Iulian Ioniță, *Theoretical and applied criminology*, Publishing House Pro Universitaria, Bucharest, 2020, p. 18.

[5] V. Cioclei, *Manual of criminology*, Edition 9, Publishing House C.H. Beck, Bucharest, 2021, p. 185.

tends to be a paranoid individual with severe behavioral disturbances, exhibiting psychopathic or psychotic tendencies, being a social misfit. The criminal is not in any way interested in hiding his deed, therefore he does not take any measures to erase or modify his traces, nor does he avoid serving his sentence."[6]

There are also cases in which he ends up being killed by the authorities/police officers at the scene, as in the case presented below.

Conclusive examples of mass murder are: the killing of a large number of civilians in terrorist attacks (the motivation is mostly religious). The killing of pupils/students in schools/universities or killing people in the case of hostage-taking, killing people in the case of bank robberies.

A comprehensive definition of the notion of serial murder is that according to which: "serial murder represents the killing of victims disparate in time, days, weeks or even months apart, committed relatively with the same mode of operation and by the same perpetrator in office by the unpredictable instinctive determinations of his genetic dictation activated conjuncturally".[7]

There are also cases where there is a hybrid between serial killing and mass murder. In this hypothesis, the phrase "mass serial killers" is used. In this situation there are several successive victims, killed at approximately large intervals of time.[8]

To prevent mass killing certain signs should be identified in time. These are listed in a specialist writing as: "warning signs of violence".

"What are the common points that potentially dangerous people share? What are the warning signs of potential violence that appear even years before violence actually occurs?: thoughts of violence and violent fantasies; actual warnings of impending violence; auditory hallucinations; bullies and victims of bullying; previous acts of violence or sexual violence; chronic drug or alcohol abuse; cumulative anger; dramatic mood swings; indifference to life, to suffering, and to the pain of other creatures; history of homicidal behavior or homicidal intent manifested in childhood, collecting and possessing weapons. If a person with a background of cruelty and violence, driven by suicidal fantasies and ideas of harming others, actively collects weapons, it is the penultimate stage of murder/suicide."[9]

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[6] *Idem.*

[7] Tudorel Badea Butoi, Ioana Teodora Butoi, Alexandru T. Butoi, Călin Gabriel Puț, *Behavioral analysis from the perspective of forensic psychology, victimology and forensic tactics*, Publishing House Pro Universitaria, Bucharest, 2019, p. 48.

[8] V. Cioclei, A.R. Trandafir, D. Pârgaru, V. Dinu, F.C. Bobei, *Criminology. Seminar book*, C.H. Beck Publishing House, Bucharest 2021, p. 99.

[9] John Liebert, William J. Birnes. *Suicidal Mass Murderers: A Criminological Study of Why They Kill*, Edition 1, Publisher Taylor and Francis, Florida, 2011, p. 211.

The mass murderer at the Ulvade Texas school[10]

Anticipatory signals

There were warning signs regarding the perpetrator of the mass killing at the Ulvade-Texas School.

Before shooting 21 people at Robb Elementary School in Uvalde, Texas, the killer engaged in deviant behavior (threatened to kill himself, collected guns and made a video of himself holding a dead cat) - according to a preliminary report of a committee of Texas state investigating the massacre which it is used described the facts in press.

We identify reading the report factors that anticipated the adoption of a violent behavior that could degenerate and reach a serious violation of the law sooner or later.

Describing the event (actual/fact situation).

The mass murderer walked into his former fourth grade classroom and killed 19 students, as well as two teachers, on May 24, 2022. The tragic event ended with him being shot dead by police officers 77 minutes after invading the campus.

According to the press his name is excluded from the report in order to deny him the notoriety that he wanted as a result of the commission of this atrocity (it is a beneficial way to prevent such acts for other possible "assertion seekers").

In order to understand the criminal behavior (not to justify, because such an act cannot be justified regardless of the circumstances) it is important to know details about the perpetrator's life such as family environment, entourage, concerns, etc.

According to the newspaper "The Guardian" the mass murderer S.R. was born in Fargo, North Dakota and moved to Uvalde at a young age to live with his sister and mother, who had a history of drug abuse

He was subjected of bullying. He attracted harassment because of his stutter, a short haircut and the fact that he often wore the same clothes over and over again, the report said, citing a declaration gave to the police by a cousin.

In what concerns his school activity it was characterized by truancy until 2018, he failed, missed school more than 100 times a year, was labeled "at risk" and was referred for speech therapy. He had not progressed since his freshman year of high school in 2021, when he was 17 – the typical age of a junior. But the authors of Sunday's report could not determine whether any local school district officials visited her home. He dropped out of school until October 2021 when students began returning

[10] https://www.theguardian.com/us-news/2022/jul/17/uvalde-shooting-report-caretakers-officials-missed-red-flags

to in-person instruction amid the ongoing coronavirus pandemic. He spent most of his time online searching for gory/bloody and sexually violent material, occasionally sharing videos and images depicting beheadings and suicides, the report's authors noted.[11]

What seams courious is that he also wrote private thoughts about his difficulty making connections with other people or feeling empathy for them, saying he was “not human” and searching online for clues as to whether he was a sociopath. The searches led to an email about psychological treatment, the report's authors said. He also lost two fast-food jobs, at least one firing stemming from threats he made to a co-worker, according to the report. He began showing an interest in school shootings and at one point late last year filmed himself being driven around while holding a dead cat in a clear plastic bag.

As it is presented in “The Guardian” newspaper which has as source an official report he eventually moved in with his grandmother after a heated argument with his mother that was streamed live online. The report said he told a cousin who lived with him at his grandmother's house that he no longer wanted to live, although the cousin had hoped a frank conversation with him would change his mind.

Premeditation of the massacre

According to the official report which it was given to the press he bought 60 ammunition magazines capable of carrying 30 rounds each, along with other gun accessories. Then, on his 18th birthday, just eight days before the Mayor Robb murders, he bought two AR-15-style rifles and thousands of rounds of ammunition. He had no arrest history that would prevent him from legally purchasing the guns.

On the evening of May 23, Ramos started texting people about something he was going to do the next day. Nearly 2,000 rounds of ammunition arrived for him the next morning. He shot and wounded his grandmother, Celia Gonzales, before heading to Robb Elementary School, where investigators discovered staff had left the doors unlocked. Nearly 400 law enforcement officers from numerous local, state and federal agencies converged on the school after Ramos killed students and teachers there while wounding 17 others.

But, the report said, an unclear command structure and murky communications kept them waiting well over an hour before confronting and ultimately killing Ramos in what appeared to be the authorities' first substantial interaction with him[12]

[11] *Idem.*

[12] Conclusions Reported in The Guardian but also in other press publications.

Analyzing the case above, we are in the presence of a typical example of mass murder, which could have been prevented, if those signals of the criminal behavior of the individual that are all met/present as in the speciality books, had been taken into account.

The behavioral aspects releted to criminal behavior identified in the case: violent behavior, aggression towards animals, suicide threat; aspects regarding the environment in which the individual lives and family history: mother used drugs, disorganized family, subject to bullying; actions leading to and in direct connection with it: procuring a firearm and a large number of cartridges and making "subtle threats" on social media (Acording to the newspaper "The Guardian" which has as source an official report in April, he sent a message to someone on social media and asked if that person would remember him in about 50 days. When the person said "probably not," Ramos replied, "we'll see in May.").

On top of all this is the negligence of the school staff who failed to lock the doors.

And now the question arises: could this massacre have been prevented? Given the existence of so many warning signs, the answer is a resounding YES.

Conclusions

Despite countless studies in the field, an explanation, an exact answer to the questions "why x has deviant behavior?" "why he become a killer/criminal/serial killer/mass murderer?" "was he born a killer or he become?" has not yet been fully found. We all have an opinion, we all have part of answers but every new case teaches us that we have a long way to travel until the sciences of psihiatry, sociology, criminology, psihology and others sciences help us to find the absoulute true.

Even if at the moment we find explanations through the theories of the criminological schools, a question strictly connected to the previous one arises: "why z, who has the same characteristics, is not a murderer?". An answer would be the specificity of each individual, but it is not a sufficient answer to unravel such an enigma.

According to the representative of the Lyonese School, the theoretical concept outlined by this school was summarized in four famous aphorisms:"any act harmful to the existence of a community is a crime";"any crime is an obstacle to progress"; "the social environment is the "culture soup" of criminality; the microbe is the criminal, an element that has no importance until the day it finds "the soup that makes it ferment"; "societies have the criminals they deserve"[13]

[13] Augustin, Lazăr, *Criminology*, Editura Risoprint, Cluj-Napoca, p. 41.

It was precisely to limit this phenomenon after this violent attack in Texas that Congress gave final approval to a bipartisan compromise designed to prevent dangerous people from accessing firearms.[14] Corroborating the theory of the Lyon /lyoneze school with the measure taken by Congress, we can say that it is a step forward for society, and the society that took the measure will no longer deserve/have such criminals.

Of course, the procurement of the firearm and the ease of its procurement can be put in the "responsibility" of the respective state of the too loose legislation, but his deviant behavior and the failure to take legal measures by those who until the age of 18 had entrusted him for growth and education to the task who can it be put to?

According to the report, the mother was using drugs, so we can deduce that she was not capable of having a minor to raise and educate. Who had the legal obligation to answer for his supervision until he became an adult?

The founder of the interpsychological school, Gabriel Tarde, argued that the environment in which the individual lives is an important criminogenic factor, and imitation has the predominant role in shaping the behavior of a criminal. This imitation does not remove responsibility, each being able to choose his own path[15]

Related to Gabriel Tarde's theory, the factual situation in the practical case fully confirms it, according to what was previously analyzed.

In American society, R. K. Merton[16] highlighted the existence of a set of fundamental values, which were accepted by the entire population and protected by criminal law. Among them are listed: prosperity, freedom, acquisition, values that characterize the American way of life. Since some members of society do not have access to the means of achieving these values, a state of frustration is generated in relation to the impossibility of satisfying social aspirations and encourages the use of illegal means to achieve the goal.

Of course we can also add that the bullying he was subjected to generated a state of frustration, and corroborating with R.K. Merton's theory we also identify a potential criminogenic factor.

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[14] https://www.nytimes.com/article/uvalde-texas-school-shooting.html

[15] Augustin Lazăr, *op. cit.*, p. 51. Tarde tried to explain the criminal phenomenon by highlighting the relationship between morality and social progress as well as the role of imitation in the formation of criminal behavior. According to his theory, immorality "strikes the eyes and shines imitatively" as people are tempted to "copy" each other, as evidenced by the increasing proportion of recidivists among convicts. Interhuman relations being governed by imitation, a fundamental social fact, in Tarde's conception, the criminal phenomenon can be explained by the behavior of individuals according to the customs accepted by their environment, criminal behavior being an imitated behavior."

[16] To be seen A. Lazăr, *op. cit.*, p. 51, R. K. Merton, *Social Theory and Social Structure*, Ed. The Free Press of Glencoe, New York, 1957, p. 131.

Natural crimes, according to Garofalo", are those that offend the basic moral sentiments of probity (respect for the property of others) and piety (revulsion against the infliction of suffering on others). An individual who has an organic deficiency in these moral sentiments has no moral constraints against committing such crimes. Garofalo argued that these individuals could not be held responsible for their actions."[17]

According to a specialist writing to avoid mass killing in schools/universities, emergency psychiatric care must be more accessible.

The author believes that "the courts must be "convinced" that involuntary commitment does not have to resemble the policy of a Soviet-era Gulag to protect the public, but should consider acting prudently to protect society by exemplifying what the California court decided took consider the Tarasoff case and consider the consequences of a potentially violent person wreaking havoc on a community of potential victims."[18]

In the opinion of the previously cited author, if we replace the term "courts" with "authorities" or "qualified persons" we would find an important solution in prevention in all states, precisely by adopting a cautious attitude.

In the previously exposed case, we identified aspects that influence an individual and can lead him to crime (social environment, sociopathic personality, aggressiveness, the bullying he was subjected to), but this also raises the question of why X who is subjected to the same conditions does not kill?

One possible answer is that the criminal in general and the mass murderer in particular can be likened to an explosive mine. If this "mine" is in a warehouse and is defused, it is not dangerous, but if due to negligence it has been buried by time and environmental factors, and at some point it is acted upon by an external force, it is triggered and this is where the disaster begins.

Like the example above, so is the mass murderer. Probably the instinct existed in him from the beginning of his existance, but the education, the environment and even the specialized treatment, could "defuse" that instinct. If these elements are against it, and are "powered" when the triggering factor appears we will find ourselves in a situation similar to the case described above. The only solution is a preventive policy that annihilates or at least reduces such atrocity, and for this the intervention of each individual is necessary.

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[17] F. Adler, W. Laufer, O. Mueller, J. Grekul, *op. cit.*, p. 74.

[18] John Liebert, William J. Birnes. *Suicidal Mass Murderers: A Criminological Study of Why They Kill*, Edition 1, Publisher Taylor and Francis, Florida, 2011, p. 269.

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CRITICAL ANALYSIS OF SOME CHANGES BROUGHT BY LAW NO. 140/2022 IN THE FIELD OF PROTECTION OF PERSONS WITH INTELLECTUAL AND PSYCHOSOCIAL DISABILITIES

Associate professor PhD. Laura CETEAN-VOICULESCU[1]

Abstract

The law amending some normative acts in the field of protective measures for people with intellectual and psychosocial disabilities, brought some critical additions to the Civil Code and the Civil Procedure Code, which will be analysed in this paper. They will refer to the guardianship authority, to the source and motivation of the changes made to the Civil Code, to the appropriateness of legislative changes in the field as well as to the analysis of some modifying provisions of the Civil Code, from the perspective of legal relations in the field of family law.

Keywords*: guardianship court, guardianship authority, protection mandate, legal advice, special guardianship, notary public, persons with intellectual disabilities, persons with psychosocial disabilities, exercise capacity, the right to marry*

Introduction

Law no. 140/2022 (regarding some protective measures for people with intellectual and psychosocial disabilities and the amendment and completion of some normative acts), was motivated by the agreement of the legislation in the matter of the protection of certain categories of persons from the category of those who are incapable with some Decisions of the Constitutional Court by which it ruled on some exceptions of unconstitutionality, with some domestic or international normative acts (Constitution of Romania, Convention on the rights of persons with disabilities ratified by Law No. 221/2010, the European Convention on Human Rights).

This article analyses the source of these changes, the appropriateness of the current regulation and some changes brought by the Civil Code Amendment Law.

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

Regarding the guardianship authority

The targeted changes refer, among other things, to the guardianship authority. The guardianship authority was, prior to the repeal of the Family Code, the institution belonging to local public authorities, based on this code, with powers in the field of establishing and organizing guardianship, supervision, control, and guidance of the activity of protecting minors and incapacitated persons, in general. The Civil Code of 2011 eliminated most of the powers of this authority, regulating the guardianship court (guardianship and family court), providing in 107 article that the procedures provided for by the Civil Code regarding the protection of the natural person are under the jurisdiction of the guardianship and family court, according to the law, called the guardianship court.

In the organization of town halls, tutelary authority services function, but they remained without the powers conferred by the Civil Code. It also referred to the guardianship authority exclusively in the final provisions, where it regulated transitory elements, regarding the organization, operation and powers of the guardianship and family court. According to this article, until the organization and functioning of the guardianship court is regulated by law, the psychosocial investigation report provided for by the Civil Code is carried out by the guardianship authority.

But in the meantime, the organization and operation of the guardianship court was regulated, which is why this last article, which also referred to the institution of the guardianship authority, became obsolete.

However, the new Law amending the Civil Code and other normative acts, regarding some protection measures for people with intellectual and psychosocial disabilities, reintroduces certain powers of the guardianship authority. Therefore, the amendments to the Civil Code are aimed at reactivating the tutelage institution, taking it out of the obsolescence it was threatened with.

Thus, the amendments to the Civil Code refer to the guardianship authority when they regulate:

- assistance to people with intellectual and psychosocial disabilities, the assistant being obliged to submit an annual report or at the end of the term for which he was appointed regarding the fulfilment of his task by the guardianship authority; the guardianship authority ensures that the assistant properly fulfils his task and, for this purpose, checks the assistant's reports;
- the guardianship authority verifies the fulfilment of the duty of the guardian or the representative of the protected person to notify the guardianship court whenever it finds that there are data and circumstances that justify the reassessment of the protection

measure, as well as at least 6 months before the expiration of the duration for which it was disposed, in order to reassess it; (the obligation is laid down by the guardian or representative, the authority only checks whether the court has been notified);
- in the procedure for establishing judicial counselling or special guardianship, the prosecutor will order the drawing up of a social investigation report by the guardianship authority;
- In the case of the minor heir of the person who benefits from judicial advice or special guardianship, the legal guardian and the guardianship authority are cited.

The source and motivation of the amendment of the Civil Code and the Civil Procedure Code

Regarding the source of the amendments, Decision 601/2020 of the Constitutional Court refers to the exception of unconstitutionality of the provisions of article 164 paragraph 1 of the Civil Code, in its form prior to the repeal and amendment, according to which "the person who does not have the necessary discernment to take care of his interests, due to alienation or mental debility, will be placed under judicial prohibition". This text was repealed on January 27, 2021 by the Act of Decision 601/2020 and subsequently amended by Law no. 140/2022, currently having the following wording: "the adult who cannot take care of his own interests due to a temporary or permanent, partial or total impairment of his mental faculties, established by medical and psychosocial assessment, and who needs support in the formation or expression of his will, he may benefit from judicial advice or special guardianship, if taking this measure is necessary for the exercise of his civil capacity, under conditions of equality with other persons".

The case in front of which the exception of unconstitutionality was raised had as its object the resolution of the appeal filed against a civil sentence by which the application for prohibition was admitted. The rigid division of people between those with and without discernment has been criticized, without considering that the person's discernment can only be partially diminished, and when making the decision of lack of discernment by putting under the ban, the person in question is not at all supported in the decision-making process that concerns it. It was also emphasized that the ban represents a disproportionate and unjustified interference with the fundamental rights of the person and nullifies any possibility of reintegration into society.

According to the Convention on the Rights of Persons with Disabilities, Article 12, Paragraph 2, these persons have the right to recognition of legal capacity on equal terms with others, in all areas of life.

The article prohibits substitution legal regimes, whereby the ability to make decisions on behalf of a disabled person is transferred to a third party, requiring their replacement with support regimes, where disabled people are helped to make decisions independently.

Even the European Court of Human Rights[2] has ruled in this sense, emphasizing that the existence of a mental illness cannot justify placing under a ban, which deprives the person of the ability to act independently in all areas of life, and criticizing legal systems that distinguish between people with discernment and those with completely abolished discernment, who lose the ability to exercise completely, without providing solutions adapted to people with diminished discernment.

The Constitutional Court held that the provisions of the Civil Code operate with absolute values in the sense that any potential impairment of mental capacity, regardless of its degree, can lead to the deprivation of people's capacity to exercise, thus existing a contradiction between the Civil Code and the Convention on the Rights persons with disabilities, regarding the protective measures that must be taken, the Civil Code establishing a substitution regime, refusing intermediate solutions adapted to the particular situation of each person, and the Convention placing itself in the sphere of support measures and operating with intermediate values.

Also, the Court notes that the prohibition does not refer only to the total lack of discernment of the person, and, on the other hand, our legislation does not allow restricted exercise capacity except for the minor, not the adult who, because of the judicial prohibition, will be completely devoid of it. For these reasons, the Court emphasizes the importance of alternative and less restrictive measures than prohibition, to be resorted to only as a last resort, when other measures have proven ineffective in supporting the civil capacity of the person.

The decision of the Constitutional Court also concerned the aspect of the duration for which the protection measure is instituted and that of the periodic reassessment of the person's capacity. As a result, the Constitutional Court decided that the measure of placing under judicial prohibition is not accompanied by sufficient guarantees to ensure respect for fundamental human rights and freedoms.

Gradual protection measures in the current regulation

What is important at this point is to observe whether the way it is now regulated by the same article of the Civil Code, the protection of adults who cannot take care of their own interests due to the impairment of mental faculties, temporary or permanent, partial, or total, is an optimal one.

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[2] Judgment delivered on 27 June 2008 in the Case of Shtukaturov v. Russia; The judgment of August 31, 2016, pronounced in the Case of A.N. against Lithuania.

The current Article 164 of the Civil Code initially provides for a medical and psychosocial assessment of these persons to reach the conclusion that they need support in forming or expressing their will, followed by judicial counselling or special guardianship, if necessary for the exercise of the civil capacity of the person, under conditions of equality with others. We note that not all these measures are provided gradually. That of the medical and psychosocial evaluation is mandatory because this evaluation determines the appropriateness of the other two. If the evaluation will lead to the conclusion that the reduction of the capacity of the person in question is not major, counselling, respectively special guardianship will no longer be necessary.

Law 140/2022 additionally introduced the assistance measure for the conclusion of legal acts, in addition to those stated above. If we are to analyse the measures comparatively, we notice that the assistance is the one that will protect the adult whose discernment is not so impaired, since it does not lead to the impairment of the exercise capacity, as is the case with judicial advice, which attracts a restricted exercise capacity for the adult or of the special guardianship concerning the adult without legal capacity. The assistant will only be an intermediary between the protected major and third parties in the legal acts that he concludes, since the assistant does not replace the protected person, concluding the legal acts on his behalf, nor does he approve the acts concluded by him.

Corroborating the analysed with the provisions of Article 164, the hierarchy of protection measures becomes even clearer: assistance without loss of legal capacity, legal advice with limited legal capacity and special guardianship with lack of legal capacity. However, we consider that the measure of assistance is also one of protection, even if in the current wording, Article 164 implicitly excludes it from the category of these protection measures. And in the case of assistance for the conclusion of legal acts, it is also about an adult who, due to an intellectual or psychosocial disability, needs support to take care of his person, manage his patrimony or exercise his civil rights and freedoms. Moreover, even 106 article the 2nd paragraph provides that the protection of the major takes place through:

- Legal advice
- Special guardianship
- Trusteeship
- Other measures provided by law.

Therefore, the protection of the major will be carried out according to the needs of each person with intellectual and psychosocial disabilities, differentiated, by assisting in the conclusion of legal acts, by judicial advice, by special guardianship and/or by guardianship.

Judicial counselling is aimed at people whose mental faculties are partially damaged but need to be continuously counselled in the exercise of their rights and freedoms.

Special guardianship is aimed at people whose mental faculties are totally damaged and need to be continuously represented in the exercise of their rights and freedoms.

The ones that seem controversial are the provisions of article 164, paragraph 6, which provides for the possibility that the minor can be protected by the measure of special guardianship, between 14 and 18 years old, but not by guardianship or being placed under judicial advice, only one year before the date of reaching the age of 18 years and with effects from this age. Also, the Civil Code in its amended form does not provide whether the minor can be assisted in concluding legal acts by an assistant during the period in which he has limited exercise capacity and the right to conclude certain legal acts alone.

Regarding the guardianship, we note that it retains its special and temporary character, being instituted when it is necessary to care for and represent the person whose protection was requested or for the administration of his goods.

The protective measures are partially available, both in terms of duration and in terms of the acts/object they target.

Changes in exercise capacity

Regarding exercise capacity, Law no. 140/2022 brought some changes, talking for the first time about restricted exercise capacity in the case of a person who has reached the age of 18. I didn't call her an adult, since coming of age does not only represent reaching a certain age, regulated differently in legislation, but represents the emancipation of a person who, reaching a certain age, thereby acquires a full exercise capacity. Therefore, normally, when a person reaches the age of 18, he has in fact reached the age of civil majority, but if we refer to people with intellectual and psychosocial disabilities, turning 18 no longer has any relevance in regarding his exercise capacity.

Unfortunately, Law no. 140/2022 introduced certain provisions for the exercise of civil, patrimonial, or non-patrimonial rights, unrelated to the provisions that regulate the conditions for the enclosure, modification, or finalisation of civil legal acts, provided by all civil regulations. I analysed these correlations in detail in the next chapter, with application to the marriage act. Returning to people with intellectual and psychosocial disabilities, they will either have full exercise capacity, in cases where it has not been decided to take legal advice or special guardianship measures regarding them, whether or not they are assisted in concluding legal acts,

obviously, when the disability is not so serious as to affect their ability to make decisions on their own, either with limited exercise capacity, when the person is protected by judicial advice, or without exercise capacity, when the person is protected by special guardianship. We believe that the legal regime applicable to the conclusion of legal acts, their nullity, the way in which they participate alone or through a representative, with consent or assistance, should be like that applicable to other persons who lack legal capacity.

Thus, when we talk about minors under 14 years of age with or without intellectual or psychosocial disabilities, minors between 14 and 18 years of age with serious intellectual disabilities or persons of at least 18 years of age with serious intellectual disabilities, being in the presence of persons lacking the capacity to exercise, to have the same legal regime of protection, through representation.

When we talk about the minor person between 14 and 18 years old without intellectual disabilities or without serious intellectual disabilities, respectively about the 18-year-old person protected by legal advice, they are being with limited capacity to exercise, a similar legal regime should be applied to them (approval of some documents, assistance, the possibility to conclude certain acts by yourself).

Finally, when we talk about the minor between 16 years old without intellectual disabilities or severe intellectual disabilities, who has acquired full exercise capacity through marriage or emancipation, or the person of at least 10 years old without disabilities or with mild disabilities, who is not protected by counseling judicial or special guardianship, as it is about persons with full exercise capacity, they benefit from the full exercise of their civil rights, without the need for representations, approvals or assistance.

Changes regarding marriage

A major change is also made to the Civil Code regarding the impediment to marriage resulting from alienation or mental debility.

Persons for whom the measure of judicial counseling or special guardianship has been ordered may marry, but with the observance of a specific obligation to notify, in advance, in writing, of the formulation of the marriage declaration to the guardian under whose protection they are. The guardian has the right, after the notification, to object to the marriage. The civil status officer, upon receiving the opposition, will notify the guardianship court, and it will decide on the merits of the opposition.

Referring to the other impediments specific to marriage (the impediment resulting from the existence of an undissolved marriage, guardianship), we note that only this requires the intervention of the

guardianship court, the others being the responsibility and the decision of the civil status officer.

Regarding the absolute nullity of the marriage, the provisions of article 293 refer to the free and personal consent of the future spouses, to bigamy, to the quality of relatives and to the formalities regarding the form of concluding the marriage, together with the other provisions that refer to the lack of marriageable age and fictitious marriage. Therefore, the marriage of the person receiving legal advice or special guardianship is no longer subject to absolute nullity.

We note that the legislator did not amend the provisions of art. 293 paragraph 2 which erroneously refers to the dissolution of the previous marriage on the date of the conclusion of the new marriage, in the event that the spouse of a person declared dead has remarried and, after that, the judgment declaring death is annulled, although it would have been a suitable occasion, with the amendment of the provisions of article 293 paragraph 1. It is obvious that no divorce operates in this situation, to speak of dissolution, for the first marriage to be considered dissolved, it obviously ceases.

We also believe that there will be some controversial discussions and an uneven judicial and administrative practice derived from the changes related to the conclusion of marriage by people with intellectual and psychosocial disabilities, especially regarding those without exercise capacity or with limited exercise capacity.

As for people with intellectual and psychosocial disabilities who do not have impaired exercise capacity, they will no longer be under judicial prohibition, they will have the right to enter a full marriage. Recourse to an assistant will be made only to the extent that the person in question considers that he needs support in exercising the right to conclude the marriage. Even if the assistant will be appointed by the public notary, the marriage act is obviously concluded personally without any consent from him, and without the assistant's right to notify the guardianship court, if he deems it necessary. Regarding the notification of the civil status officer with opposition, we consider that this is possible, by any person has the right to oppose the marriage, even if article 286 of the Civil Code, as amended, refers only to the person who benefit from legal advice or special guardianship.

As the sanction of absolute nullity no longer affects, after the amendment of the Civil Code, the marriage concluded by the person with intellectual and psychosocial disabilities, the only one that could be attracted in the event of the conclusion of the marriage is the relative nullity, on the grounds of the lack of discernment at the time of expression of consent or defects of consent. But cases of relative nullity can only be

invoked by certain persons, directly interested, are subject to the statute of limitations and the nullity in question can be covered or confirmed.

Regarding people with intellectual and psychosocial disabilities who have limited exercise capacity (placed under judicial advice) or those without exercise capacity (placed under special guardianship), we express our reservations about the way in which the legislator has modified the provisions of the Civil Code. First, if the person has limited legal capacity, the legal acts they enter into should be subject to the rules regarding prior consent, similar to minors who enter into marriage between the ages of 16-18 and who, in order to enter into a valid marriage, have need a series of conditions (at least 16 years of age, consent of parents/guardians, medical certificate, authorization of the court of guardianship, valid reason). In addition, the conclusion of the marriage by the minor who is between 16 and 18 years old is subject to relative nullity if these requirements are not met, which is not provided for in the current form of the Civil Code regarding the minor with limited legal capacity. The guardian's only possibility is the one mentioned above, to oppose the marriage, a possibility recognized anyway, to any person. What is additionally provided is that the registrar will not make checks himself, but will notify the guardianship court, which will decide on the merits of the opposition. Being the only situation in which the officer notifies the court (in the other situations of filing oppositions, the civil status officer himself verifies the validity of the oppositions, within that period of 10 days from the date of registration of the marriage declaration until the date of the marriage ceremony), we consider that, again, the procedure for concluding the marriage will be disturbed by delays and uncertainties, which could be removed by a thorough amendment of the Civil Code.

The contradiction also appears between these provisions regarding marriage and those that we find modified in paragraphs 2 and 3 of art. 41, according to which the legal acts of the person with limited legal capacity (without distinguishing between the minor with limited legal capacity and the adult with the same capacity), it ends with the consent of the parents or, as the case may be, the guardian, and in the cases provided by law, also with the opinion of the family council... and the authorization of the guardianship court. The person with limited exercise capacity can make alone acts of conservation, administration, acceptance of an inheritance or liberalities without encumbrances, as well as acts of disposition of small value, of a current nature and which are executed on the date of their conclusion. But marriage obviously does not belong to any of these categories of acts.

Regarding people with intellectual and psychosocial disabilities who lack the capacity to exercise (placed under special guardianship), even if

the law includes a gap, respectively a contradiction, we consider that they do not have the right to marry, since one of the fundamental conditions of marriage it is that of capacity, on the one hand, and the fact that they lack discernment, on the other. However, the Civil Code no longer refers to the absolute nullity of marriage on this ground, and moreover, it provides that the person benefiting from... special guardianship must notify the guardian in advance that he will make a declaration of marriage, and he has the right to file an opposition, subsequently the civil status officer will notify the court which will decide on the merits of the opposition. If the court decides that the opposition is well-founded, the marriage will no longer be concluded. But we wonder what will happen if a marriage has already been contracted by the person concerned, who has either not notified the guardian or no objection has been made by him. What nullity/cancellation action can be brought? According to which cause? By whom? How long? All this was not considered by the legislator when he amended the Civil Code by Law no. 140/2022.

Conclusions

In our opinion, the dichotomous division of people with intellectual and psychosocial disabilities was not, indeed, one that ensured the exercise of their rights in full equality with others. We believe that this distinction should have been made in persons with intellectual and psychosocial disabilities with exercise capacity, for those who have a slight degree of impairment of the mental faculties, who can conclude legal acts alone, without other representations/consent or assistance, with limited capacity of limited exercise, for which a legal regime similar to that applicable to minors with limited exercise capacity, to be represented, assisted or to have their documents approved in a similar way and those without exercise capacity, with a serious impairment of mental faculties and to be deprived of the exercise of rights, to whom a regime similar to that of minors without exercise capacity should be applied, both regarding legal acts of a patrimonial nature, as well as non-patrimonial ones.

A series of scientific articles will certainly appear on this subject, the doctrine will analyze in detail the modifying legal norms, and we hope that in the shortest time we will have an improved version of the Civil Code regarding the protection of people with intellectual and psychosocial disabilities.

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LEGAL REGIME AND THE CURRENT CHALLENGES OF THE PUBLIC FUNCTION

PhD. Lecturer Maria ALBU[1]

Abstract

An administration, in order to be able to function at high standards, besides a stable and coherent legislation, must also have material and financial means and well-trained professional staff, so as to ensure a stable, professional, transparent, efficient and impartial public service, in the interest of citizens as well as of the authority and public institutions of the central, territorial and local public administration.

The challenges that constantly arise in public administration are also found in the civil service. Thus, we believe that it is useful to discuss them and the civil service regime.

Keywords: *public administration, challenges, civil service, legal regime*

Introduction

Given that any field of activity, including administration, is made up of people, organised in collectivities, it is clear that the effectiveness of public administration depends on the human quality and technical capacity of the people working in public administration.

An administration, in order to be able to function at high standards, in addition to a stable and coherent legislation, must also have material and financial means and well-trained professional staff, so as to ensure a stable, professional, transparent, efficient and impartial public service, in the interest of citizens as well as of the authority and public institutions of the central, territorial and local public administration.

The Law on the Status of Civil Servants regulates the general regime of legal relations between civil servants and the state or local public administration, through autonomous administrative authorities or through public authorities and institutions of central and local public administration, while the new statute mentions public authorities and institutions within which public functions are established, namely: public authorities and institutions of the central public administration, including autonomous authorities provided for by the Constitution or established by organic law; public authorities and institutions of the local public administration;

[1] University "1 Decembrie 1918" from Alba Iulia. Law and Social Sciences Faculty.

specialised structures of the Presidential Administration, specialised structures of the Romanian Parliament; structures of the judicial authority.

A civil servant is a person appointed by law to a public office. Depending on the category to which they belong, civil servants take decisions and/or carry out activities of a technical nature, in order to ensure the continuity of the functioning in the general public interest of the public authority and institution, and through their work they act in conditions of objectivity, professionalism, legality and impartiality for the fulfilment by the public authorities and institutions of the duties laid down by law.

Public office is the set of duties and responsibilities established by law for the purpose of exercising the prerogatives of public authority by the central public administration, local public administration and autonomous administrative authorities, or the set of duties and responsibilities established by law by the public authority or institution for the purpose of exercising its powers.

1. Legal regime

Several categories of staff work in the public administration, in terms of legal status, namely:

- persons holding various public offices (ministers, secretaries of state, local elected representatives), whose status is regulated by normative acts [2];
- contractual staff, whose legal status is primarily regulated by the Labour Code and[3];
- civil servants, whose legal status is regulated by Law No 188/1999, as subsequently amended and supplemented, and by the Administrative Code and other laws governing the legal statutes applicable to different categories of civil servants[4].For example: those performing duties in the specialized structures of the Romanian Parliament, specialized structures of the Legislative Council, diplomatic and consular services, institutions of the public order and national security system, customs structures, etc.[5]

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[2] *The function of public dignity* is the set of powers and responsibilities established by the Constitution, laws and/or other normative acts, as the case may be, obtained by investiture, as a result of the electoral process, directly or indirectly, or by appointment.

[3] *Public administration staff* comprises dignitaries, civil servants, contract staff and other categories of staff established by law in central and local government authorities and institutions.

[4] *The Administrative Code* is an emergency ordinance that regulates public administration in Romania. It was adopted by Emergency Ordinance 57 of 2019. The Code represents the materialization of a long-standing desire to unify the legal rules of public administration.

[5] *The Corps of Civil Servants* consists of all civil servants in public authorities and institutions of central and local public administration.

In our country, over the years, the legal status of the civil service has been regulated either uniformly or non-uniformly by the Organic Regulations, the 1852 Act, the Board of Directors Act, the Electoral Act, the County Councils Act and the Municipal Act of 1864, the Constitution of 1866, the Civil Servants Act of 1923, the Civil Servants Code of 1940, Act no. 746 of 1946, Decree No. 418 of 1949, the Labour Code of 1950, the Labour Code, and since 1999 by Law No. 188 on the Status of Civil Servants, as amended and supplemented, either by various laws (e.g. No. 386, 661, 743, 744/2001; No. 327, 631, 632/2002; No. 161, 507, 519/2003; No. 164, 344, 511, 512/2004; No. 76, 228, 379, 380/2005; No. 251, 417, 442/2006; No 135, 330, 379/2009; No 49, 140, 264, 284/2010; No 76, 132, 187/2012; No 2, 77, 255/2013; No 57, 436/2016; No 129/2017; No 156/2018; No 24, 145/2019 etc.), or by Emergency Ordinances (e.g. No 82, 284, 291/2000; 33/2001; No 123 /2003; No 92/2004; No 39/2005; No 2/2006; No 92, 125, 229/2008; No 3, 37, 90, 105/2009; No 44/2012; No 4, 77, 82/2013; No 18/2014; No 57/2019 etc.) or by decisions issued by the Constitutional Court in 2009, 2014, 2015, 2016, 2017, 2019, 2020, 2021 and 2022[6]. Also, with the entry into force of the Administrative Code, we find the relevant provisions in it.

Law No 188/1999 on the Status of Civil Servants, published in the Official Gazette of Romania, Part I, No 600 of 8 December 1999, was republished in the Official Gazette of Romania, Part I, No 251 of 22 March 2004 and in the Official Gazette of Romania, Part II, No 251 of 22 March 2004. Romania, Part I, No 365 of 29 May 2007. This law remained in force until 31 December 2019 and was replaced by Government Ordinance No 57 of 3 July 2019 on the Administrative Code, Part VI, published in the Official Gazette of Romania, Part I, No 255 of 5 July 2019, but a large part of the regulations stipulated in the law remained in force[7]

In the post-war period, the thesis of the uniqueness of the legal employment relationship was founded. After 1989, with the advent of the 1991 Constitution, the status of civil servants was included among the areas of regulation reserved for organic laws, so that in legal doctrine there

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[6] Regarding emergency ordinances, see Iulia Boghirnea, *Cazul excepţional şi ordonanţele de urgenţă*, in Scientific Paper no.4/2002 of the Annual National Conference on Public Sector Reform in the European Context, Paul Negulescu Institute of Administrative Sciences of Romania, Ed. Burg, Sibiu, May 2002, pp. 289-294.

[7] The principles underlying the exercise of public office are: the principle of legality, the principle of competence, the principle of performance, the principle of efficiency and effectiveness, the principle of impartiality and objectivity, the principle of transparency, the principle of accountability, in accordance with legal provisions, the principle of orientation towards the citizen, the principle of stability in the exercise of public office, the principle of good faith, in the sense of respecting mutual rights and obligations, the principle of hierarchical subordination.

was serious controversy about the legal nature of the employment relationship (public office) established between the civil servant and the public authority or institution in which he works, and, consequently, about the legal status of the civil servant.

2. **Classification of public functions. Categories of civil servants.**

Public functions are classified as follows: general public functions and specific public functions; class I public functions, class II public functions, class III public functions; state public functions, territorial public functions and local public functions.

General public functions are the set of duties and responsibilities of a general nature common to all public authorities and institutions for the realisation of their general competences, while specific public functions are the set of duties and responsibilities of a specific nature of some public authorities and institutions for the realisation of their specific competences or requiring specific competences and responsibilities. The establishment of specific functions and their equivalence to general functions is established by law, by the cumulative fulfilment of the following conditions: the level of the public function; the level of studies required to exercise the public function; the seniority in the speciality required to exercise the public function.

Civil services are divided into 3 classes, defined in relation to the level of education required for the civil service. Class I includes civil servants who have completed a university degree with a bachelor's degree or equivalent (counsellor, legal adviser, auditor, expert, inspector, procurement adviser and similar civil servants). The second class includes civil servants who have completed a short higher education course, with a diploma, prior to the application of the three Bologna-type cycles (specialist referent and similar public functions), and the third class includes civil servants who have completed secondary education or secondary education with a baccalaureate diploma (referent and similar public functions). All the above posts are executive posts.

State public functions are public functions established, according to the law, within ministries, specialized bodies of the central public administration, specialized structures of the Presidential Administration, specialized structures of the Romanian Parliament, autonomous public authorities provided for in the Romanian Constitution and other autonomous administrative authorities, as well as within the structures of the judicial authority, territorial public functions are public functions established, according to the law, within the institution of the prefect, the deconcentrated public services of the ministries and other central public

administration bodies in the territorial administrative units, as well as the public institutions in the territory, subordinated/coordinated/under the authority of the Government, the ministries and other central public administration bodies, and the local public functions are the public functions established, according to the law, within the own apparatus of the local public administration authorities and their subordinated public institutions. While the original form of the statute specified that civil servants are identified by category, grade, class and the corresponding step, the amendments made to the law by O.U.G. No 82/2000, approved by Law No 327/2002, eliminated the steps and made the grade an element of the class. There are now four professional grades: beginner, assistant, principal and senior[8].

The categories established for the civil service according to the level of duties are also partly found in the original law, it includes managerial and executive civil servants, and the innovation brought by Law No 161/2003 is the establishment of the category of senior civil servants.

Senior civil servants may only occupy civil service posts in class I, under the terms of the law, while civil servants appointed to civil service posts in classes II and III may only occupy executive civil service posts. The category of senior civil servants includes directors-general, deputy directors-general, directors, deputy directors, executive directors, deputy executive directors, heads of departments, heads of offices in public authorities and institutions, etc.

Senior civil servants carry out senior management in public authorities and institutions, including the secretary-general, deputy secretary-general of public authorities and institutions, prefect, sub-prefect and government inspector. Depending on their status, civil servants may be newcomer or permanent[9]. Junior civil servants are those persons who have passed the competition for a junior professional civil service position, and permanent civil servants are junior civil servants who have completed the probationary period provided for by law and have obtained an appropriate result in the evaluation; persons who enter the civil service in the manner provided for in this part and who have at least one year's seniority in the field of studies required for the civil service position.

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[8] Verginia Vedinaș, *Statutul funcționarilor publici (Legea nr. 188/1999) Comentarii, legislație, doctrină și jurisprudență,* Ediția a II-a, revăzută și adăugită, București, Editura Universul Juridic, 2016, p. 57.

[9] Appointment to public office shall be made by the head of the public authority or institution or, where appropriate, by the person legally empowered to appoint under the terms of specific regulations, by administrative act issued within the time limits and under the conditions laid down by law, on the basis of the results of the competition.

The status of civil servant is acquired immediately after appointment to public office, by administrative act and the exercise of the function begins after the oath of allegiance has been sworn [10].

In order to develop a professional, stable and impartial civil service and to create the necessary records for the management of staff paid from public funds, the National Civil Servants Agency is organised and operates under the Ministry of Public Administration as a specialised body of the central public administration with legal personality. The National Civil Servants Agency is financed from the state budget and the salaries of the staff of the National Civil Servants Agency are paid in accordance with the regulations on salaries of staff paid from public funds. The staff of the National Civil Servants Agency consists of dignitaries, civil servants and contractual staff.[11]

The National Agency for Civil Servants issues administrative records for the purpose of recording the disciplinary situation of civil servants. The administrative record is a document containing the disciplinary sanctions applied to the civil servant and which have not been struck off under the law. The administrative record is issued at the request of: the civil servant, for his/her own disciplinary situation; the head of the authority or public institution in which the civil servant works; the head of the authority or public institution in which the vacant senior civil servant position or the vacant managerial civil servant position is located, for civil servants who apply for the promotion competition organised to fill it; the chairman of the disciplinary commission, for the civil servant undergoing the administrative investigation procedure or other persons provided for by law[12].

Conclusions

Professionalisation in the administration and implicitly in the civil service, in the current context, are needs, without which a real reform in

[10] Public officials must adopt an impartial and justified attitude to solve citizens' problems legally, clearly and efficiently. Public officials must adopt a dignified and civilised attitude towards any person with whom they come into contact in the exercise of their public duties and are entitled, on the basis of reciprocity, to require similar behaviour from them. Civil servants are also obliged to ensure equal treatment of citizens before public authorities and institutions, a principle according to which civil servants have a duty to prevent and combat any form of discrimination in the performance of their professional duties.

[11] The National Civil Servants Agency is headed by a President with the rank of Secretary of State, assisted by a Vice-President with the rank of Under-Secretary of State, appointed by the Prime Minister on the proposal of the Minister of Public Administration. In the exercise of his duties, the President of the National Civil Servants Agency issues normative and individual orders.

[12] Miruna Tudorașcu, *Etică și deontologie în administrația publică*, Risoprint Publishing House, Cluj Napoca, 2017, p. 44.

this field will not be possible. In order to have an efficient public administration, in addition to a well-developed infrastructure, there must be competent leaders, both in terms of professionalism, experience in the public service and the qualities needed to carry out the management functions properly. They need to be good organisers and coordinators, to find the best solutions for managing human relations both within the public administration and with the beneficiaries, to behave in a fair and supportive way and to ensure a good working climate for officials and the conditions necessary for the performance of their duties.

Effective management requires adequate support from highly qualified executive staff who are able to carry out the assigned activities rationally and efficiently. However, in order to perform well, they need not only a pleasant psychological climate, with a normal pace and volume of work, but also a financial incentive for their activities (promotions, bonuses, etc.), which can lead to greater commitment to the tasks assigned to them, which can only be achieved through legislation based on the principle of unity, the supremacy of the law and the principle of fairness, guaranteeing stability in the civil service by creating opportunities and equal pay for equal work.

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14. Miruna Tudorașcu, *Etică și deontologie în administrația publică*, Risoprint Publishing House, Cluj Napoca, 2017.
15. Legislation.

FREEDOM OF EXPRESSION AND THE INTERNET

Mihaela SIMION[1]

Abstract

More often than not, the internet is facing the issue of harmful content: disinformation, instigation to hatred, propaganda of the totalitarian state, cyber bulling, pornography, copyrights infringement, etc. In this context, the identification of such illegal content is difficult, in particular because of lack of clear legal reference points and the cross-border character of the internet.

This paper aims to analyse the importance of the internet in exercising the freedom of expression, the challenges related to its abusive use, as well as the internal and international regulations which govern this matter.

Keywords: *internet, expression, freedom, regulations*

„I shall fight to death for your right to disagree with me" said Voltaire at the middle of the 18th century, even before the French Revolution of 1789, who was establishing in his iconic document – The declaration of Human and Citizen's Rights, art.11 - freedom of expression. Subsequent to this reference period, freedom of expression had been included in Constitutions and International Treaties, being a social-political right of first generation.

1. Regulations concerning the freedom of expression

To date, the freedom of expression is established internally by article 30 of the Romanian Constitution, which declared the as intangible the freedom of expressing thoughts, opinions or beliefs, as well as any other type of creations, verbally, in writing, by images, by sounds or any other public communication means. Under the fundamental law of Romania, this freedom stands, foremost, for the interdiction of censorship. Thereafter, it is complemented by the freedom to start publications, without which, the freedom of the press could not be conceived. But it cannot be conceived either, should there be the possibility, regardless of the reason, to supress a publication, so that the fundamental law does not allow such actions. The Law may yet impose on the mass communication means, the obligation to make public the source of funding.

[1] University Lecturer PhD, Faculty of Law and Social Science within the "1 Decembrie 1918" University from Alba Iulia.

The Internal Regulation is complemented by article 19 from the Universal Declaration of Human Rights[2], article 10 of the European Convention for Human Rights Protection[3], as well as art.11 of the Charta of Fundamental Rights of the European Union[4].

The distinct attention casted on the freedom of expression is justified by the fact that it is essential for any democratic regime, for a sustainable development, as well as for exercising other democratic rights, such as the right of association, the right to elect and be elected, the right to petition, the right of the citizens to legislative initiative, etc.

To express freely nowadays, stands for the faculty to reveal our thoughts, opinions according to the technical means or support which we find more suitable[5].

We need communication not only to be able to express our opinions, but also to be informed, to be able to be aware of what is happening in this world, and the internet probably represents today the most important means of communication and information.

2. The significance of the Internet in exercising the right to freedom of expression

The European Court of Human Rights highlighted in the *Cengiz decision and all against Turkey*[6], that the "Internet is nowadays one of the main means whereby individuals exercise their right to the freedom to receive and communicate information and ideas, in the same time supplying core tools to participate to activities and debates regarding political or public interest related matters. [...] On the other hand, on the

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[2] "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

[3] "1. Everyone has the right to freedom of expression. The right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or maintaining the authority and impartiality of the judiciary."

[4] "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
2. The freedom and pluralism of the media shall be respected."

[5] Louis Favoreu, Patrick Gaïa, Richard Ghevontian, Jean-Louis Mestre, Otto Pfersmann, André Roux, Guy Scoffoni, *Droit constitutionnel,* 16e édition, Dalloz, Paris, 2014, p. 928.

[6] ECHR, *Cengiz and others v. Turkey,* 1st of December 2015.

importance of websites in exercising the freedom of expression, "due to their accessibility and capacity to retain and disseminate large quantities of data, the websites contribute significantly to enhance the access of the public to news and in general, to facilitate the communication of information". The possibility that individuals might express on the Internet integrates an unprecedented tool for exercising the freedom of expression [...]"

Today, in particular, social networks are more and more present in our society due to the increasing number of users and the proliferation of the posted content. For example, in June 2020, Facebook had 2.7 billion active users on a monthly basis worldwide, registering a 12% increase in comparison to the previous year. Consequently, social networks play a major role in terms of freedom of expression online, as a larger number of individuals express and share on these platforms their experience, ideas, feelings, requests or even their personal data.

In this context, the online freedom is sought to be a superior concept to the classic freedom of expression, which, would allow an actual exercise of this right and would create a "legal paradise of information".[7]

In this respect, various platforms, such as Facebook or Twitter recognize their special status with regards to exercising the freedom of expression. Mark Zuckerberg declared on his own account that Facebook is an institution of freedom of expression that wishes to facilitate this as much as possible, except the case when it generates an imminent risk of harm or specific dangers expressed in clear terms. Furthermore, the founder of Twitter, Jack Dorsey, defined this platform as a "digital public market", highlighting the importance of exchanging free and opened ideas.[8]

3. Misuse of the internet in the name of freedom of expression

Generally the internet, but in particular de great giants of the online – Google, Facebook, Twitter, Youtube, TicTok, etc. – created the illusion of a limitless freedom of expression, considering that the individual tends to feel more secure within the familiar environment behind the screen. Therefore, humans are tempted to abuse the freedom of expression within the online environment, more often than not under the protection of anonymity, provided by means of vague or even fake accounts.

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[7] Monica Cercelescu, *Protection of freedom of expression in the context of the efforts of the states to fight the illegal and harmful content on the internet,* p. 4, article published on the site juridice.ro, https://www.juridice.ro/636601/protectia-libertatii-de-exprimare-in-contextul-eforturilor-statelor-de-combatere-a-continutului-ilegal-si-daunator-pe-internet.html

[8] https://www.affiches-parisiennes.com/liberte-d-expression-sur-les-reseaux-sociaux-et-controle-du-contenu-11774.html

The abuse on the internet may take various forms, the most commonly met being:

- disinformation, which consists in the intentional supply of fake or mischievous information, for the purpose of economic gain or to mislead the public intentionally;
- incite to hatred by means of racist or xenophobe sites;
- insult and slander;
- cyber bullying;
- copyrights infringement;
- sharing of personal data;
- pornography, etc.

Also, great challenges when it comes to the internet refer to the instantaneity and the viral character of the published content, as well as its cross-border nature, which are bound to make moderation especially complex.

4. The limits of freedom of expression on the internet

The Internet must be a universal tool of communication and receipt of real information for all of us. The principle of universality of the internet presupposes the idea of law, which is inseparable from human rights overall. The freedom of expression of an individual ends where the freedom of the other starts, in particular those referring to private life, self-image and even to receive true information, according to the public order and morality.

In this context we may ask the legit question of, who and mainly how is it possible to identify harmful posts on the internet without instituting the systematic censorship?

This essential task for maintaining democracy is achieved both by the actions of the National and European Authorities, but also by the involvement of entities managing the internet platforms, considering the lack of a general and sovereign control.

4.1 Prevention and the fight against illegal contents on the internet by internal legislation

Under paragraph 6 art.30 of the Romanian Constitution, freedom of expression cannot prejudice dignity, honour, the private life of the individual and neither the right to self-image. It is also forbidden the defamation of the country and the nation, prompting the aggression war, national hatred, racial, class or religious, inciting to discrimination, territorial separatism or public violence, as well as obscene manifestations, contrary to morality (paragraph 7).

Also internally, into the Criminal Code[9] we can identify a few crimes susceptible to be committed online: communication of false information (art. 404), pro war propaganda (art. 405), inciting to hatred or discrimination (art. 369), public provocation (art. 368), revealing a secret that might jeopardize national security (art. 407), child pornography (art. 374), offences against morality (art. 375).

Regarding the crimes of insult and defamation, they are not regulated by the Romanian legislation, although, the Constitutional Court found[10] that there is no incompatibility between the principle of freedom of expression and incrimination of insult and defamation, which would incur the discrimination of such crimes. In this instance only the civil regulations are applicable which may incur assumpsit liability in case of injurious manifestations.

4.2 The prevention and fight against illegal online content by the European legislation

According to the European Commission, what is illegal outside the internet is also illegal on the internet. Illegal content refers to any information which is not according to the EU law or the internal law of a member state. This includes the terrorist character content, materials containing sexual abuse against children, instigation to hatred, scams and commercial fraud and the intellectual copyright infringement.[11]

At the level of the entire European continent it is noticeable, unfortunately, the use of the online platforms tools for the purpose of manipulating certain types of choices, disinformation or promotion of the hatred speech.

Having to deal with this situation, the European Union mainly promoted the idea of self-regulation of the online platforms, which were therefore responsible for the deletion or blocking of illegal or harmful content, in due time. Good practice codes were therefore adopted, for the fight against disinformation and hatred instigation speech.[12]

According to Facebook standards, messages and texts which promote violence, criminal behaviours, are damaging for the public or personal security, intellectual property rights are declared unacceptable, and the

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[9] Romanian Criminal Code, published in the Official Gazette no. 510/2009, with subsequent amendments.

[10] The Decision of the Constitutional Court no. 62 of January 18, 2007 referring to the exception of non-constitutionality of the dispositions of art. I p. 56 din Law no. 278/2006 for the amendment and modification and completion of the Criminal Code, as well as for the modification and completion of other laws (Official Gazette no.104 of February 12, 2007).

[11] Recomaandation of the European Commission regarding the actions for the efficient fight against illegal content of March 1, 2018.

[12] Monica Cercelescu, *op. cit.*, p. 8.

platform is reserving the right to limit the freedom of expression as soon as this type of content is identified[13]. Facebook bans and censors on its platform any threat or credible appeals to violence that might harm the public or the personal safety, while it tolerates humoristic and satire related manifestations (jokes, stand-up comedy or song's lyrics) which may be considered threats or attacks.

Social networks are on the forefront of the problem of free speech, without them adopting common policies in relation to sanctions against hate speech. While some support the absolute freedom of expression, others claim that social networks should exercise a tighter control and even censorship regarding the potentially dangerous content. Thus, it is pertinent to bring forth the censorship applied by the social networks and the possible legal consequences thereof, with regards to the freedom of expression. Moreover, it is interesting to study the liability regime of these platforms in relation to such contents, to be able to better understand and define the level of moderation and control, required in order to not impede with the freedom of expression of the users.

The European Convention of Human Rights, ratified by all the European Union states, defines by article 10, the right to freedom of expression: "Any individual has the right to freedom of expression [...] without the possibility for the authorities to interfere". Thereafter, this definition is opposable to public authorities, but not to private entities. This is why, *a priori*, the moderation on social networks, escapes this principle of lack of interference. This is confirmed in practice, by a very limited number of cases when users are filing a lawsuit against these networks for the infringement of their freedom of expression.

With respect to their responsibility in relation to the public content, the European Directive 2000/31/CE of June 8, 2000 regarding the electronic trade, establishes a limited liability regime for the host suppliers (category wherein it is also included the Facebook platform). Thus, the hosts cannot be held liable if they were not aware of the illicit character of the message posted by an internet user or if they acted promptly to eliminate the published content as soon as they were made aware of its illicit character. The responsibility of the hosts cannot be, therefore, construed as a general obligation to monitor the content on their platforms. Neither may the member states request the hosts to look for information referring to illicit activities. Nevertheless, CJUE considers that, despite the absence of a general monitoring obligation, the host may

[13] In January 2021, the Facebook account of the former president Donald Trump was suspended for two weeks pending the investiture of his successor Joe Biden, as a result of the attempt to take by storm the building of the Capitol by the Trump partisans on January 6, 2021.

have the right to eliminate or block the access to any content which is identic or equivalent to the content previously deemed to have been illegal by the Courts, the obligation being able to be extended worldwide.[14]

In its turn, The European Court of Human Rights deemed that the obligations and responsibilities which an internet news portal must undertake in the application of the provisions of art.10 of the Convention may differ to a certain extent from those of a traditional editor with respect to the content supplied by third parties[15]. In this respect, the European jurisprudence highlights clearly that if the comments left by the internet users, broadcast a speech of hate and violence, the responsibility of the news portals online, cannot be engaged based on content uploaded by third parties, except when they are taking actions to eliminate without delay the comments which were obviously illegal, even in the absence of the notification from the presumed victim or third parties[16].

On September 15, 2022, the Council of the European Union adopted the Digital Services Act (DSA) which aims to create a safer European digital space, wherein the fundamental rights of the users are more effectively protected.[17] More concretely, the DSA aims towards the standardization of the obligations and responsibilities of the social networks on the single market. Its purpose is to eliminate the publishing of any illegal content. Therefore, this project consists in the institution of certain mechanisms for the member states, to enable them to apply their laws and values on the internet. The illegal nature of the content thus remains defined national wide. The larger platforms are more specifically targeted, respectively those with over 45 million users active per month. Once becoming effective, the responsibility of the entities managing the social networks may be engaged in case they become aware of the illegal content which they fail or refuse to eliminate. Their responsibility could be all the more easily to engage as they now have the obligation to cooperate with the authorities, as well as to submit themselves to audits performed by independent companies. This ensures the freedom of expression, in the same time, limiting its abuse. With respect to engaging their responsibilities during the moderation of the published content, this new legislation frame will facilitate the users to take actions against these platforms.

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[14] CJUE, Case C-18/18, *Eva Glawishnig-Piesczek v. Facebook Ireland Limited,* 3rd of October 2019.

[15] Frédéric Sudre, *Droit européen et international des droits de l'homme*, 13e edition, PUF, 2016, p. 836.

[16] ECHR, *Delfi AS v. Estonia*, 16th of June 2015.

[17] https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package

5. Conclusions

The principle of freedom of expression must apply not only to the traditional mass-media, but also to the internet and all the emerging media platforms which contribute to the development of democracy and dialogue.

With respect to harmful contents, more often seen on the internet, concrete action means must be found for their quick removal. Also, the companies within the field should comply with the common standards asserted by a unitary legislation, at least at European level.

These rules should concern the obligation of social networks to delete in due time (maximum 24 hours) any content which is racist, promotes pornography, terrorism or which aims to spread false information, etc. Furthermore, those guilty of such posts, as well as the responsible individuals within these companies who do not remove in a timely manner the harmful contents, should be liable to pay fines in a significant amount.

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THE SPOUSE AND THE SURVIVING SPOUSE – PARTNER AND SUCCESSOR IN THE COMPANY

PhD. student Oana-Elena BUZINCU[1]

Abstract

Perhaps more than ever, nowadays the community property regime, respectively the capacity of the spouses in a company arouses interest. Thus, in the present study I aimed to carry out a thorough analysis of the regime of the spouses' contributions to the capital of a company, but also of the acquirement of capacity of partner by the surviving spouse. All these aspects will be treated from both a theoretical and a practical perspective.

Furthermore, in this study, a temporary transition from the status of spouse to that of surviving spouse will be noticeable, as well as the switch between two different legal spheres, civil – commercial.

Keywords: *partner, spouse, surviving spouse, contribution*

1. Introductory notes

When talking about spouses, respectively about the surviving spouse, the starting point is the existence of a marriage regulated, from a patrimonial point of view, in the vast majority of cases, by the legal community property regime. Hence, the aspects analyzed in this study take into account the capacity of the spouses as participants in commercial relations, governed by the provisions concerning the legal community property regime, but also by the quality of partner of the surviving spouse as successor of the other spouse in the company by virtue of the special benefit granted by the legislator in the matter of civil-commercial relations.

Therefore, a person married under the legal community property regime can: 1. have the status of partner in a company alongside the spouse; 2. can only be the beneficiary of the equity interests or shares in the company when the contribution is made by using a joint asset and only the other spouse has the status of partner, and 3. can have the capacity of continuing partner in the company replacing the spouse who was the original partner, if the latter ceased to be a partner upon death, and the possibility of continuing the capacity of partner by the heirs of the deceased shareholder was stipulated in the Articles of Incorporation.

[1] Teaching assistant at "1 Decembrie 1918" University of Alba Iulia, Faculty of Law and Social Sciences, oana.buzincu@uab.ro

2. The Spouse as a Partner in the company

Thus, art. 349 of the Civil Code[2], in a first sentence resumes the general rule in the matter of the legal community property stating that "none of the spouses can make use of the joint assets by themselves, without the other spouse's consent", particularized for the hypothesis of the commercial relations as "contribution to a company or for acquiring equity interests, as applicable". For the agreement of the other spouse to be valid, I consider that the written, even authenticated form is required in the cases where the contribution to the capital of the company is represented by real estate, as without such consent the aplicable sanction is the one expressly mentioned in art. 347 of the Civil Code, i.e. the annulment of the act.

In the same art. 349 of the Civil Code, the legislator makes a clear distinction between the status of partner and the nature of the equity interests, respectively of the shares in the company, the capacity of partner being indisputably and apparently recognized only to the spouse contributing with the common asset, but qualifies the equity interests or the shares as common assets.

However, nothing prevents the other spouse to hold the capacity of partner for the equity interests, or the shares received in exchange for half of the property's value, but only if by convention, the spouses have not stipulated other quotas, and in this case the equity interests, or the shares belonging to each of the spouses represent their own assets.

Such a hypothesis allows the best observation of the interpenetration between the different spheres of law, and more precisely between the family law and commercial law, in the context of the joint management of the common assets of the two spouses married under the legal community property regime, the contribution to the company and even the possibility of inheritance or continuation of the capacity of partner bynthe surviving spouse of the partner who contributed with the common asset to the capital of the company.

The content of art. 349 paragraph 2 of the Civil Code reveals the clear perspective of the legislator to regard the capacity of partner differently from the one of owner of the ownership right over the asset used to contribute to the capital of the company. Also, the delimitation also takes into account the attributions deriving from the capacity of partner, which in this case belong only to the spouse who is a party in the company, not to the spouse whose assets were used for the contribution.

This type of legal construction used for the joint management of common assets is considered only when the spouses are married under the legal community property regime, this co-management being divided in

[2] Law no. 287/2009 on the Civil Code, with subsequent amendments and additions.

the specialized literature into two moments "both for the actions by which a spouse decides the bringing of a common asset as contribution to the capital of a company (the phase of the company establishment), as well as for the acts of acquisition of equity interests or shares by using common assets (the phase after the company establishment)".[3]

Furthermore, it cannot be denied that this rule concerning the joint management is applicable also in the case of the conventional community regime, when the contribution to the capital of the company is made by using a previously owned asset, which was later included in the conventional community. This statement is sustained also by the provisions of art. 368 of the Civil Code, stipulating that in the situations expressly provided for by the legislation in force, the legal conventional community property regime is complemented by the legal provisions regarding the legal community regime".

The existence of the matrimonial regime of property separation does not support the application of the provisions of art. 349 of the Civil Code, since the spouses have separate assets, and the contribution of one's own property to the capital of the company is not conditioned by the consent of the other spouse. In this case, the spouse of the partner in the company does not benefit from any equity interests or shares, all rights being exercised only by the partner spouse. On the other hand, both spouses can have the capacity of partner if their contribution to the capital of the company is a joint asset owned in quotas, each receiving, in this case, the equity interests or shares they are entitled to based on the ownership quota over the asset.

3. Surviving spouse – successor in the company

When considering the hypothesis of a spouse's death, inevitably the situation of the surviving spouse becomes an important matter, both from a moral and legal point of view.

From a legal perspective, it is the surviving spouse who apparently benefits of most of the rights following the other spouse's death. As stipulated by the provisions of art. 972, art. 973 and art. 974 of the Civil Code, the share of the inheritance established with priority by reference to any other classes of heirs, the special succession right over the furniture and household appliances subject to the common use of the spouses during their marriage, the legitima portio (art. 1087 of the Civil Code) and even the seisin (art. 1126 of the Civil Code) represent the rights of the surviving spouse, as well as other provisions from special normative acts

[3] Fl. A. Baias, E. Chelaru, R. Constantinovici, L. Macovei (coord), *Civil Code - Commentary on articles - Edition 3*, C.H. Beck Publishing House, Bucharest, 2021, p. 463.

such as: Law no. 263/2010 on the unitary system of public pensions[4] or even Law no. 31/1990 on companies, republished[5].

The share of the surviving spouse when he or she competes against other classes of heirs has seen a series of changes over time[6] leading to the regulation provided for in art. 972 of the Civil Code adapted to the needs of the current society. According to the regulation in force the surviving spouse enjoys a privilege of priority when determining the inheritance share by reference to any other class of heirs and more than that, the rights associated with his or her share are gradually increased as the surviving spouse competes against different anf farther classes of heirs.

A very special right of the surviving spouse is the one provided for by art. 973 Civil Code, more precisely the right to reside in the marital home. The conditions for being able to benefit from such a right stipulate, first of all, that the surviving spouse cannot be the current holder of any right to reside in a different dwelling suitable for his or her needs. When read for the first time, the text does not seem to raise any kind of questions, however, the current practice hypothesis brings to the fore the surviving spouse, the holder of an ownership right over a real estate shared with the deceased spouse, the house in which the married couple dwelled until the spouse's death. In such a situation, does the surviving spouse also benefit from a right of residence over the deceased spouse's share in the real estate, a share established in the execution of the liquidation act in the succession procedure, having at the same time a property right over his or her share or it is considered that since he or she is already the owner of a real right to use a dwelling, this right to reside in the marital home shall be cancelled ? The analysis of the text leads to the conclusion that the surviving spouse should not be the holder of another real right over another home, other than the one in which he or she lived with the deceased spouse, which means that this legal provision remains applicable in the case of the surviving spouse being the co-owner alongside the deceased spouse, of the joint property.

Another condition to benefit from this right is that on the date his or her spouse died, the surviving spouse must have dwelled in the home that is the object of the right to reside, i.e. to have the domicile established at that address[7]. Furthermore, the specialized literature states that “it is not

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[4] Published in the Official Gazette no. 852 of 20 December 2010.

[5] Published in the Official Gazette no. 1066 of 17 November 2004.

[6] For details, see I. Bardoczi, *Does the Civil Code of 1864 mark an evolution in the matter of the surviving spouse's ab intestate succession rights?*, available online at http://arhiva-studia.law.ubbcluj.ro/articol/530, accessed on 27.10.2022.

[7] See Fr. Deak, R. Popescu, *Treaty of Succession Law – Updated and Completed Third Edition, Vol I – Legal Inheritance*, Universul Juridic Publishing House, Bucharest, 2013, p. 270.

necessary on the date the succession is opened, for the surviving spouse to have been cohabiting with the deceased"[8].

The third condition is that that the house in which he or she has dwelled must comprise a part of or the entire succession, that is, exclusive ownership or in shares even, with the surviving spouse.[9]

The right of residence is maintained, if all these conditions are met cumulatively, until the partition procedure is started, however not earlier than one year from the date succession has been opened, but it may be cancelled even before the completion of this period, if the surviving spouse remarries.

The surviving spouse's special succession right over the furniture and household appliances exists only if the successor spouse does not compete with the heirs to the succession of the deceased, including not only the descendants-children of the deceased but also the grandchildren, great-grandchildren, etc.

The category of goods that the surviving spouse could benefit from, under the conditions provided by the law, is strictly and limitedly specified, and includes more precisely furniture and household items that have been subject to the common use of the spouses and are not considered part of the residuary estate with the other assets of the deceased.

The legislator did not define in detail the notion of furniture or household items, such a mission being reserved for the specialized literature, but clearly showed that it is impossible to talk about the totality of the movable assets subject to the common use of the spouses, as well as about the equity interests or shares that the spouses own in the company.

As stated above, the rights of the surviving spouse are not limited to the regulation provided for in the Civil code, but they are also found in special laws, thus conferring special rights upon the surviving spouse. Such a right can be found in Law no. 31/1990, republished, stipulating that any heirs, in conclusion not only the surviving spouse, can continue the activity in the company replacing the deceased, but only if it was expressly mentioned in the Articles of Incorporation. Otherwise, the collective or limited liability company is dissolved as a result of the death of one of the partners, when, due to these reasons, the number of associates has been reduced to one or when the remaining partner decides to continue the existence of the company in the form of a limited liability company with a sole shareholder.

The same provisions are also applicable in the case of simple limited partnerships or partnership limited by shares if the death of the sole limited

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[8] M. Eliescu, *Inheritance and ist devolution*, Publishing House of the Academy of the Socialist Republic of Romania, Bucharest, 1966, p. 142.

[9] Fr. Deak, R. Popescu, *op. cit.*, p. 271.

partner or limited partner has occurred. In consequence, the continuation of the capacity of partner by the spouse who initially gave his consent only to the contribution by using common assets to the capital of the company without having the status of partner himself, can be observed.

At the same time, the provisions of art. 229 of Law no. 31/1990 state that this privilege of continuing the activity in the company does not strictly concern only the surviving spouse but also any other heir of the deceased, by expressly mentioning the option of continuation in the Articles of Incorporation, as well as the limitation of this possibility to the types of companies clearly defined by the legislator.

The transcendence mentioned at the beginning of this study therefore refers to the transition from the capacity of spouse to the capacity of surviving spouse as well in commercial relations when he or she did not have the status of partner, but can become a successor of the rights and obligations of the deceased spouse in a company.

The reason why the legislator regulated the obligation to mention in the Articles of Incorporation or in the Addenda, the heirs'option to continue the capacity of the deceased shareholder in a company expressly provided for by law, concerned the close moral and even financial connection existing between the family members, and aimed to meet the principle of including other members in the company only by bringing this fact to the knowledge of the other partnership members.

The *intuitu personae* character existing in commercial relations is clearly preserved even if the possible heirs of the partners are mentioned in the Articles of Incorporation, as it is a document accepted by all the other partners.

A final aspect to be analyzed in the present study refers to the transmission of equity interests by succession as a result of a shareholder's death. In this case, the provisions of art. 258 of the Regulation on the application of Law no. 36/1995 on Public Notaries and Notarial Activity, republished, with subsequent amendments,[10] which mentions the situation in which the residuary estate contains equity interests, part interests or shares and for the purpose of determining their value, i.e. the value to be included in the residuary estate, the value resulting from the analysis of the company's financial and accounting records or, in the case of listed companies, the analysis of the entities maintaining the shareholders' register will be considered.

Therefore, it can be noted that if no clause of the Articles of Incorporation stipulates the fact that the heirs, including in this case also the surviving spouse, have the possibility to continue the capacity of the

[10] Approved by Order no. 2333/C of June 24, 2013, published in the Official Gazette no. 479 of 1 August 2013, with subsequent amendments and additions.

deceased shareholder in the company, they will receive the value of the equity shares, without having the option of becoming partners.[11] Such a benefit exists only if, after the discussion of the succession procedure, the equity shares were included in a subsequent partition procedure and were inherited by only one heir.

However, according to art. 202 of Law no. 31/1990 if the Articles of Incorporation did not provide for the possibility of the continuation of the deceased shareholder's capacity in the company by the heirs[12], the equity shares can still be transferred to them, but only with the consent of the partners representing at least three quarters of the social capital, and it is an independent act completely unrelated to the succession procedure.

4. Brief conclusions

As stated at the very beginning of the study, I tried to perform a brief analysis of the situation of the spouse of a shareholder in a company by considering the three types of matrimonial regimes existing according to the current legislation, but also the possibility of acquiring such capacity following the death of the spouse, partner in the company.

The specific rights of the surviving spouse have been detailed as well as the aspects they relate to, in particular, in the notarial practice, and at the same time the methods of getting included in the company or to receive the value of the equity shares owned by the deceased shareholder to be inherited by the surviving spouse as a special right and by other categories of heirs.

The main purpose of the study is to analyze the relationships between different subjects of the civil law - family law, with the matrimonial regimes, the succession law, but also commercial law by applying them to concrete situations in practical activity.

The surviving spouse, regardless of the matrimonial regime chosen for the governing of the patrimonial relations during the marriage with the deceased spouse, remains a central element and of interest in different areas of the civil law.

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[11] See A. Moldovan, A Zagor, *Death oft he partner in a limited liability company. Under what conditions is capacity of partner transferred through succession and other important clarifications*, available online at https://www.juridice.ro/756935/decesul-asociatului-din-societatea-cu-raspundere-limitata-in-ce-conditii-se-transmite-calitatea-de-asociat-prin-succesiune-si-alte-clarificari-importante.html accessed on 27.10.2022.

[12] See C. Dima, *Aspects regarding the transmission of shares through succession*, available online at https://buletinulnotarilor.ro/aspecte-privind-transmisiunea-partilor-sociale-prin-succesiune/ accessed on 10.11.2022.

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CONSIDERATIONS REGARDING THE REMEDY OF EXECUTION BY EQUIVALENT AND THE POSSIBILITY OF RETAINING THE PRINCIPLE OF FORCED EXECUTION IN NATURE

Assistant PhD. Candidate Raluca-Clarisa GLIGOR[1]

Abstract

Every contract generates obligations for the persons that are under the incidence of it, persons that are called generically parties. When one or even both parties violates the provisions of the contract they can be forced to perform the obligations in nature or by equivalent. In addition to these two contractual remedies, the creditor also has the possibility to request the rescission, dissoulution or reduction of its own correlative obligations, it depends on the situation (art. 1516 of The Civil Code). A diligent creditor, who is faceing a non-execution of the contract emanating from the debtor, will pursue the safest and most beneficial way to realize his right. In this paper, we will present whether and to what extent the creditor will be able to request the remedy of equivalent execution, in the context where the forced execution in nature of the obligation is possible.

Keywords: *contractual remedy, execution by equivalent, forced execution in nature*

1. Introduction

At the basis of the legal will lies autonomy of will, a principle enshrined in Article 1169 of the Civil Code, according to which "the parties are free to conclude any contracts and to determine their content, within the limits imposed by law, public policy and morality". It is extremely important to note that, as pointed out in a work in the legal literature, "*law is not only legal rules, just as morality is not limited to moral rules; but it is equally true that the legal rule is the primary element of law, established by a public authority recognised by the community and whose application is ensured by the collective awareness that it carries legal values, and if necessary by a determined coercive force"*[2].

A contract is a complex instrument through which a multitude of operations are carried out, such as the transfer of goods, the provision of services, etc., all of which are based on the relationship between two or

[1] University "1 Decembrie 1918" from Alba Iulia.Law and Social Sciences Faculty.

[2] Gheorghe G. Mihai, Radu I. Motica, *Fundamentals of Law. Theory and Philosophy of Law*, All Publishing House, Bucharest, 1997, pp. 21-22.

more persons, which comes into existence with the aim of producing legal effects. It is through contracts that individuals make their presence felt in society and at the same time satisfy the needs of everyday life, and this instrument is essential to the organisation of social life. The parties establish, in accordance with the law, their own rules to be observed from the moment the contract is concluded, and are bound only in certain circumstances to respect the form imposed by law. By concluding a contract, each party seeks to achieve an end, which will be achieved through the performance of that contract. The conclusion of the contract also activates a sense of responsibility, so that this commitment also contributes to educating the public[3].

The parties entering into the contract are pursuing an aim which cannot be achieved if the contract is not performed properly. Therefore, in the event of non-performance of the contract by the debtor, the law entitles the creditor to access a number of means by which to realise his right.

2. General considerations on the regulation of contractual remedies

Article 1.516 of the Civil Code expressly provides for the creditor's right to full, exact and timely performance of his obligation, and where, without justification, the debtor fails to perform his obligation and is in default, the creditor may, at his option and without losing his right to damages, if due, apply for or proceed to enforcement of the obligation; obtain the rescission or termination or, where appropriate, the reduction of his own obligation; use, where appropriate, any other means provided for by law to enforce his right.

In our view, contractual liability does not designate the totality of remedies available to the creditor[4]. Analysing these remedies available to the creditor, we note that Article 1.516 operates in the event of unjustifiable non-performance, without, however, any mention of damage. In order for remedies to operate, as a rule, the law does not lay down the requirement of fault, nor does it deal with the requirement of damage, as in the case of contractual liability. According to Art. 1.350 para. (2) of the Civil Code, when (the party) fails to fulfil this duty without justification, it is liable for the damage caused to the other party and is obliged to make good this damage, in accordance with the law.

According to Article 1.527 of the Civil Code, the creditor may always request that the debtor be compelled to perform the obligation in kind,

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[3] For a detailed description of the principle of freedom of contract, see Tudor R. Popescu, Petre Anca, *General theory of obligations*, Editura Ştiinţifică, Bucharest, 1968, pp. 21-23.
[4] For a different opinion, see Cristian Paziuc, *Contractual liability. A legal and economic analysis*, Universul juridic Publishing House, Bucharest, 2019, p. 72 ff.

unless such performance is impossible. The right to performance in kind includes, where appropriate, the right to repair or replacement of the goods and any other means of remedying defective performance. The text of the law makes no mention of fault or damage, which are conditions of contractual liability, which leads us to state that forced execution in nature cannot fall under the umbrella of contractual liability.

Then, turning our attention to resission, we note that even in the case of rescission, damage is not a substantial requirement, the essence of rescission being the sufficiently significant non-performance without which rescission could not be invoked. This does not mean, however, that a sufficiently serious non-performance is also sufficient to invoke this remedy[5].

The functions of the remedies differ. Some are designed to restore the situation prior to the conclusion of the contract, i.e. to put the debtor back in the situation he was in before the contract was concluded. Others are intended to restore the situation in which the contract would have been concluded and the services performed as the parties had agreed. There are remedies which seek to make good the damage, their role being to harmonise the two situations, i.e. the reality existing at the time of conclusion of the contract and the reality after conclusion of the contract and performance of the obligations.

3. The existence or non-existence of an obligation on the part of the creditor to request forced execution in nature, where this is still possible

In Article 1527 of the Civil Code, the legislator talks of a possibility for the creditor to compel the debtor to enforce the obligation in kind, unless enforcement is impossible. In what follows, we shall analyse from various perspectives the possibility for the creditor to have priority access to the remedy of execution by equivalent performance in order to enforce his right, even though forced execution in nature is possible, given, among other things, the principles underlying the contract.

Favor contractus, as its name implies, is intended to favour the contract in the event of certain conflicting situations or conflicting interests arising between certain elements subject to the analysis of the contract. From the whole regulation of the contract, we can see the legislator's preference for the idea of maintaining the contractual bond, the only real limit being the impossibility of performance.

Starting from Article 1.270, which expressly states that a valid contract concluded has the force of law between the contracting parties, we

[5] For the view that non-performance of an essential obligation is sufficient to justify rescission, we recommend Vladimir Diaconita, *Forced execution in nature of contractual obligations in the Romanian Civil Code system*, Universul juridic Publishing House, Bucharest, 2017, pp. 117-118.

cannot fail to notice the intimate link between pacta sunt servanda and favor contractus. It is the principle of the binding force of contract that establishes the rule that a civil legal act (contract or unilateral act) is binding on the parties like the law. However, the civil legal act is binding not only on the parties but also on the court, which will take account of the will of the parties in resolving a dispute. For example, when the parties stipulate a penalty clause in the legal act they conclude, the court will not be able to intervene and change the amount of that clause except in certain situations expressly and restrictively provided for by law. This reasoning is based on the need for security which must characterise civil legal relationships and, at the same time, respect for the word given[6]. We also consider that the reasoning behind the principle is justified above all by the desire of the parties who have chosen of their own free will to commit themselves legally by concluding a specific civil legal act, knowing the effects that such a commitment entails.

What we have noted so far is the substantial importance of the pacta sunt servanda principle which governs the contractual legal relationship and which also involves the rule of conformity of performance and the possibility for the creditor to have access to various remedies in the event of non-performance, the whole range of remedies being regulated in Book V of the Civil Code, Title V, Chapter II, art. 1.516-1.557 (forced execution in nature, exception of non-enforcement, termination, rescission, execution by equivalent, remedies supplemented by the additional term of enforcement which appears in the form of a precondition for access to certain remedies).

Even if to a certain extent we note a close link between the binding force of the contract and forced execution in nature, we consider that the legislator did not intend to give preference to the remedy of forced execution in nature in the sense of obliging the creditor to require forced execution in nature when this is possible, the creditor having equally the possibility to require execution by equivalent, the purpose being the same, namely the preservation of the contractual balance.

Another principle closely linked to favor contractus is the principle of good faith, enshrined both as a general principle of law in Article 14 of the Civil Code, expressing the need for natural and legal persons to exercise their rights and perform their obligations in good faith, in accordance with public policy and good morals, and in matters of contracts, Article 1.170 of the Civil Code establishing the duty of each party to act in good faith, both

[6] See Gabriel Boroi, Carla Alexandra Anghelescu, Bogdan Nazat, Ioana Nicolae, *Civil law fact sheets. General part. Persons. Main rights in rem. Obligations. Contracts. Inheritance. Family, 4th edition, revised and added*, Hamangiu Publishing House, Bucharest, 2019, p. 108.

when negotiating and concluding the contract and throughout its performance. Good faith, which is one of the pillars of any contractual commitment, implies the commitment and perseverance which each party must show in order to fulfil all the obligations assumed by the conclusion of the contract. In another expression, it has been held that good faith is a standard of honest, loyal and fair conduct in the exercise of civil rights and in the performance of obligations[7]. However, this principle is not in contradiction with the possibility for the creditor to have access to any means at his disposal for the realisation of his right.

From the definition of contract in Article 1.166 of the Civil Code, according to which a contract is an agreement of wills between two or more persons with the intention of creating, modifying or terminating a legal relationship, and from the other articles intended to regulate the general rules applicable to contracts, certain categories of contracts as well as the conditions of contracting, rules relating to interpretation, the effects of agreements of will, etc., it follows that the primacy of contractual provisions is given priority, the role of favor contractus being to harmoniously complement all the specific rules on contractual matters. For our part, we consider that, irrespective of the creditor's choice, there is no breach of the principle of good faith because, by combining the specific elements of contractual agreements with the idea of favouring the contract, thus prioritising the expressed will of the parties, the legislature did not seek to place the remedy of forced execution in nature at the top of the hierarchy, but merely to certify that the parties are complying with the contractual provisions, i.e. the purpose for which the contract was concluded.

Regarding the requirement of damage, in the section on enforcement of obligations in nature, the legislator does not make the application of this remedy conditional on the existence of damage, as the debtor can be compelled to perform his obligation in kind independently of the existence of damage. On the other hand, the obligation to prove the damage lies with the creditor who wishes to have access to the remedy of execution by equivalent, so that, according to Article 1.537 of the Civil Code, proof of non-performance of the obligation does not exempt the creditor from proving the damage, unless the law or the parties' agreement provides otherwise.

The damage referred to in Article 1.530 of the Civil Code, which governs contractual liability, is an essential requirement for this form of liability to operate. What we note is the legislator's choice not to make all

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[7] Ionuţ-Florin Cofaru, *The relationship between favor contractus and the principles applicable in contractual matters*, in Journal of European Legal Studies and Research, Timişoara, 2018 (186-196), p. 192 *apud* Marian Nicolae, *Civil law*. General Theory - Vol. I. Civil law theory, Solomon, Bucharest, 2017, p. 254.

the remedies set out in Article 1.516 conditional on the existence of a loss[8], but this does not mean that the other remedies cannot contribute to remedying losses caused to creditors in contracts.

Performance by equivalent means is the creditor's right to claim and obtain damages for the loss which the debtor has caused the creditor and which is the direct and necessary consequence of unjustifiable or, as the case may be, culpable non-performance of the obligation, Understandable as a remedy for non-performance of contractual obligations, it covers, equally, the actual loss and the loss of profit which the creditor would have enjoyed if the contract had been properly performed, as well as other losses caused by non-performance. Execution by equivalent performance is therefore a means of making good, by way of damages, the loss caused by non-performance. As pointed out in a paper[9], the loss caused by non-performance can also be regarded as damage caused to the creditor of the non-performed obligation, since the functions of payment and reparation are not incompatible, since, as the author points out, without damage there can be no claim for execution by equivalent, just as without non-performance there can be no damage and therefore no reparation.

We therefore note that the two remedies differ in several respects. Performance by equivalent is, in principle, conditional on fault, whereas forced execution in nature is not. Performance by equivalent expressly requires damage in order to operate, whereas enforcement in nature can operate even in the absence of damage. For contractual liability to operate, it is irrelevant whether the debtor is able or unable to perform, whereas enforcement in nature becomes an inaccessible remedy when the obligation becomes impossible to perform. However, all this should not lead us to conclude that the legislator would give preference to forced execution in nature, even when this, even if possible, would no longer satisfy the creditor's interest. If, for example, the obligation to hand over an asset which the debtor was obliged to hand over in exchange for another asset or for services rendered by the creditor is not performed on the date laid down in the contract, any subsequent performance of the obligation would no longer be of benefit to the creditor who had made a commitment in respect of the asset in question and who was either unable to fulfil his commitment or had to obtain another asset at very short notice. It is obvious that in such a situation the creditor will no longer be interested in receiving forced execution in nature but will prefer execution

[8] By damage we mean the harmful consequences, whether pecuniary or non-pecuniary, suffered by the creditor as a result of the non-performance, improper performance or late performance of the obligation by the debtor.

[9] Ionuţ-Florin Popa, *The coordinates of contractual liability. Part I - Fundamentals of contractual liability*, in Romanian Journal of Private Law, no. 5/2015, p. 155.

by equivalent, a remedy which will cover both the loss caused by the non-performance and, where appropriate, the lost benefit.

Conclusions

Through the legal texts, the legislator has done nothing more than to provide the creditor with all the levers necessary to enforce his right. Thus, the creditor has the right to receive from his debtor the performance of the obligation exactly as it has been assumed, and when the debtor does not perform it willingly, the law offers the creditor the possibility of requesting forced execution in nature of the obligation, unless such enforcement is no longer possible. This is, however, a creditor's right, not an obligation, so that where for the creditor execution in equivalent form is a more appropriate means of achieving the end pursued by the contract, he may have priority access to this remedy, as follows from the provisions of Article 1516. From this perspective, we note that the preference for forced execution in nature is strictly a question of the availability of this remedy.

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ISSUES CONCERNING THE RELIGIOUS CULTURAL HERITAGE IN ROMANIA

Tiberiu-Nicolae TEGLAȘ[1]

Abstract

This article wishes to remind us once again of the importance of the religious cultural heritage in Romania, which is extremely rich and diverse due to its centuries-old, even millenary historical contexts. The protection of religious cultural goods has multiple benefits, some of which are highlighted in this article.

Given that the threats to this heritage are multiple, protection measures must also be multiple. In the context of the 21st century, adequate protection and enhancement is inconceivable without the implementation of artificial intelligence in the process.

Keywords*: cultural heritage, religious, assets, artificial intelligence, protection*

Introduction

Consulting the List of Historical Monuments, we see that this abounds in historical monuments of a religious nature. Alongside these monuments there are also numerous goods, auxiliary in the performance of the divine service or part of the patrimony of the entities owning those monuments. These aspects oblige us to pay attention also to the religious cultural heritage. In a territory where religious tolerance was proclaimed hundreds of years ago[2], in a territory where the percentage of agnostic or atheist people is extremely low compared to many Western countries[3], it is imperative to pay due attention to religious cultural assets. Some of the religious goods are the result of the freedom of conscience derived from the mentioned tolerance. We say only a part, because some reminiscences precede the idea of religious tolerance, or that of freedom of conscience. However, they capture ways of exteriorising the spirit in terms of the relationship with the divinity and the coexistence of followers of different religions and confessions.

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

[2] The Edict of Torda, 1568.

[3] According to the 2011 census about 0.2%, according to https://ro.wikipedia.org/ wiki/ Religia_%C3%AEn_Rom%C3%A2nia - 02.10.2022.

Conceptual Aspects and Importance of Religious Cultural Heritage

Religious cultural heritage is part of cultural heritage, and Romania's religious cultural heritage is part of Romania's cultural heritage.

We do not detail what we mean by the expression cultural heritage[4], but we must subject to analysis the notion of religious and other notions that are used somewhat synonymously.

What do we mean by religious? We believe that a minimum of conceptual clarification is required. According to the DEX[5] (explanatory dictionary of the Romanian language) we have the following definitions:

- *religious*: pertaining to religion, referring to religion,
- *ecclesiastical (ro bisericesc)*: pertaining to the church, concerning the church,
- ecclesiastical (ro ecleziastic): pertaining to the church or the clergy,
- *cultic*: of worship,
- *sacred*: of a religious character; pertaining to religion, belonging to religion.

Leaving aside some nuances that are extremely faddish surprised by the DEX we can use them as synonyms.

Vlad Vieriu states that "looking diachronically at the cultural heritage of universal civilization we can observe, even without an intense scientific effort, that the oldest, most enduring and most representative monuments of mankind have been sacred buildings"[6] (translation from romanian). This quotation, in addition to highlighting the importance of religious goods, reminds us of one of the possibilities of classifying cultural goods into sacred and profane goods.[7] In this context one could also speak of dividing heritage goods into religious and secular goods.

A very important element to be mentioned in the context of cultural goods is that in some cases even goods to which we refer predominantly from a cultural and historical perspective may also have a religious side. We take the famous Dacian bracelets as an example, which may have been

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[4] In this regard see Tiberiu Nicolae Teglaș: Some thoughts on the importance of national cultural heritage and the need to protect it, in *Annales Universiatis Apulensis,* Series Jurisprudentia, 24/2021, Pro Universitaria, București, 2021, p 87-100.

[5] https://dexonline.ro/definitie - 13.10.2022.

[6] Vlad Vieriu: *Portecția juridică a patrimoniului cultural în dreptul comparat*, București, Universul Juridic, 2021, p. 77.

[7] In Vlad Vieriu's conception, the terms sacred and profane have a broader meaning in the context of cultural heritage in the sense that the sacred encompasses the presence of the human spirit, while the profane also refers to the rejection of cultural heritage. – *Ibidem,* p. 77-78.

offered as sacred offerings to the deities.[8] This example urges us, when we speak of national cultural goods of a religious nature, to think broadly in both material and temporal terms.

Religious goods are important on the one hand because "the irrepeatability of the act of intellectual, artistic and material creation gives them a value that transcends time."[9] (translation from romanian) on the other hand, they also enrich our culture and help us to clarify historical aspects. Churches (in the sense of institutions) and religious cultural goods also play an important role in understanding and promoting culture and history of a secular nature. We are referring here, for example, to the promotion of art, theatre, literature, classical music (classical music concerts, art exhibitions, etc.).

The importance of these assets must therefore be appreciated not only from a religious point of view, but also from a cultural, historical or even identity point of view. Even though there is no official church or state religion in Romania, the majority of Romanian citizens identify with the Orthodox religion, the Hungarian communities are Catholic and Protestant, the few remaining Saxons in the country are Lutherans, the Jews are generally followers of the Mosaic religion, and the Islamic communities in Romania are mainly made up of ethnic Tatars and Turks. Obviously there are exceptions to the above statements, but they are quite small in percentage terms. So ethnic identity is intertwined with religious or confessional identity. This is beneficial from a cultural heritage point of view, as the diversity mentioned is reflected in the diversity of cultural goods.

Churches, by conducting religious services in places of worship, by the movable and immovable property they own, restore, protect and present, contribute to the protection and promotion of cultural heritage.

Religion, history, culture and even politics often go hand in hand. The interplay between these must be taken into account to get the full picture. The Edict of Torda referred to earlier is a positive example of the interaction between religion and politics. The period of Communism, a religiously troubled period, on the other hand, is a negative example of the interaction between religion and politics. Leaving the national framework very briefly, we note that world history provides countless examples of the interaction between politics and religion from the earliest times to the present day, with some relationships being favourable to cultural heritage, others unfortunately leading to the irreversible loss of extremely valuable assets.

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[8] Barbara Deppert-Lippitz: Symbolism and significance – The dacian gold spirals, in *Patrimonium III., Fighting the trafficking in cultural goods,* Universul Juridic, Bucureşti, 2013, p. 157-174.

[9] Sorin Alămoreanu - Unpublished - Speech at the closing of the Patrimonium VI Conference, Hall of Union, Alba Iulia, 2022.

Religious Cultural Heritage Assets

Perhaps the first ecclesiastical cultural heritage assets that come to mind are cathedrals, churches or monasteries, but in addition to these there are cemeteries, church objects, paintings, icons, manuscripts, books, etc. So we have both movable and immovable ecclesiastical cultural assets.

Looking at it from a historical perspective, the church has played an extremely important role over the centuries in these territories. Churches, for example in Transylvania, have been real fortifications over the centuries, protecting the inhabitants not only physically but also spiritually. Religious cultural heritage (e.g. historical monuments) reminds us of the role of churches in society. We believe that churches in Romania still play an important role in filtering or delaying some Western trends, labelled as progressive.

On the page of the State Secretariat for Religious Denominations we find the following mention: "27,384 places of worship belonging to the 18 religious denominations in Romania (as of 31 December 2015)"[10] (translation from romanian). Romania is a country that can boast of an extremely diverse range of places of worship. For the big cities cathedrals and churches are characteristic, many of them communicating with eastern (Byzantine) or western architecture, for the Moldavian area and not only the famous monasteries, for the Maramures area the wooden churches, for Transylvania the fortified churches. If we look at it from a cultural perspective, we see the features and mystery of the East (Byzantine), the Catholic tradition, the Protestant simplicity. Diversifying the palette of religions, we cannot omit to mention the synagogues, the few mosques.

After this list, Vlad Vieriu's statement is very appropriate when he says that "The relationship between man and temple has remained broadly the same throughout the ages, regardless of religion or confession. Beyond the architectural or cultural details that distinguish them, temples (lato sensu) perform, in principle, the same religious, social, sacramental or spiritual functions, but at the same time they retain the vocation of cultural representativeness, being forever symbols of cultures and civilizations spread over time and space."[11] (translation form romanian). An extremely appropriate statement for Romania.

Some of the areas in which the importance of religious cultural goods is revealed have already been briefly mentioned. In the following we will mention some categories of religious cultural goods in order to support the statement that the religious cultural heritage in Romania is a substantial part of the national cultural heritage, we will bring some examples in this regard, then we will show some threats to this heritage, and last but not

[10] http://culte.gov.ro/?page_id=130 (04.10.2022).
[11] Vlad Vieriu, *op. cit.,* p. 74.

least the need to use artificial intelligence for an effective restoration, protection and enhancement.

In the context of religious cultural heritage we can distinguish between immovable and movable religious heritage.

The immovable cultural heritage of the Church is made up of cathedrals, churches, monasteries and monastic complexes, parish houses, cemeteries, etc. Most of the oldest architectural monuments are of a religious nature. Some are in good condition, others in a state of ruin, many have been restored several times. All are testimonies to the past, and evidence of past events. Depending on their representativeness, some are category A monuments, others category B.

We have churches or cathedrals that are almost 1000 years old alongside more recent ones. Among them we find true monuments of architecture, which delight us from an aesthetic and cultural point of view, in addition to their spiritual usefulness. These buildings are therefore true spiritual as well as cultural and even tourist resources, which should be promoted as much as possible.

According to an opinion in an article, it is difficult to say which are the most beautiful historical monuments in Romania, however in the subjectively drawn up list, alongside monuments such as the Romanian Athenaeum, the Cantacuzino Palace, the Casino in Constanta, the Bridge of Lies or the Infinity Column, three places of worship are also mentioned: Voroneţ Monastery, Fortified Church in Viscri, Black Church in Braşov.[12] These are just three examples of religious buildings whose value cannot be disputed.

If we come up with a few examples from Alba County, we also have something to be proud of. As an example we mention the ruins of a church that is considered to be the oldest Byzantine Christian church in Transylvania, discovered in 2011 during the archaeological site of the restoration works of Alba Carolina Fortress.[13] On this occasion, along with the ruins, which are thought to date back to the 950s, movable goods were also discovered: coins, ceramics, bronze and silver objects.[14]

Near the mentioned ruins is St Michael's Cathedral. This is a Roman Catholic cathedral whose existence is also millennial, being associated with the foundation of the Transylvanian Episcopate after 1009-1010 by King St

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[12] https://historia.ro/sectiune/general/cele-mai-frumoase-monumente-istorice-din-romania-576227.html (05.10.2022).

[13] See Dorin Ţimonea: *Ruinele celei mai vechi biserici creştine bizantine din Transilvania auRuinele celei mai vechi biserici creştine bizantine din Transilvania au primit regim juridic de monument istoric primit regim juridic de monument istoric, https://historia.ro/sectiune/ actualitate/ruinele-celei-mai-vechi-biserici-crestine-569860.html* (05.10.2022).

[14] *Ibidem*.

Stephen of Hungary; it should be noted that the first cathedral was largely destroyed by the invasion of the Tatars in 1241 and the Saxons in 1277, and was later rebuilt.[15]

A few steps away is the Coronation Cathedral, built relatively recently compared to the cathedral mentioned above, this year marking 100 years since its completion. The courtyard of this historic monument took place the coronation ceremony of King Ferdinand and Queen Mary on 15 October 1922. So we see, without going into further detail, the interweaving of religious, political and historical aspects.

Many localities around Alba Iulia also boast historic churches, which are true architectural, artistic and historical treasures. We have a special affinity with the Reformed Church of Teiuş, which already existed at the end of the 13th century. The Reformed Church of Sântimbru evokes the name of John Hunyadi, and through it the bloody events of 1442. Râmeţ Monastery is considered one of the oldest monasteries in Transylvania. And the examples could go on.

In addition to places of worship, we can also mention necropolises. The dimensions of their importance are also multiple: religious, cultural, historical, architectural, etc.

„Museums, ecclesiastical collections, as well as conservation centres, deposits belonging to monasteries, parishes or diocesan centres house a rich heritage of movable cultural heritage: icons, cult objects and embroideries, old books, pieces of furniture, historical documents, archaeological material."[16] (translation from romanian). The mere enumeration of these categories already foreshadows the vastness of the movable cultural heritage of an ecclesiastical nature, which is divided according to its importance and historical significance into treasure and fund.

The Batthyaneum Library is located in the fortress of Alba Iulia. There are manuscripts, incunabulas, extremely valuable books, many of which have religious content. Even the most valuable manuscript in Romania, the Codex Aureus, also known as the Lorsch Gospel Book, is of a religious nature. The first part of this Gospel Book (the Gospels of Matthew and Mark) is in the library mentioned. Other works of a religious nature which are also extremely valuable are for example the Sacred Bible from the 13th century, the Psalter of David with calendar from the 12th century. Still in Alba County, the National Museum of the Unification in Alba Iulia also

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[15] See Kund Botond Gudor: *Erdélyi hegyalja és térsége. Rendkívüli természeti, történelmi és kulturális értékek*. Gyulafehérvár, 2020, 207-209.

[16] The speech of His Beatitude Daniel, Patriarch of the Romanian Orthodox Church, at the National Conference Dogmatic Unity and National Specificity in Church Painting, 6th edition, Tuesday, May 29, 2018, Patriarchal Palace in Bucharest - can be read on the page https://basilica.ro/arta-bisericeasca-un-tezaur-cultural-national-care-trebuie-conservat-imbogatit-si-evidentiat/ (04.10.2022).

holds numerous religious assets that belong to the categories of treasure and fund.[17] These include old books, manuscripts and icons.

Romania is a country with a long religious tradition. It would be a pity to lose, to not highlight those goods that are the fruit of the creation of our ancestors, those goods through which they "communicate" with us.

Threats

This heritage being located in time and space is likely to be under threat from certain factors. Cultural heritage in general is threatened by various factors, which have been presented in an earlier study.[18] We will briefly mention some of these, and possibly others, but we will note that most of them are human factors.

Secularisation is one of the threats to this heritage. Secularisation is having the effect of alienating us from the church, although perhaps not at such a galloping pace as in the West. This estrangement is also supported by technological innovations, which, in addition to their undoubted benefits, are alternatives to visiting church sites or attending church services.

The separation from the church, from religion also affects religious monuments. In the West we see examples of this, one of the most notorious examples being the change of use of historic church monuments.

Another threat is carelessness or ignorance. Many monument churches are still in ruins. This factor unfortunately makes good bedfellows in a negative sense with meteorological factors, which are extremely fierce enemies of historical monuments. Also worth mentioning here are urbanisation policies, which are often unfriendly to the religious cultural heritage monuments. However, we must be honest and mention that in many places we can observe a protective attitude on the part of the institutions responsible for this area.

Ignorance often has irreversible consequences. This carelessness is the cause of improper storage of certain movable assets, failure to intervene in time, failure to allocate the necessary resources for restoration and enhancement.

This brings us to one of the determining factors when it comes to restoration, conservation and protection: the financial factor. And we must recognise that the proper maintenance of historical monuments or even valuable movable property requires substantial resources (e.g. books, manuscripts, etc.).

Another threat is crime. "In the universe of cultural heritage, a universe of spiritual values before being one of tangible values, man

[17] For details and examples please see http://clasate.cimec.ro/Lista.asp?jud=8252-alba (13.10.2022).

[18] Tiberiu Nicolae Teglaș, *op. cit.*, p. 87-100.

manifests himself according to the complex pattern of his being, and at the opposite pole of his inclinations towards science, culture, art and the past is his violence, which some philosophers and anthropologists have considered inherent to the human being [...]".[19] (translation from romanian).

Without referring this time to the motives for committing these crimes, we note that the crimes committed against cultural heritage are extremely varied. This variety also derives from the variety of heritage goods. But the most striking are: theft, destruction, archaeological poaching and forgery. Many of the offences listed are directed against classified cultural property. If we consult the page of the Romanian Police[20] we can be surprised by the multitude of stolen church objects. Obviously not all of them are part of the cultural heritage, but it shows the extent of the phenomenon concerning church assets. For example, at the object under code 787 we find the following details: "Icon of the Birth of St. John the Baptist, dated 1848, oil painting on wood with silver. Size 0,30 X 0,24 m, weight 1050 g, good condition. The item is classified as part of the national cultural heritage"[21] Fortunately, we do not find many church items where it is mentioned that the item is part of the national cultural heritage. We hope in a decrease in the phenomenon of crime against classified movable property, especially as in the first years of the 3rd millennium there were quite a lot of crimes against church cultural property (out of 618 objects stolen from places of worship alone in the period 2001-2005, 99 were likely to be part of the national cultural heritage).[22] But religious objects are not only found in places of worship.

One problem is that sometimes the damage is quantified only or mainly in material terms, without paying due attention to the cultural and historical damage. In the first week of 2017, the reformed church in Teiuş, a 13th century historical monument, was broken into. The material damage was minor (the door was forced open and a window was broken). We do not want to draw hasty conclusions and say that there is a causal link between the material damage component and the solution given, but it is certain that the solution was to drop the prosecution.[23]

Protection

The offences listed show us that religious property, as well as being valuable from a spiritual point of view, is also valuable from a material

[19] Vlad Vieriu, *op. cit.*, p. 82.
[20] https://www.politiaromana.ro/ro/obiecte-furate (10.10.2022).
[21] https://www.politiaromana.ro/ro/obiecte-furate/icoana1591704368 (10.10.2022).
[22] See Augsutin Lazăr, Aurel Condruz: *Corpus Juris Patrimonii, Patrimoniul Cultural Naţional,* ed. a II-a, Ed. Lumina Lex, Bucureşti 2007, p. 25-27.
[23] Final Judgment of the Preliminary Chamber no. 323/2017, Aiud District Court, Alba County.

point of view. This materiality leads to the need to take material measures, in addition to legal or spiritual ones, for their proper protection. Adequate protection therefore requires an interdisciplinary approach. In this interdisciplinary approach, forensic expertise is one example. The vastness of the religious heritage and obviously the ways in which crimes are committed against it may, in certain contexts, make it necessary to carry out written, documentary, trace, physical and chemical expertise.[24]

Numerous books and manuscripts may raise the issue of forgeries, for example the need for handwriting and physical and chemical expertise, and some objects may also require physical and chemical expertise, and the examples could go on.

In addition to these expertises, for example, when restoring monuments, various expertises and studies are used for proper restoration.

Protecting religious heritage therefore requires openness and a multilateral approach.

In the context of contemporary reality, we cannot imagine protecting and enhancing religious cultural heritage without making use of the possibilities offered by artificial intelligence.

These possibilities take the form, for example, of deciphering archaic writing, restoring fragments of writing, decoding epigraphic signs, automating 3D digitisation procedures, detecting unknown cultural heritage, detecting art crime.[25] Unfortunately, only fragments of some of the artefacts remain. With the help of artificial intelligence it is possible to deduce what they looked like.

A foreign example this time shows us the use of artificial intelligence in the case of a cathedral, and thus religious heritage. In the case of Notre-Dame Cathedral, which caught fire in 2019, laser scanning is used to reveal the structure of Notre Dame[26], and to help rebuild it, while also sounding a wake-up call about the need to create digital forms of other vulnerable historic buildings.[27]

Artificial intelligence can also be harnessed to promote cultural heritage. One can think of 3D presentations, or even more so of reality-like experiences through VR glasses. As well as facilitating digital visits to remote objects, these would also be non-invasive or non-destructive in

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[24] For details of these expert opinions see for example: Sorin Alămoreanu: *Problematica expertizelor criminalistice*, Editura Hamangiu, Bucureşti, 2013.

[25] Based on *Artificial Intelligence applications to Cultural Heritage*, 9th P lenary session (online) of the Steering Committee for Culture, Heritage and Landscape (CDCPP, Arianna Traviglia Italian Institute of Technology - https://rm.coe.int/artifical-intelligence-applications-to-cultural-heritage-by-arianna-tr/1680a096b8 (14.10.2022).

[26] A se vedea https://youtu.be/jAi29udFMKw (13.10.2022).

[27] https://amt-lab.org/blog/2022/5/how-can-technologies-help-with-culture-heritages-restoration-and-preservation (13.10.2022).

nature. We know very well that some targets cannot be visited or can only be visited to a limited extent for protection purposes. But we can also think of different applications to make it easier to get to know and visit these sites. Religious heritage sites can be suggested to us, like restaurants or petrol stations, when we travel to different areas, based on searches, etc. Many of the famous sights that we can visit are of a religious nature.

Conclusions

Religious cultural heritage is a significant part of Romania's cultural heritage. Without this heritage, whose significance and representativeness is multidimensional, on the one hand we would be poorer, and on the other, knowledge of our history, culture and even our identity would be incomplete. For this reason, we need to protect and enhance it. Protection and enhancement must be thought of in an interdisciplinary way, with the imperative inclusion of the possibilities offered by expertise and artificial intelligence.

May God help us that in addition to cultural, aesthetic and historical appreciation, these goods to bring us closer to divinity!

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THE MECHANISMS OF ADMINISTRATIVE DECISION-MAKING AND THE FORMATION OF THE NOTARY'S PROFESSIONAL WILL

Vasile LUHA jr.[1]

Abstract

The work has a practical purpose: to demonstrate why the notary - although invested by the Minister of Justice with an autonomous function - is not a public servant; this in the context in which the criminal jurisprudence assimilates it to the public servant. Therefore, it is observed that the agents of the executive - with special reference to civil servants - operate in a ***hierarchy*** *and - even if they enjoy a certain level of independence - they are obliged to execute* ***the order of the superior*** *aiming to achieve some* ***public interests****; they can refuse the execution of the order only if the order is illegal; in opposition, the notary interprets the civil law - the law of free and equal individuals - and they are always subject to the autonomous will of the clients; the entrusted function only obliges them to protect the general interests understood in the sense of the civil law and not at all in accordance with the interpretive orders that the administration produces.*

Keywords: *professional will; administrative order; autonomy of will; functional independence; public interest; general interest*

I. The questions

1. A comparative presentation of the notary's activity with the administrative one might seem inappropriate, even disturbing. It is not something common, at least not now.

The methodology of the opposition of the two functions became of interest at the moment when - forced by the needs of practice and the imminent and permanent perspective of legal responsibility - I had to substantiate - at least for me - the professional exercise of the notary, observing the tradition and recently, the reality.

The thoroughgoing study outlined two realities for me **a**) notarial doctrine is infinitely less well represented in theory in relation to the broad developments of administrative law and **b**) there is a **tendency** - even in notarial debates - to see the future of the profession in the whole of **the services provided by the administration** and **the notary among**

[1] PhD student of the Faculty of Law of the University of Craiova, notary public in Alba Iulia.

the public servants[2]; this, in the context in which the law itself presents him - the notary - as the bearer of an autonomous function[3] with which he is invested by a representative of the executive[4].

Likewise, the criminal doctrine - older or newer[5] - as well as the jurisprudence[6] - in relation to the explicit criminal regulation - although it does not regard the notary as a public servant, it assimilates to him, at least in this special field[7]; this, obviously, only in the incriminating sense - limited and explicit - given by the explanatory criminal norm[8].

2. Is the notary really a clerk?

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[2] I. A. Toader, *Răspunderea juridică a notarului public în context naţional şi european*, Hamangiu, Bucureşti, 2011, p. 199; moreover, the German notary system is based - in most states - effect of the bureaucratic tradition of the unifying German state, on the functional model of the notarial organization- Hans Gerhard Ganter, Christian Hertel LL. M., Heinz Wöstmann, *Handbuch der Notarhaftung*, 4 Auflage, Carl Heymanns Verlag, Wolters Kluwer Deutschland GmbH, Köln, 2018, pp. 1-18.

[3] Art. 3, para, (1) from Law no. 36/1995, law on public notaries and notarial activity "the public notary is appointed to perform a service of public interest and has the status of an autonomous function"; notarial law in the following.

[4] Art. 36 para. (1) of the notarial law: "the public notary is appointed by the Minister of Justice, upon the proposal of the Union Council, based on the request of the interested party and after proving that the conditions have been met..."

[5] In this regard: G. Antoniu, *Notarul public si legea penala*, in Revista de Drept Penal nr. 3/1999, pag. 120; O. Radulescu, *Despre subiectul activ al infractiunii de luare de mita*, in Revista Dreptul nr. 2/1998, pag. 95; there are also opposing points of view:Gh. Dobrican, *Calificarea penală greşită a unor fapte imputate notarilor publici*, Revista Universul Juridic, nr. 7/ 2015, p. 25-41.

[6] We exemplify, from so many possibilities, the criminal sentence no. 40 of 31.03.2017 of the Iaşi Court of Appeal, final, accessed on 17.06.2021 in https://www.jurisprudenta.com/jurisprudenta/ speta-13suo7ju/; ECHR jurisprudence - application no. 1814/11 - Popa v. Romania - in which other topics were debated - took note of the reality of the Romanian criminal regulation which would hold that the exercise of a function, even autonomous, in the expression of the positive law, as well as the inclusion of the notary's activity in the sphere to a public service would suggest obvious similarities with the administrative field, in https://www.clujust.ro/cedo-cauza-unui-notar-public-achitat-la-prima-instanta-si-condamnat-de-iccj-in-recurs/ accessed on 17. 06. 2021.

[7] Decision of the Constitutional Court of Romania no. 582/2016, published in the Official Gazette, Part I, no. 731 of September 21, 2016.

[8] Art. 175 Criminal Code - with marginal title: civil servant; (1) "public official, within the meaning of the criminal law, is the person who, on a permanent or temporary basis, with or without remuneration: a) exercises duties and responsibilities, established under the law, in order to fulfill the prerogatives of the legislative, executive or judicial power ; b) exercise a position of public dignity or a public position of any nature; c) exercise, alone or together with other persons, within an autonomous government, another economic operator or a legal person with full or majority state capital, duties related to the achievement of its object of activity; (2) Likewise, a public servant, within the meaning of the criminal law, is considered a person who performs a service of public interest for which he was vested by the public authorities or who is subject to their control or supervision regarding the performance of that public service".

Each field[9] or conjuncture offered answers adapted to the interests or the moment. They must be received as such.

However, not all of them could be defining. They - by appearance and enunciation - are not united according to a unique ideational criterion that is able to support possible ontological assumptions and, therefore, offer epistemic perspectives.

Without going into details, I note that the regulation produces three seemingly contradictory regimes for the notary: the notary exercises **a free profession**, he **is appointed by a central administrative authority** - the minister of justice who reserves a prerogative of control over him - and which delegates his exercise a **service of public interest**.

The notarial doctrine - not mandatory, national - oscillates between two extremes: the notary is the bearer of a **non-contentious**[10] and sovereign[11] **magistracy** or is **a public servant**; in other words, it could be argued - at least conceptually - that he - the notary - can belong to the judiciary or, as the case may be, to the administration.

What would, therefore, essentially differentiate and beyond the conjunctural formulations of the legal texts - the activity of the notary from the activity of the executive agent?

Methodologically, I try to trace them to their essential components.

II. Executive activity

1. The administrative activity carried out - specifically and definingly by public servants - is a form of law enforcement and part of the executive power: among other things, the administration "organizes the law enforcement activity"[12]; a distinction is made between the power and the executive function of the state, concepts that do not overlap.

The French doctrine of administrative law emphasizes an idea, which is rightly disputed: "**administrative legal regime**" is in reality the

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[9] So also the notary.

[10] [10] I. Leș, *Organizarea sistemului judiciar, a avocaturii și a activității notariale*, Lumina Lex, București, 1997, p. 5; E. Herovanu, *Principiile procedurii judiciare*, vol. I, Institutul de arte grafice ‚Lupta", București, 1932, p. 303.

[11] I. Popa, *Curs de drept notarial*, Universul Juridic, București, 2010, p. 49; G. Rouzet, *Precis de deontologie notariale*, Presse Universitaires de Bordeaux, 3-eme, Bordeaux, 2004, p. 38, with refference to Rezoluția A3- 042293 din 18. 01. 1994 - pct. 3 - Résolution sur la situation et l organisation du notariat dans les douse États membres de la Communauté européenne.

[12] C. Clipa, *Fundamentele ideologice ale dreptului administrativ*, II, 1, Dialogurile, Hamangiu, București, 2021, p. 34 cu citarea lui M. Touzeil-Divina, *Un pere du droit administratif moderne, le doyen Foucart (1799-1860). Elements d histoire du droit administratif*, LGDJ, Paris, 2020, p. 132 .

common legal regime of the state's activity and its norms even express the common right of the exercise of public power[13].

Romanian administrative law - in a genuine and remarkable effort to update and move away from clichés - has provided an analytical system through which executive activity is defined on realistic, pragmatic and technical criteria: the principle of separation of powers in the state - undisputed, moreover - is analyzed from a functional perspective, not abstract or structural.

This would mean that, in reality, **the separation of powers** exists and is presented only through the separation of functions and that the bodies designated as power bearers in the state are functionally active; that these functions involve actual legislative activities and interpretation of administrative and judicial law; the mission of the exercise of the functions would be instrumental: **the production of tools** "to avoid the abuse of power" and "no... of interaction between the authorities..."; the applied principle "involves benefits, costs and, where necessary, compensation"; the disregard of the principle can be imputed "also to some subjects of private law[14]„.

2. Consequences would result from such an approach: the state organs - representative and bearers of power - functionally, can carry out

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[13] C. Clipa, *Fundamentele ideologice ale dreptului administrativ*, II, 1, *op. cit.*, p. 41 with reference to the author who produced and developed the thesis: G. Vedel, P. Delvolve, *Droit administratif*, I, 12-eme ed., PUF, Paris, 1992, p. 28; as well as to the critique of the idea by Ch. Eisenmann, *Ecrits de droit administratif*, Dalloz, 2013, p. 292; the criticism shows, in essence, that this concept - "**administrative regime**" - support of the common law of public power - "pan-administrative" model - which would support the legal general and the activity of the legislative or judicial power - with exceptions intended for certain defining components - would be excessive, unfounded and unsupported by the constitutional regulation: the administrative regime is not constitutionally enshrined; he is only inferred by the author; the competence of the executive to regulate - no matter how it is deduced - cannot be legal support for legislative or judicial activity. I do not go into details - the hierarchy of norms and the justification of their preference, arguments, counterarguments - nor into the possible implications of the debate; I only notice the methodological outline of the concept of "administrative regime": the model presented - through arguments - suggests to me a premise, which is indeed ideal: in the exercise of the activities - no matter how important they are - it takes into account, here, even those of constitutional order - legislative or judicial activities - something defining, which would deviate - in Vedel's logic - from a common regime; we would be interested, therefore, this time in our logic - what could be this defining something for the notary and which would place him grounded in/or between the two extremes: the administration and the judiciary; or, this could only be observed by presenting the legal professions regulated in antithesis and emphasizing what could be really specific, defining.

[14] C. Clipa, *Fundamentele ideologice ale dreptului administrativ*, II, 1, *op. cit.*, p. 63 cu trimitere la A. Vermuele, *La abdicacion del derecho. Del imperio del derecho al estrado administrativo*, Tirant lo Blanch, Valencia, pp. 89 – 93 și 96 – 97.

multiple, non-uniform, non-linear, non-homogeneous activities: they legislate, regulate, judge; therefore, in real terms, each functional exercise can attest to a specific position of the one who is active: main, complementary, subsidiary, marginal, etc.; separately, it can be debated when exactly a power "borrows" or "executes attenuated" functions of another power; and, finally, it was concluded that the power of the administration can judge or regulate in "consistently attenuated[15]„ formulas in relation to the other powers.

III. Administrative system

1. Executive power and administration, systemically and legally analyzed are based on six conceptualizations[16]: public authority, public power, public administration, public service and public order.

Beyond regulations - the concept of executive **power** - expresses the prerogative to command - its assignment and **potentiality** - which is offered to **an organism** and which can be imposed by force[17]; the

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[15] C. Clipa, *Fundamentele ideologice ale dreptului administrativ*, II, 1., *op. cit.*, p. 61; the model - par excellence **realistic** and very current - throws into derision the older debate whether the notary is a magistrate, a lawyer or a public servent; it would therefore matter methodologically to indicate the **defining functions** and separately, the **borrowed ones**; therefore, in the concrete exercise of a specific function, the exercise competence and, next to it, its position - of the exercised function - in relation to others are of interest; we will therefore be dealing with main, defining functions or, alongside, with other borrowed ones; for example, in a bent view of everyday realities, it is obvious that any obscure notary aspires to be considered a magistrate; or vice versa: no judge who asserts his career accepts a notary as a magistrate; such debate inevitably becomes counterproductive.

[16] C. Clipa, *Fundamentele ideologice ale dreptului administrativ*, II, 2, Specificităţile, Hamangiu, Bucureşti, 2021, p. 38 and next.; the author indicates them as ideological foundations; and ideology is presented as a structured set of ideas - representative - which can also be identified in the legal debate; this, even if the ideological presentation would not always have the coherence of a scientific analysis and completion. From the point of view of our study, we are not interested in the details. However, I note **the special merits of the practiced systemic analysis method**: the defining **concepts are stated on the basis** of which the entire explanatory **theoretical scaffolding** of administrative law is built in **comparison** - with the constitutional law and, then, the civil law - of course, next to the regulation; moreover, **a realistic premise** is also expressed: the norms also appear in a context - also ideological - and, inevitably, they will have a certain relativity in expression and application; hence, the consequence I see: what will matter in the interpretation - if the norm and jurisprudence - will be uncertain - will be the foundation, its essential content; we find the concepts - in different substantiation positions - also in other defining theoretical developments of administrative law, such as V. Vedinaş, *Drept administrativ*, ed. a XII-a, Universul Juridic, Bucureşti, 2020, pp. 18 – 23; D. C. Mâţă, *Drept administrativ*. Noţiuni introductive. Organizarea administraţiei publice. Funcţia publică şi funcţionarul public, I, Universul Juridic, Bucureşti, 2016, p. 23; D. Apostol Tofan, *Drept administrativ*, I, ediţia a IV-a, C. H. Beck, Bucureşti, 2018, p. 7.

[17] C. Clipa, *Fundamentele ideologice ale dreptului administrativ*, II, 1....*op. cit.*, p. 60.

constitutional[18] and administrative[19] regulations detail contextual and applied and the doctrine distinguishes between **real or assimilated public authorities**; the first category is in the hands of the state or territorial bodies that impose the public will; the second one we find on account of private entities - legal entities - that provide public services for others. Subjects carrying public authority - organs, bodies, institutions, authorities - are very diverse but appear in a limited and regulated number; each of them has a level and type of authority that receives them explicitly - even if the expression of the norm is generic - through regulation[20].

Public power designates, therefore, the **prerogative itself**, **in exercise**, even the power to impose, to actually command, already given and potential in execution. It is found in two forms: **a)** in the relationship with individuals, with others we find it in an order and in the imposition of restrictions; in essence, power indicates precisely an externalized will, the **unilateral will** of the subject bearing power, his commands and dispositions, as well as **b)** in a **specia**l relationship with the same individuals where the **administration of patrimony** would be of interest; in this case, partners, **administrations are treated "as equals**"; however, and in this last administrative exercise hypothesis, the authority does not give up its prerogatives to activate managements - quite wide and diverse, by the way - through which it imposes something on the administrators and which private individuals do not have[21].

Regulated by chapters, the prerogatives of power are fulfilled through regulation, planning, authorization or legalization, control, taxation, expropriation, the construction and execution of budgets for communities, administration of heritage and, importantly, through sanctions.

The exercise of power is not an abstraction. In execution, power becomes a fact, a reality. In a strictly schematic presentation we have: a bearer **agent** - one can debate who the agent is and how he received the prerogative - produces a **unilateral** legal **will** to dominate, expresses an **order** that **imposes** it through appropriate **instruments** to those destined to execute it; therefore, **someone** - **the creditor** of the exercise of power - has the **competence** to order, to impose - so he can act against someone else - he orders, imposes something on those subject to the order, **debtors** of the fulfillment of the services described and provided by the order.

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[18] Exemplificativ, doar: art. 16 al. (1); art. 16 al. (1); art. 26 al.(1) din Constituţie.

[19] E.g: Art. 2 para. (1); Art. 5 of Law no. 554/2004, updated, regarding administrative litigation, published in the Official Gazette, Part I, no. 1154 of December 7, 2004.

[20] C. Clipa, *Fundamentele ideologice ale dreptului administrativ*, II, 1....*op. cit.*, pp. 60-76.

[21] C. Clipa, *Fundamentele ideologice ale dreptului administrativ*, II, 1, *op. cit.*, pp. 82- 83 cu bibliografia citată, precum şi cu rezervele şi explicaţiile furnizate care, totuşi, nu modifică esenţa rezumării ce o prezint.

2. **The public administration** subsumes a set of authorities, institutional bodies that should perform **the executive function** in the state; or, in another sense, a specific type of activity that would consist in "organizing...law enforcement"; or, in the general European model, authority exercising the prerogatives stemming from sovereignty[22]. The specific activity is carried out - in principle - by **ex officio issuing normative** administrative acts or **individual** administrative acts; this is done through its agents, civil servants or other categories, all of whom represent the **administration** itself according to predetermined criteria; separately, in certain situations, the administration issues - borrowing a non-specific regime - jurisdictional administrative acts[23].

The executive performs through normative (consistently political prerogative) or administrative (household) activities. It works in tiers - the system recognizes the role and power of a center - complex and, to a large extent, hierarchical: the levels, bodies, institutions, agencies **are subordinated** to each other, supervise, coordinate, collaborate and, finally, overlap with the outside, the individuals on who order or serve[24] them. The elements of decentralization, autonomy and subsidiarity are debated and fixed.

3. The normative activity of the administration is fulfilled - in a generic expression - by issuing methodologies, explaining, applying, interpreting the law; practically, the unilateral and normative administrative act has an **integrative purpose[25]** in the legal order described by the law and enjoys **the relative presumption of compliance** with the law that applies it; the non-conformity is established **post factum** by the judge in an administrative dispute which is requested and expressed expressly and not inferred, by invoking exceptions.

The individual act sets rules of conduct - with immediate or successive effects - rules that are imposed by command on an individualized subject.

4. The sphere of executive activity is difficult to delimit and, above all, to enunciate. In practical terms, the fundamental law outlines precisely what the legislature as well as the judiciary do. From the perspective of the executive, administration - in all its quantity and complexity - should be

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[22] C. Clipa, *Fundamentele ideologice ale dreptului administrativ*, II, 2, *op. cit.*, pp. 136-137.

[23] For details: C. Clipa, *Organe şi proceduri administrativ jurisdicţionale*. Introducere în studiul administraţiei publice jurisdicţionalizate, Hamangiu, Bucureşti, 2012; T. Drăganu, *Actele de drept administrativ*, Editura ştiinţifică, Bucureşti, 1959, p. 70; I. Santai, *Drept administrativ şi ştiinţa administraţiei*, II, Risoprint, Cluj Napoca, pp. 77 -80.

[24] But, in the latter case, the service is not done according to the will of the recipients but according to the will and vision of the agency; this does not mean that an agency does not take into account the will of those served: it can consult them but the decision remains essentially unilateral and imposed.

[25] See infra V, 3.

defined negatively: **it accomplishes everything that the legislator or the judge does not**[26].

In principle, the implementation of the law is done in a strict manner; in other words, the interpretation, specification, detailing related to the application of the law is not done through creativity; the author does not have the freedom to choose between several possible solutions[27]. However, there is also discretionary public administration: there would be situations when, however, by way of exception, the issuer of rules can "choose **between two or more possible solutions**, following an assessment of the appropriateness of the decision[28]„.

The administration can be of coercion or provision; the first issues orders, imposes obligations, restricts freedoms - such as entrepreneurial freedom - or rights - such as property rights; the second indicates an interventionist conduct by which **instruments** are produced - of public or private law - in order to satisfy social needs or delimit an **institutional framework** necessary for the exercise of subjective rights or for the valorization of private interests[29].

IV. Service and public interest; public order

1. In the most general expression, the concept indicates **an activity intended to satisfy a need of general interest**[30]; pursued in the administration, it becomes an activity carried out by administrative bodies. Therefore, it can be admitted that such a service can also be performed by other state entities or state authority bearers, whatever they may be[31].

The public service exists functionally through an activity related to the organization of a public authority and which takes place to fulfill a public interest; therefore, the public service is empirically presented to us under the composition of an instrument, as a means to satisfy "collective

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[26] C. Clipa, *Fundamentele ideologice ale dreptului administrativ*, II, 2....*op. cit.*, pp. 156-160.

[27] "legal public administration"- C. Clipa, Fundamentele ideologice ale dreptului administrativ, II, 2....*op. cit.*, p. 165.

[28] C. Clipa, *Fundamentele ideologice ale dreptului administrativ*, II, 2....*op. cit.*, p. 165, cu exemplificări şi dezvoltări, precum şi cu trimitere la: P. Otero, *Manual de direito administrativo*, I, Almedina, Marco, 2016, p. 203.

[29] C. Clipa, *Fundamentele ideologice ale dreptului administrativ*, II, 2....*op. cit.*, p. 172, cu trimitere la E. L. Paniagua, *Fundamentos de derecho administrativo. Del derecho del poder al derecho de los ciudadanos*, 5-a ed., Universidad Nacional de Educacion a Distancia, Madrid, 2014, p. 70.

[30] https://ro.wikipedia.org/wiki/Serviciu_public, accesat la 6. 07. 2022.

[31] Art. 5 of Law 304/2004 on judicial organization, republished in the Official Gazette of Romania, Part I, no. 653 of July 22, 2005 "The Ministry of Justice ensures good organization and administration of justice as a public service"; or C. Ionescu, O perspectivă constituţională asupra justiţiei ca serviciu public (Comentarii pe marginea articolului 124 din Constituţie) în Dreptul nr. 5/2017.

needs that are circumscribed", obviously, to an interest of public order[32]. Various needs proliferate their typology.

The services specific to the execution of a public service[33] - the tasks whose fulfillment is assumed - can also be **delegated** to others through an administrative act that should indicate, among other things, what exactly must be fulfilled, as well as the duration of the delegated service; **by delegation**, **the prerogative of powe**r inherent in the institutionalized performance of the service is also **transmitted** to the delegate.

2. **The public interest** is a key notion "in the ideological construction of public law". The content of this notion is complex, evolving and constantly receiving meanings adapted to the area of assessment as well as to the moment[34].

I stop, first, on the opposition - generally stated - public interest and private interest, noting, however, the existence of other formulations that capture intermediate areas, categorical interests.

Public interest indicates that which **serves the public good**, which is of public utility, benefits all and serves the **common interest**; by the administration law, it was considered to be of public interest "the legal order and constitutional democracy, the guarantee of the rights, freedoms and fundamental duties of citizens, the satisfaction of community needs, the realization of the competence of public authorities"[35]; private interest presupposes "the possibility - of a subject - to claim a certain conduct, in consideration of the achievement of a predictable future subjective right"[36].

The texts state extremely vague delimitation criteria. The doctrine abounds with explanations and the jurisprudence with particularizations. I won't go into details. I only note that the doctrine of administrative law enunciates another functional principle: when the two forms of interest come into conflict[37], **the public one must prevail[38]**.

The notion of niche, intermediate, categorical interest is the product of the doctrine that takes note of the existence of a reality: there are

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[32] C. Clipa, Fundamentele ideologice ale dreptului administrativ, II, 2....*op. cit.*, p. 182.

[33] Apart from those assumed and directly fulfilled: art. 590 of the Administrative Code.

[34] For details: C. Clipa, *Fundamentele ideologice ale dreptului administrativ*, II, 2.... *op. cit.*, pp. 198 -275.

[35] Art. 2 para. (1) lit. r from Law no. 554/2004, of the administrative litigation, published in the Official Gazette, Part I, no. 1154 of December 7, 2004.

[36] Art. 2 para. (1) lit. r from Law no. 554/2004.

[37] Contradiction is not the essence of this conceptualization: "relationships of reconciliation" or "confusion" may appear between them.

[38] C. Clipa, Fundamentele ideologice ale dreptului administrativ, II, 2....*op. cit.*, p. 265, cu bibliografia citată – D. Truchet, *Les fonctions de la notion d'interet general dans la jurisprudence du Conseil d'Etat*, LGDJ, Paris, 1977.

associative structures recognized as a subject of law distinct from the members that make it up and that present themselves under a double guise; on the one hand, we consider the interests of each and, distinctly, we analyze the common interests of the whole, of all subjects associated or included in a category organized under private or public law norms[39].

3. **Public order** is treated as the order imposed by the state through its system of organs and institutions to achieve the common good. More precisely, the state is the producer of legal order, it holds the monopoly of its provision[40]: first, the state has the will and the power to issue the rules and, in the opposite sense, the law ensures "the specific environment in the presence of which we can talk about public order". Legal order is not only an imposed order; it "subsumes, equally, a public order and a private order", fixed by imperative - mandatory or prohibitive - or, as the case may be, supplementary norms.

In practical terms, public order "mediates the relationship between the sphere of public interest and that of multiple private interests." It becomes an instrument through which "public authorities... resort to tempering the zeal of individuals in the exercise of their subjective rights and legitimate interests." Such an instrument is very varied and in continuous evolution, it differs from one political regime to another, it essentially describes a fluctuating, often conjunctural, proportion between **autonomy and command** and is found in mechanisms - traditional or staged - that have exactly this mission: ensuring a "fair relationship between private interests and public interest" according to certain values[41].

V. Executive agent

1. **The agent** who actually exercises the executive power - in principle, although not mandatory - is an official, a civil servant who

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[39] The model evokes - among other things - the complexity of the administration in organization and operation and - subsequently - the specifics of the assessment of the interests protected by the regulatory authorities, as well as the interests promoted by enterprises or establishments of public interest.

[40] Contextually, I have in mind only the legal public order, the one located in the normative space of the law; from a political perspective, there is - for example - also an axiological order, seen as a hierarchical system of values. Moreover, I only have in mind the order maintained by the state - at a certain historical moment - through its structure, through its form of government, through its political regime, all imposed by constitutional norms that the entire state - within a framework and by specific means – issues and imposes them.

[41] C. Clipa, *Fundamentele ideologice ale dreptului administrativ*, II, 2....*op. cit.*, pp. 275-299; there is also a **non-state public order**, more or less "normatized, securitized, imperfect and limited, ideologized, functional and systemic..." C. Clipa, *Fundamentele ideologice ale dreptului administrativ*, II, 2....*op. cit.*, pp. 279.

becomes the bearer of **a public service**[42]; that is, the agent enters into a service relationship with the superior administrative entity from where he receives a set of duties and - as a result of their effective exercise - at **a level of personal skill** - he also assumes the correlative responsibilities. In the area of exercise of the position, he acquires a competence captured in a sum of **prerogatives**: exercising the attributions and, inevitably, assuming the responsibility, the official ensures - as **a trustee, a delegate**[43] - the realization of the very prerogatives of the authority he practically **represents**.[44]

The investment in the position is made through **an appointment act** containing **a unilateral manifestation of will**[45] - of course, at the request of the interested party - which emanates from an administrative structure, which legitimizes the official - and only him - to operate in a determined legal situation and which - the appointment - enjoys a presumption of compliance with the law; what is specific to the administrative model is that the preliminary verification of the candidate's skills, the examination of his professional personality is carried out only by the entities that then decide on the entrustment of prerogatives.

From the set of duties of an agent of the executive, it draws our attention - as defining - his task **to subordinate himself hierarchically**, a task that can be explained if we observe the hierarchical organization of the exercise of executive power, of the administration[46], as well as of its functioning - in principle - on the basis of command but respecting the normative hierarchy: executive decisions - normative or individual - must always comply with the law. As long as it is accepted that the law protects the rights and freedoms of individuals, indirectly but firmly, **the**

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[42] For details C. Clipa, Drept administrativ. *Teoria funcției publice*, II, Noțiunea de funcție publică și categoria de funcționar public, Dreptul aplicabil. Răspunderea juridică a funcționarilor publici, Hamangiu, București, 2013, pp. 1- 119.

[43] For details: C. Clipa, *Drept administrativ. Teoria funcției publice*, II, *op. cit.*, pp. 99-102.

[44] C. Clipa, Drept administrativ, *Teoria funcției publice*, I, Raportul de serviciu – noțiune, natură, părți, obiect și conținut, Hamangiu, București, 2011, p. 124.

[45] In the sense nuanced by Decision no. 14/18. 02. 2008 of the High Court of Cassation and Justice, pronounced on appeal in the interest of the law, in the Official Gazette, Part I, no. 853 of December 18, 2008, it is noted that the candidate's request for acceptance into the position expresses a manifestation of will and, therefore, the service relationship becomes an employment relationship that would originate from an administrative contract. We share the criticisms formulated by the doctrine in relation to the contractual nature of the origin of the administrative function; for details C. Clipa, Drept administrativ, *Teoria funcției publice*, I.*...op. cit.* pp. 19-20.

[46] Art. 26 para. (1) from GEO no. 57 of July 3, 2019 regarding the Administrative Code, in the Official Gazette, Part I, no. 555 of July 5, 2019 – Administrative law: "in carrying out its role of general management of the public administration, the Government exercises hierarchical control over the ministries, over the specialized bodies under its subordination, as well as over the prefects".

subsequent conclusion is reached: administrative decisions cannot harm the rights, freedoms of individuals, nor their legitimate interests[47].

2. The administrative law explicitly and in detail regulated this statement deduced from the exposed conceptual model: the official recognizes "**the supremacy of the Constitution and the law**"; gives "priority to **the public interest**, in the exercise of the position held[48]„; **represents** the interests of "the public authority or institution in its relations with natural or legal persons under public or private law, from the country and abroad"[49]; conforms to "dispositions received from hierarchical superiors"[50].

However, **subordination has limits**. The official enjoys **independence** in decisions, **doubly conditional** independence: first, the decision is based on **technical arguments** and, separately, he must "refrain from any act that could harm natural or legal persons...[51]„; **the result of the action** of an official subject to the hierarchy would also be twofold: **to fulfill the public interest** - this, in relation to the superior because the latter evaluates it - and to achieve **a neutral effect in relation to third parties**, holders of rights, freedoms, legitimate interests (neutrality, objectivity, equidistance, lack of conflict of interest).

The law also indicates a mechanism for resolving **conflicts on solutions** that may arise between officials and superiors: **a)** in essence, **priority is given to the order[52]**; but this mechanism only considers the relationship and, therefore, the reduction of liability between the official and the employing agency - therefore, an internal circuit of the administration - and in no way the external relationship with third parties; **b**) when the official maintains his independence and disregards the order, he assumes his own responsibility; it is certain, however, that in neither of

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[47] Art. 370 para. (3) lit. e of the Administrative Law: ensures the support "necessary for the defense of the fundamental rights and freedoms of the person, of private and public property..."
[48] Art. 368 of (1) lit. a, b of the Administrative law.
[49] Art. 370 of (1) lit. e from the administrative law.
[50] Art. 45 para. (2) from Law no. no. 188 of December 8, 1999, republished, regarding the Statute of civil servants, in the Official Gazette, Part I, no. 365 of May 29, 2007 – Law on civil servants.
[51] For details: C. Clipa, Drept administrativ, *Teoria funcției publice*, I, *op.cit*. pp. 316-324.
[52] There is a legal detail in relation to the procedures to be followed if the public servant considers that it is necessary to refuse the order - art. 45 para. (3) from the civil servants law: "the civil servant **has the right to refuse**, in writing and with reasons, the fulfillment of the provisions received from the hierarchical superior, if he **considers them illegal**; if the one who issued the order formulates it in writing, the civil servant **is obliged to execute it**, unless it is **clearly illegal**; the civil servant has **the duty to inform** the hierarchical superior of the person who issued the disposition of such situations."

the two hypotheses, he is obliged to take into account the will of the party to whom something is imposed; at least take note of her point of view.

The neutrality of the official's action has defining particularities. They appear precisely from the specifics of the action of the executive, an action that is based on the command oppossed to all: the holder of the power of execution - the administration through its entities and agents - **issues the order, indicates the restrictions**, produces normative or individual administrative acts, executes the operations and all the others - third parties - they comply under the pressure of the potentiality of sanction. The official's neutrality indicates a task on his part – abstractly enshrined in law – to refrain from infringing the rights and freedoms of others. In such a framework, the one who applies the law or, as the case may be, his superior becomes - in fact and prior to the decision **- his own evaluator** - judge - of the conduct he will adopt: the one who decides, the one who will operate - by the nature of the organization and the operation of this power - he will capture and define the public interest - as much and as he knows - and impose on the debtors the duty of obedience.

3. The phenomenon is indicated by the administrative doctrine through the concept of **the ponderation function of public power**, the inferred and defining function of the very concept of public interest[53]: the authority limits - or must restrict - its power[54] **by its own will, through self-control mechanisms**; this, precisely so as not to violate the rights of others; or vice versa: where there is no public interest, the administration is not entitled to act[55]; this unilateral model - to be functional and to provide stability recognizes something else: the

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[53] C. Clipa, *Fundamentele ideologice ale dreptului administrativ*, II, 2....*op. cit.*, p. 250.

[54] I understand and describe the model in opposition to the meaning given by the administrative litigant to the weighting process performed post factum by an arbitrator - that is, the judge - in such an evaluation, when the manifestation of administrative authority is considered excessive, unfounded or non-compliant; Law no. 554 of December 2, 2004 of the administrative litigation, in the Official Gazette, Part I, no. 1154 of December 7, 2004: art. 1 para. (1) - **Law on administrative litigation** - "any person who considers himself injured in his right or in a legitimate interest, by a public authority, by an administrative act or by the non-resolution of a claim within the legal term, shall can address the administrative litigation court..."; in the course of the court's judgment, two preparatory, unavoidable criteria are set, essentially different from those of the administration**: a)** the judge first requires the plaintiff to indicate his own prerogatives, as well as their origin, and only subsequently to describe the excess; and **b)** - essential, unique even in any exercise of public power - the judge treats equally the subjects subject to judgment; the two criteria offer other premises for carrying out **a genuine weighting between interests already defined**, not assumed or indicated generally, abstractly, evasively.

[55] Art. 9, sentence I of the Administration Law - "the forms of activity of the public administration authorities must be appropriate to the satisfaction of a public interest, as well as balanced from the point of view of the effects on individuals..."

preliminary self-assessments of the administration, as well as its decisions[56] enjoy **the relative presumption of legality**[57].

4. **The abrupt expression "command opposed to all**" - command observed as an effect of hierarchy and, implicitly, subordination - and which could essentially define administrative activity, can be criticized; it could even suggest the acceptance of the thesis of the administrative regime, of the idea of presumption of administration, as the foundation of state activity, "the common law of public power". The dispute regarding the common administrative regime - with arguments and criticisms - is complex and indicates the turmoil related to the foundation of the general administrative theory with inherent theoretical and practical implications[58].

In reality, I am only pointing out an indisputable characteristic of the administration and relevant for the distinctions that will follow and without the pretense of entering into a debate - of French origin - with consistent and nuanced legal content or to provide critical or enlightening ideas.

I note something else. Emphasizing the Romanian administrative doctrine full of realism and obviously "pragmatic", according to which the separation of powers[59] in the state is expressed in reality through the

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[56] The administrative doctrine recognizes the reality of a discretionary power in the hands of the administration: "the faculty that the law gives them to choose, according to their assessment - of the agents - between several possible solutions, applicable to the concrete case" - for example: T. Drăganu, *Introducere în teoria şi practica statului de drept*, Editura Dacia, Cluj Napoca, 1992, p. 186; with a clarification, however: the assessment considers "achieving the goal indicated by the legislator..."; F. Ciorăscu, C. G. Gălăţanu, *Conceptul de putere discreţionară în administraţia publică*, în Reformele administrative şi judiciare în perspectiva integrării europene, Institutul de Ştiinţe Administrative Paul Negulescu, Caietul Ştiinţific nr. 7/2005, p. 328in the logic I set out, the achievement of the goal implies observing and protecting the public interest - art. 10 of the Administration Law: "public administration authorities and institutions, as well as their staff, have the obligation to pursue the satisfaction of the public interest before the individual or group interest. The national public interest takes precedence over the local public interest"; in other words, the weighting of the administration through the self-evaluation based on the exercise of a discretionary power - specific and explainable, moreover - has a preferential purpose, stated by the law itself: the public interest over the individual; such a realistic finding - beyond generic statements - underlines the essential difference between the evaluative positions of the official and the discretionary power of the judge, as well as the criteria for delimiting the public interest - as understood by the administration - and the interests of individuals asserted by them - or by advisers and their representatives - and based on their constitutionally supported autonomy of will.

[57] V. Vedinaş, *Tratat teoretic şi practic de drept administrativ*, II, Universul Juridic, Bucureşti, p. 9; Decizia nr. 889 din 16 decembrie 2021 a Curţii Constituţionale, în Monitorul Oficial, Partea I, nr. 248 din 14 martie 2022.

[58] C. Clipa, *Fundamentele ideologice ale dreptului administrativ*, II, 1, *op. cit.*, pp. 42-64; Ch. Eisenmann, *Ecrits de droit administratif...op. cit.* 291 -292.

[59] C. Clipa, *Fundamentele ideologice ale dreptului administrativ*, II, 1, *op.cit.*, p. 61 şi 63.

separation of functions, offers us an obvious methodological premise: there is sufficient **organizational support** in any development of human activity; hence, the consequence: ensuring the functionality of any organizational structure involves **an activity of execution**, of **putting into operation a regulation** and, why not, in the most general expression, an order, more or less accepted; next to the executive phenomenon, the issuer of the order always reserves the **power instruments**, of imposing his will.

5. If we move the stated conceptual scheme to the sphere of public authorities - no matter what we call the organizational support that ensures its functionality through execution or, as the case may be, no matter how we define its legal regime - we will get exactly the logical model described by the Romanian administrative theory[60]: the powers of the state are separated but collaborates through the will of the constituent legislator; however, in operation, in a practical way, the implementation of the separation of powers is achieved by **separating the functions of the bodies designated** to implement the state power; the statement gives the consequence: there are defining functions and adjacent, borrowed functions (subsidiary, complementary, marginal, helping, etc.). But all of them are based on a support (or several), an organizational structure - of course, helpful, supportive - which will work only according to the regulation of the organizer, that is, according to his order.

The observation of this reality imposes a question: if it is possible and to what extent a secondary, even inherent, functionality can cover or essentially distort – directly or occultly – the defining function?

Recognizing the existence of the problem therefore forces detailed analyzes to be able to indicate what is defining for the exercise of a function - even delegated, such as that of the notary - and, precisely, which would be the subsequent functions that could alter it - directly or indirectly - the mission and - especially - when and how[61].

6. Such a hierarchical structure with the constitutional mission to implement the will of the legislator in order to obtain the common good through **unilateral manifestations** of will and which, in turn, are based - in principle - on concrete exercises of **discretionary power** by its agents, gives rise to a system of specific liability.

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[60] C. Clipa, *Fundamentele ideologice ale dreptului administrativ*, II, 1....*op. cit.*, p. 63.

[61] The observation occurs in the space of administration analysis because the executive power constitutionally fulfills the function of organization - so, among other things, it also provides organizational support with specific command mechanisms - through which the laws regulating the various functions are implemented.

Explanatory, I resume the ideas in the logical order of the scheme: the function, the function exercised - defining or imported - indicates the nature of the power and not vice versa, regardless of the normative expressions; that is, the function gives expression to the effective public power and it is put into operation through an agent - single or collective - and the agent produces a legal will, in the essence of administrative law, the will to command and impose the order by force and, therefore, its effects.

I also gather the consequences of the scheme: if the will were really defining for the exercise of the power to order, the analysis should answer two other questions: **a)** what is specific to the formation of the will in the administrative mechanism and **b)** what is the origin of the power to form, express and impose the administrative will?

In order to be able to provide an answer, it inevitably becomes necessary to examine the particular mode of expression of the operating agent in the field of administration, which, then, would support even the particularities of the actual exercise of the function.

The implementation of the law - and it cannot be done otherwise - the will to execute it is done as a whole - by no means isolated, individualized - through administrative mechanisms and in the hierarchy, of course within the limits of the powers attributed to the bodies and their agents.

Hence, the consequence: when the law does not issue rules and the interpretation involves multiple variants - all possible and valid - or in case of insecurity, uncertainty - the superior issues the interpretive norm and the subordinate respects it and puts it into practice[62]; in other words, the command and its execution are defining for the public servent[63], for the executive assembly. The origin of power is located in the foundation of state organization: in the applied constitutional mechanism.

VI. The notarial function and the mechanisms of its exercise

Is the notary part of the structured ensemble of the executive hierarchy? Do we find in his activity the landmarks of forming the will of an agent of the executive?

1. It is indisputable that the notary - individually or associated - provides a service of public interest: the notary service; only this service has particularities; the notary does not apply any law, but - at the request

[62] It can be discussed to whom the interpretative norm produced by the superior can be opposed and, above all, why; but this is not the object of the study, now.

[63] It can also be legitimately debated what happens if the superior - when requested - does not issue the applicable rule because he does not want to or, why not, does not consider himself justified or does not want to assume responsibilities; such a working hypothesis - frequently encountered in practice - gives rise to other questions: how will the agent of the executive, caught in the equivocation of the situation and still forced to decide, proceed.

of those interested - fulfills - individually, through his own resources and at his own risk - the specific request to capitalize on the civil law, the law of personal freedom.

In practical terms, the notary - beyond the tasks of investigation, information and advice - is obliged to follow the solution requested by the clients - by no means the superior - from several possible, admissible and sufficient versions to fulfill the interests of the applicants; that is, the notary follows the "order" of the party, not another, and is legally responsible - differentiated and under special conditions - for it.

In other words, the notary does not have unilateral discretionary decision-making power[64];

It is possible that the professional positioning of the notary may produce a different form than the one proposed by the client or approved by the administration; therefore, for the notary there is always no unique solution, as a rigorous system assembled by hierarchy imposes.

There are, however, limits in the notary's activity: **a)** his solution must - in principle - protect clients from their own recklessness or ignorance; and **b)** must not harm the foreseeable interests of third parties.

Separately, the notary is required not to harm general interests[65] that in the civil mechanism produce nullities[66] and for which he is civilly liable in certain situations[67].

2. A clarification is, however, necessary.

In matters of succession or in divorce proceedings, the notary proposes solutions that he deduces through the interpretation of the civil

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[64] By exception and very limited, he can also decide unilaterally; examples of such decisions: art. 106 of (1) - summons the parties – in the divorce or succession proceedings and issues summonses for that; Art. 107 of (2) - validate wills; Art. 108-109 - suspends succession cases and puts them back on the roll, etc., - all texts included in the Notarial Law.

[65] For details and distinctions between general and public interest, protected interest and actionable interest: M. Mekki, L intérêt général et le contract, LGDJ, Paris, 2004, pp. 195 – 196; A. Damiens, *Une notion d intérêt à agir: mythe ou réalité*? sous la direction V. Barbe, C. Guillerminet, St. Mauclair, La notion d intérêt(s) en droit, IFJD, Paris, 2020, pp. 24 – 34; P. Filip, *Nulitatea actului juridic civil prin prisma interesului ocrotit*, Hamangiu, Bucureşti, 2016, pp. 116 – 164.

[66] M. Nicolae, *Drept civil. Teoria generală*, II, *Teoria drepturilor subiective*, Editura Solomon, Bucureşti, 2018, pp. 545- 546.

[67] Art. 73 of the notarial law "the civil liability of the public notary can be engaged under the conditions of the civil law, for the violation of his professional obligations, when he culpably caused damage in the form of bad faith, established by a final court decision"; and art. 1258 Civil Code: "in the event of annulment or finding of nullity of the contract concluded in authentic form for a cause of nullity whose existence results from the text of the contract itself, the injured party may request the obligation of the notary public to repair the damages suffered, under the conditions of the tortious civil liability for his own deed."

law; its solutions can only become operational to the extent that all parties receive them consensually; if there is no consent, finally, the notary is obliged to refer them to a judicial procedure, to the judge.

In such a situation, the notary, although he acts as any agent carrying authority and public power, his solution is not validated unless the parties agree to it; the model of the fulfillment of these services directs it - at least in appearance - to the judge and not to the public seevent[68].

3. Furthermore, they show that the notary does not sit and operate in an administrative hierarchy; at most, he submits to organizational and professional-functional requirements - possibly orders, commands, commands.

The National Union of the Public Notaries in Romania does not executively superordinate the notary offices; it - the Union - is regulated, presented and established in **a professional implementation entity**; therefore, it does not issue orders that oblige the notary to produce a certain solution[69].

Executive agents are required not to harm public interests; or, the public interest is the interest of the entity of which the agent is a part[70]; only secondarily, the official - effect of his equidistance - is obliged to take into account the interests of private individuals or the general social ones[71].

4. It means that a minister control could only track functionality details of the service

If we admit that the minister - who appoints notaries - has the right to control the solutions of the notary, we should also admit the reverse: in the

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[68] For details of the model, see": V. Luha jr., *Mecanismele luării deciziilor de către judecător şi formarea voinţei profesionale a notarului*, study proposed at the Conference "*Prospects and Challenges of 21st Century Law*" 24 -25 November 2022, Oradea.

[69] In practice, the regime of minutes - interpretative orders - that UNNPR together with the National Agency for Cadastre and Real Estate Advertising (ANCPI) issues in connection with the application of the civil law in the matter of real estate advertising - art. 22 point 13 of Law no. 7/1996, regarding the cadastre and real estate advertising, republished in the Official Gazette of Romania, Part I, no. 740/24. 09. 2005; for details: V. Luha jr., *Constrângeri introduse de Legea nr. 7/1996 privind cadastrul şi publicitatea imobiliară în activitatea notarială*, în coord. G. L. Gârleşteanu, M. C. Dănişor, Sistemul juridic şi drepturile fundamentale, Studii doctorale, III, Simbol - Universitaria, Craiova, 2021, pp. 222 - 235.

[70] Art. 370 of (2) lit. e) from the Administrative Law, where the official's public power prerogatives are defined: "representing the interests of the public authority or institution in its relations with natural or legal persons under public or private law, from the country and abroad, within the limits of the powers established by the head of the authority or the public institution, as well as the legal representation of the public authority or institution within which it carries out its activity."

[71] See supra V, 2.

situation where - in case of mistake - cancellation of a notarial instrument, followed by damage - the ministry - according to the general rules of administrative liability - he would also be liable for civil compensation[72].

VII. Conclusions

I summarized the doctrine of administrative law and emphasized those features that I considered to be defining for the activity of organizing the execution of laws and, above all, for the mechanisms that produce the will of the agents of the executive power.

At the same time, I have only outlined what would legitimately and sufficiently position the notary in offering and instrumentalizing legal solutions to the parties.

The exposures would have - from the stated perspective - the methodological mission of producing for the notary those professional behaviors that satisfy the motives of his clients, gain their trust and avoid conflicting situations that could give rise to legal liabilities.

In essence, I argue that the notary does not act as a clerk; separately, he does not enter an administrative hierarchy.

Therefore, it cannot receive orders for the issuance of solutions in order to enforce - upon request - the civil law; as long as the freedom of expression of the contractual will is recognized to the people, the clients will direct the professional will of the notary.

[72] V. Vedinaş, *Tratat teoretic şi practic de drept administrativ*, II, *op. cit.* pp. 491-502; C. Clipa, *Fundamentele ideologice ale dreptului administrativ*, II, 2, *op.cit.*, pp. 334-341; A. Iorgovan, *Tratat de drept administrativ*, II, ediţia a 4-a, All Beck, Bucureşti, 2005, p. 464.

A.I. AND THE CORPORATE LAW, UNVEILING ARTHUR C. CLARKE'S DREAM?

Dr. Vlad V. BĂRBAT[1]

Argument

Arthur C. Clarke can be portrayed as the father of A.I. debating the future of mankind throughout the lens of technological evolution, more precisely artificial intelligence. The purpose of our paper will not discuss the merits of this outstanding and visionary writer, but to highlight the efficacy of artificial intelligence within the boundaries of the corporate law. We will lay emphasis on the novelties as well as the challenges of A.I. in correlation to the vast domain of corporate law. The underlying question is whether artificial intelligence will indeed have the transformational abilities we discuss, or are we all only contributing to the depersonalization of corporate law?

Keywords: *Corporate Law, Transformative Powers, Smart Contracts, Chatbots, Digitalization, Rule of Law, Depersonalization, Artificial Contracts*

Introduction

The emergence of digital technology into our lives, has been indeed overwhelming, whether we discuss the political, legal social or the scientific sphere, from the dawn of society until the present day it has shaped (and is shaping) our lives on a continuous track. While the process of digitalization keeps on constructing new boundaries for the human mind, its impact on the legislative or executive corpus of the State, echoes the creation of new processes, regulations that would integrate digital technology within the corporate sphere. The purpose is to establish a unique environment in which the corporate bodies would integrate digitalization and technology as part of corporate law and their daily work.

In this sense, the European Commission on the 25 th. of April 2018 launched a provocative legislative campaign meant to reconfigure the European rule of law for corporations andcompanies in general, that handle digitalization as part of their corporate internal law. The ambitious project collected several legislative action and proposals within the Digital Single Market Strategy[2] that would establish an official framework and offer concrete digital remedies for companies.

[1] Teaching Assistant at the University of "1st of December 1918" Alba Iulia, E-mail:vlad.barbat@uab.ro

[2] For more information on the origin of the Digital Single Market Strategy, please consult: EUR-Lex - 52015DC0192 - EN - EUR-Lex (europa.eu).

Moreover, the European legislative bodies continued with the same tone by issuing Directive 1151/2019 and the Coordinated Action Plan[3] that would create rules in international commerce for the formation, registration, online filing of specific documents and papers for companies, thus transferring the material process of company formation and restructure online. It is safe to say that, for the process to be effective, the Coordinated Action Plan establishes three general conditions to be met. Firstly, an efficient and functioning governance and coordination framework is needed to build economies of scale and facilitate synergies. Secondly, large, high quality and secure data is required. Thirdly, there should be a computation infrastructure to store, analyze and process this data[4].

In accordance with the above-mentioned Directive, each Member State has now the chance to create its own adjusted bedrock of legislative procedures that would allow the companies to register, be modified, register their branches, fill documents, deposit specific documents online. Of course, the Member States can impose certain limitations concerning online registration or document filling, furthermore, the principles of this Directive forbid Member States from implementing any prerequisites for obtaining an authorization or license prior to registering a corporation online in their national legislations, unless it is required to ensure adequate monitoring of some corporate operations.

Chatbots and Smart Contracts, to begin with

Prior to our discussion, the adventure of understanding Artificial Intelligence takes us back one year, 2017 when Allan Rocha and Ricardo Vargas unveiled their creation to the world, the first chatbot called PMOtto[5]. Destined to process and convert speech and text into program commands, the chatbot can offer recommendation on project implantation techniques, providing relevant advice to the company board. A similar chatbot called Ailira[6] developed by the BotsCrew in Australia can offer legal advice to company lawyers and provide rapid solutions to repetitive tasks. Moreover, it identifies the exact company b2b and b2c business models and finds and generates legal documents.

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[3] In accordance with the European Commission's Official Newsletter on Digitalization, please consult: AI Excellence: Enabling conditions for AI's development and uptake | Shaping Europe's digital future (europa.eu).

[4] *Ibidem*.

[5] V.A. Laptev, D.R. Feyzrakhmanova, *Digitalization of Institutions of Corporate Law*: Current Trends and Future Prospects, Laws 2021, 10(4), 93, p. 13. Consulted online on the 10.05.2022, 12.40. Link: https://doi.org/10.3390/laws10040093

[6] For more information please consult: How Legal Chatbots Can Increase The Profit of Your Law Firm - BotsCrew

The application of these AI tools can be of great assistance, especially for certain segments of corporate law that cover determining and forecasting the cost of goods, taking care of a company's workforce requirements, spreading the necessary skills among participants in corporate relations and corporate entities, investing in the creation of future products, intra-departmental logistics, etc. Thus, AI offers significant promise for enhancing corporate governance processes in all its forms. The participants in the organization will make more sane management decisions that account for all possible hazards as a result of the automation of the processes for assessing a big volume of data. Aside from this, we can notice how the emerging digitalization of today, clearly offers the chance of automation. Companies become more independent, their internal processes are regulated more efficient and more integrated within the economic sector. Hence, a new "breed" of company management is created entitled DAO (Decentralized Autonomous Organizations).[7]

A decentralized organization is, in essence, a business that is run based on automatically carried out business rules produced by specialized software. Token holders, or members in a decentralized autonomous organization, can control the organization's assets, distribute earnings, and more through the use of smart contracts[8]. Participants can also change the smart contracts that control the decentralized organization by voting. Considering this, it may be said that a decentralized autonomous organization (DAO) is the digital equivalent of a traditional organization, relying instead on smart contracts and tokens for its foundation than on constituent documents and shares.

Furthermore, the fundamental benefit of decentralized autonomous organizations is their use of smart contracts, which allow members to participate in management decisions and guarantee voting and vote counting are transparent. Decentralized autonomous organizations allow their members to directly manage and control their assets, greatly simplifying the corporate governance process. As a result, we can go even further – autonomized smart contracts that would be flawless, unable to be breached by human intervention. Fantasy, we say? None whatsoever. The legal scholar Nick Szabo in his visionary paper: "Formalizing and Securing Relationships on Public Networks" [9] described the manner in which

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[7] For more information concerning DAO formation, please consult: Decentralized autonomous organizations (DAOs) | ethereum.org

[8] *Ibidem*.

[9] N.Szabo, *Formalizing and Securing Relationships on Public Networks*, (1997) 2 (9), First Monday apud P. Sirena,F.P. Patti, *Smart Contracts and Automation of Private Relationships,* p. 317. Article available online on The Cambridge Core Platform, consulted on the 06.10.2022, 10.00. Link: https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781108914857.017.

cryptography could make it possible to create computer code that can be used to shape contracts that bind parties in a way that almost eliminates the risk of contractual breach. The paper was an immediate success and set the "trend" for the functionality and efficacy of these smart contracts[10].

Smart contracts have an individual character regarding their material support and formal *(*or informal) proceedings, yet they are not so different to "classic" contracts as regards to the parties main contractual purposes. As a result, only the conclusion of the contract is decided by an "artificial intelligent agent", the other contractual components create a unique technological unity that safeguards the transaction due to specific algorithms [11].

The main benefit of the smart contract is that it "technologizes" the manifestation of will and by exactly calculated algorithms, generates the performance of the contract. Let us not be confused! - the contract still remains the intellectual work of the parties, it keeps the exact dispositions that they agreed upon and can be modified before coming into force, it meets the same ideas and desires of the parties in respects of offer and acceptance, the only mechanized component remains the execution[12].

As a consequence, we believe alongside other authors that smart contracts are in fact not so "smart" after all, due to the fact that they rely on the so-called "If-Then" principle, which states that any contractual performance will be executed only when the "agreed upon amount of money" is transferred to the system.[13] Of course, we should not exclude the importance of smart contracts and their capacity to make our contractual life more easier, as the value of smart contracts reside in their capacity to exactly interpret controversial terms clearing the contract from vagueness or terminological doubt. Moreover, help can be received from their "self-executing" and "self-enforcing" nature. The self-executing process, as previously mentioned, diminishes the possibility of contractual breach and the latter (the self-enforcing component) offers a better protection and make it redundant for the parties to receive official legal protection[14].

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[10] The notion of "smart contract" is attributed to Nick Szabo and his works.

[11] K.Werbach, N.Cornell, *Contracts Ex-Machina*, Duke Law Journal, *(*67) 2017, pp. 313-318. Article consulted online on the 06.10.2022, 10.17. Link: Contracts Ex Machina by Kevin Werbach, Nicolas Cornell :: SSRN

[12] G. Gitti, *Robotic Transaction Decisions, (*2018), Oss dir civ com, pp. 619-622, M.Durovic, A.Janssen, The Formation of Blockchain-Based Smart Contracts in The Light of Contract Law, (2018) 26 Eur Rev Priv, L.753-771, apud P. Sirena,F.P. Patti, *Smart Contracts and Automation…op. cit.*,pp. 318-319.

[13] E. Mik, *Smart Contracts: Terminology, Technical Limitations and Real World Complexity (*2017) 9 L Innovations & Tech, p. 269 apud P. Sirena,F.P. Patti, *Smart Contracts and Automation… op. cit.*p. 318.

[14] *Ibidem,* p. 319.

Practical approaches of A.I. within the corporate law

There are differing viewpoints on AI, and not just the legal departments are discussing its effects. Workers in various industries are being reassured by technology businesses at the forefront of AI approaches that AI is only used to increase and complement individuals' capabilities, not to replace them. In a panel discussion on artificial intelligence at the World Economic Forum in Davos, Switzerland, Ginni Rometty and Microsoft CEO Satya Nadella both participated. These tech experts asserted that AI may boost human ingenuity, generate more opportunities to improve workflow, and give workers "more breathing room"[15].

As stated, we identified in a resumptive manner, the efficacy of A.I. within the company law[16] and the domains are as follows:

1. Due Diligence- The process of gathering, comprehending, and evaluating all the legal risks connected with an M&A process is known as legal due diligence. Using AI tools, litigators conduct their due diligence by reviewing the relevant background data, which includes contract review, legal research, and electronic discovery;

2. Prediction-The specific A.I. algorithms can forecast how a lawsuit will turn out;

3. Document Automation- Many legal service providers employ software templates to produce filled-out papers from data input;

4. Intellectual Property- AI solutions for intellectual property let lawyers analyze extensive IP portfolios and draw conclusions from the data[17].

Robots in Company meetings? The European Commission seeks for solutions

"First Law

A robot may not injure a human being or, through inaction, allow a human being to come to harm.

Second Law

A robot must obey the orders given it by human beings except where such orders would conflict with the First Law.

Third Law

A robot must protect its own existence as long as such protection does not conflict with the First or Second Law."[18]

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[15] A. Avasthi, *The Utility of AI in Corporate Law*, online article present on the Datasaur Platform. Page consulted on the 6.10.2022, 14.14. Link: The Utility of AI in Corporate Law (datasaur.ai).

[16] *Ibidem*.

[17] *Ibidem*.

[18] The Three Laws of Robotics as they were formulated by the American writer Isaac Asimov in the 1940's while collecting his nine scientific novels to create "I Robot", his Robotic – based novel masterpiece.

As we continue our analysis on the benefits and implementation of digitalization within the corporate sphere, we observe that writers such as Isaac Asimov (1920-1992) imagined a world of man's continuous interaction with technology and elaborated algorithms, working together in a unique symphony to ensure the progress of society. Asimov throughout the Second Law of Robotics discussed problems of morality and ethics pleading for robotic intervention but also (in a way) warning us of the imminence of technology within our professional lives. As the great challenges of technology seems to overshadow man's forces, certain measures were taken as to establish a certain balance.

In 2020, The European Commission established the Report on Digitalization that aims to assure the: "Digital transformation governance encompasses both compliance with corporate decisions and approaches and flexible mechanisms promoting co-innovation, co-ownership and co - design of business solutions..."[19] Moreover throughout digitalization, the corporate life implicitly develops digital skills that can: "... identify ways in which digitalization can improve their autonomy, agility and productivity and the impact of their work."[20] Within corporate law and especially as regards to company decision making, the unique complexity of algorithms, artificial networks and intelligent agents, Digitalization provide a tremendous help concerning preventing contractual breach, the anticipation of the various types of user needs, the quantification of risk management and suggestion of company action plans. As a consequence, in order to make a decision on an informed, reasonable basis, more information is required for decisions that are more complicated. Because they are particularly well-suited to processing "big data," computers, algorithms, and artificial intelligence can help to improve decision-making[21].

Comparative analysis with the Romanian Legal System

The Romanian legal system does not (yet) grant artificial intelligence decision-making rights in any of its internal laws or codes. However, one issue that corporation regulations had to address involved assigning tasks

[19] In accordance with the European Commission's Digital Strategy, p. 17, online material consulted on the 7.10.2022, 10.30. Link: c_2022_4388_1_en_act.pdf (europa.eu).
[20] *Ibidem*.
[21] A. Agrawal/ J. Gans/ A. Goldfarb, "Exploring the Impact of Artificial Intelligence: Prediction versus Judgment", Working Paper (2016), available at https://www.aeaweb.org/conference/ 2017/preliminary/1426?page=2&per-page=50 apud F. Möslein, *Robots in The Boardroom: Artificial Intelligence and Corporate Law*, (September 15, 2017). in: Woodrow Barfield and Ugo Pagallo (eds), Research Handbook on the Law of Artificial Intelligence, Edward Elgar, (2017/18, Forthcoming) p. 7, Available and consulted online on the 7.10.2022, 12.15, p. 7. Link: SSRN: https://ssrn.com/ abstract=3037403 or http://dx.doi.org/10.2139/ssrn.3037403 and *Robots in the Boardroom: Artificial Intelligence and Corporate Law* by Florian Möslein :: SSRN

to workers or to outside parties, and there are similarities to be made. Similar to this, the "import" of norms from agency law has been explored in relation to algorithmic contracting since, regardless of their legal status, algorithms behave similarly to human agents in practice. We are aware that directors occasionally use corporate or commercial advantages[22].

We are aware that Article 114(3) of the Companies Law exclusively pertains to delegated powers covering a change to a company's corporate seat or line of activity, as the Constitutional Court confirmed in Decision 382/2018. A rise in a company's share capital is so disregarded. The principle that boards of directors should be subject to the same legal consequences as those applicable to the validity of shareholders' resolutions was fully reinstated by the Constitutional Court when they were given the authority to make decisions on issues that legally fell under the rights of shareholders[23].

Therefore, the chance that the board of directors' decision will be overturned should be taken into account while deciding whether to allow the board to enhance a company's share capital. Can the board of directors allocate its authority to automated devices with artificial intelligence in this sense? Due to the ambiguity of internal law, the issue may be contested from our perspective. A corporation director's ability to "share" its attributes is limited, and any mechanical intelligence that is appointed to oversee a specific algorithm or corporate function must be under the watchful eye or subject to independent "human" verification. In this regard, the premise of the previous thought is challenging to grasp at first.

By comparison, within the UK the legislative forum passed in 2015 the Small Business Enterprise and Employment Act in corroboration with article 154 of the Companies Act of 2006 where one can clearly read that "at least one director of the company must be a natural person"[24],this results in the prevention of any other "autonomous" systems to take over the company.[25] Furthermore, in common law jurisdictions state that "any individual performing the position of director, by whatever name called" is considered to be a "director"[26]. AI does not qualify as a person, a status

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[22] M.Neagu, *Romania: All board decisions made by delegation of powers can be challenged in court*,Newsletter of the Schöhnherr Attorneys at Law Society, 22.10. 2018, online article. Consulted on the 8.10.2022, 17.46. Link: Romania: All board decisions made by delegation of powers can be challenged in court (schoenherr.eu).

[23] *Ibidem*.

[24] F.Möslein, *Robots in the Boardroom…op. cit*.p. 15.

[25] *Ibidem*.

[26] In accordance with The Companies Act 2006, s 250, for further reading please consult D.Ahern, *The Impact of AI on Corporate Law and Corporate Governance*, As submitted for peer review to the Cambridge Handbook of Private Law and Artificial Intelligence (eds Philip Morgan and Ernest Lim) 11 November 2021, p. 8. Available online.
Link: AI AND CORPORATE LAW .pdf (tcd.ie).

that is exclusively available to humans and, in some jurisdictions, legal persons. Directors who are not natural persons are not permitted to serve as directors, we can therefore conclude that, the difficulty arises from the fact that AI is not frequently acknowledged as a legal entity.

Other places have restrictions similar to these. In accordance with German corporate law, only natural individuals may serve as directors of an LLC, as stated in 6 para. 2 GmbHG, and in stock corporations, as stated in 93 para. 3 AktG. However, because they limit the fundamental right of legal people to practice a trade or profession, similar regulations have been challenged on constitutional grounds[27].In this aspect, it can be very difficult to question whether The German Constitutional Court will indeed allow (even) legal persons to act as corporate directors in comparison with certain American states that do not officially state the rule for corporate officers to be human beings[28].

Conclusion

We have noticed an ongoing trend of artificial intelligence to overcome every aspect of our private and professional life and after we have analyzed and debated the different aspects in which A.I. can assist us, therefore it is likely that in the near future, difficult decision be taken by mechanized processes and that corporate directors be allowed to transmit their decisions to artificial intelligence. The board and its "delegated" authority to administer the business for the benefit of the investors may have the possibility to delegate the official tasks to AI machines, entrusting specific and, of course, benefiting from algorithmic results.

It's critical to keep in mind that artificial intelligence (AI) is a tool for supporting businesses, not a magic solution that removes directors or regulators from the driving seat. Although AI is capable of processing data at an exponential rate, it is not well renowned for its common sense. Despite the frequent discussion of AI and autonomous decision-making, it is still obvious that human judgment, input, and control are still required. Certain facets of corporate life, such as corporate deal-making, which is distinctively human in nature, thrive on human connection. "The corporate law framework is anticipated to undergo additional adjustments

[27] F. Möslein, *Robots in the Boardroom…op. cit*.p. 15.

[28] See, e.g., Delaware General Corporation Law Section 141(b) ("The board of directors of a corporation shall consist of one or more members, each of whom shall be a natural person") and California Corporations Code Section 164 ("Directors" means natural persons designated in the articles as such or elected by the incorporators and natural persons designated, elected or appointed by any other name or title to act as directors, and their successors") apud F.Möslein, *Robots in the Boardroom… op. cit*.p. 15.

as AI becomes more established, first focusing most visibly on process efficiency"[29].

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ASSIGNMENT OF CONDUCTING THE EVALUATION OF THE ASSETS IN INSOLVENCY PROCEDURE

Univ. Assist. Dr. Ana Maria CORDOS[1]

Abstract

The authorized assessor, in order to understand the procedural steps, must comply with the valuation standards of the goods valid at the date on which the valuations was carried out, as well as in the articles of the law in which the valuation is referred to. Or, in order to better understand the "why" should be carried out and "how" an evaluation of assets is to be carried out, an authorized evaluation will elaborate a specialized work for a company in insolvency proceedings relying on Law nr.85/2014 on insolvency and its prevencion procedures. And on the other hand, he has a very difficult task to fulfill during the procedural stages, because he must know and understand his job very well in order to be able to make the best decisions regarding the goodies he has.

Keywords*: assets, plan, evaluation, procedure, authorized assessor, insolvency*

Law no. 85/2014 regarding insolvency prevention and insolvency procedures provides for the method of making valuation reports for companies in insolvency proceedings, thus, the authorized valuer being able to understand as well as possible the importance of making the valuation and, last but not least, the purpose of making the valuation .

Compliance with the Property Valuation Standards valid on the valuation date and the legislation in force, by the authorized appraiser, leads him to understand that it is essential for him to understand the procedural stage in which the company is.

Thus, after the discussion that the authorized appraiser has with the judicial liquidator, after setting the stage in the procedure, the type of value, which can be market value or liquidation value, to be estimated, as well as the premise of the value estimation, is to be established .

By value, according to the Property Valuation Standards, we mean the conditions under which a property is used, so that, depending on the situation, one or more premises of the value are used.

During the insolvency procedure, Law no. 85/2014 on insolvency prevention and insolvency procedures provides for the need to draw up evaluation reports in several of its procedural stages.

[1] 1 DECEMBRIE 1918, University of Alba Iulia.

Thus, in the case of this article, we have tried to present the stages of the procedure of a claim before the Alba Tribunal, the Insolvency Procedure of the limited liability company, at the request of the debtor.

In a first stage, the observation stage, the judicial administrator analyzes the legal and patrimonial situation of the company to determine if there are real prospects for saving the company, based on a reorganization plan, or, as the case may be, liquidation, because the company can no longer be revitalized.

This stage, prior to the vote on the reorganization plan, presents the evaluation and takes into account:

Evaluation of guarantees related to beneficiary claims of a preferential cause,

Evaluation in order to substantiate the reorganization plan;

Evaluation in order to simulate the bankruptcy procedure

The reorganization plan may provide, together or separately, without limitation:

1) Operational and/or financial restructuring of the debtor;

2) Corporate restructuring by changing the share capital structure;

3) Restriction of the activity by partial or total liquidation of the asset from the debtor's estate.

In the case presented in the present case, only the first two operated.

The authorized evaluator, depending on what the plan provides, is required to produce evaluation reports with the aim of:

1. Evaluation of the business within the reorganization procedure;

2. Evaluation for the preparation of the merger/division project proposed by the reorganization plan.

And here, the defendant underwent evaluations only for the purpose of reorganization.

Thus, in order to be able to identify the assets subject to evaluation, the evaluator requested from the judicial liquidator the minutes of the inventory of the assets of the insolvent company, with all related annexes, in which the assets subject to mortgages, pledges, seizures or other rights will be specified assimilated to mortgages.

When the valuation is carried out for assets that are grouped in functional assemblies, the assets that form the functional assembly will be identified, and the valuation will be carried out both on the functional assembly and individually, depending on the purpose of the valuation. The creation of groups of functional assemblies can be done by the authorized appraiser in collaboration with the judicial liquidator and possibly together with other specialists. For example, in the present case, when

evaluating complex technological lines, specialists who operate in the field of the respective equipment - ballast sorting station, concrete station, machines and aggregates were called upon.

The identification of immovable assets, for their evaluation, is carried out both by analyzing the accounting records and the results of the inventory, as well as based on the entries in the Land Register and the field inspection.

- Aspects of whether an asset will be sold individually, assuming the other assets are available to the same buyer, or whether the item will be sold individually, assuming the other assets are not available to the same buyer, must be known/known by evaluator.
- When evaluating intangible assets, they must be defined in terms of their type and the legal rights or interests in them.

A specific type of case that has been much discussed recently is the assessment of the debts of the debtor company in the insolvency procedure. The identification and understanding of the context that was the basis of the creditors' acceptance of this type of guarantee, must be done before any other measure, by the authorized appraiser.

Presenting the case, which we will detail below, we specify the fact that some very important aspects were brought to the evaluator's attention by the party that requested the evaluation and which were established before starting the evaluation activity. Here there was close collaboration between the insolvency practitioner and the chartered valuer to ensure that the terms of reference were correctly identified and the premises of the valuation were clearly established from the outset. We specify the fact that the environmental obligations are fulfilled[2] so that the reorganization and exit from insolvency can be achieved successfully.

Following a written contract, concluded before the start of the evaluation activity, terms of reference are specified which have the role of ensuring that all aspects are clearly established and accepted by the authorized evaluator and the requester of the evaluation report.

Knowing the stage in which the company was in the insolvency procedure, as well as the type of value required for each stage, which in this case was the market value, the authorized appraiser made an adequate assessment with its use in making decisions in the procedure insolvency.

Thus, I showed the very important role of the authorized appraiser, well versed in his job, the evaluation result having a very big impact on the decisions that the involved parties have to take for the company in insolvency.

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[2] Bogdan Manole Decebal, *Dreptul mediului, Curs universitar*, Seria Didactica, Alba Iulia, 2016, p.77.

In the case that will be reproduced, we would like to highlight the professionalism with which the authorized evaluator came up with solutions to the social administrator in order to efficiently reorganize the company.

Alba Court,

Second Civil, Administrative, Fiscal and Insolvency Litigation Section

Sentence No. 23/F/2022

The pending insolvency proceedings concerning the debtor SC PINUL SRL through the judicial administrator Popescu Marin Individual Insolvency Cabinet.

At the roll call made in the public session, the representative of the creditor of the Alba County Public Finance Agency, as well as insolvency practitioner Ionescu Nicolae, for the creditor S.C. Trust S.R.L., the other participants in the procedure being absent.

The summoning procedure is legally fulfilled.

The case report was made by the clerk, after which it was found that the following entries were submitted to the file:

On 07.10.2022, the judicial administrator C.I.I. Popescu Marin submitted the activity report of the judicial administrator for September 2022.

On 12.10.2022, the judicial administrator C.I.I. Popescu Marin submitted the supplement to the activity report no. 365/07.10.2022 submitted to the case file and published in the Bulletin of Insolvency Procedures no. 26251/10.10.2022.

The syndic judge gives the word on the approval of the final report and on the request for the reinsertion of the debtor in the economic circuit.

The representative of the creditor AJFP Alba requests the approval of the final report, as it was drawn up, as well as the request to close the procedure for reinserting the debtor into the commercial circuit.

Insolvency practitioner Ionescu Nicolae shows that he agrees with the final report drawn up, having no objections. It requests the closing of the insolvency procedure and the taking of measures for the reinsertion of the debtor into economic activity.

The syndic judge retains the case in the pronouncement.

Syndic Judge

Through the request registered on 04/03/2018 before the Alba Tribunal under file no. 371/107/2018, formulated by the debtor S.C. PINUL S.R.L., having as its object the insolvency procedure, requested the opening of the general insolvency procedure according to the provisions of the insolvency law, because the company is unable to pay.

He showed that the company's debts totaled 750606.98 lei on 31.03.2018.

He also requested the appointment as judicial administrator of the insolvency practitioner Individual Insolvency Cabinet Popescu Marin.

By Decision no. 35/F/CC/2018, the syndic judge admitted the request made by the debtor S.C. PINULS.R.L..

He found that the debtor is in a state of non-payment.

Pursuant to art. 71 paragraph 1 of Law no. 85/2014, he opened the general insolvency procedure against the debtor.

Pursuant to art. 45 paragraph 1 letter d) in conjunction with art. 73 of Law no. 85/2014 appointed the insolvency practitioner Individual Insolvency Cabinet Popescu Marin as provisional judicial administrator.

By Sentence no. 121/F/2019, the syndic judge, based on art. 139 of Law no. 85/2014, confirmed the plan to reorganize the activity of the debtor S.C. PINULS.R.L..

Pursuant to art. 141 of Law no. 85/2014, he ordered that the debtor conduct her activity under the supervision of the judicial administrator Individual Insolvency Cabinet Popescu Marin and in accordance with the confirmed plan.

By Sentence no. 398/F/2019, the syndic judge rejected the requests made by the creditors of S.C. Holding S.R.L., Tatar Ana, Tatar Nicolae, Rosu Lucia, as well as the employees of the debtor entering bankruptcy of the debtor S.C. PINUL S.R.L..

By Sentence no. 197/F/2019, the syndic judge rejected the request of the creditor S.C. ISTRIA S.R.L. of entering into bankruptcy pursuant to art. 145 para. 1 lit. c from Law no. 85/2014 of the debtor S.C. PINUL S.R.L.

Pursuant to art. 139 of Law no. 85/2014, he confirmed the modification of the reorganization plan of the debtor S.C.'s activity. PINUL S.R.L.

Pursuant to art. 141 of Law no. 85/2014, ordered that the debtor conduct her activity under the supervision of the judicial administrator Popescu Marin Individual Insolvency Cabinet and in accordance with the confirmed amended plan.

Analyzing the documents and works of the file, the syndic judge notes the following:

By Decision no. 65/F/CC/2018, the debtor's request was admitted and, consequently, the opening of the general insolvency procedure was ordered.

On 15.11.2018, the definitive table of claims against the debtor's assets[3], published in B.P.I., was submitted to the case file. no. 2177/

[3] Raul Felix Hodos, Daniela Mincu, *Drept commercial*, Editura Universitară, Bucureşti, 2021, p. 147.

15.11.2018, the total of registered claims being in the amount of 6334867 lei and 2702797 lei of suspensive claims.

On 17.12.2018, the debtor filed the company reorganization plan.

The reorganization plan proposed by the special administrator of the debtor was confirmed by the syndic judge by sentence no. 221/F/2019.

According to the debt payment schedule, the debtor assumed full payment of the debts entered in the final table drawn up by the judicial administrator. The total payment obligations assumed were fully paid by the debtor, according to the report submitted by the judicial administrator on 09.05.2022.

According to the provision of art. 175 paragraph 1 of Law no. 85/2014: "A reorganization procedure through the continuation of the activity or liquidation on the basis of the plan will be closed, by sentence, based on a report of the judicial administrator confirming the fulfillment of all obligations of the payment assumed by the confirmed plan, as well as the payment of current due debts".

In the current situation, it is found that the debtor company has fulfilled its payment obligations assumed by the plan confirmed by the syndic judge, the company's creditors fully collecting the sums representing outstanding claims at the opening of the insolvency procedure.

Moreover, the debtor made efforts to cover the current debts, born during the reorganization period, in the last report submitted by the judicial administrator, mentioning that the obligations resulting from the current activity were paid. Therefore, the debtor is, at the moment, a solvent company, with no outstanding debts.

Taking into account the previously stated considerations, the syndic judge notes that the provisions of art. 175 para. 1 of Thesis I of Law no. 85/2014, for which he will order the closure of the procedure for the reorganization of the debtor's activity and the taking of all measures for its reinsertion in the economic activity.

For these reasons

In the name of the Law

Holds

Accepts the request made by INDIVIDUAL INSOLVENCY CABINET Popescu Marin based in *, registered in the RFO of UNPIR with no. *, having CUI * as a judicial administrator of the debtor S.C. PINUL SRL with registered office in *, CUI *, registered with ORC under no. *and, consequently: Pursuant to art. 175 paragraph 1 sentence I of Law no. 85/2014, orders the closure of the procedure for the reorganization of the debtor S.C.'s activity. PINUL SRL with registered office in Alba Iulia, str.

A. I. Cuza, no. 20, Alba County, CUI 32305050, registered at ORC under no. J1/213/2013. Orders the taking of all measures for the reinsertion of the debtor into economic activity.

Pursuant to art. 180 of Law no. 85/2014, relieves the judicial administrator of any duties and responsibilities. Pursuant to art. 179 of Law no. 85/2014, orders the notification of this sentence to the debtor, creditors, the social administrator, the Alba County Administration of Public Finances, ORC attached to the Alba Court for the execution of the mention of closure of the reorganization procedure, as well as the publication in Bulletin of insolvency proceedings. Definitive from the communication of the decision made by publication in the BPI. Pronounced today, 12.10.2022, by making the solution available to the parties, through the mediation of the court registry.

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PROTECTION OF THE ANIMAL KINGDOM – PREVENTING MECHANISM REGARDING THE CAUSE OF DAMAGES

Igor TROFIMOV[1],
Evghenia GUGULAN[2],

MOTTO:
„Only good interpretation of existence generates good existence".
Cristinel Maziliu

Abstract

Ever since man became aware of the absolute necessity of taking resolute action to protect the environment, he has resorted to establishing rules of conduct which, on the one hand, govern human actions in such a way as to cause as little damage as possible to the environment and, on the other, provide the legal framework necessary to combat damage to all elements of the environment, including the animal kingdom. In other words, it is the state that has a real function of vital importance to society to develop and implement unrestricted compliance with the regulatory framework for preventing pollution, restoring the damaged environment and improving environmental conditions.

Moreover, in this study we aim to conduct coincidental research on effective mechanisms of protection of the animal kingdom in the context of environmental damage prevention.

Keywords: *environment, animal kingdom, environmental protection, environmental damage, animal world*

JEL classification: *K320 Environmental, Energy, Health, and Safety Law*

Introduction

The environment is the key element for the continuation of human survival, so the protection of the environment in general and its factors must be one of the main concerns of mankind.

If global economic development does not keep pace with these requirements, there is a real danger of serious pollution of various environmental factors with dangerous consequences for human life and health and for flora and fauna.

[1] Academy „Ștefan cel Mare" of Ministry of Internal Affairs, Moldova, Associate professor, PhD., Head of Department „Private Law", email: itrofimov@mail.ru
[2] Academy „Ștefan cel Mare" of Ministry of Internal Affairs, Moldova, Lecture, PhD, Department „Private Law", email: eugenia.gugulan.@mai.gov.md

The animal world, as a basic component of natural biocenoses, plays an important role in maintaining ecological balance. A few animal species serve as sources of industrial raw materials, medicines, foodstuffs and other material values needed to satisfy the population and the national economy, other species are used for scientific, cultural-educational and aesthetic purposes.

Under the influence of human factors, the diversity of the animal kingdom is, regrettably, in continuous decline. Anthropic and climatic factors in recent years have adversely affected native fauna. Many wildlife species have become relatively rare or endangered and require special protection measures. Based on these considerations, the *Red Book* (Gheorghe Duca, 2015) of the Republic of Moldova has been re-edited, describing 208 species of plants and fungi and 219 species of animals.

The legislation in force regulates the relations in the field of protection and using of wild animals (mammals, birds, reptiles, amphibians, fish, insects, crustaceans, mollusks, etc.) that survive naturally on land, in water, in the atmosphere or in the ground, permanently or temporarily populate the territory of the republic[3] (Law No.439, art.1). Relations in the field of protection and using domestic animals, as well as wild animals kept in captivity or semi-captivity for economic, scientific, cultural-educational, and aesthetic purposes are also regulated by a wide variety of relevant legislation.

Moreover, the *Law on the Protection of the Environment*[4] (Law No.1515, art.2 (e)) explicitly sets out as an objective the protection of the environment in order to safeguard biodiversity and the genetic background, the integrity of natural systems, national historical and cultural values; *the Law on Environmental Impact Assessment*[5] (Law No.86, art.1 para.1) regulates the mechanism of environmental impact assessment of certain types of planned public and private activities and the mechanism of biodiversity assessment to ensure the prevention or minimization, at the initial stages, of significant impacts on the environment and the health of the population, as well as for the implementation of the Republic of Moldova's international obligations.

As a mechanism for the protection of the animal kingdom, we can also specify the *Law on Strategic Environmental Assessment* (Law no.11,

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[3] Law No. 439 on animal kingdom of 27.04.1995. Official Gazette No. 62 of 09.11.1995. Available: https://www.legis.md/cautare/getResults?doc_id=132341&lang=ro#

[4] Law No. 1515 of 16.06.1993 on environmental protection. Published: 30.10.1993 in the Official Gazette No. 10. https://www.legis.md/cautare/getResults?doc_id=132845&lang =ro#

[5] Law No. 86 of 29.05.2014 on environmental impact assessment. Published: 04.07.2014 in the Official Monitor No. 174-177. https://www.legis.md/cautare/getResults?doc_id= 133959&lang =ro#

art.1, para.1)[6] which establishes the legal framework for undertaking strategic environmental assessment, including the procedure in a transfrontier context if necessary, in order to ensure a high level of environmental protection, prevention or diminution of the effects on the environment, including on the health of the population, flora, fauna, biodiversity, soil, climate, air, water, landscape, natural objects, material goods, cultural heritage, as well as the interaction between these factors.

International regulations have focused on an ad-hoc approach to the protection of the wild world, identifying „endangered species", i.e. species or populations that are threatened with extinction, through their exposure in the commercial traffic, the destruction or threat of extinction of their habitats, and the rational use of these species has been rationalized by introducing quota systems[7] (Duţu Mircea, 2007).

The *European Convention on Human Rights* primarily enshrines as such the right to a healthy environment, the European Court of Human Rights is extending its jurisprudence on environmental matters because of the fact that the exercise of certain Convention rights could be affected by the existence of environmental damage and exposure to risks to the environment and its components.

Review of the scientific literature

The study has been carried out with doctrinal research by well known researchers and scientists, such as *Mircea Duţu* (Environmental Law Treatise), where fundamental concepts, principles, methods, and techniques specific to biodiversity conservation and nature protection are carefully addressed. The renowned Professor *Ernest Lupan*, in his studies (Treatise on Environmental Protection Law), gives his opinion on the need to protect terrestrial and aquatic fauna; he clearly defines the meaning of the concept of terrestrial fauna, sets out the conceptual delimitations between pet animals, wild animals, animals used for experimental or other scientific purposes, and proposes for comparative analysis specific regulations on the definition of wild animals and gene pools, and the legal status of wild animals. At the same time, the Romanian authors *Mircea Duţu and Andrei Duţu* (Liability in environmental law) clearly outline that: „an important role in the effective prevention of environmental damage and human health falls to the state by guaranteeing the

[6] Law No. 11 of 02.03.2017 on strategic environmental assessment. Published: 07.04.2017 in the Official Gazette No. 109-118. https://www.legis.md/cautare/getResults?doc_id=133818&lang=ro#

[7] Duţu, Mircea, *Environmental Law*. Treatise. Volume II. Bucharest: Editura Economică, 1998, p.117.

fundamental right to a healthy and ecologically balanced environment"[8] (Duțu Mircea, Duțu Andrei, 2015).

Daniela Marinescu (Environmental Law Treatise) analyzes the legal framework for the protection of terrestrial and aquatic fauna, focusing on specific regulations for the protection of animals in general, the protection of wild animals subject to hunting, the protection of wild animals and birds in zoos and fish fauna in aquariums, protection measures for domestic animals[9] (Marinescu Daniela, 2008).

The autochthonous researcher *Igor Trofimov* in his works (Environmental Law), applying his comprehensive jurisprudential-doctrinal experience, presents in a concisely manner the legal regime of the use and protection of the animal kingdom, by appreciating the conceptual aspects specific to the animal kingdom, the measures and the mechanisms applied in the field of administration, control of the use and protection of the animal kingdom, the evidence of the animal kingdom[10] (Trofimov Igor, 2015).

Discreetly we can say, that the studies of illustrious researchers in the field of environmental protection law have essentially contributed to the formulation of concise, rational and relevant opinions in this framework.

Research Methodology

In order to elucidate the topic proposed for this topic, the doctrinal-analytical research method was mainly used. However, in order to fully complete the subject, the analytical method is not sufficient, so in order to clarify the complex subject related to the protection of the animal kingdom, the logical, comparative and synthetic analysis of the normative framework, and other methods of scientific knowledge were used.

Basic content

There are various terms used in the literature which are common in meaning, but it is necessary to distinguish between animal kingdom, wildlife, fauna, wild animals, etc.

- The *animal kingdom* is the largest systematic category in biology, the totality of species of animals that live naturally on land, in water, in the atmosphere or in the soil, including monocellular, invertebrates and chordates (Law no.439, art. 2 paragraph 2).

[8] Duțu, Mircea, Duțu, Andrei, *Liability in environmental law*, Bucharest: Editura Academiei Române, 2015, p. 117.

[9] Marinescu, Daniela, *Treatise on Environmental Law*, Bucharest: 3rd edition, Universul Juridic, Bucharest, 2008, p. 291-316.

[10] Trofimov, Igor, Cretu, Andrian, Ardelean, Grigore, *Environmental Law*. Chișinău: Tipografia „Bons Offices", 2015, p. 291.

- *Fauna* means the totality of animals throughout the world, in a given region, territory or geological period, formed as a result of a historical evolutionary process. The term fauna also covers various groups of animals-mammals, domestic and wild birds, bees, fish, silkworms[11], etc. (Lupan Ernest, 1997).
- The term *wildlife* refers to all forms of life that do not depend directly on man: animal and plant life (Duțu Mircea, 1998).

Based on the above, we can conclude that some notions by meaning are more comprehensive and include the others, but the problem of applying these notions within the existing legislative framework remains.

Thus, in the Law on animal kingdom, the notion of animal kingdom is mentioned, as we have explained above, but the situation of domestic animals is not clear, we find only the statement that „relations in the field of protection and use of domestic animals kept in captivity or semi-captivity for economic, scientific, cultural-educational and aesthetic purposes are regulated by the respective legislation[12]" (Law no.439, art.1 paragraph 2). From the context of the mentioned Law it is clear that „the animal kingdom is public property". Obviously, the question arises whether a common citizen cannot own a wild or domestic animal? The situation with wild animals has its difficulties, but it is absurd to argue that domestic animals cannot constitute private property. We can deduce that the Law of the Animal Kingdom applies mainly only to the animal kingdom (i.e. wild animals) and not to domestic animals.

Referring to other specialized legislation, it can clearly be stated that the regulation of the use of domestic animals is mainly for scientific and aesthetic purposes and less for economic purposes. Overall, there is no legislation in the national legislation that would regulate the legal situation of domestic animals, which categories of animals can be included in this list, the drawing up of such a list, the keeping of records, their use and legal protection, the establishment of punishments in the event of cruel behavior towards them, etc. Therefore, it would be logical to propose a revision of the existing national legislation with the incorporation of additions and amendments.

The above-mentioned can be used as an example in Romanian doctrine and legislation, where a delimitation or simply a classification of animal protection has been made under the following headings:

- Legal protection of wild animals,
- Legal protection of domestic animals,
- Legal protection of birds (Lupan Ernest, 2001).

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[11] Lupan, Ernest, *Environmental Law*. Bucharest: Lumina Lex, 2001, p. 242

[12] Law No. 439 on animal kingdom of 27.04.1995. Official Gazette No. 62 of 09.11.1995. Available: https://www.legis.md/cautare/getResults?doc_id=132341&lang=ro#

The Romanian researcher *Ernest Lupan* defines wild animals as "those that have not been domesticized or tamed; they exist and live, in principle, without human intervention...", while domesticated animals are „those animals that have been domesticated or tamed, they live around the house and satisfy human needs in the form of food or are used for work and recreation[13]" (Lupan Ernest, 2001).

In the context of the mentioned above, we believe that the national legislation also needs more clarification in this regard.

In the following, we present a few measures and proposals for the protection and rational use of the animal kingdom in the Republic of Moldova. We believe that these measures can also be applied to the „domestic animals" issue.

Measures to enforce the protection of the animal kingdom[14] (Trofimov Igor, 2000):

- **Establishing rules, standards, time limits and other requirements for the protection, use and reproduction of the resources of the animal kingdom. The main requirements for the protection and use of animal kingdom resources in the planning and implementation processes of field activities to avoid measures that could harm:**
  - the conservation of population and species-specific gene pools in natural ecosystems.
  - degradation of habitats and breeding conditions of animals.
  - the structure and function of biocenoses.
  - maintenance of the numbers of all populations and communities of various animal groups (vertebrates, invertebrates, micro-organisms);
  - restoration of habitats and biodiversity specific to these habitats.
- **Providing for animal protection measures in landscaping, irrigation, construction, and other projects. Conservation of the wildlife gene pool can be ensured by:**
  - establishing rules and standards for the rational use of wildlife resources.
  - in land-use planning projects to avoid activities that would affect the structural elements of the National Ecological Network;
  - creating a network of protected areas with specific representativeness appropriate to the current situation;

[13] Lupan, Ernest, *Environmental Law*. Bucharest: Lumina Lex, 2001, p. 259.
[14] Trofimov, Igor, *Environmental Law. Special Part. Introductory Course*. Chişinău: 2000, p. 158-161.

- limiting the introduction of new indigenous species into natural ecosystems;
- recultivation of land affected by the extraction of underground resources;
- Establishment of comprehensive ecological monitoring in the field;
- using all means of education and publicity to promote the need to conserve the biodiversity of the animal kingdom;
- implementation of the action plans included in the Biodiversity Conservation Strategy of the Republic of Moldova.

- **Denying unauthorized use of animal kingdom resources.** The legislation in force strictly sets out how to use animal kingdom for scientific, cultural, aesthetic, etc. purposes and how to issue permits and other documents that would allow the use of animal kingdom.

- **Protection and improvement of habitat, breeding conditions and migration paths of animals.** The design and execution of clearing, irrigation, desiccation, deforestation, quarrying, the construction of various objectives, the preparation of tourist routes, the creation of recreational areas, the laying of railways, roads, pipelines, canals, dams, etc. can be carried out in conjunction with the actual implementation of measures to preserve the habitat, breeding conditions and migration routes of animals. These works shall be carried out with prior written information to the competent bodies, the public opinion, attaching the list of measures envisaged. The works may be carried out on the basis of an authorization issued by the central authority in charge of natural resources management and environmental protection.

- **Collecting payments and compensation for damage to animals and their habitat.** In cases where damage is caused to animals and the environment in which they live, the necessary measures provided for by the legislation in effect are applied.

- **Creation of state protected natural areas. Establishing the protected areas fund aims to:**
  - to regulate relations in the field of environmental protection, conservation of natural objects and complexes for the present and future generations;
  - in-depth study of natural processes in biocenoses and restoration of ecological balance in protected natural areas;
  - maintaining the gene pool within the limits of the biological capacities of natural objects and complexes;
  - holding liable natural and legal persons who have caused damage to protected natural areas;

- compliance with international conventions and agreements on protected natural areas[15] (Law No 1538, Article 6).

- **Captive reproduction of rarely species, endangered and vulnerable animals.** It is mandatory for the protection of species of rarely endangered and vulnerable animals to be protected by the state through specialized legislation and inclusion in the Red Book of the Republic of Moldova (ed. III). At the same time, the Regulation of the State Register of the animal kingdom has been drawn up, the objectives of which are:
  - inventory of animal kingdom resources;
  - characterizing the status of animal species and populations;
  - elucidation of the ecological-economic effect of animal resources;
  - selection of strategies and tactics for the protection, reproduction and rational use of the animal kingdom;
  - to develop the prognosis of the evolution of the animal population and to create the data bank.

The purpose of the Registry is to reflect the status of wildlife for the adoption of decisions by central and local public administration authorities and by institutions and organizations providing information for the Registry on the optimization of the use of animal resources and the protection of endangered, vulnerable and rare species[16] (Government Decision no.1005, art.4).

- **Restricting the movement of animals from the wild and acclimatizing new species.**
- **Regulating their livestock.** To avoid the tendency of explosive growth of the populations of various species of animals that can cause damage to the national economy or natural ecosystems, such as wild dogs, devastating insects, aggressive bees and other invasive species, it is necessary to identify and establish a mandatory registration system, taking into account the proposals of the appropriate scientific authorities.
- **To prevent animals from being killed during production processes.** Natural and legal persons are obliged to take measures to prevent the trampling of animals when carrying out agricultural work, construction work, operating means of transport, etc. It is forbidden to burn dry vegetation, store materials and production waste without observing the measures established for the prevention of animal scavenging.

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[15] Law No. 1538 of 25.02.1998 on the Fund of State Protected Natural Areas. Official Monitor of the Republic of Moldova No.66 of 16.07.1998. Available: https://www.legis.md/cautare/getResults?doc_id=131979&lang=ro#

[16] Government Decision No. 1005 of 13.09.2004 on the approval of the Regulation of the State Cadastre of the animal kingdom. Official Monitor of the Republic of Moldova no. 175 of 24.09.2004. https://www.legis.md/cautare/getResults?doc_id=113256&lang=ro#

- **Restrictions on the rights of beneficiaries and establishment of their obligations regarding the use of natural objects for the protection of the animal kingdom.** According to the legislation in force natural and legal persons may apply the ways of using wildlife resources only within the limits set by the legislation in force and on the basis of special permits. The regulation of the use of animal resources may be limited by the local public administration bodies in cases of reduction of the number of animals or withdrawal from use of some species, whose populations are in a process of essential decrease. The Law on animal husbandry directly establishes the categories of beneficiaries and lists their rights and obligations[17] (Law No. 439, Articles 21-32).
- **Importation, exportation, translocation, acclimatization and cross-breeding of animals.** Activities relating to the import, export and marketing of animals, acclimatization of indigenous species and cross-breeding of animals are allowed only on the basis of decisions of the Ministry of Ecology and Natural Resources. In the case of animal and plant collections, the protection of which is regulated by the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the import and export (re-export) of their parts and exhibits requires a CITES permit/certificate. For other species of animals and plants, parts or exhibits of the collection, it is necessary to obtain the environmental permit for import or export, in accordance with the provisions of the Procedure for the authorization of export and import activities of plants and animals of wild fauna and flora, their parts and derivatives, as well as the import/export or re-export of species of fauna and flora, regulated by the Convention on International Trade in Endangered Species of Wild Fauna and Flora - CITES[18] (Government Decision no. 1107, art.20).
- **Protection of animals in case of chemical application in the national economy.** Farmers, businesses and organizations concerned with the use, transport and storage of chemicals, as well as individuals, are obliged to comply with the rules on the application of chemicals in order to avoid the killing of animals. The application of chemicals for which maximum allowable concentrations in the environment have not been established is prohibited. The rules for the application of chemicals and the

[17] Law No. 439 on animal kingdom of 27.04.1995. Official Gazette No. 62 of 09.11.1995. Available: https://www.legis.md/cautare/getResults?doc_id=132341&lang=ro#

[18] Government Decision No. 1107 of 11.09.2003 on the approval of the Regulation on the establishment, registration, completion, preservation, export and import of collections of animals and plants of wild flora and fauna. Published: Official Monitor of the Republic of Moldova No. 204 of 26.09.2003. https://www.legis.md/cautare/getResults?doc_id=112909&lang=ro#

list of chemicals proposed for use must be coordinated with the relevant departments of the Ministry of Health, the Ministry of the Environment, the Ministry of Agriculture and the Food Industry.

Conclusions

As a result, mechanisms for the protection of the animal kingdom (as well as domestic animals) have been described, but it should be mentioned that the enumeration of these is growing day by day, as society is confronted with new ecological problems which in the end require a logical and timely solution. Environmental security is one of the basic components that make an essential contribution to ensuring the overall environmental protection and security of the state and its sustainable development.

An important place in the state policy is occupied by the solution of the problems of ensuring environmental security, which is confirmed by the Constitution of the Republic of Moldova (art. 37), which guarantees the right of every person to a healthy environment.

The effective interaction of environmental policy with measures in the field of security in general, as well as cooperation for the purpose of environmental protection, contributes to reducing the impact of economic activities, stimulating stability and safeguarding the balance of natural ecosystems, expanding political dialogue and credibility between countries and other regions.

Negative impacts, sometimes with serious consequences, on the animal kingdom can occur primarily by polluting water, air, cultivated and wild plants, etc., but also as a result of direct human activities on animals. All of these can have a number of harmful consequences for these animals, such as pain, suffering and other problems, which can and must be reduced by preventive measures or remedial measures.

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THE NOTION OF SYSTEMIC RISK OF IMPUNITY

Univ. lect. PhD. Bogdan BODEA[1]

Abstract

The notion of systemic risk of impunity is used frequently in the Romanian jurisprudence and therefore understanding the notion is an imperative for its proper usage. The article is set to analyze the content of the notion, the effects that such a risk has on judiciary activities as well as the conformity of the usage of the notion with more traditional concepts of law such as the presumption of innocence or the rule of law.

Keywords: *impunity, systemic risk, rule of law, presumption of innocence*

I. Introduction

The notion of systemic risk of impunity is a rather new notion entered recently within the judicial vocabulary and even more recently in the Romanian jurisprudence. Therefore a good understanding of such a notion is imperative for its proper usage and in order to align the concept and its effects with the rule of law.

The typical definition of impunity is summarized in a briefing of the European Parliament called ”The state of impunity in the world”. The authors of the study showed that UN Commission for Human Rights defines impunity as “the impossibility, de jure or de facto, of bringing the perpetrators of violations to account – whether in criminal, civil, administrative or disciplinary proceedings – since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims”[2].

In our opinion a systemic risk of impunity should be defined as a consequence of a regulation or a national jurisprudence that results in an improper and unlawful avoidance of liability of a certain category of persons. However there are both limits in identifying a conduct as

[1] Faculty of Law, University of Oradea.

[2] M. Diaz Crego, I. Zamfir, S. Tarpova, *The state of impunity in the world' Summary of the 2021 report on global rights by Fight Impunity* available on https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733696/EPRS_BRI(2022)733696_EN.pdf

representing such a risk and in the procedures to be followed in order to counteract or diminish the effects of such a risk.

II. Fields of application

The notion was introduced in the national jurisprudence in connection to discussions that aroused in 3 distinct situations pending in front of the Romanian national courts. The Courts referred to the European Court of Justice seeking a decision that would establish the necessity of respecting The Romanian Constitutional Courts rulings.

The referring courts pointed out that, "under national law, the decisions of the Constitutional Court are generally binding and that failure by members of the judiciary to comply with those decisions constitutes, pursuant to Article 99(ş) of Law No 303/2004, a disciplinary offence. However, as is apparent from the Romanian Constitution, the Constitutional Court is not part of the Romanian judicial system and is a politico-judicial body. In the referring, courts state that the Constitutional Court exceeded the powers afforded to it by the Romanian Constitution, encroached upon the powers of the ordinary courts and undermined the independence of the latter stating that decisions No 685/2018 and No 417/2019 include a **systemic risk** of offences intended to counter corruption going unpunished"[3].

The two decisions that the national courts referred to were issued by the Constitutional Court. In the first one, decision No 685/2018 the Constitutional Court found that a legal conflict of a constitutional nature aroused between the Parliament and the High Court of Cassation and Justice as the ruling council of the High Court decided to draw of lots for just four judges out of a five judge panel, and not for all the members of the panel. The constitutional Court found such a practice in breach of Article 32 of Law No 304/2004 and stated that the decisions issued by a panel thus unlawfully established, entailed the absolute nullity of the decision given. Romanian Constitutional Court decisions are, under Article 147(4) of the Romanian Constitution, applicable from the date of their publication to pending cases and the Constitutional court insisted that the ruling applies to cases which had been ruled upon, in so far as there was still time for individuals to exercise the appropriate extraordinary legal remedies, and future situations[4].

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[3] See the Judgment of the European Court of Justice ECLI:EU:C:2021:1034 from 21 December 2021 in case file C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, §56 available on https://curia.europa.eu/juris/document/document.jsf?text=&docid=251504&pageIndex=0&doclang=RO&mode=req&dir=&occ=first&part=1&cid=70111

[4] Decision ECLI:EU:C:2021:1034, § 60 and decision No 685/2018 of the Romanian Constitutional Court, available on https://legislatie.just.ro/Public/DetaliiDocumentAfis/208176, §192-199

In the latter, decision No 417/2019 the Constitutional Court found that there is a legal conflict of a constitutional nature between the Parliament and the High Court of Cassation and Justice, triggered by the fact that the latter had not established specialized panels to hear cases at first instance relating to corruption offences[5]. It also stated that the adjudication of a case by a non-specialized panel entailed the absolute nullity of the decision delivered and ordered that all cases which had been decided by the High Court of Cassation and Justice at first instance prior to 23 January 2019[6] and which had not become final be re-examined by specialist panels established in accordance with that provision[7].

In the third situation referred to Court, the Bihor Tribunal underlined that it is required to give a ruling, as a matter of priority, on the request for the exclusion of evidence, and it asked whether it is required to apply Decisions No 51/2016, No 302/2017 and No 26/2019 of the Romanian Constitutional Court, emphasizing that the combined effect of those three decisions mean that it is sufficient for a court to find the SRI (Romanian Intelligence Service) to have been involved in the execution of a surveillance warrant for the absolute nullity of the evidence gathering measures to be triggered and for the corresponding evidence to be excluded[8]. The Constitutional Court declared Article 281(1)(b) of the Code of Criminal Procedure unconstitutional in so far as the infringement of the provisions on the jurisdiction *ratione materiae* and *ratione personae* of the criminal investigation body did not entail the absolute nullity of decisions given (Decision No 302/2017), and found there to be a legal conflict of a constitutional nature between inter alia the Parliament and the Prosecutor's Office attached to the High Court of Cassation and Justice, as a result of two cooperation protocols concluded between the DNA[9] and the SRI over the years 2009 and 2016, in breach of the constitutional jurisdiction of the DNA, which had the effect of undermining the procedural law governing the conduct of criminal prosecutions (Decision No 26/2019)[10].

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[5] A similar situation regarded specialized panels to hear cases of tax fraud.

[6] The date at which The High Court through its competent administrative body decided that all panels are specialized ones.

[7] Decision ECLI:EU:C:2021:1034, § 95 and decision No 417/2019 of the Romanian Constitutional Court, available on https://www.ccr.ro/download/decizii_de_admitere/Decizie_417_2019.pdf, §168-172.

[8] Under art 142 of the Romanian Criminal Procedure Code any measure of surveillance must be carried out only by the judiciary (either by the prosecutor or by the judiciary police or specially designated workers within the police force) therefore the Constitutional Court excluded the intervention of non-judiciary organisms (such as the SRI) in the judicial affairs.

[9] National Anticoruption Directory .

[10] Decision ECLI:EU:C:2021:1034, § 72, 74.

Resuming the situations described above, we can conclude that in the Romanian jurisprudence the systemic risk of impunity was identified by national courts to be the consistent practice of the Constitutional Court to impose through constitutional means and prerogatives it`s interpretation upon procedural texts. The risk was perceived in relation to corruption charges brought by the prosecutors and to the way that the Constitutional Court rulings might have influenced the decisions on merits of the national courts.

In its ruling, the European Court of Justice stated that "Article 325(1) TFEU, read in conjunction with Article 2 of the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests, signed in Brussels on 26 July 1995, and Decision 2006/928 are to be interpreted as precluding national rules or a national practice under which judgments in matters of corruption and value added tax (VAT) fraud, which were not delivered, at first instance, by panels specialized in such matters or, on appeal, by panels all the members of which were selected by drawing lots, are rendered absolutely null and void, such that the cases of corruption and VAT fraud concerned must, as the case may be further to an extraordinary appeal against final judgments, be re-examined at first and/or second instance, where the application of those national rules or that national practice is capable of giving rise to a systemic risk of acts constituting serious fraud affecting the European Union's financial interests or corruption in general going unpunished."[11]

It also added that "Article 2 TEU, the second subparagraph of Article 19(1) TEU and Decision 2006/928 are to be interpreted as not precluding national rules or a national practice under which the decisions of the national constitutional court are binding on the ordinary courts, provided that the national law guarantees the independence of that constitutional court in relation, in particular, to the legislature and the executive, as required by those provisions. However, those provisions of the EU Treaty and that decision are to be interpreted as precluding national rules under which any failure to comply with the decisions of the national constitutional court by national judges of the ordinary courts can trigger their disciplinary liability." [12]

In the wake of this decision The Bihor Tribunal decided that a systemic risk of impunity cannot be excluded when the application of the jurisprudence of the Constitutional Court in conjunction with the implementation of national provisions has the effect of avoiding the effective and dissuasive sanctioning of a well-defined category of persons,

[11] Decision ECLI:EU:C:2021:1034, dec. § 2.
[12] Decision ECLI:EU:C:2021:1034, dec. § 3.

or when such a risk would question the objective pursued by both Article 325(1) TFEU and Decision 2006/928, which is to combat high-level corruption by means of effective and dissuasive sanctions[13]. In essence the Court ruled that the exclusion of evidence requested by the defendants on the grounds that the Constitutional Court sanctioned the interference of the SRI in criminal cases is inadmissible.

III. Inconsistencies and limitations

We have a different opinion in respect of the systemic risk identified by the Romanian Courts. As it is true that a consistent practice that tends to ensure the impunity of a certain category of persons might be considered a systemic risk of impunity that needs to be tackled, we find that it is hard to consider such a risk in relation to the law.

Firstly we argue that the decisions of the Constitutional Court are to be regarded, as law in the proper sense of the word, in respect to the jurisprudence of the ECHR. The Court stated in *Del Rio Prada v. Spain* that the notion of law consist both of domestic legislation and **case-law** if requirements of accessibility and foreseeability are met[14]. The decisions of the Constitutional Court are public, issued by a constitutionally invested authority, are published in the Official Gazette and meet all the requirements of accessibility and foreseeability.

Secondly exceptions from criminal liability in respect to certain categories of people were always permitted and did not infringe the rule of law, nor cause a systemic risk of impunity. Some obvious examples are the minors under the age of 14, irresponsible people or persons that are granted immunity or special impunity[15]. Of course the reasons behind these impunities are obvious, but as a matter of fact, such impunities exist, and it is up to the legislator to decide the implementation of such impunities. We don't argue that there is a need for a reasonable social demand for such impunity to exist, but that analysis should not be the prerogative of the judicial bodies but of the Parliament as only this institution is habilitated to pass laws.

We argue that the national Courts should not be able to disregard provisions of the law without a proper procedure, and the decision ECLI:EU:C:2021:1034 cannot be regarded as providing one. Any other interpretation would mean that the national Courts, at any level might construct their own version of the law as they see fit, and thus the

[13] Decision of 30 august 2022, issued by the Bihor Tribunal in file no. 3507/111/2016, unpublished.

[14] Decision Del Rio Prada v. Spain, Judgment of 21 October 2013, available on , §91.

[15] For instance in respect to corruption offences, the person that denounces in accordance to article 290 paragraph 3 of the Romanian Criminal Code an act of active corruption.

foreseeability of the incrimination imposed by art. 7 of the ECHR is undermined.

The need to respect the rule of law implies 3 things: the independence of the judiciary, a clear set of legal norms and guarantees of respect for fundamental rights. The principal of separation of powers implies that the judiciary cannot substitute themselves to the Parliament. The Constitutional Court is regarded to be a negative legislator and thus a part of the legislative power.

Of course national courts are always allowed to interpret a legal provision and can disregard a general norm in respect to a special one. But both provisions (general and special) must exist and be specific enough to meet the foreseeability requirement. They should not be created by the judiciary thorough its own system of values.

Thirdly, it is impossible to regard the decisions of the Constitutional Court as judicial practice as they are to be qualified as law both form the standpoint of the jurisprudence of the ECHR and the belonging of the Court to the legislative power.

A general practice of the judicial bodies situated outside the law must be regarded as a systemic risk of impunity, but even that risk has to have a certain degree of severity in order for its elimination to be necessary. For instance the former Romanian Criminal Code incriminated the offence of adultery, but that offence was not prosecuted as a result of a general practice of the judicial body. Such a conduct can be regarded as a systemic risk of impunity but we doubt that anyone can argue that it should have been acted upon.

We cannot argue that a systemic risk of impunity upon corruption charges is insignificant. It should be fought. But we argue that prohibiting, as a general rule, a non-competent body to intrude in the private life of the individuals in order to perform illegal surveillance, in disregard of article 8 of the European Convention on Human Rights and furthermore to exclude evidence obtained by such means, cannot be regarded as a systemic risk of impunity, even if the case relates to corruption.

Illegally obtained evidence should not be permitted to be presented to the Court, independent of the nature of the case, be as it might a corruption case, and independent of the final outcome of the case if those evidence were to be excluded. The alternative implies, in our opinion, the return in the dark ages of criminal procedure.

The ruling of keeping such evidence is a flagrant breach of the presumption of innocence as the judge has to argue that such evidence is needed for a conviction in a priority case (a corruption case which by hypothesis constitutes a legitimate target under EU regulations). Under such perspectives we might go even further and be able to argue the

inadmissible conclusion that the presumption of innocence constitutes the primordial systemic risk of impunity, as the lack of such a legal presumption would ensure the conviction of almost any person accused.

IV. Conclusions

The systemic risk of impunity exists in almost all judicial systems. However for it to be fought, we consider that it needs to be an effective risk, with a certain degree of severity, unacceptable in a democratic society. The risk should be a consequence of a regulation or a national jurisprudence that results in an improper and unlawful avoidance of criminal liability of a certain category of persons.

Securing a fundamental right such as the right to privacy raises additional questions in respect to the proportionality test of fighting a systemic risk of impunity, and under the pretext of fighting such a risk the law cannot be amended by national courts.

THE EFFECTS OF ANTI-COMPETITIVE AGREEMENTS ON BOTH ENTERPRISES AND CONSUMERS

Phd. Candidate. Aurelian Gheorghe MOCAN[1]

Abstract

I will start off with an analysis of this form of anti-competitive practice [2]*, which is defined as a form of collaboration between companies, with the aim of reducing the pressures on the market, which lead business owners to innovate and improve their offers in terms of price and quality both of goods and services. As a result, anti-competitive agreements can harm the interests of consumers, who end up paying more for goods and services of inferior quality than they would pay in a competitive market*[3]*.*

The doctrine emphasizes that competition law has always been important for the European Union, in the terms of covering anti-competitive agreements between companies, abuse of dominant position /undue influence and concentrations[4]*.*

Keywords: *anti-competitive agreements, enterprises and consumers, European jurisdiction on competition law*

[1] Associate teaching staff at the Faculty of Law and Social Sciences, University "1 Decembrie 1918" Alba Iulia; PhD. Candidate at the University "Nicolae Titulescu" Bucharest.

[2] The anti-competitive forms practiced by companies, according to the relevant doctrine, are classified into four categories: anti-competitive agreements between companies, abuse of a dominant position (monopoly), economic concentration operations between companies, as well as state aid. Ioan Lazăr, *Dreptul Uniunii Europene în domeniul concurenței*, Editura Universul Juridic, București, 2016, p. 156.

[3] *Ibidem*, Ioan Lazăr, p. 156. The author refers to a material published by the European Commission, *Politica în domeniul concurenței,* Oficiul pentru Publicații Oficiale ale Uniunii Europene, Luxemburg, 2014, p. 5. The renowned doctrinaire also brings into discussion a remark of an interwar author on this topic, who showed that "*Agreements between producers - cartels or trusts - disrupt the functioning of the mechanism of free competition, and can often provide them with privileged situations. Adaptation between production and consumption, through the game of prices, in free competition, is often achieved only with serious difficulties and significant losses of labuor and capital.",* being a scientific work of interwar reference: V.V. Bădulescu, T*ratat de politică comercială, comerț exterior și schimburi comerciale*, Editura Scrisul Românesc SA, Craiova, 1945, p. 15.

[4] P. Graig, G. De Búrca, *Dreptul Uniunii Europene*, Editura Hamangiu, ediția a IV-a, București, 2017, p. 1185.

1. Brief general considerations on the effects of anti-competitive agreements from the perspective of European legislation and doctrine

We consider of great importance the referral to the European source of the present matter, so we mention art. 101 (ex-Article 81 TCE) of the Treaty on the functioning of the European Union [5], which provides that:

1) The following practices, considered incompatible with the internal market, are strictly forbidden: any agreement between companies, any decision of business associations, and any practice that may affect trade between member states and that have as their object or result the prevention, restriction or distortion of competition within the common market. I particularly point out those practices that: (a) establish, either directly or indirectly, the purchase or sale prices or any other trading conditions; (b) limit or control production, marketing, technical development or investments; (c) divide markets or supply sources; (d) offer their business partners unfair terms and conditions in exchange of equivalent services, creating, therefore, a competitive disadvantage for the latter; (e)force their business partners into accepting, before closing a contract, some additional services that are not in accordance with commercial usages, nor related to the subject of the contracts.

(2) Agreements or decisions forbidden under the present article are null and void.

(3) However, the provisions of paragraph (1) may be declared inapplicable in the case of: any agreements or categories of agreements between enterprises; any decisions or categories of decisions of business associations; any agreed practices or categories of agreed practices leading to the improvement of the production or distribution of goods or to the support of technical or economic progress, at the same time, ensuring consumers a fair share of the gains, and that: (a) do not force unnecessary restrictions upon companies, unless these restrictions are vital for goal achievement; (b) do not create the possibility for companies to eliminate competition for a great part of the products concerned.

We note that the European legislator forbids any agreements between enterprises, any decisions of associations of enterprises and any agreed practices that may affect trade between member states and that have as their object or effect the prevention, restriction or distortion of competition within the common market; afterwards, they make reference "in particular" to certain cases, which stress out the idea of an exemplifying enumeration, an aspect underlined in the doctrine[6].

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[5] JO series L no. 115 of May 9th, 2008, p. 0088 – 0089. (https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX%3A12008E101%3AEN%3AHTML).

[6] *Idem*, Ioan Lazăr, p. 156.

However, the structure "in particular" allows us to understand the great importance of these examples of anti-competitive manifestations, leaving, of course, space to identify any such manifestations, in accordance with the general rule of regulation, leaving it up to jurisprudence and doctrine to make the necessary additions permitted under the regulation, with the purpose to provide wider protection against anti-competitive agreements.

From the perspective of the forms of consolidated cooperation, within the legal framework of the European Union, it has been established that they must obey the treaties and the Union law, so that they are not to harm the internal market or economic cohesion[7].

2. Transposition of the institution into domestic legislation

Following the principle of the preeminence of European Union law in relation to domestic law, which sources from old European laws and jurisprudence, we refer to several legal issues [8].

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[7] Article 326 — (ex. Articles 27a to 27e, 40 to 40b and 43 to 45 TEU and ex Articles 11 and 11 a TEC)

[8] First of all, for a good understanding of the actual consequences that European Union law proposes, it is important to reiterate that according to art. 9 of the Treaty on the European Union, "Any person who has the citizenship of a member state is a citizen of the Union". This last thesis of this article enshrines an extremely generous idea, apparently theoretical, but, we believe, with concrete legal values, in the obvious sense that Union Citizenship does not replace national citizenship, but is added to it. With reference to this relationship between the European Union and the internal legislation, we mention case no. 26-62 NV Algemene Transporten Expeditie Odrneminingvan van Gend en Loos v. Nederlandse Adiministratie der Belastigen, Judgment of the Court of February 5th, 1963, request for a preliminary ruling. It is a pioneering matter. The European court mentioned, for the first time, the establishment of a new order of international law, in favor of which the states limited their sovereign rights. The direct effect of community law (today of the European Union), was later enshrined in the case no. 6/64, from 1964 Flaminio Costa v. ENEL, by which the European Court of Justice argues that Community law must be given priority over national law. In addition, we understand to refer to a relevant doctrine, which evokes the fact that the principle of the supremacy of Community law did not benefit from a legal basis in the EC Treaty, but was developed by the CEJ based on its conception of the new legal order, P. Craig, Gráinne De Búrca, *European Union Law*, *op. cit.* p. 431.
This jurisprudence, of reference accompanied by a suitable doctrine, was followed by a specific regulation, through art. 6 of (ex-Article 6 TEU (1), which stipulates that the Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of December 7th, 2000, as adapted on December 12th, 2007, in Strasbourg, which has the same legal value as the Treaties. The provisions contained in the Charter do not in any way extend the competences of the Union as defined in the Treaties. The rights, freedoms and principles set out in the Charter shall be interpreted in compliance with the general provisions of Title VII of the Charter on the interpretation and implementation and with due consideration of the explanations mentioned in the Charter, which provide for the sources of these provisions. (2) The Union accedes to the European Convention for the Protection of Human Rights and Fundamental Freedoms. The powers of the Union, as defined in the Treaties, are not modified by this accession. (3) Fundamental

rights, as they are guaranteed through the European Convention for the Protection of Human Rights and Fundamental Freedoms and as it results from the constitutional traditions common to the member states, constitute general principles of Union law.
A natural position of the European institution can be found in the act regarding the accession conditions of the Republic of Bulgaria and Romania and the adaptations of the treaties on which the European Union is founded, mentioned as such in the Official Journal of the Union no. 357, 31.12.1994, p. 2, agreement as last amended by Decision no. 2/2003 of the EU/Romania Association Council of 25.9.2003. (https://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:12005SA&from=FR), in the extent in which Bulgaria and Romania adhere to the conventions and protocols listed in Annex I, Bulgaria and Romania committing to introduce, with regard to the conventions and protocols provided for in paragraph (3) - which oblige these states to develop and implement an action plan and an updated and integrated strategy for the reform of the judicial system, including the main measures for the implementation of the Law on the organization of the judicial system, the Law on the status of magistrates and the Law on the Superior Council of the Magistracy, which entered into force on September 30, 2004 and to considerably accelerate the fight against corruption, especially against high-level corruption, by ensuring a rigorous application of anti-corruption legislation and the effective independence of the National Anti-Corruption Prosecutor's Office (currently DNA), as well as through the annual presentation, starting from November 2005, of a convincing report of the PNA activity in the fight against corruption at the high level. The National Anticorruption Prosecutor's Office must be provided with personnel, financial and training resources, as well as the necessary equipment to fulfill its vital function, administrative measures and of any other nature, such as those adopted up to the date of accession by the current member states or by the Council, and to facilitate practical cooperation between public authorities and member state organizations.
We consider that these provisions recognize and strengthen, by reference, somewhat indirectly, the direct effect of European law and its priority effect in relation to the domestic law of the member states.
The Treaty does not expressly enshrine the supremacy of European Union law over the national legislation of the Member States, but it is attached to Declaration no. 17 on supremacy - published in the Official Journal 115, 09/05/2008 p. 0344 – 0344 -, relevant document on the supremacy of EU law, which refers to the Legal Service of the Council and reiterates the constant jurisprudence of the Court of Justice of the European Union to the consolidated version of the Treaty on the Functioning of the European Union (Deed number is 12008E/AFI/DCL/17 being part of the category of declarations annexed to the Final Deed of the Intergovernmental Conference that adopted the Treaty of Lisbon signed on December 13th, 2007 - A. DECLARATIONS REGARDING THE PROVISIONS OF THE TREATIES - 17. Declaration e). The act contains an extremely relevant mention, in the sense that, "The Conference recalls that, in compliance with the constant jurisprudence of the Court of Justice of the European Union, the treaties and the legislation adopted by the Union based on the treaties have priority in relation to the law of the member states, under the conditions provided by the aforementioned jurisprudence". In addition, the Conference decided that the Opinion of the Legal Service of the Council of June 22nd, 2007, as it appears in document 11197/07 (JUR 260), be annexed to that final deed, the deed having the following content: "It appears (...) that, arising from an independent source, the right born from the treaty could not, given its original specific nature, be legally opposed by an internal text regardless of its nature, without losing its community character and without questioning the legal foundation of the Community itself".

The national legislator acted properly, by transposing the provisions of the treaty on competition of European legislation into domestic legislation.

Art. 148 of the Romanian Constitution provides in paragraph. (2) that, as a result of the accession, the provisions of the constitutive treaties of the European Union, as well as the other legally-binding community regulations, have priority over the contrary provisions of the domestic laws, respecting the provisions of the act of accession. The provision underlines the priority of European Union law in relation to domestic law, even in the context of some gaps in the Treaty, which should, perhaps, have entailed, expresisverbis, the effect of direct and priority applicability of European Union law, in relation to the internal law of member states.

In the context of constitutional obligation, passing of legislation regulating competition in accordance with that of the European Union was inevitable.

Competition Law no. 21/1996, republished[9], transposes European competition regulations, which is an inevitable aspect, not only from the perspective of obligations stemming from international obligations, but also from the perspective of national aspirations to obey fair rules of a free market, in the context of political options that are not debated upon, but with obvious legal consequences, namely a direct connection to the international legislation regulating competition in most powerful countries , and a voluntary compliance to the jurisdiction of the European Union courts. Therefore, we consider that all our domestic legal endeavors will only bring about beneficial effects to the internal legal order.

We also mention that Law 11/1991[10] on fighting unfair competition was adopted with the aim of ensuring fair competition, according to fair

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Practically, therefore, by means of this Declaration an indirect control is ensured on the way of complying with the law of the European Union in the internal legislation of each national member State and directly by the Court of Justice of the EU, one of the most important institutions of the European Union (art. 13 TUE).

Another important reference related to the jurisprudence of the Court of Justice of the European Union is related to the fact that the supremacy of Community law is a fundamental principle of European Union law. On the date of the first judgment within this acknowledged jurisprudence (the judgment of July 15th, 1964, in case 6/64, Costa/ENEL [1]), supremacy was also not mentioned in the Treaty. It is expected that at the present time and for the future, the Court of Justice of the European Union will maintain a jurisprudence in this regard.

[9] He Law was initially published in the Official Gazette f. 153 of April 10th, 1996, subsequently republished pursuant to art. III of Law no. 347/2015 for the approval of the Government Emergency Ordinance no. 31/2015 for the amendment and completion of the Competition Law no. 21/1996, Official Gazette 153 of 2016.02.29, giving the texts a new numbering.

[10] Published in the Official Gazette, May 24th, 1991.

practices and the general principle of good faith, to protect the legitimate public and/or private interest, by complying with criminal and civil contravention law rules, as it may be the case and the Regulation from November 24th, 2014[11] regulating the procedure of assessing and sanctioning unfair competition practices issued by the Competition Council.

Art. 7 of the explanatory statement of the Regulation of national courts of law holds an essential role in the enforcement of Community competition rules (EU rules, in the current European legislative context). When settling legal disputes between private persons, they protect the subjective rights provided for by Community law, for example by awarding damages to the victims of the infringement. In this sense, the role of the national courts is complementary to that of the competition authorities in the member states. They should therefore be allowed to fully apply Articles 81 and 82 of the Treaty (currently Art. 101, 102 TFEU).

3. National and European jurisdiction on competition law

When referring to the role of national courts of law in sanctioning anti-competitive agreements, we highlight a relevant doctrinal opinion[12] according to which national courts of law, defined as "*courts of common law of the legal order of the European Union*", which have to base their ruling on two inseparable laws, national law and Union law - abstractly inseparable.

When referring to the current context of jurisprudence in the issue here presented, we underline another doctrinal opinion [13], which shows that the great increase in the volume of international trade in the last decades and the passing of national regulations concerning competition in more and more countries in the world have led to the need to coordinate regulations and, implicitly, of existing national policies in this area, aiming to diminish private and public barriers to international trade, therefore avoiding regulatory conflicts and streamlining the pursuit of anti-competitive acts that would have negative effects that go way beyond the national borders of every single state.

Preliminarily, we make reference to Regulation (EC) no. 1/2003[14] of the Council of December 16, 2002 regarding the enactment of the

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[11] Published in the Official Gazette no. 918 of 2014.12.17.

[12] M. Şandru, M. Banu, D. Călin, *The preliminary referrals of the courts in Romania to CJUE*, în Culegere adnotată de jurisprudenţă, (2007 -2013), vol. I, Editura Universitară, Bucureşti, 2014, p. XIII, apud. I. Lazăr, *op. cit.*, p. 228.

[13] I. Lazăr, *op. cit.*, p. 149.

[14] Council Regulation (EC) no. 1/2003 of December 16th, 2002 (hereinafter, the Regulation) regarding the implementation of the competition rules established in art. 81 and 82 of the Treaty, published in Official Gazette series L no. 1 of January 4th, 2003. In order to understand the spirit of this essential regulation for combating anti-competitive

competition rules provided for in art. 81 and art. 82 of the treaty (hereinafter the Regulation), and Regulation (EC) no. 1419/2006, and we recall the principle of direct applicability of European Union regulations. These regulations detailing the conditions of application of the treaty have been duly transposed into domestic law.

The doctrine highlighted, when referring to agreements, decisions and agreed practices, that the regulation also establishes a series of principles according to which the agreements, decisions and practices mentioned in art. 101 paragraph. 1 TFEU, which do not meet the conditions provided for in para. 3 of the same articles, are forbidden without a prior decision in this regard: the agreements, decisions and practices mentioned in art. 101 para. 1 TFEU that meet the conditions set out in para. 3 of the same articles are not forbidden, without a prior decision in this regard[15]. The same doctrinal source also mentions that in any national or Union procedure regarding the application of art. 101 TFEU, the *weight of proof* is different depending on the situation to which it refers, in the sense that the burden of proof of a *violation* of art. 101 para. 1 TFEU rests with the party or authority claiming the law violation, and the burden of proof in the case of the enterprise or association of enterprises that invokes the *benefit* of art. 101 para. 3 TFEU rests with it, as well as that the burden of proof of a breach of art. 101 para. 1 TFEU rests with the party or authority claiming the breach.

Art. 7 of the explanatory statement of the Council Regulation (EC) no. 1/2003 mentions that national courts of law have an essential role in the

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practices, we believe it is important to highlight a statement from the recitals from point 1. of the Regulation, which justifies the regulation with the formula "to establish a system to guarantee that competition on the common market is not distorted". The Regulation does not prevent Member States from adopting and applying on their territory stricter national legislation that prohibits or sanctions unilateral conduct adopted by businesses. The Regulation also mentions, with reference to the national Courts, that they have an essential role in the application of Community competition rules. When settling disputes between private law persons, they protect the subjective rights provided for by Community law, for example by awarding damages to the victims of the infringement. In this sense, the role of the national courts is complementary to that of the competition authorities in the member states. Therefore, they should be allowed to fully apply Articles 81 and 82 of the Treaty. Specifically, it is about Art. 7 of the statement of reasons of Council Regulation (EC) no. 1/2003 which mentions that national courts have an essential role in the application of Community rules (EU rules, in the current European legislative context) of competition. When settling disputes between private law persons, they protect the subjective rights provided for by Community law, for example by awarding damages to the victims of the infringement. In this regard, the role of the national courts is complementary to that of the competition authorities in the member states. They should therefore be allowed to fully apply Articles 81 and 82 of the Treaty (currently Art. 101, 102 TFEU).

[15] I. Lazăr, op. cit. p. 216.

application of Community competition rules (EU rules, in the current European legislative context). When settling disputes between private persons, they protect the subjective rights provided for by community law, for example by awarding damages to the victims of the infringement. In this sense, the role of the national courts is complementary to that of the authorities regulating competition in the member states. Therefore, they should be allowed to fully apply Articles 81 and 82 of the Treaty (the source of the matter was later transferred to Articles 101, 102 TFEU).

As for the procedure of legal remedy of such anti-competitive practices , we point out that art. 3 paragraph 1 of the Regulation Act provides that when competition authorities of the member states or national courts of law apply national competition legislation to agreements, decisions of business associations or agreed practices (as stipulated in Article 81 paragraph (1), also mentioning previous renumbering), of the Treaty, which may affect trade between member states within the meaning of this provision, they shall also apply Article 81 of the Treaty to such agreements, decisions and practices.

The competences of the competition authorities of the member states, acting ex officio or as a result of a complaint, take the form of the following decisions: to require cessation of an infringement; to order provisional measures; to give fines, comminatory sanctions or other sanctions provided for by their national law. We note here the obvious option to assign the national courts a primary role to resolve such disputes (we emphasize that it is about substantive procedural competence, procedural primacy does not concern aspects of substantive law, as it is about an indisputable preeminence of European Union Law) in conjunction with the current stage of European integration.

Art. 7 para. 1 of the Regulation provides that if the Commission, whether acting as a result of a complaint or ex officio, finds that there is a violation of Article 81 or 82 of the Treaty, it may request through a decree the cessation of law violation by the enterprises and associations of enterprises in question. TAs to do so, the Commission may also impose any behavioral or structural corrective measures proportional to the infringement and necessary for the effective cessation of the infringement. Structural corrective measures should only be imposed when there is no equally effective behavioural corrective measure, or when an equally effective behavioural corrective measure would be more onerous for the business involved than a structural corrective measure. When the Commission has a legitimate interest in acting this way, it may also find out about past law violation. The Regulation also provides, in paragraph (2), that any private or legal person with a legitimate interest as well as any member state can file a complaint within the meaning of paragraph (1).

Art. 8 of the Regulation provides the possibility of provisional measures, which should not come as a surprise, as they also exist in the legislation of the member states.

A really interesting legal institution, regulated by art. 9 of the Regulation, is related to the manner in which the Commission undertakes commitments. It is stipulated that when the Commission intends to adopt a decision to order cessation of infringement while businesses propose engagements to address the concerns laid out in the preliminary assessment of the Commission, the Commission may decide to make those engagements binding on businesses. Such a decision may be adopted for a limited period and may also conclude that there are no longer grounds for the Commission to proceed. The regulation stipulates that the Commission may order, upon request or ex officio, to reopen the procedure: in case there is a significant change regarding any of the facts the decision has been based upon, in case the companies in question act contrarily to their engagements or in case the decision was based on incomplete, inaccurate or misleading information provided by the parties.

With regard to this Regulation, which is most important to the matter of competition, we also point out, without any claim of exhaustive analysis, that the regulations referring to the cooperation between the Commission and the competition authorities of the member states, in art. 12, state that the Commission and the competition authorities of the member states may exchange or use as evidence any issue in fact or law, including confidential information. A complete analysis of art. 12 of the Regulation reveals, however, that the protection of personal data is respected by this legislation. Para. 2 of the articles in question states that the exchanged information cannot be used as evidence except for the relevant provisions of the treaty and for the purpose for which it has been collected by the authority that transmits it. However, when national competition law and Community (currently EU) competition law are being applied simultaneously in the same case, and the result does not differ, the information exchanged under this article can also be used when applying national competition law. This provision should not come as a surprise, because the information exchange cannot exempt national jurisdiction from access to vital information so as to allow a fair and thorough settlement; but the lack of such information leads to unfair settlement of some disputes of the matter.

We also point out that paragraph (3) of art. 12 of the Regulation states that the information exchanged according to paragraph (1) may be used as means of evidence to order sanctions to private persons when the legislation of the transmitting authority offers similar sanctions in case of violation of article 101 or 102 (former 81 or article 82 in the old numbering) of the Treaty or, in case they are not provided, the information has been obtained in a way that ensures the same degree of protection of private persons'

defense rights as provided by the national rules of the authority receiving the information. However, in this case, the exchanged information cannot be used by the receiving authority to order custodial sanctions.

When it comes to the above interdiction, which refers to the use of exchanged information to impose custodial measures, we note the reasonableness of the regulation, both substantial and procedural, which prevents a transfer of a certain category of information, for which the European legislator established a preset legal regime, with a clear purpose, related to a civil area of some deviations of the matter of competition, towards the criminal area of prevention measures. This does not mean, however, that we ignore the importance of the criminal side, as an essential means of defense against anti-competitive agreements[16]. They exist, they are stipulated as such in the national law of some of the member states, but we emphasize that the European legislator did not wish to establish an institution to deal with information exchange, as an opportunity to substantiate prevention measures.

We also find it necessary to make reference to the suspension or termination of proceedings, to the Advisory Committee on Agreements and Dominant Positions, to cooperation with national courts of law, the uniform application of Community competition law, to powers regarding investigations into economic sectors and types of agreements, requests for information, powers to take statements and perform inspections, including premises, of the Commission, the investigations of the competition

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[16] We highlight the fact that not all states incriminate such practices, EU legislation does not impose such legislation on member states. For a more in-depth study with reference to the options of the legislative bodies in the member states to criminalize such acts or not, we refer to the work of the author I. Lazăr, *op. quote* p. 231.
With reference to the internal legislation, we point out that art. 63 of Law no. 21/1996 (Competition Law), republished [16], provides that *"(1) The act of any person who exercises the position of manager, legal representative or who exercises in any other way management functions in an enterprise to conceive or organize, with the intention, any of the prohibited practices according to the provisions of art. 5 para. 1 and which are not exempted according to the provisions of art. 5 para. 2 constitutes a crime and is punishable by imprisonment from 6 months to 5 years or a fine and the prohibition of certain rights.*
(2) No punishment shall be imposed on the person who, even before the criminal investigation has begun, denounces to the criminal investigation bodies his/her participation in the commission of the offense provided for in paragraph. 1, thus allowing the identification and prosecution of the other participants.
(3) The person who committed the offense provided for in para. 1, and during the criminal prosecution denounces and facilitates the identification and criminal prosecution of other persons who have committed this crime, benefits from the halving of the punishment limits provided by law.
(4) The provisions of para. 1 and 2 do not apply to the practice prohibited by art. 5 para. 1 lit. f), when this is done by agreement between the participants in a public auction in order to distort the award price, in which case the regulations specific to this field apply.
(5) The court orders the posting or publication of the final judgment of conviction".

authorities of the member states, the various sanctions such as fines, comminatory penalties, prescription periods[17], the hearing of the parties, the plaintiffs and other third parties, the respect of professional secret, exemption regulations, as well as those related to the publication of decisions[18]. Article 31 of the Regulation, with reference to the control exercised by the Court of Justice, states that it "has full competence regarding the actions brought against the decisions issued by the Commission to give a fine or order a comminatory penalty. The Court of Justice can eliminate, reduce or increase the fine or the comminatory penalty".

[17] We note a natural and important distinct regulation of the limitation periods of the substantive right to action and the right to forced execution - contained in the Regulation at art. 25 and 26 of ch. VII of this normative deed.

[18] Para. (2) of art. 30 of the Regulation provides that the publication indicates the names of the parties and the main content of the decision, including the applied penalties. This takes into account the legitimate interest of businesses in protecting their trade secrets.

MODIFICĂRI ALE LEGII SOCIETĂȚILOR NR. 31/100 ÎN MATERIA VĂRSĂMINTELOR PARȚIALE. COMENTARII ASUPRA ARTICOLULUI 9[1], AȘA CUM A FOST MODIFICAT ȘI COMPLETAT PRIN LEGEA NR. 265/2022

dr. Sebastian Bodu, MBA[1]

Rezumat

Prin Legea nr. 265/2022 a fost modificată Legea societăților nr. 31/1990. Obiectul principal al Legii nr. 265/2022 este o nouă reglementare a activității de registru al comerțului, abrogându-se legea anterioară, nr. 26/1990. Pe lângă activitatea de registru, Legea nr. 265/2022 aduce importante modificări legislației societare. Una dintre aceste modificări este posibilitatea asociaților unei societăți cu răspundere limitată de a plăti în rate părțile sociale subscrise cu ocazia constituirii societății. Modificarea apare ca o preluare neinspirată și incompletă a procedurii de la societatea pe acțiuni. În primul rând, practica arată că nu există o valorificare a vărsămintelor parțiale nici măcar la societățile pe acțiuni, deci o justificare economică pentru preluarea lor la societatea cu răspundere limitată nu există. În al doilea rând, vărsămintele parțiale la societatea cu răspundere limitată au un termen (de 3 luni) la termen (de 12/24 luni). În al treilea rând, lipsa vărsămintelor integrale, inclusiv în intervalul de 12/24 luni, duce la imposibilitatea oricăror activități, sub sancțiunea penală de la art. 275 alin. (1) lit. c) din Legea nr. 31/1990.

Summary

The Companies Law no. 31/1990 was amended by Law nr. 265/2022. The main object of Law no. 265/2022 is a new regulation of the activity of the trade registry, repealing the previous law, no. 26/1990. In addition to the register activity, Law nr. 265/2022 brings important changes to the corporate legislation. One of these changes is the possibility for the members of a limited liability firm to pay in instalments the shares subscribed when the firm is formed. The change appears as an uninspired and incomplete takeover of the procedure from corporations. First, practice shows that there is no valorification of partial payments even in corporations, therefore, there is no economic justification for taking them over with the limited liability firm. Secondly, partial payments to the limited liability firm have a term (3 months) within (12/24 months). Thirdly, the lack of full payments, including during the period of 12/24 months, leads to the impossibility of any activities, under the criminal sanction of art. 275 para. (1) lit. c) of Law no. 31/1990.

[1] Universitatea „1 Decembrie” Alba Iulia, Facultatea de Drept și științe sociale.

Subscriitorul devine în urma subscripţiei proprietarul titlurilor de participare, fiind la rândul său ţinut să îşi execute obligaţia corelativă constând în plata lor, obligaţie ce poartă denumirea specifică de „vărsământ" (în ceea ce priveşte partea reprezentând valoarea nominală), corespunzător noţiunii de liberare din dreptul comun[2]. Vărsământul aferent titlurilor se face integral la momentul subscripţiei sau parţial la subscripţie şi restul ulterior, în funcţie de forma şi tipul societăţii. La societatea cu răspundere limitată, Legea societăţilor nr. 31/1990, aşa cum a fost modificată prin Legea nr. 265/2022, vărsămintele minime iniţiale trebuie realizate în trei luni de la momentul înmatriculării, iar restul într-un nou termen ce începe să curgă de la expirarea termenului de trei luni. Vărsămintele minime iniţiale sunt de 30%.

Plata parţială este o situaţie excepţională acceptată doar în anumite situaţii în care se găsesc societăţile pe acţiuni de tip închis şi, odată cu Legea nr. 265/2022, cele cu răspundere limitată. În cazul celor pe acţiuni, actuala practică nu este generoasă în exemple de vărsăminte parţiale, iar în cazul celor cu răspundere limitată, posibilitatea nou introdusă în lege (art. 9^1 alin. (2) este oarecum inexplicabilă, dată fiind inexistenţa unei practici la cele pe acţiuni.

Din punctul de vedere al societăţii, plata parţială ulterioară subscripţiei este o facilitate excepţională motivată de nevoia de a uşura sarcina investitorilor cărora societatea în curs de constituire continuată se adresează. Ideea originară a Codului comercial[3] era aceea că facilitatea se justifica atunci când investiţiile efectuate sub forma de aport la capitalul social sunt semnificative şi, deci, o eşalonare în timp a subscripţiilor investitorilor apărea normală (întocmai ca o linie de credit bancară). Aceasta în condiţiile în care societăţile pe acţiuni erau, la început, constituite exclusiv prin subscripţie publică şi apoi listate pe bursă. O obligaţie de vărsământ integral ar fi fost, în viziunea legiuitorului antebelic, excesivă pentru acţionari, societatea nefiind neapărat în situaţia de a avea nevoie de întregul aport astfel că o plată integrală ar fi generat doar un cost inutil de oportunitate pentru aceştia. În prezent, Legea

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[2] I.L. Georgescu, *Drept comercial român*, Editura All Beck, Bucureşti, 2002, vol. II, p. 27.

[3] Pentru o opinie conform căreia vărsământul parţial prevăzut de Legea societăţilor este inspirat de legea franceză a societăţilor din 1966, a se vedea Simona Dumitrache, *Consideraţii despre momentul când se naşte dreptul de vot în cazul acţiunilor subscrise şi neliberate integral*. Revista de drept comercial nr. 10/2001, p. 65. În realitate vărsământul parţial există deodată cu Codul comercial, încă de la adoptarea lui în 1895. E adevărat că atât codul italian (după care s-a inspirat legiuitorul nostru), cât şi codul francez ori alte legislaţii europene au prevăzut dintotdeauna această facilitate.

nr. 24/2017 privind *emitenţii de instrumente financiare şi operaţiuni de piaţă* exclude societăţile admise la tranzacţionare pe o piaţă reglementată de la posibilitatea plăţii parţiale (art. 53), una din condiţiile admiterii la tranzacţionare fiind plata integrală a acţiunilor. La societăţile constituite prin subscripţie publică plata parţială nu este admisă decât la aporturile în numerar, nu şi la cele în natură (art. 21 din Legea societăţilor nr. 31/1990). Iar pentru anumite societăţi, în funcţie de obiectul de activitate, plata parţială este interzisă prin actele normative speciale care reglementează acel domeniu[4].

Societatea cu răspundere limitată nu se poate constitui prin subscripţie publică, astfel ca vărsământul parţial să ajute investitorii. De fapt, capitalul social al societăţii cu răspundere limitată nu doar că se constituie simultan, dar nu mai are nici măcar prag minim legal. Abia pe măsură ce afacerea ar fi crescut, asociaţii ar fi trebuit să beneficieze de vărsăminte parţiale odată cu schimbarea formei societare într-una de capitaluri[5] (dar, aşa cum arătam, în prezent practic cvasi-nefolosite la societatea pe acţiuni).

Termenele maxime prevăzute de Legea societăţilor nr. 31/1990 înăuntrul cărora asociaţii-subscriitori sunt obligaţi să efectueze integral vărsămintele sunt următoarele: (i) maxim 12 luni de la data înmatriculării societăţii, atunci când aporturile datorate sunt stabilite în numerar (art. 9 alin. (2) lit. a) şi art. 9^1 alin. (2) lit. a)); (ii) maxim 2 ani de la data înmatriculării societăţii, atunci când aporturile sunt stabilite în natură sau creanţe (art. 9 alin. (2) lit. b) şi art. 9^1 alin. (2) lit. b)); (iii) la societăţile pe acţiuni, maxim 3 ani de la data înscrierii menţiunii privind majorarea capitalului social, atât pentru aporturile în numerar cât şi pentru cele în natură[6] (art. 220 alin. (1) şi (2)). Toate aceste termene sunt legale şi certe. De asemenea, sunt suspensive, care amână executarea obligaţiei până la expirarea lor[7], deci creditorul (societatea) nu poate cere efectuarea vărsămintelor înainte de împlinire (art. 1412 alin. (1) C.civ.). Ele nu sunt termene de decădere[8] întrucât, la împlinirea lor, subscriitorul nu este decăzut din calitatea de asociat ci, doar i se suspendă drepturile societare, urmând a suporta în continuare fie consecinţele unei executări silite, fie anularea titlurilor cu consecinţa pierderii calităţii de asociat, ambele reprezentând iniţiative ale societăţii şi nu constatări a unor efecte survenite de drept. Deşi în întârziere, asociatul poate efectua vărsământul

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[4] Precum bănci, societăţi de asigurare sau societăţi de servicii de investiţii financiare.

[5] Max Hacman, Max Hacman, *Drept comercial comparat*, Editura Curierul Judiciar, Bucureşti, 1932, vol. II, p. 151.

[6] Aporturile în creanţe nefiind admise la majorare (art. 215 alin. (2) din Legea societăţilor).

[7] Aurel Pop, Gheorghe Beleiu, *Curs de drept civil. Partea generală*. Editura Universităţii din Bucureşti, Bucureşti, 1973, p. 332.

[8] Pentru o astfel de calificare, a se vedea Marian Nicolae, *Tratat de prescripţie extinctivă*. Editura Universul Juridic, Bucureşti, 2010, p. 781.

oricând până la data anulării titlurilor[9], obligaţia executată fiind valabilă întrucât este făcută în temeiul unui contract încă în vigoare. Dacă vărsământul s-a prevăzut a se face în tranşe plătibile la date fixe, fiecare astfel de dată reprezintă o scadenţă[10].

Termenul de 12 luni (pentru aporturile în numerar)/24 luni (pentru aporturile în natură) începe să curgă, la societăţile pe acţiuni, de la data înmatriculării. La cele cu răspundere limitată, începe să curgă după trei luni de la data înmatriculării (termen după termen). În lipsa vărsămintelor parţiale minime legale (30%), în cele trei luni societatea cu răspundere limitată nu poate începe operaţiuni. Deci o nouă problemă, în ciuda art. 53 din Legea societăţilor, ce permite astfel de operaţiuni chiar anterior înmatriculării. Aceasta reprezintă o barieră în calea comerţului. Mai mult, operaţiunile sunt absolut interzise anterior integralităţii vărsămintelor, chiar sub sancţiune penală, conform art. 275 alin. (1) lit. c) din aceeaşi lege.

Vărsămintele parţiale sunt reglementate la societatea cu răspundere limitată doar la art. 9^1, fără vreo altă reglementare cu privire la funcţionarea societăţii cu vărsămintele aduse parţial, astfel că nu ştim ce se întâmplă mai departe. Este neclar, în lipsa unor texte expres, ce se întâmplă – la constituire şi la o eventuală majorare – cu asociaţii care nu şi-au achitat vărsămintele restante. Teoretic, prin analogie ar trebui aplicate dispoziţiile de la societatea pe acţiuni privind *dubla somaţie adresată acţionarilor rău-platnici*, *executarea lor silită* sau *anularea părţilor sociale*, toate în sarcina administratorilor. Dar, în acelaşi timp, art. 197 alin. (4) din Legea societăţilor nr. 31/1990 exclude aplicarea reglementărilor administrării societăţii pe acţiuni la societatea cu răspundere limitată. În plus, pasivitatea administratorilor societăţii pe acţiuni, în cazul necompletării vărsămintelor de către acţionari, se pedepseşte penal (art. 273 lit. a) şi 274 lit. b) din Legea societăţilor nr. 31/1990). Însă norma penală nu se poate aplica prin analogie administratorilor societăţii cu răspundere limitată.

Anterior modificării art. 9^1 prin Legea nr. 265/2022, obligativitatea vărsămintelor integrale simultan subscripţiei, la societatea cu răspundere limitată, lăsa fără obiect infracţiunea de la art. 275 alin. (1) lit. c) din Legea societăţilor nr. 31/1990. Prin interdicţia de natură penală a activităţii unei societăţi cu răspundere limitată ale cărei părţi sociale nu au fost plătite integral, prevederea de la art. 9^1 alin. (1) şi (2) din Legea societăţilor, introdusă prin Legea nr. 265/2002, apare ca imposibil de aplicat, permisiunea vărsămintelor parţiale rămânând superfluă fără posibilitatea

[9] Valeriu Stoica, *Rezoluţiunea şi rezilierea contractelor civile*. Editura All, Bucureşti, 1997, p. 146.

[10] Cas. II, dec. nr. 75 din 3 februarie 1915, în Revista societăţilor şi dreptului comercial, 1916.

funcţionării. Motivul interdicţiei, preluate din Codul comercial, a fost acela de a împiedica dobândirea de titluri fără plată şi apoi vânzarea[11].

Primind un termen pentru realizarea diferenţei de vărsământ, asociaţii nu pot efectua vărsămintele anticipat în schimbul unui discont, pentru că s-ar ajunge la o subscriere a titlurilor sub valoarea nominală[12], lucru interzis expres de art. 92 alin. (1) din Legea societăţilor nr. 31/1990[13]. Faptul că aceştia trebuie să se conformeze termenelor de plată face ca societatea să ştie de la început care este capitalul pe care se poate baza şi datele la care acesta ajung în societate[14]. Asociaţii pierd beneficiul termenului doar dacă societatea intră în insolvenţă, când vărsămintele datorate vor avea regimul oricăror creanţe ale societăţii ce trebuie aduse la masa credală. Atunci când titlurile nu au fost achitate decât parţial, diferenţa de plată trebuie obligatoriu să fie menţionată în situaţia financiară anuală, conform art. 109 din Legea societăţilor nr. 31/1990, precizându-se dacă s-a cerut, fără rezultat, efectuarea vărsămintelor. Odată fixate prin actul constitutiv sau hotărârea adunării generale ce a decis majorarea capitalului social, ori dacă acestea nu prevăd nimic, lăsând aplicabile termenele legale, societatea nu poate reveni, printr-o hotărâre ulterioară care să devanseze aceste termene decât cu acceptul asociaţilor datori sau, altfel spus, cu unanimitatea capitalului social. După cum s-a precizat în doctrină, „orice măsură prin care datoria acţionarului faţă de societate, fără a fi mărită în ceea ce priveşte cuantumul, este agravată, trebuie de asemenea să fie considerată o augmentare a obligaţiilor sale. Cu toate că legea nu se referă decât la mărirea obligaţiilor fixate, dispoziţia legii trebuie să primească o interpretare largă, căci soluţia contrară ar cauza acţionarilor un prejudiciu considerabil şi nejustificat”[15]. Aceeaşi concluzie a fost argumentată prin faptul că societatea nu poate modifica contractul încheiat cu debitorul vărsămintelor, care este asimilat unui terţ din acest punct de vedere, pentru că ar însemna să dispună unilateral de averea acestuia[16].

Conform art. 9 alin. (2) din Legea societăţilor nr. 31/1990, *capitalul social vărsat* al societăţii pe acţiuni constituite prin subscriere simultană

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[11] Vasile Dimitriu, *Curs de drept comercial predat la Facultatea de Drept din Iaşi*, anul 1901-1902 (curs litografiat). Iaşi, 1902, p. 236.

[12] *Ooregum Gold Mining Co. Of India Ltd. vs. Roper* (1892) AC 125 (*House of Lords*), în *Sealy´s Cases and Materials in Company Law*, 9th Edition. Oxford University Press, New York, 2010, de Len Sealy, Sarah Worthington, p. 469.

[13] M.A. Dumitrescu, *Codul de comerciu comentat*, Editura Librăriei Leon Alcalay, Bucureşti, 1910-1915, vol. V, p. 427.

[14] C.C. Arion, *Curs de drept comercial*, Stenografiat şi editat de Vasile Ştefănescu, Bucureşti, 1915, vol. II, p. 237.

[15] Wahl, *apud* D. Gălăşescu-Pyk – *Incorporarea rezervelor în capital*, în *Probleme juridice*, Tipografia ziarului „Curierul Judiciar”, Bucureşti, 1913, p. 74.

[16] Namur, *apud* M.A. Dumitrescu, *op. cit.*, vol. VI, p. 263.

integrală trebuie să fie de minim 30% din capitalul social subscris. Conform art. 21 alin. (1) din aceeaşi lege, jumătate din valoarea acţiunilor subscrise în cadrul unei subscripţii publice de constituire a societăţii pe acţiuni trebuie vărsat la o bancă. Conform art. 220 alin. (1) şi (2) din aceeaşi lege, acţiunile emise în cadrul majorării capitalului social trebuie plătite în proporţie de cel puţin 30% la data subscrierii. În ciuda faptului ca art. 9 nu vorbeşte despre un minim per acţiune, ci doar despre un minim al capitalului social vărsat, nu se poate stabili un minim per acţiune mai mic de 30%, întrucât celelalte texte de lege citate vorbesc ambele de un atare minim per acţiune. Aceasta înseamnă că, la constituire, societatea trebuie să aibă plătit 30% din fiecare acţiune nominativă[17] şi nu din total capital social[18], iar prin efectuarea vărsământului minim per acţiune se ajunge implicit şi la atingerea minimului de vărsământ de 30% din întreg capitalul subscris. Minimum legal, desigur, actul constitutiv putând stabili procente mai ridicate. Aceeaşi logică ar trebui aplicată, desigur, şi societăţii cu răspundere limitată. Importanţa juridică a deosebirii dintre minimul per acţiune şi minimul per capital total apare când societatea crede că poate institui un minim mai mare de 30% la unele titluri de participare şi mai mic de 30% la altele (adică anumiţi asociaţi să plătească mai mult de 30%, iar alţii mai puţin de 30%). Plata a mai mult de 30% sau integrală a unor titluri de participare nu poate fi un argument pentru a lăsa loc unei plăţi mai mici sau deloc a altora, pe argumentul că plata mai mare sau integrală a celor dintâi asigură o medie a vărsămintelor de 30% din capitalul social total. În concluzie, coroborând art. 9 cu celelalte două articole, respectiv art. 21 alin. (1) şi art. 220 din Legea societăţilor nr. 31/1990, rezultă următoarele: (i) societatea trebuie să aibă un capital vărsat de minim 30% la constituire şi (ii) titlurile de participare trebuie să fie şi ele plătite într-un minim stabilit per titlu prin lege, în speţă 30% la constituirea simultană şi la majorarea capitalului prin subscripţie simultană, respectiv 50% la constituirea continuată[19].

Cum societăţile în nume colectiv, în comandită simplă şi cu răspundere limitată sunt destinate unor afaceri de dimensiuni mai mici, plata parţială a titlurilor de participare subscrise nu se justifică, conchidem că modificarea adusă acestei din urmă forme societare este inoportună. În plus, aşa cum am arătat, prost redactată.

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[17] Această interpretare rezultă şi din art. 48 paragraful (1) din Directiva Generală Societară, care prevede un vărsământ minim de 25% din valoarea nominală a acţiunilor (sau valoarea contabilă, în statele membre care nu au instituit o valoare nominală).

[18] În acelaşi sens, a se vedea şi Mircea Costin, Corina Aura Jeflea, *Societăţile de persoane*. Editura Lumina Lex, Bucureşti 1999, pp. 139-140 (inclusiv argumentele aduse de autori) sau Simona Dumitrache, *art. cit.*, p. 67. De asemenea, Ap. Genova, dec. din 1 februarie 1924.

[19] În cazul majorării prin oferta publică, plata trebuie făcută integral la momentul subscripţiei.

AMENDMENTS TO THE COMPANIES LAW NO. 31/1990 REGARDING THE TRANCHE PAYMENTS OF THE SHARES. COMMENTS ON THE ARTICLE 91, AS AMENDED AND COMPLETED BY LAW NO. 265/2022

Sebastian Bodu, PhD, MBA[1]

Summary

The Companies Law no. 31/1990 was amended by Law nr. 265/2022. The main object of Law no. 265/2022 is a new regulation of the activity of the trade registry, repealing the previous law, no. 26/1990. In addition to the register activity, Law nr. 265/2022 brings important changes to the corporate legislation. One of these changes is the possibility for the members of a limited liability firm to pay in instalments the shares subscribed when the firm is formed. The change appears as an uninspired and incomplete takeover of the procedure from corporations. First, practice shows that there is no valorification of partial payments even in corporations, therefore, there is no economic justification for taking them over with the limited liability firm. Secondly, partial payments to the limited liability firm have a term (3 months) within (12/24 months). Thirdly, the lack of full payments, including during the period of 12/24 months, leads to the impossibility of any activities, under the criminal sanction of art. 275 para. (1) lit. c) of Law no. 31/1990.

By subscription, the subscriber becomes the owner of the shares, being in turn required to perform his correlative obligation consisting in their payment (as regards the part representing the par value). The payment related to the shares is made in full at the time of subscription or partially at subscription, and the rest afterwards, depending on the form and type of the company. For the limited liability firm, Companies Law no. 31/1990, as amended by Law no. 265/2022, the initial minimum payments must be made within three months from the moment of registration of the firm, and the rest in a new term that begins to run from the expiration of the three-month term. Minimum initial payments are 30%.

Partial payment is an exceptional situation accepted only for closed-end corporations and, starting with 2022, for the limited liability firms. The current practice of the closed-end corporations is not generous in examples of partial payments, and in the case of those with limited liability firms, the newly introduced possibility in the law (art. 9^1 para. (2) is somewhat inexplicable, given the lack of a practice for corporations.

[1] „1 Decembrie" University, Alba Iulia, Law School.

From the company's point of view, the partial payment after the subscription is an exceptional facility motivated by the need to ease the burden of the investors to whom the company in the process of continuous formation addresses itself. The original idea of the Commercial Code (1887) was that the facility is justified for the material contribution to the share capital when a time stagger of the investors' subscriptions appeared normal (just like a bank credit line disbursed in tranches). We have to consider that the first corporations registered based on the Commercial Code were exclusively constituted by public subscription and, afterwards, listed on the stock exchange. A full payment of the contribution would have been, in the view of the pre-war legislator, excessive for the shareholders, the corporation not necessarily being in a position to need the entire contribution, so a full payment would have only generated an unnecessary opportunity cost for them. Currently, the capital markets legislation (Law no. 24/2017) prohibits listed corporations of partial payment of the share contributions (art. 53), one of the conditions of admission to trading being the full payment of shares.

In corporations constituted by public subscription, partial payment is only allowed for contributions in cash, not for those in kind (art. 21 of the Companies Law no. 31/1990). And for certain companies, depending on the object of activity, partial payment is prohibited by special normative acts that regulate that industry.

A limited liability firm cannot be set up by public subscription, so that the partial payment helps the investors. In fact, the stated capital of the limited liability firm is not only constituted simultaneously, but it no longer even has a minimum legal minimum. Only as the business would have grown, the members should have benefited from partial payments with the change of form to a corporation (but, as I have shown, at present practically unused by corporations).

The maximum terms provided by the Companies Law no. 31/1990 within which the subscribing members must pay their contributions in full are the following: (i) maximum 12 months from the date of firms's registration, for cash contributions (art. 9 para. (2) letter a) and art. 9^1 para. (2) lit. a)); (ii) a maximum of 2 years from the date of firm's registration, for the in-kind and accounts receivable contributions (art. 9 para. (2) letter b) and art. 9^1 para. (2) lit. b)); (iii) for corporations, a maximum of 3 years from the date of registration of the share capital increase, both for cash and in-kind contributions (art. 220 par. (1) and (2)). All these terms are legal and certain. They are also suspensive, which postpones the execution of the obligation until they expire, so the creditor (the company) cannot ask for payments to be made before fulfillment (art. 1412 para. (1) Civil Code). They are not forfeiture terms because, upon

their fulfillment, the subscriber is not forfeited as a member/shareholder, but only his corporate rights are suspended, having to continue to bear either the consequences of a foreclosure, or the cancellation of the shares with the consequence of losing the status of a member/shareholder. Although late, the associate can make the payment at any time until the date of cancellation of the shares, the obligation being executed being valid as it is made under a contract still in force. If the payment is to be made in installments payable on fixed dates, each such date is a due date.

The 12 months period (for cash contributions)/24 months (for in-kind contributions) starts to run, for corporations, from the date of incorporation. For limited liability firm, it starts running three months after the date of registration (term after term). Without the minimum legal partial payments (30%), during the three months the limited liability firm cannot operate. So a new problem, despite art. 53 of the Companies Law, which allows such operations even before registration. This is a barrier to trade. Moreover, the operations are absolutely prohibited prior to the full payment, even under criminal sanctions, according to art. 275 para. (1) lit. c) from the same law.

For the limited liability firm, partial payments are regulated only in art. 9^1, without any further regulation regarding the operation of the firm with partial payments, so we do not know what happens next. It is unclear, in the absence of express legal text, what happens - upon registration and a possible increase - with members that have not paid their outstanding payments.

Theoretically, by analogy, the provisions from the corporations should be applied regarding the double summons addressed to non-paying shareholders, their foreclosure or the cancellation of the shares, all of which are the responsibility of the directors. But, at the same time, art. 197 para. (4) from the Companies Law no. 31/1990 excludes the rules of the corporate management to the limited liability firms. Moreover, the passivity of the directors of the corporation, in the case of non-payment by the shareholders, is punishable criminally (art. 273 letter a) and 274 letter b) from the Companies Law no. 31/1990). However, the criminal law cannot be applied by analogy to the directors of the limited liability firm.

Prior to the amendment of art. 9^1 by Law no. 265/2022, the mandatory full payments of the shares simultaneously with their subscription leaved without object for the limited liability firms the crime from art. 275 para. (1) lit. c) from the Companies Law no. 31/1990. Through the criminal prohibition of the activity of a limited liability firm whose shares have not been paid in full, the provision of art. 9^1 para. (1) and (2) of the Companies Law, introduced by Law no. 265/2002, appears as impossible to apply, the permission of partial payments remaining

superfluous without the possibility of operating the firm. The reason for the ban, taken from the Commercial Code, was to prevent the acquisition of shares without payment and then re-sale.

Having a deadline for paying the balance, the members/shareholders cannot pre-pay in exchange for a discount, because it would lead to a subscription of the shares below the par value, which is expressly prohibited by art. 92 para. (1) of the Companies Law no. 31/1990. Having to comply with the payment terms means that the company knows from the very beginning what capital it can rely on and the dates on which it reaches the company. The shareholders lose the benefit of the term only if the company becomes insolvent, when the due payments will have the regime of any claims of the company that must be brought to the creditors. When the shares were only partially paid, the balance must be mentioned in the annual financial statement, according to art. 109 of the Companies Law no. 31/1990, specifying whether the payments were asked, without result. Once fixed by the statute, by the decision of the general meeting that decided the share capital increase, or by law, the company cannot return, through a subsequent decision that advances these terms, but only with the consent of the debtor shareholder or, in other words, with the unanimity of the share capital.

As stated in the doctrine, "any measure by which the shareholder's debt to the company, without being increased in terms of amount, is aggravated, must also be considered an augmentation of his obligations. Although the law only refers to the increase of the fixed obligations, the provision of the law must receive a broad interpretation, because the contrary solution would cause considerable and unjustified damage to the shareholders". The same conclusion was argued by the fact that the company cannot modify the contract signed with the subscriber (debtor of the payments), which is assimilated to a third party from this point of view, because it would mean unilaterally disposing of his assets.

According to art. 9 para. (2) from the Companies Law no. 31/1990, the paid-up share capital of a corporation constituted by simultaneous full subscription must be at least 30% of the subscribed share capital. According to art. 21 para. (1) of the same law, half of the value of the shares subscribed within a public subscription for the establishment of a corporation must be paid to a bank. According to art. 220 para. (1) and (2) of the same law, the shares issued within the share capital increase must be paid for at least 30% on the subscription date.

Despite the fact that art. 9 does not speak of a minimum per share, but only of a minimum of the paid-up share capital, there cannot be a minimum per share of less than 30%, as the other legal texts cited both speak of such a minimum per share. This means that, upon incorporation,

the company must have paid 30% of each registered share and not of the total share capital, and by making the minimum payment per share, the minimum payment of 30% of the entire subscribed capital is implicitly reached. Legal minimum, of course, by the charter could be established higher percentages. The same logic should, of course, be applied to the limited liability firm. The juridical importance of the distinction between the minimum per share and the minimum per total stated capital arises when the company believes that it can establish a minimum higher than 30% on some shares and lower than 30% on others (i.e. certain shareholders pay more than 30 %, and others less than 30%). The payment of more than 30% or in full of some shares cannot be an reason to leave room for a lower or no payment of others, on the argument that the higher or full payment of the former ensures an average of payments of 30 % of the total share capital. In conclusion, corroborating art. 9 with the other two articles, respectively art. 21 para. (1) and art. 220 of the Companies Law no. 31/1990, the following results: (i) a company must have a paid-up capital of at least 30% upon incorporation and (ii) the shares must also be paid in a minimum established per share by law, in this case 30% upon private subscription, respectively 50% upon public subscription.

As partnerships, limited liability partnership and limited liability firms are made for smaller businesses, the partial payment of the subscribed shares is not justified, we conclude that the amendment brought to limited liability firms is inopportune. In addition, as we have shown, poorly drafted.