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SARA Law **R**esearch **C**enter
International **J**ournal of **L**egal and **S**ocial **O**rder
https://www.ccdsara.ro/ijlso
ISSN 2821 – 4161 (Online), ISSN 2810-4188 (Print),
ISSN-L 2810-4188
No. 1 (2024)

INTERNATIONAL JOURNAL OF LEGAL AND SOCIAL ORDER

„SIGURANȚA PUBLICĂ ȘI NEVOIA DE CAPITAL SOCIAL RIDICAT”

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"PUBLIC SECURITY AND THE NEED FOR HIGH SOCIAL CAPITAL"

CONCENT

SECTION: LAW

SECTION: SOCIAL ORDER

SARA Law **R**esearch **C**enter
International **J**ournal of **L**egal and **S**ocial **O**rder, https://www.ccdsara.ro/ijlso
ISSN 2821 – 4161 (Online), ISSN 2810-4188 (Print), ISSN-L 2810-4188
N°. 1 (2024), pp. 1-13

ANALYSIS OF THE ORIGIN AND BASIS OF CUSTOM, AS A SOURCE OF LAW

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Received 29.10.2024; accepted 02.12.2024
DOI: https://doi.org/10.55516/ijlso.v4i1.211

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Abstract

If we do not start our understanding of the legal phenomenon from the source – the Roman law, we will not have a correct perspective on the evolution of modern legislation. A strong argument in support of this statement is the fact that a large part of the institutions of the Napoleonic Code, which was the foundation of Romanian civil law, were taken over from the Roman law.

This study aims to analyze the origin of custom as a source of law, by investigating how the sources of Roman law arose and, more particularly, evolved. Thus, in the first section, we will note that, in the history of Roman law, custom has experienced a very interesting dynamic, generated by the social and political organization in different eras: for many centuries, custom was the only form of expression of the rules of Roman law, then with the unprecedented development of the exchange economy, the law took its place. Notwithstanding, after the establishment of the Dominate, in the background of the general decline of the Roman society, custom regained its former importance.

In the second section, the historical perspective will give way to the general theory of law, so that we will try to grasp the basis of custom from its features and the way in which this source of law is recognized and enshrined.

Key words: *custom, origin, continuity, experience, basis.*

INTRODUCTION

"For the student who comes into contact with the world of the law for the first time, but also for the scientist who has devoted his life to research in one of the legal branches, the Roman law is the beginning without which one cannot conceive, explain and understand the present and cannot foresee the future of law" (*The. Sâmbrian, 2004, p. 27).*

The immeasurable value of the Roman law is the result of the native inclination which the legal experts of Rome showed for the "art of the good and the equitable", and it is often asserted that just as the Greeks were a people of philosophers, so the Romans were a people of legal experts. Thanks to the genius of the Romans in the field of the law, the legal categories and concepts they created have been successfully taken up and applied in both feudal and modern society. Therefore, later legal experts have borrowed from the arsenal of Roman law a great number of constructions and principles of universal value which form the basis of today's rules. These constants in the law are proof of the refinement of the Roman praetors and jurisconsults, who created legal instruments so well elaborated that they have become the basis of a universal cultural heritage, found in the legal systems of very different peoples.

This legal consciousness is the source of positive law, both customary law, which arises unconsciously and latently, and written law, as a conscious act of the legislator.

Beyond the fact that the Romans are the ones who created the alphabet of law and rigorously formulated concepts, abstract categories on the basis of which the entire subject can be organized, principles of law that are the pillars of any legal system, the specialized literature has also emphasized the exceptional vitality of Roman law by the fact that the study of this legal system represents a large field of verification of theoretical theses on the genesis and general evolution of law (*E. Molcuț, 2011, p. 10*). Since the legal phenomenon evolves in close connection with the other components of the social system, being influenced by them and, in turn, exerting influence on them, researching the evolution of Roman law helps us to understand these interdependencies.

Thus, we will see that the emergence or disappearance of certain sources of law, or the more important or less important role they played at a given historical moment, were determined by the social and economic conditions, the power relations in society, the entire social background (*E. Anghel, 2021, p. 49*).

I. ORIGIN OF CUSTOM, AS A SOURCE OF LAW

In its evolution, from the establishment of the city to the codification performed by Emperor Justinian, Roman law had the following formal sources of law: custom, statute, magistrates' edicts, jurisprudence, senatus consulta and imperial constitutions.

In very ancient times (the age of royalty and republic), when the economy was natural, legal custom was the only source of law for a long time. Since the 5th century BC, law has become the main source of law, better adapted to the democratic organization of slave society.

Once with the development of the exchange economy, however, custom and law lag behind social relations that have become complex, so that legal norms find their expression in the edict of the praetor and in case-law. These two sources of law proved to be the best tools for adapting the old, rigid and formalistic

system of law to the demands of the changing practice and for reconciling the need for reform with the conservative spirit of the Romans. Through the jurisconsults' art of interpreting the old civil law, which the Romans could never abandon, and through the genius of the praetor who, by procedural means, managed to revive the old legal system, new legal institutions were created and Roman law reached its golden age.

In the classical age (the age of the principality), distinguished by the concentration of all power in the hands of the prince, the sources of law known from the ancient age (which are losing their importance, although they are still preserved) are supplemented by senatus consulta and imperial constitutions, legal forms of expression of the imperial will.

In the post-classical era (the age of Dominate), when the emperor proclaims himself dominus et deus, the imperial will becomes the main source of law, so that the rules of Roman private law take the form of imperial constitutions. But, amid the general decline of Roman society, the exchange economy also declines and there is a return of the law to custom.

As far as legal custom is concerned, the importance of this source of law in Roman law has undergone significant fluctuations, generated by the social and political organization in different historical eras: for many centuries, custom was the only form of expression of the rules of Roman law, then with the unprecedented development of the exchange economy, its place was taken by law. But with the establishment of the Dominate and the decline of Roman society, the custom regains its former importance.

The strength and uniqueness of Roman law managed to create a wonderful connection between the past and the present, breaking out of the age of antiquity and, thanks to the rigor, skill and sharp legal mind of the Roman praetor and jurisconsult, it has been the inspiration for many legal systems.

Roman law is the broadest field of study for the evolution of legal institutions because "no one still considers law as a result of chance or as an arbitrary creation of the legislator. Law, like language, customs or religion, is a social phenomenon that goes through the same phases as the society in which it develops, being born, progressing and declining with it" (*C. Stoicescu, 1931, p. 11*).

Therefore, Roman law was not an abstract product of the mind, its institutions being inspired by the nature of things and a sense of equity. There is a Roman tradition in the legal consciousness of European peoples, with modern law being a bridge between past and present. However, "when we claim the existence of a Romanist tradition, we do not mean, as has been mistakenly thought, that our consciousness reflects classical Roman law or Justinian law in its institutions and principles, but we mean the Roman nature of our legal thought and culture, which has influenced the conceptions and spirit of different times. Law is the product of tradition and progress, and tradition contains the legal wisdom of past generations,

perpetuated through the thread of history" (*Emil Cristoforeanu, în V. Hanga si M.D. Bocșan, 2006, p. 44*).

Nowadays, when we live in a maelstrom of normative acts, generating chaos and instability, when we are powerless in front of excessive regulation, we believe that it would be useful to look to the past and to seek in the vitality and universality of Roman law the answer to the question: how could the Romans create such a strong legal system, without a model to inspire them?

The evolution of Roman law was influenced by three factors: the conservative mentality of the Romans, their practical spirit and the creation of legal institutions based on considerations of equity, of good faith, expressing the three principles: *honeste vivere, alterum non laedere* and *suum cuique tribuere*.

Being a deeply conservative people, attached to traditional values, it took the genius of the praetor and the finesse of the jurisconsult to adapt the rigid and formalistic Roman civil law to the demands of a changing social life. Sometimes, this formalism was considered to be a reflection of the soul and intellectual qualities of the Roman people, the civil law being strict, rigorous, conservative, unchangeable; we recall that the Law of the Twelve Tables was in force for 11 centuries.

This explains why it was necessary for the Romans to resort to procedural means and scientific research, which they created in the spirit of equity and good faith, so that towards the end of the republic, the edict of the praetor and case-law fulfilled the functions of a legal filter, capable of bringing the provisions of the old laws into line with the new social realities: jurisconsults have extended the scope of legal regulation by way of interpretation, and praetors, by sanctioning new subjective rights, by way of procedure. The strength of Roman law is due to the fact that its sources have evolved according to the requirements of practice, responding to the needs of society, and not according to standards of legislative technique.

"What is more difficult to explain is the unique phenomenon in history, that a foreign and long-dead law should come to impose itself on foreign peoples, neither by force nor by the support of faith, with such an effect that it has rules in their own homes and taught them legal education for centuries. Roman law had long since buried itself with the people who created it, when new nations dug it up and brought it into their lives at a turning point in history that marked the beginning of the modern age. There was a slow but decisive turning-point in the evolution of the general spirit, when the medieval world became acquainted with the principles and luminous distinctions of Roman law, which had offered more guarantee of civil liberty and equality than the feudal regime of Germanic origin for centuries before" (*I.C. Cătuneanu, 1927, p. 7*).

By being referred to in Roman texts as *mos maiorum* (custom inherited from the elders), *inveterata consuetudo* (ancient custom) and *ius non scriptum* (unwritten law), the custom also existed in the Gentilic era, but it was moral rather

than legal, because there was no state to enforce it by force of law. At that time, customs were based on traditions, meant to regulate simple relationships in a primitive society, and were willingly observed because they expressed the interests of all members.

After the foundation of the state, some customs, which were in accordance with the interests of the ruling class, were sanctioned by the state and turned into legal customs. It is very interesting to note that the legal norms of the state era are mainly the codification of the non-legal customs of the pre-state era, as we can see if we study the provisions of the Law of the Twelfth Table: it sets out, in a summarized form, customs formed hundreds of years before and enshrined through application in the practice of the courts.

The primitive Roman was a farmer and shepherd, his whole life was centered around these occupations, and his wealth consisted of the land he owned, his slaves and his work animals; these were res mancipi, things considered precious, valuable at that time. Money did not yet exist, there was little exchange, the family was centered around the pater familias, so the law was correspondingly primitive. In a closed agricultural society with no commercial trade, legal relations were rarely concluded. As such, the rules of conduct, in the form of custom, concerned the organization of the state and the family, primitive property and labor relations. As legal acts were rarely concluded, they took solemn forms, full of gestures and rituals, and the subject of obligations was poorly represented.

Therefore, for two centuries, from the founding of the state and until the adoption of the Law of the Twelve Tables, the only source of law is ius non scriptum, the legal custom, created by the repetition of certain behaviors, then enshrined in the practice of the courts. It is from here that we can deduce that, at the beginning of its evolution, Roman law was a creation of judicial practice, and the Law of the Twelve Tables did not create a new legal system, but codified a customary system established by the work of the courts.

Towards the end of the Republic, in the context of the diversification of social organization and the development of the exchange economy, the old customs imposed by social practice proved inapplicable, and more subtle, more abstract forms were needed in order to find unitary solutions to cases of great diversity. Therefore, the law became the main source of law. All this transformation in the physiognomy of Roman legal institutions could not be realized directly, because the Romans believed that law is immutable. This explains the fact that the texts of the Law of the Twelve Tables, although they had become anachronistic, could not be amended or repealed, but were adapted to the new realities by means of indirect procedures, namely by means of the creative work of the praetor and case-law.

Furthermore, the Romans, being conservative and traditionalist, did not abandon their customs. In this regard, jurisconsult Salvius Iulianus argues that custom expressed the will of the whole people and fulfilled both a creative and an

abrogating function, because in those cases where we cannot use written laws, what has been introduced by customs must be observed. Through this text, the jurisconsult recognizes custom as a source of law, placing it on the same level as the law because both sources were approved by the will of the people: the law by vote, and custom by deeds.

In addition to customs and laws, the dynamics of Roman society brought with it two new sources of law, the edicts of magistrates and case-law. By the time the Aebutia Law was passed, even though the old, rigid and formalistic law had become inapplicable, the Romans did not allow it to be changed. Since the Romans considered that the praetor, the most important judicial magistrate in charge of organizing trials, could not create law, he had the difficult role of adapting the old forms to the needs of practice, indirectly, by subtle procedural means designed to modify substantive law.

This explains why the Romans usually expressed their legal norms indirectly, either by procedural means, which gave rise to praetorian law, or by prudential interpretation, which gave rise to case-law. In this way, the evolution of Roman law was marked by continuity: the laws passed by the people could not be repealed or amended, but only adapted to new social realities through procedural means and scientific research.

Today, if we look at the Anglo-Saxon system of law and the Romano-Germanic system of law, we will notice an essential difference: while the Anglo-Saxon system has taken over the spirit of Roman law, being distinguished by continuity, the Romano-Germanic system has borrowed only the concepts and institutions of Roman law, without taking over its spirit. Therefore, in continental law, the main source of law is the legislation, which provides direct legal regulation and gives the development of the law a marked discontinuity. (*D. F. Văcăroiu, 2006, p. 356*).

Returning to imperial Rome, the dynamics of the sources change with the establishment of the emperor's legislative monopoly, in the form of imperial constitutions. Notwithstanding, on the background of the general decline of Roman society and a return to the practices of the natural economy, custom regained its importance as the appropriate form for regulating social relations that evolved slowly and simplistically.

At this time, customs were enriched with elements of the customs of conquered peoples, which the Romans allowed only if they did not conflict with the fundamental principles of Roman law. However, emperors often intervened to ensure the triumph of the law, for example, Emperor Trajan re-established a law in the province of Bithynia dating back to the time of Pompey, which conflicted with local customs. Over time, the principle according to which the application of local customs is not allowed if they contravene Roman laws was formulated. Emperor Constantine decides that the power of ancient custom is not to be disregarded, but its application must not contradict the law or the reason of law.

Emperor Julian established that custom is to be observed only insofar as it does not contravene public order.

In the 4^{th}-5^{th} centuries, "vulgar" law played an important role in the provinces, with a vulgarization (simplification) of Roman law at the local level, which gradually developed into a customary system (*V. Hanga, M.D. Bocșan, 2006, p. 48*).

On the other hand, in imperial times, court practice can create a legal rule to the extent that the consistency and unity of solutions can become a custom.

In the opinion of jurisconsult Ulpian, the long-established custom must be respected as a right and as law in those cases where the written law is not sufficient. Jurisconsult Salvius Iulianus emphasizes the binding nature, pointing out that an ancient custom is not unreasonably preserved as law: "An ancient custom is not unreasonably preserved as law (and this is the law which is said to be established by custom). If the same laws are not binding on us, for no other reason than that they were passed by the will of the people, then all those which the people have passed without any written law will rightly be binding; what difference does it make whether the people manifest their will by voting or actually by deeds? It is for these very good reasons that the principle according to which laws are repealed not only by the vote of the legislator, but also by their obsolescence, by the tacit consensus of all has also been adopted".

It has been pointed out that ius scriptum derives from "the categorically expressed will of the legislator", but ius non scriptum also derives from the same will, with the difference that it is '"presumed only, since it allows the existence and perpetuation of certain customs representing consuetudo, mos majorum" (*C. Stoicescu, 1931, p. 16*).

These definitions reveal the nature of the custom: usus, the long-standing repetition of the same manifestations, and opinio necessitatis, the belief or consensus that the practice is mandatory, representing a rule of law. Therefore, custom results from the repetition of identical facts. Classical jurisconsults justified the custom by its antiquity, vetustas, without specifying how long and how many acts are necessary to determine this antiquity.

Later, the foundation of the binding force of custom was sought in its rational nature. In a constitution of Emperor Constantine, it was decided that: "what was introduced not without reason, but was established firstly by mistake and then by custom, shall not apply in similar cases".

II. THE BASIS OF CUSTOM, AS A SOURCE OF LAW

As we noted in the first section, historically, law developed in close connection with custom. Moreover, as a social rule, custom preceded law.

Mircea Djuvara wrote: "Nothing is more important for the scientific horizon of a man of law than a sense of legal relativity, as this study reveals. Such a feeling alone puts legal institutions in their true legal form. It is therefore

necessary to study their historical source, the evolution by which they have come to be what they are, and the way in which they appear in other legislations" (*M. Djuvara, 1995, p. 101*).

The legal phenomenon cannot be grasped in its entirety only through a systemic, purely technical approach, but must also be viewed from the perspective of the social and historical traditions. Apart from the values imprinted by history, law would be an artificial construction. In order to interpret the basis of creation in law, it is necessary to analyze the historical conditions and the entire social background in which the law emerged and evolved.

The idea that law is a historical product brought together the followers of the German Historical School of Law, Savigny and Puchta, "When we find a history based on documents - wrote Savigny - we recognize in them the law specific to the people to whom it applies, like the language and customs of that people". Therefore, the law is not an arbitrary product, which circumstances or human wisdom create. According to the representatives of this school, the doctrine of Grotius were to be followed, it would mean that for every human activity there are rules of natural law, which we would have to discover in order to dress them in the form of the law, which would turn natural law into a purely subjective conception.

The law is born and develops like language, undergoing continuous transformation in a slow evolutionary process. The historical school exerts an overwhelming influence on the way law is understood and defined, on its spirit. Problems of law are now beginning to be treated from a historical perspective.

The history of law is linked to the history of the people. In every society, in every country, the applicable rules of law are a faithful mirror of the state in question, reflecting its heritage, its development, its culture. As Puchta noted - "Just as the life of peoples changes over the ages, so the law, a branch of this life, also changes with the times, develops with the people to which it belongs and adapts to the different phases of its development". In his definition of law, Puchta notes its purpose, which is that law determines and decides the relations between individuals.

The ideas of the historical school of law have strongly influenced the way of conceiving and explaining the formation of law, the stages of its development and the forms of systematization of German law. However, in spite of this influence, the historical school could not completely annihilate the ideas of natural law, later conceived as a rational law, made up of general guiding ideas derived from the reasoning dictated by justice, equity and common sense (*N. Popa, 2020, p. 94*).

In modern law, the followers of the sociological school have given great importance to custom, considering it as the most appropriate source of law to express the dynamics of social facts. The positivist school, however, greatly reduced the role of custom by placing law at the center of the sources.

ANALYSIS OF THE ORIGIN AND BASIS OF CUSTOM, AS A SOURCE OF LAW

Mircea Djuvara wrote that to disregard experience in the science of law is an absurdity, since law cannot be created by rational deductions alone. “The understanding of the legal phenomenon must start from the practice of specific cases. Legal science must start from the concrete towards the abstract and not vice versa if it wants to reach the truth”.

In order to understand the basis of custom as a source of law, we will start with its definition. Specialized literature defines custom as a rule of conduct established in human coexistence through long-standing usage. Custom is observed and applied by the consensus of the members of the community, who believe in the fairness of its regulation because it reflects the way of life, values, traditions and experiences accumulated over time. Therefore, custom is the fruit of a community's life experience, which repeats a practice constantly and consistently, often unconsciously, and thus, through repetition, they come to the conviction that the rule is useful and must be followed (*N. Popa, 2020, p. 175*).

Customs are patterns of behavior as they express the needs of social groups and are imposed on members because they reflect the specific values of the group. In contrast to customs, habits are individual routines, which are behaviors that occur in certain situations and do not encounter negative reactions from social groups (for example, a person usually wakes up at 7 in the morning, eats and drinks tea, then leaves for work at 8 in the morning). Customs, however, are patterns of conduct that imply some constraint in recognizing group values and respecting them.

As an essential feature, legal custom is a source of unwritten law and is generally embodied in oral formulas, and its authority is based on the fact that it is the result of long-standing and unquestioned practice (*N. Popa, 2020, p. 138*). But not every repeated behavior becomes a rule of customary law. Therefore, for a custom to become legal, two essential conditions shall be required:

a) an objective (material) condition: it must consist of an old and unquestionable practice (longa diuturna inveterata consuetudo), followed repeatedly and consistently by the members of the community as a habit

b) a subjective (psychological) condition: the practice in question must be considered mandatory (opinio necessitatis) and must be observed as a legal norm, subject to legal sanction. Thus, a simple practice, even if it is constantly observed as a tradition, is not a custom if the psychological condition of being considered mandatory is not met, and can be imposed by means of coercion. We mention in this respect simple customs, such as leaving a tip, a practice which, although it is constantly applied, cannot be considered mandatory and liable to be enforced by legal sanctions.

These requirements are sometimes supplemented by the condition that the rule of conduct imposed by repetition and regarded as binding must be precise or as accurate as possible.

Custom has an informal nature, it is a spontaneous, intuitive, impersonal creation, since it is not born from the act of will of an authority, like the law emanating from the legal consciousness of a legislator; it springs from the spirit of the community and this spontaneous nature is not lost even if the customs were subject to codification.

Custom is born from the generalization of particular facts, as Professor Mircea Djuvara explains very suggestively: it is based on specific cases, which are then referred to, being evoked as precedents. A general notion is thus derived, made up of what is common to repeated specific cases. This is the general rule established by custom, which will be applied in future cases through case-law. Because, in the author's opinion, the case-law is the deep formal source of positive law, it is the one that interprets and applies the rules, whether they are customary or statutory (*M. Djuvara, 1995, p. 265; I. Boghirnea, E.-N. Vâlcu, 2022, p. 41*).

The law is "an organism that lives a life that does not appear clearly, entirely, in the light. This life, however, is the real life of the law, and positive law, which we know and study emanates from it". By researching the sources of law, Mircea Djuvara describes positive law as "the secretion of the legal consciousness of the society in question", pointing out that positive law is born from this consciousness, whether we are referring to customary law, which is born unconsciously and latently, or to written law, which results from the conscious action of the legislator (*M. Djuvara, 1995, p. 275*).

By analyzing the formal sources of law - custom, law, doctrine and case-law -, the author emphasizes that, as far as custom and doctrine are concerned, they manifest themselves as positive law thanks to case-law. Therefore, custom is established by case-law: custom is based on the tacit approval of the legislator, being a kind of tacitly consented law, as described by Fr. Geny. It is the state authority that enshrines the custom through the sanction assigned by the courts, even if it does not formulate the rule derived from an old recognized practice. On the other hand, constant case-law can create customs.

Not all customs created by society become sources of law. The precondition for custom to be recognized as a source of law is that the customary rule must not be contrary to public policy and morality. The mechanism of the passage of a custom from the general system of social norms into the system of sources of law is marked by two important moments: a) either the state, through its legislative bodies, recognizes a custom and incorporates it into an official rule; b) or the custom is invoked by the parties, as a rule of conduct, before a court of law and the court validates it as a legal rule (*N. Popa, E. Anghel, C. Ene-Dinu, L. Spătaru-Negură, 2023, p. 151*).

The party claiming the custom must prove its existence, any means of proof being admissible (evidence by witnesses, written evidence), their probative force being left to the judge's discretion.

Therefore, custom must be enforced through public authority: either the legislator or the courts must recognize the customary norm. It is sometimes possible that, when a new law is enacted, the legislator may abolish certain customs, or no longer recognize their validity. In this respect, in legal literature, a distinction is made between cutuma secundum legem, cutuma praeter legem și cutuma contra legem.

Consuetudo secundum legem applies by virtue of the law, in cases where the law itself refers to custom. In Romanian law, this kind of custom is the most common, the rule being that custom applies in so far as the law refers to it (*S. Popescu, 2000, page 151*). If there is a conflict between custom and law, the law always prevails. Custom plays an important role in the interpretation and application of the law as it can sometimes help to clarify the meaning and application of the law in specific situations.

The role of custom is emphasized today when interpreting whether the exercise of a subjective right complies with the coordinates of the law, so that the subjective right is exercised in accordance with social customs and mores. In this case, the custom of the place becomes a benchmark on the basis of which to judge whether the exercise of a subjective right is in accordance with the law or, beyond the law, abusive.

Consuetudo praeter legem applies when there is a lacuna in the law, which is a rare situation given that, according to the principle of analogy, where the law has lacunae, the general principles of law apply, and not a customary rule.

Consuetudo contra legem refers to the situation in which a custom contradicts the law; in this case the question of the binding force of the custom in relation to the law arises, and the answer is different depending on whether we are considering a suppletive or, on the contrary, a mandatory legal rule. In the first situation, custom may prevail over a law if it is proved that the parties intended to derogate from the provisions of the law and to comply with the customary rule. In the second situation, Romanian law does not recognize as a source of law a custom which contains a rule of law contrary to public order and good mores, nor a custom which contradicts the law.

CONCLUSION

Law is connected to history and social environment. There are many factors that lead to notable differences between legal systems, most of them non-legal: psychological, geographical or religious. To imagine that the law must be the same everywhere and always the same is a false conception, according to Ihering. The perception of law often varies from one people to another, from one continent to another. Each of the types and families of law revealed by historical development has its own specific features, determined by a set of factors that influence the law, giving it dynamism, an evolutionary nature, distinctiveness. By abstracting, we will find that institutions, concepts and principles originating in

Roman law have survived in the societies that created them, by being applied throughout a millenary evolution.

These legislations which are historically and spatially dissipated are nowadays united by the Roman legal thesaurus, which represents the common heritage of our legal consciousness. This legal consciousness is the source of positive law, both customary law, which arises unconsciously and latently, and written law, as a conscious act of the legislator. The difference lies in the fact that, while the Anglo-Saxon system has taken on the very spirit of Roman law, evolving through case-law, the Romano-German system has borrowed only the concepts and institutions of Roman law, without taking on its spirit. Therefore, in continental law, the main source of law is the legislation, which provides direct legal regulation.

In conclusion, there cannot be legislation common to all societies, but "there exists in the legal relationship that something which necessarily subsists everywhere" and that "something" are the legal permanents, the constants of law, the object of study of the legal encyclopedia (M. Djuvara, 1995, p. 6).

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SARA Law **R**esearch **C**enter
International **J**ournal of **L**egal and **S**ocial **O**rder, https://www.ccdsara.ro/ijlso
ISSN 2821 – 4161 (Online), ISSN 2810-4188 (Print), ISSN-L 2810-4188
N°. 1 (2024), pp. 14-26

ESTABLISHING THE CHILD'S RESIDENCE, TAKING INTO ACCOUNT THE CHILD'S BEST INTEREST

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Received 03.11.2023; accepted 10.01.2024
DOI: https://doi.org/10.55516/ijlso.v4i1.181

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Abstract

The Civil Code in force brought some changes in the matter of parental authority, the establishment of the child's residence and other measures that can be taken with regard to children, changes that brought to light a universally applicable rule: the principle of the best interest of the child. The transition from a divided parental authority to a parental authority exercised jointly and equally raised a series of problems. Both the legal subjects involved, mainly the parents, as well as the Courts constantly appealed to the best interest of the child, adopting different solutions from case to case.

Key words: *parental authority, the best interest of the child, the child's home.*

INTRODUCTION

From a constitutional point of view, the legislator sought to protect the family and particularly children and teenagers. Thus, by art. 48 para. (3) and art. 49 (1) of the Romanian Constitution, the foundations of the principle of protecting the interests of the child were laid. (*Cercel, Ghita, 2018, pp.1*).

Also, the common law by art. 263 of the Civil Code, establishes that any measure regarding the child, regardless of its author, must be taken with respect for the child's best interests. The legislator provides that "parents exercise parental authority only in the best interest of the child, with the obligation to respect his person, and associate the child to all decisions that concern him, taking into account his age and degree of maturity" [art. 483 para. (2) Civil Code from 2009 -

Law no. 287/2009][1]. The legislator's concern for this principle is also highlighted in other texts within the same act. Thus, according to art. 262 para. (2) of the Civil Code, the parent separated from the child may have personal ties with him and his right may be limited only by respecting the best interests of the child.[2] (Civil Code from 2009 - Law no. 287/2009]

The doctrine says that although there is no clear definition of the "best interest of the child" principle, we can identify a "series of criteria according to which it can be determined." (*Cercel, Ghita, 2018, pp. 1*). Thus, three categories were identified according to which decisions regarding children should be made: "the child's needs, his opinion, depending on age and maturity, and the ability of the parents to respond to the child's needs. In order to determine the best interest of the child, several aspects must be taken into account to ensure a harmonious physical, moral and intellectual development. In the decision making progress, one should take into consideration the child's age, the behavior of the parents before and after the separation, as well as the degree of attachment and concern they showed towards the child." (*Cercel, Ghita, 2018, pp. 1*). This principle, which can overturn a series of rules, will prevail in any measure or decision taken by a public authority, by an authorized private body, by the Guardianship Court, but especially by parents, relatives, persons towards whom the child presents attachment or any adult who is placed in the position to make such a decision. To these criteria, we can also add the importance of establishing the child's home.

The legislator defined the child's home under the art. 496 of the Civil Code, as the home where the minor lives with his parents, thus creating a suitable environment for the exercise of parental authority. At the same time, the Civil Code provides that "if the parents do not live together, they will determine, by mutual agreement, the child's residence. In case of disagreement between the parents, the Guardianship Court decides, taking into account the conclusions of the psychosocial investigation report and listening to the parents and the child, if he has reached the age of 10, the provisions of art. 264 remain applicable."3 (art. 496(3) Civil Code from 2009 - Law no. 287/2009)

This text represents a transposition of art. 100 of the Family Code, which ordered that "if the parents do not live together, they will decide, by mutual

[1] art. 483 para. (2) Codul Civil din 2009 (Legea nr. 287/2009) - Republicare, Monitorul Oficial nr. 505 din 2011, cu modificările şi completările ulterioare, art no.483 of the Civil Code of 2009 (Law no. 287/2009) - Official Publication no. 505 of 2011, with subsequent amendments and additions

[2] Art.262 para (2) din Codul Civil din 2009 (Legea nr. 287/2009) - Republicare, Monitorul Oficial nr. 505 din 2011, cu modificările şi completările ulterioare [art 262 (2)The Civil Code of 2009 (Law no. 287/2009) - Official Publication no. 505 of 2011, with subsequent amendments and additions]

[3] Art. 496(3) din Codul Civil din 2009 (Legea nr. 287/2009) - Republicare, Monitorul Oficial nr. 505 din 2011, cu modificările şi completările ulterioare [art 493 (3) of The Civil Code of 2009 (Law no. 287/2009) - Official Publication no. 505 of 2011, with subsequent amendments and additions]

agreement, with which of them the child will live. In case of disagreement between the parents, the Court, after hearing the guardianship authority, as well as the child, if he has reached 10 years of age, will decide, taking into account the interests of the child".[4] Therefore, as it was also shown in the doctrine that "both before and after the new Civil Code entered into force, the residence of the child, from marriage or not, was and is, in principle, with his parents, without any distinction of their marital status; if the parents did not live or do not live together, the decision regarding the child's residence belongs to them and only in case of disagreement, the Court would intervene." *(Florian, 2015, pp.2)*

The problem that has arisen is how can the Court assess what is the "best interest of the child" when it comes to establishing his home? What does this principle entail and what must the judge take into account?

The starting point was the Convention on the Rights of the Child adopted by the United Nations Organization in 1989 (entered into force in 1990) and which states four governing principles: non-discrimination, the best interests of the child, the survival and development of the child as well as the participation of the child in decisions which concern him. According to one opinion, the Convention played a fundamental role in the recognition of certain rights of the child as well as the establishment of measures to protect them. (Couzens, 2013, pp.64). Thus, according to art. 3 of the Convention "in all actions concerning children, undertaken by public or private social assistance institutions, by Courts, administrative authorities or legislative bodies, the interests of the child shall prevail. The member states of the Convention undertake to provide the child with the protection and care necessary to ensure his well-being, taking into account the rights and obligations of his parents, his legal representatives or other persons to whom he has been legally entrusted, and for this purpose they shall take all appropriate legislative and administrative measures. The member states of the Convention shall ensure that the institutions, services and establishments responsible for the protection and care of children comply with the standards established by the competent authorities, in particular those relating to security and health, the number and qualification of staff in these institutions, as well as ensuring competent supervision." (Convention on the rights of the child adopted by the United Nations)[5]. A study has shown that some authors believe that "ensuring the best interests of the child means the meeting of the individual needs of the child according to his age, sex, health, development, life experience, family,

[4] The Family Code was adopted by Law no. 4 of January 4, 1953, amended and supplemented by Law no. 4 of April 4, 1956 and republished in B. Of. no. 13 of April 18, 1956, expired on October 1, 2011, by Law 71/2011 for the implementation of Law no. 287/2009 regarding the Civil Code, Official Gazette no. 409 of 2011, with subsequent amendments and additions.

[5] Conventie din 1989 cu privire la drepturile copilului - Republicare, Monitorul Oficial nr. 314 din 2001, cu modificările şi completările ulterioare. [Convention from 1989 on the rights of the child - Republication, Official Journal no. 314 of 2001, with subsequent amendments and additions.]

cultural and ethnicity, taking into account the views of the child. This statement seems reasonable; however, it also seems that it does not fully characterise the best interests of the child." (*Fursa Yaroslavivna S., Bordiuh Oleksandrivna T., & Fursa Yevhenovych Y. 2022, pp. 217)*

It was argued that the best interest of the child was a principle found in most family law cases. However, in a Court decision, it was stated that this principle can also govern other law, therefore it is essential that when a custodial sentence is ordered for one of the parents it should be taken into account the effects that such sanction would have on minors. *(Couzens, 2013, pp. 62)*

Another case, relevant to the present analysis, is the solution that was given in Van der Burg and Another v. National Director of Public Prosecutions and Another 2012 (2) SACR 331 (CC) (Van der Burg). In the decision given in S. v M., the Court was once again faced with the application of the principle of the best interests of the child in relation to coercive measures. From the facts it appears that from 2000 to 2008, the parents of three minor children, illegally sold alcohol in the house that was the family's residence. The house also served as a place for the consumption of alcoholic beverages by the parties' customers. Despite the repeated warnings and other measures taken by the law enforcement, the parties did not stop carrying out the illegal activity. Given that the measures taken against the parties were unsuccessful, the prosecutors asked the Court to confiscate their family home, a request that was favourably resolved by the Trial Court. The parties appealed against the decision to the Constitutional Court. In the grounds of the appeal, the appellants argued that the legislation on the basis of which the confiscation was ordered was not applicable in the case and that the measure of confiscation was not proportional to the criminal offence committed. *(Couzens, 2013, pp. 63)*

The Van der Burg case confirms the previous position of the Court, in the sense that parents are primarily responsible for ensuring the daily needs of their children, including their residence, and that the State only acts as a guarantee for the parental duties, intervening when they are not exercised according to the law. The requirement that the assessment of the child's best interest must be made based on concrete elements presented to the Court. This way, at least partially, the possibility of manipulating the child's best interests by other participants in the litigation is removed.

Last but not least, the Court must ensure that the parents and the minor are listened to, an aspect expressly regulated in art. 496 of the Civil Code. The reason for listening to the minor is to establish the appropriate environment for his education, so that they meet his needs. Therefore, it has been shown that "respect for children's opinions is also one of the general principles for creating child welfare. Even though they are minors, every child has the right to express their opinions about what they want what they like, and what they dislike." *(Mustika, Rizky, 2023, pp.23).* However, the judge must be cautious in determining the

child's best interests, especially since they, due to their age or lack of experience, can be easily influenced in choosing to live with one of their parents. (*Nicolae, 2018, pp. 24).* Thus, it has been argued that "studies have found that children and adolescents are likely to feel caught between parents if there is severe conflict, which increases the risk for children's behavioural and psychosocial problems." *(R. Berman, K. Daneback, 2020, pp.7).*

I. THE CHILD'S RESIDENCE PROVIDED BY THE CIVIL CODE

The placement of article 496 of the Civil Code within Chapter II of Title IV of Book II of the new Civil Code is important, since establishing the child's residence is one of the parental duties, and, as a result, represents an attribute of the parental authority. Thus, it was argued that "under the new provisions, the parental authority implies that parents have both rights and obligations towards their child, regardless of the evolution of the relations between them (art. 397 NCC regarding divorced parents, art. 505 NCC for the situation of the child out of wedlock). In essence, the gap between the capacity of holder of parental rights and duties, on the one hand, and the power to exercise/fulfil the rights, and parental duties, on the other hand, has been eliminated." (*Florian, 2013, pp.147)*

In the doctrine it was shown that "the joint exercise of authority does not necessarily imply that the parents and the child share the same living space. The fact that the minor lives with one of the parents is a sign that this parent holds the exercise of parental authority, but does not exclude the collegial formula for the exercise of parental rights and duties." *(Florian, 2013, pp. 147).* However, in the exercise of parental authority, spouses are entitled to establish the child's residence, either by agreement or by means of a Court decision.

According to art. 503, 504, 505 Civil Code, parental authority is exercised as follows: as a general rule, "parents exercise parental authority jointly and equally; towards third parties in good faith, any of the parents, who alone executes a current act for the exercise of parental rights and duties, is presumed to have the consent of the other parent".[6] By way of exception, if the parents are divorced, art. 504 of the Civil Code shows that "parental authority is exercised according to the provisions regarding the effects of divorce in the relations between parents and children."[7]

If the child is out of wedlock, we note that the legislator institutes the same regime as the child from a validly concluded marriage, in the sense that parental

[6] Art. 502,503,504, din Codul Civil din 2009 (Legea nr. 287/2009) - Republicare, Monitorul Oficial nr. 505 din 2011, cu modificările și completările ulterioare [art. 502, 503, 504, of The Civil Code of 2009 (Law no. 287/2009) - Official Publication no. 505 of 2011, with subsequent amendments and additions]

[7] Art. 504 din Codul Civil din 2009 (Legea nr. 287/2009) - Republicare, Monitorul Oficial nr. 505 din 2011, cu modificările și completările ulterioare [art. 504, of The Civil Code of 2009 (Law no. 287/2009) - Official Publication no. 505 of 2011, with subsequent amendments and additions]

authority is exercised jointly and equally by both parents, when they live together. In the situation where the parents of the child out of wedlock do not live together, the manner of exercising parental authority is established by the Court, the provisions regarding divorce being applicable by analogy.

The legislator's reference to "current acts" in the regulation of the exercise of parental authority caused controversy in the identification of "usual acts" or "unusual" ones that can be concluded by parents. Thus, in the matter of customary documents, it is presumed that "there is the consent of the other parent" *(Florian, 2013, pp.147). Per a contrario*, non-usual acts cannot be concluded without the consent of both parents. In case of misunderstanding, the parents are obliged to address the Court in order to resolve the dispute. However, there is also a situation in which one of the parents abusively refuses to conclude a legal act, thus harming the interests of the minor. Thus, it was concluded that "the abusive exercise of parental rights and duties in relation to the other co-holder of the authority, can justify the reconfiguration of the parental authority, putting an end to its joint exercise in favor of the unilateral exercise of parental authority". *(Florian, 2013, pp.147)*

The imperative provisions regarding the child's home lead us to consider that the choice of home falls into the category of non-usual acts, mentioned. This is because, in the absence of an agreement between the parents, the Court will establish the residence of the minor taking into account both the position of the parents and of the minor.

A first amendment of art. 496 of the Civil Code, more precisely "the minor child lives with his parents", was in the sense that "the *ad literam* interpretation of the text would be unrealistic and excessive, the child's residence could also be established at a third person." *(Florian, 2013, pp. 148-149).* Therefore, in the presence of the agreement between the parents, the child's residence could even be established at a third person's residence, when the best interest of the child is taken into account. This opinion is argued and supported by art. 498 of the Civil Code, which provides that "the child who has reached the age of 14 can ask his parents to change the type of education or professional training or the residence in order to complete his education or professional training. If the parents refuse, the child can notify the Court, which decides on the basis of the psychosocial investigation report. The hearing of the child is mandatory, as is shown by the art. 264 of the Civil Code."*(Florian, 2013, pp.148)*

Regarding the establishment of the minor's residence through the agreement of the parents, we note that the legal text does not impose a judicial control. (art. 496 (2) Civil Code of 2009 - Law no. 287/2009)[8]. The majority opinion is in the

8 Art. 496 (2) din Codul Civil din 2009 (Legea nr. 287/2009) - Republicare, Monitorul Oficial nr. 505 din 2011, cu modificările și completările ulterioare [art 496 (2) The Civil Code of 2009 (Law no. 287/2009) - Official Publication no. 505 of 2011, with subsequent amendments and additions]

sense that "the child's residence, established by the consent of the parents, regardless of whether the agreement is for the minor to live together with both parents, with one of them or with a third person, does not require judicial control, since the provisions of art. 496 para. (3) of the Civil Code, referring to the residence established by the decision of the Guardianship Court, has in mind, express verbis, those situations in which there is a lack of agreement between the parents". *(Florian, 2013, pp.149).* The point of view is also supported by other legal texts. Thus, specialized literature advanced the idea that "if in the context of consensual divorce by notarial procedure, one of the requirements for the admissibility of the dissolution of the marriage carried out in this way is the existence of an agreement of the spouses regarding the child's residence [art. 375 para. (2) Civil Code from 2009 - Law no. 287/2009), whatever the terms of the agreement - and the agreement on the matter is obviously not subject to Court censure - all the more it must be accepted that parents who are not yet divorced, have the right to decide the child's residence extrajudicially."[9] *(Florian, 2013, pp. 149).*

However, our opinion is that the agreement between the parents can be subject to control, in order to respect the best interest of the child. In support of this point of view, we recall the fact that, within the notarial divorce procedure, it is necessary to draw up a social investigation report. Thus, when we discuss the establishment of the minor's home after the divorce in the framework of a notarial procedure (non-contentious), a social investigation report will be drawn up to establish whether, by their agreement, the parents pursued the child's best interests. But what happens when the parents do not choose the divorce procedure, being only *de facto* separated or, if it is not a *de facto* separation, they choose not to live together (e.g. carrying out a work contract in another locality/country). According to a doctrinal opinion, in this case too, a control by a competent authority would be necessary, in order to respect the principle of the best interest of the minor. *(Nicolae, 2018, pp.28)*

The rule according to which "the exercise of parental authority is shared and the minor lives with his parents" has an exception in the sense that when one of the parents is under a Court ban, deprived of parental rights or is, for any reason, unable to - manifests his will, the Court will not be able to establish the residence of the child with the parent who does not have the exercise of parental rights, even if, possibly, there was an agreement in this sense between the child's parents in this regard.

[9] Ibidem

II. JUDICIAL DIVORCE PROCEDURE

Establishing the child's residence in the case of divorced parents has raised many question marks in doctrine and practice. Thus, it was considered that although the parental authority is jointly exercised by both parents, concretely, after the divorce, "the premise is that the parent with whom the minor will live should hold the exercise of parental authority." *(Florian, 2013, pp.152).*

At first sight, art. 918(1) of the new Code of Civil Procedure, removes any doubt about the claims that the Court will have to deal with. Thus, the judge will have to rule on some essential elements regarding the exercise of parental authority in relation to the needs of the minor. (art. 918 (1), Civil Procedure Code of 2010 - Republication, Official Journal no. 247 of 2015, with subsequent amendments and additions).[10] Therefore, the divorce Court also pronounces on the parents' contribution to the expenses of raising and educating the children, the child's residence and the parent's right to have personal connections with him, the names of the spouses after the divorce, the family residence, the claimed compensation for material damages or moral damages suffered as a result of the dissolution of the marriage, maintenance obligation, termination of the matrimonial regime, etc.

What is subject to discussion, however, on which aspects will the divorce Court be able to rule *ex officio*? At para. 2 of the same art. 918 of the Civil Procedure Code, it is stipulated that "when the spouses have children born before or during the marriage or adopted, the Court will rule on the exercise of parental authority, as well as on the parents' contribution to the expenses of raising and educating the children, even if this was not requested by the divorce petition. Also, the Court will rule *ex officio* on the name that the spouses will bear after the divorce, according to the provisions of the Civil Code."[11] As it can be seen, the main issue raised by the doctrine is that, although it is an attribute of the exercise of parental authority, the Court will not *ex officio* rule on the residence of the minor child. The only claim on which the Court can rule ex officio would be that of the parents' contribution to the expenses of raising and educating the children. Therefore, "since only one of these "derivatives" of parental authority is explicitly qualified as having the status of a mandatory request, we can not derogate from this rule. " *(Florian, 2013, pp.155)*

On the other hand, the Civil Code regulates in art. 400, the obligation of the Court to establish the child's residence after the divorce. Thus, we consider that the provisions of the Civil Procedure Code will be completed with the provisions of the Civil Code.

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[10] Art. 918 (1) of the Civil Procedure Code of 2010 - Republication, Official Journal no. 247 of 2015, with subsequent amendments and additions

[11] Art. 918 (2) of the Civil Procedure Code of 2010 - Republication, Official Publication no. 247 of 2015, with subsequent amendments and addition

III. THE PROCEDURE AT A NOTARY PUBLIC'S OFFICE

The Notary Public can also fulfill the divorce procedure. The finality of this procedure is conditioned, however, by the agreement of the parties regarding the essential elements after the dissolution of the marriage (such as the names of the ex-spouses after the pronouncement of the divorce) but, in particular, regarding the situation of children. In this sense, the legislator regulated the divorce procedure by agreement through several normative acts, among which we mention the Civil Code, Law no. 36/1995 of Notaries Public and notarial activity with subsequent amendments and additions, as well as in the implementing regulation of the latter. Thus, in art. 375 of the Civil Code says that "divorce by the consent of the spouses can be verified by the Notary Public and in the event that there are children born out of wedlock or adopted, if the spouses agree on all aspects related to the surname after the divorce, the exercise of parental authority by both parents, the establishment of the children's residence after the divorce, the manner of preserving the personal ties between the separated parent and each of the children, as well as the establishment of the parents' contribution to the expenses of raising, educating, teaching and professional training of the children."[12]

According to art. 270 paragraph 2 of the Project of the new Regulation for the implementation of Law no. 36/ 1995, the divorce application in the notarial procedure must include the agreement of both parents regarding the minor children. Thus, according to the doctrinal opinion "in order to accept the request for divorce if there are minor children, the notary public notifies the competent authority, attaching the draft of the parents' agreement to the request." *(Popa, Moise, 2013, p.324)*

If the social investigation report shows that the agreement of the spouses regarding the joint exercise of parental authority or the agreement regarding the establishment of the children's residence is not in the child's interest, the provisions of art. 376 para. (5) are enforced. In the sense of art. 376 (5) of the Civil Code, it is stated that "if the spouses do not agree on the surname to bear after the divorce or, in the case provided for in art. 375 para. (2) Civil Code, on the joint exercise of parental rights, the civil status officer or, as the case may be, the Notary Public will reject the parties' petition for divorce."[13] Moreover, the spouses will be advised to address the Court, according to the provisions of art. 374. As a consequence of the interpretation of this text, it is concluded that it is

[12] Art.375 Codul Civil din 2009 (Legea nr. 287/2009) - Republicare, Monitorul Oficial nr. 505 din 2011, cu modificările şi completările ulterioare, art no.375 of the Civil Code of 2009 (Law no. 287/2009) - Official Publication no. 505 of 2011, with subsequent amendments and additions

[13] Art. 376 (5) Codul Civil din 2009 (Legea nr. 287/2009) - Republicare, Monitorul Oficial nr. 505 din 2011, cu modificările şi completările ulterioare, art no. 483 of the Civil Code of 2009 (Law no. 287/2009) - Official Publication no. 505 of 2011, with subsequent amendments and additions

imperative to request a social investigation report, which will be drawn up by the specially designated authority. (art. 229 of Law no. 71/2011)[14]

Therefore, when the expert report does not indicate that there is an agreement between the parents regarding the exercise of parental authority or that the establishment of residence with one of the parents is not in the interest of the minor, the Notary Public is obliged to reject the petition and guide the parties to address the Court. *(Popa, Moise, 2013, pp. 324)*

From a doctrine point of view, it was emphasized that "the social investigation reports can sometimes be written in unclear terms". *(Popa, Moise, 2013, pp. 325).* Therefore, in notarial practice there can be two problems:

- the first, refers to the interest of the minor and to what extent the establishment of the child's residence satisfies his interest
- the second, it focuses on the fact that although the social investigation report mentions that all elements of the parties' agreement are in the interest of the minor, the Notary is convinced that this principle is not fully respected.

The solution was in the art. 9 of the Law of Notaries Public that states that "each time the principle of the best interest of the child is not respected by the agreement of the parties, the Notary will issue a ruling of rejection and advise the spouses to address to the Court." *(Popa, Moise, 2013, pp.324).*

We note that while in the non-contentious procedure, through a Notary, the importance of the child's residence can lead to the rejection of the divorce request, if the divorce is pronounced by a judge, the Court must determine the residence of the minor. Moreover, the best interest of the child can only be assessed by the Court, after hearing both the parents and the minor. Therefore, based on article 496(3) of the Civil Code, the Court decides, based on the psychosocial investigation report and taking into consideration the parties' point of view, where the child should live. Therefore, after the divorce, the child's residence will be established according to art. 400 of Civil code.[15]

What happens in the situation where, after the divorce, the parent who lives with the minor changes his residence and therefore wants to change the minor's residence as well? The legislator removed any doubt regarding this situation in the art. 497 (1) of the Civil Code. Therefore, if the parental authority would be

[14] Art. 229 din Legea 71/2011 pentru punerea în aplicare a Legii nr. 287/2009 privind Codul civil, Monitorul Oficial nr. 409 din 2011, cu modificările şi completările ulterioare, organizarea, funcționarea și atribuțiile instanței de tutelă și de familie se stabilesc prin legea privind organizarea judiciară [Art 229 of Law 71/2011 for the implementation of Law no. 287/2009 regarding the Civil Code, Official Gazette no. 409 of 2011, with subsequent amendments and additions, the organization, functioning and powers of the guardianship and family court are established by the law on judicial organization]

[15] Art. 400 Codul Civil din 2009 (Legea nr. 287/2009) - Republicare, Monitorul Oficial nr. 505 din 2011, cu modificările şi completările ulterioare [art 496 (2) of the Civil Code of 2009 (Law no. 287/2009) - Official Publication no. 505 of 2011, with subsequent amendments and additions]

affected by the change of the minor's residence, it can only be made with the express consent of the other parent. (art. 497 (1) Civil Code of 2009 - Law no. 287/2009)[16]. The art. 497 of the Civil Code is placed in the Chapter dedicated to parental rights and duties. Therefore, it has a general rule, that concerns all parents even if they are married or not, separated or divorced.

Although the law does not provide an express sanction for breaching the art. 497 of Civil Code, it was shown that the parent who did not give his consent regarding the change of residence of the child can invoke art. 403 of the Civil Code.[17] Thus, in the event of a change in circumstances, the Court can modify the measures regarding the rights and duties of divorced parents towards their children, at the request of any of the parents or another family member, the child, the protection institution, the institution public specialized for the protection of the child or the prosecutor.

CONCLUSION

The importance of establishing the home of the minor child is based on the principle of his best interest. In assessing this imperative, I stated that the Court must take into account a number of aspects that could influence the growth, development and education of minor children (for example, before starting a procedure of enforced execution on the family home, the child's interest is taken into account which should prevail over other domains).

Establishing the child's residence after divorce is also a topic addressed in this theme because although the marriage ends, the parent-child relationship is ensured by their exercise of parental authority. This includes establishing the child's home/domicile, which most often corresponds to the family home during the marriage.

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SARA Law **R**esearch **C**enter
International **J**ournal of **L**egal and **S**ocial **O**rder, https://www.ccdsara.ro/ijlso
ISSN 2821 – 4161 (Online), ISSN 2810-4188 (Print), ISSN-L 2810-4188
N°. 1 (2024), pp. 27-37

PROTECTION OF HUMAN PERSONALITY THROUGH CRIMINAL PROCEDURAL MEANS

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Received 03.11.2023; accepted 10.01.2024
DOI: https://doi.org/10.55516/ijlso.v4i1.216

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Abstract

The protection of human personality in criminal proceedings is a fundamental pillar of the justice system, based on a series of essential principles and procedural means. In this regard, the fundamental principles leading to the protection of human personality are presented, such as the benefit of the doubt, the right to a fair trial within a reasonable time, respect for human dignity and privacy, the right to defense and freedom, but also the right to an interpreter for persons who do not understand the official language. Procedural means such as legal aid, the exclusion of illegally obtained evidence, the protection of witnesses and victims, as well as the regulation of preventive measures are also analyzed, all of which contribute to ensuring respect for fundamental rights and freedoms. Respect for these norms and guarantees is essential to prevent abuses and to maintain the fairness and integrity of the judicial system.

Key words: *human personality, principles, law, criminal process, judicial organization.*

INTRODUCTION

The protection of human personality is done through criminal procedural means within the criminal process, but this is primarily provided for in art. 8 of Law no. 304/2022 on judicial organization in which any person may address the justice system to defend their rights, freedoms and legitimate interests in exercising their right to a fair trial, and access to justice cannot be restricted. The constitutional provisions regarding fundamental rights and freedoms must be respected within any criminal process.

In the Criminal Procedure Code, in the provisions of Articles 2 - 13, we have a series of principles that are based on the norms of criminal procedural law,

guiding the behavior of judicial bodies and those participating in the criminal process, regardless of the procedural phase in which the process is.

Among these principles we can mention the legality of the criminal process, the separation of judicial functions, the presumption of innocence, the discovery of the truth, *ne bis in idem*, the obligation to initiate and exercise criminal proceedings, the fairness and reasonable term of the criminal process, the right to liberty and security, the right to defense, respect for human dignity and private life, the official language and the right to an interpreter, and the application of criminal procedural law in time and space.

Although these principles are applicable throughout the criminal process, as principles relating to the protection of persons involved in criminal proceedings, we have the benefit of the doubt, the fairness and reasonable term of the criminal trial, the right to liberty and security, the right to defense, respect for human dignity and private life, the official language and the right to an interpreter.

I. FUNDAMENTAL PRINCIPLES THAT ENSURE THE PROTECTION OF HUMAN PERSONALITY

The fundamental principles apply to all criminal procedural rules, so they must be respected in all phases of the criminal trial.

a) *benefit of the doubt*. This principle has a universal vocation that historically appears in the American Declaration of Independence of 1776 and in the Declaration of the Rights of Man and of the Citizen of 1879, being later enshrined in the Universal Declaration of Human Rights – art. 11 para. 1, the Charter of Fundamental Rights of the European Union (art. 47-48), in art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) – any accused person is presumed innocent until proven guilty according to law. This principle is also enshrined in art. 4 para. 1 of the Code of Criminal Procedure and provides that any person is presumed innocent until his or her guilt is established by a final criminal judgment. In practice, any person who has a certain capacity in the criminal process is guaranteed the right not to be treated as a guilty person who has committed one or more crimes and is consistent with art. 23 para. 11 of the Constitution according to which "until the final judgment of the court, the person is presumed innocent." (*Bogdan Buneci, 2022, p.30*)

This principle is also found in the provisions of art. 99 paragraph 2 of the Code of Criminal Procedure according to which the suspect or defendant benefits from the presumption of innocence, not being obliged to prove his innocence, and has the right not to contribute to his own accusation.

It should also be noted that after the administration of all the evidence, any doubt in the formation of the conviction of the judicial bodies is interpreted in favor of the suspect or defendant. In this sense, the rule *in dubio pro reo* that complements the presumption of innocence excludes the use of evidence whose content is doubtful in terms of the guilt of the accused.

b) *the fairness and reasonableness of the criminal trial.* It is a principle derived from the provisions of art. 10 of the Universal Declaration of Human Rights which states that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of the merits of any criminal charge against him.

In addition to the fact that this principle is also found in the Convention for the Protection of Human Rights and Fundamental Freedoms in art. 6 paragraphs 1 and 3 in which everyone has the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal which will decide on the merits of any criminal charge, as well as in the provisions of art. 47 paragraph 2 of the Charter of Fundamental Rights of the European Union.

The right to a fair trial is also included in Directive (EU) 216/343, in which the accused in a criminal trial may appear at trial but has the right to remain silent and the right not to incriminate himself.

In domestic law, the principle is found in the Romanian Constitution, art. 21 paragraph 3, in which the parties have the right to a fair trial and to the resolution of cases within a reasonable time, in art. 12 of Law no. 304/2022 on judicial organization, as well as in the provisions of art. 8 of the Criminal Procedure Code - judicial bodies have the obligation to carry out criminal prosecution and trial in compliance with procedural guarantees and the rights of the parties and subjects of the proceedings, so that the facts constituting crimes are ascertained in a timely and complete manner, no innocent person is held criminally liable, and any person who has committed a crime is punished according to the law, within a reasonable time.

A fair trial must recognize the parties and subjects of the proceedings the right to be informed of the accusation brought by the indictment, to benefit from the right to defense, as well as the time and facilities necessary to prepare the defense, to propose evidence in his defense, to be assisted free of charge by an interpreter if he does not understand the language used at the hearing, to benefit from free of charge by an interpreter if he does not understand the language used at the hearing, to raise requests and exceptions. Moreover, the term fairness signifies the meaning of justice, honesty, impartiality, equality. For this reason, compliance with this principle implies the protection of the person in whom the judicial bodies have the duty to carry out both the criminal prosecution and the trial with respect for procedural guarantees and the rights of the parties.

Regarding the reasonable term according to art. 224 of Law no. 303/2022 on the status of judges and prosecutors, it is specified that they are obliged to complete the work within the established deadlines and to resolve the cases within a reasonable period, depending on their complexity, and to respect professional secrecy. Also in the sense of respecting the protection of persons involved in criminal proceedings, the legislator introduced in the provisions of art. 4881 – 4886 of the Criminal Procedure Code the challenge regarding the duration of the

criminal trial (which can be introduced within the term provided for in art. 4881 paragraph 3), which can be made by the suspect, defendant, injured person, civil party and civilly liable party, to notify the court if the criminal investigation or trial activity is not carried out within a reasonable period. This can also be done by the prosecutor, but only during the trial.

c*) the right to liberty and security.*

Since fundamental freedoms constitute the very foundation of justice and peace in the world, as stated in Article 5, paragraph 1, of the European Convention on Human Rights (ECHR), *any person has the right to liberty and security of person. No one shall be deprived of his liberty except in the following cases and in accordance with the law:*

a. if he is lawfully detained pursuant to a conviction by a competent court;

b. if he has been the subject of lawful arrest or detention for failure to comply with a judgment passed by a court in accordance with the law or for the purpose of securing the execution of an obligation prescribed by law;

c. if he has been arrested or detained for the purpose of bringing him before the competent judicial authority on reasonable grounds for suspecting that he has committed an offence or for the purpose of preventing him from committing an offence or from fleeing after having committed it;

d. if it is a question of the lawful detention of a minor for the purpose of his education under supervision or of his lawful detention for the purpose of bringing him before the competent authority;

e. if it concerns the lawful detention of a person likely to transmit a contagious disease, of a lunatic, an alcoholic, a drug addict or a stray person;

f. if it concerns the lawful arrest or detention of a person for the purpose of preventing illegal entry into the territory or against whom expulsion or extradition proceedings are in progress.

The right to liberty and security is also provided for in art. 4 of the ECHR, art. 6 of the ECHR as well as in the preamble of Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in proceedings, and in the internal provisions we refer to art. 23 of the Romanian Constitution in which individual liberty and security of persons is inviolable.

In the sense of the above, the criminal procedural provisions reflect the protection of persons in the provisions of art. 9 of the Criminal Procedure Code, *namely during the criminal trial, the right of any person to liberty and security is guaranteed. Any measure depriving or restricting liberty is ordered exceptionally and only in the cases and under the conditions provided for by law. Any person arrested has the right to be informed promptly and in a language which he understands of the reasons for his arrest and has the right to appeal against the order of the measure. When it is established that a measure depriving or restricting liberty was ordered unlawfully, the competent judicial bodies have the*

obligation to order the revocation of the measure and, where appropriate, the release of the detained or arrested person. Any person against whom a measure depriving of liberty was ordered unlawfully or unjustly, in the course of criminal proceedings, has the right to compensation for the damage suffered, under the conditions provided for by law. There is a guarantee provided by law that when a preventive measure of arrest has been taken, the person has the right to be informed promptly and, in a language, he understands of the reasons for his arrest.

d) the right to defense. It is a principle with universal validity, as it is provided for in art. 11, point 1 of the Universal Declaration of Human Rights, which states that any accused person must be assured of all the guarantees necessary for his defense, a right also provided for in the provisions of art. 6, paragraph 3, letters b-c of the ECHR. Being a right with a universal vocation, this principle is also included in art. 48 paragraph 2 of the Charter of Fundamental Rights of the European Union, in Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2013, in Directive 2013/48/EU of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and subsequently in EU Directives 2016/343 and 2016/1919 on the exercise of the rights of the defense and the obligation of legal aid.

In domestic law, this principle is provided for in the Romanian Constitution in art. 24, in art. 17 of Law no. 304/2022 on judicial organization, and in the Code of Criminal Procedure it is provided for in art. 10 which shows that the parties and the main procedural subjects have the right to defend themselves or to be assisted by a lawyer.

The parties, the main subjects of the proceedings and the lawyer have the right to benefit from the time and facilities necessary for the preparation of the defense. The suspect has the right to be informed immediately and before being heard about the act for which the criminal investigation is being carried out and its legal classification. The defendant has the right to be informed immediately about the act for which the criminal action against him was initiated and its legal classification. Before being heard, the suspect and the defendant must be told that they have the right not to make any statement. The judicial bodies have the obligation to ensure the full and effective exercise of the right to defense by the parties and the main procedural subjects throughout the criminal trial. The right to defense must be exercised in good faith, according to the purpose for which it was recognized by law.

Any failure to exercise the right to be assisted by a lawyer chosen during the criminal proceedings must be voluntary and unequivocal and does not prevent the subsequent exercise of this right at any time during the criminal proceedings. In case of non-exercise of the right to be assisted by a lawyer of his choice, the suspect or defendant shall be informed by the judicial bodies, in a simple and

accessible language, about the content of the right and the possible consequences of not exercising it.

The parties, the main procedural subjects and their lawyer have the right to benefit from a certain time for the preparation of the defense, taking into account the complexity of the case, and according to art. 109 para. 2 of the Code of Criminal Procedure, the suspect or defendant has the right to consult with the lawyer both before and during his hearing or to be allowed to use notes.

Moreover, the provisions of Article 83 of the Code of Criminal Procedure provide for the rights of the defendant, and in Articles 85 and 87 the rights of the civil party and of the civilly liable party. If the provisions regarding the provision of the right to defense are not observed, the legislator provided in art. 281 para. 1 letter f of the Code of Criminal Procedure the application of absolute nullity in the situation where this right has not been respected, when legal aid is mandatory.

e) respect for human dignity and privacy.

Respect for human dignity has been a permanent concern both at international, European and domestic level, so that this principle is regulated in various acts with legal force. We could mention here Article 3 of the European Convention on Human Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 in New York to which Romania has also acceded, the Charter of Fundamental Rights of the European Union Articles 1, 4 and 7 in which it is essentially shown that human dignity is inviolable, As it must be respected and protected, no one may be subjected to torture or to inhuman or degrading treatment or punishment, and everyone has the right to respect for private and family life, home and the secrecy of communications.

Similar provisions can be found in domestic law in the Romanian Constitution – Articles 22 and 27, and according to Article 11 of the Code of Criminal Procedure, any person who is under criminal investigation or trial must be treated with respect for human dignity. Respect for private life, the inviolability of the home and the secrecy of correspondence are guaranteed. The restriction of the exercise of these rights is admitted only under the conditions of the law and if it is necessary in a democratic society.

Although the provisions of art. 11 refer to the person who is under criminal investigation or trial, this must also be observed in the pre-trial chamber phase, in the execution phase of criminal decisions, as well as in cases of postponement of the execution of the sentence or interruption of the execution of the sentence.

Within the criminal provisions there are sanctions within the framework of non-respect for human dignity and we could mention here the abusive investigation provided for by art. 280 of the Criminal Code, subjection to ill-treatment – art. 281, torture – art. 282 of the Criminal Code. In essence, any person who has a certain capacity in the criminal process (we include the criminal

investigation, the pre-trial chamber, the trial phase and the execution phase of court decisions) must be treated with respect for human dignity, torture, inhuman or degrading treatment being prohibited.

Regarding private life, the inviolability of correspondence is provided for in Article 28 of the Romanian Constitution, and respect for private life and the inviolability of the home are protected by law.

Personal data and confidential information obtained during criminal proceedings must be protected so as not to affect the reputation and privacy of the person. This is especially essential in high-profile cases, where disclosure of information can cause irreparable harm.

f) official language and the right to an interpreter.

This principle is provided for in art. 13 of the Constitution of Romania, which provides that the official language is Romanian, and in art. 128 it is stated that all judicial procedures are conducted in Romanian, and Romanian citizens belonging to national minorities have the right to express themselves in their mother tongue before the court under the conditions of the organic law. The same is also provided for in the provisions of art. 16 of Law no. 304/2022 on judicial organization.

According to art. 12 of the Code of Criminal Procedure, the official language in criminal proceedings is Romanian. Romanian citizens belonging to national minorities have the right to express themselves in their mother tongue before the courts, and procedural documents are drawn up in Romanian. Parties and procedural subjects who do not speak or understand Romanian or cannot express themselves are provided, free of charge, with the opportunity to familiarize themselves with the documents in the case file, to speak, as well as to submit conclusions in court, through an interpreter. In cases where legal assistance is mandatory, the suspect or defendant is provided with the opportunity to communicate, through an interpreter, with the lawyer free of charge in order to prepare for the hearing, to file an appeal or to make any other request related to the resolution of the case. In judicial proceedings, authorized interpreters are used, in accordance with the law. Authorized translators are also included in the category of interpreters, in accordance with the law.

For citizens belonging to national minorities, they can express themselves in their native language, but all documents are drawn up in Romanian.

When appropriate, interpreters may be used, being incidental to the case also the provisions of art. 81 paragraph (1) letter g2) of the Criminal Procedure Code when it is provided the right to communicate the translation to the injured person in a language, he understands of any solution not to prosecute and art. 83 letter f) when the defendant has the right to an interpreter, if he does not understand Romanian.

Romanian legislation includes sufficient elements regarding the right to an interpreter, as provided for as provided for in the Directive 2010/64/EU..

II. PROCEDURAL MEANS THAT CONTRIBUTE TO THE PROTECTION OF HUMAN PERSONALITY

II.1 The right to legal assistance

In criminal proceedings, the lawyer assists or represents the parties or subjects of the proceedings under the terms of the law (art. 88 paragraph 1 of the Criminal Procedure Code). In addition to the legal provisions of the Romanian Constitution, the Law on Judicial Organization no. 304/2022 and Law no. 51/1995 on the organization and status of the legal profession, provide legal provisions on legal assistance and representation, as well as in the provisions of art. 88 – 96 of the Criminal Procedure Code.

The legal provisions on the matter indicate the right of the suspect or defendant to legal assistance by a lawyer throughout the criminal investigation, the preliminary chamber procedure and the trial, and the judicial bodies are obliged to inform them of this right.

Also, the detained or arrested person has the right to a lawyer, ensuring the confidentiality of communications, and mandatory legal assistance is also provided when the suspect or defendant is a minor, if the judicial body considers that the suspect/defendant cannot defend himself/herself, or in the case of trial (pre-trial chamber and trial), in cases where the law provides for the crime committed, the penalty of life imprisonment or imprisonment for more than 5 years (art. 89 and 90 of the Code of Criminal Procedure). Also, during the criminal trial, there is the right to legal assistance for the injured party, the civil party and the civilly liable party. In order to respect human personality, even for witnesses in a criminal trial, the right to appear at the hearing accompanied by a lawyer, who may assist at the hearing, has been established (art. 118 para. 4 of the Criminal Procedure Code).

II.2. Exclusion of illegally obtained evidence

In general, evidence administered by judicial bodies enjoys the presumption of legality and therefore it should only be excluded in circumstances where the relevant legal provisions regarding its administration have been flagrantly violated.

Thus, as stated in Article 100 of the Code of Criminal Procedure, it is prohibited to use violence, threats or other means of coercion, as well as promises or exhortations in order to obtain evidence.

Regarding the principle of respect for human dignity, it is prohibited to use listening methods or techniques that affect the person's ability to remember and report consciously and voluntarily the facts that constitute the subject of evidence. Even in the situation where the person questioned gives consent to the use of such evidence. For this reason, evidence obtained through torture, as well as evidence derived from it, cannot be used in criminal proceedings, as well as those that were obtained illegally (art. 100 para. 1,2 Code of Criminal Procedure). Even in the situation where the person questioned gives consent to the use of such evidence.

For this reason, evidence obtained through torture, as well as evidence derived from it, cannot be used in criminal proceedings, as well as those that were obtained illegally (art. 100 para. 1,2 Code of Criminal Procedure).

When the illegality of the evidence used is found, it leads to the nullity of the act by which the administration of evidence was ordered or authorized, so that the evidence used is removed from the case file.

Similar provisions are also provided regarding the witness's right to silence and non-self-incrimination, who has the right not to declare facts and circumstances that, if known, would incriminate him. Therefore, the judicial body is obliged to inform the witness of this right before each hearing, and evidence obtained in violation of these legal provisions cannot be used against the witness in any criminal trial (art. 118 para. 1 and 2 of the Code of Criminal Procedure).

II.3. Protection of witnesses and victims

The protection of threatened witnesses is provided for in the provisions of Articles 125 – 129 of the Code of Criminal Procedure and in the provisions of Law No. 682/2002 on the protection of witnesses.

Thus, during the criminal investigation (art. 126 paragraph 1 of the Criminal Procedure Code), once the threatened witness status is granted, the prosecutor orders the application of one or more of the following measures:

a) surveillance and guarding of the witness's home or providing temporary housing;

b) accompanying and ensuring the protection of the witness or his/her family members during travel;

c) protection of identity data, by granting a pseudonym with which the witness will sign his/her statement;

d) hearing the witness without his/her presence, through audio-video transmission means, with distorted voice and image, when other measures are not sufficient.

The same measures can be taken in the pre-trial chamber or during the trial. There are special ways of hearing the protected witness which can be carried out only by means of audio-video means, without the witness being physically present in the place where the judicial body is located.

In addition to protected witnesses, there may also be vulnerable witnesses when the witness has suffered a trauma as a result of the commission of the crime or as a result of the subsequent behavior of the suspect or defendant, as well as in situations where the witness is a minor. In this situation too, the prosecutor and the court may order protective measures such as surveillance and guarding the witness's home, providing temporary housing, and accompanying and ensuring the protection of witnesses or family members during their travels.

With regard to the injured party and the civil party, the provisions of art. 113 of the Code of Criminal Procedure provide for their protection when the conditions provided for by law regarding the status of a threatened or vulnerable

witness, or for the protection of private life or dignity, are met. These protective measures also apply if the release or escape of the perpetrator of the crime may endanger the private life or dignity of the injured party or the civil party or may cause them damage, regardless of its nature and extent. Child victims, victims who are in a dependent relationship with the perpetrator, victims of terrorism, organized crime, human trafficking, violence in close relationships, sexual violence or exploitation, victims of hate crimes and victims affected by a crime due to prejudice or discrimination, victims with disabilities, as well as victims who have suffered considerable harm are presumed to be vulnerable. The same situation applies to the injured person or the civil party if they are in any of the situations shown above, protective measures may be taken.

II.4. Strict regulation of preventive measures

Preventive measures may be ordered within the framework of criminal proceedings when there is evidence or solid evidence that leads to reasonable suspicion that a person has committed a crime, the measure is necessary to ensure the proper conduct of the criminal proceedings and when there are no other less intrusive alternatives. According to Art. 202 of the Code of Criminal Procedure, preventive measures include: detention, judicial control, judicial control on bail, house arrest, preventive arrest.

If preventive measures regarding detention and judicial control can be taken by the prosecutor during the criminal investigation and judicial control by the judge of rights and freedoms, the preliminary chamber judge or another judge during the trial, the measure of house arrest and preventive arrest is taken only by a judge depending on the procedural phase in which the respective case is. The criminal procedural provisions provide for appeals against decisions ordering preventive measures during the criminal investigation, in the preliminary chamber procedure and against decisions ordering preventive measures during the trial.

During the criminal prosecution or trial, there are legal provisions regarding the verification of preventive measures during the preliminary chamber procedure or trial.

The provisions of Articles 209 – 242 of the Code of Criminal Procedure provide for the conditions and observance of other rights of the suspect or defendant regarding detention, judicial control, judicial control on bail, house arrest and preventive arrest.

For minors, there are special provisions regarding preventive measures applicable to them in the provisions of Articles 243 – 2441 of the Criminal Procedure Code and the measure of detention or preventive arrest is of an exceptional nature and can only be ordered if the effects that deprivation of liberty would have on the personality and development of minors are not disproportionate to the intended purpose. For this reason, when establishing the duration for which the preventive arrest measure is taken, the age of the defendant

is taken into account as of the date on which the decision is made to take, extend or maintain this measure.

Although Law No. 304/2022 on judicial organization provides in its provisions that when the general interest of society and the volume of activity regarding specialized cases justify it, specialized tribunals may be established for civil cases, criminal cases, minor and family cases, administrative and fiscal litigation cases, cases regarding labor conflicts and social insurance, civil cases arising from the operation of an enterprise, insolvency, unfair competition or for other matters, as well as specialized panels for maritime and fluvial cases.

For minors, the specialized panels and sections for minors and families, as well as the specialized courts for minors and families, try both crimes committed by minors and crimes committed against minors (*art. 44 of Law no. 304/2022*). Currently, there is the Brașov Court for Minors and Families in the country.

CONCLUSION

The protection of the human personality in criminal proceedings is the foundation of a fair justice system. This is achieved through a series of principles and procedural means aimed at preventing abuses and protecting the dignity and integrity of the person. Respect for these principles is essential for maintaining trust in the judicial system and ensuring fair and impartial justice.

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SARA Law **R**esearch **C**enter
International **J**ournal of **L**egal and **S**ocial **O**rder, https://www.ccdsara.ro/ijlso
ISSN 2821 – 4161 (Online), ISSN 2810-4188 (Print), ISSN-L 2810-4188
N°. 1 (2024), pp. 38-46

CRIMINAL LEGISLATION REGARDING CRIMES AGAINST SEXUAL FREEDOM AND INTEGRITY COMMITTED AGAINST MINORS

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Received 15.11.2024; accepted 21.12.2024
DOI:https://doi.org/10.55516/ijlso.v4i1.217

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Abstract

This study analyzes the criminal legislation in Romania regarding crimes against sexual freedom and integrity committed against minors, in the context of the recent amendments to the Criminal Code of 2023 and 2024. Despite efforts to align with European directives and strengthen the protection of minors, frequent changes and inconsistencies of legislation challenge effective law enforcement. The rapid succession of changes and legal ambiguities can affect the real protection of minors. In our opinion a coherent penal policy and the adoption of clear measures to protect the rights of minors, in accordance with international standards, are necessary.

Key words: *minor, sexual intercourse, consent, victim, punishments, legislative changes.*

INTRODUCTION

Child sexual abuse and sexual exploitation of children, including child pornography, are serious violations of fundamental rights, in particular the rights of children to the protection and care necessary for their well-being, as stipulated in the 1989 United Nations Convention on the Rights of the Child and in the Charter of Fundamental Rights of the European Union.

In accordance with Article 6(1) of the Treaty on European Union, the Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union, which, in Article 24(2), provides that in all actions concerning children, regardless of whether they are carried out by

public authorities or private institutions, the best interest of the child must be considered paramount *(Directive 2011/92/EU)*.

Unfortunately, sexual violence is ubiquitous, in almost every culture, at all levels of society and in every state of the world. Relevant data contained in international studies indicate that at least one woman in 5 has suffered an attempted rape or rape, and the vast majority of victims are women and children of both sexes. Sexual violence is seen as a global problem, not only in a geographical sense but also in terms of the age and gender of the categories affected by this type of violence. *(Explanation of reasons for amending the Criminal Code)*.

I. EUROPEAN AND DOMESTIC PROVISIONS REGARDING CRIMES AGAINST SEXUAL FREEDOM AND INTEGRITY RELATING TO MINORS

According to Directive 92/2011 of the European Parliament and of the Council, it is established in the provisions of art. 2 what exactly is meant by:

"Child" – i.e. any person under the age of 18;

"Age of sexual consent" - i.e. the age below which it is prohibited, in accordance with national law, to practice sexual activities with a child;

"Child pornography" - i.e. (i) any material that visually depicts a child engaged in explicit, real or simulated sexual behavior; (ii) any depiction of the genitalia of a child primarily for sexual purposes; (iii) any material that visually depicts any person who appears to be a child engaged in explicit, real or simulated sexual conduct, or any depiction of the sexual organs of a person who appears to be a child, primarily for sexual purposes; or (iv) realistic images of a child engaged in sexually explicit behavior or realistic images of a child's sexual organs, primarily for sexual purposes.

According to this directive and the Criminal Code in force (published in the Official Gazette, Part I no. 510 of 24 July 2009, in force from 1st February 2014) the practice of sexual activities, i.e. with a person under the age of 18, who has not reached the age of sexual consent, is punished according to the crime with imprisonment.

Unfortunately, the current Criminal Code, since its entry into force on February 1st 2014, has been amended 35 times to date, 12 times in 2023 and 5 times in 2024, without having a coherent criminal policy, the essential changes which were made in 2023 concern crimes against freedom and sexual freedom, especially with regard to crimes committed against minors.

Thus, by Law no. 217/2023, amended and supplemented by Law no. 424/2023, several legal texts concerning minors were adopted, currently existing as crimes: the use of child prostitution provided for in article 2161, the rape committed on a minor art. 2181, sexual assault committed on a minor art. 2191, determining or facilitating the maintenance of sexual or sexual acts between minors art. 2192, sexual corruption of minors art. 221 and recruitment of minors for sexual purposes prov art. 222.

It was considered that there must be legislative solutions against sexual abuse and violence of any kind directed against children in order to guarantee a real protection of this category, regardless of the time that has passed since the act was committed (by law no. 217/2020 was amended art. 153 para. 2 C.pen. which states that crimes related to rape of a minor, sexual assault of a minor have no statute of limitations).

As we showed above, in the last 10 years there has been an incoherent criminal policy where, from particular cases, a legislative amendment has been reached, so that some criminal provisions regarding sexual activities against minors lead to the false impression of additional protection of the minor against sexual abuse. Many of the provisions seem unconstitutional or even confusing, so there is a possibility that in some situations minors will suffer due to committing certain sexual abuse crimes.

II. LEGISLATIVE CHANGES WHICH WE CONSIDER ARE A DIMINISHMENT OF PROTECTION FOR MINORS

Although the criminal amendments were criticized by some authors of criminal law, they entered into force after January 1st 2024, so that the protection of minors by criminal means was reduced *(Professor PhD Valerian Cioclei and PhD Hunor Kadar).*

In the sense of what has been shown, we will exemplify some crimes by which there is a decrease in the protection of minors, namely:

a) Use of child prostitution prev. of art. Art. 2161, according to which *the maintenance of any act of a sexual nature with a minor who practices prostitution is punishable by imprisonment from 6 months to 3 years, if the act does not constitute a more serious crime.*

By the practice of prostitution is understood the maintenance of sexual acts with different people in order to obtain patrimonial benefits for oneself or for another *(art. 213 par. 4 Penal Code - pimping).*

This crime has a very narrow applicability, showing that for example if an adult has a sexual act with a minor over the age of 16, the act does not constitute a crime, if the minor does not practice prostitution.

When a 15-year-old minor maintains a sexual act with a 17.5-year-old minor, who engages in prostitution, he/she as an active subject will be liable for the use of child prostitution, while the passive subject, the 17.5-year-old minor, who prostitutes, will not commit any crime *(Valerian Cioclei, 2024, p. 197).*

Likewise, an adult by law touching or kissing a 16.5-year-old minor who is a prostitute is a crime, and the same act committed by a minor of the same age who has not started sexual life is not a criminal act. We specify that the notions minor of age and major also include the female gender.

b) The rape of a minor - the introduction of this criminal offense by Law no. 217/2023 had influences on the internal judicial practice in which solutions

were pronounced regarding valid consent even at a lower age (14 years) regarding a sexual relationship, oral or anal intercourse, as well as any other acts of vaginal penetration, adopting a threshold regarding the age of the minor, namely the one who has not reached the age of 16, which constitutes rape even in the situation where there was his consent to sexual relations, since children cannot truly consent / to give valid consent to sexual acts with an adult, even when we obviously do not have coercive behavior on the part of the adult *(Explanation of reasons to Law no. 217/2023 - George Visu – Consent or coercion).*

Due to the criticisms that were signaled at the issue of Law no. 217/2023, it was amended and supplemented by Law no. 424/2023, so that in the first two versions of this crime they are similar to the old crime of sexual intercourse with a minor, which has been abrogated, and the next two, when the crime is committed by coercion, contain provisions similar to those provided for the crime of rape in art. 218 Criminal Code.

The novelty of this crime is that we have the crime of rape when according to art. 2181 paragraph 1 Criminal Code, the act is not committed by coercing the victim, the minor consenting to the sexual act, but this consent would be vitiated due to age and mental immaturity *(Valerian Cioclei, 2024, p. 221).*

When we have this version of the rape provided by art. 2181 C. pen. in which the acts are committed without coercion (on a case-by-case basis here the judicial bodies should be able to appreciate with a forensic psychiatric expertise regarding discernment-consent) the act is not punished if the age difference between the perpetrator and victim does not exceed 5 years.

If in the previous regulation regarding the crime of sexual intercourse with a minor the provision was for a difference of up to 3 years, this has been increased to 5 years, so where there is better protection of the minor, where for example, a minor of 16 years maintains a sexual act with a minor of 13.5 years, and this act is no longer sanctioned considering the age difference of 2.5 years (previously, if the difference exceeded 3 years the punishment was from 2 to 9 years) *(Valerian Cioclei, 2024, p. 221).*

In situations where sexual intercourse, oral or anal intercourse takes place between a minor and another minor under the age of 14, it is sanctioned according to art. 114 of the Criminal Code. In the provisions of art. 114 paragraph 1 C. pen. if the minor is between the ages of 14 and 18 at the time of the crime, a non-custodial educational measure is taken, and paragraph 2 shows when a custodial educational measure can be taken, in certain situations. How can such an educational measure be taken when the punishment provided by law for the crime committed is 7 years or more times life imprisonment, and in the case of rape of a minor on paragraph 2 there is no punishment to which we can refer, so that the legal provision somehow leaves its application up in the air, even when a non-custodial educational measure would be taken, since no punishment is provided for.

The situations in which we have sexual intercourse, oral or anal intercourse, as well as any other acts of vaginal or anal penetration committed by a minor with another minor under coercion are punishable by imprisonment from 3 to 10 years and prohibiting the exercise of certain rights. And in this situation the legislator "forgot" that according to art. 114, only educational measures can be taken, so the minor cannot be punished either with prison or with the prohibition of certain rights.

Legal oversights also exist within art. 2181 paragraph 4 of the Criminal Code, where letter g) states that the rape was committed either with the consent of the minor or by coercion, since the victim became pregnant. If the rape was committed by coercion, it was normal to provide for this situation as well. However, if the act was committed with the consent of the minor, which legal provision is to be applied, Art. 2181 para. 1 and 11 if, for instance since the age difference between the perpetrator and the victim does not exceed 5 years? or even if this situation exists, is applied a penalty where the special maximum of the penalty is increased by 3 years so that the perpetrator can risk a penalty of up to 15 years in prison? Where is the protection of the minor here, if also in this situation the acts constitute rape of a minor?

c) Sexual assault committed on a minor - This crime is similar to the crime of rape on a minor provided by in art. 2181 with the difference that the material element of the objective side is represented by acts of a sexual nature other than those provided by in art. 2181 Criminal Code.

For this crime as well, depending on the age of the minor, the cases that apply to the commission of such acts have been established, specifying that, just like in the case of rape provided in the art. 2181 para. 1 and 11, the acts are not sanctioned if the age difference between the perpetrator and the victim does not exceed 5 years, unlike the previous age threshold that was set at the age difference of up to 3 years (until January 1st 2024), and it represented sexual assault committed against a minor. Increasing the age difference to 5 years makes the same act no longer punishable, which leads to a de facto weakening of the protection of the minor and not to an additional protection as mentioned in the statement of reasons for the law no. 217/2023.

d) Determining or facilitating the maintenance of sexual or sexual acts between minors. The crime was introduced by law no. 217/2023, taking elements in paragraph 1 from the crime of rape provided by art. 2181 para. 1-3 Criminal Code in the sense that an adult determines the maintenance of a sexual relationship between minors who have not reached the age of 16, and on paragraph 2 it is the adult who determines the commission of any act of a sexual nature other than those mentioned above. in paragraph 1 by minors who have not reached the age of 16, punishing themselves with the provisions of art. 219 para. 1 – 3 of the Criminal Code, in both situations the penalty is reduced by one third.

As can be seen only from the reading of the two paragraphs of this article, there is no "facilitation" as a way of achieving the material element and where the legislator refers only to the fact that we have an action to determine the major to a minor for the maintenance of sexual relations with another minor.

By determining the maintenance of sexual acts or acts of a sexual nature, it is understood that an adult convinces a minor who has not reached the age of 16 to maintain one of the sexual acts that fall within the content of the crime of rape committed against a minor as well as the commission of any act of a sexual nature, other than those provided in paragraph 1 of art. 2192 Criminal Code.

It exists in both situations of determining that the minor endures or performs such an act, the legislator succeeded in not making any difference between maintaining the sexual act, on the one hand, and enduring or performing it, but it is essential that the determination be made by an adult, and the maintenance of sexual intercourse or the bearing or performance of it be made by minors under 16 years of age.

In the judicial practice, there will be situations in which this crime enters into competition with, for example, the previous version of art. 2192 paragraph 2 Criminal Code, when the determination of the minor under the age of 14 was to endure or perform an act of a sexual nature regardless of whether the act was performed with a minor or an adult, situations in which there is the possibility of not being punished considering that under the old provisions there were legal penalties for this. In both paragraphs of art. 2192 regarding the determination of the maintenance of sexual acts or of a sexual nature must be done voluntarily and not by coercion.

We believe that the mere determination of minors to perform sexual acts involving penetration or to perform acts of a sexual nature constitutes a crime. If the determination is made through acts of coercion, we are either in the situation of inciting the crime of rape provided by art. 2181 paragraph (2) Criminal Code or instigation to the crime of sexual assault committed against a minor provided by article 2191 paragraph (12) Criminal Code.

Also, the methods of punishment by reducing by one third, as they are provided in art. 2181 paragraph 1 – 3 and art. 2191 paragraph 1-3 become inapplicable since the crime under art. 2192 refers only to sexual or sexual acts committed only between minors.

e) Sexual corruption of minors is when the sexual act of any nature is committed by an adult in the presence of a minor, when a minor is determined by an adult to assist in the commission of acts of an exhibitionist nature or at shows in which acts are committed sexual of any nature, including materials of a pornographic nature or to incite a minor by means of remote transmission to commit any act of a sexual nature on him or with a person. It should be noted that the crime of sexual corruption of minors occurs only if a minor has not reached

the age of 16 in both situations presented, and at the incitement of a minor including when the act of a sexual nature is not committed.

If for the other types of crimes regarding minors we criticized the age difference between the subjects of the crime, in the case of the crime of sexual corruption of minors we can have hilarious situations where, for example, an adult aged 20 years and 3 months will be able to support a sexual relationship with a minor of 15 years and 3 months, since the age difference between the two does not exceed 5 years and will not constitute rape with a minor, but if this is done in the presence of a minors under 15 years of age, the adult will be liable for the sexual corruption of minors, provided by art. 221 para. (3) Criminal Code.

Things are simple because it does not sanction the adult who maintains a sexual act with a minor, but it sanctions him because he was "seen" by another minor of the same age having a sexual act. Or, looking at it from the perspective of the minor: it is permissible to have a sexual act, but it is forbidden to witness a sexual act." *(See in this sense, Professor PhD Valerian Cioclei).*

f) Enlisting minors for sexual purposes. It is a new crime as the Romanian legislation adopted such a crime to be consistent with the Council of Europe Convention for the protection of children against sexual exploitation and sexual abuse (ratified by Romania through law no. 252/2010).

In this crime, the active subject is an adult (regardless of gender) who recruits minors (also regardless of gender) who have not reached the age of 16, either for the purpose of committing a sexual act of any kind, or for the purpose of committing the crime of child pornography provided by art. 374 of the Criminal Code.

This can be done even when the proposal was made by means of remote transmission. For this type of crime, the legislator was clearer in the sense that there must be only the recruitment of minors for sexual purposes which consists of an act of proposal by the perpetrator, who has not reached the age of 16, to meet for the purpose of committing a sexual act of any nature or those provided for the crime of child pornography.

This crime is consummated the moment the proposal to meet for sexual purposes was made, and it reached the recipient minor. If the raping also leads to sexual intercourse, oral or anal intercourse or another act of vaginal penetration, we may find ourselves in the situation of a criminal contest and the rape of a minor.

CONCLUSION

Amendments to the Criminal Code made in 2023 and 2024 mainly targeted crimes against sexual freedom and integrity committed against minors, with the aim of stiffening penalties and clarifying certain legislative aspects. However, the frequency and nature of these changes raises questions about the coherence of criminal policy in this area.

In 2023, by Law no. 217/2023, significant changes were introduced, such as:

• Setting the age of consent at 16, considering any sexual act with a minor under this age as rape, even with their consent.

• Eliminating the possibility of applying the criminal fine for the crime of using child prostitution and increasing the prison sentence from 6 months to 3 years.

• Introduction of aggravating circumstances for the crime of rape, such as the commission of the act by a family member or by a person using the authority of his position.

Later, in December 2023, Law no. 424/2023 made additional changes, correcting and completing the previous provisions under certain aspects. For example, a new paragraph was introduced that sanctions sexual relations between minors under the age of 14, according to the provisions of art. 114 of the Criminal Code.

In 2024, Law no. 202/2024 continued the series of amendments, targeting in particular the crimes of human trafficking and slavery, by increasing the punishment limits and prohibiting the suspension of the execution of the sentence under supervision for these crimes.

Although these changes reflect an ongoing concern for the protection of minors and the fight against sex crimes, the frequency and rapid succession of changes can create confusion and difficulties in uniform enforcement of the law. To ensure a coherent criminal policy, it is essential that legislative changes are well-grounded, follow a clear strategy and are effectively communicated to all actors involved in the judicial system.

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SARA Law **R**esearch **C**enter
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ISSN 2821 – 4161 (Online), ISSN 2810-4188 (Print), ISSN-L 2810-4188
N°. 1 (2024), pp. 47-57

THE ROLE OF CUSTOMS IN CODIFICATION OF DIPLOMATIC AND CONSULAR LAW

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Received 15.11.2024; accepted 21.12.2024
DOI: https://doi.org/10.55516/ijlso.v4i1.213

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Abstract

Diplomatic and consular customs are still a lively subject to research, being primary sources of diplomatic and consular law, important in maintaining peace and diplomatic relations between states. Therefore, using the methods of scientific legal research, we proposed, starting from the analysis of the process by which the old diplomatic customs were formed, the origin of diplomatic and consular customs but also the opinions formulated in the specialized literature, Romanian and foreign, relative to the new dynamics of the formation of new customs in the field of diplomatic and consular law with regard to the time factor, to identify their role in the codification of diplomatic and consular law as well as to point out the importance of recognizing and transposing customs into text in a certain political and diplomatic context between Yugoslavia and the Soviet Union, as a result of which there was this need to be codified in the two Vienna Conventions on Diplomatic Relations (1961) and Consular Relations (1963).

Key words: *codification of customs; consular customs; diplomatic customs; Vienna Convention on Diplomatic Relations of 1961; Vienna Convention on Consular Relations of 1963.*

INTRODUCTION

The maintenance of international peace and security, the sovereign equality of states, as well as the development of reciprocal diplomatic and consular relations between states represent the goals and principles affirmed in diplomatic and consular law, through the adoption of the two Conventions on Diplomatic Relations (1961) and Consular Relations (1963).

As for the concept of "diplomacy", we must note that the first permanent representation formations appeared in the 13th century, when countries and commercial cities appointed agents with reciprocal representation obligations in the harbours and commercial centers of other countries *(Ernest Nys, 1884, p.8)*, but the beginnings of diplomacy appeared with the emergence of the state *(C.-F. Popescu, 2012, p. 242)*.

However, the term "diplomacy" comes from the Greek word *„diplóó",* which meant "double" and was used for the first time in the 18th century, which meant an activity of drafting diplomatic documents in two copies, one was given as a letter of recommendation to the envoys and the second was kept in the archive, the one who owned this doublet was called a diplomat and the activity he carried out was called diplomacy *(Ion M. Anghel, 1996, p. 5)*.

Diplomacy was defined, in doctrine, as the activity of some state authorities of "establishing, maintaining and developing relations with other states, defending its rights and interests abroad, for the achievement of the goals pursued in foreign policy" *(C.-F. Popescu, 2012, p. 242)*.

The foundation of diplomacy is the communication and negotiation of interests and needs between governments of states directly, through their heads, or indirectly, through correspondence or through an ambassador *(F.G. Feltham, 1997, p. 1)*.

The diplomat or head of the diplomatic mission portrays "a symbol" of bilateral relations between two states, the accredited state and the accrediting state *(Nehaluddin Ahmad, 2020, p. 1)*.

Custom is the reproduction of a behaviour, of a long-standing practice, so that it appeared, as a rule of conduct, before the law *(N. Popa, p. 175; I. Boghirnea, A. Tabacu, 2011; pp. 137-142; C. B. G Ene-Dinu, 2023, pp. 105-114)*. This is the pattern of custom in all branches of law. See for details, *(M.-C., Cliza, C.-C., Ulariu, 2023, p. 23; E.-E. Ștefan, 2023, p. 112; Manuela Niță, 2022, pp. 215-224)*. Thus, as in the case of most of the norms of classical international law, they were formed, in time, by custom, simultaneously with the practice of diplomacy itself later being incorporated or codified in international conventions/treaties.

But, the scientific research of the role of custom in public international law, as an essential source, has its starting point from art. 38 of the Statute of the International Court of Justice, which creates a hierarchy of formal sources in the matter *(Michael Wood, Omri Sender, 2024, p.13)*. The International Court of Justice has the obligation, on the basis of these sources, to be able to resolve the disputes that are submitted to its judgment. Thus, the Statute lists in a certain order the formal sources of international law: international conventions/treaties, "international custom, as evidence of a general practice, accepted as law" as well as the general principles of law.

THE ROLE OF CUSTOMS IN CODIFICATION OF DIPLOMATIC AND CONSULAR LAW

International custom is formed through the constant and uniform repetition (*diuturnitas*) of certain determined conduct of states, which is based on the recognition of the fulfillment of certain commitments (*opinio iuris atque necessitatis*), this producing the same legal effects that an international treaty produces, having the same legal force as a written source.

In the specialized literature, "international custom" has been defined as "the tacit expression of the consent of states regarding the recognition of a certain rule as a mandatory norm of conduct in relations between states" *(D. Popescu, 2005, p. 32).*

International custom produces the same legal effects that an international treaty produces, having the same legal force as a written source.

Only within the legal relations between subjects of international law, customary norms are formed, these having two elements that must be met cumulatively, namely: one material and the other psychological *(I. Diaconu, 1977, pp. 92-93).*

Thus, the material or objective element - *usus* - represents a repetition of a constant, generalized practice *(V. P. Haggenmacher, 1986. pp. 25-26)* of states and not "a random action" *(C.-F. Popescu, 2012, p.12),* a series of similar actions of states or similar solutions intervened in analogous situations within the framework of international relations between states, having a continuous evolution over time.

In the doctrine, it is shown that today, the condition of a long-term practice for the formation of custom is no longer an essential condition, especially in terms of multilateral diplomacy, a time interval determined for each individual situation, imposed by the need for legal regulation, being sufficient *(Ion M. Anghel, 1996, p. 6),* insisting on the frequency and uniformity and representativeness of the practice (C.- F. Popescu, 2012, p. 12). However, the opinion according to which customs, in international law, can have a spontaneous character (instant custom), thus excluding any aspect of duration, is criticized and completely excluded *(Ghe. Moca, 1989, p. 34; I. Diaconu, 1977, p. 94).*

The psychological, intentional or subjective element - *opinio juris sive necessitatis* - represents the essential part of custom, being the conviction of states, subjects of international law, that this practice is mandatory, and on the basis of which to regulate their relations based on this generalized practice, "accepted as law". In the Continental Shelf case (Libya vs. Malta) the International Court of Justice ruled that "It is obvious, of course, that the substance of customary international law must be sought, first of all, in the effective practice and in the *opinio juris* of states"[1].

[1] International Court of Justice, Judgment of 03.06.1985, Continental Shelf Case (Libya v. Malta)

Thus, the recognition of customs as binding receives "enforcement", thus transforming them into rules of law *(J. Basdevant, 1936, pp. 516-517, apud. I. Diaconu, 1977, p. 93).* This psychological element differentiates international custom from "courtesy", "usage" or "diplomatic protocol" which are not binding, therefore, do not produce legal effects, these not being customs from the perspective of international law.

What distinguishes custom, therefore, from international usages, regardless of their dimension, is the so-called psychological or subjective or even legal element, *opinio juris,* which characterizes custom. As the International Court of Justice has ruled, in order to be able to speak of a customary rule, "*The States concerned must […] have the feeling that they are complying with it, which is equivalent to a legal obligation. Neither the frequency nor even the habitual nature of the acts are sufficient. There are a number of international acts, in the field of protocol for example, which are almost invariably carried out, but are motivated by simple considerations of courtesy, expediency or tradition, and not by a sense of legal obligation*". The International Court of Justice, in this case, ruled that "the substance of customary international law must be sought, first of all, in the effective practice and in the opinio juris of States"[2].

In public international law and especially in diplomatic and consular law, the concept of "customs" used in the definition proposed by the new Civil Code according to which "customs are understood as the custom and professional usages" (art. 1, paragraph 6 of the Civil Code) - is not applicable to this matter.

The norms of diplomatic law, through the way they were formed, had the same trajectory as other legal norms from other branches of law, until their recognition by the state, a predominantly customary character, being the oldest source of law in the matter and continuing to be considered a primordial, first-rank source *(Ion M. Anghel, 1996, p. 11; Khagani Guliyev, 2014, p. 104).*

I. SOME ASPECTS REGARDING THE NEED TO CODIFY DIPLOMATIC AND CONSULAR CUSTOMS, FINALIZED BY THE CONCLUSION OF THE VIENNA CONVENTIONS OF 1961 AND 1963, RESPECTIVELY

To understand this approach to codifying international customs, we must start with the Charter of the United Nations[3], which was adopted in 1945, which in art. 13 paragraph 1 letter a provides that "*the General Assembly shall initiate studies and make recommendations in order to: promote international cooperation in the political field and to encourage the progressive development of international law and its codification*", one of the objectives of the organization being to encourage this desire, namely to progressively develop the codification of international law.

[2] International Court of Justice, Judgment of 20 February 1969, North Sea Continental Shelf Case, ICJ Reports, § 76 and 77.
[3] Charter of the United Nations of 26 June 1945, Published in the Official Gazette of 26 June 1945.

A first stage took place in 1949, when the UN materialized this objective during the first session of the International Law Commission, which planned the codification of international law. In the Report of the International Law Commission[4] on the work of its first session, 12 April 1949, in the second chapter entitled "Survival of international law and selection of subjects for codification" it is stated that this Commission has the power or competence to select these customs to be codified *(for more details, see Fernando Lusa Bordin, 2014, pp. 535-567)*. Thus, a provisional codification list was drawn up, such as for example: "the regime of territorial waters"; "nationality, including statelessness"; "treatment of aliens"; "right of asylum"; "diplomatic relations and immunities", as well as "consular relations and immunities"[5], which will, after a detailed study by the Commission and the UN General Assembly, complete or delete certain topics for codification from the list.

Therefore, the rules regarding the inviolability of the premises of the diplomatic or consular mission as well as of diplomatic or consular agents are, for example, norms of diplomatic and consular law of a customary nature.

A second stage took place towards the end of 1952, when the UN General Assembly was notified by Yugoslavia with a proposal for a resolution expressing its dissatisfaction with the fact that the Soviet Union had seriously violated diplomatic customs *(Sanderijn Duquet, Jan Wouters, 2017, p.5)*, so that the UN General Assembly raised and gave priority to the codification of the theme/subject of "diplomatic relations and immunities", selected in 1949, at the level of "priority topic"[6].

The third stage was the priority of codifying customs relative to "diplomatic relations and immunities", as well as "consular relations and immunities", as objectives of the five multilateral conventions[7] and those of the UN, through the signing in 1961 and 1963 of two Conventions through which the commitment of states after the Second World War was benefited, renewed on the basis of the principles of international cooperation of states, their equality, peaceful coexistence and the establishment of friendly relations, desires that were

[4] The first session of the International Law Commission was held at Lake Success, New York, from 12 April to 9 June 1949, as provided for in General Assembly Resolution 174 (II) of 21 November 1947.

[5] Extract from the Yearbook of the International Law Commission, vol. I, 1949, pp. 279-281.

[6] Resolution No. 685 (VII), Request to the International Law Commission, 5 December 1952, see https://digitallibrary.un.org/record/211256?v=pdf#files

[7] „ "Multilateral conventions can play an important role in recording and defining norms deriving from international custom," the International Court of Justice ruled, also in the Continental Shelf (Libya vs. Malta) case. This process can be done through the mechanism of codification of customs. For details see https://www.icj-cij.org/case/68 accessed on 11.09.2024. The first multilateral convention, in diplomatic matters, is the Vienna Regulation on diplomatic ranks, signed in 1815.

established in the preamble of the two conventions and which are found in the UN Charter.

The Vienna Convention on Diplomatic Relations of 1961[8] and the Vienna Convention on Consular Relations of 1963[9] represent the conventional regulation by which diplomatic and consular customs were codified, stating that "the rules of customary international law must continue to govern matters in which they have not been expressly regulated in the provisions of the present convention".[10]

The provisions regarding custom contained in the Vienna Convention also exist in the European Convention on Consular Functions concluded in 1967, the purpose of which was to transpose it to the practice of European states *(C. Popescu, 2022, p. p.254)*.

The collection of customs and their publication transforms them from customary, unwritten law into positive law *(N. Popa, 2020, p. 178),* a phenomenon about which Hegel said "When customs come to be gathered and gathered together, then their collection constitutes the Code of Laws [...]" *(Hegel, p. 240).*

II. IDENTIFYING SOME CUSTOMARY RULES BY CODIFYING THEM WITHIN THE TWO VIENNA CONVENTIONS

A first attempt at progressive codification of the diplomatic department was made through the Final Act of the Congress of Vienna in 1815, being the first multilateral agreement on the subject of the classification of diplomatic agents, taking into account the new realities and "demands of international relations between states".

After this year, other such congresses and international conferences[11] followed *(Ion M. Anghel, 1996, p. 18),* but as we have shown, a plan for codifying diplomatic and consular customs was only made in 1949 during the first session of the International Law Commission, when certain topics for codification were selected.

In accordance with the Resolution of the General Assembly of the U.N.U. of December 7, 1959, the Plenipotentiary Conference, convened by the U.N.U. in Vienna between March 2 and April 4, 1961, the Vienna Convention of April 18, 1961 on Diplomatic Relations, which entered into force on April 24, 1964. This U.N. Conference brought together plenipotentiaries from various states, who had

[8] Vienna Convention on Diplomatic Relations of 1961 published in the Official Gazette no. 89/8 July 1968.

[9] Vienna Convention on Consular Relations of 1963 published in the Official Gazette no. 10/28 January 1972.

[10] Preamble to the Vienna Convention on Diplomatic Relations of 1961

[11] These international meetings constitute the traditional form of multilateral diplomacy, consisting of meetings of diplomatic delegations of states, which were convened to debate issues of mutual interest, with the aim of reaching an agreed solution of international cooperation.

the power to decide to draft an international treaty, with the aim of codifying diplomatic law, the oldest customs in this matter.

Also, on April 24, 1963, the Vienna Convention on Consular Relations was adopted by the Conference of Plenipotentiaries convened by the UN in Vienna, between March 4 and April 24, 1963, attended by representatives of 92 states, a convention that entered into force on March 16, 1967[12].

Being a group of related legal norms, it was natural that the signatories of the codification of diplomatic law should deal, after its completion, with the codification of consular law, a phasing that was in the conception of both the International Law Commission and the UN General Assembly *(Ion M. Anghel, 1978, p. 19).*

It was agreed that this codification should not be a simple recognition of existing customs, but also their adaptation to the new realities existing in international diplomatic relations, adding a progressive significance to this approach *(Ion M. Anghel, 1996, p. 19).*

However, the Vienna Conventions did not cover the regulation of the entire general diplomatic and consular law, specifying in its preamble that the norms of customary international law, which are important, numerous and varied *(Ion M. Anghel, 1978, p.22),* will continue to regulate matters not expressly regulated by these conventions but also to help interpret the new norms of diplomatic and consular law.

Therefore, between these conventions, on the one hand, and diplomatic and consular customs, on the other hand, as sources of international law, "a complementarity and close interpenetration are established". That is, if for the signatory states of the two conventions, they are a source of law, for the other non-signatory states the same binding legal norm remains in the form of custom *(I. Diaconu, 1977, p. 105).* The merit of these two Plenipotentiary Conferences is that they adopted the two Conventions on diplomatic relations, respectively consular relations, through which a series of customary rules were confirmed, formed through the practice of states, elevating them to the rank of international regulations with general applicability, thus representing the common will of the states that signed, ratified or adhered to them and becoming, for example, the main, basic element or common law in the matter *(Ion M. Anghel, 1978, pp. 31-33).*

Thus, customary rules on diplomatic immunities were codified, such as: the inviolability of the premises of the diplomatic mission, of diplomatic archives and documents; the accredited (residing) state is prohibited from entering the premises of the diplomatic mission without the consent of the head of the

[12] Being ratified by Romania by Decree no. 481/20 December 1971 for the accession of the Socialist Republic of Romania to the Vienna Convention on Consular Relations, published in the Official Gazette no. 10/28 January 1972.

diplomatic mission; the freedom of the diplomatic mission to communicate with its government using all appropriate means of communication, including through diplomatic couriers or messages in code or cipher (art. 27 para. 1); the inviolability of official correspondence or the diplomatic bag (art. 27 para. 2).

As for the inviolability of the diplomatic agent, provided for by art. 29 of the Convention (1961) over the years it has lost its sacred character, but the violation of its inviolability entails the international responsibility of the accredited state, which has the obligation to take all necessary measures to prevent any attack on the person, freedom or dignity of the head of the diplomatic mission or any member of the diplomatic staff of the mission.

Also, as for the immunities of the staff of the diplomatic mission, these rules also have their origin in customary law, being considered among the oldest in the field *(M. Bassiouni, 1980, p. 609).* Thus, diplomats and their family members benefit from the immunity of the person and personal home, their property, documents and correspondence (art. 29-37 para. 1).

Also through the Vienna Convention, another customary rule that was codified is that relating to the exemption from taxes and duties on the headquarters or residence of the diplomatic mission, as well as on customs duties on objects and products intended for the use of the diplomatic mission, in a quantity that is established by provisions of the receiving state (creditor).

Also, the right of the person representing the accrediting state to fly the flag of his country, which he represents, as well as to place the coat of arms of the accrediting state on the premises of the diplomatic mission and on the autorurism of the head of the mission (art. 20),

The International Court of Justice ruled that this provision should continue to apply even if the states in question are in a military conflict *(Case of the Democratic Republic of the Congo v. Uganda).*

From the economy of the Vienna Conventions *(on the commentaries on diplomatic relations regulated in the Vienna Convention, see Eileen Denza, 2009, pp.1286–1288)* several aspects of the role of custom in the codification of diplomatic and consular law emerge, these being a basis in the regulation of these provisions, namely: the diplomatic mission is understood as a complex and unitary authority of diplomatic relations; if within the framework of customs only the person of the ambassador enjoyed immunities and privileges, the Convention added to them, extending the immunities and privileges to members of the administrative and technical staff, who have the quality of members of the mission; the accredited state is granted a range of special prerogatives; a balance is ensured between the mutual interests of the two states – the accrediting and the accrediting: they become rules of law and certain rules of courtesy (for example: those relating to the request for agreement or customs exemption, etc.).

Consular customs were also transposed into the Vienna Convention of 1963 on the same line of rules.

CONCLUSION

The importance of these two Vienna Conventions on diplomatic and consular relations transformed diplomatic and consular law from a predominantly customary law into a written conventional law, which prompted that the norms were easier to prove, collective or multilateral treaties being today the main formal source of diplomatic and consular law.

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SARA Law **R**esearch **C**enter
International **J**ournal of **L**egal and **S**ocial **O**rder, https://www.ccdsara.ro/ijlso
ISSN 2821 – 4161 (Online), ISSN 2810-4188 (Print), ISSN-L 2810-4188
N°. 1 (2024), pp. 58-69

PROCEDURAL GUARANTEES FOR THE MINOR SUSPECT OR DEFENDANT DETAINED DURING PROSECUTION

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Received 05.11.2024; accepted 07.12.2024
DOI: https://doi.org/10.55516/ijlso.v4i1.218

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Abstract

In the context of current Romanian society, which undergoes an accelerated evolution of the criminal phenomenon generated by the multiplication of youth crimes, the need to ensure a social climate of public safety compelles the judicial bodies to resort to exceptional measures regarding the perpetrators of crimes who are still under the age limit. Within the past few years, not only has the number of such situations increased, but also the typology of crimes committed by youths has undergone changes, going from theft and less serious crimes to rape, drug-related crimes or cybercrimes. This article aims to analyse the procedural guarantees provided by the Romanian criminal law, granted to the minor throughout his legal journey from being the perpetrator of a crime to the legal status of being a suspect/defendant detained by the judicial bodies for the committed felony. Using as research methods documentation, comparative research, analysis of normative acts, doctrinal research and interpretation, the article culminates with a proposal of ferenda law regarding the conditions under which the preventive measure of detention can be taken against a minor suspect/defendant aged between 14-16 years old, who has not yet been subjected to a psychiatric examination, but who has committed a serious crime and his release poses a high risk for society. Finally, the article highlights the importance and effects of respecting the procedural guarantees granted to the detained minor, both from the perspective of exercising the punitive-educational role of the criminal process, and that of restoring the climate of public safety.

Key words: *juvenile delinquency, procedural rights of minors, The Romanian Code of Criminal Procedure, legislative change, public safety.*

PROCEDURAL GUARANTEES FOR THE MINOR SUSPECT OR DEFENDANT DETAINED DURING PROSECUTION

INTRODUCTION

In all modern states of the world, juvenile delinquency is a recurring concern of criminal politics due to the age range that makes criminality considered juvenile. Criminal manifestations during minority are generated either by the multitude and diversity of factors that can negatively influence the ability of minors to adapt to the imposed norms of social conduct, or by the fragile and easily influenced nature of their personality *(Dublea et al., 2013, p. 68).*

Age and level of awareness are indicators of the social adaptation process, which reflect both the influence of biological factors on development and the way in which the individual internalizes social norms and values. Following aspects related to these two defining perspectives on development, the Romanian legislator decided that, under civil, criminal and criminal procedural aspects, the term "minor" should refer to a person who has not reached the age of 18. The status of minor confers particularities, limitations, but also special rights – for example, the need for legal representation by parents/guardians, limited legal capacity or special legal protection.

Analyzing the Romanian criminal law further, we find that the legislator considers that minors reach a sufficient degree of maturity to understand the illicit nature of the acts and to autonomously manifest their will upon reaching the age of 16, when they will be criminally liable according to the law. However, from a social-psychological point of view, they differ from adults, and the way in which the criminal case in which they are involved is resolved will be influenced by the particularities of their age and they will not receive equal treatment with that of adults, but will benefit from special additional protection (Crișu, 2006, p. 1). Minors under 14 years of age benefit from an absolute presumption of lack of criminal capacity, and for those between the ages of 14 and 16, criminal liability is conditioned by proving the existence of discernment at the time of committing the act[1].

To be the active subject of a crime implies sufficient intellectual and moral maturity to distinguish between legal and illegal and to control one's own actions in accordance with legal norms. However, insufficient maturity and adaptation to social rigors raise doubts as to the extent to which a juvenile offender is capable of understanding the social significance of their act and of assuming its legal consequences. This relative criminal responsibility of minors has led to a legal need for the adoption of special procedural provisions designed to provide the child with additional protection in criminal proceedings *(Crișu, 2020, p. 460).*

The objective of improving the act of justice in the field of juvenile delinquency has led to numerous changes in criminal procedural provisions over

[1] Art. 113 of the The Romanian Criminal Code adopted in 2009 (Law no. 286/2009 on the Criminal Code, published in the Official Gazette of Romania no. 510 of 24 July 2009, with subsequent amendments and additions).

time, with the primary aim of serving the best interests of the child, regardless of their procedural status *(Buneci, 2019, p. 83)*. In this regard, the present study focuses on examining the procedural safeguards afforded to minors along their procedural path from the initial stage of being the perpetrator of a crime to the status of suspect or defendant detained by the judicial authorities.

I. PROCEDURAL GUARANTEES REGARDING THE HEARING OF THE CHILD SUSPECT OR ACCUSED DURING CRIMINAL PROSECUTION

Chapter III of Title IV of the current Romanian Code of Criminal Procedure (CCP) establishes the special criminal procedure applicable in cases involving minor "offenders", intended to protect children in contact with the criminal law, to prevent the occurrence of harmful consequences on the psycho-emotional development of the minor and to ensure the exercise of the child's right to a fair trial. Thus, the aforementioned procedure begins with several additional protection measures intended for minors, among which we mention the *iuris et de iure* presumption of minority: when there are reasons to believe that the suspect or defendant is a minor and the judicial bodies cannot establish his or her age with certainty, the person in question will be considered a minor[2]. We appreciate that the presumption in question allows its extension also to the perpetrator who has not yet been identified, but against whom evidence has been collected, for example CCTV footage that captures a person with the characteristics of a minor committing a crime. We believe that in such a situation, even criminal prosecution will also take on more permissive nuances, in the name of child protection, the intended goal being to find the truth and establish guilt, but through less invasive or assertive investigative methods than those used in criminal cases involving adults.

Recent amendments[3] to the current Romanian Code of Criminal Procedure state that, during the criminal investigation phase, in the event of any hearing or confrontation of a suspect/defendant under the age of 18, the criminal investigation body is obliged to summon the parents/guardians/curator/person in whose care or supervision the minor is temporarily located, as well as a member of the General Directorate of Social Assistance and Child Protection[4]. Before the legislative changes in 2023, the legal framework stated the obligation to summon the legal representatives of the suspected or accused minor only in the case of those under the age of 16, while for minors over this age, the summoning of their guardians was optional. However, the Constitutional Court of Romania

[2] Art. 504 para. (3) of The Romanian Criminal Procedure Code adopted in 2010 (Law no. 135/2010 on the Criminal Procedure Code, published in the Official Gazette of Romania no. 486 of 15 July 2010, with subsequent amendments and additions).
[3] By Law no. 201/2023 for the amendment and completion of Law no. 135/2010 regarding the Criminal Procedure Code, as well as for the modification of other normative acts, published in the Official Gazette of Romania no. 618 of 6 July 2023.
[4] Art. 505 para. (1) CCP.

established through Decision no. 102/2018[5] that the right to parental care is not limited to minors under 16 years of age, but also extends to those over this age, in accordance with the principle of upholding the best interests of the child. With the aim of guaranteeing a fair trial, failure to comply with the new criminal procedural provisions may attract the sanction of relative nullity if the court considers that the minor defendant has suffered harm that cannot be removed otherwise than by annulling the procedural act drawn up in violation of the imposed rules.

With regards to conducting other criminal investigation acts that require the presence of the minor suspect or defendant, the summoning of his/her legal representatives is still left to the discretion of the criminal investigation body, which will take into account the best interests of the minor, but also the need for a proper criminal trial length in accordance with the principle of prompt resolution of the case. As an additional procedural guarantee for children who are suspects or accused in criminal proceedings, in situations where the parents or legal representatives could not be identified or their presence would be detrimental to the best interests of the minor, their hearing will not take place without summoning another adult nominated by the child and accepted by the investigative body in this capacity[6]. However, if the person designated by the minor could hinder the criminal prosecution, another adult chosen by the judicial body will be summoned instead, aiming at the best interest of the child. By drafting numerous criminal procedure provisions, the Romanian legislator anticipated the possibility of various situations, but in the absence of an alternative, the unjustified failure to appear of the persons legally summoned will lead to the hearing or confrontation of the minor being carried out in the adult's absence, considering the need of resolving the case within a reasonable time.

The transposition of the provisions of Directive (EU) 2016/800[7] into national criminal procedural provisions has resulted in the establishment of a new additional procedural guarantee for children. The legal provisions thus introduced[8] establish the right of minor suspects or defendants to be informed with regards to their rights, the capacity in which they are being heard and the criminal offence for which they are suspected or accused, as well as a series of additional information intended to help children understand their rights, the criminal trial and its phases. Thus, in addition to the general rights of the adult suspect/defendant[9],

[5] Decision of the Constitutional Court of Romania no. 102/2018, published in the Official Gazette of Romania no. 400 of 10 May 2018.
[6] Art. 505 para. (1^2) CCP.
[7] Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, published in the Official Journal of the European Union No. L 132 of 21 May 2016.
[8] Art. 505^1 CCP.
[9] Art. 83 CCP.

minors receive, in a clear and accessible manner, information regarding the main stages of the criminal trial, protection of privacy, parental assistance during certain procedural stages, assessment by the probation service, preventive measures and their content, as well as the exceptional nature of custodial measures, assessment and medical assistance in the event of detention or preventive arrest, etc. The communication of this information is made by the criminal investigation body, before the first hearing, in simple vocabulary – appropriate to the age of the child, both to the minor involved in the criminal case and to his or her legal representatives.

The provisions analysed above highlight the sensitive and special nature of hearings in criminal cases involving minors, emphasizing the need for a differentiated approach, dictated by the particularities of their age and development, which require clear and adapted communication in order to facilitate the understanding of judicial proceedings.

Given the minor's limited capacity to exercise legal rights, it is considered that he does not have the necessary intellectual tools to ensure an effective defense during the criminal trial, which is why the law requires the provision of legal assistance[10]. The minor's right to be assisted by a lawyer of his choice throughout the criminal trial will be communicated to him before the first hearing as a suspect. According to recent legislative amendments[11], in the event of the minor's option not to exercise this right, the judicial body records in writing the voluntary and unequivocal decision of the suspect/defendant[12], but still proceeds to request the presence of a public defender to provide legal aid, in all cases[13]. The minor may change his/her option at any stage of the criminal process and may request legal assistance from a designated solicitor.

In this regard, the provisions of Directive (EU) 2016/800 allow member states to temporarily derogate from the application of the right of the minor suspect/accused to immediate legal assistance during criminal proceedings for exceptional cases[14], such as situations with an imminent risk of serious harm to the life, liberty or physical integrity of a person or in order not to impede the conduct of the criminal trial. However, we note that national criminal procedural provisions offer increased protection to minors in contact with the law, with legal assistance being mandatory in all cases, which places Romania above European

[10] Art. 90 CCP.
[11] By Law no. 122/2024 for the introduction, amendment or completion of the mention regarding the transposition of European Union norms in the content of certain normative acts, as well as for the amendment and completion of Law no. 302/2004 regarding international judicial cooperation in criminal matters and Law no. 135/2010 regarding the Code of Criminal Procedure, published in the Official Gazette of Romania no. 414 of May 7, 2024.
[12] Art. 89 CCP.
[13] Art. 91 CCP.
[14] According to art. 6 para. (8) of Directive (EU)/2016/800.

reference norms in terms of guarantees granted to minors in criminal proceedings. Moreover, if carrying out procedural acts without parental assistance in situations where it is mandatory may attract the sanction of relative nullity, carrying them out in the absence of the minor's mandatory legal assistance attracts the absolute nullity of any illegally obtained evidence and implicitly its exclusion from the case file[15].

Besides this, the national standard established by the provisions of the current Romanian Code of Criminal Procedure is superior to the minimum standard established by the European Convention also with regard to other provisions that guarantee individual freedom in judicial proceedings (for example, by regulating the manner of exercising a right to compensation for damage suffered as a result of unjust deprivation of liberty) *(Lorincz & Stancu, 2024, p. 12).*

A legal provision that, on one hand, strengthens the protection granted to children involved in legal issues, and on the other hand offers the authorities a clearer perspective on the circumstances and causes that led to the commission of a crime is provided for in art. 506 of the Romanian Code of Criminal Procedure – the child assessment report, introduced into the Romanian criminal procedure legislation by Law no. 356/2006, thus replacing the social investigation. After filing charges against a minor, when he/she acquires the status of a defendant, the authorities involved during prosecution (i.e. police/prosecutor) may request the probation service in whose territorial jurisdiction the minor resides to prepare the child assessment report. According to legislation on the subject[16], the document in question presents a complete picture of the minor's situation, including his/her living environment, educational and professional background, general behavior, and a detailed analysis of the act committed. In addition, the risk of recidivism is assessed and recommendations are made regarding the most appropriate educational measures, as well as a social reintegration plan. The doctrine reveals that the assessment of minors involved in criminal acts is essential, both to protect the interest of society in ensuring the application of the law, and to guarantee the rights and welfare of these young people. Through the assessment, judicial bodies can make informed decisions and order personalised educational measures *(Neagu & Damaschin, 2021, pp.582-583).*

II. DETENTION OF A MINOR SUSPECT OR ACCUSED – PROCEDURAL GUARANTEES AND GAPS

Depriving a minor of their liberty raises numerous ethical and legal questions. European Directives[17] encourage finding alternatives to this measure

[15] Art. 281 para. (1) lit. f) CCP.
[16] Art. 34 of Law no. 252/2013, published in the Official Gazette of Romania no. 512 of August 14, 2013, with subsequent amendments and additions.
[17] According to art. 11 of Directive (EU)/2016/800.

and, if taking it is truly necessary, it is essential to assess its impact on the child's physical, psychological and social development, as well as their prospects for reintegration. Being in police custody is a traumatic experience for any individual, even more so for a minor. This event can have profound consequences on the child's psychosocial development, consequences that can manifest in the short and long term. The deep feeling of isolation, the almost intolerable boredom generated by near-total lack of stimulation: "*staring at nothing*", as well as the unknown of the detention environment generate a high level of stress and anxiety. A case study conducted in the UK over young participants who had been in police custody once or more describes the experience of detention as "*unjustifiably harsh*" *(Bevan, 2022, pp. 805-821)* and a promoter of the development of post-traumatic stress disorders, which manifest through nightmares, social withdrawal, difficulty concentrating or altered sleep quality and even a feeling of deprivation of autonomy *(Gooch & Von Berg, 2019, pp. 85-101).*

Given the potentially devastating effects that taking a preventive measure against a minor suspect or defendant could have on their development and aiming to minimize them, the Romanian legislator has provided for a series of special criminal procedural provisions applicable to this category of individuals, which can be found in articles 243-244[1] of the Romanian Criminal Procedure Code.

In the perspective of a further analysis of the current legal provisions regulating the preventive measure of detention, we recall that this represents a procedural measure consisting of deprivation of liberty for a fixed period and which is taken under strict conditions, against a person regarding whom there is evidence or solid indications that he/she has committed a crime. Detention is taken for a maximum of 24 hours, exclusively during prosecution, by the criminal investigation body or the prosecutor in charge of the case[18], aiming to prevent the commission of new crimes, ensure the presence of the suspect during criminal proceedings or at trial, but also to create optimal conditions for a fair trial[19]. Like other preventive measures, detention may be taken against a person only if it is necessary to achieve the intended purpose – finding the truth and establishing guilt, and the principle of proportionality must be respected[20].

The legislation[21] allows for the adoption of preventive measures that are specific for adults even against minors who have reached the age of 14, under the same conditions and for the same duration. However, in the case of minors, there is an additional requirement: the detention or preventive arrest must not have a disproportionately negative impact on their personal development, in relation to the purpose pursued by taking the measure. The detention of a minor is taken as a measure of last resort, in a completely exceptional manner, for the commission of

[18] Art. 203 para. (1) CCP.
[19] Art. 202 para. (1) CCP.
[20] Art. 202 para. (3) CCP.
[21] Art. 243 CCP.

serious crimes - usually involving violence, with the aim of removing the concrete danger and restoring social balance. Once the measure is ordered against the minor, he has the right to have a family member or another designated person informed about the measure being taken against him and about the place where he will be detained. Also, the right to be personally informed may not be denied except for special reasons, and the information may not be postponed for more than 4 hours[22].

In the case of minors aged between 14 and 16, given the relative presumption of lack of discernment at this age, in order to establish criminal liability, the legal provisions [23] require a forensic psychiatric evaluation to establish with certainty the perpetrator's mental condition at the time of committing the crime. However, the urgent nature outlined by the conditions of taking preventive measures in an early phase of the criminal investigation cannot oblige the criminal investigation body to postpone the detention of the suspect until the completion of the expertise as its report would reach the prosecutor over a period of days, at best. The criminal procedural provisions in the matter require judicial bodies to carry out criminal prosecution acts that require the presence of the suspect/defendant against time and do not allow the restriction, for a period longer than 8 hours[24], of the person's right to leave the premises of the unit where the activities are carried out if they are not under the effect of a preventive measure that is depriving of liberty.

In such situations, for example, catching a minor between the ages of 14-16 in the act of committing a particularly serious crime, the criminal investigation body is allowed to detain the minor, even in the absence of the expert report – the definitive scientific evidence regarding the perpetrator's discernment at the time of committing the crime. However, the expert report could later establish that the person did not commit the act with discernment, thus absolving him of criminal liability and seriously violating his right to a fair trial.

In this regard, the prosecutor will be literally forced, without using a metaphorical expression, to carry out a sociological, psychopedagogical and even psychiatric analysis, devoid of any support that those specialized in such scientific fields could offer him at that moment. Even if the seriousness of the crime requires the immediate (at least temporary) removal of the social danger and the isolation of the defendant in a controlled, detention environment, it is hard to believe that the criminal prosecution body can have the entire intellectual tools of a multidisciplinary team aimed at providing a concrete analysis of the personality

[22] Art. 210 CPC.
[23] Art. 184 para. (1) CPC.
[24] According to art. 265 para. (12) of CPC: "*Persons brought with a warrant for bringing remain at the disposal of the judicial body only for the duration required by the hearing or the performance of the procedural act that made their presence necessary, but not more than 8 hours, except in the case when their detention or preventive arrest has been ordered*."

of the minor defendant at the moment when the custodial measure of detention is taken. Referring strictly to the preventive measure in question, the literal interpretation of the law[25] would clearly support that the criminal prosecution body is the competent person to provide interpretation of the effects of this measure on the personality and development of the minor, given that only such an analysis could show whether the effects of holding a minor suspect are disproportionate to the purpose pursued by taking it.

Since the wording of the legal text leaves room for divergent interpretations, and the complex nature of the analysis necessary for the temporary deprivation of liberty of a minor should not be imposed entirely on the criminal prosecution bodies, the procedural regulation should be adapted so as to transmit minimal indications regarding the extension of the analysis imposed on the prosecutor. Given the absence of such specifications in the legal text and judging by the wording of para. (3) of art. 243 of the CPC, which refers to establishing the duration for which preventive arrest may be taken and requires the competent judicial body to take into account the age of the defendant at the time of ordering the taking, extension or maintenance of this measure, we consider that the criminal procedural regulations require the judicial authority to analyze the effects that the deprivation of liberty would have on the personality and development of the minor defendant, but the only analysis criterion that it regulates is the age of the defendant.

However, judicial reality shows us that neither age, nor the subsequent conclusions of a psychiatric evaluation, nor the lack of a criminal record can always be sufficient to justify release, given the seriousness of the crimes committed. For example, the Public Ministry's activity report for 2023 shows that the number of minor defendants sent to trial was 3,194, down 9.4% compared to the previous year. However, of this total, 448 minor defendants were already in preventive arrest, 8.2% more than in 2022. According to the same official criminal statistics on sentencing, among minor defendants, the criminal trend for murder, rape or robbery increased compared to the previous year[26].

Focusing on the additional procedural guarantees addressed to the minor defendant, we note, in the content of art. 244 of the CPC, the norm of reference to the special law on the execution of sentences and measures ordered by judicial bodies in the context of criminal proceedings, which enshrines the special detention regime for minors and the right of those detained to be housed separately from adult defendants[27]. Subsequent legislative amendments[28] have

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[25] Art. 243 para. (2) CPC.

[26] https://www.mpublic.ro/sites/default/files/PDF/raport_activitate_2023.pdf, accessed on 19.10.2024.

[27] Art. 117 para. (1) of Law no. 254/2013, published in the Official Gazette no. 514 of 14 August 2013.

enshrined the right of the detained minor to be informed, in addition to the general rights of the detained person (i.e. the right for a member of his/her family or another person designated by the minor to be informed about the taking of the detention measure and the place where he/she is detained, the right to emergency medical assistance, the right to file a complaint against the measure ordered)[29] and the right to special conditions for the execution of the measure. The notification in question will also be made to the parents or, in their absence, to a legal representative or another adult designated by the minor and accepted in this capacity by the criminal investigation body or to a person chosen by the judicial body, pursuing the best interests of the child[30].

CONCLUSION

The right to a fair trial is an essential pillar of the rule of law and applies equally to children. From their first contact with the justice system and throughout the process, children are entitled to robust procedural safeguards, as well as protective measures that take into account their specific vulnerability.

We cannot ignore, however, that the commission of particularly serious crimes, lacking a subsequent firm response from the criminal prosecution bodies, poses the risk of maintaining a criminal climate, while also creating the impression for the defendant that he will not have to bear the consequences if he persists in defying the law. Moreover, the impact felt on the injured person or on members of civil society who become aware of the act will be one of distrust in the coercive force of the state and in the capacity of the judicial bodies to stop the criminal phenomenon.

Noting the lack of continuity in the criminal procedural provisions regarding the particular factual situations of minors with relative responsibility and the excessive burden imposed on criminal prosecution bodies, I consider it useful to submit the following proposal de lege ferenda: informing the territorially competent probation service, prior to ordering the detention measure against the minor defendant or at least concurrently with informing him and his legal representative about the taking of the preventive measure, by completing paragraph (4) of art. 243 of the Code of Criminal Procedure. I believe that in the event of a minor with a criminal record, the probation services could promptly transmit previously drawn up evaluation reports to the prosecutor, thus providing him with the most complete possible picture of the personality of the minor defendant. I also appreciate that informing this service could constitute an additional procedural guarantee and would be able to help develop a work

[28] Introduction of art. 244^1 of the CPC by Law no. 284/2020, published in the Official Gazette no. 1201 of December 9, 2020.
[29] Art. 209 alin. (17) C.proc.pen.
[30] Art. 244^1 alin. (2)-(4) C.proc.pen.

strategy for preparing a minimum analysis of the case involving the accused minor, which could serve to resolve the complaint against the detention measure, but also to the decision of the judge of rights and freedoms notified of the proposal for the preventive arrest of the defendant.

The preparation of an analysis of the minor's situation, which is truly necessary in making a decision on detention, exceeds the prosecutor's competence and requires the assistance of a multidisciplinary team consisting of psychologists, educators, social workers or school counselors. The individual assessment of the minor is a complex and continuous process, which must begin from the first phases of the criminal process, in order to ensure an informed and fair decision on the measures to be taken, and its preparation in an inadequate manner cannot be justified by shortcomings such as lack of staff or a high workload. The fact that an assessment report will be prepared later cannot cover the lack of a minimum and professional initial assessment of the minor at the time of making a decision regarding his or her freedom, even if the deprivation of freedom is provisional.

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International **J**ournal of **L**egal and **S**ocial **O**rder, https://www.ccdsara.ro/ijlso
ISSN 2821 – 4161 (Online), ISSN 2810-4188 (Print), ISSN-L 2810-4188
N°. 1 (2024), pp. 70-75

ABOUT TAXATION: TAX INCENTIVES VS TAX AMNESTY

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Received 05.11.2024; accepted 07.12.2024
DOI: https://doi.org/10.55516/ijlso.v4i1.219

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Abstract

In the current period, the question arises of the appropriateness of the fiscal amnesty approved by the governors. To be able to answer, we consider it useful to understand the legal framework of this mechanism, its advantages and disadvantages, the risks it could induce. We will also analyze, by comparison, the concept of tax incentives, drawing the differences between the two notions. However, we must remember that both measures are decided by the governors in order to support taxpayers, differentiating themselves through their own application mechanisms.

Key words: *tax amnesty, tax incentives, legal framework, national and international context.*

INTRODUCTION

The current national and international context, of the various crises faced by the economy, have imposed an adaptation of the fiscal policy through a diversification of measures and instruments with the help of which the state can maintain the macroeconomic stability of Romania. Also, the complexity of the changes and challenges that the state, on the one hand, and the taxpayer, on the other, must face, also require a strategy to ensure the strengthening of relations between the two. In conditions of fragility of the internal economic environment (even external), but implicitly, of certain categories of "vulnerable" natural persons, the Government must promote a prudent fiscal policy with the aim of managing budget resources and obligations as best as possible.

The measures that are taken in the fiscal space must be sustainable, aim at improving and simplifying fiscal legislation, revising fiscal facilities, all these actions also based on dialogue with the business environment.

I. LEGAL FRAMEWORK

The seat of the matter in terms of payment facilities and the method of extinguishing fiscal obligations (including extinguishment by canceling the fiscal obligation) is represented by the Fiscal Procedure Code[1]. The Romanian legislator must continue to improve the fiscal procedural legislation in order to correspond to the principles of transparency, stability, predictability. Payment facilitation or possible tax amnesty measures will be aimed at discouraging tax avoidance practices, thus guaranteeing a fair taxation of taxpayers.

II. ACTUAL STATE

The Fiscal Procedure Code establishes the possibility for the central or local fiscal body to grant payment facilities in the form of payment installments. These deferrals are frequently approved in the form of delays in the payment of penalties etc. Borrowers who face financial difficulties, but meet the legal conditions for granting them, can benefit from these facilities. Such a measure, which involves the payment of outstanding tax obligations in installments, presents advantages both for the state, as a creditor, and for the debtor taxpayer (the state registers a better collection of budget revenues, with a lower financial effort than the costs of execution enforcement of budgetary claims; the taxpayer receives a useful lever in the recovery process in case of temporary financial difficulties).

The facilitation in the form of the stagger provided by the legal norms in force, can be requested by any debtor (legal person, natural person, associations without legal personality[2]).

The payment installments granted by the central fiscal body present certain features, aspects that aim at the scope of the installment; the assimilation, for the purpose of scheduling, of some obligations as fiscal obligations (such as those of the nature of fines administered by the fiscal authority, budget receivables related to contractual legal relationships established by court decisions etc.). There are certain categories of fiscal obligations, expressly and limitedly provided by the law, for which payment installments are not granted (for example, the case of fiscal obligations with a total value below 500 lei in the case of natural persons, respectively 2,000 lei in the case of associations without legal personality and 5,000 lei in the case of legal entities[3]). Rules are also stipulated regarding the staggered period, and the fiscal body will individualize this period taking into account the amount of the fiscal obligation and the debtor's financial ability to pay

[1] Law no. 207/2015 Fiscal Procedure Code published in the Official Gazette of Romania no. 547/23.07.2015. See Art. 22, Art. 184 et seq.

[2] Regarding associations without legal personality, the conditions to benefit from the staggered measure are those specific to legal persons (art. 184 paragraph 2 of the Fiscal Procedure Code).

[3] See Art. 184 para. 7 of the Fiscal Procedure Code.

(it should be noted that, in assessing this staggered period, the competent body is required not to approve a repayment period longer than requested).

As we have already shown, the legal regime of the payment facilities that can be granted by the local fiscal body is contained in art. 185, of the Fiscal Procedure Code. We must mention that it was necessary to establish the possibility of granting such facilities also for fiscal claims administered by local fiscal bodies and not only for those administered by the central fiscal body, because this measure ensures the equality of rights of citizens before the law and public authority, without privileges and discrimination[4]. The deferment is granted only at the express and well-justified request of the taxpayer facing financial difficulties. This debtor, although it performs or has the possibility to perform its due obligations, has a low degree of short-term liquidity and may, in addition, record a high degree of indebtedness. These factors may prejudice the fulfillment of obligations by the debtor. In addition, we can note that the taxpayer whose managerial and economic viability potential shows a downward trend, but who executes or is able to execute the required obligations, is in difficulty. The actual procedure for granting payment facilities at this level is approved by decision of the deliberative assistance at the local level.

We can conclude in this first part that the tax relief represents those facilities granted by the competent tax authorities with the aim of helping taxpayers to pay their tax obligations, the specific actions consisting in the rescheduling of debts, the reduction of tax rates, the granting of temporary exemptions etc. Also, tax incentives are aimed at facilitating voluntary tax compliance and supporting taxpayers who have difficulties in fulfilling their tax obligations (by reducing the tax burden. Tax incentives can also be granted in the long term, being applied as permanent measures also to stimulate tax compliance or to support certain sectors of activity or certain categories of taxpayers in financial difficulty.

Cancellation, as a specific way of extinguishing the tax liability, used only exceptionally, also reflects the state's policy towards taxpayers. Thus, two categories of acts of cancellation of fiscal obligations can be identified, respectively: acts with general applicability and those with individual applicability *(Postolache Rada, 2009, p.226)*. The legal framework regarding acts with individual applicability is represented by art. 266 of the Fiscal Procedure Code, the legislator establishing the cases in which the cancellation can be ordered with the approval of the enforcement body (for example, when the enforcement expenses, exclusive of those regarding communication by mail, are higher than the tax receivables subject to enforcement; in in the case of outstanding fiscal claims administered by the central fiscal body, outstanding on December 31 of the year, with a value below 40 lei etc.). The deliberative authorities (by decision of

[4] Art. 16 of the Romanian Constitution.

the local Council) will be able to establish, for the fiscal claims administered by the local fiscal body, the ceiling of the fiscal claims that can be cancelled, without exceeding the previously stipulated maximum limit[5].

Fiscal annulment, analyzed as another way of extinguishing fiscal claims, consists in the creditor's renunciation of the collection of some claims (either considering the impossibility of recovering them, or the inefficiency of collection in certain situations provided for by law). Taking into account these aspects, we could state that the cancellation has the legal nature of "debt forgiveness" (debt remission) regulated by the Civil Code[6] *(Lazăr Ioan, Florea Bogdan, 2023, p.541)*. There are also contrary opinions that state that, although the effect of the cancellation is the exemption from the payment of the obligation, this modality does not have the meaning of debt remission in the Civil Code *(Morozan Florina, 2014, p.32).* The two procedures for extinguishing obligations have different legal bases, specific conditions of application[7] (for example, in the case of cancellation, its granting is not left to the free, discretionary assessment of the fiscal body) *(Postolache Rada, op.cit., p.227).*

Through the norms of a general nature, respectively through the normative acts with general applicability aimed at a wide category of taxpayers, the extinguishment of the fiscal obligation can be ordered, in this formula we are in the presence of a fiscal amnesty. Through the tax amnesty, the budgetary obligations owed to the debtors are extinguished by the effects of some normative acts (for example, the situation of the amnesty applied to the sums improperly collected as a pension, social allowance for pensioners and companion allowances[8]. Thus, in order to mitigate the negative effects of the recovery of these amounts from the beneficiaries, the exemption from the payment of these debts was ordered by law. It should be noted that in this situation we cannot hold the fault of the beneficiaries, the errors belonging exclusively to the social insurance system, errors in the interpretation of the law, respectively errors of the IT processing system data).

We can see that the tax amnesty measure is an act of "lenience" that must be resorted to with caution, through clear and precise legal provisions only in special social-economic conditions or in situations of natural calamities, state of necessity, avoiding abuses and ensuring the correct applicability of the amnesty. We should not forget that caution is also justified because the final effect of the amnesty is the definitive reduction of outstanding debts from the records of the state's fiscal bodies.

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[5] The threshold of 40 lei, according to art. 266 para. 5 and 6 of the Fiscal Procedure Code

[6] Art. 1629-1633 of the Civil Code

[7] Moreover, the different application conditions are also reflected in the value dimensioning of the annulment measure, in justification, etc.

[8] https://www.cdep.ro/pls/proiecte/upl_pck.proiect?idp=21821 accessed on 01.11.2024, 3 p.m.

The tax amnesty has advantages, but it is also sometimes contested for the risks it entails. These risks materialize, for example: in the taxpayer's tendency to postpone the payment of tax obligations in the hope of adopting a legislative act of amnesty; in the possibility of the state losing tax revenues (in the short term, the level of budget receipts may increase, but, in the long term, through the previously mentioned attitude of the taxpayer, to wait for new and new amnesty acts, revenues may be lost). Also, a problem is raised by the possible inequity generated by the tax amnesty, between the taxpayer in good faith, who pays his tax obligations on time and in the legal amount, and the one who "avoided" paying them on time, being somehow " rewarded" by reducing the accessories or, in part, even the taxes due.

We must also bring up the year 2024 when, through the adoption of Emergency Ordinance no. 107[9], the issue of the advantages and disadvantages of the tax amnesty was brought back into focus. The government justified this action on the grounds of prudent management of budget revenues, especially in the context of the initiation of the excessive deficit procedure. Measures had to be found to facilitate a better collection of revenues to the state budget, given the trend of slowing economic growth. The governors argued that, although the question of the fairness and morality of such a measure sometimes arose, under the given conditions amnesty was necessary. The representatives of the business environment, of those taxpayers who execute their budget obligations in good faith and on time, consider this legal measure as generating moral risk, characterized by a tendency to assume unjustified risks that also involve the bearing of costs by third parties who assume all or part of these risks.

The amnesty aimed to erase the accessories related to the debts of natural and legal persons, who pay their main debt by November 25 of the current year[10]. There are opinions according to which the current amnesty will only have the effect of collecting some amounts to the budget, but it has no long-term vision. These amnesty measures should be substantiated by some impact studies and be followed by voluntary compliance measures. Along with voices from the business environment that criticized the measure of the recent tax amnesty, the Council of Foreign Investors[11] from Romania was also heard, which called for a much too quick approval of the measure, without any specific analysis and without the formulation of points of view by the environment of business. It is considered that

[9] Government Emergency Ordinance no. 107/2024 published in the Official Gazette of Romania no. 905/06.09.2024

[10] It is necessary to specify that following the notifications made by the unions of Finance workers, which showed that it was impossible to process all the requests of taxpayers with debts by November 25, it was decided to extend the initial deadline. Thus, in order to honor all the requests of interested taxpayers (about 100,000 requests) for this measure, a new deadline was set, namely December 20, 2024.

[11] https://fic.ro/ accessed on 08.11.2024, 4 p.m.

prudence must prevail in the decision to grant tax amnesties. The behavior of taxpayers who have benefited from the amnesty measure will be monitored, but in the following period they do not show a compliant behavior of paying taxes and submit an amnesty request when the governors adopt a new such debt cancellation measure. Moreover, some experts believe that the amnesty measure and its effects should be revocable for these taxpayers.

CONCLUSION

Both payment facilitation and tax amnesties will continue to be popular methods and available to governments in their efforts to improve the collection of budget revenues, but also to prevent or at least reduce tax evasion. Although both measures support taxpayers, they differ in certain features, through the implementation mechanism. Thus, the amnesty can be analyzed as a temporary measure, which takes into account debts or undeclared income from the past. On the other hand, the tax reliefs are measures that are applied for the future, in the long term.

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ISSN 2821 – 4161 (Online), ISSN 2810-4188 (Print), ISSN-L 2810-4188
N°. 1 (2024), pp. 76-91

PUBLIC SERVICES - EFFECTIVE MEANS OF PUBLIC AUTHORITIES FOR SUSTAINABLE DEVELOPMENT

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Received 10.11.2024; accepted 14.12.2024
DOI: https://doi.org/10.55516/ijlso.v4i1.220

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Abstract

Sustainable development has become a more and more common concept in the current background of social, economic, legal realities that concern not only the evolution of Romania in the coming years, but the evolution of the whole humanity. Romania, as a member state of the United Nations (UN) and the European Union (EU), has signed up to the 17 Sustainable Development Goals (SDGs) of the 2030 Agenda, adopted by the UN General Assembly Resolution A/RES/70/1 at the UN Summit on Sustainable Development in September 2015. The EU Council Conclusions, adopted on June 20, 2017, "A sustainable future for Europe: the EU response to the 2030 Agenda for Sustainable Development" is the policy document committed by the EU Member States on the implementation of the 2030 Agenda for Sustainable Development. In this background, each country involved has sought to regulate as best as possible the levers to achieve these goals. This study attempts to answer the question whether public services in Romania and not only, in an improved formula, can represent real mechanisms towards a sustainable development of the society.

Key words: *sustainable development, public services, efficiency, legal values, economic values.*

INTRODUCTION

A public service based on values, efficiency and respect for fundamental human rights

As a preliminary remark, we note the definition given to public service in administrative law, by art. 2 para. (1) letter m) of Law no. 554/2004 of the contentious administrative, according to which public service is the activity organized or, as the case may be, authorized by a public authority, in order to

satisfy a legitimate public interest or, in other words, the verification of the circumstance whether, the satisfaction of a general interest is aimed by performing the service provided and whether a public authority is directly or indirectly revealed[1].

[1] The following were noted in specialized practicum: *"According to art. 41 of the law: (1) Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the Union institutions, bodies, offices and agencies. For those reasons, the Tribunal finds that the dismissal of the original application appears to be unforeseeable, inequitable and unsubstantiated in the light of the evidence adduced in the case. Under these circumstances, once again, the annulment of the decision and the award of the benefit to the applicant appear well-founded. In the background of the dismissal of the first application, the applicant reiterated the administrative petition, being registered under no. 133824/14.06.2023, and based on it, Resolution no. 5904/12.12.2023 was issued, by which the rights regulated by art. 3 ind. 1 para. 3 and art. 1 para. 1 letter c) of GO no. 105/1999 were recognized as of 01.01.2024. According to GO no. 105/1999: Art. 5. The persons referred to in Articles 1, 3 and 31 shall benefit from the provisions of this Ordinance with effect from the first day of the month following the month in which the application was submitted (...). According to Law no. 210/2022, in force as of 16.07.2022: Art. III. – By way of derogation from the provisions of art. 5 of Government Ordinance no. 105/1999 on the granting of certain rights to persons persecuted by the regimes established in ...from September 6, 1940 to March 6, 1945 on ethnic grounds, republished, as subsequently amended and supplemented, the rights established according to Article 31 of Government Ordinance no. 105/1999, republished, as subsequently amended and supplemented, shall be granted and paid as follows: b) as of 1 January 2023, the rights established for the children of persons who have been in one of the situations referred to in art. 1 para. (1) letter c) and g), as well as for children referred to in art. 31 para. (1) of Government Ordinance no. 105/1999, republished, as further amended and supplemented. By GEO no. 168/2022, in force as of 09.12.2022: Art. XXI. - In article III of Law no. 210/2022 for the amendment of art. 1 para. (2) of Decree-Law no. 118/1990 on the on the granting of certain rights to persons persecuted for political reasons by the dictatorship in place since March 6, 1945, as well as to those deported abroad or made prisoners and to establish certain measures required for the implementation of Government Ordinance no. 105/1999 on the granting of certain rights to persons persecuted for ethnic reasons by the regimes set up in ... as of September 6, 1940 to March 6, 1945, published in Official Journal of Romania, Part I, no. 698 of 13 July 2022, letter b) shall be amended and shall read as follows: "b) as of January 1, 2024, the rights established for the children of the persons who found themselves in one of the situations referred to in art. 1 para. (1) letter c) and g) of Government Ordinance no. 105/1999, republished, as further amended and supplemented, as well as for children referred to in art. 31 para. (1) of the same ordinance". Subsequently, by means of GEO no. 115/2023, in force as of 15.12.2023: Art. XXIII. – In article III of Law no. 210/2022 for the amendment of art. 1 para. (2) of Law-Decree no. 118/1990 on the granting of certain rights to persons persecuted for political reasons by the dictatorship in place since March 6, 1945, as well as to those deported abroad or made prisoners and to establish certain measures required for the implementation of Government Ordinance no. 105/1999 on the granting of certain rights to persons persecuted for ethnic reasons by the regimes set up in ... as of September 6, 1940 to March 6, 1945, published in Official Journal of Romania, Part I, no. 698 of 13 July 2022, letter b) shall be amended and shall read as follows: "b) as of January 1, 2025, the rights established for the children of the persons who found themselves in one of the situations referred to in art. 1 para. (1) letter c) and g) of Government Ordinance no. 105/1999, republished, as further amended and supplemented, as well as for children referred to in art. 31 para. (1) of the same ordinance". The Tribunal notes that the*

Furthermore, the term of public service designates either a form of activity carried out in the public interest or a subdivision of an institution of the internal administration divided into departments, services, etc..

Services in the public interest include those entities which, by the activity they perform, are called upon to satisfy certain general interests of the members of society.

The provision of a public service cannot be random or discriminatory. Structural values are therefore recognized as the foundation of public service[2].

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petition of the applicant was formulated on 23.06.2022, at the time when the land covered by the law was not extended to 01.01.2023, 01.01.2024 or 01.01.2025, but was extended on 16.07.2022, 09.12.2022 and 15.12.2023. In application of the principle tempus regit actum (the law is applicable at the time of issuance of the act, regardless of subsequent amendments: art. 3 and 6 of the Civil Code, art. 1 para. 2 of the Administrative Code), the Tribunal holds that the law applicable is that of the time when the petition was filed and not that of the time when the judgment was adopted. This is all the more so as the defendant was bound to respond to the applicant's petition within 30 days, the situation being generated by the authority by late settlement of the application. At the same time, the Tribunal takes into account not only judicial practice which has recognized rights from an earlier date (Judgment no. .../14.04.2022 pronounced by Bucharest Tribunal – Division II of the Contentious Administrative and Fiscal), but also administrative practice where petitions were settled more quickly, before the legislative change. The right to a fair trial and the principle of good administration require consistent practice. In such circumstances, in view of the fact that the applicant's allegations are confirmed in the light of the findings and taking the view that the applicant has a single right and that it is not possible to overlap them, the Tribunal will admit the application in part, will annul Judgment no. 5904/19.01.2023 and will order the defendant to recognize the applicant's right recognized by art. 3 ind. 1 para. 3 of OG no. 105/1999, as the child of ..., in the situation set out in Art. 1 para. 1 lit. c) of OG no. 105.1999, for the period 27.03.1942-06.03.1945, from 01.07.2022 until the moment of overlapping with the rights granted by judgment no. 5904/12.12.2023" – Bucharest Tribunal, Division II of the Contentious administrative and fiscal, civil sentence no. 4891/10.07.2024, https://www.rejust.ro/juris/4e5545886, in the form of 22.08.2024.

[2] The following was held in a certain case: "*The Tribunal shall dismiss the motion to the ineligibility of the action. The contested notification takes the form of an unjustified refusal within the meaning of Article 2 para. 2 of Law no. 554/2004, a similar administrative act which, pursuant to art. 1 para. 1, 8 para. 1 and 18 para. 1 of Law no. 554/2004 may be challenged before the court of contentious administrative and fiscal. Furthermore, for the unsubstantiated refusal to recognize a certain right, preliminary procedure shall not be required, according to art. 7 para. 5 of ... no. 554/2004. Finally, on the basis of the grounds indicated in this paragraph, the result of the admission of such an application is not the annulment of the notification, but directly the recognition of the right of the court, for which reason the application will be partially admitted. As to the merits, by notification no. 93145/PAS/02.02.2024, the application for the issuance of a simple passport with residence in ..., submitted on 29.01.2024, was rejected, as the provisions of Art. 9 para. 1 lit. c) of GR no. 94/2006 are not fulfilled. It was held that the surname and name ..., entered on the marriage certificate and citizenship certificate, did not correspond with the name Ustenko ... entered on the document issued by the authorities of #######. According to art. 28 para. 5 of GO no. 94/2006, if there are differences between the names entered in the documents referred to in para. 4 and those required to be entered in the passport, the application may be approved only after the entries have been made in the civil status record, in accordance with Law no. 119/1996. #### reasons will no longer be taken into account, having regard to the elements*

arising from the rational thinking that administrative acts must state the reasons on which they are based. Any other element falling under the idea of a new argument appears as a form of non-motivation of the act and will not be taken into account. The reasoning of an administrative act has two essential aspects, namely the indication of the legal texts applicable to the given situation and, secondly, the indication of the factual circumstances on the basis of which the applicability of those legal texts was held. As regards the obligation of the administrative authorities to state reasons for their decisions, the Tribunal notes that according to art. 31 para. 2 of the Constitution of Romania, "public authorities, according to their competence, shall be bound to provide correct information to the citizens in public affairs and matters of personal interest." Furthermore, according to art. 1 para. 3 of the Constitution of Romania, "Romania is a democratic and social state, governed by the rule of law, in which human dignity, the citizens' rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values, in the spirit of the democratic traditions of the Romanian people and the ideals of the Revolution of December 1989, and shall be guaranteed." Given that the public authorities are required to ensure that citizens are properly informed of matters of personal interest to them, and given that the decisions of such authorities are subject to judicial review by way of contentious administrative, the idea that the absence of an explicit statement of the reasons for the contested administrative act is permissible cannot be maintained. Statement of reasons is a general obligation applicable to any administrative act. It is a condition of the external legality of the act, which is subject to a concrete assessment according to its nature and the context of its adoption. Its purpose is to set out clearly and unequivocally the reasoning of the institution issuing the act. In the absence of an explicit statement of reasons for the administrative act, the possibility of challenging that act in court is illusory, since the judge cannot speculate on the reasons that led the administrative authority to take a particular measure. The absence of such reasoning favors the issuance of abusive administrative acts, since the absence of reasoning renders judicial review of administrative acts ineffective. Art. 41 of the Charter of Fundamental Rights of the European Union enshrines "the right to good administration". According to paragraphs 1 and 2 of this article, (1) "every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union. (2) This right includes: (a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken; (b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy; (c) the obligation of the administration to give reasons for its decisions." #### in the light of these obligations, the failure to give reasons for the administrative act constitutes a breach of the principle of the rule of law, of the right to good administration and of the constitutional obligation of the administrative authorities to ensure that citizens are correctly informed about matters of personal interest to them. The public administration's right of discretion is not, however, an absolute right, because otherwise it would become an abuse of rights. The limits of the right of discretion enjoyed by the public administration are set by the law itself, and exceeding these limits renders the act invalid. The authority issuing the act has the ability to choose, among several possible solutions, the one that best corresponds to the public interest to be protected, thus revealing the quality of the administrative act to satisfy both the strict rigors of the law and a social need determined in a particular time and place. Therefore, the contentious administrative court has to verify whether the act complies with the law and whether the conduct of the issuing authority strikes the right balance between the subjective right or legitimate private interest allegedly infringed by the applicant and the public interest which the public authorities are called upon to protect. Only in so far as the evidence in the case leads to the conclusion that that fair balance has been disrupted by an abusive, excessive exercise of the public authorities' discretion can there be an abuse of discretion within the meaning of Article 2 of Law no.

They are generally accepted principles that influence our perception of what is right and appropriate.

The values defined in official documents are the benchmarks that allow citizens to know the mission and vision of public organizations and also govern the day-to-day activities of the public service.

In Romania, the right of access to public services must be ensured in accordance with the principles of transparency, equal treatment, continuity, adaptability, accessibility, accountability and non-discrimination.

I. GENERAL VALUES THAT PUBLIC SERVICES SHOULD PROMOTE ON THE PATH TO SUSTAINABLE DEVELOPMENT.

1.1. Global trends

All OECD countries have defined a set of core values on which public service is based. In a 2015 sociological survey, citizens in OECD countries indicated their core values and the main sources of these values to highlight their priorities and concerns.

One of the basic common features is that OECD countries draw their values from the same major sources, namely: society, democracy and profession.

All these values imply the need for a reform of the organization, functioning and even thinking of the public service system in democratic countries, which has been a constant concern of all modern countries over the last 20 years.

For example, civil service reform has been a top priority among the actions taken to reduce costs and improve public sector performance.

Of the ninety-nine low- and middle-income countries included in a survey by Elaine Kamarck, twenty-four had announced civil service reforms by the end of 1999 *(Kamarck, 2007, p. 98).*

The initiatives included the establishment of clear categories of personnel, their alignment with pay scales and career systems, the development of job descriptions and the introduction of measures to connect performance with salary rewards and career mobility. Furthermore, some countries have sought to decentralize the decision-making process on the personnel - including standards for hiring, performance, promotion and dismissal – from the central commissions

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554/2004. The administrative law relationship is, however, also governed by the principle of proportionality between the measure ordered in each individual case and the public interest protected, requiring that administrative acts do not exceed the limits of what is appropriate and necessary to achieve the purpose pursued, so that the inconvenience caused to the individual is not disproportionate to the aims pursued. In other words, any administrative measure taken must be appropriate, necessary and proportionate to the aim pursued, having regard to the nature, seriousness and frequency of the irregularities detected and to their scale and implications. – Bucharest Tribunal, Division II of the contentious administrative and fiscal, civil sentence no. 4779/05.07.2024 https://www.rejust.ro/juris/59ee74698, in the form of 22.08.2024.

of civil servants or human resources units to organizational operations within public sector.

Major personnel downsizing efforts have been carried out in Bolivia, Cameroon, Chile, Ghana, Sri Lanka, Uganda, Venezuela and many other countries. Eliminating fictitious employees has been a priority in Brazil, Costa Rica, Ghana, South Africa, South Korea, Tanzania and Uganda, among other countries. Ghana and Laos introduced early retirement programs and other restructuring measures in the 1980s, while Brazil introduced measures to make it easier to hire and dismiss civil servants *(Donahue, 2003, p. 96)*.

Following these reforms, a great number of countries succeeded in increasing public sector salaries and in reducing pay discrepancies.

Other public sector reforms have helped governments manage development more effectively. For example, in Botswana, improvements have been implemented in the public sector by computerizing data management systems.

More than two thirds of OECD member countries have established a legal framework setting out the rules of conduct that public officials must observe.

The legal documents are varied and can include constitutions (Turkey), general civil service laws (Denmark, France, Hungary) or public service (Japan), codes of administrative procedure (Greece, Portugal), labor law (Czech Republic), codes of ethics (United States), disciplinary regulations (Portugal) and codes on conflicts of interest and post-term of office for public service (Canada).

Codes of conduct and codes of ethics (France, Italy) or codes governing the public service (UK) are also a common source for rules of conduct in about a third of the member countries. In Canada, the code governing conflicts of interest and the post-employment period for civil servants has been adopted in the form of a regulation, while the code for conflicts of interest and the post-employment period for public office holders is a code of conduct.

Other sources include customer service charters (Australia), circulars (Norway) or circular letters (Ireland), publications (the US handbook), case law (France) and training courses for civil servants (Finland).

In the United States, the Office of Ethics in Public Administration periodically sends approvals to ethics officials to provide guidance on the application of ethics rules and regulations. These guidelines are usually distributed to each official by the ethics officers within the organizations.

Removing the political rhetoric that often dominates the field of public service reform, it becomes obvious that although modernization is frequently mentioned, sustainable and user-centered change practices are really sought after. In this background, the concept of organizational renewal becomes particularly relevant: it is in the study of renewal, as a result of changes taking place over time, that we can see the potential for new models of public service delivery *(Milner, Joyce, 2005, p. 87).*

Probably the best supporters of renewal as a key organizational aspiration are Tushman and O'Reilly, who, while not explicitly addressing a public sector audience, identify key themes that have considerable resonance for the public sector. The acknowledgment of the fact that many of the change management activities, regardless of the type of the organization they are implemented in, do not have significant benefits in the medium term is essential for the concept of renewal and its inseparable connection with leadership *(O'Reilly III, Tushman, 2013, pp. 324-338).*

Renewal, on the other hand, presents change and change practices as part of a phased continuum that depends on effective long-term leadership and contributes to the development of organizational capacity, which is essential to equip organizations with the right culture and behaviors to deal with a wide range of possible futures. Tushman and O'Reilly examine the lessons that can be learned from the past and the implications this analysis may have for those interested in exploring the concept of renewal.

The ever-increasing development of national administrative systems has led to an increase in the number of civil servants in each country.

The trend towards more part-time jobs and more women employed is closely linked to changes in public sector.

In all countries, employment in social care services accounts for an increasing share of total public employment.

In many countries, such as the United States, Germany, the United Kingdom, France and Australia, employment in education, health and social services makes up half of all public sector employment, and in Scandinavian countries, New Zealand and Canada, the share is even higher.

The continued growth in employment in social care after World War II is the result of two different trends. In the 1960s and 1970s, there was a strong absolute increase in the number of public employees in social care services, outstripping growth elsewhere in the public sector. Subsequently, in the 1980s and 1990s, the number of public employees in these services stagnated, but relative growth continued due to downsizing in other areas. Privatization and corporatization of public enterprises and public services (telecommunications, ferries, buses, postal services and others) have reduced the number of public employees in these traditional services *(Bowman, 2007, p. 27).*

Therefore, employment in education, health and social services continued to grow in relative terms.

The increase in the share of public employees in these areas is accompanied by other important developments in the public sector in many of the countries surveyed. In those countries that maintain a distinction between civil servants and public employees working on the basis of a collective contract under private law and general labor law, the relative share of civil servants tends to decrease.

This fall is due in part to a general policy shift towards hiring public staff working under labor law and private law arrangements in some countries.

In search of greater flexibility in personnel management, government leaders at all levels have in recent years sought to expand the use of "at-will" hiring in the public sector. These efforts have faced varying degrees of political and legal resistance.

For instance, in the US state of Georgia, the governor's plan to transform all new state employees in "at-will" employees met with little opposition, but in Florida, state employees and their union fought a fierce battle against the elimination of protections requiring "just cause" for dismissal, protections that were enjoyed by 16,300 state employees. In courts, Florida state employees primarily sought protection in constitutional rights. They challenged the state's withdrawal of job security on constitutional grounds in three cases: *Croslin v. Bush* (2002), *Florida Public Employees Council 79, A.F.S.C.M.E. v. Bush* (2002) and *Muldrow v. Bush* (2002). Unsurprisingly, none of the plaintiffs have prevailed in these constitutional lawsuits. Courts across the nation have reviewed similar legislation and almost always found it to be legal *(Bowman, 2007, p. 27).*

Many of the state's expenditures are directed towards supporting the costs of social assistance, which is an objective necessity in a democratic state organized on the principles of social justice and humanitarianism.

There is an opinion according to which, "*social assistance and social protection aims not only to create a prosperous society, but also a highly inclusive society for all its citizens, including those who, for subjective or objective reasons, are in marginal positions. It is precisely the successes and achievements in the field of social protection and social policy that are a factor indicating the level of prosperity of the state. Social protection must be the cornerstone of state policies, the main mechanism through which society intervenes to prevent, limit or remove the adverse effects of events considered as "social risks". Therefore, public authorities shall not neglect persons who have fulfilled their obligations to the state or are unable to fulfill them for reasons beyond their control*" *(Munteanu, Rusu, Vacarciuc, 2015, p. 127).*

However, one of the requirements of a modern administration is the obligation of the state to modernize the way of public service delivery by implementing mechanisms for digitalization of public administration.

1.2. National trends

In Romania, this trend of modernization of the public service system was reflected, for example, in GEO no. 41/2016[3], which established in art. 1 para. (2) the obligation for all public institutions, specialized bodies of the central and local

[3] On establishing some simplification measures at the level of central public administration and amending and supplementing some normative acts, published in Official Journal no. 490 of June 30, 2016.

public administration, as well as private legal entities which, according to the law, have obtained public utility status or are authorized to provide a public service, under public authority regime, to publish, ex officio, information and models of forms or applications related to all public services provided, in electronic format, both on their own website and on the single electronic contact point.

Art. 2 of the same ordinance provided that public institutions, specialized bodies of the central and local public administration, as well as private legal entities which, according to the law, have obtained the status of public utility or are authorized to provide a public service, under public authority regime, shall be bound to accept the electronic copy of the identity card, delivered by e-mail, ensuring the conditions provided for by the legal regulations on the protection of individuals with regard to the processing of personal data[4]. The same legal entities

[4] The case law decided the following: "*As regards the objections seeking the partial admission of the plea of limitation of the substantive right of action for the amount of RON 258,655.12, the Court notes the following: In this case, by means of the sue petition filed on 05.08.2022, the appellant – plaintiff, the territorial and administrative division (TAD) of City ... sought an order that respondent – defendant ... S.A. pay the amount of RON 266,836.68 lei, consisting of the amount of RON 241,637.46 representing the values of the works carried out and the amount of RON 25,199.22 design and permits paid by TAD of City ... and the amount of RON 9,614.76 share of co-financing of 43,72% of the value of the additional works carried out, which was due to the defendant from the initial value of the contract, damage caused by the non-payment of the value of the share of contract no. 384/E/12.10.2018 concluded between City ... as applicant, .. S.R.L. as contractor and ... S.A. as operator. According to the provisions of art. 2523 of the Civil Code and those of art. 2524 para. 1 of the Civil Code, "The limitation period shall begin to run from the date on which the holder of the right of action knew or, according to the circumstances, ought to have known of the creation of the right of action.", „... unless otherwise provided by law, in the case of contractual obligations to give or perform, prescription begins to run from the date on which the obligation becomes due and the debtor was required to perform it.", rules governing the beginning of the limitation period. In this present case, as the first instance correctly held, the right of action of the appellant - plaintiff - TAD City of .. for the amounts claimed, arose on .., the moment of the conclusion of the protocol for the delivery-acceptance of works no. 10080 - art. 3.1.2 of contract no. 384/E/12.04.2018. The Appellant argues that the limitation period was interrupted by notification of delay no. 7555/24.02.2022 since it expressly and punctually provides for the provisions of Article 151 of Law No. 123/2012 on Electricity and Natural Gas, according to which "The distribution system operator or the transmission system operator to which assets have been handed over in accordance with the provisions of para. 3 shall be bound to return the countervalue of the amount invested by the applicant, in accordance with ANRE (Romanian Energy Regulatory Authority) regulations". Thus, it should be noted that the notice of delay expressly refers only to the amount of 8,796.32 lei, representing the share of the difference resulting from the execution of contract no. 384/E/12.10.2018 on the extension of the natural gas distribution network in locality .... 151 of Law no. 123/2012 are general provisions without specifying any specific amount of the claims brought before the court. According to the provisions of art. 2540 of the Civil Code "The period of limitation shall be interrupted by putting the person for whose benefit the period of limitation is running into default only if the default is followed by the service of legal proceedings within six months as of the date of the notice of default." Therefore, the Court notes that, by notification no. 7555/24.02.2022, the respondent-defendant was put in default only for the amount of 8,796.32 lei claimed by the appellant-plaintiff as a share*

of the difference resulting from the execution of contract no. 384/E/12.10.2018, and under these circumstances, notification no. 7555/24.02.2022 had the ability to interrupt the extinctive period of limitation only for this amount, by the sue petition filed by Bacău Court on 05.08.2022, within the 6-month period provided for by art. 2540, final thesis of the Civil Code. Furthermore, since the claims at issue derive from the performance of an administrative contract, it should be noted that the provisions of art. 11 of Law no. 554/2004 of the contentious administrative, which regulates two categories of time-limits for bringing a case before the contentious administrative court, the legal nature of which is expressly provided for in para. 5, as follows: a limitation period of six months, the expiry of which extinguishes the right of action, and a peremption of one year, applicable only for substantiated grounds and which cannot be exceeded either by the occurrence of any cause of interruption or suspension of the running of the six-month limitation period. Therefore, the sue petition for the amount of RON 258,655.12 was formulated on 05.08.2022, exceeding both the limitation period of 3 years laid down in art. 2517 of the Civil Code and the special time-limits laid down in art. 11 of Law no. 554/2004 of the contentious administrative. On the merits, the Court notes that plaintiff TAD City ..., as applicant, forced intervener.... Oil S.R.L, as contractor and defendant Delgaz ... S.A, as operator concluded Contract no. 384/E/12.10.2018 for the extension of the natural gas distribution network, under the provisions of art. 5 letter d of the Regulation on connection to the natural gas distribution system approved by Order no. 32/2017 of the President of ANRE and as a result of the exercise by applicant TAD City ... of the right recognized by the provisions of art. 51 para. 1 letter c of the same normative act to designate an economic operator authorized by ANRE to carry out the works, which is expressly stated in the document entitled "Response regarding the technical-economic study prepared by .. S.A. on 12.10.2018", submitted by TAD City with no. 31442/15.10.2018. At the same time, a separate contract no. 33706/01.11.2018 was also concluded for the performance of the works between the TAD City .., as purchaser and.. OIL S.R.L, as operator designated according to art. 5 letter f) and art. 5 1 para. 1 letter c) of Order no. 32/2017. Therefore, according to art.1270 of the Civil Code "The validly concluded agreement shall have the force of law for the contracting parties." Furthermore, according to art. 1350 of the Civil Code "Every person shall be bound to perform the obligations he/she has contracted. Where, without justification, he/she fails to perform such obligation, he/she shall be liable for any damage caused to the other party and shall be bound to repair such damage in accordance with the law." The premise of contractual liability, i.e. the failure to perform the contractual obligation and thus the breach of the principle of the binding force of the legally concluded contract or of the adage pacta sunt servanda, in other words, a breach of the parties' agreement, which, once concluded in compliance with all the formal and substantive conditions, "shall have the force of law for the contracting parties". The second paragraph of this article lays down the conditions required for contractual liability, namely: a) the unjustified failure to fulfill a contractual obligation; b) the party who does not have a justification for the failure to fulfill of the obligation undertaken by the contract shall be held liable for the damage caused to the other party by non-performance. c) the party who failed to perform the obligation shall be held liable to repair the damage caused to the other party under the law. In the case, according to the provisions of art. 3.1.2 of agreement no. 384/E/12.10.2018 for the extension of the natural gas distribution network, respondent – defendant ... SA as operator undertaken the obligation to pay to the contractor, forced intervener ... S.R.L. the amount of RON 170,675.57 (VAT included) representing the amount with which it will contribute to the investment after acceptance of the completed works. It should be noted that, the agreement of the parties to the contract was to establish the participation fee of the distribution operator in a fixed amount of RON 170,675.57 and it was paid by the respondent - defendant to the operator designated by the appellant - plaintiff respectively intervener .... S.R.L. At the same time, from the perspective of carrying out additional works, it should be noted that, when calculating the specific indicators of

shall be bound to publish an e-mail address for receiving the electronic copy of the ID card on the electronic single point of contact and on their own website.

Every public institution, specialized body of the central or local public administration, as well as private legal entity which, according to the law, have obtained the status of public utility or is authorized to provide a public service, under public authority regime, shall be bound to remove the requirement to submit notarized copies of documents when providing public services, replacing them with the certification of conformity with the original by the competent official, as provided for by art. 2 para. 3 of the cited normative act.

Although it is an anathema of modern times, the digitalization of public institutions is nevertheless a pressing need of modern states, its importance being all the more evident in Romania.

The automation, defined as a technique, method or system of operating and controlling business processes by mechanical or electronic means that replace human labor, is becoming increasingly widespread. Thanks to improvements in the techniques through which it is implemented (i.e. artificial intelligence, machine learning, robotics), it has acquired characteristics of efficiency and

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the cost-benefit analysis of 10.10.2018 no. HQ561/10.10.2018 and the estimate prepared, the estimated cost of the works was RON 426,688.93, and the final cost of the works actually performed, according to the report of acceptance of works no. 1080/28.03.2019, was RON 412,313.93, respectively lower than the value taken into account when establishing the fixed rate at the time of conclusion of the contract. Moreover, the Court also holds that, by paying the participation fee set out in the contract, the parties strictly complied with the provisions of Contract no. 384/E/12.10.2018 and implicitly with the provisions of ANRE Order no. 104/2015 and Law no. 123/2012 on electricity and natural gas, which were taken into account when drafting the terms of the contract in view of the specific nature of the works covered by the contract. In connection with the content of Contract no. 384/E/12.10.2018, the provisions of Article 1350 of the Civil Code governing contractual liability are not applicable since, contrary to the claim of the appellant - plaintiff, the respondent - defendant cannot be held to be under a contractual obligation to pay the co-financing share of 43.72% of the total value of the works carried out. Therefore, in the absence of the contractual obligation the non-performance of which is alleged, contractual liability cannot be incurred in this case since the premise of contractual liability, namely the non-performance of the obligation, is lacking. According to the will of the parties referred to in art. 4.2.1 of the contract, it has been established that the appellant-plaintiff will be entitled to recover part of the amount invested, directly from the new applicants to be connected to the objectives/pipelines and that the manner of recovery of the investment from the new connected users is not subject to the contract. Therefore, the Court notes that, the amount claimed by the appellant-plaintiff as a financing share of 43.72% of the value of the additional works carried out under the Agreement is not substantiated and was rightly rejected by the judgment under appeal. For the above reasons, pursuant to the provisions of article 496 para. 1 of the Code of Civil Procedure, the appeal will be dismissed as unfounded. In what concerns court fees requested by means of statement of defense by respondent S.C. ... S.R.L., the Court notes that the respondent has not proved the existence and extent of such costs, for which reason, pursuant to the provisions of article 452 of the Code of Civil Procedure, it will dismiss this claim as unsubstantiated" – The Court of Appeal of Târgu Mureș, Division of the Contentious administrative and fiscal, civil sentence no. 62/07.03.2024 https://www.rejust.ro/juris/4e85276de, in the form of 25.08.2024.

versatility, making it applicable in sectors ranging from industry to services and in activities, from operational to strategic ones.

Nowadays, the risk of replacing "people with machines" no longer concerns those routine and repetitive activities typical of assembly line operators, but more sophisticated and complex activities, which Western doctrine has defined as unstructured or semi-structured. Once with the advances in artificial intelligence, the recent history of automation has become fully intertwined with the management of government administrative activities, of business processes and has provided support at many stages of commercial activities *(Yang, Qiu, Chen, 2002, p. 405).*

In this dimension of modernizing the way public services are delivered, the digitalization of state systems is an urgent necessity for Romania.

The decision-making process usually involves one or more criteria on the basis of which the political or administrative decision-maker has to make judgments.

The information processed on the basis of these criteria can help to reduce the uncertainties faced by state institutions so that they can apply certain decision rules to improve outcomes (for instance, assessment of information value).

Digital information in public services can also be used as a guide to action, drawing on the insight and experience of an expert (who may be the decision-maker or another person). This can be stored formally for later use in a knowledge base or kept informally as personal expertise and knowledge. This knowledge and expertise can be fed back into decision making to help reduce uncertainty, apply a historical perspective and use corporate knowledge *(Yang, Qiu, Chen, 2002, p. 405).*

State institutions can also obtain relevant information about the efficiency of the public service or about the shortcomings in its functioning, as well as about the market environment, in the form of strategic information from outside the organization. This information can again be fed back into the decision-making process to reach more informed conclusions.

The decision-making process in order to improve the way public services are delivered requires the use of artificial intelligence systems, in order to provide the state authorities with competences in the field with an overview of the state of public services in Romania and to give the decision-maker the logical and scientific arguments to evaluate alternatives based on criteria and rules, using information, expertise, intuition and knowledge.

The automation of the decision making process within Romanian public administration practically simulates the actions of public service delivery, imitating the way of thinking, approaches and problem solving, often improving performance by eliminating human subjectivity and preconceptions.

As more and more decisions are studied and understood, along with advances in technology, the process becomes more and more efficient *(Yang, Qiu, Chen, 2002, p. 405).*

However, we note that each Romanian public administration authority should establish a set of standards to regulate the professional conduct of civil servants involved, directly or indirectly, in the process of public service delivery, usually formalized as a code of ethics or a guide of good practices[5].

[5] The following were noted in specialized practicum: "*By means of petition no. 155/20.09.2023 registered under no. 17871/21.09.2023 by defendant County Police Inspectorate of Bacău, the plaintiff requested the defendant to declassify the organization and operation regulation of Police Inspectorate ... Bacău according to art. 20 and art. 33 of Law no. 182/2002 and to be notified, under Law no. 544/2001, among others, on the organization and operation regulation of Police Inspectorate... Bacău. By means of notification no. 26477/2.10.2023, defendant General Inspectorate of the Romanian Police notified the plaintiff, as a response to its petition no. 155, that the organization and operation regulation was classified in accordance with the provisions of Governance Ordinance no. 585/2002 and that the requests of the plaintiff were delivered to the competent police units. According to response no. 57875/30.10.2023-f. 42 to the statement of defense, defendant County Police Inspectorate of Bacău responded to plaintiff in the sense that the draft of the organization and operation regulation was sent to the Cabinet Directorate within the General Inspectorate of the Romanian Police and that this project was approved on 29.12.2011, the decision of the Inspector General of the General Inspectorate of the Romanian Police approving those rules, which is a confidential information, being also submitted on file on page 43. Art. 24 of Government Ordinance no. 585/2022 provides that confidential information shall be declassified by the heads of the issuing units by removing it from the lists provided for in Article 8, which shall be reviewed whenever necessary. Article 29 of Order no. 105 of 12 July 2013 on structural planning and organizational management in the units of the Ministry of Domestic Affairs: the draft regulations of the units subordinated to the structures/institutions subordinated to the Ministry shall be forwarded, as appropriate, to the structures of the next higher rank the competences of which are affected by their provisions, similar to the procedures set out in art. 28 para. (1)-(4), and shall be endorsed by the heads of the structures/persons in charge of organizational and legal matters at the level of the units the heads/commanders of which issue the approval orders/dispositions. Article 30 of the same normative act: The drafts of regulations, endorsed under the terms of art. 28 and 29 shall be approved: a) by order of the ministry – in case of the units of the central apparatus and of the structures/institutions under the subordination/coordination of the Ministry; b) by order of the Secretary of State or, as the case may be, of the Secretary General - in case of units the activity of which is coordinated by them, other than those referred to in letter a); c) by provision of/order of the head/commander of the structures/institutions subordinated/coordinated by the Ministry - in case of units subordinated to them; d) by order of the head of unit of the central apparatus - in case of units directly subordinate to or directly coordinated by them. As mentioned above, defendant General Inspectorate of the Romanian Police approved the organization and operation regulation of Police Inspectorate ... Bacău, the act being registered with the defendant under no. S/8035/25.08.2011, being attached to order no. 90/29.12.2011 of the General Inspectorate of the Romanian Police. In the light of the legal provisions set out above, the court finds that the Police Inspectorate .. Bacău is only the issuer of the draft, and by the operation of draft approval by which it is given legal force, the defendant General Inspectorate of the Romanian Police acquires the quality of issuer of the final act. The draft is only an appendix to the approval provision, being an integral part thereof, and*

therefore, the defendant has the competence to analyze whether the organization and operation regulation of the Police Inspectorate ...Bacău can be declassified in the light of the provisions of Government Resolution no.585/2002. Therefore, according to the legal provisions above, the lack of (passive) capacity to stand trial of defendant Inspectorate ... of Police ... is unsubstantiated, in view of the fact that the defendant has the power to classify and declassify the information contained in the regulation and, at the same time, has classified the regulation as a confidential information. By analyzing the plea of lack of subject-matter, the court found that it was unsubstantiated, given that the regulation in question was not communicated to the plaintiff, as he had requested, so that the subject-matter of the case exists, but it should not be confused with the merits of the claim, which will be analyzed. In what concerns the merits of the case, the court held first of all that, as it follows from response no. 26477/2.10.2023 of defendant General Inspectorate of the Romanian Police, in view of the reference to the plaintiff's request and the mention of the way in which the organization and operation regulation of County Police Inspectorate of Bacău was classified, this represents a refusal to declassify the regulation and not the failure to respond to the plaintiff's request for declassification. According to the provisions of art. 20 of Law no. 182/2002, any Romanian natural or legal person may file objection with the authorities that have classified the information in question, against the classification of the information, the duration for which it has been classified, as well as against the manner in which one or another level of secrecy has been assigned. The appeal shall be settled in accordance with the law of the contentious administrative. Therefore, by noting that the refusal of defendant General Inspectorate of the Romanian Police to have declassified the regulation in question falls under the legal definition of the unjustified refusal provided by art. 2 para. 1, letter 1 of Law no. 554/2004, this should be assessed in consideration of the provisions of Law no. 554/2004. According to art. 15 letter e of Law no. 182/2002, confidential information is defined as the information the disclosure of which is likely to cause damage to a legal person, whether governed by public or private law. Art. 8 of Government Resolution no. 585/2002 provides that the list of confidential information shall include information on the activity of the unit and which, without being, within the meaning of the law, state secrets, shall be known only to persons to whom it is necessary for the performance of their duties; its disclosure may prejudice the interests of the unit. ####, the court found that none of the defendants had argued that the organization and operation regulation would contain such information, nor how the defendant county inspectorate's interest would be prejudiced by disclosing the contents of the organization and operation regulation. On the contrary, defendant County Police Inspectorate Bacău delivered to General Inspectorate of the Romanian Police – Security Structure, the documentation with the proposal to declassify the regulation in question, by notification no. 90596/8.11.2023-f. 46. Furthermore, art. 33 of the same ...no. 182/2002, provides the prohibition on classifying as official confidential information which, by its nature or content, is intended to inform citizens about matters of public or personal interest, to facilitate or cover up circumvention of the law or obstruction of justice. There is no doubt that the provisions of a regulation of organization and operation contain the duties and rules of conduct to be adopted by the staff of the institution to which the regulation refers, so that those provisions create rights or obligations for the staff, knowledge of which is essential for the protection of the public interest, which is the basis of the organization of any public service. Furthermore, art. 580 para. 2 of the Administrative Code provides that the principle of transparency, specific to public services represents compliance by public administration authorities with the obligation to provide information on how component activities and objectives are established, how public services are regulated, organized, operated, financed, delivered and evaluated, as well as on user protection measures and mechanisms for resolving complaints and disputes. Furthermore, according to Law no. 544/2001, art. 5 para. 1 letter a, the obligation to communicate ex officio shall be incumbent on any authority or public institution, since this is

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CONCLUSION

We are all heading towards a new reality dominated by the digital world where even the most profound legal concepts will be affected. We cannot deny this trend and we are already implementing certain aspects that we find, with direct reference to the present study, in making public services more efficient by improving certain aspects of their day-to-day functioning. For sure that this new digital stage represents a decisive step towards sustainable development concepts. For example, important chapters such as "health and well-being", "quality education", "peace, justice and effective institutions" will be greatly influenced by the digital age in which mankind has entered. In this background, public services, designed to serve the general interest of citizens, will adapt to new trends. Starting from the idea often expressed in the doctrine according to which "there is a correlation from whole to part between the executive and the public administration; the administration being a segment of the executive, without overlapping with it" (Stefan, 2019), we will note that in the future, both the executive as a whole and the administration as part of it will have to accept and implement the new trends generated worldwide, both in legislative and practical terms, at the level of civil servants or administrative staff. And this will certainly be a decisive step towards sustainable development, both generally and in each individual segment.

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information of public interest, normative acts regulating its organization and operation. Therefore, the provisions of art. 24 of Government Resolution no. 585/2002 are also applicable, according to which confidential information shall be declassified by the heads of the units that issued it, by removing it from the lists provided for in Article 8, which shall be reviewed whenever necessary. In what concerns the petition substantiated on Law no. 544/2001, the court found that the requested act is available to the defendants, this resulting from their activity, so that the request falls within the powers of the defendant public institution. The request for communication of the regulation is subsequent to the request for declassification, the plaintiff requesting communication of the organization and operation regulation of the Police Inspectorate .... Bacău declassified and not in its existing form, so that the decision on this petit is determined by the decision on the first head of claim. For the above reasons and in application of the provisions of art. 18 of Law no. 554/2001, the petition was admitted, defendant General Inspectorate of the Romanian Police was obliged to declassify the organization and operation regulation of the Police Inspectorate .... Bacău, and both defendants to communicate to the plaintiff, after declassification, the organization and operation regulation of the Inspectorate ... of Police Bacău. At the same time, taking into account the proven and reasonable nature of the costs claimed by the plaintiff represented by the lawyer's fees in the amount of RON 2500, as well as the procedural fault of the defendant General Inspectorate of the Romanian Police in relation to the solution ordered in the case, the court ordered the defendant to pay the plaintiff the amount of 2500 lei representing lawyer's fees" – Bucharest Court of Appeal, Division of the contentious administrative and fiscal, civil sentence no. 199/09.02.2024, https://www.rejust.ro/juris/6249382g5, in the form of 28.08.2024.

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SARA Law **R**esearch **C**enter
International **J**ournal of **L**egal and **S**ocial **O**rder, https://www.ccdsara.ro/ijlso
ISSN 2821 – 4161 (Online), ISSN 2810-4188 (Print), ISSN-L 2810-4188
N°. 1 (2024), pp. 92-106

IS CASSATION RECOURSE AN EFFECTIVE REMEDY IN ADMINISTRATIVE CONTENTIOUS? IS THERE A NEED FOR A REFORM OF THE REMEDIES AND TO REPLACE CASSATION RECOURSE WITH APPEAL?

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Received 10.10.2024; accepted 14.12.2024
DOI: https://doi.org/10.55516/ijlso.v4i1.221

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Abstract

This study aims to approach the system of remedies in administrative contentious, from legislative, doctrinal and jurisprudential perspectives. From a historical perspective, was recourse the traditional remedy in administrative contentious or not? Under the current legislation, the cassation recourse, an extraordinary remedy, remedy of legality and with a restrictive regime of evidence, is an effective remedy in administrative contentious? Is there a need for a reform in the system of remedies and the replacement of the recourse by appeal? The conclusions of the study present the advantages and disadvantages of each remedy for the purpose of launching a debate on the choice between tradition and modernity.

Key words: *justice, administrative law, administrative contentious, remedies.*

INTRODUCTION

Administrative contentious has been defined as 'the set of rules for the

application of jurisdictional solutions to disputes related to administrative activity' (*Verginia Vedinaș 2018, p. 149*) or as a 'contradictory procedure through which a person transfers the conflict with a public authority to administrative courts.' *(Dragoș, p.1)*

In this system of procedural rules applicable to the resolution of administrative law conflicts, the system of remedies requires the existence of at least one remedy at law through which the conflict can be re-analysed by a higher court, after its resolution by an administrative jurisdictional entity or a lower court.

The system of administrative law remedies varies from one national legislation to another, and even within the same legislation, different procedures for resolving conflicts can be encountered.

In France, for instance, the procedural system is dualistic, with jurisdiction shared between the Council of State and administrative courts (administrative tribunals, administrative courts of appeal, and the Court of Cassation). The Council of State has the authority to resolve cases both on merits and in a second level of devolutive jurisdiction or even in cassation, handling recourses against resolutions passed in special administrative procedures.

Administrative courts have the authority to rule on substantive disputes in areas such as public service, tax litigation, in civil matters, pensions etc. The administrative courts of appeal handle appeals against resolutions passed by these administrative tribunals, while the Court of Cassation addresses cassation recourses against rulings from administrative courts of appeal. The French system provides several forms of appeal: cassation recourse, opposition, motions for revision, and appeals for the correction of clerical errors. *(Broyelle, 2024, p. 429 496)*

Several other states, such as Belgium, Italy, and the Netherlands have organised their administrative jurisdiction systems after the French model.

In Germany, the system of administrative jurisdiction is completely separate from public administration, administrative courts adjudicating all disputes in this area being: administrative tribunals, higher administrative courts, and the federal administrative court *(Săraru, 2022, pag. 36).*

Austria, Sweden and Portugal have adopted the German model, with jurisdictions autonomous from the administration.

In Romania and Spain, the system of administrative jurisdictions is integrated into the common law judicial system, with administrative disputes being resolved by specialised departments of ordinary courts.

In the United Kingdom, there are no administrative jurisdictions. Administrative law litigation is resolved by ordinary courts, noting that the British

legal system is based on natural law and the precedential value of judicial precedent.

The Code of Administrative Procedure of the Republic of Moldova[1] was adopted in 2018; it regulated the system of administrative jurisdictions, also integrated into the common court system, with specialized judges. District courts have full jurisdiction on the merits, while the courts of appeal resolve appeals against resolutions passed by lower court judges, and the Supreme Court of Justice has jurisdiction over solving appeals.

I. ADMINISTRATIVE CONTENTIOUS IN ROMANIA. HISTORICAL LANDMARKS IN THE MATTER OF REMEDIES AT LAW

The first regulations regarding administrative contentious in our country appeared in the United Principalities of Romania in 1864, under the governance of Prince Alexandru Ioan Cuza, who, adopting the French model, established the Council of State, with three main significant responsibilities: as an advisory body regarding draft laws, as an advisory body for the Government, and as a body with judicial powers in the field of administrative litigation *(Rarincescu, pag. 78*).

In 1866, the first Constitution of Romania was adopted, which, after just two years, abolished the Council of State and assigned the authority to resolve disputes between the administration and individuals to courts of common law.

During this period, bodies with jurisdictional powers in certain areas, such as taxation, pensions, etc., were also established (*Apostol Tofan, pag. 108*).

In 1905, the Law for the Reorganization of the High Court of Cassation and Justice was passed. Through this law, the Administrative Contentious Department was established within the Supreme Court, with responsibilities regarding the resolution of direct appeals filed against illegal administrative acts.

In 1910, a new Law for the Reorganization of the High Court of Cassation and Justice was passed; this abolished the Administrative Contentious Department, transferring jurisdiction to resolve cases in this area to ordinary tribunals. It should be noted that this law eliminated judicial review of legality, allowing courts to rule only on claims for damages caused by the issuance of illegal administrative acts, not on their nullity.

The first law specifically regulating administrative contentious was the 1925 Law of the Contentious Administrative, which, in Article 11, provided a single law remedy against decisions rendered on the merits by the courts of appeal, namely recourse to the Court of Cassation. Article 12 of the same law established a different type of recourse in this matter, in cassation. Similar to the current form of appeal in administrative contentious, the High Court of Cassation and Justice would rule on the merits of the case if the appeal were admitted.

[1] Published in the Official Gazette of the Rep. Of Moldova no. 309-320 of 17.08.2018

However, it should be emphasized that at that time, there were two ordinary remedy routes: appeal and recourse ***(****Ciobanu, Nicolae p. 1340).*

Another special law, namely the Law for the Court of Cassation and Justice, re-established the administrative contentious department under the name of the Third Section of the Court of Cassation and Justice (*Săraru, 2022, p. 434*). The aforementioned laws were prefaced by the provisions of the Constitution of 1923, which established a special text for administrative contentious, thereby instituting full jurisdictional review (for management acts) and annulment litigation (for acts of authority) in the Kingdom of Romania.

Through the Local Public Administration Law of 1936, Administrative Courts were established as entities with special jurisdiction, resolving only disputes related to acts issued by local authorities. During this period, the competence to resolve administrative contentious disputes was shared among ordinary tribunals, which handled disputes regarding management acts (including claims for damages), courts of appeal, which resolved disputes concerning acts of authority (including claims for damages related to these), administrative courts, which dealt with disputes regarding acts of local authorities, and a series of administrative jurisdictions with competences established by special laws.

What followed was a dark period for administrative litigation. During the communist era, administrative contentious was abolished by Decree No. 128/1948. Ordinary courts retained the competence to analyse only the legality of individual administrative acts and only where the law expressly provided for this possibility. By Decree No. 132/1952, the appeal route was abolished, making recourse the only ordinary remedy at law in all matters. Until the adoption of the Constitution of 1965, there was effectively no form of judicial control over the legality of acts issued by public authorities and institutions. Article 35 of the 1965 Constitution reintroduced the institution of administrative contentious, stipulating: '*the possibility for a person harmed in their rights by an illegal act of a state body to request, under the law, the annulment of the act and compensation for damages.'* Subsequently, Law no. 1/1967 was adopted regarding the adjudication by courts of requests from those harmed in their rights by administrative acts, according to which courts could rule on the legality of administrative acts but not on the appropriateness of their issuance.

After the Revolution, through Law no. 29/1990 regarding administrative contentious, the institution regained its role in the legal system, resuming the interwar tradition.

Following this law, administrative contentious departments were established within the tribunals and the Supreme Court of Justice, and starting with 1993, after the reestablishment of the courts of appeal, within the latter courts as well. Initially, the competence to resolve matters of administrative

contentious belonged to the specialized departments of county tribunals (Article 6 of the law), and decisions issued by these courts on the merits could be challenged to the Administrative Contentious department of the Supreme Court of Justice (Article 14 of the law).

After the amendment of the Code of Civil Procedure by Law no. 59/1993, the appeal was reintroduced into the system of remedies at law, and the courts of appeal were re-established. However, from the perspective of administrative contentious, the amendment consisted only of the sharing of competence on the merits between tribunals and courts of appeal, with the remedy against lower court decisions remaining recourse.

Nevertheless, it should be noted that, due to the provisions of Article 304/1 of the 1865 Code of Civil Procedure, the administrative contentious appeal had the traits of a hybrid appeal route, devolutive in nature, not being limited to the grounds for cassation provided by Article 304 of the 1865 Code of Civil Procedure.

Not much changed once Law no. 554/2004 regarding administrative contentious [2] entered into force. Articles 10 and 20 of the law-maintained cassations as the sole appeal route and also preserved the shared material competence between tribunals and courts of appeal. The appeal is suspensive of execution, and, following the interwar model, in case of admission, the appellate court must resolve the case on its merits, except in situations where a ground for cassation with referral is retained.

The true change in the legal nature of administrative contentious appeals came, paradoxically, not through the amendment of Law 554/2004, but through the entry into force of the new Code of Civil Procedure, in 2010. Law 134/2010[3] configured the appeal as an extraordinary means of attack, in cassation, with the grounds for appeal being exhaustively specified by law, accompanied by a very restrictive legal regime for evidence.

The question we pose is whether, in the current procedural system, the appeal represents an effective means of attack in administrative contentious, considering that it is a form of remedy at law where only the conformity of the ruling with the applicable legal norms is verified and which can be promoted for eight grounds of legality provided by Article 488 of the Code of Civil Procedure[4].

II. THE MAIN CHARACTERISTICS OF APPEAL IN THE MATTER OF ADMINISTRATIVE CONTENTIOUS UNDER CURRENT LEGISLATION

According to the provisions of Article 20 and Article 10 paragraph 2) of Law no. 554/2004 regarding administrative contentious, the only remedy at law in

[2] Published in the Official Gazette of Romania, part I, no. 1154 of December 7, 2004
[3] Published in the Official Gazette of Romania, part I, no. 485 of July 15, 2010
[4] Approved by Law no. 134/2010, published in the Official Gazette of Romania, part I, no. 485 of July 15, 2010 and republished in the Official Gazette of Romania no. 247 of April 10, 2015

administrative contentious is the appeal. There are some exceptions where a request for retrial is the legal remedy at law; however, these are special administrative procedures which, according to the provisions of Article 5 paragraph 2) of Law no. 554/2004 regarding administrative contentious, are not subject to the control provided by this law. Thus, in contravention matters, the court ruling passed on the merits regarding the administrative act – the minutes for establishing and sanctioning the contravention – can be challenged by request for retrial according to the provisions of Article 34 paragraph 2) of Government Ordinance no. 2/2001 regarding the legal regime of contraventions[5]. In public procurement matters, *'the ruling passed in cases of litigation and requests regarding compensation for damages caused during the awarding procedure, as well as those concerning the enforcement, annulment, nullity, resolution, termination, or unilateral cancellation of administrative contracts can be challenged by a request for* retrial', as provided by Article 55 paragraph 3) of Law no. 101/2016 regarding remedies and appeals in matters of public procurement contract awarding, sectorial contracts, and concession agreements for works and services, as well as for the organization and operation of the National Council for Solving Complaints[6].

In these conditions, it has been shown in doctrine and jurisprudence[7] that in administrative litigation, the appeal is the only compatible remedy at law *(Cătană, p. 426)* or that the request for retrial is incompatible with the specifics of the matter *(Săraru, 2024, p. 246).*

How does the appeal in common law differ from the appeal in administrative litigation? First of all, according to Article 10 paragraph 2) of Law no. 554/2004 regarding administrative contentious, recourse is suspensive of execution, which means that the public authority cannot be compelled to enforce the court ruling on merits *(Apostol Tofan, p. 172).* In another aspect, unlike common law, if the court of appeal admits the remedy at law, after annulment, it will resolve the case on its merits. This provision applies without distinction based on the rank of the court, so that even the High Court of Cassation and Justice (Î.C.C.J.), as a court of appeal in administrative contentious, will annul with retention and will re-examine the case on its merits. The only exceptions where Article 20 paragraph 3) of Law no. 554/2004 regarding administrative contentious allows, once only, for annulment with referral are as follows: when the ruling of

[5] Published in the Official Gazette of Romania no. 410 of July 25, 2001, with subsequent amendments

[6] Published in the Official Gazette of Romania no. 393 of May 23, 2016, with subsequent amendments and completions

[7] ÎCCJ resolution (RIL panel) no. 17/2017, published in the Official Gazette of Romania no. 930/27.11.2017, par. 63

the lower court was passed without examining the merits or when the judgment was made in the absence of a party which was illegally summoned both during the process of producing evidence and during the arguments on the merits.

Finally, unlike common law, the term for appeal in administrative contentious is 15 days from notification.

Apart from these differences, as a result of the provisions of Article 28 of Law no. 554/2004 regarding administrative contentious, the legal regime of appeal is that provided by the Code of Civil Procedure, meaning it is an extraordinary remedy at law that can only be exercised for grounds of legality, which are exhaustively specified by law.

The Romanian lawmaker opted for a closed system of grounds for cassation, modelled after the Italian system, listing exhaustively 8 grounds for cassation which essentially pertain to a violation or incorrect application of the law *(Nicolae, p. 153).* Moreover, if we analyse the fifth ground for appeal [Article 488 paragraph 1), point 5 of the Code of Civil Procedure], which states that *'when, by the ruling passed, the court violated procedural rules non-compliance with which attracts the sanction of nullity',* we will note that the first seven grounds for appeal are essentially procedural errors that lead to the nullity of the court ruling, and only point 8 of Article 488 paragraph 1) of the Code of Civil Procedure refers to the violation or incorrect application of substantive legal norms.

In systems which are open regarding grounds for cassation, specific grounds for cassation are not enumerated; instead, the legislator limits itself to indicating, in general terms, the purpose of the appeal. For example, in France, the new Code of Civil Procedure states in Article 604 that *'the appeal in cassation aims to obtain the censure by the Court of Cassation of the non-compliance with legal norms by the challenged ruling'* (*Nicolae, p. 144*) [8]. In these legal systems, it is up to the courts of cassation to establish, through case law, specific grounds for cassation.

What is important for this study is to emphasize that the closed system of grounds for cassation chosen by the Romanian legislator has led to the development of a non-unitary practice among the courts of appeal regarding the interpretation of cassation grounds and the classification of specific arguments expressed by parties within these grounds. In particular, the eighth ground for cassation has provided opportunities for diametrically opposed solutions from courts. According to Article 488 paragraph1), point 8) of the Code of Civil Procedure, cassation of a ruling can be requested when *'the ruling was passed in violation of or with incorrect application of substantive legal norms'.* It is very difficult to draw a clear distinction between 'the state of facts' and the norm of

[8] "Le pourvoi en cassation tend à faire censurer par la Cour de cassation la non-conformité du jugement qu'il attaque aux règles de droit"

'substantive law'. Consequently, there is a wide range of approaches from the courts of appeal, some of which are even diametrically opposed. For instance, when the ground for appeal consisted of the illegal rejection, in the party's opinion, of its request for the administration of evidence deemed essential in the case, some courts have interpreted the ground for cassation broadly, considering that it falls under Article 488 paragraph1), point 8 of the Code of Civil Procedure[9], while others have found that the court of appeal does not have jurisdiction to analyse issues related to the administration and interpretation of evidence[10].

The existence of such a non-unitary practice undoubtedly affects the legitimate expectations of the litigant, especially in the field of administrative contentious where there is only one rather restrictive remedy at law available.

It is difficult to argue which orientation of practice is preferable: the restrictive one which respects the role and purpose of cassation appeal, or the extensive one, which considers it preferable to broaden the procedural rights of parties in appeal, given that this is the only remedy at law available.

Moreover, regarding the admissible evidence in appeal, Article 492 of the Code of Civil Procedure limits new evidence to documents, which, in the context of what has been previously stated, clearly restricts the appellant's ability to argue a specific ground for cassation.

It is true that the legislator envisioned this hybrid system of appeal in administrative contentious, allowing the court of appeal to resolve the merits of the case; however, the devolutive effect comes only after passing through the stage of analysing the grounds for appeal, which is often an insurmountable obstacle for the appellant.

Taking into account this brief overview of the legal regime of recourse in administrative contentious, we note that there are sufficient arguments to conclude that the restrictions imposed by the appeal procedure could influence the litigant's

[9] High Court of Cassation and Justice, administrative and fiscal contentious department, decision no. 3584 of June 28, 2023. The supreme court ascertained that, by rejecting the expert evidence, transgressed its obligation to play an active role, and consequently transgressed its obligation to effectively analyse the case. In the opinion of the supreme court, this vice puts it in the incapacity to perform judicial review (https://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=210812#highlight=##)

[10] High Court of Cassation and Justice, second civil section, decision no. 1151 of June 25, 2020. The High court maintained that the means of producing accounting expert evidence is not an illegality critique and concluded that it cannot analyse this ground for cassation. (https://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=171282#highlight=##)

effective right of access to a court, a right protected under Article 6 of the European Convention on Human Rights, in its civil component.

Therefore, in the continuation of this study, we will analyse the possibility or necessity of reforming the system of remedies at law in administrative contentious, particularly from the perspective of examining a draft law to amend the law on administrative contentious, which we have identified on the website of the Chamber of Deputies.

III. REPLACING RECOURSE WITH APPEAL OR CHANGING THE LEGAL REGIME OF RECOURSE?

The dilemma between appeal and recourse as remedies at law and that of appeal in administrative contentious is not new, having been previously analysed in doctrine *(Ursuța, p. 558-565).*

In 2022, the Chamber of Deputies adopted a draft law for amending Law no. 554/2004 regarding administrative contentious[11], which provides for the modification of Article 20 paragraph 2 so that rulings from the lower court can be appealed within 30 days from the communication of the ruling. The draft law also stipulates that the appeal is suspensive of execution, that rulings made in appeal are not subject to recourse, and that both evidence proposed within the timeframe before the first instance and evidence proposed late are admissible. Furthermore, the draft law maintains recourse as a means of remedy in the enforcement phase of rulings issued in administrative contentious, according to the procedure provided by Article 25 of Law no. 554/2004 regarding administrative contentious, against rulings issued under Article 24 paragraph 3) of the law[12], and replaces recourse with appeal in cases of rulings issued under Article 24 paragraph 4) of the administrative contentious law[13].

The text is perfectible, not meeting the criteria set forth by Law no. 24/2000[14], republished, regarding legislative technique; however, these can be corrected by the Senate as the decision-making chamber. For example, it would be preferable to use the phrase "decisions can only be appealed" (following the model of the Code of Civil Procedure) instead of "decisions made in appeal are not subject to recourse," or to eliminate the provisions regarding the admissibility of evidence in appeal, provisions which, in our opinion, are redundant, doing

[11] Pl-x no. 2/2022 (https://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?cam=2&idp=19743)

[12] The procedure provided by art. 24 par. 3) of Law no. 554/2004 refers to enforcing a fine on a legal entity, public authority or institution for a culpable non-execution of the obligation established by the administrative contentious court and granting penalties in favour of the obligation's creditor.

[13] The procedure provided by art. 24 par. 4) of Law no. 554/2004 refers to transforming the fine and penalties into compensation owed to the state and the creditor for continued non-execution of the enforceable title even after the enforcement of fines and the establishment of penalties.

[14] Republished in the Official Gazette of Romania, no. 463 of May 24, 2004

nothing but repeating the system of Decision no. 2 of March 30, 2020, issued by the High Court of Cassation and Justice – RIL panel[15].

However, we must note the legislator's intention to introduce a single, fully devolutive, ordinary remedy at law in administrative contentious.

In the explanatory memorandum, the initiators of the law stated that the proposal aims to ensure equal opportunities in the administration of evidence, facilitate the act of justice, balance the power dynamics between individuals and authorities, and provide a legal framework for re-evaluating the merits of cases.

Currently, the draft law is with the Senate, which is the decision-making chamber, registered under number L309/2022[16], and is under consideration by the Senate's permanent committees.

At the same time, a draft law regarding the Code of Administrative Procedure has been published for public debate on the website of the Ministry of Development, Public Works, and Administration[17].

Surprisingly, Title VIII, Chapter II, Article 309, entitled "Recourse," fully adopts the current Article 20 of Law no. 554/2004 regarding administrative contentious. Therefore, it is intended to maintain a single remedy at law for administrative litigation, in the form of the current recourse. In the explanatory memorandum of the bill's initiator, there is no mention regarding Chapter II of Title VIII - Procedure for Resolving Requests in Administrative Contentious.

It is difficult to believe that the initiator of this draft law was unaware of the parliamentary initiative to amend the law of administrative contentious, which likely took into account the unfavourable opinions of the Economic and Social Council and the Legislative Council regarding this legislative proposal, in the manner they are motivated. Thus, a logical conclusion would be that by submitting it for public debate, there is a desire to gather a relevant number of legal opinions, after which a decision will be made for one of the options.

What, therefore, would be the advantages and disadvantages of each of the options presented earlier?

[15] Published in the Official Gazette of Romania, no. 548/2020‘ In the unified interpretation and application of the provisions of art. 470, art. 478 par. (2) and of art. 479 par. (2) of the Code of Civil Procedure, by relating the latter with art. 254 par. (1) and (2) of the Code of Civil Procedure, the notion of new evidence which can be proposed and approved in the appeal stage includes both evidence presented in lower court by writ of summons or statement of defence, and evidence which was not presented to lower court or were presented late, and regarding which the trial court has ascertained the time limit to have been exceeded.

[16] https://senat.ro/legis/lista.aspx?nr_cls=L309&an_cls=2022#ListaDocumente

[17] https://www.mdlpa.ro/pages/proiectlegecodadministrati8v21112023

From one perspective, it has been argued that the legislative solution that establishes recourse as the sole remedy at law in administrative contentious has a long-standing tradition in Romanian administrative litigation *(Marin, p. 450).*

It is true that recourse is the traditional solution in Romanian administrative contentious; however, over time, this appeal route has had a non-homogeneous legal regime: it was an ordinary remedy alongside appeal during the interwar period, the only ordinary and devolutive remedy during the communist period, a hybrid remedy under Law no. 29/1990 and Law no. 554/2004 until the entry into force of Law no. 134/2010 regarding the Code of Civil Procedure, and partially devolutive in that it was not limited to the grounds for cassation of ordinary recourse, but was restricted regarding evidence to written proof. Finally, the current recourse is the most restrictive of all forms of remedy in administrative contentious, restrictive both in terms of grounds and evidence.

From a different perspective, the Supreme Court of Cassation and Justice (Î.C.C.J.)[18], asserts that it is a court of cassation and does not have the competence to judge appeals. We find that this argument is not entirely immune to criticism. On the one hand, in administrative contentious, recourse, as regulated by Article 20 of Law no. 554/2004 regarding administrative contentious, is devolutive even though it falls under the jurisdiction of the High Court; in this matter, the provisions of Article 497 of the Code of Civil Procedure regarding cassation with referral do not apply, but rather the provisions of Article 20 paragraph 3 of the Code of Civil Procedure, which provide the court's competence to re-evaluate the case on its merits after admitting the recourse, without distinguishing based on the rank of the court *(Trăilescu, p. 294).* On the other hand, in other areas, the Supreme Court also judges devolutive recourse and even appeals. For example, in disciplinary matters, the High Court rules on recourse against decisions of the Superior Council of Magistracy as a disciplinary court and recourse against the Council of Notaries Public in disciplinary matters, which are devolutive as a result of the interpretation given by the Constitutional Court[19]. In criminal matters, the High Court also hears appeals against its own decisions rendered in lower court. Therefore, it is not essential to the activity of the High Court to judge cassation recourse; it has the competence to judge both devolutive recourse and appeals.

Regarding the devolutive nature of the appeal, it can indeed be stated that the appeal is a much more comprehensive and less formal remedy at law than cassation. The appeal allows the court not only to analyse the legality of the

[18] High Court of Cassation and Justice, RIL panel, resolution no. 17 of September 18, 2017, published in the Official Gazette of Romania, no. 930 of November 27, 2017.

[19] CCR resolution no. 381/2018 and CCR resolution no. 291/2022, through which the Constitutional Court ascertained that the provisions of art. 51 par. 3) of Law no. 317/2004 on the Superior Council of Magistracy, also regarding the provisions of art. 75 par. 11) thesis III of Law no. 36/1995 of notaries public and notarial activity are constitutional only to the extent to which recourse provided by these law is devolutive.

decision but also to conduct an examination both in fact and in law. The parties can present any defence means to the court and can invoke any substantive or procedural exceptions. The appeal is a less formally demanding route, not requiring the framing of appeal grounds within a template exhaustively regulated by the legislator. We may say that the appeal is a more "user-friendly" means of appeal for litigants and, certainly, closer to the imperative of effective access to a court.

It could also be argued that in the recourse regulated by the law on administrative contentious, the court can administer any means of evidence after cassation; however, to reach this procedural stage, it is necessary first to identify grounds for illegality in the decision issued by the lower court, for the appellate court to find them well-founded, to order the cassation of the decision, and subsequently to proceed to re-evaluate the dispute on its merits.

Regarding this aspect of evidence administration, we could argue against the appeal that it is a remedy at law with a dilatory effect, such that the duration of the litigation would be longer than in the case of resolving recourse. The prompt resolution of administrative litigation is indeed a goal of the actions within the field of administrative law; however, the speed with which a conflict between public authority and an individual is resolved should not necessarily prevail over the imperative of delivering a thorough and lawful solution based on establishing the actual facts and correctly applying substantive law, as required by the rule imposed by Article 22 of the Code of Civil Procedure regarding the judge's role in uncovering the truth. On the other hand, if we consider that recourse resolution can have two procedural stages, as previously mentioned, there is no longer such a significant temporal advantage in favour of recourse.

Moreover, according to Article 20 of Law no. 554/2004, ‘when the lower court decision was passed without examining the merits or if judgment was made in the absence of the party who was illegally summoned both for the administration of evidence and for the debate on the merits’, the appellate court resorts to cassation with referral, which significantly increases the case resolution duration, considering that after the lower court ruling, a second appeal presumably follows. In the case of an appeal, this issue would not exist, as the court would reanalyse the case in fact and law in all situations. It should also be noted that, under Article 480 paragraph 3 of the Code of Civil Procedure, the appellate court can refer the case back to the lower court only at the express request of the parties, if it resolved the case without entering into a review of the merits or in the absence of summoning a party, or if it finds that the lower court lacked jurisdiction.

Lastly, it should be emphasized that appeals are judged by a panel of two judges, while cassation recourse is judged by a panel of three judges. At the level

of the courts of appeal and the High Court of Cassation and Justice, multiple panels could be formed if cassation were replaced with appeals, which would actually lead to a reduction in the duration of case resolutions.

Thus, the argument regarding the duration of case resolutions is relative, with arguments to be found both in favour of appeals and cassation.

Certainly, replacing cassation with an appeal is not the only solution we can imagine when considering the reform of the system of remedies in the administrative contentious.

Recourse could be reformed to become a fully devolutive remedy at law, following the model provided by the Constitutional Court of Romania regarding the disciplinary responsibility of magistrates and notaries public[20]. However, in this case, the court would essentially be judging an appeal under a different name, and this remedy would deviate from the purpose of cassation recourse.

In doctrine, more radical solutions have also been proposed, such as the abolition of the appeal and the transformation of recourse into an ordinary remedy, combined with the reconfiguration of the challenge to annul and the regulation of cassation solely for issues concerning the conformity of the decision with legal principles, under the jurisdiction of the High Court of Cassation and Justice *(Nicolae, p. 303-490).* The author proposes several reform options for the system of remedies applicable to the entire civil procedural law, not just administrative contentious. Starting from the premise that there is no constitutional or infralegal imperative regarding the existence of a three-tier jurisdiction, it is proposed to abolish the appeal, reverting to the model of the 1952 reform, with a single ordinary remedy at law, namely recourse, merging courts with tribunals that would have full jurisdiction on the merits, and ordinary recourse being assigned to the courts of appeal. Concurrently, it is proposed to reconfigure the challenge to annul by adding grounds related to lack of motivation or nullity of the decision passed on the merits or in recourse. Cassation recourse would be under the exclusive jurisdiction of the High Court of Cassation and Justice and would aim only at pronouncing on '*the conformity of the challenged decision with applicable principles and rules of law, for the purpose of ensuring correct interpretation and uniform application'.*

We believe that such a system would be beneficial in administrative contentious if the material competence were no longer segregated between tribunals and courts of appeal, administrative tribunals were established, and these tribunals were granted full jurisdiction on the merits, while the courts of appeal would handle ordinary recourse. In this way, the High Court of Cassation and Justice would only judge an extraordinary remedy at law, for legality, which would not suspend execution, addressing only issues of principle. This would lead

[20] Idem Note 15

to the alleviation of the supreme court and to achieving the long-desired unification of judicial practice.

CONCLUSION

In our opinion, recourse in administrative contentious, as currently regulated, raises certain issues regarding effective access to a court of law. At present, we believe that the appellate courts in administrative litigation are forced to interpret the grounds for cassation extensively, especially the one provided by Article 488 paragraph 1 point 8 of the Code of Civil Procedure, as procedural key factors are currently limited in cassation.

We consider that extensive debates involving all eminent jurists are necessary because, in the field of administrative law, more than in any other branch of law, there is a need not only for speed but also for predictability, stability of legal relationships, and the correct resolution of conflicts between public authorities and individuals within the natural framework of substantive law.

We also express our confidence that, alongside other valuable scholars of administrative law, we are contributing to identifying solutions regarding remedies at law in administrative contentious, both through this study and through our future research.

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SARA Law **R**esearch **C**enter
International **J**ournal of **L**egal and **S**ocial **O**rder, https://www.ccdsara.ro/ijlso
ISSN 2821 – 4161 (Online), ISSN 2810-4188 (Print), ISSN-L 2810-4188
N°. 1 (2024), pp. 107-120

THE CITIZENS' PARTICIPATION IN THE DEVELOPMENT OF PUBLIC POLICIES AS A WAY OF CONTINUOUS ADAPTATION OF THE ADMINISTRATIVE ACTION TO SOCIETAL CHANGES AND THE CHALLENGES OF ITS IMPLEMENTATION

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Received 25.09.2024; accepted 20.10.2024
First online publication 26.10.2024
DOI: https://doi.org/10.55516/ijlso.v4i1.192

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Abstract

The object of the study is to analyze the importance of the development of participatory mechanisms for a better adaptation of the administrative action to the citizens' needs and expectations. The author examines the legal framework of several countries in order to assess the level of compliance with European standards, to identify the difficulties they are facing to and to propose possible solutions.

Key words: *Administrative action, consultation, decision-making process, local democracy, participatory culture, participatory mechanisms, public policy, referendum.*

INTRODUCTION

Since the beginning of the 20th century, the role of public policy and administration has undergone significant evolution. The administration no longer aims to dominate but to serve by satisfying individual and collective needs. Its legitimacy does not depend anymore on the mythical State power, but on the degree of satisfaction of the citizens, who are "users" of public services. Jacques Chevallier, the major French specialist in Administrative Science, called this change "the evolution from power administration to service administration"

(Chevalier, 1985, p. 35). He explains that there is a big difference between the two concepts. "Power administration" only knows subjugated, passive and docile people, who are placed in a situation of inferiority compared to an institution benefiting from incontestable legitimacy. That is why they are dedicated to obedience and become passive and malleable objects. On the contrary, "service administration" is required to satisfy the needs of the users of public services *(Chevalier, 1985, p. 36).* Following this logic, administrative authorities must maintain permanent contact with the citizens, especially by involving them in public policies. The use of participatory mechanisms can facilitate the establishment of their necessary dialogue.

Over the past three decades, the reconfiguration of the relationship between administration and the citizens has mainly taken place on the local level. Public decision-makers can no longer work "in the room". They must inform and consult beneficiaries of the local policies in order to adopt measures responding to their real needs. This evolution represents a real opportunity to revisit the role of each actor, by focusing on the meaning of the public policy actions: a shared and co-constructed meaning as widely as possible. In this approach, the users of public services are the starting points, because the decisions concerning the changes which must be adopted will be preceded by analyzing their needs, their habits, their will to participate or not in the elaboration of the project in question.

The strengthening of the citizen participation in the decision-making process is constantly encouraged by the Council of Europe, especially on the local level, within the framework of the European Charter of Local Self-Government, adopted on the 15th of October 1985. The Congress of Local and Regional Authorities[1], which was established on the 14th of January 1994 to replace the Conference of Local and Regional Authorities, is in charge of promoting local democracy, improving governance at the sub-State level and ensuring compliance with the Charter by member States *(Delcamp, 1999, p. 139-174).* This is the reason similar debates and experiences in this field are present in a great majority of member States of the Council of Europe.

In fact, the forty-six member States of the Council of Europe ratified the European Charter of Local Self-Government, which is composed of a Preamble and eighteen articles. It is a relatively short document, but it is marked by a concern for pragmatism. It defines the implementation of the different elements of local autonomy (art. 3, 4, 5), freedom of management (art. 6-1, 7, 8, 10 and 11) and the ways this one must be practiced (art. 6-2 and 9). The Charter also contains several principles for which member States cannot invoke reservations. They concern the main rights of local entities to autonomy, to election of local authorities, to have their own powers, administrative structures, and financial

[1] Resolution 307(2010) REV2, 30th of October 2013.

resources, but also the citizens' right to participate to the management of public affairs, which is provided for in the Preamble of the Charter.

Two other texts were adopted later to complete the Charter and bring within its goal the right of every person to participate to the development of local policies. The first one was the European Charter on the Participation of Young People in Local and Regional Life from the 19th of March 1992. Despite its potential, this document has not been sufficiently disseminated and used by the member States (*Doorley, 2006, p. 6*). Ten years later, in the Final Declaration of the Conference on Young People, Actors in their Towns and Regions, organized on the 7th and 8th of March 2002 in Krakow, a request was made for its revision in order to bring it into line with the challenges and developments of contemporary societies. In response to this request, the Congress of Local and Regional Authorities adopted, on May 21, 2003, the Revised European Charter on the Participation of Young People in Local and Regional Life. In the three parts that compose the new document are provided for the areas, the instruments of youth participation and the types of bodies that can be put in place to allow the association of young people in decision-making process. The text defends the need to allow young people to exercise their rights to democratic citizenship and to fully play their role as active citizens within society.

The second text was the Additional Protocol on the right to participate in the affairs of local authorities, adopted on the 16th of November 2009. Like the Preamble to the European Charter of Local Self-Government, the Preamble to the Additional Protocol stipulates that "the right to participate in the affairs of local authorities' management of public affairs is one of the democratic principles common to all member States of the Council of Europe". The Additional Protocol establishes a real individual right to determine or influence the manner local authorities exercise their powers. In order to ensure the effective implementation of this right, member States must adopt the necessary normative framework (art. 1) and provide for concrete measures to encourage the participation (art. 2).

European texts have therefore established the foundations for the development of participatory democracy at the local level, which seems to become the new global framework within which local public action now takes place. Indeed, participatory democracy which, according to the definition given by Professor Loïc Blondiaux, "designates all the approaches aiming to involve citizens in the political decision-making process", is assigned three types of objectives to support it *(M.-H. Bacqué, H. Rey et Y. Sintomer, 2005, p. 25-26).* Firstly, it is seen as a tool serving the improvement and accountability of public action. The association of citizens in decision-making processes makes it possible, on the one hand, to integrate the expertise of a new category of actors, and on the other hand, to increase the transparency of these processes and the strengthening

of the responsibility of public authorities through the obligation to account for their actions. Secondly, participatory democracy is assigned a social objective based on its capacity to strengthen the social bond between citizens. Exchanges within the framework of various meetings can lead to mutual understanding and awareness of the difficulties faced by certain persons *(S. Depaquit, 2005, p. 28).* Thirdly, participatory democracy is given an educational dimension *(M.-H. Bacqué, H. Rey et Y. Sintomer, 2005, p. 7).* The association of residents in the decision-making process contributes to the formation of a participatory culture and the restoration of civic responsibility.

The texts adopted by the Congress of Local and Regional Authorities therefore aim to encourage member States to open the decision-making process in order to promote greater participation on local level and to reduce the opposition between citizens and political and administrative authorities. The analysis of the national reports communicated to the European institution shows that the local level is beginning to become the favorite field for participatory practices (I). At the same time, the member States are reluctant regarding the legal framework of these practices, a position which raises numerous questions regarding their sustainability and the risks of political instrumentation (II). Number of extra-legal factors must also be taken into account in order to ensure an effective implementation of participatory tools and, consequently, to respond to citizens' demand to be more present in the decision-making process and to influence the public authorities' action according to their needs and expectations (III).

I. THE CONFIRMATION OF A PROGRESSIVE ANCHORING OF PARTICIPATORY MECHANISMS IN LOCAL PUBLIC ACTION

There are numerous variations and participatory practices. Some of them aim to involve citizens very early in the decision-making process, by allowing to contest the desirability of a project, or even to participate in defining the problem. As such, three main areas of intervention can roughly be distinguished. The practice of participatory budgets, which allow citizens to influence or fully control the budgetary process, can be taken as a first example. In France, such experiences began to be implemented in 2000. For example, in 2005, the region Poitou-Charente granted a global sum of money, part of the annual budget, for all educational institutions in its charge in order to identify, within the framework of a general deliberation, the main projects to be supported. After the deliberation, the participants met and voted on each project to establish a hierarchy which gave the order of financing by the region within the limit of the overall envelope initially set. Since 2009, the city of Nancy has developed an initiative presented as a participatory budget, integrating an axis based on "listening to the territories". Under the name of "proximity living environment envelopes", local authorities propose each year to reserve a part of public funds for the realization of projects identified following consultation with residents. The city of Paris carried out its

first participatory budgeting exercise in 2014. The process developed and diversified each year thereafter, in terms of allocated amounts, number of financed projects and number of participants[2]. This proves that Parisians are interested in local affairs and want to participate to public policies decision, including budgetary questions.

The same remark can be made in the case of the experiences of the so called "open decision-making process". As an example, can be cited the *Decide Madrid digital platform*, which was open by Madrid City Council. One of the four main functions of this platform is to create a space where any resident can propose a new local law. The proposals which receive the votes of one percent of the population are subject to a binding public vote. The Council has one month to write technical reports on the legality, feasibility, and cost of the selected proposals. They are then published on the platform for ensuring the respect of the principle of transparency[3].

The opening of the procedure for local policies development represents another way to allow citizens to be informed about the planned projects and to participate to their development. Public participation in policy development can occur at any stage of the procedure through citizen panels, deliberative forums, focus groups, etc. The system is regularly applied in Germany, under the name of *planungszelle*, and has different variations in Spain *(I. Blacon, 2005, p. 161-178).* The principle consists in recruiting between ten and several hundred citizens chosen at random in order to nourish collective reflection concerning questions of public policy. Meeting for several days (four days in the German model), the jurors receive multiple information and listen to different witnesses (experts, representatives of interest groups) whom they can request to be heard themselves. A citizen report is written in the form of an opinion or recommendation.

In Italy, this system is present at regional level. In Tuscany, it was introduced in 2007 under the name of "regional participation policy" and reinforced by Law No. 46/2013, which provided for the creation of an independent institution, called the Authority for Participation. Its mission is to ensure the creation of a more participatory culture throughout the region and to distribute funding to support innovative methodological approaches to participation (including the use of new information and communication

[2] In 2014, the 40,745 participating voters allocated 17,7 million euros to 9 projects; in 2015, the 70,000 participating voters allocated 75 million euros to 188 projects; in 2016, the 92,809 participating voters allocated 100 million euros to 219 projects.

[3] The first vote on citizen proposals was held in February 2017. Madrid residents were asked to vote on the proposals "100% sustainable Madrid" and "Single ticket for public transport". The two proposals were voted on respectively with 94% (198,905 votes) and 89% (188,665 votes) of the votes. The town Council had to publish technical reports on each of them.

technologies) to enable the advent of new forms of exchange between public institutions and citizens.

The success of these mechanisms depends on many parameters. The systematic search for inclusion constitutes one of them. On the one hand, to prevent participatory policies from only being aimed at certain categories of the population, thereby reinforcing already existing unequal mechanisms. On the other hand, in order to ensure the effectiveness of the participatory tools put in place: the most appropriate responses to the existent problems are generally given by the people who are directly confronted with them. In the *Manual on the Revised European Charter on the Participation of Young People in Local and Regional Life*, this idea is expressed in a more graphic way with a quote from the African proverb "the person who wears the shoes knows where they hurt"[4]. The creation of youth congresses or parliaments – a practice which has become widespread in recent years in the member States of the Congress of Local and Regional Authorities – is part of this logic of seeking sectoral participatory mechanisms.

In France, after a slow start, the participation of young people at the local and regional levels has experienced significant development over the last five years: the Youth Parliament of the region Provence-Alpes-Côte d'Azur was created on the 1st of January 2017; the Youth Council of the region Île-de-France was reformed in 2017; the Regional Youth Council of Occitanie leads its activity since the 9th of June 2018; the Regional Youth Council of Bretagne was reformed in 2016; the Regional Youth Council of Normandie was created in 2020, the Regional Youth Council of the region Grand Est was established on the 19th of March 2022. They are considered as real democratic laboratories.

If these initiatives represent a significant step forward allowing young people to be direct actors in the decision-making process relating to issues that concern their lives and activities, the small number of applications presented by young people to participate to such institutions shows that this mechanism is not fully used, and that participative culture must continue to be developed. This situation highlights the problem of the feverishness of citizenship education in France. But reading the presentation of the different regional youth councils also allows us to identify discrepancies at the level of participatory engineering, in its general aspect. In particular, can be noted differences concerning the age, the duration of the mandate, the method of designating the members of these councils, the areas of intervention, the granting of a specific budget to their actions. They represent a plurality of experiences which, for the moment, cannot be defined as institutionalized participatory actions. Local and regional authorities are free to decide on the creation of these councils, sometimes even to choose candidates on

[4] Counsil of Europe, *« Parole aux jeunes ! ». Manuel sur la Charte européenne révisée de la participation des jeunes à la vie locale et régionale*, Strasbourg, 2015, p. 12.

the basis of their cover letter. These practices present a problem in terms of transparency of the procedure and, consequently, of legitimacy of the institution. Local political authorities can also establish by themselves the limits of the action to be granted to these councils and the importance that must be given to the decisions taken at the end of the deliberations. Such a situation is explained by the absence of the legal framework required at the national level. Consequently, the local political leaders are free to use or not such mechanisms, to establish the rules to be respected, according to their electoral goals.

II. THE PERSISTENCE OF NATIONAL RELUCTANCE WITH REGARD TO A LEGAL FRAMEWORK FOR PARTICIPATORY PRACTICES

Even if the right of citizens to participate in local affairs is considered as a "structural condition" of local self-government, which is provided for in Articles 3, 4 and 5 of the European Charter of Local Self-Government, in the majority of the member States, the Constitution only refers to local referendums as a way to exercise the local direct democracy. The other participatory mechanisms are generally absent, or their implantation is quite limited. For example, the Constitution of Slovakia provides for participation through "assemblies of residents of cities and towns" only[5]. In Slovenia, according to article 145 of the Constitution, "citizens, in order to assert their interests, may create local self-governing bodies". In France, by the constitutional revision of 2003[6], was introduced, in addition to the local decision-making referendum, the right of petition reserved "for voters of each local authority" which allows them to request inclusion on the agenda of the local deliberative assembly of a question falling within its competences[7]. The French Environmental Charter of 2004, which is part of the constitutional block, establishes in article 7 that "every person has the right, under the conditions and limits defined by law, […] to participate in the development of public decisions having an environmental impact".

Constitutional progress in the field of participation in the decision-making process in France was preceded by a certain number of legislative reforms. First, the law No. 92-125 of the 6th of February 1992, relating to the territorial administration of the Republic, established on local level the right of the inhabitants to be consulted "on decisions that concern them" and provided for the possibility to organize consultative referendums for all types of decisions taken by the local authorities. The law No. 95-115 of the 4th of February 1995 for development and regional planning extended the inhabitants' right to ask the organization of a consultation. Also, 20% of the inhabitants who are registered on

[5] Art.67.
[6] Constitutional Law No. 2003-276, March 28, 2003.
[7] Art. 72-1 § 1 of the Constitution.

the electoral lists of a municipality can contact the municipal council for a request to organize a referendum on a development project. By law No. 2002-276 on local democracy of the 27th of February 2002, the local entities with a population exceeding 80,000 inhabitants were obliged to create "neighborhood councils" with an advisory and proposal role.

Despite the late ratification by France of the European Charter of Local Self-Government and its Protocol[8], the national normative framework in the field of citizen participation in the decision-making procedure seems to be quite developed. In the same time, a more careful analysis of the legislation makes it possible to note that these participatory mechanisms are regulated quite strictly, and the conditions of their implementation are more favorable to political authorities. For example, article L. 1112-15 of the General Code of Local Entities (*Code général des collectivités territoriales*) provides for that local authorities can organize a consultation before adopting a decision only "if they consider it necessary". Also, according to article L. 1112-16 of the same Code, if a consultation is requested by the inhabitants, the deliberative assembly of the local entity "decides if the request is accepted or not". In the case of the neighborhood councils, which role is to work closely with the local authorities in order to inform them about the concrete problems the inhabitants are faced to and to find solutions by working together, their composition and missions are established by the deliberative assembly of the local entity[9]. Such a practice can be used by local authorities for controlling the action of the neighborhood councils in accordance with their political objectives but against the real interest of the inhabitants.

Except the field of town planning, which is formally concerned by real consultation[10], participatory procedures in France are completely controlled by local political authorities. The examples cited above show that the legal framework presents the characteristics of a flexible and relatively non-binding law, leaving great freedom to local authorities in the implementation of the participatory mechanisms. In practice, local officials engage in original and varied experiments which are developed outside of any legal obligation. This situation doubly strengthens their position. On the one hand, it offers them an opportunity to control the whole procedure, by determining their operating principles. On the other hand, it represents a good way of communication, by showing their "participatory goodwill". In the context of incomplete participatory engineering, it seems difficult to prospect the effectiveness of the normative framework in force,

[8] France ratified the Charter on January 17, 2007, twenty-one years after signing it; the 2009 Additional Protocol was ratified by Law No. 2020-43 of January 27, 2020.
[9] Art. L. 2143-1 of the General Code of Local Entities (*Code général des collectivités territoriales*).
[10] Art. L. 103-2, Town Planning Code (*Code de l'urbanisme*).

which may even experience setbacks. According to some observers[11], the law No. 2020-1525 of the 7th of December 2020, relating to the acceleration and simplification of public action, and its implementing decrees risk leading to a "significant regression" of the right to participation. The reduction of delays, the measures of simplification of some procedures to ensure more efficiency in the public action are incompatible with deadlines necessary to initiate a consultation or a referendum. This is a concrete example showing the inconsistencies between the political discourse which supports the development of participatory mechanisms to better respond to citizens' expectations and the real actions which, in practice, make their implementation impossible.

France is not an exception in this regard. The annual reports of the European Local Democracy Week[12] reveal the existence of similar difficulties in other member States[13], but also some progress demonstrating that a better legal framework remains possible. In Poland, for example, the legislator provided for in 2018 the obligation to establish a citizens' budget in all towns having the status of *powiat*. The amount allocated must be at least 0.5% of the local entity's expenditure and citizens decide annually on the allocation of these funds. The executive body of Polish local authorities is obliged to draw up an annual report on this question. The report is made public and is subject of a discussion in which all willing residents can participate. By the adoption of this law, other participatory forms have not been excluded, but it has the merit of making a certain number of participatory tools obligatory, thus ensuring their effective implementation. Such measures have also the advantage to guarantee uniform implementation and, consequently, to respect the principle of equality between citizens and their right to participate in decision-making policies in their municipality. The introduction of mandatory procedures reduces the risks of manipulations by political leaders.

If the Congress of Local and Regional Authorities carries out numerous actions to remedy these problems, its mainly object is to support local governance actors and encourage cooperation activities[14]. Its power of constraint remains *de*

[11] See the opinion of the National Commission for Public Debate from the 3rd of March 2021: https://www.archives.debatpublic.fr/sites/cndp.portail/files/documents/avis_2021_decretasap.pdf.

[12] The European Local Democracy Week (ELDW) is an annual European event in the framework of which local authorities and associations from the 46 Council of Europe member States organize public initiatives to meet and engage with their citizens on issues of local interest. The aim is to promote and foster democratic participation at local level and strengthen the trust that citizens have in local authorities. For more information, see: https://www.coe.int/en/web/congress/european-local-democracy-week.

[13] See the annual report of evaluation: http://www.congress-eldw.eu/fr/page/141-previous-editions-of-eldw.html.

[14] For a presentation of the different actions, see: https://www.coe.int/fr/web/congress/beopen.

facto quite weak. The Revised European Charter on the Participation of Young People in Local and Regional Life is not a conventional instrument. Recommendation Rec(2004)13 of the Committee of Ministers supporting its implementation has been adopted by all member States of the Council of Europe but, from a legal point of view, it is a moral responsibility of implementation. The principles, good practices and guidelines contained in the Charter are therefore not legally binding. That is why their impact on national policies remains limited. As for the Additional Protocol to the European Charter of Local Self-Government on the right to participate in the affairs of a local authority, which entered into force on the 1st of June 2012, after the eight required ratifications, and has legal value, it has been signed by twenty-four[15] member States of the Council of Europe and ratified by only twenty of them[16]. This situation proves that, behind the voluntarist speeches, States are hesitant to make a legal commitment, knowing that such an approach will force them to be more rigorous, both in terms of adoption of texts and guarantee of effectiveness of participatory policies.

Defending the need for the development of participatory tools, Giovanni Di Stasi, former President of the Congress of Local and Regional Authorities, emphasized that "there can be no democracy without local democracy"[17]. As the "historic cradle of democracy" (*Ph. Chanial, 2003, p. 269*), the local level represents a real laboratory of alternative forms of government which can be implemented to remedy the dysfunctions of representative democracies. However, as Professor Loïc Blondiaux notes, "participatory democracy cannot be improvised, nor does support amateurism". The success of its implementation depends on the degree of involvement of each political authority, at local, national and European levels. The difficulty is not only of a legal nature. There are many extra-legal factors which must be considered and involve specific work.

III. THE EXTRA-LEGAL REASONS FOR NATIONAL RESISTANCE AND THE NEED TO DEVELOP A PARTICIPATORY CULTURE

The French National Commission for Public Debate carried out several studies to identify the reasons constituting a barrier to the implementation of the

[15] Albania, Armenia, Belgium, Bulgaria, Cyprus, Estonia, Finland, France, Georgia, Hungary, Iceland, Lithuania, North Macedonia, Malta, Montenegro, Norway, Netherlands, Portugal, United Kingdom, Serbia, Slovenia, Sweden, Switzerland, Ukraine: https://www.coe.int/fr/web/conventions/full-list?module=signatures-by-treaty&treatynum=207.

[16] Armenia, Bulgaria, Cyprus, Estonia, Finland, France, Georgia, Hungary, Iceland, Lithuania, North Macedonia, Malta, Montenegro, Norway, Netherlands, Serbia, Slovenia, Sweden, Switzerland, Ukraine: https://www. coe.int/fr/web/conventions/full-list?module=signatures-by-treaty&treatynum=207.

[17] Council of Europe, *« Parole aux jeunes ! », op. cit.*, p. 30.

participatory mechanisms by local authorities[18]. One of them is financial. More ambitious projects aimed at building a stronger dialogue with citizens cost from 100,000 to 200,000 euros for a municipality. These costs explain the difficulty of carrying out such projects, particular in small and medium-sized local entities. In the same way, the results of satisfaction barometers are very important for the evaluation of public policies and their adaptation to the citizens' needs. Considering the price for the realization of a satisfaction barometer for one service, which varies between 5,000 and 7,000 euros, its generalization for all public services, every year or at least every two years, is impossible from the financial point of view.

The human cost is another determining factor. The implementation of participatory mechanisms requires the mobilization of a quite important number of public agents *(T. André, S. Bennasr, A. Danon, V. Garnoix, O. Laigneau, 2017, p. 5),* generally for long periods of time. As these additional activities cannot be carried out by agents exercising their usual missions, additional recruitment is necessary, which is costly. The pressures placed on local authorities to reduce expenditure and, more particularly, salary expenditure, go against political projects aimed at opening citizen participation. This cannot be done without ensuring necessary human resources.

The question of culture to be anchored in political action is also major and requires targeted measures. Despite the undeniable evolution of behaviors, certain public agents remain culturally attached to the image of domination in the relationship with users, even unconsciously. This approach, which does not allow to bring citizens into administrative logic, is incompatible with the principles of participatory policies. With a view to an expanded implementation of participatory mechanisms, public agents must be trained in this method of government *(D. Gerbeau, B. Erbeau, 2017, p. 25).* A high level of training is also necessary to guarantee good results in the implementation of these policies. When the different experiments fail, the risk is then to lead to the disappointment of the teams involved in the project. The innovation processes are then perceived as an element of communication more than a factor in improving public service or strengthening the sense of agents' action. Another point to be taken into account is the duration of the participatory practices and its impact on the public agents' motivation. Experiments aimed to rethinking public policies based on users have an overall positive effect on public agents who implement them, because they bring meaning to their action and are vectors of mobilization. The sustainability of

[18] See, for example, the report *Démocratie participative et quartiers prioritaires : réinvestir l'ambition politique des conseils citoyens,* Paris, 2018 : https://www.debatpublic.fr/sites/default/files/2021-04/rapport_conseils_citoyens.pdf.

these positive effects requires strong political and administrative support. If this one is absent, public agents will not see the need to improve their skills in this field. The area of expertise will therefore remain insufficiently developed. In the long term, this will pose a problem for the success of the project to strengthen the participatory process.

For an effective implementation of the participatory policies, there is a new triptych relationship (users – public agents – decision makers) to be created and developed. That is why, the large diffusion of these approaches is also fundamental. Sporadic and scattered experiences lead to the creation of simple "participatory islands" on local level. They are not sufficient for a real change in political practices and to create the citizen participatory culture. The success of the project requires a generalization of practices, awareness of citizens of the interest of participation and minimum preparation. For this last point, prior preparation of information materials, explanation of the technical language used, which is not known by all citizens due to its technical nature, is essential for not to discourage participation from the start.

The mobilization of the communication is therefore necessary both on internal and external levels for a need of information, but also to guarantee the respect of the principle of transparency and to propose a continuous evaluation. If the evaluation ensures that the objective set initially is achieved, it is also part of an improvement process of public policies. The scientific aspect of indicators and the evaluation of public policies provides a guarantee of seriousness to procedures. Listen and involve agents and users in the construction of public policies deliver better results, improve the quality of public services, and strengthens the legitimacy of the public action.

CONCLUSION

This study highlights the ambivalence of the current situation in almost all European countries in the field of the decision-making process and the involvement of citizens in this process in order to adapt public policies to their interests and expectations. Ambivalence is present at all levels. First, at the political level, we note that despite strong statements defending the need to proceed with inclusive decision-making processes, political leaders refuse to adopt binding legal texts that could force them to respect the commitments made. Second, on the legal side, if certain developments exist, they remain mainly characteristic of certain areas. A global approach in the legal construction of participatory mechanisms does not exist either at the national or at the local level.

This global approach does not seem to be desired by political leaders in view of the reluctance they show with regard to the ratification of the Additional Protocol to the European Charter of Local Self-Government on the right to participate in the affairs of a local authority which has a binding legal value. Third, the same observation can be made at the level of extra-legal measures that

must be taken to ensure the successful implementation of participatory mechanisms, such as the creation of specific jobs for this purpose, the granting of the required financial allocation and even the training of staff already in post.

This context is not conducive to the development of participatory democracy, which constitutes one of the main causes of the gap that continues to exist between the public policies implemented and the real expectations of citizens.

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SARA Law **R**esearch **C**enter
International **J**ournal of **L**egal and **S**ocial **O**rder, https://www.ccdsara.ro/ijlso
ISSN 2821 – 4161 (Online), ISSN 2810-4188 (Print), ISSN-L 2810-4188
N°. 1 (2024), pp. 121-135

CUSTOM – A CONSTANT IN LAW

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Received 25.09.2024; accepted 23.11.2024
DOI: https://doi.org/10.55516/ijlso.v4i1.210

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Abstract

Custom, also known as tradition or customary law, has played a fundamental role in the development of law over time, being considered one of the oldest formal sources of law. Although in many modern legal systems it no longer holds the same value or importance, the study of customs remains essential for understanding the formation of positive law and the national character of a legal system. An analysis of legal folklore, i.e., the study of customs, habits, and traditions from a legal perspective, allows for both the historical evolution of legal norms and the general principles of law of a community to be outlined. Through custom, societies established accepted and respected rules of conduct over generations, thus laying the foundation for the subsequent development of written legislation. Custom preceded written laws and represented a form of social regulation based on the unanimous acceptance of certain conduct norms. In the absence of a formal legislative system, communities turned to traditions and customs to regulate social relations and ensure stability and order. Before the advent of written laws, customs and traditions were the only means by which communities were organised.

Key words: *custom, source of law, branches of law, legislation.*

INTRODUCTION

This article represents a continuation of the previous material titled "The Presence of Custom as a Legal Source from Country Law to Modern Civil Law", presented at the Conference With International Participation "Public Security and the Need for High Social Capital", Project financed by Arad County Council at the Arad County Cultural Center, 10th-11th of November 2023, within the panel "Abstract Thinking and Concrete Experience in (Post) Modern Legal Theory." In that article, I examined the weight of custom as a source of law in various

historical stages, from Country Law to modern law, with a special focus on civil law.

In this material, I propose an analysis of custom as a constant feature of law, arguing for its role and importance in the current legal system, with a detailed look at different branches of law through the comparative method. We will examine how custom retains its relevance and adaptability in branches such as international law, commercial law, constitutional law, and criminal law, in the context of modern regulations and new legal challenges. While the previous material presented the historical presence and role of custom, this article aims more at a comparative approach to highlight how custom, despite having a reduced weight compared to other formal sources of law, remains a flexible element, with distinctive suppleness in various branches of law, contributing to the completion of written legal norms and the adaptation of law to the needs of contemporary society.

For a social practice to become a custom and thus be considered a source of law, two fundamental conditions must be met: an objective condition and a subjective condition.

The first condition, also referred to in specialised literature as *usus*, concerns the existence of a continuous and uninterrupted practice. This practice must be consistently and uniformly followed by community members and applied under the same circumstances over time, without altering its content or the effects its application creates. The constant repetition of an act requires a sufficiently long period to establish uniformity and consistency in its application. However, the notion of duration is relative and varies depending on the nature of the legal relationship. For example, in certain fields, such as public international law, there are acts that, by their nature, can only occur at long intervals. For instance, in relations between states, certain rules may apply only occasionally *(Daugirdas, K. 2020, p. 229–233)*. In such situations, even if the number of repetitions is smaller, the rule may acquire legal force if it is respected every time or in most relevant cases *(Herdegen, M. 2024, p. 440-441)*. Constant repetition, even if rarely applied, must be perceived as the expression of a constant legal conviction *(Boghirnea I., Vâlcu E., 2022, p. 38-45)*, meaning a clear manifestation of the fact that the rule has the binding force of a norm.

The subjective condition, *opinio juris sive necessitatis*, involves the recognition and collective conviction that the respective practice is not merely a social custom but represents a legal obligation, thus holding the force of a legal norm. Therefore, community members must perceive this practice not merely as a tradition but as a mandatory rule that must be respected and applied in similar cases. This distinguishes custom from mere social practices by the fact that its binding nature does not depend solely on the will of the individual subject to the rule but is imposed by a common sense of obligation.

By cumulatively fulfilling these two conditions, the social rule transforms into custom, which, in turn, becomes a legal norm through its tacit and general recognition, coming to be legitimately invoked as a norm in various legal situations. This process contributes to the consolidation of informal rules, which can play an important role, particularly in traditional societies or areas where written regulations are limited or non-existent. Customary rules manifest through the constant repetition of acts accompanied by a profound sense of obligation, even if this obligation may be vague or implicit. This constant repetition represents the material element of custom, the external and visible part of an unwritten rule. However, the mere repetition of certain acts or behaviours is not sufficient to define a legal custom.

Many actions are repeated constantly in society, yet they do not acquire the status of a legal norm. For example, personal conduct rules, such as those related to politeness or caution, are followed by most individuals without the belief that someone else might impose compliance with these norms. These rules may be observed out of personal conviction that they represent appropriate behaviour or a moral duty, but they do not acquire the force of a legal norm. The key element distinguishing mere habit from a customary rule is the sense of legal obligation perceived by the community. Rules of politeness or caution do not have this legally binding component, as, even if followed out of personal initiative, there is no belief that their violation could result in legal sanctions or consequences. On the other hand, a customary rule is based on the tacit acceptance that its violation could be sanctioned within the community, even if it is not regulated by a written law.

Legal custom differs essentially from simple traditions without legal significance by the fact that, when recognised as a source of law, it is applied by authorities and courts, with the support of the state *(Popa, N. 2020, p. 174-175)*. Although custom is not directly created by the legislator, its recognition as a legal norm is based on the tacit approval of the legislator, thus conferring it the legal force equivalent to an unwritten law. Legal custom is, in essence, a tacitly agreed law, as its consistent and uncontested application by society members eventually becomes accepted and supported by the state *(Boghirnea, I., 2008, pp. 23-31)*. In this process, the state's authority plays a decisive role in validating and consolidating the customary norm. This validation is achieved through the courts sanctioning cases of non-compliance with the custom. In this way, legal custom becomes a legitimate source of law, equivalent in legal terms to formal legislation.

The formation of a custom is the result of a process of collective persuasion *(Popa, N., Anghel, E., Ene-Dinu C., Spătaru-Negură, L., 2023, p. 152)*, in which the contributions of each person merge to give rise to a common norm. Custom, in this sense, is born from the collective wisdom of a people, perceived as an anonymous and collective work of the entire community. From this perspective, custom emerges from the lived experience of a people that has

thought it, evaluated it, and desired it, and through the correctness and unmistakable way in which it resolves social conflicts, the customary norm has imprinted itself in the minds and hearts of all members of society. Implicitly, every custom has the spirit of the creator people imprinted in its normative content—*Volksgeist* *(Popa, N. 2020, p. 175)*. For the Romanian people, if we could map its customary system, we would have to use the symbols sewn onto the traditional costumes of each region of Romania. From this perspective, in administrative law, the role of custom as a source of law is reflected through the lens of local autonomy, which can lead to the formation of long-standing administrative practices imposed by geographical, demographic, and other factors *(Ștefan., E. E., 2023, p. 113)*. In this regard, Article 104, paragraph 2 directly refers to custom as a source of law for the status of the administrative-territorial unit: "The status of the administrative-territorial unit must include local identity elements of a cultural, historical, customary, and/or traditional nature, based on which programs, projects, or activities, as applicable, can be developed, and their financing provided from the local budget."

Although this general societal will, which gives rise to custom, may be forgotten over time, it initially played an essential role in the formation of custom, being perceived as an informal legislator. A crucial moment in the formation of a customary norm occurs when a member of society fails to conform to the usual behaviour of the community, and their action is condemned by the other members. This reaction of condemnation transforms the habit from a mere collective practice into a collective will, with a subjective sense of obligation. At this point, the violation of the customary norm is socially sanctioned, and the norm becomes more than a convention; it consolidates as a binding rule.

I. THE PRESENCE OF CUSTOM IN DIFFERENT BRANCHES OF LAW

In modern law, customary law has lost much of the importance it held in previous eras, and its role has become secondary in most legal systems, with the exception of traditionalist systems. This decline in the relevance of custom is explained by its conservative nature, being a rule that presupposes the maintenance and perpetuation of the social relations from which it emerged. In a modern era characterised by rapid social transformations and the need for constant adaptation, custom can no longer adequately respond to the changes and complexities of new social relationships. Nevertheless, custom has not entirely lost its status as a source of law. In modern law, custom continues to serve as an interpretative and supplementary source of law. This means that although written norms and legislative codes are dominant, custom can be used to clarify or fill gaps in the legislation when legal norms do not regulate a particular issue. Particularly in areas where written law does not cover all practical details, custom can provide traditional solutions to be used as a reference.

Thus, modern custom retains its validity, albeit to a lesser extent, being invoked mainly to support the interpretation of the law or to offer solutions where written law is incomplete or insufficient. This reflects the adaptability of customary law to the new requirements of a modern society, in which social and economic relations evolve much more rapidly than in the past.

I.1 Labour Law

In the field of labour law, although it was initially argued in the literature that legal custom cannot constitute a source of law in labour law, as it was considered incompatible with the legal regulation of labour relations, more recently, some authors have started to argue the contrary *(Țiclea, A., Georgescu, L., 2024, p. 20).*

This change in perspective comes in the context of the emergence of the New Civil Code, which in Article 1, paragraph 6, regulates professional practices as primary sources of law, derived from custom.

These practices represent consistent and generally accepted practices in a particular professional field and are considered a source of law to cover potential legal gaps or to clarify certain aspects in relationships between professionals. In this sense, they contribute to the flexibility and adaptability of civil norms to economic and professional realities, thus ensuring the fair application of the law according to the specificities of each field.

Professional practices, which are forms of professional customs, are based on widely accepted practices within industries or specific sectors and are commonly applied by employers when making decisions regarding staff employment. However, the use of these practices is strictly limited by imperative legal norms and collective labour agreements, which cannot be violated under the pretext of applying customs. Professional practices have been recognised as sources of civil law precisely because civil law regulates not only the relationships between natural and legal persons in general but also the relationships between professionals.

Professionals are defined as "...all those who operate a business." *(Article 3, New Civil Code)*. The New Civil Code does not offer an explicit and concise definition of a professional, leaving this term somewhat open to interpretation depending on the legal and practical context. A professional is interpreted through the lens of the economic, commercial, or service-providing activities carried out by that person. Although there is no direct definition, the Civil Code relies on the legal tradition, which understands a professional as a natural or legal person who carries out a continuous and organised activity for the purpose of obtaining profit or income. Thus, this term includes both traders and other persons who provide professional services or conduct economic activities, including those regulated by various special laws. The Implementation Law No. 71/2011, in Article 8, lists

several categories of professionals, including traders, who are renamed as professionals in Article 6 of the same law.

Even though custom does not play a primary role in labour law, there are situations where certain common professional practices may have legal relevance, provided they are objectively justified and do not violate imperative laws or the provisions of collective labour agreements. This interpretation opens a pathway through which custom can, in a limited context, be recognised as an additional element within the regulation of labour relations.

I.2 Constitutional Law

Custom plays a significant role in constitutional law, where it can contribute to the establishment of rules regarding the political organisation of a state. These rules can be of two types: customary, based on traditions and practices, and codified, recorded in an official document forming the written constitution of a state.

A customary constitution is made up of accepted practices and traditions regarding the establishment, competence, and functioning of state authorities, as well as the rules governing the relationships between these authorities and citizens. Until the 18th century, most states relied almost exclusively on customs for political organisation. Such customary constitutions were flexible but also imprecise, as it was difficult to determine the original meaning of a custom, to establish when a custom became obsolete, or to identify exactly when a new custom formed and became accepted by the community.

Nowadays, purely customary constitutions no longer exist, as all states have adopted written constitutions that are clearer and more precise in their regulations. However, customary constitutional norms continue to coexist with written constitutions, fulfilling a supplementary role. These norms are invoked when the written constitution does not provide solutions for certain situations or when there are no clear regulations in the official document.

A classic example is the British constitutional system, where a significant part of the political organisation and functioning of state institutions is based on customary norms, thus complementing what we refer to as the British constitution. Other states may also have certain customary elements in their constitutions, although their role is much more limited than in past centuries. The British Constitutional Body includes, alongside written norms (statutory law), law derived from judicial precedents (common law), and an unwritten part consisting of customs. These constitutional customs have developed over a long period of practice and represent an essential component of the British political system, complementing the written constitution and ensuring the continuity of political and administrative traditions.

The constitutional customs in the UK regulate important aspects of the functioning of state institutions and their relationships with each other, as well as

the relationships between the state and its citizens. These unwritten norms, respected with the same authority as written ones, reflect the nature of a political system based on tradition and stability, where changes are rare and gradual, allowing for the formation and consolidation of long-term customary norms.

In modern constitutional law, although a purely customary constitution no longer exists, customary norms continue to play an important role as supplementary rules, ensuring the coherent functioning of the state in the absence of explicit regulations in the written constitution. This coexistence allows for the flexible adaptation of the political system to new circumstances, while also maintaining the continuity of the state's constitutional traditions.

A classic example of a constitutional custom in the history of Romanian law was the rule during the period of the 1866 Constitution, according to which the head of state had to appoint the government from the political party with the best standing after elections *(Ene-Dinu, C., 2023, p. 252-253)*. This constitutional custom gradually became established, becoming common practice between 1869 and 1891. Over this period, the practice consolidated and was recognised as an unwritten but obligatory norm, reflecting the will of the electorate and respect for the parliamentary majority.

This evolution illustrates how a custom can become a constitutional practice through repeated application and general acceptance, even if it is not formally codified in a written constitutional document. Constitutional custom has a limited role in supplementing and interpreting the written constitution. Custom can fill gaps or clarify aspects not sufficiently specified in the constitutional text, but it cannot contradict or replace written legal norms. This supplementary and interpretative role must be exercised with rigour and great caution to avoid any form of arbitrariness in the application of constitutional norms.

In essence, constitutional custom serves as a complementary mechanism, intended to support the proper functioning of the written constitution, ensuring its interpretation and application in a coherent manner and in accordance with established practices. However, under no circumstances can custom prevail over written norms, as this would create major risks for the stability and predictability of the constitutional system.

Today, it is considered that constitutional custom plays a more significant role in democratic and stable state systems, where there is a long tradition of political and legal continuity. This is because a customary rule requires time to become established, being recognised and consistently applied within the state's institutions. In contrast, in constitutional systems that have undergone frequent changes, custom has a smaller influence, as these transformations do not allow for the formation of consistent and uninterrupted long-term practices.

Therefore, constitutional custom plays a significant role in state systems with a long democratic tradition, such as the United Kingdom, while in newer or

less stable constitutional systems, where changes are more frequent, custom has a reduced influence.

In Romania's 1991 Constitution, some customary rules were included, particularly those established before the communist regime. However, it was argued that once these rules were transformed into written constitutional provisions, they lost their customary character. This opinion is not shared, as the essential difference between law and custom is not that one is written and the other unwritten, but in how they are created. Law is issued by the state through a formal legislative act, while custom is the result of consistent practice and is only recognised by the state, not created by it. Thus, the customary nature of a norm is not automatically lost by its inclusion in a written constitution. Even if these rules are formalised in the constitutional text, they retain their customary origins, being the result of historical practice and legal tradition. Their incorporation into the written constitution can be seen more as a codification of already existing and accepted rules than as the elimination of their customary character.

This point of view emphasises that, although the formalisation of custom in the form of a written constitutional provision brings it into the realm of positive law, its customary essence, derived from long-standing practice and traditional recognition, remains present. Thus, customary legal traditions can continue to influence constitutional law, even when they are codified in written texts.

According to some opinions expressed by constitutional law specialists *(Muraru, I.; Tănăsescu, E. S., 2024, p. 36)*, in addition to the customs already incorporated into the 1991 Romanian Constitution, new constitutional customs have emerged or are in the process of forming over time. These customs have arisen from the consistent practice of state authorities and institutional relationships, which, although not explicitly provided for in the constitutional text, have been tacitly accepted and have gained a binding character through repeated and consistent application.

Such constitutional customs have formed in response to practical situations not clearly regulated by the Constitution, but which, in the absence of written norms, required interpretative solutions. For example, practices such as the appointment of the prime minister or the consultation procedures between the president and Parliament in certain situations can acquire a customary character if they are consistently applied and recognised by political and institutional actors.

This evolution of constitutional customs demonstrates that the Romanian constitutional legal system is dynamic and adaptable, allowing for the formation of unwritten norms that complement and support the application of written norms. Constitutional customs thus contribute to the stability and efficient functioning of institutions, ensuring the continuity of democratic practices in situations where written law does not provide complete solutions.

In the case of the Romanian Parliament, after 1989, parliamentary customs have developed, playing a supplementary role in relation to written regulations. These customs emerged as a response to situations not explicitly regulated by parliamentary rules, being accepted by parliamentarians and consistently applied within legislative activities. For instance, practices related to the debate of laws or the relationships between the chambers of Parliament can become parliamentary customs if they are repeated and observed without opposition. Parliamentary customs are thus recognised as supplementary sources of law in the legislative process, complementing the formal framework of legislative procedures. These customs ensure flexibility and adaptability in the legislative process, enabling the efficient functioning of Parliament even in the absence of written regulations. They are essential for maintaining the coherence and continuity of parliamentary procedures in new or unforeseen situations.

Parliamentary customs clearly illustrate how legal custom can become a formal source of law, contributing to the regulation of legislative procedures and their adaptation to the specific needs and circumstances of each moment.

I.3 Criminal Law

In criminal law, the fundamental principle is that of the legality of offences and punishments, “nullum crimen, nulla poena sine lege”, which stipulates that no person can be convicted of an act that is not expressly provided by law as a crime, and no punishment can be applied unless stipulated by law, in the broad sense of the term.

Regarding the authorship of the first written codification of the principle of legality, there are two different perspectives:

The first view attributes this codification to King John of England, who established in Article 39 of the Magna Carta Libertatum (1215) that no free man could be punished without a legal trial. This document is seen as one of the earliest texts emphasising the principle of legality and the protection of individual rights against arbitrary power.

A second opinion is attributed to the Swiss doctrine, which asserts that the first appearance of this principle can be found in the peasants' demands during the Peasants' War (1525), led by Thomas Müntzer. During this conflict, the peasants demanded that people be judged not based on the will of the lord but according to written law, highlighting the need to eliminate arbitrariness in the application of justice.

Thus, the origin of this principle is disputed, with each national tradition attributing its authorship to different events and historical documents.

In this context, custom should theoretically be entirely excluded as a source of law in criminal law, as custom, being an unwritten norm, contradicts the principle of legality, which requires clarity and predictability in legal norms. However, the issue is much more nuanced, as custom can play an indirect role in criminal law.

In the following, we will analyse the dual role of custom in this field, as well as its compatibility with the principle of legality:

1. Custom in the interpretation of criminal norms – Although custom cannot create offences or punishments in criminal law, it can influence the interpretation of certain criminal provisions. Criminal legal norms may refer to social practices, customs, or traditions to clarify certain concepts or behaviours. In this case, custom serves as a contextual element that helps interpret criminal norms without contravening the principle of legality.

An example in this regard could be the interpretation of socially acceptable behaviour within a specific cultural or local context, where criminal law refers to notions influenced by local customs or traditions. This is the case with Article 375 of the Penal Code – "Outrage against good morals." In the context of the principle of legality, the notion of good morals involves a subjective and occasional interpretation of a behavioural standard deduced from the impressions, values, and beliefs of the interpreter. The interpreter imagines ethical desirability and social normality according to their upbringing, inclinations, and the values of the society they are part of. The text highlights the idea that the legal interpretation of moral values is selective and influenced by subjective factors, thus creating a specific ethical model that is more inductive than deductive. This means that, rather than starting from abstract and universal principles to determine what is right or wrong, legal interpretation is based on pre-existing moral values, selected from the social and cultural context of the case. These moral values re-enter the legal sphere through a formal channel, namely through legislation and legal interpretation, but their effects on society are unpredictable and cannot be fully determined. In essence, good morals describe a closed, repetitive, relatively stable interpretative circuit within a specific time frame and geographic area, i.e., a process that self-perpetuates and is influenced by the specific context of each case, while also being guided by the ideology and subjective values of both the interpreter and the social group to which the interpreter belongs.

2. Custom as a supplementary element in legislative gaps – In certain legal systems, custom can play a supplementary role in the absence of clear legislative provisions, but not in the sense of creating new offences or punishments. Custom may complement criminal law in terms of procedural aspects or the manner in which certain norms are applied, as long as it does not violate fundamental rights or the principle of legality. This is the case in religious legal systems where written and official law coexists with customary legal systems of religious origin, and customs, traditions, or unwritten rules are used as the primary means of resolving conflicts within those social groups. A distinctive feature of these religious legal systems is the overlap between the legal and religious spheres, meaning that legal norms and regulations are largely influenced or dictated by

religious principles and laws. This overlap strongly contrasts with secular legal systems, which promote a clear separation between legal norms and religious ones, establishing that a state's laws should be independent of religious influence.

In conclusion, while custom cannot be a primary source of law in criminal law, it can play an interpretative or supplementary role in certain legal systems, helping to clarify and apply written norms. This dual role of custom is permissible to the extent that it does not contravene the principle of legality, which remains essential in regulating criminal behaviour *(Manea, T. 2001, p. 87).*

I.4 Public International Law

Custom is recognised as a source of law in public international law, playing a significant role in regulating relations between states *(Niță, M., 2022, pp. 215-223).* According to Article 38, paragraph 1 of the Statute of the International Court of Justice, international custom is considered one of the main sources of international law, alongside international conventions (treaties), general principles of law, judicial decisions, and the doctrines of the most highly qualified jurists. International custom is defined as a generally accepted practice, which, through its constant and uncontested repetition, gains the status of a legal norm. It is recognised and applied by states in their mutual relations, and adherence to custom becomes binding for states that accept and follow it *(Droubi, S., d'Aspremont, J., 2020, pp 216-225).* This form of unwritten law is rooted in the necessities of social life at the international level and the demands of international life, which require standardised rules and behaviours to ensure stability and predictability in international relations *(Johnston, K., 2021, pp. 1175–1184).*

The International Court of Justice has also recognised that international customs can be formed not only through the actions of states but also through the general practice of international organisations *(De Bartolo, D., 2017, pp. 174–178).* This means that, through repeated and accepted behaviours by members of international organisations, unwritten rules can crystallise and acquire binding force. One example of such a custom is the recognition that a voluntary abstention from voting by a member of the United Nations Security Council does not constitute an obstacle to the adoption of a resolution. In other words, it has become a customary rule that if a Security Council member abstains from voting, this does not equate to a veto and does not prevent the adoption of a resolution, provided that the required majority of votes is present. This example shows how the practice of international organisations can lead to the development of customs that play a vital role in international law, contributing to the establishment of rules governing relations between states and between organisations.

In relations between states, a repeated and consistent practice does not automatically become international custom if it is not accepted by states as having binding legal force. In this case, the practice remains a mere usage, which belongs more to the realm of morality or international courtesy, without having the character of a legal norm. A classic example is diplomatic protocol *(Popescu,*

C.F., 2022, pp. 253-258), which regulates certain behaviours and ceremonies in diplomatic relations but does not have the binding legal force of an international custom *(Popescu, R.M., 2023, pp. 40-41).*

For a practice to acquire the status of international custom, it must meet two essential cumulative criteria. The first element requires the existence of a consistent and coherent practice by states, materialised in their conduct. The practice must be applied repeatedly and continuously in relations between states, with broad applicability and acceptance by the states involved *(Roughan, N., 2009, pp. 305–313).* The second element is the psychological aspect (opinio juris): in addition to factual repetition, states must be convinced that following that practice is not merely a convention or form of courtesy but a legal obligation. States must implicitly or explicitly recognise that the practice in question has the force of an international legal norm, which must be respected as a matter of legal obligation.

International custom develops through the practice of states and opinio juris, that is, the general belief of states that the respective practice is legally binding, not just a political or diplomatic convention. Examples of international customs include aspects related to international practice based on the air codes of states, on the provisions of treaties in the field of aeronautical law. These customary norms establish that states exercise full and exclusive sovereignty over the airspace above their territory *(Miga-Beşteliu, R., 1997, p. 53)*.

It is challenging to demonstrate that a practice has been applied sufficiently consistently and generally by states to be considered a custom. This requires evidence showing the continuous and uncontested application of the norm by a significant number of states. Even if the existence of custom is recognised, it is sometimes difficult to determine exactly what it regulates due to the unwritten and flexible nature of the norm *(Bederman, D. J., 2010, pp. 31–50).*

Customary norms must align with peremptory norms (jus cogens) of international law. Jus cogens norms are rules that cannot be derived, modified, or overridden by the agreement of states and hold fundamental importance, such as the prohibition of genocide or slavery *(Bordin, F.L., 2022, p. 73).* Moreover, if there is a conventional norm (a treaty or written agreement), it takes precedence over customary norms. In practice, customary norms are supplementary, being applied only in the absence of written rules regulating the same matters.

CONCLUSION

Custom is not only a source of law but also a reflection of the values and mindsets of a society, contributing to the formation of a normative framework that has evolved alongside society itself, developed through the repeated and constant application of a legal idea in numerous individual cases, that is, through the accumulation of precedents over a long period. Essential to the emergence and

existence of custom is that this practice is old, uncontested, and recognised by the community as a valid legal norm that can be legitimately invoked in similar cases.

Customary norms represent rules whereby a behaviour becomes obligatory due to habit, meaning through the adoption and constant repetition of that behaviour by the majority of members of a society. When people living in a community behave similarly over a period of time under similar conditions, the desire to conform to those behaviours gradually forms, influenced by the majority.

At first, the subjective sense of these acts does not carry the character of obligation. People simply follow certain behaviours without feeling any formal compulsion. However, after a period of constant repetition of these acts, the idea forms in the mind of each individual in the community that they must conform to the norms that others follow. At the same time, the desire arises for other community members to also follow these rules, thus creating a sense of collective obligation.

This process transforms a custom, which at first is merely a voluntary practice, into a customary norm. Thus, custom becomes obligatory when community members perceive the adopted behaviour as not just a simple convention but a rule that must be respected by all. In this way, customary norms acquire legal force, even though they are not formalised by written law.

Research into the phenomenon of custom is far from exhausted. The fields of commercial law and mediation are extremely vast and complex, offering many opportunities for further in-depth studies. Commercial law, covering aspects such as commercial transactions, contracts, corporations, and competition law, is constantly evolving, especially in the context of globalisation and the development of international trade. Commercial customs and business practices may vary from country to country and even from industry to industry, providing material for comparative analysis.

In the same vein, mediation, as an alternative method of conflict resolution, is becoming increasingly relevant due to the growing need for efficient and swift solutions in the context of commercial disputes. Studying mediation practices and customs related to them can provide valuable insights into how parties can reach amicable solutions without resorting to courts.

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SARA Law **R**esearch **C**enter
International **J**ournal of **L**egal and **S**ocial **O**rder, https://www.ccdsara.ro/ijlso
ISSN 2821 – 4161 (Online), ISSN 2810-4188 (Print), ISSN-L 2810-4188
N°. 1 (2024), pp. 136-148

LEGITIMITY OF POLITICAL DECISIONS: THE ROLE OF THE REFERENDUM IN THE DEMOCRATIC PROCESS

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Received 10.11.2024; accepted 14.12.2024
DOI: https://doi.org/10.55516/ijlso.v4i1.223

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Abstract

The popular vote in Romania has a history that spans several decades in various political and social contexts.

Starting from the initial forms of consultation of the population known as the plebiscite, at present, as a result of social and political evolution and transformations, we find the referendum regulated at constitutional level.

The referendum is an important tool in the democratic process to allow citizens to speak directly on key issues affecting society. Through the referendum, citizens have the opportunity to participate actively in political decision-making, thereby strengthening the principles of the democratic state. This form of direct democracy gives citizens the opportunity to vote on specific issues such as revision of the constitution, impeachment of the president, adoption of important laws or topics of public interest.

The role of the referendum is also to legitimize political decisions and to evaluate the mandates of elected representatives, which can lead to public debates that stimulate citizens' information and promote a better understanding of the problems faced by society.

Referenda are therefore not only a voting tool, but also a means of civic education and strengthening social cohesion, with the potential to strengthen democracy and create a sense of belonging and responsibility among citizens.

The Constitutional Court of Romania has a fundamental role in ensuring the legality and legitimacy of the referendum process, contributing to the protection of democracy and the fundamental rights of citizens. It helps to maintain a balance between political decisions, popular will and respect for constitutional norms.

LEGITIMITY OF POLITICAL DECISIONS: THE ROLE OF THE REFERENDUM IN THE DEMOCRATIC PROCESS

Key words: *referendum, plebiscite, constitution, rule of law, political decision.*

INTRODUCTION

In Romania, the history of the referendum is closely linked to its political and social evolution, reflecting the major changes that have taken place over time.

The first attempts to organize the referendum in Romania were recorded at the beginning of the 20th century, but the consecration as a form of direct consultation of citizens in connection with a law of a very special importance or on a situation of national importance occurred after 1991 in the context of Romania's transformation into a democratic state and the regulation of the referendum in the constitution.

Although the history of the referendum in Romania practically begins after 1991, with the adoption of the constitution enshrining the rule of law, we cannot fail to mention that forms of popular consultation existed before 1991.

Thus, with the realization in 1859 of the national unitary state through the union of Wallachia and Moldavia and the adoption in 1864 of the "Developing Statute of the Convention of 7/19 August 1858" and of the electoral law, practically the first constitution in Romania appeared and with the first constitution was manifested the first form of consultation of the population, namely the plebiscite.

The constitutions of 1866, 1923, 1938, 1948, 1952, 1965, 1986 followed, which, through their content, reflected the political situation in Romania. During 1944-1948 and 1989-1991, constitutional acts were issued.

As a result of the emergence of the Constitution and the development of constitutional law in doctrine, the Constitution was defined as ”that law which, having legal force superior to other laws, systematically regulates both the principles of the socio-economic structure and those of the organization and functioning of the state based on it, guarantees the fundamental rights of citizens materially and establishes the duties corresponding to these rights”.

The form of consultation of citizens prior to 1989, in the context of the adoption of constitutions, was the plebiscite which, due to the conditions in which it was organized, acquired a negative connotation, denoting an unfree and incorrectly organized popular vote from a democratic point of view. As a result, the masses have been subjected to disinformation and manipulation by certain interest groups which have imposed certain momentary decisions on their elected representatives (Parliament) through pressure and a ”vote of the masses”.

The Plebiscite took place in the context of the dissolution of the Assembly (parliament) by the ruler being considered to have been organized in the attempt of the ruler Alexandru Ioan Cuza to cover, in fact, a coup d'état.

The constitution of 1866 was inspired by the constitution of Belgium of 1831 and was adopted during the reign of King Carol I. The king’s accession to

the throne was put to a popular vote in March 1866 when ‘a body of voters of the same size was called upon to say whether he wished to designate Carol I as sovereign prince of the United Principalities. The decision came after the removal of Alexandru Ioan Cuza from the leadership of the state, the deputies and state officials had sworn allegiance to Filip de Flanders, who, however, did not accept to take over power from Bucharest’. The result of the consultation was: 224 romanians voted against, 685.969 voted in favour. Thus began the reign of the kings of Hohenzollern.

In February 1938, Carol II proposed to the country a new Constitution. He did so after deciding not to convene the elected Parliament in December 1937 and after appointing members of a technocratic government headed by the patriarch. The vote on the plebiscite was compulsory and lasted from 8 a.m. to 5 p.m. Before the elections, jobs were held and there were parades on the streets, a newspaper said, ‘schools, guards and pre-military with music’. Almost 4.3 million citizens were on the ruler's side, and only 5483 appear to be against. the constitution thus approved was in force for two years and seven months .

Ion Antonescu also organized two plebiscites. The citizen was called upon to pronounce on one and the same thing, i.e. ‘the approval of the face of Marshal Antonescu’s leadership of the country since 6 September 1940’. The first consultation was held on 2-5 March 1941, the second was supposed to last from 9 to 12 November 1941, but was extended by three days, when it was seen that the mobilization was weak. 3.4 million citizens sided with the marshal, having garnered – half a year earlier – 2.9 million votes. It was the only time in our history that voters were called to the polls in alphabetical order: A to L went in the morning and M to Z in the afternoon. The number of those who resisted was 2996 in March and 68 in November. "The country's unanimity sat next to Marshal Antonescu", noted a chronicler of the time.

In the autumn of 1986, the General Secretary of the Romanian Communist Party, Nicolae Ceausescu, first amended the Constitution, because it did not provide for referendums. The subject of popular approval was formulated as follows: "a 5% reduction in Romania's armaments, personnel and military expenditure". The country was then a member of the Warsaw Pact, an alliance against NATO. Young people aged 14-18 were also called to the polls – with the right to vote in an advisory capacity. Statistics show that only 4 teenagers and 233 adults would be absent from the call. 17,655,974 Romanians said "yes".

By analyzing the history of popular consultations in Romania, we can better understand the dynamics of the relationship between the state and citizens, as well as how the popular vote influenced the evolution of the Romanian society and legitimized the political decision. Between 1864 and 1989, six plebiscites were organized for the legitimacy of political decisions.

LEGITIMITY OF POLITICAL DECISIONS: THE ROLE OF THE REFERENDUM IN THE DEMOCRATIC PROCESS

I. SOME ASPECTS CONCERNING THE NATIONAL REFERENDUM

In line with the evolution of the constitution and society, the manner of consulting the population in matters of public interest has also evolved from the incipient forms represented by the plebiscite (1864), to the current forms regulated by the provisions of Articles 2, 90, 95, 146, 150, 151 of the Constitution and the provisions of Law No 3/2000, as amended.

The referendum is an essential tool of direct democracy, through which citizens can express their opinion on certain issues of public interest.

It follows from the constitutional and legal provisions in force that in Romania the referendum is the means of direct consultation of the population and of expressing the sovereign will of the Romanian people regarding the revision of the constitution, the dismissal of the President of Romania, issues of national interest.

Depending on the issues that may form the subject of the referendum, it can be initiated by the president of the country in situations involving issues of national interest. The Government may propose to the President the approval of a referendum for constitutional amendments. Parliament may decide to hold a referendum on constitutional or legislative matters. Citizens may initiate a referendum under the conditions laid down in Articles 150 and 151 of the Constitution.

The referendum to amend the Constitution and the referendum to dismiss the President have a decisional character, and the effects are direct.

The referendum on issues of national interest shall be advisory in nature and its effects shall be indirect. The indirect effect is explained by the Constitutional Court as appearing when the result requires the intervention of other bodies, most often the legislative ones, in order to implement the will expressed by the electoral body. However, the will of the people must not be disregarded and the results of the referendum must be put into practice, even if it is an advisory endeavour, 'the effects of the referendum must be expressly provided for in the Constitution or by law, whether the referendum is advisory or decision-making'. However, there is no deadline for the results to be put into practice, so a decision can be postponed indefinitely. An example is the result of the 2009 referendum, when Romanians voted for a parliament with 300 elected representatives.

A proposal to revise the constitution from citizens requires 500.000 signatures of citizens. The referendum can be reached only after the draft amendment to the fundamental law is approved with two thirds of the votes of the MPs. The result of the referendum is validated if the validly expressed options represent at least 25% of the citizens registered on the permanent electoral rolls. Also, the subjects of the initiative to revise the constitution may be the president, at the proposal of the government, as well as at least a quarter of the number of deputies or senators.

The referendum for the dismissal of the President of Romania is mandatory and shall be established by decision of the Parliament, under the conditions provided for in Article 95 of the Constitution. The dismissal of the President of Romania is approved if, following the referendum, the proposal received a majority of the valid votes cast.

As regards the topics on which the President may call a referendum, the legislation states that they are 'of national interest'. The Constitutional Court ruled that the head of state is the only one who can decide the topics for consulting the population, and the Parliament cannot interfere, censoring its decision.

II. NATIONAL REFERENDA AFTER 1989

2.1. Over the years, several referenda have been organised in Romania on various issues such as declaring Romania's intention to join the European Union (2003), replacing the phrase 'between spouses' in Article 48(1) of the Constitution with a more restrictive one, 'between a man and a woman' with regard to the family (2018), the decrease in the number of parliamentarians, the suspension of the President, etc.

The first referendum looked, again, like the plebiscite of 1864, at a constitution, respectively, the one discussed in the first parliament elected after the fall of the communist regime. The Christian and Democratic National Peasants' Party then called for a boycott of the approval referendum, inter alia because the form of government was not put to a vote. More than 8.4 million voters agreed to the new fundamental act and 2.2 million opposed it.

A referendum was held in 2003 to validate constitutional amendments. The most significant change concerned the duration of the presidential term, which increased from 4 to 5 years and made a slight differentiation in the functioning of the chambers. Scheduled for one day, the consultation was extended the next day. The number of those who opposed the revision was ten times lower than those who agreed.

In 2007 the referendum saw the impeachment of the president. The procedure had been launched in 1994 against another president, but the Constitutional Court considered that there were no grounds to punish the head of state, so a popular vote was not reached, provided as a mechanism to confirm the decision taken in the assembled chambers. Thirteen years later, the Constitutional Court also found that there was no reason to impeach the president, but 322 deputies and senators did. Thus, a referendum was organized in which 44.5% of the voters participated, so the procedure was invalidated, because the majority of those registered on the electoral lists were needed. Of those present, 75% voted against the suspension.

It was also in 2007 that the President initiated a popular consultation. Thus, the President proposed a new way of voting, i.e. he asked the citizens whether they agreed that "starting with the first elections to be held for the

Romanian Parliament, all deputies and senators should be elected in single-member constituencies, on the basis of a two-round majority vote". The referendum was held on the same day as the first European Parliament elections, but in separate polling stations. As only a quarter of citizens spoke, the consultation had no effect.

In November 2009, at the same time as the presidential election, the President initiated two referendums. The first aimed to abolish the Senate, and the second proposed that the maximum number of elected representatives should be 300. Both proposals were broadly supported: 72% wanted a chamber, not two, and 83% of citizens agreed to set a maximum number of 300 elected. The results were valid, because the presence exceeded the threshold of 50%, but the legislators ignored them.

In 2012, a new proposal to suspend the president was rejected by the Constitutional Court because although the majority of those who voted said yes, only 46% of the citizens went to the polls.

On 6-7 October 2018, a referendum was held to amend Article 48 of the Romanian Constitution. The initiative aimed to replace the phrase 'between spouses' in Article 48(1) of the Constitution with a more restrictive one, 'between a man and a woman'. The referendum sought a constitutional ban on same-sex marriage. The Constitutional Court endorsed the amendment proposal on July 20, 2016, noting that it does not bring any interference to any individual right. The revision proposal was also endorsed by the Chamber of Deputies on 27 March 2017. On 11 September 2018, the Senate, as the decision-making body, adopted the proposal to revise the Constitution by 107 votes" in favour", 13 votes 'against' and seven abstentions. The question put to voters was 'Do you agree with the law revising the Romanian Constitution as adopted by Parliament?', to which they had to answer 'yes' or 'no'. The referendum failed as the validation threshold was not reached. According to the Central Electoral Bureau, 21.1% of Romanians with the right to vote went to the polls in the two days dedicated to the consultation.

The amendment of the Constitution was supported by 91.56% of those present at the polls. On May 26, 2019, at the initiative of the President of Romania, the referendum on justice was organized simultaneously with the elections to the European Parliament. The referendum was validated in the context in which 41.28% of Romanians with the right to vote went to the polls . The President announced the beginning of the demarches for a referendum on the pardon and the amendment of the Criminal Code as early as 2017. However, the procedure was suspended until April 2019, when the President decided to re-consult Parliament to 'enlarge the scope of the referendum'. On April 4, the President announced the topics for the referendum: the prohibition of amnesty and pardon for corruption offences and the prohibition of the adoption by the Government of emergency ordinances in the field of criminal offences, penalties and judicial organisation, correlated with the right of other constitutional

authorities to refer ordinances directly to the Constitutional Court. The joint legal committees of the Senate and the Chamber of Deputies gave a favourable opinion on the organization of the referendum and the joint plenary of the two chambers gave a favourable opinion on the President's initiative. The referendum had two questions: 'Do you agree with the prohibition of amnesty and pardon for corruption offences?' and 'Do you agree with the prohibition of the adoption by the Government of emergency ordinances in the area of criminal offences, penalties and judicial organisation and with the extension of the right to challenge ordinances directly to the Constitutional Court?'. To each of them voters had to answer 'yes' or 'no'.

After hearing the results of the referendum, the President sent a letter to the presidents of the political parties and formations represented in the Parliament, inviting them to consultations in order to establish the directions of action necessary for the implementation of the referendum.

The National Political Agreement for consolidating Romania's European path was signed, through which the signatories committed themselves to transposing into legislation the ban on amnesty and pardon for corruption offences, the ban on the adoption by the Government of emergency ordinances in the field of justice laws, the measures necessary to ensure integrity in public functions and the measures necessary to ensure – both at home and abroad – the full and effective exercise of the right to vote by Romanian citizens.

The agreement also requires the signatories to support "deepening integration with the European Union and strengthening the European project, as well as strengthening the transatlantic relationship".

II.2 Referendum in the age of digitalisation represents a new dimension of civic participation in the democratic process.

Digitalisation has profoundly transformed the way modern societies work, including democratic processes. The referendum, as a tool to directly express the will of the people, was influenced by technological advances, offering new opportunities and challenges in terms of civic participation. This theme explores how digitalisation affects the referendum, its advantages and disadvantages, and its implications for democracy.

Digitalisation has enabled the modernisation of the electoral process, including the referendum through electronic voting. The implementation of electronic voting systems can facilitate the participation of more citizens by reducing queues and waiting times and allowing remote participation.

Online platforms also allow information on the subject of the referendum to be disseminated quickly, making it easier for voters to be informed and for public debate to be promoted.

In this way, digitalisation can improve transparency. Citizens can be more informed and actively participate in decision-making.

III. THE GUARDIAN OF DEMOCRACY IN THE PROCESS OF THE REFERENDUM

The Constitutional Court plays an important role in the referendum procedure by observing the procedure for its organization and conduct and confirming the results of the referendum.

Examining acts issued by the Constitutional Court in the context of the referendum procedure, it is concluded that these may be opinions and decisions and that they may directly or indirectly influence the conduct of the referendum and its results.

Opinions are delivered on the initiative to suspend the President from office and are the only acts of the Court that have an advisory character.

Decisions of the Constitutional Court are generally binding and have power only for the future. Consequently, all public authorities are bound by the decisions and rulings of the Constitutional Court.

According to the case-law of the Court, the force of ”res judicata” attached to judicial acts attaches not only to the operative part, but also to the considerations on which the decisions of the Constitutional Court are based, both the Parliament and the Government, i.e. the public authorities and institutions, must respect both their recitals and their operative parts.

Examples of the importance and role of the Constitutional Court in the referendum procedure can be Decision no 799/2011, Decision no 730/2012, Decision no 2 of 27 June 2019, Advisory Opinion no 1/2012.

By Decision no 799/2011, the Constitutional Court ruled on the draft law on the revision of the Constitution submitted by the President of Romania at the initiative of the Government. Examination of the content of Decision no 799/2011 shows that the Constitutional review Court carried out an extensive analysis of the draft law on the revision of the constitution from the following perspectives: the fulfilment of the constitutional conditions of form and substance relating to the revision of the constitution, conditions which ‘relate to the initiative of the revision and the limits of the revision’, compliance with the provisions of international treaties on human rights to which Romania is a party, and compliance with the principles which underpin and define the Romanian State, laid down in Article 1 of the Constitution.

In exercising its powers, the Constitutional Court held that the draft law submitted by the President ‘contains a series of amendments and additions to the draft revision law submitted to the President of Romania by the Government’ and that the exercise of the right of initiative was carried out in compliance with Article 150(1) of the Constitution. Thus, the court ruled that the president has the possibility to decide whether to initiate the procedure for revising the constitution and if he decides to initiate the procedure he can only partially endorse or supplement the Government's proposal.

Regarding the observance of the provisions of the international treaties in the field of human rights to which Romania is a party, as well as the observance

of the principles that substantiate and define the Romanian state, the Constitutional Court found that some of the amendments proposed by the draft law on the revision of the constitution are constitutional, others unconstitutional, some of them it considered as not falling within the scope of the constitution and others it interpreted in the sense of constitutionality of the legal provisions. We also note that in the decision-making process there is a contrary opinion of a constitutional judge.

In another case, the Constitutional Court ruled on the inadmissibility of the request made by the President of Romania regarding the settlement of the constitutional legal conflict between the Romanian Parliament and the President of Romania, a conflict that arose as a result of the Parliament's action to order the suspension of the President of Romania. The effects of the suspension consist in the interruption of the presidential mandate until the validation of the referendum result by the Constitutional Court. In substantiating the decision on the inadmissibility of the President's request, the Constitutional Court stated that 'only the Parliament may decide to suspend the President, given this power, and once the parliamentary procedure for suspending the President of Romania from office has been initiated, according to the Constitution, it cannot be stopped', regardless of the opinion given by the Constitutional Court, which is of a strictly advisory nature. In the procedure for the suspension of the President of Romania, governed by Article 95 of the Constitution, the role of the Constitutional Court ceases once the advisory opinion is issued.

If the proposal for suspension from office is approved, a referendum on the dismissal of the president shall be held within 30 days.

As regards the situations in which the Constitutional Court delivered judgments, we note that by Decision No 33/2009 the Constitutional Court ruled on the application for annulment of Decree No 1507 of 22 October 2009 on the organisation of the national referendum, in which context it verified the constitutionality of the decree by reference to the constitutional provisions conferring on the President of Romania the power to have recourse to the referendum procedure on issues of national interest and defined the notion of issues of national interest. Moreover, by Decision No 2/2019, it held that "the resolution of complaints submitted to the Constitutional Court concerning compliance with the procedure for the organisation and conduct of the national consultative referendum also entails, inter alia, the verification of the constitutionality of the legislative acts issued with a view to organising the referendum or of those laying down procedural rules for its organisation and conduct, in so far as the resolution of complaints does not fall within the remit of the electoral bureaux or the courts". In the absence of any constitutional and legal regulation in this respect, all complaints filed and registered with the Constitutional Court are admissible until the Constitutional Court confirms (confirms, as the case may be) the results of the referendum.

Regarding the referendum of 26 May 2019, the court noted that there was no complete information on all the legal and technical details involved in the two questions, as the recommendations of the Venice Commission were not followed. There were also several hypotheses in the questions, which would have required separate treatment. Given that the referendum was advisory in nature and that the expressed will, even in the context of obvious deficiencies in the drafting of the questions raised, gives guidance to the authorities as to the majority will expressed by the voters, there is no constitutional basis for invalidating the referendum.

Since a will with a political and not a legal effect has been expressed, in the sense analysed, the legal, technical and detailed aspects are to be duly assessed by the authorities and implemented in compliance with the constitutional and legal reference framework.

In conclusion, reviewing the procedure for the organisation and conduct of the consultative referendum of 26 May 2019, the Court found a number of shortcomings, both as regards Presidential Decree no 420 of 25 April 2019 and as regards the conduct of the referendum. However, the Court considered that the deficiencies found are not such as to support a violation of the constitutional framework that shapes the consultative referendum. Thus, under Article 90 of the Constitution, the people are consulted by the President of Romania, and the result of the consultation must be taken into account by the authorities in addressing the issues of national interest that formed the subject of the consultation, in the sense of their political orientation. This approach can materialize in various measures of public authorities, without imposing an option for one or another category of measures, such as the revision of the Constitution. As a result, the triggering of the consultative referendum, the questions put to the people by the President, the exploitation of the answers received by the public authorities are subsumed under a political effect which, in turn, produces consequences in terms of the political responsibility of the institutional actors involved, and not in terms of their legal responsibility. To the extent that the political decision is to adopt legislative measures, they may be subject to constitutional review in accordance with the applicable constitutional framework.

The Constitutional Court found that the condition regarding the participation in the referendum of at least 30% of the persons registered in the permanent electoral lists (for both questions) is met. Also, the condition that validly expressed options represent at least 25% of those registered on the permanent electoral rolls (for both questions) is met. For the first question, the majority vote of the participants who expressed valid options (85.91%) was for the answer "YES", i.e. in the sense of the agreement with "the prohibition of amnesty and pardon for corruption offences". For the second question, the majority vote of the participants who expressed valid options (86.18%) was for the answer “YES”, i.e. in the sense of the agreement with “prohibiting the

adoption by the Government of emergency ordinances in the area of criminal offences, penalties and judicial organisation and extending the right to challenge ordinances directly to the Constitutional Court".

Rejecting the appeals, the court found that the procedure for organizing and holding the national referendum of 26 May 2019 was observed and that it is valid, as of the total of 18.267.997 persons registered on the permanent electoral lists, 7.922.591 persons participated in the vote in the first question and 7.923.869 persons in the second question, i.e. 43.37% and 43.38% of the number of persons registered on the permanent electoral lists, respectively. At the same time, the options validly expressed for the first question are 41.16%, and for the second question 41.15% of the number of persons registered on the permanent electoral lists.

The Court confirmed the results of the national referendum of 26 May 2019 and found that 85.91% of the valid votes cast were for the answer 'YES' to the question 'Do you agree with the prohibition of amnesty and pardon for corruption offences?' and 86.18% for the answer 'YES' to the question "Do you agree with the prohibition of the adoption by the Government of emergency ordinances in the area of criminal offences, penalties and judicial organisation and with the extension of the right to appeal the ordinances directly to the Constitutional Court?".

However, the outcome of the consultative referendum provides only political guidance on the issues of national interest that formed the subject matter of the consultation. However, the decision on how the will expressed in the referendum will be implemented lies with the public authorities with competence in the matter. Also, regardless of the content of the questions addressed to the people during a consultative referendum, the revision of the Constitution follows the procedure regulated by the provisions of art. 150-152 of the Fundamental Law, texts that establish the initiators, the rules of debate, adoption and approval of the law revising the Constitution, as well as the limits of the revision.

Thus, the revision of the Constitution can be initiated both by citizens (in compliance with the rules on the minimum number of supporters and territorial dispersion) and by the President, on the proposal of the Government, and involves the mandatory holding of a referendum, in accordance with Article 151(3) of the Constitution. This decision-making referendum, which has the effect of revising the constitution, is not to be confused with the consultative referendum, which, regardless of the questions submitted to the people and its theme, remains a consultation with political effects. The constitutional provisions regulate in this respect the competence of the court of ex officio constitutional review of both the initiative to revise the constitution and the law to revise the constitution. The court shall also ensure that the procedure for the organisation and conduct of the referendum, including the revision of the constitution, is observed.

Ruling on the free formation of the will of the electorate, essential for free voting, the Venice Commission recommended that "the issue put to the vote must be clear, must not be misleading, must not suggest an answer, voters must be informed of the effects of the referendum, the participants in the elections must be able to answer questions only by 'yes', 'no', or by white vote". Similarly, the Venice Commission recommended that the authorities provide objective information.

CONCLUSION

The evolution from the plebiscite to the referendum reflects a transition from forms of expression of popular will that were often domineering and manipulative, to a democratic mechanism that encourages citizen participation and accountability.

In the proper functioning of this democratic mechanism, an important role is played by the Constitutional Court, which can interpret, modify or stop, within certain limits, the initiative submitted to referendum.

Thus, the relationship between the popular vote and the constitutionality control in the referendum is a complex one, being essential for ensuring a fair and legitimate democratic process.

Constitutional review by the Constitutional Court is designed to verify that referendum initiatives comply with constitutional norms and principles and ensure that the popular vote is not used to violate fundamental rights or promote policies contrary to the constitution.

The popular vote and the constitutionality control are interdependent in the referendum, the popular vote ensuring the legitimacy of political decisions, and the constitutionality control ensures that these decisions respect the legal norms and the fundamental rights of the citizens, essential for the functioning of the democratic system.

In the era of focus on digitalisation, the referendum takes on a new dimension full of opportunities but also challenges. It is essential that the authorities strike a balance between using technology to increase participation and ensuring the integrity and security of the electoral process. In this context, digital education and the promotion of a healthy online environment are becoming crucial for guaranteeing a functioning and inclusive democracy.

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SARA Law **R**esearch **C**enter
International **J**ournal of **L**egal and **S**ocial **O**rder, https://www.ccdsara.ro/ijlso
ISSN 2821 – 4161 (Online), ISSN 2810-4188 (Print), ISSN-L 2810-4188
N°. 1 (2024), pp. 149-158

CUSTOMARY INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS IN ARMED CONFLICTS

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Received 05.11.2024; accepted 20.11.2024
First online publication 21.11.2024
DOI: https://doi.org/10.55516/ijlso.v4i1.200

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Abstract

International law is derived from both treaty law and customary international law. Treaties are formal written agreements among States that establish specific rules. On the other hand, customary international law is not codified in written form but is based on "a general practice accepted as law". It must be shown that a norm is reflected in state practice and that the international community views it as legally binding in order to prove that it is customary. Rules derived from "a general practice accepted as law" make up customary international law, which exists apart from treaty law. Customary international humanitarian law (IHL) is essential in contemporary armed conflicts because it fills in the legal gaps left by treaty law in both international and non-international conflicts and improves the protections provided to victims.

Key words: *customs; international humanitarian law; conflicts; human rights; states.*

INTRODUCTION

The primary sources of international law are regarded as formal. They originate from formal entities such as laws, customs, and treaties. The ICJ statute's Article 38(1)(a-c) is generally acknowledged as the foundation of the formal

source of international law. Its assertion of the origins of international law is widely accepted as authoritative. The Statute of the International Court of Justice in the Hague, Article 38, has been seen as a handy list of international legal sources.

In doctrine, customs have been classified according to the space in which the custom is applied and the number of participants: general customs, regional customs, and local customs *(Boghirnea, 2023 p. 150).*

In certain states, custom serves as a primary source of law, provided that it does not conflict with public order, good manners, or morals. Furthermore, the general principles of law are only to be enforced when there is no law or custom. *(Boghirnea, 2011).*

International law is based on both treaty law and customary international law. Treaties are documented agreements in which States formally set certain rules. In contrast, customary international law is unwritten and comes from "a general practice accepted as law." To prove that a specific rule is customary, it is necessary to show that it is evident in state practices and that the international community views such practices as legally obligatory.

It is widely acknowledged that governments' consistent and pervasive practices serve as the foundation for customary international law. International custom is seen as a source of international law since it is believed that if governments behave consistently, they may be doing so because they feel obligated to do so by law, a concept known as opinio juris. A new rule of international law is established if enough governments behave consistently, out of a sense of duty, for an extended amount of time *(Baker, 2010).*

Customary international law is universal in its reach.' It is not subject to control by a few actors in the international legal process, and it binds all participants in international and non-international armed conflicts to the extent that it applies to such conflicts *(Paust, 2006).*

Customary international law also provides relevant *rights* for all participants in international or non-international armed conflicts whether or not they are nationals of a state, nation, or belligerent that has ratified a treaty reflecting the same rights. Concerning treaty-based rights, it is worth emphasising that the nationals of a state that has ratified the 1949 Geneva Conventions are bound by and have numerous express and implied rights under such treaties *(Paust 2006).*

Article 38 of the Statute of the International Court of Justice identifies “international custom, as evidence of a general practice accepted as law” as the second source of law that the Court uses. This means that customary international law (CIL) requires two elements: state practice and opinion juris, which is the belief that the practice is legally obligatory. A fundamental principle of international law is that sovereign states must consent to be bound by international legal obligations *(Barret 2020).*

CUSTOMARY INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS IN ARMED CONFLICTS

The customs of armies as they evolved over time and across all continents are the foundation of international humanitarian law. Not every army followed the "laws and customs of war," as this area of international law has historically been referred to, and not all foes were subject to the same regulations. However, the general trend was behavior restriction toward both combatants and civilians, mostly due to the idea of the soldier's honour. The laws, which were created by the armies themselves and also inspired by the writings of religious leaders, generally forbade actions deemed to be unduly cruel or dishonourable *(Henckaerts & Doswald-Beck 2009, p.31).*

In the five decades since the Geneva Conventions were adopted in 1949, armed conflicts have surged across nearly every continent. These essential treaties, which include the four Geneva Conventions and the Additional Protocols of 1977, aim to protect individuals not directly involved in hostilities, such as the wounded, the sick, prisoners of war, and civilians. Unfortunately, these agreements have often been violated, resulting in significant suffering and unnecessary deaths. This underscores the urgent need for better adherence to International Humanitarian Law, emphasizing the importance of upholding humanity's principles even in times of conflict *(Henckaerts & Doswald-Beck 2009, p.32).*

I. THE CONTRIBUTION OF INTERNATIONAL CUSTOMARY AND HUMANITARIAN LAW TO THE RESOLUTION OF CONFLICTS

International humanitarian law (IHL) is specifically designed to regulate the behaviour of parties engaged in armed conflicts. Its main purpose is to govern interactions between warring factions while upholding the essential rights of individuals under the control of opposing forces. IHL aims to protect not only combatants but also non-combatants, such as civilians and medical personnel, ensuring that the atrocities of war do not impact those uninvolved in the fighting *(Gasser, 2000, p.99).*

To justify intervention in the war on the grounds of a global order that the United States believed it had the right to impose by force of arms, Wilson described the German military navy's actions on April 2, 1917, as warfare against mankind. The United States violated the tradition that has been in place since the Peace of Westphalia (1648) by "claiming the right to decide the justness or unjustness of war in the name of humanity, democracy, and international law." This tradition states that any sovereign state can declare and wage war against other sovereign states to protect its interests while still being recognized as a iustus hostis as a partner in achieving peace *(Avrigeanu, 2017, p.34).* The rules of international law outlined in agreements, treaties, etc. that the parties agreed to uphold, as well as the widely accepted customary principles and standards of international law, must be adhered to during armed confrontations between two or more states. To minimize the devastation and negative effects of war, international humanitarian law is a body of customary or conventional

international legal norms designed to specifically regulate issues that arise in situations of international or non-international armed conflict *(Zlate, Tusa, Iancu 2022, p.168).*

The alleged customary right to self-defense, self-intervention, and self-protection was argued in the pleadings in Corfu Channel, UK. The Court dismissed the British defense of Operation Retail, citing reasons that it was in violation of international law. It is noteworthy that the Court did not cite a UN Charter standard because Albania was not a UN member state at the time. Its argument was founded on the idea of sovereign equality because respect for territorial sovereignty is a fundamental tenet of international relations. Regarding the intervention, the Court rejected the British claim that it was the expression of a policy of force that had historically led to the most severe abuses and that, regardless of current flaws in international organization, could not be justified under international law. It appears that the ICJ's ruling reflects the prevailing customary law *(Czaplinski, 2016, p.715).*

All subjects of international law are bound by customary international law. The principles of customary international humanitarian law undoubtedly bind international organizations. However, according to the principle of conferred powers as stated in the advisory opinion on reparations for injuries suffered in the service of the United Nations, their binding force is restricted to the activities carried out within the specific organization's statutory powers *(Czaplinski, 2016, p.731).*

Many of the regulations pertaining to the application of international humanitarian law have been incorporated into customary international law. First and foremost, each party to a conflict must ensure that its armed forces, as well as any individuals or groups operating (in reality) under their direct supervision or direction, respect and uphold the application of international humanitarian law. As a result, every party to the conflict including armed opposition groups must instruct and guide their armed forces regarding international humanitarian law.

Criminological research, according to Iancu, discusses the drama of the victim, the offender, and the social control agent. It also discusses three different kinds of acts: criminal response, passing to action, and prevention. *(Iancu 2018, p.151).*

Regarding individual responsibility, Customary International Law and Humanitarian Law require accountability for crimes committed by all persons who commit crimes, give orders to commit crimes, or in some way are responsible as commanders or superiors for the commission of war crimes. The enforcement of the war crimes regime, or the investigation of war crimes and the prosecution of suspects, is an obligation incumbent on states. States may be relieved of this obligation by establishing international courts or mixed tribunals for this purpose.

In addition to codifying the initial standards of Customary International Law, Additional Protocol I established the framework for the development of new customary regulations. Evidence of the profound influence of Additional Protocol I on state practices, both in international and non-international armed conflicts, can be found in the practices collected for our study (see below). Beyond the scope and influence of the Protocol, the study found that the fundamental ideas of Additional Protocol I are widely accepted and implemented. Despite the fact that the study's objective was not to ascertain whether the provisions of particular treaties were customary, it did conclude that many customary norms are comparable to those found in treaty law *(Henckaerts & Doswald-Beck 2009)*.

The most important contribution of Customary International Law and International Humanitarian Law to the resolution of internal armed conflicts lies in the fact that it goes beyond the provisions of Additional Protocol II. The practice has created a significant number of customary rules that are more detailed than the frequent and general provisions of Additional Protocol II and, in this way, have filled significant gaps in resolving internal conflicts *(Henckaerts & Doswald-Beck 2009)*.

II. INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW

Armed conflict victims are intended to have the bare minimum of protection under international humanitarian law. The 1949 Geneva Conventions and the 1977 Additional Protocols safeguard particular fundamental rights for people in certain situations about both international and domestic armed conflicts. International human rights law, on the other hand, has a wider reach than international humanitarian law.

International humanitarian law only addressed armed conflict between states before the middle of the 20th century. "The initiation and waging of war was an exercise of sovereign power, a prerogative held by State, suitable for regulation by international law," as this statement reflected. Therefore, non-international armed conflicts were strictly regarded as being outside the purview of international regulations, except the widely accepted recognition of belligerency, which was quickly becoming outdated. In the Tadić Jurisdiction Decision, the International Criminal Tribunal for Yugoslavia Appeals Chamber reaffirmed four factors that contributed to this historical development: the need for protection and regulation mechanisms in light of the increasing frequency of internal conflicts, the evolving character of those conflicts (long-lasting), the growing participation of third states, and the use of proxies. The change brought about by the Universal Declaration of Human Rights, which states that "a state sovereignty approach has been gradually supplanted by a human-being-oriented approach," is equally important *(Nejbir, 2021 p.37-70)*.

According to Wood, there are at least three significant distinctions between international humanitarian law and international human rights law, at least one of which is pertinent to the topic of this contribution. *The two* types of law, international human rights law and international humanitarian law, are quite different. They have different goals and policies. Another important difference is how they are enforced. International human rights law is often enforced through courts and international supervisory bodies, while the enforcement of international humanitarian law is less likely to involve a court. International courts and tribunals can only have jurisdiction if the state involved agrees to it. This means that even if there are rules for reparations, it's rare to enforce them through the courts. Additionally, international humanitarian law applies universally, meaning it applies to all states unless a state can prove it consistently objects to it *(Wood, 2018).*

On the other hand, human rights law varies significantly from region to region. For example, the European Convention for the Protection of Human Rights and Fundamental Freedoms outlines five specific circumstances in which detention is allowed. In armed conflict, the International Court of Justice has stated that human rights protections remain in effect unless explicitly suspended under provisions such as those in Article 4 of the International Covenant on Civil and Political Rights. When examining the relationship between international humanitarian law and human rights law, there are three potential scenarios: some rights are governed solely by international humanitarian law, some are governed only by human rights law, and some are subject to both frameworks *(UNHR, 2011).*

The European Convention on Human Rights and Fundamental Freedoms, which is enforceable under national law in every contracting state, is examined by some authors. They also emphasize that the European Union's Charter of Fundamental Rights, which has the same legal force as the Treaties, also outlines the freedoms and rights safeguarded by this act *(Franguloiu, Hegheș, Pătrăuș, 2023, p.141).*

Fundamental rights are those that are necessary for human existence (e.g. G. both the rights to liberty and life). From one historical period to the next or from one state to another, these fundamental rights may change or evolve *(Spătaru-Negură, L.-C. 2024, p.4).*

Kodra claims that there is a growing recognition of international humanitarian law as a component of international human rights law that applies in times of armed conflict. This is because human rights are protected by international humanitarian law and cannot be diminished by states, even in dire circumstances like armed conflict. Since both human rights law and international humanitarian law focus on protecting individuals, they share many similarities. In international armed conflicts, both human rights law and international humanitarian law are applicable and can be enforced concurrently. Some rules of

international humanitarian law and human rights law are similar. Non-discrimination, which is one of the key principles of international human rights law, is also a central concept in the Geneva Conventions related to the law of armed conflict. The right to life, as international humanitarian law calls for, as far as possible, the protection of life during hostilities and prohibits arbitrary killings or executions of persons under the control of an authority *(Kodra, 2012, p.113).*

The key point is that while humanitarian law applies only during armed conflicts as outlined in Common Article 2 of the 1949 Geneva Conventions human rights law is applicable in both peacetime and wartime. According to the European Union Guidelines on promoting compliance with international humanitarian law, "International Humanitarian Law is applicable in times of armed conflict and occupation." In contrast, human rights law applies to everyone within a state's jurisdiction during both peace and conflict. The International Criminal Tribunal for the Former Yugoslavia has established that human rights law and humanitarian law are mutually complementary, and it is both appropriate and necessary to use one to inform the other. Given their similarities in goals, values, and terminology, referring to human rights law is generally a helpful way to clarify the content of customary international law within humanitarian law. In some respects, international humanitarian law can be seen as merging with human rights law. However, the Tribunal emphasized that concepts developed in the realm of human rights can only be incorporated into international humanitarian law if they account for the specific characteristics of humanitarian law *(Orakhelashvili, 2008).*

In 2010, the Security Council demonstrated its opposition to the impunity of grave violations of international humanitarian law and human rights standards. It also promoted the defense of accountability through the use of various tools, including truth and reconciliation commissions, national victim reparations programs, institutional reforms, and traditional dispute resolution procedures. This has an impact on the State's pledge to "seek sustainable peace, justice, truth, and reconciliation," to "end impunity," and to "ensure that all UN activities aimed at restoring peace and security respect and promote the rule of law." The UN General Assembly adopted the Basic Principles and Guidelines on the right of victims of grave violations of international humanitarian law and gross violations of human rights standards to seek restitution and remedies in 2005. an instrument that concentrates on victims' rights and states' responsibilities *(Remón, 2021).*

According to Duner, the defence of human rights may implicate the use of violence, as in the idea of humanitarian intervention. Kosovo is frequently held to be the purest case of humanitarian intervention that has taken place and ushered in a new era in the defence of human rights *(Duner, 2001).*

CONCLUSION

International human rights law sets important limits on the power of the state, ensuring that all individuals under its authority are treated with dignity and respect. These limits apply universally, even during times of crisis, emphasizing the inalienable rights of every person. This framework aims to protect civil, political, economic, social, and cultural rights, affirming that these rights must be upheld regardless of the circumstances.

Additionally, customary law is crucial in addressing the gaps left by written law, whether due to its nonexistence or its inapplicability for example, because of the difficult process of ratifying and signing.

The origins of international humanitarian law can be traced back to ethical principles concerning honour and the expected civil conduct of professional armies. Key historical practices and agreements, including the Geneva Conventions, have influenced its development, highlighting the necessity of alleviating the harsh realities of war.

International human rights law has a diverse origin, emerging from various cultural traditions, historical events, and social movements that advocate for individual dignity and rights. Its development has been shaped by a range of philosophical, legal, and political perspectives, highlighting the universal importance of recognizing and upholding human rights. A key distinction between international human rights law and international humanitarian law is their approach to armed conflict and the use of force. While international humanitarian law acknowledges the reality of conflict, it emphasizes that using armed force should not be seen as a legitimate way to resolve disputes. Instead, it aims to protect non-combatants from the devastating consequences of war, prioritizing humanitarian protections over a mere code of honour for combatants. This shift reflects a broader understanding of the need for compassion and restraint in the face of violence, focusing on reducing human suffering and maintaining dignity during times of conflict.

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SARA Law **R**esearch **C**enter
International **J**ournal of **L**egal and **S**ocial **O**rder, https://www.ccdsara.ro/ijlso
ISSN 2821 – 4161 (Online), ISSN 2810-4188 (Print), ISSN-L 2810-4188
N°. 1 (2024), pp. 159-171

ENSURING THE CELERITY OF THE PROCEEDINGS THROUGH THE CONTESTATION REGARDING THE DURATION OF THE CRIMINAL PROCESS

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Received 25.09.2024; accepted 30.10.2024
First online publication 03.11.2024
DOI: https://doi.org/10.55516/ijlso.v4i1.193

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Abstract

The concept of public safety is also manifested by respecting the fundamental rights of the person during the judicial proceedings, rights among which is the right to resolve the case within a reasonable time.

From this perspective, to ensure the speedy resolution of criminal cases, in the regulation of the current Romanian Code of Criminal Procedure, the contestation regarding the duration of the criminal process was introduced, an institution that allows the request to expedite the resolution of the case if the criminal prosecution or trial activity is not carried out in a reasonable time frame.

In this context, the present work addresses the institution of the contestation regarding the duration of the criminal process, bringing to attention also some jurisprudential aspects regarding the need for the interpretation and uniform application of the provisions of the Code of Criminal Procedure in the matter of the admissibility of this contestation.

Also, using documentation, observation, interpretation and scientific analysis as research methods, this study discusses the consequences of not complying with the term established for the resolution of the case in the situation of admitting the contestation regarding the duration of the criminal process.

The paper concludes with a concrete proposal for a ferenda law, regarding the establishment of a processual sanction, which will ensure the effective role of the contestation regarding the duration of the criminal process as a genuine

accelerator remedy in case of exceeding the reasonable duration of the procedures.

Key words: *reasonable term, fair trial, criminal case, accelerator remedy, processual sanction.*

INTRODUCTION

Starting from the fact that public safety also implies the respect of the fundamental rights of the person during judicial proceedings, the present study approaches the institution of the contestation regarding the duration of the criminal process, an institution that seeks to ensure the right to resolve the case within a reasonable time.

The objective of this paper is to highlight the need to ensure the efficiency of the regulation of the contestation regarding the duration of the criminal process, a procedure introduced for the first time in Romanian legislation in 2013, through the normative act implementing the current Code of Criminal Procedure.

Thus, in the first section, which follows the introductory one, the right to the resolution of the case within a reasonable time is presented, as part of the fundamental right to a fair trial, as they are guaranteed both at the international level (Universal Declaration of Human Rights, Covenant international regarding civil and political rights), as well as on European level (the Convention for the Protection of Human Rights and Fundamental Freedoms, the Charter of Fundamental Rights of the European Union) and nationally (the Constitution of Romania, the Law on judicial organization in Romania, the current Romanian Code of Criminal Procedure).

At the same time, a brief reference is also made to the meaning of the phrase "reasonable term" in the jurisprudence of the European Court of Human Rights, as well as to the obligation of the states party to the European Convention to regulate the way of capitalizing on complaints regarding exceeding the reasonable duration of judicial procedures.

The second section is intended to analyze the way in which, in the Romanian Code of Criminal Procedure, the institution of the contestation regarding the duration of the criminal process is regulated, as a special procedure made up of a complex of norms with a complementary and derogatory character from the usual procedure. Emphasizing the fact that the Romanian legislator conceived this institution as an accelerating remedy in the case of the lack of speed of the judicial bodies, an aspect of different judicial practice is also addressed, which was clarified by the High Court of Cassation and Justice through a recourse in the interest of the law.

In the third section, the issue of the effects of non-compliance with the deadline set for the resolution of the case is dealt with, in the event of the admission of the contestation regarding the duration of the criminal process. It is emphasized that, beyond the disciplinary sanctions that could be applied to the

prosecutor or the judge who does not respect the judicial term established for solving the case, no processual sanction is provided for such a situation.

In the section devoted to final considerations, it is concluded that, in the absence of an express provision regarding a possible sanction of a processual nature to be applied in the event of exceeding the reasonable term for the resolution of the case in the assumption of the admission of the contestation, the role of this institution of acceleration remedy is significantly diminished. Therefore, the paper concludes with a concrete proposal for *a ferenda law*, in order to make the internal regulations more efficient in the matter of ensuring the speed of criminal judicial proceedings and guaranteeing the right to resolve the case within a reasonable time.

I. THE RIGHT TO RESOLVE THE CASE WITHIN A REASONABLE TIME – COMPONENT OF THE FUNDAMENTAL RIGHT TO A FAIR TRIAL

The fundamental right to a fair trial is guaranteed internationally, primarily by the Universal Declaration of Human Rights[1], which states that "everyone has the right in full equality to a fair and public hearing by an independent and impartial tribunal that will decide either on his rights and obligations, or on the merits of any criminal charge against him".

Also, according to the International Covenant on Civil and Political Rights[2], "everyone has the right to have his dispute fairly and publicly examined by a competent, independent and impartial tribunal established by law, which shall decide either on the merits of any criminal accusation directed against her, or on the contestations regarding her civil rights and obligations".

At the European level, the right to a fair trial is enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms[3]: "Every person has the right to a fair trial, in public and within a reasonable time, by a court independent and impartial, established by law, which will decide either on the violation of his civil rights and obligations, or on the merits of any criminal charge against him. [...]". Therefore, in the sense of the European Convention, the notion of a fair trial also includes the requirement to judge the case within a reasonable time.

In the member states of the European Union, the protection of the right to a fair trial has been strengthened by the provisions of the Charter of Fundamental

[1] Art. 10 of the Universal Declaration of Human Rights, published in the United Nations Brochure of 10 December 1948.

[2] Art. 14 para. (1) from the International Covenant on Civil and Political Rights of December 16, 1966, published in the Official Gazette of Romania no. 146 of November 20, 1974.

[3] Art. 6 paragraph 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, concluded on November 4, 1950, with subsequent amendments and additions, published in the Official Gazette of Romania no. 135 of May 31, 1994.

Rights of the European Union[4] which also expands the meaning of the concept of "right to a fair trial" with reference to the "reasonable term": "Every person has the right to a fair trial, publicly and within a reasonable time, before an independent and impartial court, established in advance by law. [...]".

Internally (of Romanian legislation), provisions regarding the reasonable term of the proceedings are found, first of all, in the Romanian Constitution[5], in which it is stipulated that the parties have the right to resolve cases within a reasonable term.

The current Law on judicial organization[6] also provides that all persons have the right to a fair trial and to the resolution of cases within a reasonable time.

Last but not least, the current Romanian Code of Criminal Procedure[7] (CCP) enshrines, as a principle of the application of the criminal procedural law, along with fairness, the reasonable term of the criminal process. As it appears from the content of art. 8 CCP, the judicial bodies have the obligation to carry out the criminal investigation and the trial within a reasonable period, so that the facts that constitute crimes are ascertained in good time.

Regarding the meaning of the expression "reasonable term", according to the jurisprudence of the European Court of Human Rights (*Case of Comingersoll S.A. v. Portugal*[8]), the reasonableness of the duration of the proceedings is assessed according to the circumstances of the case and considering certain criteria: the complexity of the case, the plaintiff's behavior (in the sense of judicial behavior, including the exercise of procedural rights), the behavior of the authorities (for example, unjustified delays in resolving the case) and the importance for the plaintiff of the object of the case (the stakes of the judicial case).

Therefore, from a criminal procedural point of view, compliance with the reasonable term implies promptness (operativeness) and speed (celerity) in the activity of collecting and administering evidence, in order to avoid their disappearance or damage, as well as to remove the risk of diminishing the social resonance of deed.

In other words, ensuring celerity by carrying out the criminal process within a reasonable period of time, as a fundamental principle of the application

[4] Art. 47 paragraph two of the Charter of Fundamental Rights of the European Union of December 12, 2007, published in the Official Journal of the EU no. C 303/1 of December 14, 2007.

[5] Art. 21 para. (3) from the Romanian Constitution of November 21, 1991, republished in the Official Gazette of Romania no. 767 of October 31, 2003.

[6] Art. 12 of Law no. 304/2022 regarding judicial organization, published in the Official Gazette of Romania no. 1104 of November 16, 2022, with subsequent amendments and additions.

[7] Law no. 135/2010, published in the Official Gazette of Romania no. 486 of July 15, 2010, with subsequent amendments and additions (entered into force on February 1, 2014).

[8]The ECtHR Judgment of April 6, 2000 pronounced in the *Case of Comingersoll S.A. v. Portugal*, document available online at https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-58562%22]}, accessed on 28.08.2024.

of the criminal procedural law, requires the performance of judicial activities and, implicitly, the resolution of criminal cases, in the shortest possible time, in a moment as close as possible to that of the commission of the crime. The fulfillment of this requirement must not, however, affect the quality of the processual and procedural acts carried out, by violating other fundamental principles of the criminal process, such as legality or finding out the truth (*Lorincz, 2015, pp. 83-84*).

Moreover, both the principle of legality and the principle of finding the truth are specific to the disciplines in the branch of criminal sciences, the necessity of their application being obvious in the course of criminal investigation or prosecution (*Iancu, 2019, pp. 459-460*).

In order to ensure compliance with the principle of carrying out the process within a reasonable time, in the jurisprudence of the European Court of Human Rights (*Case of Kudla v. Poland*[9]) it was held that the states party to the Convention for the Protection of Human Rights and Fundamental Freedoms are obliged to make available to litigants a way of attack to capitalize on complaints about exceeding the reasonable duration of the procedure and that a court vested with the disposal of such an appeal should have jurisdiction to at least order the award of damages when it finds that the complaint is well founded (*Bogdan, Selegean, 2005, p. 147*). In this sense, a special procedure was established in the Romanian Code of Criminal Procedure that regulates the possibility of the parties, the main procedural subjects and even the prosecutor in the judgment phase, to file a contestation regarding the duration of the criminal process, requesting the acceleration of the resolution of the case. Regarding the award of damages, according to our legislation, the person whose right to the resolution of the case within a reasonable time has been violated can claim civil damages under the common law (*Ghigheci, 2014, p. 144*).

II. REGULATION OF THE CONTESTATION REGARDING THE DURATION OF THE CRIMINAL PROCESS, AS AN ACCELERATOR REMEDY IN THE CASE OF EXCEEDING THE REASONABLE DURATION OF THE PROCEEDINGS

Having its origins in the adversarial (accusatory) procedural system, the concept of "reasonable duration of the proceedings" or "reasonable term for the resolution of cases", as well as that of "fair nature of the process", was also translated into the legal systems of inquisitorial inspiration (the continental procedural system, applicable in most states that have ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms).

[9] The ECtHR Judgment of October 26, 2000 pronounced in the *Case of Kudla v. Poland*, document available online at https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-58920%22]}, accessed on 28.08.2024.

Moreover, the contemporary mixed procedural system combines the notion of "reasonable term" with that of "speediness" or "celerity", specific to the Romano-Germanic family of law (continental law), of which the Romanian law system is also a part. From this perspective, to ensure the operativeness or speed of the resolution of criminal cases, in the regulation of the current Romanian Code of Criminal Procedure, the contestation regarding the duration of the criminal process was introduced, an institution that allows the request to expedite the resolution of the case if the criminal investigation or trial activity is not carried out within a reasonable time frame.

Being proposed, even in the doctrine prior to the adoption of the current Romanian Criminal Procedure Code, as a procedure to ensure an effective remedy in case of lack of speed in the conduct of the criminal process (*Udroiu, Predescu, 2008, p. 647*), the institution of the contestation regarding the duration of the criminal process was introduced, in the Romanian legislation, by the Law for the implementation of the code[10], by adding some additional articles to the code adopted in 2010 (art. 488^1 – art. 488^6); the provisions of these articles apply, however, only to criminal proceedings started after the entry into force of the new code (after February 1, 2014).

Conceived as an accelerator remedy, this institution aims both to establish the violation of the right to resolve the case within a reasonable period of time, and to speed up the procedures, by obliging the judicial bodies to resolve the case, either in the criminal investigation phase or in the judgment phase, within a certain period, established by the judge of rights and liberties or by the court (*Volonciu, Uzlău et al., 2014, p. 1211*).

In terms of its legal nature, although it is called a contestation, this institution is not regulated in Romanian legislation as an actual way of attack, but as a special procedure (in Chapter I^1 of Title IV of the Special Part of the Code of Criminal Procedure), in the meaning of the way of carrying out judicial activities different from the common procedure, made up of a set of rules with a complementary and derogatory character.

Thus, in the cases in the criminal prosecution phase, the holders of the right to contest and to request the acceleration of the procedure are: the suspect, the defendant, the injured person, the civil party and the civilly responsible party. In the cases in the judgment phase, the contestation can be formulated, in addition to the previously mentioned procedural subjects, also by the prosecutor.

Until the resolution, the contestation can be withdrawn at any time, but in case of withdrawal, it cannot be repeated within the same procedural phase.

The terms after which the contestation can be filed (or the duration that the legislator considered unreasonable for the conduct of the proceedings) differ depending on the procedural phase or stage:

[10] Law no. 255/2013, published in the Official Gazette of Romania no. 515 of August 14, 2013.

- at least one year from the start of the criminal investigation, for the cases in the criminal investigation phase;
- at least one year after being sent to court, for criminal cases pending trial in the first instance;
- at least 6 months from the referral to the court with a way of attack, for criminal cases under ordinary or extraordinary ways of attack.

In cases under criminal investigation, the competence to resolve the contestation regarding the duration of the process belongs to the judge of rights and liberties from the court that would have the competence to judge the case in the first instance.

In criminal cases in the judgment phase (including in ways of attack, ordinary or extraordinary), the competence to resolve the contestation rests with the court hierarchically superior to the one before which the case is pending. If the procedure, the duration of which is contested, is pending before the High Court of Cassation and Justice, the resolution competence rests with another panel within the same section of the supreme court.

With regard to the formal and substantive conditions, the contestation filed, both during the criminal investigation and in the judgment phase, must be in writing and include: the name, surname, domicile or residence of the natural person, respectively the name and headquarters the legal person, as well as the capacity in question of the natural or legal person who prepares the request; the name and quality of the person representing the party in the process, and in the case of representation by a lawyer, his name and professional office; mailing address; the name of the prosecutor's office or the court and the file number; the factual and legal grounds on which the appeal is based; date and signature.

The contestation settlement procedure requires the rights and liberties judge or, as the case may be, the court to order the following measures prior to the settlement:

- informing the prosecutor, respectively the court before which the case is pending, regarding the contestation filed, with the mention of the possibility of formulating a point of view related to it;

- transmission within 5 days of the file or a certified copy of the case file by the prosecutor, respectively by the court before which the case is pending;

- informing the other parties in the process and, as the case may be, the other persons who have the right to lodge a way of attack, regarding the contestation formulated and the right to express their point of view within the term granted for this purpose by the judge of rights and freedoms or by the court; if the suspect or defendant is deprived of liberty, either in that case or in another case, the information is also given to his lawyer, elected or appointed ex officio.

Failure to transmit the point of view of the judicial body or the other informed procedural subjects does not prevent the resolution of the contestation.

The deadline for resolving the contestation is no more than 20 days from its registration.

It should be emphasized that the difficulty of adapting an institution of adversarial inspiration to the specifics of a procedural system of continental law led to some criticisms of unconstitutionality, which even determined a legislative amendment of the provisions relating to the contestation settlement procedure. More precisely, one year after the entry into force of these provisions, the Constitutional Court of Romania found that the legislative solution, from that moment, according to which the dispute regarding the duration of the criminal trial is resolved "without the participation of the parties and the prosecutor" is unconstitutional[11]. Therefore, in 2016[12], the respective provisions were modified, so that according to the current regulation, the appeal is resolved in the council chamber, but with the summoning of the parties and the main procedural subjects and with the participation of the prosecutor. Of course, the non-appearance of legally summoned persons has no consequence, in the sense that it does not prevent the resolution of the contestation.

To resolve the contestation, the judge of rights and liberties or the court checks the duration of the judicial proceedings based on the works and material from the case file and the points of view presented, the elements taken into account for assessing the reasonableness of the duration of the trial being the following:

- the nature and object of the case;
- the complexity of the case, including from the perspective of the number of participants and the difficulties of administering the evidence;
- the extraneous elements of the case, which may attract recourse to some forms of international legal assistance in criminal matters;
- the behavior of the appellant in the procedure the duration of which was contested, including the aspect of exercising his rights and fulfilling his procedural obligations in the respective case;
- the procedural behavior of the other participants in question, including the authorities involved;
- the intervention of some legislative changes with incidence in the analyzed case;
- any other elements likely to influence the duration of the procedure.

In the situation where he considers the appeal to be well-founded, the judge of rights and freedoms or, as the case may be, the court admits it and sets the deadline for the prosecutor to solve the case by one of the solutions of sending or not sending to court, respectively the court to solve the case, as well as the term in which a new contestation cannot be filed.

Under no circumstances, the judge of rights and liberties or the court will not be able to give instructions or provide solutions on factual or legal issues that anticipate the way the case will be resolved or that would affect the freedom of the

[11] Decision of the Constitutional Court no. 423/2015, published in the Official Gazette of Romania no. 538 of July 20, 2015.

[12] By Government Emergency Ordinance no. 18/2016, published in the Official Gazette of Romania no. 389 of May 23, 2016 (on which the Parliament has not yet ruled, in terms of approval or rejection by law).

prosecutor to pronounce the solution which he considers legal and well-founded or, as the case may be, the freedom of the judge of the case to decide, according to the law, regarding the solution to be given.

In the case of finding that the reasonable duration of the procedure has been exceeded, a new contestation in the same case will be resolved only by taking into account reasons arising after the previous contestation.

The contestation is settled by a conclusion that is not subject to any appeal, being final from the moment of the pronouncement. Within 5 days of the pronouncement, the conclusion is motivated and communicated to the objector, being transmitted for information to all parties or procedural subjects in the case who have the right to file a contestation regarding the duration of the process.

The formulation of the appeal in bad faith constitutes an abuse of law and, by way of derogation from the general provisions regarding the amount of the fine applicable for such a judicial misconduct[13], it is sanctioned with a judicial fine from 1000 lei to 7000 lei and with the obligation to pay the legal expenses incurred.

Non-compliance with the dilatory terms provided by law for the formulation of the contestation, respectively the dilatory term, established by the judge of rights and freedoms or by the court, in which a new contestation can no longer be formulated (assuming the admission of the initial contestation), leads to the rejection as prematurely of the contestation filed and upon its restitution by administrative means.

It is worth noting that, in the judicial practice in Romania, different interpretations have been given on the issue of the admissibility of the contestation regarding the duration of the proceedings during the criminal investigation in the case of facts whose perpetrators have not been identified, although the criminal investigation bodies have submitted the necessary diligence to this end. Thus, two jurisprudential guidelines regarding such a situation were outlined:

- according to the first guideline, the judge of rights and liberties should evaluate the reasonableness of the duration of the criminal investigation in relation to the elements provided in the Code of Criminal Procedure, adapted to the particularities of the case, analyzing whether the exceeding of the reasonable duration of the procedure is caused by the inactivity of the criminal investigation bodies and attributable to them. Therefore, in such an interpretation, the contestations formulated in the cases in which the investigation is carried out *in rem*, the authors being unknown, were rejected, to the extent that it could not be noted that the exceeding of the reasonable deadline for solving the case is imputable to the criminal investigation bodies.

[13] According to art. 283 para. (4) letter n) CCP, the abuse of law consisting in the exercise of processual and procedural rights in bad faith by the parties is sanctioned with a judicial fine from 500 lei to 5000 lei.

- in the second interpretation, it was considered that the judge of rights and liberties evaluates the reasonableness of the duration of the procedure by the formal application of all the elements provided for in the law, without verifying whether, concretely, the necessary diligence to identify the authors has been carried out and whether the extension the pursuit beyond a reasonable duration is imputable to the criminal investigation bodies.

Resolving the recourse in the interest of the law promoted in order to unify judicial practice in the matter, the High Court of Cassation and Justice established that: "in the cases whose object is contestations regarding the duration of the process in the case of facts whose perpetrators have not been identified (or identifiable), although the criminal investigation bodies have submitted the necessary diligence for this purpose, deadlines are established in order to complete the criminal investigation (which also involves identification of the perpetrators) and, respectively, in which a new appeal cannot be formulated"[14].

In justifying its decision, the supreme court held that the contestation filed during the criminal investigation *in rem* is admissible, in the conditions where the author is not identified, although the criminal investigation bodies have submitted all the diligence for identification. In other words, the judge of rights and liberties cannot reject such a contestation only on the grounds that the criminal investigation is carried out *in rem*, in the absence of the identification of the authors, in the conditions that the criminal investigation bodies have submitted the necessary diligence for this purpose, not being attributable to exceeding the reasonable duration of the procedure.

Consequently, in order for the institution of the contestation regarding the duration of the criminal process to achieve its goal - that of an effective accelerator remedy in the case of the lack of speed of the judicial bodies, the unified interpretation and application of the provisions of the Romanian Criminal Procedure Code is necessary, as required by the Decision of the High Courts of Cassation and Justice no. 7/2022, in the sense of the admissibility of this contestation including in cases with unknown authors (*Lorincz, Stancu, 2022, p. 61*).

III. THE CONSEQUENCES OF FAILURE TO OBSERVE THE DEADLINE FOR THE RESOLUTION OF THE CASE, IN THE SITUATION OF THE ADMISSION OF THE CONTESTATION REGARDING THE DURATION OF THE CRIMINAL PROCEEDING

As we showed previously, if the judge of rights and liberties during the criminal investigation or the court in the procedural phase of the judgment, assesses the contestation as well-founded, admits it and sets a deadline for solving or settling the case.

Not being a statute of limitations, exceeding this judicial term cannot attract procedural sanctions that affect the acts performed or to be performed. In

[14] Decision of the High Court of Cassation and Justice no. 7/2022, published in the Official Gazette of Romania no. 484 of May 16, 2022.

other words, from the perspective of the classification of criminal procedural terms, related to their effects, this term established after the admission of the appeal is a recommendation or relative term, the non-compliance of which has no consequences on the validity of the completed acts (*Ristea, 2011, p. 22*), but may attract disciplinary sanctions for the judicial bodies that have the obligation to comply with it.

In this sense, the current law on the status of judges and prosecutors[15] stipulates their obligation[16] to solve the works within the established terms and to decide in the cases within a reasonable time, depending on their complexity.

Also, according to the same statute of judges and prosecutors, their failure to comply repeatedly and for imputable reasons with the legal provisions regarding the speedy resolution of cases or the repeated delay and for imputable reasons in carrying out the works, constitutes a disciplinary offense[17] that may attract the application one of the disciplinary sanctions provided by law[18]: the warning; reduction of the monthly gross employment allowance by up to 25% over a period of one year; disciplinary transfer for an effective period of one to three years to another court or prosecutor's office, even of an immediately lower rank; downgrading to professional grade; suspension from office for a period of up to 6 months; exclusion from the magistracy.

In order to apply, however, a disciplinary sanction against the magistrate prosecutor or judge who would not comply with the deadline set for the resolution, respectively the settlement of the case after the admission of the contestation regarding the duration of the criminal process, the condition of repeatability of failure to comply with such a deadline must be met.

We note, at the same time, that the legislator did not provide a processual sanction for exceeding by the prosecutor or, as the case may be, by the court the term set by the judge of rights and liberties, respectively by the court that admitted the contestation regarding the duration of the criminal process

CONCLUSION

It can be said that the non-existence of a processual sanction provided by law for non-compliance with the deadline set for the resolution or settlement of the case in the event of the admission of the contestation regarding the duration of the criminal process considerably reduces the role of this institution, that of an accelerating remedy in case of violation of the reasonable duration of the procedures.

[15] Law no. 303/2022, published in the Official Gazette of Romania no. 1102 of November 16, 2022, with subsequent amendments and additions.
[16] Art. 224 para. (1) from Law no. 303/2022.
[17] Art. 271 letter g) from Law no. 303/2022.
[18] Art. 273 para. (1) from Law no. 303/2022.

We find that, regarding the criminal investigation bodies, in the Code of Criminal Procedure[19] *the unjustified failure to comply with the written provisions of the prosecutor, within the deadline set by him, is qualified as a judicial misconduct, sanctioned with a judicial fine. Similarly, for the special contestation procedure regarding the duration of the criminal process to become an effective remedy in the case of the lack of speed of the judicial bodies, we propose by law ferenda the establishment of the procedural sanction of a judicial fine also for prosecutors or judges who do not respect the term established for the resolution of the case in the event of the admission of the contestation regarding the duration of the criminal trial, by adding letter m*[1]*) to art. 283 para. (4) CCP with the following content: "unjustified non-compliance by the prosecutor or by the members of the trial panel of the term set by the judge of rights and liberties or by the court for the solution, respectively for the judgment of the case, in the situation of admitting the contestation regarding the duration of the criminal process;".*

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SARA Law **R**esearch **C**enter
International **J**ournal of **L**egal and **S**ocial **O**rder, https://www.ccdsara.ro/ijlso
ISSN 2821 – 4161 (Online), ISSN 2810-4188 (Print), ISSN-L 2810-4188
N°. 1 (2024), pp. 172-189

PROTECTIVE MECHANISM IN CIVIL AND CRIMINAL MATTERS FOR VICTIMS OF DOMESTIC VIOLENCE

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Received 25.02.2024; accepted 03.05.2024
DOI: https://doi.org/10.55516/ijlso.v4i1.182

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Abstract
Domestic violence is a reality that is no longer ignored by the authorities who seek the most effective protective measures. The protection order is a protective mechanism designed to protect the victim by taking immediate measures to physically remove the aggressor and, under certain conditions, force him to follow detoxification programmes. The issuing of a protection order does not preclude the perpetrator from being held criminally liable when the conditions for this are met or from being given a custodial preventive measure. The protection order is a civil procedural measure, which removes a danger to the victim, and the preventive measure of preventive custody is provided for in criminal procedural law, which aims to remove a state of danger to public order.

Key words: *domestic violence, family member, protection measure, protection order, criminal liability.*

INTRODUCTION

The last century has been marked by a rapid evolution of society which has reconfigured all sectors of socio-economic life. In recent decades, society has become more aware than ever of the existence of a phenomenon that can no longer be ignored by the state authorities: domestic violence.

The escalation of the phenomenon of domestic violence has forced the Romanian legislator, as well as the authorities involved in the administration of

justice, to take steps to identify mechanisms to protect victims of domestic violence, not only in civil matters but also in criminal matters.

Judicial practice has shown that the application of a single instrument by the civil court to protect victims of domestic violence is not sufficient to put an end to the danger to which they are exposed.

The intensification of the Romanian authorities' efforts to counter domestic violence is also justified by the fact that 60% of the Romanian population "shows tolerance towards violent behaviour adopted in the family, which is considered as justified in certain situations" *(Andrei, L., Giurea, L. C., Palaghia, C.M., Domestic Violence, p. 11).*

In this scientific approach we will analyze the judicial practice of the Romanian courts from the perspective of the way in which the main mechanisms regulated by the Romanian legislation for the protection of victims of domestic violence are used, but also of the requirements imposed by the case law of the European Court of Human Rights.

I. STANDARDS IMPOSED BY THE EUROPEAN COURT OF HUMAN RIGHTS

The European Court of Human Rights (hereinafter referred to as ECtHR) has repeatedly ruled, through several judgments in which it analysed the violation of Art. 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, that the state authorities have a positive obligation to take all measures for the protection of victims of domestic violence, measures that are adequate to discourage and prevent this phenomenon, and when they are informed, by any means, of the existence of a case of domestic violence to conduct an effective official investigation (*D.M.D. v. Romania, M. and M. v. Croatia, Bălşan v. Romania, Buturugă v. Romania).*

In Balșan v. Romania, the ECtHR recalled that "Article 1 of the Convention, read in conjunction with Article 3, imposes a positive obligation on States to ensure that persons within their jurisdiction are protected against all forms of ill-treatment prohibited under Article 3, including where such treatment is inflicted by private persons. The Court also recognised the particular vulnerability of victims of domestic violence and the need for active state involvement in their protection." (*para.57, Judg. Bălșan case, application no. 49645/09, against Romania available https://hudoc.echr.coe.int/?i=001-173619*).

In the above-mentioned case, the ECtHR reiterated that States have an obligation to create "a system of sanctions for all forms of domestic violence and to provide sufficient safeguards for victims" *(para.57 above-mentioned Judgment).*

It should be pointed out that, in the view of the ECtHR, the fact that certain State authorities recognise that a person has been the victim of domestic violence and take measures, in accordance with the powers conferred on them by domestic law, for the protection of the victim does not exempt the other

authorities from fulfilling their positive obligation to carry out an effective investigation of the facts complained of or which they have learned or ought to have learned of in order to ensure real and concrete protection for the person who claims to be the victim of domestic violence (*Buturuga v. Romania case available at https://hudoc.echr.coe.int/?i=001-201342).*

In this case the ECtHR held that "Although the legal framework put in place by the respondent State offered the applicant some form of protection (supra, para. 65, s.n. the issuance of the protection order), it intervened after the acts of violence complained of and was unable to remedy the shortcomings of the investigation" (para. 72 of the above-mentioned judgment). Thus, even if the victim of domestic violence requested and obtained a protection order from the civil court, this did not relieve the prosecuting authority of its obligation to conduct an effective investigation of the facts and to provide guarantees and protection to the victim.

The ECtHR also ruled in another case that "Member States should endeavour to protect expressly and comprehensively the dignity of children, which in turn requires in practice an adequate legal framework to ensure the protection of children from domestic violence, which falls within the scope of Art. 3 and which includes: a) effective deterrence of such serious violations of personal integrity; b) reasonable measures to prevent ill-treatment of which the authorities knew or ought to have known; and c) effective formal investigations in cases where a person makes a substantiated complaint of ill-treatment" (*para.52 H.R. D.M.D. v. Romania case*, https://hudoc.echr.coe.int/?i=001-177226).

In ensuring the dignity of children, in the ECtHR's opinion, there can be no compromise in condemning violence against them, whether it is accepted as "tradition" or disguised as "disciplinary" action. It is clear that respect for the dignity of the child cannot be ensured if national courts accept any form of justification for acts of ill-treatment, including corporal punishment, prohibited under Article 3 (*para. 50 Hot, cited above*).

In the light of the ECtHR's ruling, it follows that the obligation to take all measures to protect victims of domestic violence is incumbent not only on the prosecuting authorities and the specialised criminal courts, but also on the civil courts. The state authorities must therefore be proactive.

II. STANDARDS AND OBJECTIVES IMPOSED BY INTERNATIONAL LEGAL INSTRUMENTS

Awareness of the phenomenon of domestic violence, to which the ECtHR has actively contributed and which through its case law has set standards in this area, has led to the emergence of the Council of Europe Convention on preventing and combating violence against women and domestic violence of 11.05.2011

(*hereinafter referred to as the Istanbul Convention, ratified by Law No 30 of 17 March 2016*[1])

From the preamble of this Convention it was recognised that "women and girls are often exposed to serious forms of violence, such as domestic violence, sexual harassment, rape, forced marriage, crimes committed in the name of so-called 'honour' and genital mutilation, which constitute a serious violation of the human rights of women and girls and a major obstacle to the achievement of equality between women and men", including children who "are victims of domestic violence, including as witnesses to domestic violence".

The Istanbul Convention defined domestic violence as "all acts of physical, sexual, psychological or economic violence occurring within the family or domestic environment or between former or current spouses or partners, regardless of whether the perpetrator shares or has shared the same household with the victim" (*Article 3(b) of the legal instrument*).

This international instrument aims, among other things, to protect women against all forms of violence and to prevent, prosecute and eliminate violence against women and domestic violence (Article 1(1)(a) of the Convention).

In the light of the above, we can say that the main purpose of the Istanbul Convention is to protect victims of domestic violence. It is particularly important to note that one of the measures to protect victims of domestic violence is the adoption of measures aimed at rehabilitating and providing specialist assistance, not only to victims of violence, but also to the perpetrators.

Therefore, the Convention stipulates that States ratifying this international treaty will adapt their domestic legislation "to initiate or support programmes to teach perpetrators of domestic violence to adopt non-violent behaviour in interpersonal relationships, with a view to preventing further violence and changing violent behaviour patterns." (Article 16(1)) and "to initiate or support programmes designed to prevent perpetrators, in particular sex offenders, from reoffending" (Article 16(2)).

Furthermore, an obligation is established for States ratifying the international legal instrument to "take the necessary legislative or other measures to ensure that in criminal proceedings instituted for the commission of any of the acts of violence falling within the scope of this Convention, culture, custom, religion, tradition or so-called 'honour' shall not be regarded as justifying such acts". This refers in particular to allegations that the victim has violated cultural, religious, social or traditional norms or customs of appropriate behaviour." (Article 42(1)).

When offences are committed in the specific area covered by the Istanbul Convention, signatory States are required to adopt legislative measures to ensure effective, proportionate and dissuasive penalties (Article 45(1)) as well as to take

[1] Published in the Official Romanian Monitor, No 224 of 25 March 2016

other measures against offenders, including "monitoring or supervision of convicted persons; withdrawal of parental rights, if the best interests of the child, which may include the safety of the victim, cannot otherwise be ensured" (Art. 45(2)).

With regard to the prosecution and punishment of acts of domestic violence, the Istanbul Convention requires signatory States to adopt measures to ensure that this "shall not be wholly dependent on a report or complaint made by the victim if the offence was committed in whole or in part in their territory, and that proceedings may continue even if the victim withdraws his or her report or complaint" (Article 55(1)).

The Convention briefly analysed above is not the only international instrument which establishes the obligation of States to guarantee protection to victims of domestic violence.

The Convention on the Rights of the Child, adopted by the United Nations General Assembly on 20 November 1989, and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, an international instrument which was signed in New York on 6 September 2000 and which requires States Parties to "take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse". (Article 19).

At the same time, Directive (EU) No 29 of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime and replacing Council Framework Decision 2001/220/JHA (published in the Official Journal of the European Union L 315/57 of 14.11.2012) provides in Art. 1 par. 1 the rights of any person who has been the victim of a crime, namely: "to be recognised as such from the moment of identification, to be treated with respect, professionalism, individualised protection and support, financial compensation and restoration of rights".

III. MECHANISMS FOR THE PROTECTION OF VICTIMS OF DOMESTIC VIOLENCE IN CIVIL MATTERS

In civil matters, the main mechanisms for the protection of victims of domestic violence were established by Law No 217/2003 on preventing and combating domestic violence[2] .

The Romanian legislator defined domestic violence as "any intentional act or inaction of physical, sexual, psychological, economic, social, spiritual or cyber violence, which occurs in the family or domestic environment or between spouses

[2] Republished in the Official Journal of Romania, Part I, No 948 of 15 October 2020, hereinafter Law No 217/2003

or ex-spouses, as well as between current or former partners, regardless of whether the aggressor lives or has lived with the victim" *(art.3 Law 217/2003*).

The forms of manifestation of domestic violence are listed in art. 4 of this normative act, and it considers violence: verbal, psychological, physical, sexual, economic, social, spiritual and cyber violence.

In judicial practice, it has been appreciated that the respondent's act of continuing to try to enter the dwelling, even though the court had previously provisionally ordered the applicant and her children to enter it, having concluded an eviction report to this effect by a bailiff, thus creating a state of fear and anxiety for the appellant and the minors, justifying the admission of the civil action for the issuance of a protection order (*Civil Decision no. 546/2023 of the Court of Sibiu, available at* www.rejust.ro).

At the same time, it was established that the respondent's conduct took the form of verbal, psychological and cyber violence within the meaning of Article 4(4). 1 lit. a, b and h of the Law, when he addressed insults, insults and threats to the complainant, had acts of demonstrative violence on objects (overturning the garbage bin with the car), manifestations of jealousy, continuous attempts to control the complainant's life, following her and watching her home even during the night, making multiple phone calls and sending countless messages to the complainant which by their content create fear and stress. Harassing the complainant online, abusively using information and communication technology in order to shame, humiliate and frighten her (sending messages on Whatsapp containing threats, insults, including sending to witness X indecent pictures capturing intimate details of the complainant) are acts of violence (*Dec. civ. no. 107/2023 of 14.09.2023 of the Arad Court, available on* www.rejust.ro).

In order to comply with the standards imposed by the ECtHR in para. 50 of the Judgment in D.M.D. v. Romania, of 03.10.2017, the Romanian legislator has established a negative obligation for the authorities, namely not to accept in the case of domestic violence in any form and under any circumstances, that custom, culture, religion, tradition and honour be considered as justification for acts of violence (art. 4 para. 2 of Law no. 217/2003).

In civil matters, Law no. 217/2003 establishes that a family member means: "a) ascendants and descendants, brothers and sisters, spouses and their children, as well as persons who have become relatives by adoption, according to the law; b) spouse and/or ex-spouse; siblings, parents and children from other relationships of the spouse or ex-spouse; (c) persons who have established relationships similar to those between spouses or between parents and children, current or former partners, whether or not they lived with the offender, ascendants and descendants of the partner, and their brothers and sisters; d) the guardian or other person exercising de facto or de jure rights in relation to the person of the child; e) the legal representative or other person caring for the person with mental

illness, intellectual disability or physical disability, except for those who perform these duties in the exercise of their professional duties" (art. 5 (1)).

The Temporary Protection Order is the first instrument of protection for victims of domestic violence that is regulated in Law 217/2003.

Provided for in Chapter IV of Law 217/2003, the aforementioned instrument of protection is issued by the police officer who, in the exercise of his duties, finds that there is an imminent risk that the victim's life, physical integrity or state of liberty may be in danger as a result of acts of domestic violence (one such act being sufficient) and aims to reduce this risk (Article 28(1)).

When issuing this protection instrument, for a limited period of 5 days, the case officer, after assessing the factual situation he/she is faced with, orders one or more protection measures that he/she considers appropriate to reduce the risk found. The measures that the police officer may provisionally order are expressly provided for by Law 217/2003, and concern: the temporary eviction of the aggressor from the common dwelling, regardless of whether he is the owner of the property right; the reintegration of the victim and, where appropriate, of the children in the common dwelling; the obligation of the aggressor to keep a certain minimum distance from the victim, from the members of her family, as defined in Art. 5 or from the protected person's residence, place of work or educational establishment; order the perpetrator to wear an electronic surveillance device at all times and order the perpetrator to hand over to the police the weapons held (Art. 31 para. 1; for details, Franguloiu, S., "Necessity of full implementation of the electronic monitoring measure in case of application of alternative measures to detention", accepted for publication in the Journal of Criminalistics, Criminology and Penology, Romanian Society of Criminology and Criminalistics). It should be noted that this protection instrument is enforceable in the sense that the measures imposed are binding after its issuance without the passage of any period of time and without the need to summon the alleged aggressor, being necessary, however, to communicate it to the persons who were involved in the incident that led to its issuance, according to Article 32 para. 1 and art. 33 of Law no. 217/2003.

The legislator has established a presumption that the order issued by the police officer is deemed to have been served even if the offender refuses to receive it or to sign for it, and if he leaves the place where the order was issued, although he has been expressly told to wait for the outcome of the checks (*Article 33(3) of Law No 217/2003*).

The order issued by the police officer is subject to confirmation by the public prosecutor of the competent court within 48 hours of its issuance (Article 34(2) to (4) of Law 217/2003), and after confirmation, the Public Prosecutor's Office will submit to the court a request for the issuance of a protection order, to which it will attach the documentation underlying the issuance of this instrument and the confirmation (*Article 34(6) of Law 217/2003).*

The person against whom the provisional protection order has been issued has the possibility, within 48 hours of its communication, to lodge an appeal against it, which will be decided by the court in whose territorial district it was issued (Art. 35 para. 1).

A second instrument provided for by Law 217/2003 is the protection order, which the victim of domestic violence can apply for to the court, namely the court of his/her domicile/residence.

Victim of domestic violence (Art. 40 para. 2, 3) who considers that his/her life, physical or mental integrity or freedom is endangered as a result of the conduct of a family member, has the possibility to request the court to order, on a provisional basis, one or more measures, obligations or prohibitions consisting of "a) temporary eviction of the aggressor from the family home, regardless of whether he/she is the owner of the property; b) the reintegration of the victim and, where appropriate, the children, into the family home; c) the limitation of the abuser's right of use to only part of the common home where this can be shared in such a way that the abuser does not come into contact with the victim; d) the accommodation/placement of the victim, with his/her consent, and, where appropriate, of the children, in an assistance centre among those referred to in Art. 19; e) order the offender to keep a specified minimum distance from the victim, from the members of the victim's family, as defined in accordance with Article 5, or from the residence, place of work or educational establishment of the protected person; f) prohibiting the offender from travelling to certain localities or specified areas which the protected person frequents or visits regularly; (g) an obligation on the offender to wear an electronic surveillance device at all times; (h) a prohibition on any contact, including by telephone, correspondence or any other means, with the victim; (i) an obligation on the offender to hand over to the police any weapons he or she has; (j) the custody of minor children or the establishment of their residence; (k) a prohibition on the offender's receiving state child allowance and an order that the parent to whom the child has been entrusted for upbringing and education or with whom the child's residence has been established receive it. "(Article 38(1)).

In addition to these measures, the court may order the perpetrator to bear the costs of renting and maintaining temporary accommodation for the victim of domestic violence, her minor children and other family members (Article 38(3)) or to undergo psychological counselling, psychotherapy and may recommend voluntary commitment (Article 38(4)).

In judicial practice, it has been held by the courts that, under Article 38 para. 4 of Law no. 217/2003, that the aggressor must attend psychological counselling courses at the Assistance Centre for Aggressors in X., taking into account the self-control difficulties manifested by the respondent, the fact that more than 6 months have passed since the dissolution of the marriage without him being aware of the fact that the petitioner is free to interact with other male

persons, taking into account also the fact that the respondent is a drug and alcohol consumer, showing depressive behaviour (*Dec. civ. no. 107/2023 of 14.09.2023 of the Court of Arad, available on www.rejust.ro)*

In justified cases, the court has the possibility to request, under the terms of the Law on Mental Health and Protection of Persons with Mental Disorders no. 487/2002 (republished in the Official Journal of Romania, Part I, no. 652 of 13 September 2012), the non-voluntary admission of the aggressor; if the aggressor is a consumer of psychoactive substances, the court may order, with his consent, the integration in a programme of assistance to drug users *(art. 38 para. 4 Law no. 217/2003).*

If the civil court grants the application for a protection order, it may also establish control measures on the part of the authorities to monitor compliance with the obligations and prohibitions laid down, which may consist of an obligation for the aggressor to report to the police station designated to supervise compliance with the protection order at intervals set by the court; to provide information on the new home, if eviction from the family home has been ordered, and regular and/or spontaneous checks on the whereabouts of the person against whom the order has been issued *(Art. 38 para. 5 Law no. 217/2003).*

The court, having regard to all the circumstances of the case, has exclusive jurisdiction to decide on the duration of the protection and supervision measures referred to in the protection order, the legislature limiting itself, by Article 39 of Law No 217/2003, to laying down the maximum duration for which those measures may be ordered, namely 12 months from the issue of the order, and to establishing a presumption as to the duration of the measures if no mention is made in the judgment as to their duration, namely the maximum duration referred to above.

In order to ensure effective protection of victims, the legislator has established mechanisms to ensure that, in justified, urgent cases, the protection of the law is obtained, i.e. the protection order against the aggressor.

Thus, in order to remove the difficulties involved in drawing up an application for a protection order enabling the victim of domestic violence to obtain state protection as quickly as possible, a pre-established form is made available to the victim of domestic violence (Article 41(1), annexed to the Framework Law, and the police officer investigating the complaints, even if he considers that the requirements for issuing the temporary protection order are not met, is "obliged to inform the persons claiming to be victims of domestic violence about the possibility of making an application for the issuance of a protection order according to the provisions of Art. 38 and to provide them with the application form provided for in Art. 41." (Art. 28(5)).

The legislator has also removed any financial barriers by exempting civil actions for the issuance of a protection order from stamp duty *(Article 41(2) of Law 217/2003).*

With regard to legal aid, we note that, although Law 217/2003 provides that the legal assistance of the person requesting the protection order and of the aggressor is compulsory (Article 42(2) and (3)), the law does not specify the cost of the fees of the court-appointed defence counsel.

Under these circumstances, judicial practice is not uniform on this matter.

There are civil courts which consider that, since legal aid is compulsory, the fees of the public defender are to be paid out of the State budget and leave these costs to the State (in this regard, civil judgement. no.546/15.09.2023 of the Tribunal Sibiu, civil judgement no.193/07.06.2023 of the Tribunal Suceava, civil judgement no.107/14.09.2023 of the Tribunal Arad, civil judgement nr.1383/15.09.2023 of the Tribunal Iași) but there are also courts which oblige the plaintiff or the defendant to pay the fees of the lawyers appointed by the court (dec. civ.nr.1169/13.09.2023 of the Tribunal Dolj) *(all available www.rejust.ro).*

Regarding the court hearing, in order to protect the privacy and image of the parties, the legislator has established that the trial of civil actions concerning protection orders shall take place in chambers and, in view of the role conferred on the Public Prosecutor's Office by Article 131 of the Romanian Constitution as representative of the general interests of society and defender of the rule of law, with the mandatory participation of the prosecutor *(Article 42(1) of Law 217/2003).*

These types of cases are tried in urgent procedure, being exempted from the procedure of regularization of the request for judgment provided for in Articles 200 and 201 of the Civil Procedure Code, the time limit for summons is reduced, the urgent rules of summons apply, and in particularly urgent cases the court may pronounce a decision without summoning the parties, the case being decided exclusively on the basis of the request and the documents submitted with it without the need to hear the conclusions of the parties *(Article 42(4) and (5) of Law No 217/2003).*

Specialized literature has pointed out that the law establishes that the summons period is the one applicable in urgent cases "the judge's assessment will not concern the reduction itself, but the duration of the reduction" (Tăbârcă, M., Drept procesual civil, procedura contencioasă în fața prima instanța. Judicial non-contentious procedure, 2nd edition, vol.II, Solomon Publishing House, Bucharest, 2017, p.175) and the summons must expressly state that the time limit has been reduced.

Regarding the probatory evidence, the legislator has stipulated in Article 42(6) of the Law that "evidence which requires a long time to be taken is not admissible".

Therefore, the court may receive the documents submitted by the parties within the time-limit, hear the witnesses who were present at the time-limit or take evidence by questioning the parties present in the courtroom.

The court may postpone its decision for a maximum of 24 hours, and the reasons for the decision must be drafted within 48 hours of the decision (Article 42(8)), the legislator requiring that the entire procedure in which the civil court decides the application must not exceed 72 hours from the time of its submission, except where a provisional protection order has been issued in the case (Article 42(9)).

The alleged victim of domestic violence has the right to dispose of the application for a protection order, even in cases where it has been made on her behalf by another person, as is clear from the interpretation of Article 43 of Law 217/2003.

The judgment issuing the protection order is found to "have, from its pronouncement, the authority of res judicata" and "represents an enforceable title" (Boroi G., Stancu M., Drept procesual civil, editura Hamangiu, București, 2015, p.561).

It should be noted that, while the victim of domestic violence could have withdrawn the application for a protection order prior to the court judgment, after the order has been issued and has become final, compliance with the order is mandatory even for the person in whose favour it was issued, as is clear from the provision of Article 44(1) of the Convention. 3.

IV. MECHANISMS TO PROTECT VICTIMS OF DOMESTIC VIOLENCE IN CRIMINAL MATTERS

As we have shown above, contemporary social reality has demonstrated that it is not enough to establish mechanisms for the protection of victims of domestic violence in civil matters alone and that a stronger criminal justice response is also needed to protect victims of these forms of violence, to promptly punish perpetrators of this type of acts and to reduce the phenomenon.

In criminal matters, measures have been introduced in Romania to protect victims of domestic violence, both in substantive criminal law and in criminal procedural law.

While in civil matters, the Romanian legislator has mainly focused on taking measures to establish a mechanism for the protection of victims, in criminal matters it can be seen that there is a greater concern to ensure that persons who commit offences involving (active and passive) family members are held criminally liable.

If in civil matters the term family member covers a broad category of persons, in substantive criminal law the legislator has restricted this concept to ascendants and descendants, brothers and sisters, their children, as well as persons who have become by adoption, according to the law, such relatives (in case of adoption, also the adopted person or his descendants in relation to the natural relatives), the spouse, persons who have established relationships similar to those

between spouses or between parents and children, if they live together *(art. 177 para. 1 and para. 2 of the Criminal Code).*

It has been remarked in the doctrine that "according to the current regulations, the notion of "family member" extends to cohabitants and relatives, as well as to any other persons, under two conditions: they must have established relations similar to those between spouses or between parents and children and they must live together" *(Chiș I., Dobrinoiu, M., Dobrinoiu, V., Gorunescu, M., Neagu, N., Pascu, I., Pascu, M.A., Păun, C., Sinescu, M.C., p.80).*

In order to consider the commission of an offence that can be classified as domestic violence, within the scope of protection of the criminal law, it is necessary "the capacity of spouse of the active and passive subject that must exist at the time of the commission of the act. The offence subsists even if the spouses live separately" *(Ibid. p. 79).*

This is one of the main differences between civil and criminal matters concerning the concept of victim of domestic violence.

While in the view of Law No 217/2003 the ex-spouse is also considered to be a family member, without fulfilling any additional conditions, benefiting from the special protection of civil law, in the view of the criminal code, it is necessary that this special quality exists at the time of the offence or that the ex-spouse lives and cohabits with the defendant.

At the same time, in criminal matters, the judicial authorities have to take into account whether the perpetrators of crimes related to domestic violence are adults or minors. In this regard, it has been recognised that young people, not having fully developed personalities, "need special attention and assistance in order to develop mentally and intellectually and to integrate better into society, and must be protected by the law under conditions that guarantee their peace, freedom, dignity and safety" (Alexandru, M., Franguloiu, S., p.9).

In criminal matters, the legislator has chosen to punish persons who commit offences involving acts of violence against family members, either by separate incrimination or as an aggravating circumstance, in all these cases the punishment provided by law for these acts being more severe, considering the special status of the active subjects.

The Criminal Code in force brought as a legislative novelty the regulation of a new crime, namely Domestic Violence, with its own nomen juris.

According to Art. 199 para. 1 of the Penal Code, with the marginal name of "Domestic Violence", "the acts provided for in Art. 188, Art. 189 and Art. 193-195 committed against a family member are criminalized, the special maximum penalty provided for by law is increased by one fourth.

In the light of previous criminal legislation, the commission of the offence of assault or other violence, the offence of bodily harm or the offence of murder against a family member appeared as an aggravating circumstance but, as noted in

the doctrine, "did not exist in the case of serious bodily harm and assault or injury causing death" (*Chiș, I., s.a. Ibidem, p. 78).*

It has been mentioned in the specialized doctrine that "the separate regulation of the crime of domestic violence is nothing more than the aggravated version of some crimes against life or corporal integrity, which was imposed in order to eliminate the gaps and inconsistencies caused by the successive amendments of the previous Criminal Code" (Ibidem).

It should be noted that in the case of the offence of domestic violence provided for in Article 199 para. 1 in relation to the provisions of Art. 193 and Art. 196 of the Criminal Code, i.e. the offences of assault or other violence and culpable bodily harm, criminal proceedings may also be initiated ex officio, but the legislator has further established in Art. 199 para. 2 final sentence of the Criminal Code that "reconciliation of the parties removes criminal liability".

As has been argued in specialist doctrine, reconciliation of the parties "constitutes a bilateral act, necessarily implying the consent of the injured party and the accused" *(Damaschin, M., Neagu, I. p. 294)* and has the meaning of "clemency of the victim which has greater influence on the offender (obviously in limited cases) than the severity of a sanction" *(Oancea, I., p.478 apud Giurgiu, N., p.427).*

Therefore, in the case of domestic violence offences, the victim of the offence has a right of disposal over the prosecution.

In the current legislator's view, the crime of rape is regulated as a form of domestic violence under Article 218 of the Criminal Code, and the literature states that "rape of a spouse, of brothers' or sisters' children or of persons who have become such relatives by adoption is the standard form of the crime, while rape of relatives in the direct line, brothers or sisters is the aggravated form of the crime" (*Chiș, I., p. 166*).

In our opinion, the current regulation and the recognition that rape can also be committed against the husband is a positive development of the legislator and judicial practice, representing a recognition of the status of the husband as a victim of the crime of rape.

Earlier doctrine did not recognise the status of a wife who was forced to have sexual relations against her will as a victim of the crime of rape. It was thus held that "a man who commits such an act against his wife does not commit the crime of rape. The existence of marriage presupposes the woman's consent to sexual relations with her husband, and if this consent is no longer maintained, she may end the conjugal life by dissolving the marriage through divorce" (*Bulai, C., Dongoroz, V., Fodor, I., Iliescu, N., Kahane, S., Oancea, I., Roșca, V., Stănoiu, R., p. 331*).

Even if rape committed against the spouse is not currently incriminated as an aggravating circumstance of the offence provided for by Article 218 of the Criminal Code, it is in the light and wisdom of the judge, depending on all the

circumstances of the case, to determine the penalty that reflects the seriousness of the act of rape committed against the spouse.

At the same time, a protection mechanism for victims of domestic violence offences is also represented by the possibility for the court to apply to the defendant, in the event of a conviction, where the penalty is imprisonment, the accessory and complementary penalties regulated by Article 66(2) of the Criminal Code. 1 lit. e, lit. n and/or lit. o of the Criminal Code, namely the prohibition of parental rights, the right to communicate with the victim or his/her family members, with the persons with whom he/she committed the crime or with other persons, determined by the court, or to approach them, and the right to approach the victim's home, workplace, school or other places where the victim carries out social activities, under the conditions determined by the court.

The above-mentioned additional penalties constitute a special form of protection for victims of domestic violence and ensure that the perpetrator does not contact the victim after the sentence has been served.

Recent studies state that "the purpose of the additional penalty under letter o) is to prevent the convicted person from being in the places indicated and in this way to prevent revenge against the victim" (*Boroi, A., p. 494).*

If the perpetrator of the assault who has also been sentenced to the accessory and supplementary penalties provided for in Article 66(1)(a) and (b) is convicted of an offence under Article 66(1)(a), the offender shall be liable to the penalty provided for in Article 66(1)(b). 1 lit. e, lit. n and/or lit. o of the Criminal Code evades its execution or does not execute it according to the law, commits the offence of non-execution of criminal sanctions provided for and sanctioned by Art. 288 para.1 of the Criminal Code.

The criminalisation of the offence provided for in Article 288 para. 1 of the Criminal Code is a normal state of affairs, given that the additional and accessory penalties are established by a court decision, which, as established in the literature, "does not only contain the assessment and resolution of the case, but also constitutes an act of disposition. What the court has ordered by a final judgment becomes binding and enforceable both on the parties concerned by the judgment and on the bodies called upon to enforce it." *(Volonciu, N., p. 164).*

Moreover, under Law 217/2003, also as a form of protection of the victim of domestic violence, the violation by the person against whom a protection order has been issued of any of the measures mentioned in the order and the violation by the person against whom the provisional protection order has been issued of any of the measures established by the provisional protection order constitute offences, according to Art. 47 para. 1 and para. 2.

It is relevant that the offences mentioned in the previous paragraph persist irrespective of the conduct of the person in whose favour the protection order was issued, because, as already stated above, under Article 44 para. 3 of the

aforementioned act, compliance with the protection order is also mandatory for the victim.

Also as a special form of protection, the legislative has established that, as of 01.01.2024, in the case of rape and sexual assault offences provided for by Art. 218, 218[1], 219 and 219[1], the statute of limitations shall not remove criminal liability (Art. I, paragraph 1 of Law no. 217/2023[3]).

With regard to the protection mechanisms for victims of domestic violence offences provided for by criminal procedural law, it is worth mentioning the right of the injured party to request to be informed, in the event that the defendant is deprived of his liberty, "of his release in any way or his escape" provided for by Article 111(2) of the Criminal Code. 5 C.pr.pen., as well as the fact that the law of criminal procedure presumes that victims of domestic violence are vulnerable victims and several special protection measures must be taken against them *(art. 113 para. 2 C.pr.pen.).*

By *lege lata*, being presumed vulnerable victims, according to Art. 111 para. 6 and par. 7 C.pr.pen., the judicial body may order, when there is this possibility, and when it considers, with reasons, that it does not prejudice the proper conduct of the trial or the rights and interests of the parties: the hearing of the injured person in premises designed or adapted for this purpose or through or in the presence of a psychologist/other specialist in counselling victims and as far as possible their hearing, as well as their possible rehearing is carried out by the same person (Franguloiu, S., p.).

By law from 01.01.2024, as additional protection measures for victims of domestic violence crimes, they will be provided with compulsory legal assistance (Art. II, para. 2 of Law no. 217/2023), they will be able to be heard by videoconference or other technical means of communication at the place where they benefit from the protection measure of temporary accommodation, and their statement will be recorded, without exception, if the victim is a minor (Art. II, para. 3); the hearing will be declared non-public ex officio or at the request of the injured party/prosecutor (Art. II, para. 6); cases involving minor victims will be heard urgently and in priority (Art. II, para. 7), when the injured person is a minor under 16 years of age and the judge considers that the taking of certain evidence may have a negative influence on him/her, the minor will be removed from the hearing and the injured person will be heard only in duly justified cases (Art. II, para. 8).

V. CO-EXISTENCE OF CIVIL AND CRIMINAL PROTECTION MECHANISMS FOR VICTIMS OF DOMESTIC VIOLENCE

The protection mechanisms for victims of domestic violence established by the legislator in the two areas, civil and criminal, are not mutually exclusive;

[3] Published in the Official Gazette of Romania no. 634/11 July 2023

on the contrary, they are designed to complement each other in order to ensure that the victim does not benefit from illusory, ineffective rights.

The legislative authority itself has established that "the issuing of the provisional protection order does not prevent the taking of a preventive measure under Law No 135/2010" *(Article 28(6)).*

Judicial practice has established that the same person, alleged perpetrator of an act of domestic violence, may be issued a protection order, as well as to order the measure of preventive arrest *(Decision no.22/AUP/2019 of the Suceava Court, unpublished, which ordered the preventive arrest of the defendant, noting that previously against him was issued, by s. c. no.1764/16.04.2019 of the Suceava Court, a protection order).*

In accordance with the above, we note that by civil judgement no. 6658 of 2023 of the Court of Sect. 1 Bucharest – first instance (unpublished) a protection order was issued against the respondent, although by the conclusion of 26.07.2023, pronounced by the same court (unpublished), the alleged aggressor was preventively arrested.

However, there have been civil courts which have held that a victim protection measure is not required under the provisions of civil law where the alleged offender is under pre-trial detention.

In this regard, by civil judgement no. 2401/2023 of the Suceava Court – first instance (unpublished), it was held that as long as the defendant, the defendant in question, was ordered to be placed under preventive arrest, and when this measure is replaced or expires, the judicial authorities may order the same measure as the one requested in the present case (keeping a distance from the victim), the civil action lacks one of the elements required by Article 32 of the Civil Procedure Code, i.e. the interest to act, which is why the application was rejected accordingly.

In the contrary sense, by civil judgment no.193/2023, the Suceava Court (second instance) stated that the purpose of the two measures differs, the issuing of the protection order being a civil procedural measure, which removes a state of danger for the victim, while the preventive arrest is a criminal procedural measure, aimed at removing a potentially dangerous state affecting public order. The protection order may be issued for a period of 6 months and the preventive measure for a maximum of 30 days with the possibility of extension, and nothing prevents the court from ordering in parallel a civil procedural measure, the main objective of which is to protect the victim, given that in this case the aggressiveness of the defendant and his dangerousness to members of his family have been fully proven (available at www.rejust.ro).

CONCLUSION

As it is obvious, the protection of victims of violence is a desideratum that must constantly concern the judicial authorities of the state, especially since reality has shown that domestic violence is a major problem of Romanian society.

In our opinion, the legislator has now succeeded, through legislative amendments, including Law No 217/2023, in bringing both civil and criminal legislation into line with the standards imposed by the above-mentioned ECtHR decisions, as well as with European legislation.

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SARA Law **R**esearch **C**enter
International **J**ournal of **L**egal and **S**ocial **O**rder, https://www.ccdsara.ro/ijlso
ISSN 2821 – 4161 (Online), ISSN 2810-4188 (Print), ISSN-L 2810-4188
N°. 1 (2024), pp. 190-207

THE IMPLICATIONS OF AI IN E-COMMERCE

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Received 29.10.2024; accepted 20.11.2024
First online publication 21.11.2024
DOI: https://doi.org/10.55516/ijlso.v4i1.201

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Abstract

This research discusses the implications of Artificial Intelligence "AI" on E-Commerce, the integration of AI in E-commerce has revolutionized the digital marketplace, by improving consumer engagement, efficiency, and personalization through the integration of AI with E-commerce (Andy Pandharikar, Frederik Bussler, 2022, p.42). However, this dynamic collaboration additionally brings with it a host of legal hazards and risks that demand careful consideration (Dave Chaffey, Tanya Hemphill, and David Edmundson-Bird 2019, P.29).

This study explores the core ideas of E-Commerce, clarifying its meaning, importance, legal structure, and regulatory agencies to create a thorough grasp of the E-commerce environment. Similarly, an in-depth analysis of AI is presented, encompassing its definition, diverse applications across fields, and an exploration of the risks inherent in AI operations. By scrutinizing the benefits and risks associated with the application of AI in E-commerce, including emerging technologies like blockchain, smart agent utilization, and other pertinent risks, this study aims to provide a nuanced perspective on the legal implications facing businesses operating at the intersection of AI and E-Commerce.

This research aims to provide light on the intricate legal challenges and prospects for compliance in the ever-changing field of AI-driven E-commerce by using a thorough and academic approach.

Key words: *(E-commerce, Artificial Intelligence, Blockchain, Smart Agent, & Emerging technologies).*

INTRODUCTION

The main advantage of globalization is that it promotes the dissemination of technology and information, including investments in human resources,

education, and local R&D projects that are crucial to developing the ability to learn and use knowledge effectively *(Steger 2024, P.38)*. This necessitates a suitable level of privacy protection as well as respect for intellectual property rights both domestically and globally *(Radi Romansky, Irina Noninska, 2015)*.

The emergence of modern digital technology, such as big data, AI and the Internet of Things, has imposed new realities through a set of opportunities and risks that have destabilized existing economies, introduced the concept of the information society to the knowledge and digital economy, and contributed to a qualitative and accelerated shift in shaping a new global political and economic landscape *(Vogelsang 2024, P.52)*.

I. THE ESSENCE OF E-COMMERCE

E-commerce has become progressively more popular in recent years. According to recent statistics, 2.71 billion individuals worldwide, or around 33% of the world's population, purchase via E-commerce platforms. Experts predict that the E-commerce sector will increase its valuation from its current $6 trillion to $8 trillion by 2027 *(CommerceSellers 2024)*.

This chapter elaborates the Definition, the Importance of E-commerce, and Legislations and Authorities regulating E-Commerce on the following.

A) The definition of e-commerce

The World Trade Organization defines E-commerce as the activities of producing, distributing, marketing, selling, or delivering goods and services to the buyer through electronic media *(Buster 2017)*.

The OCED defined E-commerce as It encompasses all types of economic transactions, whether written, visual, or audio, that involve businesses or individuals and rely on the electronic exchange of commercial data. It also covers the effects of the method and how much it affects the systems and procedures that regulate and support various business operations *(OECD 2009, P.94)*.

Thus, it becomes clear that it is a digital, technical development of traditional trade through a set of economic operations related to the sale or purchase of products, services, and information, concluding contracts, and paying the purchasing value remotely, via various networks, such as the Internet or any local or global network.

B) The importance of e-commerce

Extrapolating the definition of E-commerce, it becomes clear that there are benefits achieved from using E-commerce methods in the field of international trade.

1. Expansion of the trading area

Traditional commerce needs a tangible market where the customer can go to buy, while electronic commerce transcends the borders of countries and is free

from access restrictions[1]. It exists everywhere and at all times, where anyone can view the product and buy it.

2. Global standards

These are the standards or standards of the Internet, through which E-commerce transactions are carried out uniformly among countries of the world, while traditional trade is subject to local standards and standards that differ from one country to another *(Svatosova 2020, P.145)*.

In all cases, the application of E-commerce requires the availability of electronic infrastructure, such as the information and communications technology sector, which includes wired and wireless communication networks, communications devices, technical support services, and human capital used in business and E-commerce, in addition to the availability of sectors producing information technology *(Kumar, M Thinesh; Kumar, N.; Sha, S Nazim; Kennedy, E Noble; M Ilankadhir 2024)*.

C) LEGISLATIONS AND AUTHORITIES REGULATING E-COMMERCE

This Part sheds light on the role of the WTO, UNCITRAL, OECD, Federal Trade Commission, and the League of Arab States' Economic Unity Council on the following:

1. World trade organization

The World Trade Organization is considered one of the most important international economic organizations due to the number of countries joining it and the areas it covers, as well as the results that result from it. In furtherance of achieving the role assigned to the organization in terms of digital transformation or applying competitiveness, there are two types of World Trade Organization agreements:

First, the Agreement on Liberalization of Trade in Services (GATS): This agreement subjected service activities to an international agreement for the first time in history. The signatory countries committed to the agreement on April 15, 1994 in Marrakesh to achieve complete liberalization of the aforementioned services *(GATS 1995)*.

Second: TRIPS agreement: TRIPS agreement sets out the minimal requirements for WTO member countries' commerce in terms of protecting intellectual property. It addresses topics such as industrial designs, patents, trademarks, and copyright. In order to promote trade and investment, it seeks to guarantee that intellectual property rights are upheld and safeguarded internationally *(TRIPS 1994)*.

2. Uncitral rules

[1] Mustafa Seref Akin, Enhancing E-commerce competitiveness: A comprehensive analysis of customer experiences and strategies in the Turkish market, Journal of Open Innovation: Technology, Market, and Complexity, 2024.

The objective of UNCITRAL, a legal organization housed inside the UN system, is to further the unification and harmonization of international trade law. In order to handle several facets of international trade, including commercial arbitration, electronic commerce, and cross-border transactions, UNCITRAL creates model laws and legal instruments *(UNICITRAL 1996-2001-2017-2019)*.

In 1996, the rules guaranteed equal treatment between electronic and paper information and legal recognition of electronic transactions and operations, based on the basic principles of non-discrimination against the use of electronic means, functional parity, and technological neutrality. In 2001, additional rules were stipulated regarding the use of electronic signatures. In 2005, the United Nations Convention on the Use of Electronic Communications in International Contracts was based on UNCITRAL texts to constitute the first treaty guaranteeing legal certainty for electronic contracting in international trade.

In 2005, the United Nations Convention on the Use of Electronic Communications in International Contracts was based on UNCITRAL texts to constitute the first treaty guaranteeing legal certainty for electronic contracting in international trade. It adopted electronic transferable records in 2017, which apply the same principles to enable and facilitate the use of electronic forms of transferable documents and instruments, such as bills of lading, checks, promissory notes, and warehouse receipts. In 2019, the UNCITRAL Rules agreed to publish notes on key issues related to cloud computing contracts while continuing its work on developing a new instrument on the cross-border use, trust, and recognition of identity management services.

3. The organization for economic co-operation and development guidelines:

The objective of the OECD is to support countries to develop laws that encourage confidence and trust in online transactions. On a variety of E-commerce-related topics, such as consumer protection, digital security, cross-border data flows, and regulatory frameworks, the OECD publishes reports, research, and policy recommendations. It has created standards and principles for data protection and privacy in the digital economy, highlighting the significance of fair dispute resolution procedures, effective enforcement of consumer rights in digital transactions, and clear and transparent information for online consumers.

4. The federal trade commission

(FTC) is a prominent regulatory body in the United States, which oversees E-commerce practices. Its mission is to protect consumers from deceptive and unfair business practices, and the Commission actively investigates allegations of false advertising, privacy violations, and anticompetitive behavior *(FTC 1914)*.

5. The league of arab states' economic unity council

Arab countries are no less interested in E-commerce than other countries, and this is clearly evident through the Economic Unity Council of the League of Arab States, as well as the draft Arab laws that attempted to give definitions, as well as the role of the E-Commerce.

In general, E-commerce laws vary greatly from one country to another, between consumer protection laws, data privacy security, and intellectual property protection. For example, the Children's Online Privacy Protection Act protects children's online privacy in the United States of America *(COPPA 2018)*, and the General Data Protection Regulation (GDPR) governs data protection and privacy in the European Union *(GDPR 2018)*.

II. AI EVOLUTION: ECOMMERCE INNOVATION BY SMART AGENTS AND BLOCKCHAIN

As a consequence of the Internet of Things, the digital revolution, and technical advancements, AI has become a part of everyday life. This part provides an explanation of AI's definition, characteristics, and areas of its application. Following that, heading into great depth, the role of the smart agent and blockchain supported by AI in E-commerce operations

A) The Essence OF AI

1. Definition of AI

There are various definitions of AI, The World Intellectual Property Organization defines it as a field within computer science that aims to create machines and systems that can perform tasks that require human intelligence, either with minimal or no human intervention *(WIPO 2022)*.

AI can be described as a collection of gadgets, programs, and algorithms that replicate human behavior and reactions *(Chowdhary 2020, P.52)*. Based on automated self-learning in analyzing data, allowing such to learn from experience, generate conclusions, identify patterns, comprehend language, and use visual perception to make predictions or suggestions, or make choices to solve issues with a high degree of precision and a low mistake rate, much like human intelligence.

2. Main Characteristics of AI

From the Definition, it is clear that AI contains of two main characteristics:

2.1. The Machine's ability to simulate the cognitive function of humans

The primary goal of deploying AI is to perform human cognitive functions by carrying out tasks that people typically complete accurately and proficiently, regardless of whether humans have mastered or learned these tasks beforehand.

While the initial focus of AI research was on simulating human intelligence, efforts have since evolved to create autonomous systems that can rival human intelligence and consciousness. These systems allow machines to use their inherent abilities, which are programmed into them, along with library skills, to solve some complex problems, which is challenging for humans to solve easily *(Daudet 2024, P.71)*.

2.2. The Ability of Prediction, Forecasting, Automatic Thinking, and Machine Learning:

Without the need for human intervention, it can learn from and adapt to its environment by gathering, analyzing, and linking data and information. This helps to disseminate a greater amount of infinite data that is unavailable to humans and, in doing so, contributes to the quick solution of problems and provision of alternatives.

3. Areas of AI Application

The fields in which artificial intelligence is happy are varied. We mention the following the most important of these fields:

3.1. Biometric Identity Verification

AI systems can analyze and compare user biometric data, such as fingerprints, iris, and voice, with high accuracy and speed to ensure the authenticity of identity. It can also be used to prevent unauthorized access to systems and data, such as recognizing faces when entering the door of a house.

3.2. Detecting targeted Cyberattacks

AI technologies can monitor data traffic patterns and analyze unusual behavior in the network. Artificial intelligence systems are also trained to identify common features between known attacks and infer from this the presence of potential attacks earlier in a more intelligent and effective way and take measures to address them before they occur. Investing in developing and adopting these technologies is a crucial step towards building a regulatory environment on the Internet *(Huseyin Ahmetoglu and Resul Das 2022)*.

3.3. Behavior and Predictive Analysis

The ability of AI to analyze the behavior of users and systems using machine learning and intelligent data analysis is an essential part of security strategies that aim to enhance cyber protection and prevent cyberattacks before they occur. An AI system, for instance, can keep an eye on users inside a particular system, recording any efforts by users to get illegal access or transmit unusual amounts of data, and gather information about possible attacks. The same objective is also assisted by predictive analytics, which monitors and analyzes large data to support decision-making and the application of security measures based on successful prevention and prediction *(Mohamed Chawki and Mohamed Saeed 2024, P.151)*.

3.4. Smart Encryption

Astute AI encryption methods aid in preventing unwanted access to sensitive personal data. These tools should get more sophisticated and effective as technology advances, improving security services' capacity to stop these crimes and uphold digital security.

B) The Role of the Smart Agent and Blockchain supported by AI in E-commerce operations

The effects of AI technologies have extended to more than one sector, the most important of which is the e-commerce sector, because it represents the mainstay of the success of their companies and businesses, starting from predicting customer behavior all the way to reducing the data entry process, following consumer patterns, and raising product efficiency, which makes AI became indispensable in business life in an unprecedented way.

The unprecedented scientific and technological development has led to the introduction of modern means of contracting, which have contributed greatly to the development of traditional contracting methods, replacing them with modern technologies. This part discusses two of the most important types of modern contracting methods, namely smart agent technology and blockchain technology.

1. The Role of the Smart Agent supported by AI in E-commerce operations

This part explains the definition of a smart agent, its characteristics, and the role in concluding smart contracts.

1.1. Definition of Smart Agent

In the general rules of law, agency means a contract according to which the agent is obligated to perform legal work on behalf of the principal, and the agent is obligated to implement the agency without exceeding its stated limits. However, the agent may deviate from the limits of the agency if it is impossible for him to notify the principal in advance and the circumstances make it likely that the principal would only have agreed to this behavior. The agent shall then inform him of that action, and therefore it becomes clear that agency in its traditional sense depends on the client's trust in the agent and his well-known knowledge of the agent.

Nevertheless, as technology has advanced, civil and business transactions have moved from the real world to the virtual one. This is due to the vast information network found in the Internet of Things and the electronic cloud, as well as the enormous and never-ending supply of electronic goods and services. The rise of the smart agent can be attributed to the practice of many computer program designers developing a software mechanism that makes goods and services more accessible by allowing network users to authorize transactions and other commercial actions in a simple and convenient manner.

The Smart Agent can be defined as a combination of information technology and artificial intelligence programs that operate automatically, independently, without human control, and are used to take an action or respond, in whole or in part, to data messages, tasks, or actions on behalf of their user. In doing so, it shows a great degree of flexibility, learning, adaptation, communication, and interaction with its user and the environment in which he is present. The smart agent assigned to a specific task by its user, such as purchasing a commodity or obtaining a specific service, navigates the Internet to find the required commodity or service after negotiating its price, researching its

conditions, and comparing it to similar goods and services offered digitally *(Algabri 2023, P.42-47)*.

1.2. Main Characteristics of Smart Agent

It is clear from the previous definitions that a Smart agent has several characteristics that make it very close to the role of a natural agent *(Salama 2024, P. 2517.)*.

1.2.1 The Independence of the Smart agent in making decisions from its user and from other agents

The normal situation for any technology or computer program is that its outputs are determined according to its inputs. This is in contrast to the situation with the smart agent, where it is provided by its user with some data related to the tasks he wants to carry out, but it does not remain constant. The smart agent changes it and builds on it. He renews it every time he deals with a consumer or another agent, so that he can benefit from his expertise and practical experience. It is clear from this that the smart agent has control over its inputs, actions, and outputs, according to the data it obtained from its user, or collected about the requested good or service, or from those dealing with it, and this is what distinguishes it from other software and traditional search engines.

1.2.2. The Ability to take initiative and react

The agent is able to modify his behavior and interact with his environment the smart agent does not limit his work to the user's supervision and guidance, but rather takes the initiative and changes his reactions to achieve his goal whenever the environmental conditions in which he works are appropriate.

1.3. Smart Agent's role in concluding smart contracts

A smart agent can enter into contracts and acts on behalf of the buyer or the seller *(Brahim Bouhentala and Fahima Guessouri 2024, P.412-417)*.

1.3.1. The ability of the smart agent to conclude contracts and actions on behalf of the buyer

First, the smart agent plays an important role in identifying and searching for the buyer's needs through the data he enters on websites. Then the smart agent collects information and data about the requested good or service and classifies them into lists, comparing all the goods and services offered in terms of price and quality, while recommending to the buyer to buy a specific type, stating the reason for him, and negotiating their prices and contracting terms through previous experiences and acquired expertise. The smart agent can also pay the agreed-upon price using the consumer's credit card, the data of which he previously provided to the smart agent he uses.

1.3.2. The ability of the smart agent to conclude contracts and actions on behalf of the seller

On the other hand, thanks to blockchain technologies, sellers can know all the information and data about the consumer or other merchants, as the technology helps the seller by collecting consumer data, their consumer and

purchasing tendencies, and their preferred services. So that the seller can easily target these people with new goods and services that are consistent with his inclinations, to entice him to buy, conclude contracts, deliver the products, collect the price, provide after-sales service information, and evaluate the selling experience conducted by the buyer. This technology is considered better for the seller and easier than using it for any other marketing method, which provides the required goods or services very quickly and with high accuracy, better than traditional search engines.

2. The Role of Blockchains supported by AI in E-commerce operations

This part discusses the essence of Blockchain and its most important characteristics.

2.1. The Essence of Blockchain

The tremendous development in the field of the Internet has led to the emergence of blockchain technology, through which information can be exchanged and contracts can be concluded with a system of higher security and privacy. It is also characterized by autonomy from its users, especially in sales, supply, and insurance operations.

It is defined as an open-source, decentralized database that relies on mathematical equations and cryptography to record any transaction, deal, or information, such as cash transactions, the transportation of goods, or general information *(Ssumita Ruj, SALIL Kanhere, and Mario Conti 2024, P.33)*. It is clear from this definition that blockchain technology is a platform that embodies the largest distributed digital record, open to everyone, through which the largest amount of transactions can be stored in a decentralized ledger or database. It is characterized by being an impenetrable platform and not subject to modification, change, or distortion in any way. Once the transaction is completed, it cannot be changed or reversed, which achieves the highest degree of security.

Commercial contractual relationships are easily documented through this technology. For example, the first person's possession of the item sold is documented and verified by reviewing the book of contracts previously registered in the blockchain. It is also verified that the second party owns the required monetary value of the item sold, in the event of a contractual agreement. In the transaction, ownership is transferred from the first party to the second party and is documented in a constantly updated contract book. Therefore, this technology replaces traditional intermediaries, such as banks in the framework of money transfer operations, or the Real Estate Registry Department in registering properties, and the brokerage shop in sales and rental operations *(Horiachko 2023).*

2.2. Main Characteristics of Blockchain

Contracts and legal transactions concluded via blockchain technology are characterized by several characteristics, the most important of which are:

2.2.1 Technology that cannot be changed, modified or distorted

One of the most important characteristics of blockchain technology is that the data recorded in it cannot be deleted, modified, or distorted, which brings many benefits during the registration processes, transfer of ownership, and concluding smart contracts. In fact, despite the benefits provided, this feature can be criticized as this stagnation in modifying data has a negative impact, especially in the case of an error in transmission or documentation, as it is not possible to modify what was done regarding it.

2.2.2 The Decentralized nature of the technology

Blockchain technology does not depend on a centralized system in the process of storing, auditing, and processing data. This means that the data that is stored in it will not be with the state agencies, but rather will be present in a data book, a copy of which is available to all citizens, which makes tampering with the data in this platform almost impossible, which makes it difficult to lose, hack, or modify this data, which has a high degree of transparency and privacy *(Javad Zarrin, Hao Wen Phang, Lakshmi Babu Saheer & Bahram Zarrin 2021, P. 2851-2853).*

This feature can be criticized because, in light of the tremendous technological development, governments' fears of losing control over it increase.

2.2.3 An Efficient Technology

Blockchain technology has a high speed in transferring data compared to other current systems. It is also low in cost and works to reduce the movement of consumers to complete their tasks, which helps reduce the costs required to complete transactions using traditional methods.

2.3.4. An Independent Technology

Blockchain consists of a group of centers. Each center is considered independent from the other, unaffected by it, and even equal to it, which achieves parity. This feature can be criticized because this independence would make it difficult to control this technology from one party if necessary *(Basher 2021, P. 28).*

III. BEYOND AUTOMATION: UNPACKING AI'S IMPACT AND RISKS ON E-COMMERCE

AI plays a significant role in how e-commerce businesses draw in and keep customers by offering unique online shopping experiences that offer a number of benefits, such as voice and visual search capabilities and the ability to use chatbots to facilitate customer interaction and determine his requirements; however, there are further dangers for it.

This part discusses How AI is used in e-commerce, then elaborates and analyzes the basic risks and challenges caused by the use of artificial intelligence in e-commerce in detail as follows:

A) How AI is used in E-commerce

This section delves into detail on each of the various uses of AI in e-commerce, including marketing, content creation, customer behavior analysis and prediction, and dynamic pricing.

1. Analyzing and Predicting User behavior:

For e-commerce businesses, analyzing users purchasing behavior is essential. By utilizing AI, more information about potential customers can be obtained, as the technology analyzes customers' browsing patterns and learns about the kinds of products they are interested in, what they have previously purchased, and how long they spend on those pages, enabling the prediction of their future preferences *(Andik Riwayat 2024, P.151-155).*

2. Marketing and Advertising purposes:

E-commerce companies employ AI to market their products. The ideal time to advertise as well as the best digital channel such as an email, social media post, or message on a mobile device for every prospective client are decided by the AI algorithms *(Grzegorz Chodak 2024, P.217-224).*

Additionally, chatbots can respond to inquiries about the product at any time and outside of designated working hours, which lessens the workload for businesses in terms of easily communicating with clients by offering a digital experience and unique content accompanied by photographs of the most appealing marketing materials, making recommendations, and lessening dependency on employees.

3. Dynamic Pricing:

The automation of price modifications is known as dynamic pricing. It entails periodically optimizing product prices using data-driven algorithms based on competition, supply and demand patterns, real-time customer behavior, and merchant feedback. With the help of artificial intelligence, dynamic pricing forecasts the best times to discount goods and calculates the appropriate price drop required to boost sales *(Yaşar 2024, P.42)*.

This eliminates the need for human input and guarantees competitive pricing for businesses.

B) The Challenges of implementing AI in E-commerce

AI systems involve various risks, and this part clarifies both the general risks of using AI systems in e-commerce and elaborates the AI risk management in accordance with the AI Law regarding the use of AI systems in e-commerce in detail as follows:

1) General Risks

The effects of AI on e-commerce are felt in a number of legal domains, thus it is important to examine critically at the implications:

1.1. The Manipulation

AI systems aim to influence the user’s decision-making. As algorithms advance, it is simpler to trick users by withholding particular information from them or giving it to them at a certain moment. As a result, manipulation might

promote impulsive purchasing, sell more things, or offer certain products. Customers' weaknesses are targeted through manipulation, which has a number of negative effects, including financial harm from forcing them to purchase products they weren't really drawn to. Additionally, it may undermine people's autonomy by interfering with their freedom to make choices about themselves *(Jon Pinney and Kyle Stroup 2020).*

1.2. Discriminations

There is no doubt that AI is not absolutely perfect, but it also has many flaws, and an error in the algorithms may easily lead to discrimination.

The use of AI in e-commerce raises concerns about potential errors that might expose users to prejudice due to inferences and analyses drawn from big data and their metadata, which includes information on their age, gender, complexion, and other characteristics. E-commerce is a sector where discrimination can occur and customers can receive distinct search outcomes on websites depending on which ethnic group is present in a certain location with a given zip code. Naturally, in this example, due to the zip code, there was discrimination or algorithmic prejudice in this case. Not based on race *(Yaşar 2024, P.44).*

Companies may use AI algorithms to deliberately differentiate the prices of certain goods in e-commerce. The huger data companies have about user, including IP addresses and user cookies, and the amount of money they recently paid to purchase products, the easier it will be to determine the highest price for certain users. However, it could have negative economic consequences for some customers.

1.3. Impact on Legal Concepts

Since AI automates operations that people have completed before, it raises concerns about how current legal frameworks, such as those pertaining to contract law, intellectual property rights, and consumer protection, apply to AI-driven e-commerce practices. AI-powered technologies, such as chatbots and recommendation engines, must comply with consumer protection laws to prevent misleading advertising and ensure fair practices and uphold consumer rights. E-commerce companies shall adhere to competition laws to prevent price fixing, market manipulation, or gaining an unfair advantage through AI technologies.

1.4. Privacy Concerns

AI algorithms depend on collecting and analyzing huge amounts of sensitive personal data about users, in order to make predictions and make decisions, so e-commerce companies must ensure transparency in collecting, using and storing data, and implement security measures to protect them from any information leakage or data breach.

To ensure transparency, e-commerce companies must also be able to explain how artificial intelligence algorithms reach the recommendations or

decisions they issue, especially in cases where they affect consumer choices or prices.

Compliance with personal data protection laws must also be ensured, as privacy laws provide many rights to users such as the right to rectification, the right to erasure, and the right to restrict processing. For e-commerce, there will be concerns about the reality of exercising those rights, for example whether the correction Effective or not, and whether the data has actually been deleted or not *(Moschovitis 2021, P.237).*

1.5. Cybersecurity Concerns

The Cyber space has many risks, and therefore applications of AI in e-commerce may witness many cyber threats, in addition to the possibility of algorithm bias leading to various discriminatory results. Therefore, cyber security measures shall be maintained in compliance with agreements that guarantee the protection of sensitive information, reduce the risk of algorithmic bias, and provide fair treatment to all users.

1.6. Cross-Border and Accountability Challenges

E-commerce operations often cross-national borders, requiring compliance with diverse legal frameworks across different jurisdictions. As AI systems make their decisions independently, assigning liability for errors or misconduct becomes difficult, so e-commerce companies shall be prepared to address legal challenges through dispute resolution mechanisms, compliance audits, and cooperation with regulatory authorities to mitigate risks. Legal effectively.

2) AI Act Risk Management:

Regarding the employment of AI systems in E-commerce

The dangers associated with "AI systems" are categorized by the AI Act, thus it's critical to understand the functions of e-commerce businesses in order to determine how the Act may impact them. Because companies will be considered service providers if they create their own AI systems. But They will be regarded as publishers if they only employ AI systems created by other entities.

2.1 Unacceptable AI System Risks

The law stipulates the necessity of prohibiting any AI systems that would carry out any form of discrimination, or any illegal activities that would assist in committing any cybercrime, or any systems that would help achieve illegal surveillance or violate the users' personal rights in any way.

The prohibited practices that are likely to occur in e-commerce are risks related to manipulation and discrimination, which are represented by the use of subliminal techniques, or the exploitation of the weaknesses of vulnerable groups, which we will explain in detail in the following:

2.1.1. Subliminal Techniques

It refers to technologies that cannot be perceived or controlled, which affect independence and decision-making ability *(Cohen 2023).*

The AI Act stipulates the prohibition of any artificial intelligence system that deploys subliminal techniques in a digital service, enabling it to intentionally manipulate or deceive the user, weakening his ability to make an informed decision and causing significant harm *(AI-Act 2024)*.

It is clear now that AI algorithms have the ability to mislead users in e-commerce through a variety of means. For example, they may conceal information regarding a particular product, create a false countdown to a discount, or use deceptive language.

The researcher believes that the act has excluded other cases that represent a high risk because it requires that the technologies be subliminal, as some subliminal technologies that customers can perceive may also cause significant harm, such as sending timed advertisements to customers when they are most likely to buy a particular product. It is also clear that the act stipulates that the technology causes significant harm, and this may cause difficulty in knowing or measuring the extent of the significant harm, as it is important that the harm be evaluated according to a case-by-case scenario.

2.1.2. Exploitation of the weaknesses of Vulnerable groups

The Act prohibits the use of an AI system that intentionally or unintentionally distorts or exploits the vulnerabilities of certain vulnerable groups, such as children, persons with disabilities, or in a specific social or economic situation. E-commerce companies may seek to exploit these groups. If they are able to develop technologies that claim not to sell products to children, it may be easy, through big data analysis, to exploit the weaknesses of customers who suffer from certain addictions.

2.2. High AI System Risk

The Act stipulates that any high-risk system that could endanger human safety or fundamental liberties, like self-driving cars, shall be implemented and adhere to a number of standards pertaining to cybersecurity, transparency, record-keeping, risk, and data management systems, among other stringent protocols. According to the act, the risks of e-commerce activities do not fall into this category because the act defines high-risk activities exclusively.

However, the researcher believes there might be significant hazards associated with e-commerce as well. Since the main goal of AI is to make people's lives easier, then the main goal for e-commerce companies ought to be to maximize profits. Therefore, even if it violates a user's fundamental rights, it is only natural for companies to ensure that the AI algorithms which gather and analyze massive amounts of data achieve the objective of profit over any other goal.

Furthermore, not every e-commerce platform may offer a human control tool for decisions made by AI or when interacting with particular groups *(Takyar 2024)*.

2.3. Limited AI System Risk

It is a type of AI system as it may be subject to a very limited risk, and the law may set some requirements for it, but they are not proportionate to the risk as risks. The most prominent examples are virtual assistants such as Siri from Apple, Google Assistant, Alexa from Amazon, and others.

Section 50 of the Artificial Intelligence Act sets out transparency obligations. The obligations that e-commerce companies must adhere to vary depending on whether they develop their own AI systems or use AI systems developed by third parties.

Since the AI system "is intended to interact directly with natural persons," as the e-commerce company is a service provider, then the service provider must disclose that the product is an AI system, unless it is obvious.

E-commerce companies need to make sure that consumers are aware that they are dealing with AI when they employ chatbots that they have designed themselves. Although the publishers, e-commerce enterprises are not required to notify natural people if they utilize a system created by third parties.

2.4. Minimal / No-Risk AI Systems

E-commerce companies need to make sure that consumers are aware that they are dealing with AI when they employ chatbots that they have designed themselves. As the publishers, e-commerce enterprises are not required to notify natural people if they utilize a system created by third parties. Although it may be expected that e-commerce businesses won't adhere to non-mandatory regulations since doing so would put a significant financial or resource strain on them, however, there is no denying that following these regulations gives them a greater reputation than other businesses.

CONCLUSION

The integration of AI applications with machines and modern technology has led to a qualitative shift in the field of electronic commerce, from smart search, voice and visual search, through chatbots and automated description of products, all the way to targeted advertisements, warehouse mechanisms, and fast shipping, which have made the online purchasing experience easy. Which helped e-commerce companies analyze customer behavior and predict their decisions, but it had a set of risks that included easy manipulation of customers, discrimination, and risks related to privacy and cybersecurity, transparency, human control, and accountability.

The AI act guarantees some of the prohibited practices, including subliminal techniques, or if the techniques result in significant harm, or if the weaknesses of Vulnerable groups are exploited. However, the researcher believes that some subliminal techniques may cause significant harm as well, which enables artificial intelligence algorithms to exploit points of the weakness of Vulnerable groups that are addicted to a certain thing is that it is difficult to

measure the major damage, and it is first that the damage be evaluated according to each case and the extent of the seriousness of the damage in each case.

The researcher believes that attention must be paid to the infrastructure that supports digital transformation, eradicating digital literacy, encouraging export activity, standardizing measurement and quality, and supporting the role of trade and professional unions. Many partnerships need to be established with international organizations, engaging in international electronic markets, and supporting international cooperation in this regard. Many binding international agreements must be made to ensure the protection of users' privacy and protect against contemporary cyber threats.

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SARA Law **R**esearch **C**enter
International **J**ournal of **L**egal and **S**ocial **O**rder, https://www.ccdsara.ro/ijlso
ISSN 2821 – 4161 (Online), ISSN 2810-4188 (Print), ISSN-L 2810-4188
N°. 1 (2024), pp. 208-214

CONSUMER PROTECTION AND PUBLIC HEALTH

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Received 03.02.2024; accepted 04.04.2024
DOI: https://doi.org/10.55516/ijlso.v4i1.179

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Abstract

One of the objectives of the European Union is to ensure a high level of protection for its citizens, an objective that cannot be achieved without guaranteeing the protection of the health, safety and economic interests of consumers. In the context of these concerns, the European legislator has integrated consumer protection into all relevant policy areas of European Union legislation. The central aim of this policy is the protection of citizens' health, although the main responsibility in this direction rests with the Member States. Looking beyond the borders of the member states and even of the European Union, the Covid-19 pandemic has proven that health is a priority and goes beyond the area of interest, which is limited to the borders of a state or a union of states, but has gained global relevance.

Key words: *normative framework, traders, principles, consumer protection instruments, Union legislator.*

INTRODUCTION

The single market of the European Union[1] can function adequately only under the conditions in which consumer protection is guaranteed at its level, through an effective regulatory framework. In this context, vulnerable consumers are targeted, in the sense of an additional protection for them in their relationship with traders. Union legal norms that guarantee consumer protection have become essential objectives of the European Union's policy, based on both the regulations of the Treaty on the Functioning of the European Union and the provisions of the Charter of Fundamental Rights of the European Union. The concern of the

[1] L.C.Spătaru-Negură, European Union Law - a new legal typology", Hamangiu Publishing House, Bucharest, 2016, p.112

European legislator is based on the principles and instruments with which consumer protection guarantees its operation.

I. LEGAL BASIS OF CONSUMER PROTECTION AND PUBLIC HEALTH POLICY

1. 1. The consumer protection policy is regulated in:

article 4 paragraph (2) letter (f) and articles 12, 114 and 169 of the Treaty on the Functioning of the European Union (TFEU), - article 38 of the Charter of Fundamental Rights of the European Union . The European Union designed an action program in the field, based on the "New Consumer Agenda", which was adopted on November 13, 2020. The Agenda presented the vision of the EU policy for consumer protection, for the period 2020-2025, aiming to respond their immediate needs, with special reference to the COVID-19 pandemic, with the subtitle "Strengthening consumer resilience for a sustainable recovery".

The agenda includes the following segments as priority action areas:

(1) the green transition; this area highlights the possibilities offered by the green transition in the sense that sustainable products and lifestyles are accessible to everyone, regardless of geographical position or income;

(2) digital transformation; the extremely current digital space, it is proposed to be a safer space for consumers, from the following perspectives: consumer rights to be protected, fair conditions of competition in order to provide Europeans with an innovative context for the services offered to them;

(3) the effective assurance of compliance with the rules and remedial measures; compliance with the rules and remedial measures were aimed at combating the impact of the COVID-19 pandemic on consumer rights. Although ensuring the rights of consumers falls under the responsibility of the member states, respectively their national authorities, the EU has defined its coordination and support role in this field through the Regulation on cooperation in the field of consumer protection[2]. The regulation establishes a cooperation framework that allows national authorities from all countries in the European Economic Area to jointly address cases of breach of consumer protection rules when the trader and the consumer are established in different countries. The national authorities form, according to the regulation, a network of public authorities that are mandated to enforce the legislation, also called "CPC Network". The said authorities have competence in actions to combat illegal practices and in identifying dishonest traders.

[2] Regulation (EU) 2017/2394 on cooperation between national authorities responsible for ensuring compliance with consumer protection legislation and repealing Regulation (EC) no. 2006/2004 (CPC Regulation)

(4) responding to the specific needs of consumers[3]; this field of action is mainly aimed at vulnerable consumers who need additional guarantees;

(5) consumer protection in a global context, implies the concern of the European Union for the protection of consumers against unfair practices used by operators outside the EU. In this sense, the institutions of the Union are oriented towards market surveillance, aiming for closer cooperation with the authorities of the EU's partner countries.

2. 2. The legal basis of public health policy is represented by: - article 168 (public health protection), - article 114 (single market) and - article 153 (social policy) of the Treaty on the Functioning of the European Union (TFEU). The primary responsibility for the organization and provision of health and healthcare services rests with the Member States. EU policy in this area only complements national policies.

EU policies and actions in the field of public health have in mind the following strategic objectives: - protecting and improving the health of EU citizens; - supporting the modernization and digitization of health systems and infrastructures; - improving the resilience of health systems in Europe; - the preparation of EU countries to better prevent and combat possible future pandemics.

The EU health strategy is implemented by: EU institutions, member countries, local and regional authorities and other interest groups. Representatives of the European Commission together with representatives of national authorities are the ones who discuss strategic health issues in high-level working groups.

In this context of concerns, the General Directorate for Health and Food Safety (DG SANTE) of the European Commission was established within the Commission, whose role is to support the efforts of the member states in this field. The means used in this direction are: - the formulation of legislative proposals, which fall mainly within the competence of the Commission, in its capacity as legislative promoter; - financial support; - coordination and facilitation of the exchange of best practices between EU countries and health experts; - organization of health promotion activities[4].

According to the aforementioned legal grounds, on which the public health policy is based, numerous legislative acts have been adopted in the field: (a) patients' rights in cross-border medical care; (b) pharmaceutical products and medical devices (pharmacovigilance), counterfeit drugs, clinical tests; (c) sanitary security and infectious diseases; (d) digital health and medical assistance services

[3] E.N. Vâlcu, Brief considerations regarding the specific concept of "consumer. Contracting party involved in a commercial legal relationship, International Journal of Legal and Social Order, vol.3, no.1(2023), Section Law, DOI: https://doi.org/10.55516/ijlso.v3i1.159, pp .536-545

[4] J. Goicovici, The law of relations between professionals and consumers. University Course, Hamangiu Publishing House, 2022, p.43

- tobacco; - organs, blood, tissues and cells. Also, public health is the subject of some Council recommendations addressed to the member states.

II. ACHIEVEMENTS BASED ON LEGISLATIVE DEVELOPMENT AND IMPLEMENTATION OF LEGISLATIVE MEASURES RELATING TO PUBLIC HEALTH PROTECTION POLICY

● Provisions relating to health policy in the EU have developed as a result of the free movement of people and goods in the internal market, which has required the coordination of public health, and the crisis caused by the diseases faced by the population of the EU, and not only, required that the protection of public health become one of the central points of the current political agenda[5] of the EU institutions. Following these concerns, the European Medicines Agency (EMA) was established at the EU level in 1993 and the European Center for Disease Prevention and Control (ECDC).

Political actions regarding public health have taken shape in areas such as the environment and food, establishing for this purpose the European Chemicals Agency (ECHA) in 2006, within REACH for the evaluation and registration of chemical substances and the European Food Safety Agency (EFSA) in 2002.

In 2020, the COVID-19 pandemic exacerbated the cross-border health crisis, which required considerable efforts, both from the EU and the Member States.

● However, the legislation in the field, namely that regarding medicines, was introduced in 1965, in order to achieve high standards in research and the pharmaceutical industry, the harmonization of national procedures for granting licenses for medicines and the introduction of rules regarding advertising, labeling and distribution[6]. In 1978, the first research programs in the field of medicine and public health were initiated, with thematic approaches such as health problems related to age, the environment, lifestyle, and risks caused by radiation. Emphasis was also placed on the analysis of the human genome, and especially of the main diseases. Public health was thus the object of mutual assistance agreements in the case of catastrophes and extremely serious diseases, for example, "mad cow disease". Major health problems caused by drug addiction, cancer, and AIDS/HIV have been recognized, leading to the facilitation of the free movement of patients and medical personnel in the EU, an extremely important segment of the freedom of movement of citizens in the EU, but also of a form of cooperation and assistance between member states.

[5] For example, the crisis caused by bovine spongiform encephalopathy ("mad cow disease") at the end of the last century, see Christian Kurrer / Nicoleta Lipcaneanu https://www.europarl.europa.eu/factsheets/ro/sheet/49 /public-health 04. 2023

[6] See for more details, Christian Kurrer / Nicoleta Lipcaneanu https://www.europarl.europa.eu/factsheets/ro/sheet/49/public-health 04. 2023

The Treaty of Maastricht, from 1992 (the year of signing), introduces, even if limited, public health into the founding treaty, so that through the Treaty of Amsterdam from 1997, it strengthens the provisions regarding health, stating that the field is the main competence of member states, with the European Union playing a prominent role.

The Commission, in 1993, publishes a communication in the field of public health, mainly focused on aspects related to health promotion, prevention and combating of cancer, rare diseases, medicines.

All these approaches of the Union led to other, later, more applied programs, for example: - public health program (2003-2008),

- the second program in the field of health (2009-2013), - the third program in the field of health (2014-2020),

- the current EU health program (2021-2027).

● The latest developments in the field of consumer health protection policy aim at:

- Consolidation of the inter-institutional framework, namely the Parliament, as a legislator, alongside the Council, through the procedure of adopting legislative acts through the co-decision procedure, in the medical field; we also mention in this context the way in which the Commission launches legislative initiatives, a way that has been adapted with standardized consultation procedures between services, the establishment of new rules regarding comitology and dialogue with civil society and experts[7]. The implementation of health programs has also been strengthened by entrusting them in 2005 to the Executive Agency for Health and Consumers (EAHC).

- The need to strengthen the ability to react quickly. The ability to react rapidly has been proven in the case of the COVID-19 pandemic, so in 2021 (September) the Commission is establishing a new European Health Emergency Preparedness and Response Authority (HERA).

- The need for better coordination of health promotion and disease prevention. This line of action addresses the underlying causes of poor health, namely personal lifestyle, economic and environmental factors (pesticide pollution, heavy metals, endocrine disruptors). Coordination is related to other policy areas of the Union: environment, transport, agriculture and economic development.

CONCLUSION

There are many aspects related to the protection of health as a policy in the framework of consumer protection, not presented here, having limited space for debate for such a complex field. Each action of the institutions of the Union

[7] See for more details, Christian Kurrer / Nicoleta Lipcaneanu https://www.europarl.europa.eu/factsheets/ro/sheet/49/public-health 04. 2023

(involved in this process, legislatively, with direct implications for consumers) and of the Member States, regarding the protection of health, can be the subject of a separate theme. But we cannot overlook:

- The "From farm to consumer"[8] strategy, intended to contribute to the production of both sustainable food and healthier food products;

- The "Zero Pollution"[9] action plan, aimed at creating cleaner and healthier living spaces;

- The "EU for health" program (2021-2027)[10], intended to contribute to addressing health issues from different points of view;

- Addressing health problems caused or exacerbated by climate change[11], given the statistical increase in the number of deaths caused by excessive heat, natural disasters, the change in modes of infection for water-borne diseases and diseases transmitted by insects, snails or other cold-blooded animals[12];

The EU joint action on mental health and wellbeing[13] ran from 2013-2018 and created a European framework for action on mental health and well-being[14] etc. These are just a few aspects.

The European Parliament concerned itself with the establishment of a coherent policy in the field of public health specified, on the occasion of a proposal for a regulation, the need to support[15] much closer cooperation in the field of health in order to create a European Health Union.

The European Green Deal package is an example of this, having a direct or indirect impact on health, for example the clean and circular economy strategy, the zero pollution target, the food chain sustainability target and the climate neutrality target[16]. In summary, the package assumes the following directions of action: to reach zero net emissions of greenhouse gases by 2050, to decouple economic growth from the use of resources, to leave no person and no place behind[17]. It should be noted that in 2023, the Commission (ENVI) established a new permanent Subcommittee for Public Health (SANT), which will

[8] https://food.ec.europa.eu/horizontal-topics/farm-fork-strategy_en

[9] https://environment.ec.europa.eu/strategy/zero-pollution-action-plan_ro

[10] European Parliament and of the Council on the establishment of a Union action program in the field of health for the period 2021-2027 and repealing Regulation (EU) no. 282/2014 ("EU health program") COM/2020/405 final

[11] https://www.who.int/news-room/fact-sheets/detail/climate-change-and-health

[12] See, Christian Kurrer / Nicoleta Lipcaneanu https://www.europarl.europa.eu/factsheets/ro/sheet/49/public-health 04. 2023

[13] The 2023 Communication on Mental Health, dated 7 June 2023

[14] https://mentalhealthandwellbeing.eu/

[15] THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the evaluation of medical technologies and amending Directive 2011/24/EU
COM/2018/051 final - 2018/018 (COD)

[16] See, Christian Kurrer / Nicoleta Lipcaneanu https://www.europarl.europa.eu/factsheets/ro/sheet/49/public-health 04. 2023

[17] https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_ro

strengthen the role of Parliament in exercising control over EU policies in the field of health and in promoting their development.

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SARA Law **R**esearch **C**enter
International **J**ournal of **L**egal and **S**ocial **O**rder, https://www.ccdsara.ro/ijlso
ISSN 2821 – 4161 (Online), ISSN 2810-4188 (Print), ISSN-L 2810-4188
N°. 1 (2024), pp. 215-223

THE EVOLUTION OF INTERNATIONAL CRIMINAL JUDICIAL COOPERATION AT THE LEVEL OF THE EUROPEAN UNION

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Received 10.11.2024; accepted 19.12.2024
DOI: https://doi.org/10.55516/ijlso.v4i1.226

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Abstract

In this article I have developed the essential aspects related to international judicial cooperation in criminal matters at the European level: the need for cooperation.

The development of human society in general, and the development of technology in particular, have increasingly facilitated and determined the development of relations between states. An important aspect of human progress has been the facilitation of the freedom of movement of individuals and goods, which, although it represents a simplification of daily life and an added value, being beneficial to society, has also created the chance for criminals to lose more easily follow.

The progress of mankind in all fields has also generated the diversification of forms of violation of the criminal law, which increasingly exceeds the national borders of the states, not infrequently becoming a form of international violation of the criminal law.

The increase in international criminality required the mobilization of states in organizing and intensifying the fight against criminality by adopting legal instruments recognized worldwide in an organized framework.

International criminal judicial cooperation between states was thus regulated.

Key words: *criminal judicial cooperation, European Union, crime.*

INTRODUCTION

”An important foreign policy task for our state is the formation of a safe international environment”. *(Nahorniuk-Danyliuk O., Trach S., Rossokxa S., Tsutskiridze M., p. 58).*

There are several legal institutions at European level that represent particularly important and effective tools in the fight against criminality and in the cooperation of states in the field of criminal law.

International judicial cooperation in criminal matters involves a complex of rules by which states help each other in the fight against the cross-border criminal phenomenon.

”International legal cooperation in criminal justice concerns the exchange of information, evidence and suspects between countries for the purpose of investigating and prosecuting criminal activity that has a cross-border impact” *(Ilchyshyn N., Brusakova O., Krykun V., Myroshnychenko Y., p. 3).*

The process of carrying out justice is facilitated by the cooperation between states that can retaliate against criminality extended to the territory of several states or to detect criminals who take refuge in countries other than those where they committed the crimes.

There are two types of criminal problems that can determine the cooperation of states in solving them:

- those caused by the commission of crimes by individual persons or those committed in criminal participation on the territory of a state after which those persons take refuge on the territory of another or other states

- those stemming from the commission of crimes through acts of criminal activity on the territory of several states, in which case the criminality is international.

In the latter situation, most facts involve the action of criminal groups formed for the purpose of committing crimes.

In these cases, we are talking about organized crime, which is particularly dangerous, because it involves an organizational structure that is often difficult to destabilize.

We can talk about criminal acts committed by organized criminal groups since the beginning of the last century.

They go beyond the borders of a single state and usually extend regionally, but we can identify extensive cases of extended actions even at the global level, such as acts of terrorism, drug trafficking and consumption, trafficking of arms, munitions and radioactive substances assets or the most common of all live meat trafficking.

These represent the main forms of manifestation of organized crime in today's reality.

The gravity of these facts requires a fierce fight at the level of nations to combat them and reduce the criminal phenomenon, which could not be successful without judicial cooperation supported at the institutional level.

As a result of these antisocial manifestations, the need to establish and develop judicial cooperation in criminal matters was felt, the main objective of which is to minimize the risks of hindering the work of justice.

Currently, the ways to achieve international judicial cooperation in criminal matters are: extradition, the European arrest warrant, the transfer of proceedings in criminal matters, international legal assistance in criminal matters, the recognition of criminal judicial acts in relations with states outside the European Union, such as and with European states, international JIT procedures, joint investigation teams

In order to achieve this international goal, the Romanian state, for its part, has obliged itself through international treaties and conventions and through internal legislation to actively participate in the fight against international criminality.

The fight against criminality is also a priority at the level of the European Union, where specialized structures have been established, both in preventing and combating criminality.

The purpose of these structures is to identify, catch and ensure the prosecution of criminals who try to ensure their escape by taking refuge in the territory of another state than the one in which they committed the criminal act.

If the Treaty on the establishment of the European Economic Community from 1957 did not contain provisions giving it powers in criminal matters, the cooperation between the member states in the criminal field being carried out through bilateral or multilateral conventions concluded within the Council of Europe, the need for effective and direct cooperation was gradually realized bearing in mind the long-term objective of eliminating border controls and the free movement of people.

”The actual cooperation, at the level of the ministers of internal affairs of the Community states, began informally in the 1970s, in areas such as the fight against terrorism, drug trafficking and border control”. (Ștefan T., published on (www.euroquod.ro/dokuwiki/lib/exe/fetch.php?media=capitolul_5-intro_si_asist_jud..pdf).

The next step at the European level was the Schengen Agreement signed on June 14, 1985, by which the elimination of control at the borders of the member states was conditioned by the adoption of compensatory measures in the matter of police and judicial cooperation.

Through the Schengen Agreement, new forms of cooperation were introduced to improve security in the European Union following the elimination of internal border controls.

The cooperation aimed at cooperation on several levels: between police forces, customs authorities and control authorities at the external borders of all member states.

The Schengen Agreement ensured:

”- improving communication systems between police forces

- cross-border pursuit of criminals

- cross-border surveillance of suspects

- mutual operational assistance

- direct exchanges of information between police authorities”.

(https://www.consilium.europa.eu/ro/policies/schengen-area/).

The provisions on international cooperation contained in the Schengen Agreement have been a major achievement in the fight against terrorism and serious and organized crime, human trafficking and illegal migration.

An important step in international cooperation in the criminal field was the Maastricht Treaty.

The European Union was established by the Maastricht Treaty of November 1, 1993. This treaty is the official birth certificate of the European Union.

According to the Maastricht Treaty, the European Union is a construction that rests on three pillars:

- the European Community,

- Common Foreign and Security Policy (CFSP) and

- Cooperation in the field of Justice and Internal Affairs (JAI).

Without removing the other community treaties and without replacing the European Communities, however, according to the Maastricht Treaty, the European Union is not based exclusively on the European Communities.

As can be seen, they constitute only one of its pillars of support, which is a community pillar with a supranational character.

Thus, the Treaty includes two other new areas, in which the member states of the Communities propose to cooperate closely, namely the other two pillars that are predominantly intergovernmental in nature.

The special importance given by the Treaty to cooperation in the field of Justice through the regulation of the third pillar of the European Union is noted.

In Title VI of the Treaty, provisions were introduced regarding cooperation in the field of Justice and Internal Affairs to combat cross-border crime and illegal migration, cooperation that forms pillar III of the treaty.

Pillar III operated on the basis of unanimity within the Council of the European Union.

The objective of the provisions was to guarantee the safety and security of European citizens. It has been recognized at the legislative level that this objective can only be achieved through close cooperation in the field of justice and home affairs.

Therefore, an important decision established by the treaty was the improvement of collaboration in the field of law and internal affairs.

In this sense, in order to ensure a better coordination of police collaboration, the European Police Office, "Europol", was established, with headquarters in The Hague.

One of the areas of common interest was police cooperation and judicial cooperation in criminal matters.

The immediate need at the European level was the enlargement of the European Union.

In this sense, a new treaty was signed on October 2, 1997, the enlargement treaty, the Treaty of Amsterdam.

This treaty entered into force on May 1, 1999.

This treaty amended the Treaty establishing the European Union, amended the Treaties establishing the European Communities and certain related acts.

The main goal of the European Union being its expansion to the east, the needs of ensuring a more effective and democratic functioning of the Union had to be adapted.

The cooperation between the states at the governmental level in the field of interest, criminal and police judicial cooperation was strengthened, defining precise objectives and tasks in this field, so that a legal instrument similar to a directive was created (www.europarl.europa.eu).

The chapter on criminal justice and police cooperation was introduced, replacing the chapter on Justice and Home Affairs provided for in the Maastricht Treaty and including the Schengen acquis.

It was established by the Treaty of Amsterdam and the so-called ”Space of freedom, security and justice” through which the rights of EUROPOL were extended.

Within this official framework of the created space, police and judicial cooperation took place starting with the Treaty of Amsterdam.

As a response to the creation of ”Europol” at the level of police cooperation, the European Council in 1999 decided to create ”Eurojust” in the field of judicial cooperation.

The same European Council in Tampere in 1999 approved the principle of mutual recognition of court decisions, being an impetus for the national legislation of the member states.

”Intergovernmental cooperation in the field of judicial criminal and police cooperation has been strengthened by defining precise objectives and tasks, as well as by creating a new legal instrument analogous to a directive”. (www.europarl.europa.eu).

”But the really important amendment produced by Amsterdam is the provision for a jurisdictional control in relation to police and judicial cooperation in criminal matters.

In this respect, two articles are modified to allow the attribution of competence to the Court of Justice: Articles 35 and 46 TEU" *(Bulnes, p. 619).*

Another important moment in the European construction plan was the signing of the Treaty of Nice on February 26, 2001.

On the occasion of the summit in Nice, the Charter of European Fundamental Rights was proclaimed as a political declaration, which means that the European Union ensures the construction of an area of freedom, security and justice in which the person feels safe.

It therefore follows that the European Union is intensifying the fight in the field of crimes that endanger a healthy and safe European construction.

"The European Union proposes to identify the means and methods that ensure a unitary and organized character of the repression of criminal acts".

The premise from which one starts in arguing the necessity of this approach is that free movement within the European Union also determines the free movement of criminals and crimes.

The reform of the legal framework of the European Union required the signing of the Treaty of Lisbon on December 13, 2007.

Through this treaty, the Treaty on the European Union and the Treaty establishing the European Community were amended, i.e. the two treaties that constitute the basis of the European Union.

It is also known as the Reform Treaty.

The treaty ensured a solid path in strengthening criminal cooperation at the European level.

Through the Treaty, the European Parliament became an involved party, whose powers established rules ensuring a legislative framework regarding the assistance that states give each other in the fight against the cross-border criminal phenomenon.

In the field of interest, it brought a major change because pillar III of the European Union was eliminated, and the issues related to police and judicial cooperation in criminal matters were regulated in Title V called, "The area of freedom, security and justice", which it includes, in addition to cooperation in criminal matters and police cooperation, the policies on border control, the right to asylum and immigration and cooperation in civil matters.

According to the Treaty, in the field of criminal judicial cooperation, the usual legislative acts defined by art. 288: regulations, directives, decisions.

The adoption of these acts within the internal law of the member states ensures their supremacy over national law.

According to the Treaty, "Judicial cooperation in criminal matters within the Union is based on the principle of mutual recognition of court judgments and judicial decisions".

The Parliament and the Council have legislative prerogatives.

Based on them, the adopted measures concern:

- by which to ensure the recognition in the Union of court decisions
- through which to prevent and resolve jurisdictional conflicts between member states
- through which it supports the professional training of magistrates and judicial personnel
- by which it facilitates cooperation in the criminal field between the judicial authorities of the member states.

The Parliament and the Council through directives can establish minimum rules to facilitate the mutual recognition of court decisions, minimum rules regarding the definition of crimes and criminal sanctions for cross-border crimes of particular gravity such as: terrorism, human trafficking and sexual exploitation of women and of children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organized crime (www.eur-lex.europa.eu).

The Treaty of Lisbon strengthens Europol and Eurojust, in order to be able to respond more operatively to acts of organized crime, human trafficking networks or money laundering crimes.

Eurojust is a body within the European Union based in The Hague whose objectives are: cooperation between the competent authorities of the member states with powers in terrorism, illicit drug trafficking, human trafficking, clandestine immigration channels, illicit trafficking of radioactive materials and nuclear weapons, illicit motor vehicle trafficking, counterfeiting of the euro, money laundering linked to international criminal activities, cybercrime, fraud and corruption, crimes affecting the financial interests of the European Community, laundering the products resulting from crimes, crimes that affect the environment, participation in a criminal organization.

Another important body of the Union is Europol whose duties are established by the European Parliament and the Council: ”the collection, storage, processing and analysis of information, as well as the exchange of information transmitted in particular by the authorities of member states or third countries or authorities; coordinating, organizing and carrying out research and operative actions, carried out together with the competent authorities of the member states or within joint research teams and, as the case may be, in collaboration with Eurojust” *(https://eur-lex.europa.eu/legal-content).*

Another important institution is the European Public Prosecutor's Office, which has powers regarding the perpetrators of crimes affecting the European Union budget.

This institution has powers regarding fraud crimes, corruption crimes, or cross-border VAT frauds with a value greater than 10 million euros.

The question arises as to which European institutions have legislative powers in the field of judicial cooperation in criminal matters.

The European Parliament and the Council are the institutions that draw up the legislation on judicial cooperation in criminal matters at the European Union level.

Naturally, this legislative activity took shape through a series of important acts targeting equally important areas.

Common minimum standards for criminal proceedings have been established: in this sense, a series of directives have been adopted regarding the criminal procedure regarding the rights existing during the course of a criminal proceeding: to information, to have access to a lawyer, to interpretation, with regarding the presumption of innocence, translation, special rights regarding children involved in criminal proceedings or regarding free legal assistance.

Regarding the fight against terrorism, directives and regulations were adopted.

Another important area is the fight against corruption, cybercrime, fraud and money laundering

A series of acts developed in the form of directives provided protection measures at the European level *(www.europarl.europa.eu).*

Areas of major interest in which European acts have been adopted are the exchange of information between member states and EU agencies and in the field of victim protection.

CONCLUSION

At the European level, the need for cooperation has become more and more accentuated considering the removal of controls at the borders of the member states of the European Union.

In the case of a violation of the criminal law, holding the guilty party accountable is both a state right and an obligation, only in this way can the violated legal order be restored.

But, not infrequently, this is more difficult because there is the possibility that criminals after the commission of a crime, or after their trial, take refuge in the territory of another state in order to avoid prosecution or the execution of a criminal sanction.

For such situations, there is mutual cooperation between the states, being regulated by the European legal acts and those of the member states, several forms of cooperation, the most common being the European arrest warrant, extradition, recognition of court decisions.

In order to intensify the fight against criminality at the level of the European Union, it is absolutely necessary to have bodies with attributions in the field, which can carry out their activity on the basis of normative acts developed at the European level.

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SARA Law **R**esearch **C**enter
International **J**ournal of **L**egal and **S**ocial **O**rder, https://www.ccdsara.ro/ijlso
ISSN 2821 – 4161 (Online), ISSN 2810-4188 (Print), ISSN-L 2810-4188
N°. 1 (2024), pp. 224-233

VIOLENCE AGAINST WOMEN IN THE UNITED KINGDOM AND ROMANIA AS A SOCIAL PHENOMENON AND DEFECTIVE APLICATION OF LAW

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Received 25.02.2024; accepted 03.05.2024
DOI: https://doi.org/10.55516/ijlso.v4i1.183

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Abstract

In todays world we observe the rise of misogyny as a social phenomenon. This rise in anti-woman sentiment is directly linked to the appearance of Andrew Tate as a figurehead for the hatred of women. Even after he was banned on most online platforms a slew of copycats has appeared to continue his evil crusade. As one head of the hydra is cut off, another one is appearing. The law, being made without the digital space in mind and not fully being operational beforehand is obviously insufficient in trying to stop this phenomenon. A dry and efficient legal analysis of the law and legal process is not enough in order for us to have solutions. Both in Romania and the UK we observe the violence being propagated and even being on a steady rise. In order to understand the "why" we must look at society through a philosophical lens. In this article the subject was the law but it was analysed under the microscope of feminist philosophy and semiotic readings of mythology.

Key words: *violence against women, Sexual Offences Act of 2003, feminism, misogyny, semiotics in legal scholarship.*

INTRODUCTION

Whenever we think about criminal acts committed against women, we may encounter many thoughts as built by different human sciences. We may think of sociological structures, we may attempt to understand the psychological aspects that give birth to the abuser and the abused. The UK and Romanian societies are almost diametral opposites at first glance. In the case of the UK, we see a liberal society that gives the impression of more inclusivity and acceptance. In the case of Romania, we primarily see an ex-soviet country that experienced turbulent

periods and still maintained a visibly traditionalist and conservative point of view. In this article we will focus on the legal and sociological aspects, also, we will use continental philosophy to understand why we still observe such a virulent growth of violence against women both in real life and in digital spaces.

I. LEGAL FRAMEWORK

When it comes to the legal framework, we must analyse the Sexual Offences Act of 2003 in the UK and Law 286/2009, also known as the Criminal Code of Romania. In both legislations we observe certain gendered aspects of how the law is applied. In the UK the act of rape can only committed by a man[1]. In the Criminal Code there are such offences as the harm brought to the pregnant woman and the foetus[2]. For the most part, both the UK and Romania have similar laws that operate in the absence of gender. Both legal systems have similar offences. When it comes to jail sentences, we observe in England that the sentences are by far harsher[3] than those of the Romanian system.

The laws in themselves do not present clear insufficiencies but we still see that in most cases women are the main victims of violent crimes in a domestic setting[4]. The real issue arises in two aspects that mostly relate to how to laws are applied and how the population approaches reporting crimes. In regards to how the law is applied a few separate issues appear.

Firstly, the difficulty of proving not only rape but also proving the identity of the perpetrator. In the UK, there is a long and argues bureaucratical process, as in every country, to prove rape or sexual violence *(Nick Dawnay, Kayleigh Sheppard, p.210).* Whenever one of such links fails to properly function the possibility of punishment falls apart and shatters.

Furthermore, the issue of this bureaucratic machinery that, yes, is quite steady and rigorous is also a lumbering giant with a questionable rate of success. The cold approach of all real sciences hits the irrational and twisted forms of the human brain, be it the mind of the legislator, a prosecutor or a policeman. In England and the UK at large only about 4 to 11% of rapes that were reported ever resulted in any sort of conviction[5].

[1] Sexual Offences Act of 2003, para. 1, (1). Rape is defined as an act of penetration with the use of the penis. By this definition we can assume that for the most part only men can be the perpetrators of rape.

[2] Codul Penal art.199 and art.200 define the crimes of abortion and damages broth forward to the foetus. In most cases only a woman or her newly born child can be the victim of such actions.

[3] While in Romania a person found guilty of rape may serve between 3 and 10 years, in the UK the sentence would be lifelong imprisonment.

[4] https://www.ncdv.org.uk/domestic-abuse-statistics-uk/. Even if by some metrics men are the principal victims of violent crimes, the women tend to be the primary victims of domestic abuse and sexual violence.

[5] Idem, p. 222

The second aspect that is more so relating to the UK is the high percentage of policemen involved in violent actions against women. The most recent data shows that an estimate of 1500 policemen were perpetrators of violence against women[6]. Out of the 1500 an estimate of 10% were the subjects of any further investigations[7]. Even if the data in itself is considered insufficient by the authorities, the mere idea that such a big number of policemen are even suspected of committing violence of a sexist nature is concerning.

This doesn`t only create an unsafe environment for women that may wish to report any type of violence that they were the victim of, but it also creates a barrier between the initial complaint and the creation of an actual investigation. In both countries[8], the vast majority of violent acts against women, be it rape or any forms of physical or mental aggression were perpetrated by family members. This gives birth to the issue in how such crimes may be reported. If the woman is financially dependent or afraid to talk about their experiences it will be virtually impossible for her to report to the police or in some cases even to admit that she is a victim of domestic abuse.

In general terms, rapes and domestic abuse tend not to be reported in either country. In 2019 Romania was the country with most people believing that non-consensual sex can be sometimes justified, furthermore, 23% of respondents believe that women gravely exaggerate rape allegations and that any domestic abuse is a family matter that should be solved internally[9]. The UK has reached a new high in regards to the amount of rapes reported, as previously stated this is a grandiose issue. If not all rapes are reported to the police then how many instances of such vile acts happen in reality, both in Romania and in the UK[10].

II. SOCIOLOGICAL FRAMEWORK

When it comes to the societal aspects of this issue, we have in front of two extremely different cultures existing almost in a perfect antonymous relation *prima facie*.

Observing Romania, we notice a more traditionalist and conservative society that has had a great deal of progress when it comes to women`s rights, in an ironical twist of faith, under the repressive communist regime *(Claudia Florentina Dobre, p.43)*. In the case of the UK, we observe a society that has started an irreversible process of secularisation starting in the 1960`s with the

[6] *Tackling Violence Against Women and Girls – Policing Performance and Insights Publication,* released by the NPCC and College of Policing on March 2023, p. 6
[7] Ibidem, p.7
[8] https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/domesticabuseinenglandandwalesoverview/november2022.
[9] https://www.gds.ro/politica/europa/2019-08-07/romania-pe-primul-loc-in-ue-in-cazul-violurilor/.
[10] https://www.bbc.com/news/uk-62258162.

Christian population slowly decreasing and more materialist and liberal values taking a hold of societal functions (*Sam Brewitt-Taylor, p. 326*).

The UK has a long history of feminist actions starting with the Suffragettes and going on today with the push for LGBTQ rights and MeToo. Even if such pushes are historically important and a necessity in order to diminish the violence women have to endure the progress was slow and gruelling.

In the case of Romania, women have gained equal footing with men when it comes to the right to participate in the economical, political, social and cultural life of the time. Even with this social leap, the fundamental issues faced by women did not disappear overnight. In contemporary times, we have two different paths taken for the purpose of emancipating women, both have proven effective only to a certain degree *(María Paz Bermúdez, Montserrat Meléndez-Domínguez, p. 380-385)*. It is still a disturbing occurrence that even after numerous advancements women still don`t have the plenitude of freedoms awarded by society to men.

We may be able to find some semblance of clarity in the work of Simone de Beauvoir, specifically, her book, *The Second Sex.* In this book, she presents the issues that were faced by women historically utilizing psychoanalysis, historical materialism and all other tools at her disposal in order to properly understand the struggles of women both academically and phenomenologically. She does not present the woman as a metaphysical category or as an easy to define biological construct, her analysis is more so a comprehensive look for the time at the psychoanalytic, historical, biological and dialectical dimension of women all through a phenomenological lens.

She dismantles the proposition made by Friedrich Engels. In the conception of Engels, before the discovery of metal, women would work with men in the gathering of resources. After the dissolution of tribal family formations in antiquity, the woman became secondary to the labour and endeavours of the man. Her role was to raise children, prepare food and rule over the dimension of domestic duties *(Simone de Beauvoir, p.84)*. Ultimately, de Beauvoir admits the insufficient nature of the material dialectic in understanding the role of the woman, deeming it a useful but insufficient tool.

She also dismantles the ideas that at the time were taken for granted in the 20th century. Both Freud and Adler considered the patriarchal model just as a natural occurrence of human existence *(Simone de Beauvoir, p.69).* They have deemed the female faith as a tragedy, a woman is stuck between the rebellion against patriarchy reaching a" viriloid" form that may be unappealing to the male or to succumb and be feminine as she is" expected to be"(*Simone de Beauvoir, p.70)*. Even so, she still finds some usefulness in the conceptions that many psychoanalysts have articulated in regards to how men exist. Mainly, the idea that

sticks with de Beauvoir is the nature of women being *the Other*, but she makes it clear that there is no clear reason as to why *(Simone de Beauvoir, p.102)*.

As she discusses the role of women in antiquity, she reaches a synthesis of all three aspects initially dismantled. In the discovery of new tools made of metal and tailored to men's physique, women were left behind in the field of labour. This first factor combined with the different thought patterns that women unavoidably created as a subjugated class resulted in the start of her oppression.

All three aspects, the biology of women, the psychological position as the other and the exclusion of women from the labour force has resulted in her not being included as equal since the times of Sumerian and roman mythos *(Simone de Beauvoir, p.102).* Even before any written law the woman was made to be a secondary aspect of men, bever the subject, but the adjective to a men's needs and wants *(Simone de Beauvoir, p.104*).

Women held an ambivalent and paradoxical place in society, both as the necessary for furthering the species but also seen as" imbecilic" in the Roman codes or the doorway of the devil in Canon law (*Simone de Beauvoir, p.105*). This state of affairs will continuously be perpetrated until the current times, be it in lesser or more hidden manner.

With this information, we can re-evaluate the idea of Romania and the UK being antonyms when it comes to the way women are treated. We can observe the fact that they are mostly 2 sides to the same coin. Even if there was obvious progress which lessened the violence against women, be it in a sudden event or by a slow-paced fight, the fundamental status of women did not change. Women, in a subconscious manner have remained secondary.

This perpetuated secondary nature creates the conditions for women to be the main victims of domestic violence, of an authority that is being societally challenged by a gathering of *others* uniting in solidarity.

III. ANDREW TATE AND MESSIANIC MYTHOLOGY

To further problematise what was said and add a new layer, we must look at the digital dimension of humans. Before the internet humans had 3 melding and intermingling dimensions: the physical, the intellectual and the emotional dimensions. The internet has added a fourth dimension that is superstructural in nature. It could elicit harsh reactions of all other 3 dimensions. We may feel physical disgust at what we see online, we may feel great anguish or happiness or we can be drawn in intellectually or repulsed by information.

A bizarre phenomenon that appeared primarily out of the digital spaces but has become a real threat to most European societies are incel communities. Incel is an abbreviation for involuntary celibates. Such people have gathered in online spaces under the vail of anonymity in order to bemoan their hardships in finding not only a suitable partner, the lack of community that the modern man seems to be suffering from. Such people have created a culture of their own with rules,

hierarchies and of course mythology. Such communities are a den of impenetrable nihilism with no logical exit other than the death of the believer or violence against the other. Such ideals are typical of suicide cults[11]. Under some unspeakable circumstance, tragedies such as mass shootings are born out of these communities. The infamous case of the Isla Vista killings is one example of what can be defined an incel has come into the real world and resulted in 6 deaths, 7 when counting the suicide of the perpetrator, Elliot Roger[12]. The man himself became a hero in incel communities.

In this closed circuit a new figure has arrived in the digitalised global subconscious, that is Andrew Tate. Regardless of what any person may think of the man himself we are still talking about a person with immense amount of influence[13] and quite vile and virulent messaging. This man became almost a messianic figure to all the various incel communities. He represented the perfect male fantasy of having physical power, social status, copious amounts of money, luxury items and women`s attention. This image is digested as it comes by the media and by most people, but it comes with a secondary meaning.

Roland Barthes in his book *Mythologies* uses the science of semiotics to explain how mythology is created and how to analyse anything from this angle of myth, he talks about wrestling as a theatrical performance *(Roland Barthes, p.13)*, in the analysis of detergent he concludes that linen is deep *(Roland Barthes, p.36)*.

This is an important tool in our quest to understand how and why violence against women is still perpetrated. The way mythology is described by Barthes is as a tri-dimensional structure[14]. A myth is constructed from the signifier[15], the signified[16] and the sign[17], but the terms gain and loose value along the equation. In the first reading of a myth, we are doing the basic semiotic interpretation, in the secondary reading the sign itself becomes a signifier. Another way of

[11] *A Study of Religious Obedience*, by Winston Davis published in Nova Religio: The Journal of Alternative and Emergent Religions, Vol. 3, No. 2 (April 2000) describes the many facets of the Heaven's Gate cult. There are striking similarities regarding the way incel communities gather around ideals personified by charismatic sexist gurus and the way adepts of the Heaven's Gate cult operated. In both scenarios there is the use of linguistic tricks and games to mask the real meaning, there are clear hierarchies and beliefs constructed on pre-existent concepts but rehashed in a short-circuited manner, making them useful tools for what may be called brainwashing.

[12] https://www.bbc.com/news/world-us-canada-43892189.

[13] https://www.euronews.com/culture/2022/12/28/actors-scammers-criminals-who-were-the-most-googled-people-of-2022. In 2022 A. Tate was the 8th most searched person according to data provided by Google.

[14] Roland Barthes, MYTHOLOGIES, The Noonday Press - New York, Farrar, Straus & Giroux, 1991, p.113

[15] The signifier is any physical thing that signifies, such as a picture or a word on a page.

[16] The signified is the concept indicated by the signifier.

[17] The sign is the smallest possible unit of meaning, such as a later or a corner of a painting or picture.

understanding this concept is skipping stones on a lake, a stone is thrown and it will jump off the surface of the water a few times. Progressively, the circles it makes get smaller until the rock sinks. In this manner, we can use this system to reduce the myth of A. Tate to its practical conclusion.

If we are to think of A. Tate as a messianic figure to communities of incels he is the Signified of the first semiotic analysis, the Signifier for incels is the attitude he presents in any form of media apparition, a brash and uncaring demeaner of the typical brute. The Sign is the language and aesthetic he indulges in, this specific mixture is appalling as a whole to society. The first semiotic reading points that the language A. Tate uses is the thing that gives incels the messianic call to rally around him. On a second semiotic reading the language becomes the mere Signifier, the Signified is the messianic figure and the Sign is the fundamental reaction from civil society. A short-circuit happens in the second semiotic reading, the language used by A. Tate is sometimes codified in order to make it palatable or it's also divided in its consistency [18].

He never is clear in regards to his beliefs, in some interviews he claims to joke, in some interviews he openly praises misogynistic points of view. This ironic and flimsy attitude is a veil of self-protection, it`s a method to claim plausible deniability. If the man cannot be decisive in his stance of either being a misogynist or just being an edgy entertainer, it shows a lack of ideological and personal security. With the new added information, we must go back and modify the first semiotic reading. If the Sign of the first semiotic reading is insecure language that is appalling to the majority of people, then the Signifier becomes the insecure machismo and the signified becomes an insecure messianic figure. In this insecure messianic figure, insecure men and young impressionable children can find their idol.

IV. THE SYNTHESIS OF THE LEGAL, FEMINIST AND MYTHOLOGICAL ANALYSIS

Now that we have embarked on a journey to analyse the law that in theory protects women but in practice still has major failures for various reasons, we have looked at a feminist analysis of the way women are viewed by society as a secondary class and have dismantled the mythology of modern-day sexism we can finally synthesise the ideas to come to some resolutions.

We must go back to look at the Sexual Offences Act of 2003. Section 1 of the law specifies that rape is the act of penetration with a penis, hence, only man can be the perpetrators of such crimes. This in itself should not raise suspicions as in the second section there is the crime of assault by penetration [19] which is

[18] https://www.bbc.com/news/uk-64125045. On occasion he may self-identity as a sexist, for another interview he may just claim that he thinks that" misogyny is a hateful ideology that cannot be tolerated"

[19] Sexual Offences Act of 2003, section 2

virtually identical except for the necessity of the perpetrator to have a penis. If we are to glare at these differences through the lens of women as secondary to men, we can assume that this is not a measure to protect women, it's a silent declaration of the" natural right" *(Simone de Beauvoir, p.105)* of the man to be so cruel. In a semiotic reading the law works as signifier, the sign is the gendered concepts and the signified is the concept of rape. When going to the level of mythology rape, as it is defined in the UK, becomes a dark possibility of the male indulging in his violent libidinal expression. By both analysis we can now realise a hidden truth, as reflected by law, that only men are allowed to develop such violent tendencies as to become rapists.

In the Romanian legislation we don't observe such semiotic finesse but we still see the paternalistic urge of the legislator. It harkens back to the idea of women being secondary and not being able to fully live as subject, but only as the object or the other. It is the other that must be kept in parameters in order to remain subjugated. Even if the intention in itself is good, to protect the perpetuation of life, the form does not fit society. Abortion in Romania is not a form of progress or emancipation, it's the result of a trial and an error in the communist era. The cruel reality is that Decree 770/1966 banned abortion, instituted regular gynaecological checks for women to prove pregnancy. The most intimate of dimensions was invaded[20]. Immediately after the fall of communism the abortion ban was lifted, but the fundamental social stigma of abortion was never whipped from the social subconscious[21].

CONCLUSION

We have sadly observed that in both countries there are deep seeded tendencies that encourage the violence perpetuated against women on the basis of their womanhood. Even if the laws are made with the best intentions and the lawmakers truthfully had the protection of women as the goal, the fundamental structures and social perceptions we hold from time immemorial will keep women as the secondary class to men. Unless both societies are ready to deal with the inner subconscious perception of womanhood and approach to law making the status of woman will not exceed the otherness or the objectified status. Even Simone de Beauvoir agrees that the status of women in the 1950s has improved there are still issues today. Both in the UK and Romania the emancipation of women was done in a contextual manner in the absence of clear analysis or purpose. It was a concentrated effort on the part of women but it was not

[20] https://historia.ro/.

[21] https://www.npr.org/2021/09/01/1021714899/abortion-rights-romania-europe-women-health. In current times, Romania has started to be affected by the pendulum swing of anti-progressive formations, mostly funded by U.S. think-tanks. Due to this new dynamic a relatively simple procedure like abortion is becoming harder and harder to obtain.

sufficiently well implemented in order to achieve a fully ethical and non-aesthetic liberation.

This is a task of herculean difficulty but it is necessary for women to be enabled to become masters and subjects of their own faith if we ever wish to achieve equity in living.

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SARA Law **R**esearch **C**enter
International **J**ournal of **L**egal and **S**ocial **O**rder, https://www.ccdsara.ro/ijlso
ISSN 2821 – 4161 (Online), ISSN 2810-4188 (Print), ISSN-L 2810-4188
N°. 1 (2024), pp. 234-240

HUMAN RIGHTS LAW FROM GENERAL THEORY OF LAW PERSPECTIVE

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Received 25.01.2024; accepted 07.05.2024
DOI: https://doi.org/10.55516/ijlso.v4i1.177

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Abstract

The current study tries to analyse the relationship between the human rights law from the general theory of law perspective. Starting from the multiple meanings of the term 'law', going through the differentiation between "human rights", "public freedoms" and citizens' rights, distinguishing the component of national law and that of international law, we propose to show the readers the perspective of human rights as revealed by the general theory of human rights.

Key words: *citizen**;** general theory of law**;** human rights**;** law**;** protection;*

INTRODUCTION

Due to the complexity and diversity of the legal phenomena, the word "law" has several meanings, of which the most commonly used are: law as science, objective law, positive law, subjective law, natural law, law as art and technique. In general, when we use the word 'law', we mean 'the set of rules which organise and coordinate society' (*N. Popa coord., 2017, p. 24*).

Society is governed by many types of rules (e.g. social rules, legal rules, moral rules, religious rules, technical rules), the most important of which are the legal rules. The set of legal rules constitutes the objective law. These legal rules impose obligations on subjects of law, enabling them to pursue certain legally protected interests, organise the general functioning of the state as well as non-state bodies, assign statuses and roles to subjects of law (e.g. parent and child, buyer and seller, beneficiary and provider, donee and donor). From this perspective, it is argued that "law combines necessity and freedom" (*N. Popa, 2014, p. 30*).

Necessity, which is a separate area of law, is the result of the general purposes of social life that are set out in objective law. The essential condition of objective law is the coexistence of freedoms. Freedom is a relative state of man, which can be subjective (internal - the experience of the person and the theoretical

possibility of choosing something) and objective (external - the concrete possibility of acting in accordance with one's inner experience). Freedom is an innate right, which originates in the state of nature, without the need to recognise it through the rules of positive law.

We can thus conclude that "necessity is the starting point in the analysis of freedom, expressed through the state" (*N. Purdă, N. Diaconu, 2016, p. 33*), law expressing necessity as the starting point in the analysis of freedom.

The relationship between "law" and "human rights" is a relationship from the whole to the part, transposing into the legal plane the relationship between the general interests of a society and the personal interests of people. It is thus clear that law gives expression to the general interests of society, while human rights give expression to personal interests.

The internal determination of law is based on the legal quality of will and interest, which is the essential quality of the entire legal system. No matter how many changes the legal system undergoes, this quality will remain unchanged. We thus emphasise, as taught in the general theory of law, that 'the essence of law provides the foundation of the legal system and is expressed by the legal will and the legal interest" (*N. Popa coord., 2017, p. 38*)[*].

It is interesting what happens when the general interest sometimes conflicts with the personal interest. It should not be forgotten that where one person's subjective right ends, the subjective rights of others begin.

The important thing is the legal norms, i.e. the legal will of the legislator, which expresses the general will of a state expressed in official form, based on consideration of the fundamental interests of society.

The aim of the state should be to protect the general interest of citizens, their happiness. We live in a world that is becoming increasingly urban, which is why ensuring the security of citizens is an important role of states, and there is increasing talk of urban security (*F. Dieu, B. Domingo, Méthodologies de la sécurité urbaine, Ed. L'Harmattan, Paris, 2018*). Analysing the history of time, we observe that if citizens have not been happy, if their purpose has not been satisfied and if they have not perceived that the intercession of this satisfaction is the state itself, then the state has stood on weak legs, as Hegel said.

The philosophy of law presupposes a balance between the general interest of the state and the particular interests of individuals.

René Cassin, one of the most outstanding promoters of human rights, who was awarded the Nobel Prize in 1968 alongside Eleanor Roosevelt for drafting the Universal Declaration of Human Rights, believed that the main purpose of the state was to defend the inalienable rights of the state.

I. MEANING OF THE EXPRESSION „ *FUNDAMENTAL HUMAN RIGHTS”*

Human rights have always been a concern for mankind, as people, as human beings, are considered to have certain rights. Although there have been

legislators over the years who have opposed the recognition of human rights (e.g. in totalitarian states), as mankind has evolved, the term 'human rights' has been established.

Since ancient times, in all ages of history, national legislators have determined and sometimes even legally defined the rights and obligations of its members, even imposing limitations to maintain social order. Ideas about human rights have been developed since antiquity or the Middle Ages, but as pointed out in the doctrine, "the actual concept of human rights was born in the run-up to the bourgeois revolutions in Europe" (*N. Purdă, N. Diaconu, 2016, p. 17*)[*], and these rights have also become established in social practice.

The idea of natural rights was intensely promoted during that period, as witnessed by the Declaration of the Rights of Man and of the Citizen of 26 August 1789 and the Bill of Rights of the Constitution of the United States of America of 1791.

The most prolific period for the recognition of human rights, as well as their protection, was the period after the Second World War (i.e. the Universal Declaration of Human Rights adopted by the United Nations General Assembly on 16 December 1948, the Convention for the Protection of Human Rights and Fundamental Freedoms drawn up by the Council of Europe and signed on 4 November 1950).

In view of the atrocities of that period, it was increasingly emphasised that these rights were inherent in human nature, and that their denial resulted in man being impoverished by the very attributes of being human, leading to armed conflicts between states and hostilities between peoples.

As can be seen from a diachronic analysis of legal systems, human rights do not have an immutable content, evolving with the dynamics of international relations and the values enshrined therein. Moreover, when analysing the human rights enshrined at each stage of history and in the light of the progress of science, new rights emerge (e.g. the right of access to information, the right to the achievements of technology).

Legal relationships and legal situations create the legal order, which can be domestic or international, depending on the applicable law - domestic law or international law (including European Union law).

Domestic law is the law in force in a particular state, the purpose of which is to regulate the legal relationships that take place on the territory of that state. International law is the body of rules of law governing relations with other states, which are largely derived from international treaties concluded in certain areas (e.g. human rights, international trade, law of the sea, airspace).

Today, the issue of human rights has both a domestic and an international component, which gives people the confidence and power to fight against the state in defence of their fundamental rights and freedoms, believing that beyond their territory, the state or an international forum is watching over their rights.

Human rights that are essential to human beings are called fundamental rights (e.g. the right to life, the right to liberty). These fundamental rights may evolve or differ from one historical stage to another or from one state to another.

Unfortunately, there is no generally valid definition of fundamental human rights in international law, and several definitions of fundamental human rights exist in doctrine. For example, "fundamental human rights are those subjective prerogatives inherent to the human being, of an essential, unitary, indivisible and imprescriptible nature, which define the human personality, are conferred by domestic law and recognised by international law" (*N. Purdă, N. Diaconu, 2016, p. 31*)[*].

Human rights have also evolved as a result of globalisation, which has had a positive and negative impact on them. The positive aspect is linked to the notion of legal transplantation, since the development of the internet and trade has improved the knowledge and practice of human rights. The negative aspect, however, relates in particular to economic and social rights, which have failed to evolve with migration, as migrant workers do not enjoy better living and working conditions in the countries where they choose to work and are thus clearly disadvantaged. We can see that the environment is increasingly affected, the underdevelopment of some regions is worsening, creating great economic differences between people.

Over the years, there has been a sustained concern on the part of intergovernmental organisations to adopt a common set of rules in all areas, especially human rights. The subjects of international law are constantly seeking solutions "to establish control over economic and social developments so that the negative effects of globalisation on the exercise of fundamental human rights can be reduced" (*N. Purdă, N. Diaconu, 2016, p. 55*)[*].

II. THE RELATIONSHIP BETWEEN "RIGHTS" AND "FREEDOMS" AND BETWEEN "HUMAN RIGHTS" AND "CITIZENS' RIGHTS"

From the analysis of domestic and international legislation, when talking about human rights, we notice that two nouns are used: 'right' (of the human or citizen) and (public) 'freedom'. Although some authors might consider these two nouns to be synonymous, there are authors who consider that they do not have the same content (*C.A. Colliard, 1982; L. Richter, 1982*).

We are of the opinion that, at present, these two legal concepts are perfect synonyms, having the same content, being subjective rights recognized and protected by national legislators. A subjective right is the right of a subject of law to enforce a legally protected interest, and in the event of another subject of law disregarding the right, he may resort to the coercive force of the State.

For example, according to the Romanian Constitution, the term 'right' is used in the provisions on the right to identity (art. 6), the right to asylum (art. 18), the right to life and physical and mental integrity (art. 22), the right to defence (art. 24), the right to free movement (art. 25), while the term 'freedoms' is used in the provisions on individual freedom (art. 23), freedom of conscience (art. 29),

freedom of expression (art. 30), freedom of assembly (art. 39). Please note that from a political point of view, "the Constitution is a social contract between nation and power which determines both the rights that rights (human rights and citizens' rights) and the prerogatives with which the nation which the nation also mandates, in a limited way, the power to exercise it on its behalf and for it, and the manner of exercising them, i.e. the separation of powers in the state" (*M.-C. Cliza, C.-C. Ulariu, 2023, p. 172*).

In our view, there are no legal differences between these two concepts, and it can be said that a right is a freedom and freedom is a right.

But what is the relationship between "human rights" and "citizens' rights"? Could they mean the same thing? We believe that these two notions should not be confused, as they do not overlap perfectly. The relationship is from whole to part, given that three different categories of people can be found on the territory of a state: own citizens, foreign citizens and stateless persons.

While human rights are *universally valid* and *apply regardless of nationality*, the rights of the citizen are specific to a limited group of people (i.e. citizens of that state). Human rights thus include the rights of own citizens, the rights of foreign citizens and the rights of stateless persons (*M. Andreescu, A.N. Puran, 2017, p. 237*).

Thus, by "citizen's rights" we mean the specific rights of a person who is bound by the relation of citizenship to the respective state, while also acquiring a series of correlative obligations. The most important rights of citizenship are recognised and guaranteed by the State through the Constitution.

CONCLUSION

Human rights and freedoms are dynamic and sensitive to the dynamics of each state's society. We can therefore conclude that these two concepts, "human rights" and "citizens' rights", do not overlap, but are different in content.

It is interesting to point out that these rights, if violated by other subjects of law, can be enforced by the state of citizenship (e.g. through courts or ombudsmen), but also by a wide range of international actors, on the basis of international conventions (e.g. the European Court of Human Rights).

It is obvious that the legal protection of human rights must include a judicial component, otherwise they would remain on a suspended, arbitrary plane.

It is necessary to distinguish the protection of human rights from other branches of law because of the similarity of legal relationships that are subject to different branches of law. This belonging to a branch of law is important for the correct application of the law as a result of the legal qualification of the legal relationship. Thus, the legal classification of a particular legal relationship within a legal branch determines the applicable legal rule.

It should be borne in mind that in order to qualify the legal relationship properly, the enforcement body, which has fundamental and specialist legal knowledge, will perform a number of preliminary operations (i.e. naming the legal

rule, verifying its authenticity and legal force, determining the exact content of the legal rule).

We consider that the legal protection of human rights combines a national law component (thus constituting a branch of national law based on national regulations on this issue) and an international component (thus constituting a branch of international law based on international regulations on this issue).

At present, several issues are raised about the relationship between national and international human rights regulations, but these will be the subject of a separate article. At the same time, we stress that the system of law is unitary, its branches of law interfering.

The separation of international human rights protection from public international law is obvious (there is a relationship from the particular to the general), as this new discipline is based on legal rules of public international law that define and protect fundamental human rights.

Treaties adopted at international level presuppose the harmonization of the requirements of international cooperation with the principle of state sovereignty, since failure to respect these two principles would lead to interference in the internal affairs of states.

For this reason, the treaties imply an obligation on States parties to adopt legislative and administrative measures to ensure the realisation of the fundamental human rights recognised by the treaties, which thus become effective. In this respect, it can be said that the international consensus is that the realisation and guarantee of human rights is based on the adoption of national legislative measures. An example of this is the Convention for the Protection of Human Rights and Fundamental Freedoms itself, which does not replace national systems for monitoring human rights, but represents an additional international guarantee to them, which intervenes only in the event of failure by the national authorities to guarantee those rights. The Convention itself requires the exhaustion of domestic remedies as the main condition of admissibility. Please note also that the dynamic and evolving interpretation of the provisions of the Convention is an important method of interpretation of the Court. The judges create law on the basis of interpretation of the Convention (I. Boghirnea, 2013, p. 108), combining elements of continental law and anglo-saxon law.

Although questions are constantly raised about the fragmentation of international law that would threaten the complex legal system created by the subjects of international law, we nevertheless believe that, at the level of human rights, we are witnessing a process of convergence, characterised by coherence and unity.

Nowadays, the unprecedented proliferation of international human rights organisations and jurisdictions is leading to a trend towards their hyper-specialisation, which should not be seen as having a negative connotation, as a human rights culture is being created... and thus a human rights education, which is essential for every individual. As the promotion of human rights becomes more

effective, a real human rights education will be created that will lead to fewer human rights violations.

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SARA Law **R**esearch **C**enter
International **J**ournal of **L**egal and **S**ocial **O**rder, https://www.ccdsara.ro/ijlso
ISSN 2821 – 4161 (Online), ISSN 2810-4188 (Print), ISSN-L 2810-4188
N°. 1 (2024), pp. 241-250

DECLINE OF THE NOTION OF LEGAL CUSTOM THROUGH THE SPECIFICITIES OF ARTIFICIAL INTELLIGENCE

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Received 10.11.2024; accepted 19.12.2024
DOI: https://doi.org/10.55516/ijlso.v4i1.229

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Abstract

The present study aims to explore the transformations brought to custom, a traditional source of law, by the emergence of artificial intelligence (AI). The plan of the analysis is structured in two main parts: the first part focuses on the presentation of the notion of custom and its particularities in relation to usage. The second part of the paper develops the concept of AI and its functions, in particular that of the legal algorithm. The central issue around which this article is articulated is the protection of fundamental rights and free will, since AI tends to take the place of the legislator, producing new social rules based only on factual data, which lack the power of abstraction.

Key words: *AI, algorithm, custom, usage, law.*

INTRODUCTION

At a time when humanity is experiencing a technological progress unique in its history, the present work aims to go back to fundamental principles. The custom, the main tool of what we might call traditional law, in which orality played a central role, is put to new tests. With its multiple meanings and meanings, it has over the ages fulfilled both the principal function of law and that of complementing the written rule, when codes came later.

Historically, the custom has been around since ancient law, but it became a real source of law in the Middle Ages *G. Kadige, De la place et du rôle de la coutume dans les droits antiques, în F. Garnier si J. Vendrand-Voyer, La coutume dans tous ses états, La Mémoire du Droit, Paris, 2013, p. 27*).

For example, in France the institution of custom was brought by the Germanic barbarian tribes. In this way, customs characteristic of nomadic

populations took root in the territorial area in which these peoples settled. Of course, with the passage of time and the advent of the monarchy, the barbarian customs were replaced by new rules of law, and the coup de grace came with the codification of customs in the Napoleonic Code of 1804 (*J. Gilissen, La rédaction des coutumes dans le passé et dans le présent, 1962, Université libre de Bruxelles, Bruxelles, p. 15*).

I. CHARACTERIZATION OF THE NOTION OF CUSTOM

Etymologically, the word "*custom*" brings to mind the passage of time, more precisely a legal rule established by constant and long-standing practice. Often, custom is synonymous with *usage* or is understood as a *practice* in a particular area of trade. In order to understand the legal meaning of the term custom, we will try to give it a legal definition (*I.1*), and then to individualize it in relation to other similar legal concepts (*I.2*).

1.1. The legal definition of custom

The concept of custom is found in all legal systems, even if it is not presented in the same way, as it is up to each legal system to define what it means by "*custom*" (*H. Ruiz Fabri, L. Gradoni, Coutume, Répertoire de droit international, Dalloz, Paris, 2017, n°1*).

For example, there are certain legal systems which list their sources, among which reference is made to custom or usage, such as the Swiss Civil Code (*Art. 1*) and the Romanian Civil Code (*Art. 1*) or the Statute of the International Court of Justice (*Art. 38*).

It should be noted, however, that in France, the Law of 30 Ventôse XII on the unification of civil laws in a single body under the title of the French Civil Code, marked by the revolutionary spirit of the time, repeals in Article 7 "*roman laws, ordinances, general and local customs, statutes and regulations*". Thus, despite the fact that the draft law provided for the retention of custom as a source of law, it was excluded from the final text to make room for the new source, the law (*S. Pintor, Réflexions au sujet de la coutume en droit interne, in Mélanges Lambert, t. 1, 1938, LGDJ, p. 372*).

A general definition of legal custom is given in the famous *Vocabulaire Juridique* under the direction of Professor Gérard Cornu. Thus, custom is "*the objective rule of law based on popular tradition (consensus utentium), which confers a legally binding character on a constant practice*" (*G. Cornu, Vocabulaire juridique, ed a 12-a , PUF, Paris, 2016, p. 625*). In other words, a true unwritten "*law*" which does not emanate from the legislative power and which is adopted by a community as such by custom (*diuturnus usus*), giving it a binding character (*opinio necessitatis*).

This traditional concept of custom is based on a Romano-Germanic definition, which is articulated around two elements, namely *a material* and *a psychological element ((J. Gaudemet, Les naissances du droit – Le temps, le*

pouvoir et la science au service du droit, ed a 3-a, Montchrestien, Paris, 2001, p. 47).

The material element represents a constant practice *over time* (*consuetudo*), general and *long-standing*, concerning the resolution of a given situation. Of course, the practice that we observe through the *passage of time* has a relative appreciation, since duration is a factor with a variable geometry, in relation to the size of the population to which we refer and the frequency of repetition. Clearly, a social behaviour that is repeated infrequently takes longer to crystallize into a custom, whereas repetition at short intervals and in a homogeneous group of people means that the practice in question becomes established as a custom more quickly (*P. Deumier, Coutume et usage, Répertoire de droit civil, Dalloz, Paris, 2014, n° 21*).

Next, the material element must be *constant and unbroken*. The constant and uninterrupted or continuous character of the custom means the application of the unwritten rule, unanimously accepted, "*to all similar cases in the region in which its authority is invoked*" (*Commercial Court of Seine, France, May 31, 1929, Gazette de Palais, Paris, 1929, p. 166*).

In addition to the above-mentioned attributes, practice as a material element of custom must also be *current*. Thus, the courts, in their role as arbiters of the application of the law in time and space, ensure that the customary rule, which is alleged to have been disregarded, is not out of date. Moreover, they have a duty to check whether it is mature and fully shaped or is in the process of being formed. The term "*current*" also means whether or not the custom has been maintained after the legislative amendments or whether it has been replaced by another custom (*P. Deumier, op.cit., n° 23*).

Last but not least, the practice must be general in nature. To qualify as a custom, it must not be understood as accepted by all, but adopted by all members of the community. *Per a contrario*, a practice, however old and repetitive it may be, does not qualify as a custom if it remains strictly individual in its application.

The psychological or *moralelement* is characterized by the feeling of duty, of obligation that the subjects of the relationship have to comply with the unwritten rule (*F. Gény, Méthodes d'inteprétation et source du droit privé positif, LGDJ, Paris, 2016*).

Thus, in order for an unwritten societal norm to have the value of custom, it must prove its constancy over time, and the way in which the subjects of law manifest themselves must not change with the passage of time, on the one hand, and on the other hand, the coercive force it releases must be intrinsic to the human being, i.e. not imposed on him by a sovereign power.

Criticized by doctrine, in particular by Kelsen (*H. Kelsen, Théorie générale du droit et de l'État, 1997, LGDJ, Paris, p. 168*) and Gény (*F. Gény, op.cit.,2016, n° 120*), the psychological element represents the sense of duty, the natural and

normal behavior of any individual. It is precisely this element that differentiates custom from the notion of usage or practice.

Indeed, even if the legal norm is the fruit of the elaboration of the legislature or the result of the jurisprudence of the courts, the general, uninterrupted and long-standing process or practice of a group is only fully accomplished when it inspires a sense of duty.

1.2. Individualization of custom

As we have shown above, in order to be able to speak of a customary rule, two elements must be brought together: material and psychological. In the case of custom, the moral element is missing. By way of example, the 1969 decision of the International Court of Justice in a case concerning the delimitation of the continental shelf in the North Sea between Denmark and the Federal Republic of Germany and between the Netherlands and the Federal Republic of Germany, which stated: "*the States concerned must (...) feel that they are complying with what is a legal obligation. Neither the frequency nor even the ordinariness of acts is sufficient. There are many international acts, in the field of protocol, for example, which are almost invariably complied with, but they are motivated by mere considerations of courtesy, expediency or tradition, and not by the sense of a legal obligation*" (*ICJ, February 20, 1969, North Sea Continental Shelf case, ICJ Reports, § 76 and 77*).

As a consequence, the full awareness of being bound by a legal obligation and the belief that the latter requires a specific behavior (*opinio juris*) makes the difference between custom and usage, which lacks this aspect.

It can be concluded that only custom is the source of law, since usage oscillates between a mere fact, a custom in the process of formation or a tacit convention (*P. Deumier, op.cit., 2014, n° 28*).

However, it should be noted that some doctrine advocates abandoning this distinction, considering it purely theoretical (*F.Osman, Les principes généraux de la lex mercatoria, LGDJ, Paris, 1992, p. 424*). The terminology used is therefore merely a question of language adapted to the branches of law. In public international law, for example, we speak of "*custom*", whereas in the law of international trade we refer to "*usage*" (*Y. Derains, Le statut des usages du commerce international devant les juridictions arbitrales, Revue d'arbitrage, Paris, 1973, No 122, p. 135*).

Also, a distinction between the two notions is made by some authors by hierarchizing them (*G. Cornu, Droit civil. Introduction au droit, 13th ed., LGDJ, Paris, 2005, n° 420; Ph. Le Tourneau, Quelques aspects de l'évolution des contrats, in Mélanges Raynaud, Dalloz-Sirey, Paris, 1985, p. 349*). From this perspective, the two notions have the same legal force, the difference being that usage has greater vivacity and flexibility to develop in more compact groups,

whereas custom, by its rigor, is more difficult to produce effects in a dispersed society.

It is worth noting that the Romanian legislator lists, in Article 1 of the Civil Code, in addition to the law and general principles, custom and not custom as the source of law. Thus, under Romanian law, custom is the source of law which imposes an obligation on the parties.

Whatever the angle from which we analyze the comparison between custom and usage, these two concepts acquire legal value only by reference to the law (*praeter, secundum* or *contra legem*).

In practical terms, the three concepts are, first and foremost, *complementary*, with custom having in particular a suppletive role in the absence of legislative provisions. This function, also called *praeter legem* (outside the law), symbolizes the capacity of custom to apply by virtue of a force of its own. However, the development of modern law has increasingly limited the manifestations of custom, whatever the branch. The only source of law which is still alive today is usage, and this is restricted to relations between professionals.

More often than not, the law itself lays down how custom and usage are to be used, the latter having the role of *secundum legem*. The consequences of the implementation of this legislative method are positive, as it strikes the right balance between the general interest protected by the rule of law and the particular needs of different groups of individuals, who are allowed to determine the customary rule they will follow.

Another function that has been attributed to the rule of law is a *subversive* one. The study of cutum *contra legem* poses most challenges for law. First of all, there is a conflict between custom and law when the latter is imperative. On the other hand, custom finds preferential application over the law when the rule of law contained in the text of the law has a pre-established, implicit application. Therefore, what is within the power of the parties to agree by mutual consent when concluding a contract is also within the power of the usages arising from the repetition and generality of the same contract.

We can conclude, finally, that customary law was not lost after the advent of the written civil codes, but continued to develop spontaneously.

II. THE ROLE OF ARTIFICIAL INTELLIGENCE IN LAW

The emergence of new technologies, and in particular Artificial Intelligence, has led to profound changes in all spheres of contemporary society, some of them radical. The field of law has obviously not been exempt from these trends. How AI can become a source of law and what risks legal algorithms entail, we will analyze in the two parts of this chapter.

2.1. Presentation of the AI concept

In addition to "*hybrid*", "*Artificial Intelligence*" is one of the most fashionable terms in current parlance. Being used at every turn, the noun

"*intelligence*" and its adjective "*artificial*" are becoming commonplace. However, it should be noted that AI has no universally accepted definition. (*R. Stancu, Articulating civil liability in the paradigm of artificial intelligence law, International Conference "Towards a Law of Artificial Intelligence. Premise. Actualități. Perspective", Bucharest, April 05, 2024*).

The notion of AI appeared in the mid-1950s, when the mathematician Alan Turing wondered whether a computer would one day be able to "think" or whether it was limited to an "*imitationgame*" of human thought.

From the perspective of the legislator, in particular the European legislator, AI is "*the possibility for a machine to reproduce behaviors associated with humans, such as reasoning, planning or creativity*" (*European Parliament, Artificial intelligence: definition and use, https://www.europarl.europa.eu/topics/fr/article/20200827STO85804/intelligence-artificielle-definition-et-utilisation*).

Another useful definition is that given by the European Commission, which defines AI as "*systems that exhibit intelligent behaviors by analyzing their environment and that take action - with some degree of autonomy - to achieve specific goals*" (*Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions on Artificial Intelligence for Europe, https://eur-lex.europa.eu/legal-content/FR/TXT/?uri=CELEX%3A52018DC0237*).

AI technology can be divided into different levels of complexity, starting from the so-called "*weak*" ones, where human intervention is necessary for the program to make decisions, to those considered "*powerful*", which have implemented technology that gives them the ability to self-learn, allowing them to go beyond the limits initially programmed and adapt to new situations, unforeseen at the time of the original program design.

In general, we can reduce the notion of AI to a computer algorithm, a computer program or software that automatically executes the programmer's commands within the limits of certain parameters set in advance (*R. Stancu, Manifestarea de voința la încheierea contractului inteligent*, *Universul Juridic, 2024,https://www.universuljuridic.ro/manifestarea-de-vointa-la-incheierea-contractului-inteligent/*).

It should be noted that there is this reflex to view computer algorithms from an inferior perspective. By placing these programs in a superior position to human intelligence, we lose sight of the fact that they are merely tools created to perform certain functions, without free will.

Referred to in the legal field as Legal *Tech*, artificial intelligence is in fact a system of expertise, as is the case with contract management programs, which reproduces the cognitive mechanisms of a specialist in a particular field through logical reasoning (*E. Barthe, L'intelligence artificielle et le droit, I2D Information, données & documents, Paris, n°1/2017, p. 23*).

Legal algorithms are the result of the emergence of two technologies, namely *machine learning* (ML) and *natural language processing* (NLP). ML is a technology that may or may not be supervised by humans and is based on *deep learning*, a deep and static machine learning. This type of technology is most often used to develop legal algorithms. (*H.Surden, Machine Learning and Law, Washington Law Review, Washington, 2014, n°1*).

NLP is based on ML technology, to which is added a *parsing* technique. However, NLP, even though it indirectly and implicitly detects the meaning of words, cannot deduce logic. For example, licit and illicit are similar concepts for it.

However, what sound the effects of using the algorithm in the sphere of law.

2.2. Can software be a source of law?

During the yellow vest (*gilets jaunes*) demonstrations in Paris in mid-November 2018, the French authorities used a computer program that was able to identify, by analyzing social media data, the organization of protests in the City of Lights before the protesters gathered (*E. Chol, Gilets jaunes : la révolution en algorithme, Le courrier international, 14 December 2018, https://www.courrierinternational.com/article/edito-gilets-jaunes-la-revolution-en-algorithme*).

Moreover, the computer program not only detected the organization of a demonstration of a scale known to everyone, but also proposed legal solutions. Thus, the computer algorithm, by anticipating events and offering solutions before the facts take place, makes justice predictable (*S. Chassagnard-Pinet, Les usages des algorithmes en droit : prédire ou dire le droit ?, Recueil Dalloz, IP/IT/, 2017, p. 495*).

However, in spite of the apparent certainty that the algorithm offers thanks to its implacable mathematical logic, it shows its limits when it comes to "*learning*" the difference between *soft* l*aw* and *hard law*. Yet it is precisely this ability to distinguish between the two types of law that enshrines the dual function of the legal algorithm, which is to provide and to state the applicable rule of law. (*B. Barraud, Le coup de date permanent, la loi des algorithmes, Revue des droits et liberés fondamentaux, Paris, 2017, chron. 35, https://revuedlf.com/droit-fondamentaux/le-coup-de-data-permanent-la-loi-des-algorithmes/*).

The role of the algorithm is to understand the behavior of a group of individuals through the prism of the flow of collected data. It relates strictly to the materiality of the gestures and expressions of the group in question, in the case of the yellow vests, to their demands, and then generates a *complementary norm derived* according to their expectations and the economic situation of a locality or country. However, the program leaves abstract norms out of its calculation (*S. Chassagnard-Pinet, op.cit.*).

By the algorithm's inability to abstract, limiting itself only to the brute facts expressed, e.g., fuel prices too high, travel difficulties, dissatisfaction, the legal

answer it gives is not one of causation, but of correlation. The program provides an accurate reflection of society and not a rule of law. (*H. Croze, Justice prédictive. La factualisation du droit, JCP éd. G., n° 5/2017, Paris, 101*).

In the paradigm of the legal algorithm, the tutelary figure of the legislator disappears, replaced by mathematical formulas that include in their evaluation the relative behavior of humans. When the algorithm identifies a new element, it associates it with a consequence and proposes a rule of law. In this way, the legal rule risks becoming extremely unstable and the law is inundated with rules created continuously by the algorithm (*S. Chassagnard-Pinet, op.cit.*).

As we have shown in the first part of the study, for a societal behavior to become custom and then law, it must be validated by the passage of time. Thus, in order to be able to say that the solution proposed by the algorithm has the value of a legal norm, the computer program must observe a repetition over time, record it in its database, translate it mathematically into computer code and then ensure that it does not lose its value with the passage of time. It is also a sine qua non that the subjects of the right perceive it as an obligation. Obviously, a third condition, in addition to proof of the passage of time and the fact that it is an obligation, is that it must be in the general interest (*B. Oppetit, Sur la coutume en droit privé, Droits, Revue française de théorie, de philosophie et de culture juridique, Paris, n.3/1986, p. 44*).

We can conclude that the function of the legal algorithm is to provide a complementary, derived, automatized and personal rule. In concrete terms, the algorithm plays a complementary role to governance by law, in the sense that mathematical formulas improve the rule of law, adapting it to the new expectations of the times and avoiding the risk of becoming obsolete (*A. Supiot, La gouvernance par les nombres. Cours au Collège de France (2012-2014), Fayard, Paris 2015*).

CONCLUSION

What we call Artificial Intelligence is actually a scientific discipline. By extrapolation, we have come to call AI all the products that result from the research domain of the Artificial Intelligence discipline. However, since we are talking about scientific research, the idea of reproducing human intelligence must be excluded.

In a generally accepted manner, the rule of law is an abstract, mental notion that is meant to frame the behavior of individuals in a certain time and space. With the digitization of society, economies and our lives in general, algorithms have become ubiquitous in the everyday life of modern man. Moreover, computer programs have also penetrated the legal world, participating in the governance of society and taking part in the act of justice.

DECLINE OF THE NOTION OF LEGAL CUSTOM THROUGH THE SPECIFICITIES OF ARTIFICIAL INTELLIGENCE

With the emergence of legal algorithms or Legal Techs, which analyze data from the virtual environment in record time, the legal world is undergoing a profound change. By issuing rules, algorithms thus become sources of law.

It is undeniable that algorithms are producing increasingly accurate results thanks to data mining (a set of data mining and analysis tools designed to extract the most important information), advances in natural language processing and machine learning (machine learning and deep learning techniques inspired by biology and interconnected neural networks). However, one wonders whether in this evolution where only the sky is the limit fundamental rights are protected or whether the free will of each individual in society is affected (G. Conti, W. Hartzog, J. Nelson, L. A. Shay, Do Robots Dream of Electric Laws? An Experiment in the Law as Algorithm, in R. Calo,M. Froomkin, I. Kerr, eds, Robot Law , Edward Elgar, 2016, p. 274).

Then, if what some authors call the "law of algorithms" is a reality, it imposes a caveat, since only a small part of society's members are aware of its existence. Not having the status of a source of law such as law, custom, customs or jurisprudence, individuals do not have the automaticity to verify it. And if they want to be informed, where can they do so? However, the principle according to which nemo censetur ignorere legem requires compliance with the rule developed by the algorithm (B. Barraud, Le coup de data permanet, op.cit., 19).

Through the creation of new technologies, a new legal language is emerging. Returning to our topic, we can say that customary law continued to develop spontaneously after the appearance of civil codes, but the current context forces custom to take on new forms. So, the legal algorithm does not present a direct threat to the existence of custom and written law, but aims at a transformation of the conception of their nature and role.

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SARA Law **R**esearch **C**enter
International **J**ournal of **L**egal and **S**ocial **O**rder, https://www.ccdsara.ro/ijlso
ISSN 2821 – 4161 (Online), ISSN 2810-4188 (Print), ISSN-L 2810-4188
N°. 1 (2024), pp. 251-269

A BRIEF GLIMPSE UPON THE "PARADIGM SHIFT" REGARDING PERSONS WITH DISABILITIES - TALES OF CONSISTENCY

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Received 20.09.2024; accepted 20.10.2024
First online publication: 26.10.2024

DOI: https://doi.org/10.55516/ijlso.v4i1.191

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Abstract

The article provides a detailed analysis of the paradigm shift introduced by the UN Convention on the Rights of Persons with Disabilities (CRPD). The CRPD, adopted in 2006, is recognized as a significant human rights treaty that reaffirms the universal concept of human dignity, applying it to all individuals, including those with mental disabilities. The convention emphasizes the need for legal frameworks to evolve, ensuring that persons with disabilities enjoy legal capacity on an equal basis with others. The historical context leading up to the CRPD is outlined, noting that earlier UN declarations and principles laid the groundwork by gradually recognizing rights of persons with disabilities. This development can be divided into three stages: the initial recognition of legal personality, the establishment of principles for mental health care, and finally, the CRPD's comprehensive approach to legal capacity.

A key focus of the article is the controversy surrounding Article 12 of the CRPD, which grants persons with disabilities the right to legal capacity in all aspects of life. This provision challenges traditional systems of guardianship and substitute decision-making, which have historically been used to manage the affairs of individuals with mental disabilities. The article discusses the debates and misunderstandings among national legislators regarding the implementation of this "paradigm shift," particularly the move from substitute to supported decision-making.

Overall, the article argues that the CRPD represents a culmination of decades of evolving legal principles aimed at ensuring equality and dignity for persons with

disabilities. The author emphasizes the need for national laws to align with this new approach, ensuring that legal capacity is universally recognized, regardless of an individual's mental or physical condition.

Key words: *The UN Convention on the Rights of Persons with Disabilities; paradigm shift; equal recognition before the law; persons with disabilities.*

INTRODUCTION

Some Introductory Remarks

The United Nations Convention on the Rights of Persons with Disabilities (CRPD), adopted by the UN General Assembly in 2006 and in force since 2008[1], is widely regarded as the first human rights treaty adopted in the 21st century (*Watson, Anderson, Wilson, Anderson, 2022, p. 2806*) and an esteemed representative of "core" human right treaties (*de Búrca, 2015, p. 295*). It resolutely reaffirms human dignity as a universal concept and as an unalienable right, applicable to all persons regardless of their individual features. Divided into seven chapters and containing exactly fifty articles, it is evident that the Convention strives to provide an extensive set of rules on the subject. Its creators recall the necessity to set higher standards in the legal protection of persons with disabilities - a task that cannot be achieved without the timely intervention of national legislators who should provide adequate legal means to achieve this humane result.

Moreover, by the explicit recognition of disability as an "*evolving concept*" in Recital (e) of the Preamble, the drafters bring about an entirely new legal approach regarding persons with disabilities, referred to by many scholars as a "*paradigm shift*" (*Rimmermann, 2017, p. 30 et seq.*). It consists of providing these persons with an unhindered possibility to enjoy legal capacity on an equal basis with others in all aspects of life (art. 12, para. 2 CRPD), thus imposing a legal obligation on State parties to amend their national legislation in accordance with the Convention rules. The drafters define "*persons with disabilities*" in a very broad manner, thus stretching the concept of equal legal capacity embodied in art. 12 to individuals with physical and mental disabilities alike (art. 1, para. 2 CRPD).

However, the Convention brought about heated doctrinal discussions within many State parties. The main issue is whether pre-existing rules on guardianship and substitute decision-making procedures regarding persons with mental disabilities throughout different national legislations stand at variance with the

This study is financed by the European Union-Next Generation EU, through the National Recovery and Resilience Plan of the Republic of Bulgaria, project SUMMIT BG-RRP-2.004-0008-C01". The present paper is part of a collaborative research project. All opinions, views and legislative interpretations expressed herein, are my own.

[1] Drafted on 13 December 2006; Signed on 30 March 2007; In force since 3 May 2008.

new approach, adopted by the drafters, and, should there be a logical collision, how to resolve it. That is why, the present article is a humble attempt to assess conflicting views on the relation between guardianship and the provisions of CRPD in order to establish what necessary measures should be undertaken by the respective legislator to ensure conformity of national rules on persons with disabilities with the "*paradigm shift*", introduced by the CRPD.

I. THE CRPD AND ITS BACKGROUND

Some critics claim that this new type of legal approach to persons with disabilities might be considered unexpected and hasty by some national legislators and that it even may lead to "*adverse consequences*" (*Scholten/ Gather, 2018, p. 226*).

To my view, there might be some margin for discussion. UN's concern for equal treatment of persons with disabilities spans over a period of several decades[2]. Nowadays, it seems to be accepted (*Series, L., Nilsson, A., 2018, p. 342*) that the first specific expression of this concern lies in the ***UN Declaration on the Rights of Mentally Retarded Persons (1971)***[3]. Some of the more important reasons to adopt this declaration are the "*necessity of assisting mentally retarded persons to develop their abilities in various fields of activities*" and the promotion "*of their integration as far as possible in normal life*", as it is laid down in the Preamble. The drafters deal with basic human rights of persons with disabilities (*Schoenfeld, 1974, p. 31*), such as the mere possibility to bear human rights (Paragraph 1); access to medical care and education suited to the person's individual needs (Paragraph 2); the right to live with one's family (Paragraph 4) etc. In this regard, it is particularly worthy to point out that the right to a qualified guardian when this is required to protect the person's well-being and interests is explicitly laid down within the system of human rights (Paragraph 5). The drafters aim to provide a substantially higher level of protection of the legal interests of the person, by providing in Paragraph 7 that whenever such persons are unable, because of the severity of their condition, to exercise all their rights in a meaningful way or it should become necessary to restrict or deny some or all of these rights, the procedure within national legislations used for that restriction or denial of rights must contain proper legal safeguards against every form of abuse. This procedure must be based on an evaluation of the social capability of the mentally retarded person by qualified experts and must be subject to periodic review and to the right of appeal to higher authorities. It would seem that, at this early stage, the UN renders the appointment of guardians and substitute decision-

[2] A thorough presentation of UN's acts on persons with disabilities can be found in **Rimmerman, A**. Disability and Community Living Policies, op.cit., p. 31 – 34.

[3] Adopted on 20 December 1975 by UN General Assembly Resolution 2856; Full text available at - https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-rights-mentally-retarded-persons (last visited 22.07.2024).

making an expression of legal protection of one's interests and does not consider it detrimental to the person with disabilities.

In just four years to follow, the UN adopted the ***Declaration on the Rights of Disabled Persons (1975)***[4]. While it does not present a radical turning point, the 1975 Declaration contains the first eloquent expression that "disability" is a wide concept that refers to persons with physical ***and*** mental disabilities equally and simultaneously - a concept subsequently adopted in art. 1 CPRD as well. It simply refers to the previous declaration regarding the possibility to appoint a guardian (paragraph 7 UN Declaration'1975). Even at this early stage, the drafters admit that, in connection to the enjoyment of civil and political rights by the person with mental disability a "*possible limitation or suppression of those rights for mentally disabled persons*" is sometimes justified, provided that the additional requirements are met in national legislations, such as the involvement of medically competent specialists, the existence of a periodic review and the right to appeal to a higher authority.

It is worth to recollect that, as a rule, UN Declarations are non-binding instruments and do not create direct legal obligations for State parties or other actors. At the same time, in their Preambles both UN declarations contain the unfortunate finding that "*certain countries, at their present stage of development, can devote only limited efforts to this end*". Perhaps particular socio-economic circumstances in the second half of the XX century throughout carious national legislations are the very reason why such a non-binding form is chosen on the first place. It may be that the drafters consider it unwise to impose an entirely new legally binding regime regarding persons with disabilities on State parties, since such an approach might actually produce detrimental consequences.

The non-binding intervention of the UN in the subject of rights of persons with disabilities remains a trend throughout the 1980s. Instead of introducing legally binding supranational acts, the United Nations prefers to raise worldwide awareness of these persons' rights. An expression of this policy is a UN proclamation from December 1982, whereby the decade from 1983 until 1992 is pronounced "***United Nations Decade of Disabled Persons***". Moreover, a major outcome in the same 1982 - declared by the UN as the *International Year of Disabled Persons* - is the formulation of the *World Programme of Action concerning Disabled Persons*, adopted by the General Assembly on 3 December 1982, by its resolution 37/52[5]. These initiatives are accompanied by the preparation of the first worldwide reports about conditions of people with mental disabilities. Legal scholars point out that rapporteurs "*found widespread human*

[4] Adopted on 09 December 1975 by General Assembly Resolution 3447; Full text available at - https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-rights-disabled-persons (last visited 22.07.2024).

[5] Full text available at - https://www.un.org/development/desa/disabilities/resources/world-programme-of-action-concerning-disabled-persons.html#text (last accessed on 27.07.2024).

rights abuses and a generally "gloomy picture" of the conditions of mentally disabled people", resulting in the call for the establishment of a permanent international body to supervise respect for the rights of people with disabilities (*Rosenthal, E., Rubenstein, L., 1993, p. 257 et seq*.). Despite the subsequent lack of initiative on the establishment of such a body, the UN remains persistent to promote rights of persons with disabilities.

On 17 December 1991, the UN General Assembly adopts ***The Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care***[6]. These twenty-five principles define fundamental freedoms and basic rights of persons with disabilities and are intended to serve as "*a guide to Governments, specialized agencies and regional and international organizations, helping them facilitate investigation into problems affecting the application of fundamental freedoms and basic human rights for persons with mental illness*" [7]. Contemporaries boast the *1991 Principles* and point out that they articulate principles of human rights in mental health treatments and prohibit or restrict obsolete medical practices (*Zifcak, 1996, pp. 1-10*).

It is fair to point out that even these Principles do not depart from the substitute decision-making process. On the contrary, as early as Principle 1, the drafters explicitly provide that" *Any decision that, by reason of his or her mental illness, a person lacks legal capacity, and any decision that, in consequence of such incapacity, a personal representative shall be appointed, shall be made only after a fair hearing by an independent and impartial tribunal established by domestic law.* " [8] Moreover, it is worth mentioning that this is not the first instance when the to use the notion of "*legal capacity*", mentioned in Principle 1. It has already been introduced within UN legislation in art. 15 of the 1979 *UN Convention on the Elimination of All Forms of Discrimination against Women*[9]. It

[6] Full text available at - https://www.ohchr.org/en/instruments-mechanisms/instruments/principles-protection-persons-mental-illness-and-improvement (last accessed on 24.07.2024).

[7] Cf History of United Nations and Persons with Disabilities – United Nations Decade of Disabled Persons: 1983 – 1992. https://www.un.org/development/desa/disabilities/history-of-united-nations-and-persons-with-disabilities-united-nations-decade-of-disabled-persons-1983-1992.html (last accessed on 20.07.2024).

[8] It should be noted that the adoption of the Principles does not mark the end of UN's initiatives on the subject. On the contrary, on 16 December 1992, the General Assembly appealed to Governments to observe 3 December of each year as International Day of Disabled Persons. The Assembly further summarized the goals of the United Nations regarding disability and asked the Secretary-General to move from consciousness-raising to action, placing the Organization in a catalytic leadership role, which would place disability issues on the agendas of future world conferences.

[9] Cf. Adopted on 18 December 1979 by the UN General Assembly, full text available at https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women (last accessed on 16.02.2024). The provision of art. 15 is, as follows: "*States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity.*"

is evident that the drafters have attributed to the notion of "legal capacity" one and the same meaning in both conventions – the legal ability to act on one's behalf autonomously.

Therefore, it is easy to percept the 21st-century CRPD as a logical continuation of these processes, as is evident from recitals from the preamble. More specifically, Recital (10) recognizes the need to promote and protect the human rights of all persons with disabilities, including those who require more intensive support. As early as Recital 11, drafters of the CRPD express their concern that, despite these various instruments and undertakings, persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world,

Given this brief historical overview, one can deduce that the adoption of the CRPD is not a spontaneous and unexpected whim, but the result of a targeted policy which, in our opinion, can be divided into three stages of legal development.

The first stage, spanning from 1971 to 1991, is aimed at affirming that people with disabilities should be recognized as full-fledged subjects of law at all, i.e. not to be deprived or limited in their **legal personality** solely due to the presence of a mental disability.

The adoption of 1991 Principles can be regarded as the backbone of the second stage. The Principles are intended to guarantee that persons with disabilities will enjoy the same basic rights concerning various health aspects, such as right of access to specialized medical services and the prohibition of aggressive treatment (Principle 11). At this second stage, there is no question of reconsidering the placement under guardianship at all. On the contrary, as early as Principle 1, para. 6 it is stated that "*any decision that, by reason of his or her mental illness, a person lacks legal capacity, and any decision that, in consequence of such incapacity, a personal representative shall be appointed, shall be made only after a fair hearing by an independent and impartial tribunal established by domestic law*". As it is evident, the drafters' aim is to identify good practices and basic principles in the legal treatment of people with disabilities and, ultimately, to establish an exemplary model of legal framework to be adopted by national legislations regarding medical care provided to people with disabilities.

In this sense, the adoption of CRPD in 2006 can be regarded as the third stage in the development of the legal framework in relation to people with disabilities. At this stage, the drafters irrefutably presume that the desired advanced level of legal protection of people with disabilities has been already achieved worldwide. The drafters assume that national legislators have already unanimously recognized full legal personality of people with disabilities and that these people are not subjected to humiliating and damaging treatment. As it can be deduced, the past five decades provide a solid foundation upon which the CRPD can introduce a new paradigm on the legal capacity of people with disabilities.

Therefore, the adoption of the CRPD can by no means be regarded as hasty or inconsiderate, but should be considered as an expression of a consistent legislative policy lasting for half a century.

II. THE CRPD AND CONTROVERSIES SURROUNDING THE "UNIVERSAL LEGAL CAPACITY"

The drafting process of the CRPD encompasses a period of four years. The provisions were negotiated over eight sessions of the Ad Hoc Drafting Committee (*Series, Nilsson, 2018, p. 343*). Despite the swift resolution of the matter, there were many controversies. For instance, some national legislations, among which Russia and China, ostensibly willing to clarify the notion of 'legal capacity', proposed to include a footnote defining its meaning. However, their true proposal was to limit the scope of legal capacity solely to "the capacity to hold and bear rights", i.e. to legal personality and thus to exclude the "capacity to act". This purported "clarification" was resolutely dismissed by the Drafting Committee, since it compromised the very idea of the intended "paradigm shift". However, the biggest controverse was manifested in connection with art. 12 CRPD. A small number of national legislations submitted interpretative declarations when ratifying the CRPD stating that they understand article 12 to permit substitute decision-making[10].

Despite these controversies, the drafters of the CRPD brought about a paradigm shift by recognizing legal capacity as the *centre of all individual freedoms (Škorić, 2020, p. 32)*. Moreover, it is worth pointing out that the final text of the CPRD does not mention substitute decision-making whatsoever. On the contrary, it is evident that the creators' intention is to bring about a "paradigm shift" in the legal status of people with disabilities by providing a universal legal capacity not depending on the presence or lack of mental and psychical disabilities.

Article 12 CRPD lays down the most prominent principle of "equality before the law". In order to reveal the true legislative incentive, this article is to be construed together with art. 6 of the ***Universal Declaration of Human Rights 1948*** (*Everyone has the right to be recognized before the law*) and art. 16 of the ***International Covenant on Civil and Political Rights*** (*Everyone shall have the right to recognition everywhere as a person before the law*.). The provision of art. 12 CRPD can therefore be regarded as a continuation of these fundamental rules, aimed specifically at people with disabilities.

Art. 12 consists of five paragraphs, who have to be interpreted systematically. Some scholars are inclined to view art. 12 CRPD as containing a

[10] Among them are Australia, Canada, the Netherlands, Poland, Estonia, Norway, Egypt and Singapore.

"*defense right*" vis-à-vis invasions of one's legal personality and the right to call for support when necessary (*Nachtstatt, 2019, p. 15 – 16*).

Paragraph 1 enacts rules on legal personality of people with disabilities. The drafters state that the mere ability to be recognized as a person is a necessary pre-requisite for individual autonomy. This provision actually contains a non-discrimination rule, providing that all persons, irrespective of any disability, enjoy the same legal recognition of their personality (*Series, Nilsson, 2018, p. 348*).

Pursuant to **Paragraph 2,** States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. Perhaps this provision has stirred the highest number of discussions among contracting States. It is worth to remind that art. 12, para. 2 CRPD is the reason for the previously discussed reservations. Some critics of the "paradigm shift" claim that there is no uniform meaning of "legal capacity" and that this purported obscurity makes it hard for national legislators to bring their provisions in accordance with the Convention. Others tend to deny the existence of a new approach regarding people with disabilities and their legal capacity whatsoever and claim there is no need for any amendments within national legislations (*Scholten, Gather, 2018, p. 229*).

In order to reveal the true meaning of Paragraph 2, one must recollect that the long-standing tradition in many national legislations regarding people with mental disabilities is to appoint a specific person – guardian/administrator/proxy, who will act on behalf of that person with respect to both his or her personal and financial matters. Throughout the last two centuries, many national legislations have provided that every human being should have full mental capacity in order to enjoy legal capacity, i.e. the possibility to act by one's own volition and to cause legal consequences. Should it be established that the mental abilities of a person are impaired or missing, the person is deemed incapable of making autonomous decisions on their own. Therefore, the appointed legal representative makes all relevant decisions and the person with disabilities is deprived of their own legal capacity with the objective criteria "*best interest of the person*", rather than giving advantage to the personal will and preferences of this person. This "functional" approach considers mental capacity to be a necessary prerequisite for legal capacity (*on the correlation between mental capacity and legal capacity cf. Arstein-Kerslake, Flynn, 2016, p. 474 et seq*). In case of a lacking mental capacity, the person is regarded as lacking certain psychological features which brings about the appointment of a guardian - a system is also known as "substitute decision-making"[11].

[11] The most comprehensive summary of the substitute decision-making system can be found, to our view, in Para. 27, General Comment No. 1 - Article 12 : Equal recognition before the law (Adopted 11 April 2014), prepared by the Committee on the Rights of Person with Disabilities - https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-1-article-12-equal-recognition-1 (visited on 28.207.2024).

This very system is challenged by the drafters of the CRPD. Therefore, it is of little surprise that the first General Comment on the Convention, adopted at the Eleventh Session of the United Nations General Committee on the Rights of Persons with Disabilities (March 31st – April 11th 2014) is solely devoted to art. 12 CRPD[12]. The reason to put an emphasis upon art. 12 CRPD in particular can be explained, to our view, by the UN Committee's observation that there is a "*general misunderstanding*" of the exact scope of the obligation of States parties under article 12 of the Convention. This misunderstanding the members of the UN Committee discover in the unwillingness of some national legislators to grasp that "*the human rights-based model of disability implies a shift from the substitute decision-making to one that is based on supported decision-making*".

Being prepared by a body of the UN itself, the 2014 General Comment is actually the most authentic construction of art. 12 CRPD. It contains the resolute position that art. 12, para. 2 recognizes that persons with disabilities enjoy legal capacity on an equal basis with other persons in all areas of life. In order to completely eradicate any possible attempts to misinterpret the notion of "legal capacity", the drafters unequivocally provide that legal capacity comprises both the ability to hold rights and duties (legal standing), and the ability to exercise these rights and duties (legal agency)[13] in an autonomous manner. On the other hand, "mental capacity" is precepted as the individual decision-making skills of a person, which naturally vary from one person to another. The substitute decision-making system presupposes an impaired mental capacity should inevitably result in depriving the person of their legal capacity.

The drafters' aim is to re-consider mental capacity as a necessary prerequisite of legal capacity. As it is pointed out, no legal instrument on the topic, i.e. the provisions of art. 6 of the Universal Declaration of Human Rights, art. 16 of the International Covenant on Civil and Political Rights, as well as art. 15 of the Convention on the Elimination of All Forms of Discrimination provides a distinction between mental capacity and legal capacity. In the light of these preceding rules, art. 12 CRPD cannot possibly provide that *"an unsound mind" and other discriminatory labels can be considered as a legitimate reason for the denial of legal capacity (both legal standing and legal capacity)*[14]. The Committee points out that deficits in mental capacity should not be used to restrict or revoke legal capacity of persons with disabilities and, thus, ultimately overthrows the substitute decision-making system[15].

[12] Cf. https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-1-article-12-equal-recognition-1 (visited on 17.02.2024). Henceforth it will be referred to as General Comment.
[13] Cf. General Comment, p. 3, para. 13.
[14] Ibid., p. 3, para. 13.
[15] Ibid, p. 3, para. 13 and 14.

Therefore, it can be of no surprise that the members of the UN Committee consider legal capacity as an "*inherent right accorded to all people*"[16], comprised of both legal standing and legal agency, the latter meaning the abstract ability to act autonomously and to have these actions recognized by law with regard to third parties. Thus, legal capacity would mean that all people, including persons with disabilities, have both legal standing and legal agency simply by virtue of being humans. Therefore, these two phenomena cannot be separated in the manner, presupposed by the functional approach, without discriminating against people with disabilities.

Paragraph 3 seems to be the logical continuation of the preceding two provisions. It recognizes that *States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity*. As far as people with disabilities are concerned, art. 12, para. 1 recognizes their legal personality, whereas para. 2 – their legal capacity. The next step is to make sure that the "paradigm shift" towards supported decision-making is not just wishful thinking, but an actual State party obligation. Some scholars point out that art. 12, para. 3 forms the foundation of the support paradigm and calls for a State party obligation to provide support for the exercise of legal capacity (*Series, Nilsson, 2018, p. 363 – 364*).

Paragraphs 4 and 5 provide obligations for State Parties. The former urges State Parties to provide legislative safeguards to prevent abuse while persons with disabilities exercise their legal capacity and sets out primary requirements, whereas the latter - to take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property

In order to facilitate national legislators, the General Comment has attempted to clarify the notion "support". By providing support throughout the decision-making process, State parties refrain from denying persons with disabilities their legal capacity. On the contrary, they enable these persons to make valid legal decisions[17]. Within the meaning of art. 12, "support" is defined as a broad term that encompasses both informal and formal support arrangements of varying types and intensity, such as peer support, advocacy and assistance in the recognition of diverse, non-conventional methods of communication, especially for those people who use non-verbal forms of communication to express their will and preferences. Moreover, the UN Committee calls for the adoption of a statutory requirement aimed at private and public actors, such as banks and the like, to provide information in an understandable manner or to

[16] Ibid, p. 3 – 4, para. 14.
[17] Cf. General Comment, p. 4, para. 16.

provide other form of assistance, so that people with disabilities "*can perform the legal acts required to open a bank account, conclude contracts or conduct other social transactions*"[18].

The drafters of the General Comment № 1 explicitly provide that "*in order to recognize universal legal capacity, whereby all persons, regardless of disability or decision-making skills, inherently possess legal capacity, States parties must abolish denials of legal capacity that are discriminatory on the basis of disability*".[19] In order to achieve this result, the Committee proposes a two-step process, consisting of the abolition of the substitute decision-making regime and the development of supported decision-making alternatives (para. 28). The main idea of the new regime is to comprise various support options that give primacy to one's own wills and preferences. Their exact content, form and procedures will be determined by the national legislators in a manner which is most expedient and in harmony with national legal and social traditions. However, in para. 29, (a) – (i), the Committee has set out some "*key provisions to ensure compliance with article 12 of the Convention*" with regard to these various forms of support. Among them worth pointing out is the requirement that all forms of support are based on the wills and preferences of the person and not on what is believed to be in his or her objective interest (para. 29, (b) of the General Comment).

This approach by the UN Committee is criticized by some as being one-sided and not willing to deal with the "hard cases", where the person has an extensive cognitive impairment and their will cannot be discerned. It is argued whether such a situation requiring "100 per cent support" "*necessarily shades towards substitute decision-making*" and that supported decision-making in this particular instance is actually almost identical to an optimally operating guardianship, i.e. substitute decision-making (about this discussion cf. *Alston, 2017, p. 38*).

In our humble opinion, the viewpoint of the UN Committee can be easily explained, when one recollects the purpose of the CRPD to promote legal capacity on an equal basis. The aim of the Committee is to set the principal position that persons with disabilities are autonomous and, instead of being deprived of their legal capacity, should be supported throughout the exercise of their rights in the most suited manner. Should the drafters allow retaining some form of substitute decision-making model as an exception (e.g. for the "hard cases"), this shall inevitably lead to unequal treatment of persons with disabilities. A set of questions arise, among which the issue who will determine whether the individual case is a "hard" or an "easy" one. Another problem is the criterion upon which such an assessment will be made. This assessment is, however, an expression of the functional approach, which is resolutely turned down by the UN Committee as

[18] Cf. General Comment, p. 4- 5, para. 17.
[19] Cf. General Comment, p. 6, para. 25.

being discriminatory. Thus, by not allowing any exceptions with regard to "hard cases", the members of the UN Committee stand true to the preset aim of providing legal capacity on an equal basis.

Moreover, it can be argued whether the approach is really one-sided. Regarding art. 12, para. 4, the General Comment № 1 (2014) explicitly provides in its paragraph (18) that "*the type and intensity of support to be provided will vary significantly from one person to another owing to the diversity of persons with disabilities ... At all times, including in crisis situations, the individual autonomy and capacity of persons with disabilities to make decisions must be respected*". Moreover, para. 29, (b) of the General Comment is particularly aimed at the "hard cases", by providing that "*all forms of support ..., including more intensive forms of support, must be based on the wills and preferences of the person ...*". Therefore, to our view, the aforementioned criticism seems to be somewhat unjustified.

III. THE CRPD AND ITS IMPACT

3.1. Supporters of substituted decision-making often refer to the circumstance that the European Court of Human Rights (ECtHR) never denied this approach in its established case law (*Stavert, 2020, p. 5* – "*However, as already mentioned, as the current legal framework in Scotland currently gives precedence to ECHR rights and ECHR jurisprudence continues to favor the emphasis on defining limits for intervention approach*."). There are numerous recent examples of case law where ECtHR discussed respective national provisions on deprivation of legal capacity and found no violation of human rights in their mere existence[20]. It should be recalled, however, that the ECtHR "*rules on individual or State applications alleging violations of the civil and political rights set out in the European Convention on Human Rights"*[21]. No mention of a universal legal capacity or intended "paradigm shift" are expressed within its provisions. Therefore, it might ostensibly seem that the ECtHR seems reluctant to acknowledge that persons with mental disabilities are being deprived of their legal capacity under the "functional approach".

At the same time, one should recollect the long-standing position of the Council of Europe regarding persons with disabilities, and their numerous instruments, some of which even predate the CRPD. As early as 1999, the Committee of Ministers of the Council of Europe adopted the "***Principles***

[20] Among them cf. ***D.D. v. Lithuania* 13469/06 – Judgment from 14 February 2012 – "***Under the Court's practice, persons of unsound mind who were compulsorily confined in a psychiatric institution should in principle be entitled to take proceedings – attended by sufficient procedural safeguards – at reasonable intervals before the court to challenge the lawfulness of their continued detention***."; A.-M.V. v. Finland – Judgment from 23 March 2017.**

[21] Cf. https://www.coe.int/en/web/tbilisi/europeancourtofhumanrights (last visited on 13.08.2024)

concerning the legal protection of incapable adults"[22]. However, particular interest lies in the 2004 ***Recommendation No. REC (2004) 10 of the Committee of Ministers to member States concerning the protection of the human rights and dignity of persons with mental disorder***[23]. The provision of its article 4, paras. 1 and 2 provide that *persons with mental disorder should be entitled to exercise all their civil and political rights* and that *any restrictions to the exercise of those rights should be in conformity with the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms and should not be based on the mere fact that a person has a mental disorder*. This provision may be interpreted as a timid attempt to overcome the idea that legal capacity presupposes mental capacity. In other words, the Committee affirms that not every person suffering from a mental illness should *prima facie* be deprived of their legal capacity for this sole reason. The Explanatory Memorandum renders such an interpretation appropriate. Pursuant to its para. 47, "*Restrictions on these rights should be an exception rather than the norm. Given the importance of these rights, any restrictions on them must be prescribed by law. Such rights may be restricted for various reasons, for example under criminal law or laws relating to child protection, but the second paragraph emphasises that restrictions should be in conformity with the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms and should not be based on the mere fact that a person has a mental disorder.*"

The recommendation to assess every case individually does not by itself mean that the Committee seemed inclined to fully depart from the substitute decision-making system at this point. Such a policy shift did however occur. The Council of Europe Disability Strategy 2017-2023[24] is eloquent evidence of the substantial impact, brought about by the adoption of the CRPD. This otherwise non-binding instrument sets forth to recognize equal recognition before the law regarding persons with disabilities as one of the priority areas. Regarding the exact content of the notion, the drafters refer directly to art. 12 CRPD, thus providing that legal capacity is comprised by the capacity to hold rights and duties and the capacity to act on them simultaneously.

In Recital 62, the drafters assume that "*legal capacity continues to be denied to a part of the population on the basis of disability, particularly intellectual or psychosocial disability. Substituted decision-making, including full guardianship*

[22] Full text available here - https://www.coe.int/t/dg3/healthbioethic/texts_and_documents/Rec(99)4E.pdf (last visited on 13.08.2024)

[23] Full text available here - https://rm.coe.int/rec-2004-10-em-e/168066c7e1 - (last visited on 13.08.2024)

[24] Full text available here - https://www.coe.int/en/web/disability/strategy-2017-2023 - (last visited on 13.08.2024)

regimes where persons are stripped of their personhood in the eyes of the law and of the society, still prevail in many member States."

Taking into consideration these negative traits of substituted decision-making, in Recital 63 the drafters call for Member States " *to replace substituted decision-making with systems of supported decision-making. Possible limitations on decision-making should be considered on an individual basis, be proportional and be restricted to the extent to which it is absolutely necessary. Limitations should not take place when less interfering means are sufficient in light of the situation, and accessible and effective legal safeguards must be provided to ensure that such measures are not abused.*"

Therefore, it is of no surprise that quite recently, in 2023, the Council of Europe invoked Member States to adjust their national legislations on persons with disabilities with the paradigm shift, brought about by art. 12 CRPD[25]. Whether this call will lead to a change in EctHR case law on the deprivation of legal capacity via a national court judgement as well, remains to be seen in the following years.

3.2. In order to assess the consequences of adopting the CRPD into national legislations, it may be prudent to assess its impact. To my view, a major complication in the process of duly implementing the provisions of CRPD into various national legislations it that the drafters did not re-classify substituted decision-making as an obsolete legal institute. The resolute denial of the deprivation of legal capacity due to a mental illness is adopted in para. 9 of the General Comment № 1 (2014)[26]. This view is, however, not expressed within the provisions of the UN Convention and can be regarded, at most, as the authentic construction of its provisions.

These national legislations can be divided into two main groups, based on the lack or presence of a reservation clause regarding art. 12 CRPD.

3.1. As it has already been pointed out, **Australia** is among the national legislations who ratified the Convention with a reservation concerning art. 12, thereby declaring its reluctance to abandon the substitute decision-making system already incorporated into its domestic law. However, this position is actually not as rigid as it seems at first glance. Perhaps it was the resolute and authoritative General Comment on art. 12 that ushered the Australian Law Reform Commission to set forth the National Decision-Making Principles[27]. Published on 18.09.2014,

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[25] https://www.coe.int/bg/web/commissioner/-/a-paradigm-shift-is-needed-towards-a-human-rights-approach-to-mental-health-care

[26] "*The Committee reaffirms that a person's status as a person with a disability or the existence of an impairment (including a physical or sensory impairment) must never be grounds for denying legal capacity or any of the rights provided for in article 12.*"

[27] Cf. https://www.alrc.gov.au/publication/equality-capacity-and-disability-in-commonwealth-laws-alrc-report-124/3-national-decision-making-principles-2/national-decision-making-principles-2/ (last accessed on 21.02.2024)

The National Decision-Making Principles provide a conceptual overlay, consistent with the CRPD, for a Commonwealth decision-making model that encourages supported decision-making.

The National Decision-Making Principles consist of four central ideas to serve as a guiding point in a future law reform of the legal capacity of persons with disabilities, whereby every principle is accompanied by a potential set of rules. First of all, all adults have an equal right to make decisions that affect their lives and to have those decisions respected. According to the second principle, persons who require support in decision-making must be provided with access to the support necessary for them to make, communicate and participate in decisions that affect their lives. Moreover, a person's will and preferences must direct decisions that affect their lives. Finally, legal frameworks must contain appropriate and effective safeguards in relation to interventions for persons who may require decision-making support, including to prevent abuse and undue influence.

As it is evident, these four main ideas (or Principles) are an embodiment of the paradigm shift adopted by the CRPD and is aimed at the recognition of people with disabilities as persons before the law and their right to make choices for themselves. Indeed, the principles call for a preference of the individual autonomy, irrespective of existing mental disabilities.

However, within the view of the Australian lawyers, this shift is not that radical. Regarding *Principle 3 - Will, preferences and rights*, the Australian Law Reform Commission developed a model law reform that actually does not fully depart from the substitute decision-making approach. Pursuant to Recommendation 3-3, containing Will, Preferences and Rights Guidelines[28], the drafters have attempted to strike a balanced approach by affirming supported decision-making as the main rule. It is applicable as the default rule, whereas representative decision-making is being considered "*a last-case scenario*" in the "*hard cases*" - what should happen when the current will and preferences of a person cannot be determined. The focus should be on what the person's will and preferences would likely be. In the absence of a means to determine this, a new default standard is advocated—expressed not in terms of 'best interests', but in terms of human rights.

The influence of the National Decision-Making Principles can be found in one of the most recent legislative amendments on persons with disabilities, namely the Guardianship and Administration Act (GAA), in force since 01.03.2020 in the Australian State of Victoria. Scholars point out that this act embeds elements of Article 12 CRPD and understandings of supported decision-making into legal reform particularly in relation to persons with severe cognitive disability (*Watson, Anderson, Wilson, Anderson, 2022, p. 2812).* The main idea, set out in art. 8 of the

[28]Cf. https://www.alrc.gov.au/publication/equality-capacity-and-disability-in-commonwealth-laws-alrc-report-124/3-national-decision-making-principles-2/will-preferences-and-rights-2/ (last accessed on 21.02.2024)

Act, is that a person with a disability who requires support to make decisions should be provided with practicable and appropriate support to enable the person, as far as practicable in the circumstances, to make and participate in decisions affecting the person to express the person's will and preferences and to develop the person's decision-making capacity. The will and preferences of a person with a disability should direct, as far as practicable, decisions made for that person. Moreover, a general "restriction clause" in provided in the manner that powers, functions and duties under this Act should be exercised, carried out and performed in a way which is the least restrictive of the ability of a person with a disability to decide and act as is possible in the circumstances (cf. art. 8, para. 3 GAA).

Although the institute of substitute decision-making is retained in the newly enacted GAA, its scope of application is quite limited. In order to abstain from depriving the person with disability of their legal capacity, the drafters have provided that guardians can be appointed in relation to personal matters, whereas administrators are restricted to financial matters[29]. This approach appears to be a dramatic shift towards individual autonomy and supported decision-making, especially in the light of the circumstance that the already repealed Guardianship and Administration Act from 1986 provided that the guardian has powers and duties over the represented person as if they were a parent and the represented person was their child (cf. art. 24, para. 1 of the repealed Act)[30].

3.2. A much more resolute approach has been adopted by national legislations who ratified the CRPD without any reservation clauses regarding its art. 12. Above all, it is worthy to point out that pursuant to art. 1 of the *Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities*, the UN Convention on the Rights of Persons with Disabilities was approved on behalf of the European Community, currently known as the European Union, without a reservation clause on art. 12 CRPD[31]. This would mean that every national legislation belonging to the European Union should inevitably bring its rules on persons with disabilities in conformity with the provisions of the CRPD. Such legislative amendments have been introduced with the "*Erwachsenenschutz-*

[29] Pursuant to art. 3, para. 1 of the Act, *"personal matter"* refers to any matter relating to the person's personal or lifestyle affairs, such as where and with whom the person lives, daily living issues such as diet and dress, as well as medical treatment decisions. The same provision art. 3, para. 1 of the Act contains many more legal definitions, incl. "*financial matter*" - any matter relating to the person's financial or property affairs and includes any legal matter that relates to the financial or property affairs of the person.

[30] A comparison between the repealed and the newly enacted Guardianship and Administration Acts can be found here - https://www.judicialcollege.vic.edu.au/resources/fact-sheet-guardianship-and-administration-act-vic (last accessed on 22.02.2024).

[31] Cf. Official Journal L 23, 27.1.2010, p. 35–36 - https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32010D0048 (last accessed on 22.07.2024).

Gesetz"[32] in **Austria** in 2018[33], in **Germany** in 2023 (*Weber-Käßer, 2023, p. 538 et seq*)34, and, outside the EU, in **Chile35** in 2021 (*Models of Implementation of Article 12 of the Convention on the Rights of Persons with Disabilities (CRPD), 2024, p. 116)*' in order to ensure full conformity with the provisions of CRPD.

It is worthy to point out that some national legislations signed the supranational act without reservation, but are yet to ensure conformity of their domestic law with the "paradigm shift" of art. 12 CRPD. Among them is **France**. Even today, despite the ratification of CRPD, the provision of art. 494-1 of the French Civil Code explicitly provides the opportunity to deprive persons of their legal capacity because of a mental disability[36]. This collision between domestic law and supervening international provisions did not remain unnoticed, though, In 2021, the Committee on the Rights of Persons with Disabilities expressed criticism over this lack of legislative activity and pointed out that French civil law still lacks a supported decision-making mechanism (*Models of Implementation of Article 12 of the Convention on the Rights of Persons with Disabilities (CRPD), 2024, p. 205 – 206*).

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[32] This act introduced a legislative amendment to numerous provisions of the Austrian Civil Code, inter alia § 242, para. 1 ABGB, where the legislator provided that legal capacity cannot be limited via appointing an agent – „*Die Handlungsfähigkeit einer vertretenen Person wird durch eine Vorsorgevollmacht oder eine Erwachsenenvertretung nicht eingeschränkt*." – full text available - https://www.parlament.gv.at/dokument/XXV/I/1461/fname_607999.pdf

[33]

[34] The article discusses the new revision of § 1814 BGB, which enables persons with disabilities to be supported while making decisions. It should be pointed out that Germany abolished the guardianship system in the early 1990s.

[35] Article 9 of the Act No. 21.331 - '*On the recognition and protection of rights of persons in mental health care'*, published in the Official Gazette on May 11, 2021, provides that: *The person with mental illness or psychological or intellectual disability is the holder of the rights guaranteed by the Political Constitution of the Republic. In particular, this Law assures him/her the following rights: 1. to always be recognized as a subject of rights. 2. to participate socially and to be supported to do so, if necessary*. I am using the translation, as it appears in p. 116 of *Models of Implementation of Article 12 of the Convention on the Rights of Persons with Disabilities (CRPD) (2024)*, cited above.

[36] The authentic text of art. 494-1 of the French Civil Code is, as follows: "*Lorsqu'une personne est dans l'impossibilité de pourvoir seule à ses intérêts en raison d'une altération, médicalement constatée soit de ses facultés mentales, soit de ses facultés corporelles de nature à empêcher l'expression de sa volonté, le juge des tutelles peut habiliter une ou plusieurs personnes choisies parmi ses ascendants ou descendants, frères et sœurs ou, à moins que la communauté de vie ait cessé entre eux, le conjoint, le partenaire auquel elle est liée par un pacte civil de solidarité ou le concubin à la représenter, à l'assister dans les conditions prévues à l'article 467 ou à passer un ou des actes en son nom dans les conditions et selon les modalités prévues à la présente section et à celles du titre XIII du livre III qui ne lui sont pas contraires, afin d'assurer la sauvegarde de ses intérêts*".

CONCLUSION

The CRPD adopts a resolute approach towards persons with disabilities. Introducing the "paradigm shift" and the concept of universal legal capacity is aimed at reaffirming these persons as actual participants in socio-economic affairs. However, there may still be room for debate whether a full adoption of its provisions into the respective domestic legal system has been actually carried out in all UN Member States

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SARA Law **R**esearch **C**enter
International **J**ournal of **L**egal and **S**ocial **O**rder, https://www.ccdsara.ro/ijlso
ISSN 2821 – 4161 (Online), ISSN 2810-4188 (Print), ISSN-L 2810-4188
N°. 1 (2024), pp. 270-284

THE UNIVERSAL AND FAIR ACCESS TO PUBLIC WATER SUPPLY SERVICE

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Received 10.11.2024; accepted 19.12.2024

DOI: https://doi.org/10.55516/ijlso.v4i1.230

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Abstract

This paper focuses on one of the most important issues of our time, namely access to water. Currently, in relation to climate change, on a global level we can talk about a water crisis, to which public authorities on all continents must find solutions. The reason for our analysis is a news story from August 2024 that appeared in the mass media, according to which almost 600 localities have restrictions in the supply of drinking water. Therefore, this worrying information made us curious to document this topic.

The scope of the paper is to investigate, from an interdisciplinary point of view, the way in which the legislator deals with the issue of access to public water supply services, from a national perspective but also from a comparative law perspective. The research can contribute to enriching the literature and developing the state of the art on the issue, supporting authorities to identify new solutions for access to water services for the whole society. By way of law-specific research methods, the conclusion of the paper will be that on the one hand, the state must guarantee access to water for citizens and on the other hand, people must respect the law and be more responsible towards water. The result of the research shows that the administration is at the service of the citizen so that water services provided to the population must be carried out effectively in order to make sure that water is available for as many people as possible.

Key words: *public authorities, sustainable development, public water supply service, public interest, ECHR.*

INTRODUCTION

Water, food and shelter are among man's primary physiological needs for survival, as identified by the American psychologist Abraham Maslow, who

prioritized the specific human needs in the well-known Maslow's Pyramid. Who would have imagined that a renewable resource such as water is becoming of paramount importance for all life on the planet, nowadays? A specialized author pointed out that: "*more and more problems are becoming global issues in the 21st century and the making their legislative framework requires global solution, as well*" *(Petrasovszky, 2019, p.193).* We believe that nowadays, given the unpredictable events occurring in nature (global warming, falling of groundwater, pandemics, etc.), there is a need for a sense of rigor in society, a growing sense of responsibility, respect for others and the environment. In this regard, we consider that the authorities are obliged by virtue of the social contract to protect all people in a fair and non-discriminatory manner, taking into account the specific nature of administrative activity, which is dominated by the public law regime, namely the priority of public interest over private interest.

This summer, as in case of other summers in recent years, we have seen media reports according to which entire localities are suffering from water shortages. And not only in Romania but also in other countries[1] Public authorities call on people not to waste water and to use it responsibly. For example, it is approximated that almost 600 localities have drinking water supply restrictions. At the same time, mankind is also facing new challenges: drying up riverbeds and the danger of flooding, which, at least in summer, means less water consumption. For us, researchers and ordinary people, this can be a wake-up call to reflect on our own behavior.

At international level, authorities have designed measures to eradicate poverty, social exclusion and discrimination so that all people have equal access to opportunities and resources[2]. But no matter how generous the European proposals are, we believe that without responsibility on the part of all actors involved, be they states, authorities or individuals, whatever action is taken, it cannot fully achieve its goal. Furthermore *"from the historical point of view, states have been concerned to incorporate the issue of human responsibility in their constitutions and common acts under different terminologies" (Ștefan 2013, pag.12).* Therefore, states have legal instruments to fall back on if people do not realize that water should be protected and not wasted.

A review of the specialized literature reveals that the topic of water is at the forefront of the scientific community's attention. According to one author: "*The fresh water of our earth is in constant decline, and the water crisis poses a huge challenge to the whole world" (Erdos, 2019, 39).* According to another author: "*Between 2000 and 2022, the world has experienced remarkable progress*

[1] https://www.euronews.ro/articole/criza-apei-in-eufnguearopa-care-sunt-cauzele-si-cat-de-grava-este-situatia

[2] https://www.europarl.europa.eu/factsheets/ro/sheet/60/combaterea-saraciei-a-excluziunii-sociale-si-a-discriminarii

in drinking water and sanitation" *(Nguea, 2024)*. The right to water in conjunction with economic rights and proposed solutions to reduce water consumption is also analyzed: "*Water protection and consumption can be influenced through regulation of environmental charges and regulation of other payment obligations*" *(Nagy, 2019, p.162).* In this context of the globalization of the water issue, the topic analyzed is topical and of general importance, arousing the interest of the authorities but also of the population. The aim of the present study is an interdisciplinary analysis of drinking water issues in order to grasp the state of legislation and trends in access to water.

The research questions are the following: "*What does the legislation provide on drinking water supply services?", "Where does our country stand on access to public water services?" "Is there ECHR case law on access to water?".* Methodologically, the paper is divided into three sections, organized chronologically as follows: Section I describes the legal framework applicable to access to public water service at national level. Section II highlights the most important international documents on water in the background of sustainable development. Section III presents a case study on the level of the access to water in our country and the relevant ECHR case law.

I. NATIONAL LEGAL FRAMEWORK APPLICABLE TO ACCESS TO WATER IN THE BACKGROUND OF THE SUSTAINABLE DEVELOPMENT

1.1. National legislation in the field of water supply service

The legal framework applicable to the public water supply service consists of Law no. 51/2006 on community services of public utilities which is the general law on public utilities and Law no. 241/2006 on water supply and sewerage services, which is the special law in this field. The Administrative Code and Government Ordinance no.7/2023 on the quality of water intended for human consumption are added to the aforementioned**.**

1.1.1. Law no. 51/2006 on community services of public utilities establishes the unitary legal and institutional framework, objectives, competences, powers, duties and specific instruments necessary for the establishment, organization, management, financing, operation, monitoring and control of the regulated provision of community services of public utilities [published in Official Journal no. 254 of 21 March 2006, as further amended and supplemented, art. 1 para. (1)]. In this respect, as the doctrine points out "*public services are undoubtedly a pillar of the society*" *(Cliza, 2023, p.49)*. In fact, other experts have also been working on a detailed analysis of public services *(Negruț, 2020, pp.1-18).*

Public utility services are defined by the normative act as: *all the activities regulated by this law and by special laws which ensure the satisfaction of essential needs of general public utility and interest, with social nature of local*

communities, concerning: water supply, sewerage and wastewater treatment, public lighting, etc. [art. 1 para. (2)]. We note that according to art. 7 para. (1): "The organization and operation of public utilities must ensure the fulfillment of public service obligations as defined in accordance with the basic requirements: *universality*; continuity in terms of quantity and quality; adaptability to user requirements; *equal and non-discriminatory accessibility to public service*; transparency of decision-making and user protection".

At the same time: "*Public utilities are the responsibility of local public administration authorities, or, where appropriate, intercommunity development associations, the purpose of which being the public utilities* (...)" [art. 3 para. (1)]. We note in this respect that "*public administration includes central public administration bodies and their decentralized services as well as local public administration bodies*" *(Cliza, Ulariu, 2023, p. 154).* National Authority for Community Services of Public Utilities - ANRSC is the competent regulatory authority for public utility services: water supply and sewerage.

1.1.2. Law no. 241/2006 on water supply and sewerage services (Published in OJ no. 563 of 29 June 2006, as further amended and supplemented) defines in art. 3 a number of basic concepts with which it operates: water supply and sewerage service; public water supply service, public water distribution network etc. For example, public water supply system is: "*all the buildings and related land, technological installations, functional equipment and specific facilities, by means of which the public water supply service is provided. Public water supply systems shall comprise the following components: sewer connections from the point of demarcation and collection; sewerage networks; pumping stations; wastewater treatment plants; outfall collectors to the drainage channels; mouths to the drainage channels; dewatered sludge deposits*" (letter d).

Furthermore, *"The public water supply and sewerage service is part of the community public services of public interest"* [art. 1 para. (3)]. We also note the provisions of art. 29 according to which*:* "*The right to non-discriminatory access and use of the service is guaranteed to all users,* under contractual conditions and in compliance with the provisions of the service regulation and the programs for the rehabilitation, extension and modernization of water supply and sewerage systems". In the background of the analysis, art. 11 para. (3) letter b.) is also important*:* "*Local public administrations' strategies will be focused on the following targets: (...) ensuring non-discriminatory access to water and sanitation services for all members of the community*". Furthermore, we also emphasize the provisions of art. 37^6 para. (3*): "The authorities of the local public administration shall have the following obligations towards users: (...) to adopt*

and maintain a balanced, fair and non-discriminatory conduct between operators and users (...)".

1.1.3. The Administrative Code

Another relevant normative act is the **Administrative Code** (published in the Official Journal of Romania, Part I no. 555 of 05.07.2019) which regulates public services in Part VIII. Art. 580 regulates the principles applicable to public services: transparency, equal treatment, continuity, adaptability, accessibility, accountability, provision of public services at a high level of quality. Of all these, we note the principle of equal treatment in the provision of public services [para. (3)] which entails "*removal of any discrimination against beneficiaries of public services,* based, as the case may be, on the basis of ethnic or racial origin, religion, age, gender, sexual orientation, disability, and the application of identical rules, requirements and criteria for all public service authorities and bodies, including in the public service delegation process". In relation to the topic under consideration, it is important to consider art. 582 on public service obligations. We note only the provision in para. (2) namely, "*public service obligations mainly entail the provision of universal service, continuity and sustainability of the service, as well as measures to protect the beneficiary"*.

1.1.4. Government Ordinance no. 7/2023 on the quality of water intended for human consumption

The last normative act to be mentioned is Government Ordinance no.7/2023 on the quality of water intended for human consumption (published in OJ no. 63 of 25 January 2023). In our opinion, the quality of water intended for human consumption is in the public interest. The scope of the Ordinance is "*to protect human health against the adverse effects of contamination of water intended for human consumption by ensuring that it is safe and clean; to improve access to drinking water*".

II. LEGAL FRAMEWORK FOR SUSTAINABLE DEVELOPMENT

In line with European legislation, the *National Strategy for Sustainable Development of Romania 2030* was adopted (G.O. no. 877/2018, published in OJ no. 958 of 21 November 2018). According to the Strategy, sustainable development for Romania, means "*the desire to strike a balance between the aspirations of its citizens, the society they depend upon and are defined by, and the context that enables their self-realization. This balance begins with the individual (...) the role of the state is to facilitate the finding of this equilibrium, not just for the citizens of today, but also for future generations".* Romania's Sustainable Development Strategy is based on the premise that sustainable development requires a mindset which, once adopted by the citizen, will help create *a more equitable society* defined by: balance and solidarity, and the ability

to cope with the changes brought about by current global challenges (...)". By analyzing the National Strategy, our country aims to reach 6 Targets in 2030, as follows:

"*Target 1*.) Substantially increase the efficiency of water use in industrial, commercial, and agricultural activities; expand the rational reuse of treated and recycled water with a view to meeting the requirements of a circular economy;

Target 2.) Substantially increase the efficiency of water use in all sectors and ensure a sustainable process of abstraction and supply of drinking water in order to address water shortages;

Target 3.) Connect at least 90% of households in towns, communes, and compact villages to the drinking water and sewerage network

Target 4.) Increase access to drinking water among vulnerable and marginalized groups;

Target 5.) Improve water quality by reducing pollution, eliminating waste disposal, and reducing to a minimum the number of chemical products and dangerous substances, thereby reducing the proportion of untreated waste water, and significantly increasing recycling and safe reuse

Target 6.) Provide access to adequate and equitable sanitary and hygienic conditions for all with a special focus on those in vulnerable situations".

This paper has focused only on the component of access to public drinking water service for the population, although all targets are of public interest. Currently, in terms of administrative-territorial organization, there are 41 counties in Romania, plus the capital, Bucharest municipality. At territorial level, a documentary and computerized research, using alphabetical criteria, revealed that all counties have adopted County Development Strategies, such as: Alba County Development Strategy 2021-2027[3], Arad County Development Strategy for the period between 2021-2027[4], (etc. Local Development Strategies also exist at the city level, i.e. at the level of municipalities, towns, communes, districts of the capital, including Regional Development Strategies and Regional Development Plans.

Romania has adopted the Preliminary Theses of the draft Code on several community services of public utilities (published in OJ no. 858 of 1 September 2022) which dedicates to it a whole part regulating: water supply, sewerage, wastewater treatment, etc.. The future Code is intended to partially repeal a number of legal acts, such as: Law no. 51/2006 on community services of public utilities and Law no. 241/2006 on water supply and sewerage services. The Code

[3] https://judetul-alba.ro/strategia-de-dezvoltare-a-judetului-alba-2021-2027/

[4] https://www.cjarad.ro/uploads/files/Info_Cons_Loc/Strategia%20de%20dezvoltare%20a%20jude%C8%9Bului%20Arad%202021-2027.pdf

on several community services of public utilities is not adopted at the time of writing this paper.

As a legal novelty, the legislator adopted G.O. no.1.117/2023 on the approval of the Methodology for Sustainability Reporting - *Romanian Sustainability Code* ((OJ 1052 of 21 November 2023). Essentially, certain entities [5] report several indicators for free on one platform. The Romanian Sustainability Code is addressed to entities that on the balance sheet date exceed an average number of 500 employees during the financial year, which are bound to prepare a non-financial statement containing the following information: environmental, social and personnel issues, respect for human rights combating corruption and bribery**.**

III. INTERNATIONAL PLAN ON WATER AND SUSTAINABLE DEVELOPMENT – SEVERAL MILESTONES

Specialized literature captures a legislative gap on water: "*The European Union fell short of introducing an independent provision in the TFEU or in the 2000 EU Charter of Fundamental Rights explicitly recognizing the right to water. While the Charter contains several provisions that may imply such a right, it does not directly mention the right to water as an autonomous fundamental right*" *(Benohr, I., 2023, pp.53-77).* Another study noted that: "*Since the 'Earth Summit' in 1992 in Rio de Janeiro, the concept of sustainable development has been widely discussed and implemented globally*" *(Lozowicka, 2020)***.**

The first international instrument that we mention is: "*Transforming our World: The 2030 Agenda for Sustainable Development".* It sets 17 Sustainable Development Goals (SDGs). In terms of international efforts, it is stated that "*The 2030 UN Sustainable Development Agenda aims at 'transforming our world' to protect universally agreed sustainable development goals - that – due to globalization – can no longer be secured by any state without international law and multilevel governance of global public goods (PGs) (Petersmann, 2023).* According to public information, Romania joined the 192 UN member states at the September 2015 UN Development Summit by adopting the 2030 Agenda for Sustainable Development, a global development agenda of universal character that promotes a balance between the three dimensions of sustainable development: economic, social and environmental[6].The topic analyzed by us in this study falls under SDG 6 which refers to *Clean water and sanitation – Ensure availability and management of water and sanitation for all*. The New Agenda is guided by the purpose and principles of the United Nations Charter, including full respect for international law [7] It is grounded in the Universal Declaration of Human

[5] https://codsustenabilitate.gov.ro/
[6] https://www.mae.ro/node/35919
[7] https://sdgs.un.org/2030agenda

Rights, international human rights treaties, the Millennium Declaration and the 2005 World Summit Outcome Document (Idem, item 10).

"SDG" concept appeared during the United Nations Conference on Sustainable Development (RIO+20) in 2012 (https://anes.gov.ro/wp-content/uploads/2018/07/Agenda-2030-pentru-dezvoltare-durabila.pdf). The SDGs replace the 8 Millennium Development Goals (MDGs) contained in the text of the UN Millennium Declaration adopted in September 2000 (These are: 1. End poverty and hunger; 2. Achieve universal primary education; 3. Promote gender equality and empower women; 4. Reduce child mortality; 5. Improve maternal health; 6. Combat HIV/AIDS, malaria and other diseases; 7. Ensure environmental sustainability; 8. Global partnership for development.) (Idem). Public information shows that the Millennium Declaration was the only Global Development Agenda agreed at the highest level between 2000-2015 (Idem).

Furthermore, legal frameworks also includes *Directive EU 2020/2184 of the European Parliament and of the Council of 16 December 2020 on the quality of water intended for human consumption* **(**published in Official Journal of the European Union L 435/23.12.2020) with the following purpose: *"to protect human health from the adverse effects of any contamination of water intended for human consumption by ensuring that it is wholesome and clean, and improve access to water intended for human consumption"*. Doctrine states that the European normative act lays down quality standards for water, i.e. water intended for human consumption is "*wholesome and clean" (Ștefan, 2023, p. 214.)*

We also recall *Recommendation Rec(2001)14 of the Committees of Ministers to member states on the European Charter on Water Resources*[8] The Preamble provides as follows: "*Fresh water resources must be used in keeping with the objectives of sustainable development, with due regard for the needs of present and future generation. (...) Humanity uses more than half of the planet's water reserves: the quantity of water available per capita is now no more than 7 000 m^3, as against 17 000 m^3 as recently as 1950* (Idem). Furthermore, "*Everyone has the right to a sufficient quantity of water for his or her basic needs*." (Idem, par. 5). Finally, we note one last relevant international document with a 10-year impact, namely International Decade for Action, Water for Sustainable Development, 2018–2028" proclaimed by the United Nations General Assembly in 25.11.2016 (A/RES/71/222, https://sdgs.un.org/documents/ares71222-international-decade-action-wa-23198).

IV. CASE STUDY

4.1. Degree of achievement of SDG no. 6 - Clean water and sanitation by Romania

[8] https://rm.coe.int/1680504d8

At a general level, our country is facing two situations: on the one hand, it has committed itself to achieving the sustainable development goals set by the 2030 Agenda and, on the other hand, the drought of recent years has led public authorities to introduce water consumption restrictions at certain times of the year. To this end, this section takes a practical snapshot of our country's progress against *Goal no. 6 – Clean water and sanitation.* For this purpose, statistical research was carried out on the basis of publicly available information from the National Institute of Statistics. In relation to the analyzed topic, we are interested in the *Communications on public utilities of local interest*[9] .

Public water supply service in the reference period 2018-2021 was considered, by focusing on the length of the drinking water distribution network as well as the water distributed, measured in thousand cubic meters. By comparison, if at the end of 2018 the simple length of the drinking water distribution network was of 84,504.4 km, in 2021, the network reached 90,352.4 km. In terms of total drinking water distributed, in 2018 the value was of 751,809 thousand cubic meters and in 2021 it was of 797,885 thousand cubic meters (Idem). In terms of the population connected to the water network, according to NIS, in 2022 there were 14,277,262 persons, representing 74.9% of Romania's resident population[10]. At the level of development regions, in 2022, the highest share of the population connected to the public water supply system in the total resident population was recorded in the Bucharest-Ilfov Region (94.1%), followed by the South-East Region (89.5%) and the lowest level of connection was recorded in the North-East Region (50.7%), followed by the South-West Oltenia Region (63.4%) (Idem).

Furthermore, in Romania there is a Plan for water restrictions and use of water in periods of shortage in accordance with the Order no. 9/2006 of the Ministry of Environment and Water Management for the approval of the Methodology for the elaboration of plans for water restrictions and use of water in periods of shortage (published in OJ no. 331 of 12 April 2006) and is generally activated in summer. "Apele Române" National Administration continuously monitor the exploitation of water resources. According to the law, "*The plans for water restrictions and use of water in periods of shortage are intended to establish temporary restrictions on the use of water in accordance with Article 14 of the Water Law no. 107/1996 in situations when, for objective reasons, the authorized water flows cannot be ensured for all use"* (art.2 Methodology).

Article 14 of Water Law no. 107/1996 (published in the Official Journal no. 244 of 8 October 1996) lays down the regime of these restriction plans: "*if, due to drought or other natural disasters, the authorized water flows cannot be provided to all authorized users, temporary restrictions on the use of water*

[9] https://insse.ro/cms/ro/tags/comunicat-utilitatile-publice-de-interes-local
[10] Idem

resources shall apply" [para. (1)]. Even under these conditions, water restrictions have to take into account certain requirements provided for by art. 10 of the Water Law: *"meeting water needs of the population has priority over the use of water for other purposes. Priority over other uses is given to the supply of water for livestock, the replenishment of intangible water reserves after fires, and the flows necessary to maintain the ecological balance of the aquatic habitat* [para. (1)]; *"restricting the use of drinking water by the population for other activities is prohibited* ([para. (2)]). Therefore, "*the legal norm requires acceptance and compliance with the prescribed conduct*" *(Hegheș, 2022, p.153).*

4.2. ECHR case law on access to public water services

In this section, the paper focuses on the identification of situations where the law applies to the concrete case, bringing the ECHR case law on water up to date. Therefore, in the event of a state-citizen conflict, it is up to the judge to verify the interpretation of the law. In this respect: "*Every application of the law requires interpretation* (...) *(Boghirnea & Vâlcu, 2009, p.255)*. "In the same vein, we note that other specialized authors have also analyzed legal interpretation from the point of view of the general theory of law *(Popa et al, 2017, 197-202)*". A relevant case has been selected from ECHR case law which captures the problems faced by local public authorities at the time in relation to access to public water services. We take into consideration case *Hodorovic and Others v. Slovenia* (applications no. 24816/14, 25140/14, judgment of Strasbourg, 10 March 2020[11]*).* The case concerns the applicants' complaint about access to drinking water. In fact "*the applicants, members of the Roma community living in illegal settlements, request access to drinking water and sewage services, given that the measures in place so far were insufficient*" [12](.

In this case, the Court makes clear that "*access to safe drinking water is not, as such, a right protected by Article 8 of the Convention. However, the Court must be mindful of the fact that without water, human beings cannot survive. A persistent and long-standing lack of access to safe drinking water can therefore, by its very nature, have adverse consequences for health and human dignity* (...)" (para.116). The Court observes that "*the municipal authorities of Ribnica and Škocjan also undertook some concrete actions to ensure that the applicants had access to safe drinking water*" (para. 150). Furthermore, "*the applicants' respective buildings could not be legalized because they were erected on land not intended for residential use" (par. 150).* Moreover*, „In the absence of legalization, the buildings could not be connected to water and sanitation services*" (para. 150).

In conclusion, the Court notes that "*while it falls upon the State to address the inequalities in the provision of access to safe drinking water which*

[11] https://hudoc.echr.coe.int/fre?i=001-201646

[12] https://irdo.ro/pdf/volume/CEDO_Repere_teoretice_si_analiza_jurisprudentiala.pdf, p.175)

disadvantage Roma settlements, this cannot be interpreted as including an obligation to bear the entire burden of providing running water to the applicants' homes". The Court finds that "*the measures adopted by the State in order to ensure access to safe drinking water and sanitation for the applicants took account of the applicants' vulnerable position and satisfied the requirements of Article 8 of the Convention*" (para. 158).

CONCLUSION

The work revealed that access to public drinking water supply service is of major importance for the population. On the basis of the documentation carried out, we can draw a number of conclusions in response to the research questions set.

With regard to the regulatory framework, it is noted that there is legislation on public utilities, including public water utility. As the topic of access to public water services was intended to be analyzed under the umbrella of sustainable development, the paper presented the legislation applicable to access to water and combined it with an analysis of the concept of sustainable development. At national level, the legislative framework consists of the following: Law no. 51/2006 on community services of public utilities and Law no. 241/2006 on water supply and sewerage services. The legislator has not yet adopted the Code on several community services of public utilities. At the European level, we note EU Directive 2020/2184 of the European Parliament and of the Council of 16 December 2020 on the quality of water intended for human consumption.

Furthermore, Romania, among other UN member states, participates in a global program called the 2030 Agenda for Sustainable Development. Several sustainable development objectives are set by means of this program. The study focused on Sustainable Development Goal - SDG no. 6 Clean water and sanitation - Ensure availability and management of water and sanitation for all. In this respect, in addition to the theoretical component, doctrine and legislation, the research also focused on the applied component of the topic.

The paper presented a case study with two components. On the one hand, in order to find out Romania's progress in the fulfillment of SDG no. 6, a statistical processing was carried out based on official information published by the National Institute of Statistics. The results of the research show that not all of the country's population is currently connected to the national water supply network, in 2022, 14,277,262 people were connected to the national water supply network and the length of the drinking water distribution network at the end of the year was of 90352.4 km. It is also noted that access to the public water service was provided in compliance with the provisions of the law, namely the principle of equal treatment in the provision of public services, which excludes discrimination and no person has been unfairly treated. Access to public water service in

Romania is therefore fair and non-discriminatory. Moreover, in the summer of 2024 the authorities were faced with the problem of water restriction and use. The documentation shows that there is legislation at national level to draw up plans for water restriction and use in times of scarcity so that all people have equitable and non-discriminatory access to water.

On the other hand, case Hodorovic and Others v. Slovenia, settled by ECHR, revealed practical issues in the field of access to public water services and the challenges for local public authorities, so we conclude that there is case law on the topic under analysis.

The final conclusion of the paper is that, in our opinion, although important steps have been taken to achieve equitable and non-discriminatory access to public water supply for the population of our country, the findings show that there are still steps to be taken in this respect to achieve 100% connection rate. The research carried out has not exhausted the issue of access to public water services, so we are drawing lines of future research that will consider extending the analysis to the issue of water access restrictions at international level.

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SARA Law **R**esearch **C**enter
International **J**ournal of **L**egal and **S**ocial **O**rder, https://www.ccdsara.ro/ijlso
ISSN 2821 – 4161 (Online), ISSN 2810-4188 (Print), ISSN-L 2810-4188
N°. 1 (2024), pp. 285-290

BULLYING – PROBLEMS OF RECOGNITION AND FIGHTING THE PHENOMENON

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Received 14.11.2024; accepted 21.12.2024
DOI: https://doi.org/10.55516/ijlso.v4i1.227

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Abstract

Bullying is aggressive, repeated and intentional behavior that occurs within unequal power relations and can have serious consequences for children's health and well-being. It is important that every child is protected against bullying and has adequate support and resources to deal with it. Child protection against bullying involves an integrated action by families, schools, communities and authorities to prevent, identify and manage bullying situations. It is essential to promote a climate of respect, empathy and tolerance among children and young people, as well as to encourage open and non-violent communication for conflict resolution. Schools have a crucial role in the prevention of bullying, by implementing educational policies and programs that develop students' social and emotional skills, encourage positive relationships between them, and provide support and prompt intervention in the event of bullying incidents. Teachers and school staff have a responsibility to be aware of the signs of bullying and to intervene appropriately to protect the children involved.

Key words: *bullying, protection, consequences.*

INTRODUCTION

Children are a primary, essential human resource in a society. The consequence of this quality involves offering trust and patiently tending to their needs, so that they evolve in a society based on democratic principles.

The multitude of existing recommendations at the international and regional level regarding the need to monitor the phenomenon of violence against children underlines the importance given at the European and national level to the phenomenon of violence against children, as a component of protecting their rights. In the context of protecting children's rights, it was emphasized that they

are not just detached or isolated values, devoid of context, but exist in a wider ethical framework. The right to life, the right to health[1], the well-being of a person is not analyzed only through the lens of the absence of infirmity or disease, but implies a complete social, mental and physical well-being.

As a component of the protection of minors against any form of abuse, discrimination and violence, the fight against bullying is an action carried out by the competent institutions with the aim of eradicating this phenomenon that occurs at the level of groups of children and refers to various behaviors that humiliate and exclusionary in nature, are repeated or part of a pattern that occurs over a period of time. [2]

Psychological violence - bullying was defined as *the action or series of physical, verbal, relational and/or cyber actions, in a social context that is difficult to avoid, carried out with intention, that involves an imbalance of power, has as a consequence the achievement of dignity or creating an intimidating, hostile, degrading, humiliating or offensive atmosphere, directed against a person or a group of persons and aimed at aspects of discrimination and social exclusion, which may be related to belonging to a certain race, nationality, ethnicity, religion, social category or to a disadvantaged category or beliefs, gender or sexual orientation, personal characteristics, action or series of actions, behaviors that take place in educational units and in all spaces intended for education and professional training.* [3]

The creation of the legislative framework to fight against the phenomenon is a first measure that the legislator has taken. Bullying is criminalized both criminally and civilly. In criminal law, tools to fight against bullying are sanctioning based on the offenses provided for by article 206 of the Penal Code (Threat), art. 207 Criminal Code (Blackmail), art. 208 Criminal Code (Harassment), art. 226 Criminal Code (Violation of privacy), art. 193 Criminal Code (Hitting or other violence), art. 194 Penal Code (Bodily injury), art 196 (Bodily injury due to negligence), art 205 Penal Code (Unlawful deprivation of liberty) etc.

On the other hand, the illegal deed can attract tortious civil liability. The parents or legal representatives are called to answer in accordance with the law if the deed is committed by minors or the persons who commit the deed in the case of adults. The conditions imposed by the attraction of tortious civil liability also imply the existence of moral or material damage or both, as well as the existence of a causal relationship between the deed and the damage. Its repair can be done

[1] DECISION NO. 803/2004/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 21 April 2004 adopting a community action program (2004-2008) to prevent and combat violence against children, young people and women and to protect victims and groups risk (Daphné II program) www.salvaticopiii.ro-protection-against-violentei

[2] www.salvaticopiii.ro-protectie-impotriva-violentei

[3] ORDER no. 4,343/2020 of May 27, 2020, art 1.

either by restoring the previous situation, or by paying compensation (by equivalent) or in kind where appropriate. The aggressor can also be forced by the court to apologize publicly.

Along with the general regulation, a series of normative acts were adopted and plans developed whose objective is to prevent and combat violence in schools, whether it refers to physical, verbal, psychological, cultural, cyber-emotional violence etc.

Pre-university education law no. 198/2023, provides that education is based on a set of values, among which we mention as an example: collaboration, diversity, excellence, equity, inclusion, integrity, professionalism, respect, responsibility. Respect presupposes a positive and appropriate relationship, by adopting correct behaviors and attitudes towards the actors involved in the educational process, either teaching staff or beneficiaries, but it presupposes the same characteristics towards the environment, institutions and society.[4]

The normative act mentioned above is also based on a series of principles, among which we mention: the principle of non-discrimination, of quality, of relevance, of the efficiency of decision-making decentralization, of guaranteeing the cultural identity of all Romanian citizens and intercultural dialogue; of recognizing and guaranteeing the rights of national minorities, ensuring equity and equal opportunities, transparency, freedom of thought, inclusion, centering education on its primary beneficiaries, participation and responsibility of parents/legal representatives, flexibility/adaptability of the trajectory educational, of basing decisions on social dialogue and consultation, of respecting the student's and education staff's right to opinion, of data-based educational policies, of accessibility and availability, of respecting the right to life, of ensuring physical and mental integrity, respecting the dignity and protection of the status of education staff and beneficiaries, the adaptability of the national curriculum, the best interest of the student.[5]

The law also involves the achievement of objectives such as the National Plan to combat school violence[6], which involves actions to prevent but also combat school violence. It is intended to reduce activities and behaviors that compromise or favor the disregard of the rules of morality and conduct, in all aspects, both as cultural, verbal, psychological - bullying, physical, social, emotional, cyber, sexual violence, as well as any other activities or behaviors that may endanger the health or integrity of primary beneficiaries and staff in the educational system *(Varadi Csema Erika, Cîrmaciu Diana, 2019, 230-232)*.

[4] Pre-university education Law no. 198/2023, published in the OFFICIAL GAZETTE of Romania no. 613 of July 5, 2023.
[5] Art 3 of the Pre-University Education Law 198/2023
[6] DECISION no. 1,065 of August 28, 2024, published in the Official Gazette of Romania, Part I, no. 881 of September 2, 2024.

The plan is designed for a period of 3 years, precisely due to the fact that the phenomenon of bullying is dynamic, it knows more and more complex and varied forms. Physical/psychological violence is manifested between preschoolers/students, between the staff of the educational unit on pre-preschoolers/preschoolers/students, is exercised by students on the school staff, manifested by parents in the space of the educational unit. There are also cases of anti-school violence that manifests itself through the carrying or unauthorized use of dangerous objects, violating the secrecy of correspondence; running games of chance; destruction of school property, vandalism; theft and attempted theft.

As forms of bullying we can mention: relational bullying, physical bullying, cyberbullying, bullying based on differences in race, culture, religion, sexuality.

There are elements of relational bullying - nicknames, teasing, cursing, offending, humiliating, humiliating because of the grades, the answers given, the family, etc. It involves intentional, well-defined mental abuse.

Physical bullying involves actions of destroying things, intentionally stepping on the victim, pushing, slapping, touching, hitting, throwing objects, threatening, throwing personal items on the ground, etc.

Cyberbullying includes, among others, threatening or harassing on the phone or on social networks, posting private messages without consent, creating private online groups where the victim is discussed, posting embarrassing pictures or mean comments on groups or social networks, sending malicious messages on the phone, groups or social networks, etc.

Kaspersky Lab is a manufacturer of IT security solutions, and has proposed a series of online programs that draw attention to the dangers posed by cyberbullying. In the program for children's safety on the Internet, "Kids safety by Kaspersky" outlined 11 types of cyberbullying, namely: fake accounts, gossip, video recording of attacks. exclusion, sabotage, harassment, cheating, online stalking, comments, incitement, abusive insistence.[7]

Bullying based on differences in race, culture, religion, sexuality involves laughing or teasing on the basis of religious beliefs or practices, teasing with the subject of lifestyle, accent, home, neighborhood, family, traditions, skin color, physical form, ethnicity, racist comments, etc.

Religious affiliation marks the outline of personal identity, the way it presents itself or is perceived by those around, a fact that made "religion" one of the four criteria protected against discrimination at the level of European Union legislation *(Mihăilă Oana, 2021, 31-47).*

The solutions must be implemented through supple methods, through actions that are based on a regular analysis of the phenomenon, of the data and

[7] https://www.agerpres.ro/cybersecurity/2019/05/15/kaspersky-lab-lanseaza-cartea-kasper-sky-si-ursul-cel-verde-pentru-educarea-minorilor-si-parintilor-fata-de-pericolele-de-pe-internet-

information that reach the decision makers, the action effort must be joint, involving the social assistance services, government institutions and non-governmental, school, local public administration authorities, police, specialized NGOs, citizens.

In all the sustained effort, an important role is given to direct communication between the school, the police and the school psychologist or social worker. Attention to the danger represented by this phenomenon is emphasized through the presentation of photo and video materials, with the organization of debates on the issues presented. Well-being is not an abstract concept, nor is it achieved just by applying some rules. It is not a task written in the job description of a school counselor or a director. It is a concept that requires conscious, common involvement on the part of students, teachers, parents, community in creating an authentic, honest, competitive and safe environment, in which problems are identified in time, appropriate measures are taken proportionally, immediately, which communicates students a message of seriousness and professionalism in approaching the subject and leads them to trust that adults hear them, that taking the measure of immediate communication of any case of bullying is actually a measure of community and not individual health, which makes them responsible and gives them moral power, having the possibility to use the power of law and not the right of power.

Violence in schools, whether physical or mental, is a present, constant, but also widespread phenomenon, due to access to inappropriate content on the Internet and technology, but especially due to lack of self-esteem. Confidence in one's own person, in the beneficial uniqueness of the defining elements of one's self, is the way to maintain balance in a variable situation, full of dangers or excesses.

The solutions for preventing and combating violence/bullying can only be taken in concert, because the phenomenon is complex and cannot be solved by dispersed methods. Controlling access to technology, supporting socio-emotional counseling programs, introducing courses on managing one's own emotions, along with the co-involvement of parents in school and extracurricular activities, identifying the times of children's qualities/competencies and cultivating them, as well as an appropriate school orientation that to give the child a school satisfaction, could constitute support levers in the fight against the phenomenon of violence.

CONCLUSION

The notion of bullying has experienced a wide transformation, it is not only a product of social life in recent years. It is true that even 20-30 years ago there were manifestations in schools that today we would identify as bullying, but their intensity was not deep, and the school had its own mechanisms to fight the problems. Today, however, the phenomenon is extensive, complex, the school is only a part of the manifestation field of bullying, the entire social environment can

be taken over by direct or indirect forms of aggression. Passivity as a form of non-involvement is the wrong solution, because not identifying and naming the problem only makes it worse. Regardless of the quality we have, of parents, teachers, witnesses, involvement is the first condition for identifying and solving the problem, along with the non-formal education that it is necessary to transmit, to offer them the elements for acquiring self-confidence, the love of self-valuation, so that they do not become victims of those around them.

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SARA Law **R**esearch **C**enter
International **J**ournal of **L**egal and **S**ocial **O**rder, https://www.ccdsara.ro/ijlso
ISSN 2821 – 4161 (Online), ISSN 2810-4188 (Print), ISSN-L 2810-4188
N°. 1 (2024), pp. 291-299

PROFILING OVERVIEW IN FORENSIC INVESTIGATIONS

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Received 03.01.2024; accepted 08.04.2024
DOI: https://doi.org/10.55516/ijlso.v4i1.178

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Abstract

The profiling investigation has great applicability in the field of forensics, providing relevant information regarding the psycho-behavioral interpretation of the criminal, in the context of the dynamics of the criminal act. In order to interpret criminal behavior and outline the psychological profile, the exploratory skills of the lawman stand out on the "game board", in a direct confrontation with the criminal. Although, from a legal point of view, in the criminal legislation in Romania, profiling is not found among the means of evidence, this investigative tool is mainly used in crimes of great violence, which present atypical elements.

Key words: *criminal investigation, criminal behaviour, criminal personality, violent crimes, crime scene analysis.*

INTRODUCTION

Enrico Ferri stated that delict is always the action of a person and the catastrophic expression of a human personality. Therefore, the truth of things should be sought in the study of the offender`s personality, the individual behaviour being guided not only by momentary external stimuli, but also by stable predispositions representing the personality. Therefore, the crime scene bears the offender`s signature, although the profiling is not likely to supply the offender`s identity, only his pattern, based on some answer-oriented reference diagrams. The essence of profiling is found in the accuracy of the information gathered. Thus, criminal profiling is considered ”a variety of techniques whereby information gathered at a crime scene, including reports of an offender's behaviour is used both to infer motivation for an offence and to produce a description of the type of person likely to be responsible (*Davies A., 1993, p. 173*).

This investigation technique, although it has high applicability, is not widely accepted though within the jurisdictions of many states, being considered as not being reliable enough concerning the proof of guilt or innocence of the person investigated. At present, it is mainly used in the American and West-European states, based on the specialised knowledge of professionals from different fields, such as forensics, psychology, sociology, criminology etc. As its scientific character has not yet been established, existing some controversies regarding the admissibility of its evidentiary value, the offender`s profiling keeps on being a misunderstood technique by courts.

In the Romanian legislation, the Criminal procedural code does not provide profiling among the means of evidence, but, besides the problem of admissibility as evidentiary value of this type of investigation, we have to admit its practical relevance in solving complex criminal causes, helping to maintain the investigation on the right track. Also, we should also consider the possibility of occurrence of some errors in the carrying out of such investigations, in the context of some profiles established subjectively by profilers. Thus, it is necessary the creation of some standards of appreciation of expert profilers and, at the same time, of establishing the significance of such an expert report for the identification of offenders (*Butoi T.B., Butoi I.T., Butoi A.T. and Puț C.G., 2019, p. 27*).

I. CRIMINAL PROFILING PROCESS – STRENGTHS AND WEAKNESSES

„Criminal profiling", also known as behavioural profiling, crime scene profiling, offender profiling, psychological profiling and also criminal investigative analysis, is an investigative tool to discern offender characteristics from behaviour (*Petherick W. and Brooks N., 2021, p. 694*). It is an investigative tool that helps to identify and hold liable an unknown offender, offering a description of his physical, mental and social characteristics to the investigation bodies. Such a description refers to elements such as age, sex, race, height, weight, occupation, level of education and professional training, level of intelligence, marital status, type of temper or the eventual behavioural disorders etc. In Ainsworth`s opinion, *criminal profiling* is considered "the process of using all the available information about a crime, a crime scene, and a victim, in order to compose a profile of the (as yet) unknown perpetrator" (*Ainsworth P., 2001, p.7*).

In the specialised literature, they distinguished two main types of approaches in achieving criminal profiling (*Hazelwood R.R. and Douglas J.E., 1980, pp.18-22*):

- *top-down approach* (American or FBI approach) – according to which, from the data gathered at the crime scene, the investigators can identify the offender`s characteristics, situating him/her into a certain pre-existing typology – thus, he/she will fall under the typology of organised or disorganised offender. There are three relevant steps within such method: (1) examination of the evidence gathered from the crime scene, classification of crime scene as organised

or disorganised (2) and crime reconstruction (3), by processing the data gathered and issuing hypothesis regarding what went on, in chronological order of events, and also regarding the behaviour of the offender and of the victim. The pioneers of this approach were Ressler, Burgess and Douglas. Thus, ”criminal profiling” allows the identification of the offender`s personality and behavioural characteristics, based on the analysis of the offence committed, process usually involving going through seven stages, the first four being essential (Burgess M. and Douglas J.E., 1986, pp. 9-10):

- evaluation of the criminal act itself (1);
- comprehensive evaluation of the specifics of the crime scene (2);
- comprehensive analysis of the victim (3);
- evaluation of preliminary police reports (4);
- evaluation of the medical examiner's autopsy protocol (5);
- development of profile with critical offender characteristics (6);
- investigative suggestions predicated on construction of the profile (7).

The method was criticized, the offender not being able to be simply classified into a typology or another, often existing incidents characteristic to both typologies. Also, by improving the modus operandi, a disorganised offender can turn into an organised one, becoming therefore a professional. However, some fundamental traits remain stable in time as a result of the needs and motivations they generate and support. Being considered a reductional method, by its simple way of approach, this method, in principle, applies to series killers in the sexual area.

- *bottom-up approach* (British approach) – that is based on statistical data, permanently updated from the study of the offenders` behaviour during the murder. Thus, they build a general portrait of a type of personality, dominated by a *modus operandi* specific to his profile, as offenders develop certain patterns of behaviour and the characteristics own to his personality are reflected in their actions. The method is based on the evidence at the crime scene and on the witnesses` statements (*Canter D.V., Alison L. J., Alison E. and Wentink N., 2004, p. 294*). Starting from the smallest details that can be extremely enlightening, the overall picture is outlined, therefore the particular characteristics of the offence are associated with the ones of the offender. According to the nature and quantity of the information revealed in each case, the profile varies. It is realised a general description of the possible offender, starting from pattern based on reference behavioural characteristics, the generated profile leading to the restraining of the group of suspects. The method focused on the victim-offender interaction, the way in which the offender interacts with the victim, reflecting his day-to-day behaviour. The pioneers of this methods are David Canter and Paul Britton, profiling experts who, out of the statistical analysis of the solved murders, built crime-related typologies. The method has a much wider applicability than the FBI method, and the accuracy of the results of this approach depends on the accuracy

of reporting and registering the offences committed. In Canter`s conception, an offender "*leaves psychological traces, tell-tale patterns of behaviour that indicate the sort of person he is. Gleaned from the crime scene and reports from witnesses, these traces are more ambiguous and subtle than those examined by the biologist or physicist. They cannot be taken into a laboratory and dissected under the microscope. They are more like shadows, which undoubtedly are connected to the criminal who cast them, but they flicker and change, and it may not always be obvious where they come from. Yet, if they can be fixed and interpreted, criminal shadows can indicate where investigators should look and what sort of person they should be looking for*" (*Canter D., 1994, p. 12*). Thus, the profiler`s skills in understanding the human nature and the offender`s pathology, in observing and correct understanding of the crime scene, are whose offering truthfulness in the construction of the psychological profile. Based on its deciphering, one can also shape his modus operandi in the future (*Stancu E., 2007, pp. 544-545*). Logis is essential to build rational and solid arguments about the offender`s characteristics, not only in shaping the profile itself, but also in communicating the elements of the profile to consumers. Therefore, the profile construction should be grounded on two elements: logic and reasoning (Petherick W. and Brooks N., 2021, pp. 695).

Both methods briefly explained above, but enough to outline their importance in the forensic investigation of offences with unknown authors, were both put into question and criticized in considering the weaknesses identified. Based on such drawbacks, the method set out by the American profiler Brent Turvey regarding the behavioural evidence analysis confirms their potential, representing an addition to them. Its relevance is recognised as a result of the fact that it focuses on the evidentiary material means discovered at the crime scene, together with the aggressor`s behaviour and with the consideration of the victim`s characteristics. Turvey rules out the native gift of intuition that a profiler should hold, being a piece in a puzzle represented by the whole process of criminal prosecution. Thus, in the profiling activity, they impose a thorough assessment of the physical evidence collected and analysed accordingly by a team of specialists from different fields, with the purpose to recreate the crime scene systematically, developing a strategy that would help detain the offender in the criminal prosecution stage, and then help convict him/her in the judgement stage. In making the offender's profile, Turvey differentiates the inductive profiling from the deductive one. In his conception, the inductive profile implies a subjective approach based on extensive generalisations from statistical data. Thus, in similar situations, offenders have similar motivations (*Butoi T.B. et al. 2019, p. 31*). Such an approach was criticized by Turvey, as he is an advocate of the deductive method based on objectivity, where the criminal profiler keeps an open mind. In this context, the skills of critical thinking that the criminal profiler should have, prevail, as well as the capacity to understand the needs underlying the offender`s

behaviour (*Fintzy R.T., 2000, p. 1532*). And this means to ask the right question regarding the crime-related behaviour. The aspects that require investigation, relevant in the forensic inquiry, include the criminal skills, knowing the victim, knowing the crime scene and knowing the methods and material traces discovered at the crime scene. In the analyse of the behavioural evidence, Turvey puts emphasis on the forensic analysis of all traces (analysis of lesions, of blood stains, of the bullet trajectory), on the characteristics of the crime scene (based on photos), on the victim`s and witnesses` statements, as well as a thorough study of the victim`s characteristics (*Turvey B., 2012, pp. 189-192*).

Concluding these references concerning criminal profiling, we mention that not all types of offences fit with this investigation technique. Generally, it is about the offences where the offender showed elements of psychopathology, serial murders, violent offences and sexual aggressions.

II. CRIME SCENE - *MODUS OPERANDI* AND CRIMINAL MOTIVATION

The events taking place at the crime scene require a psycho-exploratory approach that should offer an answer to the conclusive question ”*Who committed the offence*”, in the context of some *sine-qua-non* preliminary questions, such as ”*What happened*” and ”*Why did it happen*” (*Butoi T.S., 2019, pp. 52-57*). In criminal profiling, the modus operandi offers clues regarding the offender. For example, the disorganised serial killer’s modus operandi usually indicates a psychotic profile characterised by spontaneous, unpredictable murders and surprise attacks (*Butoi T.B. et al., 2019, pp. 50-51*). At the same time, no one acts without motivation, the psycho=behavioural print having a particular significance in the context of forensic investigation. Thus, the serial killer will always have a sexual motivation dictating his modus operandi.

The crime scene is the starting point in forensic investigation, that should always be managed correctly and investigated as best as possible. Each place of the crime scene is unique, with a special significance and offering an original experience, providing physical evidence that should be carefully interpreted and analysed by investigators. The profiler`s role is to get into the offender`s and the victim`s mind, *modus operandi* being the label of his personality and behaviour. We can deduct from here the type of personality and the motif of the murder. For example, the offences committed sexually are likely to reveal the offender`s motivation. They try to identify the common characteristics of the offenders who committed the same offence, including the reasons, behaviour and psychological traits (*Jitariuc V., 2023, p. 241*).

Both the crime scene and the *modus operandi* can provide relevant data regarding a certain human behaviour that should be observed, studies and decoded psychologically in order to make a correct and thorough interpretation of the motivation and of the characteristics of those elements involved in the offence (*Cârjan, L., 2005, pp. 577-578*). Starting from atypical elements, a certain type of

abnormal personality of the offender is built. To get into the offender`s mind and observe his pathological disorders is related to the profiler`s mastery in the context of an inductive and deductive thinking. His creation is related to the reproduction of the crime scene in which the profiler should submit to the role play form a double perspective, victim and offender, offering the moment the same significance as much as possible.

Therefore, *modus operandi* represents the main component of an investigation, especially regarding those offenders who are perpetrators and who repeat the murder. Obviously, the modus operandi is not always the same, as the offenders improve themselves intime, their method of operation acquiring other characteristic elements. However, some basic characteristics remain, leading to the limitation of the circle of suspects, that qualifies it as a trustworthy indicator concerning the correlation of a suspect to the *modus operandi* used. But there are situations in which the *modus operandi* has a special significance, so that it represents the only evidence necessary to identify the one who vomited the offence.

The characteristics of the crime scene will always indicate the offender`s personality, out of the examination of the *modus operandi*, by relating to all its components, being able to show an overall picture of the personality of the person who committed the act, and also the characteristics of the group of affiliation. Some characteristics cannot be classified into a common pattern of personality. That is why they should not disregard the circumstantial elements, the occasional unpredicted and unexpected circumstances that can occur and influence crucially the adoption of a certain *modus operandi* (*Iacob A., Măndășescu H., Bălțatu S. and Ignat C., 2008, p. 35).*

In forensic investigation, a series of clues can be considered when approaching and decoding the crime-related activity, being elements of the *modus operandi:*

- finding patterns – the *modus operandi* can be used to establish certain murders that are connected among each other. There are a few specific types of modus operandi that are related to the identification of such important patterns of behaviour.

- physical clues (traces at the crime scene) – at the crime scene, there can be physical evidence characterising a certain modus operandi.

- psychological clues – committing the offence can take place in relation to a certain victim profile or in

a certain emotional or psychological state of the offender;

- geographical clues – referring to the place and environment of committing the deeds. Thus, some offenders act only into a certain geographic area;

- temporal clues – it is based on the moment (period, time) of committing the offence. There are offenders who repeat the deed at a certain period of time, in connection with their personal experiences, presenting a certain pattern.

Therefore, criminal profiling should target all the information that can be gathered in relation to the offence committed, provided both by physical and non-physical clues. Any crime-related activity is likely to produce changes in the physical environment. Thus, the criminal profiling techniques involve a thorough analyse of the crime scene and finding the common patterns with the previous incidents (How Criminal Profiling Offers an Insight into a Criminal's Mind - IFF Lab).

The whole crime-related scenario reveals personal attributes of the offender`s behaviour – emotional, psychological, physical, ordinary and even professional characteristics – the offender`s profiling establishing the person most susceptible to commit the offence from the perspective of some specific and unique characteristics. For that matter, Turvey himself, in the context of behavioural evidence analysis, defined criminal profiling as ”the process of inferring the personality characteristics of individuals responsible for committing criminal acts” (*Turvey B., 2002, p. 1*).

Therefore, criminal profiling is usually implemented to predictive profiling, in the sense of identification of suspects, by establishing common patterns. Thus, they can conclude regarding the possible reasons of the offence, based on which they draw up deductions concerning who is the most ”probable” to have committed such murder. Therefore, the results depend on their perspective on the dynamics of human behaviour. The patterns of speaking and writing, the styles, verbal and nonverbal gestures, as well as other traits and patterns are those shaping the human behaviour. These individual characteristics work in common to make each person act, react, function or perform in a unique and specific way, and the individual behaviour usually remains substantial, regardless of the ongoing activity (*Douglas J.E. and Munn C., 1992).*

CONCLUSION

The profiling technique has its own merit, i.e it succeeds, by analysing the behavioural patterns and other clues, resulting from the modus operandi and from the research of the crime scene, to deduct the characteristics of the possible offender. Although extremely controversial at present, it is useful, and it can be used at the same time as a technique of prevention of criminality, in considering the criminological theories in relation to the explanatory causes of criminality.

Criminal profiling is therefore a specialised field of knowledge, involving psychiatrists, psychologists, criminologists, judicial bodies, being a powerful tool of investigation, based on the collaboration of these professionals in gathering the resources that can lead to finding the truth. However, at a certain moment, criminal profiling does not have enough reliability in order to be admissible as

evidence in a trial, being considered as based on deductions, suppositions, suspicions, stereotypes and probabilities. Thus, as long as it cannot be proved, the forensic investigation cannot be considered a science. This is the situation for now, though.

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SARA Law **R**esearch **C**enter
International **J**ournal of **L**egal and **S**ocial **O**rder, https://www.ccdsara.ro/ijlso
ISSN 2821 – 4161 (Online), ISSN 2810-4188 (Print), ISSN-L 2810-4188
N°. 1 (2024), pp. 300-307

AMPLIFICATION BY ANONYMITY, AN UNASSUMING TOOL OF CYBERBULLYING

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Received 17.09.2024; accepted 20.12.2024
DOI: https://doi.org/10.55516/ijlso.v4i1.212

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Abstract

The paper explores the phenomenon of amplification through anonymity as a form of cyber-bullying in the Romanian media, highlighting how online anonymity influences user behavior, through what specialists call "the effect of online disinhibition."

In the absence of personal responsibility and identification, users have the possibility of posting multiple comments under different pseudonyms, inducing the perception of a broad consensus around certain opinions. This phenomenon is known as the "False Consensus Effect" and is often used to create false impressions on public opinion, manipulating readers' perceptions and increasing psychological pressure on targets.

Diaz and Nilsson (2023) have shown that internet manipulation often tends to alter individuals' behavior. By accepting their comments, by generating a group of supporters, they feel entitled to expose a point of view, to support it beyond the limits of accepted social conventions.

In the 2000s, the concept of "cognitive hacking" was launched and it is detailed in the research of Thompson, Trevisani and Sisti (2004). Cognitive hacking is actually a cyber attack against an individual, likely to change the perception and behavior of others towards him. At the same time, the paper highlights how some publications contribute to this manipulation through selective editorial filters and even by involving journalists in comment sections, using a subjective tone, contrary to the editorial objectivity they should respect.

Also, the comment rating systems (through upvotes or ratings) are susceptible to manipulation, allowing users to self-amplify their opinion and create the illusion of collective support.

Legally, these practices raise issues related to disinformation and manipulation of public opinion, but also to the responsibility of platforms and publications towards user-generated content. According to the legislation of online communication and protection against cyberbullying, there is a need for stricter regulation of anonymity and editorial control mechanisms. The European Union, for example, has adopted a series of legislative measures in this regard, through the Digital Services Act (DSA), which requires social media platforms to limit the abuse of anonymity and make users responsible for the content posted. Also in this context, a simple and effective mechanism for moral sanitation of the online press forum is at the disposal of editors: filtering comments, as well as displaying the IP address, are ways to highlight multiple comments posted by the same user under different nicknames.

Starting from these ideas, the paper proposes an interdisciplinary analysis, examining from a journalistic, sociological and legal point of view the challenges brought by online anonymity and its role in amplifying cyber-bullying phenomena.

Key words: *Cyber-bullying, online offence, cognitive hacking, manipulation, abuse.*

INTRODUCTION

Cyber-bullying is a common form of harassment in the digital environment. It is usually a repetitive, intentional, hostile action that exerts psychological pressure on the victim, with the aim of creating harm or discomfort. The victim becomes a target.

Clemson University's Olweus Bullying Prevention Program states that bullying occurs when a person is “repeatedly and over a long period of time exposed to negative actions by an individual or a group of people”.

Cyber-bullying has become a ubiquitous phenomenon with the increase in interactions in the digital environment. An essential component of cyber-bullying in the comment section of the Romanian digital media is the anonymity offered by online platforms. Unlike traditional bullying, where the identity of the aggressor is known, and which involves an interaction where the victim and the aggressor face each other openly, in the online environment anonymity allows users to hide their true identity and therefore express themselves more aggressively, without fear of direct consequences. Commenters do not reveal their real identity and the publication does not force them to do so, and anonymously they post several comments on the same article, with different pseudonyms, leaving the impression of the existence of a general current of opinion on the subject.

Research led by Mona O Moore, from the Anti-Bullying Center at Trinity College Dublin, has revealed that individuals subjected to constant bullying are more likely to develop symptoms of anxiety, emotional problems, extreme stress, which in extreme cases leads even to suicide. Bullying can cause low self-esteem, eating disorders, body dysmorphia.

The lack of clear regulations and the cumbersome procedure for identifying and sanctioning harassers allow the development of an anarchic, wild virtual space where the norms of coexistence are optional.

Another situation is that certain publications apply filters for comments. Or, by flagging the fake comments (which they see were posted from the same IP, so they belong to the same person) the editors thus contribute to the manipulation of the reader. Sometimes it is even in the interest of the editorial office to do so, and some of the comments happen to be posted by the journalists themselves. A common phenomenon is the attitude of the journalist who writes the article. In the article he uses an unbiased tone, but in the comments section he uses a subjective, partisan tone, the complete antithesis of what a journalist should be.

Last but not least, some editorial offices have implemented a scoring system for article comments. This means readers can rate the comment. If a comment has a better rating or more positive reactions, then the more relevant it is and appears before other comments. It's just that there is no filtering system for ratings, and they can be given at discretion and without limit even by the author of the comment, and repeated by reloading the page. In the situation where the author of the comment seeks to create the impression that his comment is appreciated, therefore validated by public opinion, he can without any censorship and control mechanism give himself as many upvotes as he wants.

In our research, we took as a case study the local online press from Arad, a city in western Romania, with a population of approx. 145,000 inhabitants. We analyzed a number of four online publications, the most influential in Arad, each with a declared traffic of over 2500 unique visitors per day. We specify that for the local press in Romania, such traffic is considered medium level.

Each of the analyzed publications has a comment section for online articles. Two of them (the most popular) have instituted a comment filtering system. However, both publish anonymous comments under various pseudonyms, some of which are clearly offensive.

We have found out that some commenters have pseudonyms that they frequently use and comment on certain articles. The majority of comments, over 90% of the total, are generated by articles on administrative, political or sports topics.

None of the analyzed publications implemented a comment transparency system. Under these conditions, it is impossible for the receiver to establish the identity of the commenter or the frequency of comments generated by a particular user. Due to the comment posting system, it cannot be determined if a user posts

multiple comments under different pseudonyms. In our opinion, researching the tone of these comments, some keywords, the topic of the phrase, grammatical errors, figures of speech used, there are frequent situations where a commenter returns to the website of the online publication with several anonymous comments, sometimes even responding to his own comment to validate his message. Through this technique, the aim is to emphasize the idea that the opinions expressed have appeal to the public.

We have also identified frequent situations in which the journalist enters into a dialogue with the readers in the comments section. Again, it cannot be determined, in the absence of a transparent mechanism for posting comments, whether the original comment was also posted by the journalist or by a reader.

I. THE CONTEXT OF CYBER-BULLYING THROUGH ANONYMITY

Amplification through anonymity and cyber-bullying are current phenomena that require in-depth research. Cyber-bullying has become a ubiquitous phenomenon with the increase of the interactions in the digital environment. The phenomenon gained momentum with the development of social networks and mass media, which allow users to anonymously avoid any moral or legal norm of behavior.

In our opinion, this situation is determined by several considerations: the growth of the audience of the platform, the militancy of the online communication channel, the ignorance of the law in relation to offenses in the online environment. Unlike traditional bullying, where the identity of the bully is known, online anonymity allows users to hide their true identity and therefore express themselves more aggressively without fear of direct consequences. Research shows that online anonymity can lower users' inhibitions, causing them to act in ways they wouldn't in real life. This phenomenon is called the "online disinhibition effect" and plays a crucial role in negative behaviors, including cyber-bullying. In this framework, anonymity can be understood not only as a communication tool, but as an element that distorts responsibility and, implicitly, behavior. We can even notice a double measure here: reactions sanctioned by law in real life, sometimes even with custodial sentences or financial fines, are tolerated (and thus encouraged) in the virtual environment.

The concept of the "online disinhibition effect" was proposed by psychologist John Suler in 2004 in an article titled "The Online Disinhibition Effect," published in CyberPsychology & Behavior. Suler *(Suler, 2014, p.322)* explored how anonymity and the online environment cause users to behave differently from their real-life interactions, often exhibiting more aggressive or vulnerable behaviors. He identified two types of online disinhibition: toxic disinhibition, which includes hostile, offensive or aggressive behaviors such as trolling or cyber-bullying, and benign disinhibition – which involves behaviors of

emotional openness or increased self-disclosure, allowing users to discuss personal issues, seek support or share private aspects of their lives.

In his article, Suler identified several factors that contribute to this disinhibition effect: dissolved anonymity - users feel that they are not associated with their real identity, invisibility: the feeling that they are not seen by others when communicating online, timelessness - the possibility to respond later, which reduces spontaneous inhibitions, minimized authority – the online environment eliminates or reduces differences in social status or authority, encouraging more direct behaviors.

The study of the disinhibition effect has also been addressed by other researchers. Katelyn McKenna and John Bargh (2000) analyzed differential self-expression in forming relationships on the Internet. In "Plan 9 from Cyberspace: The Implications of the Internet for Personality and Social Psychology," they explored how online anonymity and privacy influence identity formation and interpersonal relationships. They noted that anonymity can provide a safe space for identity exploration, but can also lead to risky behaviors. They claim that "under the protective cloak of anonymity (ie, the Internet) users can express how they really feel and think." ...(p....)

Adam Joinson (2001), in his study "Self-disclosure in Computer-Mediated Communication: The Role of Self-Awareness and Visual Anonymity," investigated how anonymity affects self-disclosure. He concluded that invisibility and anonymity reduce inhibitions and increase users' willingness to share their thoughts and emotions, but that this openness can come with impulsive or thoughtless behaviors.

Although prior to the Internet, the concept of "face" and self-presentation in Goffman's work (especially in "The Presentation of Self in Everyday Life") is relevant to understanding online behavior because his theory of assumed public and private roles anticipates how online anonymity encourages people to behave differently depending on their audience.

Editorial control and handling of comments

Some editorial offices use editorial filters to control which comments are visible or to prioritize them. An experiment on Reddit revealed how comments originally downvoted continue to attract negative reactions, and those upvoted continue to attract positive reactions.

Strossen (2012) highlights how this control can lead to the manipulation of information, turning the comment section into a partisan space. The study of Singer (2014) is also relevant, which explains how editorial policies can distort the perception of public opinion, either by hiding opposing comments or by promoting those who support a certain direction. Marwick and Boyd (2011) talk of “digital framing practices” suggests that some journalists contribute to

comment sections using anonymous accounts, thereby influencing the tone of debates and maintaining a semblance of objectivity in the original text.

The Pew Research Center (2014) report presents data on editorial participation in comment sections and highlights the ethical dilemmas and impact on the credibility of journalism.

The legal framework of cyber-bullying in the Romanian press

In documenting the study, we took steps to identify the ways of action by which a person who considers himself a victim of cyber-bullying by the press, concretely of anonymous comments on online newspaper forums, can protect his right to the protection of his own image.

Procedurally, such a person must file a complaint with the police, the only institution empowered to request editorial offices to identify users' IP. Following the response received from the Police, the injured person can go to court.

The act of cyber-bullying is criminalized by several provisions of the Criminal Code: art. 206 threat, art. 207 blackmail, art. 208 harassment. The criminal action is initiated upon the prior complaint of the injured person. Penalties can go up to seven years in prison.

In the situation where the prosecutors consider that the deed does not constitute a crime, the victim can address the civil court, for moral damages, based on the provisions of art. 72 of the Criminal Code: "(1) Every person has the right to respect for his dignity. (2) Any harm to a person's honor and reputation without their consent is prohibited. "

The Romanian Civil Code stipulates both material and moral damages, in situations where a person suffers damage to his self-image, reputation and sense of security.

Although in theory there are legislative provisions that tangentially refer to the cyber-bullying phenomenon, and there are specialized lawyers, but in practice it is found that the number of cases in which the victim addresses the court is very low because there is a difficulty in identifying the perpetrators/abusers. A failure in such a process can lead not only to the continuation of the phenomenon of harassment, but even to its amplification.

CONCLUSION

The phenomenon of cyber-bullying is present in the forums of the Romanian media and is growing exponentially. In the local press in Arad, which I researched, the most visible areas are administration, politics and sports, with more than 95% of the comments referring to these topics.

The identity of commenters is protected by a system of filtering and publishing comments that allows the use of pseudonyms, which are sometimes proper nouns, names of people (without being able to verify their real existence), sometimes common nouns. Under the protection of anonymity, in the online

environment related to the investigated publications, accusations, insults and even threats are launched against the victims of the cyber-bullying phenomenon. This phenomenon can affect a person's image by attracting public opprobrium and can lead to some actions directed against the victims of this phenomenon (dismissal, marginalization, exclusion).

The legislation in Romania has not been updated, in the sense of including aspects related to cyber threats to individuals, it operates on the basis of the general provisions in force since 1969 and periodically updated. The phenomenon of cyber-bullying is assimilated to the classic crimes of threat, harassment, blackmail, although there are obviously situations that would require new approaches. The digitization of society generates new, complex phenomena, with a major impact on the psyche and human behavior, for which the Romanian legislation is still not prepared.

Under these conditions, newspaper forums represent an anarchic virtual society, where the observance of moral rules depends on the moderators. However, we noticed that slips are allowed and, in some situations, even encouraged, to increase the visibility of the publication or article, to generate views and implicitly traffic, which are in direct correlation with advertising budgets.

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SARA Law **R**esearch **C**enter
International **J**ournal of **L**egal and **S**ocial **O**rder, https://www.ccdsara.ro/ijlso
ISSN 2821 – 4161 (Online), ISSN 2810-4188 (Print), ISSN-L 2810-4188
N°. 1 (2024), pp. 308-317

THE (IN) SECURITY OF INFORMING AUDIENCE IN NOWADAY'S MEDIA CASE STUDY: CLONING ROMANIAN NEWS WEBSITES

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Received 15.11.2024; accepted 21.12.2024
DOI: https://doi.org/10.55516/ijlso.v4i1.215

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Abstract

Informing the public correctly these days is not as simple as we might think, in the "communication age", despite the diversity of tools and the fast pace at which news can be disseminated in real time. Journalists and online channels face significant challenges, dealing not only with disinformation, propaganda or fake news, but also with other larger impediments such as cyber-attacks, phishing, website cloning, scams and distribution of malware. Cloning incidents involving the Romanian media have been sporadically reported over the years, especially during significant events, political elections or crises. of all kinds This article aims to highlight some of these cases in recent years that contribute to a state of insecurity among online readers.

Key words: *website cloning, manipulation, phishing, media, security.*

INTRODUCTION

Several incidents of newspaper cloning have begun to appear in the international and Romanian media[1] in recent years. These are related to practices of replication by falsification of original media publications. The easiest newspapers to falsify are especially those online.

[1] We mention some of the cloned newspapers in Great Britain: *Daily Mirror, Manchester Evening News, Chronicle Live, The Guardian*, in 2021, when over 1000 news sites and over 50,000 fake news articles were cloned (compared to 2020, when the British media faced over 700 illegitimate news sites and around 20,000 of articles). Charlotte Tobitt, *Theft of news articles and entire websites more than doubled in UK in 2021*https://pressgazette.co.uk/news/ripped-articles-cloned-news-websites/ (accessed 10.10.2024)

THE (IN) SECURITY OF INFORMING AUDIENCE IN NOWADAY'S MEDIA CASE STUDY: CLONING ROMANIAN NEWS WEBSITES

The recipe for completely falsifying a newspaper issue involves creating fake versions of well-known publications in order to spread false information or deceive readers. Through a series of techniques, depending on the intentions of those who carry it out, but also on the resources they have.

Cloning Romanian media sites usually involves creating a counterfeit version of a legitimate news site to spread disinformation, phishing attempts, or to generate advertising revenue through deceptive means.

Cloning incidents involving the Romanian mass media have been sporadically reported over the years, especially during major social events (the case of wars, the Olympic Games - for phishing attempts), electoral periods and elections (with the aim of spreading misinformation or manipulate public opinion) or crises (during the COVID-19 pandemic, many fake news sites appeared, capitalizing on public fear and misinformation).

I. CLONING TECHNIQUES

Homograph spoofing[2] is a type of attack where attackers use characters that look similar to one another, but are actually different, to trick users. This is usually done with domain names, but can also be applied to other areas, such as URLs or even email addresses. The goal is to create a website or link that looks like a legitimate one but is actually fake, tricking users into thinking they are interacting with a trusted information source. Some already known examples are those of some famous publications. In 2017, cybersecurity researchers discovered a domain that looked almost identical to the legitimate *New York Times* website, but with one subtle difference: the domain used the Cyrillic character for "y" instead of the Latin "y" (the legitimate domain was nytimes.com, and the fake nytimes.com – with Cyrillic "y", which looks identical to Latin "y" in most browsers, imperceptible to the average user). This domain was part of a larger set of attacks designed to trick users into thinking they were on the real *New York Times* website. Once on the fake site, users could have become vulnerable to phishing attacks, scams or malware. Other examples could include fake versions of sites like *CNN* or *BBC*, where attackers used homograph spoofing to create similar domains like: bbc.com - bbc.com (using Cyrillic "c" instead of "c" Latin) or cnn.com - cnn.com (using Cyrillic "c" instead of Latin "c").

Doppelgänger is the term that refers to a double, double or "evil twin", a concept that appeared in history and literature. At the end of 2023, euronews.com presented a material about Doppelgänger, as the name of the new disinformation campaign launched by Russia against Ukraine and the cloning of news sites or the massive distribution of "fake news", reaching the conflict between Israel and Hamas[3]. And the French and German media have faced such cases, we mention

[2] The term spoofing means "cheating", "falsification", "trick".

[3] Sophia Khatsenkova, "Doppelganger: How a Russian disinformation campaign is exploiting the Israel-Hamas war", https://www.euronews.com/my-europe/2023/11/23/doppelganger-how-a-

Le Parisien (leparisien.fr replaced by leparisien.pm in 2022), *20 Minutes*, *Le Monde*, but also the newspaper *Der Spiegel*, for distributing fake news about the war in Ukraine and the one in the Gaza Strip. Social media users have created a platform to check their authenticity, Antibot4navalny, against these fake sites.

In the case of cloning a news site, the content is fake or only partially falsified. Cloners publish made-up articles, often based on rumors or distorted information, which may seem credible at first glance. These may include sensational headlines to attract attention, which may not even have any connection with the content of the article. A very important step is then to distribute the new site online. Counterfeiters mostly use social media platforms, emails and other digital channels to disseminate these fake newspapers, taking advantage of algorithms that promote popular content. This is where search engine optimization (SEO) and marketing intervene. Using search engine optimization techniques to make fake sites appear in the first search results can increase the exposure of these sites.

Those who clone news websites are counting on the fact that the IT field is one that not everyone is good at (although everyone uses devices) and will exploit this lack of media education. Many people are not educated in identifying reliable sources, which facilitates the unconscious spread of false information.

Partial and unauthorized reproduction is another very common situation and involves the use of original content taken from newspapers without permission, which can lead to legal and copyright issues.

A new challenge is the phenomenon of deep fake, when with the help of artificial intelligence (AI), images and videos of celebrities or well-known people are also generated, not just processed and also have their voices cloned.

II. AUDIENCE RISKS

All the above phenomena are very serious and can lead to misinformation. Cloned newspapers can be used to spread fake news *(Shu et al., 2017)*, thereby affecting public opinion and trust in the media.

Phishing is a type of cyberattack in which attackers attempt to trick the reading public into providing sensitive information such as passwords, credit card numbers, spam or other personal details *(Arun Anoop M, 2016, 412-417)*. This is often done by impersonating a trusted entity, usually through email, social media or fake websites (including news websites) that appear legitimate. The goal is to trick the victim into clicking on a malicious link or downloading malicious

russian-disinformation-campaign-is-exploiting-the-israel-hamas-war; Andrea Smernea, Doppleganger. Cum au clonat rusii paginile unor publicatii internationale pentru a raspandi informatii false despre Ucraina si Israel, https://www.digi24.ro/stiri/externe/mapamond/doppleganger-cum-au-clonat-rusii-paginile-unor-publicatii-internationale-pentru-a-raspandi-informatii-false-despre-ucraina-si-israel-2590129 (accessed 02.09.2024)

software, leading to data theft or bank fraud. The scam also behaves similarly, a way of fraud in the form of false offers of "free samples", fake e-mails, counterfeit goods.

The impact on the media industry is an increased one. These incidents can undermine the credibility of legitimate publications. of journalists and the profession itself and can affect their income, especially in the already complicated context of the media industry *(Maruta M., 2023, 271-284).*

III. FROM NEWSPAPER CLONING TO CLONE ROMANIAN NEWS WEBSITES

A special case of cloning a physical newspaper took place in 2012, being considered "an unprecedented attack on the press". The *Ring* newspaper was cloned, and its copy reproduced the logo, format and fonts, but only had 16 pages, unlike the original which had 24 pages. The fake one had completely different topics on the first page, being a vendetta between the candidates for the 3rd District Mayor's Office of Bucharest, the cousins Liviu and Robert Negoita[4]. The clone printed in Baia Mare circulated in the Romanian capital at the end of the electoral campaign. The editor-in-chief of the free daily newspaper, edited by SC Ring Media Group SRL, urgently notified the police, who discovered hundreds of copies of the cloned number in several cars abandoned in traffic.

A first example of cloning a news website took place in 2009, being the page of the well-known television station *PRO TV*. The original site www.stirileprotv.ro, owned by PRO TV SA, was cloned by another site with an almost identical name, but anonymous owner - www.stirile-protv.ro[5]. The copy reproduced the articles, the editorial style ("underlined phrases, links to other articles"), the site's headings with the names and order from the original site, the editorial campaigns. At the request of Pro TV SA, the fake website was suspended for "copyright infringement". In 2020, stirileprotv.ro website is once again the target of clones by "ghost sites", which are used by the well-known media brand to "misinform" but also "to obtain various material benefits." Even in 2023, there were scams (dishonest schemes, frauds) with get-rich-quick recipes, promoted through sponsored posts on social media, which used the visual identity of Pro TV News.

In the summer of 2019[6], two websites used *Libertatea*'s newspaper logo, which had no connection with the Romanian publication edited by the Ringier

[4] Ioana Radu, "PDL, acuzat ca a clonat un intreg ziar", https://www.cotidianul.ro/pdl-acuzat-ca-a-clonat-un-intreg-ziar/ (accessed 11.10.2024)

[5] Petrisor Obae, „Clona site-ului de stiri al Pro TV a fost inchisa", https://www.paginademedia.ro/2009/02/clona-site-ului-de-stiri-al-pro-tv-a-fost-inchisa/ (accessed 22.10.2024)

[6] Petre Dobrescu, „Site-ul Libertatea, clonat in Rusia si Panama" https://www.libertatea.ro/stiri/site-ul-libertatea-clonat-in-rusia-si-panama-2733869?fbclid=IwAR13mF5Lu1-Dd5-_rzXgg3LYbI35wf1LyRfGCWWBzWsJDQH53bBRkYW1Egk (accessed 11.10.2024)

media company. Among the duplicated elements were the identical design, but also the signatures of several *Libertatea* reporters. An investigation by *Libertatea* journalists, who label the actions "identity theft", revealed that one site was registered in Panama and the other in Russia *(life24-ro.site and sigmaweb-worksz.com)* and that one of them promoted slimming products, through sponsored posts, on Facebook, reproduced through photos, in the material on *Libertatea.* The Ringier media company notified the two sites to stop using the *Libertatea* logo.

In 2020, *Libertatea* is again the target of a website clone. *Libertatea* published a material dissing a website that reproduced an online page of their newspaper[7]. funlandinfinity.club had duplicated the *libertatea.ro* website and published an article in which it claimed that the Minister of Finance of Romania at the time, Florin Citu, supported a cryptocurrency trading platform. The page was also used by the star of the *Pro TV* television station, Andreea Esca, in a similar material, asking readers for their bank card details and an initial investment of 250 euros, and even the president of Romania, Klaus Iohannis.

The page also had contact details, also false, that referred to a non-existent phone number and an address that corresponded to a village in Lombardy, Italy. This time, the fake material encouraged readers to invest in the Bitcoin Revolution platform, "an algorithm designed to take money from the richest people in the world and redistribute it among middle-class Romanian citizens". The material included comments from some so-called customers, other fictitious accounts, which led to other sites, which could only be accessed with a username and password that sent the reader to a collage with the news presenter Cristian Leonte, from Stirile Pro Tv. *Libertatea* journalists contacted the National Authority for Administration and Regulation in Communications to close the site, but not having legal prerogatives for this action, they suggested forwarding the case to the Romanian Police, cataloging cloning as a "cybercrime". Similar incidents of deep fake (images and recordings generated with the help of AI) happen with *Libertatea* (but also with several Romanian banks) in 2022 and in 2024, when the cloned sites are distributed on the socialization networks[8]. The platforms to which the readers were redirected were "non-existent". Well-known people such as Mugur Isarescu (governor of the National Bank of Romania),

[7] Iulia Marin, "FAKE NEWS! Un site obscur a clonat o pagina din *Libertatea* si le cere oamenilor sa investeasca in criptomonede, folosindu-se de numele Andreei Esca si ale lui Florin Citu si Klaus Iohannis" https://www.libertatea.ro/stiri/un-site-obscur-a-clonat-o-pagina-din-libertatea-si-le-cere-oamenilor-sa-investeasca-in-criptomonede-folosindu-se-de-numele-andreei-esca-si-ale-lui-florin-citu-si-klaus-iohannis-3036170 (accessed 10.10.2024)

[8] Petre Dobrescu, „Imaginea site-ului Libertatea, folosita in deep fake-ul cu guvernatorul BNR Mugur Isarescu. Banca centrala avertizeaza impotriva fraudelor", https://www.libertatea.ro/stiri/imaginea-site-ului-libertatea-folosita-in-deep-fake-ul-cu-guvernatorul-bnr-mugur-isarescu-banca-centrala-avertizeaza-impotriva-fraudelor-4796867 (accessed 10.10.2024)

Sebastian Burduja (Minister of Energy), Ion Tiriac (businessman), Marcel Ciolacu (Prime Minister of Romania) appear in various videos promoting investments, which were actually frauds. This time, not only their image is used, but their voice is also cloned, clear examples of deep fake, against which the above have filed a criminal complaint.

IV. Cloned TV and news agencies websites

In 2021, the website of the news porta *profit.ro*, the publication launched by experienced journalists in the economic field, was cloned (*profit.ro* is part of Clevergroup, together with the TV channels *Prima TV*, *Prima News*, *Prima Sport*, *Agro TV*).

In February 2022, other media sites in Romania are falsified, according to *paginademedia.ro*[9]. The independent news agency *News.ro* and *Capital.ro* were cloned by sites from Russia (bitinitiators.com/profitsmall.com/feednewers.com), attracting the attention of the National Cyber Security Directorate at the time. being "involved in attempts at fraud and disinformation". *News.ro* fought for several months to block the cloned pages, which appeared in the online environment, copying the agency's layout and distributing it on Facebook, promoting solutions for immediate enrichment.

The National Cyber Security Directorate suggested in the article that the public must be the one to protect themselves in these situations, offering a list of precautions to follow: "check carefully the details of the information sources, such as the site's domain name; If you receive news from unknown or dubious sources, always verify the link before accessing, preferably with a security solution; Make sure you use an official communication channel when read news from the online environment, to make sure that the information you read is not an attempt at disinformation". Once we come into contact with such cloned sites, the only "weapon" would be to report them to the Directorate - "Do not hesitate to notify the Directorate if you notice other such dangerous initiatives, which aim to mislead users and misinform ".

A case that became an internal investigation for the journalists from the newspaper *Bursa*, was the cloning of the online site, *bursa.ro*, in January and then in February 2023. On January 30th, 2023, a first material appears "Cybernetic attack on the address of the *Bursa* newspaper and of the reading public"[10], signed I.Ghe., which publishes two photos mirrored - one with the fake page and the

[9] Iulia Butea „Alerta. *News.ro* şi *Capital.ro* au fost clonate de site-uri din Rusia. „Verificati cu atentie detaliile surselor de informare”" https://www.paginademedia.ro/stiri-media/publicatii-romanesti-clonate-rusia-20616270
(accessed 01.11.2024)

[10] https://www.bursa.ro/atac-cibernetic-la-adresa-ziarului-bursa-si-a-publicului-cititor-60709848#google_vignette
(accessed 21.10.2024)

other with the official page of the newspaper online from January 27th, 2023. The cloned page imitated the frontispiece of the newspaper, but there were also changes regarding the rest of the titles ("Local news from all over the country"). The copy was opened with a main article, signed by a *Bursa* journalist (Andrei Iacomi), about a Romanian personality, Ion Tiriac, precisely to convince the public to access the link that ultimately led to the financial harm of the readers. The material was entitled "SPECIAL REPORT: Ion Tiriac's last investment horrified the management of large banks in Romania" and advised the public "to invest in a new cryptocurrency trading program called - in the fake article - Crypto Engine". If the readers were not interested in that material but wanted to access other sections of the cloned page, they were immediately redirected to the trading program. The cloned page by "unknown authors" was quickly published on several anonymous Internet sites. In the material from *Bursa*, the journalist Andrei Iacomi explains how we can immediately realize if we are dealing with a fake: "there are terms used/translated in a wrong manner and there are some missing reasons. We (i.e. the editorial staff of the *Bursa*) do not make investment recommendations because that is not the role of the media." The journalist denies that he knows Ion Țiriac and claims that he did not write or sign the that material.

The management of the newspaper presented all these data to the Police of Sector 1 Bucharest, because "the cyberattack makes a misleading advertisement that can financially harm the reading public and that harms the newspaper *Bursa* and the editorial team in a subsidiary way", demanding the opening of a criminal investigation regarding "the commission of fraud crimes, forgery and use of forgery regarding the identity, in order to obtain undue benefits, acts provided for and punished by the Criminal Code", identifying the authors of the cyberattack and holding them criminally and materially liable.

On February 14, 2023, the journalist Andrei Iacomi signed an investigation related to the cloning of the newspaper website in which he had been involved in January.[11] This time, other clones of the publication are reported, with "fake articles", which "do not have the address of the publication's website". The "fraud" that circulates on the cloned pages still has the image of Ion Țiriac urging readers to invest through a cryptocurrency trading algorithm, in order to "get rich" is actually a way to harm readers, as in the case other Romanian news sites. The recipe for this scam is the same: "names of people with great financial success or other influencers are used who urge people to take advantage of a so-called opportunity to make a lot of money, even millions" in a short time. Readers must create an account at the indicated site, where it is redirected, but "quickly", in order not to miss the opportunity. Next comes the request to deposit a few

[11] https://www.bursa.ro/povestea-clonarii-site-ului-bursa-oamenii-sunt-ademeniti-sa-depuna-sume-de-bani-cu-promisiunea-unor-castiguri-fabuloase-09530940#google_vignette (accessed 22.10.2024)

hundred euros, a discussion with financial experts or algorithmic trading systems capable of producing enormous sums for the lucky user. Then starts "an aggressive campaign by which readers are asked to make new deposits, you can no longer withdraw the money initially placed, and at a certain moment the site disappears completely". The signatory of the investigation reveals that behind the cloning was an IP (Internet Protocol) from Russia and the journalist tried to test the business as a simple user. After being redirected to other sites, fake cryptocurrency sites, on which he finally registered, with the promise he will be contacted by representatives of cryptocurrency companies, who, predictably, demanded money in exchange for a "25 lie -30% per week". When he told them that he was an undercover journalist, the agent replied that he will be contacted by a financial expert, but he never called him. The National Cyber Security Directorate self-reported in this situation, identifying the location of the cloned site and invited the editorial staff to take part in Online Safety, a joint project of the Romanian Association of Banks and the Romanian Police. A specialist in issues of this kind way, from the cyber security company BIT Sentinel, includes the duplication of *Bursa* newspaper page in the fake-news category, "for which user education is the key to solving the problem". It suggests minimal measures for readers: "to read carefully", "to have a bit of critical thinking about the content presented by a particular site - for example to check simple matters such as the actual address of the site", because there is a risk that the information is not truthful. Also, the attention of citizens who want to make financial transactions is drawn to the fact that there are a lot of financial frauds, through the phishing method.

Digi24, a major news television channel in Romania, was a target of cloned URL to spread false information or engage readers in phishing attempts. During the COVID-19 pandemic, but also in 2023, several fake *Digi24* sites have been reported[12], trying to trick users into thinking they are accessing legitimate news. These cloned sites often used URLs that were very similar to the original but had small changes *(digi24.ro.com or top.rodigi24.com)*, but the *Digi24* logo and font used were identical, "to induce misleading the readers, causing them to access" the respective news, cataloged by *Digi24.ro* representatives as "false".

The materials were "about celebrities from Romania", which promoted different products and services, but a very clear sign that they were "fake news" are the grammatical mistakes that appeared even in the titles of the materials (first of all, what was striking was the lack of agreement in gender and number correlated with the stars portraited: the TV shows hosts Andreea Marin, Andreea Esca, repetition of the same title with another character- Mihai Gadea and

[12] Adriana Dutulescu, "AVERTISMENT: Imaginea Digi24.ro este clonata si folosita alaturi de numele unor vedete din Romania pentru escrocherii", https://www.digi24.ro/stiri/actualitate/avertisment-imaginea-digi24-ro-este-clonata-si-folosita-alaturi-de-numele-unor-vedete-din-romania-pentru-escrocherii-2468847 (accessed 22.09.2024)

Andreea Marin, name mistakes of the Romanian president - Klaus "Johanis" instead of Iohannis), associated with the photos of the stars and the appellation "shocking news", written in capital letters, on a red background, to be easily noticed. It is interesting that one of the news was broadcast and sponsored on Facebook from Sri Lanka, most likely from the fake page of a former governor "which, although it has a blue tick, does not seem to be an official page of a politician", although Facebook in this way it confirms the authenticity of the profile.

Digi24.ro, like other news sites from the country and abroad that face similar situations, issues warnings about such scams in order to educate the public, claiming that they do not reproduce cloned links because "once accessed, they can be dangerous" for users because "they can steal personal data from the electronic device of the one who clicks on it, or they can be used for financial scams". The journalists checked the respective links that led either to empty pages or to sites that presented questionable financial schemes.

CONCLUSION

Cloned news sites, fake news, scams and false video content, created by AI are more and more frequent these days. It is very easily to get tricked by the malevolent persons, algorithms or AI. As the possibility of normal people to create content or to transmit information really quick grows, the risks for the reader to find misleading news grows.

The audience needs to learn to check information and the sources not only within an article, but the news websites. Although the public might feel alone in this process, it is also more independent in fact-check and creating own opinion. It is going to be hard at the beginning, but after learning to be cautious, readers will also be selective in the field of an insecure communication field.

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SARA Law **R**esearch **C**enter
International **J**ournal of **L**egal and **S**ocial **O**rder, https://www.ccdsara.ro/ijlso
ISSN 2821 – 4161 (Online), ISSN 2810-4188 (Print), ISSN-L 2810-4188
N°. 1 (2024), pp. 318-327

THE WAR IN UKRAINE - A LONG TERM CONFLICT

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Received 10.10.2024; accepted 14.12.2024
DOI: https://doi.org/10.55516/ijlso.v4i1.222

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Abstract

European security has been severely shaken by the Russian Federation's surprise invasion of Ukraine in February 2022. The causes and determinants, as well as the implications of this conflict, require a broader, more comprehensive approach, starting from the events of 2014. The conflict in Ukraine is and will remain a hot topic of utmost interest due to its political-military and economic-social implications, at a global level. The outlook for the conflict in Ukraine remains uncertain and dependent on a whole range of factors and circumstances.

Key words: *NATO, security, geopolitics, military conflict.*

INTRODUCTION

The current War in Ukraine is a complex conflict with deep historical roots and significant geopolitical implications. While the invasion effectively took place in February 2022, the spark of the conflict has to be traced back at least a decade, with 2014 being a landmark year in this regard. Beginning as a protest movement against the pro-Russian government of Viktor Yanukovych, the conflict rapidly escalated into violences, culminating in the Russian Federation's annexation of Crimea and the explosion of inter-ethnic unrest in Ukraine's eastern regions of Donetsk and Luhansk.

I. CAUSES AND STAGES OF CONFLICT

1.1 The root causes of the conflict in Ukraine are multiple and complex, with historical, political, economic and cultural roots. From a geopolitical perspective, Ukraine is at the border between East and West, and its aspirations

for European and Euro-Atlantic integration have been perceived by Russia as a direct threat to its sphere of influence. The complex history between the two countries, including close cultural ties and historical resentments, have fueled the already rising tensions.

The historical connections between Ukraine and Russia date back to the 9th century, when Kiev was the center of the first Slavic states, and the region played a prominent role in later Russian history. During the Soviet period, Ukraine was part of the Soviet Union, during which it suffered greatly, including from the artificial famine of 1932-1933 known as the Holodomor[1]. The memory of these events deeply influenced pro-Ukrainian national sentiments.

With the collapse of the Soviet Union in 1991, Ukraine gained its independence, but subsequent economic and political challenges have created instability that has contributed to growing internal tensions.

Figure 1: Ukraine before 2014 & Ukraine in 2024

Thus, these internal tensions have polarized the entire Ukrainian society between pro-Europeans and pro-Russians, with wide and deep disputes between supporters of the Western orientation (European and Euro-Atlantic integration) and supporters of Russian influence. This polarization was evidenced, for example, in the 2010 presidential elections, when pro-Russian Viktor

[1] The Ukrainian famine (1932-1933), also known as Holodomor (Ukrainian: Голодомоор), was one of the worst national catastrophes of Ukrainians in modern history, with an estimated 10 million dead. While the famine in Ukraine was part of a famine that also affected other regions of the Soviet Union, the Holodomor is strictly understood as the events that affected the territories inhabited by ethnic Ukrainians. Researchers agree that the famine was caused by the agricultural policy of the Soviet government and Stalin rather than by natural causes, and the Holodomor is also referred to as the 'Ukrainian genocide', which would imply that the Holodomor was engineered by the government with the aim of destroying the Ukrainian nation as a political factor and social entity. Historians are still debating whether or not the policies that led to the Holodomor fall under the provisions of the Genocide Convention, and several countries have since recognized the Holodomor as genocide. On November 28, 2006, Ukraine's parliament passed a resolution stating that the Soviet-era forced famine was an act of genocide against the Ukrainian people.

Yanukovych won the election, leading to massive protests by pro-European supporters.

On the other hand, endemic corruption and economic decline have led to widespread distrust among Ukrainian citizens of the political elite. Dissatisfaction with Yanukovych's government culminated in the Euromaidan demonstrations, which called for wide-ranging reforms and a pro-European orientation.

Another significant cause is the sphere of geopolitical interests in the wider Black Sea area, a point reached by the Yanukovych government's refusal to sign the Association Agreement with the European Union in 2013, thus attracting widespread discontent among Ukrainians. This was perceived as a caving in to Russian influence, further inflaming internal tensions. Russia perceived this possible eastward expansion of Euro-Atlantic structures as a direct threat to its security. The Russian Federation's support for separatist movements in eastern Ukraine can be seen as a permanent attempt to keep Ukraine within its sphere of influence.

Economic factors cannot be ruled out either, as close trade ties with Russia are recognized, Ukraine was heavily dependent on Russian natural gas and trade with Russia, making integration into the European space a challenge. This economic dependence was exploited by Russia to maintain control and influence over Ukraine. Domestic economic crises and falling living standards have fueled social tensions, and the lack of economic prospects has amplified the desire for change.

Not least, propaganda and media factors have fueled internal disputes over identity. Some regions, particularly eastern Ukraine, have a predominantly Russian-speaking population and a cultural identity more closely tied to Russia, while the west tends to identify more with Ukrainian national ideals and Europe. Propaganda on both sides (Russian and Ukrainian) has amplified the divisions, presenting diverging narratives of conflict, identity and sovereignty.

In essence, we can see that the war in Ukraine has not a single cause, but is the result of complex interactions between several inputs. Historical, political and economic tensions, combined with external influences and national identity, have created an environment conducive to conflict escalation. The situation remains of ongoing concern, with implications extending beyond Ukraine's borders, affecting regional stability and international relations.

1.2 Stages of the conflict. Although Ukraine was invaded, effectively by Russian troops, in February 2022, the Russian-Ukrainian conflict[2] has older roots and can be analyzed in several stages:

[2] The Russo-Ukrainian War is an ongoing war between Russia and Ukraine, which began in February 2014. Following the Revolution of Dignity in Ukraine, Russia occupied and annexed Crimea from Ukraine and has supported pro-Russian separatists fighting against the Ukrainian army in the war in Donbas.

- The historical and political context before 2014, when Ukraine had a complex history, marked by historical ties with both Russia and the Soviet Union. After gaining independence in 1991, Ukraine oscillated between pro-European and pro-Russian orientations, leading to internal tensions.

- The crisis in Crimea in 2014, preceded by the Euromaidan[3] protests in November 2013-February 2014, with Russia's annexation of Crimea a key moment in the conflict. In March 2014, Russia intervened militarily in Crimea and a controversial referendum was held, with the result in favor of Crimea's annexation to Russia. This action was widely condemned by the international community and led to the imposition of economic sanctions against Russia. On February 22, 2014, President Viktor Yanukovych fled Kiev and the Ukrainian Parliament adopted a series of measures to replace the government.

- The war in the Donbas from 2014-2022, when pro-Russian separatists unleashed large-scale fighting in the Donetsk and Luhansk regions of eastern Ukraine, declaring independence. The fighting led to a severe humanitarian crisis. Ukraine has launched anti-terrorist operations to re-establish control over the regions and Russia has been accused of supporting the separatists. In an attempt to impose a diplomatic solution, the Minsk Peace Accords (Minsk I/September 2014 and Minsk II/February 2015) were signed in 2014/2015 in the presence of OSCE officials and representatives of Western states (Figure 2).

Figure 2: The Minsk Agreement (Minsk II) was signed by Russia, Germany, France and Ukraine in 2015, (Vladimir Putin, Angela Merkel, Francois Holland and Petro Poroshenko).
Source: https://www.dw.com/ro/ce-con%C8%9Bine-acordul-de-la-minsk/a-62145009

These agreements included a ceasefire and other measures to de-escalate tensions, but violence has continued and the process of implementing the agreements has been flawed, with all parties involved constantly violating them.

[3] In November 2013, the Ukrainian government's decision to suspend preparations to sign an association agreement with the European Union sparked massive protests in Kiev, known as Euromaidan. The protests escalated into violence in January and February 2014, leading to clashes between demonstrators and police.

- ***Escalating tensions and the February 2022 invasion*****,** were preceded by a massive mobilization of Russian troops on the border with Ukraine at the end of 2021. On February 24, 2022, Russia launched a full-scale invasion of Ukraine, marking the beginning of a new stage in the conflict. Ukraine responded with significant resistance and the international community condemned the invasion, offering military and humanitarian support to Ukraine.

On the other hand, the international community, including Western countries, has supported Ukraine with military and economic assistance, as well as sanctions against Russia. These sanctions have targeted key economic sectors including energy, finance and technology. NATO increased its presence in the region and the EU continued to support reforms in Ukraine.

The conflict continues with intense fighting in different regions of Ukraine and its fate remains uncertain. There are continuing international efforts for diplomatic solutions, but tensions remain high and the prospect of peace is difficult to assess.

II. IMPACT ON POPULATION

The war in Ukraine, which began in 2014 and has intensified drastically since February 2022, has had, and continues to have, a profound and devastating impact on the Ukrainian population, both in humanitarian and socio-economic terms. It is estimated that millions of people have been forced to flee their homes and the conflict has generated severe humanitarian crises. The Ukrainian economy has been severely affected and the country's infrastructure has been largely destroyed, especially in the eastern half of the country. Personal tragedies and broken communities have left a lasting imprint on Ukrainian society.

The humanitarian impact. Millions of Ukrainians have been affected, directly or indirectly, by the tragedies of this conflict (Figure 3). It is estimated that tens of thousands of civilians and soldiers have been killed or wounded and millions of Ukrainians have been forced to leave the country.

Figure 3: The humanitarian impact of the conflict in Ukraine,
(source: UNICEF/Filippov and Euronews)

By the beginning of 2024, it is estimated that more than 8 million people had fled to other European countries, making it one of the biggest refugee crises in Europe in decades. Millions have also been internally displaced within Ukraine, from the war-torn east to the west-central areas less exposed to Russian attacks.

The psychological impact. Many Ukrainians, including children, have been exposed to violence, destruction and death, resulting in psychological trauma. The increase in post-traumatic stress disorder (PTSD) symptoms is a major concern, with a lasting effect on mental health. At the same time, censorship and fear of repression have increased, affecting people's mental health.

Economic impact. Attacks on cities and critical infrastructure (roads, hospitals, schools) led to the destruction of the local economy. Many businesses closed or suffered significant losses. The majority of the population faced a drastic reduction in income, increasing the number of people in extreme poverty. In many cases, those who remained in the country experienced shortages of food, water and other essential resources. Many people lost their jobs, and those who remained had limited access to job opportunities, increasing unemployment.

Figure 4: The economic impact of the conflict in Ukraine, screenshot (https://www.digi24.ro/stiri/economie/cele-mai-grave-efecte-ale-razboiului-din-ucraina-asupra-economiilor-din-europa-vor-aparea-in-urmatorii-ani-2515213)

The impact on education. Many schools have been destroyed or closed, affecting access to education for millions of children. Even in areas not directly affected by the fighting, many children were unable to attend school due to migration or trauma. Despite attempts to implement online learning, the quality of education has been seriously affected and students have had difficulty accessing necessary resources.

Impact on the health system. The healthcare system was overburdened, with large numbers of injured and patients in need of medical attention. Hospitals were attacked, and many medical facilities were destroyed or operating in poor conditions. Millions of people had difficulty accessing health services, especially for non-urgent treatment.

The impact of the war on the Ukrainian population is profound and varied, affecting every aspect of life. The consequences are felt not only in the short term,

but it will take many years for Ukrainian society to fully recover from these devastating events. Once the conflict is over, the challenges of reconstruction, reconciliation and recovery will require a sustained commitment from Ukrainians and the international community.

III. REPLACING RECOURSE WITH APPEAL OR CHANGING THE LEGAL REGIME OF RECOURSE?

THE FUTURE OF THE RUSSIAN-UKRAINIAN CONFLICT

In the first part of this year, the war in Ukraine entered a phase of relative stagnation, with a well-defined front line and constant attacks on both sides. But this summer's tactical move by the Ukrainians to attack the Russian Federation in their offensive on the Kursk region surprised everyone, not just the Russians, including their own soldiers. (Figure 3)

Figure 5: Press article on the "Kursk Offensive", screenshot (https://www.digi24.ro/stiri/externe/ofensiva-din-kursk-i-a-luat-prin-surprindere-chiar-si-pe-soldatii-ucraineni-au-crezut-ca-ordinul-sa-invadeze-rusia-este-o-gluma-2900475)

The prospects for a lasting solution remain unclear, and the escalation or de-escalation of the conflict depends on many factors, including domestic politics in Russia and Ukraine, but also on the reaction of the international community. The future of the conflict in Ukraine is highly uncertain and depends on a complex set of internal and external factors.

The future of this war depends on a number of factors: continued US assistance, continued European assistance, continued generation of Ukrainian forces, but there is a reality here, Ukraine has a population less than one third of Russia's. Russia is apparently not concerned about casualties. And Russia has an

economy ten times the size of Ukraine's - said General David Petraeus, former CIA director, in an interview published this summer[4].

Several aspects are extremely essential in the evolutionary analysis of the whole conflict situation.

The dynamics of military actions. Changes on the battlefield, including the success or failure of Ukrainian or Russian offensives, will directly influence the course of the conflict. If Ukraine continues to achieve some strategic victories, it could shift the balance of power in its favor. On the other hand, a strengthening of Russian positions could lead to further escalation.

Moreover, continued support from Western countries is essential for Ukraine. Increasing or decreasing this support, both in terms of military equipment and actual funding, could influence Ukraine's ability to sustain the war effort.

Diplomacy and peace negotiations. International organizations and third countries can play a crucial role in mediating peace talks. These initiatives may lead to a ceasefire or peace negotiations, but the terms of the negotiations will profoundly influence the future of each party involved.

In another vein, the willingness of the parties to compromise will be crucial. Ukraine wants recognition of its sovereignty and the liberation of occupied territories, while Russia may have different demands. A mutually acceptable deal may be hard to achieve. Also to be taken into account will be Ukraine's position on the recent incursion into the Kursk region, and how it intends to deal with the occupied Russian territories.

Geopolitical factors. Tensions between Russia and the West (in particular with the United States and the European Union) will influence the course of the conflict. Economic sanctions and political measures imposed on Russia are geopolitical factors with a long-term impact.

However, the interests of powers such as China, Turkey, India and other relevant global actors in the conflict could influence the decisions of those directly involved. These states could either provide support or mediation, or simply extrapolate conflicts to other regional contexts.

The economic impact of war. With the possible end of the conflict, Ukraine will face huge challenges in rebuilding its infrastructure and economy. Economic stability will influence Ukraine's ability to maintain effective governance and avoid possible internal conflicts.

On the other hand, the economic consequences for Russia, including sanctions imposed by the international community and political isolationism, will

[4] The three factors determining the fate of the war in Ukraine. A former CIA chief explains, 23.08.2024, source: https://www.digi24.ro/stiri/externe/cei-trei-factori-de-care-depinde-soarta-razboiului-din-ucraina-explicatiile-unui-fost-sef-al-cia-2904595

also influence Moscow's attitude towards the continuation or termination of the conflict.

Managing inter-ethnic relations in Ukraine. Ukraine's ability to maintain national unity in the face of economic and social challenges will be crucial. Regions that have been most affected by the conflict could face resentment or tensions, and government authorities need to respond effectively. Tensions between different ethnic groups in Ukraine could pose a long-term risk, especially if the integration of those affected by the conflict is not properly managed.

Regional security. Eastern European states will continue to strengthen their defenses against perceived threats from Russia. This may lead to a further escalation of tensions in the region. The future of the European and global security system will be influenced by this conflict, and some states in the region may change their defense policies, including through increased military spending.

Humanitarian challenges. The conflict will continue to generate huge humanitarian needs and managing those affected will be an enormous challenge for governmental and non-governmental organizations. Rebuilding trust and social cohesion will require considerable resources, time and international commitment.

In such circumstances, the priority of the North Atlantic Alliance is to strengthen defense and deterrence in order to avoid a possible conflict with Russia. According to NATO doctrine, "***the best way to avoid war is to be prepared for it and to make that clear to a potential aggressor, in this case Russia***," said Sean Monaghan, an expert with CSIS Europe, Russia and Eurasia program[5]. As a result, the Washington summit this summer focused on defense and deterrence at all levels..

CONCLUSION

The future of the conflict in Ukraine is determined by a whole range of factors such as the interactions between the parties directly involved in the conflict and major international actors, political decisions, military realities and economic and humanitarian challenges. A deep understanding of regional dynamics is also essential to anticipate future moves. While hopes for a peaceful solution remain, the complexity and depth of the conflict suggest that the challenges will continue long into the future.

In conclusion, the war in Ukraine is a long-lasting conflict because its roots are deep and its complexity is amplified by the geopolitical interests at stake. Resolving this conflict will require not only political will, but also a sincere commitment from all actors involved to find a solution that meets the needs and aspirations of the Ukrainian people.

[5] https://www.defenseromania.ro/experienta-ucrainei-arata-ca-un-razboi-cu-rusia-poate-fi-prelungit-potrivit-expertilor-csis-nato-nu-este-pregatita-pentru-asa-ceva_628946.html, accessed 20.08.2024.

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SARA Law **R**esearch **C**enter
International **J**ournal of **L**egal and **S**ocial **O**rder, https://www.ccdsara.ro/ijlso
ISSN 2821 – 4161 (Online), ISSN 2810-4188 (Print), ISSN-L 2810-4188
N°. 1 (2024), pp. 328-338

EDUCATIONAL INCLUSION OF PUPILS FROM DISADVANTAGED COMMUNITIES

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Received 25.02.2024; accepted 03.05.2024
DOI: https://doi.org/10.55516/ijlso.v4i1.176

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Abstract

In this paper we aim to conduct a study on the implementation of educational projects and institutional partnership programs in Călăraşi County in order to reduce and prevent school dropout. Research objectives were the analysis of the effectiveness of educational projects and institutional partnership programs for the reduction and prevention of school dropout, at the level of Călăraşi county and reducing the percentage of school dropouts in educational units, from disadvantaged areas of Călăraşi County, involved in the institutional partnership projects and programs.

Key words: *social equity; educational system; educational inclusion;*

INTRODUCTION

I. ASPECTS OF SOCIAL POLICIES REGARDING VULNERABLE GROUPS IN ROMANIA

The term vulnerable group is used in legislative documents or research reports as similar to disadvantaged, marginalized, excluded or risk group. Vulnerable groups are underserved groups, often in chronic poverty, unable to take advantage of opportunities or defend themselves against inherent problems. Examples of this are the disabled, abandoned children, people infected with the HIV virus, the elderly, ethnic minorities, single-parent families, etc.

If we look at access to education from the point of view of equal opportunities, according to which any person is free to make choices, but also to

develop his personal capacities, we can affirm the necessity of each person's participation in social life, without making distinctions related to ethnicity, gender, religion, age, disability, etc.

Romania, as a member country of the European Union, must promote fundamental rights, non-discrimination and equal opportunities for all.[1]

With regard to access to education in the school environment, teachers have a fundamental role, namely they must identify means to prevent and eliminate discriminatory attitudes, encourage tolerance and provide equal opportunities for education for all students, from disadvantaged backgrounds and not only. In today's society, equality is being discussed and desired more and more, valuing diversity. Practically starting from the fact that society is made up of various segments, coming from environments more or less disadvantaged by society, there is the need to ensure six equals. Likewise, we must not neglect aspects related to equity, especially within the instructive-educational process.

To ensure equal opportunities, it is necessary to create the right context, so that those from disadvantaged groups can also benefit, perhaps not immediately, but gradually, from the same starting conditions within the inevitable competition between individuals.

We can include in the category of underprivileged children those children who live in rural, isolated or remote areas, who can only get to school if they have school minibuses intended for the transport of students, as well as Roma children, whom the collectives in the student classes still accept hard; also, children orphaned by one or both parents are part of this category.

We can identify three large groups of vulnerable categories in the educational environment, namely: students of Roma ethnicity, students with special educational requirements, students from rural areas, where we can identify vulnerable subcategories. The equalization of opportunities for all children, with the aim of achieving the educational ideal, can only be achieved if we start from ensuring equal access to the curriculum, to numerous educational materials, but also through the appropriate use of instructional strategies properly correlated with learning activities. It is a reality that currently, the Romanian school faces such problems. The important thing is to identify them and find solutions, consciously.

• *Students of Roma ethnicity*

Romania has a relatively high percentage of young Roma, which makes access to education an even more urgent need. Even if there are no exact official data, relevant information about the Roma population and aspects related to its level of education have been collected through some studies. The number of Roma enrolling in school has continuously increased, but the access of Roma

[1] The European Parliament and the Council of the European Union declared 2007 the European Year of Equal Opportunities for All.

children to pre-school education is still very low, even though it is known and promoted that kindergarten is of major importance in school success. In the educational environment and beyond, efforts are being made to eliminate inequities, especially for Roma children or those from rural areas, coming from vulnerable backgrounds. However, there is an impediment in achieving fair access to education for students from disadvantaged backgrounds, namely the fact that a rather low percentage is allocated for education.

If we refer to the dropout rate in compulsory education, it is quite high for Roma children[2], according to the latest studies.

We can identify several reasons why the percentage of enrollment in preschool education is low and the school dropout rate is high, as far as Roma children are concerned, such as:

• There are Roma communities, in isolated areas, with difficult access to school;

• In areas with a high concentration of Roma, economic development is low;

• It is known that there are many Roma children who are used as labor force;

• Roma families have very low confidence in the education system;

• There is a fairly large number of unqualified teaching staff working in schools in Roma communities;

• Roma children encounter linguistic, but also traditional, difficulties in school;

• There are still discriminatory mentalities of the non-Roma population towards the Roma;

• The low level of enrollment of Roma children in preschool education, which has consequences for entering primary education and increasing the school dropout rate.

Belonging to the Roma ethnicity, along with poverty and rural residence, often correlates with low educational performance, poor participation in education, all of which lead to school dropout. According to a UNDP report on education, the Roma population is the most disadvantaged social category in Europe (Bruggermann, 2012). This situation is also specific for the Romanian space, the Roma being one of the most disadvantaged social categories within the educational system.

• *Students with special educational needs*

Special education[3], subordinated to the Ministry of Education, is one of the components of the Romanian education system; it offers children, according to

[2] About 12 to 20% of Roma children drop out of school.

[3] Special education is organized according to the type of deficiency – mental, hearing, sight, motor and other related deficiencies.

their needs, suitable educational programs. All employees of an educational unit must take special education into consideration and responsibility. The results come from the teamwork of teaching and non-teaching staff, from special education. Romania, as a member country of the European Union, offers access to education for children with disabilities; children have access to certain forms of education, in relation to the degree and type of deficiency; depending on these aspects, they can be enrolled in mainstream education or in special education. Children with medium disabilities can adapt to the educational process in mainstream schools, but it would be ideal to have support services, from an educational point of view.

The organization of special education is carried out according to the type of disability. The Commission for Child Protection, subordinate to the County Council, is the one that has the competence to identify the type of deficiency and its degree. Children in special education can follow the curriculum of mainstream schools, but adapted, or they can follow an adapted curriculum, specific to the special school; but if we refer to the duration, the schooling period, it may differ[4]. Children's access to rehabilitation and recovery resources is ensured, from a medical, psychological and social point of view, throughout their schooling; access is also ensured to other types of support services within the community or in collaboration with other specialized institutions. Special education is organized at all levels of pre-university education, starting with preschool, primary, secondary and lower secondary levels, but also educational centers, such as day care centers, etc.

The legal framework in the field of special education in Romania is in accordance with international legislation in relation to the education of children with special educational requirements, with which our country also agreed after signing some documents.[5] If we talk about SEN, we are primarily referring to the educational needs, which complement the general objectives of education, regarding schooling according to individual characteristics or according to the child's deficiencies, respectively learning disorders; at the same time, SEN it is necessary to ensure the appropriate means, with the aim of appropriate recovery; we cannot talk about equity, equal opportunities regarding access to education, if certain children are not given educational attention and additional assistance.

II. THE SCHOOL IN THE RURAL ENVIRONMENT IN ROMANIA

In rural communities in Romania, we can start from the premise that Romanian villages can be microsystems dedicated to participation in lifelong

[4] For example, for children with severe mental deficiencies, the duration of schooling in primary and secondary education can be 9-10 years, which means that it is 1-2 years more than the 8 years spent in mainstream education.

[5] UN Convention on the Rights of the Child; The Salamanca Declaration; The standard rules regarding special education; The World Declaration on Education for All.

learning, due to the fact that there is a high degree of cohesion between citizens. In order for this to become possible, it is necessary to coordinate the financial resources and, more than that, the human resources that Romanian villages need. Teachers must be encouraged to become vectors of change in these communities, true agents of change, and local public authorities to support these efforts, education to become a priority.

However, the most serious problems identified in the rural environment are early school leaving and functional illiteracy.

These situations are usually correlated and occur as a consequence of one another; that is why there are statistics that lead us to make this association, between school dropout and functional illiteracy, since one of the age groups that have not completed more than 8 classes are young people between 18-24 years old, and another age group is represented by those who are 15 years old, although most of them have already entered high school, so they have passed the stage at which dropout is measured; in addition, there is a higher probability that those who dropped out of education early are also functionally illiterate, than those who continue in high school education.

An increased school dropout rate is registered at the secondary education level, among children from rural areas. A number of reasons can be identified that lead to a high percentage of school dropouts, especially if we refer to children from isolated rural communities; among these could be: poverty, lack of means of transport, low motivation regarding financial gain, as a result of education, lack of qualified teaching staff in rural areas, a fact that leads to a relatively poor quality of education in rural areas.

III. EDUCATIONAL POLICIES REGARDING CHILDREN FROM VULNERABLE CATEGORIES

Ensuring equal opportunities regarding access to education, education for all children, represents an essential and defining requirement of the education process, closely related to the requirements of today's society. Educational policies, international and national, must contain solutions to ensure the future of education and implicitly of society.

In the vision of the educational policy of the Ministry of Education, any child can have the right to education; The Ministry of Education develops projects/programs regarding the education of these categories of children[6]. Therefore, the Government and all decentralized local authorities are forced to ensure all the conditions that can be imposed for the education of any child. Thus, any innovation in the field of education must also be centered on children with disabilities, respectively on children who cannot have access to education.

[6] Such are the programs "Second chance", "Access to education of disadvantaged groups", "Together, in the same school", the National Strategy of "Community Action".

EDUCATIONAL INCLUSION OF PUPILS FROM DISADVANTAGED COMMUNITIES

Models of social integration can be created, through contents, strategies and teaching methods within the education system. Certainly the social environment, more specifically the family, the group of friends, social interactions, have a very important role, but still education remains the decisive role in ensuring equal opportunities.

We can affirm the fact that most of the responsibility for complying with these principles rests with school institutions, but they do not have the necessary administrative and financial preparation, nor qualified personnel in the field of inclusive education.

From a theoretical point of view, it has been found that equal opportunities are sufficiently ensured in the educational process, in most countries of the world, but the implementation of this particularly important aspect continues to remain one of the causes of the current reforms. In the current context, the concept of "equality" has a much broader meaning than equal rights for all citizens, but it represents a real equality of changes regarding social promotion, and the most appropriate tool is education.

We can list some of the responsibilities of the Ministry of Education, in the field of respecting equal opportunities: it has the obligation to ensure the training and information of all teaching staff, from all forms of education, on the subject of equal opportunities; through the county school inspectorates, must ensure the correct application of the education plans and other curricular tools, as well as in the current activity of the educational units, of the measures to implement the principle of equal opportunities.[7]

If we talk about the inclusive school, it is known that it is based on the type of curriculum suitable in relation to the needs of the children, based on certain contents of the general curriculum, which can be adapted to the level of children with special requirements; also, the inclusive school uses methods, didactic techniques, intuitive teaching aids to adapt the curriculum within it.

At the European and national level, there is legislation on equal opportunities, namely: the Universal Declaration of Human Rights and the United Nations Convention; UNESCO Convention on the fight against discrimination in the field of education (1960); Convention on the Rights of the Child (1989); Charter of Fundamental Rights of the European Union (2000); Council Directive 2000/78/EC; The Romanian Constitution; Law 202/2002; Government Ordinance no. 137/2000 on the prevention and sanctioning of all forms of discrimination[8]; Law no. 48/2002 for the approval of Government Ordinance no. 137/2000 on the prevention and sanctioning of all forms of discrimination; Government Decision no. 1194/2001 regarding the organization and operation of the National Council for Combating Discrimination; Notification no. 29323/2004 regarding the

[7] http://www.oecd.org/edu/school/38614298.pdf

[8] https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:32011H0701(01)

promotion of inclusive school principles, as an intercultural school, open to all, where every child benefits from equal access to a quality education and the National Education Law no. 1 of Jan. 2011, art. 2 (4)[9], Law on pre-university education 198/2023.

The educational policy at the level of the Ministry of Education is centered on the reorganization and modernization of the special education area, based on achieving the goal of educational and social integration of children with special needs, and the purpose being their adaptation in society. In order to achieve this goal, a series of action directions have been identified, among which the schooling of children from the beginning in a school belonging to mainstream education, with qualified and dedicated support services[10]. The Ministry of Education, in partnership with the county school inspectorates and educational units, have also carried out many programs and projects in this direction.

IV. EDUCATIONAL RESEARCH

The study of the implementation of educational projects and institutional partnership programs, at the level of Călărași County, with the purpose of reducing and preventing school dropouts

4.1. Research objectives:

- Analysis of the effectiveness of educational projects and institutional partnership programs for the reduction and prevention of school dropout, at the level of Călărași county.
- Reducing the percentage of school dropouts in educational units, from disadvantaged areas of Călăraşi County, involved in the institutional partnership projects and programs.

4. 2. Research hypothesis:

"The students' completion of the activities within the institutional partnerships[11], based on a psycho-social-educational intervention plan, will lead to a decrease in the school dropout rate in disadvantaged communities in Călărași County."

At the level of Călărași County, a series of educational partnerships and projects were carried out, with the aim of ensuring equal opportunities regarding

[9] The state ensures Romanian citizens equal rights of access to all levels and forms of pre-university and higher education, as well as lifelong learning, without any form of discrimination.

[10] Recent changes concern the creation of support services for children in difficulty. The expectations, in terms of increasing the quality of education for these children, will include the training of teachers from mainstream education in the field of education for children with special needs and inclusive education, educational psycho-pedagogical and specialized support services, home schooling, schooling with reduced frequency and specialized services for speech therapy and psycho-pedagogical counseling.

[11] Institutional partnerships have a very important role in terms of identifying problems that can lead to school dropout, situations of ensuring equity and equal opportunities in the school environment.

acSENs to education and reducing the school dropout rate; I personally initiated and coordinated many of these.

The activities carried out in the framework of these projects and partnerships aimed to increase the motivation of students for learning, with the aim of preventing and reducing the school dropout rate. The partnerships started from the premise that a student who gets involved in his education will certainly be a motivated student and will continue or complete his studies.

There are many disadvantaged communities in Călărași County. I've been able to get involved in projects, programs and partnerships in just about every such community. At the level of the municipalities, Călărași and Oltenița, we have also coordinated and implemented such projects, we have initiated partnerships with the main connecting institutions, such as educational units with the Special School, DGASPC, Associations and NGOs, local authorities, etc.

4.3. The experimental batch

In the present research, we referred to the projects and institutional partnerships between the "Ștefan Bănulescu" Pedagogical High School in Călărași and the Special School in Călărași, with Associations, respectively NGOs, but also with educational units from the rural environment (the "Iancu Rosetti" from Roseți, the Secondary School from Dragoș-Vodă, the Secondary School from Unirea), the Day Center for school and preschool children from Dragoș-Vodă, Călărași county (can be found in the annexes), thus targeting all categories of vulnerable children.

4.4. Educational projects and programs

Educational projects and programs, institutional partnerships, volunteer activities, for vulnerable groups (from isolated areas, very poor children, abandoned and/or children in the protection system, children with disabilities and/or SEN, children with parents who have gone abroad , children of immigrants, etc.) at the level of Călăraşi county.

4.5. Research results

a) The analysis of the achievement of the objectives proposed within the partnership was carried out by means of a questionnaire, applied to a sample of 5 teaching staff (2 from the Pedagogical High School and 3 from the Special School) and 10 practicing students from the Pedagogical High School. To the question "Argue if such a Partnership is necessary", all 15 subjects said that it would be very useful, especially in the context of ensuring equal opportunities regarding access to education.

b) The PEST analysis is a tool that focuses mainly on the political, economic, social and technological aspects - sometimes also on the ecological ones. (Niculiţă Lidia, 2009)[12]

[12] Hence the name PEST(E) analysis

Aspect	Comments
Political	From a political-strategic point of view, the partnership responds to the educational policies of the EU.
Economic	The Ministry of Education is relieved of the financial support of this program, it being carried out in partnership with local communities.
Social	The partnership strengthens relations in the community, supports students from disadvantaged backgrounds from an educational and occupational point of view.
Technological	The educational units within the partnership, in collaboration with the local community, ensure the spaces and facilities necesary to carry out the activities in the program
Ecological	The same human and material resources from the school program are used, and through the activities carried out, ecological education is developed and strengthened, taking into account the period in which the partnership is carried out.

Tabel 1. PEST analysis of the implementation of the Partnership

c) The SWOT analysis highlights the strengths, weaknesses, opportunities and threats of the partnership.

Internal aspects	**External aspects**
Strong points	***Opportunities***
- it is a form of education and culture - welds school-family, student-student and teacher-student relationships - uses material and human resources economically and ecologically - the activities are optional, not required - supports the community and is supported by the community	- adaptation to EU educational policies - increasing the visibility and attractiveness of the school in the local community - attracting financial resources from national and European funds - development of individual skills and talents
Weaknesses	***Threat***
- the use of technological resources at an accelerated rate -lack of funding, economic agents being legally unmotivated to support educational programs	- program termination due to lack of funding or space - lack of motivation on the part of teaching staff; - lack of motivation from the parents

Tabel 2. The SWOT analysis

Comparative study of school dropout rate

In relation to the second objective of the research, a comparative study of the percentage of school dropouts for students enrolled in educational units from underprivileged environments, where the activities of educational projects and institutional partnerships were carried out, was carried out.

County	Initial dropout rate (sept.2021)	The subsequent dropout rate (sept.2022)
Roseți	4%	3,2%
Dragoș-Vodă	3,6%	2,9%
Unirea	3%	2,1%
Sohatu	4,8%	3,9%

Tabel 3. Initial and subsequent dropout rate

Interpretation of the results and validation of the hypothesis

It is known that the evaluation process is a complex one, from a didactic and psycho- pedagogical point of view, and it must be integrated from a functional point of view, but also structurally, in the instructive-educational process; later, the child is known and his progress is followed in relation to himself[13].

Following the research applied to the experimental group and the interpretation of the recorded data, we came to the conclusion that the educational projects and the institutional partnership programs implemented between the "Ștefan Bănulescu" Pedagogical High School in Călărași and other school institutions in Călărași county, are very useful and can lead to the reduction , namely the prevention of school dropout, but also the provision of equal access to education for all children, regardless of the environment they come from, their type of disability or their ethnicity.

CONCLUSION

There are a lot of factors that lead to school dropout, but most of them are of a social nature, such as poverty, social vulnerability, limited education, but also individual factors, such as: difficulties in mastering the subject, lack of self-esteem self and low motivation, etc. Among the causes related to the characteristics of the students, who may be in a situation of dropping out of school, are: health, lack of motivation for school activities, learning difficulties, high absenteeism.

It has been shown to be a beneficial collaboration between the school, social assistance and other public services with attributions in the field of child protection, including through specialized projects and commissions, such as the

[13] https://www.mecc.gov.md

Council for Child Protection. However, there are not enough resources to carry out more educational and social activities with children, with the aim of preventing school dropout and ensuring access to education for all children.

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SARA Law **R**esearch **C**enter
International **J**ournal of **L**egal and **S**ocial **O**rder, https://www.ccdsara.ro/ijlso
ISSN 2821 – 4161 (Online), ISSN 2810-4188 (Print), ISSN-L 2810-4188
N°. 1 (2024), pp. 339-344

THE CROP AND IT ROLE IN TAKING DECISIONS

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Received 10.11.2024; accepted 19.12.2024

DOI: https://doi.org/10.55516/ijlso.v4i1.225

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Abstract

„The crop that comes from the Latin word 'colere' that is translated 'to grow/'to honor' generally only human activity. The definition given by UNESCO considers culture as <<a number of distinc characterstics of a society or terms like social grup in spiritual, materials, intellectuals or emotional.>>.

Culture is an inheritance which is transmitted by means of specific communication codes such as gestures, words, writingand arts, media (press, radio, television), interactive media (phone). In the same way, the gestures, rituals, theoretical knowledge, abstract norms, religon are transmitted. Culture can be acquired through varous forms of subjective memory (reflexes, words, images), but olso through objectue memory (objets, landscapes, books, numbers, rules).

*The popular use of the word 'culture' in many Western societies may reflect the stratifying chracter of these societies. Many use this word to designate the conumer goods of the elites and activites such as kitchen, art or music. Others use the high culture label to distinguish it from low culture by designating all consumer goods not belonging to the elite." (*Wikipedia).

Key words: *Culture, decision, human, policeman, specific.*

INTRODUCTION

„It has often been shown that beautiful people are thought superior to wished-intelligent, more confident, bold, happier and more joyous, higher with umor and flexibility, more friendly, more interesting and gifted than ugly people, on the other hand, they have a relativity good opinion about themselves. Beautiful people have more and more freqvent social contacts, they are often called for their opinion, are better appreciated and, in general, people look better willing to help.

But there is a significant exception, due perhaps to jealousy, as unattractive women do not believe that beautiful women has a personage superior social status to bears. These women consider attractive women as fierce, selfish, inappropiate to be mothers, willing to stay in the social race, snobbish and indifferent toward those whom society has deprived. They suspect them of extramarriage, then of having the initiative more often in divorce process." *(Hans Eysenck, Michael Eysenck – Descifrarea comportamentului uman, Editura Teora, Bucureşti, 2001, p. 24).*

I began this artical with an extract from the work of the two titans of the study of human personality to show that mankind has developed in time a number of cultural cliches that they consider and apply on priority to not only true, but also based on logical reasoning. Ideas are pre-conceived becouse of its own inability to achieve a specific purpose, or becouse of personal frustration, that we shoul not bring into discussion our own incompetence.

There are people who are considered omniscient, even though when they come up with their pesonal and professional capabilites, try to change the subject of the discussion. That happens, in particular, to mask or divert the attention of the senser from their serios gaps when they should aproach a subject of expertise. Many people choose to manifest their opinion on a topic with emotional implications that they consider to be in control of, on the one hand, and on the other hand, they believe that they can also coopt for the peope round them.

From the point of view of the policeman who ist on enforce the law, these cultural or social debasement creases, we must not influenceits way of evaluation and analystics of the facts. We support them because we have met in the course of operative activity situations in which persons who were considerated very beautiful by most of the society members had a very rich criminal activity.

They relied on the natural approach and communication skills of interhuman nature to cheat on those they were able to establish a communication bridge.

At the same time, very offensive individuals, have had an irreproachable behavior and are legally or profetionally at the point of view.

In this wide universal cultural context, the policeman should also take into account the speciffic national or zonal when analyzing and interpretation their behaviors for making decisions. We support this because decisions must be consistent with the concrete message that the person concerned wanted to transmit when he saud something or made a particular gesture.

I. CULTURE AND DECISION CORRELATION

The culture, in a conceptual sense ,,consists of all material and spiritual products of human work's, resulting from the practice of transforming man's

transformation reflected in social behaviour, and we maintain the rules that supply it. E. B. Taylor definites it as well <<assembly which includes knowledge, arts, moral, legal rules, components and various of skills or customary acuiredby man as a member of the company>>" *(Coordonator Ursula Șchiopu – Dicționar de psihologie, Editura babel, București, 1997, p.. 199).*

This is the large spectrum of culture seen in the complexity of human society or mentally. However, we must be aware that there is a cultural specific for each nation, so the policemen must adapt after that specific.

National specificity is „<<complex of spiritual determinates>>, <<culture quality>> syntetic, <<stylistic heritage>>, filed of psychometric polarity, <<stylistic matrix>> capable of making a certain <<etichal prioritization>>, intermittent distribution from one society to another of cultural features, basic personality (moderate, national, social), cultural model (national), ensemble of symbols, models and distinct cultural institutions fromone society from nother etc, all these are concepts that can be used competitive and complementary to define national specificity." *(Coordonatori Cătălin Zamfir, Lazăr Vlăsceanu – Dicționar de sociologie, Editura Babel, București, 1998, p. 588-589).*

All these will be together with the information collected or recorded on the spot in order to convince the policeman who are the best suited for decisions they have to take at a certain time.

II. PROFESSIONAL CULTURE AND ITS IMPLICATIONS FOR DECISION

The professional training provides a central place in the cultural development of both the individual and the overall society. In this way, the more educated people have a society, the more people will be orietend on intellectual preponderence. At the opposide side, a precarious education gives strictly fundamental preoccupations of members of the comunity because they don't know, in fact, they don't have the intellectual capacity to devote themselves to tasks.

The policeman, in this subunits, will be able to take action where and when they consider it appropiate.

Thus, when the policeman is pursuing his activity in a area in which undereducated persons are mostly uneducated or with precatious education, he must know that the passage to an act is prelevalent and takes the place of resonable discuss or agruments. Therefore, these people have every chance of violent action before they argu, because in the absence of intellectual abilitiesthey prefer force speak for them.

In the areas where urbanisation ths occured, such events are much more freqvent, because the areas are inhabited by people who have moved from thhe village to city. Urbanisation is a process of increasing the urban areas and increasing their specific characteristics. Urbanisation is a component of the

restructuring of the relations between the rural and urban areas on the one hand and between city centre and outskitrs, on the other hand. From a point of view, the first time halting preaches the increas in the population in the areas surrounding the region of the domination town." *(Coordonatori Cătălin Zamfir, Lazăr Vlăsceanu – Dicționar de sociologie, Editura Babel, București, 1998, p. 618).*

In areas where people are established with strong intellectual training, swiching to action, partticularry with regard to violence, is very rare, because they prefer to judge before they move to act. In other words, these people will prefer to speak and solve the problems by way of the verb. An example sowing this is academic camaraderie, where crime is very low and the violent one is practically inexistent.

In such an area, policeman should use a higher vocabulary and tone is one that does not cause perplexity and lack of reaction. That is the exact opposite of what the policeman thinks he must have a repertorie in the bad-tempered areas. That's because „there's a general culture and speciality culture which can be theoretical and practical." *(Coordonator Ursula Șchiopu – Dicționar de psihologie, Editura babel, București, 1997, p. 199).*

III. GEOGRAPHICAL CULTURE, FACTOR IN DECISION MAKING

Another interesting aspect of the cultural factor is the geographical area that certain persons occupy. The geographical area always leaves its mark on te people who ocuppy it. Thus, the more people live in geographical areas with more limited resources, the more creative and less waste the resources. This attitude is directly related to the omission of crimes.

We support this because in this zones with limited resources people have to survive together. The only thing he didn't get involved in is gambling. Consequently, the committing of crimes is not an option, because it is followed not only by public abscess, but also by disobeying community law, which means the physical disappearance.

Here we take the exemple of the Arctic zones communities, where people live and ensure their existence only by supporting each other. In these areas police strutures are practically non-existent..

The commitment of crimes is the apparence of areas with abundent reources, as the offender wants more than they can produce, and geographic area does not make it compulsory to stay in a given territory to ensure its survival. On the other hand, leaving the community where the work commited turns into a conception of the Communities resources accumulated from the infraction.

In these areas, practically, in the towns of the modern world, policeman must pay attention to the law breakers, they are coming into contact with, because their reactions are unpredictable and the first priority that must prevail

in any case is the security of the policeman and the innocent people who fiind themselves on the spot when he has to apply legal measures to an offender.

CONCLUSION

(HUMAN ACTIVITIES REFLECTED IN THE DECISION-MAKING CULTURE)

It was a culture of plenary importance in spoken language. This is why the great culture man of Romains and Romania, Nicolae Iorga, said „How many languages you know, you are ever a human!'"

In other words, the way we speak is an integral part of our culture.

On the other hand, the way we build our words, rearranging these in sentences and then the splitting is another mirror of the culture into which a human being lives.

Take, for exemple, the German language. In the grammar German language, it is very rigurous, both in its written and spoken form. For exemple, certain common nouns are always written with the big letter, regardless of their position in the structure on sentence or phrase. This leads to their bending, to the property, to the accumulation of goods, and also to the respect for the property or good of their own or others.

In English, however, there's only one word written with the big letter reardless of the place occuired in the text structure, namely the EU personal pronouns I. This results in putting their own person into centre of English culture, which is more important than anything else. In other words, everything is subqualifying or subordinte to this I which imposses on everybody, regaedless of the facts (objects) or even the relationship with other people.

In Romainan language we only have the own nouns that is written in capital letters. This shows that the good Roumanin people is very decent and very obedient to the rules .

All of these psihological characteristics of the people can be deduced from the way that people have built their language.

Now we must say that „the impressive definitions are related to the characteristis of people's impressionism in ideogenesis and accesion to cultural acts, and the dynamic, functional-dynamic definitions pay attention to the individual relationships with the memory of the condensed world in the cultural products of society's history." (Coordonator Ursula Șchiopu – Dicționar de psihologie, Editura Babel, București, 1997, pag. 199).

The aspects of social life and consider important express culture. Thus, for example, in English culture, but especially in Japanese, the label is more important than the content of the said. In fact, the mesage sent to the other people is displayed on the labe land censored.

Interhuman relationship is an integrated part of the society culture, here we consider all forms of interhuman relationship, starting from the interfamily relattionship and reaching the neighborhood.

While staying in the human relationship area, we must show that marriage is an inclusive of the culture of a people. In his activity, the policeman should also consider these legal rules, but also the pretext that the marriage that should take decisios in the operational activity.

Even if it may seem inappropiate, we must show that the way of feeding is also a part of the culture. Thus, there are the crops in which one eats directly by hand, regardless of the social status (Indian culture), are cultures in which beignase are used to eat (Asian cultures) and there are the cultures that have developed specific instruments to ensure food (European culture).

All these have a direct influence on the action, but especially on the decision-making of every policeman taking action.

Policy communication has to take account of all these features when it is to decide in an operative situation. That's because people get to consider certain gestures/actions or words, although those gestures or words can be totally unfiltted in different social or cultural enviroments.

We will end this article with Mihai Ralea's famous aphorism, who said that „culture is what is left after you forget what you learned!".

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SARA **L**aw **R**esearch **C**enter
International **J**ournal of **L**egal and **S**ocial **O**rder, https://www.ccdsara.ro/ijlso
ISSN 2821 – 4161 (Online), ISSN 2810-4188 (Print), ISSN-L 2810-4188
N°. 1 (2024), pp. 345-355

THE IMPACT OF SOCIAL CAPITAL ON THE PERCEPTION AND REALITY OF PUBLIC SECURITY

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Received 10.11.2024; accepted 19.12.2024
DOI: https://doi.org/10.55516/ijlso.v4i1.228

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Abstract

Social capital plays a crucial role in strengthening public security by influencing both the perception and reality of safety within a community. This complex concept, defined by mutual trust, social networks, and norms of reciprocity, facilitates cooperation between citizens and authorities, contributing to crime reduction and enhanced community resilience. In a community with high social capital, the perception of safety is improved through trust in neighbors and law enforcement institutions, encouraging citizens to engage actively in community life and collaborate in risk prevention. Local social networks, whether offline or online, play an important role in sharing relevant information, discouraging antisocial behavior, and mobilizing resources in emergencies. However, the perception of safety, often influenced by media and social networks, can amplify fear of insecurity even in the absence of real risks, leading to social isolation and fragmentation. In such situations, transparent communication from authorities and community policing initiatives are essential for restoring trust and a sense of security. Thus, social capital supports both a positive perception of safety and actual security by fostering united, responsible communities capable of managing security risks effectively.

Key words: *Social capital, public security, perception, social networks, community resilience, trust.*

INTRODUCTION

Public security is one of the essential priorities of any modern society, with a direct impact on citizens' quality of life, economic development, and social stability. Given today's societal complexities, public security extends beyond the intervention of authorities alone; it is the result of extensive collaboration between citizens and institutions. In this context, the concept of social capital has become increasingly relevant in understanding and enhancing public safety. Social capital, defined as the network of social ties, mutual trust, and reciprocity norms among community members, is a fundamental element in fostering a positive perception of safety and supporting proactive behaviors in the face of security risks.

The link between social capital and public security manifests through several channels. First, the level of trust among citizens directly influences how they perceive risk and safety within their community. A united community where people trust one another and are willing to cooperate will feel safer and be more inclined to support authorities in crime prevention and control activities. Conversely, in a community where trust is low and social relations are fragile, citizens perceive higher risk and are less willing to actively engage in maintaining public safety.

Another important aspect is the norms of reciprocity and cooperation that emerge within a community with high social capital. These norms generate a sense of collective responsibility, discouraging antisocial behavior and encouraging active citizen involvement in community surveillance and support. Social networks and relationships also play a crucial role by facilitating communication and rapid information exchange about potential security incidents, thus preventing the escalation of risky situations.

In the absence of adequate social capital, communities become more vulnerable, and interventions by authorities become more challenging and costly. A community with low social capital is more prone to uncertainty and fear, even in the absence of concrete dangers, as social relationships and mutual support are diminished, leaving citizens isolated and reluctant to participate in security initiatives.

This paper aims to explore how social capital influences both citizens' perception of public security and its reality, emphasizing the importance of social relationships and collaboration among citizens in building a safer and more resilient community against modern threats.

I. DEFINING SOCIAL CAPITAL AND ITS COMPONENTS" IN THE CONTEXT OF ITS IMPACT ON THE PERCEPTION AND REALITY OF PUBLIC SECURITY

Social capital is an essential concept for understanding social dynamics and how interpersonal relationships contribute to community cohesion and the creation of a sense of public safety. Social capital can be defined as the set of resources available within a community—such as trust among citizens,

relationship networks, and norms of reciprocity—that facilitate collective action. "Social capital is not merely the sum of individual connections but refers to the social bonds, norms, and trust that enable coordinated and mutually beneficial cooperation" *(Putnam, 2000)*. In the context of public security, social capital plays a crucial role by enhancing collaboration between citizens and institutions, reducing crime rates, and increasing the sense of safety.

Social capital can be divided into several components, each playing a specific role in influencing the perception and reality of public security:

Trust between Citizens and in Public Institutions: Trust is the central element in forming a solid social capital. In communities where people trust each other and public authorities (police, firefighters, emergency services), there is a heightened perception of safety. "Trust is the foundation of a united community and an essential factor in public security" *(Coleman, 1988).* Trust in public institutions encourages citizens to cooperate with them, while mutual trust among citizens reduces tensions and interpersonal violence.

Networks of Relationships and Social Bonds: Social networks (family, friends, neighbors) form the foundation of social capital, enabling rapid information sharing about security incidents and helping the community stay informed and prepared. "Strong social bonds increase communities' capacity to address security issues" *(Putnam, 2000).* Social networks also provide emotional support, enhancing community resilience in the face of threats.

Norms of Reciprocity and Cooperation: Norms of reciprocity—the tendency to help and receive help from others—are fundamental to maintaining public security. "Reciprocity generates an atmosphere of trust and support that discourages antisocial behavior and encourages cooperation" (Bourdieu, 1986). In communities where reciprocity norms are well-developed, citizens are more willing to help each other in the face of dangers and collaborate with authorities in crisis situations.

Measuring social capital can be done through indicators such as the level of trust among citizens, frequency of social interactions, involvement in volunteer activities, and participation in community events. "Social capital is measured through trust relationships and the degree of interaction among community members" *(Ellison, Steinfield & Lampe, 2007).*

A high social capital indicator may be a low crime rate in communities where citizens know each other and cooperate. Studies show that "where people have strong social bonds, crime rates are lower, and the quality of life is perceived as higher" *(Putnam, 2000).*

In communities with high social capital, the perception of safety is stronger because citizens feel they are not alone and can rely on each other in risky situations. "The perception of safety is reinforced by mutual trust and shared support within a cohesive community" *(Kapucu, 2006).* This perception

encourages citizens to stay vigilant and cooperate with authorities, contributing to improved actual safety.

In communities where social capital is weak, trust bonds are more fragile, and citizens tend to be less willing to collaborate with the police or other public safety institutions. "Low social capital increases a community's vulnerability to security risks and reduces its ability to handle threats" *(Sampson, Raudenbush & Earls, 1997).* Isolated communities, where residents are unfamiliar with each other and do not interact, are more vulnerable to criminal activities, as offenders perceive a low probability of intervention or reporting of suspicious activities.

II. THE RELATIONSHIP BETWEEN SOCIAL TRUST AND THE PERCEPTION OF SECURITY

Social trust is a central element of social capital and plays an essential role in shaping the perception of safety within a community. People tend to feel safer when they trust those around them, whether neighbors, colleagues, or public authorities. "Social trust enhances the sense of safety and strengthens cooperation among citizens to maintain a secure environment" *(Putnam, 2000).* This trust facilitates cooperation and paves the way for a more united community where citizens collaborate to prevent and address security risks. This phenomenon significantly impacts the perception of public security and even actual safety, as citizens who trust each other and public order institutions are more likely to become actively involved in protecting their community.

In a community with a high level of trust among citizens, people are less concerned about potential external threats and feel secure. For instance, in a community where people know their neighbors and feel that they would help in case of danger, the perception of safety is enhanced. "Trust in neighbors and mutual support increase the perception of safety and reduce anxiety about potential threats" *(Coleman, 1988).* Conversely, in areas where social relationships are weak and citizens do not know or trust their neighbors, the sense of insecurity rises even in the absence of evident threats.

In a community where citizens trust each other, they are more likely to cooperate to discourage antisocial behaviors such as vandalism, theft, or disruptive conduct. "A united community, where mutual trust is strong, can reduce crime risk, as people are more likely to intervene and support each other" *(Sampson, Raudenbush & Earls, 1997).*

Trust in public authorities, particularly the police and other security institutions, contributes to a more positive perception of public security. "When citizens trust the police, they are more willing to cooperate, report incidents, and engage in public order maintenance efforts" *(Kapucu, 2006).* Conversely, when trust in authorities is low, citizens may be reluctant to seek their assistance, which can increase the risk of criminal activities.

In communities where authorities are perceived as efficient and trustworthy, citizens feel that their security is well-protected, thus enhancing the general sense of safety. "An effective and transparent institution strengthens citizens' perception of safety and reduces anxiety about security risks" *(Putnam, 2000)*. Community policing initiatives and neighborhood patrols are examples of practices that improve the perception of safety and support trust between citizens and authorities.

Typically, in rural communities where people know each other and interact more frequently, the level of social trust is higher, and the perception of safety is more positive. "In rural communities, where social bonds are strong, the sense of safety is greater, and crime rates are lower" (Coleman, 1988). In large cities, where interpersonal relationships are weaker and people have fewer social ties, the perception of safety is reduced.

In neighborhoods with high social capital, people tend to feel safer and are more willing to collaborate with each other and with authorities. By contrast, marginalized neighborhoods with weakly developed social capital are more vulnerable to crime, and the perception of safety is lower. "Differences in levels of social capital affect not only the crime rate but also how citizens perceive safety within their community" *(Sampson et al., 1997)*.

III. THE INFLUENCE OF LOCAL SOCIAL NETWORKS ON PUBLIC SECURITY

Local social networks, both offline and online, play a significant role in enhancing public security by facilitating communication and collaboration among citizens. Within a community, local social networks—which include family ties, friendships, neighborhood relationships, and online communities—enable the rapid exchange of information, fostering a sense of solidarity and social cohesion. These networks are fundamental in building strong social capital, which contributes to a positive perception of safety and reduces actual security risks. "In a community with well-established social networks, citizens are better informed, more united, and more capable of acting together to prevent and address security incidents" *(Putnam, 2000)*.

Neighborhood networks facilitate the informal monitoring of public spaces and residential areas. People who have social ties with their neighbors and interact frequently are more attentive to what is happening around them, making them more likely to notice suspicious activities. "People with strong social ties are more likely to step in to help their neighbors and cooperate to reduce risks" *(Sampson, Raudenbush & Earls, 1997)*. In a vigilant community, offenders are discouraged from acting, knowing they are being monitored by neighbors who communicate with each other and are willing to report suspicious activities to authorities.

Neighborhood networks support the rapid exchange of relevant security information, such as alerts about potential incidents, safety tips, and risk

prevention recommendations. "This communication among neighbors enhances perceived safety and creates an atmosphere of solidarity within the community" *(Coleman, 1988).*

In communities with high social capital, local social networks often include organizations and citizen groups actively involved in monitoring safety and reporting incidents. These "watchdog" initiatives involve volunteer citizens who patrol certain areas or ensure that neighbors adhere to security guidelines. "These groups can work effectively with the police and other authorities to create a more robust public security system" *(Bourdieu, 1986).*

Local civic groups often organize activities and social events that help strengthen bonds among members and reinforce social capital. Such events, like local fairs, neighborhood festivals, or regular meetings, contribute to "building trust and increasing mutual acquaintance among citizens, which has a positive impact on public security" *(Putnam, 2000).*

With the rise of online social networks, many communities have created dedicated groups on platforms such as Facebook, WhatsApp, or Nextdoor. "These groups facilitate rapid communication among members, allowing them to stay informed in real-time about security incidents, share advice, and collaborate to protect the community" *(Ellison, Steinfield & Lampe, 2007).*

Online social networks enable rapid mobilization in emergency situations, such as natural disasters, major accidents, or serious security incidents. "Through messaging platforms, citizens can communicate in real-time and coordinate relief efforts" *(Kapucu, 2006).* Such examples demonstrate how online social networks contribute to enhancing security and increasing community resilience.

Social networks, whether online or offline, help "keep citizens consistently informed, contributing to a heightened sense of safety" *(Putnam, 2000).* Citizens who are well-informed about incidents in their community and who know that neighbors are vigilant and willing to collaborate have a more positive perception of safety.

IV. COMMUNITY AND THE REALITY OF SAFETY: HOW SOCIAL COHESION CONTRIBUTES TO CRIME REDUCTION

Social cohesion is a central aspect of social capital, defined by strong bonds among members, a sense of belonging, and norms of collaboration and mutual support. Cohesive communities are characterized by high solidarity, creating a "social shield" against antisocial behavior and crime. "High social capital contributes to mobilizing citizens to maintain a safe environment and to prevent antisocial behavior" *(Putnam, 2000).* By strengthening social cohesion, citizens become more aware of their shared responsibility for community safety and are more willing to collaborate in maintaining a secure environment.

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"Communities with strong social cohesion have a lower incidence of crime" *(Sampson, Raudenbush & Earls, 1997)*. In a cohesive community, citizens tend to monitor public spaces and engage actively in neighborhood surveillance, which discourages criminal activities. Conversely, in fragmented communities where social ties are weak and citizens are not well-acquainted, crime rates tend to be higher, as offenders perceive a lack of supervision and unity.

Sampson et al. (1997) introduced the term "collective efficacy" to describe a community's ability to maintain order and safety through social cooperation. Collective efficacy manifests through "informal social surveillance and the willingness of citizens to intervene in support of neighbors and the community" *(Sampson et al., 1997)*. In this way, social cohesion contributes to crime reduction, as citizens feel they can rely on each other in times of crisis.

In communities with high social capital, well-established norms of reciprocity mean that "people are willing to help each other and fulfill their obligations to other community members" *(Coleman, 1988)*. These social norms discourage antisocial behavior and support a climate of respect and mutual responsibility, essential factors for reducing crime.

In cohesive communities, shared values-such as mutual respect, tolerance, and support-lay the foundation for a stable and safe social environment. "When citizens share common values and feel part of a community, they are more inclined to work together to maintain safety" *(Putnam, 2000)*. Thus, offenders are discouraged from committing crimes in a community with strong social cohesion, knowing that citizens are attentive and engaged.

Civic involvement, including participation in volunteer activities and community initiatives, contributes to increased social cohesion and crime reduction. "Citizens who engage in volunteer activities feel a greater responsibility for their community and are more likely to intervene in incidents" *(Bourdieu, 1986)*. These activities build bonds among citizens and reinforce solidarity, contributing to more robust public safety.

Safety programs, such as neighborhood patrols or "Neighbourhood Watch" projects, are concrete examples of how civic engagement can reduce crime. "These programs demonstrate that civic engagement is a crucial factor in crime prevention" *(Ellison, Steinfield & Lampe, 2007)*.

Studies show that rural communities with strong social ties generally have lower crime rates compared to less cohesive urban areas. "In rural areas, social relationships are stronger, and citizens tend to be more aware of what is happening around them, contributing to a safer environment" *(Coleman, 1988)*. In middle-class neighborhoods with strong civic initiatives and active citizen participation, social cohesion is a key factor in crime prevention and public order maintenance.

V. THE ROLE OF SOCIAL CAPITAL IN CRISIS AND EMERGENCY MANAGEMENT

Social capital plays a vital role in managing crises and emergencies, providing a support network and resources for communities facing major threats, such as natural disasters, security incidents, or public health emergencies. Communities with high social capital are more resilient in crises due to strong support networks and norms of reciprocity, enabling them to mobilize resources quickly and support affected members. "Social capital contributes to mobilizing citizens in times of crisis, facilitating the coordination and cooperation needed to address unexpected events" *(Kapucu, 2006).*

During a crisis, neighborhood networks and informal relationships are essential for a community's quick and effective response. People connected through strong social relationships are more likely to offer and receive help in an emergency. "People with strong social ties are more inclined to intervene to help their neighbors and cooperate to reduce risks" *(Putnam, 2000).* These trusted social bonds thus facilitate a prompt and coordinated response to crisis events.

Today, online social networks have become a crucial communication channel during crises, allowing citizens to quickly share relevant information and seek help. Studies show that "online networks enhance social capital by informing citizens and mobilizing resources in real time" *(Ellison, Steinfield & Lampe, 2007).* This type of communication helps spread information quickly about safe locations, available resources, and potential dangers, aiding community coordination during a crisis.

In communities with high social capital, norms of reciprocity-where people are willing to offer help, trusting they will also receive support when needed-are well-established. These norms are fundamental in crisis management, providing a "framework for mutual support and community aid" *(Coleman, 1988).* During an emergency, this solidarity reduces anxiety and supports community cohesion, thereby enhancing resilience and recovery capacity.

Resource Mobilization through Mutual Support: Faced with disaster, communities with high social capital can mobilize resources more quickly and effectively than those with weaker social ties. "When community members are accustomed to collaborating and sharing resources, they can better handle crisis situations" *(Sampson, Raudenbush & Earls, 1997).* For example, during natural disasters, people may coordinate rescue or relief efforts, distributing available resources and ensuring that all vulnerable members receive necessary assistance.

Collective efficacy, defined as a community's ability to organize to maintain order and respond to crises, is closely tied to social capital. "A community with high collective efficacy is better equipped to manage crises and collaborate to minimize damage" *(Sampson et al., 1997).* Collective efficacy strengthens a community's capacity to respond in emergencies, as citizens are accustomed to working together for the common good.

In communities with high social capital, collaboration between citizens and authorities is more efficient. Citizens are more willing to follow imposed

measures and actively engage in crisis management, "motivated by trust in public institutions and responsibility toward fellow community members" *(Kapucu, 2006)*. For example, in cases of fire, earthquake, or other disasters, collaboration between citizens and emergency services increases response efficiency and mitigates negative impacts on the community.

A well-known example is the response of Japanese communities during the 2011 earthquake and tsunami. "Due to social cohesion and high social capital, many communities were able to mobilize quickly, coordinate rescue efforts, and reduce the disaster's impact on their members" *(Aldrich, 2012)*. During the COVID-19 pandemic, social capital played a crucial role in supporting community members affected. "Communities with strong social ties rapidly organized relief initiatives for vulnerable individuals, facilitating access to food, medicine, and emotional support" *(Putnam, 2020)*. This example underscores the importance of social capital in resource mobilization and community support during health crises.

Social capital is an essential factor in crisis management and ensuring community resilience in emergencies. Through local social networks, norms of reciprocity, and collective efficacy, communities with high social capital are better equipped to face crises and recover from critical events. Examples worldwide show that, in resilient communities, citizens are more willing to collaborate, support one another, and work with authorities, reducing the negative impact of crises. In this sense, investing in social capital is an effective strategy for strengthening response capacity and protecting community safety against modern risks.

VI. PERCEPTION VS. REALITY OF SAFETY: HOW CITIZENS' PERCEPTION OF SECURITY INFLUENCES COMMUNITY BEHAVIOR

The perception of safety plays a crucial role in shaping citizens' behavior and influencing the social atmosphere within a community. Although the objective reality of safety can be measured through crime rates and reported incidents, how people perceive safety directly affects how they interact, engage, and organize their daily lives. "The perception of safety often differs from objective reality and can be influenced by various factors, including media, social networks, and individual experiences" *(Putnam, 2000)*.

In many cases, citizens may perceive a higher level of risk than actually exists due to fear of crime, leading to avoidance behaviors. "Even in communities with low crime rates, the perception of insecurity can lead people to avoid public places, reduce social interactions, and isolate themselves" *(Sampson, Raudenbush & Earls, 1997)*. This phenomenon reduces social cohesion, leading to a decrease in social capital and increased vulnerability to real risks.

Media and social networks play a key role in shaping perceptions of safety. "Excessive reporting of crime events and alarmist news can amplify fear of

insecurity, even when crime rates are decreasing" *(Ellison, Steinfield & Lampe, 2007).* This "indirect media influence can create an exaggerated perception of risks, causing citizens to adjust their behavior and avoid certain places or activities."

A positive perception of safety contributes to increased social capital by encouraging interactions and civic participation. "When people perceive their environment as safe, they are more likely to engage in community activities, connect with neighbors, and attend local events" *(Putnam, 2000).* This involvement enhances social cohesion and builds a sense of trust and responsibility toward the community.

Conversely, a negative perception of safety can lead to social fragmentation and isolation. "Citizens who perceive a high risk of insecurity are less likely to participate in social activities and build neighborhood relationships" *(Coleman, 1988).* This leads to a decline in social capital and a more vulnerable community, as trust bonds are weak and cooperation is reduced.

Public institutions, such as the police and local administrations, play an important role in how citizens perceive their community's safety. "Open and transparent communication from authorities helps reduce anxiety and clarify the true security situation" *(Kapucu, 2006).* For example, providing accurate information about crime rates and safety measures can reduce unfounded fears and increase citizens' trust in security institutions.

Community policing practices, including frequent patrols and interaction with citizens, have shown that they "reduce fear of crime and improve perceptions of safety" *(Sampson et al., 1997).* When citizens see police active and connected to the community, the perception of safety improves, and antisocial behaviors are discouraged.

Studies show that in cities with high social capital, such as many Scandinavian communities, citizens feel a strong sense of safety and actively participate in community life. "High social capital helps create an environment where safety is both perceived and real" *(Aldrich, 2012).* In contrast, in many urban areas with low social capital, citizens have a heightened perception of insecurity, even when crime rates are not necessarily higher. "The fear of insecurity in these communities is fueled by social isolation and lack of cooperation among citizens" *(Putnam, 2000).* These communities tend to experience higher rates of social fragmentation and reduced participation in community activities, making them more vulnerable to real risks.

CONCLUSION

In conclusion, social capital is a fundamental element in improving public security by influencing citizens' perception of safety and strengthening prevention and emergency management measures. Communities with high social capital—characterized by trust bonds, norms of reciprocity, and a strong social

network—demonstrate an increased ability to cooperate effectively, reduce crime, and successfully face crises.

The difference between the perception and reality of public safety highlights the important role of trust and social cohesion. In a community where citizens perceive safety as high, they are more likely to participate in community activities, interact with others, and collaborate with authorities. Conversely, an exaggerated perception of insecurity, amplified by the media or by ineffective communication from authorities, can generate fear, isolation, and a decrease in social cohesion, even in the absence of significant objective risks.

In times of crisis, communities with well-developed social capital demonstrate resilience through rapid mobilization and mutual support. Local social networks, whether online or offline, facilitate information sharing and support the coordination of relief efforts, helping to reduce the impact of crises on community members. This collective mobilization is essential for effectively managing emergencies and reducing community vulnerability.

Thus, investing in social capital by strengthening community ties, supporting civic initiatives, and building trust between citizens and authorities is a crucial strategy for improving public security. By developing united, informed, and cohesive communities, public safety can become not only an objective reality but also a shared sense of security felt by all citizens.

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