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„SIGURANȚA PUBLICĂ ȘI NEVOIA DE CAPITAL SOCIAL RIDICAT”

*

"SAFETY OF THE PERSON AND THE NEED FOR HIGH SOCIAL CAPITAL"

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LEGAL CONCERNS OF THE EUROPEAN UNION ON COMBATING TRAFFICKING IN HUMAN BEINGS

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Abstract

Trafficking in human beings is a form of crime that has spread in the contemporary era. Victims of trafficking in human beings are vulnerable people, especially women, children or jobseekers, lured by promises of advantageous jobs abroad, treatment opportunities or study offers. The European Union promotes international cooperation and makes legislative and institutional efforts to combat trafficking in human beings.

The EU Strategy to Combat Trafficking in Persons (2021-2025) focuses on preventing crime, bringing traffickers to justice, protecting victims and strengthening Member States' capacity to act.

Keywords: *human trafficking; organized crime; as a derivative; EU strategy; national strategy*

INTRODUCTION. THE EVOLUTION OF THE PRIMARY LAW OF THE EUROPEAN UNION ON THE CREATION OF AN AREA OF FREEDOM, SECURITY AND JUSTICE

The need for cooperation in the field of justice and home affairs has resulted from the evolution of cross-border phenomena on organized crime, international terrorism, drug trafficking and human trafficking.

The increase in crime at European level has initially led to informal co-operation between security services and police forces in European countries[1].

* "Cooperation in the field of justice and home affairs" was initially regulated as a basic policy within the European Union by the provisions of the Maastricht Treaty (Title VI, art. K1 and K9), as well as those contained in art. 100C and 100D of the EC Treaty and declarations on asylum and police cooperation, cooperation in the field of justice and home affairs. The Maastricht Treaty reorganizes the Community architecture into "three pillars", the "Third Pillar of the European Union" being

[1] In 1972, the Pompidou Group on Drugs was set up.

represented by "Cooperation in the field of justice and home affairs". This form of cooperation was initially conceived as a way of intergovernmental cooperation, later, its content being progressively communitized by the treaties of Amsterdam and Lisbon.

* By the Treaty of Amsterdam, cooperation in the field of justice and home affairs was reorganized, some of the areas of this cooperation passing under Pillar I, being communitized, under the Union institutions, establishing as a common goal, the achievement of a space of freedom traffic, security and justice. The Amsterdam Treaty deepens the objectives and procedures for cooperation in the field of justice and home affairs, and introduces new provisions on "closer cooperation" between Member States in this field. In accordance with the Treaty of Amsterdam, the following areas of State cooperation are provided:

- free movement of persons;
- control exercised at the external borders of the states;
- asylum, immigration and protection of the rights of third - country nationals;
- judicial cooperation in the civil field.

* The Treaty of Lisbon defines the Union as an area of freedom, security and justice, with the fundamental values of respect for human rights and the various legal systems and traditions of the Member States.

The Union shall provide its citizens with an area of freedom, security and justice, without internal frontiers, within which the free movement of persons is ensured, in conjunction with appropriate measures on external border control, asylum, immigration, crime prevention and control. this phenomenon[2].

The Treaty renounces the architecture structured on the three pillars, including issues related to the "Area of Freedom, Security and Justice" in the Union's internal policies and actions. In this area the treaty contains regulations on:

- "Policies on border control, asylum and immigration"[3];
- "Judicial cooperation in civil matters"[4];
- "Judicial cooperation in criminal matters"[5];
- "Police cooperation"[6].

As regards the competence of the Union to adopt regulations in this field, the Treaty establishes a shared competence between the Union and the Member States[7].

[2] Article 3 paragraph 2 TEU.
[3]art.77 -79TFEU
[4] art.81-TFEU
[5] art.82-86TFUE
[6] art.87-89TFEU
[7] Art.4 para.2 lit j) - TFEU. According to Article 2 (2) TFEU, where the Treaties confer on the Union a shared competence with the Member States in a given field, the Union and the Member States may legislate and adopt legally binding acts in that field. Member States shall exercise their competence to the extent that the Union has not exercised its competence. Member States shall exercise their competence again to the extent that the Union has decided to cease exercising it.

The provisions of the Treaty are complemented by derivative regulations adopted by the institutions of the European Union.

Currently, the acquis communautaire on the area of freedom, security and justice includes regulations on various areas of cooperation, namely[8]: Free movement of persons, asylum and immigration; Judicial cooperation in civil matters, Judicial cooperation in criminal matters; Police and customs cooperation; Citizenship of the Union; Discrimination; Fight against terrorism; Fight against organized crime; Trafficking in human beings; Fight against drugs; Justice, freedom and security.

I. EUROPEAN UNION STRATEGY ON COMBATING TRAFFICKING IN HUMAN BEINGS

Trafficking in human beings is a form of crime that has spread in the contemporary era. Annually, in the world about 600,000 - 820,000 people are trafficked across the state border, not including those who are trafficked within the states, a number that can reach millions. About 70% of the trafficked persons are women and girls, most of whom are forced into prostitution. About 50% of trafficked persons are minors who are sexually exploited, forced labor, or have their organs taken away[9].

Trafficking in human beings is a form of organized crime, which involves the violation of fundamental human rights. Victims of trafficking in human beings are lured with promises of advantageous jobs abroad, treatment opportunities or study offers. Subsequently, at the place of destination, they discover that they have been misled by traffickers and are forced to work for free or for a ridiculous salary. Women and girls are often recruited to work in the service sector or in the hotel industry, but end up in prostitution.

- The Commission has drawn up the EU Strategy on Combating Trafficking in Human Beings 2021-2025[10] (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the EU Strategy on Combating Trafficking in Human Beings 2021-2025).

Regarding the international dimension of trafficking in human beings, the strategy states that in 2020 534 different trafficking flows were identified globally and over 120 countries reported victims from over 140 countries of origin[11]. Trafficking in human beings is a transnational crime and half of the victims identified in the European Union are non-EU citizens, mainly from Africa, the Western Balkans and Asia.

[8] https://eur-lex.europa.eu/summary/chapter/justice_freedom_security.html
[9] https://www.mfa.gov.md/ro/content/traficul-de-fiinte-umane
[10] Bruxelles, 14.4.2021 COM(2021) 171 final
[11] UNODC, Global Report on Trafficking in Persons, 2020 (2021). UNODC used the term "flow" for a combination of a country of origin and a country of destination in which at least 5 victims were detected during the period under review. For flows, data from 2018 (or most recent) were used as a reference. For countries where data for 2018 were not available, the most recent data from 2019, 2017 or 2016 were used

Traffickers take advantage of social inequalities, as well as the economic and social vulnerabilities of people, which have been exacerbated by the COVID-19 pandemic, and this helps criminals find victims more easily. The pandemic has also hampered victims' access to justice, assistance and support, as well as the criminal justice response to this crime. In addition, traffickers have adopted a new business model, namely the recruitment and exploitation of victims via the Internet, which makes it difficult for law enforcement and judicial authorities to respond.

The strategy identifies key priorities, with the aim of effectively combating human trafficking. The strategy proposes concrete actions, which will be developed with full respect for fundamental rights, for the early identification and cessation of trafficking in human beings, for bringing criminals to justice, turning human trafficking from a low-risk and high-profit crime into one. with high risk and low profit, as well as to protect victims and help them rebuild their lives.

The Commission renews its commitment and establishes a sound policy framework to protect vulnerable people from trafficking in human beings, to strengthen the capacity of victims to act, to bring criminals to justice and to protect our communities. This commitment is mainly aimed at women and children.

The priorities and actions set out in the strategy will be implemented in the period 2021-2025. In the meantime, the Commission will be prepared to respond quickly to any new developments or trends by continuously monitoring and analyzing the evolution of trafficking in human beings inside and outside the EU. Together, the EU and its Member States must always be one step ahead of criminals, those who use and exploit victims[12].

II. THE EUROPEAN UNIO'S SECONDARY LAW ON PREVENTING AND COMBATING TRAFFICKING IN HUMAN BEINGS

European Union secondary legislation contains legal instruments on the definition of crime, the establishment of common sanctions and targets for the prosecution of offenders and the protection of victims.

The general legal framework of the European Union on trafficking in human beings contains specific regulations on:

- Preventing and combating human trafficking;
- Issuance of a residence permit for victims of human trafficking;
- International cooperation on preventing and combating illicit trafficking in migrants by land, sea and air.

**** Preventing and combating human trafficking***

The main document in this regard is - *Directive 2011/36 / EU on preventing and combating trafficking in human beings and protecting its victims*[13], which contains common minimum rules for the determination of offenses of trafficking in human beings and for the punishment of their perpetrators. The document also provides

[12] Strategy Conclusions - p. 22.
[13] JO L 101, 15.4.2011, pp. 1-11

for measures to better prevent this phenomenon and to strengthen the protection of victims.

Trafficking in human beings is expressly prohibited in the EU Charter of Fundamental Rights (Article 5), and the EU has created a comprehensive legislative and policy framework to combat this phenomenon, in particular through this Directive (2011/36 / EU) and EU strategy for 2012-2016 to eradicate trafficking in human beings.

The provisions of the Directive criminalize the following intentional acts: recruitment; transport; transfer; housing or receiving persons by force for exploitation.

Exploitation includes at least: sexual exploitation or prostitution; forced labor or service (including begging, slavery, exploitation of criminal activities or organ harvesting).

The Directive sets the maximum penalty for these offenses at least five years in prison and at least 10 years when aggravating circumstances are found, for example if the offense was committed against victims who were particularly vulnerable (such as children) or if it was committed within a criminal organization.

EU countries can prosecute their own citizens for crimes committed in another EU country and can make use of investigative tools such as interception (for example, telephone conversations or e-mails).

Victims receive assistance before, during and after the conclusion of criminal proceedings, in order to be able to exercise the rights conferred on them by the status of victims in criminal proceedings. Assistance may consist of receiving in shelters, providing medical and psychological assistance and providing information and interpretation services.

Children and adolescents (under the age of 18) benefit from additional measures, such as physical and psychosocial assistance, access to education and, where appropriate, the possibility of appointing a guardian or representative. They should be questioned without delay, in premises adapted for this purpose and by specialists trained as such. Victims have the right to protection from the police and to legal aid in order to be able to claim compensation.

EU countries must take preventive measures to:

- discouraging requests that encourage human trafficking;
- launching awareness-raising and training campaigns for officials so that they can identify and deal with victims and potential victims of trafficking in human beings.

An EU Anti-Trafficking Coordinator has been appointed to ensure a coherent and coordinated approach to combating this phenomenon.

To help national authorities combat the abuse of the right to free movement, the Commission has published a handbook on marriages of convenience between EU citizens and non-EU nationals. Some forced marriages, for example, may involve aspects of trafficking in human beings.

**** Residence permit for victims of trafficking in human beings***

- *Council Directive 2004/81 / EC of 29 April 2004*[14] on residence permits issued to third-country nationals who are victims of trafficking in human beings or who have been facilitated by illegal immigration and who cooperate with the competent authorities lays down the procedure for issuing and renewing of the residence permit, the conditions for refusal of renewal or withdrawal, as well as the treatment given to victims before and after a permit is issued.

The provisions of this Directive are coordinated with those contained in Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, which provides a horizontal legal framework for both EU and non-EU citizens (and has strengthened most of the provisions of Directive 2004/81/EC, including the framework for the protection and assistance of children).

Temporary residence permits can be issued for non-EU nationals who are victims of trafficking in human beings or (optionally) who have been the subject of an action to facilitate illegal immigration.

The directive applies to non-EU nationals, even if they have entered the EU illegally. Permits may be granted to those who have reached the age of majority, as defined by the law of the EU country concerned, and may apply to children under the conditions laid down by national law.

Those persons should be informed of the possibilities offered by this Directive by the competent authorities of the EU country concerned.

The competent authorities may issue a temporary, renewable permit valid for a period of at least six months if:

- the presence of the victim can help the investigation;
- the victim shows a clear will to cooperate;
- the victim has broken any connection with the alleged perpetrators of those crimes.

The permit may be renewed if the relevant conditions continue to be met. The permit grants the beneficiary access to the labor market, vocational training and education, under the conditions established by national legislation.

The permit may be withdrawn for several reasons, including if the victim reconnects with the alleged perpetrators or ceases to cooperate, or if the proceedings are interrupted.

**** International cooperation on preventing and combating trafficking in human beings***

• Council Decisions 2006/616 / EC and 2006/617 / EC approve the UN Protocol against Trafficking in Migrants (by Land, Air and Sea), in addition to the UN Convention against Transnational Organized Crime.

This Additional Protocol to the United Nations Convention against Transnational Organized Crime aims to prevent and combat illegal trafficking in migrants, promote cooperation between signatory countries and protect the rights of illegally introduced migrants.

[14] JO L 261, 6.8.2004, pp. 19-23

The signatory countries must establish as criminal offenses the following acts, if they are committed intentionally, for the purpose of financial or material gain:

- illegal trafficking in migrants, in the illegal introduction of a person into a State which is neither the State of the person's nationality nor the person of permanent residence;
- the production, procurement, supply or possession of fraudulent travel or identity documents for the purpose of permitting the smuggling of migrants;
- facilitating the stay of a person in a state without fulfilling the necessary requirements for legal residence;
- attempts, participation and instigation in the commission of such offenses.

The signatory countries must also consider the following circumstances as increasing the gravity of the crime (aggravating circumstances):

- endangering the life or safety of the migrants concerned;
- subjecting those migrants to inhuman or degrading treatment, including for the purpose of exploitation.

Victims of illegal migrant trafficking must not be prosecuted.

Countries must take steps to strengthen their border controls and have the right to refuse entry to anyone involved in illegal migrant trafficking. Countries with common borders or located on routes used by criminal groups must exchange certain information such as the following:

- point of departure and destination of traffickers;
- routes and modes of transport used;
- methods and means of:
- hiding and transporting people;
- misuse of travel or identity documents.

• Regarding the prevention, repression and punishment of trafficking in human beings, especially women and children, the following have been adopted:

- Decision 2006/618 / EC on the conclusion by the EU of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, in addition to the United Nations Convention against Transnational Organized Crime[15] - within the scope of Articles 179 and 181a of the Treaty establishing the European Community
- Decision 2006/619 / EC on the conclusion by the EU of the Protocol on the Prevention, Punishment and Punishment of Trafficking in Persons, Especially of Women and Children, in addition to the United Nations Convention against Transnational Organized Crime - within the scope of Part Three Title IV of the Treaty establishing the European Community

[15] The UN Convention against Transnational Organized Crime, adopted by the United Nations General Assembly on 15 November 2000, entered into force on 23 September 2003. It is complemented by three protocols: the Protocol against Trafficking in Human Beings, which entered into force on 25 December 2003; Protocol against Illegal Trafficking in Migrants by Land, Air and Sea, which entered into force on 28 January 2004; and- Protocol against the Illicit Manufacturing of and Trafficking in Firearms, which entered into force on 3 July 2005.

These decisions ratify, on behalf of the European Union (EU), the Protocol to Combat Trafficking in Persons supplementing the Convention against Transnational Organized Crime adopted by the United Nations General Assembly on 15 November 2000[16].

The objectives of the protocol are:

- preventing and combating transnational trafficking in human beings, especially women and children, by organized criminal groups;
- protection and assistance to victims of exploitation;
- promoting cooperation between countries in this field.

Each signatory country must adopt the necessary laws and other measures to establish as offenses acts defined as trafficking in human beings, including acting as accomplices in such acts.

Disputes between the signatory parties concerning the interpretation or application of the Protocol shall be settled by negotiation and, if this is not possible, by arbitration.

If a dispute arises in arbitration, if no settlement is reached within six months, either party may bring the dispute before the International Court of Justice.

The signatory countries must take measures to prevent and combat trafficking in human beings, in cooperation with relevant civil society organizations. These measures may include information and communication campaigns and social and economic initiatives.

III. NATIONAL LEGISLATIVE AND INSTITUTIONAL CONCERNS REGARDING THE PREVENTION OF TRAFFICKING IN HUMAN BEINGS

Under the legislative aspect, trafficking in human beings is sanctioned by the Criminal Code through 2 distinct articles, for adult victims (art. 165 of the Criminal Code) and for child victims (art. 206 of the Criminal Code).[17]

By HG no. 861 / 31.10.2018, the National Strategy on Trafficking in Persons for the period 2018-2022 was approved. It was developed at the initiative of the National Agency against Trafficking in Human Beings with the participation of public institutions with responsibilities in the field of combating trafficking in human beings and non-governmental organizations that carry out activities to prevent and assist victims of this phenomenon.

[16] Annexes II to Decisions 2006/618 / EC and 2006/619 / EC specify the competence of the EU with regard to matters governed by the Protocol.

[17] Other provisions on preventing and combating trafficking in human beings are contained in: Law no. 678/2001 on preventing and combating trafficking in human beings, as subsequently amended and supplemented; Law no. 248/2005 on the regime of free movement of Romanian citizens abroad, with subsequent amendments and completions; Law no. 286/2009 on the Criminal Code of Romania, with subsequent amendments and completions; Law no. 135/2010 on the Code of Criminal Procedure, with subsequent amendments and completions; Government Decision no. 293/2003 for the approval of the Regulation for the application of the provisions of Law no. 678/2001 on preventing and combating trafficking in human beings; Government Decision no. 1238/2007 for the approval of the specific National Standards for the specialized services for assistance and protection of victims of human trafficking.

- The national strategy aims to reduce the impact and size of human trafficking at the national level by prioritizing and streamlining activities in the fight against it. The general objectives of the strategy are:

- Consolidation and diversification of measures to prevent human trafficking

- Improving the quality of protection and assistance provided to victims of trafficking in human beings for social reintegration

- Developing the capacity to investigate crimes of trafficking in human beings and trafficking in minors

- Increasing the quality of disseminated information on the phenomenon of human trafficking

- Developing and expanding the cooperation process between relevant national and international actors involved in the fight against human trafficking, as well as dynamizing efforts of diplomatic action to prevent and combat human trafficking and to protect Romanian citizens in destination countries.

Legislatively, it is necessary to evaluate the normative acts incident to the field of preventing and combating human trafficking, the legislative approaches aiming mainly at clarifying the competences and responsibilities of the structures with attributions in the field, correlating the subsequent fields, as well as Euroconforming with the related European acts. Legislative initiatives to amend and / or supplement higher level normative acts (laws, Government ordinances) and lower level norms (Government decisions, as well as orders and instructions of the Minister of Internal Affairs) will be carried out according to annual legislative plans, based on the new opportunities arising from the National Strategy.

The organizational framework necessary for the implementation, monitoring and evaluation of the National Strategy implies the collaboration of all institutions involved and interested in order to implement, in an efficient way, the directions of action, general objectives and specific objectives provided in this strategy, respectively: Ministry of Internal Affairs specialized structures: (National Agency Against Trafficking in Human Beings, General Inspectorate of the Romanian Police, General Inspectorate of the Border Police, General Inspectorate for Immigration, Prefect's Institution); Ministry of Justice; Ministry of Labor and Social Justice, through its structures: (National Authority for the Protection of the Rights of the Child and Adoption, the National Authority for the Protection of Persons with Disabilities, the National Agency for Employment, the Labor Inspectorate); Ministry of National Education, Ministry of Foreign Affairs, Ministry of Health, Other institutions / authorities that may have responsibilities in the field of human trafficking, involved, as responsible or partner, in the implementation of the National Strategy against human trafficking 2018-2022.

- The National Agency against Trafficking in Human Beings fulfills the role of national rapporteur, collecting in this respect, data from governmental and non-governmental actors carrying out activities in the field of combating trafficking in human beings.

Among the main attributions of ANITP, can be mentioned:

- elaborates, on the basis of the proposals of the institutions with attributions in the field, the draft of the National Strategy against trafficking in human beings.

- draws up, with the participation of the other structures of the Ministry of Internal Affairs and on the basis of data provided by public institutions with responsibilities in the field and non-governmental organizations, the Annual Report on the evolution of human trafficking;

- develops campaigns to prevent trafficking in human beings and programs to facilitate the assistance of victims of trafficking in human beings and collaborates with public and private institutions and non-governmental organizations to implement joint campaigns and programs;

- facilitates the participation of victims of trafficking in human beings in the activity of criminal investigation and trial in cooperation with the institutions with attributions in the field;

- conducts studies and research on the diagnosis and evolution of the phenomenon of human trafficking.

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https://eur-lex.europa.eu/summary/chapter/justice_freedom_security.html

https://www.mfa.gov.md/ro/content/traficul-de-fiinte-umane

UN Convention against Transnational Organized Crime, adopted by the United Nations General Assembly on 15 November 2000;

Protocol against Trafficking in Human Beings, which entered into force on 25 December 2003;

Protocol against Illegal Trafficking in Migrants by Land, Air and Sea, which entered into force on 28 January 2004;

Protocol against the Illicit Manufacturing of and Trafficking in Firearms, which entered into force on 3 July 2005;

EU Strategy on Combating Trafficking in Persons 2021-2025;

National strategy on human trafficking for the period 2018-2022;

UNODC, Global Report on Trafficking in Persons, 2020 (2021).

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UNCONSTITUTIONALITY OF SOME PROCEDURAL-CRIMINAL PROVISIONS REGARDING THE OBLIGATION TO INFORM ABOUT THE TECHNICAL SURVEILLANCE MEASURE

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Abstract

The concept of "public safety" can be viewed, in relation to the need to respect the fundamental rights of the person during judicial proceedings, from a dual perspective:

- on the one hand, public safety is guaranteed by ensuring that these fundamental rights are respected, because the safety of every person involved in legal proceedings ultimately leads to the preservation of public safety;

- on the other hand, some limitations of these rights (in the sense of interfering with their exercise) may occur, in a state governed by the rule of law, only under conditions strictly provided by law and in cases justified precisely by the need to guarantee public safety. This study addresses, from this second perspective, the possibility of limiting by law the fundamental rights of the person during judicial proceedings (in this case, the right to privacy) and refers to the regulation of technical supervision, as evidence in criminal proceedings, calling into question the unconstitutionality of some criminal procedural provisions regarding the obligation to inform the under-surveillance person about the measure that targeted her.

Keywords: *respect for privacy, judicial procedure, public safety, technical surveillance, unconstitutionality*

INTRODUCTION

Compared to the need to respect the fundamental rights of the person during judicial proceedings, the concept of "public safety" can be viewed from a dual perspective:

- on the one hand, public safety is guaranteed, inter alia, by ensuring the observance of these fundamental rights, because the safety of every person involved in a judicial procedure, regardless of its procedural quality and regardless of the nature of the judicial procedure (criminal, civil, administrative litigation etc.), ultimately leads to the preservation of public safety; in other words, public safety

is the expression of the legal security of each person participating in the social relations established within a state governed by the rule of law;

- on the other hand, some limitations of these rights (in the sense of interfering with their exercise) may occur, in a state governed by the rule of law, only under conditions strictly provided by law and in cases justified precisely by the need to guarantee public safety, as an expression maintaining the balance between personal interests and the general interest of society.

From the second perspective, the possibility of limiting by law the fundamental rights of the person during judicial proceedings (in this case, the right to privacy), we can address some issues regarding the regulation of technical surveillance, as evidence in criminal proceedings.

I. PRINCIPLE OF RESPECT FOR PRIVACY

Article 11 of the current Romanian Code of Criminal Procedure provides for two closely related principles - respect for human dignity and respect for privacy:

"(1) Anyone who is being prosecuted or tried should be treated with respect for human dignity.

(2) Respect for privacy, inviolability of the home and secrecy of correspondence are guaranteed. Restriction on the exercise of these rights is permitted only in accordance with the law and if it is necessary in a democratic society."

Regarding the observance of privacy, as a novelty, through the provisions of the current Code of Criminal Procedure, the Romanian legislator raises this requirement to the rank of principle of application of criminal procedure law (Lorincz, 2015, p. 50), expressly regulating it in para. 2 of art. 11.

Moreover, this recognition of respect for the right to privacy, as a fundamental principle of the Romanian criminal process, is a transposition into our criminal law of some provisions of a number of international documents, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms ("Everyone has the right to respect for his private and family life, his home and his correspondence" – art. 8 para. 1) or the Charter of Fundamental Rights of the European Union ("Everyone has the right to respect for his private and family life, his home and the secrecy of his communications" – art. 7).

Also, in the Romanian Constitution is guaranteed respect for intimate, family and private life (art. 26), inviolability of the home (art. 27) and secrecy of correspondence (art. 28); pursuant to these constitutional provisions, the current Code of Criminal Procedure outlines the content of the fundamental principle of respect for privacy in three aspects: respect for privacy, respect for the inviolability of the home and respect for the secrecy of correspondence.

In the second thesis of para. 2 of art. 11 Code of Criminal Procedure (CCP) is provided the possibility of restriction the exercise of the right to privacy (in the broad sense, which includes the three aspects mentioned above) if two requirements are met: the restriction should be carried out only in accordance with the law and the restriction should be necessary in a democratic society. Also, this

internal regulation of the limitations of the right to privacy is a transposition of the conventional provisions (para. 2 of art. 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms): "the interference of a public authority in the exercise of this right is permissible only in so far as such interference is provided for by law and if it constitutes a measure which, in a democratic society, is necessary for the national security, ***public security***, economic well-being of the country, defending order and preventing criminal acts, protecting the health, morals, rights and freedoms of others".

In this sense, there are in the current Code of Criminal Procedure some provisions that constitute legal exceptions to the principle of respect for privacy, such as those contained in art. 138, on special methods of surveillance or investigation: interception of communications or any type of remote communication, access to a computer system, video surveillance, audio or photography, locating or tracking by technical means, seizing, handing over or searching postal items etc.

II. TECHNICAL SURVEILLANCE – EXCEPTION OF THE PRINCIPLE OF RESPECT FOR PRIVACY

Among the evidentiary procedures regulated in the current Code of Criminal Procedure are also the special methods of surveillance or investigation, as legal ways to obtain the means of proof necessary to find out the truth in cases involving certain crimes expressly provided by law.

According to art. 138 para. 1 CCP, special methods of surveillance or investigation are as follows:

a) interception of communications or any type of remote communication;
b) access to a computer system;
c) video, audio or photography surveillance;
d) location or tracking by technical means;
e) obtaining data on a person's financial transactions;
f) seizing, handing over or searching postal items;
g) use of undercover investigators and collaborators;
h) authorized participation in certain activities;
i) supervised delivery;
j) obtaining traffic and location data processed by providers of public electronic communications networks or providers of electronic communications services intended for the public.

As it appears from the content of art. 138 para. 13 CCP, by ***technical surveillance*** is meant the use of one of the following methods:

a) interception of communications or any type of remote communication;
b) access to a computer system;
c) video, audio or photography surveillance;
d) location or tracking by technical means.

According to art. 139 CCP, the technical surveillance is ordered by the judge of rights and freedoms when the following conditions are cumulatively fulfilled:

a) there is a reasonable suspicion of the preparation or commission of an offense under the law (these are some offenses with a high degree of social danger, such as: offenses against national security, drug trafficking, illegal operations with precursors or other products likely to have psychoactive effects, offenses relating to non-compliance with the regime of weapons, ammunition, nuclear materials, explosives and restricted explosive precursors, trafficking and exploitation of vulnerable persons, acts of terrorism etc.);

b) the measure is proportionate to the restriction of fundamental rights and freedoms, given the particularities of the case, the importance of the information or evidence to be obtained or the gravity of the offense;

c) the evidence could not be obtained otherwise or obtaining them would involve particular difficulties which would prejudice the investigation or there is a danger to the safety of persons or property.

III. INFORMING THE UNDER-SURVEILLANCE PERSON. DECISION OF THE CONSTITUTIONAL COURT NO. 244/2017

As it appears from the content of art. 145 para. 1 CCP, after the termination of the technical surveillance measure, the prosecutor must inform, in writing, within 10 days, on each subject of a warrant about the measure of technical surveillance that has been taken with regard to him.

After the moment of informing, the under-surveillance person has the right to take note, upon request, of the content of the minutes in which the technical surveillance activities performed are recorded. Also, the prosecutor will ensure, upon request, listening to conversations, communications or conversations or viewing images resulting from the activity of technical surveillance (art. 145 para. 2 CCP).

In the absence of an express legal provision, in the practice of the criminal investigation bodies, the obligation to release, at the request of the defendant or his defense counsel, some copies of the recordings of the telephone conversations was questioned, the opinion unanimously agreed by the participants in the Meeting of the chief prosecutors of the criminal and judicial investigation section at the level of the Prosecutor's Office attached to the High Court of Cassation and Justice and the prosecutor's offices attached to the courts of appeal (26-27 May 2016) being that, although the law does not oblige the release of such copies, this may be a way of fulfilling the obligation to ensure the listening of these recordings, according to art. 145 para. 2 CCP.

The term for formulating the request by the under-surveillance person is, according to art. 145 para. 3 CCP, of 20 days from the informing date.

Paragraphs 4 and 5 of art. 145 CCP contain provisions regarding the possibility of postponing the informing, as well as the limits of such postponement. Thus, the prosecutor may motivated postpone the informing or the presentation of the supports on which the technical surveillance activities are stored or of the minutes of the rendering, if this could lead to:

a) disrupting or endangering the proper conduct of the criminal investigation in question;

b) endangering the safety of the victim, witnesses or members of their families;

c) difficulties in the technical surveillance of other persons involved.

Such a postponement may be ordered at the latest until the end of the criminal investigation or until the case is closed.

Therefore, the current Romanian Code of Criminal Procedure enshrines the right of any person who has been the subject of a technical surveillance warrant, regardless of his quality, to be informed about the measure that concerned him, even in conditions of a postponement of this informing. The object of the postponement may be either the fact of informing (and, implicitly, the presentation of the materials on which the surveillance activity was recorded), either, after the informing has been made, only the presentation of the supports on which the surveillance activities are stored or the presentation of the minutes.

The doctrine *(Chiriță, 2014, p. 327)* considered that, given that the purpose of the postponement is that the investigated person does not know the existence of the technical surveillance warrant, the motivated ordinance by which the prosecutor postpones the informing is confidential and should be attached to the criminal investigation file only after it has been completed or at the time the prosecutor ordered the informing.

The general provisions of the Romanian Code of Criminal Procedure (contained in art. 145) allow, however, the postponement of informing only until the end of the criminal investigation or until the case is closed. Therefore, at the latest before ordering a solution to the case, the prosecutor has the obligation to inform the person who has been under technical surveillance and to inform her, upon request, of the contents of the minutes of the rendering, as well as to ensure, on request, the possibility to listen/watch the recordings. For this reason, in order to guarantee the exercise of the under-surveillance person's right to be informed, the doctrine *(Volonciu, Vasiliu, Gheorghe, 2016, p. 248)* stated that, if the prosecutor ordered the postponement of the informing, he is obliged to inform, in writing, the person concerned within 10 days of the disappearance of the reason for postponement and to provide her with an interval of 20 days in order to formulate the request. If the postponement concerned only the presentation of the media on which the surveillance activities are stored or of the minutes, the prosecutor will have to provide the under-surveillance person with access to these materials before ordering a solution to the case.

Regarding the provisions of art. 145 CCP, the Constitutional Court of Romania admitted, however, an exception of unconstitutionality, finding that the legislative solution contained in these provisions "***which does not allow contesting the legality of the technical surveillance measure by the person concerned, which does not have the quality of defendant, is unconstitutional***".

Thus, in the motivation of Decision no. 244/2017, the court of constitutional contentious, analyzing the provisions of art. 344 para. 2, art. 341 para. 2 and

art. 318 para. 15-16 CCP, regarding the possibility to contest/verify the legality of the technical surveillance measure, noted that these provisions do not allow any under technical surveillance person, regardless of his procedural capacity, to bring an appeal to verify the legality of the measure taken against him/her during the criminal investigation. In other words, from the economics of the criminal procedural provisions governing the procedures subsequent to the settlement of the case by the prosecutor (by referral to court, closing or waiver of criminal prosecution), it follows that only the person who has the capacity of defendant in that case is entitled to an "effective remedy" to enable him to remove a possible breach of his right to privacy.

Therefore, the Constitutional Court found that "with regard to persons subject to technical surveillance measures, other than the defendant, *the state has not complied with its positive obligation to regulate a form of a posteriori control, which the person concerned may access in order to verify the fulfilment of the conditions and, implicitly, of the legality of this measure*", thus violating the provisions of art. 26 ("Intimate, family and private life") and art. 53 ("Restriction on the exercise of certain rights or freedoms") of the Romanian Constitution, as well as those of art. 8 ("The right to respect for private and family life, home and correspondence") and art. 13 ("The right to an effective remedy") of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

IV. LEGISLATIVE INTERVENTION OPERATED BY LAW NO. 58/2019

Law no. 58/2019 introduced, in Law no. 535/2004 on preventing and combating terrorism, a provision (in art. 38^4) which establishes an exception to the obligation to inform the under technical surveillance person about the measure that was taken in his regard. Thus, in criminal cases having as object the investigation of the commission of a terrorist crime, "*the provisions of art. 145 of the Code of Criminal Procedure does not apply if in the case a closing solution has been adopted pursuant to art. 16 para. 1 letter c) of the Code of Criminal Procedure*".

This means that, if the prosecutor has ordered the closing solution on the grounds that there is no evidence that a person has committed the crime of terrorism, the general provisions contained in the Code of Criminal Procedure on the informing the under-surveillance person do not apply. For example, if it is held, on the basis of evidence, that another person, and not the one against whom the criminal investigation was carried out, committed the crime of terrorism or if, following the evidence administered (including interception of communications) there is insufficient evidence that the suspect or defendant in question has committed the crime of terrorism, there is no obligation to inform the persons concerned of the technical surveillance measure.

Considering this legislative intervention, we can question the conformity of this provision introduced by Law no. 58/2019 with the provisions of the Romanian Constitution and with those of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

We note that this aspect of the "absence of informing the under-surveillance person about the measure taken against him/her" was addressed in the jurisprudence of the European Court of Human Rights, the European court considering that "in principle, the person subject to the surveillance measure has the right to be informed this measure once it ceases", but as an exception, the absence of such informing "is not, in itself, incompatible with the provisions of art. 8 para. 2 of the European Convention" *(Ghigheci, 2014, pp.236-237)*. In this regard, the European Court has shown (the judgment of September 6, 1978, in Klass and Others v. Germany) that "*the activity or danger covered by a certain series of surveillance measures may be prolonged for several years, even decades after the suspension of these measures. Subsequent notification to each individual who has been subject to the surveillance measure may jeopardize the achievement of the long-term goal initially intended for surveillance. Moreover, as the German Federal Constitutional Court rightly observed, such a notification may lead to the disclosure of working methods, the areas of operation of the secret services and even the identification of their agents. As long as the interference resulting from the contested legal provision is in principle justified under art. 8 para. 2, failure to inform the person concerned at the end of the surveillance cannot in itself constitute an infringement of this article, as this fact ensures the effectiveness of the interference*."

Moreover, in the same case (Klass and Others v. Germany), the Strasbourg Court held that "*democratic societies are threatened by sophisticated forms of espionage and terrorism, so the state must be able to effectively combat these threats, to conduct secret surveillance of subversive elements operating under its jurisdiction*" (Udroiu, Predescu, 2008, p. 821).

Therefore, the exemption, by special law (Law no. 535/2004), from the application of the general provisions of the Romanian Code of Criminal Procedure regarding the informing of the under-surveillance person, does not constitute a violation of the constitutional provisions guaranteeing the right to privacy and nor of the conventional provisions, as long as this derogation is justified, being necessary in a democratic society in order to ensure national security and to prevent/combat acts of terrorism.

CONCLUSIONS

In conclusion, considering the declaration as unconstitutional of the legislative solution contained in art. 145 CCP, which does not allow contesting the legality of the technical surveillance measure by any under-surveillance person, regardless of its quality (therefore, which does not have the quality of defendant), for the implementation of the Decision of the Constitutional Court no. 244/2017 it is necessary to amend/supplement the Romanian Code of Criminal Procedure.

In order to ensure the possibility of accessing, before a court, persons whose legitimate interests have been harmed by the technical surveillance measure aimed at them, the procedural-criminal provisions must allow the verification of the legality of this measure through a form of *a posteriori control*, which may be

exercised after the procedural moment at which the secrecy of the judgment (conclusion of the judge of rights and freedoms) by which the technical surveillance measure was ordered and of the data obtained through that measure is removed.

In fact, through the latest draft law for amending and supplementing Law no. 135/ 2010 on the Code of Criminal Procedure (submitted for public debate by the Ministry of Justice on 2 September 2021), it is proposed to introduce provisions (in art. 145^1 - with the marginal name "Complaint against technical surveillance measures") which to regulate the remedy available to the under-surveillance person.

It is true that, in principle, acts and measures of criminal prosecution can be challenged by complaint, but technical surveillance is a measure ordered by the judge of rights and freedoms, and acts, respectively measures ordered by the judge of rights and freedoms are usually challenged by contestation.

Moreover, as stated in the doctrine *(Chiriță, 2014, p. 328)*, in the matter of means of evidence obtained through technical surveillance, the illegality of the evidence can be invoked in relation to the substantive and formal conditions of issuing the warrant and performing the technical surveillance. However, as long as, following the request of the under-surveillance person, a verification of the legality of the substantive and formal conditions of issuing the technical surveillance warrant, and not only of the surveillance, will be initiated, we consider that the marginal name of art. 145^1 must be "*Contesting the technical surveillance measure*", and the remedy must be the contestation.

We also consider that the deadlines provided by law for the introduction and settlement of the appeal should be short (48 hours, respectively 5 days), so that such a procedure does not lead to the delay of the case, and the moment from which is calculated the 48-hour period in which the under-surveillance person may lodge a contestation to the prosecutor who made the informing must be that of taking note of the contents of the minutes or of hearing the conversations or communications or viewing the images referred to in para. 2 of art. 145 CCP.

In order to also regulate the situations in which the prosecutor postpones motivated the informing or the presentation of the supports on which the technical surveillance activities are stored, we propose the introduction of a final paragraph of art. 145^1 with the following content: "*If the prosecutor ordered the sending to court or waiving the criminal investigation and postponed the informing according to art. 145, the contestation lodged at the prosecutor after submitting the file to the court is sent, for competent resolution, to the judge of the preliminary chamber to which the case is assigned.*"

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THE COMPLIANCE WITH THE RIGHT TO A DOUBLE DEGREE OF JURISDICTION IN THE MATTER OF PLEA AGREEMENT

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Abstract

The expansion of negotiated justice phenomenon has generated and continues to produce profound reverberations in current legal systems. The emergence and development of proprietary forms of manifestation of the concept has led to important structural changes in the procedural architecture of all contemporary jurisdictions, regardless of their origin, continental or common-law. The collision of this new form of accomplishing justice and public safety with the established landmarks of the classic criminal process has led to a paradigm shift in relation to the nature and consistency of the fundamental rights of participants in the criminal process.

One of the most important such rights is the right to a double degree of jurisdiction in criminal matters, a principle widely embraced by all major legal systems. The interference of the landmarks on which representative institutions for the idea of negotiated justice are based on with this principle has caused many controversies regarding its imminent dissolution, discussions found even at local level, with the introduction of the special procedure of the plea agreement in the current Code of Criminal Procedure.

Keywords: *negotiated justice, Code of Criminal Procedure, plea agreement, right to a double degree of jurisdiction, Protocol no.7 to the Convention for the protection of human rights and fundamental freedoms.*

INTRODUCTION

The efforts made over the last decades at the level of the European bloc to set up an area of freedom, security and justice, as required by Article 3 (2) of the Treaty on European Union *(Treaty on European Union, 2016)*, have been reflected in a broad and continuous process to diversify and strengthen the mechanisms used to prosecute perpetrators in the Member States, but also to recover the proceeds derived from crimes.

The abolition of internal borders and the unhindered exercise of the right to free movement has inevitably led to an increase in the number of people involved in criminal proceedings in a Member State other than that of residence, which is why the component of judicial cooperation in criminal matters has experienced unprecedented expansion. For these reasons, the legislative framework envisioned and operationalized by the European institutions involved the design and provision to national judicial bodies of tools capable of generating a prompt and firm response in the fight against crime, now characterized by a transnational dimension, such as the order European Investigation Order, a recently introduced means of cooperation.*(Directive 2014/41/EU, 2014)*

However, the harsh reality shows us that the most spectacular phenomenon generated by the expansion of the European construction was not that related to the development and improvement of common means of investigation and cooperation, but rather that of embracing new legal concepts and principles or the distinct dimensions given to the existing ones.

This legal infusion was not only reflected at the doctrinal level or in terms of enshrining substantial new rights, the mutual transfer of legal principles and concepts involving the creation of subordinate legal institutions, appropriate to the specifics and sensitivities of each legal system.

In the sense of those mentioned above, there was the rise of the phenomenon of negotiated justice, a concept of accusatory inspiration, but which in terms of the advantages it offers in contrast to the classic alternative of attracting criminal liability, found a way to reconcile itself with traditional principles of continental law. The reception of this concept arose rather from a necessity than from the desire to resize the landmarks that govern the criminal process in the continental law system, more precisely, in response to the exponential growth of the volume of activity of judicial bodies, and also in the standards of quality that the act of justice must reflect, in the face of precarious or insufficient budgetary allocations.

The delicate desire for the speedy repression of any form of illicit manifestations, in the context of the widespread adoption high-standard protection of the rights of participants in criminal proceedings also ensuring the effectiveness of the concept of public safety, has created the necessary gap to transplant the concept of negotiated justice. Of course, this translation of procedural vision was by no means rudimentary, but "through the filter of the fundamental principles underlying the continental legal system"*(Văduva, 2018, pg.7)*, and its degree of reception and forms of expression were essentially different from one system of national law to another.

The deep reverberations produced to the continental legal edifice have led to a systemic fragmentation that was not anticipated, but which can be found both at the macro-legal level within this large family of law, generally known by the homogeneous legal forms that characterize it, but also within each jurisdiction, by observing the detachment from the classical normative landmarks. *(Langer, 2004, pg. 62)*

In this sense, at present time, we find implemented in the system of continental law both institutions that are based on the concept of negotiated justice in its primary

sense, in *France -Comparution sur reconnaissance préalable de culpabilité (French Code of Criminal Procedure, art. 495-7 – 495-16), Italy -Patteggiamento(Bârsan and Cardiș, 2015, pg.117), Germany -Verständigung im Strafverfahren*, *(Bârsan and Cardiș, 2015, p.109)* as well as simplified court proceedings based on guilty pleas, which are rather enshrined to the concept of consensual justice.

Although the two concepts are similar in content and effects, there is no identity between them, but rather a *part-whole* relationship. Without carrying out an exhaustive analysis of them, as the approach would go beyond the scientific framework and the objectives set out in this article, it should be noted that the domestic criminal justice system also brings together legal forms subordinated to the concepts above mentioned, respectively the plea agreement and the abbreviated procedure based on guilt recognition.

The assertion of the aforementioned legislative view has only been possible with the help of the European Court of Human Rights, which ruled that the express or tacit waiver *(Kwiatkowska v. Italy, 2000)* of a number of guarantees specific to the right to a fair trial by means of a simplified procedure is not incompatible with Article 6 of the Convention, as long as the procedure as a whole is fair. *(Scoppola v. Italy, 2000)*. Nevertheless, proceedings subject to the concept of negotiated justice must not be regarded as interfering only with the rights or guarantees strictly associated with the idea of a fair trial, as regulated in Article 6 of the European Convention on Human Rights, but also with other guarantees placed in a complementarity report with those mentioned above, such as the right to a double degree of jurisdiction in criminal matters.

I. THE ORIGINS AND THE IMPORTANCE OF THE RIGHT TO A DOUBLE DEGREE OF JURISDICTION IN CRIMINAL MATTERS

I.1 The right to a double degree of jurisdiction in criminal matters in the context of the emergence of negotiated forms of justice

The diversification and systematization of investigative means used to investigate criminal cases but also of the forms of attracting criminal liability, have inherently led to the increase of the oppressive force of law enforcement institutions, called to carry out the criminal policy of the states.

In recent decades, there have been extensive discussions about the "americanization"*(Langer, 2004, pg.1)* phenomenon of the continental legal system. The meaning of this term designates the alteration of procedures and landmarks traditionally grounded in the jurisdictions that compose it and the integration of adversarial influences and concepts, in various forms. Some doctrinaires have gone so far as to anticipate a merger between the two systems, a legal form in the architecture of which the dominant weight would return to common-law principles *(Kelemen and Sibbit, 2002, pg.272)*, while the position of others has been a nuanced one, emphasizing that metamorphosis only entails a partial reception of the Anglo-Saxon precepts *(Wiegand, 1996, pg.137).* In what concerns us, the contact of *plea-bargaining*, but also of other specific Anglo-Saxon principles with the hard

core of the continental procedural architecture produced at most a fragmentation of it, not a contamination that would generate its redefinition.

The emergence of heterogeneous manifestation forms of negotiated justice on continental grounds has only supplemented the pressure on national legal systems to ensure an adequate standard of protection of the rights of all participants in criminal proceedings. As the proceedings based on pleadings eminently involve the waiver of a number of rights and guarantees concerning the fair trial, the manner in which they are regulated must ensure a fair balance that justifies the disadvantages arising from such a manifestation of will.

The assessment of the fairness of procedures in the case of institutions based on the idea of negotiated justice involves a distinct specificity, generated by the reason for their establishment, the form chosen for their operationalization, but also the degree of influence exerted on specific rights and guarantees. We therefore consider that the analysis of the fairness of proceedings in the context set out above must be guided by inevitably stricter benchmarks than those underlying the assessment of this characteristic in the case of traditional criminal proceedings.

In the anglo-saxon realm, the main criticism brought to the institutions subordinated to the concept of negotiated justice stems from their inability to respond effectively to fundamental procedural needs. Ensuring a legal balance between defense and prosecution, strengthening the legal aid mechanism, integrating the interests of all parties involved, especially victims and civilly liable parties in the procedural mechanisms, reconfiguring the role of the judge by expanding its analytical capacity and responsibilities in connection with the plea agreement, are often considered priorities for strengthening and modernizing the proceedings.

In the civil law system, failure of negotiated justice institutions in some jurisdictions is due to other, higher reasons, which are more related to vision and legal tradition, but also to the lack of a comprehensive procedural reform to organically integrate the concept, in line with established international standards regarding procedural rights.

In the category of procedural rights directly affected by the particularities of alternative criminal prosecution procedures, must be included as we started earlier, the right to double degree of jurisdiction in criminal matters.

Interestingly, although the European Court of Human Rights gives a generous dimension to the right to a fair trial through all its case law examples, the requirement of a double degree of jurisdiction is considered a guarantee of the aforementioned principle, but strictly in criminal matters, and not for the civil limb.(Ciucă, 2008, pg. 21)

I.2 The legal establishment and the particularities concerning the right to a double degree of jurisdiction in criminal matters

Colloquially known as *the right to appeal(Arangüena Fanego, 2012, p.167),* the right to a double degree of jurisdiction is enshrined in Article 2 of the Additional Protocol to the European Convention on Human Rights No.7, which entered into force on November 22, 1984*(Additional Protocol to the Convention no.7, 1984)*. The

special importance of the principle is reflected by the fact that its establishment at conceptual level is not singular, a similar form being found in the content of Article 14 paragraph 5 of the International Covenant on Civil and Political Rights *(International Covenant, 1976).*

The two normative texts pursue the same desideratum, that of ensuring a fair trial for the defendant, in terms of giving the possibility to submit the case for re-examination before a higher court, whose decision is either to give weight and fix definitively the issues retained in the first conviction, making it easier for the defendant to accept the legal situation, or to dismantle the entire evidentiary and legal edifice on which it was based, because inherently there may be isolated situations in which a decision is the result of assessment or procedural errors, due to the fallible nature of human actions.

A thorough analysis carried on the content of the two normative texts establishing this principle, reflects a number of differences in terms of their scope. Thus, *prima facie*, from the terminology[1] used to outline the scope, it seems that the legal text enshrined in the Convention, gives a broader meaning to the scope of the principle, by using the autonomous notion of *offence*, which may include not only the actions that are qualified so by the national legislations.. However, the scope of the principle is limited in conventional matters by two factors, the first of which is of a legislative nature and the second derives from the meaning of a notion which constitutes a *sine qua non condition* for the incidence of the principle.

Thus, on the one hand, article 2, paragraph 2, of Protocol No. 7 to the Convention expressly and exhaustively enshrines a number of exceptions[2] outside the scope of the principle, and on the other hand, its content reveals that right is applicable only to facts which are brought in front of a "court", a term used to exclude from the scope of the principle the sanctions imposed by those judicial bodies which do not meet the requirements of independence and impartiality in order to be qualified so.

Another interesting aspect is the fact that this principle is not expressly regulated in the Charter of Fundamental Rights of the European Union*(Charter of Fundamental Rights, 2010)*, the doctrinal opinions *(Arangüena Fanego, 2012, pg.167)* being in the sense that it would be implicitly enshrined in Article 47 of the Charter, which regulates the right to a fair trial and an effective remedy. On the other hand, the settled case-law of the European Court of Human Rights has ruled that the right to an effective remedy states both a right of individuals, a remedy

[1] Article 2 of the Protocol no.7 to the Convention uses the phrase "all criminal offences" while art.14. par. 5 of the Covenant preferred the use of the term "crimes", aspect which implies the conclusion that the latter is more likely targeted to actions which are strictly qualified as offences by the national provisions.

[2] "*This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal*."- art.2 par.2 of the Protocolul no.7 to the European Convention on Human Rights, available on http://ier.gov.ro/wp-content/uploads/2018/11/Protocolul-nr-7.pdf, accessed on 20.11.2021

made available to them and a means of ensuring compliance with the other provisions of the Convention, which in principle, can only be invoked in relation to another right recognized by the other conventional provisions *(Zavoloka v. Latvia, 2009)*. In other words, the right to an internal remedy does not enjoy an autonomous, independent character. Moreover, even national practice *(sentences no.413/S/2008 and no. 414/S/2008 in Macavei, 2013)* embraces this view, the courts constantly referring to Article 13 of the Convention as an accessory in relation to other rights effectively regulated and safeguarded at the conventional level, including the relation with the right to a double degree of jurisdiction in criminal matters. Therefore, we consider doubtful the approach regarding the implicit consecration of the principle and of the right that fills it with substance in the content of art. 47 of the Charter of Fundamental Rights of the European Union.

In essence, the right to a double degree of jurisdiction in criminal matters entails the possibility that the legal situation brought before the court may be the subject of a dual analysis, carried out successively and by different level courts of law, to rule on the merits of the case, and at the end of this process the second decision will prevail. *(Montero Aroca, 1990, pg. 1272-1273)*.

I.3 The relationship and the interference of the right to a double degree of jurisdiction in criminal matters with the rights and guarantees enshrined at international level

Although regulated separately in the Convention, the principle of a double degree of jurisdiction should not be isolatedly viewed, dissociated from the principle of ensuring the right to a fair trial, because, dare we say, there is a relationship of complementarity between them, because in the process of re-examining the case, all the prerogatives and guarantees that fill the right to a fair trial are exercised, and in the same time, the absence of a second degree of jurisdiction in criminal matters does not allow the manifestation of the first principle in its full attributes.

Moreover, the recent national jurisprudence[3] *(Decision no.445/P, 2015)* itself has been concerned with this aspect, of the indissoluble link between the two

[3] *"According to art. 351 of the Code of Criminal Procedure, the trial of the case takes place in session, orally, directly and in contradiction. These principles governing the trial phase find their application in the regulation of the trial of the case in the first instance. Thus, the court has the obligation to proceed to the hearing of the defendant and the witnesses, thus respecting the principles of directness and adversariality.*
The manner in which the first instance proceeded cannot be equivalent to an effective settlement of the case, the trial having a purely formal character, which does not correspond to the requirements of the basic rules of the criminal process, so that the retrial of the case is required by the first instance. At the same time, given that the criminal procedural law provides for two degrees of jurisdiction, it is necessary for the court to go through all the procedural stages, in order not to deprive the defendant of a degree of jurisdiction, by resolving the case directly by the appellate court. .
The appellate court could not fully replace the trial phase that should have taken place in the first instance, because such a solution would lead to the artificial elimination of a degree of jurisdiction, to the detriment of the procedural interests of the defendant, for which the procedural law provides of two degrees of jurisdiction.

principles, emphasizing the importance of going through two distinct procedural stages before the conviction becomes final, so that the requirements of a fair trial are met. In other words, in order to ensure the effectiveness of the principle of dual degree of jurisdiction, each procedural phase must be followed in compliance with the principles of orality, directness and adversarial proceedings, manifested in the form of a real and concrete analysis of the evidence.

I.4 Controversial aspects regarding the effectiveness of the right to a double degree of jurisdiction according to the national case-law

The importance of this principle can also be inferred from the fact that Article 2 of Protocol no.7 to the European Convention on Human Rights establishes only a limited number of situations that are exempted from the application of the double degree of jurisdiction in criminal matters, as for reasons regarding the minor

The irregularity found by the Court is not found among those provided by art. 281 C. pr. pen. which, according to art. 421 point 2 lit. b C. Pr. Pen, allow the case to be sent for retrial to the first instance. However, given that there was no actual trial before the first instance, in order not to deprive the defendant of a degree of jurisdiction by judging the case by the appellate court, after re-administration of all evidence, it is necessary to overturn the criminal sentence and the retrial of the case by the first instance, in order to resolve the merits of the case in compliance with the procedural guarantees conferred on the parties by the Code of Criminal Procedure. The decision of the appellate court is final, according to art. 552 Code of Criminal Procedure and therefore there is no other court that can examine the legality and validity of the judgment handed down by the appellate court that administered and interpreted the evidence administered directly for the first time, provided that the court of first instance did not directly administer all necessary evidence.

The double degree of jurisdiction is a right recognized in criminal matters by Protocol no. 7 of the European Convention on Human Rights. It presupposes that any person convicted of a crime by a court has the right to request an examination of the judgment establishing his guilt by a hierarchically superior court. The double degree of jurisdiction aims at a devolving judgment of the case before two courts, one of substance, and the second, of judicial control. In the first instance there was no trial with respect to all procedural guarantees, so that in this case the first degree of jurisdiction cannot be taken into account, therefore for the respect of the right to a fair trial and the effective assurance of two degrees of jurisdiction, according to art. 2 of Protocol no. 7 of the European Convention on Human Rights, it is justified to send the case for retrial.

Moreover, the provisions of art. 421 point 2 lit. a C. Pr. Pen. obliges the appellate court to give a new judgment and to proceed in accordance with the provisions on the trial on the merits, which leads to the conclusion that the new judgment of the appellate court can be pronounced only to replace the previous judgment of the first instance, but which was pronounced after conducting a trial that complied with the provisions of art. 349 et seq. Code of Criminal Procedure. The decision of the first instance did not follow the mentioned rules, which is why it would be contrary to the spirit of the law to require the court of judicial control to judge directly on appeal a case that did not go through all stages of the trial in the first instance. The Court finds that the non-existence of a second degree of jurisdiction in terms of the interpretation and direct administration of evidence infringes the right to a fair trial of the defendant prev. of Article 6 para. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the right to a fair trial being closely related to the right to double jurisdiction in criminal matters.

In view of these considerations, the court notes that the first instance court must resolve the case according to the common law procedure, respecting the principles of orality, directness and adversariality, including as evidence."

gravity of the offence, the rank of the jurisdiction that ruled on the case in the first instance, and also the nature of the pronounced solution[4].

In connection with the first exception, the issue of applying an administrative sanction pursuant to art.91 of the old Criminal Code of Romania is interesting, when according to art.18[1] of the same normative act, a solution of non-prosecution was ordered. In order to clarify the meaning of the notion of minor offence, the Committee of Ministers of the Council of Europe, meeting at its 375th meeting in September 1984, ruled that the determination of this character of the act will be assessed mainly by the possibility of imprisonment or not. *(Explanatory Report, 1984, pg. 5)*

Returning to the issue found in domestic law and above presented, an interpretation was actually given by the European Court of Human Rights, which ruled that a court decision confirming the legality of the prosecutor's order, but at the same time finding the accused guilty, *must be considered a declaration of guilt and attracts the applicability of Article 2 of Protocol No. 7 to the Convention (Grecu v. Romania, 2007).* The Court also rejected the Government's arguments that the offense was of a minor nature, as long as the act could be punishable by imprisonment, disregarding the fact that it lacked the degree of social danger necessary to meet the specific elements of objective typicality, as they were drawn by virtue of the psychological conception about the offence. Moreover, another argument invoked by the Court was that at the time of pronouncing the respective solutions, the prosecutors were not independent from the executive, not being "courts" within the meaning of Article 6 par. 1 of the Convention.

Although the status of prosecutors was consolidated as a result of the adoption of Laws no. 303/2004 and 304/2004, aiming to detach them from the title of executive agents, however, the Decision of the Constitutional Court no. 358 of 30 May 2018 brings this issue to the forefront again, especially by the lights of the provisions found in art. 132 paragraph 1 of the fundamental law. According to this text of law, *prosecutors carry out their activity according to the principle of legality, impartiality and hierarchical control, under the authority of the Minister of Justice*. The Court ruled that the Public Ministry, *"although not part of the executive or executive authority, does not have a position of institutional independence from it, as the text of the Constitution is very clear, the activity of prosecutors being under the authority of the Minister of Justice" (Decision no. 358/2018)*, the argumentation used by the court of constitutional contentious continuing with expressions and phrases[5] that call into question the independence requirements prescribed by

[4] *"This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal."*

[5] "*Prosecutors may not invoke a position of independence, like judges, in respect of which Article 124 paragraph (3) expressly provides that "Judges are independent and subject only to the law", since their activity is carried out under hierarchical control and under the authority of the Minister of Justice "," This policy must be executed by Government agents, namely prosecutors, so that the requirements regarding the complete independence of judges are not equally applicable to prosecutors "," The Court also notes , that*

art. 6 par. 1 of the Convention, required for the inclusion of prosecutors in the sphere of the autonomous notion of "court".

As such, the decision of the Constitutional Court previously evoked sheds new light on the status of Romanian prosecutors, with legal consequences for some fundamental criminal procedure institutions.

First of all, it should be noted that the issue of compliance with the double degree of jurisdiction when applying an administrative sanction in case of a non-prosecution solution did not disappear with the repeal of the old Codes, but remains relevant to acts committed under the previous Criminal Code. Thus, according to art. 19 of Law 255/2013, the prosecutor may order the dismissal of a case, as a new solution introduced by the current Code of Criminal Procedure, when he finds that a deed committed before its entry into force lacks the degree of social danger specific to an offence, by reference to art.18^1 of the Criminal Code of 1968. Recent jurisprudence[6] has confirmed the possibility of applying an administrative sanction together with the disposition of this solution, given the indissoluble link between art. 18^1 of the Criminal Code of 1968 and art. 91 of the same normative act, so that the issue of double degree of jurisdiction compliance on the occasion of formulating a complaint against the dismissal solution according to art. 339 and art. 340 of the current Code of Criminal Procedure still remains topical.

The new valences promoted by the previously evoked decision of the Constitutional Court of Romania also influence the institution of *"Renunţarea la urmărirea penală - waiving the criminal prosecution"* enshrined in the current Code of Criminal Procedure, an institution with strong accents of consensual justice, at least in the case where one or more obligations provided in art.318 par.6 C.proc.pen is imposed. Provided that through this solution, the guilt of a person who has the quality of suspect or defendant can be ascertained, we appreciate that the provisions of art.2 of Protocol no.7 to the European Convention on Human Rights find their full applicability, so that the solution promoted by the current Code of Criminal Procedure, in the sense of the finality of the court's decision confirming the solution of waiving the criminal investigation, can be criticized by reference to the conventional requirements regarding the double degree of jurisdiction in criminal matters.

the authority of the Minister of Justice is not an administrative one, on the contrary, he has full competence in terms of authority over prosecutors "and that" the notion of authority has a very strong meaning, it is defined as the power to give orders or impose on someone obedience, however, in the given constitutional context, it refers to a decision-making power regarding the management of the prosecutors' career."

[6] *Pro Lege* Law Review. "*Fapte care nu prezintă pericolul social al unor infracţiuni. Sancţiunile şi cheltuielile judiciare avansate de stat în cazul aplicării dispoziţiilor art. 19 din Legea nr. 255/2013. Aplicarea prin analogie a dispoziţiilor Codului de procedură penală anterior" article available on* http://revistaprolege.ro/fapte-care-nu-prezinta-pericolul-social-al-unor-infractiuni-sanctiunile-si-cheltuielile-judiciare-avansate-de-stat-cazul-aplicarii-dispozitiilor-art-19-din-legea-nr-2552013-aplicarea-prin-anal/, *accessed on 04.11.2021*

II. THE PARTICULARITIES OF THE RIGHT TO A DOUBLE DEGREE OF JURISDICTION IN CRIMINAL MATTERS REGARDING NEGOTIATED JUSTICE

II.1 The right to a double degree of jurisdiction in criminal matters in the context of the procedural logic imagined by the current Romanian Code of Criminal Procedure

As we have pointed out in the preceding paragraphs, the right to a double degree of jurisdiction in criminal matters presupposes the possibility of an examination of the merits of the case, in two different stages, by different courts of law. *Ab initio*, it should be noted that this right is granted only to the convicted person and not to the one who was acquitted in the first instance or to the participants who have an active role in carrying out the proceedings (for example, the Public Ministry). *(Arangüena Fanego, 2012, pg. 168)*

The double examination of the case that this principle inevitably implies, raises a question mark upon its nature and scope, but also upon the margin of appreciation that the national legislator has, when it outlines the system of appeals in criminal matters.

The current Code of Criminal Procedure *(Code of Criminal Procedure, 2010)* departs from the procedural logic of the three degrees of jurisdiction promoted by the old regulation on appeals, the appeal remaining the only ordinary remedy, with a reformatory effect, through which a new trial on the merits of the case is conducted. Moreover, at the level of continental jurisdictions, the appeal is the common ordinary remedy, generally fully devolutive, which implies bringing the case before a higher jurisdiction, where it is again examined on points of facts and law. *(Ninu, 2020, pg. 8)*

With regard to the devolutive effect of the appeal, this particular feature is the one that most intensely interferes with the right to a double degree of jurisdiction in criminal matters, because, in essence, it presupposes an independent trial, which deals with the elements of fact and law that prior received an illegal or erroneous release on the merits.

In the case of the ordinary trial procedure, followed by the introduction of an appeal, we consider that there are no special problems related to the incompatibility of the procedural architecture imagined by the Romanian legislator with the requirements of art. 2 Protocol no.7 to the European Convention on Human Rights. The only hypothesis that could contradict the principle mentioned above is when the first instance judgment or the one following the introduction of an appel has a purely formal character, thus violating the essential rules on orality, adversariality and mediation in the administration of evidence *(Cutean v.Romania, 2014)*. Such situations can be imagined when the court of first instance does not directly re-administer the evidence from the criminal investigation phase even though the defendant expressly requests it, or when the different procedural stages of the trial phase are completed by different judges, in violation of the fundamental principles stated above. *(Decision no.1176/2017)*

A special situation, however, arises when we assess the compatibility of the principle of double degree of jurisdiction with the system of remedies established in proceedings based on guilty pleas.

Undoubtedly, the task of drawing up a system of remedies in criminal matters lies with the national legislator, which has the difficult task of conciliating the requirements of legality and truth-finding with the requirements of celerity in the criminal process, but also to ensure the stability of final judgments, by imagining an appropriate system of remedies. *(Macavei, 2013)*

Like other rights enshrined at conventional level, the right to benefit from two degrees of jurisdiction must be asserted and effectively guaranteed *(Chiriță, 2007, p. 424-428)*. The attribute of effectiveness is manifested at two levels, a legislative one – providing for the state to create a system of remedies to challenge the conviction in a higher court with full jurisdiction, and another one, a jurisprudential one – providing for judicial bodies vested with the settlement of the case to perform a real judicial assessment, and not a formal one.

As a result, we must recognize the difficult task of the legislator, regardless of the jurisdiction to which we refer, to create legal institutions based on guilty pleas, which meet the operational requirements arising from their nature, but at the same time being able to ensure the full exercise of the rights enshrined at the conventional level.

II.2 The compatibility of the plea agreement with the full exercise of the right to a double degree of jurisdiction in criminal matters

In our domestic criminal system, the only exponent of negotiated justice concept, in its primary form, is the plea agreement, whilst the other institutions that allow the accused to alter the outcome of the sentence through his manifestation of will, are subordinated, in our view, to the concept of consensual justice, a notion with a broader content.

The plea agreement has been imagined as a special procedure with a well-defined area of impact, and whose enforcement mechanism reveals a set of rules that constitute derogations from the ordinary trial procedure *(Neagu, 2010, pg. 573)*, justified by its functional autonomy and the specificity of adversarial elements, which involve the waiver of the benefits regarding the presumption of innocence, the right to silence and the benefit against self-incrimination, guaranteed by Article 6 of the European Convention on Human Rights.

In essence, it implies a convention *(Lupou, 2016, pg. 115)* between the prosecutor and the defendant, in the material sense, based on the admission of guilt regarding the charge against the latter, in exchange for a more favorable legal situation to be agreed upon by means of negotiation. Once it takes the procedural form prescribed by art.482 of the Code of Criminal Procedure and is endorsed by the hierarchically superior prosecutor, it becomes an official indictment which is afterwards presented to the court.

In the event the court accepts the plea agreement, it is not within its remit to assess and decide on the treatment of the sanction to be imposed on the

defendant,„*as long as before the court isn`t brought the legal conflict between the defendant and the state, but the validation of the agreement through which the involved parties decided to end it*" [7]. The only aspect that is subject to the judge's analysis is the adequacy of the agreed punishment in relation to the gravity of the charge and the danger of the offender, but the court cannot establish another sanctionatory treatment, as it would interfere with the will of the parties of the agreement, in which case, a rejection of the plea agreement is stipulated.

In order to guarantee the right to a double degree of jurisdiction in criminal matters, art. 488 par. 1 C.proc.pen. establishes that *"against the sentence pronounced according to art. 485 and 486, the prosecutor, the defendant, the other parties and the victim may declare an appeal, within 10 days upon communication"*, the appeal being the only remedy against the sentence by which the court resolves the plea agreement. The normative text regulating the appeal in the case of these proceedings has a character of novelty, its initial form providing only the right of the prosecutor and the defendant to appeal, and only against the type and amount of the sentence or the form of its execution. The changes occurred as a result of the intervention of the Romanian Constitutional Court, which held that *"the provisions of Article 488 paragraph (1) of the Code of Criminal Procedure create unequal treatment between the injured person, the civil party and the civilly responsible party, on the one hand, and the defendant, on the other hand" (Decision nr. 235/2015)*, and that the legislative solution that enshrines only the right of the defendant and the prosecutor to file an appeal, excluding victims, civil parties and civilly liable parties is unconstitutional, violating the right to access to justice as it is provided by art. 21 par. 2 and 3 of the Basic Law, as well as the provisions of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, but also the right to defense, regulated by Article 24 paragraph 1 of the Constitution. Therefore, the decision of the constitutional court opened the way for legislative changes that enshrined the right of victims, civil parties and civilly liable parties to appeal such a decision.

The court entitled with constitutional assessment has not limited its decision to criticizing the way in which the legislator chose to limit the spectrum of holders who could file the appeal against the sentence by which the court ruled on the agreement, extending *ex officio* its control on the provisions of art. 488 par. 3 and 4 of the Criminal Procedure Code, which regulated the procedure before the appellate court and the solutions that the latter could pronounce on the occasion of the resolution of the appeal. On the one hand, we must take notice that art. 488 paragraph 2 of the Criminal Procedure Code, in the form prior to the amendments operated by Emergency Ordinance no. 18/2016, apparently allowed the formulation of the appeal for any reason, in case the agreement had been rejected. However, by reference to the restrictive manner in which the solutions of the appellate court were established in art. 488 par. 4 C.proc.pen., the legislator left

[7] https://www.juridice.ro/351877/aspecte-de-practica-neunitara-in-materia-dreptului-penal-si-procesual-penal-minuta-intalnirii-reprezentantilor-csm-cu-presedintii-sectiilor-penale-de-la-iccj-si-curtile-de-apel.html , accesat la data de 15.11.2021

unregulated the situation when the decision of the court of first instance was vitiated by aspects of illegality, regardless of whether they were subsumed to cases of absolute or relative nullity. The situation was even more precarious regarding the decision by which the court of first instance accepted the agreement, in this situation, the object of the appeal was limited to the manner, amount and form of execution of the sentence, leaving unsanctioned aspects such as the lack of material competence, vitiation of the defendant's consent, legal violations regarding the agreement itself or the settlement of civil claims, circumstances that flagrantly contravened the provisions of art. 21 and 24 of the Constitution.

The changes operated by Emergency Ordinance no.18 / 2016 were meant to reconcile the aforementioned provisions with the constitutional requirements *(Udroiu, 2017, pg. 555)*, currently the appeal being open to the victim of the offence, to the civil party and to the civilly liable party, both regarding the criminal limb and also the civil limb, but even more importantly, the solutions of the appellate court are no longer limited to the previously regulated cases. However, it is inexplicable the omission of the legislator to modify the solutions that the appellate court may adopt, when the agreement was rejected on the merits of the case, the current solutions provided by art.488 paragraph 4 letters a and c C.proc.pen. leaving unregulated the situations when the judgment of the court of first instance was given in violation of the provisions on relative or absolute nullity. *(Decision nr. 235/2015)*

Symmetrically with the procedure in the first instance, art. 488 paragraph 3 of the Criminal Procedure Code has been modified in the sense of establishing a contradictory procedure, in which the parties and the victim are cited.

Regardless of the holder of the appeal, the deadline for filing is set at 10 days, which runs from the communication of a copy after the minutes of the court. In accordance to the ordinary trial proceeding, the term has a procedural, peremptory and successive nature. *(Ștefan, 2014, pg. 218)*

Effectiveness of the right to a double degree of jurisdiction, established by art. 2 of Protocol no.7 to the Convention, presupposes that the hierarchically superior courts vested with the resolution of the case, have full jurisdiction and also use it, in the sense of examining the case in all aspects, both factual and legal.

However, the case-law of the european court shows us that national jurisdictions have an extremely generous margin to ensure full compliance with this principle *(Krombach v. France, 2001)*, given the possibility that domestic courts have been granted with, not to analyse legal and factual aspects in a single step, in the form of a single procedure; It was held that there was no violation of the article under review when legal issues could be the subject of an appeal, and the amount of the penalty and other matters of fact could be the subject of another appeal before another body, as long as the convict was able to submit to superior courts all the points of fact of the case, as they are found in the content of the conviction that was appealed *(Pesti and Frodl v. Austria, 2000)*.

Based on these considerations, we can strongly affirm that the current regulation of the plea agreement does not raise issues of conventionality regarding

the system of remedies designed by the legislator to serve against the decision by which the court of first instance rules on the agreement. The fact that the fundamental principles and guarantees that fill the right to a fair trial with content are strongly diluted, does not mean that the procedure as a whole is not fair. First, there is nothing to prevent a person who is the subject to criminal proceedings from disposing of certain procedural rights *(Navalnyy and Ofitserov v. Russia, 2016)*, as an expression of his freedom of will. On the other hand, the validity of the waiver is conditioned by a number of conditions such as full acknowledgement of the factual situation and the legal consequences to which the accused person is exposed, but also by a sufficient judicial assessment of the agreement between the parties to the agreement. *(Natsvlishvili and Togonidze v. Georgia, 2014)*

The waiver of a series of guarantees specially designed to ensure the right to a fair trial and the alteration of the content of classic criminal trial principles can by no means lead to the conclusion that the assessment of plea agreements, both in first instance and following an appeal, is just formal. The aforementioned specificity is only the result of the nature and the role of the procedure, finalized with the ratification of the agreement between the prosecutor and the defendant, after an assessment of the evidence administered in the criminal investigation phase, according to the standard of evidence required for conviction, so in accordance with art. 396 par. 2 C.proc.pen.

Consequently, it can be concluded that the current system of remedies imagined by the legislator in the area of plea agreement does not raise any issues regarding the compatibility with the standard provided by Article 2 of Protocol 7 to the European Convention on Human Rights, as long as both available degrees of jurisdiction make it possible to completely analyze the circumstances of the case, even if in a scenario characterised by renunciations to essential guarantees of a fair trial.

Moreover, even in the case of the primordial form of regulation of the institution, the compatibility with the requirements of the double degree of jurisdiction was a false problem. Thus, although the defendant's appeal against the judgment by which the court ruled on the agreement was limited to the manner and amount of the sentence or the form of execution, errors of law could have been corrected through a cassation appeal, the European Court of Human Rights also admitting the hypotheses of fulfiling the double degree of jurisdiction requirements through different procedures.

Another interesting topic that deserves to be addressed in the end of this article and which, moreover, is inconceivable for the domestic legal system, is the possibility that accused persons have in different jurisdictions, of trading the right to appeal against the judgment on the agreement, in exchange for a milder sanctionatory treatment.

Indeed, the issue is controversial because it involves the direct impairment of the right to a double degree of jurisdiction, as it is provided for in Article 2 of Protocol No. 7 to the Convention. However, we consider that the right we have referred to is not an absolute one, so that there is no impediment to giving it up,

provided that the waiver is voluntary and in full knowledge of the facts, excluding any forms of pressure or dolosive maneuvers.

These practices are well-spread in jurisdictions such as Spain – *conformidades (Della Torre, 2018, pg. 205),* Germany - *Absprachen*, later explicitly prohibited by law *(Schmitt, 2016, pg. 143-144)*, and in Italy it is also allowed to trade the actual outcome of the appeal - *patteggiamento in apello (Catalano, 2001, pg. 7)*.

Unsurprisingly, the anglo-saxon legal system has been more permissive in relation to this subject, the application of a milder sanctioning treatment being in some particular cases the result of the express waiver of the defendant's right to appeal against the sentence *(Miller, 2007, pg. 1115-1116)*. This perspective is a reflection of the *common-law* inspired criminal philosophy, which promotes the purely liberal conception of procedural rights, any of which may be the subject of an act of disposition in exchange for favorable legal treatment. *(Reimelt, 2010, pg. 871)*

CONCLUSIONS

The widespread dispersion of means of manifestations derived from the concept of negotiated justice has made it difficult for national legislators to reconcile the established principles regarding fundamental rights with the newly adopted references together with this novel procedural vision. However, a careful analysis of the effects concerning this legal translation, rather enhances the waivable nature of procedural rights and guarantees, rather than their possible dissolution. The limitations found, including to the right to a double degree of jurisdiction in criminal matters, are not the result of the metamorphosis suffered by the modern criminal procedure architecture, but the effect of capitalizing on the right of disposal that benefits the holders, which further highlights the relative nature of fundamental rights, in the absence of which the idea of negotiation and judicial concessions would have been illusory.

Undoubtedly, both at the macro-legal level but also in the domestic field, the plea agreement has gained a decisive role in the administration of justice, contributing to the achievement of the goal of ensuring a safe public climate. The need for rapid and effective repression against any form of criminality would have been impossible without the existence of this instrument, which was accompanied by a much looser view on the quantitative requirements for the effectiveness of fundamental rights and guarantees specific to the criminal process.

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SHORT CONSIDERATION REGARDING THE MEDIATION IN ROMANIA

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Abstract

Due to the favorable international context for the promotion and development of alternative methods of dispute resolution, mediation has also established itself in our country as an important element of the judicial reform strategy. The classic resolution of the conflict by going to court does not always appear as a covert response to the needs of the parties involved.

The prolonged health crisis has repercussions in the already existing crisis of the judicial system - the high number of cases encumbering the activity of the courts, therefore, in these times any solution is welcome for the effective resolution of disputes between participants in legal relations.

Keywords: *mediation, mediator, legal framework, Mediation Council*

INTRODUCTION

In 2006, the Law on mediation and the organization of the mediator profession was adopted (Law, no. 192, 2006), the legislative approach starting from the international principles and rules in the field, the new legal framework having the role of ensuring the mediation procedure functionality and utility.

I. MEDIATION

The structure of the normative act includes 7 chapters, these being presented as follows: Chapter I *"General provisions"* contains the definition of mediation and indicates its scope. The mediation is a way of resolving conflicts amicably, with the help of a third party specialized as a mediator. The mediation is based on the trust that the parties place in the mediator, as a person capable of facilitating negotiations between them and supporting them in resolving the conflict, by obtaining a mutually convenient, efficient and lasting solution. Also in this chapter

are stated the fundamental principles of mediation, which take into account the voluntary nature of the procedure, impartiality, neutrality and confidentiality. Unless otherwise provided by law, the parties may resolve their disputes of any kind through the mediation procedure, even after the commencement of a trial before the court. Strictly personal rights, namely those which the parties may not dispose of by convention or by any other means permitted by law may not be subject to mediation.

The voluntary character of the mediation was also strengthened by the Decision of the Constitutional Court (Decision C.C., no. 266, 2014) by which it emphasized that the parties are themselves responsible for the procedure and can organize it as they wish and conclude at any time. It was also noted that the parties can only be invited by a court to resort to mediation to resolve the dispute (the courts may invite the parties to participate in an information session on the use of mediation, if such sessions are organized and easily accessible. The Court notes that, although both the national law, Law No 192/2006 and the Code of Civil Procedure, and Directive 2008/52 / EC of the European Parliament and of the Council have made the mediation an optional, alternative and informal procedure, Article 2 paragraph (1) of Law No. 192/2006 provided for the obligation of the parties to participate in the information session on the advantages of mediation, under the sanction of inadmissibility of the request for summons, established by the same article, however, the briefing on the benefits of mediation was mandatory.

The Court also considered that the criticized legal regulation, by which the parties were forced to go through the information procedure on mediation, overturned the presumption "nemo censetur ignorare legem". Thus, the citizen benefits from the presumption of knowledge of the law. As such, no special information procedure on the content of a law was justified. Undoubtedly, this obligation established under any sanction, not only under that of the inadmissibility of the request for summons, contravened the provisions of art. 21 of the Constitution, which stipulate that no law may restrict the exercise of free access to justice. The obligation to participate in information about the advantages of mediation is a restriction of free access to justice, because it was a filter for exercising this constitutional right, and by sanctioning the inadmissibility of the lawsuit, this right was restricted. As a result, according to the Decision of the Constitutional Court, starting with August 10, 2014, the provisions that stipulated the obligation to participate in the information ceased to have legal effects (Morozan Florina, 2014, pp. 231-233).

According to the regulations in force, the judge, the prosecutor, the public notary, the lawyer, the bailiff and the legal adviser recommend to the parties, respectively to the party they represent the amicable settlement of the dispute, of the conflict, through the mediation procedure.

In principle, any conflicts in civil, commercial, family matters, some in criminal matters, conflicts in the field of consumer protection may be subject to mediation if the consumer alleges the existence of damage as a result of the purchase of

defective products or services, non-compliance with the contractual clauses or guarantees granted, the existence of abusive clauses contained in contracts concluded between consumers and economic agents or the violation of other rights provided by national or European Union legislation in the field of consumer protection.

*Family disputes subject to mediation may have as their object (*see*,* Decision of HCCJ no. 33/2019): sharing of common property, drawing up a parental plan, any other misunderstandings that arise in the relations between the spouses regarding the rights they may have according to the law. This procedure, through mediation, has certain advantages over the classic court trial, among which we would note: short duration, reduction of stress that the parties go through in the case of a lawsuit. Also, through mediation, an attempt is made to reduce the conflict situation between parents, emphasis is placed on the best interests of children and minors (Mihăilă Carmen Oana, 2020, pp.83-96). The rules for communication between the parties are established, as well as a detailed parenting plan, which must be followed by both parents.

According to the law, *the mediation is also possible in criminal matters* in criminal cases concerning crimes for which, according to the law, the withdrawal of the preliminary complaint or the reconciliation of the parties removes the criminal liability (Mirișan Valentin, Domocoș Carmen Adriana, 2019, p. 459). Thus, the crimes for which the mediation is possible would be: assault or other violence, culpable bodily injury, threat, harassment, sexual harassment, home invasion, violation of professional headquarters, violation of privacy, disclosure of professional secrecy, abuse of trust by fraudulent creditors, violation of the secrecy of correspondence. We must specify that if the mediation agreement was concluded in the criminal investigation phase, the criminal proceedings are stopped and the parties request the consecration of the agreement by the court/notary. If the mediation agreement has been concluded in the trial phase, the defendant is acquitted and the agreement is enforced. The mediation agreement may also intervene before the submission of the preliminary complaint, if the injured party does not want to notify the criminal investigation bodies or the perpetrator does not want to risk the notification of the criminal investigation bodies.

Also, in civil matters, disputes can be mediated regarding: the delimitation of property boundaries, claim, eviction, claims, obligation to do, divisions, sharing of movable property and real estate, successions (sharing of estate), execution of contracts of various types, foreclosures, establishing the situation of material and/or moral damages, the field of insurance etc.

If we look at possible litigation in the banking field, the fast and confidential mediation procedure can solve problems related to: a. *complaints from the customers* (miscalculated interest, unjustified increase in interest and fees during the performance of the contract, introduction of new fees not stipulated in the contract, failure to disclose the interest rate and fees, change of contract terms without the agreement of the parties and without signed additional documents by

both parties, bank fraud, unjustified registration as a bad payer at the Credit Bureau, abusive clauses in existing contracts, renegotiation of credit agreements, respectively b. *litigations or conflicts that can be complained about by the bank* (non-payment on time by customers of interest rates on loans, late payment of installments and interest, customers' refusal to pay interest and legally calculated increases etc.).

And, last but not least, mediation can resolve labor disputes regarding issues related to the continuation, termination or performance of an individual employment contract, issues related to collective labor agreements, issues related to conflicts that arise between colleagues or departments. In these situations, the mediation of labor disputes can intervene both before the initiation of a trial before the courts and after a request for a summons, appeal or recourse has been made, as the case may be.

The status of the mediator is configured in chapters II "The profession of mediator", III "The organization and exercise of the activity of mediators" and IV "The rights and obligations of the mediator". The mediator appears as a guarantor of an ethics specific to the mediation process in which confidentiality, neutrality and impartiality occupy a well-established place. According to the law, the person who cumulatively meets the following conditions can become a mediator:

a) has full exercise capacity;

b) has a higher education diploma;

c) has been in service for at least 3 years;

d) is medically fit to perform this activity;

e) enjoys a good reputation and has not been definitively convicted for committing a crime likely to harm the prestige of the profession;

f) has graduated the courses for the training of mediators, in accordance with the law, or a postgraduate program of master level in the field, accredited according to the law and endorsed by the Mediation Council;

g) was authorized as a mediator, under the conditions of Law no. 192/2006.

The authorized mediators are registered in the list of mediators, an instrument prepared and updated by the Mediation Council. The public information mentioned in this table allows the persons interested in the mediation procedure to form an objective image of the mediator, of their practical experience and professional training. These data refer to the identity elements of the mediator (including the website of the office), the mediation course completed, the year of starting the activity, the field of specialization, the professional organization of which the mediator is a member, the form of exercising the profession (professional civil society of mediators, abbreviated SCPM; mediator's office, abbreviated BM; office of associate mediators, abbreviated BMA; employee with individual employment contract within one of the forms of exercising the profession provided above), possible causes of suspension. In order to organize the mediation activity, the Mediation Council was established, consisting of nine full members and three alternates, elected by secret ballot by the mediators with the right to vote. The term

of office of the members of the Mediation Council is four years. Also, for the good development of the Mediation Council activity, permanent consultative commissions are organized, respectively: Consultative Commission of the professional body of mediators in Romania, The Commission on the Relationship with the Judicial System, The Consultative Commission for the Training Quality, The Consultative Commission for the Quality of the Mediation Service, The Committee on the Promotion of Mediation, The Committee on Relations with Authorities and Other Representative Bodies, The Legislative Committee, The Committee on International Relations, The Advisory Committee on Mediation Organizations.

According to the provisions of the Statute of the mediator profession, the exercise of the mediator profession is subject to the following fundamental principles: the principle of legality; the principle of professionalism; the principle of autonomy; the principle of freedom; the principle of independence; the principle of neutrality; the principle of impartiality; the principle of confidentiality; the principle of professional secrecy; the principle of disciplinary liability; the principle of adopting a fair and civilized behavior; the principle of discrimination; the principle of preventing conflict of interest; the principle of cooperation and partnership; the principle of responsibility.

Although the mediation procedure has a number of advantages (participants finding mutually convenient, efficient and sustainable solutions, flexibility, low costs, etc.) and in the current period there is a need to promote mediation effectively, both among participants in the administration of justice and among the citizen as an integral part of civil society.

Knowing the advantages of the procedure, those involved in the conflict can thus make an informed decision whether it is in their legitimate interest to resort to mediation. In fact, in the activity I carry out, I have often identified the need of the economic agent, service provider, to resort to mediation in resolving disputes arising in customer relations - the trader understood that the mediation procedure provides the lawyer, legal counsel, greater control over the understanding and implicitly over the conclusion of the conflict.

Given these considerations, we must remember an important step in promoting the mediation, because by amending the National Education Law (National Education Law, No. 1, 2011), Legal Education was introduced as a discipline, which will be taught in schools from 2022. In the new law there are several mentions regarding the possibility of resorting to mediation in certain criminal cases.

In accordance with the provisions of Law no. 192/2006 on mediation and the organization of the mediator profession, the Mediation Council, in its capacity as regulatory authority in the field of mediation, has decided that it is important to get involved, in order to make proposals for the introduction of such theoretical as well as practical mediation lessons in the school curriculum. The Mediation Council wishes to be involved in this approach because there is the possibility of introducing mediation as a discipline of study and restorative practice for both middle school and high school students. In this view, it has been suggested to set

up a working group that will act to establish concretely the basic content for the middle school level as well as for the high school level. Subsequently, two or three distinct teams will be organized to continue the specific activity of the project Mediation in school, on the levels Mediation in secondary school, Mediation in high school within the subject Legal education and Mediation in high school within a new subject "Restorative methods and practices. Mediation". The working group will include in a document strong arguments for which the mediation is worth getting to school, to be submitted to the Ministry of Education to draw up the curriculum for the new discipline whose sanctioning law is to be published, the discipline "Legal Education"; it will contribute to the elaboration of a set of didactic support documents for the structure of an optional course, of some lessons on mediation, including the adaptation for the online education.

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CONSIDERATIONS OF COMPARATIVE LAW IN THE MATTER ABSOLUTE NULLITIES IN MARRIAGE

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Abstract
In comparative law, the sanction with absolute nullity of a marriage concluded in breach of the substantive conditions is regulated differently, as the legislator has chosen to dissolve the marriage according to the seriousness of the defects (in Italian law) or a certain tendency to restrict to strictly necessary the causes of nullity and their effects, limiting them to the cases considered to be essential for the stability of the marriage and the validity of the marital union (in French law).

Keywords: *Absolute nullity, virtual nullity, non-existence of the act, sexual differentiation, limitation period*

INTRODUCTION

The origin of the term nullity is Latin, *nulli* - *nullo* - *nullae*, meaning without value (Guțu, 1973, p. 804), and the sanction of nullity is "the means prescribed by law not to allow the individual will to go beyond the limits that are imposed by the rules of positive law.

The full sanction consists in the destruction of the legal act by which the individual will disregarded the restrictions of the law" (Cantacuzino, 1998, p. 61).

The origin of the term nullity is Latin, *nulli* - *nullo* - *nullae*, meaning without value (Guțu, 1973, p. 804), and the sanction of nullity is "the means prescribed by law not to allow the individual will to go beyond the limits that are imposed by the rules of positive law.

The full sanction consists in the destruction of the legal act by which the individual will disregarded the restrictions of the law" (Cantacuzino, 1998, p. 61).

The civil sanction of nullity is not directed against the legal act as such, but against the *effects contrary to the law* (s.n.) produced against the flawed

background of the act, aiming to ensure the achievement of the purpose envisaged by the legislator by establishing the condition of invalidity (Florian, 2011, p. 46; Florian, 2016, p. 62; Pînzari, 2015, pp. 164-165). Therefore, the nullity retroactively abolishes the effects of the civil legal act because the conditions required by law (regarding the substance and/or form) for its valid conclusion[1], were not observed, the nullity having a threefold role (regardless of the field in which it intervenes): preventive, sanctioning and guaranteeing the principle of legality, theorists in the field classifying it according to certain criteria (Bodoaşcă, Drăghici, Puie, Maftei, 2013, pp. 241-242; Reghini, Diaconescu, Vasilescu, 2013, p. 58; Lupaşcu, Crăciunescu, 2017, p. 258).

The condition of nullity is that it has a cause present at the time of concluding the legal act, a cause that is decided exclusively by court. The effects of the nullity will be retroactive precisely due to the justifying cause of the nullity.

Therefore, it is not the nullity itself that has the gift of retroactivity, but *the finding of nullity* (s.n.), *so that the retroactivity refers to the decision in the annulment of the act, and not to the conclusion of the annulled act* (s.n.) (Florian, Pînzari, 2006, pp. 43-44).

I. CAUSES OF ABSOLUTE NULLITY OF MARRIAGE

The current comparative presentation of the causes of absolute nullity of marriage concerns the specific regulations of two European countries with old and solid traditions in this field.

We will first refer to the French legislation in which the annulment of a legal act on the ground of its annulment remains more limited in matters of marriage than in other legal acts. By widening the possibilities of opposition to marriage, the law prevents the nullity that could affect the marriage already officiated.

The development of the French legislation shows this tendency to restrict cases of nullity and their effects to the bare minimum, limiting them to those considered essential for the stability of marriage and the validity of the union. In that regard, the French case-law provides numerous examples of actions for annulment which are considered to be abusive (P. Murat 2015, pp. 130-131).

By mitigating the application of the system of nullities, on the one hand, not all irregularities are sanctioned with nullity, on the other hand, the nullity regime is itself modified in terms of its application and consequences.

[1] Article 1246 para. (1) The Romanian Civil Code provides: "Any contract concluded in violation of the conditions required by law for its valid conclusion is subject to nullity, unless otherwise provided by law."

Therefore, the general principles of nullity apply to marriage, but with important restrictions. The restrictive nature of the theory of marriage nullities is not an impediment for the actions for nullity to be in a constant increase. Thus, according to an *Infostat Justice* study from 2004, a number of 737 marriages were annulled by the High Courts (73.6%) and a number of 265 applications for annulment were rejected (26.4%). In 2010 there were 980 applications for marriage annulment before a High Court and 168 applications before a Court of Appeal, 179,433 divorce applications before a High Court and 15,204 applications before a Court of Appeal (Murat, 2015, pp. 131-132)

Instead, the French canon law adopts a different position, multiplying the cases of nullity in order to preserve the seriousness of the marital relationship (Murat, pp. 131-132)

Chapter IV of Title V of the French Civil Code, entitled "*Applications* (s.n.) for marriage annulment" (Article 180 of the French Civil Code), covers a number of cases of relative or absolute nullity, without this list being exhaustive.

For certain conditions of marriage conclusion, the absence of the text providing for nullity in case of non-compliance is explained by the fact that these are the least serious irregularities, the problem arising in the most serious situation. Related to all these aspects, the French doctrine retained three interpretations (Murat, 2015, pp 132 – 134):

1. In a first interpretation, the legal list of nullities is considered to be limiting and there are no other cases of nullity than those provided for in the texts.

The principle of "No nullity without text" applies to this interpretation, as this rule is due to the importance of marriage, the stability of the institution and its public order character.

Today, this interpretation is considered outdated, being criticized by a detailed and rigorous analysis.

2. In a second interpretation, it is considered fair to admit the existence of virtual nullities.

At present, it is recognized that if the law makes a condition for the valid conclusion of the marriage, it is obvious that the legislator understood to sanction by nullity its absence, not being necessary an express stipulation. This is also the reason why Chapter IV of Title V, Book I of the French Civil Code is entitled "*Applications* (s.n.) for marriage annulment" and not *cases* of nullity (s.n.). Rationally, the classic thesis of "no nullity without text" would be almost impossible to support in several situations, such as: sexual identity (this being before Law No. 404 of May 17, 2013 which paved the

way for marriage between persons of the same sex) or the total absence of the marriage officer who could not be sanctioned with nullity because it was not expressly targeted by the legislator. The French case-law has not been "hindered" by the above-mentioned principle and has declared null and void in the absence of the text of the law (Murat 2015, p. 133).

However, the French doctrinaires recommend a certain caution regarding virtual nullities, arguing that the saying "no nullity without text" nevertheless expresses a simple truth: nullity is a major sanction in the case of marriage due to the effects of maximum gravity it produces and should not be used too easily.

3. In a third interpretation of the French doctrine it is argued that in the face of difficulties in accepting nullities *not provided for by law* (s.n.) one must resort to a sanction that would be the *non-existence of the legal act of marriage* (s.n.).

The theory of the non-existence of legal acts is not specific to either the institution of marriage or private law, but it is given special importance due to the possibility of applying the principle "no nullity without text". According to this theory, the non-existent marriage would be the one that lacks a constitutive element, a situation encountered in the following cases:

a) total absence of consent (but the Law of 19 February 1933 amending the French Civil Code provided for this case absolute nullity - art. 184 of the French Civil Code). Referring to this aspect, in the French doctrine, it was not always obvious that dementia should be considered a lack of consent to marriage within the meaning of art. 146 of the French Civil Code. For this consent to be lacking, the individual must not have understood at least in part the meaning and importance of the word "yes" they uttered. It is a matter of fact which reverts to the sovereign judgment of the trial judges. It was considered that the mere finding of an impossibility, depression or mental destruction is not sufficient to establish the absence of consent; on the contrary, however, they are certainly likely to lead to the pronouncement of nullity pursuant to art. 146 of the French Civil Code *global mental disorders* (s.n.). In a judgment, the Court of Cassation ruled that the obligation to prove the absence of consent rests with the person contesting the validity of the marriage. (Murat, 2015, p. 46).

The marriage of the mentally insane has an exceptional character in the French law, so that the adult under guardianship or curatorship can marry if they receive authorization; the possible obtaining of this authorization does not, however, eliminate the need to express a valid consent of the person concerned at the time of the marriage performance.

If the state of dementia is proved *at the time of the marriage performance* (s.n.), despite the authorizations granted, the provisions of art. 146 of the French Civil Code and the action for nullity remains probable (Murat, 2015, p. 46).

Regarding the marriage of the adult protected by guardianship, Law no. 308/5 March 2007 brings a reform regarding the legal protection of the above mentioned persons. Thus, the marriage of the adult under guardianship requires the authorization of the guardianship judge or of the family council, if one has been established. The parents or the entourage will simply be consulted for the opinion, according to art. 460 para.2, French Civil Code. The authorization will be given only after the hearing of the future spouses (Murat, 2015, p. 81). The appeal is accepted by the guardianship judge against the decision of the family council that authorized the marriage of an adult under guardianship from the moment when the latter's consent could not be received and when no element allows us to believe that there was the will to contract marriage. If the family council has to listen to the future spouses, on the other hand, it cannot make them participate in the deliberation. This would be an irregularity that could invalidate the decision of the family council (Murat, 2015, p. 81). Compliance with the rules on guardianship is no longer necessary when guardianship ended with the death of the adult, and in the event that a posthumous marriage is envisaged, the authorization of the President of the republic is sufficient. The adult under guardianship is obliged to express his / her consent valid at the time of the marriage performance, regardless of whether the authorization is necessary or not (Murat, 2015, p. 81).

In the case of the marriage of the adult under guardianship, art. 460 para. 1 French Civil Code provides that the authorization of the curator or, in the latter's absence, of the guardianship judge is necessary, the decision of the latter being susceptible to appeal within 15 days, according to art. 1239 French Civil Procedure Code.

As in the previous case, no medical opinion is required.

The action for annulment of the marriage cannot be exercised by the curator on the grounds that the latter would not have given their authorization if more than one year had elapsed (the one-year term was extended to five years by Law no. 399/4 April 2006) (Murat, 2015, pp. 80-81) without a complaint from him/her, since they became aware of the marriage (Murat, 2015, pp. 80-81).

We do not believe that the solution of the French legislator to extend the scope of those who can conclude a valid marriage to adults under

guardianship or curatorship is the most appropriate. These institutions (guardianship and curatorship) are created precisely for the protection of persons unable to protect themselves and in order to protect their interests, or a simple authorization allowed by the curator or the guardianship judge to conclude the marriage does not replace a valid consent from legal view and could remove the harmful consequences that could occur in such a marriage due to lack of discernment, even if these people also have moments of temporary lucidity.

Such people have their own world that goes beyond the realm of reality, they lose their critical sense and are unable to integrate socially. In addition, there is a danger of unhealthy offspring (of course, this can happen outside of marriage), and from a social point of view they will not understand the meaning of the act of marriage and what its implications are.

We do not consider that the prohibition on marriage would violate the fundamental right to marriage provided for in both domestic and international regulations (such as Article 16 of the Universal Declaration of Human Rights and Art. 12 of the European Convention on Human Rights).

b) gender identity (this before Law no. 404 of 17 May 2013 which authorized same-sex marriage). In the French law, the lack of sexual differentiation between future spouses is no longer a situation in which absolute nullity of marriage can be claimed because Law no. 404 of 17 May 2013 opened the way for same-sex marriage. Prior to the promotion of this law, same-sex marriage was prohibited under the French law. In this regard, the Bordeaux Court of Appeal upheld the judgment of the court which ruled on the nullity of marriage between two persons of the same sex, the Court stating that the difference in sex is a condition of the existence of marriage.

The Court of Cassation dismissed the appeal against the Bordeaux Court of Appeal, stating that under the French law, "marriage is a union between a man and a woman" and that this principle is not contradicted by any provision of international conventions in force in France.

The Constitutional Council, notified through a priority issue of constitutionality, stated just as clearly that the provisions of art. 144 and 75 of the French Civil Code, which raise the issue of the need for sex differentiation between spouses, are in accordance with the Constitution and do not affect the right to have a family life. Nor do they violate the principle of equality when the legislator establishes differently in different situations. The Constitutional Council considered that the issue highlighted the competence of the legislator and that it could not replace its assessment with its own (Murat, 2015, pp. 71 – 72).

For identity of legislative reason, the marriage of the transsexual person who changes their sex *after* (s.n.) the conclusion of the marriage, acquiring the same sex with the partner (spouse) from the marriage, is no longer struck by absolute nullity.

In contrast, hermaphroditism, which prevents the possibility of procreation and normal relations between spouses, being a definitive genital anomaly deriving from a genetic error, is a cause of absolute nullity even if it is not expressly provided for in marriage in several European legislations (French Civil Code, Italian Civil Code, Civil Code of the Republic of Moldova, Romanian Civil Code). The reason why this virtual nullity cannot be covered is the general interest protected by the establishment by law as an impediment to marriage of this anomaly;

c) total absence of the performance. Accepting the theory of the non-existence of the act would allow the principle of "no nullity without text" to be overturned and would lead to consequences different from those of absolute nullity. As an example in this sense, the non-existent marriage would not be susceptible to confirmation even by prescription after 30 years (according to art. 184 and 191 French Civil Code, the action in absolute nullity is prescribed after 30 years, and the one of relative nullity after 5 years - articles 181 and 183 of the same code) and could not benefit from putativity (Murat, 2015, pp. 133 - 134).

Both French doctrine and jurisprudence have been reluctant to the theory of the non-existence of the act, very few consequences of this theory being in fact of little interest: for example, it is of little use to say that in one case the court rules nullity and in another finds that there is no existence of it (Murat 2015, pp. 133-134).

Further we present some general aspects regarding the sanction of nullity of marriage in the Italian law.

In the Italian law, non-compliance with the provisions on the celebration of marriage is sanctioned differently, depending on the seriousness of the defects, as follows: (Auletta, 2011, p. 163)

1 - minor ones can lead to irregularities regarding the celebration;

2 - more serious vices, at the invalidity of the marriage;

3 -certain anomalies are causes of non-existence of marriage.

1. *Irregularities in the celebration* (such as: omission of publication or non-compliance with the temporary ban on remarriage) entail a pecuniary sanction incumbent on the justice of the peace and possibly on the spouses responsible for the defect.

2. *The causes of invalidity* of the marriage are born from:

- violation (infringement) of impediments (except for the temporary prohibition of remarriage);
- lack of discernment and the existence of vices of consent;
- simulated marriage.

In addition to these causes, there are others that are not explicitly mentioned, but are deduced from the subject of contracts (for example, the lack of an essential element).

The Italian rules do not provide data for the individualization of the type of invalidity that leads to the existence of the defect, i.e. if the marriage is null or void (for literary purposes, for example, the rules state that a marriage can be *challenged* and, at the same time, in certain cases, there is talk of its *nullity*, according to Articles 124 - 125, Italian Civil Code).

The distinction has major practical implications, the annulable marriage producing effects different from the null one. The general limitation period for an action for annulment is ten years (Article 2946 of the Italian Civil Code). On the other hand, there are no time limits for appealing if a general interest has been infringed.

According to the Italian law, the causes of nullity are considered: the existence of a previous marriage (bigamy), the impediment of crime and kinship, affinity and adoption.

Less serious are the causes of marriage annulment, such as the marriage celebrated by the minor or the forbidden court, the presence of a consent defect, the simulated marriage.

3. Regarding the *non-existence of marriage*, since it does not produce effects, it legitimizes the spouses to evade marital obligations and to conclude a new marriage. In this case, the non-existence is reduced to those hypotheses - the limit in which there is an apparent marriage ceremony; in reality, the actual celebration is also completely missing if the consent is expressed by two people of the same sex because the sex difference between the spouses is a characteristic element of the marriage covenant in the Italian law. In the absence of total celebration, it was considered excluded the non-existence of marriage celebrated in Italy (Auletta, 2011, p.166) between citizens of different nationalities (including one Italian), by the Catholic worship minister who did not have the approval of government nor did it read Articles 143, 144, 147 of the Italian Civil Code or in the absence of witnesses (Auletta, 2011, p. 165).

Instead, it is considered as existing (valid) the marriage celebrated under a false name (in the concordat marriage) whose transcription was annulled. This fact is considered by the Italian judicial practice to be irregular and is subject to rectification. Unconsumed marriage is also considered to exist.

In the Italian law, a cause of the *non-existence of marriage* (s.n.) is represented by "certain anomalies", described in the Italian doctrine as "profound and appearing in connection with the structure and functions of the business" (Auletta, 2011, p. 165), the jurisprudence considering the presence of minimum conditions necessary in all cases where two persons of the opposite sex have expressed their consent before a justice of the peace. Gender difference is an essential, defining element of the marital relationship in the Italian law, so that hermaphroditism, characterized by non-sexual differentiation, is not subject to a condition of marriage (*per a contrario*, it is a cause *of non-existence* of marriage).

The Italian law does not expressly provide by law for absolute nullity due to lack of sexual differentiation.

In our view, the Italian legislature considered that this cause of invalidity was so obvious that it was no longer necessary to regulate it expressly. The explanation could subsist in the moral considerations on which a heterosexual marriage is based, moral norms that have their origin in the ancient law, more precisely, in the ancient Roman religious norms.

As is well known, Italy has a different situation from Western countries in terms of the type of marriage. Thus, the concordat marriage - an alternative to civil marriage and an option for Catholics to enter into a religious marriage with civil effects (under clearly stipulated conditions) - is based on unshakable religious principles, springing from ancient Roman norms: *procreation* (s.n.), the indestructible character of family and marriage, monogamy, marital love etc.

The purpose of marriage in Latin-Roman antiquity was procreation, to ensure the continuity of the family and the Roman domestic religious cult. Yet, to procreate two people of different sex are absolutely necessary: female and male, otherwise the reproductive function of the family is non-existent. Even though in Roman antiquity and especially in the Greek antiquity homosexuality was tolerated, being commonly practiced, the ancestors of the Italians never accepted the conclusion of a marriage except between a man and a woman. Testimony in this sense is the famous definition of marriage given by the Roman jurisconsult Modestinus: *Nuptiae sunt coniunctio maris et feminae* (...), that is, marriage is the union between *man and woman* (s.n.).

Regarding the prohibition of concluding a marriage of the mentally insane or debilitated (by art. 85 Italian Civil Code), some doctrinal voices (Auletta, 2011, p. 27) consider that it would be more appropriate a solution that, by modifying the rule in force, to allow the judge to assess the ability of the forbidden to make a conscious choice of marriage.

In one case[2], it was noted that a subject with Down syndrome should not be excluded from the celebration of marriage because they are able to make a conscious marital choice.

We believe that the Italian magistrate's solution deserves some brief comments regarding those affected by Down syndrome. It is known and scientifically proven that Down syndrome is not a disease, but a genetic change that has always belonged to the human condition, being universally present in all peoples and socio-economic environments in a proportion of 1 to 800 newborns, stating that its incidence varies from one geographical area to another.

The specialists in the field (doctors, geneticists) say unanimously that although this syndrome is not curable, the possibility cannot be ruled out that some of them may lead an independent life, the support they need in adult life requiring emotional relationships, as well as all the other people. Each person with Down syndrome is unique in their own way, their behavior, abilities, interests and achievements differing from case to case. The emotional life of these people can be the same as that of all other individuals, many of them being able to have an independent married life in the community they are part of, being necessary to eliminate any prejudices.

In this context of medical and psychological conclusions, a legal solution is naturally needed. The sentence given by the Italian judge, in principle, we consider to be correct from a human and medical-psychological point of view. However, we do not believe that such a solution could be used as an argument of universal judicial practice valid for all situations in which a person affected by such a syndrome would like to marry.

Is the judge entitled to decide in such cases who can and who cannot conclude a marriage?

Our answer is categorically affirmative, stating that the magistrate's solution must be based not on their strictly personal findings - not having the necessary specialized knowledge and skills - but on a medical and psychological expertise performed by professionals in the field.

Therefore, we believe that the people affected by such a syndrome, if they wish to enter into a marriage, should obtain authorization to do so from a court whose decision is subject to natural remedies. A judgment based on the conclusions of professionals in the field, whatever the solution, would remove, at least in theory, the risks of exclusion from marriage and the violation of a fundamental human right, that of marriage, eliminating the discrimination based on prejudice and subjective and superficial appreciation.

[2] Varese Tribunal, October 6, 2009, G.I., 10, 846.

CONCLUSIONS

A Regardless of the country or type of legal system in which nullity is generally applied, it is one of the most severe civil law sanctions, and the nullity of marriage, in particular, derogating from the rules of common law in this matter, is all the more serious due to its consequences, considering that the legal act of marriage was never concluded, therefore, the rights and obligations between the spouses never existed, the specific personal and patrimonial relations being extinguished.

As marriage is of particular importance both personally and socially, both Romanian and foreign legislators have sought to reduce as much as possible the particularly serious effects caused by the dissolution of marriage, thus creating a legal regime somewhat different from that of nullity in the common law, looking for solutions to restrict the cases of nullity, to reduce the limitation periods of the action for annulment, to cover the possibility of cases of absolute nullity a.s.o.

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HUMAN RIGHTS ABOVE ALL? – THOUGHTS ON NECESSARY RESTRICTIONS CONCERNING THE FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION

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Abstract

The freedom of thought, conscience and religion is one of the most essential human rights promulgated in the Declaration of the Rights of Man and of the Citizen during the French Revolution. However, a freedom without any limit can also hold unthinkable dangers to the society. That is the reason why the modern international human right documents and the constitutions of the countries acknowledge the possibility of restriction. Concerning this fundamental right, we are able to distinguish several elements, but only one of them – the freedom to believe – shall be unristricted. In particular cases, the practice of one's religion can lead to the violation of public order or other fundamental rights. There are minority religions which do not respect the order of law and tend to commit certain delicts. Against these movements, the tools of penal law shall be applicable.

Keywords: *freedom of thought, conscience and religion, human rights, restriction, cultism, criminal organisation*

INTRODUCTION

The 90s was a strange period of human history. After the fall of the Berlin Wall, new ideologies started to spread in the ex-Soviet region. The effects of the so-called wild capitalism created huge differences between the different layers of the society. Many could luckily benefit from privatization, yet the major part of the population found itself in an incovinient financial state. This economical environment began to influence the mental health of the citizenship. The depressed people would find something to believe in, a community of which they could be part of. This situation even increased the effectivity of the new religious doctrines.

One of the most well-known example of cultic movements in Hungary was the case of the Holic group (originally Holic Gruppe) also called the cult of Dunaföldvár.

During the 90s, its activity got the attention of several young adults who – by getting involved in the everyday life of the community – left behind their families. The apparently peaceful doctrine originated from christianity hid unpredictable menace (Lugosi –Lugosi, 1998, p. 78-86; Kamarás, 2011, p. 1-96).
Nowadays, the youth of the information society is even more endangered. Proselyters of new religious ideologies do not have to bring personally the message. Through online content, any type of idea can reach the user.

Unfortunately, our children are not well-prepared to cope with different methods of manipulation. Although the Fundamental Law of Hungary recognises everyone's right to teach their religion in article VII, it can be noticed that a possible restriction ought to be applied. In my judgement, as the religion is such an essential part of one's personality and view of life, the act of using one's faith to force him or her to realise illegal activity shall be restricted and punished by the most radical way known in the legal system, namely by penal law.

I. THE FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION

To be able to deeply analyse the main issue, it is indispensable to summarise some essential features of the human right that theoretically allows the dangerous religious doctrines to spread. I found useful to revise the following three aspects: the history of the evolution of the fundamental right; the entitlements provided by it and the availability of their restriction; the conflict with other rights and freedoms.

I.1 History

The discussed freedom has a great history and has influenced several other principles, for example the idea of equality of the human beings was also created in connection with it. From the beginning, when Martin Luther started Reformation, the fight for the acknowledgement of all the religions lasted for centuries. The real breakthrough was the French Revolution, the year when the Declaration of the Rights of Man and of the Citizen was born. Article X. of the document proclaims that „*no one may be disquieted for his opinions, even religious ones, provided that their manifestation does not trouble the public order established by the law*". This article – besides providing the freedom of thought – declares a possible ground for restriction: it states the priority of maintaining the public order, which is one of the most essential constitutional values.

After World War II, the international organisations protecting human rights were established. Concerning universal protection, Universal Declaration of Human Rights (1948) of the United Nations is the most fundamental document. In connection with the discussed freedom, two major novelties shall be mentioned. In the first place, it formulates the key elements of the right in Article 18. As it follows: „*Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.*" On the one hand, it declares that every human being possesses this right without distinction, furthermore the freedom to believe and the freedom to act

appears separately in the text. Secondly, a general prohibition on improper interpretation also appears in Article 30 saying that „*Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein*." In other words, none of these rights and freedoms can be interpreted with the intent of violating another one.

Two years later, European Convention on Human Rights (henceforward: Convention) was created within the framework of the Council of Europe which includes a special measure regarding the possibility of restriction of the analysed freedom (Art. 9 2.): „*Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others*." Here we have to underline two considerations. The text only acknowledges the possibility of restriction in connection with the manifestation of one's religion. This wording also implies that the freedom of choosing or changing one's belief can not be restricted. In addition, the three objective and conjunctive criteria of any limitation are defined. According to the rule, such measure can only be prescribed by law, must be necessary – which includes the principle of proportionality – with the intention of protecting a constitutional value like public order, health or moral; or the rights or freedoms of others, referring to other fundamental rights. It also has to be mentioned that the International Covenant on Civil and Political Rights (1966) gives the exact same formulation concerning this issue.

The Constitution of Romania (1991) also includes – like the Declaration of 1948 – a general rule regarding restrictions on fundamental rights. Article 53, in the first place, also records that a possible restriction can only be stated by law, however the range of the protected principles is wider than in the mentioned international sources. Besides the defence of national security, public order, health, morals and the citizens' rights, the priority of the *ius puniendi* of the country and the prevention of the consequences of disasters also appear. The second part of the article contains the necessity-proportionality test, the prohibition of discrimination and of „*infringing on the existence of such right and freedom*."

The Fundamental Law of Hungary also applies the same method of formulating the criteria of a possible restriction [Art. I. (3)] in connection with all the rights provided by it: „*The rules for fundamental rights and obligations shall be laid down in an Act. A fundamental right may only be restricted to allow the effective use of another fundamental right or to protect a constitutional value, to the extent absolutely necessary, proportionate to the objective pursued and with full respect for the essential content of that fundamental right*." The requirement of regulating in an Act and no inferior source of law, the necessity-proportionality test and the protection of other human rights and constitutional values also appear just like in the Constitution of Romania. A slight difference is that the Hungarian provision does not contain a list of the protected values, but the practice of the Constitutional

Court also identified the same ones mentioned in other documents. The concept of the essential content is also a particular point of the regulation, yet the interpretaion of each fundamental right requires a different approach. The content is not well defined in many cases. Though the Constitutional Court has formulated it in connecton with a few ones like in the case of the right to life, this concept remained mainly a theoratical defence which forbids the total ignorance of a fundamental right. In my opinion, this provision has a similar meaning compared to the wording of the Constitution of Romania quoted above.

All in all, we could notice that the three conjunctive conditions were part of all measures concerning restrictions, namely the followings: the limitation has to be prescribed by law (created by the Parliament of the given country); it shall meet the requirements of necessity and proportionality; it shall defend a certain constitutional value or another fundamental freedom or right. Nevertheless, there are a few examples of entitlements that can never be limited even if these conditions were fulfilled. That is why the examination of the problem requires the identification of the elements of the described freedom.

I.2 Elements of the freedom

The freedom of thought, conscience and religion certainly can be divided into several indipendent entitlements, however in the related literature many distinct opinions can be found.

Joey Peter Moore cites the opinion of the Surpreme Court of the USA which states that the freedom of religion can be divided in two: freedom to believe and freedom to act (*Moore, 1980, p. 659)*.

With a more precise approach, Hungarian scholar of constitutional law, *Schweitzer Gábor* separates 4 distinct entitlements: the choice (and the alteration) of belief, the practice of religion, the freedom of religious assembly and the freedom of religious association (*Schweitzer, 2018, p. 464)*.

Judge of the Hungarian Constitutional Court, *Schanda Balázs* gives an even more chiselled interpretation when he makes difference between the positive and negative side of the choice of belief, in other words he emphasises the opportunity of deciding not to believe in transcendency; the freedom of worship, the freedom of manifestation of conviction, the free practice of religion, the freedom of teaching religious conviction and also includes the prohibition on discrimination based on one's belief (*Schanda, 2018 [17]-[55]*).

Analysing these categories, we have to notice that the freedom to act is also a group of numerous elements. Moreover, the discussed freedom has close connection with other fundamental rights such as the equality of people, the right to education or the right to association. Although the elements can be approached in many different ways; from our point of view, considering the division in two is the most suitable, since we can declare that all rights and freedoms that form part of the freedom to act could be limited to some extent. The reason behind this statement is that an action that is manifested in the world may result in the violation of other rights or principles. However, there can not be any ground for the

restriction of the freedom to believe, since one's conviction or in other words, the mental attitude of someone does not have any direct effect on the outer world, furthermore it is a dominant part of one's personality which shall not be modified by any legal pressure.

I.3 Conflict of rights

When it comes to the conflict of two fundamental rights, it is almost never obvious that which one should be prioritised. Nevertheless, it can be stated that the right to life takes the most important position among all the rights. Hungarian scholar, *Majtényi Balázs* describes the next scenario (*Majtényi, 2012, p. 36)*: if the doctrines of a newly spreading religious ideology provoked a serious decrease of population due to its prohibitions on food, how would the legislator react? Although the example is quite absurd, it shows clearly that in such a case, when religion certainly infringes the right to life, that ideology would be immediately restricted or banned.

The most problems emerge when the interest related to the freedom of speech collide with religious emotions. The European Court of Human Rights (henceforward: the Court) has a rich case law by which we can conclude that the relation of the two rights is different depending on the actual situation. For a better understanding, it is suitable to examine some cases.

The case *Otto Preminger Institut vs. Austria* (case no. 13470/87) is an outstanding, yet a bit extreme example. The applicant „Institut" was a private association founded in Austria with the aim of promoting creativity and art through audovisual media. The association wanted to present the film called "Das Liebeskonzil" ("Council in Heaven") which portrayed God as a senile old man kissing with the Devil and Christ as a person with mental disorder. The presentation was prevented by the authorities. The Court agreed with the decision of the domestic court. According to the reasoning, the films value as a piece of art and its contribution to public debate did not outweigh those features that made it offensive to the Christians. It has to be mentioned that the Roman Catholic religion was the most wide-spread in the affected region. Therefore the Court found the action of the domestic authorities appropriate, since they prevented the excessive offense of religious belief and did not consider it a violation of Article 10 (freedom of speech) of the Convention.

In the case *Klein vs. Slovakia* (case no. 72208/01) a weekly magazine published the applicant's article that criticised the Slovakian Arcbishop. It had a strong sexual connotation and also referred to the Arcbishop's cooperation with the secret police of the former communist government. A criminal prosecution was initiated by two associations and the applicant was convicted of the offence of defamation of nation, race and belief. During the prosecution, the Arcbishop publicly pardoned the incident, however the national court found the applicant guilty because of the defamation of the highest representative of the church in Slovakia and of disparaging the Catholic faith. The Court did not accept the reasoning of the domestic court, saying that the pejorative opinion was related to a certain person

(the Arcbishop) and had not unduly interfered with the right of believers. Furthermore, the magazine in which the article was published was not meant to be read by a wide range of audience, but only by a few intellectuals. Therefore the Court found the conviction inappropriate and did notice the violation of Article 10.

In a Turkish criminal procedure, the applicant – owner of „Berfin" publishing house – was charged with insulting „God, the Religion, the Prophet and the Holy Book" because of publishing the book entitled „*Yasak Tümceler*" („The forbidden phrases"). The book conveyed the author's views on philosophical and theological issues in a novelistic style. The applicant was sentenced to the payment of a small fine. The Court opined that the book did not only contain provocative comments, but also an abbusive attack on the Porphet Mohamed, by which Muslims could have probably been offended. Therefore the Court found that the implied measure was necessary and – since authorities did not seize the book, but only imposed a small amount of fine – proportionate to the aims pursued (case *I.A. vs. Turkey* no. 42571/98).

Finally, an honorable mention is the case *Larissis and Others vs. Greece* (no. 23372/94) in which three air force officers, members of the Pentecostal Church were convicted of proselytism by a national court. They had previously intented to convert numerous people to their faith, including three subordinates at the air force. The Court held that there had been no violation of Article 9 (freedom of thought, conscience and religion) of the Convention in connection with the measures imposed to protect the perpetreators' subordinates from being put under undue pressure by senior personnel. On the other hand, the Court found a violation of Article 9 with regard to the measures taken against the applicants for proselitysing civilians, since they were not subject to constraints as the subordinates. Summarising, in this judgement the Court found a violation and a non-violation of the Convention in the same case.

In short, we can conlude that the freedom of expression – without a doubt – is capable of being a possible cause of limitation of the freedom of religion, but it is far from evident. As we have seen, in many cases, where a significant part of the population founds a content offensive, the national authorities have to act under social pressure and also the Court tends to approve the opinion of the religious majority. On the contrary, an opinion is considered illegal only if it violates religious emotions directly without a proper reason. In this context, criticism can be acceptable under the law – even if it can be felt offensive – if the aim is to judge a public figure in the press. Last but not least, proselytising is always a difficult issue, as the teaching of one's belief is provided by the law, yet violating the freedom of belief is strictly prohibited [in the Hungarian Penal Code (henceforward Btk.) it is considered a delict, see: Section 215 (1)]. Through the case law of the Court, it seems that making difference is available by examining the relationship between the proselyter and the recipient.

II. DESTRUCTIVE RELIGIOUS MOVEMENTS

As previously mentioned, not all of the religious associations are completely harmless. Although the perilous cultic activity is not so significant nowadays in Eastern-Europe, there is a number of precedents. With the intention of being politically correct, avoiding mainly pejorative expressions like cult or sect, I preferred to use the word combination „destructive religious movement" (henceforward: DRM) when referring to such groups.

II.1 Concept

Firstly we have to admit that there is no legal term that would define DRMs. To find an acceptable definition, taking into consideration the results of other social sciences is required. As a beginning, religious studies seem to be convinient. According to the Hungarian bishop, *Bütösi János* (*Bütösi, 1994, p. 10)*, cultism is a doctrine that rejects the idea of the Holy Trinity or interprets the personality of Christ in an inappropriate way. This leads us to the definition of heresy, so in this case, we should make another consideration.

French sociologist, *Jean Vernette* states that since in the field of religious studies there is a serious debate about this topic, the science of sociology may provide an answer. From an objective point of view – he says – a cult is a dissident movement which protests against churches or societies (*Vernette, 2003 p. 8-9)*. That reveals an important aspect of DRMs, none other than the so-called „contra attitude". This makes a difference between heresy and cultism: the previous one „only" rejects one of the main doctrines of the original religion, meanwhile the other endangers the society.

Considering these ideas, I found appropriate the following definition: a DRM is such a religious movement that – evangelizing the modified doctrines of a major world religion – exists and works separated from the historical churches and is harmful to society.

II.2 Categorisation

After having created an acceptable concept for the groups we call DRMs, we ought to make subcategories for a better understanding of the phenomenon. The authors opinons vary regarding this question too.

Vernette uses a sociological method to categorisee such groups (*Vernette, 2003, p. 17-18*):

- Ones inspired by Christianity and Judaism
- Ones inspired by oriental religions (Hinduism, Buddhism, Islam)
- Gnostic/mystique groups (combining the elements of the previous ones in a particular way)

This approach is based on the historical churches, whose doctrines were modified by the leader to create his or her own interpretation.

Chinese scholar, *Guobin Zhu* separates the concepts „sect" and „cult": in his interpretation, the first one follows the modified version of classical doctrines, while the second one introduces radically new practice (*Zhu, 2010, p. 475-476*). This type of distinction rarely appears in European bibliography, since most of the European DRMs are based on Christianity.

Naturally, there are some pseudo-religious associations for whom the religious basis is just some sort of disguise. Concerning these organisations, we must mention the interpretation of Spanish lawyer, *Josue Domínguez Velasco* (*Domínguez Velasco, 2017, p. 194*) who says that in a sociological sense, a „sect" is such a pseudo-religious group that follows purposes that are against the law and has illegal activity under the disguise of religiousness. I strongly disagree with this point of view, as in many cases, DRMs are led by a mentally ill person whose only purpose is the fulfillment of his or her goals.

Unfortunately, these approximations are probably not applicable in the field of jurisprudence. Therefore I attempted to create useful subcategories that can be helpful in the practice:

- Who is offended directly by the crimes committed by the DRM?
  - the follower/member
  - the outsider/civilian
  - both
- Is the leader a mentally ill person?
  - yes
  - no
- What kind of protected legal interest is endangered?
  - human life and health
  - properties
  - both

It can be seen that these subcategories are based on the injured person, the perpetrator's (or abettor's) mental state and the endangered protected legal interest. As a termination of these considerations, I have to mention that those DRMs in which the leader is a mentally sane person usually endanger the properties of the followers. This is a formation that represents the interpretation of *Domínguez Velasco*.

III. DESTRUCTIVE RELIGIOUS MOVEMENTS AND CERTAIN LEGAL SYSTEMS

International sources of law only acknowledge the possibility of restrictions concerning religious associations, but they did not formulate a detailed regulation. Therefore it is the duty of the countries to cope with the problem.

III.1 The French way

During the 90s, questions regarding DRM activity were in the spotlight. *Morin* in 1995 stated that the criminal and laboural law regulation of that era was unable to protect people from the exploitation of the religious leaders (*Morin, 1995, p. 40-41*). *Macone* saw two alternatives in that situation: either applying a passive attitude and believing that the already existing regulation is able to moderate the situation or applying an active attitude and forcing the legislation to create new regulations regarding the control of DRM activity (*Macone, 2008, p. 186*). French legislator chose the latter option.

French lawyers saw various applicable methods in several branches of law. *Macone* planned to use the establishement of limited ability to act from the field of civil law, so the „stolen" money could have been claimed back at the court (*Macone, 2008, p. 191-193*).

Another French lawyer, *Claude Goyard* suggested to create an administrative establishment with the purpose of making suspicious religious organisations transparent. Among others, this organisation could have collected information about the improvement of particular movements, alerted the prime minister, the police forces and the publicity of the potential threat, mediated between the victims and their families to facilitate the reintegration process etc. (*Goyard 1996, p. 541*).

Finally the field of criminal law was chosen to cope with this issue. In 2001 the „Law Against Cults" was accepted by the French Parliament. Its technique was to increase the criminal law liability of legal entities in connection with several delicts in the Code pénal usually committed by DMRs (for more details see: *Macone, 2008, p. 205-208*). It was not a secret that the law's main objective was to stand up against the Church of Scientology.

III.2 A notable regulation of the Romanian Penal Code

Under Article 381. of the Romanian Penal Code (henceforth: RPC), we can observe the prohibition of preventing or disturbing the free exercise of a religious rite [RPC Art. 381 (1)]. As previously mentioned concerning in connection with the judgement of the Court, this rule also appears in the Btk. in the chapter „Crimes Against Human Dignity and Fundamental Rights", meant to protect both the freedom to choose and the freedom to practice one's belief. „Any person who: a) restricts another person in his freedom of conscience by force or by threat of force; b) prevents another person from freely exercising his religion by force or by threat of force; is guilty of a felony..." – it says.

However, the Romanian rule follows [RPC Art. 381. (2)]: „order a person under duress, to attend religious services of worship or to perform a religious act related to the exercise of worship shall be punished..." As I see, this rule was indirectly – and maybe unconsciously – designed against DRM activity. „Ordering to attend religious services of worship" can be interpreted as an abstract description of the prohibition of agressive recruitment and the expression „ordering to perform a religious act" – in a wider sense – may refer to illegal „rites" as well like murdering someone as a sacrifice or desecration. In the second scenario, I suppose that the act of the perpetrator of this crime would be also punished as the abettor of homicide or desecration. From this point of view, the fact that the initiation of criminal procedure depends on the injured person's complaint [RPC Art. 381. (4)] can cause a serious problem, since the followers usually do not disobey their leader.

Nevertheless, I believe that this particular state of affairs may be an acceptable alternative of restriction in any legal system and should be introduced in Hungary in a similar way too.

III.3 Categorising destructive religious movements under the scope of Hungarian criminal law

The Hungarian Penal Code (henceforward: Btk.) – like many other acts on criminal law in Europe – is made up of two main parts: the General Part and the Special Part. For a better understanding of DRMs, an analysis divided into two is required.

III.3.1 Analysis through the Special Part

The Special Part of the Btk. lists the particular properties of each delict one by one. At this point, we attempt to create sets of DRMs on the basis of the crimes they regularly commit. According to *Domínguez Velasco*, it is recommended to do the categorisation in this manner, thus DRMs usually commit a certain group of illegal activities such as misleading advertisements, manipulation of members, duress, forced labor, abuse of minor etc. (*Domínguez Velasco, 2017, p. 195*). To test the validity of this idea, we ought to check the activity of some well-known movements.

Finding the ideal subjects of the analysis is not that easy as it seems for the first sight. There are some particular incidents which can not be considered as a general scenario neither in the life of DRMs. For example, *Moore* tells the story of the Holiness Church that worked in Tennessee. During one of their rites, the chosen one could enjoy the blessing of contacting celestial creatures by getting bitten by venomous snakes (*Moore, 1980, p. 660-661*). The majority of the DRMs that exists or existed for a longer period of time has relatively more normal purposes. To get an apporpriate picture of religious radicalism, I chose 3 organisations whose names are presumably already heard: the Children of God, the Church of Scientology and the Unification Church.

Founded by David Berg, the Children of God, also known as the Family, began its activity in the 60s, in America. They foretold an international catastrophe and only joining them could save one's life. They condemned both the capitalist and the communist system. They supported free love except the love of homosexual men. They taught regularly the stories of the Holy Bible in their own interpretation. The members usually starved and were kept awake all day and night. Those who dared to violate the rules were punished physically. They seperated the followers from their families and forced them to sell their properties and sacrifice their wealth (*Lugosi, 1994, p. 15-17*). Despite the insane doctrines, they were not noticed by the authorities, as they lived in closed communities and moreover, they did not commit any extremely serious crimes. The physical punishments may have realised delicts of simple battery [Btk. Section 164 (2)], but due to the lack of private motion, they remained undetected. Because of the doctrine of free love, the members probably realised various times the delicts of sexual abuse and incest (Btk. Section 198-199), but there was also a low probability of detection in such a group. In my opinion, the most likely was that later or sooner, the leader had to face the charges of procuring for prostitution or sexual act and living on earnings of prostitution (Btk. Section 201-202), since he trained various underaged to earn money using their bodies and that kind of earnings was usually the only income of the group.

The Church of Scientology was founded by sci-fi writer L. Ron Hubbard who adopted numerous elements of his novels. According to *de Rosa*, though they

believe in the existence of souls (thetan) and reincarnation, this is not the core of the movement. He rather introduces their activity as some sort of a strange, scientifically not proved therapic method whose only purpose is the financial exploitaiton of the members (*de Rosa, 1991, p. 186-187*). We have knowledge about prosecutions in which certain leaders were condemned because of defamation, budget fraud and forgery of administrative documents (Btk. Section 226, 396, 342; *Lugosi, 1994, p. 69-60; Domínguez Velasco, 2017, p. 196*). In general, it is almost impossible to fight their activity, since manipulating innocent people to sacrifice all their wealth for the Church can not be evaluated as fraud. In addition, they usually defend themselves in front of the European Court of Human Rights saying that certain states intended to violate their right to religious practice without any reason. Nowadays, they have founded legal entities in several countries. One state may dismiss one of their organisations, but their international system is literally undestroyable.

The Unification Church or the Church of Moon was founded by Sun Myung Moon in the 50s. His main doctrines were published in his book „Divine Principle" in which he stated that he was the Second Coming himself. His writing is also characterised by an anti-communist ideology. At the beginning, they recruited violently and separated the new members from their families. They forced the followers to gift away their properties, since the „Messiah" shall be the richest of all (*de Rosa, 1991, p. 177-179*). This movement works through a hierarchic modell: leaders are always chosen by their superiors and everyone's superior was Moon himself. It was considered that his children would be free from the original sin. They practiced regularly a strange rite called „collective marriage" where they made strangers marrying eachother. Some reports say that they had traded weapons in the Far East (*Lugosi, 1994, p. 69-74*). During their recruitment, they probably committed several times the delicts of violation of personal freedom and duress (Btk. Section 194-195). Moreorver, the Far East activity surely realised the crimes of criminal offenses with explosives or blasting agents and criminal offences of firearms and ammunation (Btk. Section 324-325).

Additionally, we may mention the fact that these 3 organisations cooperated in the past to protect themselves from the authorities (*Moore, 1980, p. 710*).

Now we have noticed that the criminal portfolio of each DRM is completely different, since they do not share common purposes. This leads us to the conlusion that we need to find another way to categorise such entities.

III.3.2 Analysis through the General Part

The General Part of the Btk. consists of those rules that have to be applied during the interpretation of each part of the codex. In this chapter, we observe those rules that can be problematic to apply in procedures in connection with DRMs. In my judgement, two topics are conspicuous: the grounds for exemption – especially insanity (Btk. Section 17) and coercion and threat (Btk. Section 19) – and the question of organised crime.

In the first place, in connection with the grounds for exemption, we have to analyse the two main personality type that always appears in such organisations: the leader and the follower.

When it comes to the leaders, we should make difference between two basic personalities. The first one is the real criminal who has a „unique sense of business". This kind of false prophet only acts by economic means. Italian doctor, *Cesare Lombroso* mentions an outstanding case from the XIII. century when a self-styled prophet sold all his followers from France to African slave traders (*Lombroso, 1998, p. 145*). Such ridiculously bizarre cases do not occur nowadays, but the technique of making immense profit of people's faith still exists. For instance, the Church of Scientology accepts huge amounts of „donations" in exchange for their books and services (*Lugosi, 1994, p. 65*). Concerning this type, there is no chance for exemption.

The other case is far more interesting. According to Hungarian priest, *Süle Ferenc,* DRM leaders usually suffer from mental illness that makes them hear „celestial messages" (*Lugosi – Lugosi, 1998, p. 96-97*). *Le Bon* says that these ideological fanatics become the apostles of their own beliefs and adds that this kind of madness is usually accompanied by excellent rhetorical skills and a passion to act. He also mentions some sort of innate prestige or charisma that makes them respected leaders (*le Bon, 2018, 89-98, 98-101*). In this case, we should take into consideration the possibility of personality disorder that is one out of five categories of insanity according to Hungarian jurisdiction (for more details see: *Görgényi – Horváth – Gula – Jacsó – Lévay – Sántha – Váradi, 2019, p. 200*). This kind of antisocial personality can not be the basis of exemption in every cases, it must be examined every time by a psychiatrist expert. From the perspective of Hungarian scholar, *Belovics Ervin*, this state of mind can only be evaluated as insanity, if the perpetrator presents severe phatological, psychotic symptoms (*Belovics – Nagy – Tóth, 2015, p. 206*). All in all, exculpation in the case of an insane prophet is not beyond imagination.

Concerning followers, it is proved that the most endangered age group is the one of unstable, rootless, self-realising young adults who suffer from emotional crisis. Those who have recently become independent from parents' control (age 18-20) are especially endangered (*Lugosi – Lugosi, 1998, p. 98*). Psychologial experiments also proved that persons with low self-esteem feel less regret than mentally healthy people when committing crime (*Aronson, 1994, p. 176-178*).

In their case, neither a high-level manipulation nor „brainwash" could be the basis of exemption, insanity would not be diagnosed. However another ground, the coercion and threat might be able to be proved. We have to examine the validity of this ground if the perpetrator was compelled to do the illegal act by force (physical pressure) or by threat (psychical pressure). In both cases, we can make a differece between depriving and breaking the ability to act according to one's free will. According to Hungarian law, the previous scenario provides the possibility of limitless reduction of the penalty, while in the other case it can be the basis of full exemption. Our experiences show that in those DRMs where the members live together in a closed

community, the leader is able to blackmail its followers by threatening the life of their family. If this was the case, the follower would be acquitted and the leader would be condemned as a covert offender [Btk. Section 13 (2)].

Finally, it is relevant to examine if a DRM should be evaluated as a criminal organization. In the official English translation of the Btk. the definition says that „criminal organization shall mean when a group of three or more persons collaborate in the long term to deliberately engage in an organized fashion in criminal acts, which are punishable with five years of imprisonment or more" [Btk. Section 459 (1) 1.]. This translation is not completely satisfying, since it omits two important criteria appearing in the original version: conspirative working and hierarchic structure. All 5 conditions are objective, or in other words independent from the consciousness of the members. For a better understanding, let's see them one by one:

- *Three or more persons*: the fulfillment of this criterion does not require at least three persons to take part in each illegal act. Moreover, it is not necessary for the members to know eachother's identity. One person who makes the connection between them is sufficient. If during the prosecution it turns out that one perpetrator can not be condemned due to a ground for exemption it will not free the other perpetrators from the disadvantegous legal affect of being part of such an organisation. Regarding DRMs, we can easily recognise that this will not be the barrier of the more severe evaluation.
- *Long term collaboration*: this is also a precondition of conspirativity if we think about it. According to the Hungarian practice, this means at least a half or a whole year (*Görgényi – Horváth – Gula – Jacsó – Lévay – Sántha – Váradi, 2019, p. 283*). During this time, cooperation of all the members is not required, only the activity matters. In case of our research, we have seen that the more significant organisations can work over many decades, thus this criterion is also fulfilled.
- *Hierarchic structure*: this one consists of two subconditions: subordinate relationship between the members where the leader is above everyone and normally the inferiors commit the actual delicts and the distribution of tasks. This model can be observed through the Unification Church.
- *Conspirative working*: a new conceptual element replacing the expression „coordinated". It refers to the coordination between the members including the preplanned distribution of tasks, the distribution of the gained advantages, the common steps to avoid impeachment etc. (*Görgényi – Horváth – Gula – Jacsó – Lévay – Sántha – Váradi, 2019, p. 284*). Analysing DRMs, we could see how the surpreme leader defines the major tasks of the followers, than how he maintains the well-functioning system and community using the acquired goods and capital.
- *Engaging (intentional) criminal acts, which are punishable with five years of imprisonment or more*: means that the organisation was originally designed to commit at least two delicts of the discussed kind. It is important to mention that the original applicable penalty shall reach the minimum of five year imprisonment stated in the Special Part, not the increased version based on the legal effect of criminal organization (*Belovics – Nagy – Tóth, 2015, p. 330*). Since we are

considering an objective criterion, it does not matter if particular members do not know the exact means of the group. It is sufficient if they know about the other mentioned conditions and the general purpose of comitting crime. The legislator also punishes the simple preparation activities realised to help the perpetration of such groups. In this case, members will face the charge of „participation in a criminal organization" (Btk. Section 321). This is the property that many DRMs fail to have. Thinking about mad prophets and their manipulated followers, it is hard to declare that they do not act in favor of their particular belief. However, in such groups like the Unification Church or the Church of Scientology where the main purpose is the exploitation of the believers, the condition may be fulfilled. *De Rosa* mentions such judgements in Italy where the Church of Scientology was condemned as a legal entity (*de Rosa, 1991, p. 188-189*).

CONCLUSIONS

We have created the legal concept of DRM successfully that covers all the religious movements with which penal law should deal. After observing their activity both in and out of the group, we can constate that the major part of their illegal acts is already punished under common states of affairs. We have also analysed the potential issues that may emerge during jurisdiction, but all we know is that all cases require particular evaluation involving experts. Summarizing the gained experience I would make two suggestions.

In the first place, as I said before, various harmful activities of the discussed groups are under prohibition, though their recruitment and later their method to convince the victims to do terrible things is not forbidden directly by law. Thus a new *sui generis* abettor-like state of affairs that punishes „brainwashing" literally should be created.

At the same time, following the French solution, the liability of religious legal entities should be increased. In Hungary, a way of cancellation already exists in the field of public law, but it is an incredibly slow and circumstantial process. Therefore I suggest that those religious legal entities whose surpreme leader commits the previously mentioned hypothetical delict shall be *ipso iure* ceased.

Finally, I could also imagine a newly created administrative establishment that would register – completing the official public records based on the law concerning churches – all the religious movements which do not have a legal personality. This way, radicalisation of such groups could be noticed before their behaviour becomes agressive and the law enforcement agencies could be alerted in time.

Presumably, the fight against religious manipulation will never end, since lots of cases remain undetected, but these measures may be able to help to reduce the number of victims.

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LEGISLATIVE DELEGATION IN THE ROMANIAN CONSTITUTIONAL SYSTEM

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Abstract

Charles de Montesquieu says, "anyone in power tends to abuse it", this is not done in a rule of law. Thus, as a reaction to this problem, the aforementioned author elaborated the principle of separation of powers, which enshrines the three powers existing in a democratic state, namely the legislative, executive and judicial power. These three powers were entrusted to different bodies, power being limited by power, as he himself had said. Post-decembrist Romania adopted the system of the three powers, entrusting the legislative power to the Parliament, the executive power to the Government and the President, and the judicial power to the courts. Although the Parliament is the exclusive holder of the legislative function, in certain situations, it delegates this function to the Government, through the institution of legislative delegation, regulated at the constitutional level.

Keywords: *legislative delegation, ordinances, enabling law.*

INTRODUCTION

I chose to present this topic at the conference, entitled *Public Safety and the need for high social capital*, due to the impact that ordinances, especially emergency ordinances, have on the social life of the entire community. It is clear that the institution of legislative delegation is the object of study of the constitutional law branch, but through the ordinances are regulated a wider range of social relations are regulated, for example, emergency ordinances have applicability also in the field of criminal law, because as we will be able to observe during this article, it can also be issued in the field of organic laws.

I. LEGISLATIVE DELEGATION

Making a foray into history, the **legislative delegation** was justified by the need for the existence of a law-making power that would be available to the **executive**, because the legislators were not able to foresee and prevent by laws everything that could be of use to the community, thus, the executive having at hand this possibility to use it, until such time as the legislator can be constituted. (Muraru, Tănăsescu, 2019, p. 963)

As can be seen from the above, the legislative delegation in favor of the **Government** is an exception, the coroner being the only one entitled to regulate the social relations in a **democratic society**.

In **Romania**, the institution of delegation was established as an exceptional measure for particularly critical periods, such as war periods.(Muraru, Tănăsescu, 2019, p. 963), the Government being substituted to take decisions that are initially taken by the Parliament.

In an attempt to provide a definition of legislative delegation, we can say that this represents the way of cooperation between the **Parliament and the Government**, by virtue of which the Government is vested with the exercise of a part of the legislative function under certain conditions. The act by which the Government exercises this delegated power is called an ordinance, (Muraru, Tănăsescu, 2019, p. 963) which, as we will see below, is of two kinds, simple ordinance and emergency ordinance.

The seat of the matter is located in the **fundamental law** itself, in **article 115**, which has the following content*: "(1) Parliament may adopt a special law empowering the Government to issue ordinances in areas not covered by organic laws. (2) The enabling law shall mandatorily establish the field and the date until which ordinances may be issued. (3) If the enabling law so requires, the ordinances shall be submitted to parliament's approval, according to the legislative procedure, until the end of the empowerment period. Failure to comply with the deadline entails the termination of the effects of the ordinance. (4) The Government may adopt emergency ordinances only in extraordinary situations, the regulation of which cannot be postponed, having the obligation to motivate the urgency in their content. (5) The emergency ordinance shall enter into force only after its submission for debate in an **emergency procedure** to the Chamber competent to be notified and after its publication in the **Official Gazette of Romania.** The chambers, if they are not in session, are compulsorily convened within 5 days of submission or, as the case may be, of referral. If, within 30 days of submission, the notified Chamber does not pronounce on the ordinance, it shall be deemed to have been adopted and shall be sent to the other Chamber, which shall also decide in an emergency procedure. The emergency ordinance containing rules of the*

nature of the organic law shall be approved by the majority provided for in Article 76(1). (6) Emergency ordinances may not be adopted in the field of constitutional laws, may not affect the regime of fundamental institutions of the State, the rights, freedoms and duties stipulated by the Constitution, electoral rights and may not concern measures of forced passage of goods into public property. (7) The ordinances referred to the Parliament shall be approved or rejected by a law which shall also include the ordinances whose effects have ceased according to paragraph (3). (8) The law approving or rejecting shall regulate, if necessary, the necessary measures regarding the legal effects produced during the period of application of the ordinance." (Article 115 of the Constitution)

From this text, we can see that **simple ordinances** are issued by the Government on the basis of an enabling law voted by the Parliament, which provides for the field and the limit under which the ordinance can be issued, and **emergency ordinances** represent a delegation of a constitutional order in favor of the Government, which in exceptional situations that do not bear postponement can issue ordinances, with the obligation to submit them for approval to the Parliament, followed by the publication in the Official Gazette of Romania.

At the same time, it is stated that the legislative delegation represents an exception even from the principle of separation of powers, because this time, the function of lawmaking is transmitted to the executive, as a rule, it is the prerogative of the legislative power.

It should also be noted that the legislative delegation represents a deviation from the rule according to which the powers received by delegation can no longer be delegated in their turn. (Deleanu, 2006, p. 701)

It is imperative to mention that the Parliament is in accordance with **the Constitution of Romania**, the **supreme representative** body of the Romanian people and the sole legislative authority of the country (Article 115 of the Constitution), which makes it the exclusive holder of the legislative function. By the mere fact that the legislator can delegate this function, it cannot deprive it of it, because it can issue an enabling law, which of course it can repeal, and in terms of constitutional delegation, here too parliament can approve or reject an emergency ordinance, which is what the holder of the office does in its own conscience.

In the first years of the adoption of the current **Constitution of Romania**, the legislative delegation was not so used, the Parliament exercising the legislative function it had received through the fundamental law. Since 1997, doctrine has begun to pay more attention to this institution, and government practice has caused it to move further and further away from the letter and

spirit of the Constitution. The first prime ministers from 1996 to 2000 began to use this institution in excess, even reaching the situation that, in 2000, the Government adopted more ordinances than the days of a year. (Muraru, Tănăsescu, 2019, p. 965).

By way of example, we state that until 2016, namely at the 25th anniversary of the adoption of the present Constitution (1991), 2,850 emergency ordinances were issued, that is, on average, one emergency ordinance every 3 days. It is important to note that between 1992 and 1996 only 20 emergency ordinances were issued, and the remaining 2,830 between 1997 and 2015, so an average of one emergency ordinance per 2 and 4 days respectively. (Boc, 2016, p. 19)

Unfortunately, this custom of the Government to use this institution in an excessive way is still practiced today. On the official website of the Chamber of Deputies[1] are listed the emergency ordinances issued by the Government in 2021, the number is quite small, namely 99 ordinances, compared to other years, I would like to say, only the emergency ordinances are listed, not the simple ones.

Before proceeding to the presentation of the ordinances by which the legislative delegation is exercised by the Government, it is necessary to define these **ordinances**, thus, the ordinance is a **governmental act** of enforcing the enabling law, by its approval by the Parliament, it becomes law, and as far as the emergency ordinances are concerned, the Constitutional Court states that the law of approval integrates in all the provisions of the approved emergency ordinance, and by approval, the emergency ordinance ceases to exist as a separate normative legal act, the approval thus giving rise to a new normative act that absorbed the emergency ordinance. (Muraru, Tănăsescu, 2019, p. 966)

In other words, the simple ordinance, that is, the one issued under the enabling law, only meets the requirements laid down by Parliament in that law. And as for the emergency ordinances, that is, those issued on the basis of constitutional delegation, they are absorbed into the law of approval, being considered law, but they, as we could see, were issued by the Government, not by the Parliament. As a conclusion to the above, the ordinances, regardless of whether they are simple or urgent, are the fruit of the cooperation of the two powers, legislative and executive.

As for the simple ordinances, they are issued by the Government on the basis of the special enabling law approved by the Parliament. This law must

[1] http://www.cdep.ro/pls/legis/legis_pck.lista_anuala?an=2021&emi=3&tip=18&rep=0, accessed on 27.10.2021, at 10:17.

necessarily establish the field in which the Government may intervene with primary legal regulations, and the date until which it may intervene. It is important to note that the non-observance of the time period entails the unconstitutionality of the ordinance. Simple ordinances cannot be issued in the dement of organic laws. As for their entry into force, they enter into force 3 days after their publication in the Official Gazette of Romania. (Vida, 2012, p. 198).

As for the emergency ordinances, they are issued by the Government in exceptional situations, which do not bear postponement, hence resulting in two substantial determinations, the first is the existence of an exceptional situation, and the second is the urgency. The government has an obligation to motivate emergency ordinances, and in short, the motivation must answer the questions of how? and why?. The emergency ordinance enters into force only after its submission for debate in an emergency procedure to the Chamber competent to be notified and its publication in the Official Gazette of Romania. Emergency ordinances can also be issued in the field of organic laws, which cannot be issued in the field of constitutional laws, they cannot affect the regime of fundamental institutions of the state, the rights and freedoms and duties provided by the Constitution, electoral rights, and they cannot concern the forced transfer of some goods into public property. (Deleanu, 2006, p. 705, 706)

As can be seen, the differences between the two ordinances refer to the basis of issue, to the areas in which they can be issued, as well as to the way in which the legal effects are produced.

CONCLUSIONS

In conclusion, the legislative delegation is nothing more than an interinstitutional collaboration between the legislative power, represented by the Parliament and the executive power, represented by the Government. Although some authors in the field of constitutional law consider that emergency ordinances should no longer find their legal regulation, using other means that the Constitution enshrines, I am of the opinion that they are necessary, but they should not become a rule, but should consist of being just exceptions, and the general rule should be that the Parliament adopts the laws, as the sole legislating authority of the country.

By lege ferenda, the revision of the text of the law that allows the Government to issue emergency ordinances by limiting to a certain number that the executive cannot overcome with the risk of unconstitutionality of the ordinance, this would make the Government more respsonsible and

attentive to the situations that require the issuance of such ordinances, avoiding abuse in their issuance.

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THE EUROPEAN PILLAR OF SOCIAL RIGHTS

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Abstract

The European Pillar of Social Rights is a high-profile political reaffirmation of twenty social rights and principles. Its implementation deploys the full EU governance arsenal: regulations, directives, recommendations, communications, new institutions, funding actions, and country-specific recommendations. As such, the static imagery evoked by a 'pillar' does not capture the true nature of the initiative, which is dynamic and fluid, wide-ranging, and permeating. An equation of the Pillar with the set of twenty rights and principles it proclaims similarly fails to capture its true significance, which lies in its programmatic nature. Several important measures have already been proposed as part of this new social action plan for Europe, some of which are close to adoption. This Article analyses the meaning of the Pillar and its potential significance, by considering its content sensu largo, and its broader context. It argues that even if the Pillar cannot address all the EU's social failings, it has put a surprising social spin on the Better Regulation Agenda that was threatening to erode the social acquis, it has rekindled the EU's relationship with the International Labour Organization and Council of Europe, and it helps rebalance the EU's output by reviving the use of the Treaty's Social Title.

Keywords: *Social rights, Social Europe, European Social Pillar*

INTRODUCTION

More than ever before, small communities and the European Citizens need guidance towards a world of continuous changes onto a more green and sustainable future, where the regulation of general framework of the social domain is in the centre of the European Unions s interest. This idea has received support and voice through the speeches made by the European Commission, as well as through the resolutions of the European Parliament and came to life in the Strategic Agenda of the European Union for the years 2019-2024 drafted by the European Council. The best way to achieve this is through the European Pillar of Social Rights, which offers real opportunities for job creation, which puts "skills, innovation and social protection on an equal footing.".

In the last decades, The European Union has developed a strong and rich acquis in the field of Social values, bur also a major progresses in what free movement of persons, living and working conditions, equality between women and men, health and safety at work, social protection, education and training are concerned.

Globalization, the digital revolution, dynamic working patterns and social and demographic developments offer new opportunities and new challenges and, as a consequence, labour markets and society are evolving rapidly while meber states are dealing with situations like significant inequalities in the health area, long term unemployment, youth unemployment or solidarity between generations, all on different scales. In order to remedy such situations, the European Union has stabilised its economy, significantly increased employment levels and lowered the unemployment rate, but the social consequences of the economic and financial crisis are still being felt deeply. The European Pillar of Social Rights is part of a broader effort to establish a more sustainable and inclusive growth model by improving Europe's competitiveness and making it more attractive for investment, creating jobs and promoting social cohesion.

„The aim of the European Pillar of Social Rights is to serve as a guide to achieving effective social and employment outcomes when addressing current and future challenges, aimed directly at meeting people's essential needs, and for ensuring better activation and enforcement of social rights".

The high standards that Europe and Europeans have in terms of working conditions and the social protection of workers have given shape to the idea of competitive sustainability, an idea that is 'at the heart of Europe's social market economy, which is about identifying a model of sustainable and inclusive growth that delivers the best of people and the planet'. This is the unique model on which Europe's social and economic resilience is based. The Union's ambition is to deliver on the promise of shared prosperity. This is also the promise of the European Pillar of Social Rights, proclaimed by the European Parliament, the Council and the Commission in 2017.

The COVID-19 pandemic has thrown the world into a sudden and deep recession. Despite the strong, coordinated and innovative response at national and EU levels, many uncertainties remain; in particular how long this crisis will last and how exactly it will affect our lives and economies. „We need to protect European citizens, their health and their jobs while ensuring fairness, resilience and macroeconomic stability across our Union. While the pandemic has hit all Member States, the scale of the impact as well as the pace and the strength of the recovery will vary significantly across regions". (COMMUNICATION FROM

THE COMMISSION, Annual Strategy for 2021 on Sustainable Growth, available on EUR-Lex - 52020DC0575 - EN - EUR-Lex (europa.eu).

The European Pillar of Social Rights sets aut 20 key principles and rights essential for fair and well-functioning labour markets and social protection systems. It reaffirms some of the rights already present in the Union acquis. It adds new principles addressing the issues raised by societal, technological and economic developments.

Climate change and environmental challenges, digitalisation, globalisation and demographic trends are rapidly changing our daily lives. Due to COVID-19, Europe has been exposed to further drastic changes that have affected our jobs, education, the economy, social protection systems and social life. In times characterized by profound transformations, such as those we are experiencing, our social structure is being put to the test.

The Pillar sets aut 20 key principles which represent the beacon guiding us towards a strong social Europe that is fair, inclusive and full of opportunity in the 21st century, divided as follows:

- Equal opportunities and acces to the labour market
- Fair working conditions
- Social protection and inclusion

In what Equal opportunities and acces to the labour market are concerned, the Pillar points out the following main aspects: Education, training and lifelong learning in the sense that everyone has the right to high-quality and inclusive education, training and lifelong learning in order to acquire and maintain skills that enable them to participate fully in society and manage successfully transitions in the labour market, gender equality, equal opportunities, meaning that, irrespective of gender, racial or ethnic origin, religion or belief, disability, age or sexual orientation, everyone has the right to equal treatment and opportunities in employment, social protection, education and access to goods and services available to the public. Equal opportunities for under-represented groups should be encouraged, as well as active support for employment. (European Pillar of Social Rights in 20 principles - https://ec.europa.eu/info/strategy/priorities-2019-2024). More than that, to the identification and management of gender-based discrimination "present in the current society (even if, in general, European states enjoy a high level of gender equality)" (D. Cîrmaciu – Increasing tax collection and reducing tax evasion - Imperatives of the fiscal sustainability strategy - budget - p. 140), can also contribute to the study and implementation of effective fiscal policies and strategies. Also here, we can mention principles from other branches of law

that interfere with the field we are discussing, especially the principle of legality of incriminations and sanctions, "a principle unanimously admitted in the criminal doctrine in Romania (L. R. Popoviciu- Criminal Law. General Part-p. 15). Gender-based violence is just one of the possible ramifications that show the connection between the two areas, and here we can point to gender-based violence as forms of violence: physical, sexual or psychological violence, domestic violence or sexual harassment.

As for the fair working conditions that the Pillar is talking about in part two, they refer in the main to safe and adaptable jobs both in terms of the type and duration of the employment relationship and ensuring the flexibility necessary for employers to adapt quickly to changes in the economic context, in accordance with legislation and collective agreements. The atypical times we are living in have imposed the promotion of innovative forms of work, in which to ensure good quality working conditions, but also occupational mobility. Workers' wages must ensure a decent living for them. „Adequate minimum wages must be ensured which can meet the needs of the worker and his family, taking into account the economic and social conditions prevailing at national level, while protecting access to employment and incentives to seek employment. In-work poverty must be prevented" (The 20 principles of the European Pillar of Social Rights- p. 20).

Information about employment conditions and protection in the event of dismissal of workers is another mention in the Pillar, so that workers have the right to be informed in writing when they are employed of their rights and obligations arising from the employment relationship, including in relation to probationary period. Before dismissal, workers have the right to be informed of the reasons for the dismissal and to be given a reasonable period of notice. Workers shall have the right of access to impartial dispute settlement mechanisms and, in the event of unjustified dismissal, shall have the right to an appeal, including adequate compensation.

In the content of the document describing the European Pillar of Social Rights, an important place is occupied by the social dialogue between the social partners, as well as the conclusion of collective agreements on issues relevant to them, while respecting their autonomy and the right to collective action. Where appropriate, agreements concluded between the social partners should be implemented at Union and Member State level.

Work-life balance is another item on the Pillar's agenda, so that 'parents and people with caring responsibilities have the right to adequate leave, flexible forms of work and the right of access to care services'. (The 20 principles of the European Pillar of Social Rights -p. 20). Women and men have an equal

right of access to special leave in order to fulfil their caring responsibilities and should be encouraged to use these leave in a balanced way.

Chapter III of the Pillar concerns social protection and inclusion, in which context it talks about the care to be provided to children, but also support for this category, with a predilection in the sense that children have the right to protection against poverty, to early childhood education and care services. Social protection includes provisions relating to adequate unemployment benefits of reasonable duration, in accordance with the contributions paid and the national eligibility rules. Old-age benefits and workers' pensions must be proportionate to the contributions paid and ensure an adequate income for them. Old-age benefits and workers' pensions must be proportionate to the contributions paid and ensure an adequate income for them. Men and women must have equal opportunities to acquire pension rights. A dignified life also means the right to affordable and good quality healthcare, but also the provision of social housing for the homeless, along with easy access to essential services such as water, sanitation, energy, transport, financial services and digital communications.

Due to the shortness oh this presentation of the essential points of the European Pillar of Social Rights, we must see its efficiency, especially because not only Euro area member states must implement it, but also the other ones, which is designed to to lead to real convergence at European Union level, the rights and principles established by the Pillar and must be implemented at the level of the European Union and the Member States in full respect of their autonomy and competences and the principle of subsidiarity.

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SAFE TRAFFIC, REFLECTED IN THE DAILY NEWSPAPER *CRISANA* (2021)

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Abstract

Accidents and informative-preventive materials have always had a special echo in the media, whether we refer to the written press, radio, television or online journalism, arousing the interest of the public eager for fresh and exciting information.

This article aims to observe the current importance of safe traffic in a local newspaper during 2021 (until the time of writing this material) and to identify the most interesting news and stories on this topic.

The researched materials could be divided into several categories, due to their specificity: information, prevention, accidents and materials related to traffic safety.

Keywords: *road traffic, safety, accidents, Crisana, news*

INTRODUCTION

Safe traffic was and remains a topical issue in the press, a fact observed in the numbers of the daily newspaper *Crisana.* Accidents are events that meet the criterion of information, because they interest as many readers as possible. These media materials are part of the event news category, along with fires, natural disasters, scandals, crimes, arrests, etc. They can of "have a fast impact, strong, but only for a short duration". (Coman M., 2009)

Beyond reflecting these events in the print media, we must also consider the legal framework for the safe movement of citizens. Law number 265/2008 on road safety management on road infrastructure, on road safety audit aims to "ensure and increase traffic safety on public roads", "to prevent loss of life and injury to bodily integrity of persons". The same law seeks to "avoid the occurrence of material damage as a result of traffic accidents" and contains

provisions on "acquiring and terminating the status of road safety auditor/ inspector, road safety impact assessment, road safety audit and inspections.

The materials on safe traffic identified by this research in 2021 in the daily *Crisana* are varied, and can be classified into informative materials on restrictions, preventive materials, accidents and materials on other topics, which partially affect the issue of traffic safety. We will also focus on a few examples from each category.

II. INFORMATIVE MATERIALS

A number of texts are information sent by the police, law enforcement, local institutions to the newspaper in the form of press releases. Many of these are not signed by journalists.

In cadrul programului de bugetare participativa - Treceri de pietoni iluminate inteligent (*Within the participatory budgeting program - Intelligently lit pedestrian crossings)* is a material from July 21st, 2021 which shows that "the city of Oradea will have intelligent illuminated pedestrian crossings, for traffic safety". Other news on the same topic are the *Inelul rutier metropolitan - Se analizeaza variante de traseu (Metropolitan Road Ring - Route variants are analyzed*, October 13th), *Modernizarea zonei centrale a municipiului Beius - Au inceput lucrarile (Modernization of the central area of Beius - Work has begun* - October 11th, 2021), *Finis – Podul Catanelor, intre util si periculos* (Finis-Catanelor Bridge, *between useful and dangerous* (Dan Ispas) from August 4th, 2021, *Comisia tehnica - Restrictionari ale traficului in Oradea (Technical Commission - Traffic Restrictions in Oradea* - September 16th, 2021), *Parcarea etajata de la fosta baza Vointa, finalizata - Acces gratuit timp de trei luni (Multi-storey car park at the former Vointa base, completed - Free access for three months* - September 16th, 2021).

Restrictii pentru autocamioane pe teritoriul Ungariei (*Restrictions for trucks on the territory of Hungary),* from October 29th sends the message of the Hungarian border authorities to the Territorial Inspectorates of the Border Police Oradea and Sighetul Marmatiei "through the Artand-Bors Contact Point, on the territory of Hungary, will be restricted greater than 7,5 tonnes."

On November 3rd, a CNAIR press release is published, called *Transport agabaritic inspre Bors* (*Oversized Transport to Bors),* about a vehicle that "transports a transformer. The maximum width of the vehicle shall be 3,5 m, and the speed shall be adapted to the traffic conditions."

III. ARTICLE ON PREVENTIVE TOPICS

The relationship of the police or other institutions with the press is a strong link between civil society and it, through a permanent communication, made through press releases or interviews, which helps the activity of road accident prevention.

Joi, in Parcul Libertatii - Atelier de educatie pentru siguranta (Thursday, in Liberty Park - Safety Education Workshop, Ionas Loredana) is a material that presents safety education workshops organized by prevention police officers from the Bihor County Police Inspectorate for children, during the summer holidays, in Liberty Park in Oradea. Within them "the topic of road safety will be addressed through traffic simulations and stories accompanied by role-playing games".

In July 2022, more than 220 police officers were involved in an action to "combat indiscipline among all participants in road traffic and to maintain a climate of public order and peace among local communities" according to the article *Politistii au facut perchezitii, au confiscat o arma si au retinut mai multe persoane - Razie in tot judetul (Police searched, confiscated a weapon and detained several people - Raid throughout the county* -Ungur, Alina).

Actions within the accident prevention campaigns appear in the pages of *Crisana*, as well as *Apa, cafea si recomandari preventive oferite soferilor care au condus mii de kilometri - Actiuni preventive in PTF Bors (Water, coffee and preventive recommendations offered to drivers who drove thousands of kilometers - Preventive actions in PTF Bors)*, meant "to prevent victimization by accidents caused by driving fatigue".

The safety of citizens in traffic is the central topic of the news *Politistii continua controalele anti-Covid in Bihor - Zeci de amenzi pentru nepurtarea mastii (Police continue anti-Covid checks in Bihor - Dozens of fines for not wearing a mask),* specifying verification of compliance with anti-Covid prevention measures in traffic and means of transport, by citizens of Oradea and fines taken by those who did not comply with "legal provisions and health protection measures, in order to prevent the spread of Covid-19 in Bihor County and in order to inform economic operators and citizens about the new legislative changes regarding the introduction of the Covid Green Certificate." (Ungur Alina, November 7th)

In the article on the social sector, *In Cetatea Oradea - Lectii de siguranta in trafic pentru elevi si soferi (In Oradea Fortress - Traffic safety lessons for students and drivers),* from September 2nd, 2021, the topic is preventive education, being about the resumption of a road safety laboratory, established in order to "reduce road accidents and to save, in the end, as

many lives as possible". The anti-Covid measures led to the cessation of its activity, and "if the sanitary norms imposed by the pandemic will allow, the students will resume, from this fall, the road education activities in the laboratory from Oradea Fortress".

IV. EVENTS: ACCIDENTS OR THE TRAFFIC DANGERS

The media is primarily a means of information, but also of educating the public. The phenomenon of traffic accidents is always a sector sought by readers in the pages of newspapers, on their number, the causes that led to their occurrence and their consequences, often with totally unpleasant long-term consequences.

We list the materials *Doua persoane, intre care un copil, au murit - Accident mortal la iesirea din Biharia* (*Two people, including a child, died - Fatal accident at the exit from Biharia* July 25th, 2021), *Oradea-Biharia - Un nou accident mortal* (*Oradea-Biharia - A new fatal accident* July 29th, 2021), *Accident pe DN1* (*Accident on DN1*, November 5th, 2021) - in Tileagd, *O femeie și-a pierdut viața. Traficul este blocat - Accident mortal pe DN79* (*A woman lost her life. Traffic is blocked - Fatal accident on DN79* October 8th, 2021), *DN 76 in Dusesti - Autocar cu 20 de pasageri izbit in plin* (DN 76 in Dusesti - Bus with 20 passengers hit in full (October 6th, 2021).

V. MATERIALS ON TOPICS RELATED TO TRAFFIC SAFETY

The media makes public the regulations of road legislation on traffic on public roads, changes in legislation in force in pedestrian indiscipline, indiscipline of drivers of animal-drawn vehicles, indiscipline of drivers of mopeds and motorcycles, non-compliance with traffic rules by drivers. auto. The information and prevention campaigns organized by the Police and the media are joined by various articles related to the topic of traffic safety.

One such text is *Critical Mass 2021 - Biciclistii vor respect in trafic! (Critical Mass 2021 - Cyclists will respect traffic!* of September 19th, 2021). On November 8th, two materials on traffic safety appear. On the one hand, the *Calendar* section briefly mentions the celebration of the Vienna Convention on Road Signs and Signals at that time – "1968: The Vienna Convention on Road Traffic is adopted". On the same day, the journalist Vasilica Achim signs the *Cluj-Napoca. Elevi si studenti oradeni in Gala Academiei - Premiati pentru inovatie (Cluj-Napoca relationship. Oradea pupils and students in the Academy Gala - Awarded for innovation).* Even if the report describes how "two teams of pupils and students from Oradea were recently awarded special prizes, during the Academy Gala Discover your passion in IT (DpIT)

2021, for their innovative applications", a reference is made and to another winning project also from Oradea, but from 2020, regarding "an application created in order to reduce the number of traffic accidents".

This is also the material from November 9th, 2021, on the topic of "pedestrian safety". *Leaga Parcul Libertatii de Aleea Strandului - A fost finalizata noua promenada (Connect Libertatii Park with Strandului Alley - The new promenade has been completed)* coming to meet those who want to recreate, to enjoy the view and the peace that the proximity of Crisul Repede offers, thus avoiding road traffic. "The new pedestrian alley can also be used by cyclists who want to avoid the Magherul Passage. For the safety of pedestrians, a metal protection railing was installed along the entire length of the alley", says Oradea City Hall.

The news of November 11th, 2021, *Pe traseul drumului expres Arad - Oradea - Studii si lucrari pregatitoare* (*On the route of the express road Arad - Oradea - Studies and preparatory works)* presents the important stages regarding traffic safety, which must be done for the construction of the express road Arad - Oradea. Another news, *In perioada 17 noiembrie - 6 decembrie - Circulatie inchisa pe str. Sf. Apostol Andrei (Between November 17 and December 6 - Closed traffic on Sf. Apostol Andrei Street)* takes over a press release sent by the "municipality of Oradea" to Crișana, briefly announcing the citizens that due to the works being done in the area, traffic will be deviated.

Also in this category we mention other articles: *Amenzi si permise suspendate (Fines and suspended permits* October 15th) and *Investitie estimata la 10,9 milioane lei pe strada Iosif Vulcan - Licitatie pentru parcarea etajata* (*Investment estimated at 10.9 million lei on Iosif Vulcan Street - Auction for multi-storey parking* - September 15th, 2021).

Some materials reflect the concern for the increased safe movement of citizens, presenting various urban projects that are carried out locally for this purpose. One such informative material is the one from November 3rd, 2021 - *Pasajul subteran din dreptul Pietei Cetate - Se lucreaza la devierea conductelor* (*The underground passage next to the Citadel Square - Works on diverting pipes)*, which explains that through this "investment we aim to streamline road traffic to reduce pollution, increase safety and attractiveness of public transport in the city." This material has a continuation in the issue of November 19th, 2021, entitled *Pasajul din zona Pietii Cetate - A inceput forarea primilor piloti (The Passage in the Citadel Square area - The drilling of the first pilots has started*) on the construction of a new road crossing, which "aims to streamline road traffic in order to reduce pollution and increase safety, support public transport by reducing

the travel times of buses and trams, and increase the attractiveness of public transport in Oradea."

CONCLUSIONS

Observing the materials from the daily *Crisana* during the current year, it is clear that the issue of safe traffic is a topical one, of major importance for the newspaper's public, due to the frequency of these texts.

Most of the texts on safe traffic are of the preventive type - campaigns to combat and prevent traffic lights, difficult traffic, dangerous situations for citizens involved in traffic.

Most of the texts are treated remotely, they arrive in the editorial office in the form of press releases sent by central institutions or by organizations. Accidents are also common in the newspaper, it is felt that the tone is more alert, a sign that the reporter was on the ground at the time of documentation, they have a more generous space in the pages of the newspaper than informative or preventive materials.

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THE EUROPEAN ORDER FOR PAYMENT – AN EFFECTIVE MECHANISM FOR RECOVERING CROSS-BORDER CLAIMS

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Abstract

The rapid and efficient recovery of certain liquid and due claims is a goal assumed by the Member States of the European Union, having a special importance for economic operators in the European Union, as late payments are a major cause of insolvency, which increasingly threatens small and middle sized enterprises.

Thus, the European Parliament adopted Regulation (EC) no. 1896/2006 establishing a procedure for issuing a joint European order for payment, as well as Regulation (EC) no. 861/2007 establishing a common European debt procedure, the purpose of which is to simplify, speed up and reduce the costs of settling cross-border disputes concerning uncontested pecuniary claims by issuing a European order for payment and ensuring the free movement of European order for payments, legal transactions and documents in all Member States by setting minimum standards the observance of which makes any intermediate procedure in the Member State of enforcement unnecessary before recognition and enforcement.

Keywords: *European civil procedure, European order for payment, cross-border litigation, debt recovery, European order for payment*

INTRODUCTION

The Tampere European Council (1999) called on the EU Council and the Commission to adopt a program of measures on the initiation of a European Enforcement Order, but also on those aspects of procedural law for which minimum standards are considered necessary to ensure the implementation of the principle of mutual recognition, while observing the fundamental principles enshrined in the content of the EU Treaties (point 37 of the proposed Program of Measures, published in January 2001). It was appreciated that the principle of

mutual recognition of judicial and extrajudicial decisions is the "keystone" of international judicial cooperation (Tampere European Council Meeting, Oct. 1999).

The Lisbon Treaty, on the segment of judicial cooperation in criminal matters, in art. 81 TFEU states that the Union develops judicial cooperation in civil matters with cross-border implications, based on the principle of mutual recognition of judicial and extrajudicial decisions (M. Pătrăuș, Drept Instituțional European, 2021, p. 145). At the same time, the Treaty provides that the cooperation may include the adoption of measures to approximate the laws, regulations and administrative provisions of the Member States.

Although there was previously a possibility in the TEC to adopt measures to harmonize the civil procedures of the Member States, this is strengthened by the current provision of the Treaty and is based on the need for minimum harmonization to facilitate mutual recognition of judgments.

Mutual recognition of judicial decisions in civil matters, a fundamental concept in the field of judicial cooperation, helps overcome the difficulties generated by the diversity of judicial systems in the European space (http://ec.europa.eu. justice/recognito-decision/index_en.htm).

In the context of the growing development of national and international trade relations, it has been concluded at European level that it is necessary and useful for European citizens to find a legislative solution, based on the principle of mutual trust, through which to achieve as soon as possible, the recovery of certain, liquid and due claims, so that, for this purpose, numerous agreements have been concluded between the Member States of the European Union, in order to facilitate the development of contractual relations between different parties, which are part of different national states, considering at European level the adoption of a single instrument in this regard, the European order for payment.

I. THE EUROPEAN ORDER FOR PAYMENT

I.1 European regulations

The European order for payment is an instrument of judicial cooperation in civil matters, based on the principle of mutual recognition of judgments and lies in a firm, accelerated, simplified and efficient mechanism capable of facilitating the recovery of claims arising from trade relations between individuals, corporate bodies of the various European member states of the European Union.

This procedure is regulated at European level by ***EC Regulation no. 1896 of 12 December 2006 on the establishment of a European order for payment procedure.***

The purpose of a European legislative solution established by this Regulation is to simplify, speed up and reduce procedural costs in cross-border disputes concerning uncontested pecuniary claims, by establishing a European single order for payment procedure, and to ensure the freedom of movement of European order for payments within all Member States by setting minimum standards by which no

intermediate procedure is required in the Member State of enforcement before recognition and enforcement.

By adopting Regulation no. 1896/2006, the first real European civil procedure was created at European level - the European order for payment procedure (http://ec.europa.eu/justice/civil/).

The procedure was preceded by ***Regulation No. 805/2004 on the European Enforcement Order (TEE)***, main achievement of which was the elimination of the *exequatur* for the execution of judgments handed down in another Member State of the European Union in certain categories of civil cases, subject to compliance with certain procedural guarantees, which must be confirmed by a competent authority by a pre-established certificate.

Subsequently, by ***EC Regulation no. 1896 of 12 December 2006 on the establishment of a European order for payment procedure***, a unitary European order for payment procedure was established for the recovery of certain, liquid and due claims resulting from trade relations between nationals of Member States, between natural persons, legal persons, professionals or not, on the date on which the application for a European order for payment is submitted.

The scope of the Regulation is that it applies in civil and commercial matters and whatever the nature of the court (in the case of judgments, court settlements and authentic instruments concerning uncontested claims). It does not apply to:

(a) the condition and capacity of natural persons, matrimonial regimes, wills and successions;
(b) bankruptcies, proceedings for the dissolution of companies or other insolvent legal persons, agreements and other similar proceedings;
(c) social security;
(d) arbitration.

To initiate the procedure, form A of Annex no. 1 to the Regulation has to be filled in with full details of the parties, as well as the nature and amount of the claim (these forms are available to citizens of the European Union, and not only, on the website https://e-justice.europa.eu in all languages. By accessing this page, any interested person can also obtain information on the courts that can issue a European order for payment and to which the application form should be submitted).

Thus, the applicant's application is typed and contains the following elements:

a) *the name and address of the parties and, as the case may be, of their representatives, as well as of the notified court;*
b) *the amount of the claim, in particular the main and, where applicable, interest, contractual penalties and costs;*
c) *where interest on the claim is charged, the interest rate and the period for which such interest is charged, unless legal interest is automatically added to the main debit under the law of the home Member State;*
d) *the cause of action, including the description of the circumstances invoked as the basis of the claim and, as the case may be, of the required interest;*

e) *a description of the evidence in support of the claim;*
f) *the basis of the competence;*
g) *the cross-border nature of the dispute within the meaning of Article 3 of the Regulation.*

In the application, the claimant must state that to the best of their knowledge the information provided is accurate and acknowledge that any intentional false statement risks attracting the penalties provided for by the law of the home Member State. It is important to note that the introduction of a European order for payment entails the payment of any costs incurred.

I.2 European and national jurisprudence

The request for a order for payment shall be lodged with the competent court of the State of origin. By *Decision no. 693 of February 27, 2015 pronounced by the Second Civil Section of the High Court of Cassation and Justice having as object a negative conflict of competence* - the High Court of Cassation and Justice ruled that, if a legal person of Romanian nationality formulated a request for the issuance of a European order for payment directed against a natural person domiciled in Romania, for a claim referring to a loan agreement, from this document not resulting that the defendant-debtor natural person would have concluded the respective contract for a use that could be considered as related to their professional activity, the provisions of art. 6 para. (2) of Regulation E.C. no. 1896/2006 which establish that, in such a situation, the jurisdiction to resolve the request for the issuance of the European order for payment belongs to the court of the Member State of the European Union in which the defendant-debtor resides.

By the Sentence 124/2016 of the Bihor Tribunal, the unpublished Commercial and Administrative Litigation Section having as object a European order for payment, it was held that, by the request registered on role of the Aleșd Court, the plaintiff H.-Z. A.S. SP. ZO.O requested in contradiction with SC R. SA the issuance of the European order for payment for the amount of 62,739.20 Euros, an amount to be increased with interest, contractual penalties and court costs. The application completed according to the form -A of the EC Regulation no. 1896/2006 shows that the dispute has a cross-border character and concerns a certain, liquid and due claim, which arose on the basis of a sale-purchase contract concluded with the defendant, which has the quality of consumer and domicile on the territory of Romania and which has not fulfilled their obligation to pay for the delivered goods. By the pronounced sentence, the Aleșd Court admitted the exception of the material incompetence of the Court and ordered the decline of the competence to settle the case having as object a European order for payment in favor of the Bihor Court.

In order to rule this decision, it was noted that from a material point of view, the code of civil procedure is the one that regulates the competences of the courts and distinguishes between the competence that belongs to the courts and the one that belongs to the courts from a material point of view in commercial matters. Thus, according to art. 95 paragraph 1 letter a of the Code of Civil Procedure, the courts judge in the first instance all the claims that are not given by law in the competence

of other courts. As in the present case it was a commercial claim whose object was in the amount of over 200,000 lei, the Aleşd Court, admitted the exception and declined the material competence in favor of the Bihor Court, considering that the value of the claim falls within the court's resolution. The case was registered with the Bihor Court, Commercial and Administrative Litigation Section. In accordance with the provisions of Article 8 of EC Regulation l896 / 2006, the Court proceeded to verify that the conditions laid down in Articles 2, 3, 4, 6 and 7 on the basis of the elements indicated in the application for order for payment and, finding that the elements of the application are met, given that the application is issued according to Annex I form A of EC Regulation 1896/2006 at art.7, the dispute being of a commercial nature and having a cross-border character, the court proceeded to issue the European order for payment, using the form E of Annex V, for the total amount of 65,739.20 Euros, of which the amount of 62,739.20 Euros representing the main debit and 3000 euro expenses, as well as the payment of 8% interest calculated until the date of actual payment. Pursuant to Article 12 (3) of the Rules of Procedure, the defendant was informed of the possibility of paying the applicant the amount indicated in the order for payment or of opposing the order for payment by objecting to the court of origin, the European order for payment being communicated to the defendant together with the request made by the creditor and the form of opposition to the European order for payment - form F - annex 6.

On l6.09.2010 within 30 days from the date of communication of the European order for payment, the defendant filed an opposition to the European order for payment, using the form provided in Annex 6. According to the provisions of Article 17 "if an opposition has been filed within the period laid down in Article 16 (2), the proceedings shall continue before the competent courts of the home Member State in accordance with the rules of civil procedure of common law, unless the applicant has expressly requested that the proceedings be terminated in that case. The transition to ordinary civil proceedings within the meaning of paragraph 1 shall be governed by the law of the home Member State." In the present case, it was apparent from the examination of the application for payment that the applicant had not expressly requested that the proceedings be terminated in the event of opposition to the order for payment. As in the Romanian legal system, in the situation of rejecting the request for order for payment due to the non-fulfillment of the conditions regarding the certainty, liquidity and enforceability of the payment obligation, by contesting the claim, a new lawsuit must be filed by common law, which must be either in accordance with the provisions of art. 194 of the Code of Civil Procedure, and having regard to the main purpose of the Regulation in simplifying, speeding up and reducing procedural costs in cross-border cases concerning uncontested pecuniary claims, the Court of First Instance annulled the European order for payment, following that the procedure continues in the competent courts, in this case the Bihor Court, at the request of the applicant.

In the Romanian legislation the competence is regulated in the content of art. 94-96 Cpc.

In the judgment of 10 March 2016 of the Court of Justice of the European Union (Second Chamber) in Case C 94/14 in Flight Refund Ltd v Deutsche Lufthansa AG, the Court stated that: *"EU law must be interpreted as meaning that, in circumstances where a court is seised of a procedure, such as that in the main proceedings, concerning the designation of the court of the Member State of origin of a European order for payment having territorial jurisdiction and examines, in those circumstances, the international jurisdiction of the courts of that Member State to hear the contentious proceedings concerning the debt which gave rise to such an order for payment against which the defendant has entered a statement of opposition within the time-limit prescribed for that purpose:*

– since EC Regulation No 1896/2006 does not provide any indications as to the powers and obligations of that court, those procedural questions continue, pursuant to Article 26 of that regulation, to be governed by the national law of that Member State;

– Regulation No 44/2001 requires the question of the international jurisdiction of the courts of the Member State of origin of the European order for payment to be decided by application of procedural rules which enable the effectiveness of the provisions of that regulation and the rights of the defence to be guaranteed, whether it is the referring court or a court which the referring court designates as the court having territorial and substantive jurisdiction to hear a claim such as that at issue in the main proceedings under the ordinary civil procedure which rules on that question;

- if a court such as the referring court rules on the international jurisdiction of the courts of the Member State of origin of the European order for payment and finds that there is such jurisdiction in the light of the criteria set out in Regulation No 44/2001, that regulation and Regulation No 1896/2006 require such a court to interpret national law in such a way that it permits it to identify or designate a court having territorial or substantive jurisdiction to hear that procedure, and,

– if a court such as the referring court finds that there is no such international jurisdiction, that court is not required of its own motion to review that order for payment by analogy with Article 20 of Regulation No 1896/2006."

The application shall be submitted on paper or by any other means of communication accepted by the home Member State and which can be used by the court of origin, including electronically.

The court notified with an application for a European order for payment shall, as soon as possible, examine the applicant's claim and, on the basis of the application form, whether the conditions set out in Articles 2, 3, 4, 6 and 7 of the Regulation are met and the claim appears to be founded. This examination can also be performed using an automated procedure - as is the case for example in Belgium, the Netherlands, the United Kingdom.

If the application does not meet the conditions laid down in the Regulation, the court shall give the applicant the opportunity to complete or rectify the application, unless it is manifestly unfounded or inadmissible. For this purpose, the court uses the form B in Annex II to the Regulation. Where the court requests the applicant to

complete or rectify the application, it shall set a time limit which it considers appropriate in the light of the specific circumstances of the dispute. The court may extend this period if it deems it useful.

If the application meets only part of the conditions of the Regulation, the court shall inform the applicant thereof using the form C in Annex III to the Regulation. The claimant is invited to accept or reject a proposal for a European partial order for payment for the amount determined by the court and is informed of the consequences of his decision. The claimant can respond by sending back the type C form that the court sent to them within the term established by it. If the claimant accepts the court's proposal, the court issues a European order for payment, in accordance with Article 12 of the Regulation, for the part of the application which has been accepted by the claimant.

If the claimant does not send the answer within the time limit set by the court or rejects its proposal, the court **rejects the European order for payment in its entirety**.

It is important to note that the rejection of the application does not prevent the claimant from recovering his claim by a new European order for payment or by any other procedure provided for by the law of a Member State, if they do so within the time limit provided by law, in order not to be opposed by the prescription of the material right to action, as it is regulated in the state of origin.

If the conditions set out in the Regulation are fully met, the court shall issue the European order for payment as soon as possible and in principle within thirty days from the submission of the application, using the form E in Annex V to the Regulation.

The European order for payment shall be issued together with a copy of the application form. It does not contain the information provided by the claimant in points 1 and 2 of the form A attached to the Regulation.

In the European order for payment, the defendant is informed of the possibility:

a) to pay to the claimant the amount which is mentioned in the order for payment; or
b) to oppose the order for payment by opposing the court of origin, an opposition which must be sent within thirty days from the date on which the summons was communicated or notified to them. The defendant is also informed that:
   - the summons was issued only on the basis of the information provided by the claimant and was not verified by the court;
   - the summons shall become enforceable unless there has been an opposition in court, in accordance with Article 16 of the Regulation;
   - where the opposition proceedings have been brought before the competent courts of the home Member State in accordance with the rules of civil procedure of common law, unless the claimant has expressly requested that the proceedings be terminated in that case.

The court shall ensure that the order for payment is communicated or notified to the defendant in accordance with national law, in accordance with the procedures laid down in the minimum standards laid down.

In accordance with the case law of the CJEU (C 119/13 and C 120/13) revealed in several cases, the Court has consistently stated that: "Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 establishing a European order for payment procedure should be interpreted as meaning that the procedures provided for in Articles 16 to 20 of this Regulation are not applicable ***where a European order for payment has not been communicated or notified in accordance with the minimum rules laid down in Articles 13 to 15 of that Regulation.*** Where such an irregularity is found only after the declaration of enforceability of a European order for payment, the defendant must have the opportunity to denounce that irregularity, which must lead, if duly substantiated, to the invalidity of that declaration of the executory force". The Court also stated in its judgment of 22 October 2015 in the Court of Justice of the European Union (Fourth Chamber), in Case C 245/14, in *Thomas Cook Belgium NV v. Thurner Hotel GmbH*: "**Article 20(2) of Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, as amended by Commission Regulation (EU) No 936/2012 of 4 October 2012, must be interpreted as precluding, in circumstances such as those at issue in the main proceedings, a defendant on whom a European order for payment has been served in accordance with that regulation from being entitled to apply for a review of that order by claiming that the court of origin incorrectly held that it had jurisdiction on the basis of allegedly false information provided by the claimant in the application form."**

Against the European order for payment, the defendant may file within 30 days from the date of communication or notification of the European order for payment, an opposition, application for opposition which is registered in the court of origin using the form F of Annex VI to the Regulation transmitted together with the European order for payment.

The opposition must be sent within thirty days from the date of communication or notification of the summons to the defendant, this being the express term provided for the exercise of the opposition. The defendant states in opposition that he/she disputes the claim without having to state the reasons for that appeal.

If the defendant has objected, the proceedings shall continue before the competent courts of the home Member State in accordance with the rules of civil procedure of common law, unless the applicant has expressly requested that the proceedings be terminated in that case.

The procedure continues in accordance with the rules:

a) the European small claims procedure, provided for in Regulation (EC) no. 861/2007, if applicable; or
b) any appropriate *national civil procedure.*

If the claimant has not indicated which of the procedures he/she requests to be applied to his/her claim in the following procedure if the defendant objects or if he/she has requested the application of the European Small Claims Procedure provided for in Regulation (EC) No. 861/2007, a claim which does not fall within the scope of that Regulation shall be transferred to the appropriate national civil procedure, unless the applicant has expressly requested that no such transfer be made.

It should be noted, however, that opposition to a request for a European order for payment is not an appeal. The appeal that can be exercised against the decision by which the opposition formulated by the defendant to the European order for payment was wrongly rejected is the request for re-examination regulated by art. 20 para. (2) of Regulation (EC) no. 1896/2006 establishing a European order for payment procedure, and not the appeal. By Decision no. 527 of 13 February 2014 of the Civil Section of the Bihor Court, it was established that the appeal that can be exercised against the decision by which the opposition formulated by the defendant to the European order for payment was wrongly rejected is the request for re-examination regulated by art. 20 para. (2) of Regulation (EC) no. 1896/2006 establishing a European order for payment procedure, and not the appeal.

If no opposition has been made to the court of origin, the court of origin shall immediately declare that the European order for payment is enforceable, using the form G in Annex VIL. The court verifies the date on which the payment order was communicated or notified.

A European order for payment which has become enforceable in the Member State of origin shall be recognized and enforced in the other Member States without a declaration of enforceability being required and without its recognition being open to challenge. The advantage of this procedure is that, unlike a court decision issued on the basis of common law, which must be recognized (by the executor procedure) this procedure does not need to be subject to the executor, which makes the actual settlement of the dispute to be greatly shortened.

The defendant has the right to request a re-examination of the European order for payment before the competent court of the home Member State if:

a) *the order for payment has not been communicated or notified in accordance with one of the procedures provided for in Article 14 of the Regulation; and*
b) *the communication or notification did not intervene in due time to enable him/her to prepare his/her defense, without this being attributable to him/her, or*
c) *the defendant has been prevented from contesting his/her claim for force majeure or due to extraordinary circumstances, without this being attributable to him/her, provided that, in both cases, he/she* ***acts promptly.***

After the expiry of the time limit laid down in Article 16 (2) of the Regulation, the defendant shall also have the right to seek a review of the European order for payment before the competent court of the home Member State where the payment

order was manifestly erroneously issued, taking into account the requirements set out in this Regulation or taking into account other exceptional circumstances.

If the defendant does not file an opposition, the European order for payment **automatically becomes enforceable**. *However, failure to comply with the time-limit for objecting to a European order for payment on account of the guilty conduct of the defendant's representative does not justify a review of that order for payment, since such non-compliance does not fall within exceptional circumstances within the meaning of Article 20 (1) para. (1) letter (b) of Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 establishing a European order for payment procedure, even in extraordinary circumstances, within the meaning of paragraph (2) of the same Article* (C-324/12,). According to the jurisprudence of the CJEU (C-144/12) *„Article 6 of Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, read in conjunction with Article 17 thereof, must be interpreted as meaning that a statement of opposition to a European order for payment that does not contain any challenge to the jurisdiction of the court of the Member State of origin cannot be regarded as constituting the entering of an appearance within the meaning of Article 24 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, and the fact that the defendant has, in the statement of opposition lodged, put forward arguments relating to the substance of the case is irrelevant in that regard".*

If the court rejects the defendant's request for re-examination on the grounds that none of the conditions for re-examination is met, the European order for payment remains valid. If the court decides that the review is justified on the grounds that one of the conditions for the review is met, the European order for payment is null and void.

Once it has become enforceable, a copy of the European order for payment and, if necessary, a translation thereof must be sent to the enforcement authorities of the Member State in which it is to be enforced. The enforcement shall be carried out in accordance with the national rules and procedures of the Member State in which the enforcement takes place. In order for the other party (defendant or debtor) to comply with the judgment rendered against it (for example, to make a payment), the creditor will have to appeal to the authorities responsible for enforcing the judgments. Only they have the power to compel the debtor to pay, using the coercive force of the home state if necessary. Under the Brussels I Regulation (reformation) governing the recognition and enforcement of judgments in cross-border cases, if there is an enforceable judgment handed down in a Member State of the Union, the creditor may refer to the enforcement authorities of another Member State - for example, the state in which the debtor has assets - without the need for any intermediate procedure (the regulation cancels the "exequatur" procedure).

CONCLUSIONS

In general, the procedure for the execution of the European order for payment seeks the recovery of sums of money, but this may also concern the fulfillment of other types of obligations (obligation to do or not to do, such as delivery of goods, completion of works or non-infringement a property) and is intended to facilitate the recovery of certain liquid and due claims in a relatively short time.

Various European procedures (such as the European order for payment, the European Small Claims Procedure and the European Enforcement Order) can be used in cross-border civil cases, but for all this, the judgment must be enforced in accordance with national rules and procedures in the state in which enforcement takes place by the authorities carrying them out (courts, debt collection agencies and bailiffs) (usually the place where the debtor or his/her assets are located), these procedures being laid down by the national law of the Member State in which the enforcement is expected.

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THE IMPACT OF THE PANDEMIC ON THE FREE MOVEMENT OF PEOPLE IN THE EUROPEAN SPACE

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Abstract

This paper highlights the impact of the pandemic in the European space, which involves the protection measures against the SARS-COV-2 virus, its harmful and destructive effects manifested on the population, while highlighting the operational activities of the states, regarding the protection of citizens' health. These actions of the states, with regard to the protection measures against the pandemic, incontestably imply a "passage" in the online sphere of all the processes that ensure the normal conduct of society, restricting certain rights and freedoms of citizens, including the right to free movement, this being possible only on the basis of a health certificate, recognized at European level. So this restriction of movement across borders is a safe way to prevent the population from becoming infected with the killer virus.

Keywords: *European citizenship, free movement of persons, restriction, health certificate, SARS-COV-2 virus*

INTRODUCTION

According to the general theme of the conference, the society is facing a drastic deficiency in the situation of the share capital, in this period of the pandemic. This crisis stems from the complete cessation of everything that means activities that maintain the state economy, of the blocking of tourism, but also of the total lack of activities in the labor system. This creates a pressure on the economic and social relationship of the Union, in a context in which, at the level of all countries, there has been a blockage for a fixed period of time on the movement of citizens from one State to another. Therefore, taking a synthesis look at the current European situation, it is easily observable an absolutely disastrous scenario of the economies of the states, this being a strong reflection of the impact of the pandemic on the free movement of people in the European area.

For almost 2 years, we have been facing a special situation, worldwide, which,certainly, will be extinguished extremely difficult. Of course, this COVID-19 pandemic (SARS-COV-2 virus) broke out at the end of 2019, more precisely on December 1, 2019, when the first case of coronavirus was detected in wuhan city,

China (https://ro.wikipedia.org/wiki/Pandemia_de_COVID-19). This over-infection negatively influenced the economic coefficient, due to the restriction of free movement. Ensuring a fair balance between the interests of society and protecting the lives of European citizens has become the great challenge of the current times and of the alleged joint efforts on the part of the governments of the Member States, but also the firm reaction of the Institutions of The European Union (M. Pătrăuș*, 2020, p.124).

At European Union level, the European Commission has implemented a proposal for a recommendation, which certainly guarantees a restriction of free movement in the context of the pandemic (https://ec.europa.eu/commission/presscorner/detail/ro/ip_20_1555?fbclid=IwAR1xZnV6XtGeDcN_4r8pVAV2TUrGOnTwGXo-JUgR0b-uIvIOqulxYGv91uM). The Commission has structured its proposal on the basis of 4 main focus areas, where Member States are closely working together. The Commission's actions are: the application by the Member States of common criteria and thresholds, when deciding whether or not to impose travel restrictions; the establishment of common criteria on the basis of a commonly agreed colour code; establishing a common framework for measures applicable to travellers coming from high-risk areas; providing clear and timely information to the public on possible restrictions imposed (Ibid.).In this period troubled by the effects of the pandemic, EU Member States are showing solidarity, helping each other with sanitary materials, or even by treating patients in the neighbouring country.

A notable example is the transport by plane from Bucharest to Oradea, and from Oradea to the level of specialized medical centers in Hungary, severely affected by the SARS-COV-2 virus (https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response_ro). It should be noted that the aircraft intended for the transport of infected persons belongs to the Romanian Air Force, being configured to exercise medical missions, having as effect a strong link between the health system and the Ministry of National Defense (https://www.digi24.ro/stiri/actualitate/opt-pacienti-covid-in-stare-grava-transportati-cu-o-avioane-militare-de-la-bucuresti-la-timisoara-si-oradea-1701167).

The European Union has taken the decision to adopt a therapeutic strategy by which it signs a purchase contract with the pharmaceutical company ELI LILLY, through which it administers a treatment with monoclonar antibodies to the affected people. 18 Member States are participating in this procurement contract with a view to acquiring approx. 220,000 (https://www.agerpres.ro/mondorama/2021/09/21/coronavirus-comisia-europeana-a-semnat-un-contract-pentru-achizitia-unui-tratament-anti-covid-19-cu-anticorpi-mono) treatments.

I. FREE MOVEMENT OF PEOPLE WITHIN THE EUROPEAN UNION DURING THE PANDEMIC

The free movement of persons implies the absence of any discrimination, based on original citizenship, between the workers of the Member States regarding employment, remuneration and other conditions of work and employment

(A. Fuerea, European Union Law - principles, actions, freedoms, Ed. Universul Juridic, Bucharest, 2016, p. 191). In this respect, persons are granted rights which they can assert in court in any Member State. Limitations are obviously regulated, on the grounds of public policy, public security or public health (Idem). 'The free movement of persons ... it is a reality within the European Union" (In his work European Social Law, A. Popescu and N. Voiculescu support the idea that free movement is an equal provision for all citizens) Bernanrd Teyssie outlines a definition of the free movement of persons as follows: "it is a fundamental right that national jurisdictions must defend" (A. Fuerea, European Union Law - principles, principles, actions, liberties, Ed. Universul Juridic, Bucharest, 2016, p.191).

The regulation of free movement is laid down in the Treaty on the Functioning of the European Union, in Title IV. According to Article 45 of the Treaty on the Functioning of the European Union provides: '(1) The free movement of workers is guaranteed within the Union. 2. Freedom of movement shall entail the abolition of any discrimination on grounds of cattiness between workers of the Member States as regards employment, renown and other working conditions. 3. Subject to restrictions justified on grounds of public policy, public safety and public health, the free movement of workers implies the right to: (a) to accept actual offers of employment; (b) to move freely within the territory of the Member States for this purpose; (c) to stay in a Member State in order to pursue a paid activity in accordance with the provisions of the law; (d) to remain in the territory of a Member State after having been employed in that State, under the conditions which will be the subject of regulations adopted by the Commission' (Idem, p. 188).

An example constituted, based on the above article, is represented by the fact that the Romanian citizens, who were in lockdown, due to the ravages made by the SARS-COV-2 virus, felt contaminated by the strong economic crisis that the society was facing at that time, thus resorting to a mass migration, at night, in the German state, to pick asparagus, following, then, a passage, under conditions that are absolutely not in accordance with the legislation (https://www.dw.com/ro/germania-sezonieri-rom%C3%A2ni-la-sparanghel-%C3%AEn-condi%C5%A3ii-de-covid/a-56912160). Thus, it is easy to see the strong repercussions that the pandemic is exerting on the political and economic situation of the states, while also resulting in an economic decline that is very difficult to remedy.As for the sanitary measures to combat the virus, a number of conditions apply for employees to carry out their work without their lives being endangered. In this case, we can mention, PCR test, documents recognized at European level attesting to artificial immunization (vaccine) or natural against the virus (Ibid.).

II. ISSUES REGARDING THE STATUS OF THE EUROPEAN CITIZEN AFFECTED BY COVID-19

The Maastricht Treaty introduces the legal concept of citizenship, through which a transition from the economic community to a political union takes place. Starting from this process, peace is promisingly ensured, thus allowing all the constituent

states of the European Union to live together by virtue of common rules and institutions, freely consented to. The Single European Act, the content of which applies from 17 to 28 February 1986, emphasises that the right of residence applies to all citizens of the Member States. In other news, the European-normative provision undeniably guaranteed the free movement of persons, with economic and financial activity, but not for the other citizens of the Member States (M. Pătrăuş, 2021, p. 150).

There is a new set of legislation, recognised at European Union level, which regulates free access to employment in a country, as well as new rights, at the level of which the broadening of the field of integration is devoted, such as the right to a cultural activity or the protection of the environment. These new laws fit thoroughly into the modern conception of citizenship, therefore, the conception has the disadvantage that it eliminates from the level of the concept, the large part of its specificity, since the rights of any citizen become absolutely equal to the rights of any other human being (M. Pătrăuş, 2021, p. 151).

As regards the status of a European citizen, European citizenship highlights a link between the citizen and the Union, highlighted by rights, duties, but also participation in political life. This link between the Union and the citizen allows the separation to be blurred, due to the fact that the majority of citizens in the Union become absolutely interested in the measures applied at union level, in compliance with the obligations, but also in participating in various political-democratic activities (M. Pătrăuş, 2021, p. 152).

CONCLUSIONS

Due to the context of the current situation generated by the COVID-19 virus pandemic, the migration process acquires new valences, with a strong restriction taking place caused by the intentions of the medical staff to prevent the population from overinfection. From a legislative point of view, a set of clear rules governing movement from one state to another has been adopted at European Union level. The constitution of this legislation is the result, both of the disastrous health situation and of the economic and financial impact on the citizens of the European Union, who are undeniably forced to submit, both to these legislative rules, on freedom of movement, and to medical actions to introduce artificial immunisation. At the same time, following the immunization process, a medical certificate, recognized at European level, is issued, through which citizens manage, to some extent, to overcome the restriction barriers adopted by the authorities.

The immunization process, the legislative norms implemented by the European Union authorities, but also the effort of the medical staff in combating the virus, are legal and sanitary actions, incontestably capable of bringing back the life of citizens into a sphere of normality.

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FUNDAMENTAL CHARACTERISTICS OF MODERN DEMOCRACY

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Abstract
Democracy is a political regime based on the will of the people. The main principles of democarcy are universal vote and popular sovereignty. The essence of modern democracy is related to respecting human rights, idiological pluralism, limitation and separation of state powers.
Keywords: *modern democracy, guaranteeing rights, institutional pluralism.*

INTRODUCTION

If, in the past, democracy meant that all people could directly participate in the decision making power, in modern era, democracy is mainly seen as a way for citizens to take part in the exercise of power which has the purpose of protecting and guaranteeing their fundamental rights (an authentic modern democracy does not exist unless the people have direct power or control the exercise of power). Modern democracy also implies political freedom due to the fact that public authority is based on the will of the people it constrains.

Ensuring a fair balance between the interests of society and protecting the lives of European citizens has become the main challenge of modern times and it has required a joint effort of the governments of member countries, but also a firm reaction of European Union institutions (*Pătrăuș M., 2021, p. 123).*

I. THE UNIVERSALITY OF THE PARTICIPATION OF THE PEOPLE IN PUBLIC AFFAIRS

I.1 Universal suffrage

The universality is materialized through universal suffrage, specified in article (art.) 36 of the Romanian Constitution. Dispositions related to the right to vote are also found in art. 21, paragraph (par.). 3, in the Universal Declaration of Human Rights: '*The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting*

procedures.' The right to vote is a political right which belongs not only to Romanian citizens living inside the country, but also to Romanian citizens who live outside the country.

I.2 The establishment and guaranteeing of public or private rights and liberties

The rights of the citizens must be referred to in legislative acts, together with modalities of guaranteeing the use of such legislative acts. Regardless of the generosity with which we acknowledge and establish human rights, the Human Rights Institution would lose its efficiency without a guarantee which is manifested as sanctions that are used when established rights are disobeyed (*Safta M.*, *2021, p. 34*).

Nationally, a necessary, complementary guarantee of the rule of law is manifested as a control system which ensures that laws are in conformity with Constitutional dispositions. According to the principle of constitutional supremacy, constitutional norms take precedence over inconsistent laws that become inapplicable. In Romania, the above mentioned control system belongs to the Constitutional Court.

Since its establishment, the Constitutional Court has been notified about and has ruled on the content of certain rights and the extent of their application, such as the case of the freedom of movement for which a tax for leaving the country (Constitutional Court of Romania, *Decisions nr. 71/1993 and nr. 139/1994*) has been applied, freedom of association (Constitutional Court of Romania, *Decision nr. 2/ 1993*), freedom of private life (Constitutional Court of Romania, *decision nr. 40/ 1993*), freedom of religion, restrictions of certain rights in the context of the pandemic (Constitutional Court of Romania, *Decision nr. 157/2020*). The Court has been notified in order to decide whether a form of discrimination has been created, which would have been a violation of the equality before the law principle (Constitutional Court of Romania, *Decision nr. 70/1993*).

I.3 Protection of foundamental rights

Fundamental rights are to be protected not only from possible legislative power abuse, but also from executive acts, by establishing a judiciary control. According to art. 52 in the Romanian Constitution, a party that has been injured by a public authority, either because of a legislative act or, on the contrary, because of the refusal to issue a legislative act on time, is allowed to receive official acknowledgement of the right in question, to receive the annulment of the act and to receive damage repair. The conditions of this right are established by Law nr. 554/2004 of Administrative Law and the settlement in this case is decided in Administrative Law courts.

I.4 The Institution of the Ombudsman

There also are non-jurisdictional means of ensuring conformation to fundamental rights, such as the institution of the Ombudsman which has been created together with the Constitution of 1991. The Ombudsman is responsible for protecting the rights and freedoms of the citizens in front of state authority. In order to accomplish its role, the Ombudsman presents annual reports in front of

the Parliament, reports which contain recommendations regarding the legislation or other means of ensuring the protection of the rights of the citizens.

II. INTERNATIONAL AUTHORITY

II.1 The European Convention on Human Rights and the United Nations Organizations

All of the above mentioned means are used at a national level and are based on the self-limiting will of the state, a will that is hard to maintain, therefore, the solution was to use a higher authority than that of the state, an international authority which guarantees the established human rights (*Barac L, 2018, p. 171*). These guarantees can be jurisdictional (on the European continent) or non-jurisdictional (United Nation Organization).

In Europe, the European Convention on Human Rights, which was ratified by our country in 1994, uses a resultful procedure which implies a jurisdictional control. If a state is being accused by another member state or by a private company that it has violated one of the fundamental rights recognised by the Convention, and has thus ignored the obligations which are well established by the Convention, the European Court of Human Rights may be notified. This is the real international institution that will give a decision that has the same authority as any judicial ruling. The state responsible for violating human rights principles can be sentenced and obliged to compensation. Over time, the Court has given decisions regarding rights related to the use of language, the trade union freedom, sexual education, preventive arrest, freedom of the press, the right for a fair trial, etc.

II.2 Guarantees for astablished rights)

In the case of the United Nations Organizations, the guarantees established for ensuring the conformation to fundamental human rights remain fragile (*Niculae F., 2020, p. 176*). In the case of traditional freedoms, a Human Rights Committee has been appointed, having the exclusive role of informing the way in which states respect fundamental rights.

a. The Ideological pluralism

Ideological pluralism allows free speech for various opinions related to public affirs orientations. Opinions may be debated and the population can adhere to those it considers necessary. The possibility to choose between different opinions must be established by the fundamental law of the state.

There is a strong connection between ideological pluralism and democracy. The correlation is between cause and effect: ideological pluralism determines and conditions democracy in Romania. It constitures a *sine qua non* condition for democracy (*Toader T., Safta M, 2019, p. 44*). Such an organic interconnection guarantees democracy and ensures its efficiency, guarantees the power of the people and its implication in the governing power, the solutions required in public affairs. Ideological pluralism, the guarantee of democracy, is incompatible with dictatorship and totalitarism. This principle is theoretically reaffirmed in European Union institutions and is materialized as the possibility of the people to publicly state and exchange opinions (*Pătrăuș M., 2021, p. 94*).

b. The use of the principle of the majority

This principle allows the establishment of a mutual will that is involved in shaping and making decisions. The decision of the majority must not case violence towards minorities (the opinion of the majority must be imposed through persuation and not through force or fear). The opposition must not be neglected, an opposition which, in a real democracy, plays the role of controlling the majority.

Beyond the utopic search for perfect harmony, the principle of majority remains the fundamental rule of the democratic principle, considering that it never acts as a form of an absolute principle based on which the majority can choose whatever it wants. The principle of majority is always limited by the rights of the minority. In a modern democracy, the principle of absolute majority is not accepted. Modern democracy implies a limited majority.

c. Institutional pluralism

Institutional pluralism implies a simultaneous existence of several organisms exercising power (institutional pluralism is the materialization of the principle of the separation of powers). The Romanian Constitution from 1991, even though it did not specifically establish the principle of the separation of powers, it established mechanisms which did not allow a confusion between state powers. Therefore, art. 80, par. 2 in the Constitution, an article which states that the President of the country is a mediator between state powers, can only be considered as an indirect establishment of the principle of the separation of powers in the state of Romania.

This democratic principle has evolved throughout the years, reevaluating the classical theory stated by Montesquieu. The original model of the separation of powers in a state would function poorly in modern times, therefore, the classical idea has reorientated towards the idee of balance and colaboration between state powers, a colaboration that must be governed by mutual respect and constitutional loyalty (*Verteș-Olteanu A.*, *2019. p. 113).*

The Romanian Constitutional Court has similarly defined the principle of the separation of powers in a state involved in its jurisprudence, especially after 2003 when the Constitution was revised and the Constitutional Court had a new responsability – that of solving constitutional juridical conflicts between public authorities.

According to art. 146, par. e in the Romanian Constitution, the Constitutional Court ‚settles juridical constitutional conflicts between public authorities at the behest of the Romanian President, of one of the presidents of the two Chambers, of the prime minister or of the president of the Superior Council of Magistracy'. Due to notifications placed with the purpose of settling such conflicts, the Constitutional Court has encountered behaviours of the representatives of the three powers which, even though were formally consistent with Constitutional requirements, were, nevertheless, capable of causing an imbalance in the principle of state power separation or of creating institutional blockages, which created the need for rectifications. In certain cases, these blockages have been caused by the lack of

specific constitutional reglementations which would have defined the behaviour necessary in certain practical situations (*Vida I., 2004, p. 202*). We argue that no Constitution could ever foresee all possible situations.

In other cases, the general forming of constitutional stipulations has made it possible for a power to abuse another power, a situation which could have been avoided through a proper interpretation of the Constitution, implying the obligation of public authorities to respect constitutional loyalty.

II.3 Constitutional loyality

The jurisprudence of the Court has evolved from a simple enunciation of concepts such as ‚loyalty' and ‚loyal behaviour' to stating circumstances of ‚constitutional loyalty norms', derived from a specifically established principle in the Constitution - that of the separation of and balance between the powers of the state. This derived principle has been established for the first time in the jurisprudence of the Federal Constitutional Court of Germany, however, it has been quickly adopted by jurisprudences of other European Courts.

CONCLUSIONS

The principles of modern democracy have been incorporated in several constitutional articles. Nowadays, Romania is a constitutional state, a democratic and social state in which human dignity, the rights and freedoms of the citizens, the freedom of human personality development, fairness and political pluralism represent guaranteed higher values which respect the spirit of democratical traditions of the Romanian people (*Goia S.I., 2019, p. 245*).

National sovereignty belongs to the Romanian people who exercise it through its representative bodies which are established through free, periodical and fair elections and through referendums. A group or a person could never exercise souvereignty on their own (art. 2, par. 2, revised Romanian Constitution). In Romanian society, pluralism represents a condition and a guarantee of the constitutional democracy (art. 8, par. 1, revised Romanian Constitution).

In our modern society, an important factor in guaranteeing democracy is represented by the Constitution. This document, voted by the people through a freely organized referendum, sets the norms for the rights and freedoms a person has in a state and it defines the limits of the power that various leaders of the state and government have. It also defines fundamental principles and establishes the structure, the duty and the power of the government (*Deaconu Ș., 2020, p .54).*

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REFLECTIONS ON CONTRACTUAL IMPREVISION AT EUROPEAN AND NATIONAL LEVEL

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Abstract

Imprevision has become a topical issue in the Romanian legal space with its regulation in art. 1271 of the new Civil Code, but the legal construction of the theory of imprevision is not new at all, being enshrined in jurisprudence under the previous regulation, this being so important and frequent that it was impossible for the national legislator to ignore it.

This paper aims to examine the extent to which this institution finds a correspondent in the European law or in the law of other states, for a better understanding of all the conditions that must be met in order for the institution of imprevision to be applicable.

Used as a means of aligning economic and legal realities with the new challenges of this century, the theory of imprevision can be an optimal solution for safeguarding contracts whose completion is endangered by the existence of a major imbalance between the parties' consideration, an imbalance that appeared after the conclusion of the contract.

Keywords: *imprevision, contractual relations, force majeure, fortuitous event, rebus sic stantibus, pacta sunt servanda, comparative law, European law*

INTRODUCTION

In the Romanian civil law, the will of the contracting parties is placed at the center of contractual operations. However, the direct intervention of the legislator and increasingly of the judge in contracts, in the name of public order and in the view of reconciling the interests of the contracting parties to ensure contractual balance, is now manifest and necessary in order to meet the requirements of commutative justice.

The imprevision, as a legal institution, is not entirely new in the Romanian civil law, having its roots in the Romanian legal tradition, where it was shown that *conventio omnis intelligitur rebus sic stantibus*, an expression that meant that all

conventions are considered valid if the circumstances in which have been concluded remain unchanged. Regarding the effects of the contract, the Civil Code of 1864 regulated in art. 969 the principle of binding force of the contract, following the French model, as well as the principle of irrevocability, but there was no provision in the matter of imprevision.

I. ASPECTS OF COMPARATIVE LAW AND EUROPEAN LAW

We note that the relationship between the principle of binding force and the theory of imprevision over a century began in 1920 with the admission of the theory of imprevision and materialized in 2011, when it was established as a real exception to the principle of binding force in the new Civil Code.

Renouncing the francophone legal tradition, the Romanian legislator expressly regulated the imprevision as an exception to the principle of the binding force of the contract in art. 1,271 para. (2) Civil code.

The drafters of the new Romanian Civil Code were inspired by the DCFR Rules (*Draft of a Common Frame of Reference*), which, in paragraph III.-1: 110: Variation or termination by court on a change of circumstances, regulates in a form almost identical to art. 1,271 of the new Civil Code, the theory of imprevision (the only notable difference between the two legal texts is the possibility of invoking imprevision, under the rule of DCFR Rules, and by a person who has assumed an obligation under a unilateral legal act). A similar regulation in terms of content is found in the other source of European contract law, the PECL Rules (*The Principles on European Contract Law*), which in art. 6: 111: entitled Change of circumstances presents in a manner close to that regulated by our civil code, the definition and effects of imprevision. At the same time, the Principles applicable to international commercial contracts codified by the International Institute for the Unification of Private Law in 1994 (UNIDROIT Principles - art. 6.2.1-6.2.3 provided for the revision or renegotiation obligation under a hardship clause implied in all contracts in which the hardship hypothesis was excluded) were another source of inspiration for the Romanian legislator, although, given the specifics of international trade contracts, there are some additional regulations in the text of the convention to our civil code; it is obvious, however, that the theory of imprevision has been and is effectively applied in sale-purchase contracts or in international supply contracts, the UNIDROIT Principles expressly regulating imprevision, under the name of hardship clause, i.e. that exceptional situation that fundamentally alters the contractual balance (Tiţa-Nicolescu G., 2012, p. 9-12).

The principles of European contract law, which are a set of rules created by reputable legal specialists from European Union countries under the auspices of the Commission on European Contract Law (Lando Commission) and aim to standardize the European contract law, are the common frame of reference for the European contract law. The conditions provided in art. 1,271 para. (2) - (3) are proof of the acquisition by the national legislator of this internationally promoted guideline on the existence of the contract (Seperiusi-Vlad A., 2020, p. 49).

It should be noted that both the 1969 Vienna Convention on the Law of Treaties (art. 62) and the 1980 Vienna Convention on the International Sale of Goods (art. 79) recognize the exceptional application of the theory of imprevision.

Selectively analyzing the legislation of some European states, it is not surprising that we can identify the regulation of an institution similar to the one called imprevision in our domestic law, because as we have already shown, many states have adopted the theory of imprevision long before our country.

For example, the English law encompasses contractual imprevision under the broader concept of *frustration*, which designates that sphere of impossibility of execution, among which, along with imprevision, is the force majeure (Orga Dumitriu G., 2013, p. 4). Also, although the German law does not regulate a theory perfectly corresponding to the contractual imprevision in Romanian law, a broader concept can be identified under the name of *Geschaftsgrundlage*, in art. 313 of the German Civil Code of 2000, being a theory of disruption of the contractual basis, respectively that situation occurred in a totally unforeseen way, which completely destabilizes the contractual balance (Zimmermann R., 2002, p. 2).

At the same time, it is worth mentioning the Italian law, which has a general regulation in art. 1467 and 148 of Italian Civil Code, the concept being called *eccesiva onerosita*, and the remedy implying a termination of the contract that has lost its balance of benefits. And in France, starting with October 1, 2016, the imprevision is regulated by art. 1195 of the French Civil Code, being provided conditions almost identical to those found in our law (Iftimie E., 2015, p. 23).

II. CONDITIONS AND EFFECTS OF APPLYING THE THEORY OF IMPREVISION

The binding force of the contract, a principle also known as *pacta sunt servanta*, imposes on the parties the obligation to strictly fulfill the duties they have assumed, an aspect justified both by the need to ensure the stability and security of the relationship itself and by considerations of justice and equity between these parties. Although the *pacta sunt servanda* and *rebus sic stantibus* principles are seemingly antagonistic, they complement each other, the second operating as an exception to the first, with the common goal of ensuring the legal security of contracts (Ungureanu C., 2015, p. 49).

Contracts are exposed, during their existence, to random circumstances whose origins lie in economic, social or even political circumstances. Obviously, in order to be able to discuss changes affecting contracts concluded between the parties, their effects must not have occurred in full, with a focus on successive contracts and contracts affected by a standstill period. At the time of concluding a contract, especially in periods of relative monetary stability, the contracting parties assume obligations in view of the circumstances or economic realities of the moment, but there is a possibility that after the conclusion of the contract and before its execution unforeseen events, revolution, pandemic, etc.), leading to serious imbalances between the value of benefits.

In the absence of a definition provided by the legislator, the imprevision was qualified in the doctrine as the damage suffered by one of the contracting parties

as a result of the serious imbalance of value between its services and the other party's compensation during the performance of the contract or other circumstances (Pop L., Popa I., Vidu S., 2012, p. 153).

It is very relevant to specify that not all circumstances may be relevant to the imprevision, but only those exceptional and objective circumstances which occurred during the performance of the contract and which could not have been foreseen by the parties.

Given the nature of the causes of imbalance between the contracting parties, namely economic instability or various forms of legal interventionism and taking into account the limits set out above, we state that the theory of imprevision was built in relation to the possible interference of the judge in contracts, interference that was intended to be corrective, an idea viewed at first with great reluctance by judicial doctrine and practice, being at this time enshrined in law (Burzo M., p. 67).

In the current legislative configuration, the application of the imprevision theory implies the intervention of the judge to restore the contractual balance affected due to unforeseen circumstances of the parties at the conclusion of the contract and unforeseeable from the same date, in the absence of express clauses or legal provisions to review their contract. These express clauses could be the hardship clauses.

The entire regulation of this institution finds its basis in a single article of the new Civil Code, respectively in art. 1271 of the Civil Code, which provides that *(1) Parties are bound to fulfil their obligations even if performance has become more onerous, whether because the cost of performance has increased or because the value of the performance they receive has diminished. (2) If, however, performance of the contract becomes excessively onerous because of an exceptional change of circumstances that would make it manifestly unfair to oblige the debtor to perform the obligation, the court may order:*

a) adapt the contract in order to distribute between the parties in a just and equitable manner the losses and gains resulting from the change of circumstances;

b) terminate the contract at a date and on terms to be determined by the court.

(3) The provisions of par. (2) are applicable only if:

a) the change of circumstances occurred after the time of conclusion of the contract;

(b) the possibility of a change of circumstances s well as its extension were not and could not reasonably be considered by the debtor at the time of the conclusion of the contract;

c) the debtor did not assume the risk of changing circumstances and could not reasonably be considered to have assumed that risk;

d) the debtor has tried, within a reasonable time and in good faith, to negotiate the reasonable and equitable adaptation of the contract.

This provision establishes a real exception to the principle of binding force of the contract, a principle found in art. 1270 of the Civil Code, which stipulates that: *"(1) The valid contract concluded has the force of law between the contracting parties. (2) The contract is modified or terminated only by agreement of the parties or for reasons authorized by law."*

The limitations of the *pacta sunt servanda* principle are essential to ensure the fairness of the contractual relationship, the parties being required to perform their obligations even though the execution has become more onerous, either due to increased performance of their obligation or to a decrease in the value of the consideration (application of the principle of binding force of the contract), thus highlighting the principle of *monetary nominalism* (Holban D., Marțincu I., 2019, p. 1).

It should be mentioned that art. 1271 of the Civil Code states that not every change in the consistency of the obligation occurred after the conclusion of the contract leads to the possibility of using the imprevision mechanism, but the text states that the change must be *"exceptional",* i.e. it must be of such magnitude that the obligation becomes "*excessively onerous"* (Bârsan C., 2015, p. 80).

The application of the imprevision mechanism implies the verification of the conditions established by art. 1271 para. (3) Civil Code, cumulatively, respectively: the change of circumstances to have occurred after the conclusion of the contract; the change in these circumstances, as well as the extent of the imprevision, were not and could not reasonably have been envisaged by the debtor at the time of the conclusion of the contract; the debtor did not take the risk of changing circumstances and could not reasonably be considered to have taken that risk; the debtor has tried, within a reasonable time and in good faith, to negotiate a reasonable and fair adjustment of the contract (Zamșa, 2006, p. 231-232).

Excessive onerousness is based on an exceptional and unforeseen change by the parties when establishing the contractual relationship, putting one of the parties in an economic difficulty or in a position to drastically reduce the creditor's performance, with the consequence of unbalancing the value of benefits and loss of interest in maintaining the contract. In other words, in the context of that unpredictable situation, the party would not have concluded the contract in such conditions. The premise of excessive burden is the exceptional and unforeseen change by the parties of the circumstances taken into account at the conclusion of the contract (Andrieș, M.C. 2016, p. 36).

Obviously, this exceptional change must have an objective character, an aspect that emerges from para. (1) of art. 1271 of the Civil Code, since we are talking about an execution of the obligation which has become more onerous for the debtor and which does not remove the binding force of the contract, and para. (2) requires that the more difficult execution of the obligations by the debtor be directly correlated with a gain recorded by the creditor.

It is necessary in this context to emphasize the difference between imprevision, on the one hand, and force majeure and the fortuitous case, on the other hand, because in case of imprevision, change or event is not absolutely invincible and inevitable, as in case of force majeure, according to art. 1351 para. (2) Civil Code, or one that cannot be prevented by the one who would have been called to answer, as in the situation of the fortuitous case, according to art. 1351 para. (3) of the Civil Code, he must be out of the ordinary, exceptional.

Regarding the change of circumstances, unlike the corresponding texts of the UNIDROIT Principles and the Principles of European Contract Law (which provide

for the condition that the unbalancing event itself is unpredictable), the national legislation provides for the (apparently cumulative) condition that both the event itself as well as its extent, not to have been provided at the time of concluding the contract. Together with other authors, we consider that the legal text should not be interpreted in a literal, strictly formal sense, the condition to be considered fulfilled insofar as the party affected by the contractual imbalance did not foresee and could not reasonably foresee the effects of the change of the circumstances of the contract (Sandar V., 2013, p. 14).

At the same time, if the parties provided at the time of concluding the contract the possibility of amending the contract and introduced in the contract means of readjustment, we cannot retain the applicability of imprevision, as the parties have prepared in advance for possible unpredictable changes and agreed means of rebalancing contractual obligations. In this context, the question arises how unpredictable the changes were if the parties had "prepared" for this purpose by agreeing on a milestone or benchmark for adapting mutual and interdependent benefits.

Another condition requires that the debtor has not assumed the risk of changing circumstances or is not reasonably considered to have assumed such a risk. This condition is subsequent and complementary to the previous condition, and the legislator understood to emphasize two hypotheses in which the imprevision does not work: in one of them, the debtor expressly assumed the risk of an unpredictable event and in the second case, the risk of the unforeseen event is inferred by way of interpretation of the contract. The presumption that the debtor assumes the risk of a change of circumstances is inextricably linked to his prediction of the occurrence of such changes.

With regard to the timing of the start of negotiations on the adjustment of the contract, it was stated that it is necessary that these negotiations should take place as close as possible to the intervention of the contractual imbalance (Lozneanu V., Barbu V., Bebi P., 2012, p. 24).

This condition has raised many questions in judicial practice, in view of its nature as a precondition for notifying the court or a substantive condition for the incidence of imprevision, as to the reasonable time within which it must be fulfilled, or as to the state of performance of the contract during the negotiations and the literature has shown that the provision established by art. 1271 para. (3) Civil Code establishes a mandatory prior procedure for the parties for the conventional review of the contract, before notifying the court, the non-fulfillment of this condition constitutes a condition of inadmissibility if it is formulated in court without fulfilling this preliminary procedure (Ludusan F., Puie O., 2013, p. 5). In the same sense, it was stated that this condition does not represent a condition of imprevision, but rather a condition for notifying the court, a preliminary procedure similar to the procedure of direct conciliation in cases and requests in commercial matters, provided by art. 720 ind. 1 of the old Code of Civil Procedure (Seprusi – Vlad A., 2020, p. 69).

Regarding the effects of imprevision, they are regulated by art. 1271 para. (2) of the Civil Code which stipulates that once the conditions of imprevision are met, *"if the performance of the contract has become excessively onerous due to an exceptional change of circumstances which would to distribute equitably between the parties the losses and benefits resulting from the change of circumstances, the termination of the contract, at the time and under the conditions it establishes".*

In the production of the effects of imprevision on the contract there are two stages: on the one hand, the negotiation stage initiated by the debtor in order to adapt the contract, and on the other hand, the judicial stage, of court intervention, or in order to adapt the contract to re-establish the contractual balance, or for its abolition with effects for the future.

III. APLICATIONS OF IMPREVISION

First of all, it is necessary to mention the applicability of a customized imprevision in the context of Law no. 77/2016 on the payment of real estate in order to settle the obligations assumed through bank loans.

Thus, the analysis of the Explanatory Memorandum of the Law on giving in payment shows that the idea of "restoring the contractual balance" is evoked, as well as the one referring to the situation of "crisis of the contract", defined as a context in which debtors, parties to the credit agreements, do not have the necessary means to pay the loan to the credit institution, to the non-bank financial institution or to the assignee of the claim.

As such, as a remedy to the contract crisis, determined by the debtors' inability to pay the loan, the law offers the possibility to achieve such a finality through the mechanism of payment of the mortgaged property to guarantee the obligation, so that, changing the object of the obligation, the latter no longer it is executed in kind, according to the initial agreement of the parties, but by another performance or other equivalent good.

In this view it is relevant Decision no. 623/2016 of the Constitutional Court, in the considerations of which it was noted that *"these phrases must be interpreted as a particular expression at the level of the credit agreement of the theory of imprevision", since, "even if Law no. 77/2016 does not refer in term to imprevision, the intention of the legislator to apply the institution of imprevision results from art. 11 the first sentence, which refers to the balancing of risks arising from the credit agreement, as well as from the Explanatory Memorandum of the law which uses the expression "crisis of the contract" "(para. 102).*

Furthermore, the institution of imprevision has found a natural application in the context of credit agreements granted in foreign currency, commutative contracts, with successive execution, the execution of which usually extends over a period of several years and which may be subject to unpredictable and objective changes during their development (monetary depreciation, currency devaluation). On this occasion, we recall the well-known situation of credit agreements granted in CHF and the devaluation of the national currency in relation to this foreign

currency. Regarding the concrete way of intervention of the court in this case, the Constitutional Court held, in the recitals of Decision no. 62/2017, that "it has the possibility to intervene on the contract effectively, either in the sense of ordering the cessation of its execution, or in the one of its adaptation to the new conditions, with legal effects only for the future, the already executed services remaining earned to the contract. Adaptation to the new conditions can also be made by converting payment rates into national currency at an exchange rate that the court can determine according to the specific circumstances of the case in order to rebalance obligations, which can be the exchange rate from the date of concluding the contract, the date of the occurrence of the unforeseen event or the date of the conversion".

In the recent litigations regarding the bank credit agreements concluded with the consumers, the unforeseen nature is not the main argument used by the parties, as they often prefer to base their actions on legal grounds offered by Law no. 193/2000 on abusive clauses, for reasons related to the protection offered to consumers by these special provisions (Petrisor S., 2015, p. 16). However, recent decisions of the Romanian courts in the matter of abusive clauses also incidentally deal with the theory of imprevision, this being invoked by the debtors in the alternative.

CONCLUSIONS

The regulation of imprevision in the New Civil Code is certainly one of the great challenges brought by the legislator in the Romanian civil legislation, in the context of denying the intervention of the judge in the contract and evolving towards the possibility of adapting the contract to rebalance it.

The institution of imprevision is and must remain - according to its own nature - a remedy for the contractual imbalance, and not one for the imbalance between the debtor's and the creditor's patrimony, respectively, its purpose being to protect the contractual debtor, and not necessarily on the insolvent debtor.

The current social and economic context has undergone significant changes due to the rapid development of globalization, meaning that the institution of imprevision also comes to help the contracting parties to save the concluded contracts.

From a practical point of view, as a general conclusion, the work of the courts will develop mainly in the direction of crystallization of criteria according to certain areas of activity, to measure excessive onerousness and / or equitable distribution of losses and benefits.

We consider that this institution has a praetorian character compared to some unregulated aspects, such as the criterion for determining excessive burden and unpredictability, the courts being called to assess the fulfillment of the requirements of the imprevision mechanism, for each case.

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THE JUDICIAL COOPERATION REGARDING THE CRIMINAL LAW BETWEEN THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE EUROPEAN UNION AFTER THE BREXIT AGREEMENT

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Abstract

The withdrawal of the United Kingdom from the European Union had a powerful impact, regardless the position one has when looking at this issue. Therefore, whether this issue is approached socially, legally, economically or cultural, one cannot not notice a change in approaching the relevant domains, both at the EU and UK level.

This paper proposes to reveal a few main elements that characterize the cooperation between the two parties from a judicial point of view, in general and the criminal law point of view, in particular.

Keywords: *The withdrawal agreement, The commercial and cooperation agreement, union Acts, tempus regit actum.*

INTRODUCTION

This paper proposes itself to be a short presentation of the judicial cooperation - from the criminal law point of view - between the United Kingdom and the European Union, by pointing out, when it is necessary, a parallel with other related domains that are set by The withdrawal Agreement of the United Kingdom of Great Britain and Northern Ireland from the European Union (which I will call alongside this paper as *The withdrawal agreement* – Official Journal of European Union, C 384I/01 from 12.11.2019), on one side, and The Commercial and cooperation Agreement between the United Kingdom and the European Union (which I will call alongside this paper as the *Commercial agreement* - Official Journal of European Union, L 149/10 from 30.04.2021).

In order to better understand the current situation, I consider that a short review of the facts that lead to this moment in time, especially the relevant situations that happened in the last decade is necessary.

Thus, following a consultative referendum initiated by the Government from the Downing Street no. 10 regarding the issue of remaining within the European Union or leaving it, the British people expressed themselves in favor of leaving the EU (by a fragile majority, truth to be told). Article 50 from the TEU, the Lisbon version, gives the possibility to every member state to take action as the UK did.

As a result of the referendum, negotiations were initiated between the two parties, that were given power to establish an adequate legislative frame regarding the new situation. These negotiations resulted in the signing of both parties of the Withdrawal Agreement (O.J.E.U. C 384I/01 from 12.11.2019).

I. THE WITHDRAWAL AGREEMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND FROM THE EUROPEAN UNION

Art. 50 TEU gives the right to the representative institutions of each member state to negotiate the terms to follow if they want to separate themselves from the European Union. The United Kingdom's Government has notified the European Council (document XT 20001/17 sent for the European Council in March, 29, 2019) regarding its intent in this matter after the referendum results. This was the moment that triggered the start of the negotiations regarding the withdrawal of the United Kingdom from the EU.

The negotiations lasted almost three years, a period characterized by a multitude of meetings between two delegations, one for each party, all the meetings held having a sole purpose: to apply the referendum result from 2016 organized in the UK.

I.1 The first stipulations regarding the judicial cooperation between the two parties after the withdrawal of the UK from the EU

The Withdrawal Agreement sets rules that govern a variety of domains: from border crossing and its re-installation (part II, title II of the Withdrawal Agreement) up to the economic and commercial relations between the two parties (part III titles I-IV from the Withdrawal agreement), from the social relationships between the UK and EU citizens (part II title II chapters 1-3 from the Withdrawal Agreement) up to the participation and contribution of the United Kingdom to the EU budgets in the upcoming period after Brexit (part V from the Withdrawal Agreement, chapter 2, "*The contribution and participation of the United Kingdom to the EU budgets*").

The judicial cooperation received a special attention from the two parties. This special attention resides in the fact that it can be found stipulated in a different section of the Withdrawal Agreement. In order to be more accurate, the judicial cooperation can be found in Part III of the Withdrawal Agreement, titles V and VI, whilst title X of Part III of the same Agreement stipulates the judicial and administrative procedures of the European Union. Following this train of thoughts, the judicial cooperation is stipulated by the 3rd Part of the Commercial and cooperation Agreement between the EU and UK, articles 522-701. another thing worth to be mentioned here is that the stipulations found within the Withdrawal Agreement are succeeded by the ones in the Commercial and Cooperation

Agreement signed by the two parties. Later on, in this paper, I will explain why does this fact is relevant.

The judicial cooperation, in general, and the judicial cooperation regarding the criminal law in particular, represent important pillars for the two parties involved (but not limiting to them) given the globalization context, especially considering the fact that, given the technological evolution, physical borders, territorial borders can be easily neglected when certain crimes are to be taken into consideration. Without wanting to claim that I will be presenting them all (because that is not the topic of this paper), a few examples are to be made here. Thus, money laundering, hijacking certain specific funds given by the state, or through its institutions, or hacking are only a few of the crimes that know no physical border. The main distinction between the judicial cooperation in general and judicial cooperation regarding the criminal law, resides in the fact that a crime has as in its core an increased social danger in comparison with other misdemeanors, on one side, and on the other side the penalty for committing crimes is the utmost severe punishment, ultima ratio, for the committed crimes. Regarding the fact that the criminal law's tools are the most severe means of punishment in the law system, both the doctrine (Cristinel Ghighineci in Abuz în serviciu comis de judecători, published in Universul Juridic magazine, available at the following address: *http://revista.universuljuridic.ro/abuz-serviciu-comis-de-judecatori/*) and the jurisprudence, both national (the Constitutional Court of Romania's Decision no. 405/2016, published in the Official Monitor no. 517/2016, para. 61,68 and 80) and international (the Decision of the Latvia's Constitutional Court, from 10.11.2005, pronounced in case no. 01/04, the Constitutional Tribunal of Portugal POR-201-1-008, Codices, and so on) backup this concept.

II.2 The Withdrawal Agreement's stipulations regarding the judicial cooperation in regards to the criminal law

Regarding the Withdrawal Agreement's stipulations concerning the judicial cooperation in the criminal law area, these are approached by the two parties from the actions that are still into play in the time-frame from before the transition period is over. In other words, if the committed crime took place before the end of the transition period, the law to be applied is the EU law, this being a transgression of the roman law principle *tempus regit actum.* Thus, the Convention regarding mutual assistance regarding the criminal law cooperation between the EU member states [OJ C 197/3 of 12.07.2000, 19/Volume 11, 42000A0712(01)] applies regarding the mutual assistance requests received within that instrument before the end of the transition period, the Council's Framework Decision no. 2002/584/JHA (OJEU no. L 190/1 from 13 June 2002, 19/volume 06, no. 32002F0584) finds its applicability regarding the european arrest warrants in which the wanted person was arrested before the end on the transition period in order to execute a european arrest warrant - even if the authority that must carry out the execution of the warrant decided the temporary release of the person in the matter, and the Council's Framework Decision no.2008/909/JHA (OJEU L 327/27, of 05.12.2008)

applies concerning the Courts' decisions received before the end of the transition period by the relevant authority of the recipient state. Likewise, the Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 (OJEU L 338/2 of 21.12.2011) applies in regards of the European protection orders received before the end of the transition period by the central authority or the competent authority of the recipient state, and Directive 2014/41/EU of the European Parliament and of the Council (OJEU L 130/1) applies in regards with the European investigation orders received before the end of the transition period by the central authority or the competent authority of the recipient state. Nonetheless, there are other EU Acts that can be applied given the circumstances that the committed facts at hand took place before the end of the transition period (art. 62 from the Withdrawal Agreement).

However, it does not suffice that only the incriminated action/inaction to have taken place before the end of the transition period. With the competent authorities also resides the task of creating the necessary judicial paperwork in such a manner that the EU's stipulations will not be tampered with. In other words, it is not enough that the action/s or inaction/s took place before the end of the transition period, but is also mandatory for it/them to be discovered before the end of the transition period as well and the procedure must also be started. Otherwise, the Withdrawal Agreements' stipulations do not apply anymore, but other stipulations in other laws are to be applied. Following the same train of thoughts, of great importance is not only the timing of the action(s)/inaction(s), but also the period in which the paperwork was made that stays at the core of the criminal law solicitations in the matter in-between the states. Thus, according to the Withdrawal Agreement's stipulations, at task is not to EU as a whole, but each and every member state for itself. In other words, in regards with the judicial criminal law cooperation, it is regulated by the EU law and the member state's law, the member state at task, on one hand, and on the other hand by one of the two Agreements: the Withdrawal Agreement, or the Commerce and Cooperation Agreement. What lies at the core of this matter is, to the same extent, both the time when the action(s)/inaction(s) took place and the time of the issue of the paperwork by the competent authorities, times that are crucial regarding the application of one or the other of the two Agreements.

On the same note, the Court of Luxembourg, previous to the signing of the Commercial and Cooperation Agreement, had the opportunity to decide in a preliminary action, regarding the consequences of the notification of a member state regarding its intention to withdraw from the EU, in the situation that this member state issues a European arrest warrant and stated that in case file C 327/18 the sentence pronounced on 19.09.2018, that the member state cannot deny the execution of the same European arrest warrant as long as the issuing member state is part of the EU.(M. Pătrăuș, Cooperarea judiciară în materie penală. Compendium. Legislație. Doctrină. Jurisprudență europeană și națională, 2021, p. 217).

II. The Commercial and Cooperation Agreement's stipulations between the United Kingdom of Great Britain and Northern Ireland on one side and the European Union on the other

The two Agreements signed by the two state entities create a whole, being, basically, two sides of the same judicial situation that is in an ongoing process. The first Agreement was the Withdrawal Agreement, as stated above; due to the fact that the Withdrawal Agreement was enforced for a limited period of time, a new Act needed to be drafted and set in accordance to the two parties negotiation teams, in order to avoid a legislative void for this situation. This new Act was meant to set the ground rules for the new legislative framework. Thus, the Withdrawal Agreement stipulations apply, basically, within the time-frame also known as *the transition period*, and the Commercial and Cooperation Agreement's stipulations apply, mainly, from the end of the transition period onward. However, this rule knows quite a few exceptions, and we are about to see a few of them. The transition period is the time between 1 February 2020 and 1 January 2021, according to the Withdrawal Agreement's 126 article. Within this period, the UK was no longer a member state, but continued to be part of the single market and customs union (Eurojust opinion, *Background and purposes,* para. 2).

There is no denial, however, to the fact that both Agreements signed with the UK share a few joint *rationae materiae* elements thus the created situation being able to lead to a few challenges regarding the stipulations to be applied. However, as I stated above, the *rationae temporis* competence rules are the ones to be applied, in most cases, when one must apply one or the other Agreement's stipulations. According to art. 62-65 from the Withdrawal Agreement, there are certain exceptions from the aforementioned rule that show some situations in which the Withdrawal Agreement's stipulations continue to apply even after the transition period is over.

As one can observe, para. 1 of art. 62 from the Withdrawal Agreement contains a list with EU Acts that continue to apply to both the UK and member states in situations that imply the UK, during the unfolding of the transition period, para. 2 1st thesis reveal a general rule according to which the started investigations continue in mixed teams that are formed from both, the UK and the member state investigative agents. The 2nd thesis of para. 2 contains one exception from the *before the end of the transition period* rule, that is found so often in the Withdrawal Agreement's stipulations and that is that the UK authorities continue to have acces to the web application that sets the secured information exchange, but this granted access comes with a follow-up condition: the UK must pay back to the EU the related costs to its use for maximum one year after the transition period has ended. Given this particular stipulation, as well as other resembling stipulations, I opinate that the Withdrawal Agreement contains stipulations that apply prior to the ones set into the Commercial and Cooperation Agreement, in this area and regarding to the information exchange within the joint investigation teams. However, as we are about to observe in the following pages, the Commercial and Cooperation

Agreement also contains provisions that apply to certain situations that are previous to its approval by the two parties.

Regarding a misunderstanding that involves the stipulations within the Withdrawal Agreement, according to art. 5 and considering art. 167-168 of the same Agreement, the misunderstanding or the litigation between the two parties is to be resolved by the Withdrawal Agreement's stipulations, and not by the Commercial and Cooperation Agreement. Following the same train of thoughts, it is my opinion that given a certain litigation regarding the way or the intelligibility of the Withdrawal Agreement's stipulations even if the misunderstanding appears after the end of the transition period, if it is about a situation that is stipulated in art. 62-65 of the Withdrawal Agreement, to that situation will be applied the Withdrawal Agreement's stipulations and not the Commercial and Cooperation Agreement's ones, even if, *rationae temporis*, one would be inclined to apply the stipulations of the 2nd Agreement, thus being applied the Latin adage *specialia generalibus derogant.* In case of a possible litigation concerning the Withdrawal Agreement's stipulations that appears after the end of the transition period, or if the litigation is not about a situation covered by the art. 62-65 of the Withdrawal Agreement, broadly speaking, the Commercial and Cooperation Agreement's stipulations will be applicable, and, if not, the international law in the matter will apply.

In regards to crimes, if these were committed during the transition period, the laws in force at that time will apply, with all of their rules and exceptions, if it is not stipulated otherwise in the Agreements' provisions.

II.1 The Commercial and Cooperation Agreement's structure

The first step after the official withdrawal of the UK from the EU was the coming into force of the Withdrawal Agreement. This direction had to be maintained by the two parties because it was the British people's decision revealed by the referendum's polls result to leave the EU. Thus, given the context created by the Withdrawal Agreement and the premises created by this Act, a need to initiate and apply a new act that continues to "guide" the two parties in establishing common grounds in strategical areas emerges.

The Commercial and Cooperation Agreement is structured in 7 parts, which, in turn, are structured in titles, headings, chapters and articles.

Given the fact that the two parties are no longer forming a joint market, as well as the fact that during the time they were a joint market there were some connections made, connections that can not be that easily overruled just by signing documents (emerging as a must the fact that a certain period of time would be wise to pass in order for the people to get used to the new created situation), given, among other things, their sensitivity, the process of inventing new institutions within the UK, institutions that should either be equivalent to the EU institutions, either to cooperate or collaborate with the EU institutions according to the rules enforced by the two parties throughout the two Agreements reveals itself as being a necessity.

An eloquent example regarding this matter could be the stipulations of para. 4 of the art. 568 from the Commercial and Cooperation Agreement (OJEU L,

no. 149/10 of 30.04.2021) that provides that in order for the cooperation between the Europol and the competent authority from the UK to be smoother, the UK **detaches (a.n.)** one or more connection officers within the Europol, whilst the Europol *can detach (a.n.)* one or more connection officers within the UK. Also, we can notice that, when the Agreement was signed, the UK did not still had an equivalent authority for the Europol, situation revealed by the way the document stipulates: *the cooperation between Europol and the* ***competent authority of the UK*** *(a.n.).*

Worth to be mentioned is also the fact that, even though the Agreements signed by the EU and UK are, basically, Acts that deviate from the EU law rules, given the status that the UK has now, one can notice that there are also exceptions from this principle. In other words, situations can be met where the EU law prevails over the Agreements' stipulations, thus continuing to be applied and so highlighting themselves as real exceptions from the rules. An example can be found in the art 579 stipulations, that has the following marginal designation: "Powers of Europol" and shows that "*Nothing in this Title shall be construed as creating an obligation on Europol to cooperate with the competent authorities of the United Kingdom beyond Europol's competence as set out in the relevant Union law." (*O.J.E.U. 149/10).

One cannot oversee that the stipulations of Title VII of Part III of the Commercial and Cooperation Agreement, respectively art. 596-632 set as their goal to ensure that the extradition is made based on a surrender mechanism that is met when an European Arrest Warrant is to be applied. As such, the arrest warrant in the matter must meet a few criteria and, if those criteria are not met, can result in the inefficiency of the arrest warrant.

The basic rule is that the person stipulated within the arrest warrant is to be surrendered. However, as any other general rule, this rule also knows a few particularities. This being the case, para. 3 of art. 599 reveals the exceptions from the rule (1st thesis), followed by the statement of the general rule that is to be applied by both parties.

The exceptions are stated *ad literam* within para. 3 of art. 599 and are as follows: art. 600 ("*Grounds for mandatory non-execution of the arrest warrant"*), art. 601 ("*Other grounds for non-execution of the arrest warrant"*), but only the stipulations of para. 1 let. b)-h), art. 602 ("*Political offence exception"),* art. 603 *("Nationality exception")* and art. 604 *("Guarantees to be given by the issuing State in particular cases").*

Para. 4 of art. 599, imposing an exceptional legal norm, brings into light the cases where is not necessary for the double incrimination prerequisite to be met. This prerequisite is stipulated in para. 2 and the crimes that are an exception to it are listed in para. 5 of the same article.

Title VII of Part III of the Commercial and Cooperation Agreement is to be applied even when an European Arrest Warrant is issued by a member state before the end of the transition period, that is, before 31.12.2020, but only if the wanted person was not arrested to execute the warrant in the topic before the end of the transition period. This being the case, one can sustain without being wrong that in

order to apply an EWA, one must consider the laws and regulations in force when the warrant is to be applied, and not when it was issued, thus leading to the situation where art. 632 states a genuine exception from the *tempus regit actum* principle. This even if the warrant was issued previous to the appliance of the Commercial and Cooperation Agreement's stipulations, being generated by a situation that, also, happened before the existence of the Commercial and Cooperation's stipulations, according to art. 632.

CONCLUSIONS

The cooperation between the EU and UK, regardless the domain at hand, was always atypically, ever since the EU was formed.

However, when the negotiations were about fundamental things like criminal law cooperation, the two parties left their differences apart. In my opinion, this fact reveals that, in key-moments, when the situation dictates, a close and effective cooperation between the two state entities is possible. This is because, as stated above, regardless the law system in the matter (continental or the common-law), a crime represents a dangerous action/inaction that can and has to impose the criminal liability of its author and the cooperation between different states regarding this matter is crucial to be clear, accurate, precise, thorough and mainly, not to be susceptible of interpretations. This is, in my opinion, one of the reasons why both of the Agreements are structured the way they are so that even in case of a litigation, the issues should be dealt with in an optimal and predictable term.

As one can observe, basically, the *tempus regit actum* principle represents the main rule when applying the stipulations of the Agreements, regardless the domain at hand. Nonetheless, this rule also knows exceptions that are *expressis verbis* within their texts.

Once the UK's withdrawal was done, one can notice a difference in the cooperation the two state entities had, a normal change, given the situation. Thus, the UK must create institutions that have to cooperate with the EU institutions in the key domains, in order to maintain, at least at an official level, a collaboration and cooperation relation that was before the Brexit, and the EU is held to respect the principle of loyal cooperation, the principle of legality and the other EU principles it imposed itself (Patraus, M., *Drept instituțional european,* 2018 p. 55-95).

From the criminal legislation politics point of view of the two contracting parties, considering the protected values we are safe to say that major changes did not occur.

The cooperation between the EU and the UK, however, in my opinion, has registered a recoil.

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THE EUROPEAN EXCISES SYSTEM

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Abstract

The European Union is the product of a unification process which is most highly advanced in the taxation area. The excise duties area represents a highly important element for the European taxation system because much of the competences are transferred at a European level. Moreover, the excise duties play an important role in the completion process of the single market, objective which was set by the White Paper of 1985. The aim of the present article is to prepare an assessment related to the functioning of the excise duties at the European level and to present the relationship between the European Union with the member states, including the possibility to complete the unification process of the single market. The foundation of the topic will be based on the European Union Court of Justice case law, as well as on the case law of the Romanian tax disputes courts of justice.

Keywords: *excise duties, common market, unification, White Paper, ECJ*

INTRODUCTION. TAXATION AREA AT THE EUROPEAN LEVEL

The European Union represented a reaction to the consequences suffered by the continent at the end of the Second World War (Dinan, 2001, pp. 11-12). In the beginning, the idea was to realize a military union, but this idea was turned down because by fear that the German militarism will be revived (Guillen, 1996, pp. 71-72). After prolonged debates, the foreign ministers of the 6 founding states, decided that the best solution for the European project would be to start from the economic issued, such as taxation (McAllister, 1997, p. 15).

The entry into force of the Rome Treaty in 1957, was the first step in the direction set by the member states and was also the engine the improved the economic ties between the 6 founding member states because of the complete abolition of customs duties (Vanke, 2007, pp. 456-460). The 1970`s are remembered by European Union attempts to realize the harmonization of direct

taxation (profit tax and income tax), but this goal is not even today achieved because of lack of political support.

In 1985, the under the leadership of Jacques Delors, the White Paper was presented that set 31 December 1992 as deadline to realize the completion of the internal market in the area of indirect taxation ((Lodge, 1986, pp. 209-210). In this area also were difficulties because of lack of political support with the consequence that even today the process it is not fully closed.

Excise duties, along with value on added tax (VAT), are the main representatives of the indirect taxes at the European level (de la Feria, 2009, pp. 1-5). The first European regulation in the field of excise duties was represented by Directive 92/12/CEE. According to this directive, the excise duties apply only upon alcohol beverages, tobacco, and energy. Directive 92/12/CEE was replaced by Directive 2008/118/CE (in force) representing the general spectrum of excise duties at the European level.

From the point of view of international taxation, it is important to say that excise duties were born from a religious ideology that asked for the sanctioning of persons that used to consume sin products (alcohol beverages, tobacco products). The second aim was to collect addition money for the budget (Terra, Kajus, 2012, p. 415). In present times, the role of excise duties is to tax a specific category of products because they produce a high profit (Gil Soriano, 2013, p. 4).

In conclusion, the European Union pays attention to a proper development of the excise duties system, especially that is an area were competences are shared with member states. In this case, we consider necessary to make a presentation of the excise duties with a special focus on alcohol and alcoholic beverages together with an analysis of how the European regulations reflected into the European Union Court of Justice case law as well as in the case law of the Romanian courts.

I. EUROPEAN UNION'S REGULATIONS IN THE AREA OF ALCOHOLIC BEVERAGES. EFFECTS.

The European Union represents a one the biggest consumers of alcoholic beverages at the international level. The negative effects of this aspect are highly visible requiring for action on behalf of the European institutions. In consequence, taxation represents a tradition tool for the EU to control alcohol consumption phenomena. In addition, EU regulations in the area of excise duties play the role to impose a correct competition inside the internal market.

EU regulations for alcohol and alcohol beverages are represented by Directive 92/83CEE and Directive 92/84/CEE. The analyses of the two directives provides a highly legal system. For example, member states are required to introduce a minimum standard of excise duties level. Member states are not allowed to go down under this minimum threshold.

This issue is exemplified in the case Commission vs. Hungary (ECJ, C-115/13). Hungary lowered the minimum level for excise duties provided by alcohol directives with the aim of protecting the national heritage represented by the local

producers of Hungarian palinka. The Commission said that the Hungarian legislation in case is a direct attack against fair competition inside the internal market. ECJ admitted the lawsuit brought by the Commission and declared the Hungarian legislation incompatible with the EU alcohol directives. Our opinion is that this example confirms the fact that excise duties regulation on alcohol play a key role in protecting the proper functioning of the internal market.

II. PRESENT PROBLEMS OF THE EUROPEAN EXCISE DUTIES SYSTEM REFLECTED IN THE CASE LAW OF THE EUROPEAN COURT OF JUSTICE AND ROMANIAN COURTS CASE LAW

A first case law problem reflected by the EU and national regulations on excise duties is generated by the possibility of member states to apply excise duties not only upon alcohol beverages, but also upon ethylic alcohol of 96 degrees. Our opinion is that this possibly extends unacceptably the taxable amount and generates addition reimbursement requests in the case where the ethylic alcohol it is not used for obtaining alcohol beverages (whisky, brandy, vodka, rum etc.), but it is used for obtaining other types of alcoholic products (sanitary alcohol, vinegar or wash fluid).

One example from Romania`s case law (High Court of Cassation and Justice, civil decision nr. 11/2020) exposes practical difficulties. Inspired by the European regulations, the Romanian legislation asks for alcohol produces to pay a guarantee to obtain the functioning license. Logically, such a guarantee should be asked only in the case of production of alcoholic beverages because this are the only products for which excise duties must be paid.

But in the case of calculating the taxable amount for the guarantee, the Romanian tax authorities include the whole value of the ethylic alcohol of 96 degree, irrespective of the fact that the final products are beverages or not. One of the biggest alcohol producers of Romania was in this situation and decide before the courts of law the lawfulness of the tax authorities. In the end, Romania`s supreme court accepted the point of view of the taxpayer underling the fact that in the case where the ethylic alcohol it is used to produce exempted alcohol products (sanitary alcohol, vinegar, wash fluid), the value of that alcohol cannot be included in the taxable amount of the guarantee.

As we said earlier this example from Romania`s tax law system reveals that fact the deficiencies of the European excise duty system which permits member states to have an action margin too wide. Another example it is provided by the Lithuanian origin case Bene Factum (ECJ, C-597/17). A company registered in Lithuania (Bene Factum) bought mouth wash products from Poland. The products were made of alcohol and were exempted from paying the excises.

The investigations conducted by the Lithuanian tax authorities revealed the fact that those products were used as alcoholic beverages and not for the personal hygiene. The reason was that mouth wash products were cheaper because the alcohol was exempted from paying excise duties. In consequence, the tax authorities asked the sellers to pay excise duties. The problem was brought before the European Union Court of Justice which was asked to interpret Directive 92/83/CEE.

In his reply, the ECJ remembered the fact the provision of the directive should be applied uniformly across the European Union. Accordingly, if the regulations provides that denatured alcohol is excise duties exempted, no excise duties can be asked if the alcohol remains denatured, even in the case where abusive practices can be noticed.

Another example that presents the deficiencies of the European excise duty system is represented by the civil decision no. 263/2016, delivered by Oradea Court of Appeal (Romania). The legal problem was is related to the conditions imposed by the Romanian legislation for sanitary alcohol production. As we presented above, the sanitary alcohol is exempted from excise duties. Furthermore, the production of sanitary alcohol is allowed only in tax warehouses where 96-degree ethylic alcohol production is allowed.

Oradea Court of Appeal accepted the arguments of the taxpayer and said that it is illegal to impose excise duties in the case of 96-degree ethylic alcohol transfer between tax warehouses which are under the common control to produce sanitary alcohol. The court underlined the fact that this conclusion because the production of sanitary alcohol is permitted only inside tax warehouses and the sanitary alcohol is excise duties exempted.

The solution of Oradea Court of Appeal was upheld by the Supreme Court which dismissed the judicial appeal brought by the Romanian government. The consequence of this litigation is that Romania was forced to change its legislation related to the production of sanitary alcohol. According to the new legislation, the 96-degree ethylic alcohol which comes from an external source, and it is used to produce sanitary alcohol by production tax warehouses is exempted from paying excises.

It is important to say that the lack of European regulations related to exempted alcoholic products was a critical point during the pandemics when a Romanian government ordinance authorized producers of alcoholic beverages to produce sanitary alcohol and the tax warehouses who bought 96-degree ethylic alcohol from external sources to increase their production of sanitary alcohol were fined by the tax authorities because it was considered that they did not comply with the pandemic regulation.

In the end, we think that is time to mention a positive aspect of the European excise duty system also. According to art. 1 par. 2 of the Directive 2008/118/EC, member states may impose upon alcoholic beverages and tobacco products VAT, excise duties and other domestic taxes if those taxes have a specific purpose and do not become another turnover tax.

This European regulation was interpreted by some case in the ECJ case law, such as Jordi Besora (ECJ, C-82/12) and Staatoil Fuel (ECJ, C-553/13). The ECJ decision say that taxes imposed according to art. 1 par. 2 of the Directive 2008/118/CE should be applied to a specific purpose (there should be aprove of direct link between the tax and the set objective). Also, the ECJ underlines the fact that the tax at stake must not transform into a general revenue for the budget of the member state.

Analyzing the situations in Spain and Estonia, the Court declared that the taxes imposed in these countries on energy products are contrary to art. 1 par. 2 of the Directive 2008/118/EC because their only purpose was to produce additional revenues for the public budget. Similar taxes existed in Romania, imposed by art. 342 par. (5) and par. (6) of the Tax Code, but they were repelled and the beginning of 2019 to avoid an infringement procedure that the European Commission was prepared to bring against Romania EU Pilot 7502/15/TAXU).

Last, but not least we consider important to present Scandic Distelleries (ECJ, C-663/11) case, that was the first Romania`s case in the excise duties area. This preliminary ruling case objective was to check if European directives were correctly transposed into the national legislation. Scandic Distelleries delivered alcoholic beverages from Romania to Czech Republic. When the company asked to the reimbursement of the excise duties already paid, the request was turned down by the Romanian tax authorities, for procedural motives (some declarations were present before the expedition of the goods started).

The company argued that because excise duties were paid in Romania and Czech Republic as well, all risks of tax fraud or loss of revenue were fully eliminated. In this case, Romanian tax authorities proved to be highly formalist, and, in the case, it is a breach of the principle of substance prevailing over form. Responding to the preliminary ruling, the European court declared that Romania`s domestic transposition legislation failed to notice the directive makes a distinction between the situations when the excise duties are paid in both countries and excise duties are paid only in the destination country of the goods.

According to the European judges, the required documents are necessary only in the second case. Because the Romanian legislation imposed the requirement in both cases, the Romanian legislation had affected the validity of the European legislation and the financial interests of the taxpayers whose reimbursement request were turned down unlawful.

CONCLUSIONS

In conclusion, we can see that the European Unions has regulations for the area of alcohol and alcoholic beverages, but for the completion of the internal market are necessary much stronger and decisive actions to be able to deter any unfair actions of the member states. As we know, the completion of the internal market from the point of view of indirect taxes should have happened at last on 31 December 1992, but we can notice that this objective was not reached yet.

The above presented case law represents the reflection of art. 267 TFEU (Pătrăuș, 2021, p. 381) which provides that there still are difficulties in the uniform application of the European excise duties legislation, as is the case of the products which are exempted to pay excise duties. Another negative effect is the fact that this chaotic application of the European legislation affects both the legal order and the economic stability of the European Union.

To diminish the negative effects, the intervention of the European Court of Justice and national court is highly demanded, but these interventions may alter the prestige of the European Union, especially at a time when the power of the European justice system is strongly challenged. In the end, we can notice that the proper functioning of the European excise system is extremely important for the future of the internal market. In consequence, we consider that the problems presented in the present paper should represent a reason for the speeding up the process of completion of the internal market.

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INTERFERENCE BETWEEN LEGAL AND MEDICAL ISSUES IN THE FIELD OF PALLIATIVE CARE SERVICES

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Abstract

The population of a country benefits from prevention, curative programs but also from palliative programs, addressed to patients with chronic diseases. Palliative care is defined as a holistic, complex approach to patients with chronic diseases, in order to increase the quality of life of patients and their families. From a legislative point of view, since 2018, all aspects of palliative care have been regulated in Romania as well. As can be seen from the present study, the regulation of palliative services is a complex, far-reaching one, regarding the providers of palliative services and the ways of carrying out their activity, as well as the patients.

Beneficiaries of these services and the interdisciplinary team involved in their provision. We find through this study that this regulation is a combination of the legal field with elements of medical activity.

During the Conference "Public safety and the need for high social capital", panel VII, "Protection of human capital in the field of the right to health and social care" was organized, and this study aims to raise the protection of human capital through palliative services, analyzing the stage and content of their regulation at national level.

Keywords: *palliative care, patient, service providers, hospital, hospice*

INTRODUCTION. THE PLACE OF PALLIATION IN HEALT SYSTEMS

The population of a country benefits from preventive, curative medical programs but also from palliative programs, addressed to patients with chronic diseases.

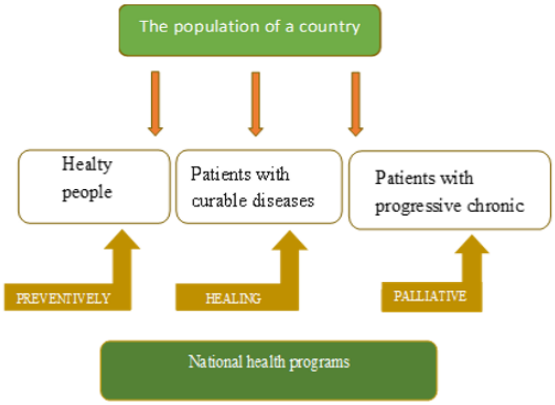

Fig. 1 Health programs at the level of a country

The concept of "palliative" is made explicit as[1]: 1. A drug or treatment that relieves or removes the symptoms of a disease for a short time without suppressing its cause. 2. FIG. (solution, measure) that temporarily or apparently solves a difficult situation. [Pr.: -li-a-] - from fr. palliative.

The sphere of human rights provided for in the European Convention on Human Rights[2] seen from a broad, integrative perspective, includes in the concept "right to life" and the right to health (Ciocan M., 2015, p. 415-428), in the composition of which is also the right to palliative care[3].

Palliative care has been defined by the World Health Organization - WHO, as an approach designed to improve the quality of life of patients and their families, to address the problems caused by incurable diseases with limited prognosis; care focuses on the prevention and elimination of suffering, through the early identification, assessment and impeccable treatment of pain and other physical, psychosocial and spiritual problems. Palliative care is addressed to patients with various progressive conditions such as cancer, (Burz C., 2019) HIV/AIDS, progressive neurological diseases, chronic organ failure (heart, kidney), advanced lung disease, severe birth defects in children, other progressive chronic diseases with limited prognosis, rare diseases.

[1] See on https://dexonline.ro/definitie/paliativ, accessed on 20.11.2021.
[2] See https://www.echr.coe.int/documents/convention_ron.pdf, accessed 20.11.2021.
[3] See "Palliative Care - A Human Right" , http://www.eapcnet.eu/ LinkClick.aspx? fileticket = iSbvDyTxilo% 3D & tabid = 958 , accessed on 20.11.2021.

I. REGULATION ON PALLIATIVE CARE SERVICES IN ROMANIA

I.1 Sedes materiae

From a legislative point of view, Order 253/2018 of the Ministry of Health approves the Regulation on the organization, functioning and organization of palliative care services[4]. This regulation defines palliative care services, the categories of patients eligible for these services, the identification of three levels of care according to the complexity of the services provided, the place of palliative care provision, palliative care providers and the requirements for of the activity.

Article 2 of the Regulation defines:

- palliative care: "a type of care that combines interventions and treatments aimed at improving the quality of life of patients and their families, to deal with the problems associated with life-threatening disease, by preventing and eliminating suffering, by early identification, correct assessment and treatment of pain and other physical, psychosocial and spiritual problems ";
- terminal care: "care provided to a patient with the available means of treatment, when it is no longer possible to improve the fatal prognosis of the disease, as well as care provided near death".

The similar definition of the concept of terminal care is also included in the provisions of the Law on Patients' Rights, no. 46 of January 21, 2003[5], art. 1, para. 1, lit. e). Also, Law 46 of 2003 provides in art. 31, paragraph 1, the patient's right to terminal care in order to die with dignity.

I.2 Levels of palliative care services

Article 3 of the Regulation identifies according to the complexity of the services three levels of palliative care indicated in Table 1.

Table 1

Level 1: Support for self-care	Level 2: Basic palliative care	Level 3: Specialized palliative care
Patient education and support for self-care aims to ensure adequate care in the periods between palliative care interventions of medical staff; this level is ensured by the staff of the basic and specialized palliative care services;	Basic palliative care is the care and support provided to patients and their families or relatives by primary care staff in community, community or hospital care, and who occasionally care for patients with chronic progressive diseases and palliative care needs;	Specialized palliative care is the care provided by providers authorized to provide specialized palliative care, through interdisciplinary teams for which palliative care is the basic activity;

[4] Published in the Official Gazette, no. 199 of March 5, 2018.
[5] Published in the Official Gazette, no. 51 of January 29, 2003, amended and supplemented, hereinafter referred to as Law 43 of 2003.

I.3 Principles of palliative care

ANNEX no. 1 of the Regulation provides in art. 1 the following principles of palliative care: - improves the quality of life and positively influences the evolution of the disease; - ensures the control of pain and other symptoms; - considers the patient and his family as a care unit; - affirms the value of life and considers death as a natural process; - does not hasten or postpone death; - integrates psycho-social and spiritual aspects in the holistic care of the patient; - ensures the satisfaction of the complex needs of the patient through the intervention of the interdisciplinary team; - includes those investigations that are necessary for a better understanding and appropriate treatment for the clinical complications of the disease; - ensures the support of the family/relatives in the care of the patient and after his death, during the mourning period.

In order to provide palliative care, on the three levels and in accordance with the principles indicated in point.2.2. and 2.3. the classification of patients is done according to their own needs in:

- patients with basic needs and a low degree of complexity are people with progressive chronic disease, with palliative care needs manifested as mild or moderate physical, psycho-emotional or spiritual suffering, who have no comorbidities and who have carers in the family.
- patients with complex needs are people with progressive chronic diseases who are in one or more of the following situations: a) moderate/severe suffering in the physical, social, spiritual, psycho-emotional field, including refractory physical suffering or complex existential suffering; b) lack of family or the existence of major conflict situations in the family; c) the presence of multiple comorbidities; d) exceeding the medical care capacity, situation established following the evaluation of the health condition performed by the family doctor or by the specialized doctor.

I.4 Palliative care providers

Patients will be provided with palliative care by providers who can be: health units with beds in the network of the Ministry of Health, in the network of ministries and institutions with their own health network, units whose management has been transferred to local public authorities and health units private. Therefore, palliative care services can be provided by public health or private health care providers. It is noteworthy that some of the providers of public or private health services are those already authorized to provide in general any category of medical services. Regarding the health units that intend to carry out the palliative care activity, it is expressly regulated, the development of this activity based on the principle of authorization of operation prior to starting the activity, authorization given in the competence of the following entities, namely:

(i) the authorization of the operation of palliative care services at home is made by the Ministry of Health, a provision that is corroborated with art. 238, paragraph

(5) of Law 95 of 2006 on health care reform[6], according to which home health care services, including home palliative care, are provided by providers evaluated and authorized in this regard and with art. 245, para. 1 and 2, of the same law, according to which the insured have the right to receive some home health care services, including palliative home care, provided by an authorized provider and evaluated under the law, and the conditions for providing home health care services are establish by the framework contract.

(ii) the authorization of the operation of other structures providing palliative care services is made by the territorial public health directorates.

Moreover, the monitoring of the activity of palliative care providers in Romania during its development is given in the competence of the General Directorate of Health Care and Public Health of the Ministry of Health, and the National Association of Palliative Care has taken over the task of accrediting them for bed units and services at home.[7]

We also note that the Regulation contains a number of annexes which provide: the conditions for authorizing palliative care providers at home - annex no. 9; the model of the application form for the operation authorization in the field of palliative care at home - annex no. 10; the model of the operation authorization form in the field of palliative care at home - annex no. 11, hygienic-sanitary conditions, endowment and equipment in palliative care services in sanitary units with beds - annex no. 5; patient management in palliative care - annex no. 6.

I.5 The multidisciplinary team involved in palliative care

An effective approach to the patient in palliative care requires good communication of the multidisciplinary team that provides holistic care services with the patient and his family.

The interdisciplinary palliative care team is a group of professionals with appropriate training and experience in providing palliative care services, confirmed by the rules established by current regulations, and the composition of the team varies depending on the particular needs of palliative care beneficiaries.

According to the principles of palliative care, the approach of the patient with incurable diseases must be complex, holistic. Identification of physical symptoms, but also of psychosocial, emotional, social and spiritual needs is an essential condition for adequate support provided to the patient and his family. Due to the complex needs, the palliative care team must be multidisciplinary, consisting of a doctor, nurse, psychologist, priest, social worker, nutritionist, masseur, volunteers.[8]

[6] Published in the Official Gazette, no. 372 of April 28, 2006, the consolidated version on 20.11.2021, hereinafter referred to as Law 95 of 2006.

[7] *Accreditation of palliative care services. Guide to the provider of palliative care services for accreditation;* http://www.studiipaliative.ro/wp-content/uploads/2015/06/Ghid-HCS-acreditare-servicii-paliatie-2016.compressed.pdf, accessed on 20.11.2021.

[8] Romanian palliation magazine: *"Online palliation. Involvement of the family doctor in the palliative care of patients"*; accessible at: http://www.paliatia.eu/new/2014/04/the-involvement-of-the-family-physician-in-according-palliative-care/?lang=ro, accessed on 20.11.2021.

Communicating the diagnosis and prognosis of the disease, along with consulting the patient regarding therapeutic decisions are essential conditions in palliative care. The discussion with the patient and the family must be realistic in terms of diagnosis, treatment efficacy, treatment complications or related to the evolution of the disease as well as the prognosis.

Moreover, art. 32 of Law 43 of 2003 provides for the patient's right to benefit from the support of family, friends, spiritual, material support and advice throughout medical care. Moreover, at the patient's request, as far as possible, the care and treatment environment will be created as close as possible to the family one.

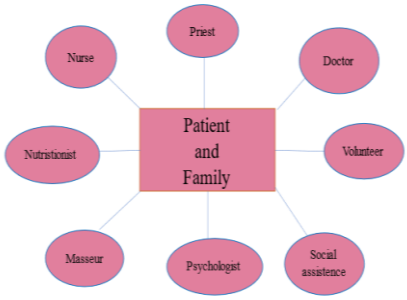

Fig. 2 The multidisciplinary team involved in palliative care

From the point of view of the location where palliative care services can be performed - palliative care is individualized in the hospital either in the bed unit or provided by the mobile palliative care team, in the hospital outpatient clinic, at home or in palliative care centers. Regarding the time of intervention of palliative care services, we find that palliative care is provided: at diagnosis or onset of symptoms; during the course of the disease, for the terminally ill patient.

I.6 Settlement of palliative care services

Regarding the settlement of palliative care services, this is specified in Order no. 1068/627/2021 of June 29, 2021 on the approval of the Methodological Norms for the application in 2021 of the Government Decision no. 696/2021 for the approval of the service packages and of the Framework Contract that regulates the conditions for providing medical assistance, medicines and medical devices, technologies and assistive devices within the social health insurance system for the years 2021-2022.[9]

[9] *"Package of basic medical services for home health care and palliative care at home", National Health Insurance House;* accessible:http://www.cnas.ro/page/pachet-de-servicii-medicale-de-baza-pentru-ingrijiri-medicale-la-domiciliu-si-ingrijiri-paliative-la-domiciliu.html, accessed at 20.11.2021.

II. INFORMED PATIENT CONSENT FOR PALLIATIVE CARE SERVICES

The provisions of Law 95 of 2006, art. 660-662 and those of Law 46 of 2003, art. 5-10 and the rules for the application of the latter law, constitute the legal basis in regulating the obligation of medical staff to obtain informed consent of the patient and the patient's right to be informed.

Law 95 of 2006, art. 660, establishes, with few exceptions, the obligation for the doctor to request the informed consent of the patient on the methods of prevention, diagnosis and treatment, with potential risk, after their explanation by the medical staff.

According to Law 46 of 2003, art. 6, the patient has the right to be informed about his health condition. The content of this right includes: the proposed medical interventions, the potential risks of each procedure, the existing alternatives to the proposed procedures, including those regarding non-performance of treatment and non-compliance with medical recommendations, as well as data on diagnosis and prognosis. This in the conditions in which, the same normative act, provides in art. 1, lit. d), as by medical intervention is meant any examination, treatment or other medical act for the purpose of preventive, therapeutic or rehabilitation diagnosis.

The informed consent of the patient is requested in writing in the conditions in which the medical staff is obliged to present the information to the patient at a scientifically reasonable level for his understanding, according to the provisions of Law 95 of 2006, art. 660, para. 2, article that corroborates with the provisions of art. 8, paragraph 1 of Law 46 of 2003, according to which, the information is brought to the patient's knowledge in a respectful, clear language, with the minimization of the specialized terminology.

Law 95 of 2006, art.660, paragraph 3, expressly regulates the content of information that must be transmitted to the patient to obtain informed consent: diagnosis, nature and purpose of treatment, risks and consequences of proposed treatment, viable treatment alternatives, risks and consequences, prognosis of the disease without the application of treatment.

The paradigm of the patient's informed consent regarding the medical act and the patient's right to information, both prior to obtaining the informed consent and during the medical act, widely developed in the doctrine (Turcu I., 2010) are two constants of medical activity.

In our opinion, they are applicable and palliative care services, regardless of their level, except self-care and independent and the location where the services are performed, so for those provided at home patient or locations of "hospice".

We base this support on the fact that, within the meaning of Law 46 of 2003, art. 1, paragraph 1, letters c, d and e, the concepts of “health care” and “terminal care” are defined. If the first concept designates both medical services and community and related services, the concept of "terminal care" refers to the care provided to a patient with the available means of treatment, when it is no longer possible to improve the fatal prognosis of the disease and care granted near death. Consequently, for all these categories of care, in extensor indicated ut supra, the

rights of patients, provided in Law 46 of 2003, including the right to be informed, are objectified.

Moreover, according to the provisions of art. 662 of Law 95 of 2006, because obtaining the informed consent of the patient is a legal obligation of medical staff, failure to fulfill this obligation, except in cases expressly provided by law, entails the liability of medical staff. The fact of not obtaining the informed consent of the patient attracts the civil liability of the medical staff, according to the provisions of art. 653, para. 3.

Consequently, the fulfillment of the obligation of the medical staff to obtain the informed consent of the patient and the assurance of the patient's right to information, become qualitative criteria in the content of palliative services. We support this all the more as palliative services are provided to people in a degree of acute vulnerability, for patients among the most exposed and in a state of emotional fragility.

But, it is necessary to point out another nuance here, the patient's right to information does not turn into the obligation for the patient to receive information on his health. The patient may refuse medical information regarding the diagnosis, prognosis of an incurable disease or may designate another person to be informed in his place. The provision is based on the right of each being to decide whether he wants to be informed if the information presented by the medical staff would cause him suffering. Providing quality palliative services is a difficult goal to achieve. Even if at the legislative level the field is regulated, we find the applicability of a series of regulations in the medical field, such as those regarding informed consent and the obligation to inform the patient, which are true standards of performance in palliative services.

CONCLUSIONS

Development care palliative is a necessity national aspect revealed by R intake "assessment of palliative care services in Romania" implemented by the Ministry of Health for the World Bank, where he notes that "Over 172,000 patients have needed annually palliative care Romania, but in almost half of Romania's counties (17) there is no such service ... only less than 2% of family doctors in Romania have basic training in palliative care."[10]

There are many barriers in providing palliative care services related to health policies, medical education, training of health professionals, but also patients and their families, limited availability of palliative services at the national level. Along with these barriers, psychosocial aspects such as communication and perception of bad news, the state of vulnerability given by terminal illness, the financial impact of illness and death, are factors that medical staff, with all the vicissitudes of the profession during the pandemic, revealed in the doctrine. (Apan. R.D., Bala C.G, 2021), as well as all persons involved in palliative services should be taken into

[10] See https://media.hotnews.ro/media_server1/document-2019-02-6-22957740-0-evaluarea-serviciilor-ingrijire-paliativa-romania.pdf, accessed on 19.11.2021.

account. And that's because "You only see clearly with your heart. The core of things cannot be seen with the naked eye. "Antoine de Saint Exupery, "The Little Prince". (Sections 1 and 2 were drafted by Burz C and section 3 by Apan R).

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PHARMACY WITH ONCOLOGICAL PROFILE IN ROMANIA. REALITIES AND PERSPECTIVES

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Abstract

The activity in the pharmacy with oncological profile generates a series of challenges both from the point of view of the staff, of the management and the preparation of the medicines. These challenges are directly related to the legislation regarding the activity with cytostatic drugs, and the connection between the two aspects is the theme of this paper.

Keywords: *Pharmacy, oncology, cytostatics*)

INTRODUCTION

In the last 18 years we have witnessed a process of change in the pharmaceutical field, including that specific to hospital pharmacy. One of the fundamental principles on the basis of which the pharmacist carries out his activity is represented according to the Pharmacist's Code of Ethics[1], art. 4, lit. f), "the *provision of pharmaceutical services is done at the highest possible quality standards based on a high level of scientific competence, practical skills and professional performance, in accordance with the progress of pharmaceutical science and practice"*, the hospital pharmacist becomes concerned with improving the quality of the activities they carry out in support of the patient. Thus, it is necessary to adopt normative acts, consolidate the existing ones, as well as implement European quality standards. (Apan. R.D., Bala C.G., 2021).

The oncology pharmacy represents the pharmaceutical activities of preparation, reconstitution and dilution of cytostatic solutions for the administration of patients. The hospital pharmacist strengthens his active role in the medical team in ensuring the treatment of the cancer patient.

[1] Published in the Official Gazette, Part I, no. 490 of July 15, 2009.

The advantages of this way of organizing the oncology pharmacy are: the preparation of medicines by specialized personnel, ensuring the quality of the medicine; the possibility of a rigorous control over the risk of contamination, both chemical and microbiological, by organizing a workspace with special facilities; ensuring traceability, patient-drug-final solution "ready to administer"; drug management, pharmacoeconomics.

According to the European Guide to Good Practice in Oncology Pharmacy[2], the aspects that define the oncological pharmacy are the following: quality management; staff; organization of space and necessary equipment.

I. QUALITY MANAGEMENT

National Authority for Quality Management in Health and clinical management rules[3], provide in the standard "*pharmaceutical and medication management ensures continuity of care and patient safety*", as well as compliance with specific requirements on the use of cytostatics. The indicator related to this requirement lists the conditions for the activity of dissolution and dilution of cytostatic drugs, stating that this activity can be performed both in the hospital pharmacy and in the clinic, in compliance with the rules of good manufacturing practice, and the activity must be processed, implemented and must ensure the protection of personnel preparing and administering cytostatic drugs.

The procedure of an activity is regulated by Order no. 600 of April 20, 2018 on the approval of the Code of internal control of public entities, issued by the General Secretariat of the Government[4]. The elaboration of a procedure must take into account "*Reference documents - with a regulatory role related to the procedural activity. The reference documents highlighted in a procedure are, as the case may be, the following: international regulations, primary legislation, secondary legislation, other internal regulations of the public entity*".

The procedure of the cytostatic dissolution activity, as an integral part of the oncological medication management, becomes complex and it must include all the aspects that have a direct involvement with reference to:

- the category of staff participating in this activity;
- space and endowment with technical equipment and protective equipment;
- the actual preparation technique;
- toxic waste management.

II. ONCOLOGY PHARMACY STAFF

Order no. 444 of March 25, 2019, for the approval of the norms regarding the establishment, organization and operation of pharmaceutical units[5], issued by the Ministry of Health, mentions:

[2] See https://esop.li/wp-content/uploads/2019/12/QuapoS6_Roumanian_HP.pdf, accessed on 27.10.2021.
[3] See https://anmcs.gov.ro/web/wp-content/uploads/2014/12/11.03-MC.pdf, accessed on 27.10.2021.
[4] Published in the Official Gazette, Part I, no. 387 of May 7, 2018.
[5] Published in the Official Gazette, Part I, no. 270 of April 9, 2019.

- art. 45, para. (7) - *"hospitals performing the National Cancer Program - Routine medical treatment of patients with oncological diseases, organized a separate space to meet all conditions necessary to ensure the quality of preparation and personal protection specialist. This space must be located in the vicinity of the oncology department and in it the specialized staff of the closed circuit pharmacy carry out their activity"*.
- art. 49, para. (1) - *"in the closed circuit pharmacy carry out their activity, in compliance with the legal provisions, specialized personnel composed of chief pharmacist, pharmacists, pharmacy nurses, administrative staff, as well as other personnel necessary to carry out the activities provided in the object of activity of the pharmacy, which will carry out its activity under the coordination and control of the chief pharmacist"*.
- art. 49, para. (5) - "*the personnel scheme of the closed circuit pharmacy will take into account the volume, the nature of the activity, as well as the number of beds, in accordance with the legal provisions in force"*.

As we can see, the legislator does not detail the specific category of staff for the cytostatic dissolution activity, but offers the possibility to take into account the nature and volume of the activity. The personnel involved in the cytostatic dissolution activity must be distinct personnel composed of pharmacists, pharmacy nurses, auxiliary cleaning personnel, auxiliary personnel involved in the transport of medicines.

Both the staff involved in the preparation activity, the pharmaceutical staff and the staff involved in the related activities (transport, cleaning, maintenance) must be regularly trained in accordance with the activity they carry out. Newly hired staff should receive a more detailed period of training as well as practical training[6].

Ordin no. 1,375 of December 6, 2016 for the amendment and completion of the Regulation on working time, organization and performance of guards in public units in the health sector[7], issued by the Ministry of Health, provides in art. 9, para. (3), point d), a 6-hour program for the activity of dissolution and preparation of cytostatic solutions.

The legislator, although it includes the activity of dissolution and preparation of cytostatic solutions with the reduction of the activity time together with other departments, pathological anatomy, forensic medicine, imaging radiology, in the salary law, Framework Law no. 153 of June 28, 2017 on the remuneration of staff paid from public funds[8], staff performing this activity do not receive any salary increase related to the toxicity risk to which they are exposed[9].

[6] See https://esop.li/wp-content/uploads/2019/12/QuapoS6_Roumanian_HP.pdf, accessed on 27.10.2021.

[7] Published in the Official Gazette, Part I, no. 988 of December 8, 2016.

[8] Published in the Official Gazette, Part I, no. 492 of June 28, 2017.

[9] See, https://www.inspectiamuncii.ro/documents/66402/264079/Gid+metodologic+pentru+prevenirea+riscurilor+legate+de+exposere+la+agen%C5%A3i+cancerigeni%2C + mutagens +% C5% 9Fi + toxic + for + reproduction / c09a8c32-e5fd-46f7-bf6a-c26bd29ca983 , accessed on 27.10.2021.

The cytostatic drugs in the reconstitution process, being concentrated solutions release vapors, aerosols that can cause an acute and/or chronic toxicity for the people who handle, prepare these drugs. Depending on the chemical structure, they have carcinogenic, mutagenic and teratogenic action (Eitel. A., Scherrer. M., Kummerer. K., 2000). Staff participating in such activities must be staff with a completed family cycle.

III. SPACE ORGANIZATION, NECESSARY EQUIPMENT, HEALT AND SAFETY AT WORK

The only legislative specifications that refer to the space and endowment with necessary equipment in the oncological medicine preparation units are those provided in Order no. 444 of March 25, 2019, for the approval of the norms regarding the establishment, organization and operation of pharmaceutical units, issued by the Ministry of Health, at art. 45, para. (7)[10] which stipulates that "the *space must be organized separately and meet all the conditions necessary to ensure the quality of the preparation, but also the protection of specialized personnel* and *must be in the vicinity of the oncology department*".

There is a contradiction within these rules, the pharmacy as a department location is always on the ground floor to ensure good supply of drugs, and clinical departments are located upstairs in most situations, so the law provides the possibility, or requires the creation of these spaces within the department clinical features of the pharmaceutical sub-department!

Ensuring the quality of the preparation involves minimizing microbial contamination through the technique of aseptic preparation, the endowment and structure of such spaces are found regulated by Decision no. 10/26.02.2015 adopting the Guide on good manufacturing practice for medicinal products for human use[11], issued by the Scientific Council of the National Agency for Medicines and Medical Devices of Romania, stating that they refer to the manufacturing process of drugs and not to the reconstitution/dilution of injectable drugs for parenteral administration.

The guide also refers to the provision of special technical equipment in the manufacturing process for "toxic and dangerous substances handled (eg with high pharmacological activity and/or sensitizing properties)", referring to substances in their pure state, not those conditioned - already manufactured. The technical equipment for equipping the space is varied, from ventilation and air filtration installations, niches with laminar air flow provided with filters to absorb the vapors / aerosols formed in the reconstitution process.

Ensuring the protection of personnel involves minimizing contamination with cytostatics during the preparation activity. The protection of personnel is also achieved through personal protective equipment in accordance with Regulation

[10] Published in the Official Gazette, Part I, no. 270 of April 9, 2019.
[11] See https://www.anm.ro/medicamente-de-uz-uman/legislatie/hotarari-ale-consiliului-stiintific/, accessed on 27.10.2021.

(EU) 2016/425 of the European Parliament[12]. Personal protective equipment consists of: coveralls, gloves, goggles with specific markings, certificates.

According to Law no. 319 of 14 July 2006, on health and safety at work[13], we can classify the risk of occupational disease caused by exposure to cytostatics, as follows:

- chapter II, art. 5, letter h): occupational disease - the condition that occurs as a result of the exercise of a trade or profession, caused by harmful physical, chemical or biological agents characteristic of the workplace, as well as by overloading various organs or systems of the body, in the process of the work;
- chapter III, Section 4, Art. 12, letter a) - to carry out and be in possession of a risk assessment for occupational safety and health, including for those groups sensitive to specific risks;
- chapter III, Section 4, Art. 12, letter b) - decide on the protective measures to be taken and, where appropriate, on the protective equipment to be used;
- chapter III, Section 1, Art. 7, para. (4) (a) - assess the risks to the safety and health of workers, including the choice of work equipment, chemicals or preparations used and the arrangement of workplaces.

The methodological rules for the application of the law on health and safety at work, Annex 22, the table of occupational diseases with mandatory declaration states "*other malignancies caused by objective occupational exposure and assessed in one of several agents on the IARC list"*, certain cytostatics according to of their mechanism of action are part of this list, and certain carcinogens are noted in the occupational noxiousness.

Personnel involved in the preparation of oncological medicines must have regular medical examinations, on employment, during employment and whenever there are suspicions of illness[14].

IV. PREPARATION OF ONCOLOGICAL MEDICINAL PRODUCTS

The preparation of oncological drugs is based on a specific form, called the chemotherapy regimen, so a clear distinction must be made between the form used to prescribe drugs in the hospital called "*prescribing conditions*" and the chemotherapy regimen.

The chemotherapy regimen is a personalized medical document for the patient, which contains the following information[15]:

- patient identification, name, sex, date of birth, medical file number;
- diagnosis and type of protocol used;
- treatment cycle number, start date, stop date and next cycle date;
- patient weight, height, body surface;

[12] Published in the Official Journal of the European Union, L 81, 31 March 2016.
[13] Published in the Official Gazette, Part I, no. 646 of July 26, 2006.
[14] See https://esop.li/wp-content/uploads/2019/12/QuapoS6_Roumanian_HP.pdf, accessed on 27.10.2021.
[15] *Ibidem*.

- the prescribed medicine, the calculated dose as well as the prescribed dose according to weight or body surface area;
- method of administration of the medicinal product, volume and type of solvent used for reconstitution / preparation;
- date, signature of the prescribing doctor.

If the biological parameters require the reduction of the administered doses, these specifications must be noted in the chemotherapy regimen.

The chemotherapy scheme is elaborated, as it is noted in the doctrine (Bot. A.C., Iancu, D.I., Kubelac, M.P., Todor, N., Achimas-Cadariu, P., Ciuleanu, T.E., 2021), based on some treatment protocols established by the chids. International clinical trials or regulated national protocols. The pharmacist is obliged to know the treatment protocols developed by the specialized commissions, to participate in the meetings of these commissions, to participate in the on-call report, to be part of the pharmacovigilance commission.

The doctrine holds that (Viaşu. M., 2015), "*Responsibility pharmacist oncologist begins with evaluating all drugs that are administered before initiation of chemotherapy, how the patient responds to drugs and if they are combined and administered in an optimal regime. This includes the assessment of renal and hepatic function, but also the assessment of aspects of genetic variability or metabolism that could affect the smooth running of treatment*."[16]

Specialist staff, pharmacists in collaboration with pharmacy assistants must ensure before preparation that the prescription is clear, all ambiguities have been clarified and the drug can be prepared.

The pharmacist has the obligation to contact the doctor in case of discrepancies, ambiguities of the chemotherapy scheme to avoid any risk of error, malpractice, as noted in the doctrine (Apan R.D., Fodor E.M., 2020).

The implementation of the online transmission of the chemotherapy regimen, for manual preparation of cytostatic solutions or for automated preparation involves the use of medical software accredited according to Regulation (EU) 2017/745 of the European Parliament and of the Council of 5 April 2017 on medical devices, amending Directive 2001/83 / EC, of Regulation (EC) no. 178/2002 and Regulation (EC) no. 1223/2009[17].

The organization of the preparation process must be carefully organized so that there are no undue delays affecting the patient's treatment.

Order no. 75/2010 for the approval of the Rules of good pharmaceutical practice, issued by the Ministry of Health[18], provides only for the preparation of main medicinal products and makes no reference to the reconstitution of medicinal products.

[16] See https://www.politicidesanatate.ro/farmacistul-oncolog-parte-importanta-a-echipei-terapeutice/, accessed on 27.10.2021.
[17] Published in the Official Journal of the European Union, L 117, 05 May 2017.
[18] Published in the Official Gazette, Part I, no. 91 of February 10, 2010.

Although centralized reconstitution also aims at pharmacoeconomic aspects, currently the reporting of drug use only allows the reporting of therapeutic units, vials, so the difference between the dose required by the patient and the dose per therapeutic unit considered residual, can no longer be used and it becomes waste. In this way, there are large losses of drugs, and if we take into account that oncological drugs have high prices, there are sometimes substantial economic losses.

V. WASTE MANAGEMENT

According to the classification of waste resulting from medical activity, cytotoxic drugs are registered as hazardous waste.

Order no. 1,226 of December 3, 2012 for the approval of the Technical Norms on the management of waste resulting from medical activities and of the Methodology for collecting data for the national database on waste resulting from medical activities, issued by the Ministry of Health[19] chapter II, art. 7, letter g) states that: "*chemical and pharmaceutical wastes are solid, liquid or gaseous chemicals that can be toxic, corrosive or flammable; expired drugs and residues of chemotherapeutic substances, which may be cytotoxic, genotoxic, mutagenic, teratogenic or carcinogenic; these wastes are included in the category of hazardous waste*", we can use the phrase - *cytostatics become hazardous only after they are waste*.

Waste resulting from cytostatic dissolution activity, empty vials or vials containing drug residues, shall be collected in packaging containing yellow polyethylene bags, placed in special places and in impermeable, airtight packaging with a temporary and permanent closure system. Packaging must be marked with the waste code, for cytostatic drugs 180108 and the '*biohazard*' icon.

In the event of accidental breakage and / or leakage in each area where cytostatics are handled, decontamination kits should be provided to remove and dispose of the drug as soon as possible.[20]

CONCLUSIONS

A Following the analysis of the above chapters, we can conclude that, in 2021, the oncology pharmacy in Romania is still in its infancy, it is necessary to adopt some normative acts, consolidate the existing ones as well as implement the European quality standards.

The conduct of such an activity involves legislation in various fields and obliges the hospital pharmacist to a continuous challenge and analysis. As noted, there is a legislative vacuum that can block the development of procedures, although practical work requires in these situations to use the recommendations of European guidelines.

The oncologist pharmacist becomes an active member of the medical team, fights with the doctor in treating this condition that holds the 2nd place, after cardiovascular diseases, as a cause of death in the EU.

[19] Published in the Official Gazette, Part I, no. 855 of December 18, 2012.

[20] See https://esop.li/wp-content/uploads/2019/12/QuapoS6_Roumanian_HP.pdf, accessed on 27.10.2021.

The conclusion of the 18 years of activity in the hospital pharmacy with oncological profile is the following: the pharmacist is "master" of drugs. The synonyms of the verb "to master" are varied: to possess, to possess, to have, to know, to retain, to dominate, to calm, to temper, to calm, to calm, to govern, to lead and they become needs in clinical practice. In order to master a medicine, you must know everything about it, whether it is notions that we know from the literature or notions that we learn from clinical practice and that use us to ensure quality treatment of our patients. , because: we have common patients with doctors, we need to make sure of this and we can do it by providing accurate data about the drug or drug combinations and improving the work we do. The development of a modern concept of pharmacy in the conditions of an outdated legislation is very difficult, it must be adapted to the concrete situation we have in order to ensure in the future a master pharmacist on the drug.

If in the past, the pharmacist was defined by the activity of prescription, now he defines something else, which essentially has the same principle, of drug preparation and knowledge. The concrete situation we have, we understand it only by looking around us how things have evolved over time; if in 2002 at the beginning of my career, we took some drugs from a shelf and sent them to the hospital ward, now in 2021 we have come to prepare the drugs, ready to administer to patients and even talk about "oncology pharmacy" or implement systems automatic preparation. I strongly believe that the need for reality tells us what we have to do, where to go provided we say the present. "If we look around our colleagues, everyone is a specialist in something, research, management, legislation, prescription, clinical (gastroenterology, psychiatry, infectious, cardiology, oncology, etc.) and I think this is the future, the acquisition of specialties and skills.

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ADVERTISING OF MEDICINES FOR HUMAN USE. PERSPECTIVES FROM EUROPEAN COURT OF JUSTICE

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Abstract

The present study aims, in the reflection of a decision given by the European Court of Justice to analyze the way to (re) establish the protection of persons in online sales of medicines, both against excessive consumption of medicines generated by advertising, self-medication and the harmful effects of long-term medication not adapted to the person's health. This method is found in the French Consumer Code and is a real connection between the requirements of the pharmacist profession and the requirements of public health protection. Given that a similar protection measure is not included in our legislation, the French regulation would be a good model for a proposal of lege ferenda in the matter.

During the Conference "Public safety and the need for high social capital", panel VII, "Protection of human capital in the field of the right to health and social care" was organized, and this study aims to raise the protection of human capital, through rules and jurisprudence which gives efficiency to the concept of "public health". Or, the protection of the population through regulations regarding the distribution of medicines is part of this broad concept.

Keywords: *advertising, drugs, pharmacy, online sales, drug abuse*

INTRODUCTION

Medical-pharmaceutical services are those services provided by individuals and legal entities, organized in various ways, to exercise their professions in this field. Attracting and retaining customers is one of the challenges of professionals practicing the medical-pharmaceutical professions. (Apan, R.D., Fodor E.,M., 2018) This objective, although it is pursued in both the medical and pharmaceutical professions, is observed with priority in the "pharma" area, in the activity of selling medicines.

The drug is defined in art. 699 of Law 95 of 2006[1], corroborated with the provisions of art. 4, point 10 of the Order of the Ministry of Health no. 194/2015 on the approval of the Norms for the evaluation and approval of advertising for medicines for human use[2], as:

a) any substance or combination of substances presented as having properties for treating or preventing disease in humans; or
b) any substance or combination of substances which may be used or administered in humans, either for the restoration, correction or modification of physiological functions by the exercise of a pharmacological, immunological or metabolic action, or for the establishment of a medical diagnosis.

The advertising of the drug, as it is defined above, as a recipient of the general public, seems a utopia, but has become a stark reality in recent years.

The present study aims that, in the reflection of the decisions given by the European Court of Justice to (re) establish the balance in the consumption of medicines, crushed by the online publicity that attracts the abuse of medicines, defined in art. 699, point 16 of Law 95 of 2006, as the intentional excessive, permanent or sporadic use of drugs, which is accompanied by harmful effects on a physical or mental level[3].

I. SEDES MATERIAE

The general regulation in the field of advertising is included in Law no. 158/2008 on misleading advertising and comparative advertising[4]. This applies without prejudice to the provisions on advertising for certain products and / or services, as well as restrictions or prohibitions on advertising in certain media, contained in other regulations. (Căpăţână, O., 1997)

Or, regarding the advertising of medicines, there are special regulations that will be applicable to the field, namely, Law no. 95/2006 on health care reform and Order of the Ministry of Health no. 194/2015 on the approval of the Norms for the evaluation and approval of advertising for medicines for human use.

II. ADVERSITING OF DRUGS – DEFINITION, CHARACTERISTICS, PROHIBITIONS

Advertising is defined in art. 3 lit. a) of Law no. 158/2008 as, any form of presentation of a commercial, industrial, artisanal or liberal activity, in order to promote the sale of goods or services, including real estate, rights and obligations.

[1] Republished in the Official Gazette, no. 652 of 28 August 2015, amended and supplemented, hereinafter referred to as Law 95 of 2006.
[2] Published in the Official Gazette, no. 168 of March 11, 2015, hereinafter referred to as the Order of the Ministry of Health no. 194/2015.
[3] Drug consumption in Romania - between statistics and the situation on the ground, http://starea-natiunii.ro/index.php/ro/noutati/facts-figures/25-facts-figures/151-consumul-de-medicamente-in-romania-intre-statistici-si-situatia-de-pe-teren-2, accese la data 03.11.2021.
[4] Published in the Official Gazette, no. 454 of July 24, 2013, amended and supplemented, hereinafter referred to as Law 158 of 2008.

Art. 811, paragraph (1) of Law 95 of 2006 stipulates that the advertising for medicines regulated in the law includes any way of information through direct contact ("door-to-door" system), as well as any form of promotion intended to stimulate the prescription, distribution, sale or consumption of medicines, so we believe that it is also applicable to online sales.

Also, art. 6 of the Order of the Ministry of Health no. 194/2015, provides as a field of application, all promotion methods, as defined in art. 4 point 21 of the same normative act, respectively, any activity organized, carried out or sponsored by a pharmaceutical company (or with its authorization) that encourages the prescription, distribution, sale, administration, recommendation or use of drugs, without restricting the use of these methods in the online environment. (Tătaru, Ș, 2017).

Advertising for medicines (advertising) is defined in art.11, paragraph 1, of the Order of the Ministry of Health no. 194/2015, as any form of organized activity aimed at informing by direct or indirect methods, as well as any form of promotion intended to encourage the prescription, distribution, sale, administration, recommendation or use of one or more medicinal products for use human. Advertising of medicines can be aimed at health professionals or the general public.

Art. 4, points 25 and 26 of the Order of the Ministry of Health no. 194/2015 defines comparative advertising as any form of advertising which explicitly or implicitly identifies a competing product and / or comparative description, and misleading advertising as any form of advertising which, in any way, including by way of presentation, induces or it may mislead any person to whom it is addressed or who comes into contact with it.

A series of characteristics and prohibitions are regulated for the advertising of the drug intended for the general public (Gavriloaia, R., 2015) which is also the theme of this paper.

(i) the advertising characteristics for a medicinal product are set out in Article 812, paragraphs 2 and 3 of Law 95 of 2006 in conjunction with art. 12, paragraph 1 of the Order of the Ministry of Health no. 194/2015 starting from the principle that, advertising intended for the general public is allowed only for those drugs that, by composition and purpose, are intended to be used without the intervention of a doctor, in order to establish the diagnosis, their prescription or to monitor treatment, being sufficient, if necessary, the advice of pharmacists, namely:

- advertising for a medicinal product must: - be done responsibly, ethically and to the highest standard, in order to ensure the safe use of medicinal products, regardless of how they are dispensed; - to encourage the rational use of the medicinal product, by presenting it objectively and without exaggerating its properties, - to be accurate, balanced, fair, objective and complete in order to enable those to whom it is addressed to form their own opinion on the therapeutic value of - to be based on an up-to-date assessment of all relevant evidence and to clearly reflect this evidence, - to encourage the rational use of the medicinal product, by presenting it objectively, without exaggerating its therapeutic properties or qualities;

- advertising for a medicinal product must not: - encourage self-medication or irrational use of the medicinal product, - be misleading, subliminal or misleading by distortion, exaggeration, unjustified emphasis, omission or otherwise, - suggest that a medicinal product or an active ingredient has any special merit, quality or property, if this cannot be scientifically documented; - prejudice respect for human dignity; nationality; - to harm the image, honor, dignity and private life of persons; - to include anything that could be offensive or misleading to the user.

(ii) the interdiction of the advertising of medicines to the general public is regulated by the principles found in the provisions of art. 812 and of art. 813, paragraph 2 of Law 95 of 2006, corroborated with art. 13 of the Order of the Ministry of Health no. 194/2015, which prohibits advertising to the general public for drugs that: - are issued only on medical prescription, -contain substances defined as narcotics or psychotropic by international conventions, such as the United Nations conventions of 1961 and 1971 and national law; have a marketing authorization valid in Romania - are distributed directly to the population by manufacturers for promotional purposes.

(iii) the arrangements for advertising medicinal products are:

1. printed materials (printed matter): scientific/promotional materials intended for health professionals, advertising materials intended for the general public, educational materials intended for patients and their organizations/associations; posters, invitations, reminders.

2. audiovisual advertising (radio, television);

3. billboards or any other form of outdoor advertising or any form of advertising presented on another type of communication channel than pharmacies, medical offices, audiovisual, print media, internet;

4. Internet advertising (web pages, e-mail, forums, blogs or any other form of electronic support)

5. offering samples;

6. promotional items (relevant to medical practice).

According to the provisions of art. 31 of the Order of the Ministry of Health no. 194/2015 to the representative of the marketing authorization holder (DAPP) is the person, commonly known as "local representative", appointed by the marketing authorization holder to represent him in Romania, and according to the provisions of art.15, paragraph 1 of the same normative act DAPP has the obligation to submit to the National Agency for Medicines and Medical Devices-NAMMD for approval all advertising materials for the general public / patients and to put them on the market only after obtaining the advertising visa.(State, D., 2015). According to the provisions of paragraph 2, this rule applies to advertising materials for OTC medicines, as well as educational materials intended for the general public/patients. (Tăerel, R., 2018)

III. JURISPRUDENCE OF THE EUROPEAN COURT OF JUSTICE ON THE ADVERTISING OF MEDICINAL PRODUCTS

3.1. Judgment of the Court of 1 October 2020, the date in question C 649/18

The purpose of the judgment is a reference for a preliminary ruling in a judicial proceeding focused on the protection of public health. The referring court was the Cour d'appel de Paris, and the judgment concerned non-prescription medicines for human use and targeted advertising on a pharmacy's website, examining the basis of the pharmacy's obligation to operate. in one state to require the patient to complete a health questionnaire before validating his first order on the website, the rule applicable in another state, namely, the one in which the general public was targeted by advertising.

3.2. The dispute in the main proceedings and the question referred for a preliminary ruling

A, a company incorporated under Netherlands law, is registered in the Netherlands for the purpose of operating a pharmacy. It also sells medicines online and para-pharmaceuticals through several websites, one of which is specifically dedicated to French consumers. Medicines marketed through this site are subject to a marketing authorization in France and are not subject to compulsory medical prescription.

A carried out an advertising campaign for the online sale of medicines to French consumers. This campaign included the introduction of advertising leaflets in parcels sent by other participants in distance selling (the so-called "cooperative" method), as well as the sending of advertising letters. **A** also published on that website promotional offers consisting of a reduction in the total price of the order when a certain value is exceeded, as well as the purchase of a paid referencing service on search engines.

Daniel B and Others sued **A** at the Tribunal de Commerce de Paris in order to obtain compensation for the damage which they consider to have suffered as a result of the unfair competition which **A** has allegedly suffered by unjustifiably obtaining an advantage from non-compliance with French regulations on advertising and online sales of medicines.

By judgment of 11 July 2017, the Tribunal de Commerce de Paris ruled that Dutch law governed the creation of a website addressed to French customers. However, according to that court, Articles R. 4235 22 and R. 4235 64 of the Public Health Code apply to companies established in other Member States which sell medicinal products on the Internet to French patients.

However, by distributing more than three million advertising leaflets outside the pharmacy, **A** would have attracted French customers by means unworthy of the profession of pharmacist, in breach of those provisions. The Paris Commercial Court concluded that the infringement of those provisions, which gave **A** an economic advantage over other market participants, constituted an act of unfair competition.

He appealed against that judgment to the Cour d'appel de Paris, arguing that Articles R. 4235 22 and R. 4235 64 of the Public Health Code did not apply to him.

Those provisions infringe the principle of the application of the rules of the country of origin laid down in Article 3 of Directive 2000/31 and Article 85c of Directive 2001/83 and the free movement of goods guaranteed by Article 34 TFEU, which are not justified by the protection of public health.

In those circumstances, the Cour d'appel de Paris decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling: '[t] he European regulation, in particular:

- article 34 [TFEU], - the provisions of Article 85c of Directive [2001/83/EC establishing a Community code relating to medicinal products for human use] [and], - the internal market clause in Article 3 of Directive [2000]/31 on certain legal aspects of information society services, in particular electronic commerce, in the internal market] allow a Member State of the [European] Union to impose on its territory pharmacists who are nationals of another Member State of the Union on specific rules concerning:
- the prohibition of attracting customers by methods and means considered to be contrary to the dignity of the profession, in accordance with the current Article R 4235 22 of the [Public Health Code];
- prohibiting the incitement of patients to abuse drugs, in accordance with the current Article R 4235 64 of the [Public Health Code];
- the obligation to comply with good medicine delivery practices established by the public authority of the Member State, which also requires the introduction of a health questionnaire in the online ordering process and prohibits the use of drug delivery practices and the Technical Standards Decree]? "

3.3. Provisions in European and national legislation

▪ European law

'Directive 2000/31-Article 8 (1) provides that' [t] he Member States shall ensure that the use of commercial communications forming part of or constituting a service of the information society provided by a member of a regulated profession is subject to compliance with professional rules concerning, in particular, the independence, dignity and honor of the profession, as well as professional secrecy and honesty towards clients and other members of the profession '.

Directive 2001 / 83- Title VIIa "Distance selling to the general public", Article 85c provides: information society services, Member States shall ensure that medicinal products are offered for sale at a distance to the public through information society services, as defined in Directive [98/34], under the following conditions:

(a) the natural or legal person providing the medicinal product is authorized or has the right to supply medicinal products to the public and at a distance, in accordance with the national law of the Member State in which the person concerned is established;

(b) the person referred to in point (a) has notified the Member State in which the person concerned is established of at least the following information: [...]

(c) the medicinal products comply with the national law of the Member State of destination in accordance with Article 6 (1);

(d) without prejudice to the information requirements laid down in Directive [2000/31], the website providing the medicinal product shall contain at least: [...]

2. Member States may impose justified conditions on the protection of public health for the retail supply of medicinal products within their territory by distance selling to the public through information society services. [...]

Directive 2001/83 provides - 'Member States shall prohibit the advertising to the general public of medicinal products which: (a) are available only on medical prescription in accordance with the provisions of Title VI;'

▪French law

The Public Health Code provides - Article R. 4235 22 of the Public Health Code (Public Health Code) provides that "pharmacists shall be prohibited from attracting customers by methods and means contrary to the dignity of the profession". Article R. 4235 64 of that code provides that '[t] he pharmacist must not lure his patients by any method or means to the abuse of medicinal products'.

The Decree on good practice for the supply of medicinal products provides - Section 7.1, entitled "Pharmaceutical advice", in section 7, entitled "Complementary rules applicable to electronic commerce with medicinal products", in the annex to the Decree of 28 November 2016 on good practices for the supply of medicinal products in Community pharmacies, in mutual aid pharmacies and in emergency mining pharmacies, referred to in Article L. 5121 5 of the Public Health Code, provides:

"The e-commerce website is designed so that no medicine can be delivered without an interactive exchange between the patient and the pharmacist in question before the order is validated. "

We note at the outset that, in the event of the online sale of medicinal products, in accordance with the provisions of French law, an automatic answer to a question from the patient is not sufficient to provide information and advice tailored to the particular case of the patient. Personal data concerning the patient are necessary for the pharmacist in order to ensure the adequacy of the order in relation to the patient's state of health and to be able to identify possible contraindications. Thus, in accordance with these regulations, before validating the first order, the pharmacist posts online a questionnaire requesting information on age, weight, height, sex, ongoing treatments, history of allergies, contraindications that the patient has and, if where appropriate, pregnancy and lactation. The patient must certify the veracity of this information and communicate it online to the pharmacist by completing the questionnaire. The questionnaire is completed at the first order, during the order validation process, and if the questionnaire has not been completed, no medicine can be released. The pharmacist then validates the questionnaire, stating that he has read the information provided by the patient before validating the order and an update of the questionnaire is proposed to the patient at each order.

3.4. A's defenses before the Court

- as to the necessity of such a measure as required by French law, To argue that the French Decree on Good Prescribing Practice would already ensure that

patients can receive personalized advice by requiring virtual pharmacies to provide it on request the possibility of an interactive exchange with a pharmacist.

- show that the quantities of medicinal products ordered by an interested person through its website are monitored on a case-by-case basis, on the basis of various parameters, including the history of orders placed by the interested party and that these checks would be sufficient to prevent the risk of improper use of medicines.

3.5. Considerations of the Court

In order to give a preliminary ruling, the Court, in accordance with the case-law, held that:

- the online sale of medicinal products in Article 1 (5) of Directive 2000/31 r is not one of the activities excluded from the application of that directive, so an online sale of medicinal products such as that at issue in the main proceedings may constitute a information society service within the meaning of Article 2 (a) of Directive 2000 / 3- Case Ker Optika C 108/09, paragraph 27[5];
- the intensive use of advertising or the choice of aggressive promotional messages are likely to be detrimental to the protection of health and undermine the dignity of a health profession - Case C-339/15 Vanderborght [2017] ECR I-0000, paragraph 69[6];
- that the restriction resulting from the application of national legislation which generally and absolutely prohibits any form of advertising used by health professionals to promote their medical activities goes beyond what is necessary to protect public health and the dignity of a regulated profession. of 4 May 2017, Vanderborght, C 339/15, paragraphs 72 and 75[7];
- the multiplication of existing interactive elements on the Internet that must be used by the customer before he can purchase medicines is an acceptable measure, which affects less the free movement of goods than a ban on the online sale of medicines, which allows to be done just as effectively the objective of reducing the risk of misuse of medicinal products purchased online - Case C-322/01 Deutscher Apothekerverband [1993] ECR I-0000. [8].

3.6. Decision of the Court

In the light of that case-law, the Court considers that:

- it is for the national court to determine whether the prohibition at issue in the main proceedings does not preclude the provider at issue in the main proceedings from advertising outside its pharmacy, regardless of its medium or size, and whether that is the case. , that prohibition would go beyond what is necessary to ensure that the objectives pursued were achieved.

[5] https://curia.europa.eu/juris/liste.jsf?language=ro&num=C-108/09
[6] https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX:62015CJ0339
[7] https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX:62015CJ0339
[8] https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX%3A62001CJ0322

- Directive 2000/31 must be interpreted as not precluding the application by the Member State of destination of a service for the online sale of non-prescription medicines to the provider of that service established in another Member State; national regulations requiring pharmacies that sell such medicines to introduce a health questionnaire into the online ordering process.

Other decisions that we consider relevant in the field of advertising of medicines for human use are:

Judgment of the Court of 11 June 2020 (reference for a preliminary ruling from the Bundesgerichtshof - Germany) in Case C-786/18 Ratiopharm GmbH v Novartis Consumer Health GmbH, „ Preliminary reference - Protection of public health - Internal market - Medicinal products for human use - Directive 2001/83 / EC - Advertising - Article 96 - Distribution of free samples of medicinal products which are available on prescription only to persons qualified to prescribe them - Exclusion of pharmacists from the possibility of distribution - Inapplicability in the case of distribution of free samples of medicinal products not issued on prescription - Consequences for Member States "[9] and

Judgment of the Court of 8 October 2020 in Case C 602/19 Kohlpharma GmbH v Bundesrepublik Deutschland, 'Preliminary reference - Articles 34 and 36 TFEU - Free movement of goods - Quantitative restrictions - Measures having equivalent effect - Refusal to approve a change in information and documents relating to a medicinal product subject to a parallel import authorization - Protection of health and life of humans - Directive 2001/83/EC."[10]

CONCLUSIONS

We find that, in interpreting European legislation, the Court gave precedence to the principle of protection of public health. We also note that in French legislation has been adopted in the sale of drugs to the population online "questionnaire method" to ensure personalized advice by the pharmacist in the online sale of drugs and to limit excessive consumption of drugs and self-medication.

The Romanian national legislation includes the principles of Directive 2001/83 - Community Code on medicinal products for human use[11], but does not establish a means of protection for the online purchase of medicines. The solution regulated in French legislation and analyzed above is a good example. The reflection topic launched by this paper is finding such a means of protecting the population at the level of national legislation and formulating a proposal for lege ferenda to complete the relevant legislation, which de facto would include the following steps: -before the validation of the first order online, the pharmacist shall post a questionnaire requesting information on age, weight, height, sex, ongoing treatments, allergic history, contraindications and, if applicable, pregnancy and lactation; order validation

[9] https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:62018CA0786&from=EN
[10] https://curia.europa.eu/juris/liste.jsf?num=C-602/19&language=RO
[11] https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX%3A02001L0083-20121116

- if the questionnaire has not been completed, no medication can be released - the patient must certify the veracity of this information; -the pharmacist then validates the questionnaire, stating that he has read the information provided by the patient, before validating the order; -the pharmacist should ensure the adequacy of the order sent via the Internet, regarding the patient's health, to be able to identify any contraindications, -updating the questionnaire is proposed for each order.

In the conditions of the pandemic with Covid, considering the fear of the disease and the fact that, the exacerbation of the drug consumption becomes a constant, the advertising of the drugs develops unhindered. [12] This requires that the rules according to which the advertising of medicines for human use is carried out be observed as rigorously as possible, as a component of the desideratum for the protection of public health.

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[12] https://www.forbes.ro/articles/prima-linie-publicitatii-172628

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LEGISLATIVE REFORMS IN PREVENTIVE MEDICINE AND THEIR IMPACT IN SOCIAL ASSISTANCE

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Abstract

Preventive medicine focuses mainly on the health of individuals in a community or group of the population as a defined social group. Because prevention was originally a concept related to public health, and referred to programs aimed at the population, which were coordinated by a health authority on the territory of a country, the population did not understand its role either. The research theme of this paper consists in the analysis of the reforms that have been implemented to protect the population.

Keywords: *prevention, preventive medicine, prophylaxis, legislation, health promotion*

INTRODUCTION

Prevention is cheaper than treating diseases! It seems to be too good a myth to be true! The experiences of two to three decades of applying serious prevention programs have already proven this. Let us also not forget the roles of prevention and encouraging people to be more proactive in their health and well-being as central 'tools' – towards a society that can build, evolve and also be independent.

The definition of health includes three frequently used criteria, namely functional well-being; the body's ability to adapt to various living and working conditions; the human condition that makes the individual creative. This classification on three types of prevention has been valid since the 1980s, and recently a new concept has been developed, namely that of "quaternary prevention", a concept initiated by a family doctor from Belgium, Dr. Marc Jamoulle (Jamoulle, 1986).

Prevention can be done at several levels, depending on the actors involved and the size of the problem. In the case of primary prevention, it aims to promote health and avoid health risks before the disease occurs; secondary prevention – it is done to detect diseases in the early stage, asymptomatic; and tertiary prevention – which

aims to stop or delay the progression of the disease to complications. The World Organization of Family Physicians, abbreviated WONCA (Bentzen N, 2003) defines "quaternary prevention" as the action of identifying patients at risk of over medicalization and protecting them from new invasive methods, suggesting which interventions are ethically acceptable.

Considering that the general theme of the 3rd edition of the Conference is *"Public safety and the need for high social capital*", within which the panel VII was organized, called „*The Protection of human capital in the field of the right to medical and social assistance"*, we chose the present topic of study in accordance with what it set out to highlight, namely an analysis of the challenges and novelties that arise in preventive medicine, with an effect in providing social services in Romania. This article closely observes the applications of preventive medicine, the recent changes in the legislation that also concerns its sector in Romania, and are having an impact on social work. It is worth emphasized the role of each person in the prevention activity, in the awareness and promotion of prophylaxis around us, relatives, friends, work colleagues.

I. CURRENT LANDMARKS OF PREVENTIVE MEDICINE IN ROMANIA

Recent legislative changes in the preventive sector include several aspects. Thus, with regard to medical aspects in various areas.

(i). It has been found the increase of the prevalence of the population in our country with Hypertension (HTA) – "(...) at the level of 2019, it appears in the top ten countries with a high prevalence of HTA among the male population (53%)"[1]. One of the recommendations: initiation of pharmacological treatment in all patients confirmed with the diagnosis of HTA, in which the systolic blood pressure values (TAS) are ≥ 140 mmHg or in whom the diastolic blood pressure is ≥ 90 mmHg, with the tas threshold changing to 130-139 mmHg in those with concomitant cardiovascular disease/risk factors for it/diabetes mellitus/chronic kidney disease.

(ii). The novelties in Vaccinology – both anti-SARS-CoV-2 (warnings[2], recommendations[3], analysis of the evidence[4], etc.), but which brought, by ricochet, to discussions about the mandatory vaccination[5] (blamed, challenged, analyzed nationally and internationally, in turn) – have ignited and divided populations (which are shared into anti-vaccineists and pro-vaccination).

[1] https://www.atelieremedicale.ro/2021/09/02/ghid-pentru-tratamentul-farmacologic-al-hipertensiunii-arteriale-la-adulti/?fbclid=IwAR0KiIWyu2BvfdsTc1LUkwHMutJnuT9kJ2wOrIa2P-le-fREmPLo6zVCf2Y, accessed on 19.11.2021

[2] https://www.cdc.gov/coronavirus/2019-ncov/vaccines/expect/after.html, accessed on 19.11.2021.

[3] https://www.cdc.gov/coronavirus/2019-ncov/vaccines/vaccine-benefits.html, accessed on 19.11.2021.

[4] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8163222/, accessed on 19.11.2021.

[5] https://rohealthreview.ro/proiect-ms-certificatul-digital-covid-19-obligatoriu-pentru-personalul-medical-cei-care-refuza-vaccinarea-sau-testarea-vor-avea-contractul-suspendat/?fbclid=IwAR1K5mGaCOvxdoNCaajQrxBbb1b7R8mI5EaFf75VivzltF_IgJ_gyRapvRc, accessed on 19.11.2021.

(iii). Regarding tropical diseases, they have entered in the center of changes in behavior and medical and social practice. In this regard, representatives of the World Health Organization (WHO) have regulated a project to improve safe treatment for more than 1 billion people annually[6].

(iv). People who were suspected or who had symptoms of chronic viral hepatitis (type B or C) were affected by the COVID-19 pandemic and did not addressed to the specialist doctor. Thus, in 2020, there were 48 new cases, almost 5 times fewer than in the previous year, respectively 2019, when 234 people were registered in the records of the National Surveillance System for Viral Hepatitis B and C[7].

(v). The situation of HIV positive people has also been affected by the current situation (the COVID-19 pandemic and the current health crisis); through the HIV/AIDS testing rate which in 2020 recorded a decrease of almost a third, although the number of new cases of HIV infection in Romania was already increasing in recent years[8].

(vi). Extending the age of free HPV vaccination for girls up to 18 years as a primary and secondary prevention measure[9]. Until now, the regulation aimed at free vaccination only for girls between the ages of 11 and 14.

(vii). As regards social assistance and childcare, in the year 2021:

- programs for obese and overweight children have been started, given the situation in our country regarding childhood obesity[10].
- settlement of the investigation services recommended by the family doctor during the prevention consultations, granted for all age categories[11].
- the "Insured's Guide" was updated[12].

The field of digitalization of the health system has come to the fore, through funds coming from the National Recovery and Resilience Plan (PNRR) - an investment of over 400 million euros is desired in this direction[13].

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6 https://www.who.int/news/item/16-08-2021-neglected-tropical-diseases-enhancing-safe-treatment-for-more-than-1-billion-people-annually, accessed on 19.11.2021.

7 https://www.cnscbt.ro/index.php/analiza-date-supraveghere/hepatita-virala-tip-b-si-c/2303-hepatita-virala-b-si-c-anul-2020-analiza/file?fbclid=IwAR3dSH2Lcfbc_rBUzlvKexiY5lCkJ7uN0SnEAlAW VJPNK1dqKnrojh7Bibw, accessed on 19.11.2021.

8 https://observatoruldesanatate.ro/wp-content/uploads/2021/07/raport_ors-raa_autoritati_locale_hiv-1.pdf, accessed on 19.11.2021.

9 http://www.ms.ro/2021/09/03/ministrul-sanatatii-ioana-mihaila-vaccinarea-gratuita-anti-hpv-extinsa-la-fete-pana-la-18-ani/, accessed on 19.11.2021.

10 https://rohealthreview.ro/campanie-de-constientizare-si-preventie-a-obezitatii-infantile-lansata-de-institutul-national-pentru-sanatatea-mamei-si-copilului/, accessed on 19.11.2021.

11 https://cnas.ro/2021/07/13/comunicat-servicii-de-preventie-decontate-din-fnuass-incepand-cu-luna-iulie-2021/, accessed on 19.11.2021.

12 http://cnas.ro/ghidul-asiguratului/?fbclid=IwAR0CXCDJmKyncMIJ5OO_V8297Mw0Kflv7YpsbDyTCAL7TllnbnBbRF_xq_o, accessed on 19.11.2021.

13 https://www.viata-medicala.ro/stiri/romania-va-investi-400-de-milioane-de-euro-in-digitalizarea-sistemului-de-sanatate-22714?fbclid=IwAR1dpb6q_1sifHsghGoflqeCrrT4FZEvKD8rtDUWaN32d2CMR03j7LE4Wws, accessed on 19.11.2021.

Another novelty is the launch of the Clinical Trials Information System (CTIS), a system with information on clinical trials, which aims to propose, authorize and supervise clinical trials in the EU, in the European Economic Area, as well as in Iceland, Liechtenstein and Norway[14].

II. PREVENTIVE MEDICINE AND ITS APPLICATION IN PRACTICE; DILEMMAS AND CHALLENGES ENCOUNTERED BY FAMILY DOCTORS

To understand the "constraints" of prevention, we need to understand the ethical principles of public health, which reflect the orientation of actions towards maintaining and promoting the health of the population – despite the "resistance" of clinicians who claim that populations are ultimately made up of individuals.

Over time, the notion of prevention was also taken up by clinicians, under the name of clinical prevention. Through clinical prevention, the clinician tries to detect the wrong behaviors, to prevent the occurrence of disease or complications. Also, it was introduced and is aimed at changing the paradigm that only in the clinic is done medicine; "(...) the prevention consultation is an important thing, because it comes to complete some health programs that... it does not exist. Normally, Romania should have had prevention programs that address the entire population, with certain selection criteria"[15].

Therefore, the present discussion makes findings towards and regarding the activity of clinicians, who state that "in our country there is no culture of preventive consultation"[15]. Moreover, a challenge of preventive medicine in Romania is the lack of preventive consultation - "Preventive consultation is much more than a curative consultation: a curative consultation means that a patient of yours, whom you know, to come with some symptoms and consult him, make a history and make a presumptive diagnosis. If you need tests, well, if not, you can make a diagnosis and make a therapeutic decision. In the case of a preventive consultation, we are talking about a much more elaborate consultation, because we are talking about a consultation "from head to toe", of all devices and systems, so you can detect any risk factors and also calculate certain scores. (...) "[15].

In this sub-theme, it should be said that the activity of family doctors from individual medical offices is indicated to be integrated in practice and according to the law of Primary Health Care, Law 95/2006 (stipulated in Chapter IV, art. 77-82)[16].

Therefore, an update (or new legislative clarifications) was needed regarding the safety and protection of medical personnel during the provision of the medical service (s). In this sense, the doctrine (Ghica M.S., 2021, pp. 133-146) shows that

[14] https://www.viata-medicala.ro/internationale/sistem-informatic-dedicat-studiilor-clinice-in-ue-se-lanseaza-in-ianuarie-2022-22570?fbclid=IwAR1Bb3gbyUgnELMnM6IvlrQ6kg8p8WmGGoxpUrDBD3k3VI1MI-4SxvUPf9o, accessed on 19.11.2021.

[15] https://www.politicidesanatate.ro/nu-exista-o-cultura-a-consultatiei-preventive-in-romania/?fbclid=IwAR3dSH2Lcfbc_rBUzlvKexiY5lCkJ7uN0SnEAlAWVJPNK1dqKnrojh7Bibw, accessed on 19.11.2021.

[16] https://lege5.ro/gratuit/g42tmnjsgi/asistenta-medicala-primara-lege-95-2006?dp=hazdanbyga4do, accessed on 19.11.2021.

the medical staff must be supported by adequate and coherent means both in the fight against the pandemic and in carrying out its usual activity.Subsection No.1 (Heading 2)

Define abbreviations and acronyms the first time they are used in the text, even after they have been defined in the abstract. Abbreviations such as IEEE, SI, MKS, CGS, sc, dc, and rms do not have to be defined. Do not use abbreviations in the title or heads unless they are unavoidable.

III. PREVENTIVE MEDICINE IS MULTIMODAL; THE POPULATION'S ACCESS TO INFORMATION, BUT ALSO ITS SOCIAL INVOLVEMENT

These times of balance, in which the individual good vs. the social good, actually show us the extent of misinformation - and prevention cannot take place with disintegrations of ideas, with split off opinions, meant to destabilize the immediate reality[17]. It is a "trivial" information about dental caries and dental services can turn into a baseless accusation, but also how to induce, intentionally or not, distrust in the medical body. It is known not today or yesterday that the accessibility of the population to prevention, diagnosis, treatment and dental rehabilitation services is in the same disastrous situation and with very high indicators of illness for years, and the continuation of "veiled" accusations such as "*In Romania, the most numerous dental extractions are the consequence of incorrect endodontic treatments made by dentists*". This is an example of what happens in the field of prevention - little by little we move away from meaning, trivialize it, but also "accept" to live in the same conditions for over 30 years, without actually getting involved, but just observe and despise him.

Prevention can NOT be done alone or by a small group of people, and the rest of the population should always wait for someone else to do something. It is everyone's turn to apply those recommendations meant to achieve a better quality of life, a better mental status than the one in which they are not involved, because the responsibility is bidirectional (doctor-patient, patient-authorities, doctor-authorities, etc.).

IV. PREVENTIVE MEDICINE AND SOCIAL WORK; WORN AND CURRENT ASPECTS

The current medical practice undergoes changes of several types – logistics, human resources, wear and tear, skills in the respective field, etc.

In art. 2 of GEO 18/27.02.2017 it is specified that "community healthcare shall be performs based on the medical and social needs identified by the catography of the population belonging to vulnerable groups in communities, being in accordance with the government policies and strategies, as well as with those of the local public administration authorities"[18]. In the same GEO (18), the objectives, activities and

[17] https://www.viata-medicala.ro/opinii/un-nu-categoric-dezinformarii-22277?fbclid=IwAR1_kTgoM4rJZjkqzS6k_EpUH2hOcqnX76VM6qkBQqgyt9A3DE3BpRc9ltQ, accessed on 19.11.2021.
[18] http://legislatie.just.ro/Public/DetaliiDocument/186978, accessed on 19.11.2021.

beneficiaries of community health care services are mentioned in Chapter V. Thus, the objectives of community health care are, according to the law:

a) active identification, in collaboration with the public social assistance service, of medical and social problems of the community and, in particular, of people belonging to vulnerable groups;

b) facilitating the access of the population, in particular people belonging to vulnerable groups, to health and social services;

c) promoting attitudes and behaviors favorable to a healthy lifestyle, including through health education actions in the community;

d) participation in the implementation of programs, projects, actions and public health interventions adapted to the needs of the community, in particular people belonging to vulnerable groups;

e) providing health services within the limits of the legal professional competences of the staff with duties in the field.

If we contemplate a little, we would notice that some of the roles and purposes of prevention are included, as a pillar in defining the health status of a population.

At the same time, being in a new medical reality – the COVID-19 pandemic – it is desired that the legislative text of the Law on social assistance no. 292/2011[19] to undergo amendments in order to clarify certain sensitive aspects of the field of social assistance – sources of funding, staff, etc.

Also in the incidence of social assistance are the persons with disabilities, who, through GEO 69/17.07.2018, have been regulated a single and objective framework to ensure the measures of equalization of opportunities and respect for rights – including the establishment of the capacity of residential centers for adults with disabilities at a maximum of 50 places[20].

In the same year, 2021, at a check of half of the number of holders and beneficiaries of social aid, there were certain mentions[21]: "*The number of social aid holders checked was 40,982 out of the 110,711, and the number of beneficiaries of social aid checked was 99,593 out of the 261,775. The number of people at high risk of vulnerability directly identified was 4,145. The risk profile of the families benefiting from social aid verified according to the characteristics of their members is as follows: 31,16% are single persons, older than 65 years, 19,98% are single persons under the age of 65 years, 17,10% are single-parent families, 15,93% are families with less than 3 children and 15,82% are families with over 3 children. (...) A number of 267 people with serious health conditions who did not benefit from special protection measures for people with disabilities or disabilities were identified by the social inspectors. A special situation is represented by children without identity. Thus, at the level of*

[19] https://lege5.ro/gratuit/gi4diobsha/legea-asistentei-sociale-nr-292-2011, accessed on 19.11.2021.

[20] http://www.mmuncii.ro/j33/images/Documente/Legislatie/OUG69-2018.pdf, accessed on 19.11.2021.

[21] http://www.mmuncii.ro/j33/index.php/ro/comunicare/comunicate-de-presa/6258-20210330-cp-ministrul-muncii-bilant-campanie-nationala-grupuri-vulnerabile, accessed on 19.11.2021.

6 ATUs, 10 children without birth certificates, without CNP, were identified, for which the inspectors immediately ordered measures. These children were nobody's."

Social assistance in Romania is a sensitive topic that shows (us) many problems that we could prevent – through a different approach, not just on paper or firefighting (at a declarative, journalistic level)…

CONCLUSIONS

At this unprecedented moment in contemporary human history, the COVID-19 pandemic is transforming our lives, societies and economies, and the profile of individuals has undergone behavioral changes, as the doctrine notes (Simionescu S., 2021, p. 204-217).

In fact, the pandemic has affected the society in general and the medical sector specifically at the structural and functional level, as outlined in the doctrine (Apan R.D., Bala C.D., 2021, p. 16-43), the current situation emphasizing deficiencies of a practical-material nature, but also ethical-legal inadequacies. During the evolution of the situation it became clear that the problems can only be solved by perfecting the medical system, but also the legislation related to the medical act.

The COVID-19 pandemic has also had (and still has) a significant negative impact on vulnerable groups' access to health and support services. It will continue to affect the general population, but especially the vulnerable groups – obese and overweight people, women, children, people over the age of 65 – but also people who are in the care of the State. It, by art.3, from the Chapter 1 of the Law on social assistance of 2011 has well mentioned its roles - *the State, through public policies in the field of social services, contributes to the promotion, respect and guarantee of the beneficiaries' rights to an independent, fulfilling and dignified life, as well as to the facilitation of their participation in social, economic, political and cultural life*. Thus, the role of the State in the life of its population is gyrated by law, in a non-discriminatory manner.

Another important aspect: the financing of these services for vulnerable people and those in the record of the state's program lists. A nominal situation: Romanian Angel Appeal and the Romanian Health Observatory, which draw an alarm signal on the urgency of allocating local funds necessary to prevent and stop the spread of HIV infection in Romania[8].

The social dimension of medical practice – whether it is the GP[22] or the epidemiologist, etc. – is an overwhelming one. It is the very field of social medicine itself that tries to implement social care by understanding the impact of social and economic conditions on health, disease and practice (medicine) and favoring the conditions under which this understanding can lead to a healthier society. That is, in other words: social medicine is the medicine that takes into account the social context and health conditions of a given population.

[22] https://www.medfam.ro/dimensiunea-sociala-a-medicului-de-familie/, accessed on 19.11.2021.

Social and preventive medicine works with certain complementary tools or fields - epidemiology; biostatistics; disease prevention and health promotion; overall health; Bioethics.

Therefore, the elaboration of a law on health prevention is useful and stringent for all persons living in Romania. Thus, the purpose of the legislative regulations is for Romania to have a population that benefits from the introduction, application and monitoring of programs that promote both health and the prevention of diseases, either transmissible or non-communicable.

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EFFECTS OF PERSONALITY TRAITS ON THE QUALITY OF LIFE IN ADULTS

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Abstract

The Quality of Life dimension has been a permanent concern for both psychologists and sociologists, in their attempt to find out the level of contribution that certain personality traits have on the image of a high Quality of Life. The purpose of the research is to analyze how Extraversion influences personal perception of quality of life and how certain dimensions of Quality of Life influence Emotional Stability. A sample of convenience, consisting of 69 people, was evaluated using the QOLI-Quality of Life Inventory and Five-Factor Personality Inventory (FFPI) from which we chose the Emotional Stability and Extraversion factor. The results showed that there is a direct positive correlation between Extraversion, Emotional Stability and Quality of Life in general. The study showed that a better quality of general life is directly related to our emotional stability. A poor quality of life can lead to sadness, frustration or despair. At the same time, the strong correlation between Extraversion and Quality of Life in general, brings to the fore the importance of extraversion as a mediator of an image of satisfaction and fulfillment.

Keywords: *quality, life, psychologists and sociologists*

INTRODUCTION

An important aspect in an adult's life is the quality of their own life.

Characterized by a continuous change of statuses and roles in society, the adult period comes with a certain fullness on all aspects of life. The tumult of youth has diminished considerably, and at this stage of life the responsibility for the family is at the highest level.

The Quality of Personal Life dimension has a well-defined outline, and aspects such as: family, financial status, goals, values, community, friends, love, etc., receive rigorous attention.

However, the subjectivity of approaching this dimension is important to analyze in terms of personality traits, due to the way they help us to see how each individual relates to both social and personal factors.

The need to have access to food and shelter, basic factors of the human condition, makes the financial aspect of great relevance. If the financial status is one that offers personal satisfaction, the other aspects of the quality of life can be easily accessed.

Through a continuous development at this level, the role of basic person within the family will be satisfied and the internal aspects, psychic, will also be satisfied.

I. QUALITY OF LIFE

Quality of life is a topic often debated by scientists and beyond, it is the ultimate goal of a better, more prosperous life. This must always be in our attention, as the main objective that needs continuous improvement and strengthening, representing the most valuable indicator to observe the progress of a society.

As the World Health Organization (1995) points out, according to Lopez and Snyder (2013), quality of life is the individual's perception of his or her own life situation in the context of culture, the patterns of values in which he or she lives, and the extent or incompatibility of goals and expectations. His interests in mental health, independence and personal and social relationships as well as individual circumstances of his life (WHO., 1995, Lopez & Snyder, 2013, p. 782).

It is a broad concept that incorporates in a complex way the physical health of people, psychological state, level of independence, social relationships, personal beliefs and their relationships with the obvious features of the environment (Briaçon; 2010; p. 21).

At the same time, Zamfir (1984) specifies that "this quality of life is ensured by all those conditions that offer the human person the possibility of a harmonious development of achieving a full, satisfying life" (Zamfir, 1984, p. 23).

We can say, therefore, that a good quality of life, at the micro level, includes elements such as: independent lifestyle, based on good taste, oriented towards authentic values, bypassing non-values.

The purpose of this chapter is to examine the ways in which quality of life has been conceptualized, defined, and integrated into human life as an imperative need for the physical, mental, and material well-being of the individual. At the same time, we want to observe how the field of psychology has assimilated this concept by observing human behavior in its attempt to highlight its goals that lead to a quality of life as high and implicitly beneficial for his psyche.

The earliest source of quality of life comes from the work Ethics of Nicomachea, by Aristotle (384-322 BC). He said that both the people in the crowd and the upper classes of society understand the good life in terms of their own happiness, but in a different way. Thus, he emphasizes that quality life is a state of mind, a kind of physical activity, meant to bring inner satisfaction.

Psychoanalyst Sigmund Freud apud Mahfouz (2006) sees the quality of life as a feeling of pleasure, happiness, pain relief and a fundamental goal of human behavior.

Also, the quality of life brings with it the satisfaction of instincts, since the principle of pleasure is the dominant principle of the operations of the psychological system. Freud believed that the instinct for life or the principle of pleasure is a reason for the permanence of life and satisfaction (Mahfouz, 2006, pp. 125-180).

At the same time, the humanist psychologist, Abraham Maslow, in his theory, emphasized a set of needs that he developed hierarchically, depending on their importance. The quality of life depends on the level of satisfaction of these needs. This can lead to a feeling of deep happiness and a high sense of the inner life of the individual (Gepner, 2003, pp. 101-111 apud Aissaoui, Baida, 2019).

Hard to define and operationalize, the feeling of happiness can be approached only empirically, the subjective side of the phenomenon of quality of life referring to the satisfaction / dissatisfaction felt by the individual and how he perceives his own quality of life. However, the degree of satisfaction / dissatisfaction with one's own life does not necessarily correlate with its objective quality, as a rule, assessments are always relative and are based on past or desired experiences for the future or by comparison with the experiences of others.

While one person may define quality of life based on wealth, another may define it based on emotional and physical well-being. At the same time, a person with disabilities can report a high quality of life, while a healthy person who has recently lost a job can report a low quality of life.

As the study by American researcher Goode (1997) showed, people with disabilities share a strong desire to engage in their community and live independently as a way to strengthen self-esteem.

The basis of his study was the measurement of the four essential factors necessary to form a good quality of life in society, namely:

- individual needs for love and acceptance, sex, friendship, security and health;
- expectations about these needs, as part of the society in which individuals live;
- available resources, necessary to meet the needs in a socially acceptable manner;
- environmental resources associated with these needs (Goode, D. and Mitchel D. 1997);

Being an evaluative concept, the quality of an individual's life is determined by the evaluation that the individual makes on his own life, as well as the various factors that influence it in one way or another. Values can be different, from the negative extreme (weak, bad, critical, unsatisfactory, harmful) to the positive extreme (good, favorable, satisfactory, satisfactory or beneficial).

Based on these definitions of the concept, Abdel-Moati (2005) highlighted three major dimensions of quality of life: (1) the objective of quality of life, which includes the social aspects of the lives of individuals provided by the material requirements of the community; (2) quality of life itself, means the degree of personal satisfaction with life and the individual sense of quality of life; (3) the quality of emotional life, which is the ideal to meet the needs of the individual and the ability to live in a spiritual and psychological consensus with himself and his community (Abdel-Moati, 2005, p. 20).

I.1 Quality of life and its determinants

Research in the field of psychology seeks to find ways in which the mental health of the individual is improved. This goal is achieved through therapeutic prevention programs, as well as through the development of programs that include self-development and optimism, as well as finding out the purpose of life and the real level of satisfaction at the individual level.

Psychologists have paid special attention to quality of life and the factors that determine it. They tried to discover the positive characteristics of the personality, the positive habits of human nature that create energies that activate a state of well-being, that propel the perception of a better life. Thus, the quality of life represents the interaction between living conditions and personal values, the individual's perception of his status in life in terms of the social-culture-community context, but also personal satisfaction in relation to life.

In order to measure the quality of life, several indices have been developed that measure different aspects of individual and societal life (Zanc, Lupu, 1994,1999, 2004): "(1) Emotional or mental well-being, illustrated by indicators such as: happiness, contentment self-esteem, a sense of personal identity, the avoidance of excessive stress, self-esteem, the richness of the spiritual life, the feeling of security"; "(2) Interpersonal relationships, illustrated by indicators such as: enjoying intimacy, affection, friends, social contacts, social support (dimensions of social support)"; "(3) Material well-being, illustrated by indicators such as: property, job security, adequate income, adequate food, employment, possession of goods (movable - immovable), housing, social status;" "(4) Personal affirmation, which means: professional competence, professional promotion, captivating intellectual activities, solid professional skills/abilities, professional fulfillment, levels of education appropriate to the profession"; "(5) Physical well-being, materialized in health, physical mobility, adequate nutrition, availability of free time, ensuring good quality healthcare, health insurance, interesting favorite activities in free time (hobbies and their satisfaction), optimal fitness or fitness , embodied in the four S, "Strenght" - physical strength, "Stamina" - physical strength or endurance, "Suppleness" - physical suppleness and "Skills" - physical skill or ability;" "(6) Independence, which means autonomy in life, the possibility to make personal choices, the ability to make decisions, personal self-control, the presence of clearly defined values and goals, self-leadership in life;" „(7) Social integration, which refers to the presence of a social status and role, acceptance in different social groups, accessibility of social support, stimulating work climate, participation in community activities, activity in non-governmental organizations, belonging to a spiritual-religious community;" "(8) Ensuring fundamental human rights, such as: the right to vote, the right to property, privacy, access to education and culture, the right to a speedy and fair trial." (Zanc, I., Lupu, I., 2004, p. 64-68)

American sociologist Schalock R. (2004), Al-Mashkaba (2015) apud Moudjahid (2019) has eight dimensions of quality of life: the emotional quality of life, which includes a sense of security, spiritual aspects, happiness, self-concept, satisfaction

or to convince; relationships between people, dimension that includes intimate friendship, emotional aspects, family relationships, interaction, social support; the quality of social status of life includes factors of social security, working conditions, property and social and economic status; educational improvement, includes the level of education, personal skills and level of achievement; physical quality of life includes health, nutrition, motor activity, health care, health insurance, leisure and daily activities; Self-determination, which includes independence, ability to choose, self-direction, goals and values; social interaction that incorporates social acceptance, social status, characteristics of the practical environment, integration and social participation, volunteering and one last dimension, namely, rights that include confidentiality, the right to vote and vote, the performance of duties and the right to property (Schalock R. , 2004, Al-Mashkaba, 2015, pp. 36 apud Moudjahid, Abdarrazak, 2019, p. 61).

Corroborating with all the above, it can be said that most human beings who want to have a normal human life, manage to integrate all the dimensions of life necessary to obtain a high quality of it. People base their personal vision on the quality of life they want to live by studying and examining reality, by confirming from others that their own values and visions are correct and in line with the society in which they live. All these aim to improve life as much as possible so that later to accept it in difficult moments and to be able to make concrete and appropriate decisions in order to live positively.

II. OBJECTIVE OF THE WORK

The purpose of this paper is to identify the relationship between Extraversion, Emotional Stability and Quality of Life.

2.1. *Research hypotheses*

This research is based on the following working hypothese.

It is assumed that there is a correlation between Emotional Stability and Quality of Life.

2.2. *Study participants*

In order to carry out this research, a convenience sample was chosen consisting of 69 respondents, aged between 35 and 65 years, both from urban and rural areas, all from Constanța County. Thus, in the age group 35-45 years 31 people were part, the age class 46 -55 years was composed of 10 people, also 10 people were part of the age class 56-60 years and 8 people they were between 61-65 years old.

In terms of gender distribution, the sample consisted of 27 men (39.13%) and 42 women (60.87%).

2.3. *Ethical requirements*

The ethical aspects of the research were ensured by obtaining the consent of the subjects to participate in the study. The research was conducted online, due to the pandemic context, and the personal data of the participants were secured by encrypting their identity. Respondents agreed to capitalize on the overall results of the research in a scientific article.

2.4. ***Research instruments and working procedure***

The research was based on the following tools: QOLI-Quality of Life Inventory, Five-Factor Personality Inventory (FFPI).

Quality of Life Inventory - QOLI

Through it one can evaluate mental health and happiness in terms of the 16 factors that actively influence the quality of life of the individual, namely: Health, Self-Esteem, Goals and Values, Money, Work, Play, Learning, Creativity, Help, Love, Friends, Children, Relatives, Home, Neighborhood, Community, but also the Welfare of the Individual in general.

The inventory is the basis of numerous assessments for understanding and treating mental and physical disorders, as support for the development of new treatments and the prediction of future health problems.

Five-Factor Personality Inventory (FFPI)

The Five-Factor Personality Inventory (FFPI Questionnaire) evaluates the five superfactors in the Big Five model: Extraversion (E), Kindness (A), Conscientiousness (C), Emotional Stability (S), and Autonomy (D). Two of the scales were capitalized, namely: Extraversion and Emotional Stability.

The Extraversion Scale assesses the well-being of the individual, the level of sociability and the participatory social level in daily life as opposed to social isolation.

Regarding the Emotional Stability scale, it assesses positive thinking, optimism, emotion control, self-confidence as opposed to anxiety, anxiety or managing stressful situations.

2.5. ***Research design***

The research was started starting with July 2021 by applying the tests - QOLI Inventory - Quality of Life Inventory and Five-Factor Personality Inventory (FFPI) - on a sample of convenience consisting of 69 people. Thus, based on the answers received, we closely followed how certain determinants of personality, influence the way it is perceived Quality of life in general.

Following the results obtained through statistical calculations, the present research aims to demonstrate that there is a direct positive correlation between Quality of Life and two of the five personality factors, namely: Extraversion and Emotional Stability. It is thus intended to highlight the fact that a positive state and a balanced emotional control directly influence the individual's perception of his own quality of life.

2.6. ***Data analysis and processing***

To verify the two hypotheses, we started from the verification of the normality of the distribution for each factor, by calculating the starting indices, plotting the histograms and the normality curve.

Thus, below we have the calculation table of the starting indices as well as the graphical representation of the normality with the help of the histograms for each analyzed factor, in part:

Table 1. Calculation of starting indices

Descriptives

			Statistic	Std. Error				Statistic	Std. Error				Statistic	Std. Error
Scor Global QOLI	Mean		1,946	,2011	Extraversiune	Mean		60,42	1,416	Stabilitate emotionala	Mean		63,35	1,464
	95% Confidence Interval for Mean	Lower Bound	1,544			95% Confidence Interval for Mean	Lower Bound	57,59			95% Confidence Interval for Mean	Lower Bound	60,43	
		Upper Bound	2,347				Upper Bound	63,25				Upper Bound	66,27	
	5% Trimmed Mean		2,007			5% Trimmed Mean		60,37			5% Trimmed Mean		62,90	
	Median		1,940			Median		61,00			Median		62,00	
	Variance		2,792			Variance		138,335			Variance		147,907	
	Std. Deviation		1,6708			Std. Deviation		11,762			Std. Deviation		12,162	
	Minimum		-2,3			Minimum		30			Minimum		42	
	Maximum		4,6			Maximum		90			Maximum		96	
	Range		6,9			Range		60			Range		54	
	Interquartile Range		2,3			Interquartile Range		14			Interquartile Range		18	
	Skewness		-,484	,289		Skewness		,072	,289		Skewness		,526	,289
	Kurtosis		-,386	,570		Kurtosis		,212	,570		Kurtosis		-,224	,570

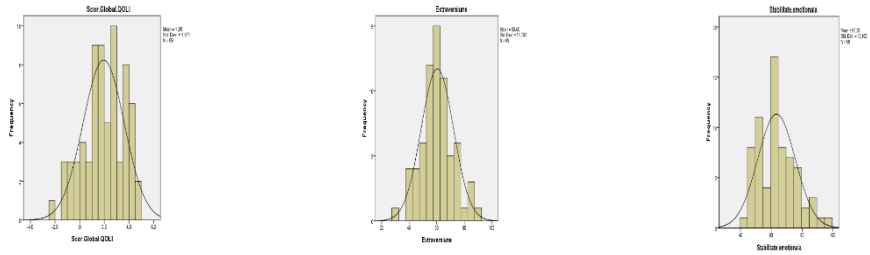

Fig. 1. Representation of histograms with the plot of the normality curve

To obtain the results, we calculated the normality of the distributions using the Tests of Normality test, taking into account the values obtained in the Kolmogorov-Smirnov test.

Table 2. Normality analysis - Tests of Normality test

Tests of Normality

	Kolmogorov-Smirnov[a]			Shapiro-Wilk		
	Statistic	df	Sig.	Statistic	df	Sig.
Scor Global QOLI	0,081	69	,200*	0,965	69	0,051
Extraversiune	0,062	69	,200*	0,992	69	0,932
Stabilitate emotionala	0,095	69	,200*	0,968	69	0,07

*. This is a lower bound of the true significance.

a. Lilliefors Significance Correction

According to the analysis of the normality test, we notice that all the analyzed factors - Global Score of Quality of Life, Extraversion, Emotional Stability - respect the normality curve, with a Kolmogorv-Smirnov index greater than 0.05 (Sig> 0.05, Sig = 0.200) indicating that for the next step the parametric analysis of the Pearson correlation index will be used.

Hypothesis 1. For the analysis of the final results in order to interpret them and taking into account the values of the Kolmogorov-Smirnov index obtained using the

test Tests of Normality- Global Score of Quality of Life and Emotional Stability with Sig> 0.05, where Global Score Quality of Life- Sig = 0.200; Emotional Stability - Sig = 0.200), shows that the next stage of the analysis is the use of the Pearson parametric method.

Table 3. Correlation table Global Score Quality of Life - Emotional Stability

Correlations

		Stabilitate.emotionala	Scor.Global.QOLI
Stabilitate.emotionala	Pearson Correlation	1	,555**
	Sig. (2-tailed)		,000
	N	69	69
Scor.Global.QOLI	Pearson Correlation	,555**	1
	Sig. (2-tailed)	,000	
	N	69	69

**. Correlation is significant at the 0.01 level (2-

Since Sig 2-tailed <0.05, (Sig. (2-tailed) = 0.001), value less than 0.05, highlights a statistically significant correlation between the two measured parameters (Global Score Quality of Life / Emotional Stability). At the same time, the value of 0.555 of the Pearson coefficient, shows the existence of a moderate positive direct correlation between the two measured factors.

At the point cloud of the calculated correlation, its direction to the upper right corner is observed, indicating, once again, the identified positive correlation.

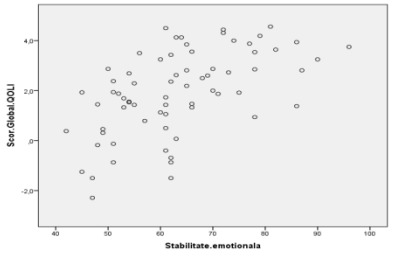

Fig. 2. Graphical representation of the correlation. The point cloud.

Thus, we can say that the hypothesis It is assumed that there is a correlation between Quality of Life and Emotional Stability has been confirmed.

The positive correlation between Quality of Life and Emotional Stability, shows the close connection between the two measured factors, so we can say that as quality of life increases, so does emotional stability, so emotions are directly proportional to how we perceive quality of life.

All aspects of an individual's life, from physical to mental well-being complete the picture of Quality of Life. So, any factor that could disrupt this balance makes its mark on that person's behavior and the way he perceives life on a mental level. Although each factor in the QOLI inventory does not correlate significantly with the Emotional

Stability factor, take as a whole shows how sensitive the Quality of Life dimension is and how easily it can positively and negatively influence emotional stability.

The current context of the Covid-19 pandemic, which since March 2020, has substantially altered social interpersonal ties, has forced the human being to reevaluate his life, values and personal needs in order to be happy.

Restrictive measures applied in several countries around the world appear to be effective in limiting the spread of Covid-19 (Bedford et al, 2020, pp. 1015-1018).

With the development of the vaccine for the prevention of severe forms of the virus and the immunization of the global population, an attempt is being made to return to normalcy before the pandemic.

However, the measures taken have disrupted and continue to disrupt people's daily employment and activities and may therefore have important implications for their health and well-being (Galea et al, 2020).

The results of the monitoring program of public opinion in the current situation started by IRES (Romanian Institute for Evaluation and Strategy), provided a worrying picture in terms of emotional stability: 89% of respondents believe they can get sick at any time, 65% they consider that someone close to them will get sick, 57% consider that due to the pandemic, their salary will be reduced, 51% that they will lose their job. 37% feel that they will not be able to take care of their loved ones because they are far away, 24% think that someone in the family would lose their job, 19% consider that they are not protected at work by coronavirus, 18% are affected by stress to stay at home and 11% are affected by the fact that children cannot go to school (Zamfir and Zamfir, 2020, p. 9:24).

People are deeply affected by every constitutive aspect of life: security of self, self-esteem, family, financial and job security, friends, community, etc.

In order to get a clearer picture of the sensitivity of the constitutive factors of quality of life to emotional stability, we will turn our attention to the answers provided by the respondents of this study. We will take into account the significant differences in answers.

Thus, although Health plays an important role for 45 people (65.22%) of the total sample, only 14 respondents (20.9%) say they are very satisfied with it, while the vast majority, 32 (46.7 %), stated that they are somewhat satisfied. It is worth mentioning that 10 people were very dissatisfied with their health, ie 14.5% of the total sample and this may sound an alarm that people tend to neglect their health due to the fear of getting sick with the new virus. .

Current research shows that dramatic changes and measures imposed in the context of the pandemic, social and physical distancing, pose important challenges to the health and well-being of individuals and those with existing morbidity from other acute and chronic diseases have the highest risk of losing the fight. Covid-19.

The survey conducted by Wang et.al. (2020) on 1210 respondents from 194 Chinese cities in January and February 2020 found that 54% of respondents considered the psychological impact of the Covid-19 outbreak to be moderate or severe; 29% reported symptoms of moderate to severe anxiety; and 17% reported moderate to severe depressive symptoms (Wang, Pan, Wan, 2020).

In the literature, health, according to Apostol (2008) is a state of general well-being of the individual that includes the dimensions: emotional, intellectual, physical, social and spiritual, each of which complements and interrelates throughout life. In order to maintain good health, a person must systematically examine and strengthen each of these dimensions in order to orient himself in the sense that he is allowed not only to live a long period of time, but to enjoy a good life. Fulfilled life (Apostle, 2008).

Emotional stability is closely linked to psychological health, referring to that state of the person in which his ability to work, to know or to carry out his favorite activities creatively, with pleasure and success is achieved. It also refers to the person's ability to understand and manage their emotions, to know how to deal with everyday problems and difficulties. Research and clinical observations in the field suggest that, during the pandemic, many people show stress or anxiety, which are fueled by the fear and pathological fear of becoming infected, of coming into contact with objects or surfaces possibly contaminated. Likewise, there is a growing fear of foreigners who may have an infection (ie, xenophobia related to the disease), fear of the socio-economic consequences of the pandemic, seeking reassurance about possible pandemic threats and pandemic-related traumatic stress symptoms (for example: nightmares, intrusive thoughts, etc. (Taylor, Thomas, 2020).

Money is another important aspect of satisfying daily needs. Lack or uncertainty of a job or other source of income has a negative and direct effect on emotional balance. For 20 people (29%) of our sample, money is very important and for 44 of the total respondents (63.77%) money is important. Regarding the level of satisfaction of the financial status, 32 people (46.38%) are somewhat satisfied and 17 people (24.47%) are not very satisfied. This aspect reflects the difficulty that the person faces and the emotional impact felt due to the lack of financial stability.

Recently, researchers have argued that the relationship between economic hardship (for example, making lifestyle adjustments due to financial needs) and psychological well-being is explained by worrying about one's financial situation. That is, a greater experience of economic hardship is associated with an increased concern for the financial situation, which in turn is associated with higher levels of psychological distress (Fiksenbaum et al, 2017).

Stevenson C and Wakefield J. (2020) through their research have shown that financial distress leads to suicidal thoughts due to increased levels of depression and loneliness. On a sample of 457 participants, they applied a series of tools to measure: the level of anxiety and depression - HADS Scale (Hospital anxiety and depression Scale), the financial threat with the help of the FTS Scale (Financial Threat Scale), suicidal thoughts - Questionnaire of Revised Suicidal Thoughts (SBQ-R) and level of group and family membership using the Group Identification Scale. The answers were obtained over a period of 6 months, all tools being used twice - in May 2020 and July 2020, respectively. The results showed a strong significant correlation between financial distress and suicidal thoughts by increasing depression and loneliness. This relationship is mediated by group / family membership. As the

study's authors state, mental illness is directly associated with financial difficulties that put enormous pressure on the psyche (Stevenson C., Wakefield J., R., (2020), pp. 2665–2675)

The current pandemic has disrupted the normal, routine, unprecedented economic system and caused significant losses and changes among mankind. Considering the high unemployment rates, according to the National Agency for Employment in Romania, a significant percentage was registered, the total unemployment rate from January 2020-December 2020 being 3.38% of the total population- no. total registered Jan-258,917- Dec- 296,051. (cf. http://mmuncii.ro/j33/images/Date_lunare/Somaj_rata_122020.pdf).

During the pandemic, worries about losing a job and difficulty finding a new job can increase worries about financial stability, leading to low emotional stability and, consequently, mental health.

The results obtained by the economic analysis of Sumner et.al (2020) estimate a major impact of the Covid-19 pandemic on poverty indexed according to income and consumption per consumer. Global poverty growth, projected by statistical analysis, would be an obstacle to the goal of eradicating poverty by 2030 (Sumner, A., Chris H., Eduardo O., 2020).

Also, the study of Blanchflower (2009) showed that a high financial situation and good health determine a high degree of life satisfaction, implicitly a high quality of life (Blanchflower, D. G., 2009, pp. 155–226).

Another aspect that needs to be mentioned is that for a high quality of life, the community plays an important role. Thus, for 45 (65.21%) of the respondents the community plays an important role and for 18 (26.1%) of the total of 69 respondents, the role played by the community is a very important one. However, 23 of the respondents (33.3%) say they are somewhat satisfied with the community they belong to and 22 respondents (31.89%) say they are dissatisfied.

According to Community Box (2018), "a healthy community is a community that empowers all residents to experience a good quality of life."

Christakopoulou et.al (2001) apud Dumitru M. et.al (2011) defined the community quality of life as a dimension that includes the economic, political, psychological and social factor of the activity of human communities (Dumitru M. et.al, 2011, pp.131).

The measurement of the quality of community life is done at a subjective level in the light of what is observed by each participant of the community. The existing pandemic substantially altered the connections that existed between the members of the community by applying preventive measures that involve isolation, physical distance, implicitly affecting the face-to-face relationship.

It is known in the literature that depending on the degree of loneliness and the time spent in solitary confinement, pathological forms of loneliness can be achieved: from transient states of dissatisfaction, boredom in the presence of others to a chronic feeling of mental isolation, lack of communication, distrust of others, which can lead to a serious state of mental illness: even the decision to commit suicide (Zamfir & Zamfir, 2020, pp.11).

Following all the above, by highlighting the sensitivity of the factors that constitute the dimension of an individual's Quality of Life but also tracing how these factors can easily influence emotional stability, we can say that the current state in a pandemic context, generates difficulties in maintaining a mental state. good, balanced of contemporary man.

CONCLUSIONS

A Hard to be defined and understood, quality of life is a concept that is permanently affected by individual subjectivity. While one person may define quality of life in terms of wealth, another may define it based on emotional or physical well-being.

The present study aimed to find out what are the determining factors that underlie a satisfactory image of quality of life.

Thus, we found out that extraversion is that surface factor of the human personality that mediates between certain aspects of life and the components of Quality of Life. The positive attitude that characterizes extraversion helps the individual to develop a sense of fulfillment and satisfaction of his own life. At the same time, I found out that the components of extraversion vibrate strongly in the current context, and limiting socialization and physical distancing can lead to emotional collapse. The change of the concrete environment that humanity knew was replaced by a dynamic and unstable one.

Calmness and serenity are feelings that are quite difficult to find nowadays, being bombarded every second by a multitude of stressors that undoubtedly influence our psyche.

The Covid-19 epidemic has caused a widespread blockade worldwide. This pandemic is already showing a high negative impact on physical and mental health. The socio-economic consequences will also be significant, consequences that will negatively affect the mental and emotional stability of all individuals. Thus, emotional stability is in a vicious circle with a sinusoidal direction, people experiencing both feelings of relief and hope with the discovery of the vaccine against Sars-Cov-2 virus, but also feelings of despair and fear in the presence of a pandemic that does not will ever be eradicated again.

Regarding the present study, we consider that it has achieved its purpose, by confirming the two hypotheses issued. Of course, the results obtained cannot be considered as representative for the general population, but it gives us a limited picture of the Quality of Life approach by the respondents who formed the research sample.

It is hoped that this study will be replicated in the future, after the disappearance of both the virus and the situations to which people are subjected, to observe how people rediscover physical socialization, direct relationships, various outdoor activities, what they aim at transforming a psyche tried by the difficulties of this period, into a strong and healthy one.

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PSYCHOLOGICAL EFFECTS OF PROFESSIONAL STRESS ON TEACHERS

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Abstract

In this paper we describe some theoretical perspective in the study of professional stress, professional stress in educational environment, causes and forms of manifestation of teacher's professional stress and a study on the association between professional self-efficacy, emotional intelligence and teacher's professional stress.

Keywords: *professional stress, self-efficacy, emotional intelligence*

INTRODUCTION.
THEORETICAL PERSPECTIVE IN THE STUDY OF PROFESSIONAL STRESS

Contemporary psychologists Kobasa (1982), Nathan (2002), Pargmam (2006) have emphasized the fact that professional stress is a common element in the life of any individual, regardless of race or cultural context.

Stress is a complex psycho-social phenomenon that arises from the person's confrontation with requirements, tasks, situations that are perceived as difficult, painful or of significant importance for the person concerned.

Nathan argues that prolonged stress can cause psychological distress, which can affect a person's ability to engage in effective behaviour. 'Stress' is defined by Parma (2006) as an "uncertain reaction to internal or external factors", which means a positive or negative reaction to environmental stimuli.

Psychologists Selye (1976), Cooper, Dewe, and O'Driscoll (2001) identify two complementary perspectives in addressing stress: stress as a reaction, and stress as a stimulus.

a) stress as a reaction

The origins of defining 'stress' as *a reaction* can be identified in medicine, and, usually, stress is studied from a physiological perspective. Hans Selye's research in

the 1930s and 1940s marks the beginning of this approach. Selye introduced the notion of stress-related illness in terms of general adaptation syndrome, suggesting that stress is a nonspecific response of the human body to the demands made on it (Selye, 1976). The emphasis is obvious, a medical one: generic illness was characterized by loss of motivation, appetite, weight loss and lack of energy. Animal studies have also revealed internal physical deterioration and degeneration. It has been considered that the responses to stress do not depend on the nature of the stressor and that, consequently, universal model.

b) stress as a stimulus

Identifying potential sources of stress is the central theme of the **stress stimulus model**, as stimulus. The rationale for this approach is that external forces act on the body in a destructive manner (Cooper, Dewe, & O'Driscoll, 2001).

If one's body's tolerance is exceeded, temporary or permanent conditions may occur. The individual is constantly bombarded with potential sources of stress (usually called 'stressors'), and a seemingly minor event can break the delicate balance between stress control mode and complete cancellation of stress control behaviours. In conclusion, this model considers stress to be an independent variable.

Both definitions of 'stress' are conceptually framed in the relatively simple stimulus-response paradigm. Today it is considered that both neglect the individual differences and the perceptual and cognitive processes that generate these differences.

Because stimulus-response definitions each focus on a single aspect of the relationship, we may consider that an event is 'potentially stressful' or that a response may be a reaction to stress. We thus consider that a stimulus or a response can be declared as "stressful", respectively "stress response" only if these two components are considered to be related and if the impact of one on the other is determined (Cooper, Dewe and O'Dr 2001).

Another problem that arises when we define stress as a stimulus or reaction is that we do not capture individual differences. Knowledge of the stimulus does not necessarily allow accurate estimation of the reaction, the probability that the stimulus will produce a response being moderated by individual differences (personalities, characteristics, expectations, values, goals). As we have shown before, stress presupposes both a stimulus and a response, both of which are related. Studies have shown that stress is a normal reaction of the body to external demands and is manifested by an increase in heart rate, blood pressure, intensifies respiratory rate and increases glucose levels. These compensatory reactions provide the oxygen, nutrients and energy needed for vital muscles and organs to cope with challenging situations (Nathan, 2002).

Lazarus (1990) defined stress as 'a particular interaction between the individual and the environment'. This interaction is perceived or evaluated by him as exceeding the resources at his disposal and which disrupt his daily routine. Among the effects of occupational stress, we mention: increased blood pressure, immune

disorders, decreased testosterone, depression and sleep disorders (authors cited by Theorell) Regarding the risk of myocardial infarction, it can occur in men in 40% of cases of occupational or professional overload lasting 5-10 years.

A synthesis of the psychosocial factors that contribute to professional distress, made by Theorell (22), indicates the following conditions:

- excessive demands (quantitative and qualitative);
- lack of decision autonomy;
- lack of social support from superiors and colleagues;
- reduced material, psychological and social rewards.

According to the authors, when an individual is confronted with an unpleasant situation, he engages in a primary evaluation process, the event being perceived as stressful or not depending on the individual or even the situation itself. In the next phase, the person will engage in a process of secondary assessment (cognitive assessment) that involves the appreciation of personal or environmental resources available to deal with the stressful event.

These two types of assessments are dependent on the psychological characteristics and personality of the individual.

Coping strategies used by people facing a stressful event are:

- problem-focused coping strategies (coping and problem solving), and
- emotion-focused coping strategies (positive reassessments, comparisons or avoidance, minimization and distancing). Individuals resort to one of two ways depending on how they perceive the situation.

- ***There are three key characteristics that cause stress:***
  - the presence of stressors;
  - personal resources for dealing with stressors;
  - the type of reaction to stress.

  Stressors are harmful factors or stimuli with strong emotional significance.
- ***Types of stress:***
  - Positive stress or "me-stress" acts as an energizing factor, helping the person to approach situations as challenges, in a more effective and focused way;
  - In the case of negative stress or "distress" the over mobilized body refuses to return to normal, the individual being nervous, ready to react, with tense muscles and facial expressions suggestive.
- ***Form of stress:***

  Everyday stress can make its presence felt in different forms:
  - ***Mental stress*** – the combined action of several stressors;
  - ***Professional stress –*** the concomitant action of physical (noise, vibration, temperature variations) and chemical stressors (volatile, irritable substances);
  - ***Overload stress –*** characteristic of people with tasks of great diversity and with an extended work schedule;

- ***Underload stress*** **–** is determined by the modification of certain professional activities;
- ***Situational or cultural stress*** **–** is caused by recent changes in the way of life of individuals.

III. PROFESSIONAL STRESS IN THE EDUCATIONAL ENVIRONMENT. CAUSES AND FORMS OF MANIFESTATION OF PROFESSIONAL STRESS

Professional stress is a psychological trait frequently observed among teachers. Its frequency and manifestations can have effects both on students' professional performance, but especially on teacher-student interpersonal relationships.

The main stressors felt by teachers in the school environment:

- Financial restrictions on pay;
- Teaching difficulties due to too busy curriculum;
- Difficulties in time management;
- Educational policies and fluctuating regulations;
- Failure to meet professional expectations;
- Number of students in the class;
- Indiscipline of some students;
- Student evaluation;
- School climate;
- Relationships with parents of students;
- Financial restrictions on school material resources;
- Autocratic school leadership;
- Verbal violence of some students;
- Material violence of some students;
- Physical violence of some students.

Teachers' stress was defined as a negative response or affect accompanied by potentially dysfunctional psychological changes. These result from aspects of the profession and are mediated by the perception that the requirements of the profession represent a threat and by the coping mechanisms used to reduce the threat.

Emotional distress of teachers

Research in the field of teachers 'emotional distress' has aimed to identify the stressors that teachers face, the individual characteristics that contribute to the onset of stress, and coping strategies associated with teachers' stress.

According to the ABC model (rational emotional and behavioural therapy), the sources of emotional distress (stressors) represent the activating event (A). Bora C.H. (2010, apud Turk, Meeks and Turk (1982) examined 49 studies on the causes of teacher stress and identified seven categories of stressors. In order of impact on teacher stress, they include: (a) poor school environment, (b) student indiscipline, (c) inadequate working conditions, (d) personal problems, (e) relationships with parents, (f) time pressure, and (g) inadequate training.

The poor school environment, identified as the most important stressor, concerns the superficial relations between teachers and school administration, conflicts with parents, poor relations with colleagues, lack of public support for schools, student apathy, job insecurity and role conflict.

Tuettemann and Punch (1993) talk about five stressors that activate distress:

- lack or difficult access to material resources,
- undisciplined behavior of students,
- the extent to which society's expectations of teachers are perceived to be high,
- overtime dedicated to school-related tasks and
- high workload.

Ross, Neibling and Heckert (1999) have identified several reasons that contribute to increased stress in the academic environment. Teachers are forced to adapt to the academic environment and due to the daily pressure to adapt to educational policies and strategies, there are tensions within interpersonal relationships. Many of the physical and emotional symptoms that appear in the majority of teachers, such as headaches, fatigue, depression, anxiety, inability to cope with challenges, have been exacerbated.

Burnout. The concept of burnout refers to the situation in which a person loses its interest or motivation to continue a certain particular task, as a result of the influences of internal and external factors. Skills and expertise in the field is active, but the desire to perform is extinguished, so that the learning activity becomes very difficult and does not produce any joy. Burnout destroys any motivation an individual has, and can diminish the initiative to engage in study and learning.

IV. STUDY ON THE ASSOCIATION BETWEEN PROFESSIONAL SELF-EFFICACY, EMOTIONAL INTELLIGENCE AND TEACHER'S PROFESSIONAL STRESS

The hypothesis from which we started in our study was to show if there is a significant link between the level of professional stress of teachers and their professional effectiveness. The hypothesis was studied on a sample represented by 75 teachers from pre-university education.

The tools applied were:

- Self-efficacy scale (SES), Ralf Schwarzer and Mattias Jerusalem (1955)
- The Emotional Intelligence Questionnaire (Schutte et al., 1998), which measures emotional intelligence based on the model developed by Salovey and Mayer.
- Perceived stress scale (PSS 14), Cohen, S., Kamarck, T., & Mermelstein, R. (1983).

Below, the descriptive indicators and the matrix of correlations are presented for the association between professional self-efficacy, emotional intelligence and professional stress.

Table no. 1. Descriptive indicators and matrix of correlations for the association between professional effectiveness, emotional intelligence and professional stress

Variable	M	SD	Auto-proficiency	Emotional Intelligence	Professional stress
Proficiency	32.44	3.91	1	0.206	-0.267*
Emotional Intelligence	151.47	17.62		1	-0.537**
Professional Stress	25.60	5.77			1

* p < 0.05, ** p < 0.01

According to correlation analyses, professional stress negatively influences the professional effectiveness of teachers. In this sense, professional self-efficacy correlates significantly negatively with occupational stress: [r (75) = -0.267, p = 0.020 <0.05]. Also, an increased level of emotional intelligence causes a decrease in the level of professional stress [r (75) = -0.537 p <0.001].

CONCLUSIONS

From a practical point of view, the data obtained are relevant in the elaboration of prevention and intervention strategies in the prevention and reduction of professional stress and of the teachers based on the knowledge of the individual characteristics.

In conclusion, emotional intelligence and professional self-efficacy are skills that are absolutely necessary in a world that is constantly changing and that requires continuous adaptation to the demands and challenges that appear daily. It is also necessary to develop stress management skills and to adopt healthy coping strategies in order to successfully meet the demands of the academic environment.

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POLITICAL CULTURE AND ITS ROLE IN THE DEVELOPMENT OF SOCIAL CAPITAL

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Abstract

The aim of this paper is to highlight aspects relating to the relationship between a company's political culture and social capital. Thus, a high level of political culture leads to the development of the social capital and the whole social body in general. At the same time, the relationship between the two concepts is directly influenced by other elements such as the level of education or the standard of living of an individual.

Keywords: *political culture, social capital, poverty, education, society*

INTRODUCTION

In contemporary times, the existence, preservation and proper functioning of democracy depends on a set of political and civic attitudes of the members of the society in question. On the other hand, social capital is based on relations between individuals and relations between citizens and institutions in a society, and it is based on citizens' trust in the authorities.

Trust is the ultimate form of share capital, therefore no company can function without trust between its members or confidence in the authorities. This paper is based on the idea that a high level of political culture in a democratic society has an important influence on the development of social capital, and collective civic action helps to ensure the smooth functioning of the entire democratic system. But the decision to trust someone or something results from a rational analysis based on information and judgment that explores arguments and risks. It depends on the amount of information held and the ability to manage the degree of certainty (i.e. uncertainty) of a particular situation. Therefore, in building trust (as an important part of social capital), the basis of information, knowledge, values and behavior that shape the political culture is very important (Dănuţ Jemna, 2020, p.12).

I. THEORETICAL ASPECTS OF THE CONCEPT OF POLITICAL CULTURE

The intention to define the concept also shows how *political culture* (Georges Ballandier, 1955, p. 94) has existed and evolved in contemporary societies alongside *institutional culture* which also contributes to shaping the idea of social capital. *Political culture* is a concept describing how individuals and groups perceive political realities and engage in political relations at different levels through behaviors, opinions, ideas and values in the fields of administration and public space. On the other hand, it is a subsystem of culture in general, which encompasses all the information, beliefs and values with which an individual can understand how a democratic political system works and, through civic involvement, help it function properly. According to Gabriel Almond, political culture is a pattern of individual attitudes and orientations towards politics among members of a society (Almond and Powell, 1966, p. 4). This definition leads us to ask whether we can link political culture to two ways: a first, general sense, in which a society's culture meets political situations, revealing its values and a second, narrow meaning, in which political culture represents the entirety of political ideas, theories and nominal values, the whole range of attitudes toward the political system, the place and the role of the system. In conclusion, we could define the field of political culture as the set of socially learned and transmitted patterns of behavior that characterize the politics of a society. Political culture is the product of the historical experience of society as well as of personal experiences that help motivate each individual.

More specifically, we can say that it is preferable for a society to develop a participatory political culture, because this type of culture is specific to democratic societies and represents the aims of social education, but also the accumulation of important administrative and governance experience in that society. The participation of society in the act of government contributes effectively to the building and strengthening of social capital as it allows for a high level of culture, social organization, efficiency and training of citizens. The optimal functioning of a democratic society, i.e. its stability and efficiency, depends on the existence and active affirmation of a certain political culture, which is conducive to the optimal functioning of social mechanisms through the participatory contribution of citizens. A low level of political culture fosters political manipulation and challenges, and,as a result, the society as a whole suffers (Cornea Sergiu, 2008, p. 194).

II. THEORETICAL ASPECTS OF THE CONCEPT OF SOCIAL CAPITAL

The second concept, *social capital* refers to the degree of involvement of citizens in the public affairs of the Community. By quoting Robert Putnam, social capital represents those characteristics of social life: networks, rules, trust, which allow participants to act more effectively together to achieve common objectives (Robert Putnam, 1995, p. 121). Social capital is also an argument but also a pressure factor for the performance of social and government institutions (Luminiţa Popescu in Transylvanian Journal of Administrative Sciences, nr. 2(29)/2011). Both the trust of citizens in each other and the trust of citizens given to the institutions, the

willingness to live according to the rules of the Community of which you belong and to sanction those who do not comply with the laws of the Community, all these elements are essential for the proper functioning of society and, by extension, democracy, contributing to the development of social capital (Diana Preda în INCE „Costin C. Kirițescu", Seria „Studii și Cercetari Economice", Vol. 4/2003). The main components of social capital are institutions, social networks and social values, but also sanctions (the latter are the processes that ensure compliance by network members) (Diana Preda în INCE „Costin C. Kirițescu", Series „Economic Studies and Research", Vol. 4/2003). The social capital can also be defined, according to Dietlind Stolle, as "*a societal resource that links citizens to each other and enables them to pursue their common objectives more effectively*" (Dragoș Dragoman, 2020).

III. POLITICAL CULTURE AND ITS ROLE IN THE DEVELOPMENT OF SOCIAL CAPITAL

For sociology, the social capital represents a complex that includes knowledge, beliefs, art, morals, law, customs and other skills acquired by individuals as members of a community/society. From a social point of view, the social capital refers to the political culture as a narrow dimension of society, as a component element of it. In our analysis, we tried to present the relationship between the social and political areas, based on political kinship relations in parallel with belonging to a certain political culture in relation to the type of sociality specific to certain stages of development. Walker Connor believes that self-conscious ethnicity (Community) can be a nation: "*an ethnic group can easily be distinguished by an outside observer, but until its members become aware of the uniqueness of the group, it is only an ethnic group and not a nation*" (Dominique Schnapper, 2001, p. 35). On the other hand, it is Benedict Anderson's vision that considers nations to exist as a psychological construction of belonging to a political culture. The nation became possible only after three cultural concepts lost power over the human minds, Benedict Anderson said, "*the belief that the language is of divine origin and has privileged access to the truth, followed by the idea that monarchs are different from the rest and rule on the basis of divine power, and last but not least the belief that death, poverty and disease are unavoidable aspects of life*" (Benedict Anderson, 1991, p. 54).

It should be remembered that what we call *social capital* involves social phenomena occurring in the process of the constitution of the modern state and state-related societies and that the evolution of the concept takes place in relation to the evolution of institutions within a political and social process. This type of approach to the concept is necessary because the individual is related to the areas of interest of the state which he uses as a socio-political support in his development process. That pattern of individual attitudes and orientations towards politics among members of a society, which represents the political culture, is directly influenced by the level of education of an individual, a Community or a society in general. This level of education is also influenced by the socio-economic level, and so we have some elements that have a major influence on each other, because poverty inflates education which has a major impact on political culture, the latter influencing the social capital. At national level, there is a marked inequality in

Romania which has negative effects on what the Romanian rural environment represents. This inequality also has indirect negative effects on the level of political culture or on the social capital. At the level of rural communities, in order to talk about civic engagement, there first needs to be economic development, a civilized standard of living that allows citizens to invest time and resources in engaging in the public space

Robert Putnam states that in developed communities (economically, politically and socially) there is also developed social capital. Access to quality education is much easier in these communities, and access to information is also easier compared to rural societies which many of them still lack electricity or access to the internet. What do we do with these less developed communities? How could these contribute to the development of the social capital? Institutions can promote social capital by creating mechanisms to facilitate citizens' participation in the public policy process. Public institutions have the capacity to influence social norms and values. (Luminița Popescu in Transylvanian Journal of Administrative Sciences, 2(29)/2011, p. 144). A first element could be to inform them about the political processes taking place at local, regional or national level, with an emphasis on civic education of citizens, which should be implemented in schools, in order to form the future responsible and civically involved adult. When a higher level of political culture, of political involvement, of the desire to accumulate information and knowledge is desired, it is very important that these members of society have their basic needs met (a decent living, a job, access to education, a salary package, etc.). When these needs are met, the individuals "moves to the next stage", where they are interested in how things work in the Community in which they live or in the country as a whole, and wishes to be involved in contributing to the development of the social capital.

I was saying about social capital that trust is an important component of it. This social trust has a powerful effect on the functioning of government in the sense that stimulating interest in participating in the public affairs of the community is only possible through the creation of trust-providing institutions both at the organizational level and in the society as a whole Luminița Popescu in Transylvanian Journal of Administrative Sciences, 2(29)/2011, p. 144). But this participation of citizens must be based on an accumulation of knowledge related to politics, administration, etc., so that their involvement, their participation is beneficial to society, leading to the development of the social capital.

At the same time, the individuals, as a subject of public law, develops a political relationship with the institutional system from which they come, generating an indissoluble type of connection. We can therefore say that the development of social capital represents the macro-social dimension of the organization of society and institutions based on the political culture of the individual who has become a citizen within this socio-political structure. In this reporting relationship the individual uses the value of social capital in the perspective that the identity and political value of a state is a source of value for the individual citizen. Basically, the more developed the economy, the more efficient the education system, the higher

the standard of living, the more the individual citizen is involved in the system, feeling represented and governed efficiently.

CONCLUSIONS

Political culture has a major impact on social capital, but in the relationship between the two concepts an extremely important role is played by education and poverty, which prevent individuals from becoming civically involved because their main problems are the unsatisfied primary needs.

In conclusion, we can say that when citizens have an optimal standard of living, have a decent education, are able to understand how a democratic political system works, are politically literate and are civically engaged so as to help it function well, then the level of social capital increases, hence the importance of political culture on the development of the social capital. The involvement of individuals in the society affairs, electoral participation, the political culture they possess, all these elements are of major importance for the proper functioning of a democratic state (Romeo Asiminei, 2013, p. 12).

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QUALITY OF LIFE IN THE PANDEMIC CONTEXT

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Abstract

The study aims to highlight whether there are statistically significant differences between people with children and those without children in terms of self-esteem and emotional stability. Overall, this research aims to determine whether there are differences between categories of people in terms of the impact that the Covid-19 pandemic has had on their quality of life. The questionnaires on which this study was based are Quality of Life Inventory (QOLI) and Five Factor Personality Inventory (FFPI) and were applied to a sample of 162 adults.

Keywords: *Quality of life, personality factors, self-esteem, emotional stability*

INTRODUCTION

The motivation for choosing this topic is based on the research team's desire to understand whether there is a relationship between self-esteem and quality of life during the pandemic, respectively between self-esteem and emotional stability, as a constitutive factor of personality (FFPI).

I. THEORETICAL PRESENTATION OF CONSTRUCTS

I.1 Emotional stability and self-esteem as factors of quality of life

Under the paradigm of self-organizational theory, emotional stability is defined as a property of labeling whether a complex emotional system can automatically maintain its balance effectively. (Chaturvedi M., Chander R., 2010).

Emotional stability allows the person to develop an integrated and balanced way of perceiving life's problems. Emotional instability or immaturity indicates the failure of the individual to develop the degree of independence or self-confidence that identifies with a normal adult, with consistent use of immature adjustment patterns and the inability to maintain balance under stress. People with emotional or unstable disorders lack the ability to eliminate problems and irritability, needing constant help to perform daily tasks. (Chaturvedi M., Chander R., 2010).

The concept of self-esteem was first described by William James in 1890 as the feeling of self-respect that develops when individuals consistently meet or exceed important goals in their lives. At present, the definition continues to be relevant and self-esteem is considered to be the evaluative aspect of self-knowledge, which reflects the extent to which people like and consider themselves competent. (Zeigler, 2013).

Morris Rosenberg concluded that self-esteem is, in short, the overall assessment that the individual has of himself. The scientist defines self-esteem as a complex cognitive and affective synthesis involved in dictating the individual's attitude towards himself. (Lupu, 2019).

The researchers found that there are a number of correlations between high levels of self-esteem and various positive feelings. Thus, people with high self-esteem have high goals, have a high level of self-confidence and consider that they are able to solve various difficult situations. (Baumeister și Leary, apud Dafinoiu, 2014).

The quality of life paradigm focuses on people, their needs and life expectancy and how they approach the conditions necessary for affirmation in society. The concept refers to what people think about their lives, their perceptions and their satisfaction. The quality of life is given by the perceptions of individuals on their social situations, in the context of the cultural value systems in which they live (WHO, 1998). The theory of quality of life argues that a finite number of areas of personal aspirations and accomplishments can be identified, valid for the entire population. Thus, a list of 16 global factors has been compiled that encompasses general concerns and covers all areas of life that contribute to quality of life. (Andrews și Inglehart, 1979 apud Frisch, 2014).

II. PURPOSE, OBJECTIVES AND HYPOTHESE

II.1 Purpose

The purpose of the research is to emphasize the importance of emotional balance on the quality of life during the pandemic. In this regard, we undertook an analysis of basic concepts, such as self-esteem and quality of life and aspects of

personality such as emotional stability, seeking to determine whether there are relationships between them and, if so, what they are.

II.2 Objectives

Regarding the objectives of this paper, on the one hand, we will try to establish whether there is a relationship between self-esteem and quality of life in the pandemic, respectively between self-esteem and emotional stability, as a constitutive factor of personality (FFPI). On the other hand, the second objective will seek to highlight whether there are statistically significant differences between people with and without children, in terms of self-esteem and emotional stability in a pandemic. For an objective analysis, we will refer to some specialized studies.

II.3 Hypotheses

Hypothesis 1. It is assumed that there are significant differences in the self-esteem of study participants (QOLI) between people with children and those without children.

Hypothesis 2. It is assumed that there are statistically significant differences between people with children and those without children in terms of emotional stability (FFPI).

III. SAMPLE AND INSTRUMENTES

III.1 The sample

The sample included 162 adults from urban and rural areas, classified by several categories of age, marital status, respectively with or without children. 36.4% of the participants are in the age group 18-25 years, 54.9% of them between 26 and 45 years, and the difference of 8.6% over 45 years. From the point of view of domicile, 82.7% reside in urban areas and 17.3% in rural areas, 79.6% being female participants and 20.4% male participants. From the perspective of marital status, 48.8% of the participants in the study are married, 43.8% unmarried and 7.4% divorced. Half of the study participants have children and the other half do not.

III.1 Instruments

The tools on which this study was based are Quality of Life Inventory and Five Factor Personality Inventory.

Quality of Life Inventory (QOLI) assesses an individual's quality of life by self-reporting the importance it attaches to each of the 16 areas of life (on a 3-point rating scale) and their current satisfaction with each area (on a scale). evaluation in 6 points).

According to its manual, **the Five-Factor Personality Inventory** (FFPI) evaluates the five superfactors in the Big Five model: Extraversion (E), Kindness (A), Conscientiousness (C), Emotional Stability (S), and Autonomy (D) (Hendriks, A. A. J., Hofstee, W. K. B., & De Raad, B., 1999).

IV. RESULTS AND DISCUSSIONS

In testing the hypotheses, the data obtained from the convenience sample were centralized, following the distribution of the electronic format of the tests created

using the Google Forms application and then when entering and processing the data collected using SPSS Statistics 26, the results obtained in applying the related statistical tests the four hypotheses being described and explained in the following lines.

Hypothesis 1. It is assumed that there are significant differences in the self-esteem of study participants (QOLI) between people with children and those without children.

The application of the Kolmogorov-Smirnov normality test highlights a non-normal distribution of the results obtained, for self-esteem, both in respondents with children and in those without, highlighted by the value of Sig. 0.00, less than 0.05 for both cases. To identify the appearance if the differences found are statistically significant we applied a non-parametric test method - the Mann-Whitney U test. The value of Asymp. Sig. (2-tailed) equal to 0.029, less than 0.05 shows that on the two subsamples in the present study there are statistically significant differences in the level reached by self-esteem depending on whether or not the subjects have children, therefore **hypothesis 1 is confirmed** on the studied group.

The study of the profile literature revealed the aspect that, analyzing the data from the National Longitudinal Survey of Young People (NLSY), which used a LISREL model, Oates, G. (1997) found that the number of children does not affect self-esteem; this has proven to be true for both women and men and for different socio-economic groups.

Hypothesis 2. It is assumed that there are significant differences between people with children and those without children in terms of emotional stability (FFPI).

The application of the Kolmogorov-Smirnov normality test highlights a normal distribution of the results obtained, for emotional stability, both in respondents with children and in those without, highlighted by the value of Sig. 0.200, greater than 0.05 in both cases. Comparing the average values of the emotional stability scores for the two subsamples shows an average of their value at the level of emotional stability of 62.09 in people without children and the standard deviation equal to 14,463. In the case of people with children, the average value is 72.27, and the standard deviation is 10.086.

As a result of testing the third hypothesis, the value obtained by Mr. 0.003, less than 0.05 reveals the aspect that the condition of homogeneity of the variants is fulfilled, aspect for which we will take into account the value of Sig. (2-tailed) equal to 0.000, which is lower than the 0.05 threshold, thus resulting in statistically significant differences between the two subsamples in the present study. Basically, **hypothesis number 2 is confirmed** on the study group.

In the academic literature, opinions on these differences between people who have children and those who do not have children are divided. The results of the tests performed by Van Scheppingen et al. (2016) do not support the theories according to which the transition to a life with children triggers positive changes in the personality factors in the Big Five model. Specifically, no significant evidence was identified in the study to support the hypothesis that parents with children

have increased levels of emotional stability, agreeableness or conscientiousness compared to adults without children. (Van Scheppingen, M.A., Jackson, J.J., Specht, J., Hutteman, R., Denissen, J.J.A., & Bleidorn, W., 2016).

The analysis of other researchers suggests that the existence of children can have both positive and negative effects on the psychological well-being of parents.. (Umberson, D., Gove, W. R., 1989).

CONCLUSIONS

Overall, the present research aimed to determine whether there are differences between categories of people in terms of the impact that the Covid-19 pandemic has had on their quality of life. With reference to the tested hypotheses, they are confirmed on the analyzed sample.

Regarding the importance of emotional balance on the quality of life during the pandemic, given the severity of the effects of COVID-19 on psychological health and quality of life, the study by Khan, Kamruzzaman, Monowar and Aftab U., (2021) showed that social distancing had significant negative influences on psychological suffering. According to the study, although psychological distress has a significant negative influence on quality of life, emotional recovery did not show a moderating effect on the relationship between psychological distress and quality of life during the COVID-19 pandemic. The results obtained also showed that emotional stability has the potential to predict the increased level of "satisfaction with life" being an important explanatory factor of psychological well-being. (Khan A.G., Kamruzzaman, N.R., Monowar M., Aftab U., 2021).

In conclusion, according to the results of the study undertaken by our research team, we reach a conclusion similar to the study of Miron et. namely, that people with high emotional stability, satisfied with their own life (with high self-esteem) have an increased psychological state of well-being and consequently a better quality of life (Miron M.I., Sulea C., Sârbescu P., 2011).

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OTHER ROMANIAN CIVIL CODE PROVISIONS ON THE MEANS FOR PROTECTING THE SUBJECTS OF LAW IN ECONOMIC INFERIORITY

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Abstract

During the timespan of over 150 years that has passed since the adoption of the old Romanian Civil Code (in force until October 1, 2011), a code influenced by the French Civil Code, which was passed almost 220 years ago, there have been large mutations at economic level that have had profound consequences in the social structure. In the two studies, presented by me during the conferences organized under the coordination of Professor Elena-Ana Iancu, I tried to analyze the measures introduced by the new Romanian Civil Code for the protection of the contractual part located in a position of economic inferiority. While in the first study, I managed to analyze only the injury, the hardship, and the reduction of the criminal clause, in this second paper I analyzed most of the other means considered by the new Civil Code for the protection of subjects of economic lower law.

Keywords: *contract formation, obligations to inform the contracting parties, unfair terms, standard clauses, non-monetary clauses, compensation for non-pecuniary damage*

INTRODUCTION

In the study published by me last year, I quoted part of the explanatory memorandum to the Draft of the New Civil Code, pointing out that the authors of the draft stressed that among the goals pursued in determining the general regime of obligations was also "to ensure a proper protection for the subjects of law in a position of economic inferiority". Therefore, the authors of the new Civil Code considered the problem of the inequality of economic power of natural and legal persons and, consequently, they wanted to avoid situations in which persons with superior financial possibilities impose their own interests in contracts concluded with parties with an inferior economic situation. In other words, the authors of the new Civil Code have noticed the danger of aggravating the gap between rich and poor.

In order to achieve this goal, in the explanations given to Book V "On obligations" within the Explanatory Memorandum to the Draft Civil Code, it is shown that

special regulations have been provided regarding the formation of the contract, the integration of standard clauses in the contract, the reduction of the criminal clause, the compensation of the non-patrimonial damage, etc. To these means, listed in the Explanatory Memorandum, it is necessary to add, according to the conclusions of the doctrine, the hardship *(clausula rebus sic stantibus).*

Notwithstanding the explanations given in the Explanatory Memorandum, the provisions on the protection of the party in a situation of economic inferiority do not form separate chapters or sections, they are dispersed throughout Book V of the new Civil Code.

Within the limits imposed by the small size that were set for us, we were able to analyze in detail in the previous study only some of the means envisaged by the editors of the new Civil Code for the mentioned purpose, namely: injury, hardship, and reduction of the criminal clause. We will try in this second study to refer to the other means envisaged by the new Civil Code for the protection of subjects of law economically inferior.

I. FORMATION OF THE CONTRACT

In this field, the new Civil Code brought important novelties (art. 1182 – 1203). The old Romanian Civil Code did not regulate the pre-contractual stage because, according to the principle of consensualism, taken over from the French law, which dominated the contractual law, the conclusion of the contract was reduced to the simple meeting of the offer with the acceptance. Even the notion of "contractual liability" appears for the first time only in the new Civil Code of 2009, but that did not mean that contractual obligations could be violated without any consequence. The compensation due to the creditor in the event of the debtor's non-performance of the obligation was regulated, on a French model, in the chapter "Obligations Effect" (*"De l'effet des obligations*") as a "performance of obligations by equivalent" where enforcement in kind was no longer possible ("*Des dommages et intérêts résultant de l'inexécution de l'obligation").*

The "negotiations between the parties" that precede the conclusion of the contract are regulated for the first time, but the novelty is, in the spirit of the new principles governing the contract, the right of the court to intervene in the formation of the contract. According to art. 1182 par.3 NCC, the court has the right, at the request of either party, to complete the contract, if the parties have agreed on the essential elements, but have not reached an agreement on the secondary items. The intervention of the court is obviously a means of defending the economically weaker side in order not to be coerced by the other side.

The requirement of "good faith" appears in several ways. Article 14 provides it as a general condition for the exercise of rights and the performance of obligations by all natural and legal persons, and Article 1170 repeats it as a special rule for the conclusion and performance of the contract: "The parties must act in good faith both in the negotiation and conclusion of the contract and throughout its execution.

They may not remove or limit this obligation". Article 1183 regulates good faith in negotiations (Good faith in negotiations):

a. The Parties shall be free to initiate, conduct and break negotiations and shall not be held liable for their failure.
b. The party engaging in a negotiation shall be bound by the requirements of good faith. The parties may not agree to limit or exclude this obligation.
c. It is contrary to the requirements of good faith, inter alia, the conduct of the party initiating or continuing negotiations without the intention of concluding the contract.
d. The party initiating, continuing, or breaking negotiations contrary to good faith shall be liable for the damage caused to the other party. In establishing such damage, account shall be taken of the expenses incurred in the negotiations, of the waiver by the other party of other tenders and of any other similar circumstances.

Thus, although the parties have the freedom to initiate, conduct and break negotiations and cannot be held responsible for their failure, yet the party that engages in a negotiation is kept complying with the requirements of good faith. The parties may not agree to limit or remove this obligation. Paragraph 3 of Article 1183 stipulates that it is contrary to the requirements of good faith, inter alia, the conduct of the party initiating or continuing negotiations without the intention of concluding the contract. It is expressly provided for the liability for initiating, continuing or breaking negotiations contrary to good faith, and the criteria to be considered when assessing the damage are also provided for: the expenses incurred for negotiations, the waiver by the other party of other tenders and any other similar circumstances.

Unfortunately, the lawmaker does not also foresee the kind of incurring liability in case of harm to good faith in negotiations. As in the Romanian law there is no notion of "culpa in contrahendo" (pre-contractual liability), the doctrine has taken the opinion in the sense of a civil tort liability (Moise, 2012, page 6), according to the general principle of the Romanian civil law, according to which the contractual liability is special and operates only in case of violation of a valid contract concluded, and any liability outside the contract can only be the common law liability that is the tort liability.

Although Article 1183 does not expressly provide for it, the doctrine has taken the view that the injury of the requirement of good faith may justify the removal by the court of the contractual clauses unfairly imposed by a professional (in other words, the court may declare them to be without effect) (Pop, Popa, Vidu, 2012, p. 171).

Article 1191 enshrines the principle of irrevocability of the offer. According to Article 1193, the offer without a period of acceptance, addressed to a person who is not present, must be maintained for a reasonable period, according to the circumstances, for the addressee to receive it, to analyze it and to send the acceptance. The tenderer shall be liable for any damage caused by the revocation of the tender before the expiry of that period.

II. OBLIGATION TO INFORM THE CONTRACTING PARTIES*

The old Civil Code provided among the requirements for the validity of the contract also "the valid consent of the obliged party", but the means of defending the will expressed freely and knowingly have been much criticized by the doctrine (Fr. Terré, Ph. Simler, Yv. Lequette, 2005, page 255). Defects in consent, regulated by the code, could only be proven after the conclusion of the contract and had only curative value. Much more effective are the preventive measures taken before the conclusion of the contract that prevent the vitiation of the consent of the parties, especially of the economically disadvantaged one, namely, imposing the information and the obligations for clarification.

The Romanian doctrine stressed that it is more appropriate, instead of regulating the contract by mandatory provisions, to deal with the consumer as a free and intelligent person, who can defend his own interests, if the means for correct information are put at his disposition (I.Fl. Popa, 1998, pp 77 and following).

The old traditional conception is outdated, according to which in a liberal society everyone must inform themselves before concluding a contract and that there is an obligation to inform only where there is an obligation to inform is expressly provided for in the law, is outdated. (Such an obligation was provided for in article 1337 of the old Civil Code of 1864 in the charge of the seller, who had to inform the buyer about the charges that encumbered the work, otherwise he was called to answer)

In the current consumer society such a conception no longer corresponds to the times because economic inequality has as a consequence the inequality of the possibility of information, which damages the balance of the contract. That is why the doctrine is in favour of a general obligation to inform the contract partners (D. Chirică, 2008, pp 284-301). It is she who has also established the general conditions that the obligation to inform must meet: the information must be complete, be clear and unequivocal, be accurate and up to date. There is even talk of an "informative formalism", that is, the fulfillment of the obligation to inform in a form provided by law, which ensures compliance with and control of compliance with the requirements regarding the information of the contractual partner (Liviu Pop, 2009, pp. 292-296).

Unfortunately, the new Civil Code does not include a special chapter dedicated to information obligations. We find only "hidden" provisions, implicit. Thus, art. 1214 par. 1 regulates the “fraud by reluctance” as a defect in consent, that is to say, the opposing party “failed, fraudulently, to inform the contractor of circumstances which it was appropriate to disclose to it”.

Or Article 1695, which provides for the guarantee against eviction, regulates in par. 2 the guarantee against eviction resulting from the claims of a third party, which is due only if they are based on a right arose before the date of sale and which has not been brought up to the purchaser's attention (emphasis added by us) up to that date (Liviu Pop, Ionuţ-Florin Popa, Stelian-Ioan Vidu, 2012, p. 93). However, the quoted articles are rare exceptions.

Under the influence of the doctrine, but also of the growing number of laws in the field of consumer protection, which have transposed European directives, the Romanian caselaw also slowly begins to recognise the existence of a general obligation to inform.

More detailed rules on the obligation to inform are found only in the special laws on consumer protection, with the mention that the laws adopted after Romania's accession to the EU have transposed the European directives in the field into the national legislation (Chr. Alunaru, 2010, pp 13-30). There are laws or ordinances of the Government in areas such as the activity of marketing packages of touristic services, the conclusion and execution of distance contracts, electronic commerce, universal service and users' rights on the electronic communications networks and services, consume loan agreements for consumers, individuals, protection of purchasers with regard to some aspects of contracts bearing on the acquisition of a right to use real estate for a limited period of time (*time sharing),*health reform and patient's rights, consumer rights in contracts concluded with professionals, etc.

- Such laws are: Government Ordinance no. 21/1992 of 21/08/1992 on consumer protection; Law on consumption code (law no. 296/2004), Government Ordinance no. 107 of 30 July 1999 on the activity of marketing tourist package holidays (which transposed the provisions of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours); Government Ordinance no. 130/2000 of 31/08/2000 on the protection of consumers in the conclusion and execution of distance contracts (republished, currently repealed by the Emergency Ordinance no. 34/2014 of 04/06/2014 on consumer rights in contracts concluded with professionals, as well as for the amendment and completion of certain normative acts, which transposed the provisions of Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on consumer protection in the context of distance contracts); Law No 365/2002 on electronic commerce, which transposed Directive 2000/31/EC on certain legal aspects concerning information society services, in particular electronic commerce in the internal market; Law No 365/2002 on electronic commerce, which transposed Directive 2000/31/EC on certain legal aspects concerning information society services, in particular electronic commerce in the internal market; Law No 304/2003 on universal service and users' rights with regard to electronic communications networks and services, which transposed Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights with regard to electronic communications networks and services (Universal Service Directive); Law No 289/2004 on the legal status of consumer credit agreements for consumers natural persons, which is currently repealed by GEO No 50/2010,which transposed Directive No 87/102/EEC of 22 December 1986 for the harmonisation of legislative, administrative and regulatory provisions on credit for consumption, as amended and supplemented by Directive No 90/88/EEC of 22 February 1990 and Directive No 98/7/EC of 16 February 1998; Law nr. 282 of 23 June 2004 on the protection of purchasers in respect of certain

aspects of contracts relating to the acquisition of a right to use immovable property for a limited period of time which transposed Directive 94/47/EC on the protection of purchasers with regard to certain aspects of contracts bearing on the acquisition of a rightto the partial use of immovable property *(time sharing).*

- Currently, Law nr. 282/2004 was repealed and replaced by the Government Emergency Ordinance no. 14 of 16 February 2011 for the protection of consumers in the conclusion and performance of contracts for the acquisition of the right to use one or more accommodation spaces for a fixed period, long-term contracts for the acquisition of benefits for holiday products, resale contracts and exchange contracts, which transposed Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on consumer protection concerning certain aspects of timeshare contracts, long-term holiday product contracts and resale and exchange contracts, which in turn repealed and replaced Directive 94/47/EC.

- Patient Rights Law no. 46/2003; Law nr. 95 of 14 April 2006 on health reform; Emergency Ordinance no. 34/2014 of 04/06/2014 on consumer rights in contracts concluded with professionals, as well as amending and supplementing certain normative acts, which transposed the provisions of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing directive 93/13/EEC of the European Parliament and of the Council and repealing the Directive 85/577/EEC of the Council and Directive 97/7/EC of the European Parliament and of the Council. In that Act, Chapter II regulates "Information for consumers for contracts other than distance or off-premises contracts" and Chapter III "Consumer information and the right of withdrawal in distance and off-premises contracts".

As regards the legal consequences of the breach of the obligation to inform at the pre-contractual stage, the Romanian doctrine was based on French law (D. Chirică, * p. 299 – 301; Chr. Larroumet, 2003, p. 346 – 347; L. Pop, * pp. 296 – 298). As it is a violation of the imperative requirement of good faith, ordinary liability – tort liability – will be attracted, given that contractual liability (special liability) can occur only in the case of a valid contract concluded. The damage caused to the other party (consisting of losses and disadvantages caused by the conclusion of the contract as a weaker party due to the lack of necessary information) must be fully repaired. The fault of the contractor who has failed to fulfil his duty to inform must not be proved, because this is an obligation to result, the breach of which entails objective liability (L. Pop, 2006, pp. 62-64, 65-66; p. 298).

III. UNFAIR TERMS, STANDARD CLAUSES, NON-USUAL TERM

The theory of unfair terms is, according to the doctrine, another limitation of the binding effect of contracts, an example of the intervention of the courts in contracts (Pop, Popa, Vidu, pp. 160-161). It is a problem specific to contracts with consumers.

In this field, the Romanian legislator transposed Directive 93/13/EEC through Law 193/2000 on unfair terms. Inspired by French doctrine, (E. Hondius, 1996, p. 591 and following, R. Zimmermann, 2007, pp. 451 and following; J. Gestin,

I. Marressaux, 1993, p. 68) the Romanian authors also considered this directive to be the most important measure for the harmonization of contract law in Europe, as it concerns the very being of the contract (I.Fl. Popa, 2004, p. 194; I. Bălan, 2001, pp. 36 and following; C. Toader, A. Ciobanu, 2003, p. 78 and following). This law must be supplemented by other laws, such as the Government Emergency Ordinance no. 34/2014 on consumer rights in contracts concluded with professionals, which transposed into national law Directive 2011/83/ EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/ EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.

It is also of real importance is the "Consumption Code" (Law no. 296/2004, republished in 2008). That designation might give the impression that it is the *"avant la lettre*" achievement of the proposal for a Directive of the European Commission on consumer rights, COM (2008) 614, a "codex of consumption" as in France ("Code de la consommation") or Italy ("Codice di consummo"). In reality, it is only a framework law, the purpose of which was to classify all the provisions in the field of consumer protection in the body of the law or in annexes (17 in number), as it clearly results from art. 88 of the law (Ch. Alunaru, 2010, pp. 13-30).

In Chapter III of the law, on consumer rights, we find provisions on unfair terms. Among them, an important place occupies the right to refuse the conclusion of contracts that contain unfair terms, according to the legal provisions in force.

Chapter IX on "Consumer rights in the conclusion of contracts" contains detailed provisions on unfair terms in consumer contracts.

Various other special laws transposing European directives contain provisions on unfair terms, in areas of consumer protection such as the marketing of package holidays; the conclusion and execution of distance contracts; the conclusion and execution of distance contracts on financial services; credit agreements for consumers, combating unfair practices of traders in relation to consumers, etc.

Various other special laws transposing European directives in different areas of consumer protection contain provisions on unfair terms.

- Government Ordinance no. 107/1999 on the activity of marketing package holidays which transposed the provisions of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours;
- Government Ordinance no. 130/2000 on the protection of consumers in the conclusion and performance of distance contracts which transposed the provisions of Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in distance contracts;
- Government Emergency Ordinance no. 85/2004 on the protection of consumers in the conclusion and performance of distance contracts relating to financial services, *which transposed* the Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive

90/619/EEC and Directives 97/7/EC and 98/27/EC, published in the Official Journal of the European Communities (JOCE) No. L 271 of 9 October 2002, as well as the provisions of Article 90 of Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market, amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC.

Unfortunately, the regulation of unfair terms in Romanian law does not concern all contracts, but only those concluded with consumers. As a positive example is given the German law, where the transposition of European legislation led to a reform of the BGB, so that the provisions of art. 305 and following concern not only the relationships of professionals with consumers, but also relations between professionals (traders) (R. Schulze, H. Dörner, I. Ebert, Th. Hoeren, R. Kemper, I. Saenger, K. Schreiber, H. Schulte-Nölke, A. Staudinger, 2012).

The definition given by art. 4 of Law nr. 193/2000 unfair terms are: "A contractual term that has not been negotiated directly with the consumer will be considered unfair if, by itself or together with other provisions of the contract, it creates, to the detriment of the consumer and contrary to the requirements of good faith, a significant imbalance in the rights and obligations of the parties."

According to this definition, the doctrine has established five criteria that determine whether a term is unfair:

- Absence of negotiations between the parties;
- Imbalance to the detriment of the consumer;
- Harm to the principle of good faith;
- The use of one of the unfair terms listed in the annex to the law;
- Other essential circumstances listed in Article 4. par. 5, such as the nature of the goods or services which are the subject of the contract at the time of its conclusion; all the factors which led to the conclusion of the contract; other terms of the contract or of the other contracts on which it is dependent.

As for the legal effect of unfair terms, the Romanian regulation has taken over the rules of the European directive, so that, according to art. 6 of Law 193/2000 on unfair terms in contracts concluded between professionals and consumers "Unfair terms contained in the contract and found either personally or through the bodies empowered by law will not produce effects on the consumer, and the contract will continue to be carried out, with the consumer's consent, only if after their elimination he can continue".

This solution was criticized by the Romanian doctrine, which considered that, according to Romanian law, other sanctions such as absolute nullity (C. Toader, A. Ciobanu, 78 ff; I.Fl. Popa, 2004, pp. 213 and following) or the consideration of unfair terms as unwritten (J. Goicovici, 2006, pp. 79 and following) would have been more appropriate. Following a rich case-law of the European Court of Justice, the Romanian doctrine accepted the penalty of invalidity as the appropriate one (L. Pop, I.Fl. Popa, S.I. Vidu, p. 169, footnote 4).

Although the regulation of unfair terms concerns only consumer contracts, the Romanian doctrine took the view that those unfair terms could also be removed from other contracts on the basis of the rules of ordinary law.

These rules include:

- defects of consent, such as "*laesio enormis*";
- the theory of the cause can lead to the removal of unfair terms, because the absence of a real and lawful cause entails the nullity of the contract;
- the requirement of good faith at the conclusion of the contract;
- the rules of transparency of the contract (transparency, clarity, intelligibility) can also be a useful tool. If the contract terms are not clear, intelligible, their content cannot be understood even on the basis of the common rules of interpretation contained in the section with this title of the Civil Code, the "subsidiary rules of interpretation" contained in Article 1269, are applied: Paragraph 1 contains a rule against *proferentem:* "If, after the application of the rules of interpretation, the contract remains unclear, it shall be interpreted in favour of the one who undertakes it." Paragraph 2 contains an application of the principle in *dubio pro reo* to adherence contracts, the typical field for unfair terms: "The provisions laid down in the adhesion contracts shall be interpreted against the proposer".

If unfair terms are regulated in the legislation on consumer protection, standard terms and non-legal terms are regulated in Articles 1202 to 1203 of the new Civil Code. The very authors of the Code pointed out in the Explanatory Memorandum that the purpose of regulating these terms was to prevent the abusive conduct of the contracting party with a superior, advantageous economic situation.

According to art. 1202, par. 2 "Standard clauses are the stipulations established in advance by one of the parties for general and repeated use and which are included in the contract without having been negotiated with the other party. Paragraph 3 of the Article provides that: "Negotiated clauses shall prevail over standard clauses", and according to par. 4 "Where both parties use standard clauses and do not reach an agreement on them, the contract shall nevertheless be concluded on the basis of the agreed clauses and any common standard clauses in their substance, unless one of the parties notifies the other party, either before the moment of conclusion of the contract or subsequently and immediately, that it does not intend to be bound by such a contract.

According to art. 1203,"non-usual clauses" means "Standard clauses which provide for the benefit of the one who proposes to limit their liability, the right to unilaterally terminate the contract, to suspend the performance of obligations or which provide for the detriment of the other party the revocation of rights or the benefit of the term, the limitation of the right to oppose exceptions, the restriction of the freedom to conclude contracts with other persons, silent renewal of the contract, applicable law, arbitration clauses or derogating from the rules on the jurisdiction of the courts". Such clauses shall take effect only if they are expressly accepted in writing by the other party.

IV. COMPENSATION FOR NON-PECUNIARY DAMAGE

Although in the Explanatory Memorandum to the Draft of the New Civil Code, the authors clearly show that among the means considered when establishing the general regime of obligations to ensure a proper protection of the subjects of law in a position of economic inferiority was also "compensation for non-pecuniary damage", within the framework of the regulation of contracts we find only one provision in this regard: Article 1531, which provides for the full reparation of the damage suffered by the creditor through the fact of non-execution, enshrines in paragraph 3 the creditor's right to compensation for non-pecuniary damage.

It therefore remains to apply by analogy compensation for non-pecuniary damage regulated in the context of tortious civil liability (Christian Alunaru, 2010, pp. 5-52). It is true that, unlike the old Civil Code, the new Code regulates civil liability in tort in much more detail and comprehensively (46 articles instead of 6 articles), the express regulation of moral damages being considered in step forward. Leaving aside the justified criticisms of the regulation of the repair of the non-patrimonial damage because it is very brief in relation to the richness of the aspects raised by the legal literature in recent years, we cannot fail to point out the contradiction between the intentions of the authors of the Code, expressed in the explanatory memorandum, and the concrete way of regulating in the texts of the Code the repair of the non-pecuniary damage suffered by the creditor through the non-performance of the contractual obligation. Even if we accept the application by analogy of the rules on tortious liability, it is clear that contractual liability has certain specific aspects with which the regulation of non-pecuniary damage in tort is incompatible. We quote by way of example, art. 1391: "Compensation of non-pecuniary damage":

(1) In the event of bodily integrity or health damage, compensation may also be granted for the restriction of possibilities for family and social life.

(2) The court may also award compensation to ascendants, descendants, brothers, sisters, and husband, for the pain caused by the death of the victim, as well as to any other person who, in turn, could prove the existence of such damage.

(3) The right to compensation for violations of the rights inherent in the personality of any subject of law may be assigned only if it has been established by a settlement or a final court decision.

(4) The right to compensation recognised under the provisions of this Article shall not pass to the heirs. However, they can exercise it if the action was initiated by the deceased.

(5) The provisions of Articles 253 to 256 remain applicable (these are non-pecuniary means of defence that can be requested from the court, *our specification).*

CONCLUSIONS

From the above, it results that the change of the economic, social, and political realities in the 200 years since the promulgation of the French Civil Code, which was the source of inspiration of the Romanian Civil Code, has led to a fundamental

change in the general theory of obligations as well. In addition to the old theory of autonomy of will, creation of the school of natural law, founded on political and economic liberalism, an expression of individualistic philosophy of the XVIII century, the principle of contractual solidarity has made its way. The creditor is no longer the master of the contract, but he also has a duty to collaborate. The contract has become a kind of microcosm, a small society where everyone has to work for a common purpose that is the sum of the individual goals pursued by each. The lawmaker and the judge increasingly intervene in contracts, the first by mandatory rules (instead of alternate ones), the second to ensure contractual balance when it is disturbed.

Although the purpose of protecting parties in a position of economic inferiority is expressly declared by the authors of the new Civil Code, the legal provisions dedicated to this purpose are few and widespread throughout the Code. Much clearer and more detailed rules are contained in the special laws transposing into national law the European directives in the field of consumer protection. Perhaps the regulation of this field outside the Civil Code is an advantage, because this area is particularly dynamic, constantly developing, and the regulation within the Code would have caused a permanent addition, modification, and eventual renumbering of the articles of the Code.

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THE LIMITATION OF EXERCISING THE RIGHT TO PRIVATE PROPERTY THROUGH PREEMPTION IN THE MATTER OF SALE

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Abstract

The pre-emptive right, known from antiquity, is subject to new forms of manifestation in present times, forms which emphasize both the interests of the legislator and those of the subjects of law, persons or authorities, in order to provide the possibility for some categories of people to manifest certain preferences, facilities, prerogatives in case an act of translation of property is concluded; the pre-emptive right can be found in case of other types of contracts. The present study aims to show the current status of speciality doctrine in regard to the legal regime which applies, as well as the legal nature of the pre-emptive right.

Keywords: *subjective right, real right, right of claim, potestative right, limitation, doctrine, law*

INTRODUCTION PRE-EMPTION

Pre-emption and implicitly the pre-emptive right appears as a distinctive judicial institution even from ancient times, as we are able to identify references to the birth of a subjective right which allowed for the possibility of a ransom pact, thus providing the seller with the possibility to buy back the good he sold within a clearly established term and with the normal obligation of giving back the price of the good and other expenses which derive from the change in ownership. These references are found within the Bible in the paragraphs which are dedicated to contracts (Romano, 1997, p. 5).

The operation of buying back a certain good was implicitly related to the pre-emptive right so, "if your brother will become impoverished and will sell his inheritance, the closest relative will buy what the brother is selling" (Romano, 1997, p. 109).

However, the pre-emptive right would later be configured as a legal institution, regulated both on a national level and on a technical level in Romanian

jurisprudence, in the post classical age, when the so-called emphyteusis contract appears, during the time of emperor Zenon.

Within the category of real rights over the good owned by another person, therefore in the case of an attribute of the private property right, a certain person, called an emphyteut would enjoy the attribute of "ius utendi" and „ius fruendi" over an agricultural land which belonged to a land owner; he was thus obliged to pay a sum of money to the land owner, in accordance with the parties 'agreement, known as a cannon. In case "the owner terminates the emphyteusis contract with the purpose of selling the land, the emphyteut would benefit from the pre-emptive right" (Ciucă, 1999, pp. 367-378) in acquiring the good he was previously using. Considering this, but also the fact that the right of use could be passed on by the emphyteut within the succession procedure, the emphyteusis contract is different from the lease of land contract, as they have a different legal nature.

Under the influence of the byzantine law, the pre-emptive right is regulated in the old feudal Romanian law under the name of protimisis. Based on a systemic analysis of the sources of written Romanian law in the Romanian provinces, Valentin Al. Georgescu defined „protimisis as a preferential buy back right, acknowledged to some people in regard to certain goods, whose owners, privileged in buying back those goods are found in a solidarity relation - kinship, common property, neighbouring property, ownership or previous ownership of that good" (Georgescu, 1980, p. 199).

The above stated definition valorises the historical texts, thus suggesting that protimisis was expressed in one of the two ways: previous buying, which was basically a pre-emptive right or the possibility of buy back which was in fact a retraction of sale. In the first situation, the person who wanted to sell a good was obliged to previously notify the holder of the protimisis right and, in case he was not interested in acquiring the good, the owner was able to sell the good to any buyer. In case the seller did not fulfil this procedure called – denuntatio – and sold the good without notifying the holder of the protimisis right, he would conclude an illegal act, thus, the holder of the protimisis right had the possibility of using the buy back right; this was a retraction of sale, resulting in paying the buyer the price he paid in order to avoid unlawful enrichment. The above mentioned situation results in the fact that the protimisis right was, by its effects, protecting the property over goods held in the same circle of social solidarity, thus avoiding certain sales which would impair on the balance and habits of that community.

We can thus conclude that protimisis was becoming a real right opposable „erga omnes" in the form of the pre-emptive right of the seller to the benefit of the holder of the preference right within a 30 day term. After 30 days, if the holder of the protimisis right did not exercise his right, to seller was able to sell the good to a third party.

After the changes occurred in 1989, when the private property right is again regulated as a real right, both on a legislative level and a jurisprudential one, the pre – emptive right knows a new and more diverse form of expression; this fact is

obvious given the new Civil code (see article 1730) and the specific laws in this domain.

The interpretation of article 1730 of the Civil Code, as well as other texts of civil law attempts to provide a definition of the pre-emptive right by considering the content of this right and emphasizing the sources of law which generate it or the convention of the parties.

Thus, the dictionary of civil law and civil procedures defines pre-emptive right as "that certain right which provides the holder called the pre-emptor - the prerogative, the possibility (n.n.) to acquire a certain good with priority" (D. Rădulescu, E. Rădulescu, G. Stoican, 2009, p. 411).

When performing a quantity analysis of the definitions phrased by specialty doctrine, we notice that they are different in regard to the area in which they apply; thus, if the pre-emptive right regards the main real rights, namely the civil circuit of immobile goods which are subject to private property, the definitions emphasize the thesis according to which the pre-emptive right is basically a limitation of the attribute of – ius abutendi - in regard to selling goods which are subject to passing on of property, namely the sale contract (G. Boroi, C.A. Anghelescu, B. Nazat, 2013, p. 53). Per a contrario, if this right applies to other types of contracts, the definitions emphasize the content of this right in regard to its normal (C. Macovei, 2006, p. 25) exercise.

Doctrine has continuously discussed the fact that this right is a faculty, a prerogative for a certain category of people.

In its essence, the pre-emptive right is that right, arising from law or the convention of the parties which provides its holder, called a pre-emptor, a priority, a preference in regard to the conduct of other people, who are third parties.

By performing a compared law analysis, we find similar regulations in French speciality literature, stating that "the pre-emptive right is that certain right acknowledged to a person or an administrative entity, based on a contract or a legal provision, to acquire property over a good in case it is sold, by considering the right of preference before any other buyer" (Guide juridique, Dalloz, 1991, p. 398).

Romanian doctrine correctly stated that the pre-emptive right is by itself a pre contractual institution as, the time when the right actually causes effect, is „ante rem venditio" as, if it would occur „post rem venditio" we would be in the presence of an assignment contract, thus resulting in a substitution of the initial buyer with the person of the pre-emptor.

In regard to the pre-emptive right, from an etymological perspective, there is a certain inconsistency from the Romanian lawmaker, as "the pre-emptive right is exclusively used in regard to the sale contract; in case of other contracts, the term of "preference" is used".

In our opinion, the two terms cause similar legal effects, thus they will in appearance cause a state of confusion; as an example, I will mention article 1828 of the Civil Code, stating that - "When concluding a new lease contract, the tenant is entitled to a preference right in equal conditions ...".

A matter which is extremely controversial in speciality doctrine is the legal nature of the pre-emptive right; thus the present study phrases a series of conclusions and opinions which show that this right is manifested by a previous procedure with a publicity purpose.

By synthetizing, we show that several opinions were phrased, which qualify the pre-emptive right as a real right, whether the right to claim or the position of future regulations which would allow for the possibility of classifying criteria for patrimonial rights and potestative rights.

By interpreting the provisions of Law no 18/1991, professor Gh.Beleiu unequivocally showed that the pre-emptive right is a real right, as it provides the holder with the right to "pursue the good which is subject to pre-emptive right" and exclusive prerogatives of real rights; subsequently, it is opposable erga omnes with a special mention that, in case of passive subjects, called to abstain from any act or fact which would impair the exercise of the right, the seller holds a distinctive position, as he has the obligation of publicise the sale offer (see the to do obligation) or the obligation to not sell the land before the pre-emptive right is exercised (see the obligation to abstain).

As a consequence, the seller has additional obligations as opposed to other passive subjects, obligations which are mainly guarantees likely to protect the pre-emptive right, which is a real, absolute and main right (Gh. Beleiu, 1992, p. 3-13).

At the same time, it is the opinion of the author that the pre-emptive right is a right affected by certain factors as "failing to exercise this right within the specified term results in the loss of exercise for the holder of the right", (Gh. Beleiu, 1992, p. 3-13).

An opposing view is expressed by other authors (E. Chelaru, 2000, p. 15-28)" who qualify the pre-emptive right as a right to claim, a personal right, given the criticism of the character of this right, which is a real right in the regulated meaning of this term.

The opinion of professor E.Chelaru shows that - "the action which protects the pre-emptive right is not a real action, as it does not follow the good, but merely the dissolution of the sale contract; the consequence is not the acquiring of the good by the holder of the right but the return of the good to the initial seller" (E. Chelaru, 2000, p. 15-28).

Thus, the respect of the pre-emptive right represents a validity condition for the selling contract; the sanction for the disrespect of this conditions is annulment of the act (E. Chelaru, 2000, p. 15-28); as a consequence, we are not in the presence of opposability erga omnes, but the respect of law which is a general requirement for all subjects of law.

In the opinion of the author, we are in the presence of a relative right, which provides his holder with the prerogative to conclude a sale contract with priority, in case the owner manifested his wish to sell the good.

As a conclusion, the pre-emptive right is a right of claim which provides the holder with a right of preference before all other buyers, with the same price and equal conditions (Al.G. Ilie, M. Nicolae, 2004, p. 34-64).

This right is only opposable erga certa personam, as its holder can demand a certain conduct from the owner who sells a certain good, namely the obligation to do (see publicity) or the obligation to abstain (see third party sale).

In the opinion of other authors (see professor V.Stoica) the pre-emptive right is a potestative right which provides its holder with the possibility of "unilaterally and discretionary influencing pre-existing legal situations, thus changing it or creating new legal situations" (V. Stoica, 2003, p. 5).

By failing to include the pre-emptive right in the category of real rights and that of claim rights, the followers of the theory according to which this right is a potestative right, emphasize the thesis according to which "only a potestative right can explain the legal power of the holder of the pre-emptive right to decisively influence a previously created legal situation which he was not a part of, thus being able to terminate, change or cause new legal situations by his manifestation of will" (I. Negru, D. Corneanu, 2004, p. 30).

Although the Romanian lawmaker did not regulate the pre-emptive right in the category of real rights - see article 551 of the Civil Code - our opinion is that it has several elements of congruence with the legal characteristics of this – jus in re – for this reason, we agree with the moderate opinion phased by professor Liviu Pop, who mentions the "so called" pre-emptive right.

Seen with obvious reservations, the pre-emptive right appears, by considering the effects it causes, as a legal or conventional limit of the attribute of – jus abutendi – in regard to contractual freedom with express reference to the matter of sales.

In case the lawmaker or the parties agreed, through their freely expressed consent, the existence of this facility given to the pre-emptor to hold a preference in case of sale and in regard to the price, we can state that, regardless of the legal nature of the analysed right, its effect is that of a limitation of the disposition right within the civil circuit.

CONCLUSIONS

Given the obligation to abstain, namely that of not selling the good before the exercise of the pre-emptive right and the obligation to fulfil all publicity formalities, the pre-emptive right is a true legal and conventional limit to disposition in the matter of the sale contract.

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CURRENT THEORETICAL AND PRACTICAL ASPECTS REGARDING THE PROTECTION AND LIMITS OF THE RIGHT TO PROTECTION OF HEALTH

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Abstract

The right to the protection of their health is one of the fundamental rights of every human being, a right which considers both the individual's right to health, but also one's right to benefit from state measures taken to ensure public health and hygiene. As a consequence, the international community, but especially states, have the obligation to facilitate the accomplishment of this right, especially during times of pandemic, when we can consider, also on a legislative level, limitations in the exercise of this right. Through this article, we aim to identify the characteristics of this right in the present sanitary context, by making appreciations from the perspective of international and regional regulations, including the declarations and comments of some international bodies with duties in public health. We will also provide short appreciations in regard to national laws which are relevant given the connection to the respect of the right to the protection of health. Thus, we will point out the limitations of this right especially in regard to its exercise.

Keywords:*ight, health, solidarity, gradual steps, right-premise*

INTRODUCTION

The Romanian Constitution, by the provisions of article 34, regulated the right to the protection of one's health, by expressing the social character of the Romanian state, as is stated in article 1 third alignment of this text. The social state is and must be „*a participant who must intervene, must have initiative and especially, must undertake measures which ensure the achievement of common good (...) must ensure the functioning of public protection and social intervention services*" (Muraru, Tănăsescu, 2019, page 11)*.

The Romanian Constitutional Court regulated that the social status represents „*the ensemble of measures which entail the economic and social policy and which*

prioritizes the economical social regulations with positive consequences on the social status of the citizens" (*Romanian Constitutional Court, Decision no 1594/2011, point I, para. 2*)*. The Romanian Constitutional Court also pointed out that, given the virtue of constitutionally regulating this measure, the state must ensure „*both the economical and social welfare of the citizens, as well as the social cohesion, without denying the public authorities' right to establish the specific conditions of achieving this purpose*" (*Romanian Constitutional Court, Decision no 1594/2011, point I, para. 2*). Such an understanding of what the social status entails considers the „*constitutional obligation (...) to intervene in favor of the citizen*" (*Romanian Constitutional Court, Decision no 1594/2011, point I, para. 5),* as the state is obliged to take action, to have a positive attitude (see *Romanian Constitutional Court, Decision no 1594/2011 point I, para. 5*); however, the degree, the level of intervention of the state will be left to the appreciation of the state, as it can be different „*depending on the political vision and the economic conditions of the state at a certain time*" (*Romanian Constitutional Court, Decision no 1594/2011, point I, para. 5).*

The existence and development of a state also depends on the health of its citizens and when the constitution of that state, as is the case of our state and Constitution, regulates the right to the protection of health, it is all the more obvious, in our opinion, that the state undertook the respect and fulfillment of some obligations which create the premise and necessary conditions so that each citizen ensures or preserves „*the highest possible standard of health*" (*the Preamble of the World Health Organization Constitution, paragraph 2*)*.

However, the obligations which a state can and will take, their exact extent, varies, as stated by the Constitutions Court of Romania, which shows, as we have previously mentioned, by the discretionary power of its authorities that the state can decide on its politics, actions, mechanisms, tools thorough which it can fulfill the constitutional obligations it undertook in order to ensure the protection of health.

The discretionary power of the state, exercised by its authorities, can be all the more visible in the present context of a pandemic, when, acting or needing to act in order to diminish and eventually eliminate the effects it produces, the state will have to take measures, to impose procedures, limitations in the exercise of the right to the protection of health, unpopular decisions, but which must ensure the public health of its citizens. However, we wonder how wide can the margin of appreciation of the state can be, in exercising its discretionary power in ensuring the right to the protection of health of its citizens in such a situation of a crisis in public health? Does the state have the right to act discretionary and, in the course of protecting the right to health, to impair on other fundamental rights and freedoms, maybe even this right of other citizens?

I. ASPECTS REGARDING THE RIGHT TO THE PROTECTION OF HEALTH FROM THE PERSPECTIVE OF INTERNATIONAL AND CONSTITUTIONAL REGULATIONS

The right to the protection of health is regulated in international documents, such as: article 25 of the Universal Declaration on Human Rights, article 12 of the International Pact on economic, social and cultural rights, article 11 and 13 of the revised European Social Charter, article 35 of the Charter of Fundamental Rights of the European Union.

Through its preamble, the Constitution of the World Health Organization of 1946 proclaimed the right to health, by stating that „*the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition*" (*Preamble of the Constitution of the World Health Organization, paragraph 2*)*.

The achievement of this right by each of us is possible if we are given the necessary legal background, as this is one of „*the positive rights (...) in the exercise of which the state must actively get involved in*" (*Deaconu, 2011, p. 206*)* in order for this right to exist and be exercised.

The legal regulation of this right on an international level is obvious, as we have shown above. However, in present times, we notice that the dimension of achieving this right depends on the financial possibilities of each individual; considering all these, the state is obliged to take measures in order to ensure hygiene and public health, as stated by article 34 second alignment of the Romanian Constitution. In our opinion, this obligations, must allow each person the access the prevention measures in matters of health, as well as medical care, as stated in article 35 of the Charter of the Fundamental Right of the European Union.

The right to the protection of health, given the fact that it entails involvement of the state in identifying and configuring measures, policies which are adequate for its optimal achievement, as well as the organizing of the medical system and some basic medical services, but services which are essential to each individual, is a second generation right This appreciation entails the fact that this is a right acknowledged to the individual „*based on the virtue of his quality of member of a social community with certain needs*" (*Deaconu, 2011, page 206*). On the other hand, given the fact that such positive rights are in the duty of the state, it can also be considered as a claim-right (See *Muraru, Tănăsescu, 2019, page 280*), as the state is obliged to act in order to guarantee the effective exercise of this right (See *Muraru, Tănăsescu, 2019, page 280*).

Given the previous appreciations, but also by considering the international and European regulations regarding the right to the protection of health and which regulate the state's positive obligation indispensably needed to achieve this right, article 35 of the Charter for the Fundamental Rights of the European Union states that this right is determined „*by the conditions established by the national laws and practices*"; thus, we can conclude that the degree of achievement of this right exclusively depends on each state.

However, we believe the present COVID-19 pandemic has demonstrated that:

- even if only the right to health is regulated, as in this case, the state attempts to ignore the obligations it would have to ensure the necessary background for the exercise of this right

or

- even if the right to the protection of health is legally regulated, the state is obliged by the fundamental law to configure the guarantees needed so that each individual benefits from a perfect state of health

the right to the protection of health must be seen as a solidarity right as „*its existence requires a solidarity from all individuals of a society*" (*Deaconu, 2011, page 206*), as the beneficiary of this right is not only the holder of the right – each individual, but the whole human community (See *Deaconu, 2011, page 206*).

During this time of pandemic, it was more than obvious that „*all human rights are indivisible and interconnected*" (*United Nations, 1993*).

It is obvious that health, without which no human being can live to the best of its competence, can't be ignored and it must be made a priority to the detriment of other fundamental rights which allow each human being to enjoy it. Doctrine has pointed out that „*health and human rights are inextricably connected*" (*Mann, Gruskin, Grodin, Annas, 1999, quoted by Forman, Kohler, 2020, page 548*). Such a claim was based also on the „*recognition of WHO (2020a), the United Nations (UN OFFICE of the High Commission for Human Rights 2020), and the Council of Europe for Human Rights (2020), among others, that a human rights approach is crucial to an effective public health response to COVID-19*" (*Forman, Kohler, 2020, page 548*)*.

In the Statement of Interpretation on the Right to Protection of Health in Times of Pandemic, passed on April 21st, 2020, the European Committee of Social Rights also pointed out that „*the right to protection of health guaranteed in Article 11 of the charter complements the fundamental rights enshrined in Articles 2 and 3 of the European Convention of Human Rights, and the rights relating to health embodied in the two treaties are inextricably linked, since „human dignity is the fundamental value and indeed the core of positive European human rights law – whether under the European Social Charter or under the European Convention of Human Rights Leagues (FIDH) v. France, Complaint No. 14/2003, decision on the merits of 3 November 2004, §31)*" (*European Committee of Social Rights, 2020, pages 5-6*)*.

In this context, we can identify another trait of the right to the protection if health, namely that it is a premise-right for the exercise of other rights, such as: the right to free circulation, the right to study, the right to work, the right to have access to culture, the access to justice, the right to physical and mental health and so on. In the present pandemic context, such rights, as the above stated ones, would not be exercised if the individual would not benefit from his health, by proving he is not infected with COVID-19. Or, without the states' contribution, namely the specific measures passed by the competent authorities and institutions, as well the support of international communities, through its competent structures, the human being can be vulnerable to any challenge of the pandemic which can affect his health and the achievement of other fundamental rights.

In supporting the statements made above, we could also argue that the right to the protection of health is a social, economic and cultural right. The social character of this right is determined by its beneficiaries – human beings, but also by the society from which he is a part of and which, in case of a pandemic, is identified with the international community (See *Deaconu, 2011, page 259*). The economic character considers „the costs it entails" (*Deaconu, 2011, page 259*), costs which in our opinion, in case of a pandemic, should be split between the entire society, as the state can only support such costs within limits which ensure the protection of the population, the prevention of the spread of the pandemic and the necessary means for the medical system in order to enable it to face the diverse challenges of the pandemic.

The limitation or even the reduction of these costs is possible, from our point of view, if the authorities would realize the cultural character of the right to the protection of health. This cultural character considers that fact that „*the maintain of health means educating the citizens in regard to the need for health*" (*Deaconu, 2011, page 259*).

In case of any pandemic, the true information and education of the members of society in regard to the causes, means of prevention and protection, possible real and effective treatments which are more than necessary. The state authorities are forced to ensure hygiene and public health especially during times of pandemic and to actively get involved and correctly inform and educate its citizens in order to remove or even avoid the use of scientifically inaccurate sources of information. Additionally, we believe the right to the protection of health is a right connected to the environment as regulated by the American Convention for Human Rights, by article 26 and as is established by „*the Inter-American Court of Human Rights in the case Poblete Vilches and Others v. Chile*" (*Hathaway, Stevens, Preston, 2020, page 4*). The health of the environment is influenced by our health. Even if the global lockdown of spring 2020 allowed the Planet to catch its breath, the limitation of the exercise of some fundamental rights and freedoms for a determined period of time, however long or short, or for an undetermined period of time would affect any human being, and their reactions would eventually reflect on the environment.

On the other hand, given the state's reaction to the pandemics, a reaction which resulted in measures, actions and procedures which have affected the exercise of some fundamental rights and freedoms, including the right to the protection of health, in a different manner, for shorter or longer amounts of time, it is obvious that there is „*the urgent need for clearer rules about legitimate restrictions of the right to health in responding to the pandemic and for safeguarding global health policy initiatives in its aftermath*" (*Forman, Kohler, 2020, page 550*).

The need for such rules is valid, even if by the Declaration of April 2020, the UN Committee on Economic, Social and Cultural Rights emphasized that in „*responding to the pandemic and protected, a minimum core obligations imposed by the Covenant (International Covenant on economic, Social and Cultural Rights, s.n.) should be prioritized*" (*UN Committee on Economic, social and Cultural Rights, 2020, para 12*). Thus, the states have to „*adopt appropriate regulatory measures to ensure that health-*

care resources in both the public and private sectors are mobilized and shared among the whole population to ensure a comprehensive, coordinated health-care response to the crisis" (*UN Committee on Economic, social and Cultural Rights, 2020, para 21*), and, also, the states have to „*devote their maximum available resources for the full realization of all economic, social and cultural rights, including the right to health …[and] mobilize the necessary resources to combat Covid-19 in the most equitable manner, in order to avoid imposing a further economic burden on these marginalized groups*" (*UN Committee on Economic, social and Cultural Rights, 2020, para 14*)*.

To the same purpose, the European Committee of Social Rights of Council of Europe also issued a Statement of Interpretation of the Right to Protection of Health in Times of Pandemic, in April 2020, which stated that „*in times of pandemic, during which the life and health of many people are under serious threat, guaranteeing the right to protection of health is of crucial importance, and governments should take all necessary steps to ensure that it is effectively guaranteed*" (*European Committee of Social Rights of Council of Europe, 2020, para 2*).

By this declaration, it was emphasized that „*States Parties must ensure that the right to protection of health is given the highest priority in policies, laws and other actions taken in response to a pandemic*" (*European Committee of Social Rights of Council of Europe, 2020, para 3*), by actions such as:

- „*taking all necessary emergency measures in a pandemic, including also adequate implementation of measures to prevent and limit the spread of the virus, measures like: testing and tracing, physical distance and self-isolation, the provision of adequate masks and disinfectant, as well as the imposition of quarantine and „lock-down" arrangements, but in accordance with relevant human rights standards*" (*European Committee of Social Rights of Council of Europe, 2020, para 3*);
- „*taking all necessary measures to treat those who fall in a pandemic, including ensuring the availability of a sufficient number of hospital beds, intensive care units and equipment*" (*European Committee of Social Rights of Council of Europe, 2020, para 5*);
- „*taking all necessary measures to educate people about the risks posed by the disease in question*" (*European Committee of Social Rights of Council of Europe, 2020, para 6*).

The same declaration states that the Parties States „*must take all possible measures (…) in the shortest possible time, with the maximum use of available financial, technical and human resources, and by all appropriate means both national and international in character, including international assistance and cooperation*" (*European Committee of Social Rights of Council of Europe, 2020, para 14*)

II. General appreciations on some legal provisions passed in Romania in order to prevent and fight the effects of the COVID-19 pandemic– a true and effective guarantee of the right to the protection of health?

Based on constitutional provisions and considering international and regional regulations we have succinctly mentioned above, national authorities have passes specific regulations after the state of emergency was proclaimed, but also after it was prolonged by Decree no 195/16.0.2020, namely by Decree no 240/14.04.2020, both issued by the Romanian President and sanctioned by the Parliament.

First of all, we must mention that the lawmaker specified, in article 2 of Law no 95/2006 regarding the health reform, with subsequent changes, that "public health assistance is the organized effort in order to protect and promote the health of the population and is achieved by: political-legislative measures, programs and strategies for those who decide in regard to the health status, organization of institutions for providing all necessary services".

In this contest, the Romanian Parliament passed Law no 55/2020 regarding some measures for the prevention and fight against the effects of the COVID-19 pandemic, in order to respond to "*the need to legislatively create mechanisms to adequately and with priority protect the conventional, union and constitutional rights to life, physical integrity and protection of health*" (*Law no 55/2020, preamble, para 4*), but also to respect *"the obligation of the state, regulated by the fundamental law to take measures to ensure hygiene and public health of the citizens"* (*Law no 55/2020, preamble, para 4*), as well as the provisions of article 53 of the Constitution regarding the exceptional character of the limitation of the exercise of fundamental rights and freedoms.

In identifying the object of regulation of this law, it is mentioned that "*it entails temporary and gradual measures taken to protect the right to life, to physical integrity and the protection of health, including by the restraint of the exercise of other fundamental rights and freedoms*" (*Law no 55/2020, article 1, first alignment*).

Defining, in article 2 if this law, the state of alert emphasizes the temporary character of these measures which can be taken in order to respond to a complex situation of emergency, as well as its proportionality in regard to "the seriousness of the situation, the need to prevent and remove imminent threats to the life and health of the people, the environment, the important material and cultural values and property" (*Law no 55/2020, article 2*).

Although the lawmaker discusses gradual steps in taking measures in case of the state of alert, Law no 55/2020 does not mention any objective criteria which would establish these gradual steps. The measures which can be taken entail several areas, namely: economy, health, employment and social protection, transportation and infrastructure, education and research, youth and sport, culture and so on, but without indicating criteria which must be considered by the authority which sanctions the state of alert and the specific identification of these measures, namely the Government, as the order and number of these measures is entirely up to the Government. Thus, in our opinion, the premise for a discretionary behaviour of the

Government was created, which makes us question the respect of two main obligations of the state in regard to the protection of health, namely "*abstain from impairing the health of the person by violent/non violent actions (negative obligation) and ensuring the necessary background to protect this right (positive obligation)*" (*Romanian Constitutional Court, Decision no 498/2018, point 39*).

Such a regulation is all the more necessary and pertinent, given our appreciation, according to which, in the present pandemic context, the right to the protection of health must be seen as a right of solidarity. Thus, the measures passed by the Romanian state, the time during which they apply must be in accordance with international measures. We believe this statement is more accurate as, according to article 3 letter m) of Law no 136/2020 regarding measures in public health for situations of epidemic and biologic risk, the international public health emergency considers "*an unusual event which, according to the International Sanitary Regulation 2005, passed by the General Assembly of the world Health Organization and enforced by Government's Decision no 758/2009, represents a risk for public health, by the international spread of the disease and demands a coordinated response"* and according to article 3 letter o of the same law "*"the spread of the disease throughout multiple continents*".

CONCLUSIONS

As stated in article 2 alignment 10 of Law no 95/2006 with subsequent changes "public health assistance represents the society's organized effort to protect and promote the health of the population". From our point of view, this "organized effort" also entails clarity, predictability in configuring specific national laws so as the measures and actions taken by the competent administrative authorities are concentrated, gradual, predictable, proportional, responsible. Doctrine also stated that „[*t]his period was crucial for preparedness and the adoption of principles such as availability, accessibility, acceptability, and quality of health services, as well as non-discrimination, participation, and accountability of the state in its public health response*" (*Montel, Kapilashrami, Coleman, Allemani, 2020, page 228*).

Thus, we believe the lawmaker should regulate such objective and transparent criteria based on which the authorities tasked with enforcing the law can build scenarios and adapt them to the specific reality of a certain time, but which can also be combined with measures stated in Law no 55/2020 for different domains. Thus, the risk of affecting the fundamental rights and freedoms of a person are diminished, including the right to the protection of health by legislative measures or even abusive or arbitrary measures of enforcement.

Also, such a legislative approach would valorise multiple characteristics of the fundamental right to the protection of health, namely: a right of second generation, a right of solidarity, a social, economic and cultural right which also entails the environment, a premise-right for other rights, a claim right.

Such a regulation would diminish the discretionary power of authorities tasked with the specific enforcement of measures during the pandemic, including the

Government, but it would be easier for the courts of law to control these measures, in regard to their lawfulness and necessity.

Configuring this rather wide and generous legal frame for authorities tasked with the passing and enforcement of measures taken to prevent and diminish the effects caused by the pandemic, can indirectly determine limitations in the exercise of some fundamental rights and freedoms.

The legislative measures, but also the specific enforcement of these measures meant to configure a coherent background by national state authorities would allow for a real protection of the right to the protection of health, without creating discrimination between individuals who wish to exercise this fundamental right. To excessively prioritize the measures destined to diminish and remove the effects of the pandemic to the detriment of other measures meant to protect the health of the population, as opposed to other health problems, even serious ones, represents a discretionary and even abusive decision of our state. To decide that certain surgical procedures and treatments must not be performed in order to free hospital rooms and spaces for the exclusive treatment of those infected with the SARS-COV-2 infection, we believe it is also a discretionary and even abusive measure which not only limits but also violates the right to the protection of health of those who are not infected with the SARS-COV-2 virus or even variants of this virus.

The almost complete lack of predictability in regard to the measures, including legislative ones, taken by the Romanian authorities, the direct and spontaneous action dictated only by specific and actual circumstances, the lack of interest or even the contempt publicly manifested by some of these authorities in regard to the exercise of the right to the protection of health even by people with serious health issues, have caused the state, through its authorities involved in the management of the current pandemic, in the situation of being unable to fully exercise the positive and negative obligations it has.

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PERSONAL SAFETY IN COMPLIANCE WITH THE REGULATIONS OF THE ROMANIAN PENAL CODE

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Abstract

Guaranteeing liberty and security rights is a fundamental principle of law state and its legal regulation is a priority in the legal systems of the countries of the European Union.

The rapid development, of technology information and its applicability, in the last decades, have ensured its access in all sectors of life, from economic to social and cultural. With these premises, cybercrime has become a field of maximum and acute actuality.

By promoting and protecting the fundamental rights of citizens and the state law, the right to liberty and security of person and in the cyber environment must be guaranteed.

The Romanian legislator shows an active and constant interest in the field, by substantiating and updating the internal normative framework that regulates information systems, as well as by ratifying the legal documents issued by the Council of Europe.

Keywords: *freedom, security, computer system, computer data, cybercrime*

INTRODUCTION

The concept of personal safety, its classic sense, in historical evolution. Viewed in historical evolution, the theme of liberty subtle appears, at the beginning of the fourteenth century, in Western Europe, more precisely in France, whose kings at that time, Philip the Fair in 1311, respectively, Louis the X-th, in 1315, issued two ordinances, in order to abolish the relations of servitude, invoking the natural law, according to which every human being must be born free.

However, the first constitutional consecration of the right to liberty was made by the British, the Magna Charta Libertatum, adopted and signed in 1215 by King John Lackland, being the first document by which the English nobility restricted monarchical power, requiring the king to respect its privileges.

Art. 39 of the Magna Charta Libertatum expressly provided that *no free man shall be arrested or imprisoned, or deprived of his property, or declared outlawed, or left in any manner, and we shall not act against him, and no one will go against him without a fair trial of his judges, according to the law of the land*[1].

The concern of modern states for the legislative consecration of individual liberty was later materialized, in chronological order, in England by the Petition of Rights (1628) and the Habeas Corpus Act[2] (1679), respectively, in the United States by the Bill of Rights[3] (Virginia 1776), respectively, the US Declaration of Independence (July, 4th, 1776)[4], in France, the French Declaration of the Rights of Man and of the Citizen[5] (August, 26th, 1789) and, last but not least, the Universal Declaration of Human Rights (O.N.U December, 10th, 1948).

The term individual freedom is used in the current Constitution of Romania, the same semantics being used over time in the previous Romanian Constitutions (from 1866, 1923 and 1938).

The Romanian Constitution in force, regulates in article 23 two fundamental legal institutions, in close and mutual interdependence: individual freedom and security of the person. Thus, the Romanian legislator agrees with the current acceptance of the European Court of Human Rights, *as the right to liberty and security is unique insofar as this expression must be read in a single sentence* (Macovei, 2003, p. 95).

According to these regulations, the security of the person as a fundamental right, represents the guarantee given by the Constitution to citizens and people against any abusive forms of repression and in particular against any arbitrary measures aimed at depriving them of liberty by arrest or detention (Tudor, 1998, p. 416).

[1] *Art. 39 Nulum liber homo capiatur vel imprisometur, aut dissaisatur, aut ultrager, aut executur, aut aliquo, modo destinatur, nec super cum ibimas, nec cum mittemus, nec per legale judicium parium suorum nel per legem terrae.*

[2] *Habeas corpus* represents the guarantee given by the Constitution to every English citizen, according to which once arrested or detained, the citizen will be referred without delay to a jury, called to pronounce either the release of the accused or his detention.

[3] *The Bill of Rights* expressly states that people are by nature equally free and independent. According to the same normative act, these are granted rights inherent to human nature, namely the right to life and liberty, as well as the right to acquire and preserve property and to pursue happiness and security.

[4] *The U.S. Declaration of Independence* settles down equality of all people as a bith consequence. At the same time, the Declaration provides inalienable rights to life, liberty and the pursuit of happiness, being regulated the establishment of governments that seek to respect these rights. Since the authority of these governments emanates from the consent of the governed, if the form of government becomes destructive, the people have the right to remove it. The same Declaration states the independence of the judiciary, the right to be tried by a jury court, the subordination of the military to civilian power

[5] *The French Declaration* settles down, as a cardinal principle, the equality of all people in front of s law, the right to property, security, freedom of thought, expression and expression, deriving from this fundamental right.

I. THE CYBER SPECE – NEW REALITIES, NEW PERSPECTIVES ON PERSONAL SAFETY

The rapid development of information technology and technique, in recent decades has made virtual communication tools / means a vital resource of daily activity, in all reference sectors of life, from the economic sector to the professional sector, the educational, social and cultural sectors.

Consequently, the values, principles and rules that the states of the European Community promote and regulate must also be respected and implemented in the on-line environment, so that cyberspace remains free and open.

The obligation to comply with these regulations has been laid down under the constitutions of the Member States, under general organic laws, special laws and last but not least, international legal documents, initiated by the Council of Europe.

The use of virtual space in everyday life, in order to facilitate social, economic, political relations, by ensuring a rapid exchange of information and other resources between states, citizens and ethnic groups, has been speculated by individuals and antisocial groups, which granted the extremely high dynamics to the development and diversification of information technology negative connotation.

The novelty, the complexity, the high speed of development, as well as the faulty and insufficient regulation of the protection in this field, including in terms of specific forensic tactics, have created a significant gap between resources alocated to protect and combat cybercrime and its evolution. Thus, today, the states of the European Union through individual and conjugated methods and tactics allocate legislative, human resources not just to ensure that the evolution of the cybercrime phenomenon has a proportional correspondent in the activity of prevention, detection and prosecution of criminals.

If, crime or delinquency *lato sensu* is a particular form of social deviance, this phenomenon affecting human relations with a negative effect on public order and communities of people, violating the social values characteristic of a society and not only, given the danger of the phenomenon[6], cybercrime is considered as the set of crimes committed, through or in connection with the use of computer systems or communication networks, in a given time and space, computer systems and communication networks can be both the instrument, target or location of these crimes (Ioniță, 2010 , pp. 395-398).

The legislation of the member states of the European Union and implicitly the Romanian legal norm, doctrine and criminal judicial practice, settle four areas of action of cybercrime[7], currently delimited, as follows:

a) activities that harm privacy: collection, storage, modification and disclosure of personal data;
b) dissemination activities of obscene and/or xenophobic content: pornographic material, racist material and inciting violence;
c) economic crime, unauthorized access and sabotage; activities aimed at distributing viruses, espionage and computer fraud, destruction of data and

[6] http://www.criminalitatea-informatica.ro
[7] www.eur-lex.europa.eu

programs or other crimes; programming a computer to "destroy" another computer;

d) inobservance of the intellectual property right.

Whereas today the phenomenon of cybercrime is one of the major threats of the 21st century, which is progressing at an extremely fast pace and in a surprisingly versatile manner, both in itself and as a *modus operandi* for other types of crime, the Council Europe has initiated numerous steps to regulate virtual activity, in order to protect the security of the person, in the virtual space.

Thus, the Council of Europe issued a series of recommendations, among which we mention: Recommendation R (85) 10[8], Recommendation R (95) 13[9], Recommendation no. R (89) 9[10].

Pursuant to R (89) 9, the main criminal offenses belonging to virtual space are inventoried, under the generic name of minimum list. This minimum[11] *list is completed with the facultative*[12]*list.* The Council specificates that this list is not limitative, moreover, the Council's recommendation is to pro-update and pro-adaptability, so that the above-mentioned lists are supplemented by other facts likely to incriminate: the creation and dissemination of computer viruses, trafficking with illegally obtained passwords, etc. intended to facilitate the penetration of a computer system, disturbing the proper functioning of it or of stored computer programs, etc. (Vasiu, 1998, p.98).

II. NATIONAL REGULATIONS FOR THE PROTECTION OF PERSONAL SECURITY RIGHT IN THE CYBER SPACE

In this context, the Romanian legislator has proved an active and constant interest in the field of information technology, by regularizing and updating the internal regulatory framework governing information systems, various facts related to information systems or the information society as a whole, and by ratification legal documents issued by the Council of Europe.

Thus, the following laws were enacted: Law no. 365/2002 on the regulation of electronic commerce amended by Law no. 121 of May 4th, 2006, Law no. 64/2004 for the ratification of the Council of Europe Convention on cybercrime, Convention

[8] Its object, the rules for the application of the European Convention on Mutual Assistance in Criminal Matters, the letters rogatory on the interception of telecommunications.

[9] The object of this recommendation is to regulate the aspects of criminal procedure related to information technology.

[10] According to this recommendation, illegal acts related to computer systems are defined and classified for the first time, respectively, the rules to be applied by Member States to combat cybercrime are enacted.

[11] The minimum list includes: computer fraud, computer forgery, damage to data or computer programs, computer sabotage, unauthorized access, unauthorized interception, unauthorized reproduction of computer protected programs; unauthorized reproduction of a protected topography, while the optional list includes alteration of data and computer programs, computer espionage, unauthorized use of a computer, unauthorized use of a protected computer program.

[12] www.coe.int.ro

of November, 23th, 2001 on cybercrime, Law no. 196/2003 on preventing and combating pornography republished in M. Of. no. 198 of March 20th, 2014, Law no. 161/2003[13] on some measures to ensure transparency and exercise of public dignity, public office and business environment, prevention and sanctioning of corruption and last but not least the Criminal Code (Law 286/2009), which entered into force on February 1st, 2014.

The General Part of the Penal Code, *Title X* - The meaning of some terms or expressions in the criminal law, the chapter allocated to explain the meaning of some terms or notions includes the definition of the *computer system, computer data, electronic payment instrument*.

Thus, according to art. 180 of the Penal Code- General Part, *the electronic payment instrument is an instrument that allows the holder to make cash withdrawals, upload and download an electronic money instrument, as well as transfers of funds other than those ordered and executed by financial institutions.*

The provisions of Penal Code – General Part, art. 181 regulates, in the first paragraph, the notion of *computer system as any device or set of devices interconnected or in a functional relationship, one or more of which ensures the automatic processing of data by means of a computer program, and in the second paragraph, the notion of computer data as any representation of facts, information or concepts in a form that can be processed by a computer system.*

Regarding the Special Part of the Penal Code, unlike the other categories of crimes, *grouped as a rule, in a single title or chapter,* according to their legal object, we find cybercrimes regulated among other category of crimes: against property, false, offenses against public safety.

Therefore, we will analyze, in the following lines, cybercrimes *that generate quantifiable material damages,* crimes regulated in Title II of the Special Part of the Criminal Code, *Crimes against property,* more precisely Chapter IV, *Frauds committed through computer systems and electronic means of payment.*

Thus, the Penal Code art. 249, incriminates the computer fraud, taking over the whole regulation provided by art. 49 of Law no. 161/2003 (recalled with the entry into force of the Penal Code) and establishes its sanctioning regime. Cyberfraud means *the introduction, modification or deletion of computer data, restriction of access to such data or impeding in any way the operation of a computer system, in order to obtain a material benefit for oneself or for another, if a person has been harmed,* which is sanctioned by imprisonment from 2 to 7 years.

Art. 250 of the Penal Code, partially taking over the provisions of art. 27 and art. 28 of Law no. 365/2002[14], impleads and establishes the sanctioning regime of

[13] According to Law no. 161/2003, seven crimes are incriminated, which correspond to the classifications and definitions given by the Convention on Cybercrime.

[14] Law no. 187/2012 for the implementation of Law no. 286/2009 on the Criminal Code, states that on the date of entry into force of the provisions of the Criminal Code, art. 24-29 of Law no. 365/2002 on electronic commerce, art. 42 - 47, art. 48 - 50 and art. 51 of Law no. 161/2003 on some measures

fraudulent cash *financial operations* or by using an electronic payment instrument or accepting the realization of such illicit transactions, as follows: *carrying out a cash withdrawal operation, loading or unloading of an instrument electronic money or funds transfer using, without the consent of the holder, an electronic payment instrument or identification data that allows its use, shall be punished by imprisonment from 2 to 7 years.*

The second and third paragraphs of the same article regulate alternative modalities regarding the material element of the objective side of the crime, namely: *the unauthorized use of any identifying data or through the use of fictitious identifying data,* for which the legislator establishes the same sanctioning regime, while the manner provided for in the third paragraph *the unauthorized transmission to another person of any identification data, in order to carry out one of the operations provided in par. (1),* has a milder sanctioning regime, imprisonment from one to five years.

Article 251 of the Penal Code impleads *the acceptance of fraudulent financial transactions*, committed by accepting a cash withdrawal operation, loading or unloading of an electronic money instrument or transfer of funds, knowing the operation is carried out using an electronic payment instrument falsified or used without the consent of its holder, either knowing that it is carried out through the unauthorized use of any identification data or through the use of fictitious identification data and establishes the sanctioning regime: imprisonment from one to 5 years.

Art. 252, which ends the chapter *Frauds committed through computer systems and electronic means of payment,* incriminates the attempt for each of the infractions regulated by this chapter provisions.

Title VI of the Special Part of the Penal Code, using the marginal term of Forgery Offenses, incriminates in Chapter III, false in documents, at art. 325 *the crime of computer forgery*, the new legal provision representing the taking over in full of art. 48 of Law no. 161/2003 which it repealed.

Thus, according to Romania legislator: *to enter, modify or delete, without right, computer data or to restrict, without right, access to these data, resulting in data untrue, in order to be used to produce a legal consequences*, represents *crime of computer forgery,* an act whose commission is punished by imprisonment from one to 5 years.

Infractions against the security and integrity of computer systems and data are set in the regulation of the Special Part of the Penal Code, in Chapter VI of Title VII - Offenses against public security.

Any *illegal access to a computer system, illegal interception of a computer data transmission, alteration of computer data integrity, disruption of computer systems operation, unauthorized transfer of computer data, and illegal operations with*

to ensure transparency in the exercise of public dignity, public office and in the business environment, the prevention and sanctioning of corruption.

computer devices or programs are incriminated and sanctioned as offenses. Even any attempt to such offenses are being sanctioned.

Thus, based on the three paragraphs of art. 360 of the Penal Code, *illegal access to a computer system,* is sanctioned differently. *If the purpose of illegal access to the computer system is* to obtain computer data, the deed is punished by imprisonment from 6 months to 5 years. The sanctioning regime is harsher (the punishment being imprisonment from 2 to 7 years) if the illegal access concerns a computer system to which, through specialized procedures, devices or programs, access is restricted or prohibited for certain categories of users.

Pursuant to art. 361 the legislator regulates two alternative contents for the infraction of *illegal interception of a computer data transmission,* as the interception, without right, of a computer data transmission that is not public and which is intended for a computer system, comes from such a system or is performs within a computer system or the interception, without right, of an electromagnetic emission from a computer system, which contains computer data. The sanctioning regime is the same, imprisonment from one to 5 years in the case of committing the crime, for any of the alternative contents.

Within the same chapter, at art. 362 of the Penal Code, *the alteration of the integrity of computer data* shall be punished by imprisonment from one to 5 years and consists in the act of modifying, deleting or damaging computer data or restricting access to such data, without right.

The infraction of *disrupting the operation of information systems* is regulated by the provisions of art. 363 of the Penal Code, while *the unauthorized transfer of computer* data from a computer system or from a means of storing computer data is incriminated in art. 364 Penal Code.

The last criminal offense incriminated in this chapter has as object *illegal operations with devices or computer programs* (art. 365).

Any attempt to commit any of the offenses regulated by the provisions of this chapter shall be punished.

In the content of *Title VIII of the Special Part, Offenses that affect relations regarding social cohabitation*, in Chapter I *Offenses against public order and peace*, at art. 374 the legislator summarizes the similar provisions stipulated by three special laws, more precisely: Law no. 678/2001 on preventing and combating trafficking in human beings, Law no. 161/2003 on some measures to ensure transparency in the exercise of public dignity, public office and in the business environment, the prevention and sanctioning of corruption and Law no. 196/2003 on preventing and combating pornography[15].

Paragraphs two and three of the same article incriminates alternative modalities of the content of the infraction, which places it in the sphere of cybercrime, as well as their sanctioning regime: *production, possession for display or distribution, acquisition, storage, display, promotion, distribution, and the provision of child*

[15] Republished in M.Of. no. 198 of March 20th, 2014.

pornography, if it has been committed through a computer system or other means of storing computer data, shall be punished by imprisonment from 2 to 7 years, as well as *unauthorized access to child pornography. Minors, through computer systems or other electronic means of communication, shall be punished by imprisonment from 3 months to 3 years or by a fine.*

CONCLUSIONS

Through the brief reviw of the main legislative regulations on cybercrime, we wanted to emphasize the urgent need for the fundamental right to security to be rethought, reformulated and updated according to the increasing use of informatic means.

In this context, the security of the person in the cyber environment must be the priority of each state of law, in order to ensure real and effective protection of the fundamental rights of citizens, because the citizen's freedom and security can only be analyzed and enacted as an inseparable binomial.

In terms of substantive law, the states of the European Union impleads as crimes the facts directed against the confidentiality, integrity and security of data and information systems, illegal access to a computer system, alteration of data integrity, etc. Given the high dynamics of the evolution of cyberspace, permanent updates of the regulations of substantive law are required, so that they reflect, in a real and accurate way.

At the same time, the high dynamics of the evolution of cyberspace and the infinity of utilisations given to it, have made the Internet the main actor and tool of cybercrime, giving the opportunity to diversify the manifestations of the phenomenon, as well as outlining a strong cross-border character, specific to this type of crime.

In this context, we consider that it becomes urgent to substantiate cross-border procedural and legal provisions, in order to prevent, detect and prosecute criminals acting in virtual space, as well as ensuring a high specialization of structures to combat and investigate cybercrime.

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JOINT INSTITUTIONALISED FIGHT AGAINST ORGANISED CRIME IN THE EUROPEAN UNION

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Abstract

Organised (international) crime is essentially perceived as a social reality in which legal and criminal structures are integral parts of the same corrupt social, political and economic system operating in two or more states, regardless of the type of actions promoted or the types of organisations of those supporting this system.

The various criteria of the multidimensional concept can be distinguished using a classification on four levels of complexity:

Perpetrators defined by individual characteristics, who participate in the commission of the specific acts of organised crime.

The elements of the structures (groups) linking these individuals.

Power structures subordinate to this structural entity.

The relationship between these illegal structures and the legal structures of society.

The contemporary concept of organised crime (in reality a form of cross-border crime) is heterogeneous and contradictory. If we focus on the general perception of this concept, we can state: organised crime is equal to a formal, homogeneous, multifunctional, criminal organisation that aims to undermine and dominate legal institutions of society, its members acting in two or more states to achieve their criminal purpose.

Organised crime can essentially be defined as that international criminal segment to which relate illegal activities, capable of seriously affecting certain sectors of economic, social and political life in two or more countries, carried out by various methods and means, in a constant, planned and conspiratorial manner, by associations of individuals, with a well-defined internal hierarchy, specialised structures and self-defence mechanisms, in order to obtain illicit profits at particularly high levels. Two main characteristics of the concept of organised crime emerge from the definition:

a. The degree of social danger of the illegal activities carried out by this criminal segment can seriously affect certain sectors of economic, social and business life.

b. The constant, organised, planned and well-conspired conduct of these criminal activities carried out in several States.)

Keywords: *organised crime, Europol, liaison officers, Europol computerised intelligence gathering system*

INTRODUCTION

EUROPEAN POLICE OFFICE (EUROPOL)[1]

The purpose of creating Europol was to improve police cooperation in the field of organised crime at international level.

Europol's objectives are to improve the effectiveness of the competent services of the Member States and cooperation in preventing and combating terrorism, drug trafficking and other serious forms of international crime where there are indications that a criminal structure or organisation exists and where two or more Member States are affected by these forms of crime in a way which, by reason of the scale, seriousness and consequences of the offences, requires joint action by the Member States.

Areas of competence, short, medium and long term:

- illicit drug trafficking;
- illicit trafficking in nuclear and radioactive materials, including the offences defined in Article 1(1) of the New York Convention on the Physical Protection of Nuclear Material (3 May 1980) and those referred to in Article 197 of the Euratom Treaty and Directive 80/836/1980 respectively;
- illegal immigration channels, including actions aimed at facilitating the international illegal residence or employment of persons in the territory of the Member States contrary to the regulations and conditions applicable in the Member States;
- Trafficking in human beings, i.e., in essence, acts whereby a person is subjected to real power in order to induce them, using violence or threats, or a relationship to manipulate them in order, in particular, to subject them to exploitation through prostitution, sexual exploitation and violence in relation to minors, or involving trade in children; trafficking in stolen vehicles, in the sense of theft or hijacking of cars, trailers, lorries or semi-trailers, buses, motorcycles, agricultural vehicles, construction site vehicles and detached parts of the aforementioned vehicles.
- Money laundering and related offences, meaning all offences listed in the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, signed in Strasbourg on 8 November 1990.

I. FUNCTION OF EUROPOL

- facilitating the exchange of information between Member States;
- collecting, collating and analysing information and intelligence;
- communicating, without delay, to the competent services of the Member States, information concerning them and links established between criminal offences;

[1] Hurdubaie I., Troneci V., *România în Interpol*, Editura M.I., Bucureşti, 1998, p. 79.

- facilitating investigations in the Member States by forwarding all relevant information to the above units;
- managing the collection of computerised information relating to:
  - persons who, under the national law of the Member State concerned, are likely to have committed or participated in an offence relevant to Europol's competence, or who have been convicted of such an offence;
  - persons in respect of whom certain serious acts committed justify, in relation to national law, a presumption that they will commit offences relevant to Europol's competence;
  - persons who may be called upon to testify in the course of investigations into the offences in question or in subsequent criminal proceedings;
  - persons serving as contact points or accompanying persons;
  - persons who could provide information on the offences under consideration;
- another separate set of functions, which aim to improve, through the national units, the cooperation and effectiveness of the competent services of the Member States, in the light of Europol's objectives respectively:
  - the enhancement of specialised knowledge which is used in the investigations of the competent services, previously;
  - defined, and the deployment of investigation advisers;
  - providing strategic insights to facilitate and promote effective and efficient use of available national resources for operational activities;
  - the preparation of general status reports on activities;
- assisting Member States through advice and research in the following areas:
  - training members of the relevant services;
  - organisation and equipment of these services;
  - crime prevention methods;
  - technical and scientific police methods and methods of annihilation.

I.1 Structures involved in the performance of Europol's general functions and the specific functions of these structures

EUROPOL		
Structural elements of	*a)Board of Directors*	***Europol Bodies***
Europol, proper	*b)The Director*	
	c)Financial Controller	
	d)Budget Committee	
	e)Staff	*- the director*
		- deputy directors
		agents
National Units		
Liaison Officers		
National Supervisory Authorities		
Joint Supervisory Authority	*- Appeals Committee*	
	- Secretariat	

I.2 Europol bodies and staff

(a) Management Board:

- composition: one representative of each Member State, with one vote, who may be replaced by an alternate member with the same rights;
- powers:
  - participate in furthering Europol's objectives;
  - defines, by unanimity, the rights and obligations of liaison officers at Europol;
  - decides unanimously on the number of liaison officers that Member States may send to Europol;
  - ensures the preparation of implementing rules on files;
  - participates in the adoption of the rules governing Europol's relations with the Member States;
  - unanimously define the arrangements for the index system;
  - approves, by a two-thirds majority, the instructions for the creation of files;
  - may take a position on the comments and reports of the Joint Supervisory Body;
  - shall examine the matters over which the Joint Supervisory Body exercises its competence;
  - regulates the details of the control of the lawfulness of requests to the information system;
  - participate in the appointment or dismissal of the Director or Deputy Directors;
  - checks that the Director regularly carries out his duties;
  - participate in the adoption of the Staff Regulations;
  - participate in the drafting of agreements and
  - adopting decisions to protect secrecy;
  - participates in the establishment of the budget, including the establishment plan;
  - unanimously adopts the five-year financial plan;
  - unanimously appoints financial control and supervises its management;

(b) The Director of Europol shall have the following responsibilities:

- to perform the tasks conferred on Europol;
- day-to-day administration;
- management of staff;
- drafting and proper implementation of Management Board decisions;
- preparing the budget, the establishment plan and the financial plan for the implementation of Europol's budget;
- management before the Management Board - participates in the work of the Management Board;
- representing Europol.

c) Europol staff

The Director, Deputy Directors and employees of Europol shall carry out their duties with a view to achieving Europol's objectives and functions, without seeking or accepting instructions from government, authorities, organisations or persons outside Europol.[2]

I.3 National units to fight cross-border organized crime

They are police structures created or designed by each Member State, with the following main tasks:

- To provide Europol, on its own initiative, with the information and clarification necessary for it to carry out its functions;
- To respond to Europol's requests of information, clarifications and advice;
- To keep the information and clarifications up to date;
- To exploit and disseminate, in accordance with the national law of its own state, the information and clarifications necessary for the competent services in its own country;
- To address requests for advice, information, clarifications and analysis to Europol;
- To transmit the information stored in the computerized collections to Europol;
- To ensure compliance with the law, in each exchange of information with Europol.

a. Liaison officers

They are experienced personnel, from the police structures of the 27 EU member states, specialized in the fight against organized crime, with the following missions:

- To represent the interests of the national units within the framework of Europol;
- To contribute, under precisely defined conditions, to the exchange of information between the national units represented and Europol:
  - transmitting Europol information, provided by the national units;
  - communicating information from Europol to their own national units;
  - cooperating with Europol agents in the transmission of information and advising them with the analysis of the information, concerning the home member state;
- To proceed among themselves, to the extent deemed necessary, to the exchange of data from the national units and to coordinate the measures that come from the data exchange.
- To consult, to the extent deemed necessary, various files;

[2] Vezi I.P. Filipescu, A.Fuerea, *Drept instituțional comunitar european*, Editura Actami, București, 2000, p. 98.

- To take technical and organizational methods, at their level, in order to ensure the security and confidentiality of the date, which falls within Europol's jurisdiction.

The national surveillance authority, designated by each Member State, responsible with supervising, in full independence and in compliance with national law, the legality of personal data, in the circumstances of their consultation and transmission to Europol, regardless of form, and that the rights of the individuals are not affected by the access of national units or liaison officers to the contents of the information systems and index systems of the Member State concerned. To this end, the national surveillance authorities:

- have access to the offices and files of the officers, sent by the Member State, represented next to Europol;
- controls the activities of the national units and the liaison officers, regarding the fulfillment of their mission, to the extent that those activities target the protection of personal data;
- comply with the requests from any person, addressed to these national surveillance authorities, to ensure that the introduction and transmission of personal data, to Europol, in any form, as well as any consultation of said data by the Member States, are done in a lawful manner.

b. Europol 's computerized information collection system

Structure	*a) The information system*
	b) The activity files
	c) The index system

a) The information gathering system is the one created and managed, in order to fulfill the Europol's functions and the one powered by the Member State through their national units and liaison officers, in compliance with their national stipulations, as well as the ones powered by Europol, through the data provided by third-party countries or courts or resulting from the analyses carried out, the content of which refers to:

- The person, as previous defined in the treatment of Europol's duties, who are either likely to have committed or participated in the commission of any of the offenses within the competence of Europol, or have been convicted of such offenses, or are grounds for presuming such offenses, respectively the following indications, exclusively:
  - surname, birth name, first name or, if necessary, nickname or provisional name;
  - date and place of birth;
  - nationality;
  - sex;
  - other elements, if necessary, to establish the identity and, especially, particular physical signs, objective or unalterable[3];

[3] See P. Tărchilă, M. Ioja, *op.cit.*, p. 166.

- The crimes, alleged acts and the places of their commission;
- The means used or susceptible to be used;
- The services treated and the number of their files;
- The suspicion of belonging to a criminal organization;
- The convictions already given for offenses relevant to Europol's competence;
- Additional information about the person and their previous offenses.

b) The activity files for analysis purposes are the files created for each analysis project, defined as the assembly, processing and use of date to support the criminal investigation and involving the establishment of an analysis group, closely associated with analysts and other designated Europol staff, by Europol's management, as well as liaison officers and/or experts from the Member State, who is the source of information or are subjects to analysis.

The contents of the files include the data relating relevant information to Europol's competence and common to them, intended for specific analysis activities and relating to:

- Persons who are either likely to have committed or participated in the commission of such offenses or have already been convicted of any of them, or who, in relation to whom, there are grounds on the basis of which they are presumed to have committed such offenses;
- Persons who may be called to testify in the criminal investigations carried out on the crimes considered or on the occasion of subsequent criminal proceedings;
- Persons who serve as contacts or are accompanying;
- Persons who could provide information on the crimes considered.

The creation of each automated personal data file is carried out on the basis of an creation instruction, subject to the approval of the Board of Directors and indicates:

- The name of the file;
- The objective of the file;
- The categories of persons targeted by the data the file will contain;
- The type of data and, possibly, the strictly necessary data, among which those listen in art.6, paragraph 1 of the Convention of the European Council from 28.01.1981, relative to the automated process of personal data;
- Different types of personal data that allow access to the entire file[4];
- Transfer or introduction of stored data;
- The conditions under which the personal data stored in the file will be able to be transmitted and to which recipients, after which the procedure;
- The data verification periods and the duration during which they are stored;
- The way of establishing the reports[5].

[4] See Stancu E., *op.cit.,* p. 477.
[5] See Pitulescu I., *op.cit.,* p. 376.

The data is introduced in these files in the following way:

- By the national units, at the request of Europol or on its own initiative;
- Supporting clarification which appear to be necessary for Europol and which are provided to Europol at its request or on its own initiative, by:
  - the European Communities and bodies governed by public law, established on the basis of the Treaties of establishment[6];
  - other public law bodies set up within the European Union;
  - bodies existing under an agreement between two or more Member States of the European Union;
  - third-party countries;
  - relevant international organizations and public law bodies of this nature;
  - other organisms governed by public law, which exist by virtue of an agreement between two or more states;
  - Interpol;
- Data accessed under the right to interrogate other information systems, with reference to personal data obtained by Europol under other conventions.

c) The index system represents the system of indexing the data stored in the activity files for analysis purposes at the level of Europol, constituted by it, on the basis of the ways defined by the Management Board, whose purpose is to allow to know whether or not information is stored.

Essential points in the logic of the theme

- the eficiency of the cooperation of the specialised institutions of the 27 member states of the eu, for the prevention and the fight against terrorism, drug trafficking and other serious forms of international crime
- the institutionalised cooperation has as common foundation the liaison officers, members of the specialised institutions that fight against international crime and the use of a common collection and exploration data system.

CONCLUSIONS

A Europol's objectives are to improve the effectiveness of the competent services of the Member States and to cooperate in preventing and combating terrorism, drug trafficking and other serious forms of international crime, for which there are indications that a criminal structure or organization exists and whether two or more Member States are effected by these forms of crime in a manner which, by the extent, gravity and consequences of the offenses, requires joint action by the Member States.

The fields of competence, short, medium and long term:

- Illicit drug trafficking;

[6] See Hurdubaie I., Tronici V., *op.cit.,* p. 489.

- Illicit trafficking in nuclear and radioactive materials, including the offenses defined by Art.1 Paragraph 1 of the New York Convention on Physical Protection of Nuclear Material (May 3, 1980) and, respectively, those referred to in Art.197 of the Eurotom Treaty and in the Directive 80/836/1980;
- Illegal immigration channels, including actions aimed at facilitating, internationally, of the illegal stay or employment of persons, in the territory of Member States, against the regulations and conditions applicable in the Member States;
- Human trafficking, respectively, par excellence, acts by which a person is subjected to real power to determine them, using violence or other threats, or a relationship to manipulate them, in order to subject them o exploitation through prostitution, sexual exploitation and violence in relation to minors, or targeting children trafficking, stolen vehicles trafficking, with the meaning of theft or hijacking of cars, trailers, trucks or semi-trailers, buses, motorcycles, agricultural vehicles, construction vehicles and spare parts, from the vehicles previously invoked;
- Money laundering and related offenses, including all offenses listed in the Convention of the European Council on Laundering, Searching, Seizing and Confiscating of the Proceeds from Crime, signed at Strasbourg on November 8 1990.

The main functions of Europol include

- Facilitating the exchange of information between Member States;
- Collecting, assembling and analyzing information and clarifications;
- Communicating, without delay, to the competent services of the Member States, the information concerning them and the links established between criminal acts;
- Facilitating the investigations of the Member States, by providing the relevant units with all the relevant information in this regard;
- Managing the collections of computerized information regarding:
  - Persons who, according to the national law of the Member State concerned, are likely to have committed and offense or participate in an offence, falling within the competence of Europol or who have been convicted of such an offence;
  - Persons for whom certain serious acts committed, according to national law, justify the presumption that they will commit offenses relevant to the competence of Europol;
  - Persons who may be called to testify on the occasion of investigation carried out on the considered crimes or on the occasion of subsequent criminal investigations;

- Persons who serve as contact points or are accompanying[7];
- Persons who could provide information on the offenses considered.

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[7] See Medeanu T.C., *Criminalistica în acţiune. Omul, terorismul şi crima organizată*, Editura Lumina Lex, Bucureşti, 2008, p. 115.

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PROTECTION OF PERSONAL DATA FOR INDIVIDUALS ON THE TERRITORY OF THE UNION OF EUROPE

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Abstract

Since 25 May 2018, with the entry into force of the General data Protection Regulation, all companies and organizations operating in the EU have the same set of data protection rules, wherever they are based. Due to stricter data protection rules:

- *citizens have more control over their personal data;*
- *companies enjoy a level playing field.*

The new General data Protection Regulation of the European Union ("GDPR") is an evolving extension of the data Protection Directive 95/46/EC *issued by the European Commission in 1995. The main purpose of this is to unify and strengthen data protection for EU citizens. It also sets new rules for the export of data outside the EU. It is important we know that the GDPR takes into account only personal data: names, email addresses, telephone numbers, marital status, banking and medical information, location data, IP addresses, photos, as well as personal photos and posts on social networks.*

Its main aims are:

- *reduction of the amount of personal data collected,*
- *deletion of unnecessary data,*
- *restriction of access to personal data,*
- *secure personal data.*

Keywords: *personal data (D.C.P.), privacy protection of individuals in the U.S., existence of a uniform practice, established at European Commission level*

INTRODUCTION. GENERAL ASPECTS

The basis of the GDPR, as it is known today, is Directive 95/46/EC on the protection of individuals with regard to the activity of collecting and processing personal data (PCD) and to ensure their free movement within and between Member States.

The Directive must be implemented separately in each EU country, once it has been adopted by the European Commission and the European Parliament. To this end, each Member State creates its own legislative framework, in line with the purpose of the Directive. However, there may be non-uniform practices across the EU. Regulation (EU) 679/2016 entered into force on 25 May 2016, specifying that it is to be applied as from 25 May 2018. The Regulation lays down a single set of rules, which will apply directly in all EU Member States, to better the protection of the privacy of individuals across the European Union.

The Regulation will be adopted by each EU Member State and will be applied as such without any changes. Thus, there will be a uniform practice, established at European Commission level, on matters of international law.[1]

The main issues to which the GDPR refers are: Data protection, rules and legislation, awareness, information, communication, individual rights, consent integrity.[2]

The GDPR is intended to protect and legislate the privacy of all EU citizens, to determine how organizations protect personal data.

I. LEGAL ASPECTS

1.1 Personal data

European Regulation 679 / 2016 and, by default, Law no. 190 / 2018 refer strictly to personal data. They are not the same as a company's secret data, business secrecy, state secrecy or any other information considered confidential. It refers to the relationship between a person whose data is being processed and the organization which processes the data.

The person whose data are processed shall be referred to as ***the data subject.***

The organization which processes the data shall be called ***the controller of the personal data***. It shall also be the holder of the personal data which it has obtained about the data subject and which it processes using manual, automated or computer methods.

Personal data shall mean any information relating to an identified or identifiable natural person, individually identified and referred to as a data subject. Carrier data appears in any format, on any physical or electronic media, regardless of the nature or content.[3]

The main categories of personal data are:

- "regular" data such as name, first name, date of birth, address, email, hobby, etc.
- Genetic data
- Biometrics, such as photography, etc.
- Health data
- Special data such as origin, raid, sex, criminal record, etc.

[1] LAW No 190 of 18 July 2018.
[2] https://www.axistechnolabs.com/company/gdpr-compliance
[3] https://www.legeagdpr.ro/

Personal data (PCD) shall be clearly expressed, may be anonymized or pseudonymised, may or may not be encrypted.

1.2 Principles of processing PCD

The following principles, detailed and explained in the GDPR Regulation, must be respected during the processing of the PCD:

- Legal pre-work, with due regard for fairness and transparency
- The collection and processing of the PCD will be for specified, explicit and legal purposes only
- Suitability, relevance and limitation to what is necessary
- The accuracy and proper update of the data
- The retention will only be for the time required, after which the PCD will be removed from the storage base
- Processing in an appropriate manner without prejudice to the data subject.

1.3 The rights of the data subject

The rights of the data subject are stated and explained in the GDPR Regulation and subsequently in the Law no. 190/2018. They are well defined to ensure effective protection of the privacy and privacy of the individual. The data subject shall thus be guaranteed:

- The right to correct and complete information, on request or in accordance with the Directive
- The right of access to the processing of the PCD made available to the operator, on the basis of written requests and at reasonable intervals of time
- The right to rectification, modification, correction, as many times as necessary, at reasonable intervals
- The right to deletion of data or the right to be forgotten/removed from the database only where this is not contrary to the legislation in force
- The right to restriction of processing
- The right of data portability
- The right not to be subject to individual automated decisions
- The right to be notified in case of breaches of the security of the PCD
- The right of access to justice.

II. INFORMATIONAL ASPECTS

From an informational point of view, the PCD may exist in several forms. Thus, they can be found as follows:

- On paper (printed documents, folders, etc.)
- Electronic (HDD, CD, Video, Memory Stick, Card...)
- Know-how (human resources)

Security measures shall be classified to ensure compliance with the provisions of the GDPR. Thus, there are:

- Technical security measures
- Physical, such as: access control to the physical perimeter of the PCD, classification and marking of documents, correct positioning of data processing equipment and devices, etc.

- It&C level, such as: encryption, anonymisation, pseudonymisation, information system access control, network traffic analysis, anti-virus and anti-spam installation, definition and use of appropriate passwords, backup
- Non-technical security measures
- At the level of human resources such as: internal organization, training, awareness-raising, etc.

The attributes of the security of information and, by default, of personal data are: confidentiality, integrity, availability and continuous resistance. One or more of these attributes may be affected if risks to the security of the PCD are identified, such as: destruction, loss, modification, unauthorized disclosure, unauthorized access to data, etc.

In order to ensure the security of processing of PCDs, technical and organizational measures should be implemented according to the level of risks identified for PCDs and the specific scope. Consideration must be given to the possibility of accidental or deliberate (illegal) affections of the rights and liberties of natural persons.

Security measures regarding the processing of personal data may also be associated with, but are not limited to, compliance with the provisions of ISO 27001:2018 – Security of information management.

The main categories of measures for the protection of PCDs are the following[4]:

- Organization of the security of the PCD. For example: establishing the context of processing, establishing roles and responsibilities;
- PCD management: Identification of PCD and information flows, identification of owners for PCD and processing processes;
- Mobile devices and remote work;
- Human resources security:before employment, during employment and upon termination of employment (IT access rights must be disabled and must be signed by network administrator);
- PCD rating – labeling, appropriate handling;
- Handling of storage media: security measures for storage, destruction and transfer;
- Access control: limit access and define processing limits, define and comply with the policy on access to PCDs, password and secure login, how to access IT systems, the computer network and the program source code, etc.;
- Cryptographic security measures;
- Physical and environmental security: physical access perimeter, delivery and loading areas, cable security, user-supervised equipment, clean office policy and protected screen policy;
- Security of operations: protection against potentially harmful codes (viruses, malware, spam, etc.), change management, capacity management, back-up policy, management of technical vulnerabilities, technical audit of information systems, etc.;

[4] https://www.juridice.ro/

- Security of communications: PCD transfer agreements, e-mail, confidentiality or non-disclosure agreements;
- System acquisition, development and maintenance: protection of transactions and specifications, protection of data used for program testing, etc.;
- Relationship with suppliers: PCD security policy for the relationship with suppliers, protection of own PCD that is accessible to suppliers, protection of suppliers' PCD, security clauses in contracts with suppliers, security of communication in the supply chain;
- Security incident management: definition of responsibilities and procedures, reporting of PCD security weaknesses and incidents, learning from security incidents, etc.;
- Business continuity: PCD security continuity planning, emergency procedures, plan testing and simulations, redundancy (multiple Internet providers, backup of PCD stored in a secure, independent location, availability of PCD processing facilities, etc.;
- PCD security analysis: compliance with security standards and policies, technical compliance analysis, independent PCD security audits.

III. KEY POINTS IN THE LOGIC OF THE THEME

a. The Regulation adopted by the Council of the European Union on a proposal from the European Commission and entered into force on 25 May 2018. The Regulation shall apply in a uniform way to all companies and organizations operating within the European Union. The main purpose of this is to unify and strengthen data protection for EU citizens.

b. The GDPR takes into account only personal data: names, email addresses, phone numbers, marital status, banking and medical information, location data, IP addresses, photos, as well as personal photos and posts on social networks.

CONCLUSIONS

The National Supervisory Authority for the Processing of Personal Data, as an autonomous central public authority with general competence in the field of the protection of personal data, guarantees respect for the fundamental rights to privacy and the protection of personal data, stated in particular by Articles 7 and 8 of the Charter of Fundamental Rights of the European Union, Article 16 of the Treaty on the Functioning of the European Union and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. 2016 marks a key moment in the development of European regulations on the protection of personal data by the adoption by the European Parliament and the Council of the Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General data Protection Regulation). The Regulation entered into force in all Member States of the European Union as from 25 May 2018, together with the adoption of the Directive on the protection of data processed for the purposes of prevention,

detection, investigating and prosecuting offenses and other judicial activities. This reform of the legislative framework in this field involves, in the short term, for Romania, a complex evaluation of the specific tools for the protection of personal data, in order to adapt the national regulatory framework and institutional preparation for the application of the new European regulations, including effective cooperation with the European data Protection Board and other relevant authorities in the European Union.

Thus, strengthening the administrative capacity of the National Supervisory Authority for the Processing of Personal Data is a priority and requires the allocation of material, financial and human resources appropriate to the exercise of our new specific tasks in order to effectively apply the European Union standards contained in the new regulations adopted.

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INTERNATIONAL MIGRATION. NEWS AND PERSPECTIVES

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Abstract

This article introduces a new perspective regarrding the social, political, and economic impact of immigration against the backdrop of an increasingly high number of migrants. It also clarifies migration causes and context in terms of state security; its consequences and its influences on society, both in the origin country and at the destination. The current study illustrates state reactions vis-a-vis migration, various ways to manage such reactions, and their impact on the population.

The context of any solutions to the migration crisis presupposes the existence of peaceful attitudes, and yet such a moment is difficult to anticipate in the Islamic world. Therefore, there are no certainties regarding the European population's state of security in the present context.

Keywords: *migration, impact, routes, globalization.*

INTRODUCTION

The evolution of international relations, of national policies regarding migration, of policies regarding the settling of an individual on the territory of a national state other than the one of their origin, consists of merely certain attempts to redefine conceptual borders and the means for communities to organize themselves in terms of their capabilities of including or excluding newcomers.

Brought to the fore are thus such debates as connect to national identity, citizenship, policies to deal with this particular phenomenon, and with the interconnection of migration and globalization, as well as state security.

Confrontations between migrants and EU nationals are, most often, of a violent nature, and the reason is not simply the natural aggression of humans but the interest in which migrant groups use such aggression to further their own goals, given the limited resources and while the local living conditions and lifestyle are not to the migrants' liking.

Conflict is manifested not only physically but also spiritually and in the realm of information. Confrontations escalate to violence over the two philosophies, Western and Islamic, which have become irreconcilable via political interference, as the latter

is nowadays a philosophy of the battle for influence, local supremacy and resources, whereas the representatives of the two philosophies fail to differentiate between what unites and what divides them.

I. THE SOCIAL, POLITICAL AND ECONOMIC IMPACT OF MIGRATION

Several notable events generated by crime, particularly crimes against individuals and private property, street violence, immigrant ghettos on the outskirts of large cities, public filth, all of which have been covered by the media, as well as certain less notable ones, such as long-term unemployment, housing crises or school violence, have transferred situational responsibility to their immigrant communities (Bădescu, 2004, p. 38).

The capacity of social, economic, political, and administrative institutions to integrate a large number of migrants, the resistance of certain migrant communities, and the social issues generated by migration-related phenomena affect state stability and, thus, the governments' ability to act. In the hosting countries, the primary challenge is the social integration of newcomers. This is how you get refugee camps, local bureaucracy to handle personal data, and legislation allowing for the management of such issues (Sava, 2005, p. 264).

The globalization and the internationalization of markets generate new migrant behaviors, heightened fluidity for territorial displacement, as migration-related phenomena take on specific meanings.

Building the Europe of tomorrow cannot be achieved without consensus regarding international migration or without the drafting of common migration policies. Awareness of specific migrant flows, and of their traits and dynamics, allows for the defining and adjusting of balances in the economic and social milieus. No longer can migration be evaluated as an instantaneous and unpredictable phenomenon, since the movement of individuals has multiple triggers of historical, behavioral, economic, and social nature (Andreescu, 2016).

We believe that international migration, willing or forceful, is essential for the contemporary globalized life. In this our century of speed, the number of individuals living outside the borders of their country of birth is larger than it has ever been in the history of mankind.

Given the current international context, Romania – a southeast European country located at the crossroads of pathways connecting the continent's western and eastern regions, as well as the Asian south to the European northwest – is a part of the "Balkan Route" of illegal migration, which affects all key areas of society, including state security and the safety of its citizens.

International migration subjects developed nations to conflicting pressures. As foreign demand for labor increases – meant to partly offset the significant reduction in birth rates below the generational replacement threshold; demographic aging; and the shortage of working youth – the populations of such states are increasingly concerned about the cultural changes that may foster an inflow of migrants, asylum seekers, and clandestine migrants.

In Western countries, the fear triggered by the events of September 11th 2001 regarding the potential connections between migrants and terrorist attacks tends to generate mistrust towards foreigners, particularly towards those hailing from less-developed Eastern nations. Hence the paradox of affluent nations, as their economies require migrant labor but the political pressures they are subjected to will result particularly in limitations placed on immigration (Zuru, 2004, p. 86).

The greatest difficulty in tackling the effects of illegal migration comes from the current complexity of the phenomenon, given by the multitude of forms and traits associated, as well as by its heightened dynamics. The clearest symptoms are the increase in the number of individuals involved in crossborder movement, and the countries recently appearing on the migration maps, whether as origins or as destinations.

Migratory movement based on emigration and immigration, willing, and caused by various reasons (historical, economic, social, political, etc.) has diverse consequences both in the origin countries and at the intended destination, including the field of crossborder crime (E.-Ana Iancu, I.-R. Rusu, N. Iancu, 2020, p. 348).

II. THE EFFECT OF MIGRATION ON STATE SECURITY

We believe that migration is a relevant dimension for the assessment of the concept of security. For Europe, its consequences are becoming critical, as emigration from the areas peripheral to Europe generates extra pressure on European stability, in terms of sheer demographic numbers as well as all associated social phenomena.

The primary causes for the unprecedented vastness of population displacement include armed conflicts, famines, natural disasters, human rights violations, and dire economic circumstances.

The political circumstances in emigrant-generating countries will influence the number of emigrants, while political tensions can escalate, often to violent outbreaks and even as far as civil war. Violence among citizen groups, as manifested by ethnic conflicts; violence between state and its citizens; and violence between states can all endanger the individuals, such that they will seek shelter in other states, with emigration often the only possible resort (Lanerman, 1999, p. 18).

As we assess migration over the last few years it is vital to also evaluate its effects on state security, and European security in general, as we consider the grave threat of the latest type of terrorism, i.e. Islamic State (ISIS), and of conflict-specific migration, i.e. the original Islamic one, in the overall context of the aging of the European population, of the reduction of the Christian demographic sector as compared to its Muslim counterpart, and of the certain radicalization against the backdrop of Islam spreading in the Western world.

The Islamic State emerged following the partial failure of the revolutions occurring in North Africa, the Near East and the Middle East beginning with 2010 and through 2011, with the toppling of authoritarian regimes such as those in Tunisia (December 2010), Egypt (Mubarak, 2011), Libya (August 2011), and

Yemen (November 2011), and the significant destabilizing of certain monarchies, such as those of Morocco, Jordan, the UAE, Bahrain, Kuwait, Oman, etc.

Soft, inertial approaches, as well as various forms of hesitation and stalling led to nothing positive. All it took was Turkey slightly loosening its bottleneck in protest of the Western states' attitude towards migrants for Europe to reveal its weakness to a humanitarian drama of significant proportions (Mansfield, 2015, p. 513).

"Will the 21st century be the century of migrants, given the great number of migrants and forms of migration, or the century of chaos, violence, and disorder?" (Geopolitica, 2015, p. 200).

III. STATE RESPONSES TO MIGRATION

Romania and the EU have policy plans for illegal migration, featuring legislation on workforce migration. Illegal migration raises particular issues, able to generate serious problems for national and European security. Particular policies on illegal migration refer to the dialogue and cooperation with third-party states on migration, border security, Frontex common management, ID and travel documentation security, fighting illegal migration and human trafficking, the achievement of re-entry agreements, information handling, determining carrier responsibility, social integration for foreign nationals, and updates to the National Strategy on Immigration.

Managing national migration without proper information and intelligence systems is no longer possible. For as realistic an idea as possible, you need to make changes to both the system for gathering primary data and to the one that centralizes such data and ensures international cooperation. Migration statistics must be associated with particular inquiries on nationally representative population samples so as to allow for qualitative substance evaluations on migration attributes.

Individuals involved in illegal migration were found either during transit (or during their attempted illegal crossing of the border via border crossing points) or spotted near the border, displaying the clear intent to cross illegally.

Over the last few years, Turkey has continuously been blackmailing the EU with the prospect that, should EU further delay Turkey's admission, it will open its borders to release the enormous migrant flow towards Europe.

According to Frontex analyses, in recent years the illegal migration routes into the EU have been (E.-Ana Iancu, I.-R. Rusu, N.Iancu, 2020, p.349):

- the Central Mediterranean route – the most active one – via Libya-Italy and Morocco-Spain;
- the Eastern Mediterranean route: Libya, Egypt, Syria-Greece;
- the West Balkan route: Turkey-Greece-Serbia-former Yugoslavia-Hungary-Austria-Germany;

and the Eastern European route: not very popular, with only Poland filing several applications for asylum.

CONCLUSIONS

Under such circumstances we are looking for answers to multiple questions that are vital to the future of the EU, such as: "Is the Schengen Area still applicable when it is so permeated by migrants and future terrorists?"

The French Prime-Minister, the Chancellor of Germany, and other EU notables push for stiffer action against illegal migration, and particularly against migration originating in the North of Africa, and the Near and Middle East; and for any other measures against current terrorism able to breach the security of any EU or world countries. But will all these be enough?

Either way, until the Islamic world is at peace – and hardly anyone believes it ever will be – we will be unable to feel fully safe in contemporary Europe.

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BRIEF CONSIDERATIONS REGARDING THE RESPECT FOR THE RIGHT OF DEFENCE OF THE ACCUSED PERSON DURING CRIMINAL PROSECUTION, IN THE LIGHT OF THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS. CASE STUDY.

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Abstract

By the entry into force of the current Code of Criminal Procedure on 01.02.2014, the national legislator aimed to create a clear, accessible and predictable judicial system for all participants involved in a criminal proceeding, but also to place this system on the pillars of new principles in order to precisely respect human rights and fundamental freedoms.

Its objectives have been specifically set out from the very preliminary theses of the adoption of the Code of Criminal Procedure, among which we mention that of *establishing an appropriate balance between the requirements for an effective criminal proceeding and respect for the fundamental human rights of all participants in a criminal trial.*

This was a pressing need, because Romania ratified the European Convention on Human Rights (hereinafter E.C.H.R.) on 20.06.1994, introducing the obligation to respect it by the national judicial bodies, an aspect subsequently transposed into the internal legislation by adopting Article 20 of the Constitution (amended in 2003), as well as by introducing Article 1 (2) of the current Code of Criminal Procedure.

Although the role of the European Court of Human Rights (hereinafter E.Ct.H.R.) is not defined by a court of judicial review of the decisions adopted by the national courts, not being able to modify or abolish them, it plays a subsidiary role to the national judicial systems which subsequently must verify the compatibility of internal legislation with the mandatory requirements of the European Court.

From the content of the File on Romania, drawn up by the Strasbourg Court Registry, published in January 2021, as well as of its Report for 2020, both published on the website of this institution, it results that between 1997 (the date of the first conviction against Romania) and December 2020, a number of 1578 judgments and decisions passed against our country, and this ranks it in the top four member countries, after Turkey (convicted in 3742 cases), Russia (convicted in 2884 cases) and Italy (convicted in 2424 cases). Statistics also show that, after Romania, there are Ukraine (convicted in 1499 cases), Poland (convicted in 1197 cases), France (convicted in 1048 cases), Bulgaria (convicted in 737 cases) and Moldova (convicted in 473 cases).

At the end of 2020, our country was convicted in 82 cases by E.Ct.H.R., and an analysis of the violated fundamental rights shows that the most common is the right to a fair trial provided for in Article 6 of E.C.H.R. (in 82 cases) which includes the right of defence of the person accused of having committed a criminal offence in its content.

In accordance with Article 6 (2) and (3) from E.C.H.R.: *"Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law... Everyone charged with a criminal offence has the following minimum rights: to be promptly informed of the nature and cause of the accusation against him in a language which he understands and in detail...; to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require..."*

Keywords: *legislator, rights, norms, prosecution*

INTRODUCTION

The present work explains the concept of 'criminal charge' as governed by the internal legislation, but also in the case-law of the European court, since there is no perfect overlap between the two judicial systems on this issue, as the European framework is much more permissive, which actually creates difficulties of interpretation in the practice of national judicial bodies.

In the *Adolf v. Austria* case, E.Ct.H.R. established that the phrase *'charge in criminal* matters' has an *'autonomous'* meaning, independent of the classifications used by the national judicial systems of the Member States.

Failure to comply with the procedural norms on the rights of defence of a person accused of committing a criminal offence may lead to the exclusion of the evidence thus obtained as a result of the violation of the principle of loyalty to the administration of evidence, laid down by Article 101 from the Code of Criminal Procedure as well as to its absolute nullity, in relation to article 281 (1) (f) from the Code of Criminal Procedure.

From the analysis carried out during the work, it was found that the current criminal procedural provisions largely meet the requirements of the European court in terms of predictability and accessibility, bringing together in Article 83 by reference to Articles 89 - 92 from the Code of Criminal Procedure, the main procedural rights of the defendant, among which we mention: the right to information about the act with which he is charged, the right not to make a statement, the right to be assisted by a lawyer of his choice or by a duty lawyer, the right of access the file, the right to propose the administration of evidence, and the right to witness the performance of any act of criminal prosecution with a lawyer of his choice or a duty lawyer, with the exceptions expressly covered by law.

The present work aims to analyze the national standards that are taken into account by the criminal investigation bodies with the purpose of ordering the initiation of criminal prosecution regarding a criminal act *(in rem* phase*),* as well as ordering further criminal investigation of a person *(in personam* phase*),* in order to

establish the level of harmonisation with the requirements of the European court in the field. This analysis concludes with a case study that was based on national courts, in order to assess in concrete terms, whether the requirements of the case-law of E.Ct.H.R. are respected by those called upon to perform the act of justice on respect for the right of defence during criminal investigation of a person accused of committing a crime.

I. THE REQUIREMENTS OF ECtHR ON RESPECT OF THE RIGHT OF DEFENCE OF A PERSON ACCUSED OF COMMITTING AN OFFENCE, LAID DOWN IN ARTICLE 6 OF ECHR

The notion of criminal charge must be interpreted from the point of view of E.C.H.R., which decided that it represents "...*the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence*" and depending on the existence or absence of *"significant repercussions on the suspect's situation"* in the *Deweer v. Belgium* case.

In accordance with the provisions of Article 6 of E.C.H.R., the concept of *accusation in criminal matters* has an *autonomous* meaning, and the *notification* of the person accused of committing a crime by the competent state authority must not comply with a certain form.

The conventional law does not require member states to regulate a list of antisocial acts that would fall within the notion of *criminal*, as E.Ct.H.R. is given the task of framing them in this sphere, according to certain criteria developed in its case-law, which is compatible with the object and purpose of E.C.H.R. (*Öztürk v. Germany* case).

The starting point for examining the applicability of the criminal side of Article 6 of E.C.H.R. results from the criteria laid down in the *Engel and Others v. the Netherlands* case, as follows:

A. Qualification in internal legislation

This first criterion is used as a starting point by the European court and it has a relative weight. If there are no problems of interpretation in the internal law of the Member States, the act under investigation is considered a criminal offence. Otherwise, E.Ct.H.R. will examine the reality of the procedure, and will be able to frame the offence in the notion of *criminal.*

B. Nature of the crime

In the *Jussila v. Finland* case, the European court decided that this criterion is the most important in making a decision, meaning that it can take into account the following factors:

- clarifying whether the legal rule in question is addressed exclusively to a specific group or is imposed on all by its nature (*Bendenoun v. France* case);
- clarifying whether the procedure is initiated by a public authority on the basis of legal powers of execution (*Benham v. the United Kingdom* case);
- clarifying whether the judicial norm has a repressive or deterrent function (*Öztürk v. Germany case*, cited above);
- clarifying whether a conviction to any type of punishment depends on finding of guilt (*Benham v. United Kingdom* case, cited above);

- the way in which comparable procedures are classified in other Member States of the Council of Europe (*Öztürk v. Germany* case, cited above).

C. The seriousness of the punishment which the person concerned risks receiving.

This criterion is analysed by the European court in the light of the maximum possible punishment provided for by the incidental law in question of the Member State complained of (*Campbell and Fell v. the United Kingdom* case).

It has also been decided that the last two criteria presented above *are alternatives and not necessarily cumulative* in the *Engel and Others v. the Netherlands* case.

In order to benefit from the protection of the fundamental right provided by Article 6 from E.C.H.R., it is sufficient for the offence by its nature to be regarded as *criminal* from the point of view of conventional law, or if it makes a person liable to a penalty which, by its nature and degree of seriousness, falls within *the criminal sphere* (*Lutz v. Germany* case).

For example, the fact that a crime is not punishable by imprisonment is irrelevant in *Nicoleta Gheorghe v. Romania* case, because *the relatively diminished character cannot free a crime from its intrinsic criminal character*.

A cumulative approach to the three criteria mentioned above may, however, be ordered in a situation where a separate analysis for each of them does not allow a clear conclusion to be reached on the existence of an accusation in criminal matters (*Bendenoun v. France case*, cited above).

Using the expressions *accusation in criminal matters* and *accused of a crime*, the three paragraphs of Article 6 of E.C.H.R. refer to identical situations, being applicable in terms of solving the criminal side of the case brought before the court.

As a result of the above-mentioned criteria, the incidence of Article 6 of E.C.H.R. may also be applied to cases related to the administrative or contravention field, such as those related to the road regime (*Lutz v. Germany* case), or those regulating the norms of social cohabitation (*Nicoleta Gheorghe v. Romania* case, cited above), including the procedures regarding tax increases or other tax penalties if the law on the application of the penalties is applicable to all taxpayers, and the increase is a considerable one (*Mieg de Boofzheim v. France* case).

The exigencies of Article 6 of E.C.H.R. also apply to cases in the criminal investigation phase, especially in terms of respecting the reasonable term or the right of defence, and in this case the European court examines them as a whole (*Imbrioscia v. Switzerland* case).

Thus, the provisions of Article 6 (1) apply from one end of the judicial proceedings to the other in order to establish the merits of an *accusation in criminal matters*, with the exception of proceedings aimed at reopening a criminal trial (*Fischer v. Austria* case). If the court has ordered the reopening of the criminal proceedings, the European court's requirements are again applicable as regards the merits of an accusation in criminal matters (*Löffler v. Austria* case).

In national criminal procedural law, the charge in criminal matters against a person who has committed a crime is made at the time when the continuation of the criminal investigation is ordered against him, also known as *in personam* stage.

The activity of the criminal investigation bodies to summon the suspect in order to inform the accused is equivalent to an official notification regarding the imputability of committing a criminal act.

We mention the fact that the purpose of the criminal trial, in accordance with the provisions of Article 8 of the Code of Criminal Procedure, is deducted from all the specific activities carried out by the criminal investigation bodies in full compliance with the right to a fair trial, respectively *"... the acts constituting criminal offences established in a timely and complete manner and no innocent person shall be held criminally liable, and any person who has committed a criminal offence shall be punished in accordance with the law*".

In accordance with the provisions of Article 285 from the Code of Criminal Procedure, *the objective of the criminal prosecution* consists of "*... gathering the necessary evidence regarding the existence of the offences, to identify the perpetrators of the offence and to establish their liability, in order to determine whether or not it is appropriate to order the indictment*".

It results that there cannot be a criminal trial, if we take into account the purpose and object of the criminal investigation activity established by the legislator, without carrying out this stage, which also has a non-public character (according to Article 285 (2) from the Code of Criminal Procedure.

The temporal limit of carrying out the criminal prosecution is characterized by an initial limitation that corresponds to the date of the beginning of the criminal investigation *in rem* and a final limit, materialized by the solutions on whether to proceed or not with the prosecution of a person ordered by the prosecutor.

Regarding the *content* and *scope* of the acts of criminal prosecution that can be carried out after the date of the beginning of the criminal investigation *in rem*, we mention that they are circumscribed to the procedural activity of administering the evidence, an essential aspect for the formulation of a criminal charge against a person.

The mere registration of a criminal complaint or a complaint that meets the substantive and form requirements laid down in Article 289 from the Code of Criminal Procedure does not necessarily automatically lead to a criminal charge against a person without the administration of a minimum of evidence, which is a particularly important stage regarding the person under investigation.

Accusing a person of committing a crime must be the consequence of the existence of certain evidence that has been obtained loyally in compliance with the legal provisions, but also in compliance with the requirements of the court of conventional law.

The case-law of E.C.H.R.,[1] regarding the person who should benefit from protection who has acquired the status of suspect, had held that he operates not from the moment when he is made aware of that status, but from the moment when

[1] www.echr.coe.int, *Brusco v. France* case, no. 1466/07 of 14.10.2010, accessed on 25.08.2019.

the national judicial authorities *"had plausible reasons for suspecting him of having committed a criminal offenc*e".

The provisions of Article 305 (3) from the Code of Criminal Procedure which regulates the conditions under which the initiation of criminal prosecution *in rem* is ordered, as well as the further conduct of criminal prosecution against a person, leave a large margin of appreciation regarding the volume of administration of evidence at the disposal of the criminal investigation bodies, but also the moment when they understand to formulate the criminal charge.

This aspect generates an unequal practice in this field, as it is enough to go through the content of the Report of the Judicial Inspection – Directorate of Inspection for Prosecutors no. 5488/IJ/1365/DIP/2018 from 05.04.2019 on "Respectarea principiilor generale care guvernează activitatea Autorităţii Judecătoreşti în cauzele de competenţa Direcţiei Naţionale Anticorupţie privind magistraţi, sau în legătură cu acestea, în perioada 2014-2018"[2], in order to see the extent of this phenomenon.

In this respect, we exemplify the criminal file no. 304/P/2014 (which was not solved at the date of the control), assigned to the case prosecutor for settlement on the 08.12.2014, regarding alleged acts committed by several judges and prosecutors (National Anticorruption Directorate – ST Ploieşti), in connection with the settlement of some civil cases whose handover was repeatedly requested between August and December 2017, as many were in progress before judicial courts. From the date of registration until the date of the control (about 4 years), criminal investigation activities were carried out in this case, respectively it was ordered to start the criminal prosecution on 10.12.2014 in terms of committing the offence laid down by Article 132 of Law no. 78/2000 reported to Article 297 from the Code of Criminal procedure; in the period 2014-2018, 37 additions to the initial denunciation were received in the file, and 2 witnesses were heard on 25.05.2018 and 31.05.2018. However, in this case, no criminal charge was made against any person, although evidence was administered, and the investigation period was considerable (over 4 years from the date of the complaint).

In another criminal case (criminal file no. 163/P/2014 of National Anticorruption Directorate - ST Suceava), regarding alleged acts committed by a prosecutor from PT Suceava, it was registered on 10.11.2014 and the criminal prosecution *in rem* in terms of committing the offense was started on 26.05.2016 as laid down by Article 132 of Law no. 78/2000, although the injured person was heard on 24.05.2015, **one year before the order was issued *in rem***.

The judicial inspectors also found (criminal case no. 33/P/2014 of National Anticorruption Directorate – ST Suceava) that the file in question was registered on 30.04.2014, as a result of the notification report from the same date (targeting a judge from the Suceava Court of Appeal), and the criminal investigation bodies

[2] English translation: *Compliance with the general principles governing the activity of the Judicial Authority in cases within the competence of the National Anticorruption Directorate on magistrates, or in relation to them, in the period 2014-2018*)

did not carry out any investigation act between August 2014 and April 2016, and, as a result, **the file remained unworked.** On 13.04.2016, it was requested the issuance of technical supervision measures through the prosecutor's report until 11.06.2016, and it was ordered to close the case by order dated 28.03.2018, based on Article 16 (1) (a) of the Code of Criminal Procedure ("the act does not exist").

We consider that the aspects found by the judicial inspectors during the control carried out at the National Anticorruption Directorate for the period 2014-2018 can also be found at the other prosecutor's offices in the country, even if at a lower level.

In order to prevent the recurrence of such situations, it is imperative that the judicial bodies comply exactly with the European court's requirements regarding *the right of defence and granting of the time and facilities necessary to prepare the defence of the person accused of committing a crime.*

This fundamental right is provided for in Article 6 (3) (b) of E.C.H.R., which regulates the right of defence and granting of time and facilities necessary for the preparation of the defence.

Since the right of defence guaranteed by Article 6 (3) (b) of E.C.H.R. has a relative character, it cannot be invoked if the accused or his lawyer does not do all the diligence necessary for the exercise of it in accordance with the provisions of national law, if he declared during the proceedings that he would not take part in them, or if the defendant was acquitted or a solution was ordered against him (*Bricmont v. Belgium* case*).*

In its case-law (*Artico v. Italy* case, cited above), E.Ct.H.R. has held that the judicial bodies of the Member States are obliged to ensure and protect "... *not theoretical or illusory rights*, ***but concrete and effective rights***" in a judicial procedure, referring to the importance of the right of defence as a basic component of the right to a fair trial, essential in a state of law.

The European Court ruled that this assessment was made in a concrete manner, depending on the circumstances of each case in relation to the complexity in fact and law of the criminal case, the importance of the activity for which the time is necessary for the preparation of the defence (proposing evidence or challenging its conclusiveness or usefulness, drawing relevant conclusions when taking preventive measures, etc.), or the decision of the accused to exercise his own defence, etc. *(Iglin v. Ukraine* case*).*

The defendant's exercise of the rights of defence assumes the possibility for him to benefit accordingly and without restrictions from all the procedural rights provided by the legal norms, in order to support the main favourable arguments before the criminal investigation bodies.

In the *Dayanan v. Turkey* case, E.Ct.H.R. decided that these facilities may consist in the right of the accused deprived of liberty to contact his lawyer orally and in writing, to know the evidentiary material in the criminal file, but also the obligation of the prosecutor to present all the means of evidence administered to the court during the criminal investigation, both in his favour and to his detriment.

The national criminal procedural provisions provide for legal regulations according to which the parties or the main procedural subjects involved in a criminal procedure must benefit from all the guarantees provided by law for the proper exercise of their rights and legitimate interests.

The right of defence can be exercised both personally (judicial authorities may restrict this right if they consider that the accused person cannot defend himself adequately and properly without the assistance of a lawyer)[3] and by a lawyer.

The national criminal procedural provisions provide a series of specific rights for the suspect or defendant in order to guarantee a concrete and effective defence, these being expressly mentioned in the provisions of Article 83 and Article 108 from the Code of Criminal Procedure.

However, the rights of defence must be exercised in good faith, as this is part of the principle of procedural loyalty, otherwise the judicial bodies may sanction the situations in which it is abused (according to the provisions of Article 283 (4) (n) of the Code of Criminal Procedure.

In the practice of the criminal investigation bodies, the violation of the right to a concrete and effective defence is encountered in the situation in which the accused is a suspect and requests the consultation of the criminal investigation file in accordance with the provisions of Article 94 (4) from the Code of Criminal Procedure[4], because it may be restricted by the prosecutor, although in the investigation phase of the act, also called *in rem* (Article 305 (1) from the Code of Criminal Procedure), most of the evidence on which the criminal charge is based is administered.

In this respect, we will present a case study in order to ascertain the degree of harmonisation of the national rules in the field with the requirements of the European court.

Case study

From the content of the Conclusion no. 337 final on 26.06.2019 of the Criminal Section of the High Court of Cassation and Justice (hereinafter HCCJ, a conclusion accessible on www.scj.ro website), it results that the defendant A. was sent to trial by indictment no. X from 18.01.2019 of the Prosecutor's Office attached to the High Court of Cassation and Justice - Section for the investigation of crimes in justice, and the case was registered before the Bucharest Court of Appeal (hereinafter CA Bucharest), Criminal Section I, for committing the crime of "abuse of office" provided for and punished by Article 297 (1) from the Criminal Code.

[3] According to Article 90 (1) (b) from the Code of Criminal Procedure, mandatory legal assistance is provided *"if the judicial body considers that the suspect or the defendant could not make his own defence*".

[4] According to Article 94 (4) from the Code of Criminal Procedure, "*during the criminal investigation, the prosecutor may restrict the consultation of the file on a reasoned basis, if this could prejudice the proper conduct of the criminal investigation. After the initiation of the criminal proceedings, the restriction may be ordered for a maximum of 10 days*".

The defendant complained in particular about the violation of the right of defence during the criminal investigation both during the criminal investigation, in front of the case prosecutor, as well as in the preliminary chamber procedure at the CA Bucharest, but also in the grounds of appeal before the preliminary chamber judge of HCCJ (as the superior court), because "*before he was assigned a procedural quality that would allow him to request and obtain participation in the performance of the acts of criminal prosecution, as well as subsequently, after acquiring the status of suspect in question and after hearing in this capacity, he was denied any request for evidence in defence by the case prosecutor, but also the re-hearing of the witnesses carried out before the criminal charge was mad*e".

The preliminary chamber judge of the superior court, after analyzing the evidentiary material administered in the case, found that the hearing of witnesses D and E was carried out by the case prosecutor on 19.12.2018, and the injured persons B and C were heard on 18.12.2018, the activities being carried out in the absence of the defendant or the chosen defender.

The preliminary chamber judge also found that, by the prosecutor's order dated 14.12.2018, it was ordered to continue the criminal investigation against suspect A in terms of committing the crime of "abuse of office", an act provided for by Article 297 (1) from the Criminal Code, and it was subsequently summoned to the headquarters of the prosecutor's office for 20.12.2018 in order to inform the accusation, as well as to his hearing as a suspect.

At that time, the suspect requested a deadline for the purpose of consulting the criminal file, as well as for his hearing and the request was approved by the case prosecutor for the date of 09.01.2019.

It results, therefore, that although the person under investigation was a suspect as of 14.12.2018, before being made aware of that capacity, the case prosecutor proceeded to hear the two injured persons, as well as witnesses D and E. The preliminary chamber judge also noted that there was no need for mandatory legal assistance in accordance with the provisions of Article 90 from the Code of Criminal Procedure in relation to the offence under investigation and the defendant (who was of age, who was being investigated in a state of liberty, etc.), as well as in the absence of an express request from the chosen defender to participate in the conclusion of any act of criminal prosecution.

Since the provisions of Article 281 (1) (f) sanction with absolute nullity the administration of evidence in the event that the suspect or defendant is not assisted by the lawyer when legal assistance is mandatory, the preliminary chamber judge of HCCJ found that the right of defence of defendant A was not violated.

The superior court thus concluded that it was "*...a circumstance which cannot be imputed to the judicial bodies which did not objectively know that the suspect had hired a defender"*, since there was no express request in the criminal file from the defendant's chosen defender to be present at the administration of this evidence at the time of the hearings held on 18th and 19th of December 2018.

On the other hand, the preliminary chamber judge of HCCJ found that the rejection of the request for re-hearing of the persons heard before being made

aware of his status as a suspect in the present case by the case prosecutor "*...may be assimilated in certain circumstances to a violation of the right of defence, in which sense it may be considered that the procedure was not fair if the accused was not given an adequate and sufficient opportunity to challenge the statements of the witnesses and to obtain their interrogation at the time of formulating the provisions and, in any event, before the indictment is issued".*

In such situations, the judicial bodies are obliged to concretely verify the importance of the evidence administered in the absence of the defendant's chosen defender, in relation to the existence of other evidence capable of supporting the establishment of the criminal charge.

If the evidence contested by the defendant constitutes the only evidence on which the accusation is based, or is the most important, the defendant must be approved to interrogate the witnesses of the prosecution until the indictment is drawn up, in order to avoid a judicial error in case of abolition of these provisions by the court.

Taking into account the above-mentioned, the preliminary chamber judge of HCCJ maintained the conclusion of the preliminary chamber judge of the Bucharest CA given in the council chamber on April 11, 2019, and found the legality of the court referral, the legality of performing the acts and the administration of evidence in the criminal investigation phase, ordering the commencement of the trial, stating that the defendant's right of defence did not suffer an infringement as regards the equity of the proceedings in the light of the requirements of the European court.

Although we appreciate the relevance of the argumentation of the courts called upon to rule on such a request in fact and in law, we must note that the further conduct of the criminal investigation against the suspect A. was ordered on 14.12.2018, and he was summoned for the notification of the criminal charge and for a possible hearing on 20.12.2018 (after 6 days), the period of time during which the criminal investigation body conducted the hearing of the injured person and of the prosecution's witnesses.

We consider that the suspect A should have been notified immediately after the criminal investigation body drew up the order for the further conduct of the criminal investigation, and to postpone the administration of the evidence after this date, except for the situation expressly governed by the provisions of Article 308 from the Code of Criminal Procedure concerning the early hearing of persons.

We mention that this is due to the fact that the provisions of Article 305 (3) in relation to Article 307 from the Code of Criminal Procedure are permissive in this respect, because they do not expressly oblige the criminal investigation bodies to immediately notify the person under investigation of the criminal charge, as provided by the requirements of the European court.

It is true that in its case-law, E.Ct.H.R. made it liable to the national judicial authorities of a Member State to notify the criminal charge of a person suspected of committing a criminal offence, no later than the time of the case trial, under adversarial conditions and in open court.

Even if it can be considered that the right of defence is not violated in such situations from the point of view of the conventional right, there are situations in the judicial practice in which the witness no longer fully supports the statement given before the criminal investigation body, situation in which, correctly, the prosecutor of the session is referring to him in terms of committing the crime of "perjury" provided by Article 273 from the Criminal Code.

The criminal investigation bodies invested with the settlement of the new criminal case note that he returns and supports again the first statement given during the criminal investigation, and not the one given before the court, on the occasion of the hearing as a suspect of the person who previously had the quality of witness, after they notify the case of non-punishment provided by Article 273 (3) from the Criminal Code.

In such situations, the witnesses invoke various reasons to justify the return to the previously given statement (respectively, the state of fatigue when they were heard in court, the passage of a long period of time between the two statements, the fact that they did not correctly understand the questions asked by the judge or by the parties' lawyers, etc.).

In these conditions, the criminal investigation bodies order the solution of closing the criminal case against the respective witness in terms of committing the offence provided for by Article 273 from the Criminal Code pursuant to Article 16 (1) (h) from the Code of Criminal Procedure.

The solution ordered as well as the suspect's statement are immediately sent to the initial criminal case pending before the first court, in order to be taken into account when resolving it.

If we analyze the cases of non-punishment provided for in Article 273 (3) from the Criminal Code, it results that the witness will not be criminally liable for committing this crime, if he withdraws his statement "... before the detention, arrest, or initiation of criminal proceedings, or before an order has been issued or another solution has been given as a result of perjury in other cases".

Basically, the person heard as a witness in a criminal case in which the prosecutor settled the case and ordered the indictment of a defendant is criminally liable for committing the crime of *perjury*, if he no longer supports the statement given during the criminal investigation during the judicial investigation, during the judicial investigation, during his re-hearing as a witness, or makes statements that no longer correspond to those initially declared, as laid down by Article 273 from the Criminal Code, which may influence the path to find out the truth.

CONCLUSIONS

In conclusion, we consider that the following aspects are necessary in order to comply exactly with the requirements of the European court regarding the observance of the right of defence of the person accused of committing a crime, as well as for the purpose of a fair settlement of a criminal case:

- re-hearing of witnesses who were heard after the date of ordering the continuation of the criminal investigation against the suspect, if requested;

- modification of ***de lege ferenda*** of the provisions of Article 273 (3) from the Criminal Code, in the sense of extending the cases of non-punishment and in the situation in which the witness withdraws the statement given during the criminal investigation, until no later than the date of settlement of the case at first instance.

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All decisions of E.Ct.H.R., E.Ct.H.R. and the statistical data indicated in the paper are accessible on the www.echr.coe.int website.

[5] English translation: *Compliance with the general principles governing the activity of the Judicial Authority in cases within the competence of the National Anticorruption Directorate on magistrates, or in relation to them, in the period 2014-2018*)

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THE PROBATIVE VALUE IN THE MEDICO-LEGAL TOXICOLOGY OF PSYCHOTROPICS

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Abstract

In forensic toxicology, there are two types of tests: screening tests and confirmatory tests. Usually, the samples are first examined for the presence of psychotropics, then a more specific confirmatory test is performed to determine the exact substance and often its concentration. A confirmatory test should have a different methodology than the screening test and should be performed on another sample, if possible.

Keywords: *forensic toxicology, screening, confirmation, psychotropic*

INTRODUCTION

In forensic toxicology, there are two types of tests: screening tests and confirmatory tests. Samples are usually first screened for the presence of medications and/or intoxicating substances, then a more specific, confirmatory test is performed to determine the exact substance and, often, concentration. A confirmatory test should be a different methodology from the screening test and should be run on a different sample/specimen, if possible.

Prior to testing of any sort, the first step is preparation. For many methodologies, the drugs must be separated from the organic matrix in which they are suspended. This can be accomplished by heat, protein precipitation, liquid-liquid extraction, or solid phase extraction. In the postmortem setting, protein precipitation and liquid-liquid extractions are the most commonly used techniques.

I. SCREENING TESTS IMMUNOASSAY

Use: Can be used to screen for a large number of drugs; can be qualitative or semiquantitative.

Basic Principle: An antibody is designed to react against a particular drug or drug class. The specimen to be tested is combined with the antibody; the antibody

binds to the drug in question, yielding a positive screen if the drug is present. If the sample is combined with a known amount of labeled antigen, competitive binding can occur between the antibody, the known amount of labeled antigen, and the unknown amount of drug. The antibody-antigen reaction is then measured, allowing for a semiquantitative determination of the amount of drug present.

Types:

Radioimmunoassay (RIA).
Enzyme multiplied immunoassay (EMIT).
Fluorescent polarization immunoassays (FPIA).
Kinetic interaction of microparticles in solution (KIMS).
Enzyme linked immunosorbent assay (ELISA).

Advantages: Relatively easy to use and to perform; requires minimal, if any, sample preparation; good sensitivity even at low concentrations; can be performed using very small sample amounts.

Disadvantages: Limited specificity as can have cross-reactivity between drug(s) and structurally similar compounds; interfering substances may be present within the biological matrix, yielding either false positive or false negative results; requires that an assay has been developed and is available for the desired drug. Urine is the preferred matrix as it has less interfering substances than blood.

II. SPECTROPHOTOMETRY

Use: Not commonly used except for the determination of carboxyhemoglobin; historically also used for barbiturates and salicylates.

Basic Principle: Molecules will absorb/distort light of different wavelengths in particular ways. A spectrophotometer can measure the changes in the wavelength of light passing through a substance to determine the presence or absence of certain molecules within the matrix.

Types:

Ultraviolet (UV).
Visible spectra.
Infrared (IR).
Advantages: Ease of use.
Disadvantages: Lack of sensitivity and specificity.

III. CHROMATOGRAPHY

Use: When combined with a detector, can be used as a screening test for a large number of drugs.

Basic Principle: Drugs are dissolved into a mobile phase (gas or liquid), which is then passed through a stationary phase (i.e., a column) allowing for separation and isolation of the constituents of the sample. The time taken to traverse the stationary phase is recorded by a paired detector and compared to an internal standard, allowing for detection of each component within the sample.

Types:

Gas (GC): Uses time to traverse a packed column in a gas matrix; usually paired with a flame ionization detector (FID) or nitrogen phosphorous detector (NPD) for identification.

Liquid (LC): Uses migration distance in a liquid matrix; can be used on a solid media (Thin Layer) or liquid (HPLC); most commonly paired with ultraviolet detector but can also be paired with fluorescence or electrochemical refractive detectors for identification.

Advantages: Can vary packing material, temperature, mobile phase components, and flow rate to adjust sensitivity and specificity; can be paired with a detector to increase specificity; HPLC is run at normal temperatures (unlike GC which is run at elevated temperatures), and may preserve heat-labile components.

Disadvantages: Time consuming; requires significant sample preparation; equipment expensive.

IV. CONFIRMATORY TESTS/EXTERNAL MODELS

Confirmatory tests are performed when a drug has been identified by one of the screening tests. Confirmatory tests should be performed by a different methodology than the screening test and on a different sample, if possible, or, at least, a different extract of the same sample. The confirmatory test should also be more specific than the screening test. The gold standard for confirmatory testing in forensic toxicology is GC or LC paired with mass spectrometry. This paired method allows for mass spectral analysis of analytes after they have been separated and isolated by chromatography. Mass spectrometry is accomplished by fragmenting a molecule by a barrage of electrons and then analyzing the relative abundance of the fragments (electron ionization) or by ionizing molecules and analyzing the charge transference (chemical ionization).

If mass spectrometry is not available, the American Board of Forensic Toxicology (ABFT) allows for confirmation by the same system as identification as long as a different chemical derivatization and column and, thus, retention time is used. However, this is not recommended by the ABFT and may face scrutiny in a court of law. Confirmation of an immunoassay with another immunoassay is never acceptable.

In Romania, neither the amount of psychotropic substance(s) that influence the central nervous system (CNS) nor the screening and confirmation (dosing) methods that can be used are regulated. It is not acceptable for a person to be investigated or convicted without a quantitative material evidence that differentiates between habitual and accepted and desired consumption and/or an influence, or not, of mental functions.

V. TESTING PANELS

Most forensic toxicology laboratories offer five basic screening tests to determine the presence or absence of the majority of forensically significant drugs. These panels include (listed with examples of the drugs/drug types found):

Lower alcohols: methanol, isopropanol, acetone, ethanol Acid/neutral: barbiturates; meprobamate/carisoprodol; NSAIDs (ibuprofen, naproxen), salicylic acid, acetaminophen; valproic acid and phenytoin;

Basic (alkaline): psychoactive medications (antidepressants, anti-psychotics); methamphetamine/amphetamine/MDMA; benzodiazepines; antihistamines;

Cocaine: cocaine, benzoylecgonine, ecgonine methyl ester;

Narcotics: morphine, monoacetylmorphine, hydrocodone, codeine;

VI. ADDITIONAL TESTING

Additional testing may be available for THC or other specific drugs. Some substances require special testing procedures for identification. For example, digoxin is detected by RIA and carbon monoxide by UV spectrophotometry or Conway diffusion (semiquantitative). Screens for heavy metals are not uncommonly performed in postmortem cases and can be accomplished by multiple methods, including special atomic absorption, inductively coupled plasma mass spectroscopy (ICP-MS), and neutron activation. The Reinsch test can also be used to determine the presence of arsenic, antimony, bismuth, and mercury. It is recommended that the particular forensic laboratory be contacted regarding any specific requirements.

CONCLUSIONS

There are, as we have shown above, many screening methods, but they generally have a low specificity, with a reasonable possibility of false positive results. For this reason it is necessary to regulate, legislate and methods of confirmation. The institutions provided in art.188 C.P.P. should have the methods of confirmation (dosing), accredited R.E.N.A.R. on I.S.O. 17025. At this moment, there is no standardization at national level, regarding the dosage of psychotropics nor regarding their concentration, at which to influence the mental state.

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THE EURO-ATLANTIC SECURITY AND THE TERRORISM[1]

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SUMMARY

The security of Euro-Atlantic area must be analyzed and understood in the context of the international security environment specific to the beginning of the 21st century, an active and effervescent one, where hybrid threats and deep economic and social imbalances are real risks. The terrorism has been, is and will continue to be a topic of maximum interest. The approach of this phenomenon from the psychological perspective not only of those directly involved, but also of those affected after the attack, is of interest and very topical, in the context of the unprecedented technological and informational explosion.

KEYWORDS: *security, terrorism, psychology*

INTRODUCTION

In an extremely unpredictable security environment, in a world of gaps and asymmetries in which the threats` synergies unbalance the systems, a structured, pragmatic, and balanced approach to security, at all levels, is an absolute necessity.

The international security is decisively conditioned by the Euro-Atlantic security, considering the concentration of military personnel and equipment in this area, including the nuclear arsenal. For this reason, when analyzing the Euro-Atlantic security architecture, we must consider all the international organizations involved (UN, NATO, EU, OSCE), the North Atlantic Alliance and the European Union being among the most active.

Considering the composition of the EU and NATO (figure no. 1), more than two thirds (21 states) of the 27 EU members and 30 NATO members, being common

[1] The content of this article represents the opinion of the authors and should not be perceived as an official position of the NATO Center of Excellence in the field of HUMINT.

members and consequently, expressing common interests, we can say that the approach of the Euro-Atlantic security must be a NATO-EU common one (Dinca, 2012, p.65). NATO-EU inter-institutional cooperation has intensified in recent years, especially in the field of hybrid threats, an example being the European Center of Excellence for Combating Hybrid Threats opened in October 2017 in Helsinki, at the initiative of Finland.

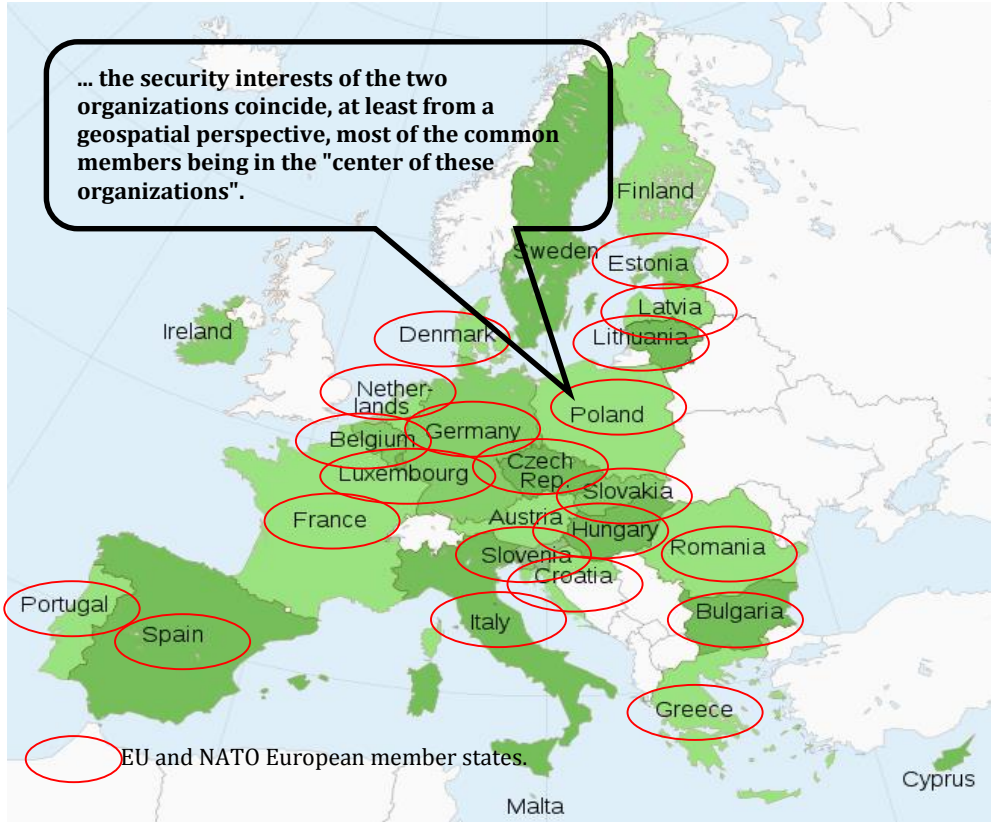

Figure no. 1: EU and NATO European member states.

From the broad spectrum of hybrid threats, such as the proliferation of weapons of mass destruction, cyberattacks, organized crime, disruptions in the flow of supplies of goods and services (energy, gas, food, etc.), migration, terrorism, I will focus on the last one.

I am convinced that the subject will continue to be one of maximum interest.

THE TERRORISM - GENERALITIES

What is terrorism, its forms, and characteristics have been debated and analyzed in various forums, but I propose an approach to the terrorist phenomenon from the psychological perspective of the subject, whether we are talking about

individual, group or terrorist organization and the psychological effect (post-traumatic reactions, behavioral changes, or even psychiatric disorders).

The terrorism is a phenomenon that must be managed and combated firmly and timely It can have serious effects on any state, not necessarily in terms of infrastructure or material damage (which are not negligible) but especially for the psychological and mass effect. Technological developments and the extensive influence of the media do nothing but exponentially amplify these devastating effects for society. The incidents of September 11 showed the whole world that even great powers like the USA are not safe from such a threat that can occur anytime and anywhere.

Defining the phenomenon of terrorism is not an easy task because this threat does not have an unanimously accepted definition due to its complexity and all forms of manifestation, and therefore we can appreciate it as "the totality of acts of violence committed by an individual, group or organization, to create a climate of insecurity or to change the form of government of a state" (Dex online, definition of terrorism, 2010).

The complexity of this phenomenon makes it manifest itself in various forms, such as international terrorism, political, religious, nuclear, state and many others. It is characterized by maximum violence, is practiced by non-combatants, is based on the element of surprise, is asymmetrical, wants to convey a message and in most cases is political and religious in nature due to differences in culture or mentality (Simileanu, 2004, p. 127).

Usually, the purpose of terrorist actions is to generate widespread media comments, the destruction or partial damage of significant buildings to the adversary, political negotiations, the assassination of key figures and why not, increasing the reputation and credibility of the group.

THE TERRORISM IN THE EURO-ATLANTIC AREA

The analysis of the EUROPOL report for 2020 (figure no. 2) shows a downward trend in the detection and detention of terrorism suspects in Europe, however Europe continues to feel the effects of jihadist radicalization, especially in countries like Austria, France, Germany and the United Kingdom, countries that have shown a somewhat exaggerated openness to migration specific to the last decades of the last century.

However, the number of terrorist attacks remains relatively constant: 69/2018, 55/2019, 57/2020, including successful, failed, and thwarted attempts. In the Eastern European space, actions have been few, detected in time and thwarted by the structures with responsibilities in the field, and those involved were detained and arrested. In other words, it can be appreciated that there were some intentions of terrorist attacks in this area as well, but all of them were countered in time.

Possible explanations for this situation can be attributed to the unprecedented information and technological explosion and to a certain "professionalization of terrorism".

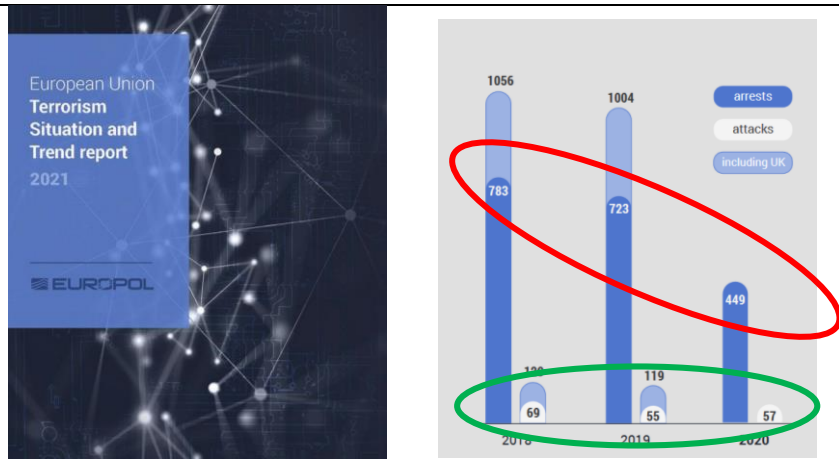

Figure no.2: Comparative analysis of terrorism in Europe (2018-2020) -according to *"European Union. Terrorism Situation and Trend report"*, (EUROPOL, 2021, p. 12).

Although it accounts for less than a quarter of all attacks in the EU, jihadist terrorism is directly responsible for more than half of the victims (12) and almost all the injured (47). The number of deaths and injuries has doubled from 10 deaths and 27 people injured in 2019 to 21 victims and 54 people injured in 2020.

In locating terrorist actions in the European space (figure no. 3), the predisposition of the subjects for Western democracies, cosmopolitan states, strongly developed economically and socially, with areas very frequented by foreign tourists, with large financial centers and large institutional headquarters is obvious.

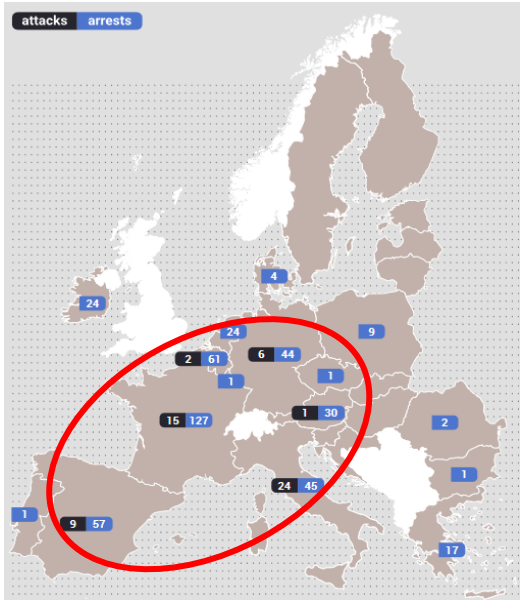

Figure no. 3: The terrorism in Europe, in 2020 -according to *"European Union. Terrorism Situation and Trend report"*, (EUROPOL, 2021, p.15)

THE PSYCHOLOGY OF TERRORISM, the psychology of the subject and the psychology of the effect of terrorist actions

The cruelty of terrorist actions and the violence directed, most of the times, against innocent civilians, led to an imprint of the subjects as individuals with serious psycho-behavioral disorders, impossible to integrate and adapt to a normal socio-cultural life. Thus, specialists in the field have identified two significantly different currents of opinion: the subject with pathological disorders, lacking awareness of his own deeds and the religious fanatic who acts under the influence of the so-called "divine commandments".

Indeed, there are very few cases of "psychopathic bombers" claimed by terrorist organizations, who usually act alone, based on claims and motivations, often illogical, meaningless. Most subjects do not suffer from mental illness, but are essentially normal, rational people, who evaluate the terrorist act from a cost-benefit perspective and summarize that it is profitable, not material but rather ideological, mystical-religious.

The second perspective, that of the suicidal fanatic, requires a higher level of education and training, allowing a comparative analysis, a quick decision, security and self-control, conscious self-destruction, all in the context of ideological motivations and / or political, non-material. The fact that some extremist leaders use quotes from religious texts to justify violence leads subjects to believe that they will assert their faith through violence. Usually, the political goals of extremist groups are masked by a religious discourse.

The terrorist attacks demand the maximum psychology of subjects strongly anchored affective and emotionally throughout the action. Affective tension, anxiety and stress increase with the action, reaching maximum levels as deadline approaches and uncertainty about possible hiccups or authorities` reaction increases. The psychological behavior of the subjects oscillates, the prolongation of the actions themselves leading to the appearance of a state of physical and mental exhaustion of them, which begin to make mistakes, this being the optimal time for intervention.

We can summarize that the subjects are predominantly young, without family obligations, balanced, educated, with significant physical abilities, strongly motivated, but very easily influenced by the socio-cultural and religious group (figure no. 4).

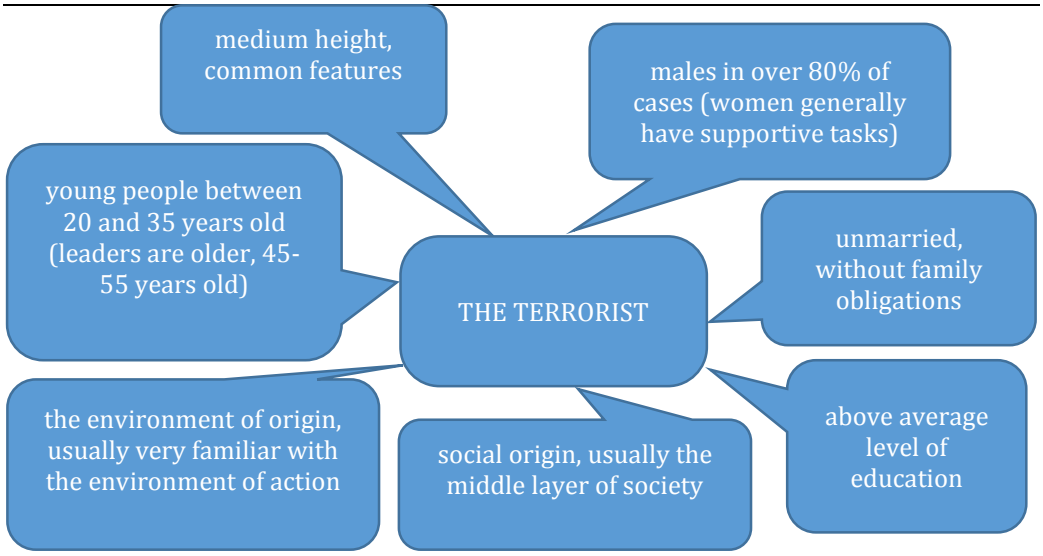

Figure no.4: General psycho-behavioral traits of the terrorist

However, the efforts of specialists to outline a unitary behavioral profile, unique and generally valid, have not proved sufficient, finding among the subjects as many similarities as differences.

The effects of terrorist acts, in addition to direct casualties, are significant, far-reaching, and long-lasting. Basically, direct victims as the main target of terrorism, are in fact in many situations, just means to reach the intended purpose, a kind of "cause of effect".

Many of the psychological consequences of terrorism (Figure 5) are like those seen in other disasters (natural disasters, serious and large-scale accidents, organized crime, rape and robbery), but most studies focus on post-traumatic stress disorder (SPT).

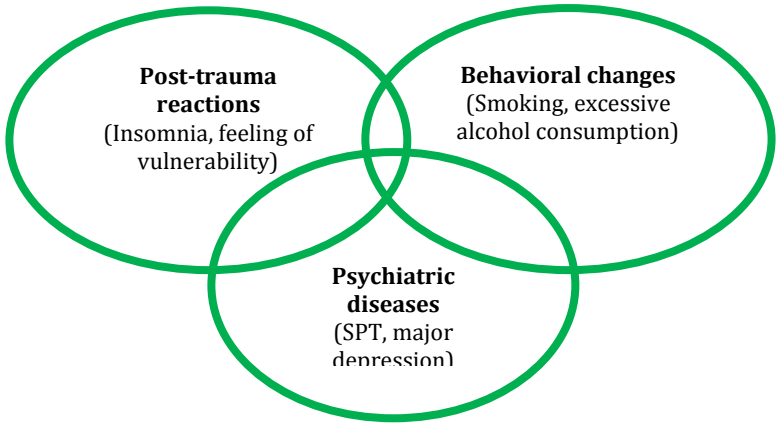

Figure no. 5: Psychological consequences of terrorism

The symptoms of PTSD are recurring memories, intrusive dreams, or thoughts (sudden and involuntary), isolation from people and certain situations, avoidance of what may remind you of the event, insomnia, extreme vigilance. In some situations, we may encounter increased consumption of alcohol and banned substances, domestic and interpersonal violence.

The terrorism can significantly disrupt the functioning of society on long-term - by eroding the sense of community and national security, damaging morale, opening ethnic or racial, economic, and religious fissures.

The current COVID-19 pandemic, one of an unpredictable magnitude and aggression, has also impacted the terrorist phenomenon in the Euro-Atlantic area. The measures like lockdowns, traffic restrictions, face masks, significantly influenced both the subjects `modus operandi and the purpose of the terrorist actions. The effects of these restrictions have already met last year in Belgium and Czech Republic.

Due to the temporary restrictions caused by the pandemic, the opportunities for large-scale attacks, with many victims, were significantly limited, public spaces (museums, theaters, churches, stadiums), public transportation, airports, tourist areas, reducing both their activity, as well as the maximum number of participants.

But we can say, without fear of being wrong, that the COVID-19 pandemic also brought through the polarization of society, misinformation and conspiracy theories, enough panic, fear, social anger, violence, so terror.

Instead of concluding, the question arises:

"Aren't we witnessing a different kind of terrorism?"

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REGULATION OF OFFENCES AGAINST PUBLIC SECURITY IN THE CRIMINAL CODE OF ROMANIA

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Abstract

The aim of this article is to highlight the place the Romanian lawmaker has given to criminal offences against public security in the criminal law. At the same time, we seek to delineate the legal object of crimes against public security from that of crimes that affect relations of social coexistence, especially those protecting public order and peace. Knowledge of the legal object contributes to a better understanding of the concepts of public security and social order that are interdependent with law and human capital. Also, through the method of documentation we aimed to highlight, in the context of the pandemic: some legislative changes that had an impact on the activities carried out in the field of public security; the main measures taken to ensure the safety of the person and the observance of health measures in criminal proceedings; the activities that were carried out online in the judicial proceedings and the manner in which the intra-institutional communication or inter-institutional communication took place; the main changes brought by the legislator in the matter of criminal offences against public security (safety).

Keywords: *public, security, forensic, criminal offence, pandemic*

INTRODUCTION

In order to understand public security and to have a sense of peace in the public space, and not only, it is necessary to be aware of the preoccupations of specialists in several fields.

The change in perception is determined by several factors of an economic, social, educational nature, by the values protected by the legislator, by the rapidly changing environment, and by the known risk (For the interpretation see S. Madai, 2020a, pp. 188-194).

If any unexpected conditions occur which lead to changes in behaviour in a particular territory or at regional level, the feeling of insecurity leads to health damages, and may result in atypical safety and reaction issues.

The prevention of and fight against the commission of criminal or contravening acts depend, on the one hand, on the extent to which the provisions of the law are known, the protection measures being applied by fields of activity, and on the other hand, on the level of education of each individual, who can educate others, even members of one's family, or receive educational messages.

The process of administration of justice with respect for fundamental rights and freedoms is essential in ensuring a climate of public safety in which institutions should be efficient, the human resources involved in functional systemic mechanisms should use forms of communication in good faith and risks should be known, understood by all parties in the public space and every individual should be aware that they have constitutional duties and obligations arising from the profession they carry out (See in Hungary: S. Madai, 2020b, pp. 49-53) .

I. CONSIDERATIONS REGARDING THE USE OF TECHNOLOGY IN A PANDEMIC CONTEXT

The management of crisis situations also implies the existence of specific regulations ensuring the general framework and/or the foundation for the adoption and applicability of certain necessary regulatory acts, depending on the types of epidemics/epizootics, etc. We have identified specific regulations in the content of the regulatory framework of Romania (Emergency Ordinance, 2004), that had been applicable prior to the COVID-19 pandemic which was declared in March 2020, from which date on several aspects were regulated, including the establishment of the duties of state bodies empowered to intervene in the implementation of risk plans developed per field of activity.

The efficient implementation of urgent measures also implies the existence of a financial framework to support the costs generated by the pandemic context (Cîrmaciu, 2020, p. 89).

The emergence of the pandemic in 2019 caused a revision of this regulatory framework, given the urgent need to adopt measures imposed by the evolution of the epidemiological situation, the necessity of taking urgent/exceptional measures in order to protect human safety, the right to life, and to provide health safety.

The main regulatory acts on the basis of which specific measures were taken in the general pandemic context are the President of Romania's Decree no. 195 of 16th March 2020 establishing the state of emergency in Romania, as well as the decrees extending the state of emergency in Romania. To the same effect, we make reference to the government decisions establishing and extending the state of alert, and to the decisions of the National Committee for Emergency Situations and the County Committee for Emergency Situations regarding the regulation of restrictions imposed at national or local level in the alert period, as well as Law no. 55/2020 on measures intended to prevent and combat the effects of the COVID-19 pandemic.

In the area of information technology, the activities aimed at the procurement of technology have intensified, accompanied by a relaxation of the procurement procedures, as well as a dynamization of the research activity in the IT field, in

order to prepare a response measuring up to the severity of the effects of the pandemic. The activation of software that had been little used previously, the identification of cyber solutions by creating software with an auxiliary role of prevention and control, but also aimed at identifying and stopping the flow of fake information, were constant concerns for specialists from almost all public or private institutions/entities.

The means to be used during this period were specified in the Decree, namely: fax, e-mail or other appropriate means in the existing context, but with the due diligence required in order to ensure security, text transmission and the acknowledgment of receipt.

At the same time, we emphasize that common software was used, according to a single design ensuring a good interconnection of the computer systems necessary in order to monitor specific situations, such as the evolution of the pandemic both at national and world level (interactive topographic map systems, statistical and data reporting systems, including the setting-up of call centre cells, with a role in reporting and conducting epidemiological investigations).

In this respect, it should be mentioned that the activation/setting-up of alternative computer networks of an INTRA/INTER type in order to ensure the alternative security required for data collection/transmission and capitalization is a constant that contributes to communication in the context of the need for physical distancing. Thus, posting information on internal networks specific to a field of activity is the method by which operators/specialists in a particular field, along a systemic line, find out within a short period of time the remarks, proposals or criticisms regarding some issues that might affect their work.

In terms of recruitment of new employees, the activity of interviewing and recruiting applicants for the available jobs took place online. Also, the activities specific to professional training were carried out via certain online platforms.

During this period, the concept of globalization has been discussed, the tendency being to give up the paradigm and to highlight the specific elements of the concept of personal security and safety, at individual level.

Regardless of the field of activity, a large number of activities are carried out online, among which we mention: invoicing methods, various summoning methods, the conduct of evidentiary procedures, receiving documents through the computer system, examining documents/legal files, communicating the rulings of the panels of judges.

The intensification of security and safety measures is a need that also results from the fact that the circulation of documents within institutions, intra-institutional/ inter-institutional communication took place online to a great extent.

The revision of the work schedule and the introduction of a new work delivery system, *telework (remote work)*, brought about a paradigm shift in the labour market, meaning that we witness specific programs of work robotization, digitization of labour relations, which results in the emergence of a new category of employees on the labour market – remote employees.

The action impact is also felt at the level of state law enforcement institutions (Ministry of Internal Affairs, Ministry of National Defence), but also in ministries specialized in the enforcement of pandemic measures (Ministry of Health, Ministry of the Economy, Ministry of Education and Research, etc.).

The implementation of the operative and medical measures was achieved by formalizing a common inventory, and by concretely applying measures that, as part of the operative activities on the ground and inside the institutions, were meant to contribute to the prevention of contamination or to limiting the number of victims.

With reference to the activity of police officers in the judicial structures, circuits adapted to the circumstances/specifics/topography of the buildings and the specific nature of the activities carried out were put in place, such as installing plexiglas panels in the premises where the presence of the main procedural subjects, parties or other procedural subjects is required, as part of the legal procecedings.

The hearings of persons have been carried out by telephone, and in urgent or time-dependent works, appropriate means of communication for online or videoconference communication are used, depending on the logistics available to the bodies carrying out activities in this field.

Activities involving the public were suspended during the state of emergency, after which they were limited by reassessment, including by limiting the number of people allowed in a specific room.

The means used for communication are those specific to remote communication, including in terms of receiving complaints or petitions.

From the standpoint of the relationship between operators in various departments, the measures taken were minimal, given that the activity presupposes an ongoing relationship between structures. Thus, personal contacts were limited to the minimum, intra-institutional relations were maintained by telephone and by correspondence.

This rule was circumvented only in exceptional situations, as required by cases in which several different structures intervened, such as on-site investigation, actions in an integrated system, supplementing the personnel with human resources from other structures for the execution of missions, and other such situations that presented aspects of a specific typicality.

Regardless of the level at which the judicial institutions/bodies carry out their duties, they remain concerned with ensuring the necessary materials for the activities to be carried out in appropriate conditions, as safely as possible and in compliance with epidemiological measures.

In all specific activities, materials necessary for protection against SARS CoV2 virus contamination and for the reduction of the viral spread risks, have been made available to the personnel.

In view of minimizing the risk for employees to fall ill as a result of contact, a segmental plan for scheduling activities to be carried out from the office and online – from home, was implemented. The mixed model of work by shifts (alternating

from one week to the next) has been used in some institutions with responsibilities in maintaining public order and security.

As regards the *measure of checking people placed in quarantine or isolation*, it was implemented by online calls and/or eye contact, and in some localities checks, respectively communications with persons finding themselves in one of the above specific situations, were performed by means of unmanned aircraft (Elena-Ana Nechita Iancu, Marin Lazău Păcuraru, 2018).

In specific activities, workers from the public order and road control structures were equipped with body worn camera equipment for the audio-video recording of interactions between police officers and citizens/traffic participants.

In *criminal investigation*, judicial proceedings were carried out in accordance with the provisions of the Criminal Procedure Code, so they were conducted acording to the classical system, without any procedural differences as compared to the period preceding the pandemic.

In terms of the relationship between the criminal investigation bodies of the judicial police, we highlight the fact that major changes occurred, namely: discussions were conducted by telephone and the circulation of documents was carried out by correspondence, except in urgent situations where it was necessary to apply preventive measures or other procedural measures that required the approval or authorization of the prosecutor.

In the *criminal prosecution* phase, videoconferences were organized, the hearings being conducted through online correspondence. The files are scanned and can be viewed according to the relevant legal provisions in the field and the capacity of the people involved. Summoning is also done electronically.

Law courts have taken measures based on the same Decree (Decree no. 195, 2020), as well as on the decrees extending the state of emergency on the Romanian territory. In Chapter 5 of the President's Decree no. 195, Art. 41-47 indicate the legislative framework in which the first measures were taken in the field of justice. We highlight Art. 42, paragraph 3, which shows that the courts have duties related to carrying out, approving and ordering the necessary measures for the conduct of court hearings by videoconference. Thus, at the level of law courts across the country, arrangements were made to participate in court hearings in an online format (videoconference), a standardized document which is signed by participants in court hearings, depending on the type of proceedings they agreed to, accepting several conditions that are needed for the proper conduct of a videoconference, such as: connectivity, time of unfolding, security of data and of communications made during the court hearing, solemnity, proof of the activity, possible subsequent controls by judicial inspectorates.

We specify that these arrangements also contain conditions regarding the administration of documents or material means of evidence that must be submitted in advance, and only in duly justified cases can be transmitted during the hearing in order to avoid a postponement of the trial.

The activity of the courts has been adapted depending on the specifics of the case, so as to take the form of online debates, the parties agreeing or not to this procedure.

The necessary translations and/or oral interpretations in judicial proceedings were carried out by means of either synchronous or asynchronous remote communication equipment.

Also, another sub-domain of activity with maximum degree of risk among the classic methods of conducting meetings between litigants and communication between participants in the criminal proceedings is the communication of procedural documents.

If the presence of persons was necessary in the courtrooms, in cases of special urgency (within the meaning of Art. 42 par. 1 of Decree no. 195), lists indicating the situation for each day were drawn up, and with the help of clerks in the access area, the observance of the circuits established was ensured, according to the topography, the specificities of the buildings, the type of case pending before the court and the scheduling announced in relation to the time range allocated to the activity for which the person concerned was invited. The hearings of persons in criminal cases should be conducted by videoconference.

Within the various departments, activities were limited, sometimes suspended by decisions of court presidents. For example, the Archives and Registry Department of the courts conducted, depending on the epidemiological situation, online or fax operations and e-mail was the main means of communication.

The rulings of the panels of judges with regard to the case were communicated by the court clerk by telephone to the parties, lawyers and experts, judicial liquidators, other participants, according to the law.

The topics of non-unitary practice, works specific to professional education, as well as other communications between the courts took place through the internal network.

II. PLACE OF CRIMINAL OFFENCES AGAINST PUBLIC SECURITY IN THE ROMANIAN CRIMINAL CODE

Title VII of the Criminal Code of Romania (CP, Law no. 286/2009), with the marginal name *"Offences against Public Security"*, is structured into several chapters. Therefore, through each chapter, social values that are important for the smooth conduct of social relations, partnerships or activities regulated by law are protected. Values are protected by criminalizing acts as criminal offences in relation to the importance of social, human values and social relations (L. Popoviciu, 2014, p. 147).

If the values protected by law are respected, on the one hand this will increase the degree of trust in the institutions/entities that take part in consolidating a safe environment around all of us and on the other hand, it will change the degree of perception of peace around us, trust among peers, the complexity of activities specific to maintaining public security, which means more than just public order and peace.

In this respect, I refer to Title VIII of the Criminal Code with the marginal name "Offences That Harm Social Relationships", structured into three chapters which, through Chapter I with the marginal name "Offences Against Public Order and Peace" delineates the legal object from that which is protected by Title VII.

Title VII of the Criminal Code is structured into six chapters that include offences whose legal object protects public security. The marginal names of the chapters are as follows: "Offences Against Railway Traffic Security" (Chapter I), "Offences Against Public Roads Security" (Chapter II), "Violation of Rules for the Control of Weapons, Ammunition, Nuclear Materials and Explosives" (Chapter III), "Violation of Rules Established for Other Activities Regulated by Law" (Chapter IV), "Offences Against Public Health" (Chapter V), "Offences Against the Security and Integrity of Computer Systems and Data" (Chapter VI).

By following the preference of the Romanian legislator to group criminal offences into the above-mentioned chapters, we note that social values specific to the fields of activity indicated in Chapters I, II, III, V, VI and social values pertaining to certain professions or activities "for which a permit is required by law" (Criminal Code, Art. 348), are all included in the category of public security. As a result, in order to understand the concept of public security (or public safety) from a legal perspective, it is necessary to know, understand and deepen, in addition to the criminal legal rules, the regulations in the special laws applying to professions in various fields.

III. CHANGES IN THE MATTER OF OFFENCES AGAINST PUBLIC SECURITY IN THE CONTEXT OF THE PANDEMIC

With reference to the criminal offence provided in Art. 352 with the marginal name "Failure to Prevent Diseases", we specify that by Government Emergency Ordinance (GEO) no. 28/2020, the legal content was modified. In the standard version, we notice that the material element is achieved by not complying with some measures that are required for quarantine, or some hospitalization measures. Quarantine is defined in the same Article, paragraph 9, as "restriction of activities and separation from other persons". Therefore, the legal text shows the meaning of the concept of quarantine including by indicating the place where it is carried out, in specially arranged premises. Persons against whom quarantine-specific measures may be imposed are persons who are ill or suspected of being ill, without specifying the disease. The purpose of imposing a quarantine is to prevent the spread of infection or contamination. In the case of the aggravated variant indicated in Art. 352, paragraph 2, the material element is achieved by "non-compliance with the prevention or control measures", with the essential requirement that the deed should result in the spread of infectious diseases. If in the variant provided in paragraph 1, the form of guilt is intention in any of the forms provided in Art. 16, paragraph 3, letters a, b, in the typical situation of paragraph 2, the form of guilt may be intention in the aggravated variant, or basic intent in the attenuated form provided in par. 4. The aggravated variant provided in paragraph 3 is committed, in

terms of the subjective side, with the form of guilt direct intent: the active subject knew that he was suffering from an infectious disease and the transmission is made by any means.

Failure to comply with quarantine or hospitalization measures (paragraph 1) or with measures for the prevention or control of infectious diseases (paragraph 2) if they cause bodily injury to one or more persons (paragraph 5, sentence 1) or the death of one or more persons (paragraph 5, sentence 2), the form of guilt is oblique (exceeded) intent. If this modality is committed with the form of guilt basic intent (paragraph 7), the legislator provides penalties (punishments) with a special minimum and a special maximum higher than the penalty provided for in paragraph 4, which refers to the deed committed with basic intent. If the transmission of the infectious disease results in the bodily injury of one or more persons (paragraph 6, sentence 1) or the death of one or more persons (paragraph 6, sentence 2), the form of guilt is oblique intention. The penalties provided by law are as follows: in the simple form, imprisonment for no less than 6 months and no more than 3 years or the payment of a fine; imprisonment for no less than one year and no more than 5 years, in the aggravated variant (paragraph 2); imprisonment for no less than 2 years and no more than 7 years in the aggravated form (paragraph 3); in the attenuated form, imprisonment for no less than 6 months and no more than 3 years or the payment of a fine; for the transmission of infectious diseases, in cases where a bodily injury occurred, imprisonment for no less than 3 years and no more than 10 years; for the transmission of infectious diseases, in cases where death occurred, imprisonment for no less than 7 years and no more than 15 years.

In the same context of the pandemic, in 2020, the legislator introduced in the Criminal Code of Romania a new Article 352[1], with the marginal name *"Omission to Declare Information".* The material element is achieved by omitting to disclose essential information "about the possibility of having come into contact with a person infected with an infectious disease". The active subject is not circumstantiated (not the object of aggravating or mitigating circumstances), it can be any person, and the obligation to give, to disclose information is related to several categories of persons, namely: - persons provided in Art. 175 of the Criminal Code, i.e. a public servant (par. 1, par.2); - medical staff; - persons from the unit in which the active subject carries out his activity. The penalty provided by law is imprisonment for no less than 6 months and no more than 3 years or the payment of a fine.

We also retain, from the doctrine (M. Pătrăuș, D. Pătrăuș, 2018, pp. 49-58) in the field of international judicial cooperation in criminal matters, the references of the authors to Law no. 302/2004 and the list of the 39 criminal offences, among these being mentioned the "conduct which infringes road traffic regulations and which, if punishable in the issuing Member State, gives rise to the recognition and enforcement of the judgment, without the need to check double criminality" in relation to the offences against road traffic security provided for in the Criminal Code in Title VII, Chapter II, Articles 334-341.

In the Criminal Code of Hungary, in Chapter XXX, with the marginal name "Offences Against Public Security", Sections 314-325 include offences which the

Romanian legislator provided for in the special law. An example in this respect is Section 314 of the Criminal Code of Hungary which has the marginal name of "Acts of Terrorism", and the following articles, 315, 316 which do not have a marginal name, but from the legal content it results that the person who "instigates, proposes, offers, adheres to or collaborates in the commission of any act" provided in par. 1, par. 2 of Section 314 or the one that threatens to commit an act of terrorism is also punishable. In the Romanian legislation, the offences provided for in Chapter IV, Art. 32-38[1] are to be found in Law no. 535/2004. Section 321 of the same code criminalizes acts that are typical to "Participation in an Organized Criminal Group", whereas, in the Criminal Code of Romania, Art. 367 provides for the "Creation of an Organized Criminal Group", but is placed by the legislator in the chapter on offences against public order and tranquility.

CONCLUSIONS

In the context of the pandemic, changes have been necessary both in order to toughen the penalties provided by law and to help prevent infectious diseases, by ordering, enforcing and complying with measures applicable in daily activities in each field.

The main measures complied with by persons in the judicial system in order to ensure personal safety in a pandemic context are related to the observance of health rules, as well as to the avoidance of overcrowding in the common areas inside the institution.

In the field of justice, the activities carried out online are numerous, from summoning, the unfolding of some evidentiary procedures, the receipt of documents through the computer system, the examination of documents/the legal file to the notification of the rulings of judge panels.

The circulation of documents within institutions took place mostly online, but security and safety measures need to be intensified.

At the end of 2021, it is still necessary to maintain physical distance while also taking protective measures, such as wearing a sanitary mask and complying with personal and collective hygiene measures in all areas of socio-economic life.

It is necessary to train personnel with regard to the occurrence, spread and risk of contacting the virus, the manner of obtaining the information necessary for prevention (only from authorized sources), all of the above in order to combat fake news.

Effective communication is achieved if there is coordination on the vertical level, between decision-making authorities and subordinates, as well as on the horizontal level, between departments on the same hierarchical level. The need for human resources remains high even if the activities have been carried out online.

We notice the tendency to give up on the concept of globalization as a paradigm and the new orientation towards the concept of personal security and safety, at individual level.

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CONSIDERATIONS REGARDING THE OPERATION OF MILITARY POLICE, AS AN INTEGRAL PART OF THE JUDICIARY

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Abstract

Judicial safeguards are particularly important and regulated in detail as fundamental human rights, in proceedings brought before domestic, as well as international criminal courts, with pertinent provisions being established as to the legality of the crime and of punishments.

At present, in the series of specialized conferences with a role in highlighting the importance of implementing the concept of "need for high social capital", it is emphasized that the application of the principles of criminal proceedings provides the foundation for citizen protection as an integral part of public safety, the entire edifice of criminal procedure rules being built on these principles.

Basically, the need for social security offered through the activity of forensic investigation of criminal offences cannot be dispersed among disciplines auxiliary to forensic science without the major contribution of criminal law.

Keywords: *military police, judiciary, safety, social capital*

INTRODUCTION

The fundamental principles of criminal law must be guidelines for both those who are called upon to prepare rules in criminal matters and those who are required to enforce such rules[1]*. Therefore, in the field of cooperation between civilians and the military (Civil-Military Cooperation/CIMIC)*[2]*, having good knowledge of these rules is an essential condition for the development of a coherent criminal procedure system, updated so as to respond to the predictable social need of generating a state of safety for the citizen. I consider the new regulatory act "the draft of the Military Police Law"* (http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?cam=2&idp=18515), *which is currently undergoing the procedure of parliamentary debates, as a benefit*

[1] www.mpublic.ro/ncpp.pdf, accessed on 03rd January 2016.
[2] https://en.wikipedia.org/wiki/Civil-military_co-operation, accessed on 16th October 2021.

offered to society, in a context where the unusual challenges raised by the social environment have major influences, and the need for safety is felt ever more acutely even at a personal level.

The adoption of a minimum set of provisions of the special criminal procedure applicable to the military is meant to remove dangerous manifestations which undermine the social relations specific to the military activity, especially institutional ones. (Iancu, Lăzău Păcuraru, 2019, pp. 205-218).

I. BRIEF HISTORY OF REGULATIONS

The history of the Military Police is closely related to the history of the Romanian Gendarmerie, from which it is originated, the first attestations of the "*troop police*" activity being found in the deeds of establishment of the "Gendarmerie" of 3rd April 1850, issued by the ruling prince Grigore Alexandru Ghica[3].

The reference periods for the emergence and dynamics of the military police, as well as the regulatory acts on which was based the specific activity, especially the judicial one, are presented as follows.

1.1. The first code of military justice

The so-called "code of military justice", which appeared rather late, almost seven years after the Constitution of 1866 which foreshadowed its appearance, consisted of the *Military Criminal Codex with Its Procedure of 1852* (*Condica penală ostășască cu procedura ei din anul 1852)*. The said *Codex* was to become, as of 24th February 1860 (through a decree of Alexandru loan Cuza, it was subsequently enforced in both Principalities), the only law on the organization of military justice in the young Romanian state, a law that was enforced until 1873, when it was replaced by the *Military Justice Codex* (*Codicele de justiție militară*) as promulgated by Decree no. 828 of 5th April 1873 (Siserman, 2004, p. 127).

Over the course of time, the code was found to be out of sync with reality (as the law did not take into account the historical needs and judicious principles resulting from the development of the military body) and resulted in consequences that were emphasized during the War of Independence of 1877 and after the proclamation of the country as a kingdom in 1881. Therefore, only eight years after its promulgation, it was necessary for a large number of provisions of the code to be amended and supplemented in order to adjust them to the military structures created and operational at the time.

1.2. Criminal procedure carried out by the military judicial authorities in the interwar period

In terms of procedure, the joint judicial authority had at hand two methods of investigating the facts, one being of an *administrative* nature, and the other, of a *judicial* one.

Unlike the administrative police, whose duty was to ensure public order and tranquility, to take measures in order to prevent various crimes against persons

[3] www.forter.ro. The term Military Police dates back to 1893, when the legislator Lascăr Catargiu promulgated the "Law on Rural Gendarmerie", with the approval of King Carol I (Charles I).

and property, therefore, to fulfill a preventive role, the judicial police had the mission of ascertaining the crimes committed, of discovering the culprits, of collecting evidence of guilt and of the cooperating with the justice system in order to repress crimes.

The army had these two categories of police, fulfilling almost the same tasks: the first one consisted of the *borough commands / garrisons (**comenduirile de piață/**garnizoan*e), which also had disciplinary duties, and the second was the *military judicial police*, whose powers were exercised by specialized personnel.

In order to discover the crimes committed, the investigations were carried out for the purposes of and in accordance with the Code of Military Justice, and, to ensure the due course of justice, that legal text was corroborated with others, stating that all investigations were carried out *"under the authority of the commanding general", by the bodies* indicated therein (Code of Military Justice, 1937).

Following the demobilization of the army, which was initiated on 1st July 1918, military police formations organized "checkpoints over the demobilized, posts, patrols and detachments for the surveillance thereof, so that the demobilization takes place in an orderly manner".

After Romania entered the Second World War, on 22nd June 1941, the military police troops carried out specific missions, such as combating terrorist actions; monitoring the guardianship of buildings of economic importance; strengthening internal order measures, etc. This structure also made a significant contribution in the second stage of Romania's participation in the Second World War. At the end of the world conflict, specialized military police formations were disbanded.

In 1947, a Military Police structure was set up, in order to coordinate the specific activity regarding the maintenance and control of military discipline, as well as operative actions for guidance of the movement of military vehicles. To this end, the following departments were established: "Order and Discipline", "Traffic Control and Guidance", "Special Criminal Investigations", "Military Prisons", etc.

1.3. Amendments to the code of military justice

In the period after 1947 (Zidaru, 2006, pp. 195-203), it is noted that the activity itself was oriented towards the abrogation of some articles of the Code of Military Justice, by reason of the obligation to reduce the number of soldiers, as a result of our country finding itself on the losing side after the Paris Peace Treaty.

First stage. After the abrogation of 98 articles, action which was specific to this stage, through various successive regulatory provisions, the *"Labour Service"* was established, as an institution of the new realities in the army, determined by the regime that was about to be put in place[4]. Members of the formations of this Service were to be considered as military, with all pertaining rights and obligations, being subject to the regulations, protection and liability provided for by the Code of Military Justice.

[4] Labour Service, a unit established by Decree no. 2/1950, with a role in the *"performance of construction works of general interest"* by the military, as shown in Art. 1 of the Decree, consulted on the website http://www.cdep.ro/pls/legis/legis, on 26th October 2021.

The Directorate of Military Justice ended its activity on 31st July 1952 through Law no. 71/1952 for the organization of military courts and prosecutors' offices, published in the Official Gazette no. 31 of 19th June 1952. On the same date, the Directorate of Military Justice within the Ministry of Armed Forces became the "*Directorate of Military Courts"* within the Ministry of Defence, a name that has been retained to this day.

However, until the publication of Decree no. 216/1960, regulatory provisions derogating from the common law that no longer had any justification remained in force in the Code of Military Justice. For example, Article 100 provided that, *"civil action before military courts may be exercised in conjunction with criminal proceedings only if the compensation concerned damage to property being used by the armed forces."* From that point on, military courts were to apply common law in order to resolve cases within their jurisdiction, to the extent that there was no special regulation.

Second stage. The abrogation of the Code of Military Justice through the entry into force of the Criminal Code of 1969, determined by the objective changes reflected in the Constitution of 21st August 1965, which stated "the liquidation of the exploiting classes, and the development of the moral and political unity of the people, forged under the leadership of the communist party", led to the criminalization of only those deeds in the new Criminal Code, as crimes against the defence capacity of the socialist regime.

It was only after the events of 1989 that a single structure was established, in line with the trends of modernization of the armies and the preparation of the NATO integration structure. After their establishment, military police forces carried out actions of public order maintenance (1990-1991) and were involved in a number of activities of the Ministry of National Defence (M.Ap.N.), such as: official visits, escorts or searches for deserters, peacekeeping actions, alongside NATO member states, in various military theatres in Angola, Albania and Somalia, Kosovo, Bosnia and Afghanistan.

II. THE MILITARY POLICE AND THE NEED FOR REGULATION AT PRESENT

Against the background of the COVID-19 pandemic management, as of 16th March 2020, following the decree imposing the state of emergency on the Romanian territory[5], members of the Military Police gained increased visibility by participating in joint missions with forces of the Ministry of Internal Affairs in order to comply with the decisions specified in military ordinances and to implement measures for the prevention of the spread of the new coronavirus.

At present, the military police force operates in a restrictive organizational framework intended mainly for the execution of guarding missions by the military

[5] DECREE no. 195 of 16th March 2020 on the establishment of the state of emergency on the territory of Romania, published in the Official Journal no. 212 of 16th March 2020.

units in the organizational structure, missions of guidance and control of the movement of military vehicles[6].

Thus, important missions that are incumbent on the military police at NATO level, having to be regulated and transposed into specific national legislation, such as specialized assistance per fields of activity for the entire personnel of the Ministry of National Defence, the enforcement of law, order and military discipline, special criminal investigations, sorting, control, guarding and escort of prisoners of war in theatres of operations, are not included among the missions of the Romanian military police.

It would be especially important to regulate a refinement of the duties of military police personnel in the field of special criminal investigation.

Therefore, according to the law, the Public Ministry exercises, through (military and/or civilian) prosecutors the following duties: "*…b) leads and supervises the criminal investigation activity of the judicial police, leads and controls the activity of other criminal investigation bodies*"[7].

Judicial activity is constantly regulated in the criminal law, as well as in the law of organization and operation of the judicial system (judiciary) in our country, but in reality it is non-existent, this activity being carried out by the military criminal prosecution bodies, for the Ministry of Internal Affairs (M.A.I.), with the support of its own judicial police, an aspect that is somewhat controversial (the military function being a statutory one, regulated separately from that of the judicial police as public servants); however, in the structures of the Ministry of Defence this aspect is not regulated by law[8].

An explanation provided by the military prosecutors for this state of facts is that the special criminal investigation bodies of military origin do not have specific training for the criminal investigation activity, although, as noted, such a regulation does exist, but it has not been put into practice, and this is precisely the reason for the current initiative of making public the need to "activate" these structures that are perfectly regulated by law.

[6] ORDER no. 1428 of 12th September 2006 for the approval of "P.M. - 2, Rules regarding the conditions in which special combat vehicles can travel on public roads, the control of motor vehicles belonging to the Ministry of Defence and the accompaniment of military columns".

[7] Art. 63 of LAW no. 304 of 28th June 2004 on judicial organization, Art. 100 - (3) Military prosecutor's offices **have special investigation bodies put in their service**, in relation to which they exercise the duties provided for in Art. 63 letter b). https://www.mpublic.ro/ro/content/spm-serviciul-de-urmarire-penala-si-judiciar.

[8] Order of the Minister of Internal Affairs no. 216/2009 regarding the criminal investigation of the personnel in the structures of the Ministry of Internal Affairs published in the Official Journal of Romania no. 631 of 23rd September 2009. The institutions in the National System of Public Order and National Security, except the Ministry of National Defence, have developed their own specific regulatory acts establishing the competences and responsibilities of these special criminal investigation bodies in accordance with the legal rules provided in the Criminal Code and the Criminal Procedure Code.

My opinion in this respect is that military structures include personnel with legal training, even military approved according to the law[9], who, through minimum specialization in the criminal field, can successfully carry out the duties of special criminal criminal investigation bodies, regardless of the structure they are part of (military police and/or separate structures within military judicial bodies).

Although most NATO member countries, such as the USA, Germany, Bulgaria, etc., have clear procedures regarding the investigation of their own personnel in the military structures who commit criminal acts, this power being assigned to the military police, there is still a need to draft such legal rules at the level of the military structures of Romania.

In this context, the adjustment of *Law no. 346/2006 on the organization and operation of the Ministry of National Defence* created the legislative framework for a new conceptual approach to the use of military police in the Romanian Army, by including the duties, organization and operation of the military police and of special criminal investigation bodies in a special law, which is being debated in the legislative forum[10].

Thus, the draft law proposes the assignment of the field of competence to the military police, as a special judicial body with duties regarding investigation only for the criminal offences committed by the military, in order to[11]:

- carry out the criminal prosecution acts under the conditions provided by the Criminal Procedure Code;
- coordinate and enforce bench warrants regarding the military;
- participate together with other structures of the military police, as the case may be, in missions of pursuit, capture and escort of deserters.

Other fields assigned to military police structures are:

a) the field of ensuring the security of army personnel and of military objectives;
b) the field of observance, maintenance, restoration of internal order and of

[9] Internal regulations of the prosecutor's offices / Text updated on the basis of the amending regulatory acts, published in the Official Journal of Romania, Part I, until 5th June 2020. Published in the Official Journal, Part I no. 1004 bis of 13th December 2019.
Art. 14 The management of the Prosecutor's Office attached to the High Court of Cassation and Justice and its structures issue an assent for the appointment of the specifically designated officers as special criminal investigation bodies, at the proposal of the competent bodies, and withdraw the assent granted to specifically designated officers who have not properly performed their work-related duties; http://pcaconstanta.mpublic.ro/regulament_pca.htm, accessed on 22nd October 2021.

[10] https://www.google.ro/search?q=proiect+lege+politie+militara+camera&sxsrf=AOaemvKescmehU7PjpDIRzEg-Li6J3GXog:1634891115899&ei=a3VyYdCNom6kwXtroPwAw&start=0&sa=N&ved=2ahUKEwif5NWBzN3zAhUJ3aQKHW3XAD44FBDy0wN6BAgBEEA&biw=1588&bih=728&dpr=1, accessed on 21st October 2021.; http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?cam=2&idp=18515, accessed on 25th October 2021. *Draft Law on the duties, organization and operation of the military police.* Art. 5. (l) Within the Directorate there is a structure consisting of officers who are law graduates, specifically appointed by the Minister of National Defence, with the assent of the General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice, who have the status of special criminal investigation bodies.

[11] Art. 6, Art. 9, Art. 11 of the *Draft Law on the duties, organization and operation of the military police.*

military discipline;
c) the field of maneuver and mobility support, of control and guidance of the movement of motor vehicles in military columns;
d) the field of guidance of the evacuation of displaced persons during the unfolding of military actions;
e) the military police participate in guiding the evacuees or refugees out of the area of responsibility of the armed forces;
f) the field of collection, reporting, dissemination of data and information for the specific activity.

Romanian or foreign civilian and military personnel, as well as the civilian population have the obligation to follow the instructions of the military police officers in the exercise of their duties.

III. THE MILITARY POLICE AND THE NEED FOR REGULATION AT PRESENT

MILITARY POLICE IN THE EUROPEAN UNION (E.U.)

The Treaty of Lisbon introduced the concept of a European capability and armaments policy and also established a connection between the Common Security and Defence Policy (CSDP) and other Union policies, calling for cooperation with the Commission whenever necessary[12].

The E.U. participates in various forms of in-depth coordination and cooperation, in particular with the UN and the North Atlantic Treaty Organization (NATO), as well as – inter alia – with the African Union, the G5 Sahel, the Organization for Security and Cooperation in Europe, and the Association of Southeast Asian Nations[13].

The European Union must acquire the "political will" to build its own army – a concept which reflects the E.U. officials' flirtation with the idea of setting up their own military structure (Leyen, 2020).

A structure with military specificity in its incipient stage is the EUROGENDFOR (European Gendarmerie Force) integrated police unit[14]. Its staff consists of members of a *police force with military status*, and the distribution of the staff is done according to national regulations – but the staff is always selected from force units of a gendarmerie type.

The structure has operational characteristics such as the following: a) it consists of robust forces, that are quickly implementable, flexible and interoperable; b) it is a multifunctional body capable of carrying out a wide range of executive police tasks; c) it is able to act in unstable environments; d) it may be either placed under a civilian authority or made part of a military chain of command, an area of responsibility (AoR) being assigned to it, depending on the operational situations created.

[12] Art. 42 paragraph (3), Art. 45 paragraph (2) of the Treaty on the European Union - TEU.
[13] https://www.europarl.europa.eu/factsheets/ro/sheet/159/politica-de-securitate-si-aparare-comuna, accessed on 23rd October 2021.
[14] https://eurogendfor-org, accessed on 23rd October 2021.

CONCLUSIONS

The considerations above concern the duties of the military police as a judicial body, which are strictly limited to the current and future provisions established by law. Military police missions are not an instrument of "social repression", on the contrary we can say that the citizen will understand how this structure with military specificity contributes to giving a final shape to a solid social capital in order to maintain peace and general order, which are so needed in society.

The approach of highlighting from a historical perspective and then from a judicial one the origin of the military police structures in our country has the role of diminishing, by turns, the citizens' fears with regard to the establishment and repositioning of the competencies of this structure, which are adapted to the needs of the context in which we live, situations where measures of a military organizational nature sometimes become effective and even desirable.

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THE CRIMINAL LEGAL REGIME OF THE PREPARATORY ACTS

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Abstract

This article deals with the particular aspects of the first phase of the external period of the intentional criminal activity, the phase of preparatory acts, essentially problematic, regarding the criminal legal regime and in particular their criminalization and sanctioning.

In committing crimes, use of the preparatory acts had and has, not infrequently, a high frequency.

Criminal law theorists have called "iter criminis" the criminal activity of a person, which, like any human activity has a development in time and space. During the course of the criminal activity, several phases can be distinguished.

It is true that the legislator criminalizes and punishes acts that have produced a dangerous consequence, but it is no less negligible to take into account some stages that occur during the course of the crime and which, although they do not lead to dangerous consequences, are dangerous because they can they contribute either to the preparation of the commission of the crime, or they can present themselves even in the form of carrying out the criminal activity, which independently of the offender's will, or due to his intervention not to produce in the end the dangerous consequence.

A form of committing the crime is represented by its preparation by externalizing acts, activities that ultimately contribute to the creation of favorable conditions for obtaining the dangerous consequence accepted by the offender.

In this context, compared to the special implications that the preparatory acts have not infrequently had in the commission of criminal acts, the clarification of their problem represents both a doctrinal contribution and a practical necessity.

Keywords: *acts of preparation, crime, intention, incrimination, sanction*

INTRODUCTION

The institution of preparatory acts is known in the conduct of the intentional crime as the first phase of the external period.

During the preparatory activity, the perpetrator procures the necessary means to commit the act.

This preparatory activity presents a multitude of characteristics, conditions of realization, forms and a lasting manifestation.

The offender can produce the necessary objects, sometimes he can use them, or even adapt existing ones, he can seek to obtain the necessary information to help him achieve a desired result or he can even draw up a plan of action.

An important feature of acts of deprivation is that they are not part of the content of the rules of criminalization.

The notion, the characteristics, the incrimination and the sanctioning of the preparatory acts determined the orientation of some explanations and the tracing of a general content, developing a scientific analysis regarding them.

In the theoretical explanations of the preparatory acts, the most general and characteristic aspects of the preparatory acts that have been in time susceptible to further developments and edifying deepening must be clarified.

The preparatory acts, as a form of the intentional crime, must be analyzed scientifically and from the point of view of the fact that it follows in time as a stage of making the criminal decision.

The act of preparation is an activity that is preceded by a psychic attitude of the man who projects in his mind the crime with its development and its consequences.

The purpose of this paper is to develop the theoretical concept of solving the problem of one of the phases of the intentional crime, namely training in criminal law, as well as to review the principles of practical application of this concept.

I. EVOLUTION OF CRIMINAL ACTIVITY

"Criminal law is certainly a sensitive policy area, in which the differences between national systems remain substantial, for example in terms of types and levels of sanctions, as well as clarifying behavior as a crime or misdemeanor" (Mirişan, 2017, p. 12), however, a constant of criminal law in most criminal regulations is the institution I chose to present in this study: the preparatory acts.

In the view of general criminal law, the part intended for the forms of the intentional crime must clarify from objective scientific positions the evolution of the criminal activity, the stages it goes through in its development, the relationship between the different phases that distinguish in the criminal resolution, must define the intended crime , the forms it can take, as well as the evolution of scientific research on intentional criminal activity.

The doctrine of criminal law also has the task of scientifically analyzing each of these phases.

Only after clarifying these issues has it become possible to outline an overview of the forms of intentional crime of which they are part and the preparatory acts.

Distinguished legal theorists have addressed these issues of criminal law and developed them by clarifying the aspects of the place of each stage of criminal activity in its realization over time.

The crime committed is the typical form of the crime described in the criminal law, because it involves the production of dangerous consequences for society by violating fundamental rights, without which we would not be in the field of criminal law.

In the case of intentional crimes, the active subject of the crime first conceives the criminal activity, then executes it in order to produce the consequences.

The moment when the concordance between the deed of the person and the content of the incrimination norm is realized takes place when the criminal activity has been carried out in its entirety and the result has occurred. Basically, then the criminal decision was made.

In other words, the criminal activity has reached the phase of consequences" (Nistoreanu, Boroi, 2004, p. 25).

The non-production of the socially dangerous consequences does not mean that the activities reached in the phase of the execution of the crime cannot be incriminated, and in very special cases even those that form only the preparation of the crime.

What is certain is that, in the course of the crime, two phases are distinguished:

- The internal phase, which takes place in the inner forum of the person.

In this phase, the person conceives the crime, the idea of crime, the type of crime that he would like to commit and which in its development has 3 essential moments:

- sprouting the idea of committing the crime
- own deliberation on its commission
- the date of the decision to commit the crime.
- The external phase, which, as the word says, "external" is achieved by transposing the criminal decision taken by the perpetrator and which is the last moment of the internal phase.

By moving to the external phase, the criminal judgment is expressed in the following forms:

- form of preparatory documents (preparatory),
- attempt,
- the crime committed (Pitulescu, Medeanu, 2006, p. 159).

If the internal phase of the intentional crime by making the criminal decision forms the subjective side of the crime, from which the intention emerges as a form of guilt, the external phase realizes the objective side of the crime.

Making the criminal decision and even its manifestation by word of mouth, by oral transmission, although, as I said, it realizes the subjective element of the crime, it has no criminal relevance. Only the externalization of the decision through

material activity is likely to harm the social relations protected by the criminal law (Boroi, 2006, p. 135).

Therefore, in the external phase, the criminal decision is externalized by acts of nature to highlight it, at which point it acquires interest from a legal point of view (Boroi, 2006, p. 135).

So far, criminal thinking is not a danger, a threat as long as it has not been realized in a deed.

The criminal decision and its manifestation do not attract the criminal responsibility of the one who took it even if he communicated it, because they do not correspond to the concept of crime (Boroi, 2006, p. 135).

However, when the criminal decision taken is carried out through a material activity, then it acquires criminal relevance and then the external phase of the crime is carried out.

It is the moment when the perpetrator proceeds to carry out the decision taken.

This criminal material activity can be accomplished by one or more acts and has a development over time.

It results that the external phase of the intentional crime, manifested through material activity has in its turn several forms of development:

- the activity of the person carried out in order to prepare the crime which corresponds to the *phase of the preparatory acts* and in respect of which, although it is externalized and part of the external phase of the crime, the question arises whether it is part of the objective side of the crime

- the activity of the person performed in order to carry out the criminal activity that corresponds to the *phase of the execution acts*

- the activity of the person for the full accomplishment of the physical activity and the obtaining of the dangerous result that corresponds to the phase of the *socially dangerous consequences*.

These forms of criminal activity differ from each other in relation to the moment when it is or at which its development has taken place, and which may be closer or less close to the final moment of the occurrence of the consequences that the law had in view.

Definitions of the forms of the crime were also given in the doctrine: "by the forms of the crime are meant those types or variants of the crime that differ from each other according to the stage in which they are or at which the criminal activity has stopped. (Boroi, 2006, p. 136).

The Romanian criminal law considers that the forms of human activity that can harm the protected social values are dangerous.

Under these conditions, the question arises whether all forms of intentional criminal activity have criminal relevance and can withstand the rigors of criminal law through criminalization and the application of a criminal sanction.

II. ACTS OF PREPARATION – FIRST PHASE OF THE EXTERNAL PERIOD OF THE CRIMINAL ACTIVITY

The first of the forms and phases of the intentional crime that is externalized is the acts of preparation.

During the preparatory activity, the perpetrator procures the means and tools that may be necessary for the commission of the act, a procurement that can be done by producing, adapting, acquiring, or obtaining information to help him.

At this stage, the perpetrator can develop a plan to commit the crime.

Practically, in the phase of preparation acts is included the entire activity of preparation of the crime preceding the execution.

It is situated in time within the "iter criminis", after the criminal decision has been taken, being the first stage of its exteriorization and before the actual execution of the dangerous criminal activity through material acts susceptible to dangerous consequences.

Being carried out after the criminal decision has been taken and in the execution of the decision to commit a crime that they are preparing, it results that they can only be found for the intentional crimes.

They are not part of the criminal activity of execution, but are only likely to allow the transition to execution (Pitulescu, Medeanu, 2006, p. 161).

"According to the French professor Garraud, preparatory acts are those which do not enter or do not constitute the execution of the projected crime, but which are linked in the perpetrator's intention to this crime and which contribute or tend to contribute indirectly to its execution" (Pitulescu, Medeanu, 2006, p. 161).

It has been found in practice that in most cases, the perpetrator does not proceed to the execution of the criminal judgment before trying to ensure its success by preparing it in advance. He tries to create the most favorable conditions and means to be sure of the success of his criminal activity.

Only then, the perpetrator engages in the actual execution of the acts that characterize the material element of the crime, ie after preparing it.

We can state that the preparation for committing a crime takes place through preparatory or preparatory acts which consist of "certain acts, data acquisition activities, information or adaptation of the means or tools that will be used to commit the crime as well as creating favorable conditions for committing it" (Bulai, 1997, p. 390).

From the definition given to the training acts, their modalities can be deduced (Boroi, 2006, p. 137):

- the licit or illicit procurement of instruments or things to be used for committing the deed, making, modifying or adapting the instruments or things that will be used for committing the deed.

These are acts of material preparation.

We say that they are material because they involve performing acts that have a physical materiality, a physical existence.

For example, if the perpetrator wants to commit a murder, he can get a gun, if he wants to commit a theft, he can make a key to break into a building.

They can also be considered acts of material training (for example: procuring a knife, a poisonous substance, a rope, a ladder, the keys to open the locks, securing the means of transport, removing obstacles, etc.) (Basarab, 1997, p. 350).

- gathering information and data on the place and time of the crime or on the victim, her lifestyle, behavior and daily schedule, or on the object or objects pursued by the offender, the possibility of appropriating and capitalizing on them .

These are acts of moral preparation.

We say that they are moral because they do not presuppose acts that have a physical materiality, a physical existence.

They consist in collecting data, information that creates favorable psychic conditions for committing the crime (Bulai, 1997, p. 390).

Preparatory acts are possible in the commission of any intentional crime.

They must meet certain conditions in order to be considered as such:

- Being encountered in intentional offenses, it follows that preparatory acts must also be carried out intentionally (Mitrache, Mitrache, 2006, p. 233), they reveal the fact that the perpetrator foresaw and pursued the production of the result for which he prepares, sometimes this undoubtedly resulting from it (drawing up a sketch for a house in which the perpetrator entered), sometimes this being equivocal, the preparatory activity can be associated the achievement of a lawful purpose (the purchase of a knife), in which case it must be established with certainty whether they were committed for the commission of the offense.

- The preparation of the crime must be done by the perpetrator is with direct intent, thus seeking to ensure the success of his illicit activity.

- The preparatory acts must be carried out for the commission of the crime (the purchase of the knife must be made in order to injure a person, obtaining information on the whereabouts of the person when the crime will be committed).

- The acts of preparation must not be part of the acts of execution, ie not be required by the content of the rule of incrimination to achieve the content of the material element of the objective side, which delimits them from attempt, otherwise one of the most controversial issues in the literature Specialized.

Thus, any activity that falls within the material element of the crime "as well as those acts that, without being part of the illicit action, are directly related to it, being directed against the object of the crime" (Zolyneak, 1992, p. 378).

III. CHARACTERISTICS OF THE PREPARATION ACTS

The training documents have a number of characteristics:

- take place after the criminal decision has been taken;
- they can be material acts, when they materialize in a physical materiality, or moral acts when they do not materialize in a physical materiality;
- do not fall within the scope of criminal activity, are not part of the enforcement acts;

- represents an activity that precedes the execution;
- are likely to allow execution (Pitulescu, Medeanu, 2006, p. 161);
- contributes to the execution of the crime;
- creates the necessary conditions for the execution of the crime and the pursuit of the dangerous pursuit to be possible;
- have an optional character, for committing the intentional crime, its preparation not being obligatory;
- depend on the concrete way in which the perpetrator intends to commit the act and not on the way in which the incrimination norm is formulated;
- are possible in most cases, but are not mandatory;
- there are also situations in which the preparatory acts are not possible, the facts of danger being edifying in this respect (Pitulescu, Medeanu, 2006, p. 161);
- the preparation must be carried out intentionally;
- training can be carried out through a wide and varied range of activities that can be carried out in order to commit a crime in order to ensure its success;
- cannot be conceived only if the execution of the criminal judgment takes place within a certain time;
- they must be able to create favorable conditions for the commission of the offense;
- must be carried out to serve the commission of the offense;
- can be delimited in time and space;
- they presuppose a lasting manifestation;
- presuppose the existence of a period of time between the taking of the criminal judgment and enforcement in which they have effective trening;
- favors the production of the result;
- do not directly endanger the social values protected by criminal law.

IV. REGIME OF PREPARATION ACTS. CRIMINALIZATION AND CRIMINAL SANCTION OF THEM

The externalized criminal activity is preceded by the psychic attitude of the person to commit the crime, because first the thought of committing the deed is formed, then the decision is made to commit the deed and then it is passed to its realization.

The criminal decision taken can be externalized:

- or by a preparation of execution, when the perpetrator makes material or moral acts of preparation;
- either directly by execution which may remain in the form of an attempt or may produce a socially dangerous consequence by committing the crime committed or exhausted.

The Romanian penal code in force does not include a definition given to the preparatory acts, it only provides a definition of the attempt, this implying the execution of the criminal intention.

The doctrine has the task of defining the preparatory acts that have been seen as an activity of preparation for the commission of the crime by procuring tools, means and knowledge of the circumstances necessary for the commission of the crime, as an activity that precedes the execution.

The preparatory acts as a form of the external phase of the crime consist in the acts by which the realization is prepared, the concrete execution of the decision regarding the commission of the typical crime, being placed ante infractio (Tănăsescu, Tănăsescu, Tănăsescu, 2002, p. 257).

The question was whether they were a form of crime.

Preparatory acts (Basarab, 1997, p. 209) represents an independent form of crime that can be understood outside the content of the basic crime.

"However, independence is relative, because the meaning of the preparatory acts is fully realized only in connection with the subsequent forms and circumstances in which the legal content of the basic crimes is realized." (Tănăsescu, Tănăsescu, Tănăsescu, 2002, p. 257).

Complex discussions took place in the criminal doctrine regarding the criminalization and criminal sanctioning of preparatory acts.

The Romanian Criminal Code in force adopted the principle of non-incrimination of preparatory acts, not providing by a general provision the incrimination of these acts as a form of crime.

By way of exception, in some cases acts of preparation are criminalized as stand-alone offenses in the form of an attempt to commit a number of highly dangerous offenses, such as forgery or possession of instruments for the purpose of counterfeiting securities, in which case by committing the crime in consummated or tentative form, they will not be sanctioned separately as a competition of crimes, because they are absorbed in the committed crime.

In case of criminalization of the preparatory acts, their legal content is sufficient, in the sense that it does not need other additions (in terms of the subjective side or the objective side) (Tănăsescu, Tănăsescu, Tănăsescu, 2002, p. 258).

Therefore, the preparatory acts are not incriminated and sanctioned by the criminal legislation in Romania, except for the situation in which they represent independent crimes.

CONCLUSIONS

Crime is an antisocial activity, unsuitable for social relations.

It is all the more serious when it is committed intentionally, that is, when the perpetrator is aware of the production of negative consequences of his actions, consequences that he wants.

In fact, the intentional crime is the most common type of crime encountered in the judicial practice of states in general.

In its development over time, as a period, it goes through certain stages, each of them being characterized by a certain degree of execution of the criminal decision.

It is natural for the criminal law to incriminate the crimes committed, ie those for which the socially dangerous consequences provided in their basic contents or in the aggravated or attenuated contents have occurred.

There are situations in which the deed does not produce the socially dangerous consequence, remaining only in the form of decision-making, preparation (preparation) or execution.

Even if it does not produce the socially dangerous consequence, it can be incriminated and sanctioned.

Among the forms of criminal activity, particular aspects require the phase of preparatory acts, which immediately follows the internal phase manifested in the inner forum of the individual where the criminal decision-making process takes place and which reveals the criminal resolution as a result of the psychic attitude of the active subject.

Training documents do not have an express definition given by the Criminal Code.

The preparatory acts are located in time after the commission of the crime and are undertaken in order to ensure the success of the crime and to produce the dangerous consequence.

Acts of preparation can be acts of material preparation and acts of moral (intellectual) preparation.

They must meet clear conditions in order to be considered as such and have their own characteristics which distinguish them from other forms of crime.

They are found only in intentional crimes.

They are not incriminated and criminally sanctioned, except when they are independent crimes.

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PHISHING ATTACKS, AS A FAVOURABLE CONDITION FOR TERRORIST ACTIVITIES

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Abstract

Since attacks of a phishing type can be included in the category of cybercrime, this paper is aimed at presenting some theoretical aspects specific to this type of criminal offence, the goal being to create logical arguments that would result in conclusions liable to be put to use, but also some methods for counteracting this offence in an incipient stage. These cyber attacks are usually based on a user's ignorance about the ease with which he is making available, in a virtual environment, his bank account details, credit card details, other personal data, including access passwords. Thus, the money present in the bank accounts, which constitutes the material object of the offence, will be used, without the knowledge of the legal holders, by hackers for banking transactions, which are difficult to follow, in order to finance terrorist activities.

Keywords: *cyberspace, computer virus, phishing, cybercrime, terrorism*

INTRODUCTION

We consider phishing to be different from the classic computer virus in that the classic computer virus can affect both the hardware and the software, and the hacker mainly aims to destroy or delete files, delete information, block the operating system, etc., whereas the hacker who uses a phishing action is interested, in the initial phase, only in copying some information.

Therefore, when talking about a classic virus we do not refer to the background of the computer system, focusing instead on the form of corruption of the computer system, and "*phishing describes how the problem occurred, rather than how it behaves*" [Anderson, 2021].

According to other specialists, *"phishing is a form of fraud in the online environment which consists in using certain techniques to manipulate the identity of individuals/organizations in order to obtain material benefits or confidential information"* [Neagoe, Borşa, 2016, p. 90].

From our point of view, the most common phishing attacks can be considered as fraud committed by e-mail or by mobile phone and they represent a method by which the hacker, using an electronic message, tries to attract the attention of the customers of an institution, usually a bank, in order to take possession of personal data that will be used for financial transactions in favour of terrorist structures.

Usually, messages such as "*Important message – update of personal data, the failure to confirm the details of the online account will lead to its permanent suspension, or a request to enter a new password or the PIN code on the grounds that it is necessary to confirm or change such data*" [https://www.bancatransilvania.ro/securitatea-informatiilor/despre-phishing], can be found on links that imitate the official page of the banking institution.

I. BRIEF CONSIDERATIONS REGARDING THE PHISING ACTIVITY PROVIDED FOR AT THE LEVEL OF THE EUROPEAN UNION AND IN THE ROMANIAN LEGISLATION

At the level of the European Union, provisions on the prevention, combating and criminalization of terrorism are to be found in EU Directive [DIRECTIVE (EU) 2017/541], and those specific to criminal acts of the phishing type are included in the provisions of Art. 3 par. (1) letter (i) of the same regulatory act issued at European Union level.

Romania pays special attention to preventing, combating and criminalizing acts of terrorism, transposing into national legislation the regulations of criminal rules adopted at European level, this field being regulated mainly by a special law [Law no. 535 of 2004].

Given that the phishing act is a crime that occurs in a space without borders and at the same time follows a strong dynamic, being also characterized by anonymity, it is easy for a terrorist entity [see the definition according to Art. 4 par. 1 of Law 535 of 2004], or sympathizer of this structure, to initiate and perform terrorist acts via computer data systems.

If we refer to phishing attacks from the perspective of terrorism, we will define this type of criminal offence as an illegal interference in cyberspace whose action targets the computer systems of banking structures, or assimilated to such banking structures, in order to control bank accounts belonging to natural persons (individuals) or legal entities for the benefit of and in order to facilitate terrorist capabilities.

Taking into account the characteristics of crimes circumscribed to acts of terrorism and the manner in which terrorist entities initiate, support, carry out or facilitate attacks by using computer or telecommunications networks, in our opinion, terrorist acts of the phishing type form the object of the criminal offence provided for and sanctioned by the provisions of the Romanian special law [article 32 par. 1 letter q of Law no. 535 of 2004], in the case of unauthorized access to computer systems or data or unauthorized transfer of computer data, and those that have as a starting point the terrorist acts of the phishing type are regulated by the provisions contained in Art. 36 of the special law adopted in Romania, in the case of the crime of financing terrorism.

The substance of this paper deals with an analysis of the crime of phishing that is circumscribed to terrorism, from the perspective of Romanian legislation.

II. THE CYBER TERRORISM CRIME OF A PHISHING TYPE

Although the scope of the Romanian legal rule is much more comprehensive in the case of cyber terrorism, we will analyze only the manner in which the crime of cyber terrorism by phishing is provided for and criminalized in the Romanian legislation.

II.1 Legal object

The general legal object consists in the social relations that arise and develop in the human community, at local, national or international level, between individuals, authorities and other institutions, and which are based on mutually beneficial relations, aiming to protect the social value represented, which is, in this case, national security.

The complex legal object is composed of the main specific legal object represented by the social relations affecting the administration of justice through the delay in determining the manner in which the illegal act was committed and through preventing the restoration of legality as soon as possible, while the secondary specific legal object is represented by the social relations regarding the legal circulation of money and the negative impact on the estate of the natural person or legal entity through the diminishment of monetary funds.

II.2 The material object

Given that the specific legal operations concretely refer to tangible assets, in this particular case "*the value being transferred (monetary funds)*" [Lascu, 2001, p. 20], the crime of cyber terrorism of the phishing type has a material object.

II.3 Subjects of the crime

The active subject

It is represented by any natural person or legal person who commits the deed as perpetrator, co-perpetrator, instigator or accomplice. The instigator finds himself in the situation of being the object of a formal concurrence of crimes (multiple offences) [article 38 par. (2) of Law no. 286 of 17 july 2009], because he is also the perpetrator of the crime of instigation, a deed that is provided for and sanctioned, in Romania, by the law on the prevention and combating of terrorism [article 33^2 of Law no. 535 of 2004].

In the case of this crime, taking into account the definition of phishing attacks from the perspective of terrorism, we consider that there may be co-perpetration because, in order to make as difficult as possible the identification, in the early stages, of the illegal interference in cyberspace, but also of measures intended to restore legality, we do not exclude the simultaneous intervention of two or more persons on the computer system that manages the personal data assimilated to the bank account or bank accounts belonging to a natural person or legal entity.

The passive subject

Since this crime belongs to the field of terrorism, the main passive subject is the state as the main holder of the protected value, namely the assurance of national

security, regardless of whether the state's own authorities or an international organization are affected as a result of the offence.

This is also a situation that involves a secondary passive subject, which can be any natural person or legal entity that suffers injuries/damages as a result of the offence being committed.

II.4 Conditions regarding the place, time and the situation favourable to committing the criminal offence

The provisions of the legal rule that criminalize the deed do not provide for the existence of special conditions of place or time, but there is the prerequisite condition of the existence of money in the bank account.

II.5 The constituent elements of the offence

The objective side of the criminal offence

a) The material element of the objective side designating the illegal act provided and sanctioned by the legal rule is achieved by the action of a person whose purpose is to create a false reality in order to obtain for himself or another an undue benefit to be used in order to finance terrorism.

According to the provisions of the criminal rule, the material element consists of commissive activities, performed by the person who is the active subject of the crime, consisting of any activity that meets the constituent elements of crimes against the security and integrity of computer systems and data [article 32 par. 1 letter q of Law no. 535 of 2004].

b) The immediate consequence of the unlawful act consists in the fact that national security has been endangered, including by causing damage to the estate belonging to a natural person or legal entity.

c) The causal relation – results *ex re* (from the materiality of the deed).

The subjective side of the criminal offence

In terms of the subjective side of the offence, considering the behaviour of the active subject, but also the socially dangerous result of the illegal action through the desire to obtain an unjustified benefit, we note that it is characterized by guilt in the form of direct intent.

The guilt manifested in the form of direct intent cannot be questioned because the active subject was aware that he was carrying out an illegal activity, by causing damage, in order to obtain an undue material benefit.

The motive and purpose of the criminal offence

The motive and purpose are the same as for all crimes resulting from the commission of a terrorist act, namely to illegally obtain certain amounts of money in order to finance terrorism.

II.6 Forms of the criminal offence

Attempt and preparatory acts

Just like any crime belonging to the field of terrorism, the crime of cyber terrorism of the phishing type is likely to unfold over the course of time and therefore, most often, there are some preparatory acts. Because of the social danger represented by the criminal offence, along with the attempt, the legislator deemed

it fit to criminalize the preparation of criminal acts, by assimilating them to the attempt [article 37^1 of Law no. 535 of 2004].

Consumption and exhaustion of the criminal offence

The consumption of the offence takes place at the moment when the crime is materialized, creating the state of danger.

Exhaustion takes place either following the intervention of the authorities to restore legality, or following the last illegal act committed through the criminal offence and the voluntary cessation of the illegal act, if it's a situation of continuous offence.

II.7 Sanctions

Taking into account the purposes of the special criminal law criminalizing terrorism [article 1 of Law no. 535 of 2004], the legislator sought to make sure that the sanction applied was in relation to the social danger posed, thus, he considered that, outside the custodial sentence [article 32 par. 1 of Law no. 535 of 2004], the penalty of a fine should not be applied [article 32 par. 2 of Law no. 535 of 2004].

CONCLUSIONS

Even if, at first sight, this criminal act, through its materialization, does not have as a direct effect the loss of human lives, we cannot omit that a crime which helps to finance terrorism will cause chaos and will implicitly lead to terror through the killing of human beings and the destruction of goods.

Therefore, the measures ordered by financial institutions with a view to preventing and combating phishing activities will only become effective if the technology on which the IT field is based are supported by multidisciplinary collaborations between national security experts and IT specialists.

Also, the state authorities, regardless of whether they carry out their activity in the financial or legal field together with specialists in the private financial field, must intensify their efforts to find the best practices in order to implement solutions for the prevention of criminal acts of the phishing type.

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