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CONTENT

INCONSISTENCIES AT THE EUROPEAN LEVEL IN THE PROTECTION OF THE RIGHTS OF PERSONS BELONGING TO NATIONAL MINORITIES: COHERENT SOLUTIONS RESIDING IN THE CORRELATION BETWEEN THE POSITION OF THE EUROPEAN COURT OF HUMAN RIGHTS WITH THAT OF QUASI-JURISDICTIONAL MECHANISMS

Nicolae VOICULESCU[*]
Maria-Beatrice BERNA[**]

ABSTRACT

In this paper, we will observe the incongruence between the opinions expressed by the European Court of Human Rights, the Advisory Committee of the Framework Convention for the Protection of National Minorities and the Venice Commission in regard to the issue of guaranteeing the right to education of persons belonging to national minorities. We will analyze the legal and para-legal (sociological or historical) arguments on which is based each of these positions, suggesting solutions that tend to reconcile the three positions by recognizing the supremacy of the European Court and the need to rally non-jurisdictional mechanisms to the standards drawn by European Court. We will also review the implications that the doctrine of the living instrument and the margin of appreciation of the States have on the subject.

KEYWORDS: *the rights of persons belonging to national minorities; the doctrine of living instrument; the States' margin of appreciation; consensus; incongruence;*

1. Profiling the protection of the rights of persons belonging to national minorities: international optics

The protection of the rights of persons belonging to national minorities is special in the broader scope of the international protection of human

* *Professor Ph.D. Emeritus, Titu Maiorescu University, Bucharest, Romania, Alternate member MB, European Union Fundamental Rights Agency.*

** *Lecturer Ph.D., Faculty of Law, "Titu Maiorescu" University, Bucharest, Romania, Diplomat Romanian Ministry of Foreign Affairs.*

rights. First of all, because it is improbable to formulate a definition attached to *national minorities*. In the content of hard law international legal instruments, *national minorities* are only mentioned, without attaching to them any explanatory or definitional coordinates. In the scope of soft law documents, some attempts were made to capture the essence of the concept of *national minority*, but without concretizing the result of a supranational consensus in the matter. Despite the lack of a consensus on the conceptualization of *national minority*, three criteria (at least!) can be remembered: (1) the criterion of ethnogenesis – minorities have a late ethnogenesis in the sense that they appeared later on the territory of the State where the majority population was formed; (2) the criterion of numerical weight and non-dominance – minorities are numerically inferior compared to the majority population and, as a rule, hold a non-dominant position; the case of multi-ethnic States in which ethnic groups are representative at the governmental level reconfigures the minority problem[1]; (3) the criterion of distinctive features (ethnic, linguistic, religious, cultural) compared to the majority population[2].

Secondly, minorities are not granted collective rights (they enjoy individual rights which, by their nature, can usually be exercised jointly with other people).

Thirdly, in the absence of recognition of collective rights to the benefit of national minorities, the latter cannot arrogate their status as *rights holders*[3]. Thus, the human person who exercises individual rights (independently or together with other persons) remains the legal holder in relation to matters concerning national minorities. However, the regulation of

[1] For example, Bosnia and Herzegovina has a tripartite governance that defines a collective and rotating Presidency, made up of three members, each belonging to one of the three constituent peoples (Bosnians, Serbs and Croats). Moreover, from a statistical point of view, the ethnic and religious geography of the state is distributed as follows: 50.11% of the total number of inhabitants are of Bosnian ethnicity, 30.78% of Serbian ethnicity and 15.43% of Croat ethnicity. Given this ethnic and governmental representation, it is difficult to associate the 3 ethnicities (Bosnian, Serb and Croat) with 3 minority communities.

[2] See, in detail, European Commission For Democracy Through Law (Venice Commission), Compilation Of Venice Commission Opinions And Reports Concerning The Protection Of National Minorities, Strasbourg, 11 November 2017, CDL-PI(2018)002, pp. 4-9.

[3] Accordingly, any reference used in the work with national minorities will be understood as a reference to persons belonging to national minorities.

the specific realities of national minorities is a complex issue, which often escapes the scope of binding regulations and transcends to the scope of soft law regulations. The difficulty of identifying precise regulations in the matter of the rights of persons belonging to national minorities resides, first of all, in the fact that minority groups are not homogeneous. Furthermore, additional difficulties in choosing a normative path (*hard law* or *soft law*) for the problems of persons belonging to national minorities lie in the heterogeneity of individual identities. In the recommendations of the OSCE High Commissioner for National Minorities, are emphasized the characteristics of individual identities of persons belonging to national minorities (multiple, multi-layered, contextual and dynamic). Thus, individual identities are *multiple* (given the fact that people belonging to national minorities usually assert several horizontal identities - such as belonging to several ethnicities); *multilayered* (the same person may identify by ethnicity, language, religion, gender, etc.; each of these characteristics representing a component layer of identity); *contextual* (depending on the circumstance, a certain dimension of identity can become dominant); *dynamic* (in the dynamics of circumstances, the dynamics of identity also change; as a consequence, the attachment of people to these identities can also be changed)[4].

Among the international instruments that guarantee the protection of persons belonging to national minorities, the Framework Convention for the Protection of National Minorities[5] stands out for its multilateral character and for the duality of the control mechanisms used to monitor the implementation of the provisions of the Convention: the Committee of Ministers and the Consultative Committee. At the content level, the Framework Convention indicates the relationship with the protection system represented by the European Convention for the Protection of Human Rights and Fundamental Freedoms[6] through Articles 19 and 23. In

[4] OSCE High Commissioner for National Minorities, Ljubljana Guidelines on the Integration of Diverse Societies & Explanatory Note, November 2012, ISBN: 978-90-75989-17-5, p. 14.

[5] Adopted on 1 February 1995 and entered into force on 1 February 1998. *Brevitatis causa*, any reference in the text to the Framework Convention for the Protection of National Minorities will be highlighted by the phrase "Framework Convention".

[6] *Brevitatis causa*, any reference in the text to the European Convention for the Protection of Human Rights and Fundamental Freedoms will be highlighted by the phrase "European Convention".

this sense, according to Article 19 of the Framework Convention, the party states will implement the principles provided in its content taking into account, where necessary, the limitations, restrictions or derogations provided by the European Convention. Article 23 of the Framework Convention states that insofar as the rights and freedoms provided for by this legal instrument are subject to corresponding provisions of the European Convention, they shall have a meaning consistent with the latter[7]. On the other hand, in the architecture of the Council of Europe, the protection of persons belonging to national minorities is addressed through the activity of the European Commission for Democracy through Law[8]. Through flexible activities, such as: disseminating standards and good practices in the matter of the protection of persons belonging to national minorities, advising states that wish to align their legal and institutional structures with European standards and international practice in the fields of democracy, human rights and the rule of law, dialogue, formulation of studies and opinions, the Venice Commission analyzes and pronounces on emerging issues in the field of protection of the rights of persons belonging to national minorities.

2. The case of *Valiullina and others v. Latvia*: reflecting the conceptual incongruence of the protection of the rights of persons belonging to national minorities

In the case *Valiullina and others v. Latvia*[9], the views of the European Court of Human Rights, the Venice Commission and the Advisory Committee of the Framework Convention concerning the subject of the equal and non-discriminatory guarantee of linguistic rights in the educational field with regard to persons belonging to national minorities are expressed

[7] Similarly, the relevance of the European Convention in the matter of human rights is also highlighted in relation to the legal system of the European Union. The Charter on Fundamental Rights of the European Union provides in art. 52 para. 3 that, if the Charter includes rights that correspond to rights guaranteed by the European Convention, their meaning and extent are the same as those provided for in the European Convention.

[8] *Brevitatis causa*, we will use the expression "Venice Commission" to denote the European Commission for Democracy through Law.

[9] The judgement handed down by the European Court of Human Rights in the case of *Valiullina and others against Latvia*, on September 14, 2023, requests no. 56928/19, 7306/20 and 11937/20, which became final on 19 February, 2024.

in an incongruous relationship. The factual situation on which the analyzes of the 3 bodies of the Council of Europe are based can be summarized as follows: the Latvian educational reform of 2018 establishes in public schools the progressive increase of the subjects to be taught in the state language against the background of cultivating the feeling of promotion of national identity and protecting the latter from any interference likely to circumscribe it[10].

Conversely, persons belonging to the Russian-speaking minority argued that such a reform significantly restricts the possibility of using the Russian language (as a minority language), the establishment of a large proportion of subjects to be taught exclusively in the Latvian language affecting their linguistic rights in a disproportionate and discriminatory. The historical context is likely to shed light on the subtext of adopting the Latvian reform in 2018. The period in which Latvia was subjected to Soviet occupation compromised the sense of national identity by eroding two essential state components: (1) reshaping the population structure through large-scale group transfers on the territory of Latvia - following the migrations directed by the occupying forces (thus, in the period 1951-1990 the rate of migration to Latvia of the masses of population coming from other territories of the former Soviet Union led to a significant decrease of people of Latvian ethnicity); (2) Russification by imposing the Russian language as the official language of communication in state institutions and schools. Gradually, a segregated teaching system was established by organizing schools that had Russian as the only language of instruction[11].

The incongruity of the visions of the three European bodies regarding the optimal way to guarantee the linguistic rights of persons belonging to national minorities by referring to the educational environment is also accentuated by the way of perceiving national identity-a concept which, over time, has been subjected to antagonism rule: (1) on the one hand, the idea of a monolithic course of building national identity is brought into

[10] See the summary of the legal arguments presented in the case of *Valiullina and others against Latvia*, on September 14, 2023, requests no. 56928/19, 7306/20 and 11937/20, accessible at: *https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-14185%22]}*.

[11] According to para. 7-12 of the judgment handed down by the European Court of Human Rights in the case of *Valiullina and others against Latvia*, on September 14, 2023, requests no. 56928/19, 7306/20 and 11937/20, which became final on 19 February, 2024.

discussion, by integrating in an aggregate of elements, culture, tradition and civilization that make a nation what it is- that is, different from other nations; (2) on the other hand, national identity is not defined by fixity and cannot be perceived in monolithic terms; the fact of a people being what it is must be seen in dynamics and must be related to the constantly changing realities[12].

We deem that the two visions must be correlated and adjusted into a third one that accepts national identity as a source of political legitimacy but flexes the characteristics that make up national identity, recognizing their ability to adapt to the present by taking into account the historic past. Another important point in the conceptualization of national identity is a correct adjustment of the degree of integration of the otherness brought by the minority that is culturally and civilizational distinct from the majority group. It is true that the multilingual and multicultural profile of a State recommends its democratic characteristics, but we must always bear in mind the fact that the degree of inclusion that the State is willing to offer to persons belonging to national minorities cannot affect what is necessary to preserve national identity (especially in the dimension of ensuring the individual's sense of belonging to the state community) and also what is necessary to guarantee public order and national security.

Faced with these issues, the European Court of Human Rights ruled that the Latvian reform of 2018 was carried out by the authorities with the aim of facilitating equal access of students to the state education system and removing the consequences of educational segregation established under the Soviet regime. Currently, the effects of this reform were intended to be reflected by restoring the use of the Latvian language as the official language of teaching and ensuring the unity of the educational system. Following the legislative reform, Russian pupils belonging to national minorities and Latvian pupils are in a similar situation being subjected to education in the Latvian language (recognized as an official language at the constitutional level) with the legitimate aim of improving pupils' skills in using the state language and ensuring equal access of all students to the same learning conditions. Thus, we can construe the reform as objectively and reasonably based on legitimate aims. As for the *proportionality* of the reform measures imposed in the educational system, we note that they

[12] Bhikhu Parekh, *The concept of national identity*, Journal of Ethnic and Migration Studies, Volume 21, Issue (2), 1995, pp. 255-268.

were imposed progressively and ensured the gradual transition of students belonging to the Russian minority to the same educational standards imposed for all participants in the educational process. Moreover, the Russian language was not completely eliminated from the educational system, but the proportion of subjects taught entirely in Russian was reduced in order to ensure the increase of linguistic skills in the official language of the state. So, there is the possibility for people belonging to national minorities to use their mother tongue in education, only in a different weight than that allowed during the Soviet occupation. At the same time, the European Court emphasizes in the judgment that, in the absence of a European consensus referring to matters of education, we cannot foreshadow the obligation to teach in the mother tongue. On the other hand, the reasoning of the European Court notes that the decrease in the use of the Russian language in education can be interpreted as a measure of support for persons belonging to the Russian minority to adapt to the social realities specific to their country of origin and to fulfill the obligation to integrate into the majority culture. The European Court also notes that the organization of Latvia's educational system directly depends on the state's margin of appreciation[13].

The opinion of the European Court of Human Rights expresses a complex reasoning, based on both historical and factual aspects to which are added legal arguments. The manner in which the European Court resolved the legal issue under consideration both emphasizes the importance of providing adequate measures for the inclusion of the Russian minority as well as the relevance of the protection of identity and national security. It is clear that between the two dimensions it is necessary to maintain a fair balance. The issue is thoroughly resumed within soft law instruments taking into account the importance of ensuring a fair balance between public and private interest.

The Oslo Recommendations[14] depict the linguistic element as being closely related to the building of individual identity and also as an essential

[13] See, in detail, para. 191-212 of the judgment handed down by the European Court of Human Rights in the case of *Valiullina and others against Latvia*, on 14 September 2023, requests no. 56928/19, 7306/20 and 11937/20, which became final on 19 February, 2024.

[14] The Oslo Recommendations regarding the Linguistic Rights of National Minorities & Explanatory Note, Published and disseminated by the OSCE High Commissioner on National Minorities (HCNM), pp. 1-2.

tool which may become central to social and civil action. Being twofold, the question of protecting the linguistic rights of persons belonging to national minorities affects both the construction of the personal identity of the individual pertaining to such a minority and also the issue of social interactions and maintain the social equilibrium.

In our assessment, a pertinent juridical comment on the linguistic rights of Russian speakers in the context of the Latvian reform of 2018 concerns the possible violation of the *doctrine of earned rights by persons belonging to the Russian minority during the Soviet occupation*. It is true that international standards establish that no disadvantage may result from a person's choice to identify himself/herself as a member of a national minority, including in terms of his rights. However, from our point of view, the theory of earned rights by persons belonging to the Russian minority constitutes a false problem. In order to be able to discuss the rights earned by persons belonging to the Russian minority, it is necessary to have, as a prerequisite, a climate of political stability that allows the exercise of political power by forums democratically chosen by the citizens and recognized as such. Either way, the situation evoked in this case does not presuppose the existence of a legitimate and democratic political decision-maker, but of governing authorities that were established against the background of the Soviet occupation (which do not benefit from legitimacy and recognition from the Latvian government). In the given conditions, the discussion will be translated from the realm of earned rights to the realm of rights imposed by an illegitimate and immoral governing authority. Thus, the Latvian reform cannot amount to a violation of the principle of earned rights especially because the circumstances under which those rights were acquired may be deemed as unjust and illegitimate.

In another token, the Advisory Committee departs from the European Court's view on the subject and proposes an approach that presents the Latvian reform of 2018 as incongruous to the protection of the rights of persons belonging to the Russian minority. In the third Opinion on Latvia[15] the Advisory Committee assesses with reserve and even circumspection the essence of the educational reform, analyzing in detail Latvia's justification related to the preservation and promotion of national identity in

[15] Advisory Committee on the Framework Convention for the protection of national minorities, Third Opinion on Latvia adopted on 23 February 2018.

terms of supporting a social hierarchy within which only ethnic Latvians can occupy a superior position: *Society in Latvia continues to struggle with the consequences of past divisions, with the principal national groups – the Latvian majority and the Russian minority – holding different geopolitical viewpoints and cultural identities. The authorities have based efforts to integrate society on the promotion of the Latvian language, the sense of belonging to the State of Latvia, respect for the unique cultural space of Latvia, the formation of a common social memory, and civic participation. The process of integration into society is hampered, however, by ethnic Latvians' lack of trust towards national minorities and a sense of being under threat. The tendency of the Latvian majority towards ethnic isolation does not create the favourable dynamics required for an integrated society where diversity is respected and valued. Differentiation, in the Preamble of the Constitution, between the ethnic "Latvian nation" and the civic polity of "people of Latvia", increasingly more visible in public discourse, impedes progress towards the creation of a cohesive society based on civic identity, and increases the sense of exclusion of national minority groups, further consolidating ethnic hierarchies rather than social cohesion*[16].

Moreover, in the Fourth Opinion on Latvia[17] the theme of the protection of the rights of persons belonging to national minorities is directly addressed, being correlated with the results of the reforms in education initiated in 2018 and 2022. Both are assessed as being detrimental to the rights of persons belonging to national minorities: *Teaching in and of minority languages has been significantly reduced first in the context of the 2018 education reform, which established a maximum share of 50% teaching in minority languages at primary level, 20% at lower secondary level, and full education in Latvian at upper secondary level. In 2022, the authorities decided to completely phase out education in minority languages, keeping only the option of extra-curricular courses of minority culture and language of three hours per week. As exceptions apply for languages that are official languages of the European Union (EU) and*

[16] *Ibidem*, p. 1.
[17] *Ibidem.*

those falling under bi- and multilateral agreements, the restrictions apply to the Belarusian and Russian languages[18].

The Venice Commission advances a peculiar compromise vision between those supported by the European Court through jurisprudence and those invoked by the Advisory Committee. Broadly speaking, the assessment of the Venice Commission resides in the following: not the educational reform itself is a factor that could potentiate the violation of the rights of persons belonging to national minorities, but the fact that this educational reform is not supported by additional guarantees in favor of persons belonging to national minorities. In the conclusions presented by the Venice Commission in the Opinion formulated on the subject, the pendulum between the Russian language (used predominantly at the national level during the Soviet occupation) and the Latvian language (recognized as the state language following the end of the Soviet occupation and the beginning of reforms in educational field) can be placed under the name of *asymmetric bilingualism*. The solution to this lies in recognizing the legitimacy of the measure of using the Latvian language in educational programs for minorities in order to improve the language skills of all students in the educational system. On the other hand, the reform will have to be used together with additional measures that will guarantee schools implementing minority educational programs, appropriate teaching methodologies, educational materials, etc.[19].

3. The issue of protecting the rights of persons belonging to national minorities reflected within the matrix: states' margin of appreciation-consensus-doctrine of the living instrument

We deem that the incongruity of the 3 visions lies, first hand, in the fact that granting the right to education in the mother tongue in favor of persons belonging to national minorities is an issue on which the states parties to the main international instruments in the matter (the Framework Con-

[18] Advisory Committee on the Framework Convention for the protection of national minorities, Fourth Opinion on Latvia adopted on 9 October, 2023, p. 7, para. 9.

[19] European Commission for Democracy through Law (Venice Commission), Latvia opinion on the recent amendments to the legislation on education in minority languages, adopted by the Venice Commission on 18 june 2020 by a written procedure replacing the 123rd plenary session, para. 115-117.

vention for the Protection of National Minorities and the European Convention on Human Rights) exercises a wide margin of appreciation. On the other hand, the flexibility of the provisions of the Framework Convention determines the difficulty of reaching a real consensus on the subject.

As for the *margin of appreciation* of the states, the European Convention imposes on the states parties the obligation to comply[20] with the judgments issued by the European Court of Human Rights, while, in the case of the obligations arising from the Framework Convention, a *flexible approach* is required – as indicated in the Explanatory Report of this instrument legal. It is true that *the binding nature of the judgments of the European Court does not determine, de plano, the lack of applicability of the margin of appreciation of the states, but only nuances it*. Comparatively analyzing the margin of appreciation of the states in the logic established by the European Convention, respectively in the one corresponding to the Framework Convention, is required a parallel analysis of them.

According to para. 11-13 of the Explanatory Report of the Framework Convention, the latter has the vocation to respond to different and difficult situations and problems, a fact that determines that its regulations are rather *programmatic*. This means that states parties to the Framework Convention do not have directly enforceable obligations: states have a wide margin of appreciation regarding the implementation of the objectives they have committed to achieve, taking into account all the circumstances. In the same key, the programmatic character of the Framework Convention as well as the lack of consensus at the level of the member states in the matters that are attributed to its regulatory sphere, determine the lack of a concrete conceptualization of the notion of *national minority*. Without guaranteeing collective rights, the Framework Convention protects the rights of persons belonging to national minorities (which can be exercised individually or jointly with other persons), with the States Parties seeking to transpose these rights at the national level through national legislation and appropriate government policies[21].

[20] Article 46 of the European Convention specifies that: *1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.*

[21] See, in detail, para. 11, 12, 13 of the Explanatory Report of the Framework Convention for the Protection of National Minorities.

In Latvia's fourth monitoring cycle, the Advisory Committee recognized the state's margin of appreciation in reforming the education system, subject to the fact that the reform measures do not clearly distinguish between possible measures promoted by the Russian authorities (against the stability of Latvia) and the legitimate interest of ethnic Russians living on the territory of Latvia to exercise their rights under the Framework Convention without restrictions. Within Latvia's margin of appreciation was circumscribed the recognition of the Latvian language as the sole basis of integrated and cohesive societies, the assertion of national identity being intimately and exclusively linked to the Latvian language. Although recognized and applied by the Advisory Committee in the *Valiullina* case, the margin of appreciation of the states was not appreciated as the optimal legal reasoning for solving the complex issue of guaranteeing the rights of persons belonging to national minorities.

Having due consideration to the standards and principles established by European Convention and in the light of their preeminence, we must acknowledge that the binding nature of the judgments of the European Court of Human Rights produces both vertical effects (in relation to the member states of the Council of Europe according to article 46 of the European Convention) as well as horizontal effects (according to which the binding character of the judgments of the European Court of Human Rights must be recognized including by the bodies acting within the architecture of the Council of Europe).

The principle of the margin of appreciation of the states was taken into account in shaping the legal reasoning on the basis of which the European Court of Human Rights ruled in the case of *Valiullina and others against Latvia*[22]. Through the entry into force of Protocol no. 15[23], the European Convention was completed by introducing the doctrine of the margin of appreciation of the states in the preambular part - the latter strengthening the *suis generis* mode of operation of the European Court of Human Rights. As shown in the Explanatory Report of Protocol no. 15 of the European Convention, the consecration in the official text of the Convention of the doctrine of the margin of appreciation of the states entails an

[22] The judgment of the European Court of Human Rights in the *case of Valiullina and others v. Latvia*, application no. 56928/19 and two others, on 14 September 2023, which became final on February 19, 2024.

[23] Adopted on 26 June 2013 at Strasbourg and entered into force on 1 August 2021.

explanatory vocation on the conventional system of human rights protection, mainly emphasizing the following: *(1) in the logic of the European Convention system, states are, first of all, responsible for ensuring the protection of the rights and freedoms provided for by the Convention in favor of the persons situated under their territorial jurisdiction; (2) subsequently, it falls, first of all, to the states parties the obligation to guarantee an effective remedy before the national courts in the event that a litigant invokes the violation of his fundamental rights and freedoms; (3) the competence of the European Court becomes incidental to the extent that conventional rights and freedoms are not respected at the national level, without thereby replacing the national courts of law; the role of the Court is to assess whether the decisions of the national courts are compatible with the conventional legal system, subject to the respect of the margin of appreciation granted to them; (4) states parties enjoy a wide margin of appreciation in assessing situations that call into question the protection of human rights, being better placed than an international court to appreciate local conditions and needs*[24].

In the reasoning of the judgment handed down by the European Court in the *Valiullina case*, it is expressly mentioned: *Accordingly, the Court considers that as regards the right to education the States have a wide margin of appreciation in organizing their education systems, particularly as regards the language of instruction in public schools. The respondent State, in restoring the use of Latvian as the language of instruction and gradually implementing the education reform, has not overstepped its margin of appreciation, as it has maintained a possibility for Russian-speaking pupils to learn their language and preserve their culture and identity. The Court concludes that the State has put in place an education system in the official language of the State, while also ensuring the use of minority languages in varying proportions, depending on the school and class in which a pupil is enrolled*[25].

Thus, in the case of the reform undertaken by Latvia regarding the educational system in minority languages (2018 reform), the way of

[24] According to para. 7-9 of the Explanatory Report of Protocol no. 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

[25] See, at length, para. 212 of the judgment of the European Court of Human Rights in the case of *Valiullina and others v. Latvia*, application no. 56928/19 and two others, on 14 September 2023, which became final on 19 February, 2024.

implementing the margin of appreciation of the states is different as we refer to the European Court of Human Rights and the Advisory Committee: in the first case, the margin of appreciation is a sufficient basis to give the state a win in the management of policies formulated in the field of protection of the rights of persons belonging to national minorities; in the second case, the margin of appreciation of the states is an element to be taken into account that must be correlated with the most appropriate measures for the protection of the rights of persons belonging to national minorities. Hence, in the two analyzed legal orders, the margin of appreciation of the states prevails in the system of the European Convention, while in the system of the Framework Convention, the margin of appreciation of the states subsists until the competition with the widest possible guarantee of the rights of persons belonging to national minorities.

The margin of appreciation of states is closely related to the dynamics of social relations in a given state and, as a consequence, is directly dependent on the consensus between states. At this point, the *doctrine of the living instrument* becomes incident.

The doctrine of the living instrument was explained in the jurisprudence of the European court in the sense in which: *the Convention is a living instrument which must be interpreted in the light of present-day conditions, and in accordance with developments in international law, so as to reflect the increasingly high standard being required in the area of the protection of human rights, thus necessitating greater firmness in assessing breaches of the fundamental values of democratic societies. In other words, limitations to rights must be construed restrictively, in a manner which gives practical and effective protection to human rights*[26]. As follows, the doctrine of the *living instrument* indicates the trend of evolution of the European Convention in the sense of promoting an approach based on the consensus of the member states of the Council of Europe in the field of protection of the rights and freedoms provided for by the European Convention.

Thus, the doctrine of the living instrument is closely connected with the doctrine of the margin of appreciation of the states given the fact that reaching a consensus at the level of the member states of the Council of

[26] See the judgment of the European Court of Human Rights in the case of *Demir and Baykara v. Turkey*, application no. 34503/97, pronounced on 12 November 2008, para. 146.

Europe represents a point of support and guidance for the European Court which, interpreting jurisprudentially the issues resulting from the application Convention, will implicitly decide on the margin of appreciation of the states. So, in issues concerning the protection of human rights where there is a high level of consensus, the margin of appreciation of states can be limited. Conversely, sensitive human rights issues that do not enjoy a consensual approach among states will require a wide margin of appreciation.

In this case, the protection of the rights of persons belonging to national minorities is not a subject on which the member states of the Council of Europe have reached a consensus (an aspect underlined, on the one hand, by the flexible language used in the Framework Convention and on the other hand, by the monitoring carried out through the Advisory Committee which involves issuing *recommendations; at the same time, the European Court highlighted, through jurisprudence, the lack of signing and ratification of the Framework Convention by all the member states of the Council of Europe*). Consequently, the states' margin of appreciation will be wide – an aspect fully reflected by the recent jurisprudence of the European Court and enhanced by the work of the Advisory Committee of the Framework Convention.

We must bear in mind that, relative to the circumstances of the case, the margin of appreciation of the state does not emanate from its unilateral and discretionary assessment. The basis of Latvia's margin of appreciation is originated within the protection of national security and identity, which were systematically undermined during the Soviet occupation.

Conclusions

The lack of consensus of the states in relation to the subject of protecting of the rights of persons belonging to national minorities cannot be transposed at the supranational level, in the activity of the regional mechanisms for the protection of human rights; such an approach will lead to an even greater fragmentation of the European vision in the matter.

The tendency in addressing the problematic subject of the protection of the rights of persons belonging to national minorities should be oriented towards obtaining a greater degree of coherence and correlation between

monitoring and control mechanisms (in this case, the European Court of Human Rights, the Advisory Committee, the Venice Commission).

In the architecture of the human rights legal order of the Council of Europe, a harmonization of the reasoning issued by the 3 monitoring mechanisms is required, with the preservation of the judicial authority of the judgments issued by the European Court of Human Rights.

The monitoring mechanisms that are likely to be creators of soft law (the Advisory Committee or the Venice Commission) must approach with high caution the way of positioning towards a situation that exceeds the scope of the consensus of the European states.

Thus, the Venice Commission as an advisory body of the Council of Europe has the vocation to support the member states of the Council in improving their legal systems; also, the purpose of the Venice Commission (specified in Article 1 of the Revised Statute[27]) consists in supporting the member states of the Council of Europe in approaching their legal systems and foreshadowing, in the future, the reaching of a consensus on issues related to the protection of human rights and of fundamental freedoms.

Similarly, the Advisory Committee as a monitoring mechanism established under the Framework Convention whose activity is focused on observing the degree to which the state subject to monitoring has implemented the provisions of the Convention, should aim to reach a consensus among states on issues related to the protection of the rights of individuals belonging to national minorities (although the extent of the states' margin of appreciation regarding the application of the Framework Convention is reflected in the work of the Advisory Committee, the latter has the responsibility of establishing some recommendations that allow the states to foreshadow a predictable and foreseeable conduct in addressing the issue of protecting the rights of individuals belonging to national minorities).

In addition, explicit provisions could be considered in the constitutive documents of the three monitoring mechanisms that would clarify the establishment of their respective powers in their interactions and functions and the designation or even, possibly, the structuring of an institution that would bring consistency and the desirable efficiency in their activity.

[27] The Statute of the Venice Commission was revised on 27 February 2002, by Resolution (2002)3 adopted by the Committee of Ministers.

On the other hand, it must be retained the legal authority of the European Court of Human Rights judgments, including on a horizontal line, in the relations between the bodies of the Council of Europe competent in the field of protecting the rights of persons belonging to national minorities. Thus, the recommendations of these bodies must be converging with the Court's jurisprudence. In order to realize this objective, the reform of the consultative mechanisms is envisaged in order to bring them up to the standards of the European Court.

Without compromising their independence, the quasi-jurisdictional mechanisms must recognize and apply the judgments of the European Court in order to ensure the guidance of state action. The margin of appreciation of the states is not an absolute instrument, nor can it be used contrary to the European legal order in matters of human rights. The absolute independence of the non-contentious monitoring mechanisms can lead to giving subsidiary value to the legal reasonings extracted from the Court's jurisprudence - a fact that tends to depreciate the latter.

Or, independence must be concurrent with respecting all the aspects established by the European Court through its jurisprudence: otherwise, the loss of the Court's legitimacy produces a domino effect on the entire human rights protection system, proportionally affecting the credibility of the quasi-jurisdictional mechanisms. A relation of *hierarchical collaboration* must be established between the European Court of Human Rights, the Advisory Committee and the Venice Commission, encouraging the exchange of opinions and best practices in order to perfect the analysis of cases related to the protection of the rights of persons belonging to national minorities subject to compliance, in absolute value, of the jurisprudence of the European Court.

The phrase *absolute value* will have a meaning that must be sought in the effect produced on state conduct. Or, if the state is bound by the decision handed down by the European Court, then how can its policy in the field of protecting the rights of persons belonging to national minorities be shaped in the opposite direction to those established by the Court through the recommendations emanating from quasi-jurisdictional mechanisms?

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CERTAIN CONSIDERATIONS ON THE LEGISLATIVE CHANGES REGARDING THE PROCESSES OF ACQUISITION AND LOSS OF ROMANIAN CITIZENSHIP

Andrei TINU[*]

ABSTRACT

The right to citizenship is one of the fundamental human rights that has aroused the interest of specialists and researchers in the field. The present article continues the author's effort of knowledge, an effort that has materialized in studies and articles whose theme has focused on the concept of citizenship. In this work, the author makes a brief analysis of the main legislative amendments adopted in the last year, either enacted, such as the Government Emergency Ordinance no. 100/2024 and the Order of the Ministry of Justice no. 1726/C/2024 for the approval of the organizational chart of the National Authority for Citizenship, or not enacted, as in the case of the new Romanian citizenship law, which is the subject of a constitutional challenge raised by the High Court of Cassation and Justice.

KEYWORDS: *citizenship; acquisition; withdrawal; biometric data; citizenship card;*

The Citizenship is, as stated in the body of this article, a complex concept, which first requires a detailed analysis of the legal-historical, political and cultural factors that have determined its definition. Contemporary realities, which correspond to a constantly changing world, have led to the redefinition of terms and concepts. In the post-global era of history, citizenship, initially assumed to be an individual's membership of a nation state, is now taking on new theoretical dimensions. The contemporary individual is a universal citizen and, depending on the legal provisions of the various states of the world, may hold one or more citizenships. There has been a growing trend in recent times towards replacing national citizenship with European citizenship, in the general desire to standardize the identity of the seven hundred and fifty million inhabitants.

* *Lecturer Ph.D., Law Faculty, "Titu Maiorescu" University, Bucharest, Romania.*

Romania, as a fully-fledged member of the European Union, is making efforts to adapt national legislation to the *Community acquis*, which is in full swing. The legislation on citizenship is no exception to these efforts. Amendments to this legislation must consider not only the Community provisions on the process of granting/losing citizenship, but also the realities existing at global level: changes in the labour market, human trafficking, global security.

In 1991, the year in which the first democratic constitution in Romania entered into force, the Romanian Citizenship Law no. 21/1991 was adopted and implemented, which has undergone, in more than thirty years, a series of additions and amendments that have contributed, in the opinion of the legislator, to solving the problem of citizenship. The large number of applications and the complexity of the process of granting/withdrawing Romanian citizenship led to the establishment, in 2010, of a separate institution – the National Authority for Citizenship – *which is responsible for ensuring 'the application of the legal procedure for granting, regaining, renouncing and withdrawing Romanian citizenship"*[1].

Romania's entry into NATO and the European Union, its partial acceptance into the Schenghen Area and the Visa Waiver project, which will allow Romanian citizens to travel visa-free to the United States of America, have made it necessary to harmonize Romanian legislation with the new status. However, certain imperfections regarding citizenship legislation continue to give rise to new controversies, which are being translated into constitutional challenges.

This is the reason we aim to analyse some of the changes in the primary, secondary and tertiary legislation on the granting, loss or withdrawal of Romanian citizenship, the position of civil society, the petitions and the decisions of the Constitutional Court of Romania.

By *Government Emergency Ordinance no. 100/2024*, initiated by the Romanian Government, some amendments and additions were made to Romanian Citizenship Law no. 21/1991 and other normative acts referring to the process of acquiring or losing the status of Romanian citizen. As stated in the explanatory memorandum of the aforementioned normative act, the initiator took into account several factors, including *"the risk of*

[1] Article 4 of *the Emergency Ordinance No. 5 of 2010 on the establishment, organization and functioning of the National Authority for Citizenship, https://legislatie.just.ro/Public/DetaliiDocumentAfis/115987*, accessed on 3.08.2024, 15.40.

fraud in the procedure for regaining Romanian citizenship, usually by using false documents"[2] by applicants claiming to be descendants of former Romanian citizens who hold the citizenship of states that were part of the Union of Soviet Socialist Republics, and "exemption from the requirement to hold a short-stay B1/B2 P type visa for travel to the United States of America"[3].

The visa waiver program for Romanian citizens – the Visa Waiver Program – is both a Romanians' wish and a fundamental pillar of the bilateral relationship between Romania and the United States of America. To achieve the objective of eliminating travel visas for Romanian citizens as of 2025, the government in Bucharest must fulfil a series of conditions set out by American legislation, specifically those that involve increasing the security of identity and travel documents. In this regard, by the adoption of GEO 100/2024, amendments were made allowing the identity of Romanian citizenship applicants to be confirmed biometrically. *"One of the objectives of the Law on the amendment and completion of the Romanian Citizenship Law no. 21/1991, as well as for the amendment and completion of other normative acts – says the initiator – was to establish the necessary and proportionate measures to guarantee the certainty of establishing the identity of future Romanian citizens"*[4]. The measures mentioned as security measures are the collection of biometric data when registering applications for acquiring/ regaining Romanian citizenship (biometric photographs and fingerprints) and the subsequent comparison of these data with directly verifiable comparable elements[5]. At the same time, it is envisaged to replace the current paper certificate of citizenship with an electronic card[6], which will include a high-security storage medium, in which the personal and biometric data of the applicant whose application for Romanian citizenship has been approved will be stored.

[2] *Explanatory memorandum to the Government Emergency Ordinance No. 100/2024 for supplementing and amending the Romanian Citizenship Law No. 21/1991, as well as for amending and supplementing other normative acts*, Section 2.2: Description of the current situation, electronic edition, p. 2.

[3] *Ibidem*, p. 5.

[4] *Ibidem*, p. 6.

[5] *Ibidem*.

[6] *https://m.dcnews.ro/apare-cardul-de-cetatenie-de-la-1-septembrie-anuntul-mai_967641.html*, accessed on 04.08.2024, 9.30.

The citizenship card will be issued under the security conditions provided for by the emergency ordinance that is the subject of this analysis. Thus, the normative act establishes a series of verifiable and secure procedures to guarantee the certainty of the identity of future Romanian citizens, while also providing for the harmonization of data protection regulations, including data retention exclusively for the purposes for which the data are processed[7]. Government Emergency Ordinance no. 100/2024 also includes provisions on the realization of the IT infrastructure necessary for the implementation of biometrics in the process of granting Romanian citizenship upon application and the reconfiguration of the procedures for the submission of the oath of allegiance and the communication of correspondence to the National Authority for Citizenship (requests and summons addressed to the applicants, orders of the President of the institution, etc.), with the purpose of establishing clear time benchmarks for the fulfilment by the competent Romanian authorities of the obligation to delete the collected biometric data[8].

By implementing measures for biometric confirmation of the identity of applicants for Romanian citizenship, it is ensured that security risks and threats to global security because of changes in the labour market and migration are eliminated.

Returning to the reasons behind the amendment of the primary, secondary and tertiary legislation on citizenship, the initiator of GEO 100/2024 had in mind, on the one hand, the increase in attempts to circumvent specific procedures and, on the other hand, the exponential growth in the number of applications submitted under Article 11 of Romanian Citizenship Law No 21/1991, as subsequently amended and supplemented. This increase has made it impossible to resolve applications for regaining Romanian citizenship within the deadlines established by law and has made the legal procedure for granting or losing Romanian citizenship vulnerable. Proportionally, the situation of the applications submitted to the National Authority for Citizenship highlights the disproportion between the applications based on the provisions of Article

[7] *Explanatory memorandum to the Government Emergency Ordinance No. 100/2024 for supplementing and amending the Romanian Citizenship Law No. 21/1991, as well as for amending and supplementing other normative acts,* Section 2.2: *Description of the current situation*, electronic edition, p. 8.

[8] *Ibidem,* pp. 8-9.

11, 8 or 10 of the normative acts regulating the conditions and procedure to be followed by the applicants for Romanian citizenship[9].

In the explanatory note accompanying the draft emergency ordinance, it is stated that, between 2010 and 2024, 28724 applications were submitted under Article 10 of Law 21/1991, representing 2.78% of the total, and 967463 applications under Article 11 of the same normative act, i.e. 93.75% of the total applications for Romanian citizenship, of which 830209 applicants opted to maintain their residence abroad[10].

The regulatory changes proposed by GEO 100/2024 complement the previous amendments adopted by the Chamber of Deputies, the decision-making body on Romanian citizenship legislation, on June 26, 2024. The draft law amending and supplementing the Romanian Citizenship No. 21/1991, as well as amending and supplementing other normative acts No. 382/2024, introduced for debate on June 25, 2024, and for which 85 amendments were submitted, of which 77 were accepted, was adopted with 172 votes in favour, 31 against and 39 abstentions, and was sent for promulgation[11]. The amendments proposed by the legislator concern both substantive and technical aspects, namely the introduction of biometric data to verify the identity of the petitioner. Among the amendments made, a new para. (7) has been added to Article 9 of the law, which provides for new elements of verification by the Citizenship Commission of the fulfilment of the conditions imposed by the law, including for minors who, at the date of the Commission's report, have reached the age of majority[12].

A further proposed amendment concerns the failure to take the oath of allegiance within the time limit by a person who has obtained Romanian citizenship under Article 82 of the law, which entails the termination of the effects of the Government decision, the termination of these effects being established by the President of the National Authority for Citizenship[13].

To harmonize the Romanian legislation with the relevant European standards, the legislator decided to introduce provisions on the conditions

[9] *Ibidem* p. 3.

[10] *Ibidem.*

[11] *https://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?cam=2&idp=21852*, accessed on 4.08. 2024, 15.12.

[12] *https://www.cdep.ro/pls/proiecte/docs/2024/pl382_pr382_24.pdf*, accessed on 04.08. 2024, 15.24.

[13] *Ibidem.*

and place of collection of biometric data. Article 132(1) stipulates that the biometric data shall be collected at the time of submission of the application for Romanian citizenship. The technical specifications regarding the procedure for the electronic collection and storage of biometric data, the measures necessary to ensure their security and confidentiality and the security features of the citizenship card will be laid down by a government decision[14].

The biometric data of the applicant for Romanian citizenship will be collected at the headquarters of the National Authority for Citizenship, at its territorial offices or at the headquarters of Romania's diplomatic missions and consular offices in the territory of the state where the applicant is legally domiciled or residing and will be used exclusively to verify the identity of the applicant and of the minor who has reached the age of 14 at the time of submitting the application for citizenship or when taking the oath of allegiance, as well as the identity of the holder of the citizenship card when the latter is to be presented[15].

Some of the provisions of Law no. 21/1991 amending and supplementing Romanian citizenship and amending other normative acts have attracted the attention of the magistrates of the High Court of Cassation and Justice (HCCJ), who have lodged a constitutional challenge, based on the provisions of Article 46 lit. a) of the Romanian Constitution and Article 15 para. (1) of the Law on the Organization and Functioning of the Constitutional Court No 47/1992, republished. According to the CCJ, the normative act amending and supplementing Law 21/1991 contains numerous elements of unconstitutionality, as it can be *"clearly observed that multiple normative solutions concerning both the substantive conditions for granting or regaining Romanian citizenship, or for its withdrawal, as well as procedural aspects, do not meet the requirements of clarity, predictability and accessibility consistently established in the case law of the Constitutional Court, a circumstance that creates the premises for unconstitutionality defects in relation to the provisions of Art. (5) of the Constitution"*[16].

[14] *Ibidem.*

[15] *Ibidem.*

[16] *Explanatory memorandum to the Government Emergency Ordinance No. 100/2024 for supplementing and amending Romanian Citizenship Law No. 21/1991, as well as for amending and supplementing other normative acts,* Section 2.2: *Description of the current situation*, electronic edition, p. 4.

Following the referral to the High Court of Cassation and Justice, case no. 2138 AI/2024 was registered at the Constitutional Court, with a judgment date of 24.09.2024[17].

New organizational structure of the National Authority for Citizenship

The new changes in the citizenship legislation have brought with them a new organizational chart of the National Authority for Citizenship, whose staffing continues to be small and disproportionate to the importance of the field and the workload, with the total number of posts, including dignitaries, management positions and the staff of the office of the President of the institution, amounting to 105 employees.

By Order of the Minister of Justice 1726/C/2024, published in the Official Gazette, Part I, No. 796 of 12 August 2024, the new organizational chart of the National Authority for Citizenship is approved.

The new organizational chart is the result of the proposals of the National Authority for Citizenship (27784/ANC/25.06.2024 and 27842/ANC/2024), which took into account the provisions of Law 296/2023 on some fiscal-budgetary measures to ensure Romania's long-term financial sustainability, with subsequent amendments and additions, Article 11 of the Government Emergency Ordinance no. 5/2010 for the establishment, organization and functioning of the National Authority for Citizenship, approved by Law 112/2010, republished, Article 13 and point III, position 2 of Annex 2 of Government Decision 592/2024 on the organization and functioning of the Ministry of Justice[18]. The fundamental aims of the reorganization of the institution with a fundamental role in the procedure for granting and withdrawing Romanian citizenship are to reduce budgetary expenditure by abolishing, in accordance with Law 296/2023[19], four posts of head of office and to reduce the

[17] *Ibidem*, p. 5.

[18] *Order of the Minister of Justice no. 1726/C/2024 for the approval of the organizational chart of the National Authority for Citizenship*, Official Gazette Part I, no. 796 of August 12, 2024 (electronic edition), accessed on August 16, 2024, at 19.10.

[19] *Law 296/2023 on some fiscal-budgetary measures to ensure Romania's long-term financial sustainability, with subsequent amendments and additions* (electronic edition), accessed on August 16, 2024, 19:00, 31.

time taken to process applications for granting and renouncing Romanian citizenship.

Conclusions

With these amendments, whether we are talking about the draft law subject to constitutionality review or the Government Emergency Ordinance No. 100/2024, the initiators intended to create a legislative framework capable of meeting the needs of a society that is constantly evolving and subject to vulnerabilities. These reasons have to be completed with the post-global risks of terrorism and information warfare, the uncertainties related to the safety and security of the world, the successive attempts to defraud the procedure for granting and regaining Romanian citizenship.

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THE OBJECT OF THE MANUAL GIFT. PERSPECTIVE OF THE VALIDITY OF THE CONTRACT IN RESPECT OF INTANGIBLE ASSETS

Christine Giulia ABAZA*

ABSTRACT

In the context of the complexity of contemporary legal relationships, understanding the mechanisms of property transfer within civil law becomes essential. This article aims to analyze the specific characteristics of manual gifts, in relation to the distinctions between tangible and intangible assets, as well as the legal implications of the transfer of ownership as an effect of this institution. In addition, we aim to explore the conditions of validity of the manual gift, contributing to a clearer interpretation of the legal norms in force. Through this analysis, we will pursue both the theoretical clarification and the applicability of this institution, inviting a broad debate about the encounter between the theory of law and the economic and digital reality of our era.

KEYWORDS: *donation; manual gift; civil law; intangible assets;*

In a constantly changing society, the complexity of legal relationships concerning the right to property is accentuated, reflecting economic, technological and social developments. In this context, the transfer of ownership of assets is of particular importance. The manual gift, as a civil law institution, present in the legislation of many jurisdictions, in relation to intangible assets, requires a more nuanced analysis, given their intangible nature. Unlike tangible property, the transfer of which can easily be affected by the mere physical transfer of the property, in the case of intangible property, this concept is often inadmissible because it raises conceptual difficulties, as regards the requirements of validity and the methods of proving that type of transfer.

In particular, the analysis of the manual gift in connection with intangible goods is a complex topic, which deserves an in-depth study. Recent doctrinal opinions suggest an increasing trend of recognition of the

* *Ph. D. student, "Titu Maiorescu" University, Bucharest, Romania.*

role of intangible assets in the modern economy, which requires an adaptation of civil law legislation and doctrine to respond to contemporary challenges.

For these reasons, we propose research that contributes to debates on the practical relevance of the manual gift, exploring not only the legal implications, but also its impact on the economic relations between legal subjects.

1. Concept. Legal characteristics

In civil law, the manual gift is a form of donation that is made by transferring the property, from the donor to the recipient, without requiring additional legal formalities, including the authentic form specific to the donation[1]. It is worth mentioning that, although the manual gift represents a particular form of donation, it is subject to the principle of irrevocability of the second degree, art. 1.015 of the Civil Code being applicable.

The manual gift is, primarily, a bilateral legal act and, by its nature, a unilateral contract. It is admitted that the parties may also agree in the case of manual gifting any clause specific to the donation, such as: encumbrances, reservation of a usufruct, exemption from reporting, etc.[2].

The existence of the legal transaction is conditioned by the remittance, as a rule, material, of the property that is the object of the donation, which gives this contract a *real* character. Also, the remittance can also be made by making the property available to the recipient. A mere agreement between the donor and the recipient regarding the object of the donation, without being accompanied by its remittance, has no legal value. That agreement cannot have the value of a promise of donation, nor could it be subject to atypical enforcement by issuing a decision that replaces the donor's consent and takes the place of a contract[3].

[1] The legal definition of the institution can be found in art. 1.011 para. (4) Civil Code: *"Tangible movable property with a value of up to 25,000 lei may be subject to a manual gift, except for the cases provided for by law. The manual gift is validly concluded by the agreement of wills of the parties, accompanied by the tradition of the good".*

[2] François Terré, Yves Lequette, *Droit civil. Les successions, les libéralités*, Précis Dalloz, Paris, 1997, p. 404. Philippe Malaurie, *Droit des successions et des libéralités* 11th ed., LGDJ, Paris, 2024, p. 263.

[3] In the opinion of Professor Francisc Deak, also argued by the opinion of Professor Philippe Malaurie, "*Such an agreement is absolutely null and void both as a donation and*

According to the classical doctrinal opinion, the tradition can take place only with regard to tangible goods, a concept also addressed by the Romanian legislator, which expressly provides that the object of the manual gift can be only *tangible movable goods,* with a value of no more than 25,000 lei. In the modern doctrinal opinion, the possibility of making a manual gift on intangible goods is admitted, with certain limits due to the specificity of each good[4]. In this regard, it is admitted that the transmission can also be dematerialized, as in the case of a bank transfer, since the object of the donation is the amount of money transferred from the donor's bank account to the recipient's bank account, without one of the parties having physical contact with it[5].

The view in question is supported, in particular, by French doctrine, which considers the dematerialization of the tradition process to be an evolution parallel to the increasingly dematerialization of goods[6]. Thus, the manual gift can also be made by modern means, which do not involve a material delivery of the goods, from the donor to the recipient, but which do not give rise to any doubt as to the intention to donate, respectively to receive the donation and to transfer the property from one patrimony to another[7].

Therefore, regardless of the way in which the donated property is delivered, the tradition must be effective, not symbolic. We also remind that tradition is not a requirement for the execution of the manual gift but is a condition for the valid conclusion of the contract, which has a real character; The delivery of the property is autonomous and distinct from any document, which can serve as evidence of the legal transaction[8].

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as a promise of donation (due to the lack of authentic form). Nor can it be qualified as a pre-contract (unilateral or bilateral promise) of a manual gift, because the manual gift is not susceptible to a pre-contract; The promise of a manual gift is null and void". For details, see Philippe Malaurie, *Droit des successions et des libéralités*, p. 259. Francisc Deak, Lucian Mihai, Romeo Popescu, *Tratat de drept civil. Contracte speciale*, Vol. III, 5 ed., Universul Juridic Publishing House, Bucharest, 2018, p. 225.

[4] For details, see Dan Chirică, *Tratat de drept civil. Succesiunile și liberalitățile*, 2nd ed., Hamangiu Publishing House, Bucharest, 2017, pp. 152-154 and the bibliography cited there.

[5] *Ibidem*, p. 155.

[6] Philippe Malaurie, *Droit des successions et des libéralités*, p. 260.

[7] Francisc Deak, Lucian Mihai, Romeo Popescu, *Tratat de drept civil. Contracte speciale,* Vol. III, p. 229.

[8] *Ibidem*, p. 225.

Although we consider that such a mention could be redundant, we briefly specify that the manual gift is an *inter vivos* act*,* which must be concluded during the donor's lifetime, like any other donation; the conclusion of a *post-mortem* manual gift could not be possible. On the other hand, the execution of a possible burdens or obligations stipulated in the *instrumentum* may take place depending on its specificity, after the death of the donor, too.

Finally, we intend to mark the personal character of the manual gift, by specifying that the tradition of the donated good is usually carried out between the donor and the recipient. However, it has been admitted that, by exception, the delivery or, as the case may be, the receipt of the property can also be carried out through a third party designated by the donor or recipient (mandatary), and in the case of persons lacking legal capacity, the property is received by their legal representative. The essence of the manual gift is that the delivery of the property to the recipient or his legal or conventional representative is carried out before the death, incapacity or bankruptcy of the donor[9].

2. General conditions of validity of the manual gift

a. Capacity of the parties

Being an act of disposition, the disposer must have full legal capacity to exercise. This condition must be met at the time when the donor expresses his consent and hands over the donated good.

As regards the incapacity to dispose of, the general provisions on donations are applicable. In this regard, we recall the following general rules regarding the incapacity to dispose of the matter: (i) minors may not dispose by donations, either personally or through a legal representative; (ii) the person benefiting from judicial advice or special guardianship may not dispose of it by donations, either personally or through a legal representative or guardian; (iii) the minor who has become an adult or the former protected person may not dispose by donations, even after acquiring full legal capacity to exercise, in favor of the legal representative or guardian, before being discharged, unless the gratified person is the

[9] *Ibidem*, p. 224.

ascendant of the disposer; (iv) the insolvent person may not dispose of his assets free of charge.

From these rules, the Romanian legislator also establishes a series of exceptions, including: (i) the guardian of the person without capacity to exercise and the minor with limited capacity to exercise may make ordinary gifts, appropriate to the material state of the minor; (ii) the married or emancipated minor, who has acquired full capacity to exercise, under the conditions of the law; (iii) in the case of the person placed under protection by judicial advice or special guardianship, the guardianship court, by the decision establishing the protection measure, depending on the degree of autonomy of the person, may decide not to affect the capacity of the protected person to dispose of it through donations; (iv) the guardian of the person placed under special guardianship may gratify the descendants of the protected person, with the approval of the family council and the authorization of the guardianship court, without being able to exempt from the report[10].

Regarding the capacity to accept the manual gift, we specify that in the case of the person without the capacity to exercise, the manual gift is accepted by his legal representative, like any donation, and in the case of the person with limited capacity to exercise, as a rule, following the legislative amendments following the promulgation of Law 140/2022 on some protection measures for persons with intellectual and psychosocial disabilities and the amendment and completion of certain normative acts, should be accepted by it, alone (insofar as it is not encumbered), according to art. 41 para. (3) Civil Code, however, due to legislative inaccuracies as a result of the failure to adapt the provisions of art. 1.013 para. (4) Civil Code, in practice, the donation without encumbrances is accepted by the person with limited capacity to exercise, with the consent of the legal guardian.

The incapacities to receive donations are expressly provided by law in art. 990 of the Civil Code and are applicable, under penalty of relative nullity: to doctors, pharmacists or other persons who have provided, directly or indirectly, specialized care to the disposer for the disease that is the cause of death, who have received donations during this period. The same rule applies to priests or other persons who provided religious

[10] Gabriel Boroi, Carla Alexandra Anghelescu, Ioana Nicolae, *Fişe de drept civil*, 8th ed., Hamangiu Publishing House, Bucharest, 2024, pp. 465-467.

assistance during the illness that is the cause of death. By exception, donations made to the spouse, relatives in the direct line or privileged collaterals, as well as donations made to other relatives up to the fourth degree inclusive, are valid, if, on the date of the gift, the donor does not have a spouse, relatives in the direct line or privileged collaterals. However, if the disposer has been reinstated, the action for the annulment of the manual gift can be filed within 3 years from the date of the donor's reinstatement.

Last but not least, we specify that, in order to be gratified by a manual gift, a person must exist at the time of performing the tradition. In this sense, both an existing natural person and a legal person can be rewarded. However, to the extent that the conditions laid down by law are met, we accept that the institution of trustee substitution may be applicable.

b. Legal will

The meeting and concordance of the two elements of the legal will, consent and cause, must correspond to the principle of the real will of the parties. For the legal will to be valid, as in the case of any legal act, the consent must be free, serious and expressed in full knowledge of the facts, and the cause must exist, be lawful and moral.

In the matter of gifts, fraud is of particular interest, as a defect of consent, as it takes on characteristic forms, through *capture and suggestion*. About suggestion it was stated that it can consist of tendentious and occult maneuvers, and the capture consists in the use of fraudulent means in order to gain the trust of the donor. The purpose pursued by the perpetrator of the fraud is to determine the disposer to make a donation, which he would not have done if these means had not been used[11]. As an objective element of deceit, the suggestion is a subtle way in which the disposer is induced the idea of making a donation, and the capture is manifested by harsh means, through which the decision to gratify a certain person is directed[12].

[11] Ioana Nicolae, "Consimțământul – condiție de fond pentru validitatea testamentului", Universul Juridic Magazine no. 4/2020, pp. 12-22.

[12] Alexandru Bacaci, Gheorghe Comanita, *Drept Civil. Succesiunile*, Universul Juridic Publishing House, Bucharest, 2013, p. 53.

c. The object of the manual gift

Considering the way in which the Romanian legislator intended to regulate this institution, the manual gift can only have as its object tangible movable property, susceptible to tradition. Therefore, immovable property, future property and, as a rule, intangible movable property cannot be the subject of a manual gift, but only of a donation contract concluded in authentic form, according to the general rules. If the donated property is co-owned, the manual gift can only be made with the consent of all the co-owners, since, in the matter of co-ownership, all legal acts free of charge constitute acts of disposition.

It is our contention that the tradition of intangible assets such as a claim (except bearer securities, which are transmitted by the material remittance of the title), intellectual property rights, a goodwill or shares cannot be admitted because the lack of tangibility of the intangible assets complicates the process of tradition and proof of the legal transaction and could facilitate the intention of defrauding the donor's creditors.

Regarding intellectual property rights, we mention that the creation should not be confused with its material support. As we have mentioned in other works, the material support of the work gives rise to a property right distinct from the copyright born as a result of the creation by the author[13]. The fact that the material medium (for example, a painting) may be subject to remittance does not imply the assignment of the copyright in that work. The copyright is reserved to the author of the work, regardless of the quality of owner of the material medium.

However, overcoming the classic barriers of the categories of intangible assets recognized by the legislation in force, we find ourselves in a position to consider the analysis of an extension of the admissibility of making a manual gift on goods such as digital assets, which, as a rule, are transferred from one patrimony to another similar to a bank transfer. In the context of the volatility of these assets, their economic value and the globalization of transactions with goods such as cryptocurrencies or similar digital assets, we believe that the admissibility of making a manual gift on such goods could be justified by the practical inconveniences associated with concluding a donation contract in authentic form, including with regard to the

[13] Christine Giulia Abaza, "Substantive conditions of the mortgage contract on copyright", Annals of Titu Maiorescu University, 2023.

possible conflict of laws in space. In this context, if *the animus donandi* exists, and the substantive conditions are met, the practical usefulness of the manual gift could prevail over the solemn formalities of the donation. In addition, in practice, these types of donations are made by transferring from one account or digital wallet to another, or by revealing keys or codes[14].

The limitation of the manual gift on tangible goods is based on the reason of protecting the civil circuit, ensuring the clear and precise identification of the donated good, so that there is no room for uncertainty. At the same time, this regulation has the role of protecting the donor's consent, guaranteeing the existence of adequate means of proof of the legal transaction. By voluntarily handing over a specific and tangible individual asset, the donor explicitly manifests his understanding and awareness of the importance of the act he undertakes, and the proof of its existence can be carried out relatively simply, considering the physical and tangible nature of the asset. On the other hand, the admission of an extension of the manual gift to *any* intangible assets could generate significant difficulties in terms of their identification, valuation and control, creating the premises for the destabilization of the civil circuit and the easy defrauding of creditors. Such an extension would entail risks related to the lack of clear and reliable records, as well as vulnerability to fraud, since intangible assets cannot be transferred or identified in a manner as easily verifiable as tangible assets, which would undermine the security and transparency of legal transactions.

However, we consider it appropriate to adapt the legislation in force, in compliance with the principles of transparency, protection of consent and transactional evidence, without jeopardizing the stability and security of the civil circuit. Basically, the reasoning for which the legislator exempted the manual gift from the rule of conclusion in authentic form was the dynamics of the civil legal relations between the subjects of law, and the categorical inadmissibility of the manual gift on any type of intangible property would restrict the flexibility and adaptability of social life and would diminish the initiative to adjust the legal regulations to the new forms of ownership and transfers of goods. Digitalization and the rapid development of financial technologies have led to the emergence of new types of goods that, although intangible, have a significant economic

[14] Philippe Malaurie, *Droit des successions et des libéralités*, p. 261.

impact and can be transferred quickly and securely through technologies such as *blockchain*. Moreover, given that the transfer of rights over such assets can be validated by immutable digital records, the legislative regulations could be adjusted to allow their transfer within a clear legal framework, which would ensure both the protection of the parties' consent, the existence of a lawful and moral cause, but also the transparency and security of transactions. In this respect, adapting the legislation to the realities of the digital economy would not only mean a simple modernization of the rules, but also a strengthening of the protection of the rights of the parties involved in such transactions.

De lege ferenda, we propose adapting the legislative framework to the needs of everyday life, so that certain forms of manual gifting such as bank transfers, asset transfers via *blockchain* are obviously not disapproved. Basically, the legislation has the role of regulating certain aspects of social life, giving efficiency to the practices established between the subjects of law. A hostile approach on the part of the legislator only demonstrates an inability to adapt to the evolution of society that would not only not meet its needs but would constitute a real barrier to its development. Of course, legal specialists thus acquire an essential role in supporting the bodies with legislative powers for a correct and adapted regulation of the legal norms.

Starting from the doctrinal statement that the manual gift, like any donation, is susceptible to clauses specific to it, and the object of the manual gift is "presumed" to be the right of ownership over the donated good, the specialized literature has analyzed the possibility of gifting only a right of usufruct over the good and the stipulation in the *instrumentum* of the reservation of bare ownership over the donated good. The doctrinal conclusion was to admit this situation: *"The manual gift can have as its object not only the right of ownership in its entirety, but also bare ownership or usufruct. [...] In other words, where, on the basis of an agreement between two persons, a movable asset animus donandi is transferred from one person to the other, it is presumed that full ownership of that thing has been transferred, but if it is proven that there is an added agreement (agreements) from which it follows that the donor has retained his bare ownership, it follows that what has been transferred is not in fact*

full ownership (the presumption in this regard being rebutted in such a case), but only an attribute of it, namely, usufruct"[15].

We assert that this operation does not enjoy a fair and complete legal classification. The contract by which the owner transmits to a person *usus* and *fructus* over his property represents an agreement for the establishment of a right of usufruct, and the delivery of the good is not equivalent to a manual gift, but to the execution of the obligation to hand over the good by the bare owner, to the usufructuary. Moreover, the Romanian legislature admits the constitution of a right of usufruct, both for consideration and free of charge.

In addition, such an agreement is incompatible with a donation and, even more so, with a manual gift, in view of the argument of contradiction between the duration of a right of usufruct and the principle of irrevocability of the second degree that affects any donation, regardless of its form. By its essence, the right of usufruct is a temporary right, which, in favor of a natural person, can be for life at most, and in favor of a legal person it can be constituted for a period of no more than 30 years, which means that at the expiration of the term for which it was established, the usufructuary or his successors have the obligation to return the property to the bare owner. This obligation is incompatible with the very essence of the donation, the donor not having the possibility to request the return of the good except under the express and restrictive conditions provided by law, through the mechanism of revocation of the donation for ingratitude or non-performance of the charge. Last but not least, the usufructuary does not acquire *ius abutendi,* and the principle of irrevocability of the donation, among other things, imposes the sanction of absolute nullity of the donation even if *the donor is allowed to dispose of the donated property in the future, even if the donor dies without having disposed of that property*[16].

Therefore, we consider that an agreement concluded between the owner and a person through which the attributes of *usus* and *fructus* are transmitted does not have a manual gift as a legal mechanism, however, we consider that it is possible to transmit the right of usufruct, already constituted, to a third person, through the mechanism of assignment of the

[15] See Dan Chirică, *Tratat de drept civil. Succesiunile și liberalitățile*, pp. 154-155, and the bibliography cited there.

[16] Art. 1015 para. (2) letter d) of the Civil Code.

right of usufruct, regulated by art. 714 of the Civil Code, which may have an *animus donandi* cause*,* but of the usufructuary, not of the bare owner.

Conclusions

We believe that the extension of the object of the manual gift to include certain categories of intangible assets would contribute to an adaptation of the legislation to the contemporary realities of society, given the technological and economic developments of the last decades. However, we do not believe that this concept should be absolutized, since a clear distinction must be made between the nature of tangible goods and that of intangible goods, given the different characteristics of their transfer. In the context of the dematerialized transfer of intangible assets, possible proof of the parties' intention and informed consent could be achieved through the use of electronic means over which the donor has full control. A relevant example would be the transfer of assets to an electronic account, similar to a bank account, which guarantees that the intention to transfer the intangible asset from the donor to the recipient is certain, real.

In conclusion, the integration of intangible assets within the framework of the manual gift should be carried out with caution, while ensuring that the fundamental principles of civil law, such as free consent and the security of the civil circuit, are respected in a way that does not deepen legal ambiguities. The adaptation of the legislation should be accompanied by further clarifications in order to prevent possible conflicts of interpretation and to ensure adequate protection of the parties involved in these legal relationships. Thus, the development of clear and precise rules is essential to ensure the validity and effectiveness of these transfers in the current digital context.

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CIVIL CIRCUIT. RECONSIDERATION OF THE NOTION FROM A DOUBLE CIVIL VERSUS ADMINISTRATIVE PERSPECTIVE

Liliana Cătălina ALEXE*

ABSTRACT

The concept of "civil circuit" can be considered, without making too much of a mistake, one of the most well-known notions of law. In this article we will analyze how present it is in the space of law, how understandable is its content captured in two large branches of law (civil versus administrative), placed in the mirror, how far can the translation from the (generous) space of civil law to the space of administrative law (marked by slightly restrictive characteristics) be achieved, if this migration (allowed or not, as we will conclude) influences, in its determined elements, the concept of "civil circuit", determining its own particularities. The article also wants to draw attention to the danger (from judicial interpretation), because undefined in the body of (special) laws, concepts or notions of the type in question cannot be excluded from entering the zone of vulnerability. Defining the concept in the interpretation of the courts, starting from its civil meaning, passing it through the space of administrative law to find its contextual meaning specific to this matter.

KEYWORDS: *civil circuit; administrative circuit; legal construction; elements; administrative act;*

I. "Civil circuit" – legal construction or legal fiction?

Undoubtedly, the notion is part of the legal terminology, of the legal vocabulary, of the legal tools.

Analyzed separately, the terms from the notion of "circuit" and "civil" belong, equally, to the common language and legal terminology, being used with difficulty and lacking the substance, which together, join to convey the concept.

* *Ph.D. Student, "Titu Maiorescu" University, Bucharest, Romania. Judge, Bucharest Court of Appeal, Section VIII Administrative and Fiscal Litigation.*

The definition of the notion does not seem to be particularly concerned with the space of law (except when we encounter it in the legal norm subject to interpretation, causing difficulties in application), probably due to the (rather) familiar character of the notion, somehow integrated in the legal terminology, constantly evoked and implicitly, borrowing the (misleading) attribute of "understood".

The first remark is that there is no proper and precise regulation regarding this terminology, although it would have been necessary, being present in the body of legal norms, with an impact on the interpretation and application of the norm.

The second remark is that we are not dealing with a legal fiction.

The need for this concept cannot be denied. It was necessary in the process of repertorization of law.

If we also take a look at the semantic field of the terms incorporated in the notion, the noun "circuit" brings to mind the action of circulating.

Regent is a word with lexical meaning, having the meaning of "to be in motion", "to be transmitted from one to another", "to spread", "to use in a current way", to which is attached the ubiquitous adjective "civil ", a natural part of the circuit to which it refers, regulating, in general, social relations (converted into legal relations")

The Civil code took the notion easily, as something already given, taken for granted, although things cannot be placed in this direction when we "place" terminologies with a high degree of generality in regulatory spheres of legal norms.

In order not to lose the thread of my analysis, I return to the conclusion above, with sufficient strength in affirmation.

Legal fiction presupposes ab initio a representation that does not correspond to reality or that has no counterpart in reality, allowing me to borrow part of the dictionary definition (because any definition can only start from semantics, from the meaning of the word, to arrive at a fair trajectory to its legal foundation).

The civil circuit is as real as possible, so real that there was no pressing need for its regulation.

Without general definitions in which terms and expressions find their legal meanings, it has proven (and not infrequently) that they deserve special attention, the lack of regulation can even significantly undermine the vital role in the understanding of the concept.

The following analysis of the notion demonstrates that there are significant barriers to understanding the notion and it deserves to be brought back into focus.

This article will focus on two branches of law – the subjects of civil law and administrative law – in other words, it will put private law and public law face to face, the analysis will take into account these differences, detecting the vulnerabilities of a legal construction with a crucial role in the legal order, with effects and borders not yet established.

II. The concept of "civil circuit" in the matter of civil law.

Definition and properties of the concept

A concept[1] is a linguistic signifier. The language of law uses concepts, a productive fact, of particular importance in the structure of all subjects.

The first aspect is the one according to which the concept must be destructured in the meaning or meanings assignable to the terminology.

The legal dictionary defines it as follows: "component part of the legal circuit, which includes all the facts and legal acts that give rise to, modify or terminate civil law relations".

The civil circuit represents all the facts and legal acts based on which civil legal relations are born.

The term is one of special importance in civil construction.

There is a civil circuit of goods, firmly stated in the norm of article 457 of the Civil Code: "Goods can circulate freely, except in cases when their circulation is limited or prohibited by law", a circuit of lands regulated by art. 66 of the Land Fund Law no. 18/1991 ("Privately owned lands, regardless of their owner, are and remain in the civil circuit. They can be acquired and alienated in any of the ways established by civil legislation, in compliance with the provisions of this law"), in accordance with these rules being an assignee of the right of ownership.

[1] Concept – general idea that correctly reflects reality.

Upon an examination of the provisions of the Civil Code, in a "looking back" in the rules of the Code, we note the present notion as follows:

➢ **ART. 193**

Effects of legal personality

(1) The legal entity participates in its own name ***in the civil circuit*** and is responsible for the obligations assumed with its own assets, except in the case where the law would order otherwise.

➢ **ART. 218**

Participation ***in the civil circuit***

(1) The legal acts made by the administrative bodies of the legal entity, within the limits of the powers conferred on them, are the acts of the legal entity itself.

(2) In relations with third parties, the legal entity is bound by the acts of its organs, even if these acts exceed the power of representation conferred by the act of incorporation or statute, unless it proves that the third parties knew it at the time the act was concluded. The simple publication of the act of incorporation or the statute of the legal entity does not constitute proof of knowledge of this fact.

(3) The clauses or provisions of the act of incorporation or of the statute, as well as the decisions of the statutory bodies of the legal entity that limit or expand the powers conferred exclusively by law on these bodies are considered unwritten, even if they have been published.

➢ **ART. 553**

Private property

(1) All goods of private use or interest belonging to natural persons, legal entities under private law or public law, including the goods that make up the private domain of the state and administrative-territorial units, are the subject of private property.

(2) Vacant inheritances are ascertained through a succession vacancy certificate and enter the private domain of the commune, city or municipality, as the case may be, without registration in the land register. The buildings in respect of which the right of ownership has been waived according to art. 562 para. (2) they are acquired, without registration in the land register, of the commune, city or municipality, as the case may be, and enter their private domain by the decision of the local council.

(3) Vacant inheritances and immovables mentioned in para. (2), located abroad, belong to the Romanian state.

(4) The objects of private property, regardless of the owner, are and remain in the civil circuit, unless the law provides otherwise. They can be alienated, they can be the subject of forced pursuit and they can be acquired by any means provided by law.

- **ART. 1229**

Goods that are not in ***the civil circuit***

Only the goods that are in the civil circuit can be the object of a contractual performance.

- **ART. 1484**

Assignment of rights or shares

If the asset perished, was lost or was removed from ***the civil circuit***, through no fault of the debtor, he is obliged to cede to the creditor the rights or actions in compensation that he has with regard to the respective asset.

What is the "civil circuit" from the civil rules? How understood is the notion in the context of its activation in practice?

Undoubtedly, the notion is a legal construction according to which this circuit is considered to exist, but it is not established, fixed in content.

We don't lose sight of the answer, but it is important to be given after a summary examination, with the same purpose, of the administrative matter as well.

III. The concept of "civil circuit" in the matter of administrative law

The area of administrative (law) is represented in the article, mainly, by the Administrative Litigation Law nr. 554/2004[2] and by the Administrative Code approved by Emergency Ordinance no. 57/2019 of July 3, 2019.

We did not deliberately ignore other normative acts in which it can be found, but I gave priority to the forceful acts of the contentious.

[2] Law no. 554 of December 2, 2004 of the administrative litigation was published in the Official Gazette no. 1154 of December 7, 2004. Government Emergency Ordinance no. 57/2019 was published in the Official Gazette of Romania, Part I, no. 555 of July 5, 2019.

Administrative litigation Law no. 554/2004 uses the notion of *"civil circuit"* twice in the provisions of art. 1 para. 6 and art. 7 para. 5 of the law, texts with the following content:

– art. 1 para. (6): "The public authority issuing an illegal unilateral administrative act can request the court to cancel it, in the situation where the act can no longer be revoked because ***it entered the civil circuit and produced legal effects***. In the event of the admission of the action, the court, if it was notified through the summons, also decides on the validity of the legal acts concluded on the basis of the illegal administrative act, as well as on the legal effects produced by them. The action can be brought within one year from the date of issuance of the act".

– art. 7 para. (5): "In the case of actions brought by the prefect, the People's Advocate, the Public Ministry, the National Agency of Public Servants, of those that concern the claims of persons injured by ordinances or provisions from ordinances or of actions directed against administrative acts that can no longer be revoked since they ***entered the civil circuit and produced legal effects***, as well as in the cases provided for in art. 2 para. (2) and in art. 4 is not mandatory prior complaint"[3].

In the Administrative Code we notice the notion of "civil circuit" three times in the number of searches:

➢ **ART. 26**

Exercise of control by the Government

(2) In exercising the control provided for in para. (1), the Government may request the revocation of illegal, groundless or inappropriate administrative acts issued by the authorities provided for in para. (1) which have not entered ***the civil circuit and have not produced legal effects*** and which may harm the public interest.

➢ **ART. 275**

The legal regime applicable to the acts of the prefect

(8) The minister who coordinates the institution of the prefect may propose to the Government the revocation of the orders issued by the prefect that are normative in nature or those provided for in para. (2) and

[3] On 02.08.2018, para. (5) of art. 7, Chapter II was amended by point 5, art. i of Law no. 212 of July 25, 2018, published in the Official Gazette no. 658 of July 30, 2018.

(6), if he considers them illegal or groundless, if they have not entered ***the civil circuit and have not produced legal effects*** and may harm the public interest.

- **ART. 355**

The legal regime of private property of the state or administrative-territorial units

The goods that are part of the private domain of the state or of the administrative-territorial units ***are in the civil circuit*** and are subject to the rules provided by Law no. 287/2009, republished, with subsequent amendments, if the law does not provide otherwise.

Naturally, the first finding that emerges is the conceptual package, the same one, connecting two powerful invoice requirements: "they did not enter the civil circuit and did not produce legal effects" present in the area of the administrative matter.

Per contrario, can the act of administrative invoice enter the circuit, without producing effects?

The answer that can be seen, to the first filter of logical-judicial reasoning, would be an affirmative one.

The legislator of the 2004 dispute brings into the norms of Law no. 554/2004 (at the date of publication, only in the provision of art. 1 par. 6 of the law) the notion of "civil circuit", marking, in the texts of the law, only the temporal moment, one of the beginning "he/she entered the civil circuit", adding, in addition, a cumulative type condition (through the presence of the coordinating conjunction "and" that links the two requirements): "they produced legal effects".

With the permission of the author of the article "Brief x-ray of the last discrete proposals to amend the Administrative Litigation Law adopted by the Romanian Parliament at the end of 2022" I take an extraordinary remark about this civil circuit exploited in litigation: "In other words, starting from 2018, it became (more) relevant to know what it means to enter the civil circuit and produce legal effects because in some cases it even depended on these notions admissibility of the action in litigation*"*[4].

[4] I. Suatean, drd. Faculty of Law, University of Bucharest, Brief x-ray of the last discrete proposals to amend the Administrative Litigation Law adopted by the Romanian Parliament at the end of 2022, Legal Forum no. 1/2023, Annales of the University of Bucharest – Law Series, https://drept.unibuc.ro › documents › AUBD, accessed on 08.11.2024: "First of all, a brief clarification of the context is necessary. The categories

As a result, it appears necessary to return to the legal dialogue the vulnerable aspects of the function of the civil circuit when it is subject to the public law regime[5].

The legislator brings into the field of administrative normativism, lightly (regulatory lightness, to put it non-accusatively, when the regulatory technique does not bother you too much, nor the anticipation of difficulties in application), if not quite easily, big notions, relaxed in the space of law, thinking that this very abstract notional content would also be sufficient.

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of administrative acts exempted from the formulation of the prior complaint benefited in 2018 from an important addition: that of acts that can no longer be revoked because they have entered the civil circuit and have 14 Legal Forum no. 1/ 2023 produced legal effects 11. This phrase had already made a career in administrative law through the prism of art. 1 para. (6) from Law no. 554/200412, but with its installation and in the list of exceptions to the formulation of the preliminary complaint, it acquired something that it (perhaps) completely lacked before – a practical stake. In other words, starting in 2018, it became (more) relevant to know what it means to enter the civil circuit and produce legal effects, because in some cases even the admissibility of the action in litigation depended on these notions".

[5] Regarding the way of drafting normative acts, the Constitutional Court notes that, according to Law no. 24/2000, the rules of legislative technique require the legislator to create an explicit configuration of the concepts and notions used in the new regulation, within the framework of the adopted legislative solutions, which have a different meaning than the common one, in order to ensure their correct understanding and to avoid misinterpretations (art. 25), and if a notion or term is not established or may have different meanings, its meaning in the context is established by the normative act that establishes them, within the general provisions or in an annex intended for the respective lexicon, and becomes mandatory for the normative acts on the same subject [art. 37 para. (2)]. The Court also notes that, in general, the legal style, due to its very reason for being, uses the same terminology, including technical words that correspond exactly to legal notions. The constant and uniform use of the same terms in the drafting of normative acts is a guarantee for achieving the coherence of national legislation, in these conditions the conceptual determination and definition of these terms is no longer necessary, therefore, the official, authentic, contextual interpretation of notions with normative content identical to the previous regulation (see, in this sense, Decision no. 489 of June 30, 2016, published in the Official Gazette of Romania, Part I, no. 661 of August 29, 2016, para. 59 and para. 61, Decision no. 12 of January 14, 2020 regarding the exception of unconstitutionality of the provisions of art. 7 para. (6) and 11 para. (e) of the Administrative Law no. 554/2004, in the wording prior to the amendment by Law no. 212/2018, as well as the provisions of art. 11 para. (2) from the Administrative Litigation Law no. 554/2004, published in the Official Gazette no. 198 of 11.03.2020).

It is not the first time that the legislator uses this "planting" tool, welding elements of the civil with those of the administrative, without the caution that should have been taken at least in terms of the cause-effect relationship and the notions that it connects within the norm in the realm administrative.

According to art. 28 of the Administrative Litigation Law, the provisions of Law no. 554/2004 is supplemented with the provisions of the Civil Code and with those of the Civil Procedure Code, insofar as they are not incompatible with the specifics of the power relations between public authorities, on the one hand, and persons injured in their rights or legitimate interests, on the other on the other hand.

However, administrative normativism cannot be easily assimilated to civilian normativism.

When we propose to bring such elements into the same territory of the norm, the level and technique of content construction must be high.

Per a contrario, the question: How long is an administrative act, claimed by the injured party to be illegal, outside the civil circuit? not without answers, but the present study claims to demonstrate that they are not enough.

This is because certain characteristic factors of the civil cannot support our confidence in the interpretation if the elements of the contentious case, the particular elements of the administrative act, in general and of the type of administrative act in the case plan are ignored.

The administrative rules reproduced above (art. 1 para. 6 and art. 7 para. 5 of Law no. 554/2004) are impactful in the administrative field, causing controversies, being subject to constitutionality control by referral to the Constitutional Court in reference to the phrase "administrative acts that can no longer be revoked because they entered the civil circuit and produced legal effects" inserted in their contents.

The course of an objection of unconstitutionality, resolved relatively recently by the Constitutional Court, once again refers to the interpretation of the one who implements the norm.

By Decision no. 598 of November 21, 2023 regarding the exception of unconstitutionality of the phrase "actions directed against administrative acts that can no longer be revoked because they entered the civil circuit and produced legal effects" from the provisions of art. 7 para. (5) from the Administrative Litigation Law no. 554/2004, published in the Official Gazette no. 131 of February 15, 2024, the Court finds that "the legal issue

invoked by the author of the exception of unconstitutionality and referred to the Constitutional Court for resolution – regarding the establishment of the moment of entry into force of administrative acts and the production of legal effects – is in reality one of interpretation and application of the legal norms applicable to the specific case referred to the judgment of the court that referred the matter to the Constitutional Court" (par. 29).

The constitutional court continues in the final part of the same paragraph: "If judicial practice shows a non-unitary interpretation, the Constitution, by art. 126 para. (3), assigns to the High Court of Cassation and Justice, and not to the Constitutional Court, the competence to establish the interpretation and uniform application of the law by the other courts".

The High Court unbinds, relatedly, and not directly, the notion of "civil circuit" in the Panel for unbinning some legal issues in order to issue a preliminary decision, by which to give a solution in principle regarding the following legal issue:

"In the interpretation and application of the provisions of art. 1 para. (6) from the Administrative Litigation Law no. 554/2004, can the public authority issuing a unilateral administrative act with a normative character ask the court to cancel it?".

The notification was registered on the roll of the High Court of Cassation and Justice with no. 1,379/1/2023, resolved by decision no. 74 of November 20, 2023, published in the Official Gazette, Part I no. 12 of January 8, 2024.

Relevant, from this dismissal of the supreme court, are the following considerations:

"85. Secondly, administrative acts with a normative character are not likely to enter the civil circuit, in the sense referred to by art. 1 para. (6) from Law no. 554/2004.

86. ***The civil circuit*** represents the sum of private legal relationships, seen in their dynamics, so that a normative act has no way to enter the civil circuit, since it only creates vocations, not subjective (effective) rights, able to be the object of a legal relationship under private law.

87. ***Entry into the civil circuit*** refers to the birth of concrete legal relationships and subjective rights that a normative administrative act cannot generate by itself.

88. Even if after publication any administrative act with a normative character produces objective legal effects, by modifying the existing nor-

mative reality at that time, this aspect is not referred to by art. 1 para. (6) from Law no. 554/2004".

Recently, the High Court decided in the plenary session of the judges of the Administrative and Fiscal Litigation Section on 05.11.2024 that:

"In the plan of verifying the admissibility or inadmissibility of the action to cancel the government decisions certifying the public domain of the counties/municipalities/cities, in the hypothesis of not going through the prior procedure, the mere existence and/or publication of the decisions of the local councils or of the government decisions do not prove the entry into the circuit civil or the fact that they produced legal effects, to be verified, on a case-by-case basis, the existence of concrete elements that to prove both the entry of administrative acts ***into the civil circuit and the production of legal effects****. To the extent that such proof is not provided by the interested party, the action to cancel the contested decision is inadmissible"* (excerpt from the minutes of the meeting).

It is true that a certain type of administrative acts (decisions of local councils and government decisions) are in the sights, but the interpretation remains valuable.

In our opinion, the judge, called in these situations, to develop legal reasoning that respects the application limits of these notions, is not really a strong guarantee of reassurance.

The judge's obligations in the process architecture are imperatively increased, taking into account that a fair trial can only be determined by the circumstances of the particular case under discussion, by the obligation to know them (through the mechanism of questioning or the explanations given by the parties in any judicial procedure allowed by art. 22 para. 2 of the Civil Procedure Code).

The law, moreover, reserves the judge's discretion.

Whenever the law reserves the judge's discretion or requires him to take into account all the circumstances of the case, the judge will take into account, among others, the general principles of law, the requirements of equity and good faith (art. 22 para. 7 CPC).

It is not superfluous to remember that the Convention (EDO) does not guarantee theoretical and illusory rights, but concrete and effective rights; and if the right to revoke an administrative act (paralyzed, in the situation where the act entered the civil circuit and produced legal effects) is treated in a superficial manner, it tends to become an illusory right.

The following query is kept.

By presiding over judicial proceedings, the power and position could allow the judge to "get closer" to the plan of the process, easily recognizing those concrete elements?

What are the concrete elements that prove the entry of administrative documents into the civil circuit and what are those elements to be able to speak of a civil circuit?

What happens in the realm of interpretation, and not of judicial or jurisprudential innovation (the ultimate terminology that I avoid using in the description due to the danger of recreating or standardizing that it may contain) is not the same as what is obtained from the clear establishment of the legal meaning.

Otherwise, illegal administrative acts that can no longer be revoked because they entered the civil circuit and produced legal effects still remain on debatable ground.

Moving away from our own question above, to establish the moment/moments (be it some landmark, indicative moments) in relation to which an administrative act can be considered not to be introduced in the civil circuit (its introduction occurring after, obviously, the moment issuing and communicating it) can be as good an answer as the one sought (when an act is in circulation and produces legal effects).

In other words, the deed was issued, it was communicated to the beneficiary, with the following for him to engage it legally, using it for a multitude of concrete and subjective purposes through legal acts.

The reasoning forces us to return to the definition of the legal act – manifestation of will of one or more natural or legal persons, made in order to create, modify or extinguish civil legal relations – and to the classification of acts (unilateral, bilateral – conventions or contracts or multilateral, for a fee or free of charge, civil legal documents between the living or civil legal documents for the cause of death, constitutive, translational and civil legal documents declarations, legal documents named, established by civil law, with its own regulation or unnamed legal acts, which did not enjoy a legal name and its own regulation.

Can all these types of documents be concrete elements?

Can we say that the concrete elements (evoked by the supreme court) that would demonstrate the entry of administrative acts into a civil circuit are, mainly, legal acts?

Could we say – without making too much of a mistake – that the statement is sufficient and would represent the answer sought?

But administrative operations have such a feature[6], can they be concrete elements, if the activity of the public administration is expressed in administrative operations, material operations, administrative facts?

However, unlike the administrative act, administrative operations and material operations do not produce legal effects by themselves.

And in this regard, a convincing factor that such a transfer of concrete elements can be possible is that through similarity (administrative operations and material operations can be involved, subsequently introduced into relationships by the will manifested externally, known by those to whom address which obliges the subject of law to whom it is addressed, to a certain benefit).

We will leave the subject open as it has its own controversy.

In the end,

In our opinion, we can conclude without making too much of a mistake that, the conceptual package *"they did not enter the civil circuit and did not produce legal effects"* present in the space of the administrative matter, is not well characterized in terms of the safety requirements that it should emanate.

The consistency of the articles in question has a precarious character within the administrative decision-making mechanism, and the legislative technical norms from Law no. 24/2000 should be reactivated.

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[6] According to Prof. university Dr. Verginia Vedinaș, the legal acts carried out by the public administration are of two categories: acts specific to the administration (administrative acts and administrative contracts) and acts by which the administration behaves like any subject of law, in relations with other subjects of law (legal acts subject to common law, civil contracts, documents issued under common law). Most of the legal acts that intervene in the activity of public authorities are made up of administrative acts.

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RISK ISSUES IN THE LEASE CONTRACT

Daniel-Cătălin CHIFOR*

ABSTRACT

Risk in the lease contract is an essential concept in relation to the understanding of the responsibilities of the contracting parties but also in relation to how they protect themselves in the face of uncertainty. In connection with the creation, performance and termination of the lease, risk manifests itself in several forms and identifying these is crucial for maintaining a balanced contractual relationship. Discovering the meaning of the concept of risk is closely linked to an understanding of the functionality of the legal institution of force majeure and fortuitous event in relation to the fortuitous impossibility of total/partial, temporary/definitive performance. Risk is not a young concept, but one that has existed in all legal systems since ancient times, retaining its central elements of danger and opportunity.

KEYWORDS: *risk; fortuitous impossibility of performance; rental risk; tenancy;*

"We must take risks, we will fully
understand the wonder of life
only when we let the unpredictable happen"[1].

1. Origins, etymology, definition of risk and reasons for choosing this theme

An understanding of the origin and etymology of concepts allows a deeper appreciation of the connotations they carry on words, with etymology providing a window on the social, cultural and linguistic context in which a word evolved. The concept of risk is found in ancient Greece (in the area of maritime trade where Greek navigators used the words *"rizikon"* and *"rhiza"* when explaining techniques for avoiding dangers at

* *PhD student "Titu Maiorescu" University Bucharest, Romania.*

[1] Paulo Coelho, *La râul Piedra am șezut și-am plâns*, trad. Pavel Cuilă, Humanitas Publishing House, Bucharest, 2018, p. 21.

sea[2]. Eastern culture also encountered the early forms of the concept of risk, where it had a similar meaning to that of crisis, a concept used in China to determine danger and opportunity[3].

The closest form of the concept of risk in today's lithography is found in the Latin risicum, from which the Italian word risco derives, which refers to a dangerous threatening situation.

In the Romanian context, the concept of risk is overshadowed by an evil shadow, with its negative connotations being emphasized. Professor Paul Vasilescu defines risk as a *"dangerous hazard with damaging consequences, which requires the assumption of its negative consequences by a person, but who does not necessarily create the harmful danger, but may take advantage of it or try to contain it"*[4].

The concept of risk cannot be seen in a negative connotation, since taking a risk can lead to a benefit. Risk must be seen both as a threat and as an opportunity, risk being a situation or event which, although it does not materialize, has the potential to influence the intended or expected outcome. The General Secretariat of the Government of Romania is a pioneer in providing a definition of risk, stating that risk is understood as *"a situation or event that has not yet occurred, but which may occur in the future, in which case the achievement of the results previously set is threatened or potentiated. Thus, risk can represent either a threat or an opportunity and should be approached as a combination of probability and impact"*[5].

In our opinion**, *risk is a factor of external origin to a social relationship, with a profoundly random character, which is predictable but***

[2] Rolf Skjong, "Etymology of risk", February 25th 2005, DNV Research and Innovation, Norway, Web. 2. Apr. 2010 *apud* Cantemir Mambet, Transdisciplinary approach to risk management and risk management and decision making – PhD thesis, p. 20. available at: https://ciret-transdisciplinarity.org/biblio/biblio_pdf/Cantemir_Mambet_Final.pdf (last accessed: 03.12.2024).

[3] Victor H. Mair, "*Danger + opportunity ≠ crisis: How a misunderstanding about Chinese characters has led many astray"*. Article in PinyinInfo.com, p. 2.

[4] Paul Vasilescu, *Civil Law. Obligations – in the new Civil Code*, Hamangiu, Publishing House, Bucharest, 2012, p. 559.

[5] Risk management methodology, Competence makes the difference! Project selected under the Operational Program Administrative Capacity co-funded by the European Union, from the European Social Fund, p. 7, material available at https://sgg.gov.ro/1/wp-content/uploads/2018/07/Metodologia-de-management-al-riscurilor-2018.pdf, last consultation 04.12.2024.

remains uncertain as to its possibility of occurrence and its occurrence disturbs the social equilibrium and may result in harm to the parties to the relationship caught by the risk but also in the possibility of benefits for one party, as the case may be.

In the following, we have chosen to develop aspects related to the ***risks encountered in connection with the creation, execution and termination of tenancy contracts***, a choice motivated by the complexity that the legislative changes have acquired in the contemporary period, but also by the social conception of property and the way in which the community manifests itself in relation to the need to own or not to own a property.

In order to be able to write this study, scientific research methods will be used to ensure the rigor and validity of the subjects addressed, using doctrinal research involving a broad analysis of specialized works, relevant case law and legislation on the subject. The comparative method will allow the examination of the similarities and differences between various situations, providing valuable insights on the analyzed topic and the critical analysis will be a pillar in the evaluation of arguments and interpretations already existing.

The state of research in the field of risks related to the origination and enforcement of tenancy agreements is dynamic and constantly evolving, driven by fluctuations in the real estate market and the degree of protection offered to tenants by legislation. The impact of digitization should not be ignored either, as there are already online platforms providing property rental services, which attract new types of risks and opportunities.

The approach found in the present study will facilitate a better understanding of the challenges faced by the parties to a tenancy agreement and contribute to the development of effective strategies to manage the risks and their effects for a stable and successful.

2. The risks of the tenancy – the time of the birth and performance of the tenancy relationship, termination of the contract

The tenancy contract is regulated in the Civil Code in Title IX – *Various Special Contracts*, Chapter V – *The Tenancy Contract*, Articles 1777-1850, and is in the legal nature of a signatory contract, which is why the issue of *"risks in the technical sense, i.e. the question of what happens if*

the lessor can no longer ensure use"[6] is also raised, an impossibility which may arise as a result of total or partial destruction of the property, without the fault of either party. The question of risk has a broad scope and is not limited solely to the occurrence of natural disasters which may lead to the disappearance of the asset and the impossibility of performing the contract, but also includes the possibility of an administrative decision prohibiting the letting activity (e.g. an administrative order to demolish a building, a decision to expropriate a building), the cause of the impossibility being irrelevant[7]. The impossibility must arise from a close connection with the particularities of the good and not with the particularities of a part of the tenancy relationship (we are not in a situation of risk analysis when the lessor would lose an authorization required by law).

In a tenancy contract, risk analysis involves distinguishing between the risk of the thing, the risk of the performance and the risk of the consideration (contractual risk).

The risk of work is expressly regulated in the Civil Code in the rules relating to the risk of loss of the asset[8]. In his capacity as owner, the lessor bears the risk of damage by virtue of the *res perit domino* rule where there is no other legal or conventional rule of a binding nature[9]. The risk of damage shall also be borne by the lessor under the *res perit domino* rule[10].

The risk of impossible obligations is present when the obligation to return the leased asset is impossible to fulfill for reasons beyond the control of the debtor of the obligation to return the asset, the obligation being extinguished according to the *res perit creditori* rule, which is based on the premise that the impossibility of fulfilling the obligation is definitive

[6] George Alexandru Ilie*, Risks in contracts, from the old to the new Civil Code,* Universul Juridic Publishing House, Bucharest, 2012, p. 186.

[7] *Ibidem.*

[8] Art. 558 Civil Code: *"The owner shall bear the risk of destruction of the property, unless it has been assumed by another person or unless otherwise provided by law".*

[9] See *Théorie des risques et transfert de propriété. Comparaison des droits français, de l'OHADA et du commerce international*. Thèse pour le doctorat en droit privé et sciences criminelles présentée et soutenue publiquement le 24 janvier 2018 par Monsieur Allatan Ndordji, Université de Poitiers, faculté de droit et des sciences sociales École Doctorale Droit et Science Politique Pierre Couvrat – ed 088, p. 4.

[10] Codruța Elena Mangu*, "The risk in the main contract vices under the new Civil Code",* Universul Juridic Publishing House, Bucharest, 2013, p. 116.

or essential. Likewise, the lessor, as the debtor of the obligation to ensure the use of the asset, is also released from the obligation if the impossibility arose for reasons independent of the parties to the contract and is of a total and definitive nature, the same *res perit creditori* rule being applicable. Even when the leased asset is naturally fungible and there is a possibility of producing an asset with similar characteristics, the above obligations will be extinguished, as the provisions of 1818 of the Civil Code expressly provide for the termination of the lease by operation of law, the legislator having in mind the contractual mechanism and not the fungibility of the leased asset.

Risk of correlative obligations/contractual risk

The lease contract is *"translative of use and the use of the asset is temporary (...) the lease conveys the right of use of the asset, as a right of claim, it does not convey ownership or any other real right. This means that the lessee is a precarious possessor and the risk of fortuitous destruction of the leased asset is borne by the owner"*[11].

Art. 1818 of the Civil Code[12] expressly deals with the problem of the impossibility of using the leased asset due to its total destruction, stating that in this situation the lease contract is automatically terminated, which means that in order to analyze the risk in the lease contract it is necessary to distinguish between the situation of total and partial loss of the asset.

In the situation of total destruction of the leased property, the legislative solution offered is a simple one, and any interested party may request the establishment of the termination of the contract based on

[11] Ioana Nicolae *About the Lease Contract (I)*, Universul Juridic Magazine no. 6, June 2018, p. 17.

[12] Art. 1818 Civil Code:

(1) If the property is entirely destroyed or can no longer be used in accordance with its intended purpose, the tenancy shall terminate by operation of law.

(2) If the impossibility of use of the property is only partial, the lessee may, according to the circumstances, request either termination of the tenancy or a proportionate reduction of the rent.

(3) Where the property is only damaged, the tenancy shall continue and the provisions of Article 1.788 shall apply.

(4) In all cases in which the total or partial impossibility of use of the property is fortuitous, the lessee shall not be entitled to damages.

Article 1818 para. 1 Civil Code. The reason for offering such a legislative solution is the need to protect the interests of both parties, since any other possibility which would allow a different option would automatically disadvantage the other party. The total loss of the property does not create a per se obligation on the landlord-lessor to rebuild the property, who bears the risk of accidental destruction of the property on the basis of the *res perit domino* rule[13]. The lessee cannot be obliged to purchase a similar asset, since the legal rule provides for the solution of termination by operation of law in the event of accidental destruction of the leased asset, which, by means of the contract, even if it would generally belong to the category of fungible goods, becomes non-fungible by the conclusion of the lease. Obviously, the parties may conclude a new contract of the same legal nature but in respect of a similar or future asset. This solution may also be justified by the lessee's natural need for continued use of the asset, which is incompatible with a lengthy postponement that may be caused by the time needed to reconstruct the lost asset[14].

In the same context, the landlord-landlord cannot ensure the use of the property, and therefore cannot claim the payment of the rent by virtue of the *res perit debitori* rule, bearing exclusively the associated risk. As regards the landlord's restitution of the use of the property, there can be no question of its retrocession, given its legal nature and the impossibility of returning it for a period of time, and the fact that the use was provided in consideration of the receipt of rent, the existence of which will undoubtedly be consolidated, as it is a consideration for the use of the property.

Last but not least, the applicability of art. 1818 of the Civil Code, which is premised on the existence of a permanent impossibility of use of the asset, must be distinguished from the situation of simple damage to the asset, which entails the incidence of art. 1788 of the Civil Code. and, as a rule, the continuation of the tenancy is the consequence, however art. 1818 Civil Code is applicable when the limits of art. 1788 Civil Code are

[13] See also Petruța-Elena Ispas, *Civil Law. General theory of obligations. Sinteze. Jurisprudence, Grile,* 2nd ed., Hamangiu Publishing House, Bucharest, 2022, p. 313: *"with regard to contractual obligations, the fortuitous impossibility of performance has the effect of dissolving the contract, with the application of the provisions on the bearing of contractual risk".*

[14] George Alexandru Ilie*, op. cit.,* Universul Juridic Publishing House, Bucharest, 2012, p. 190.

exceeded[15]; according to the latter rule of law, *"the proper condition of the thing (according to the purpose pursued by the parties) must exist not only at the time of delivery, but must be maintained throughout the operation, by the lessor"*[16].

Art. 1818 of the Civil Code adds – compared to the old regulation in the case of the impossibility of using the asset due to its total destruction – **that the termination of the contract will be adopted only if the asset can no longer be used by the parties in accordance** with the purpose for which they have agreed, **the parties' purpose being sovereign** over any other consideration.

By the lease the lessee does not acquire a right in rem, but he becomes the guardian of the property, on the ground that the landlord is unable to supervise the property, which, if exercised, would constitute a disturbance of the tenancy acquired by the lessee, a disturbance which is improper in the legal nature of the lease. As the lessee is a guardian of the leased property and also liable for the obligation to return it, it is for the lessee to prove the fortuitous circumstance which led to the total or partial destruction of the leased property, the burden of proof being presumed in his case, and in the event of impossibility of proof, contractual fault being presumed.

In the event of partial destruction of the leased property, the legislator establishes in Art. 1818 para. 2 of the Civil Code a right of the lessee to request the termination of the tenancy or the proportional reduction of the rent. The incidence of the case of termination provided for by the aforementioned legal rule should not be extended to the case of early termination of the tenancy contract, which may be requested when the tenancy contract does not provide for a right of unilateral termination of the contract, since in this situation the Court of Cass. has held that "*if the tenant wishes to terminate the present contract, he is obliged to notify the lessor (...) of his intention, but also agrees to pay damages, accepting the obligation to pay the damages provided for in the case of early termination', does not constitute a clause effectively terminating the contract,*

[15] *Ibidem.*

[16] Liviu Stănciulescu, *Curs de Drept civil,* 2nd revised and added ed., Hamangiu Publishing House, Bucharest, 2014, pp. 292-293.

but merely regulates a procedure for expressing the intention to terminate early, to which is attached the obligation to pay damages"[17].

Article 1818 para. 2 Civil Code the legislator has established an option mechanism left to the discretion of the tenant who may opt *(i)* to terminate the contract if the circumstances prove that even a partial impossibility of use is important and represents a reason why he would not have contracted or he may opt *(ii)* for a reduction of the obligations contracted, such as a proportional reduction of the rent in relation to the part of use that can no longer be procured. The last option has some particularities: it belongs to the lessee alone, the lessor being excluded, the latter being unable to impose either solution as he would not justify an interest; the lack of interest subsists even in the situation of a reduced rent (even if it is disadvantageous for the lessor), as he bears the risk of the asset's deterioration (even partial deterioration) by virtue of the *res perit domino* rule, a rule which has no power as regards the lessee's justified option to continue the tenancy at a reduced price in relation to the share of the asset's deterioration. However, the option to continue the tenancy at a proportionately reduced price cannot be abusive but must be justified by circumstances, such as the purpose of the contract, the nature of the leased property, etc., which will be taken into account by the court when it is seized.

The risk of the disappearance of the usefulness of the case is to be analyzed by the court entrusted with the resolution of a case based on art. 1818 of the Civil Code, regardless of the option chosen by the tenant, since if the partial use of the property is no longer in accordance with the purpose intended at the conclusion of the contract, the termination of the tenancy is fully justified. *Per a contrario*, if the purpose of the lease remains consistent with the practical usefulness of the remainder of the property resulting from the partial destruction, the tenant's option to continue the lease represents a veto right before the lessor which cannot be censured in the event of improper exercise of that right. The last option can be applied only if the subject-matter of the contract is divisible, since it is

[17] *Decision No. 4400 of December 10, 2013 delivered on appeal by the Second Civil Section of the High Court of Cassation and Justice* on damages *apud* Corina Cioroabă, *ICCJ. Expression of intention to terminate vs. unilateral declaration of termination*, September 2, 2014, material available at https://www.juridice.ro/335364/iccj-exprimare-intentie-de-reziliere-vs-declaratie-unilaterala-de-reziliere.html (last accessed 07.12.2024)

only in that case that we can also determine the proportionate reduction in the rental price.

The contractual risk also includes ***the risk of tenancy***, which is a specific risk arising from the nature of the tenancy contract, the tenant receiving in exchange for the rent the full use of the property together with all the consequences arising from it: physical safekeeping of the property, preservation, maintenance, proper use just like a property owner. The tenant's direct use of the property implicitly entails an obligation to exercise due diligence.

The rental risk concerns, on the one hand, the burden of the reputed rental repairs and, on the other hand, the tenant's liability for fire occurring in connection with the rented property. Undoubtedly, the tenant is liable for the rental risk arising from the need for repairs determined by the ordinary use of the rented property[18], art. 1822 para. 1 of the Civil Code, according to which *"the lessee shall be liable for the deterioration of the leased property during its use, including that caused by fire, unless he proves that it occurred fortuitously"*. However, this legal text establishes liability for fire on the part of the tenant in all cases where the cause of the fire is not a fortuitous event, but the legislator does not expressly determine what is meant by the term 'fortuitous'. We consider that the general wording should not be subject to a restrictive interpretation of the text of the law, since the global expression includes the incidence of fortuitous event, force majeure, as well as the act of a third party, situations in which the tenant is exonerated from liability, an idea that can be supported by the provisions of art. 1351 para. 4 of the Civil Code, which provides that if the debtor is exonerated from liability for fortuitous event, the same treatment will also apply to force majeure. These provisions do not cover the situation where the risk of tenancy, including fire, arises as a result of the culpability of persons to whom the tenant has allowed the use of the leased property, in which case the tenant shall bear the risk of repairing all the damage.

With regard to the creation, performance and termination of the lease, we consider that both parties should bear in mind the meaning of the concept of risk management and the concept of risk management.

Risk administration is the way of determining the measures to be taken to reduce the likelihood of risk and to minimize the consequences for the

[18] Codruța Elena Mangu*, op. cit.*, p. 120.

agreed contractual project, the consequence of having a risk management technique in place is to reduce the exposure to risk when it constitutes a threat[19]. Risk administration should not be confused with the ***risk management*** process which is a process of identifying, assessing, managing, handling, dealing with and establishing a plan of risk mitigation measures, including regular review and monitoring of risks and establishing responsibilities[20].

3. Conclusions

In contemporary times we are witnessing the international standardization of the meaning of the concept of risk, it being unanimously accepted that risk is a concept with an ancient etymology that encompasses both the possibility of a failure and the possibility of a benefit, both arising from a fortuitous event.

Starting from these premises, we have also outlined the definition of this notion in the contractual field, considering that risk is a factor of external origin to a social relationship, with a profoundly random character, which is predictable but remains uncertain as to its possibility of occurrence and its occurrence disturbs the social balance and may result in damage to the parties of the relationship caught by the risk but also in the possibility of obtaining benefits by one party, as the case may be.

Our study included highlighting the key issues related to the occurrence of risk in relation to the origin, performance and termination of the tenancy contract, distinguishing between the risk of the thing, the risk of impossible obligations and the contractual risk. We have shown that the risk of the work is borne by the owner of the property by virtue of the *res perit domino* rule and as regards the risk of unenforceable obligations we have emphasized that the *res perit creditori* rule is applicable. We continued with the analysis of the contractual risk where a distinction was made between the situation of total and partial impossibility of performance, establishing that in the first situation the fate of the contract is sealed by its dissolution, while in the second situation the contractual project can be adapted by

[19] *Risk management methodology, Competence makes the difference!,* Project selected under the Operational Program Administrative Capacity co-funded by the European Union from the European Social Fund, *op. cit.,* p. 5.

[20] *Ibidem*.

reducing the consideration in relation to the partial loss suffered by the asset, the solution of requesting the adaptation being an exclusive attribute of the lessee, which the lessor cannot refuse if justified by the circumstances. The study also included reflections on the tenancy risk, demonstrating that the legislator establishes the rule that the tenant must bear the tenancy risk, and that he is only exempted from liability if the risk arises from a fortuitous event.

Finally we identified and delimited the concept of risk management and risk management.

We believe that the opinions and arguments presented in our study are likely to clarify the definition of the concept of risk, which was taken into account as a premise in the analysis of all the above-mentioned situations and which led to the demonstration of the solutions presented.

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EXPLORING THE LEGAL LANDSCAPE OF EMINENT DOMAIN

Paul-Sorin COPOCEAN[*]

ABSTRACT

The article analyzes the concept of eminent domain which has primarily legal valences with profound consequences both for individuals as subjects of law and for society. Finding its roots in Roman law, in which dominium eminens *represented the authority of the state over property, the article traces the evolution of this concept over the centuries. The central theme is the demarcation between the public interest and individual rights. There is a divergence in the interpretation of the notion of public interest from one legal system to another. In the United States, the concept has had a broad interpretation that has allowed expropriations for a variety of public purposes, from infrastructure projects to economic development. In contrast, European courts have adopted a more restrictive approach, emphasizing the need for strict proportionality between the public interest served and the rights of the owner. Next, the socio-economic impact of eminent domain is examined beyond the legal framework. Expropriations have a serious impact on the livelihoods of individuals in social structures. Therefore, the article points to the need for adequate compensation and clear procedures to mitigate these negative impacts. Eminent domain is a potentially complex issue involving both benefits and disadvantages. At the same time it is a tool that governments need to realize indispensable public projects. However, it needs to be carried out with great care to avoid arbitrary expropriations while guaranteeing private property rights.*

KEYWORDS: *eminent domain; expropriation; public interest; property rights; legal framework;*

Property is a legal and economic concept with a long evolution in terms of its transformations throughout history, and which, in the context of the development of civilizations, had an important role for both power structures and the economy. In antiquity, property is known to have been concentrated in the hands of elites and the state, while resources were centrally controlled. At the same time, the concept of public and private property was differentiated according to the needs of development and control of natural resources. Also, property in antiquity had a broader

* *Ph.D. Student, "Titu Maiorescu" University, Bucharest, Romania.*

scope than a simple right; it was a symbol of power, social status, and identity. In Egypt, property was inextricably linked to the state and religion. The pharaoh was considered the supreme owner of all land, and the nobility and priests owned the largest estates. In Mesopotamia, we find the first regulation of social relations as well as aspects related to the circulation of property – the Code of Hammurabi, which established laws regarding the sale, purchase, rental and inheritance of property. Appearing around 1760 BCE, it provided a detailed framework for regulating specific operations ranging from simple transactions to more complex issues such as inheritances and the division of property. From this perspective, we can conclude that a wide variety of legal situations were covered by this legislative instrument. In a broader spectrum, antiquity established the power of laws, customs, and rulers to influence the way people acquired, used, and transmitted their properties. At the same time, whether we are talking about land, slaves or precious objects, property represented a central element in people's daily lives, shaping the social, economic and political relations of those times[1].

Further over time, the concept of property, constituting a fundamental pillar of human society, has transformed, adapting to different forms of social and political organization. However, if in antiquity property was seen as a less abstract right and more closely linked to the actual possession of an asset, in the Middle Ages the concept of *dominium eminens* appeared, whose origins can be found in both Roman law and feudal practices. Thus, the existence of a supreme property right, held by the sovereign, over the entire territory of the state was introduced. The analysis of the term highlights its Latin origin which means supreme dominion and refers to the right of expropriation (eminent domain). The concept, which was initially treated in a detailed manner by the Dutch jurist Hugo Grotius in his work "De Jure Belli et Pacis" from 1625, provided that the property of citizens is under the control of the state, which by virtue of this right can use, alienate or destroy it not only in cases of extreme necessity, but also for public utility, with the obligation to compensate the losses of those affected[2].

[1] Roth, M.T. *Law Collections from Mesopotamia and Asia Minor*. Atlanta: Scholars Press, 1995 pp. 71-143.

[2] *https://definitions.uslegal.com/d/dominium-eminens/.* Accessed on 6 of December 2024, time 18:06 pm.

In the history of the Romanian state, *dominium eminens* was provided for in the Law of the Land, granting the rulers the prerogative to abolish the ancient property rights of the peasants and boyars. During the Phanariot period, the rulers tried to consolidate this right, and in the 19th century, through the reforms of Alexandru Ioan Cuza, the concept of property was transformed, so that the new regulation recognized its absolute character[3].

Despite the fact that *dominium eminens* emphasizes the supreme authority of the state over the lands and resources within its jurisdiction, throughout history, this concept has evolved and been applied in accordance with the needs of the social structures of different periods. Although it has its roots in the Middle Ages, the echoes propagated by *dominium eminens* are also found with force in modern law, and studying it helps to outline the limits of private property and the relationship between individual and public interest. To explore this theme in more detail, we will analyze the diachrony of the concept of *dominium eminens* and shed light on its implications for contemporary law because it still retains the essence of a fundamental principle in the administration and use of land for collective and public needs. Its evolution was marked by the establishment of progressive limitations, while acquiring the characteristic valences of a balancing mechanism between the state's need to use private property for public use and the protection of the individual rights of owners.

In 1789, the concept of *dominium eminens* was transformed in the United States into what is today called expropriation for public utility. This was made possible by the limitations introduced by the Fifth Amendment to the US Constitution: "*nor shall private property be taken for public use, without just compensation"*. The founders of the United States, aware of the risk of abuse of this power, instituted two essential restrictions: private properties can only be taken for public use, and the state is obliged to provide fair compensation to affected owners.

Moving in this direction, around 1800, several US states included clauses regulating *Eminent Domain* in their constitutions, establishing restrictions similar to those in the federal Constitution. These clauses, which varied widely in detail and length, stipulated that the taking of private property by the state must be carried out only for *public purposes*. Thus, most American states introduced provisions aimed at preventing abuses of power. An exception to this trend was the state of

[3] Pirlica, A. *"Evolution of Property Law",* Universul Juridic Premium*,* no. 9, 2017.

Indiana, which did not clearly spell out limitations on *Eminent Domain* in its constitution. However, the courts of this state have held that the principle of procedural fairness in the state constitution also implies protection against possible abuses of this power[4].

The U.S. Supreme Court first examined federal power in relation to eminent domain in 1876, in *Kohl v. United States*, and later in cases such as *United States v. Gettysburg Electric Railroad Company*. It should be noted that the use of *Eminent Domain* during the historical period described aimed to facilitate transportation, provide water, construct public buildings, and preserve places of historical interest.

The activity of federal agents regarding eminent domain throughout the 20th century has been correlated with major events and activities that have become incidents over time. The population's increasing needs for diversifying means of transportation triggered a wave of expropriations for the construction of railways or the maintenance of navigable waters. In the 1930s, New Deal policies led to numerous land expropriations for irrigation projects, the relocation of poor farmers, and the establishment of new national parks, such as Shenandoah, Mammoth Cave, and Great Smoky Mountains National Parks[5].

During World War II, the Land Division of the U.S. Department of Justice coordinated the acquisition of over 8 million acres of land for airports, ports, or the construction of buildings for the manufacture and storage of war materials and for national defense facilities.

From a judicial perspective, the first important decision was *Berman v. Parker issued by the United States Supreme Court in 1954* which significantly expanded the definition of public use within the concept of eminent domain. The interpretation given by this decision exceeded the notion of a strict public interest necessity and proposed the idea of a public purpose defined by government authorities. This interpretation has allowed governments to promote the process of urban renewal to revitalize blighted urban areas, even by taking over properties that are still in good condition. In this way, governments and private developers began to use *eminent domain* to take land belonging to private individuals, and

[4] *https://ij.org/issues/private-property/eminent-domain/eminent-domain-history/.* Accessed on 02 December 2024 on 8:04 pm.

[5] *https://www.justice.gov/enrd/condemnation/land-acquisition-section/history-federal-use-eminent-domain*. Accessed on 08 December 2024 on 06:00 pm.

redistribute it to real estate developers who were going to build projects that promised higher tax revenues. In this way, large-scale abuses were encouraged as several state supreme courts adopted this reasoning in turn, transforming *eminent domain* into an instrument through which the state could favor private interests under the pretext of urban revitalization.

The precedent set in the Berman decision paved the way for an expansive and abusive interpretation of the concept of public utility, allowing governments to arbitrarily expropriate property for the benefit of private interests in the name of economic development.

In Hawaii, in the mid-20th century, a small portion of the population owned a disproportionately large proportion of agricultural land. This concentration led to very high land prices and limited access to housing for a large portion of the population. To address this situation, the state of Hawaii passed a law that allowed the government to expropriate land from large landowners and resell it at more affordable prices. The stated goal of the law was to reduce the concentration of ownership and make housing affordable. Owners of expropriated land challenged this law in court, arguing that the proposed expropriations did not serve a real public purpose, but only the interests of private groups. However, the US Supreme Court rejected the arguments raised and upheld the constitutionality of the Hawaiian law. Thus, if in the Berman case, the Supreme Court accepted that eliminating urban degradation can be considered a public purpose, in the Midkiff case, which had as its object the application of the law of the state of Hawaii, the Court went further, accepting that the redistribution of property to reduce social inequalities can also be considered a public purpose. The Midkiff decision gave governments significant power to intervene in the housing market and redistribute property, even in the absence of obvious social or economic emergencies.

The *Poletown* case is another emblematic example of this trend. In 1981, the Michigan Supreme Court authorized the city of Detroit to expropriate an entire neighborhood, with over 1,000 homes, hundreds of businesses, and numerous places of worship, in order to give the land to General Motors. The justification for this decision was based on General Motors promise to create new jobs and bring additional revenue to the local budget. Thus, the idea was foreshadowed that economic development could be considered a sufficient reason to violate the property rights of some citizens.

Moreover, the 2005 Supreme Court Decision in *Kelo v. City of New London* reached the pinnacle of this evolution, but at the same time marked an inflection point in the interpretation of the right of expropriation in the United States. The Court ruled in this case that private property can be expropriated and transferred to a private developer for economic development projects, even if the affected properties are not in a state of degradation. The case had as its starting point the adoption by the city of New London in the state of Connecticut of a development plan aimed at revitalizing a waterfront area. To carry out this plan, the city used the right of expropriation to take over the properties of some residents, including those of Susette Kelo. The justification for this approach was that the new development plan envisaged the creation of jobs, increased tax revenues, and the revitalization of the local economy. By a 5-4 majority, the Supreme Court upheld the city's decision and argued that the city's economic development plan constituted a public use reason within the meaning of the Fifth Amendment. This decision significantly expanded the scope of the right of expropriation, allowing governments to take over private property for economic development, even if the main beneficiaries are private developers. The Kelo decision generated widespread controversy, with critics arguing that the decision undermined property rights and opened the way for abuses as governments could expropriate private property for the benefit of vested interests.

In the years following the Kelo decision, a significant increase in cases of abusive expropriation could be observed across the country, with governments using the Kelo decision as justification to expand their power. Through this, the sense of security of landowners was negatively affected, as private property became more vulnerable to government intervention. Although controversial, the Kelo decision also had a positive effect, as it led to a mobilization of civil society and political actors to protect property rights. Consequently, several states have adopted laws that imposed restrictions on the expropriation procedure to ensure that this instrument will only be used in exceptional cases and in the real public interest. One of the main objectives of these reforms was to redefine the concept of public utility. Following the Kelo decision, several states excluded economic development from the definition of public utility, limiting the use of expropriation to infrastructure projects and activities truly necessary for the community. Stricter criteria were also imposed for

declaring a property as degraded or dangerous, which diminished expropriation for private development projects.

Another important reform aimed at increasing the transparency of the expropriation process. Thus, stricter requirements were introduced regarding notification of owners, organization of public debates, and justification of expropriation decisions. More effective mechanisms for compensating expropriated owners were also established. In general, these reforms were aimed at protecting the rights of owners and preventing abuses by governments. The Kelo case represented an important point in the history of property rights in the United States, the public and political reaction to this decision led to a series of legislative reforms that strengthened the protection of property rights.

With all the associated challenges, expropriation remains an essential tool for governments in carrying out projects of strategic importance, and its role in protecting national security, preserving the environment, and developing infrastructure should not be forgotten. Projects such as expanding Everglades National Park or securing the border with Mexico demonstrate that expropriation can be used for beneficial purposes for society. In order to reconcile the need to protect private property with the need to carry out projects of public interest, it is crucial to have a clear and transparent legal framework. The legislative reforms adopted following the Kelo case aimed to limit abuses and ensure adequate compensation for expropriated owners. At the same time, it is important to recognize that expropriation can be a legitimate tool when used responsibly and in the public interest. Moving to the European continent we observe a contrast to the previously discussed aspects and encounter a different approach to the legislation regarding the limit of public utility. The notion of privation or lack of property is equivalent to that of dispossession, in other words, the deprivation of the private person of the object and attributes of the right of ownership corresponds to the transfer of this right to the patrimony of the state. In the case law of the European Court of Human Rights, deprivation of property means the complete and definitive taking over of an asset, such that the holder of the right to that asset no longer has the possibility of exercising any of the attributes conferred by the right he had in his patrimony. In the case of *Sporrong and Lönnroth v. Sweden*, the European Court found that Article 1 of Protocol No. 1 contains three distinct principles: the principle of respect for property, the deprivation of property being subject to certain conditions, and the power of States to regulate the

use of property in accordance with the general interest by laws deemed necessary for this purpose.

In the case of *James and Others v. the United Kingdom*, the European Court developed these principles, finding that the applicability of the latter two must be ensured before deciding on the former. The rules mentioned are not absolutely independent of each other, the second and third directly refer to infringements of the right to property and, therefore, they must be interpreted in the light of the first principle enshrined.

Article 1 of Protocol No. 1 provides that deprivation of property must be *subject to the conditions prescribed by law* and control of use must be based on *such laws as the State considers necessary*, being the first and most important requirement provided for by art. 1. This requirement of legality is intended to provide a guarantee against arbitrary actions and measures taken by the State. The cause of public interest is an important condition in assessing the application of Article 1 of Protocol No. 1 and it must be verified whether there is a reasonable relationship of proportionality between the means employed and the aim pursued. Also, to be justified, any interference with the exercise of the right to property must serve a legitimate aim in the public or general interest. Proportionality thus becomes mandatory and implies the concern that none of the interests involved should benefit from absolute protection, by generally denying the protection of the other. A measure interfering with the peaceful enjoyment, possession and use of property must be necessary in a democratic society and directed solely towards the achievement of a legitimate aim.

Conclusions

While the US Supreme Court has allowed, in light of the examples described, expropriations including for private commercial development, the European Court of Human Rights imposes strict conditions for the deprivation of property, emphasizing the need for a fair balance between general interests and the fundamental rights of the individual. This difference reflects the distinct approaches of the two legal systems regarding the limit of public utility and the protection of property rights.

The expansion of the meaning of public utility in the national legislation of states can hide significant dangers. One of the main risks is the possibility of abuse of power by the authorities, in order to justify the

expropriation of private property for projects that do not truly serve the public interest. There is also a risk that the vague definition of public utility could be used to favor private interests at the expense of public ones, which could undermine democratic principles and the rule of law. In conclusion, we consider it essential to define the concept of public utility clearly and precisely in order to prevent abusive interpretations. At the same time, the expropriation process must be transparent and involve public participation, and the compensation granted to owners must reflect the market value of the property and include any additional damages suffered. The implementation of these measures can significantly contribute to preventing abuses and ensuring a fair balance between the general interests of the community and the fundamental rights of the individual.

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APPLICATION OF CRIMINAL LAW: THE SIGNIFICANCE OF THE PRINCIPLE OF TERRITORIALITY OF CRIMINAL LAW

Alexandra Raisa COZMA*

ABSTRACT

In this study, a synthetic analysis of the application of criminal law in space is carried out, focusing mainly on the impact that the principle of territoriality of criminal law has on new types of crime, such as cybercrime and organized crime.

KEYWORDS: *criminal law; principle of territoriality; supremacy of Community law; organized crime;*

I. Introduction

In the Middle Ages and the Ancien Regime, the exercise of *ius puniendi* could be applied to all persons who committed an offense both inside and outside the territory of the state, so that the criminal law "pursued" its citizens wherever they were. But with the birth of modern liberal states, the application of the criminal law was limited to offenses committed on their territory and only exceptionally could be extended to some offenses committed by their citizens in foreign states[1].

The punitive power of the state is part of the exercise of its sovereignty and is therefore subject to limits determined by the space in which that sovereignty is exercised. For this reason, this sanctioning power has, in principle, a territorially delimited character, but the fact that it is increasingly appreciated that the actions of transnational organized crime affect the interests of the justice of several states requires the prior existence of a series of judicial mechanisms of extraterritorial intervention and coopera-

* *Ph.D. Student, "Titu Maiorescu" University, Bucharest, Romania.*

[1] Berdugo Gómez de La Torre, Arroyo Zapatero, Ferré Olivé, García Rivas, Serrano Piedecasas, Terradillos Basoco, *Curso de Derecho Penal. Parte General,* Barcelona, 2004, p. 89.

tion between different states. Consequently, in order to avoid possible loopholes in this area, certain legal rules have emerged to deal with cases where the punitive powers of several States converge or to determine how international cooperation in the prosecution of offenses affecting the supranational community[2] should be organized.

Exceptions to the principle of territoriality, the so-called extraterritoriality of criminal law, are manifested in our system by three principles, the personality of criminal law, the reality of criminal law and the principle of universality of criminal law.

Among these three principles, the one that has seen the greatest expansion in recent times as a result of the European Court of Human Rights' decisions in the Pinochet and Scilingo cases has been the principle of universal jurisdiction, which has become the subject of debate both from a doctrinal and jurisprudential perspective. Although the need for this principle to exist in European legal systems is recognized, we must start from the idea that it is a principle whose applicability is problematic, since the same judicial bodies, other than those of the State on whose territory the crime was committed, can investigate and judge a set of facts and alleged perpetrators when they are so serious that they can be classified as international crimes. Also, this aspect is joined by the establishment of the International Criminal Court after the adoption of the Rome Statute, which marks both the moment before and after the interpretation of this principle. In this sense we show that at the beginning this international judicial body seemed the most suitable to judge those responsible for committing such acts. And yet, when this body was implemented under the principle of complementarity that guides its activity, the principle of universal justice seems to have acquired even more relevance, in the opinion of some authors or judicial bodies, even excessive and dangerous, when its use could be fall within the limits of the abuse of law.

[2] Muñoz Conde, García Arán, *Derecho Penal. Parte General,* Valencia, 2004, p. 152. It is noted that such legal norms are part of the internal law of states, either because they are contained in laws issued by the legislative power itself, or because they are derived from international treaties, which are incorporated into the internal system from the moment they are transposed and published. However, although they are rules of domestic law, the whole matter is influenced by principles of an international character arising from agreements between states.

II. The principle of territoriality

The principle of territoriality, which focuses on the place where the acts were committed, is the general principle for determining the jurisdiction of states to prosecute crimes. The state is competent to punish, in accordance with its own laws, the acts committed on its territory, regardless of the nationality of the person who committed them. According to art. 8 para. (4) from the Romanian Penal Code, the competence to prosecute and sanction a crime rests with Romania when it was committed on the territory of Romania, as well as when "on this territory or on a ship under the Romanian flag or on an aircraft registered in Romania an act of execution, instigation or complicity was carried out or the result of the crime was produced, even in part".

The concept of territory is equivalent to the space in which the state exercises its sovereignty in a geographical and legal sense. The geographical space includes "the expanse of land, the territorial sea and the waters of the soil, the subsoil and the airspace, included between the state borders". To these are added certain particularities, such as the cases of embassies and consulates, which would be part of Romania's territory for diplomatic purposes, and crimes committed inside them would be subject to Romanian law. However, this competence is limited by the inviolability[3] of the mentioned spaces under the Vienna Convention of 18 April 1961 and 1963, as well as by the fact that diplomatic agents enjoy immunity from civil, criminal and administrative jurisdiction[4]. Romanian doctrine[5] admits that this category includes: diplomatic representatives of

[3] Muñoz Conde, Garcia Arán, *op. cit.*, p. 154.

[4] Carrillo Salcedo, *Curso de Derecho Internacional Público,* Madrid, 1994, p. 239. Considering diplomatic agents exempt from criminal liability on the territory of the state of residence, they can only be expelled. However, this immunity does not exempt members of the diplomatic corps from the jurisdiction of the sending state. As for inviolability, it can be called immunity against any form of coercion and obliges the receiving state to refrain from any coercive action towards the diplomatic mission and its members, as well as to grant them special, material and legal protection. Inviolability has certain limits, such as that the diplomatic mission and its members must respect the laws of the state of residence and have the obligation not to interfere in its internal affairs (p. 237).

[5] Pascu Ilie, Uzlău Andreea Simona, Muscalu Gheorghe, *Drept penal. Partea generală,* 4 ed., Hamangiu Publishing House, Bucharest, 2016, pp. 90-91; Mitrache Constantin, Mitrache Cristian, *Drept penal. Partea generală,* VII ed., Universul Juridic Publishing House, Bucharest, 2009, pp. 73-74; Bulai Costică, Bulai Bogdan*, Manual de*

foreign states (ambassadors, consuls, members of a diplomatic corps[6]), personnel of foreign armies stationed or transiting on Romanian territory, personnel of foreign ships or aircraft located on the territory of the country, as well as any other persons who, in accordance with international treaties, are not subject to the criminal jurisdiction of the Romanian state. In this case, the Romanian state may declare persons in the above-mentioned category as persona non grata.

In the same way, the stations included under a flag or flag of a State, i.e. those ships or aircraft regardless of where they are, are part of the national territory of a State.

As regards the place of commission of the deed, in ordinary cases, when both the action and the result took place on the territory of the Romanian state, there are no doubts regarding the application of the territorial principle. The problem arises in so-called "distance crimes", where the action and the result occur in different places. In this sense, the Spanish doctrine on the matter has mostly supported the theory of ubiquity, according to which the deed can be considered committed both in the place where the action was performed and in the place where the result occurred. This theory is also adopted by the Romanian legislator and we find it in most modern legislation[7]. From this perspective, the Spanish courts are competent to prosecute acts initiated in Spain whose results occur outside the territory, and vice versa, but to exercise this jurisdiction, they must have the author of the acts at their disposal or, otherwise, request his extradition[8].

In Romanian doctrine, it has been established that the crime has a territorial and an extraterritorial scope in relation to the territory[9]. Unlike

drept penal. Partea generală, Universul Juridic Publishing House, Bucharest, 2007, pp. 108-109.

[6] Udroiu Mihail, *Drept penal. Partea generală,* Ed. C.H. Beck, București 2019, p. 65.

[7] Brutaru Versavia, *Aplicarea legii penale în spațiu, potrivit Legii nr. 286/2009. Noul Cod penal. Studii și cercetări juridice,* Serie Nouă, Anul II (57), 4, Octombrie-Decembrie 2012, Editura Academiei Române, p. 522.

[8] Muñoz Conde, Garcia Arán, *op. cit.*, p. 156.

[9] Brutaru Versavia, *Aplicarea legii penale în spațiu, potrivit Legii nr. 286/2009, Noul Cod penal, Studii și cercetări juridice,* Serie Nouă, Anul II (57), 4, Octombrie-Decembrie 2012, Editura Academiei Române, p. 518.

criminal law which has a territorial character, the crime can be committed in several territories[10].

Nowadays, the use of new technologies such as the Internet presents new challenges in terms of identifying the place where the crime was committed. Thus, Romeo Casabona showed that the information society is characterized by the absence of borders and the immateriality of communication, with the consistent problems of identifying the authors and establishing the criminal liability of some network operators, such as service providers or service managers. As with the commission of other crimes, Spanish law applies when the act and result take place in Spanish territory. But problematic are those cases that are related to another state, such as when the data accessed or the private communication that is carried out crosses several states (crimes in transit). In this case, the above-mentioned author claims that all these places of transit should be considered irrelevant, as well as the place where the service provider is located, since for these crimes the relevant place would be the one where the access or modification of the illegal data was achieved.

In his opinion, it would be more appropriate to apply the theory of ubiquity, accepting for its determination both the date and place of the action and the occurrence of the result, if it exists. However, in view of the difficulties raised by this new form of criminality, it would be advisable to supplement the principle of territoriality in this area with the principles of real or universal justice and with the appropriate support, where appropriate, of international law[11].

In the same way, Spanish jurisprudence has examined another series of problematic cases, such as cases of the use of foreign-flagged vessels to commit drug-trafficking crimes. Regarding the commission of these crimes which may be of universal jurisdiction, the Supreme Court examined in the Sentence of February 16, 2006, no. 178, whether acts committed on a ship flying the flag of the Republic of Togo could be tried in Spain. Against the positions which emphasized that "no state can assign juris-

[10] Oancea Ion, *Drept penal. Partea generală,* Didactică şi Pedagogică Publishing House, Bucharest, 1971, p. 95.

[11] Romeo Casabona, *Comentarios al Código Penal, Parte Especial,* Títulos VII-XII y faltas correspondientes, Valencia, 2004, p. 5 and so on. He believes that in order to identify the competent judge in each specific case, it is necessary to find the place where the act was committed, since these crimes have no material result and are not, in general, remote crimes.

diction outside its territory without an international norm permitting it and that general (customary) international law has always assigned exclusive jurisdiction over merchant vessels of the flag state navigating the waters international", the Supreme Court indicated that the jurisdiction of the ship's flag[12] would not in all cases constitute a principle of universal value. It is recognized that for the recognition of the nationality of ships to be applicable there must be a genuine relationship between the state and the ship, a relationship which, in principle, cannot be recognized for so-called flags of convenience when they correspond to fraudulent approaches with a criminal purpose. The Convention on the Law of the Sea establishes with regard to the illicit traffic in narcotic drugs and psychotropic substances that "all states must cooperate to suppress the illicit traffic in narcotic drugs and psychotropic substances carried out by ships on the high seas in violation of international conventions", and in the Convention on the Sea free, adopted in Geneva on April 29, 1958, it is established that "ships shall sail under the flag of a single State and, except in the cases expressly provided for in international treaties[13] or in these articles, are subject, on the high seas, to the exclusive jurisdiction of the respective state". In this sense, the Spanish Supreme Court considers that the United Nations Convention, of December 20, 1988, against illicit traffic in narcotic drugs and psychotropic substances, provides sufficient coverage[14] to estimate the competence of the Spanish judicial bodies regarding the pursuit and trial of illegal drug trafficking psychotropic, toxic and narcotic. Also, the prin-

[12] Art. 91.1 de la Convención de las Naciones Unidas sobre el Derecho del Mar, Montego Bay el 10 de diciembre de 1982.

[13] The single convention on narcotic drugs from 1961 provides in art. 36 that "the serious crimes cited above, whether they are committed by compatriots or by foreigners, will be prosecuted by the party on whose territory the crime was committed or by the party on whose territory the delinquent will be found, if his extradition is not acceptable, according to the legislatio of the party to which the extradition request was addressed, and the mentioned offender has not yet been prosecuted and tried".

[14] It provides in art. 4 para. (1) the following: "Each party: (...) b) Can adopt the necessary measures to establish its competence with regard to the crimes it has established according to para. 1 of art. 3, when: I. The crime was committed by one of its citizens or a person residing in its territory. (...) III. The crime is one of those established according to para. c/IV/ of para. 1 of art. 3 and was committed outside its territory, for the purpose of committing on its territory one of the crimes established according to para. 1 of art. 3", and in para. (3) it states: "This convention does not exclude the exercise of any competence in criminal matters, established by a party in accordance with its domestic law".

ciple of universal jurisdiction is recognized by Spanish national law, and according to international treaties or conventions to which Spain is a party, drug trafficking crimes carried out on the high seas must be prosecuted in Spain.

However, regardless of the importance of the universality of the criminal law itself and the law of the flag state, at present, the idea of the production and application of the criminal law is governed by the normative creation by the states and is centered on the principle of territoriality. However, this procedure must accept the growing importance that the European Union has in harmonizing legislation and in implementing police and judicial cooperation mechanisms in Europe and the relevance that the principles of extraterritorial application are gaining more and more in the face of the crime phenomenon organized and the so-called "relocation of crime" or the commission of criminal acts affecting different national territories[15].

The influence of European regulations on national criminal law and the issue of the unification of criminal law in Europe

Although the European Union does not have a supranational criminal law[16], it managed to generate various forms of influence on national criminal legislation, the so-called "Europeanization of national criminal law" and thus creates a European judicial space equipped with its own institutions whose purpose is coordinate and cooperate with national police and judicial authorities. As the doctrine highlighted, the forms of influencing the national criminal law are the assimilation and the principle of the supremacy of the community law that produce the so-called negative effects on the national criminal law and their harmonization. Assimilation

[15] Berdugo Gómez de La Torre, Arroyo Zapatero, Ferré Olivé, Garcia Rivas, Serrano Piedecasas, Terradillos Basoco, *op. cit.*, p. 93.

[16] Regarding this aspect, Quintero Olivares points out in the article "La unificación de la Justicia penal en Europa", published in Revista Penal no. 3/1999, p. 53, that it would mean closing our eyes to reality if we forgot that for a long time the only way to homogenize criminal law was the right of extradition. With the adoption of the European Convention on Extradition of April 21, 1982, a framework was established that obliges, through the principle of double criminality, to be aware of the fact that if domestic law is to be effective in cases where the perpetrator is not on Spanish territory, it must – harmonize your legislation with that of the various states that are party to the Convention. In the same sense, Vormbaum, Moritz, "El desarrollo de la Unión Europea y su influencia sobre el Derecho penal europeo", Revista penal nr. 19/2007, pp. 101 and 102.

obliges Member States to protect Community legal assets, such as European Public Finances, in the same way as they protect their own interests, in an effective, proportionate and sufficiently dissuasive manner.

Community law, made up of Regulations, Directives and Treaties of the European Community, in addition to having direct effectiveness[17], it benefits from supremacy in relation to internal regulations. Therefore, the national judge cannot apply an internal legal rule that is contrary to Community rules, criminal laws being no exception to this rule. Therefore, by harmonizing or approximating legislation, the aim is to create homogeneous criminal patterns both in terms of prohibited conduct and, as the case may be, applicable sanctions. Harmonization can be achieved both through international directives and treaties and, after the adoption of the Treaty of Amsterdam, through framework decisions[18]. However, the obstacles that stand out for the unification of European criminal law are, on the one hand, the real absence of the effective competence of the Community Parliament[19] to issue criminal laws and, on the other hand, the fact that the criminal policy of each country may require specific legislative actions, determined by the crime characteristics of each society, which makes a state legislative policy absolutely necessary. In the face of positions that claim that the common list of European crimes should be reduced to community interests, as in the version chosen in the so-called Corpus Iuris and that this would mean limiting these crimes to those actions that affect the financial interests of the European Union, we also oppose we believe that this common catalog of crimes should be extended to everything that could be considered the fundamental heritage of European citizens, including the environment, food, free movement, non-discrimination, freedom of work, etc. However, it was insisted that the main disadvantage would be that before proceeding with this incrimination it is necessary to develop a scale of values on which the European personality must necessarily depend, without exaggeration, even at a theoretical level, the volume of common legal assets[20]. Regarding the cooperation

[17] On the effects of direct vertical effectiveness of Community Directives: Vázquez Orgaz, *La eficacia directa de las Directivas comunitarias*, avaible at *www.derecho.com*;

[18] Berdugo Gómez de La Torre, Arroyo Zapatero, Ferré Olivé, Garcia Rivas, Serrano Piedecasas, Terradillos Basoco, *op. cit.,* p. 94.

[19] Quintero Olivares, *op. cit.,* p. 57.

[20] *Ibidem*; In the same way, Hirsch, Hans Joachim, "Cuestiones acerca de la armonización del Derecho penal y del Derecho procesal penal en la Unión Europea", în

between the member states of the European Union, the Treaty of the Union establishes in art. 29 The European Judicial Area through the cooperation of police and judicial bodies of different states, establishing Europol and Eurojust. In a first step, the classic instruments of cooperation, such as legal assistance and extradition, were improved, creating simpler extradition processes between the member states of the Union. In addition, the principle of mutual recognition was established, which allows any court decision rendered in one Member State to be valid in any other Member State[21]. The progressive simplification of the extradition procedure culminated in its replacement with the European Arrest and Surrender Warrant regulated by the Council Framework Decision of 13 June 2002. This system is inspired by mutual recognition, by virtue of which it is not necessary to standardize the extradition procedure between the member states, a simple judicial request being sufficient for the legal resolution to be executed in another state, which is the one that proceeds to detain and hand over the requested person. Also, for certain crimes it is not necessary to fulfill the conditions of the principle of double criminality, as in the case of acts of terrorism, human trafficking, drug trafficking, corruption, xenophobia, homicide and forgery of means of payment and crimes under the jurisdiction of the Criminal Court International. The European arrest warrant is not executed only in case of amnesty, res judicata and minority[22].

The importance of organized crime in the enforcement of criminal law in space

On the other hand, as some authors have pointed out in relation to the second problem we indicated above, compared to the classic criminal activities carried out practically individually, a more collective crime, the so-called "organized crime" that generally affects several countries. It is about organized criminal groups that can act both in the legal and in the illegal area of political and economic activity and whose influence in these areas sometimes extends to being able to negatively condition entire

Estudios sobre Justicia Penal, Homenaje al Profesor Julio B.J Maier, Buenos Aires, 2005, pp. 661 and next.

[21] Berdugo Gómez de La Torre, Arroyo Zapatero, Ferré Olivé, Garcia Rivas, Serrano Piedecasas, Terradillos Basoco, *op. cit.*, p. 95.

[22] Muñoz Conde, García Arán, *op. cit.,* p. 170.

sectors of productive, social and institutional life. The consequences of economic globalization and the ability to use the new resources of the world space explain the extraordinary expansion of these great criminal organizations, such as the Sicilian Cosa Nostra, the Neapolitan Camorra, the Calabrian N'Drangheta, the Japanese Yakuza and the Chinese Triads, the Colombian and Mexican Cartels, the Russian criminal organizations, Turkish-Kurdish or Italian-American, who are dedicated to arms trafficking, drugs, money of illicit origin, slavery, drug trafficking human organs, embryos, works of art, etc. Considering the obvious inability of the criminal legal systems of individual states to deal with the activity of transnational organized crime, we believe that international cooperation in criminal matters is the most appropriate criminal response[23].

In the European Union, the Europol Convention, of July 26, 1995, establishes that one of its objectives is to improve the efficiency of the competent services of the member states and the cooperation between them in order to prevent and combat organized crime affecting several member states. In the same way, the Treaty of Amsterdam, of October 2, 1997, indicates the commitment of the signatory states to progressively adopt measures that establish minimum rules regarding the constitutive elements of criminal acts and punishments in the field of organized crime, terrorism and drug trafficking[24].

III. Conclusions

In general, the application of criminal law in space has always been governed by the principle of territoriality, since in a state of law the exercise of *ius puniendi* must take place mainly within the limits of its own territory. However, the need to avoid the existence of criminalization loopholes made it necessary to exceptionally use a series of extraterritorial

[23] Blanco Cordero, Sánchez García de La Paz, "Principales instrumentos internacionales (de Naciones Unidas y la Unión Europea) relativos al crimen organizado: la definición de participación en una organización criminal y los problemas de aplicación de la Ley penal en el espacio", Penal Review no. 6/2002, pp. 3 et seq.; In the Draft United Nations Convention against Organized Crime, as revised in March 1999, an organized group was defined as "a group consisting of three or more persons who exist for a certain period of time and whose purpose is to commit serious crimes in order to obtain, directly or indirectly, of a financial or material benefit";

[24] Blanco Cordero, Sánchez García de La Paz, pp. 6 and next.

principles, such as the personality, reality and universality of the criminal law. However, today we have to ask ourselves if this so-called extraterritoriality of the criminal law is really as specific as it is desired. The growing existence of organized crime whose activity is carried out on the territory of different states and the necessary protection of the common interests of countries integrated in international organizations has generated the creation of several exceptions to the classic principles of extraterritorial application of criminal law. Among these we mention that of double criminality and that the extradition systems established by countries that belong to common international organizations should be significantly streamlined, especially in the European environment by resorting to the principle of mutual recognition and the existence of the warrant of arrest and surrender. If the principle of double criminality limited the application of the personal principle when the Romanian jurisdiction prosecuted the acts committed by our citizens abroad, so also the principle of non-surrender that governs the matter of passive extradition was ignored in some cases, through international agreements and normative acts of international organizations from which Romania is a part of.

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GOODWILL.
LEGAL NATURE – *DE JURE OR DE FACTO* UNIVERSALITY?

Alexandru George DUDĂU[*]

ABSTRACT

Goodwill is of particular importance in the activity carried out by the professional trader to obtain profit because it serves as an indispensable means to achieve his purpose. The correct identification of the legal nature of goodwill remains of major importance in determining the legal regime applicable to it, in the absence of any legal regulation on these aspects. The usefulness of the concept is based on the general aspects but particularly on those relating to the economic operations carried out by professional traders. In light of the new legal text, which defines the concept of goodwill as consisting of all movable and immovable, tangible and intangible assets, it is clear that it is more a de facto universality, i.e. a set of assets with a common purpose determined by their owner. Goodwill is eminently composed of assets, not rights and obligations. In such a context, the characterization of goodwill as a patrimony of affectation/patrimonial mass of the professional trader seems to be increasingly removed from the legal reality and its specific nature, given that there are clear differences between the two concepts which cannot be reconciled.

KEYWORDS: *de facto universality; collection of assets; rights and obligations; patrimonial mass;*

Section I. *Notion*

For a professional trader to be able to carry out his activity and to participate in legal relations, he needs, among other things, the use of working tools appropriate to the purpose of the activity he intends to carry out, such as goods, furniture, installations, buildings, trademarks, etc. All these assets used by the professional, intended for the conduct of the commercial activity, constitute what is called *goodwill*.

* *Ph.D. Student, "Titu Maiorescu" University, Bucharest, Romania.*

Unfortunately, our current legislation contains no provisions governing the legal status of goodwill but only certain references to the institution of goodwill, despite the important role it plays in the conduct of commercial activity.

Goodwill is currently covered by a legal provision in Article 3(1)(r) of Law no. 265/2022[1] on the Trade Register and for amending and supplementing other regulatory documents with an impact on the registration in the Trade Register, which provides a legal definition of goodwill.

We also find several references to the notion of goodwill in the Civil Code, such as those in Art. 340(1)(c) *"goods intended for the exercise of the profession of one of the spouses, if they are not elements of goodwill forming part of the community of property",* and those in Art. 745 concerning the usufruct of the goodwill. References to goodwill are also to be found in Book VII of the Civil Code on Provisions of Private International Law, namely those in Art. 2638(2)[2].

Thus, the law recognizes the existence of goodwill as a legal reality but the legal doctrine has been entrusted with the task of specifying the legal regime applicable to it, which is of interest from a twofold point of view[3]:

On the one hand, the professional trader is interested in securing legal protection for the assets which he assigns to his business. These assets must have a special status allowing them to be transferred by legal documents *inter vivios* or *mortis causa*.

On the other hand, the recognition of goodwill is also called for by the need to protect the interests of the professional trader's creditors. Goods intended for commercial activity are the main assets of the trader's

[1] Romanian Official Gazette no. 750 of July 26, 2022.

[2] The text refers to the law applicable to the substantive conditions of the civil legal document, the general rule being that they are those determined by the *law chosen by the parties.* In the absence of choice of law by the parties, the law of the State with which the legal document is most closely connected shall apply, and if that law cannot be identified, the law of the place where the legal document was concluded shall apply, in accordance with Art. 2638(1), and para. (2) of the same Article provides that the law of the State in which the debtor of the characteristic performance or, as the case may be, the author of the document has, at the time of conclusion of the document, his habitual residence, *goodwill* or registered office shall be considered to be the law of the State in which such connections exist.

[3] Ioan Schiau, *Drept Comercial (Commercial Law)*, Hamangiu Publishing House, Bucharest, 2009, p. 75.

assets. For this reason, the movement of such assets is subject to special formalities to ensure that creditors' rights are respected.

Section II. Definition and characteristics of goodwill

The Romanian legislator has given a legal definition to this notion through Art. 3(1)(r) of Law no. 265/2022 on the Trade Register, establishing that goodwill is *"all movable and immovable, tangible and intangible assets – trademarks, companies, emblems, patents, good custom – used by an economic operator to carry out its business, attract and maintain customers"*.

Traditionally, several definitions of goodwill have been given in the commercial law doctrine[4], among which we note: "Goodwill is a set of tangible and intangible assets that a trader assigns to the conduct of his business to attract customers and, implicitly, to obtain profit".

Another opinion[5] stated that the definition of goodwill should be reconsidered as a result of the new conception of the legal nature of goodwill, resulting from the recognition of the division and the affectation of the patrimony by traders who are individuals or social traders, thus "goodwill is the universality of rights and obligations with patrimonial value, resulting from the division of the trader's assets and assigned by him to the conduct of his professional activity, organized in a creative way to attract and develop the clientele, to make a profit".

The definitions proposed above are based on the authors' conception of the legal nature of goodwill, namely that goodwill is a patrimony of affectation, as it is regulated by Art. 31(2) of the Civil Code, as well as by reference to the provisions of Government Emergency Ordinance no. 44/2008, Art. 2(j). The following characteristics of goodwill have been extracted from this context:

– goodwill is a universality with patrimonial value, constituted by the commercial affectation created by the professional trader, individual or legal entity, resulting from their division from his assets;

[4] Stanciu D. Carpenaru, *Tratat de drept comercial roman,* ed. a IV-a (Treatise of Romanian Commercial Law, 4th ed.), Universul Juridic Publishing House, 2014, p. 92.

[5] Lucia Valentina Herovanu, *Fondul de comerț* (Goodwill), Universul Juridic Publishing House, Bucharest, 2011, p. 38.

– since goodwill is a universality, and universalities do not have corporality, it must be analyzed as an intangible asset;

– universality is closely linked to the professional trader, its elements are privative, therefore they belong only to the owner of the assigned assets;

– goodwill, considered a universality, is assigned to the commercial activity, this assignment is made by the professional trader; based on his express will, he determines the assets necessary for his activity and assigns them this destination;

– the assignment of assets is made to attract customers and, implicitly, to make a profit.

Section III. Delimitation of the concept of goodwill from other institutions

Goodwill and enterprise. What is interesting is the fact that the concept of "enterprise" has a legal definition in Article 3(3) of the Civil Code, as follows*: "the systematic performance, by one or more persons, of an organized activity consisting in the production, management or disposal of goods or the rendering of services, whether or not for profit, constitutes the operation of an enterprise".* As is clear from the above-mentioned legal text itself but as has also been noted in specialized doctrine[6], the new Civil Code does not define the enterprise but what it means to operate an enterprise.

From this definition, we draw the essential elements of the enterprise and also its characteristics, which we will briefly present as follows:

The notion of enterprise designates a systematically organized activity. This activity has an autonomous character, in the sense that the organizer is independent in making decisions; the activity may be carried out by one or more persons, at their own risk, these persons having the status of professionals; the object of the activity consists in the production of goods, the execution of works and the rendering of services, and the purpose for which the systematically organized activity is carried out may be a profit-making one or one without such a purpose.

[6] Stanciu D. Carpenaru*, op. cit.,* p. 34.

The main differentiating elements between the two notions are:

– Goodwill is a collection of assets which the professional trader assigns to the conduct of his business, whereas an enterprise is a systematically organized activity exercised on the goodwill, which brings together not only the assets of the goodwill but also capital and labour[7].

– The presence of risk differentiates the two concepts. If the risk of assigning the assets is permanently present in the case of goodwill, since they are parties in the competitive struggle on the market, the aim of which is to attract customers to obtain profit, obtaining profit may or may not be an aim of the operation in the case of the enterprise, and consequently, the entrepreneur's risk is also assumed or not, depending on the proposed purpose.

– Goodwill can only be conceived in the context of a commercial activity, as opposed to an enterprise, which is not limited to this type of activity, and there may be civil enterprises, etc.

Goodwill and trading company. The distinction between the two institutions is less difficult, since the company is a legal entity, and therefore appears in the legal landscape as an independent subject of law, with its assets and a specific purpose, whereas goodwill is a collection of assets, a universality, and not a subject of law.

Goodwill may be only one element of the company's assets, which may also include other assets, but also a set of liabilities.

The same company may operate more than one goodwill, either in different places of operation or by the type of products manufactured or goods sold.

Section IV. Legal nature of goodwill

As regards the legal nature of goodwill, there has not been a unified view on this issue. Moreover, even after the entry into force of the new Civil Code, the previously existing controversy has not been settled because goodwill does not enjoy an express regulation of the applicable regime so there has been a great freedom of interpretation of its legal nature in legal doctrine.

[7] Gheorghe Pipera, *Drept comercial. Intreprinderea* (Commercial Law. The enterprise), C.H. Beck Publishing House, 2012, p. 55.

Under the old Civil Code of 1864, several theories have been put forward as to the legal nature of goodwill. These traditional theories (theory of the personification of goodwill, theory of de jure legal, theory of de facto universality, theory of incorporeal property, etc.) were aimed at respecting the established principle of civil law concerning the uniqueness of the person's assets[8].

The new Civil Code has expressly provided for the possibility of dividing the patrimony of individuals and legal entities into several different patrimonial masses, i.e. the creation of patrimonial masses of affectation, which is why some authors consider that the problem of the legal nature of goodwill has been resolved, as a result of the interpretation of these legal provisions that provide for the possibility of dividing the patrimony into patrimonial masses distinct from the general patrimony. However, legal doctrine is still not unanimous on this point.

Thus, in one opinion[9], goodwill is considered to be a *patrimony of affectation,* i.e. a fraction of the patrimony of the individual or legal entity assigned to the conduct of commercial activity. In support of this opinion, it is argued that the new Civil Code adopts a modern conception of the patrimony of individuals or legal entities, which may be subject to division or affectation only in the cases and under the conditions provided by law.

Also, Government Emergency Ordinance no. 44/2008[10] on the conduct of economic activities by self-employed persons, sole traders and family businesses, allows the individual carrying out an economic activity to reserve part of his assets for the performance of the economic activity[11]. This part of the assets earmarked for carrying out the economic activity constitutes a patrimony of affectation.

[8] For a full development of these theories, see L.V. Herovanu, *op. cit.,* pp. 88-107, as well as the legal doctrine cited there.

[9] Stanciu D. Carpenaru, *op. cit*., p. 98; Vasile Nemes, *Drept Comercial,* ed. a 2-a (Commercial Law, 2nd ed.), Hamangiu Publishing House, Bucharest, 2015, p. 51.

[10] Official Gazette no. 328 of April 25, 2008.

[11] According to Art. 2 (j) of Government Emergency Ordinance no. 44/2008, the patrimony of affectation is the totality of assets, rights and obligations of the self-employed person, the sole trader or members of the family business, assigned to exercising the economic activity, constituted as a distinct fraction of the patrimony of the person, separate from the general pledge of their personal creditors.

Another opinion[12] considers that goodwill is not to be confused with the patrimony of affectation, in that goodwill represents a *de facto universality* governed by the provisions of Article 541 of the Civil Code, which stipulates that the de facto universality constitutes the totality of assets belonging to the same person and having a common destination established by the will of that person or by law.

In this view, goodwill does not include the rights and obligations of the owner[13], which are part of the patrimony of affectation. There may be assets in the goodwill, that can be conceptually included in the patrimony of affectation. The legal basis for this idea was Art. 1(c) of Law no. 11/1991, amended by Law no. 298/2001, which defined goodwill as consisting of all movable, immovable, tangible and intangible assets assigned to the trader's business[14].

As far as we are concerned, we believe that to be able to provide an answer as to the legal nature of goodwill, it is necessary to first analyze the institution of patrimony from the point of view of the possibility of its division and the segregation of creditors, and then to highlight the elements that differentiate the two institutions, so that we can conclude whether goodwill overlaps with a patrimonial mass of affectation or, on the contrary, is a different concept, with its characteristic elements and different legal nature.

Patrimony is defined as the totality of rights and obligations with economic value belonging to a subject of law[15]. The Civil Code also contains provisions on patrimony, patrimonial masses and patrimonies of

[12] See Gh. Pipera, *op. cit.,* 2012, p. 55; Smaranda Angheni, *Drept comercial. Profesionistii-comercianţi (Commercial Law. Professionals-traders),* C.H. Beck Publishing House, Bucharest, 2013, p. 41.

[13] Smaranda Angheni, *Drept comercial. Tratat* (Commercial Law. Treatise), C.H. Beck Publishing House, Bucharest, 2019, p. 98.

[14] It should be noted that this law was repealed by Government Ordinance no. 12/2014 amending and supplementing Law no. 11/1991 on combating unfair competition and other acts in the field of protection of competition, published in the Official Gazette no. 586 of August 6, 2014, which entered into force on August 9, 2014.

[15] See C. Hamangiu, I. Rosetti-Bălănescu, A. Băicoianu, *Tratat de Drept Civil Roman,* (Treatise of Romanian Civil Law), vol. I, All Beck 1998 Publishing House, pp. 521-522; Corneliu Birsan, *Drept civil. Drepturile reale principale* (Civil Law. Non-ancillary rights in rem), Hamangiu Publishing House, 2013, p. 6; Ioan Adam, *Drept civil. Teoria generală a drepturilor reale,* ed. III-a (Civil Law. General theory of rights in rem, 3rd ed.), C.H. Beck Publishing House, Bucharest, 2013, p. 9.

affectation in Article 31, which states that *"any individual or legal entity is the owner of a patrimony which includes all the rights and debts that can be valued in money and belong to him/her"*.

Every subject of law is the owner of a single patrimony, no matter how many or few rights and debts he/she may have.

The provisions of Article 31(2) of the Civil Code allow the owner of the patrimony to divide this legal universality into several patrimonial masses, thus *"it may be subject to division or affectation only in the cases and under the conditions provided by law"*.

The concept of divisibility of patrimony is used by the legislator *stricto sensu*, designating the formation of patrimonial masses only under the law, while those formed by the will of the owner, such as fiduciary patrimonial masses, those assigned to the exercise of a profession and those specifically provided by law, are considered as patrimonies of affectation[16].

As has been pointed out in legal doctrine[17], the new Civil Code abandons the idea of the uniqueness of the patrimony and equal competition between creditors under Art. 31(2) and Art. 2324(2)-(4), which establishes a segmentation of the patrimony into two or more distinct patrimonial masses; the creditors of each of these distinct masses no longer interfere with each other, i.e. they do not enter into equal competition in the pursuit of the debtor's assets.

Thus, Article 2324(3) of the Civil Code establishes what is called the principle of specialization of the general pledge of unsecured creditors, providing that those creditors whose claims arose in connection with a particular division of assets, authorized by law, must first pursue the assets that are the subject of that patrimonial mass, and they may pursue the other assets of the debtor only if these assets are not sufficient to satisfy the claims.

This paragraph introduces a right of "discussion" for the owner of the patrimony, similar to the trustee's benefit of discussion[18]. By way of example, the joint creditors of the spouses must first pursue the joint assets and then their assets and personal creditors will have to pursue the debtor spouse's assets first, and if they do not succeed, they will be able to demand

[16] I. Adam, *op. cit.*, p. 9.
[17] Gh. Pipera, *op. cit.,* 2012, pp. 60-61.
[18] I. Adam, *op. cit.,* p. 17.

the division of the spouses' joint assets, according to Art. 352-353 of the Civil Code.

Paragraph (4) of Article 2324 of the Civil Code establishes a demarcation between the professional and personal creditors of the professional debtor to avoid possible competition between them since these categories of creditors cannot interfere during the period of the special affectation. Thus, those assets which are the subject of a division of the assets assigned to the exercise of a profession authorized by law may be pursued only by those creditors whose claims arose in connection with that profession, without being able to pursue the debtor's other assets.

By analyzing the text of the law, we deduce that the assets which are found in a patrimonial mass assigned to the exercise of a profession will not be able to be pursued by creditors whose claims were not born in connection with that profession; therefore, they will not be able to be pursued by creditors whose claims were born in connection with other patrimonial masses.

From the analysis of the institution of patrimony and the possibility of its division, as well as the segregation of creditors, we will make the delimitation between goodwill and the institution of patrimony, referring both to the provisions of the Civil Code and the special provisions of Government Emergency Ordinance no. 44/2008, by highlighting the characteristic elements that distinguish the two concepts, as follows:

– The patrimony is a true legal universality; the patrimony of affectation is a universality assigned to the exercise of a profession, a division of the whole, with a special legal regime determined for the purpose to which it is assigned.

– Although the law is the common source of both general patrimony and the patrimony of affectation, for a patrimony of affectation and goodwill to exist, the will of the person to constitute it is also necessary. The will in this case is a prerequisite for the application of a legal regime that leads to the division of assets. By contrast, in the case of general patrimony, the will is not necessary.

– The general patrimony, as well as a subdivision of it, does not include non-patrimonial personal rights (name, reputation), whereas goodwill includes the company, emblem, reputation, etc.

– The patrimony, as a legal universality, exists as a permanent, continuous reality throughout the existence of the subject of law, whereas the patrimony of affectation and goodwill have a temporal dimension

determined by the purpose for which it is assigned, for which the division was made.

– The general patrimony, as well as a division thereof, is inalienable and cannot be detached by the owner, whereas goodwill can be alienated and may be subject to legal documents transferring ownership.

The analysis carried out above by comparing the specific elements of the patrimony/patrimonial masses with those of goodwill reveals several common aspects but they do not overlap completely, as there is a clear difference between the two categories of institutions. It is precisely these differences which, in our opinion, are the elements which argue that goodwill is not a patrimony of affectation, since it is based on certain specific characteristics which are incompatible with the institution of patrimony or a patrimonial mass assigned to a specific purpose.

In this context, we consider that goodwill overlaps several of the features of de facto universality, unlike patrimony of affectation. Even though the provisions of the Civil Code allow persons to divide their patrimony into distinct patrimonial masses, goodwill is still a separate category from the patrimony of affectation, even if its structural elements may also be part of a patrimony of affectation, constituted for the exercise of an authorized profession. However, goodwill remains distinct from it.

The goodwill, among its component elements, does not include the rights and obligations of the professional trader, because, as provided for in Art. (1)(r) of Law no. 265/2022 on the Trade Register, the goodwill consists of all *movable and immovable, tangible and intangible assets*. The rights and obligations are not specific to the de facto universality either, since the latter is also likely to include only certain *assets*, unlike the patrimony of affectation, where the rights and obligations are included by right in the latter, this being the very reason for the patrimony assigned to the exercise of a profession.

In our opinion, when goodwill is set up, it is intended to be exploited to attract customers and implicitly to make a profit, and not to assign rights and obligations to the performance of the activity, unlike the patrimony of affectation, which is an operation made to assign assets, rights and obligations, exercise a profession, but more importantly, in our opinion, it is made to specialize the general pledge of unsecured creditors, so that personal creditors do not interfere with those whose claims arose in connection with the exercise of the profession authorized by law.

In conclusion, for these considerations and arguments indicated *above,* we believe that goodwill has the legal nature of a de facto universality, and not of a patrimony of affectation.

Section V. Conclusions

After the advent of the legal definition of goodwill under the provisions of Art. 3(1)(5) of Law no. 265/2022 on the Trade Register, we consider that goodwill should no longer be regarded as a patrimony, but as a component element of the patrimony, together with the other assets, rights and obligations that are included in the patrimony or the respective patrimonial mass.

Goodwill is a de facto and not a legal/de jure universality; it does not include the rights and obligations of the professional trader but only movable or immovable assets assigned by the owner to a well-determined purpose, namely to attract and maintain customers.

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REGULATIONS ON PRIVATE PROPERTY RIGHTS IN THE COMMUNIST PERIOD

Elena-Claudia DUMITRACHE[*]

ABSTRACT

The communist regime aimed to abolish the concept of private property, a goal achieved through the enactment of new legislative forms of personal and private property. These measures were carried out through abusively imposed legislative measures such as the massive expropriation of private property and the nationalization of land and buildings in the social interest declared to be in fact a public interest. The main normative acts of the communist political regime were represented by the three constitutions adopted in 1948, 1952 and 1965, which overshadowed the Civil Code of 1864. The adopted normative acts regulated the acquisition of private property rights under a new vision: exploitation and work, without fair and prior compensation.

KEYWORDS: *legislative abuse; constitution of socialist power; private property;*

1. Introduction

Although the right to private property has been defined as that right which "lies at the basis of the development of human society and represents one of the fundamental problems of individual existence and human society"[1] or as "the premise of any economic activity, that is, the premise of the functioning of the engine of any society"[2]. During the communist period, the rules regulating private property rights were strictly determined by "the social policy specific to each historical stage of economic development and consolidation of the socialist order with its economic and political purpose of structure or essence: the abolition of

∗ *Ph.D. Student, "Titu Maiorescu" University, Bucharest, Romania.*

[1] Corneliu Bîrsan, *Drept civil. Drepturile reale principale*, ed. a II-a rev. și adăug., Hamangiu Publishing House, Bucharest, 2007, p. 27, *apud* Adrian Dobre, *Aspecte generale privind proprietatea și scurt istoric al proprietății.*

[2] Eugen Chelaru, *Curs de drept civil. Drepturile reale principale*, All Beck Publishing House, Bucharest, 2000, p. 14.

exploitation and the increase of the material and spiritual well-being of those who work"[3].

The essence of communist legislative norms was the protection of land and, in particular, agricultural land, producer of social and economic well-being, collective, under the strict coordination of state powers, and not the form of private property rights.

In the following we will present some of the most important legislative regulations regarding the legal regime of private property rights over agricultural land during the communist period, starting with Law No. 187 of March 23, 1945 for the implementation of agrarian reform, the communist Constitutions of 1948, 1952 and 1965 and Law No. 59 of October 29, 1974 on land.

2. Law No. 187 of March 23, 1945 for the implementation of the agrarian reform

Law No. 187 of March 23, 1945, for the implementation of the agrarian reform, preceded the 1948 Constitution, a normative act by which the political power, under the umbrella of the national, social and economic interest of the country, abolished private property, through abusive expropriations and without equivalent compensation. In essence, this law, for the declared purpose of implementing the agrarian reform, was in fact a law of mass expropriation of the holders of private property rights, without granting any compensation. Thus, the following assets became state property: "land and agrarian properties of any kind belonging to German citizens and Romanian citizens, natural or legal persons, of German nationality (ethnic origin), who collaborated with Hitlerite Germany, the lands and other properties of war criminals and those guilty of the country's disaster; the lands of those who took refuge in countries with which Romania is at war or who took refuge abroad after August 23, 1944; the lands and all agricultural assets of absentees; the lands of those who in the last seven consecutive years have not cultivated their lands on their own, with the exception of plots of up to 10 ha; agricultural assets of any kind of Romanian citizens who volunteered to fight against the United

[3] Constantin Buga, Daniela Păunescu, Petre Marica, *Regimul juridic al terenurilor în R.S.R.*, Ceres Publishing House, Bucharest, 1980, p. 11.

Nations; deceased assets[4]; surplus agricultural land constituting properties of individuals exceeding the surface area of 50 ha, namely: arable land, orchards, meadows, artificial ponds and ponds, whether or not they serve for fishing, swamps and floodplains" as provided for in art. 3.

Also, by the provisions of art. 20 and art. 21 provided for the prohibition that newly established agricultural holdings could not be alienated or encumbered with encumbrances, in whole or in part, except in cases where the Ministry of Agriculture approved such situations, with each new holder receiving the land free of encumbrances.

3. Constitution of the Romanian People's Republic of April 13, 1948

Constitution of the Romanian People's Republic of April 13, 1948[5] was issued by the Grand National Assembly and was published in the Official Gazette no. 87 Bis of April 13, 1948, the date on which it entered into force, being the first Constitution of the communist political regime that created the legislative framework for the implementation of the socialist economy and the restructuring of the legislative authority.

First of all, this Constitution aimed to transfer the assets qualified as common assets of the people, into the ownership of the state, without the owners being compensated in fact, in order to promote an idea such as "the common assets of the people constitute the material foundation of the economic prosperity and national independence of the Romanian People's Republic", as provided for in art. 7.

Thus, assets such as all kinds of subsoil wealth, mining deposits, forests, waters, and natural energy sources became the property of the state, for the common interest of the people, even if these assets were privately owned by citizens, according to Article 6 of the Constitution. The expropriation procedure was to be regulated later, based on a special law and with fair compensation established by the courts, according to Article 10.

The exception to this rule was represented by the ownership of real estate acquired by inheritance or by work or "saving" in order to stimulate the people's desire to work and keep their land in their ownership.

[4] Real estate belonging to legal entities was so named because it could not be transmitted through manual tradition like property belonging to individuals.

[5] *Constituția Republicii Populare Române din 13 aprilie 1948*, published in M. Of. nr. 87 Bis din 13 aprilie 1948.

This historical period was characterized by the "existence of socialist state property, cooperative property and personal property, the latter being reduced to the possibility for individuals to have a home, household movable goods, strictly personal goods and, possibly, a nationally produced car, purchased on the domestic market"[6].

We can thus recall that "state property from the socialist and communist regime period, created by the people and in the interest of the people" limited individual property and significantly diminished its prerogatives compared to the regulation in the Civil Code of 1864 and the Constitution of 1923. Thus, excessive control over property was established, in the name of an apparent, popular democracy, the right to property losing its classical configurations in this historical-political period.

In an opinion, it was argued about the 1948 Constitution that "although it recognizes the existence of three types of property (state, cooperative and participatory property), it in fact proclaims the principle of the supremacy of state and cooperative property over private property, as well as the special protection of state property"[7].

It can thus be argued that according to this Constitution "socialist property was born by taking over from private property some assets, especially immovables (mines, forests, factories, etc.) which, together with those already in state ownership, formed the two types of socialist property: cooperative and state socialist. This was achieved in particular by ... the nationalization of some buildings intended for housing and the transfer to the state of buildings considered ownerless or abandoned"[8].

Although the Romanian people were still governed by the socialist political regime, the 1948 Constitution was repealed on September 24,

[6] Marian Enache, Marian Constantinescu, *Renașterea parlamentarismului în România*, Polirom Publishing House, Iași, 2001, *apud* Marian Enache, *Regimul juridic al proprietății în România,* Buletinul Curții Constituționale, 2022 semestrul I.

[7] Angela Baciu, *Istoria constituțională a României-deziderate naționale și realități sociale*, Lumina Lex Publishing House, Bucharest, 2001, p. 203, *apud* Ion Popescu-Slăniceanu, Isabela Stancea, *Dreptul de proprietate privată în sistemul constituțional românesc și în Noul Cod Civil,* in Revista Drepturile Omului.

[8] Constantin Stătescu, Corneliu Bârsan, *Drept Civil. Teoria generală a drepturilor reale*, Universitatea din București, Facultatea de Drept, 1980, *apud* Mateescu-Munteanu, Ruxandra-Cristina, *Retrocedarea imobilelor preluate abuziv în perioada 6 martie 1945-22 decembrie 1989.*

1952, with the entry into force of a new constitution, namely the 1952 Constitution.

4. Constitution of the Romanian People's Republic of September 24, 1952

Constitution of the Romanian People's Republic of September 24, 1952 was published in the Official Gazette no. 1 of September 27, 1952[9], date on which it entered into force.

This Constitution was adopted by the Grand National Assembly on the basis of articles 38 and 104 of the Constitution of the Romanian People's Republic of 1948, after discussing the draft published on July 19, 1952 by the Constitutional Commission for the preparation of the draft Constitution, abrogating the 1948 Constitution.

By provision art. 7, the provisions of the 1948 Constitution were taken over, according to which "the riches of any nature of the subsoil, the factories, plants and mines, the forests, the waters, the sources of natural energy... constitute state property, the common good of the people", the land belonging only to those who work it.

The principle of acquiring through social work the right of ownership but only over the dwelling house, the auxiliary household next to the house, the household objects and personal use, as well as the right of inheritance over the personal property of citizens was also maintained. In addition, the right of personal use of peasants over plots of land located in the vicinity of agricultural households was legislated.

5. Constitution of the Socialist Republic of Romania of August 21, 1965

Constitution of the Socialist Republic of Romania of August 21, 1965 was adopted by the Grand National Assembly in the meeting of August 21, 1965, after discussing the project published on June 29, 1965[10]. The Constitution entered into force on the date of adoption, that is, August 21,

[9] *Constituția Republicii Populare Române din 24 septembrie 1952,* published in M. Of. nr. 1 din 27 septembrie 1952.

[10] *Constituția Republicii Socialiste România din 21 august 1965,* published in M. Of. nr. 65 din 29 octombrie 1986.

1965, expressly abrogating the 1952 Constitution on the same date. Subsequently, on October 29, 1986, it was republished, and on December 8, 1991, it was abrogated by the 1991 Constitution of Romania.

Within the 1965 Constitution, through provision art. 6, the scope of socialist property rights was extended to the means of production, claiming that these goods belong to the entire people, in the form of cooperative property.

They were maintained in art. 7 the provisions according to which "the wealth of any kind of subsoil, mines, lands from the state land fund, forests, waters, sources of natural energy, factories and plants, banks, state agricultural enterprises, stations for the mechanization of agriculture, communication routes, means of transport and state telecommunications, the state fund of buildings and housing", belong to the entire people, being state cooperative property.

The provisions regarding the expropriation of lands and buildings only for works of public interest and with the payment of fair compensation, according to art. 12, were also briefly preserved"[11].

Alongside these Constitutions of the Romanian state, a series of other normative acts were adopted that endangered the right to private property, such as Law No. 59 of October 29, 1974 on land.

6. Law No. 59 of October 29, 1974 on land

Law No. 59 of October 29, 1974 on land was issued by the Grand National Assembly, having a special significance in terms of ensuring real estate publicity of land, guaranteeing the right to private property. [12]

The aim of the communist social system was to ensure a unitary and efficient regulation of land use, through which the inconveniences observed over time would be removed. The aim was thus to regulate within a single normative act all the legislative provisions previously developed, which no longer corresponded to the new socialist goal, but also to be taken into account in contemporary times.

[11] *Constituția Republicii Socialiste România din 21 august 1965,* published in M. Of. nr. 65 din 29 octombrie 1986, republicată la data de 29 octombrie 1986.

[12] *Legea nr. 59 din 29 octombrie 1974 cu privire la fondul funciar*, published in M. Of. nr. 138 din 5 noiembrie 1974.

This law was the basis for the issuance of Law no. 7 of 13 March 1996 on the cadastre and real estate advertising, published in the Official Gazette no. 61 of 26 March 1996, being repealed by it.

Given the division of land according to economic destination, into agricultural land, forestry land, land under water, land intended for human settlements and land with special destinations, in order to centralize them, the establishment of the general land cadastre was envisaged, under the authority of the Ministry of Agriculture and Food Industry. At the local level, this responsibility fell to the committees, respectively the executive offices of the people's councils.

In this context, the owners or possessors had the opportunity to personally draw up the land cadastre, based on the data contained in the general cadastre.

According to the provisions of art. 37, the system of general and mandatory records of the entire land fund in the Socialist Republic of Romania was regulated, regardless of the owners and the destination of the lands. Their records were kept by the county cadastre and territorial organization offices, by communes, cities and municipalities.

It was specified in article 18 that measurements of the lands, of the areas occupied by constructions were to be carried out, followed by the drawing up of maps, plans and cadastral registers, steps necessary to establish the destination and registration of the category of land use or, in other words, a nationwide inventory of land areas was to be carried out.

It was stipulated as an essential purpose of this normative act that of registering the owners and the title on the basis of which the holders held a right of ownership or social use, as well as an inventory of the legal acts regarding the real rights established over the lands or buildings, in order to ensure their publicity and opposability against third parties.

It can be concluded that another purpose provided by the socialist legislator was to legally regulate the circulation of agricultural lands.

As a means of implementing and complying with these norms by the holders, the obligation was established for the owners of lands and buildings to communicate to the county cadastre and territorial organization office any changes made, compared to the latest data recorded in the cadastral documents, within a maximum period of 60 days from their occurrence, as follows from the provisions of art. 39.

It can be noted that this law laid the foundations of the national real estate advertising system through the land register, as a result of the fact

that "in the documents of the general land cadastre, according to the legal norms regarding the right of ownership, the lands and buildings that constituted: state property, cooperative property or other public organizations, personal property and private property were registered, and the identification of the owners and the real rights over the lands and buildings located on them was carried out by the committees, respectively the executive offices of the communal, city and municipal people's councils" as follows from the provisions of art. 40.

The general land cadastre works were carried out through: the works of decision-delimitation of the neighbouring surfaces, the cadastral maps and plans, as well as the cadastral registers and files, and the data regarding the owner of the lands, the destination, the category of use, the surface area and the qualitative characteristics of the lands were noted in accordance with the data recorded in the general land cadastre, as follows from the provisions of art. 42.

The cadastre works prepared under this law could be contested according to art. 41, as follows: the general land cadastre works were prepared on the territory of a commune, city or municipality; the committee, respectively the executive office of the people's council displayed at its headquarters, for a period of 30 days, the list of identified owners and the cadastral documentation prepared, for consultation; against these documentations regarding the accuracy of the data recorded in the cadastral registers and plans, a written appeal could be filed by any interested person within 60 days of the display of the lists; the appeals were resolved by the Committees, respectively the executive offices of the people's councils within 30 days of their registration; against the way in which the appeals were resolved, complaints were provided as a means of appeal, which were to be filed within the courts in whose territorial jurisdiction the land or construction in question was located.

The procedure for registering land in the general land cadastre system, relating to the territory of a commune, city or municipality, was finalized by the decision to implement the general land cadastre on that territory by the executive committee of the respective county people's council or of the municipality of Bucharest.

However, the state reserved the right that, depending on the general interests and the specific needs of certain branches of the national economy, which owned land or buildings, ministries or other central bodies may

organize special records, using as basic data only those recorded in the general land cadastre, as follows from the provisions of art. 43.

Regarding the practical aspects of Law no. 59/1974, we can conclude that it constituted, together with Law no. 58/1974 on the systematization of urban and rural territory and localities, a unitary and coordinated regulation, through which concrete and efficient measures were adopted with a view to the circulation regime of agricultural land [13], but also of those who were part of the land fund.

This land fund law targeted the legislative framework of all categories of land, regardless of their destination, including agricultural.

The operations of land consolidation and land exchange imposed by the state, without necessarily requiring the owner's consent, were not qualified as legal operations of civil law, but a true expropriation, the compensation consisting in offering another area of land in exchange.

For situations in which the land exchange would have been carried out between two private individuals, it had to be approved by the executive committees of the county people's councils and the municipality of Bucharest.

In the situation in which the private individuals did not reach an agreement of will, the state bodies intervened in order to achieve the public interest.

The entries in the land register did not confer a constitutive character to the right of ownership, but only a character of opposability through the publicity and cadastral evidence of the lands.

Common to the two laws is that the right of ownership over agricultural land could not be alienated or acquired through other legal acts than through legal inheritance regulated by the Civil Code of 1864, the sanction being the transfer of the right into the ownership of the socialist state, therefore the confiscation of the land, a procedure that did not fall under the jurisdiction of the courts.

It is thus observed that testamentary inheritance was excluded as a way of acquiring agricultural land, although it also had its normative existence in the norms of common civil law.

In the situation where the legal heirs of arable land could not continue their agricultural activities, they were subject to contravention sanctions,

[13] Constantin Buga, Daniela Păunescu, Petre Marica, *Regimul juridic al terenurilor în R.S.R.*, Ceres Publishing House, Bucharest, 1980, p. 21.

followed by a procedure for transferring the property to the state that lasted 2 years, a period during which: the state established a real right of temporary use over the assets in question to the socialist organizations and the legal heir had the possibility of contesting the measure ordered in the courts and of complying with the requirements to work the agricultural land according to its destination.

Also at the end of this 2-year period provided for by the provisions of art. 71 of the Law, it was considered that the state's right to the land confiscated *ope legis* arises.

In judicial practice, the question arose whether this prohibition on alienation of the right of ownership also covers other real rights over agricultural land for plant production, in which sense two opinions were issued: the first opinion was that other real rights could not be established over agricultural land, and the second opinion that these real rights are permissive in the context of the two laws issued.

It was thus considered that real rights such as the right of use or the right of superficies of the spouse according to the Family Code over agricultural land for plant production can be established if this coexistence of rights did not hinder the socialist interest of the state.

In the context of Law no. 58/1974 and Law no. 59/1974, the courts ruled by Decision no. 11/1976[14] that the usucapion of agricultural land for plant production cannot be carried out, since usucapion would produce a constitutive effect of rights, therefore it would represent another way of acquisition outside the legislative context conferred by the two laws, according to which the right of ownership was obtained exclusively through legal inheritance, any other ways of acquisition and alienation being prohibited, sanctioned with absolute nullity and subsequently confiscated by the state.

In situations where the term of usucapion had expired before the entry into force of the two Laws no. 58 and 59/1974, the courts issued decisions by which they found the existence of a property right, conferred by law retroactively from the day of the commencement of possession, and not from the date of the expiration of the term of usucapion.

Regarding the partition of agricultural land for plant production, the declaratory effect provided for in art. 786 of the Civil Code was taken into

[14] Constantin Buga, Daniela Păunescu, Petre Marica*, Regimul juridic al terenurilor în R.S.R.,* Ceres Publishing House, București, 1980, p. 51.

account, which did not contravene the provisions of art. 30 of Law no. 58/1974, the transfer of ownership not operating on the date of the judicial or conventional partition, but on the date of acquisition of the undivided share, the partition not being regarded as an act of alienation of the asset[15].

A questionable situation was the acquisition of ownership of agricultural land by an heir who has the status of both legal heir and testamentary heir, when the testamentary disposition was made after the entry into force of the two laws.

In the situation where there was a single heir with a dual vocation, legal and testamentary, the legal inheritance had priority, the legal act not being affected by legal ineffectiveness.

If there were several legal heirs, and the inheritance asset was agricultural land, only the status of legal heir was affected, the testamentary bequest being affected by ineffectiveness.

However, the division of land between several legal heirs, therefore the division of inheritance, could only be achieved by authentic act and with the prior authorization of the executive committees of the communal, city or municipal people's councils and with compliance with the systematization norms, the sanction that intervened being the relative nullity as provided for in art. 30-32 of Law no. 58/1974.

The need to obtain the prior authorization of the executive committees arose from the need to comply with the systematization plans, with the aim of exercising control powers by state bodies in order to avoid a physical division of the land, through parcelling and which would contravene the public interest.

Another important observation on these laws is that the distinction was made between personal property and private property, both of which are main real rights and forms related to socialist individual property.

Thus, the right of personal property derived from the right of socialist property, being a subjective right that belonged to each individual to acquire, as a direct consequence of the work performed, individual consumer goods, sometimes even land, exercising possession, use and disposal over them. The right of private property was constituted over the produc-

[15] *Ibidem*, p. 53.

tion of goods or the household goods of peasants or craftsmen, therefore over the means of production, including land, but also income from work[16].

Another important effect of these two laws was the impossibility for creditors to foreclose on vacant construction land, regardless of its location or use category.

This effect stemmed from the express provision of the method of acquiring land, as these assets could no longer be acquired through forced sale procedures, except in cases where the creditor was the Romanian socialist state. Creditors could, however, recover their claims if the land became state property, and the creditor sought compensation from the state for the owner.

In the case of land with buildings, if the owner proceeded to alienate the ownership right, the related land became *ope legis,* the property of the state, for which he received compensation as in the case of expropriations, and in favor of the owner of the building, a right of use was established over the land necessary for the use of the building, for the duration of the existence of the respective building, the latter being obliged to pay an annual tax to the state, according to art. 49 of Law no. 4/1973[17].

7. Conclusions

The legislation created during the communist regime represented the greatest challenge for the democratic political regime in order to regulate the provisions regarding the reconstruction and guarantee of the right to private property.

Although the Civil Code of 1864 was maintained in force by the communist political regime as the basic legislative norm, starting with 1945 the right to private property was subject to transitional legislative provisions established by a liberal capitalist system that valued private property above all else, to the opposite extreme. During the communist system, attempts were made to abolish this right and offer a new concept in order to satisfy the public interest, based on all socialist amendments.

[16] Constantin Buga, Daniela Păunescu, Petre Marica, *Regimul juridic al terenurilor în R.S.R.*, Ceres Publishing House, București, 1980, p. 172.

[17] *Legea nr. 4 din 28 martie 1973 privind dezvoltarea construcției de locuințe, vânzarea de locuințe din fondul de stat către populație și construirea de case de odihnă proprietate personală.*

The three communist Constitutions adopted in 1948, 1952 and 1965 addressed the acquisition of private property rights through exploitation and work, essential ideological and moral values within personal property, thus providing continuity to bourgeois political ideas, namely that the right to property could be obtained by those who work, this historical vision becoming an incentive for work.

Regarding the right to property obtained through legal inheritance, we note that no legislative changes were made, except for limiting the acquirers to owning a single home, regardless of the method of acquisition.

Finally, we can appreciate that in the pre-communist period, extensive restrictions were stipulated on private properties, the creation of legislative norms by the socialist power being a means of acquiring and confiscating real estate from individuals in order to ensure state capital, through nationalizations and massive expropriations. The essence of property rights was limited to the ownership of goods such as household and personal items, and in some exceptional cases, land, income and savings. At the end of the communist period, the message conveyed regarding the concept of private property was to be a mixed one, stimulating citizens to buy new buildings from the state, by taking out state loans, which were recovered from the work performed by the owners in the public interest.

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6. Constantin Stătescu, Corneliu Bârsan, *Drept civil. Teoria generală a drepturilor reale*, Universitatea din București, Facultatea de Drept, 1980, *apud* Mateescu-Munteanu, Ruxandra-Cristina, *Retrocedarea imobilelor preluate abuziv în perioada 6 martie 1945-22 decembrie 1989.*
7. *Constituția Republicii Populare Române din 13 aprilie 1948*, published in M. Of. nr. 87 Bis din 13 aprilie 1948.
8. *Constituția Republicii Populare Române din 24 septembrie 1952,* published in M. Of. nr. 1 din 27 septembrie 1952.
9. *Constituția Republicii Socialiste România din 21 august 1965*, published in M. Of. nr. 65 din 29 octombrie 1986, republicată la data de 29 octombrie 1986.
10. *Legea nr. 59 din 29 octombrie 1974 cu privire la fondul funciar*, published in M. Of. nr. 138 din 5 noiembrie 1974.

SOME CONSIDERATIONS ON PRACTICAL ASPECTS OF ON-SITE RESEARCH

Andrei IONESCU[*]

ABSTRACT

The on-site investigation is one of the initial, immediate and mandatory acts of the criminal investigator and consists in the direct examination, through his own senses, of the place where a crime was committed or its results were discovered, in order to discover, fix, collecting and interpreting material and other evidence that contributes to the formation of a complete, faithful representation and to an easier understanding of the essence of the mechanism, the sequence in time and the mobile the actions undertaken by the criminal in materializing the criminal resolution.

KEYWORDS: *forensics; on-site investigation; judicial body; presumption of innocence; indictment; court decision;*

1. Preliminaries

Starting from the notion of on-site investigation, the operative discovery, the thorough investigation and the complete establishment of crimes constitute the main task of the judicial bodies in compliance with the rules of forensic technique and tactics[1].

In order to fulfill this duty in optimal conditions, it is necessary to improve the quality of work, by using, in the practical activity, forensic scientific methods and means. Among the criminal cases whose resolution requires the use of forensic scientific methods and tools to a greater extent and with greater skill are those that have as their object crimes against life and other serious crimes that result in the death or injury of the victim.

We also show that in the investigation and establishment of crimes against life, it is necessary, more than in the case of any other crimes, to

∗ *Ph.D. Student, "Titu Maiorescu" University, Bucharest, Romania.*

[1] Gh. Popa, N. Gamenț, *Practical course in forensic tactics in powerpoint,* Pro Universitaria Publishing House, Bucharest, 2015, p. 11.

act as a team[2], constant practice demonstrating its usefulness and efficiency in ensuring the operative performance of complete checks that elucidate the essential aspects of the cases respectively[3].

Without intending to analyze teamwork, we recall that in the mentioned fields, although it is a truism regarding the methodological necessity of this investigative principle, today we witness an incomplete assumption of this principle, many attributing it a formal character and, more chosen, since the psycho-social implications derived from the formation of the investigation team were ignored, or at least diminished.

In what follows, we propose to highlight some deficiencies in the administration of evidence, legally spaced by art. 192 of the Code of Criminal Procedure, namely the on-site investigation, all the more so, as in the administration of this means of evidence, the need for intuition and flair on the part of the investigation team is still preserved. Of course, technology, digitization, and forensics, down to the last detail, would seem that these human factors would be superfluous, inoperative, but we believe that forensic investigation remains an art[4].

Of course, totalitarian scientific positivism does not exist in forensics, but it would be an error to exclude the personalization of research from the arsenal of forensics, with the mention that all these personal qualities must be subsumed under a positive concept, their value being zero without correspondence in evidence.

We are convinced that our approach is not an easy one, but analyzing several court decisions, we find that the criminal investigation bodies do not give due attention to the administration of this means of evidence, despite its importance in the early phase of the criminal investigation, which administered legally and professional has the opportunity to correctly guide the actions undertaken by the criminal investigation

[2] M. Terbancea, *Research ethics in the team*, in the journal Problems of criminalistics and criminology, no. 1, 2, 1984, pp. 2022.

[3] I. Rusu, S. Spătaru, *The lack of real cooperation between the members of the complex research team affects the quality of the criminal investigation documents,* in the journal Problems of criminalistics and criminology no. 4/1984, pp. 101-104.

[4] J. Nepote, *Situation actuelle et tendance d'evolution de la criminalistique*, R.I.P.C., no. 384/1983, p. 2, *quoted* in V. Berchește, *Criminal research (Criminalistics – theory and practice). Complete Criminal Investigation Guide,* ICR Publishing House and topography, Bucharest, 2009.

bodies, to develop real versions[5], to carry out organized work, according to the criminal investigation plan, which – drawn up under these conditions – represents the result of the collective thinking of the team members (many times it does not exist), each one's contribution being the result of the actions he carried out. We say this in the conditions where many monographs, chapters or scientific articles have been written on this topic. The cases that we will present bring back into discussion, residually, problems regarding the epistemology of the investigation of crimes against life and traffic crimes.

Over time, the feeling is that, despite the documentary material, this means of proof is less and less known.

The results of the incorrect administration of this means of evidence can be found during the criminal trial and, why not, in the solutions pronounced by the courts.

Therefore, we set off on the premise that one of the main conditions for the achievement of multiple and complex tasks related to the discovery of crimes and the perpetrators of crimes that result in the death or injury of a human being, is the active, sustained and creative application by the investigative bodies criminal and courts of scientific, tactical and special technical procedures and methods developed by the science of forensics.

In a future article, we will highlight some issues related to the probative value of the statements taken from witnesses or perpetrators during the on-site investigation, especially under the current Code of Criminal Procedure, and here we have in mind the institution of the preliminary chamber.

2. Murder or accidental death? Presentation of the case

By criminal sentence no. 19 of January 28, 2020 of the Gorj[6] Court pronounced in file 1299/95/2019 based on art. 396 para. (5) related to art. 16 para. (1) lit. c) from the Criminal Procedure Code, the defendant V.I. was acquitted, for committing the crime of murder, prev. and ped. of art. 188 para. (1) of the Criminal Code.

[5] V. Lăpăduși, S. Grejdinoiu, *Considerations regarding the forensic investigation of the crime scene*, in the journal Forensic investigation of the crime scene, Bucharest, 2004, p. 16.

[6] Available on www.rolii.ro.

In essence, it was noted that by the indictment of May 14, 2019 of the Prosecutor's Office attached to the Gorj Court, it was ordered to send the defendant V.I. to court, in a state of preventive arrest, for committing the crime of murder, provided for by art. 188 para. (1) of the Criminal Code.

In the referral act, it was essentially noted as a state of fact that, on December 21, 2018, the defendant V.I. hit the victim R.M. with hard objects in the area of the skull, which led to her death on December 22, 2018, (without indicating the time, place, vulnerable thanatogenic body and the position of the victim-aggressor s.n. A.I.).

In the course of the judicial investigation, extensive evidence was administered[7], including a new medico-legal expertise[8], considering the conclusions of the medico-legal expertise report (autopsy) of 22.12.2018 drawn up by the Gorj Forensic Medicine Service and the new medico-legal expertise report legal document of 23.09.2019 drawn up by the Institute of Legal Medicine Craiova, and the lack of data essential for clarifying the factual basis and implicitly finding out the truth. At the same time, the verification and approval from a scientific point of view of the conclusions of the two medico-legal expert reports by the higher medico-legal commission of the National Institute of Forensic Medicine Mina Minovici Bucharest was arranged. The higher medico-legal commission within the National Institute of Forensic Medicine Mina Minovici Bucharest,

[7] In order to correctly establish a state of facts, during the judicial investigation, in the presence of the defendant, the items of clothing that R.M. was wearing on 21.12.2018 were viewed, the court finding that her handkerchief did not show traces of blood (not being not even submitted for genetic expertise), a fact that proves that he either did not have it on his head, or he had left it on his back, as he claims the defendant. However, this aspect can lead to the idea that the fatal attack did not take place in the room where the victim was found (in the absence of traces of splashes), a circumstance which, corroborated with those shown regarding the traces of blood on the defendant's clothes, creates serious doubts regarding his presence near the victim at the time of the hit.

[8] This was ordered considering the inconsistencies between the medico-legal documents found in the criminal investigation file and, implicitly, the insufficiency of the medico-judicial information provided by them, the court ordered the performance of a new medico-legal expertise by the Institute of Forensic Medicine Craiova, establishing 13 objectives. From the conclusions of this report, it follows that the death of the named R.M. was caused by meningo-cerebral hemorrhage as a result of a cranio-cerebral trauma produced by an active mechanism (with the highest probability). The cranial flat wounds were most likely caused by an active mechanism, by repeated blows with a hard body and possibly an elongated hard body with an irregular surface, the time of death cannot be established with certainty, it could be from the afternoon of 21.12.2018.

approved the new medico-legal expert report of 23.09.2019 drawn up by the Institute of Forensic Medicine Craiova.

As a result of the immediate re-administration and supplementing of the evidence, the court found that there are inconsistencies between the evidence and the state of facts held by the prosecutor, as well as that there are missing evidentiary elements (from the criminal investigation phase), which refer to essential factual circumstances and impede the establishment of guilt the defendant sent to court.

In its reasons, the court showed that according to the provisions of art. 4 in conjunction with art. 99 C.Pr.Code., any person accused of a crime is presumed to be innocent until his guilt is established by a final criminal decision.

This principle should not be understood as a favor, an allowance of the law to relieve judicial bodies of evidentiary efforts or to favor the superficiality of using all means to find out the truth, but it is a procedural remedy when all means have been exhausted for establishing the truth. In correlation with this principle are the provisions of art. 103 para. 2 of the same code, which establish that sentencing is ordered only when the court is convinced that the accusation has been proven beyond any reasonable doubt.

The court held that the evidence administered in the case does not fully and convincingly outline the circumstances of the alleged act, in the case the factual circumstances in which the suspicious death of the named Rîjniță Maria occurred were not elucidated in the criminal prosecution phase and a factual situation based on clear evidence of guilt, imposing the rule that any doubt is interpreted in favour of the defendant (*in dubio pro reo*), as stipulated by the provisions of art. 4 para. (2) C.Pr.Code.

We make the clarification according to which the prosecutor's office declared an appeal against this sentence[9].

[9] In the grounds of appeal, among others, it was shown that: the court of first instance unjustifiably removed the report of a new medico-legal expertise; that the mechanism for causing the injuries undoubtedly results from this and that the victim's death occurred a few hours after applying the blows; that in the case of the crime of murder, the law does not provide for the existence of a mobile; that the windows should not have been described in the report of the on-site investigation, since it appears from the photo plates that they had foil and it is observed that this is intact; that no blood spatters were found on the wall because the bed had a high headboard; that the handkerchief had no traces of blood, which proves that the victim had no bleeding injuries when she was brought into

The Court found that the act of murder, prev. of art. 188 para. (1) of the Criminal Code for which the defendant was sent to court exists, constitutes a crime and was committed by the defendant V.I. with guilt in the form of indirect intent, taking into account the offending object used, "long hard body with irregular surfaces", the targeted area the head, the intensity of the blows, their number, the profuse bleeding that caused the blood to pass through the mattress on the bed and the connection of causality between the defendant's action and the victim's death.

The appellate court[10], finding that the defendant's guilt has been established beyond any reasonable doubt, will proceed to sentence him for the crime of first degree murder. of art. 188 Criminal Code.

We note that the appeals court, appropriating the criticisms of the prosecutor's office, gave implicit priority relevance to the report of a new medico-legal expertise, approved by the higher medico-legal commission that operates under the "Mina Minovici" Institute of Forensic Medicine Bucharest.

In what follows, we do not intend to analyze the judgments pronounced in the case, although a simple reading shows that the court of appeal[11], in

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the house by the defendant, that it was not necessary to establish the activity of the victim and the defendant prior to the crime. At the same time, it is also shown that: the victim's death occurred on December 21, 2018; the victim was standing or on the bed in a sitting position at the time of the blows, and no splashes of blood were found; the defendant's injuries are from December 21; that the defendant hit the victim with a hard body described as a piece of wood because she would more than likely have refused to have sexual relations with the defendant. We notice that a new state of facts is described, than the one with which the court was vested by the indictment, but this too without factual conductivity.

[10] Unpublished.

[11] Thus, in the grounds of appeal and decision, it is mistakenly held that the first instance removed the report of a new medico-legal expertise, the culmed, ordered by the first instance at the first term of court. Obviously, this support cannot be accepted, for the simple reason that the acquittal solution was pronounced on the basis provided by art. 16 para. (1) lit. c) from the Criminal Procedure Code, i.e. there is no evidence that the defendant committed the crime. The option of the first court excludes, therefore, this possibility expressed by the prosecutor in the reasons for the declared appeal. And, yes, maybe the first court should have pronounced the solution of acquittal on the grounds that the deed does not exist. But, for reasons of "own technique and tactics" probably anticipating the prosecutor's criticism according to which "the judge is not allowed to remove an expert work drawn up by the 12 most reputable doctors in Romania", the first court chose as the basis for the acquittal the one provided by art. 16 para. (1) lit. c) from

its own reasoning, uncritically took passages from the prosecutor's opinion presented in the grounds of appeal formulated regarding the acquittal solution, not being therefore exempt from servitudes. Certainly, in our opinion, these factual contradictions could have been avoided if the on-site search was complete, carried out under the conditions noted at the beginning of this article.

In the same way, if the prosecutor had two inexhaustible and dubious versions[12] regarding the state of facts, the first court his own version, and the court of appeal hers, what can the defendant, the parties or a neutral observer think? What is the truth? Was the court right? Convinced the decision of the last court that represents, isn't it res judicata *pro veritate habetur*? There are so many questions without a definite answer.

All these questions would not have existed if the on-site investigation was done professionally, if an investigation plan was established and the criminal prosecution versions were developed or the negative circumstances were eliminated.

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the Code of Criminal Procedure, i.e. the lack of evidence. In other words, without explicitly removing the new expertise, the judge of the case was probably "forced" to give precedence to the conviction based on the entire evidence set under the conditions of art. 103 of the Criminal Procedure Code, to the detriment of intimate conviction. On the contrary, the court of appeals took "tale quale" the prosecutor's assertion, implicitly removing in the process of evaluating the evidence, the genetic expertise report drawn up in the case, which invalidated the thesis of the fight between the victim and the defendant, which otherwise was not even described in the referral document of the court. It is observed that the prosecutor, finally, after the trial in the first instance, through the grounds of appeal, exposes and imposes inextricably, a new state of facts regarding: the date of death of the injured person, the date of the injuries on the defendant's forearm, establishes for the first time the motive of the deed, the vulnerable thanatogenic body (piece of wood, put in the stove and burned), the position of the victim at the time of the hit, the approximate time of the blows, also explaining the reason why the physical blood samples found at the scene were not taken. Accepting the state of affairs presented by the prosecutor, we wonder why the defendant was not also sent to court for committing the crimes of attempted rape and leaving without help a person in difficulty prev. and ped. of art. 32 rap. to art. 218 Cr.Code. and 203 Cr.Code?

[12] Gh. Zăhărăcescu, *Details regarding the organization and planning of the criminal prosecution, the criminal prosecution plan*, in The Journal Problems of criminalistics and criminology no. 2/1981, p. 86, *apud* E. Stancu, *Criminalistics treaties,* 6th ed., reviewed, Universul Juridic Publishing House, Bucharest, 2015, p. 400.

3. Reception and comments on the case

Before proceeding to the "dissection" of the case, we recall that it is generally known that the evidence administered in the matter of crimes against life must clarify the essential aspects of the criminal offense[13]:

- correct identification of the causes of death[14];
- the time and place of the alleged offense[15];
- the existence of an act of the accused person's own[16];
- clarifying the consequences of the accused person's own act[17].

Relating these criteria to the case brought to trial, the court held that from the documents and files of the file it could be established that on December 22, 2018, around 04:00, the police authorities were notified by the said V.I. (son of the defendant) regarding the fact that at his father's residence in the city of Ţicleni, in a room of the house, the deceased named R.M., who showed signs of violence on the face and body.

[13] As has been consistently shown in judicial practice (criminal sentence no. 197/2011 pronounced by the Gorj Court, file no. 15709/95/2011, amended by decision no. 362/2012 of the Craiova Court of Appeal, which remained final prince decision no. 3419/2013 pronounced in file no. 5012/1/2013 of the Supreme Court).

[14] The verification of the mechanism of death is important for the establishment of the possible instruments by which the death was caused, which, in turn, will lead to the identification of the instruments in their materiality, the taking of biological samples, fingerprints. The establishment of the instrument that caused the death, but the lack of its identification at the scene of the crime or at the residence of the suspects, means that the evidence does not contain elements by which the crime can be more easily attributed to a certain person and allow others to be excluded from the circle of suspects.

[15] The correct establishment of the place of the crime allows the collection of traces, including the biological ones coming from the victim. These evidences are necessary to identify the guilty person and exclude people who were initially involved in the circle of suspects, but who did not cause the fatal outcome. In relation to establishing the time and place of the act, the defenses formulated by the accused person, regarding his presence in another place, are checked.

[16] In the absence of evidence regarding the act itself and the causal link between it and the lethal result, a conviction cannot be pronounced. In this context, the defenses of the people in the circle of the suspect regarding where they were at the time of the victim's death must be clarified.

[17] In this way, the contributions that could not lead to death are highlighted, the defenses of the accused person regarding the lack of suitability of his act of conduct in producing the lethal consequence are verified.

From the medico-legal autopsy report[18] no. 1856/22.12.2018 results that the death of the named R.M. was violent, it was due to meningo-cerebral hemorrhage with ventricular flooding as a result of a craniocerebral trauma. The injuries could be caused by hitting with hard objects, compression with the finger (injuries on the arms and thighs), crawling (injuries on the hip and left flank) and possibly falling (injuries on the lumbar region and knees), those at the level of the skull being directly related to the cause of death. In the blood collected at the autopsy, 2.83 gr./00 of ethyl alcohol was detected, and the death of the named R.M. can be dated from December 22, 2018.

During the criminal investigation, the medico-legal examination of the defendant was also ordered, and from the medico-legal report no. 1854/22.12.2018 of S.M.L. Gorj, it turned out that he had traumatic injuries that could have been caused by hitting with a hard body or scratching with a nail, the injuries can date from December 22, 2018 and require 7-8 days of medical care from the time of occurrence. The defendant presented an excoriation of 10/0.5 cm. on the right anterior forearm, and the coroner concluded that it was caused by scratching with a fingernail.

At the same time, in the case it was ordered to carry out a genetic[19] expertise judicial[20].

[18] D. Magherescu, *The general theory of forensic expertizes*, Hamangiu Publishing House, Bucharest, 2021, p. 158.

[19] *Ibidem*, p. 168.

[20] The conclusions of the expertise were submitted by the National Institute of Forensic Medicine "Mina Minovici" Bucharest – Genetic Laboratory during the preliminary chamber procedure. The expert work showed that: 1. The analysis through rapid identification tests of biological microtraces highlighted the presence of human blood on several items of clothing belonging to the named R.M. (two sweaters, a body blouse, pantyhose and a scarf), on the bedding picked up from the residence of the defendant V.I. (the three pillowcases and the sheet), as well as on a number of clothing items belonging to the defendant V.I. (t-shirt, sweatpants, shorts, panties); 2. No traces of sperm were highlighted in the vaginal secretion of the named R.M; 3. The genetic analysis of the blood traces identified on the clothing items worn by the said R.M. highlighted on the two sweaters, body blouse, sweatpants and scarf one and the same female genetic profile, in perfect correspondence with the reference genetic profile of named R.M.; on the panties: a mixture of genetic profiles from at least two people, at least one of whom is male, and the genetic characters from the reference DNA profiles of the named R.M. and the defendant V.I. are found in this mixture; 4. The genetic analysis of the biological traces taken from the said R.M. highlighted: for the vaginal secretion, the area of the

Later, by the conclusion of 12.08.2019, the court, taking into account the inconsistencies between the medico-legal documents in the criminal investigation file and, implicitly, the insufficiency of the medico-judicial information provided by them, ordered a new medico-legal expertise[21] by Institute of Forensic Medicine Craiova, establishing 13 objectives.

Analyzing in detail the briefly presented case, we also notice that:

a) The evidence only proved that R.M. died as a result of head injuries. Thus, although the victim was discovered at dawn on 22.12.2018, and the defendant was requested to give statements shortly after the discovery of the victim, following the on-site investigation, the murder weapon could not be identified (both the prosecutor and the forensic doctor in the medical records stating that the injuries to the skull were caused by hitting with "hard objects"). The indictment does not specify or assume what was the weapon of the crime or the injurious thanatogenic object.

Moreover, not even in the expert report drawn up by I.M.L. Craiova, despite the objectives set by the court, the offending body remained determinable, namely "hard elongated body with irregular surface" (objective

hands and "under the neck" one and the same unique female genetic profile in perfect correspondence with the reference genetic profile of the said R.M.; for the traces taken from the thighs: a mixture of genetic profiles from at least two people, at least one of whom is male, and the genetic characters from the reference DNA profiles of the named R.M. and the defendant V.I. are found in this mixture; 5. Genetic analysis of the biological traces taken from the defendant V.I. highlighted: in the subungual deposits: a unique male genetic profile, in perfect correspondence with the reference DNA profile of the defendant V.I.; on the face: a mixture of genetic profiles from at least two people, at least one of whom is male, and the genetic characters from the reference DNA profiles of the named R.M. and defendant V.I. are found in this mixture; Genetic analysis of blood traces on the clothing worn by the defendant V.I. highlighted: on the underpants: a unique male genetic profile, in perfect correspondence with the reference DNA profile of the defendant V.I.; on the T-shirt and shorts: one and the same unique female genetic profile in perfect correspondence with the reference genetic profile of the named R.M; 7. The genetic analysis of the traces of blood taken from the objects in the defendant's home highlighted: on the three pillowcases and sheets: one and the same unique female genetic profile in perfect correspondence with the reference genetic profile of the named R.M.; for the reddish-brown marks (blood) on the stove: a mixture of genetic profiles from at least two people, at least one of whom is male, and the genetic characters from the reference DNA profiles of the named R.M. and the defendant V.I. are found in this mixture.

[21] V. Iftenie, D. Dermengiu, *Legal medicine*, 3rd ed., C.H. Beck Publishing House, Bucharest, 2019, p. 223.

no. 6). Together with the first instance, we also believe that, based only on some inferences regarding the offending object used, it cannot be established beyond any reasonable doubt that the author of the deed brought to trial is the defendant V.I.[22].

b) The defendant's clothes and body showed traces of blood belonging to the named R.M., and the traces of blood found in the defendant's home belong to him and the victim, but these aspects and the circumstance that the defendant, in a state of intoxication, went to a public place in pants shorts and T-shirt, on which he had blood stains, observed by several witnesses, after the victim was brought into his home, do not exclude the version presented by this[23].

It is generally known that in the context of the interpretation and correlated analysis of the circumstances and evidence of the case, a special explanatory weight must be given to the material evidence that has a high persuasive force in the absence of eyewitnesses. Under this aspect correctly, we believe, the court observes that, although in the report drawn up on the occasion of the on-site investigation (tab 2) it is noted that 3 blood stains were identified, one near the staircase (much more visible in the electronically stored images) and 2 blood stains, most likely produced by dripping, with a diameter of 5-6 mm., located near the porch and on the porch, these were not properly described nor biological samples[24] were not taken in order to carry out a biochemical expertise.

As far as we are concerned, we believe that this means of evidence, depending on the disposition and shape of these stains, could establish certain moments of the incident, the position of the victim, the means of

[22] Only in the grounds of appeal does the prosecutor assume that the victim was hit with wood that was later burned in the stove.

[23] The defendant constantly claimed that he picked up the victim, who was in an advanced state of intoxication and who already had traces of blood in the occipital area of the head (crested), holding her by the arms, dragging her into the house, after which he allegedly placed her in the bed where she was later found dead. In this sense, the traces of blood discovered outside the house and which correspond to the route (photo no. 10, 11, 12, 13 and 14, visible much more clearly on the optical support submitted to the file) also support this. Moreover, on the defendant's clothes, the traces of blood are produced by wiping/smearing, and by no means by splashing, a fact that could have called into question the presence of the defendant near the victim when she was hit in the head.

[24] C. Drăghici, R. Dobreanu (Mahmood), A. Iacob, R. Iordache, *Treaties on forensic technique*, 3rd ed., reviewed and added, Sitech Publishing House, Craiova, 2018, p. 50.

traumatization, the path of the criminal and other circumstances of major importance for the investigation.

Moreover, without their sampling, it was not possible to establish whether these traces of blood are of a human nature – if so, to which person they belong – or if they are of an animal nature. We believe that in the case it was useful to carry out a traceological expertise in the immediate chronological descent of this act, which could provide serious clues in the case.

Moreover, observing the decision that gives us the occasion for these debates, we note that the court requested the County Police Inspectorate – Forensic Service for clarifications regarding this aspect since the beginning of the judicial investigation, but this unit verified that they were not raised such biological traces (tab 37, court file).

c) In the case of committing a crime, it is known that the perpetrator creates traces/micro-traces at the scene of the crime, which can remain on his body and that of the victim, on their clothes or on the ground and objects, they being of particular importance[25].

In the case, the place of the crime could not be identified with certainty. The location indicated by the prosecutor as the place where the crime was committed, i.e. inside the house, is not supported by the material traces discovered in the perimeter where the deceased victim was found.

The photographic plates regarding the fixed aspects and the traces picked up during the on-site investigation by the Criminalistics Service of the Police Inspectorate of Gorj County do not support the statements in the indictment, given that in the place where the victim fell, near the stairs, as they witnesses N.R., N.I., C.E. and the defendant stated, the presence of several blood stains of various sizes and some splashes on the porch of the house, which would correspond to the route indicated by the defendant, when he picked up the victim and took her into the house.

The court held that, contrary to what was held in the indictment, the place where the deceased victim was found – in bed – is not the same as the place where the alleged attack took place, considering the material traces discovered in this perimeter.

Thus, from the photo plates taken during the investigation (photo 22 – tab 61 d.u.p.) it follows that the wall behind the bed does not show stains

[25] Gh. Popa, *The discovery, collection and preservation of the microtraces at the crime scene*, Forensic investigation of the crime scene, Bucharest, 2004, p. 97.

or splashes of blood and, with the exception of the stove, on which a trace of erased/smeared blood was found, there is no other material traces.

At the same time, it is found that at the base of the foundation there is a stain with the appearance of blood, and in the hall of the house several drops of blood (highlighted mainly in photo no. 10, 11, 12, 13 and 14) and which cannot be justified logical in the situation in which the victim would not have presented blows while she was down next to the ladder, in that very place, being hard to believe that later the defendant would have collected blood for to position him in the places where he was photographed by the criminal investigation bodies.

At the same time, it is well known that in the case of injuries caused by hitting with a hard body, they leave traces of blood by splattering, or in the room where the prosecutor suggests that the crime took place, no such blood was identified or found material traces.

We note that, although the report of the on-site investigation seems exhaustive, it does not capture essential aspects, in the sense of whether or not traces/fingerprints that could have belonged to other people were identified on the window sills, nor whether the access path from the main street is the only way to the defendant's house.

d) Regarding the advanced state of intoxication of the defendant, which could have justified a criminal attack, it is noted that the criminal investigation body did not establish his blood alcohol level, which is easy to do by taking biological samples during the investigation at on the spot. Moreover, all the witnesses heard in the case stated that although the defendant was drunk, he behaved normally and had no locomotor imbalance.

e) *Iter criminis.* Observing the referral act of the court, we appreciate that the course and phases of the crime have not been established, the prosecutor limiting himself to presenting this aspect in a sibilance. First of all, it is observed that the date of death is assumed to be 22.12.2018, or from the expert work approved by the supreme forum in the matter, it would appear that the date of death is the afternoon of 21.12.2018.

In this sense, we believe that the criminal investigation bodies would have been able to determine the time of death with certainty if they had measured the body's temperature in the morning of 12.22.2018, when the on-site investigation was carried out.

If it had been done in this way, the defendant's defense could also be verified, according to which the second time he came home, around 4:00 p.m., he would have given the victim beer to drink, bought by him at the store from the locality, whose Newmarkt container was not used as evidence by picking up this object and taking traces of saliva for expert examination.

Contextually, we note that, moreover, the court established as the objective of the new expert work the identification of the liquid/alcohol swallowed by the victim (objective no. 10), but the experts in the matter could not make judgments in this regard based only on the photographic material. In this sense, if the exact date of death had been established, seeing also the conclusions of the genetic expert report (submitted in the preliminary chamber phase), the judicial bodies could remove the defendant's defenses regarding the alleged acts/sexual relations. At the same time, the expert report drawn up at the request of the court concludes that the lesions on the genital level can date from 21.12.2018 or a maximum of 1-2 days ago, which constitutes another doubt regarding the author of the crime of murder.

4. Conclusions

In the light of what has been presented, we conclude that in many situations the complex, qualified, thorough investigation of the place of the crime can provide certain elements that can ensure a scientific conclusion regarding the way of committing the crime and the author of the crime.

It must be emphasized the special importance of the discovery in the criminal field of all traces and clues that can – in one way or another – contribute to the elucidation of the problem, even if at first glance some of them would seem worthless.

Thus, careful, multilateral observation of all the elements of the crime scene is necessary, the increased value of some being exclusively a problem of interpretation of the traces, an activity that is subsequent to the investigation of the crime scene, but intimately related to it. In the light of what was exposed, the on-site investigation remained incomplete, with the consequence of the reduced reliability of the existing evidence on file.

However, the investigation materialized in the on-site investigation act cannot and must not establish the defendant's guilt in producing the injuries

that caused the death – as he can guide the judicial body in the early phase of the investigation, strengthen or eliminate versions of the investigation, reaching subsequently to a categorical syllogism stripped of errors by means of apodictic or dialectical, inductive or deductive reasoning – and the doubt about the circumstances its production benefits the defendant.

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THE WARRANTY OBLIGATION FOR HIDDEN DEFECTS: LEGAL ANALYSIS AND ESSENTIAL CHARACTERISTICS

Adina IORDACHE*

ABSTRACT

This article examines the obligation of warranty for hidden defects within sales contracts, analyzing the legal foundations and its applicability in protecting buyers against hidden defects in purchased goods. The study explores the legal framework of the warranty obligation, the essential conditions for establishing the seller's liability, as well as the remedies available to the buyer, including defect rectification, price reduction, or contract termination. The article addresses the criteria for classifying defects, the differences between apparent and hidden defects, and highlights relevant examples from case law and doctrine to provide a comprehensive understanding of the subject. Additionally, the article emphasizes the role of prescription periods in delineating the seller's liability and maintaining contractual balance between the parties. Through a detailed approach, this paper contributes to clarifying the practical and theoretical implications of the warranty obligation for hidden defects, offering valuable perspectives for legal doctrine and practice.

KEYWORDS: *legal warranty; hidden defects; contractual equity; contractual remedies; seller's liability;*

Introduction

The obligation of warranty for hidden defects represents a fundamental cornerstone of the legal framework governing sales contracts, reflecting the legislator's concern for protecting buyers and ensuring fairness in contractual relations. This legal mechanism plays a significant role in preventing imbalances caused by defects in goods that are not visible at the time of contract conclusion but may substantially affect their use or value.

* *Ph.D. Student, "Titu Maiorescu" University, Law Doctoral School, Bucharest, Romania.*

The regulations governing the warranty for hidden defects aim to provide a clear and equitable framework for the parties involved, establishing strict conditions for holding the seller liable. These conditions include the hidden nature of the defect, its severity, and its existence at the time the good was delivered. These requirements not only define the scope of the warranty obligation but also protect buyers from potential abuses or negligence by sellers.

This article seeks to provide a detailed analysis of the obligation of warranty for hidden defects, addressing aspects such as the classification of defects, remedies available to buyers, and the implications of prescription periods. Throughout the analysis, practical examples and doctrinal interpretations will be used to highlight the nuances of the applicable legal framework and underscore its importance in modern commercial relationships.

Through this research, the aim is not only to clarify the theoretical and legal aspects of the warranty obligation but also to offer a practical perspective on how it contributes to building trust in commercial transactions. In a society where consumer demands are continually evolving, the analysis of the warranty for hidden defects gains particular significance, contributing to a better understanding and effective application of legal regulations.

The obligation of warranty for hidden defects

The obligation of warranty for hidden defects constitutes a fundamental component of the sales contract, aiming to protect the buyer against hidden defects in the goods that affect their usability or diminish their economic value. According to Art. 1672 para.(3) of the Civil Code, the seller is obligated to ensure the quality of the delivered goods and is held liable if the goods exhibit hidden defects that would have discouraged the buyer from entering into the contract or accepting the agreed price, had these defects been known prior to the conclusion of the contract[1].

Hidden defects, unlike visible ones, are flaws that cannot be discovered by the buyer through a standard and reasonable inspection of the goods. For example, in the case of a second-hand car, an engine defect that only

[1] M. Mureșan, S. Fildan, Ș.I. Lucaciuc, *Drept civil. Contracte speciale*, Cordial Lex Publishing House, Cluj-Napoca, 2013, p. 99.

manifests after prolonged use may qualify as a hidden defect. Similarly, if a building has an undersized foundation or its structure is compromised by substandard materials, the buyer may invoke the warranty obligation. In such cases, the law provides the buyer with two options: either to request contract termination and restitution of the performances or to opt for a proportional reduction in the price.

This legal concept is closely tied to the notion of error regarding the substance of the goods, as regulated by Art. 1207 para. (2) point 2 of the Civil Code, as both aim to protect the buyer's consent, which was given based on incorrect or incomplete information about the purchased goods. However, the differences between these two legal regimes are significant. While an error regarding the substance allows for the annulment of the contract due to the absence of an essential quality of the good, the warranty for hidden defects limits the remedies to corrective measures concerning the execution of contractual obligations. This distinction is particularly relevant in judicial practice, where confusion may arise regarding the applicable legal regime.

For instance, if a buyer purchases a painting by a renowned artist for which the seller guarantees authenticity, but it is later revealed that the painting is a reproduction, this situation constitutes an error regarding the substance that can lead to the annulment of the contract. Conversely, if the painting is authentic but has an invisible defect (such as structural damage to the canvas's support) that makes it unsuitable for display, the buyer can only rely on the remedies provided under the warranty for hidden defects[2].

Doctrine and case law emphasize the importance of clarifying the applicable legal regime, particularly regarding prescription periods, conditions of applicability, and the effects on the contract. In cases of hidden defects, the buyer must act within a reasonable time after discovering the defect and demonstrate that the defect existed at the time of the transfer of the goods. This requirement differs from the situation of an error regarding the substance, which pertains to the moment of consent and not the subsequent characteristics of the good[3].

[2] D. Alexandresco, *Explicațiunea teoretică și practică a dreptului civil roman*, tom VIII, Bucharest, 1925, pp. 334-335.

[3] F. Moțiu, *Contracte speciale. Curs universitar*, ed. a VIII-a, rev. și adăug., Universul Juridic Publishing House, Bucharest, 2020, p. 76.

An essential feature of the warranty obligation is its general applicability to all sales, with the exception of forced sales. Forced sales, such as those conducted in enforcement proceedings, exclude this warranty due to the lack of control exercised by the seller over the qualities of the sold goods[4]. This exception highlights the voluntary nature of the warranty obligation and the balance that civil law seeks to protect between the contracting parties.

The regulation of the warranty obligation for hidden defects is crucial for maintaining contractual equity and protecting buyers from unfair practices or defects that could cause significant harm. Its extended applicability in areas such as real estate transactions, the sale of complex technical equipment, or consumer goods strengthens trust in commercial relations and enhances the legal protection of the parties involved.

1. Classification of defects in sales contracts

The classification of defects in sales contracts provides a clearer understanding of the application of the warranty obligation, enabling the differentiation of situations in which the seller may be held liable. The legal framework of this obligation varies depending on the nature of the defects, but the essential conditions remain unchanged: the defect must be hidden, significant, and must have existed at the time of the contract's conclusion. For a rigorous analysis, defects are classified based on several criteria.

A primary criterion is the buyer's ability to discover the defects, which divides them into apparent and hidden defects. According to Art. 1707 para. (2) of the Civil Code, a defect is considered hidden if it could not have been detected by a prudent and diligent buyer without the expertise of a specialist[5]. For instance, a defect in an electrical appliance, such as an issue with the internal electrical circuit that cannot be identified through a standard inspection, falls into the category of hidden defects. In contrast, visible scratches or other obvious external flaws of the same appliance are considered apparent defects, for which the buyer cannot claim a warranty. This distinction emphasizes the buyer's responsibility to examine the

[4] *Ibidem*, p. 94.

[5] P. Vasilescu, *Drept civil. Obligații*, Hamangiu Publishing House, Bucharest, 2017, p. 345.

goods at the time of delivery, adhering to a reasonable standard of diligence.

The importance of this criterion derives from the objective nature of a defect being hidden. Doctrine and case law have clarified that the buyer's lack of experience, incompetence, or lack of information does not transform an apparent defect into a hidden one[6]. Thus, the buyer must adopt an active attitude and inspect the goods, and if the goods involve significant technical complexity, the buyer is responsible for consulting a specialist. Consequently, a buyer who neglects to perform a basic inspection at the time of delivery assumes the risk of later discovering apparent defects.

Another relevant criterion concerns the extent to which defects affect the usability or value of the goods. In this respect, defects are divided into serious and minor. Serious defects, such as a major structural defect in a building or significant mechanical issues in a vehicle, prevent the goods from being used as intended or substantially reduce their value[7]. In such cases, it is reasonable to assume that if the defect had been known, the buyer would not have entered into the contract or would have negotiated a lower price. On the other hand, minor defects, such as a small crack in a decorative element or a slight aesthetic imperfection, do not significantly affect the functionality of the goods and, therefore, do not impose liability on the seller.

The timing of the defect's existence represents another decisive factor. To hold the seller liable, the defect must have been present in the goods at the time of delivery. Even if the defect was not fully developed, it is sufficient for it to have existed latently. For example, a plumbing system prone to cracks that only manifest after use may qualify as a hidden defect present at the time of delivery. Conversely, defects that arise later due to external causes fall under the buyer’s responsibility, as the risks transfer to the buyer upon delivery.

Additionally, a distinction must be made between defects known and unknown to the seller. If the seller was aware of the defects and concealed them in bad faith, they may be obligated to pay damages to compensate for the harm caused. For instance, the sale of a house with structural issues

[6] P. Dumbrăvanu, *Vicii ascunse și contractele de vânzare-cumpărare*, disponibil la *https://pauldumbravanu.ro/2020/04/02/vicii-ascunse-si-contractele-de-vanzare-cumparare/,* accesat la 29.11.2024.

[7] M. Mureșan, S. Fildan, Ș.I. Lucaciuc, *op. cit*., p. 100.

deliberately concealed by the seller through superficial repairs would result in extended liability. In the absence of knowledge about the defects, the seller's liability is limited to refunding the purchase price and covering sales expenses.

Another criterion concerns the buyer's awareness of the defects. If the buyer was aware of the defects at the time of contracting and chose to proceed with the purchase, it is considered that they assumed the risk. For example, if a buyer is informed by the seller about the poor condition of a vehicle part and still decides to purchase the car, they cannot later invoke the warranty obligation for that defect. In such cases, the seller may include a non-warranty clause, explicitly excluding liability for known defects.

The detailed classification of defects significantly contributes to understanding and applying the legal framework of the warranty obligation. It provides a clear delineation between situations where the seller can be held liable and those where the risks of the sale transfer to the buyer, ensuring contractual balance.

2. Conditions of liability for hidden defects

The conditions for holding a seller liable for hidden defects are clearly defined in legal regulations, aiming to protect the buyer against deficiencies that affect the usability or value of the goods. To establish the seller's liability, several essential conditions must be cumulatively met.

The first criterion concerns the timing of the defect's existence, which must precede or at least coincide with the delivery of the goods. According to the principle of risk transfer upon delivery, the seller cannot be held liable for defects that arise after this point, as they fall under the risks assumed by the buyer[8]. For instance, a defect in a car that occurs after it has been delivered to the buyer and used for a significant period cannot be attributed to the seller unless it is proven that the defect existed latently at the time of delivery. In the case of fungible goods, the defect must be present before or at the moment of transfer since risks remain with the seller until that point. A particular situation arises when the contract is

[8] I. Reghini, S. Diaconescu, P. Vasilescu, *Introducere în dreptul civil*, Hamangiu Publishing House, Bucharest, 2013, p. 496.

concluded under a suspensive condition, in which case the defect must have existed at the time the condition is fulfilled.

Another essential requirement is the hidden nature of the defect. According to regulations, a defect is considered hidden if it could not have been identified by the buyer through a normal inspection, appropriate to the nature of the goods, at the time of contract conclusion or delivery[9]. For example, an internal crack in industrial equipment that cannot be detected without specific tests falls into this category. It is important to note that the seller can be held liable for hidden defects even if they were unaware of them unless the parties expressly agreed to exempt the seller from liability. This principle ensures buyer protection, avoiding situations where the seller's lack of knowledge could undermine the other party's rights.

The severity of the defect is another crucial condition. To establish liability, the defect must be severe enough to affect the use of the goods for their intended economic purpose or significantly reduce their value[10]. For example, a defect in the heating system of a house that renders it uninhabitable during the winter constitutes a serious defect. Likewise, a significant reduction in the value of the goods, such as in the case of an appliance that fails to meet guaranteed technical specifications, may justify a price reduction claim. If the defects are minor and do not substantially affect the use of the goods, the seller's liability cannot be invoked.

The cumulative fulfillment of these conditions allows the buyer to seek the remedies provided by law, such as contract termination or price reduction, thus protecting the contractual balance and trust between the parties.

3. Effects of the warranty obligation for hidden defects

The warranty obligation for hidden defects, when all legal conditions are met, generates significant rights for the buyer, aimed at ensuring contractual equity and remedying the imbalance caused by the defects in the goods. According to Art. 1710 para. (1) of the Civil Code, the buyer has the right to choose one of the following remedies: removal of the

[9] L.R. Boilă, *Drept civil. Contracte speciale*, C.H. Beck Publishing House, Bucharest, 2023, p. 21.

[10] D. Chirică, *Tratat de drept civil. Contractele speciale*, C.H. Beck, Publishing House, Bucharest, 2017, p. 146.

defects, replacement of the goods, price reduction, or contract termination. The choice of remedy lies with the buyer, emphasizing its protective nature within the contractual relationship.

The first available remedy is the **removal of the defects**, either directly by the seller or at the seller's expense. This option is particularly applicable when the defects can be remedied and do not fundamentally affect the functionality of the goods. For instance, in the case of industrial equipment with a minor technical defect that can be repaired, the buyer can request that the seller covers the cost of the repair. This measure is preferable in situations where replacing the goods is neither feasible nor necessary.

Another remedy is the **replacement of the defective goods** with goods of the same kind that are free from defects. This solution is commonly employed in the sale of consumer goods or fungible items, where replacement can be carried out quickly and efficiently. For example, if a defective mobile phone is delivered by a retailer, the buyer may request an identical phone that meets the contractual specifications.

If neither defect removal nor goods replacement is viable, the buyer may request a price reduction proportional to the diminished value caused by the defect. This action, known as *actio quanti minoris* or *actio estimatorie,* involves assessing the loss in value caused by the defect, often through an expert evaluation[11]. For instance, if a purchased vehicle has a defect in the air conditioning system that significantly reduces comfort but does not justify replacing the entire vehicle, a price reduction may represent an equitable solution.

In cases where the defects are severe enough to fundamentally affect the goods' usability for their intended purpose, the buyer may opt for contract termination. The action seeking contract annulment due to hidden defects is referred to as *actio redhibitoria*[12]. This remedy involves returning the goods to the seller and refunding the purchase price to the buyer, along with any expenses incurred in concluding the contract. For example, if a purchased building has major structural defects that render it

[11] A.R. Adam*, Drept civil. Teoria generală a obligațiilor*, 2 ed., C.H. Beck, Publishing House, Bucharest, 2017, p 58.

[12] L. Pop, I.F. Popa, S. Vidu, *Drept civil. Obligațiile*, Universul Juridic, Publishing House, Bucharest, 2020, p. 111.

unsafe for use, the buyer can request contract termination and the refund of the amount paid.

The buyer benefits from a right of choice among these remedies, with their decision determined by the specific circumstances of each case. This flexibility enhances buyer protection and allows for the legal solution to be tailored to their particular needs. Thus, the effects of the warranty obligation not only ensure fair remedies but also maintain balance between the parties within the contractual relationship.

4. Prescription of the right to action for hidden defects

The **actio redhibitoria** and **actio quanti minoris**, through which the buyer seeks remedies for hidden defects, are patrimonial actions of a personal nature that derive from the sales contract. These actions are subject to extinctive prescription, which sets time limits for exercising these rights. The regulation of prescription aims to maintain contractual balance, protecting the buyer while preventing indefinite liability for the seller.

According to the Civil Code[13], the prescription period begins depending on the nature of the goods and the timing of defect discovery. For movable goods or goods other than constructions, the prescription period is one year from the date of delivery, provided the defect was not discovered earlier. If the defect is discovered before this period expires, the prescription begins on the date the defect is identified. For example, a buyer who purchases a household appliance and discovers a functional defect six months after use can initiate legal action within one year from the moment of discovery.

For constructions, the prescription period is longer, being three years from the date of delivery, with the same exception regarding prior discovery of the defect. This extended period reflects the specific nature of constructions, where deficiencies may appear after prolonged use or only under certain operating conditions. For instance, structural cracks or thermal insulation problems may become apparent only after a season of intensive use, justifying the longer prescription period.

The law provides two alternative starting points for the prescription period, depending on the circumstances of each case[14]. The subjective moment refers to the date when the defects were discovered. This is

[13] Civil Code, art. 2537 alin. (1).

[14] L. Pop, I.F. Popa, S. Vidu, *op.cit*. p. 448.

relevant in cases where the deficiencies are hidden and cannot be detected until after the goods are delivered. The objective moment corresponds to the one-year or three-year period from delivery or the expiration of the warranty period, if such a period is contractually stipulated. Thus, a buyer benefiting from a contractual warranty period longer than the legal one can initiate action within that interval if the defect becomes evident during the warranty period.

This regulation aims to balance the buyer's right to enjoy the purchased goods in proper condition with the seller's right not to be held liable for an unreasonable period. Therefore, the prescription period ensures legal certainty, defining the timeframe within which rights may be exercised.

Conclusions

The warranty obligation for hidden defects constitutes a cornerstone of the legal framework governing sales contracts, ensuring a balance between the rights and obligations of the parties. By strictly regulating the conditions for holding the seller liable, this obligation protects the buyer’s interests and strengthens trust in contractual relationships.

The detailed analysis of the warranty obligation for hidden defects highlights three key aspects.

Firstly, the legal conditions necessary for invoking this obligation – the hidden nature of the defect, its severity, and its existence at the time of delivery – ensure the buyer’s protection without imposing excessive liability on the seller. This balance is crucial for maintaining legal certainty and contractual equity.

Secondly, the remedies available to the buyer – defect removal, price reduction, and contract termination – demonstrate the flexibility of the legal framework governing warranties, allowing solutions to be tailored to the specifics of each case. The buyer’s ability to choose the appropriate remedy underscores the protective nature of this obligation, enabling them to select the solution that best addresses their needs and interests.

Thirdly, the prescription periods applicable to cases of hidden defects provide clarity and limit the duration of the seller's liability, promoting the stability of legal relationships. By differentiating the terms based on the nature of the goods and the timing of defect discovery, the legislation

accommodates the diversity of practical situations and ensures an adequate and efficient legal framework.

In conclusion, the warranty obligation for hidden defects serves not only as a buyer protection mechanism but also as a tool for maintaining quality standards in commerce and preventing disputes. Through rigorous application and continuous adaptation to economic and social realities, this obligation contributes to the development of contractual relationships founded on trust, responsibility, and equity.

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THE PRE-CONTRACTUAL ABYSS

Rațiu Flavia Simona PETRIDEAN*

ABSTRACT

In spite of the conservative spirits, positioned by themselves, in the traditional and classical scheme of how contracts are formed, the realities of the Romanian private law space, show us that often the formation of a convention is progressive from the volitional point of view. The potential of some definitive contractual relations commits the parties, on the basis of the malleability of contractual freedom, to preliminary discussions, often recorded in various types of contractual relationship, which progressively mature their consent, even before the final contract is concluded. The study of the forms of preparatory contracts, punctuated in the pre-contractual period, is like a <matrioska>, because it abandons the illusory image of the sudden union between offer and acceptance, by detecting several species of conventions, the variable legal power of which facilitates the physiognomy of the final contract, through the fragmentary legal consistency of the will.

KEYWORDS: *pre-contractual period; preparatory contracts; agreements of partial wills;*

General considerations

The geometry of the Romanian private law space shows us a different reality in terms of the progressive formation of the contract. Despite the fact that there is no general legislative framework in the economy of the New Civil Code, it has been shown that the pre-contractual legal picture does not only consist of the agreement of wills, which, even if it is the defining element of any agreement, exceeds the scope of the two-step mechanism – *offer* and *acceptance*- by reviewing a more complex technique, preceded by *negotiations*. Often, the time needed to coordinate the conduct of negotiations is lengthy and is marked by various *preparatory acts of* varying legal force. In this connection, an initial opinion[1] con-

* *Ph.D. Student, "Titu Maiorescu" University, Law Doctoral School, Bucharest, Romania. Ph.D. student Bucharest University, Doctoral School of Political Sciences.*

[1] Viorel Terzea, *Răspunderea civilă contractuală*, Solomon Publishing House, Bucharest, 2021, p. 173.

sidered that there were four types of agreement which belonged to the general category of pre-contracts: *agreement in principle, promise to contract, option agreement and preference agreement*. On the other hand, another opinion considered that these formulas, which more or less prefigure the structure and content of the future contract, form part of a so-called category of preparatory contracts, the purpose of which is the conclusion of a final contract, listing in this respect: *negotiation contracts, scoring, framework contracts, preference pacts and promissory contracts*[2]. Indeed, such a motley inventory cannot be overlooked, as we are in a landscape synthesized by the legislator, either at the principle level, or in the field of special contracts, so that any subsequent completeness can be found in the area of doctrine and specialized practice. Moreover, a pre-contractual stage can represent both a step forward and a step backwards in terms of achieving contractual consensus, and a punctilious sealing off of the concept of pre-contractual instruments and agreements would restrict the entire creative process available to the parties on the basis of the guiding principles. For example, the legal nature of the option pact is basically a version of the unilateral promise, and as for the score (partial agreement), this in turn is a variety of the negotiated contract, just as the very essence of the preference pact is found in the body of the conventional pre-emption. From another angle, we also point out as a distinguishing feature the fact that "*the negotiation agreement gives rise to obligations only in respect of the conduct of the negotiation procedure, whereas the pre-contract gives rise to a right of claim*"[3]. In other words, the common denominator between them is that they are contracts, the presence of which occupies a certain time and space. On the other hand, it should be noted that in the context of the present analysis, we are limited to those instruments with contractual value, but it should be pointed out that instruments which, even if by their nature they do not have contractual value, may also contribute to the perfection of the future contract, but they provide a certain order, depending on the sphere of interest of the parties involved. At the negotiation stage, therefore, the varying legal power of the documents that can be used opens up a new world, sometimes hidden

[2] Monna-Lisa Belu Magdo, *Teoria contractului*, Hamangiu Publishing House, Bucharest, 2021, p. 201.

[3] Viorel Terzea, *Răspunderea civilă contractuală*, Solomon Publishing House, Bucharest, 2021, p. 174.

in the mechanism for forming and assuming the legal will. And, finally, this very biodiversity requires us to briefly analyze the most important contractual legal instruments that can be used in organizing pre-contractual negotiations.

Legal nature of sequential pre-contractual agreements

1. The "gre a gre" contract

In the specialized doctrine of Romanian private law, a typology of contract is brought into discussion, under the shelter of the principle of freedom of contract, which, even if it has been neglected for a long time, has found its applicability in the formation of the final contract, by the fact that it introduces the negotiations themselves, in a dimension that gives rise to an obligatory relationship of a contractual nature. A preparatory contract, often referred to in French literature as *a gre a gre*, is often referred to in legal terminology as an *agreement in principle, a negotiating agreement or a pre-contractual protocol/protocol of agreement*. Indeed, a pre-contractual formula which illustrates the conduct of the negotiating parties, inserted in a conventional link, legitimizing the creation of an obligation to negotiate the future contract in good faith. The practical usefulness of such a duty provides the parties with both psychological comfort and a means of controlling and preventing certain abuses specific to the pre-contractual period, since both parties have agreed to certain points from the very moment when the meeting of wills took place. Subsequently, the agreement in principle may form part of the contract or may even have an interpretative value. Thus, the duty to act in accordance with the requirements of good faith ends up being accompanied by specific duties expressly assumed by the parties to the agreement in principle. First of all, the analysis of this obligatory relationship brings to the foreground the main obligation incumbent on the parties: to negotiate the future contract in good faith. Starting from the premise that "*from an agreement to negotiate arises not an obligation to conclude a future contract, but an obligation to negotiate such a conclusion*"[4], we agree with the view that

[4] Ana Juanita Goicovici, *Formarea progresivă a contractului*, Wolters Kluwer Publishing House, Bucharest, 2009, p. 92. The work is available in digital format on the

there is an *obligation of result*, since each party guarantees the other that it will negotiate on the basis of the agreement in principle. Indeed, with regard to the legal characterization of the obligation to negotiate in good faith, we are obliged to open a small parenthesis in order to point out that there are certain French specialists who maintain that it is either an obligation of means, based on the idea of uncertainty hanging over the outcome of the negotiations, or an artificial dichotomy is proposed to combine the idea of result with that of means – the obligation to negotiate (obligation of result) and the obligation to negotiate in good faith (obligation of means)[5]. Indeed, when the parties undertake to negotiate in good faith, they are, in essence, ensuring "*the creation of intermediate situations which combine the idea of result with that of means appropriate to the attainment of a result*"[6]. However, we have reservations about this qualification, as it would indirectly undermine the guarantee of pre-contractual legal certainty. We consider, however, that the obligation to negotiate in good faith, once imposed as an obligation of result, dictates a fair and just basis for the whole process. Although, there is a strong possibility that the product of negotiations may remain unknown even on such a background. It should also be taken into account that this conventional organization of negotiations, as we observe, lies within the perimeter of good faith and thus the obligation to negotiate must be performed in accordance with its dictates. Moreover, the imperative requirements of good faith cannot be limited or excluded, and any clause contrary to this is absolutely null and void, including the presence of contractual civil liability for the person at fault.

Without going into other exhaustive details, in addition to the effects of the negotiation agreement, we are forced to move the camera to the possible secondary obligations that may accompany this preparatory contract. In this respect, it is worth recalling that the parties agree on a complex number of aspects, such as the objectives of the negotiation, the conditions under which it is to take place, the timeframe within which it is to take

website of Lucian Blaga Library in Cluj-Napoca; https://www.bcucluj.ro/; accessed on October 30, 2024.

[5] For more details, see Liviu Pop, "*Despre negocierile precontractuale și contractele preparatorii*", in Revista română de drept privat No. 4/2008, Year *George Beleiu*, p. 104.

[6] Ana Juanita Goicovici, *Formarea progresivă a contractului*, Wolters Kluwer Publishing, Bucharest, 2009, p. 94. The work is available in digital format on the website of Lucian Blaga Library in Cluj-Napoca; https://www.bcucluj.ro/; accessed on October 30, 2024.

place, the initiator of the negotiation, the forms of the discussion or even the question of the involvement of third parties in the negotiations[7]. In substance, one can summarize the framework for the conduct of the negotiations, contained in this contractual formula, summarized in duties ancillary to the main obligation, which become imputable to one or both of the parties involved. They may also be formulated in provisions (clauses) such as those relating to the obligation of exclusivity in negotiations, the confidentiality clause, the duty of candor or even the obligation to bear any costs that may arise[8]. However, this contractual spectrum should not mislead us, since its intrinsic nature is that of a potestative right, which has the ability to break commitments, as a result of the reflection time that the negotiating agreement gives us in the conclusion of the future contract. The weighing of advantages and disadvantages, being an emergence that the contractual dimension of partial agreements cannot fence off, the sanity of consent to the final contract often being at stake. That is to say, despite the fact that we are in the presence of an obligatory relationship of a contractual nature between the parties to a future definitive contract, the negotiation agreement does not guarantee a positive outcome, but only certain particular commitments, which are intended to ensure a certain discipline in the negotiations. In substance, the agreement is from the outset accompanied by a certain degree of precariousness, without, in principle, incurring liability, on the grounds that the flexibility of the negotiating agreement is only a temporary contractual framework, giving them the freedom to withdraw from the contractual relationship at any time, as long as they have complied with the requirements of good faith. At the other extreme, the culpable failure to comply with the actions or inactions set out in the negotiated agreement brings us into the realm of contractual (damages) civil liability. As a consequence, the party presumed to be at fault will have to cover the damage caused in those circumstances that have imposed certain expenses, such as those resulting from feasibility studies, impact studies, lost opportunities, or even excessive time invested in the negotiation. We conclude in this respect that we are in the hypothesis of termination of the agreement in principle and the

[7] Liviu Pop, "*Despre negocierile precontractuale și contractele preparatorii*", in Revista română de drept privat No. 4/2008, Year *George Beleiu*, p. 104.

[8] Ioan Adam, *Treatise on Drept civil. Obligații, Vol. I. Contract*, C.H. Beck Publishing House, Bucharest, 2017, p. 91.

defendant's obligation to pay damages, without the possibility of instituting an enforcement operation, because on the one hand, by the nature of the agreement, it cannot be imposed the conclusion of the negotiated contract, and on the other hand, the imposition of a negotiation under duress is inadmissible, because it would be either fruitless or even prejudicial[9].

Also, in a close connection with the *agreement in principle*, as an unnamed contractual legal instrument, but with a function of variety[10], is the *partial agreement*, which we also find in specialized literature under the name of "*punctaj*" (scoring), a contractual formula that forms the contract *piece by piece*, by definitively fixing certain clauses or points, on which the parties not only have agreed, but also do not intend to go back on them. Moreover, we are assuming that the clauses have been won, which, together with the other elements resulting from further negotiations, will be able to form the final contract. In other words, such a record, dated and signed, can be legitimized as a partial and definitive agreement of wills[11], which may be multiple and successive, and may eventually form a whole, i.e. the intended contract.

In other words, in spite of *the similarities* between the two contractual formulas, which generate an obligation to negotiate in good faith, we show that the partial agreement has as its purpose the establishment and definitive fixing of the clauses or points of the final contract, in an irrevocable manner, unlike the agreement in principle, which has as its purpose the creation by the will of the parties of a flexible-organized contractual framework in which negotiations can take place, through which, later on, the final contract can be concluded[12]. Also, in the context of the present analysis, we must open a parenthesis regarding the so-called irrevocability of partial agreements, since this characteristic is not at odds with the right to break off negotiations, the justified abandonment being considered

[9] Ana Juanita Goicovici, *Formarea progresivă a contractului,* Wolters Kluwer Publishing House, Bucharest, 2009, pp. 107-108. The work is available in digital format on the website of Lucian Blaga Library in Cluj-Napoca; https://www.bcucluj.ro/; accessed on October 30, 2024.

[10] Sometimes specialized private law doctrine argues the contrary. See in this regard, Monna-Lisa Belu Magdo, *Teoria contractului*, Hamangiu Publishing House, Bucharest, 2021, p. 205.

[11] Liviu Pop, "Despre negocierile precontractuale și contractele preparatorii", in Revista română de drept privat No. 4/2008, Year *George Beleiu*, p. 107.

[12] *Ibidem*.

legitimate if the negotiations are unsuccessful and, as a consequence, the score will become null and void[13]. Moreover, we conclude that the drawing up of the score, as a stage in the contract negotiation process, does not imply the obligation to conclude the contract.

Indeed, such a pre-contractual picture must be analyzed in terms of both the effects and the purposes it imposes on the legal circuit, since it is easy to see that the two categories of pre-contractual agreements have their own physiognomy, which prevents a total merger between the two, subject to the differences mentioned above. After all, this fragmentation of the process of determining the content of the future act – the *score*- can intervene as a segment either in the phase of free contractual negotiations or under the auspices of the negotiation agreement[14], and has its own individuality, also exceeding the scope of a will agreement, even if only partial, but positioned within a specific period of time and at the same time conditioned by the final contract.

2. Preference pact

The historiography of the legal institution of the pact of preference[15] shows its ancestral origins, as far back as the ancient Roman period, in a rudimentary procedure of the right of pre-emption, regulated by law, such as *venditionis bonorum*, or even in the will of the parties, with the aim of preserving economic and political power, by means of property, which appeared at the time as a confirmation of the existence of civil rights, religion and implicitly of class, in principle around the *Gentes Maiores*. Subsequently, the legal process found its application in Byzantine law, based on a series of social, economic and political interests, which were also translated into ancient Romanian law in the form of a mechanism for supervising and controlling the economic unity of the village community over privately owned land.

[13] Ana Juanita Goicovici, *Formarea progresivă a contractului,* Wolters Kluwer Publishing House, Bucharest, 2009, p. 114. The work is available in digital format on the website of Lucian Blaga Library in Cluj-Napoca; https://www.bcucluj.ro/; accessed on October 30, 2024.

[14] Monna-Lisa Belu Magdo, *Teoria contractului*, Hamangiu Publishing House, Bucharest, 2021, p. 205.

[15] See Ioana Ionescu, *Antecontractul de vânzare-cumpărare*, Hamangiu Publishing House, Bucharest, 2012, pp. 7-9.

In this vein, returning to the contemporary epic thread of our times, in our specialized literature, the preference pact becomes a creation of judicial practice and doctrine, which is not expressly regulated in the current Civil Code, although, in a certain vision, it often comes to be identified with the right of pre-emption established by agreement. Such a correlation, would make the right, from the pact of preference, a named contract, with a legal regime regulated by the legislator, despite the fact that there would be a number of essential differences between the two legal figures. To begin with, the pact of preference is an agreement whereby one party, called the promisor, undertakes to the other party, called the beneficiary, to prefer him as the contracting party in a specific contract. In other words, we are witnessing a contractual arrangement which gives rise to a right of preference at the conclusion of any contract, its practical applications being found either in the form of a stand-alone agreement or as a clause incorporated into another contract. In the case of an act of preference provided for in an agreement in its own right, this is an autonomous, unilateral, consensual and in principle *intuitu personae* act which, even if it is not governed by its own rules (unnamed contract), must be subject to the general conditions of validity, with the proviso that the capacity of the promisor must be specific to the conclusion of acts of administration, and that in order to maintain the validity of the act, it is necessary only to specify the exact nature of the asset, not the price[16]. In substance, its legal structure is quite distinct from any other contract, since it is a "*manifestation of the will of a person who undertakes, if he decides to contract, to give preference to a specific person, the beneficiary of the manifestation of will, to be the co-contractor*"[17]. In other words, it guarantees a right of preference to the beneficiary, but not its own decision to sell. On the other hand, one of its most common practical applications is to be found in the field of the contract of sale, where this contractual formula is regulated in the light of the New Civil Code, under the legal figure of the conventional right of pre-emption, which we consider to be a genuine variety of the preference pact, with a restricted character.

[16] Ioan Popa, "Pactul de preferință", in the specialist journal Universul Juridic Premium No. 7/2020; work available in digital format on the Lege5.ro website | Viitorul documentării legislative (subscription); accessed on 26.11.2024.

[17] See Ioana Ionescu, *Antecontractul de vânzare-cumpărare*, Hamangiu Publishing House, Bucharest, 2012, p. 12.

Moreover, we are in the hypothesis of a legal mechanism which, even if it restricts the contractual freedom of the holder of the property right, does not transform the sale into a forced sale, but only limits it in the person of the buyer, giving him a preference in the purchase of a good. In this case, however, a valid sale to another third party can be made only subject to the suspensive condition that the right of pre-emption is not exercised by the pre-emptor[18]. From this point of view[19], although they are similar, it is not possible to equate the pact of preference with the conventional right of pre-emption, since the pact of preference confers a right of priority not only to the purchase but also to the sale, irrespective of the price of the sale, and the right of priority can be extended to a number of special contracts, some of which are even incompatible with the status of pre-emptor. On the other hand, if we look carefully at the defining features, the right of pre-emption, on the other hand, is an undertaking by the promisor-pre-emptor to prefer, on equal terms of price, the purchase of a specific person, called the beneficiary, without limiting his right of disposal, but only his freedom to choose his co-contractor. Moreover, the legislator does not use the term "pact of preference" in regulating the general framework of applicability of the right of pre-emption, precisely because of its extensive application to special contracts.

And finally, we note that based on the legal nature of the pact of preference, it is recognized that this contractual commitment can be categorized in the class of those pre-contracts, with practical applications in the abyss of special contracts. It should also be borne in mind that its essential aspect consists in the *preference* enjoyed by the beneficiary over any other persons interested in the same asset, whereas the issuer of the declaration will be obliged to contract with the beneficiary only if he decides to conclude the contract[20]. Moreover, we should not be misled by the similarity between the pact of preference and the right of pre-emption, since not only does the latter right have two sources, namely the law and

[18] See Liviu Stănciulescu, *Curs de drept civil. Contracte*, 2nd revised and added ed., Hamangiu Publishing House, 2014, pp. 124-125.

[19] Ioan Popa, "Pactul de preferință", in Universul Juridic Premium, No. 7/2020; work available in digital format on the website Lege5.ro | Viitorul documentării legislative (subscription); accessed on 26.11.2024.

[20] Tita-Nicolescu Gabriel, "Convențiile precontractuale", in the specialized journal Universul Juridic Premium, Nr. 7/2017; work available in digital format on the website Lege5.ro | Viitorul documentării legislative (subscription); accessed on 27.11.2024.

the parties' agreement, but the scope of application is also much narrower than the power of the right of preference, which can be exercised even in employment law, where, for example, priority can be given to another person when concluding an individual employment contract[21]. In this sense, we consider that the right of pre-emption, in relation to such a contractual commitment, should be considered as having a nature of variety, which reinforces its own existence, through the legal regime regulated by the legislator, by extension, in the light of the New Civil Code.

In another vein, going back to the epic thread in terms of the way in which it can be seized, we admit that the preference pact can be used as an accessory clause in another contract, such as a lease, where a preference pact can be inserted in favour of the lessee, who either has invested a considerable amount in the preservation of the property, or does not have the resources to purchase it at that time, and wishes to enjoy a certain priority in a certain time to buy the space he uses. Donors may also, in a contract of gift, impose a right of first refusal on the donee if the latter subsequently decides to sell the asset. Thus, a charge is imposed, "*limiting the freedom of alienation, obviously much less than a cause of inalienability and only in terms of the freedom of choice of the person of the acquirer*"[22]. Moreover, such a clause is often applicable in practice, even in the case of companies, where it is stipulated in favour of one or more partners, giving them a right of priority in the acquisition of shares[23]. This principle is also applicable in the case of partition deeds, which imperatively stipulate that one of the parties to the partition may not sell the property that has fallen into his or her share, unless he or she has honoured the right of preference in favour of the other parties[24]. Finally, it is easy to see that, even if several definitions have been proposed, the purpose of which was to bring out its true nature, it, as a variety of preparatory contract, essentially involves a mechanism which is more easily rendered in the area of contracts of sale by presenting a specific

[21] Liviu Pop, "Despre negocierile precontractuale și contractele preparatorii", in Revista română de drept privat No. 4/2008, Year *George Beleiu*, p. 109.

[22] Ioana Ionescu, *Pre-contractul de vânzare-cumpărare*, Hamangiu Publishing House, Bucharest, 2012, p. 22.

[23] Liviu Pop, "Despre negocierile precontractuale și contractele preparatorii", in Revista română de drept privat No. 4/2008, Year *George Beleiu*, p. 109.

[24] Ioana Ionescu, *Pre-contractul de vânzare-cumpărare*, Hamangiu Publishing House, Bucharest, 2012, p.21.

mode of conduct. That is to say, a person, called the promisor, binds himself towards the other party, called the promisee, that if he decides to sell a thing, he will prefer it as a contractual partner, over any other third contracting parties, of course, under identical terms of contract. Although a more special situation may arise in the case of co-owners or owners of adjoining land, who, by virtue of the principle of freedom of contract, may grant a right of preference to one another by concluding an autonomous contract, distinct from the right of pre-emption, which by its very legal substance could limit the right of preference in accordance with that *equal price*[25]. In this regard, it is easy to see that the promisor's obligation leads to a progressive formation of consent in two stages, since on the one hand we have the moment when the contractual partner is chosen, by promising a preference to the beneficiary, establishing a right of first refusal, and on the other hand we have the moment of choice of contract, by issuing the offer[26]. That is to say, we are not talking about an actual and irrevocable consent to the conclusion of the future contract, but one that will gradually crystallize. Initially, the promisor will only restrict his freedom to choose his initial contractual partner, i.e. the promisor provides, at most, only a so-called "*fragment of consent*"[27]. Later, he will complete his initial legal will if he appropriates the decision to sell, which he actually sets out in a preliminary offer to the beneficiary. Therefore, the control over the genesis of the final contract rests with the beneficiary, who is free to conclude the contract or not, and only in the event of a decline, the promisor regains the freedom to conclude the contract with third parties.

Indeed, in comparison with the other preparatory acts, the pact of preference has a less constraining legal nature, because it does not include the obligation to conclude a specific contract at a later date, as in the case of the promise to contract, but, like the negotiation agreement, it gives rise to the obligation to propose the conclusion of a subsequent contract, with the mention that this contractual formula has a "*chosen/preferred*", which

[25] Ioan Popa, "Pactul de preferință", in the specialised magazine Universul Juridic Premium, No. 7/2020; work available in digital format on the website Lege5.ro | Viitorul documentării legislative (subscription); accessed on 26.11.2024.

[26] See Ana Juanita Goicovici, *Formarea progresivă a contractului*, Wolters Kluwer, Publishing House, Bucharest, 2009, pp. 122-123. The work is available in digital format on the website of Lucian Blaga Library in Cluj-Napoca; https://www.bcucluj.ro/; accessed on October 30, 2024.

[27] *Ibidem*.

it legitimizes by convention. Moreover, it differs from the option pact in that it does not imply a firm offer on the part of the promisor to the beneficiary. As a result, such a motley legal landscape requires us to examine in detail, firstly, the preference pact in relation to the unilateral promise to contract, and then the legal body of the option pact.

In this sense, focusing the analysis on the aspects related to the two institutions – *pact of preference vs unilateral promise to contract* –, shows us that the appropriation is not only limited to their contractual figure, but in a progressive chronological stage of the pact of preference, the two legal figures come to position themselves in mirror image. "*However, by addressing the offer of sale to the beneficiary of the pact, the situation of the promisor is no different from that of the promisee of a unilateral promise of sale*"[28]. In other words, the preference pact comes to represent a type of *unilateral promise*, since the beneficiary, as holder of a right of priority, has a right of priority, which has the power to orchestrate an entire legal situation, resulting from the transformation of the pact of preference into a genuine unilateral promise, deriving from the promisor's decision to sell. Such an application implies a metamorphosis of the pact of preference into a "*pre-contract to the unilateral promise, the latter being itself a halt in the formation of the final agreement*"[29].

It is therefore necessary to open a small parenthesis, premature to the present analysis, on the physiognomy that the specialized literature and practice have highlighted the *unilateral promise to contract.* It is indeed a veteran legal construction in our legal literature, which gives rise to a unilateral obligatory relationship, a relationship of promise *to do*, which can potentially be found in the sphere of several contractual species, not only in the field of the contract of sale, as the traditional opinion is made public. Basically, it is a preparatory contract, which prepares the formation of a definitive contract by the fact that "*one of the parties, called the promisor, binds himself to the other, called the promisee, to conclude in the future, at the latter's request, a certain contract, the essential content of which is determined at present by the promise to contract*"[30]. From this

[28] *Ibidem*.

[29] *Ibidem*.

[30] M. Mureșan, *Dicționar de drept civil*, by M. Costin, M. Mureșan, V. Ursa, Științifică și Enciclopedică Publishing House, Bucharest, 1988, pp. 408-409; *apud* Liviu Pop, "Despre negocierile precontractuale și contractele preparatorii", in Revista română de drept privat No. 4/2008, Year *George Beleiu*, p. 113.

definitional angle, the unilateral promise is a preparatory agreement, distinct from the future promised contract, anticipating the emergence of a unilateral obligatory relationship, in which the promisor's consent "*is aimed at the future conclusion of the concrete contract, by externalizing a new consent, so that the acceptance of the beneficiary to the unilateral promise does not lead to the perfection of the anticipated contract* (...)[31]. However, in the event of a change of mind on the part of the promisor, the beneficiary may either claim damages for non-performance of the promise, or apply to the court for the promise to be enforced in kind by a judgment in lieu of a contract. We deduce that consent to the promise is expressed at the same time as consent to the anticipated contract, the promisor voluntarily giving up the possibility of changing his mind by fixing the offer, which is irrevocable and unilaterally unchangeable, in the preparatory contract, while the beneficiary is given the power to control the formative process, and is free to accept or reject the offer thus contractualized[32]. In substance, only the postponement of the conclusion of the contract is involved, since the promisor's offer is already fixed and any renegotiation can only be made on the basis of *mutuus dissenssus*. Moreover, even the possible redemption of the freedom could be permissible, most probably in exchange for an appropriate payment of damages. Indeed, as it can already be seen, many of the observations related to this contractual formula are common to the synallagmatic promise, a legal figure that we will analyze in full at the end of this paper.

However, returning to the narrative thread in the previous paragraph, we point out that the promisor of the pact of preference, unlike the promisor of the unilateral promise, does not give his actual and irrevocable consent, because he is in a future circumstance that is only possible. Only when he decides to conclude a particular contract, will it put him in a position to make a particular offer to the beneficiary. Also, with regard to the similarity between the option pact and the unilateral promise to contract, it may be stated that in the case of the option pact, "*the conclusion of the contract is automatically brought about by the exercise of the option, since the consent is firm and capable of producing the effects of the*

[31] Monna-Lisa Belu Magdo, *Teoria contractului*, Hamangiu Publishing House, Bucharest, 2021, p. 210.

[32] See to this purpose, Ana Juanita Goicovici, *op. cit.,* pp. 31 and 34.

concrete contract"[33]. It is therefore no longer necessary to conclude another contract, neither as *negotium* nor as *instrumentum*. The legal nature of the option pact, however, classifies it as a variety of the promise, as will be seen in the following lines.

Certainly, the complexity of the present study requires us to interpret the institution of the option pact by drawing a parallelism with the legal figure of the pact of preference, but especially with the unilateral promise to contract. In this context, we point out that, in specialized doctrine, the option pact is assimilated to the legal nature of the unilateral promise to contract in French law, being transposed into the Romanian private law literature as a special unilateral promise, i.e. a version close to it. Indeed, the current Civil Code regulates it as an option and legal nature in Article 1278 and, by extension, in the field of sale, in Article 1688, although such a contractual undertaking may also be adapted to the conclusion of any other type of contract. From this point of view, the concept of a pact of preference is often defined as a contract by which a person, called the promisor, irrevocably expresses his consent to another person, called the beneficiary, to sell or buy a good at a specified/determinable price, if the latter decides to conclude the contract within a given period. A unilateral contractual commitment, the purpose of which is to *definitively fix the contract offer by means of a contract*[34], the promisor's will being fully and irrevocably expressed and offered to the beneficiary. The promisor therefore becomes contractually bound to maintain the offer, which cannot be revoked unilaterally during the period fixed for acceptance. From what has been analyzed, it follows that the term of option, as a legal nature, is a term of lapse, and the mere lifting of the option, leads to the final fixing of the offer. It should also be noted that, in the interval between the date on which the agreement is concluded and the time when the option is exercised, or, as the case may be, the expiry of the period, the asset in question becomes unavailable.

In this context, we note that one of its specific elements is the offer of the promisor, the legal nature of which must be analyzed by mirroring it with the legal figure of the *irrevocable offer*, which concerns a unilateral

[33] Monna-Lisa Belu Magdo, *Teoria contractului*, Hamangiu Publishing House, Bucharest, 2021, p. 210.

[34] Liviu Pop, Ionuț-Florin Popa, Stelian Ioan Vidu, *Course on Drept civil. Obligații,* Universul Juridic Publishing House, Bucharest, 2015, p. 61.

legal act, based on the manifestation of the will of a single person, whereas in the case of the option agreement we are dealing with a bilateral legal act, which implies a concordant agreement of wills, even if the beneficiary only consents to choose between accepting or not the offer[35]. In other words, the possibility of finalizing the sale consists in this "*advantage of allowing the beneficiary to perfect the contract by simply exercising the option*"[36]. A legal mechanism whereby the beneficiary, by virtue of a right of option arising from the pact, enters into a contractual commitment, without binding himself. Put simply, if the promisor remains bound by his own will, by an irrevocable obligation, the promisee, on the other hand, has no obligation. Therefore, the beneficiary has two major powers: either he raises the option, i.e. he accepts the offer of contract, and the contract will be perfected for the future, or he denies it or remains passive.

It is also an elaborate form of preparatory contract, which creates obligations only for the promisor, who expresses his consent irrevocably, a circumstance which places us in the presence of a unilateral contract. On the other hand, the beneficiary's right of option remains a mere priority, which cannot be categorized as a right in rem or a right of claim, but only as a right of option. Indeed, its legal nature of contract is imposed on the basis of the principle *pacta sunt servanda*, gives it a binding character, even if we can dissect the operation. In this regard, the eminent Professor Ioan Adam, in his specialized work[37], explains the following mechanism: on the one hand, we have the agreement in which the promisor declares that he wishes to remain bound by his own declaration of will, establishing in the case of a contract of sale, the good and the price, as well as the option term, and then the mere lifting of the option – acceptance of the consent already expressed – leads to the perfection of the contract, with *ex nunc* effects. In other words, the terms and conditions (clauses) are already established in the content of the option agreement, without any possible renegotiation being brought into question.

Indeed, at the risk of repeating ourselves, but with the aim of clarifying, such a legal landscape requires us to bring back into discussion the similar

[35] See in this regard, Ioan Adam, *Tratat de drept civil. Obligațiile, Vol. I. Contractul*, C.H. Beck Publishing House, Bucharest, 2017, pp. 530-531.

[36] Liviu Stănciulescu, *Curs de drept civil. Contracte*, 2nd revised and added ed., Hamangiu Publishing House, 2014, p. 119.

[37] Ioan Adam, *Tratat de drept civil. Obligațiile, Vol. I. Contractul*, C.H. Beck Publishing House, Bucharest, 2017, p. 532.

legal nature of *the option pact* and the *unilateral promise to contract*, although both are unilateral contracts, there are a number of essential differences between them. A first peculiarity of the unilateral promise to contract is that the promisor is bound by an obligation to *perform*, which implies that the consent of the party undertaking the commitment "*is aimed at the future conclusion of the specific contract by the manifestation of a new consent"*[38]. It follows from the foregoing that in such a case the beneficiary's consent will not lead to the conclusion of the contract, but will merely constitute a condition of it. On the other hand, the other legal figure shows us a firm consent capable of producing concrete effects in the finalization of the contract, hence the need to establish all the elements of the contract to be concluded. However, it should be added that in the case of a refusal on the part of the debtor of the obligation, if the option pact is in the situation, contractual liability is imposed, and the debtor is obliged to pay damages for non-performance of the obligation, and if the contract is concluded with a third party who is found to be in bad faith, then it is considered that, at the request of the beneficiary, the contract may be annulled and the beneficiary ordered to pay damages, without, however, being able to make a substitution[39]. In the case of a unilateral promise to contract, on the other hand, if the promisor refuses, the beneficiary may apply to the court for a judgment in lieu of a contract. A judgment which is in the alternative to an award of damages, since in substance it would constitute a restriction on the freedom to contract.

Instead, we point out very briefly that, in the physiognomy of the pact of preference, unlike the option pact, we do not have a firm offer to contract, but the similarity between the institution of the pact of preference, the option pact and implicitly the unilateral promise to contract, lies in this facultative right of option of the beneficiary to give his consent or not to the proposed contract.

We conclude by saying that, indeed, the option pact is a "*matrix"*[40] of pre-contracts, punctuated in the chronology of the formation of a contract,

[38] Monna-Lisa Belu Magdo, *Teoria contractului*, Hamagiu Publishing House, Bucharest, 2021, p. 210.

[39] Liviu Pop, "Despre negocierile precontractuale și contractele preparatorii", in Revista română de drept privat No. 4/2008, Year *George Beleiu*, pp. 108-109.

[40] Paul Vasilescu, *Drept civil. Obligații*, Hamangiu Publishing House, Bucharest, 2012, p. 281.

since its roots are, as can be seen, in *diplomatic relations* with a series of legal institutions of Romanian private law.

3. Framework contract

The biodiversity of preparatory contracts requires us to briefly review a contractual formula whose purpose is to simplify downward legal relations, preparing the legal ground for several subsequent contracts through its obligatory content. Its conventional regime, although little analyzed in the specialized doctrine of Romanian private law, is given legitimacy by the New Civil Code, which defines and regulates it for the first time in Article 1176. In this respect, the legislator reveals the creation of a legal mechanism which enables the contracting parties to define a series of rules and conditions which will govern the conclusion of future contracts, identified as *application contracts* or *performance contracts*. Moreover, the focus is often on its practical applications in the field of commercial law, as a consequence of which it is often presented as a variety of the international commercial contract[41]. By its preparatory legal technique, it succeeds in maintaining the legal autonomy of subsequent contracts, since it imposes on the parties general rules having the force of private law, without affecting the parties' freedom to conclude and determine the content of future agreements. Moreover, hence its preparatory nature, since, through the mechanism of the dual consent mechanism used, at most a causal link is established between these legal acts. Thus, the actual *(specific) obligations to be imposed on* the parties will be laid down by the subsequent performance contracts[42]. In other words, the framework contract has a nature of its own – a negotiated contract or a contract of adhesion – and becomes the source of a plurality of contracts, even if the specific content of the subsequent agreements is not to be found, creating a causal legal link by establishing in advance an obligation which will govern the conclusion of future contracts in a generic

[41] Șerban Diaconescu, *Contractul cadru de distribuție comercială*, Universul Juridic Publishing House, Bucharest, 2010, p. 10. Babiuc, I. Băcanu... and others, *Dicționar juridic de comerț exterior,* Științifică și Enciclopedică Publishing House, Bucharest, 1986, p. 115. The work is available in digital format on the website of the Lucian Blaga Library in Cluj-Napoca; https://www.bcucluj.ro/; accessed October 30, 2024.

[42] Viorel Terzea, *Răspunderea civilă contractuală*, Solomon Publishing House, Bucharest, 2021, p. 175.

manner, without affecting their independence. The term "essential elements" used in Article 1176(1) of the Civil Code and the similarity between it and that used in Article 1182 of the Civil Code should also be discussed, with the proviso that the framework contract, by its physiognomy, cannot contain the essential elements of application contracts, for reasons of prematurity, i.e. for the simple reason that the parties are not aware of them, and as a result, the legislator himself comes up with an enlightening addition to the content of Article 1176(2) of the Civil Code. In this connection, we point out that it cannot be "*considered that at the time of the conclusion of the framework contract, the conclusion of the performance contracts also occurred*"[43]. Hence the impossibility of resorting to the remedy of enforcement in kind, since the essential elements cannot be precisely determined. Basically, we are dealing here with a basic contract, which merely establishes some parameters of appropriation and contractual cooperation, by means of obligations *to do* or *not to do*, and in the event that the parties do not perform them, it is possible to order them to pay damages, on the basis of contractual civil liability.

On the other hand, its legal regime is easily distinguishable from the construction of the negotiation agreement, which executes by itself the negotiated contract or from the contractual formula of the promise to contract, which already contains all those clauses necessary for the promised contract. In fact, in the structure of the framework contract, there is at most an initial agreement which captures this "*obligation to negotiate, conclude or maintain contractual relations and a series of subsequent agreements which are forms of performance of the framework contract*"[44]. Finally, a legal configuration creating genetic material, which determines the formation of legal relations with successive execution.

4. Unilateral and bilateral promise to contract

In the specialized literature, the *promise to contract* is often found, from a terminological point of view, under a name that has been more esta-

[43] Viorel Terzea, *Răspunderea civilă contractuală*, Solomon Publishing House, Bucharest, 2021, p. 174.

[44] F.A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coord.), *Noul Cod civil. Comentariu pe articole,* ed. a 2-a, rev. și adăug., C.H. Beck Publishing House, Bucharest, 2014, Comentariu art. 1176 p. 1234 (Moise). Work available online on the website of the "Lucian Blaga" Library in Cluj-Napoca; accessed on November 9, 2024.

blished for some time in legal language, either as *a pre-contract* or with the dominance of *provisional contract* or *pre-contract*, with applications in particular in the field of sale-purchase. However, this type of contractual formula, through the framework approach, imposed in the light of the New Civil Code, in the general legal seat of art. 1279, shows that it can be used for the conclusion of any type of contract, whether named or unnamed. After all, the essence of the mechanism reviewed here is the direct consequence of the principle of freedom of contract, which does not restrict the applicability of the agreement only to expressly regulated normative acts – sale, gift, loan -, but promises may just as well be concluded for other contracts, such as exchange, partnership or lease[45]. Moreover, the presence of the promise to contract, in the complex process of the progressive formation of the contract, implies a deductive approach to the issue in question. Starting from the general rules of principle, which represent the common law in the field, with its two implications – the *unilateral* promise *to contract and the bilateral promise to contract* –, scattered additions are made by special provisions, which point out any special rules. However, it should be pointed out that the legislator was not concerned to expressly define this legal concept or to determine its legal nature, regulating it only in terms of its content and effects in the event of non-performance of the promisor's obligations.

Indeed, the representative doctrine defines the promise to contract as a contract by which at least one party firmly undertakes to give the necessary consent to the conclusion of a contract future and concrete, the essential elements of which are established in the present. In other words, it is based on a bilateral legal act, which identifies as specific parties, on the one hand, *the promisor* and, on the other hand, *the beneficiary of* the promise (unilateral promise to contract), although depending on the circumstances, the two parties to the promise may have both qualities (bilateral promise to contract). Incidentally, a childish, but necessary, mention in order to differentiate the concept we are working with from the <offer *to contract*>, the substance of which is concretized in a unilateral legal act, whereas even in the hypothesis of a unilateral promise to contract we are under the auspices of a legal act of a bilateral nature, in which the promisor

[45] Tita-Nicolescu Gabriel, "*Convențiile precontractuale*", in the specialized journal Universul Juridic Premium, Nr. 7/2017; paper available in digital format on the website *Lege5.ro | Viitorul documentării legislative* (subscription); accessed on 27.11.2024.

undertakes to remain bound by his own declaration of will, before the beneficiary. By the nature of the bilateral promise to contract, on the other hand, both parties bind themselves firmly and mutually to contract in the future. In this line of ideas, we conclude that this institutional synthesization represents a convention distinct from the future act of alienation, i.e. that "promised contract"[46]. Since, on the one hand we have the consent contained in the promise to contract and, on the other hand, its execution "*aims at the actual conclusion in the future of the concrete contract, through the externalization of a new consent*"[47]. In his specialized work[48], the emeritus professor Ioan Adam shows us that the two agreements of will represent component parts of the same common intention.

Without going too far into the spectrum of the substantive conditions of the promise to contract, in the following lines, we will summarize only those important aspects, such as the fact that the parties must be legally capable, i.e. have full capacity to contract. After all, the legal nature of the obligation undertaken is to *do*, *to achieve a result*, that is to say to conclude an *act of* intended *legal disposition*. It may also, depending on the circumstances, be owed to one or both parties, and if it is not performed voluntarily, it may be enforced by enforcement[49]. On the one hand, the legislator gives priority to the rule of enforcement by equivalent, the beneficiary having the right to have the contract rescinded and the right to damages to cover the loss suffered by the non-performance. On the other hand, there is also the possibility of enforcement in kind, which, even if it is not traditional – since a court judgment can be given, supplementing the consent of the parties and taking the place of the contract – has the capacity to cover the loss suffered by the conclusion of the act itself. However, such a solution by the court imposes certain conditions. The first falls to the party to the promise, who must fulfill his own obligations and only then

[46] Paul Vasilescu, *Drept civil. Obligații*, Hamangiu Publishing House, Bucharest, 2012, p. 282.

[47] *Ibidem*, p. 283.

[48] See to this purpose, Ioan Adam, *Tratat de drept civil. Obligațiile, Vol. I. Contractul*, C.H. Beck Publishing House, Bucharest, 2017, p. 537.

[49] See to this purpose (coord.) F.A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, *Noul Cod Cod Civil: Comentariu pe articole*, 2nd ed., revised and added, C.H. Beck Publishing House, Bucharest, 2014, Comment art.1279, p.1345 (Zamșa). Work available online on the website of the "Lucian Blaga" Library of Cluj-Napoca; accessed on November 9, 2024.

apply to the court. A further condition is closely related to the nature of the *contract*, which must allow such a judicial solution. An eloquent example in this respect are contracts *intuitu personae* (agency agreement), gratuitous contracts, such as the promise to donate, which are not suitable to be concluded by force[50]. The same exclusionist reasoning must also be applied to agreements constituting guarantees, i.e. the new Civil Code requires the same treatment, including contracts in rem. Finally, a third condition concerns the fact that the promise to contract must comply to legal requirements for the validity of the concrete contract. A balance that raises certain questions, especially about the form of the promise, as there are opinions in the specialized literature according to which "*the concrete contract dictates the form of the promise to contract*"[51].

As regards the formal conditions of the promise to contract, it should be emphasized, despite the controversies found especially in practice, that the pre-contract should not be subject to the rule *accesorium sequitur principalem*, i.e. it can take the form of a private deed, even if it has as its object a movable asset. In this regard, in the absence of an express legal provision, but as a consequence of the rule of law built on the principle of consensualism, the supreme court, in deciding certain questions of law in civil matters[52], has agreed that "*the authentic form is not mandatory when concluding a promise to sell immovable property, in order to render a judgment that takes the place of an authentic instrument*"[53]. Indeed, an exceptional case is that of a promise of gift, which by its very nature requires an authentic instrument.

Another essential aspect[54] is the fact that the promise should stipulate a clear time-limit within which the promised contract is to be concluded, under the sanctionable areola of relative nullity. In this way, its

[50] Paul Vasilescu, *Drept civil. Obligații*, Hamangiu Publishing House, Bucharest, 2012, pp. 284-285.

[51] *Ibidem*, p. 285.

[52] See ICCJ Decision, No. 23 of April 3, delivered in File No. 3996/1/2016 Official Gazette no. 365 of May 17, 2017; *apud* Ioan Adam, *Tratat de drept civil. Obligațile, Vol. I. Contractul*, C.H. Beck Publishing House, Bucharest, 2017, p. 539.

[53] Ioan Adam, *Tratat de drept civil. Obligations, Vol. I. Contractul*, C.H. Beck Publishing House, Bucharest, 2017, p. 539.

[54] See in this regard, Tita-Nicolescu Gabriel, "*Convențiile precontractuale*", in the specialized journal Universul Juridic Premium, Nr. 7/2017; paper available in digital format on the website Lege5.ro | Viitorul documentării legislative (subscription); accessed on 27.11.2024.

effectiveness would be reflected in the determination of the extent in time of the promised obligation, and implicitly the possible liability of the parties for deviation from the promise.

In addition, in order not to *discriminate against* the unilateral promise to contract analyzed in the preceding paragraphs, we go beyond the scope of the common provisions in order to highlight the specific features of the promise to contract. A variety of preparatory contract, also known as *pre-contract*, *ante-contract* or even the domination of *provisional contract*. Regulated by the provisions of art. 1279 of the Civil Code, and usually particularized by the provisions of art. 1669 of the Civil Code, the bilateral promise consists of a contract by which the parties firmly and mutually commit themselves, assuming an obligation to do, the performance of which is to conclude in the future, within an express or implicit term, the promised contract, with the stipulation that its essential elements are established at present. Moreover, "*the main effect of a promissory promise is to give rise to a contractually binding legal relationship*"[55]. Indeed, the obligations become reciprocal and unilateral, with the proviso that "*the consent in the pre-contract constitutes an ordinary performance of <to do>, distinct from the performances of the nature of those in the promised contract*"[56].

As regards the conditions as to substance and form, at the risk of repeating ourselves, we point out that the bilateral promise must meet all the general requirements of validity, in addition to which it is obligatory to insert those clauses of the promised contract without which the parties could not execute the promise[57]. On the other hand, as regards the form, the previous view is maintained that under civil law it is not considered necessary for the bilateral promise to contract to take the same form as the final contract. In the sphere of private law, even if the fulfillment the formal conditions remains a delicate matter, the promise to contract is and remains, as a rule, consensual, even if we are talking about the alienation of immovable property. Moreover, a practice to the contrary would not only be excessive, but would also lead to instability in the civil circuit,

[55] Liviu Pop, "*Despre negocierile precontractuale și contractele preparatorii*", in Revista română de drept privat no. 4/2008, Year *George Beleiu,* p. 119.

[56] Monna-Lisa Belu Magdo, *Teoria contractului*, Hamangiu Publishing House, Bucharest, 2021, p. 213.

[57] Liviu Pop, Ionuț-Florin Popa, Stelian Ioan Vidu, *Course on Drept civil. Obligații*; Universul Juridic Publishing House, Bucharest, 2015, p. 63.

departing from the very legal rationale for which the contract is concluded[58].

In substance, the pre-contract represents a guarantee of the finalization of the promised contract, by the manifestation of a new consent to that effect[59]. Consequently, in the event of non-performance of the promise, the parties are entitled to either the common remedies – exception of non-performance, rescission, damages – or a special remedy – enforcement in kind by judgment[60]. Another hypothesis of breach of promise is the conclusion of a contract with a third party, a circumstance which allows the aggrieved party to have recourse to a number of legal remedies, such as the possibility of "*claiming damages, rescission of the contract, or seeking the unenforceability of the contract with the third party by way of a Paulian action, or of invoking the relative nullity of the act of alienation, which violates the underlying legal inalienability(...)*"[61].

Indeed, the most common application of a promise, be it of a signatory or unilateral nature, is often in the field of the contract of sale. Basically, an agreement which does not have the character of a transfer of ownership since, in the hypothesis of a bilateral promise, one of the parties undertakes to sell and the other party undertakes to buy a certain good, i.e. mutual and interdependent obligations are created, to *do*. "*By the hypothesis, the conditions of the sale are required to be fulfilled from the very moment the promise is made, only the moment of the making of the sale being postponed*"[62]. It is also very important that the property should remain in the seller's patrimony, without being affected by any inalienability clause, so that the special remedy mentioned in the preceding lines can be applicable. And although there is much more to be said, we summarize

[58] See John Adam, *Treatise on Civil Law. Obligations, Vol. I. Contract*, C.H. Beck Publishing House, Bucharest, 2017, p. 538.

[59] Monna-Lisa Belu Magdo, *Teoria contractului*, Hamagiu Publishing House, Bucharest, 2021, p. 213.

[60] Liviu Pop, Ionuț-Florin Popa, Stelian Ioan Vidu, *Course on Civil Law*. *Obligations,* Universul Juridic Publishing House, Bucharest, 2015, p. 65.

[61] *Ibidem*.

[62] See to this purpose, (Coord.) F.A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, *Noul Cod Cod Civil: Comentariu pe articole*, ed. a 2-a, revizuită și adăugită, C.H. Beck, Publishing House, Bucharest, 2014, Comentariu art. 1669, p. 1756 (Gheorghiu). Work available online on the website of the "Lucian Blaga" Library in Cluj-Napoca; accessed on November 9, 2024.

what has been said above, with the likelihood of completing the study in a later and more complex work.

Conclusion

It is easy to observe that the final physiognomy of a contract is not only the classical and traditional scheme of the meeting between offer and acceptance, but we often witness a complex labor punctuated by preparatory agreements, which circumscribe in the pre-contractual abyss, with the aim of finalizing the definitive agreement of will. Moreover, an essential stage, which builds the very sanity of the future contract, through techniques, which appeal to a series of contractual legal instruments for organizing negotiations, which show us a new reality, often treated superficially in the Romanian private law. In fact, the analysis that we have undertaken in the previous lines demonstrates that when the interests at stake are considerable, the pre-contractual stage ends up being proliferated by such intermediate links necessary for the realization of the final agreement of will. An attempt has indeed been made to present a synoptic synopsis of the nature and intensity of the obligation that each contractual formula generates, but surprisingly we have found a high degree of interdisciplinarity which, despite its varying intensity, reveals a common objective: the conclusion of a contract designed to strengthen the parties' intention to give legal substance to their own will.

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JUDICIAL COOPERATION IN CRIMINAL MATTERS: CLASSICAL *VS.* THE TRANSFORMATIONS BROUGHT ABOUT BY ARTIFICIAL INTELLIGENCE

Mădălina Elena MASCARELL[*]

ABSTRACT

Judicial cooperation in criminal matters is an essential pillar of modern justice, ensuring coordination between states to fight cross-border crime, enforce the law and protect fundamental rights. The classic perspectives of this cooperation are based on instruments such as international treaties, European arrest warrants and the formal exchange of information between authorities. However, technological developments, especially the development of artificial intelligence, have brought about significant transformations in this field. Artificial intelligence promises to revolutionize the way judicial cooperation is carried out, from the automation of administrative processes and predictive analysis of decisions to the integration of biometric monitoring and identification systems. In this article, we examine how traditional perspectives merge with technological innovations, but also the ethical and legal challenges that this transformation entails.

KEYWORDS: *evolution; transformation; artificial intelligence; judicial cooperation; perspectives; future;*

Introduction

"The concept of traditional judicial cooperation has deep roots in history, being inextricably linked to the development of states, international organizations – the UN or the Council of Europe – and has evolved slowly, but complexly, with the political, economic, conceptual and mentality changes of society"[1].

∗ *Ph.D. Student, "Titu Maiorescu" University, Law Doctoral School, Bucharest, Romania.*

[1] Mihaela Pătrăuș (2021), *International Judicial Cooperation in Criminal Matters,* Universul Juridic Publishing House, Bucharest, p. 9.

The evolution of society, states and international entities, as well as the changes on the global scene, are largely due to the outlining, establishment, diversification and constant improvement of cooperation relations on multiple levels. Between the two world wars, the need to identify new forms of cooperation became increasingly evident. At the end of World War II, a group of political leaders, members of the Christian Democratic parties – W. Churchill, Robert Schumann, Alcide de Gasperi and Konrad Adenauer – decided to put an end to international antagonism. They were convinced of the need to inaugurate a new era, based on structural organization. They promoted an innovative approach to cooperation between states, based on common interests and reinforced by treaties aimed at guaranteeing the rule of law, equality between states and respect for citizens' rights and freedoms[2].

These changes in both the international community and the European structure have generated joint efforts to support the long-term interests of international society. These efforts have resulted in the promotion of universally applicable principles and the adoption of coherent regulations that set the rules of conduct for both States and citizens.

The intensification of forms of international cooperation has been and continues to be a necessity determined by the complexity of the problems generated by major transformations at international, regional or national level. Globalisation trends and the benefits of political and economic cooperation, which have favoured the mobility of goods and people across state borders, as well as the free movement of people, goods, services and capital at regional level, are generating new and complex challenges.

As a result, the growth and diversification of organised crime, as well as the cross-border activities of criminals, have been facilitated by the gradual elimination of borders, the freedom of movement of citizens, the internationalisation of crime and the conditions that have amplified the scale of this phenomenon.

[2] D.W. Urwin, *The Community of Europe. A History of European Integration since 1945,* Longman Publishing, London, New York, 1998, p. 39.

The traditional role of judicial cooperation in combating cross-border crime

The principle of mutual recognition is based on the assumption that the judgments to be recognised and enforced consistently comply with the principles of legality, subsidiarity and proportionality. This principle is a central element in judicial cooperation, profoundly influencing the forms of collaboration in criminal matters. Its application facilitates the overcoming of obstacles posed by the diversity of judicial systems in the Member States.

Currently, according to the provisions of Law no. 302/2004[3] on international judicial cooperation in criminal matters, the forms of international judicial cooperation in criminal matters are as follows[4]:

1. Extradition;
2. Surrender on the basis of a European arrest warrant;
3. Transfer of criminal proceedings;
4. Recognition and enforcement of court decisions;
5. Transfer of convicted persons;
6. Legal aid in criminal matters;
7. Other forms of international judicial cooperation in criminal matters.

The limits of judicial cooperation between States are established according to the need to protect the interests of sovereignty, security and public order of each State that is a signatory to an international treaty, convention or agreement, as well as of the Member States that must transpose and/or apply the rules of the rule of law internally.

Concretely, the beginning of international judicial cooperation in criminal matters is marked by the need to strengthen, at national level, the principle of territorial supremacy of the state, by means of a single and independent repressive authority, to which all citizens are subject. All states were governed by the *forum delicti commissi,* according to which

[3] *https://legislatie.just.ro/Public/DetaliiDocument/53158.*

[4] Alexandru Boroi, Rusu Ion, Rusu Minodora-Ioana, *Treaty on International Judicial Cooperation in Criminal Matters,* C.H. Beck Publishing House, Bucharest, 2016, p. 15.

the prosecution and punishment of criminals was the exclusive task of the courts of the state where the crime was committed[5].

Although in Romania, extradition was first regulated in the Constitution of the United Principalities of Moldavia and Wallachia, it was not promulgated by Alexandru Ioan Cuza, being rejected by letter no. 206 of November 12, 1859. Thus, at that time, anyone who took refuge on the territory of the Romanian state could not be extradited unless there was reciprocity of extradition. Currently, extradition, as a form of interstate cooperation, has been characterized by the following:

1. It serves not only as a means of combating cross-border crime, but also involves the protection of fundamental rights of persons subject to this procedure. In this context, extradition must comply with strict rules guaranteeing the procedural rights of the persons concerned, such as the right to a fair trial, protection against torture or inhuman treatment, as well as the right not to be extradited to a state where they would risk inhuman or degrading punishment. These rights strike a balance between the need for cooperation between States in the fight against crime and the protection of the fundamental rights of individuals.
2. The principle of double criminality is reinforced in extradition proceedings, according to which the action or inaction constituting the offence that is the subject of the extradition request must be criminalised by both the law of the requesting State and the law of the requested State. This principle ensures that a person cannot be extradited for an act that is not considered a criminal offence in the state in which he or she is present, thus protecting the legal sovereignty of each state and guaranteeing that extradition will not take place for acts that are not criminal in the jurisdiction of the requested state.
3. The principle of speciality is enshrined in extradition procedures, according to which the extraditable person can be held criminally liable only for the act for which the extradition was requested. This principle guarantees that, after extradition, the person cannot be prosecuted, tried or convicted of offences other than those for which extradition was requested, thus protecting the fundamental

[5] Bedi S., *Extradition in International Law and practice,* Bronder – Offset, Rotterdam, 1996, p. 16.

rights of the individual and preventing possible abuses by the requesting State.

The case law of the Court of Justice of the European Union (CJEU) has ruled on the interpretation of the provisions of Articles 18 and 21 of the Treaty on the Functioning of the European Union (TFEU) in the context in which a citizen of the European Union, who resides in the territory of a Member State other than his or her State of origin, is the subject of an extradition request made by a third[6] State. In these cases, the CJEU has emphasised that, in accordance with the principle of free movement of persons (Article 18 TFEU) and the right not to be discriminated against on grounds of nationality (Article 21 TFEU), EU citizens are protected against extradition to third countries under certain conditions. The CJEU clarified that in such situations, member states cannot allow the extradition of an EU citizen to a third country if it would violate the fundamental rights of the individual, including the right to move freely and the right to protection against expulsion or return to a country where they may suffer inhuman or degrading treatment. Furthermore, the CJEU has established that Member States must take into account the protection of the fundamental rights of the person concerned, including by examining compliance with the principles of protection of human rights and the rule of law in the requesting third State.

At the Tampere Conference in 1999[7], the European Council presented the principle of mutual recognition of judgments as a basic principle of judicial cooperation in the European Union. This principle implies that judgments given in one Member State of the European Union must be recognised and, as far as possible, enforced in all other Member States, without the need for an additional process of validation or revision of those judgments.

By applying the principle of mutual recognition, the free movement of judgments is facilitated, thus contributing to the creation of a single area of justice in the European Union. It is a key step in building trust between Member States' judicial systems and making cross-border judicial cooperation more efficient. In addition, the principle of mutual recognition is based on respect for fundamental rights and the principles of the rule of

[6] Case C-398/19, *BY,* judgment of 17 December 2020, ECLI:EU:C:2020:1032.

[7] Conclusions of the Tempere European Council, 15 and 16.10.1999 and the Council's programme of measures, published in OJ C 12.

law, and is essential for the proper functioning of an integrated European justice system. With the adoption of Framework Decision 2002/584/JHA of 13 June 2002 by the Council on the European arrest warrant and the surrender procedures between Member States, extradition to the European Union was reorganised on the basis of the principles of mutual recognition and trust between Member States[8].

The Framework Decision on the European Arrest Warrant is a concrete expression of the philosophy of integration into a common judicial area and is also the first legal instrument adopted to ensure the effective application of the principle of mutual recognition of judgments.

In conclusion, the traditional role of judicial cooperation in the fight against cross-border crime remains essential to ensure a coordinated and effective response to the challenges posed by crimes that cross national borders. By strengthening mutual trust and mutual recognition of judgments, Member States can pool their resources and expertise to tackle cross-border crime. In a globalised context, where mobility and technology facilitate criminal activities, judicial cooperation is proving to be not only a legal tool, but also a pillar of collective security and the defence of the values of the rule of law.

Artificial intelligence (AI): a revolution in the process of international cooperation in criminal matters

Artificial intelligence brings significant opportunities in law enforcement and criminal justice, helping to optimize the work of law enforcement agencies and judicial authorities. It also facilitates a more effective fight against financial crime, money laundering, terrorist financing and certain forms of cybercrime. In this area, applications based on artificial intelligence include a wide range of technologies, such as facial recognition, automatic identification of license plates, speaker and voice identification, lip movement reading technologies, sound surveillance (e.g. algorithms for detecting gunshots), autonomous analysis of databases, crime

[8] Published in the EU O.J. series L 190/1 of 18 July 2002, as amended by Council Framework Decision 2009/299/JHA strengthening the procedural rights of individuals and encouraging the application of the principle of mutual recognition with regard to decisions given in the absence of the person concerned from the trial, published in the EU OJ L81 series of 27 March 2009.

forecasting (through predictive and analysis methods of crime outbreaks), behavioural detection tools, autonomous solutions for identifying financial fraud and terrorist financing. Other applications include monitoring social media platforms (for connection extraction and analysis), the use of International Mobile Subscriber Identity Identification (IMSI) systems, as well as automated surveillance systems equipped with advanced technologies such as heart rate detection or thermal imaging cameras.

Artificial intelligence is profoundly transforming international cooperation in criminal matters, providing innovative solutions that increase the efficiency and speed of cross-border judicial processes. AI-based technologies allow complex data analysis, rapid identification of suspects, forecasting of criminal activities and facilitating the exchange of information between state authorities. AI can reduce the time and effort required to manage legal documents and administer cooperation requests[9].

The main changes brought about by AI in international judicial cooperation in criminal matters are:

Automation of administrative processes: AI can reduce the time and effort required to manage legal documents and manage cooperation requests, such as documents required for extradition requests, European arrest warrants or the recognition of criminal judgments. They can be generated automatically with the help of artificial intelligence.

Workflow management: Intelligent platforms coordinate process steps and notify stakeholders of deadlines and necessary actions.

Predictive analytics and decision-making: AI makes it possible to assess the likelihood of success of certain actions in judicial cooperation. The algorithms can analyse previous cases to estimate the likelihood of recognition of a judgment or the execution of a warrant. Predictive models can also flag potential legal or conflicting issues in the implementation of requests.

Increasing interoperability between states. AI-based systems facilitate the integration and exchange of information between judicial authorities in different countries. Automatic translation of legal documents removes language barriers, providing accurate and fast translations for criminal judgments, warrants or other procedural documents.

Detecting and preventing cross-border crime. AI plays a crucial role in combating cross-border crime through big data analysis, identifying

[9] https://www.europarl.europa.eu/doceo/document/TA-9-2021-0405_RO.html.

patterns and links between criminal activities in multiple states. Facial or biometric recognition systems deployed at border points can detect suspects who are the subject of international warrants.

Risks of applying AI in international judicial cooperation in criminal matters

Artificial intelligence is a revolutionary tool in international judicial cooperation, providing innovative solutions for managing the challenges posed by cross-border crimes. However, the use of this technology also involves a number of significant risks that can affect the integrity of the criminal justice process. These risks include:

Data protection and privacy risks[10]. AI systems involve processing large volumes of personal data, and security breaches can compromise sensitive information about victims, suspects, or witnesses. In the context of international cooperation in criminal matters, the transfer of data between jurisdictions may generate risks if national data protection laws differ.

Discrimination and algorithmic bias. Algorithms can perpetuate or amplify existing biases, which can lead to discrimination in the investigation or punishment of crimes, based on race, ethnicity, gender, or social status[11]. At the same time, there may be identification errors. Technologies such as facial recognition can generate incorrect results, which can lead to wrongful arrests or other abuses.

The risks associated with the "black box" of artificial intelligence. If a decision made by artificial intelligence is incorrect or harmful, it is difficult to assign liability. Who is responsible? The developer, the user, or the system itself? This AI 'black box' can produce results that discriminate against specific groups or contain errors, without them being identified and corrected in a timely manner.

[10] Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, detection, investigation or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA.

[11] JO C 362 8.9.2021. p. 63. https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX:52020IP0168.

The "black box" remains a major challenge for the widespread adoption of AI, especially in sensitive areas such as criminal justice. It is therefore essential that the development of technology is accompanied by measures to promote transparency, accountability and trust. To mitigate these risks, it is essential to adopt clear regulations, implement rigorous data protection measures and develop mechanisms to ensure transparency and accountability in the use of AI in international judicial cooperation. It must be used as a complementary tool, without substituting fundamental principles of justice and human rights.

Conclusions

International judicial cooperation in criminal matters has evolved considerably, moving from the classic perspectives based on bilateral treaties and mutual trust to new dimensions influenced by technological progress, in particular artificial intelligence (AI). The transformations brought about by AI mark a turning point in this area, redefining the way investigations, information sharing and cross-border justice enforcement are managed.

From a classical perspective, judicial cooperation was based on formal, manual and often slow procedures, which placed particular emphasis on the sovereignty of states. In this framework, the human factor was essential in the decision-making process, and the collaboration between states took place at a pace limited by legal and administrative constraints. In contrast, the integration of AI promises a significant streamlining of judicial cooperation, through the use of automated tools for analyzing evidence, translating documents, identifying suspects and monitoring illicit activities globally. However, this progress is not without its challenges. The opacity of algorithms, the risk of discrimination, as well as ethical and legal dilemmas related to the protection of personal data raise fundamental questions about how to maintain a balance between efficiency and respect for human rights.

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THE COURT'S INTERVENTION IN PENAL CLAUSES OF CIVIL CONTRACTS. REGULATIONS AND COMPARATIVE LAW ASPECTS

Florentina PETRE*

ABSTRACT

This article aims to analyze aspects related to the flexibility of penal clauses considering the Civil Code, both the 1864 version and the 2009 version, discussing an important institution of civil law, examining the transformations made by the legislator, and their impact on contractual relations. Furthermore, the influence of French legislation on Romanian law is highlighted, as the latter directly adopted the legal institution of the penal clause. The intervention of the court on the penal clause in civil contracts is an essential aspect of regulating contractual relationships, aimed at ensuring equity between parties and safeguarding the fundamental principles of law. This paper analyzes the legal framework of court intervention, the conditions under which the court may modify a penal clause, and the impact of such intervention on the contractual balance between the parties. The article emphasizes that the flexibility of the penal clause is allowed only under specific legal conditions, preventing discretionary judicial power. At the same time, the principle of freedom of contract is protected, as the parties are free to set the initial amount of the penal clause. Additionally, the paper addresses national case law by analyzing a relevant case for studying and understanding penal clauses in civil contracts.

KEYWORDS: *penal clause; court intervention; civil contracts; modification of penal clause; proportionality; equity;*

1. Brief historical overview

Historically, the penal clause has been a fundamental institution in civil law, with deep roots in European legislation, especially in the French Civil

* *Ph.D. Student, "Titu Maiorescu" University, Law Doctoral School, Bucharest, Romania.*

Code of 1804[1]. It was adopted by Romanian law in 1864[2], as part of the Romanian Civil Code, which almost verbatim integrated the French regulations. Thus, the penal clause became a fundamental legal practice in civil contracts, aiming to pre-establish compensation for non-performance of contractual obligations.

The regulation of the penal clause in the Romanian Civil Code of 1864 followed the French model, creating a stable and predictable legal framework for contracting parties. Historically, the penal clause was seen as an efficient means of protecting the parties' interests and a useful tool for preventing subsequent legal disputes by clearly establishing penalties for breach of obligations.

Over time, the legal regime of the penal clause underwent minimal changes in Romanian law. However, with the adoption of the 2009 Civil Code[3], which replaced the previous regulations, significant modifications were made. One such change involves the possibility for the court to reduce the amount of the penal clause if it is deemed excessive in relation to the actual damage incurred. This change reflects a broader trend toward protecting contractual balance and preventing potential abuses.

While the 2009 Civil Code did not fundamentally alter the penal clause regime, it provided a more coherent and balanced framework, considering the principles of proportionality and equity. These adjustments were meant to ensure better protection of vulnerable parties, preventing situations where the penal clause could be used abusively to impose disproportionate penalties.

2. Considerations on the penal clause

The penal clause is an essential contractual stipulation in which the parties to a contract pre-determine an amount of money or a prestation to be paid/fulfilled by one party in the event of non-performance of the obligations stipulated in the contract. It has a dual function: on the one hand, it serves as a means of ensuring the fulfillment of contractual obli-

[1] See the provisions of Articles 1226 and 1152 of the French Civil Code of 1804.

[2] See the provisions of Articles 1066 and the following in the Romanian Civil Code of 1864.

[3] See the provisions of Articles 1538 and the following in the Civil Code.

gations, and on the other, as a protective instrument for the party who may suffer damages due to the non-fulfillment of agreed obligations[4].

Essentially, the penal clause allows the parties to establish the consequences of breaching a contractual obligation in advance, thus helping to prevent potential disputes and legal conflicts. The penal clause provides pre-determined compensation in case of non-performance or improper performance of the obligations, with the aggrieved party not being required to prove the damage suffered. Thus, the penal clause not only protects the interests of the parties involved but also contributes to the stability of contractual relationships by encouraging compliance with agreed obligations.

In the Civil Code, the legal basis of the penal clause is found in Art. 1538 para. (1), which states: "The penal clause is that by which the parties stipulate that the debtor undertakes a certain prestation in case of non-performance of the main obligation".

In the previous regulation, the penal clause was treated differently, and the court's intervention in this regard was much more limited. According to Article 1087 of the 1864 Civil Code[5], when the parties agreed on a sum of money as damages in case of non-performance, the court could not modify this amount, either by reducing or increasing it. Thus, the general principle was that the parties were free to determine the sum due for breaching contractual obligations, without the court being able to intervene[6].

The only exception to this principle occurred when the obligation was partially performed. According to Article 1070 of the old Civil Code[7], the court had the possibility to reduce the amount of the penal clause when the obligation was partially performed. The reduction of the penalty was only possible if the creditor accepted the partial performance of the obligation

[4] L. Pop, *Regulation of the Penalty Clause in the Texts of the New Civil Code,* in Dreptul no. 8/2011, p. 11 and following.

[5] Article 1087 of the Civil Code of 1864: "When the agreement stipulates that the party who does not perform will pay a certain amount as damages, no amount greater or smaller can be awarded to the other party".

[6] C. Șovar, *Considerations on the Penalty Clause,* Juridice.ro, article available at *https://www.juridice.ro/658352/consideratii-cu-privire-la-clauza-penala.html,* accessed on 02.12.2024.

[7] Article 1070 of the Civil Code of 1864: "The penalty may be reduced by the judge when the main obligation has been partially performed".

or if the contract allowed for this, according to Article 1101 of the old Civil Code[8].

3. Court intervention: reduction of penalty amount

In light of the new regulations, the Civil Code stipulates in Article 1541 the rule that the court cannot reduce the penalty amounts. However, there are *two expressly provided exceptions* where the court may reduce the penalties:

A. The situation where the debtor partially performs the main obligation, and this partial performance benefits the creditor.
B. The situation where the penalty is clearly excessive in relation to the damage that could have been anticipated by the parties when the contract was concluded.

Both exceptions are at the court's discretion, and it is not obligatory to reduce the penalties but merely has the power to do so.

A. When the main obligation is partially performed, and this partial performance benefits the creditor, the damage suffered by the creditor will be smaller[9]. In such a case, it is natural that the debtor's liability should be reduced proportionally to the degree of non-performance, so that it accurately reflects the actual damage caused.

Doctrine[10] has noted that in some cases, the penal clause may explicitly provide for a reduction of the penalty in case of partial non-performance of the obligation. In such cases, the judge would be obligated to apply for the reduction as stipulated by the parties. However, it is reasonable that even in the absence of such a specific stipulation, the court should have the ability to adjust the penal clause based on the severity of non-performance to maintain balance between the parties.

[8] E.M. Enache, *The Reductibility of the Penalty Clause*, in Juridice.ro, article available at https://www.juridice.ro/198931/reductibilitatea-clauzei-penale.html, accessed on 03.12.2024.

[9] A. Stoica, V. Beleniuc, *Manual of Civil Law. General Theory of Obligations. Course Notes. Multiple-Choice Tests*, Universul Juridic Publishing House, Bucharest, 2019, p. 72-73.

[10] F. Baias, E. Chelaru, R. Constantinovici, I. Macovei, *The New Civil Code. Commentary by Articles*, 1st ed., C.H. Beck Publishing House, Bucharest, 2012, p. 1258 and following.

It is also important to note that this principle is of public order. Thus, the parties cannot stipulate in the penal clause a provision that excludes the possibility of reducing the penalty in case of partial non-performance. Therefore, regardless of the parties' intention, the court can intervene to adapt the sanction applied. According to Art. 1541 para. (3), a stipulation that the penal clause applies fully even in case of partial non-performance of obligations should be considered non-existent.

However, it is believed that there are cases where the main obligation cannot be divided in such a way that it can only be performed in its entirety. In these cases, partial performance of the obligation may not bring any significant benefit to the creditor, and non-performance in full may have a direct impact on the creditor, even without partial benefit. In such circumstances, the penal clause may be applied in full since partial performance did not benefit the creditor, and the debtor's liability should remain full according to the parties' agreement[11].

Thus, although in principle it is possible to intervene to reduce the penalty clause in the case of partial non-performance, in the case of indivisible obligations, the court may decide that the entire penalty is applicable.

B. Unlike French regulations, the Romanian Civil Code refers solely to "evidently excessive penalties", without mentioning "derisory penalties". Thus, the judge has the competence to reduce but not to increase the penal clause amount, as confirmed by doctrine[12].

This introduces questions regarding the court's ability to censor the penal clause. What characterizes the notion of an "evidently excessive penalty" in penal clause law? What is the limit up to which the court will reduce it? Since the legislator has not defined the term "excessive", the legal provisions may lead to debates and inconsistent judicial practice. Courts will have to assess this term, which could lead to different interpretations and contradictory outcomes in similar cases. This lack of clarity can affect the coherence of case law and create difficulties in applying the legal norm.

[11] G. Boroi, C.A. Anghelescu, B. Nazat, I. Nicolae, *Civil Law Sheets*, 4th revised and enlarged ed., Hamangiu Publishing House, Bucharest, 2019, pp. 549-550.

[12] L. Pop, *op. cit.*, pp. 316 and following.

The phrase "manifestly excessive penalty" was introduced by the legislator to limit the judge's discretionary power, with the provisions of Article 1541 para. (1) letter b) applying only in cases of an evident disproportion between the amount established in the penalty clause and the damage that could have been anticipated by the parties when concluding the contract. Thus, the Romanian legislator intends to prevent abuse situations, where a penalty clause could be imposed abusively or without connection to the actual damage that could result from the non-performance of obligations.

It has been considered that the use of the term "manifestly" emphasizes that the penalty must be so excessive that the judge can recognize this excess without the need for further investigations[13].

In this context, the Romanian legislator refers to the damage that the parties could have foreseen at the time of contract formation when assessing the "manifestly excessive" nature of the penalty clause. Thus, it is not necessary to consider the actual damage suffered, as the role of the penalty clause is to exempt the creditor from the obligation to prove the damage and its amount.

This regulation thus eliminates the doctrinal dispute in France regarding the comparison term that the judge should use to determine whether a penalty clause is "manifestly excessive". Under Romanian law, the judge will refer to what the parties could have foreseen at the time of contract formation, providing greater clarity and predictability in the application of this rule.

In contrast to French legislation, the regulation in the Romanian Civil Code appears to be clearer and more restrictive, so there is no risk of discretionary interpretation by the judge when it comes to reducing the penalty clause. Under Romanian law, the judge's discretion is limited by two important *criteria*[14]:

I. **The damage that could have been foreseen by the parties at the time of contract formation**, not the actual damage caused. Thus, the judge cannot reduce the penalty clause arbitrarily or

[13] F. Baiaș, *op. cit.*

[14] S. Angheni, *Defining Aspects Regarding the Penalty Clause According to the Provisions of the New Civil Code*, in the collection of studies *Corneliu Bîrsan*, Hamangiu Publishing House, Bucharest, 2013, pp. 340-353.

disproportionately compared to what the parties would have anticipated at the time of signing the contract.

II. **The principal obligation**. The reduction of the penalty clause must be proportional to the degree of non-performance of the obligation, and in the case of partial non-performance, the penalty must reflect this aspect. In no case can the penalty clause be reduced to a negligible amount, as this would undermine its primary purpose, which is to ensure compliance with contractual obligations and protect the creditor's interests.

However, the legislator explicitly provides that, in the situation referred to in para. (1) letter b), the reduced penalty must still be greater than the principal obligation.

Thus, the Romanian regulation ensures a much clearer limitation of the judge's power, preventing extreme solutions such as the total exoneration of the debtor or the reduction of the penalty clause to a symbolic amount. These limitations contribute to maintaining a fair and predictable balance between the contracting parties.

French doctrine[15] has criticized the regulations in the French Civil Code regarding the penalty clause, highlighting the lack of precision concerning the judge's discretion to reduce the penalty clause. It has been noted that the law's wording leaves some uncertainty, as the judge has the possibility to reduce the penalty without clear regulations or specific criteria for exercising this power.

This criticism specifically refers to the 1975 reform, which introduced a more flexible regulation regarding the judge's ability to adjust the penalty clause. The key issue raised by doctrine is that this vague wording allows the court to apply a reduction of the penalty clause arbitrarily, without a clear framework to determine exactly how the excessiveness of the penalty should be assessed[16].

4. Relevant case law

In the following, I found it relevant to analyze a case in which the court is requested to reduce a contractual penalty, based on Article 1541 of the

[15] G. Paisant, "Ten Years of Application of the Reform of Articles 1152 and 1231 of the Civil Code Relating to the Penalty Clause", in R.T.D. civ. 1985, pp. 647-667.

[16] F. Baias, *op. cit.*

Civil Code. Thus, in Decision No. 853/2024 of November 28, 2024, issued by the Timiș County Court, the court examined the defendant's request to reduce the penalty specified in the penalty clause of a contract, invoking the provisions of Article 1541 of the Civil Code. According to this article, the reduction of the penalty is only possible if two cumulative conditions are met: (i) the obligation was partially performed, and this partial performance provided a benefit to the creditor, or (ii) the penalty is manifestly excessive compared to the damage anticipated at the time of concluding the contract. In this case, the court must objectively assess the relationship between the penalty and the damage, and the reduced penalty must remain greater than the principal obligation.

By interpreting Article 1541, the court emphasized that the judge does not have an obligation to reduce the penalty, but rather a possibility. Reduction can only apply in cases of evident inequalities between the parties' performances. It is important for the judge to consider that the legislation aims to correct any major imbalances between the penalty clause and the damage suffered by the creditor, not to apply an automatic reduction.

It is also specified that the assessment of the "excessiveness" of the penalty should not be made solely based on the percentage or fixed amount, but in relation to the principal obligation. While the penalty clause can serve as a sanctioning function (to discourage non-performance of obligations), it also has a compensatory function, meant to offset the damage suffered by the creditor. The court must assess whether the requested penalty is proportional to the actual damage, considering both the value of the penalty and the impact of non-performance on the creditor.

Another important aspect considered by the court is that, although the existence of the penalty clause does not require proving concrete damage, the reduction of the penalty can only occur exceptionally. The court can decide to reduce it only if the obligation was partially performed, to prevent unjust enrichment of the creditor, who would receive a sum greater than the actual damage caused by non-performance or delay of the obligations.

The case analyzes the application of Article 1541 in the context of a contract with a penalty clause, highlighting the balance between the creditor's right to request penalties and the debtor's protection against excessive penalties. We believe the court should apply the principle of proportionality, correctly assessing the fairness and equity of the penalty

clause, which cannot exceed a certain level in relation to the creditor's actual damage.

Thus, special emphasis is placed on the correctness of the court's assessment and on protecting the parties from contractual abuse. The reduction of the penalty is considered necessary only in cases where there is an evident disproportion between the established penalty and the actual damage. At the same time, it ensures that the penalty cannot be used as a method to force the payment of amounts higher than those provided by the nature of the contract.

5. Conclusion

Considering the Civil Code, the penalty clause is governed by a more nuanced regulation, adapted to the principles of equity and proportionality. Unlike the old legislation, courts now can intervene to reduce the amount of a penalty clause that proves to be excessive in relation to the actual damage caused. This change reflects the legislator's concern to prevent abuses and imbalances in contractual relationships.

However, the principle of the autonomy of the parties' will is respected, with the parties having the freedom to establish the amount of the penalty clause within the contract. Judicial intervention is limited to situations expressly provided for, ensuring a balance between the parties' rights and contractual equity. The Civil Code strikes a balance between the parties, providing the creditor with effective protection against non-performance, while also offering the debtor a remedy against excessive and abusive clauses. This balance encourages responsible and transparent contractual practice.

The mutability of the penalty clause, under the current Civil Code, reflects a modern tendency to balance the interests of the parties and promote equity. This change is justified by respecting equity and avoiding the unjust enrichment of the creditor.

The possibility of reducing the penalty clause, granted to the courts, represents an important step towards strengthening equity and balance in contractual relationships, offering a fair solution in cases of a flagrant disproportion between the agreed clause and the actual damage suffered.

However, in legal practice, there are cases where the penalty clause is set at a symbolic level, which may affect equity and the preventive purpose

of the clause. In the absence of a regulation that allows courts to adjust the value of the penalty clause by increasing it, the injured party risks not being adequately compensated for the damage suffered.

To ensure equity and the preventive function of the penalty clause, we propose that courts be granted the right to intervene in such cases by increasing its value to a reasonable level. This proposal is based on the principle of good faith and the need to maintain contractual balance.

If the penalty clause stipulated in the contract is manifestly symbolic in relation to the damage that could have been reasonably anticipated at the time of concluding the contract, we propose that the court increase the penalty to a reasonable level.

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THEORETICAL AND PRACTICAL ASPECTS REGARDING THE APPOINTMENT OF THE CANDIDATE FOR THE OFFICE OF ROMANIAN PRIME MINISTER

Titi SULTAN[*]

ABSTRACT

In the current Constitution of Romania, the investiture procedure of the Government is provided for in art. 85 para. 1 in conjunction with art. 103 and art. 104. Initiated and completed by the President of Romania, according to the content of art. 85 para. 1, the investiture procedure involves four stages well-defined procedures, but the weight in its effective implementation rests with the Parliament by granting the investiture vote Although the principle of constitutional loyalty implies respect for the Constitution in its letter and spirit, fulfilling the obligations in good faith and respecting the rights that the fundamental law provides, falling within the competence limits established by the constitutional texts, cooperation, collaboration, consultation in the fulfillment of the competences competitors, in reality, the Constitutional Court, as the guarantor of the supremacy of the Constitution, was most often called upon to resolve the relationship between the main public authorities of the state, becoming practically an arbiter of political life in Romania. Exercising constitutional powers in good faith and ensuring the principle of constitutional loyalty between the President of Romania – Parliament – Government should represent a constant of the law intended to provide stability and predictability not only to legal institutions, but also the behavior of those who temporarily fulfill these functions.

KEYWORDS: *consultations; jurisprudence; decisions of the Constitutional Court; prime minister; investiture; vote of confidence; government program; parliamentary majority;*

[*] *Ph.D. Student, "Titu Maiorescu" University, Bucharest, Romania.*

1. The significance of the appointment of the candidate for the position of prime minister

The investiture of the Government represents the complex of legal acts and facts, as well as the corresponding procedures, required by the Constitution, in order to find ourselves in the presence of a legal and legitimate government team[1]. The investiture vote has a legal factual value, it signifies the "conclusion of the governance contract", legitimizes the government team and implicitly the political program of the party as the official political program of governing the country. It marks the transition from the sphere of competition for power to the sphere of the exercise of political power. The investiture of the Government is a necessary and mandatory stage in pluralistic regimes that accept the change of governors, following the consultation of the people, through elections. As such, after the elections, depending on the political configuration of the Parliament, a new Government is to be inaugurated[2]. Therefore, usually, the investiture procedure of the Government is triggered after the general elections, at the beginning of a parliamentary mandate, respectively after the presidential elections, at the beginning of the mandate of the President of the Republic. However, it can also intervene during a parliamentary or presidential mandate, in case of a serious government crisis. Although in the interwar period, through the constitutional provisions (from 1866 and 1923), a parliamentary regime was established, in the idea that the Parliament was the one that formed the Government, in state practice the opposite situation was reached, that the Government appointed by the King to form the Parliament, and the departure of the Government to attract the departure of the Parliament. With the entry into force of the Constitution of 1938 and until the elections of May 1990 (the first free general elections after the fall of the communist regime), in Romania it was no longer possible to speak of a democratic investiture procedure of the Government, various authoritarian regimes of investiture being consecrated[3].

As for the government team, the constitutional text does not make any reference to those who will be appointed to be part of the Government.

[1] Antonie Iorgovan, *Treatise on administrative law*, *vol. I*, 4th ed., ALL Beck Publishing House, Bucharest, 2005, p. 370.

[2] Ioan Vida, Ioana Cristina Vida, *Executive power and public administration*, p. 140.

[3] Antonie Iorgovan, *op. cit*., p. 371.

Therefore, any person, even not politically involved, can be part of the government team that will ask Parliament for a vote of confidence. And in this case, the person appointed to form the Government must take into account the support of the parliamentary parties and orient himself in the formation of the team according to this support. That's why some countries require that the members of the Government be at the same time the members of the Parliament (Great Britain).

2. Formation of the Government in some European states

In comparative law, the appointment of the Head of Government takes on distinct forms depending on the nature of the political regime, and within a political regime there may be several ways of appointing him[4]. Thus, the investiture procedure of the Government depends on whether we are in a parliamentary or semi-presidential regime, in a presidential regime, such as the one in the United States of America, a special situation being encountered in the case of the assembly regime, specific to Switzerland.

In parliamentary regimes, the establishment of the head of the Government, as well as its composition, cannot be done without the participation of the Parliament. In states where the multiparty system operates (Italy, Belgium, the Netherlands), the head of state appoints the prime minister, as well as the other members of the Government, who must obtain the confidence of the Parliament. There are also states where the head of state proposes to Parliament a head of government who, if elected by parliament, is appointed by the head of state.

In France, for example, the typical European model of semi-presidentialism, the prime minister is designated and appointed by the President of the Republic, without any restrictions, only the existence of a majority favorable to the President of the Republic in the National Assembly being necessary. If the choice of the prime minister rests, in principle, with the President, he, on the other hand, cannot revoke him, because only the resignation of the Government causes his departure[5].

In Germany, after the election of the Federal Diet, it proceeds to elect the Federal Chancellor (the title given in Germany to the head of

[4] Ioan Vida, Ioana Cristina Vida, *op. cit*., p. 142.

[5] Guy Carcassonne, *La Constitution introduite et commentee*, 10eme ed., du Seuil, Publishing House, 2011, p. 77.

government), on the proposal of the President of the Federation. The formation of the Government, after the election of the Chancellor, is the subject of negotiations between the parties, which establish, in detail, the political program and the composition of the Government. The members of the Government are appointed and dismissed by the Federal Diet, at the proposal of the Chancellor[6].

The head of the Italian Government, called the President of the Council of Ministers, is appointed by the President of the Republic. It has an important role in appointing the head of government, due to the internal division of political parties and the fact that negotiations to establish a government coalition take place after the elections. Before starting to operate, the Italian Government must obtain a vote of confidence from both Houses of Parliament[7].

In Great Britain, although the Government and the Prime Minister are formally-legally appointed by the Crown, the appointment of the Prime Minister is strictly conditional, because an old tradition obliges the Queen (President) to appoint the head of the party as Prime Minister majority of the House of Commons. It is the reason why the Prime Minister is considered to be elected by indirect universal suffrage, because formally each party enters the election campaign with a designated leader to be the Prime Minister, in case of electoral victory. According to the doctrine, it would seem that the option of the Romanian legislator regarding the investiture procedure of the Government was influenced by the current Spanish model, which, paradoxically, enshrines a constitutional monarchy.

3. Formation of the Government in the Romanian constitutional system

Art. 85 of the Romanian Constitution provides for 3 cases in which the President of Romania appoints the Government (para. 1) or only some members of the Government (para. 2 and 3). In the case provided for in para.1, the appointment takes place on the basis of the vote of confidence granted by the Parliament in accordance with the provisions of art. 103 of the fundamental law, and in the case provided for in para. 3, based on the

[6] Liviu Coman Kund, *European administrative systems*, 2nd ed., "Tribuna" Press and Publishing House, Sibiu, 2003, p. 59.

[7] *Ibidem*, p. 61.

approval of the Parliament, granted at the proposal of the Prime Minister. The legal act on the basis of which the President of Romania makes the appointments is the Decision of the Parliament, adopted under the terms of art. 85 para. 1, of art. 103 para. 3 of the Constitution and the corresponding provisions of the Regulation of joint sessions of the Chambers of Parliament[8].

The appointment of the Government by the President of Romania is not made at the notification of the Prime Minister, but at the notification of the presidents of the two Chambers of the Parliament and based on the Parliament's decision approving the Government Program and the complete list of the members of the Government. The constitutional obligation of the President of Romania is based on the decision of the Parliament and, in its execution, the President issues the decrees appointing the members of the Government, followed by the submission of the oath of allegiance required by law. There are mandatory regulations for the hearing of candidates for the position of minister by the parliamentary commissions, as specialized and preparation bodies for the works of the Parliament. These hearings concern the suitability for the position of the candidates proposed by the prime minister in terms of general training, training in the specialty of the field, experience in the field, training and skills for the position in the field, unblemished reputation and morality, necessary and indispensable conditions for the position of minister. The decisions of the Parliament are based on the findings made by the permanent parliamentary committees regarding the suitability of the proposed candidates for the position and, based on these guarantees, the investiture in the position by the President of Romania, the taking of the oath and the entry into the exercise of the function follow[9].

A problem that arose in practice was that of the need for the meeting of the working quorum by the standing commissions that hear the candidates for the position of minister. More precisely, if during the procedural stage of the hearing of the candidates for the position of minister in front of the permanent commissions, the opinions are not drawn up because some

[8] Approved by *Hotărârea Parlamentului României nr. 4/1992 privind Regulamentul şedinţelor comune ale Camerei Deputaţilor şi Senatului,* published in M. Of., Part I, no. 34 of March 4, 1992.

[9] Decision of the Constitutional Court of Romania no. 356 of April 5, 2007, Published in the Official Gazette of Romania, Part I, no. 322 of May 14, 2007.

commissions did not meet the meeting quorum provided by the regulation, respectively, less than half plus one of both were present at the proceedings the number of deputies, as well as the number of senators who compose them, can the Parliament vote on the composition of the new Government?[10]

Responding to this problem, the Constitutional Court established that with regard to the obligation to meet the working quorum for the parliamentary committees, "Given the nature of the internal working bodies of the parliamentary committees, the legal nature of the reports or opinions adopted by them is that of a preliminary act, with a recommendation character, adopted in order to suggest a certain conduct, from a decision-making point of view, to the plenary session of each Chamber or the assembled Chambers. The reports and opinions are binding only from the aspect of their request, not from the perspective of the solutions they propose, the Senate and the Chamber of Deputies being the only deliberative bodies through which the Parliament fulfills its constitutional duties. Parliamentary committees have the obligation to meet, but they may be put in the situation of not carrying out the activity for which they were established due to the failure to meet the quorum condition for the holding of the meetings or the impossibility of the members of the committee reaching an agreement on the issue subject to debate. However, the provisions of art. 12 of the Regulation of the Joint Sessions of the Chamber of Deputies and the Senate which regulate these two hypotheses (the quorum and the majority required to adopt a decision within the committees) enshrine the minimum procedural means of protection in order to respect the rights of all members of the committees, and not as instruments preventing the functioning of the Chambers of the Parliament. With regard to the quorum, the Court finds that it constitutes a criterion of constitutionality, conditioning the external constitutionality of the act only with regard to the adoption of laws, decisions and motions by the Chamber of Deputies and the Senate, not with regard to the adoption of acts within the procedures carried out by the working bodies of the Chambers. That being the case, the problems related to the organization and conduct of the meetings of the permanent committees for the hearing of the candidates for the position of minister are not problems of

[10] Ioan Muraru, Elena Simina Tănăsescu, *Constitution of Romania – Commentary on articles,* ed. 3, revised and added, C.H. Beck Publishing House, Bucharest, 2022, p. 755.

constitutionality, but of the application of the provisions of the Regulation of the joint meetings of the Chamber of Deputies and the Senate"[11].

4. Designation of the candidate for the position of prime minister

Art. 103 para. 1 of the Romanian Constitution recognizes **parliamentary parties** as subjects in public law reports, more precisely in constitutional law reports and, as the case may be, administrative law reports, by virtue of which they have the right to claim the President of Romania to check[12].

In the doctrine of public law, the quality of moral persons under public law of political parties in general being questioned, the opinion was also expressed that, in accordance with art. 37 of the Constitution (became art. 40 after republication), regarding the right to association, political parties must be considered private law associations, they may appear in some public law reports just as this quality can be recognized, under the law, to other private law associations or even simple individuals[13].

If, after the parliamentary elections, a party or a coalition of parties has obtained **an absolute majority**, a hypothesis that is almost impossible to achieve in reality, the President of Romania will consult with his/her representatives, with a view to appointing the candidate for the position of prime minister. If no political party has obtained an absolute majority, the President of Romania has the constitutional obligation to consult with the representatives of all parliamentary parties, in order to appoint the candidate for the position of prime minister.

However, both hypotheses are insufficiently defined from a legal point of view – **it was argued in the doctrine** – and can be the source of more or less democratic solutions. If no political party has obtained an absolute majority in the Parliament, the issue of the nomination of the candidate is controversial. The first question would be, if a parliamentarian from a party that did not obtain the highest number of votes in the elections can be appointed prime minister. The second question is whether the go-

[11] Decision of the Constitutional Court no. 209 of March 7, 2012, Published in the Official Gazette of Romania, Part I, no. 188 of March 22, 2012.

[12] Antonie Iorgovan, *op. cit.,* p. 379.

[13] Tudor Dragan, *Are political parties moral persons under public law?,* in Public Law Review no. 2/1998, p. 6.

verning coalition itself could be formed without including the party with the highest number of votes obtained in the election. The answer should be negative, because otherwise the democratic basis of such a coalition of parties would be called into question. The problem becomes more complicated if the parliamentary "majority" would be obtained by a coalition of parties which in the elections each obtained a smaller number of votes than a party which remained outside the coalition, but whose votes, taken together, give the necessary majority to govern[14].

Such a situation occurred following the parliamentary elections of December 6, 2020, when, although the PSD won the elections by obtaining the largest number of votes, it failed to form an absolute majority in the Parliament, subsequently forming the governing coalition made up of from PNL, USR, UDMR and the representatives of national minorities in the Chamber of Deputies, from among which the President of Romania nominates the candidate for the position of prime minister.

The purpose of the consultations derives from the need to ensure parliamentary support for granting the vote of confidence to the new Government.

As for the concrete methods of consultation, in the absence of any other constitutional or legislative details, the President will decide on his own, being a matter that actually relates to the practice of political life, to the President's style as a politician. If any parliamentary party will be omitted from the consultations, in the absence of the party that has the absolute majority, then it will be guilty of violating the Constitution, with all the legal consequences arising from this, and the procedure of suspension from office may be triggered, enshrined in art. 95 of the fundamental law. If in the situation of the existence of **a majority party**, a difficult objective to achieve, the problem of appointing the candidate for the position of prime minister is relatively simple, in the situation of consulting all the parliamentary parties the problem is complicated due to the need to form a governing coalition.

Related to the candidate for the position of prime minister, he can be a politician, possibly the leader of the majority party, but, equally, he can be

[14] Iulian Poenaru, *Reflections on the democratic nature of some constitutional provisions,* in Law no. 6/2002, p. 13.

a non-political person, a specialist, a technocrat[15]. In other words, there is no constitutional obligation of political or parliamentary membership of the candidate, but only the obligation to obtain majority parliamentary political support[16].

In conclusion, the constitutional text was drafted in such a way as to allow as many formulas as possible for appointing the candidate for the position of prime minister, which could be the leader of a political party, a technocrat from outside the parties, a specialist who is a deputy.

The appointment of **the candidate for the position of prime minister** represents the significance of a mandate granted by the President of Romania to the person in charge of forming the list of the future Government, drawing up the government program and presenting the request for the vote of confidence to the Parliament[17]. In any case, the person appointed by the President following the parliamentary consultation must be convinced that he will succeed in obtaining the support and, implicitly, the vote of the majority of parliamentarians. As a result of these consultations, a consensus should be reached, this being the reason why the constituent legislator imposed on the President of Romania the need to consult with the parties represented in the Parliament[18].

It remains a difficult legal problem to solve, it was noted in the doctrine, the hypothesis of a presidential opposition (strike) consisting in the refusal of the head of state to designate the person of the future prime minister, there being no express legal solution to overcome such a moment of crisis other than, possibly, the proposal of dismissal of the president by referendum[19]. And yet, after the parliamentary elections in the fall of 2016, such a situation occurred, the incumbent President rejecting the first proposal for prime minister formulated directly by the president of the party that had obtained the best score in the elections, without an official

[15] Mihai Oroveanu, *Treatise on administrative law,* 2nd ed., Cerna Publishing House, Bucharest, 1998, p. 436.

[16] Ioan Santai, *Administrative law and the science of administration, vol. I*, Partially revised edition, Alma Mater Publishing House, Sibiu, 2014, p. 297.

[17] Mihai Constantinescu, Antonie Iorgovan, *The Constitution of Romania – Commented and Annotated*, Autonomous Directorate Monitor Oficial Publishing House, Bucharest, 1992, p. 228.

[18] Benonica Vasilescu, *Administrative law,* 3rd ed., revised and added, Universe Juridic Publishing House, Bucharest, 2017, p. 98.

[19] Ioan Santai, *op. cit.,* p. 298.

motivation, but issuing the appointment decree for the second prime minister proposal coming from the entire parliamentary majority.

5. Request for investiture vote

In the second stage, the decisive role rests with **the candidate for the position of prime minister** who, within 10 days of the appointment, has the constitutional obligation to present himself to the Parliament with two elements: the list of members of the future Cabinet and the program of government. Through the political negotiations conducted regarding the future Government, as a rule, not only **the principles of the governing program** are established, but also the people who are going to fulfill this program, the vote of confidence in the Parliament also following this concordance between the program and the people able to put it in practice. At first glance, it would seem that it is too short a term for the compilation of a 4-year government program. Upon closer analysis of the procedure, it is obvious that it will be about the political program with which the majority party became victorious in the elections. However, the situation will be different, as a single-color Government will be formed, in which case it will be a single government program (as was the case with the Cabinet inaugurated in December 2000) or, on the contrary, it may be a coalition Government, in the absence of a party that has obtained the majority in Parliament, in which case the governing program may contain priorities specified in several political programs (as was the case, for example, during 1996-2000, when three Cabinets succeeded each other in government, or in the period after 2004).

In the first commentary of the Constitution from 2002, it was shown that the hypothesis may arise in which, within the 10-day period, the appointed candidate fails to draw up the Government's list and draw up the government's program, in which case he will be able to submit the mandate entrusted by the President of Romania by the act of designation. The submission of the mandate could also take place before the completion of this term if, within the framework of the ongoing political negotiations, the impossibility of establishing a governmental formula is obvious. After the completion of the 10-day period, the President of Romania is the one who can withdraw the mandate granted, especially if the impasse created is certain, and the appointed candidate has not submitted his mandate, thus

preventing, in an abusive manner, the procedure of forming the new Government. As a result of the withdrawal of the mandate, the President of Romania will start new political consultations for the appointment of the candidate for the position of prime minister[20]. After the Investiture of the Government, any change in the government program during the government will require a new vote of confidence[21].

6. Granting the vote of confidence by the Parliament

The vote of confidence is granted by the two Chambers of the Parliament in a joint session, as an expression of the majority of deputies and senators, based on the debate on the program and the list of the Government, presented by the candidate for the position of prime minister[22].

The symmetrical act with the vote of confidence is **the motion of censure**, through the adoption of which the Parliament withdraws the confidence granted.

The text of art. 103 para. 3 highlights the equality of the two Chambers in the investiture procedure of the Government, hence the need to withdraw the confidence of the Government, through the motion of censure, also in the joint meeting of the two Chambers, with the same majority[23].

Candidates for the positions of ministers are to be heard in the specialized commissions of the two Chambers, in order to obtain **an advisory opinion**. This hearing and approval are mandatory to be carried out and, respectively, to be requested, but the candidate for the position of prime minister is free to comply or not with the opinion expressed by the commissions, under the possible penalty of not obtaining a vote of confidence, or he can operate, as the case may be, the changes in the composition of the list, after which the new proposal must follow the same procedure[24].

The doctrine also expressed the opinion that, if the Parliament does not agree with certain proposals regarding the persons appointed for the

[20] Mihai Constantinescu, Antonie Iorgovan, *op. cit.,* p. 228 et seq.
[21] Antonie Iorgovan, *op. cit.,* p. 381.
[22] Mihai Constantinescu, Antonie Iorgovan, *op. cit.,* p. 229.
[23] Antonie Iorgovan, *op. cit.,* p. 381.
[24] Ioan Santai, *op. cit.*, p. 300.

positions of ministers, the candidate for the position of prime minister must make other proposals[25].

By **the list of the Government is understood its entire composition**, in its entirety, including the prime minister, it is stated in the doctrine, in view of the controversial situation that arose immediately after the 1990 elections, when the Constitution had not yet been adopted and the name of the prime minister had been omitted, he being the one who had made the proposal regarding the nominal composition of the members of the Government[26].

According to the Regulation of the joint meetings of the two Chambers, the Permanent Bureaus set the date of the joint meeting, within 15 days of receiving the program and the list of the Cabinet, taking measures to convene the deputies and senators. The president presiding over the joint session of the Chambers of Parliament, after approving the agenda, gives the floor to the candidate designated for the position of prime minister, in order to present the program and the Government's list. Next, the president also gives the floor to the representatives of the parliamentary groups in the Chamber of Deputies and the Senate, at their request, to express their points of view regarding the Government's program and list[27].

The debates must constitute a permanent reporting of the program presented and the abilities of the members of the governing team to the political programs of the majority called to govern, thus going beyond the stage of simple promises or electoral platforms, including indicating the means and resources for their realization[28].

Parliamentary debates, it was also argued in the doctrine, mean the collaboration between the legislative power and the executive power with the aim of solving problems related to the administrative policy of the country[29].

[25] Anton Trăilescu, *Administrative Law,* 4th ed., C.H. Beck, Publishing House, Bucharest, 2010, p. 13.

[26] *Ibidem*, pp. 302 et seq.

[27] Benonica Vasilescu, *Administrative law,* 3rd ed., revised and added, Universe Juridic Publishing House, Bucharest, 2017, p. 99.

[28] Ioan Santai, *op. cit.,* p. 300.

[29] Mihai Oroveanu, *Treatise on administrative law,* 2nd ed., Cerna Publishing House, Bucharest, 1998, p. 437.

The vote of the majority of parliamentarians is required for the granting of confidence to the Government and the investiture of the Cabinet, the vote being secret, with balls.

The vote of confidence is given for the entire list of the Government and not for each individual minister. This results from the fact that art. 103 para. 2 of the Constitution provides that the confidence vote of the Parliament considers the entire list of the Government[30].

If the vote of confidence is not granted, the Parliament, under the signature of the presidents of the two Chambers, immediately brings this situation to the attention of the President of Romania, in order to appoint another candidate for the position of prime minister.

7. Appointment of the Government

The decision of the Parliament by which the vote of confidence was granted will be communicated to the President of Romania who will issue the decree appointing the new Cabinet, this being published together with the government program in the Official Gazette of Romania, Part I. The appointment of the Government by the President of Romania, based on the vote of confidence granted by the Parliament, represents the manifestation of a legal competence, in the sense that the President could not refuse the appointment, being obliged to do so, as he does not have a freedom of appreciation in this sense. This does not mean that the appointment is a purely formal act of the President; on the contrary, it has a solemn character, signifying the end of the investiture procedure. In addition, the act of the President of Romania appointing the Government remains without legal consequences regarding the relations between the President and the Government, in the sense that it will not create subordination relations between the two public authorities that form the executive, the President and the Government, through the first minister.

The appointment of members of the Government by the President of Romania is not an "investment", but the confirmation and nomination of the investiture made by the Parliament. The procedure of the "investigation scrutiny" does not in any way affect the content and scope of the subsequent parliamentary control, because the Parliament does **not**

[30] Cătălin-Silviu Săraru, *Administrative law, Fundamental problems of public law*, C.H. Beck Publishing House, Bucharest, 2016, p. 605.

"approve" the Government's program, but only **"accepts" it** in principle, as an argument for the **"investments"**[31].

It follows from the presented that the investiture procedure has the significance of the formation of the Government as an expression of the will of the two public authorities elected on the basis of the vote granted by **the electoral body**, the Parliament and the President of Romania, in which the decisive role is played by the Parliament, the formation and operation of the Government presupposing its trust[32].

At the same time, the investiture procedure results in the establishment of a complex constitutional relationship between the Government, on the one hand, and the Parliament or the President of Romania, on the other.

In the same vein, the investiture procedure of the Government was seen as a complex procedure, comprising two phases, one **presidential-legislative** and the other **executive-presidential**, materializing two distinct political-legal wills, one of which is the main and essential (legislative decision), and the second is subsidiary complementary (presidential decree), formally completing the entire procedure. The lack of any act from this complex procedural unit will affect the possibility of the legal establishment of the Government[33].

The conclusion of the investiture procedure, through the appointment of the Government by the head of state and the swearing in of the new Government, results in the creation of legal relations between the Government and the Parliament, as well as between the Government and the President of Romania[34].

In relation to the Parliament, the Government is the beneficiary of a **mandate of trust**, granted through the effect of the investiture vote, which substantiates its constitutional position in the relationship with the Parliament. From this moment, the Government acquires the right of legislative initiative and the right to participate in the works of the Parliament, and the Parliament can exercise parliamentary control over the Government and can withdraw the trust granted to it.

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[31] Ion Deleanu, *Institutions and constitutional procedures, in Romanian law and in comparative law,* C.H. Beck Publishing House, Bucharest, 2006, p. 652.

[32] Mihai Constantinescu, Antonie Iorgovan, *op. cit*., p. 229.

[33] Ioan Santai, *op. cit*., p. 302.

[34] Mircea Preda, Benonica Vasilescu, *Administrative Law, Special Part,* Lights Lex Publishing House, Bucharest, 2007, p. 70.

Within the complex constitutional report that defines the relationship between the Government, Parliament and the President of Romania, essential is the relationship with the Parliament, through whose vote the Government is invested and disinvested, a characteristic specific to parliamentary regimes. That is why the position of the Government is, in essence, that specific to the cabinet in a parliamentary regime[35].

Comparing the formation of the Government of Romania with the formation of the governments of other member states of the European Union, we find that Romania also falls under the regime, more or less parliamentary, of the majority of these states.

8. Conclusions

A very important first aspect refers to the fact that the President of Romania designates a candidate for the position of prime minister and does not appoint the prime minister. The President appoints the entire Government, not just the Prime Minister, but after the Parliament gives the investiture vote to the entire government team. Therefore, the Parliament votes on the structure or composition of the Government and its political program, and not on individuals. Likewise, the President of the State appoints the entire government team and not individual persons. This also results in the political responsibility of the Government, which is collective and not individual, each member of the Government being politically responsible jointly with the other members for the Government's activity and for its acts, as provided by art. 109 of the Constitution.

The second aspect refers to the fact that the constitutional text does not impose on the head of state the obligation to appoint for the position of prime minister a person involved politically or who is a member of the Parliament. The President can propose any person for this position, but he must take into account that he needs the broad support of the parliamentary parties that vote to invest the Government. It is a mandatory condition that must be taken into account. That is why, in some countries, although the condition was not imposed that the head of the Government should be politically involved, practice demonstrates that the person appointed to

[35] Mihai Constantinescu, Antonie, *op. cit*., p. 230.

form the Government is politically involved, even the head of the party that won the elections (the example of Great Britain).

Considering the competence shared between the President of Romania and the Parliament, as well as the fact that the appointment of the Government is conditioned by the vote of confidence of the Parliament, it follows that the stage of initiating the investiture procedure of the Government, respectively the exercise of the President's competence regarding the appointment of the candidate for the position of Prime Minister aims, as a finality, to obtain this vote of confidence. Only in this way can the constitutional provisions be interpreted, namely in the sense of achieving the purpose for which they were regulated, and not of not achieving it[36].

According to the jurisprudence of the Constitutional Court, the candidate appointed by the President for the position of Prime Minister does not represent the exclusive choice of the President, but represents the result of consultations and/or negotiations between him and the political party that has the absolute majority in Parliament or of the parliamentary parties, if not there is such a majority"[37]. As a result, even if the procedure regulated by art. 103 para. 1 of the Constitution is a flexible one, it does not allow the discretionary exercise of the competence of the President of Romania. In its framework, the electoral result of the electoral competitors cannot be ignored, nor the finality of the procedure, namely the designation of a candidate who can ensure the coagulation of a parliamentary majority in order to obtain the vote of confidence. Therefore, the President of Romania, not being able to have the role of decision-maker in this procedure, but as an arbiter and mediator between the political forces, has only the competence to designate as a candidate the representative proposed by the political alliance or the political party who can ensure the necessary parliamentary support to obtain the vote of confidence of the Parliament"[38].

Therefore, "the consultation of the political parties by the President of Romania, with a view to appointing the candidate for the position of Prime Minister, is not a formal act, but must be carried out in a sincere and

[36] Ștefan Deaconu, Marian Enache, *The President of Romania in the jurisprudence of the Constitutional Court,* Publishing House C.H. Beck, Bucharest, 2021, p. 306.

[37] Decision of the Constitutional Court of Romania no. 875 of December 19, 2018, Published in the Official Gazette of Romania, Part I, no. 1093 of December 21, 2018.

[38] Decision of the Constitutional Court of Romania no. 80 of February 16, 2014, Published in the Official Gazette of Romania, Part I, no. 246 of April 7, 2014.

responsible manner, so that the person appointed by the President in following the consultation, the conviction will be formed that he will succeed in obtaining the support of the majority of parliamentarians, therefore, the vote of confidence for the new Government. This rule is equally valid for the investiture of the Government after the parliamentary elections, as well as later, during the exercise of the parliamentary mandate, if situations arise that determine the appointment of a new Government. In conclusion, the consultation to which the constitutional norms refer is not an act of courtesy, it is not a simple exchange of opinions, but a real and responsible dialogue, which produces important effects in the economy of the procedure provided for by art. 103 para. 1 of the Constitution, in the sense that it objectively substantiates the President's assessment and decision to appoint the Prime Minister"[39].

In conclusion, by carrying out the consultations and the evaluation that substantiates his decision, the President must take into account the importance of the role that the candidate designated for the position of prime minister has in the continuation of the investiture/appointment procedure of the Government.

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[39] Decision of the Constitutional Court of Romania no. 85 of February 24, 2020, published in the Official Gazette of Romania, Part I, no. 195 of March 11, 2020.

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APPARENT AND HIDDEN DEFECTS IN IT OUTSOURCING CONTRACTS AND IN SOFTWARE PROGRAMS. THEORETICAL AND PRACTICAL ASPECTS

Tiberiu Daniel TRIF[*]

ABSTRACT

This paper analyzes apparent and hidden defects in the context of IT outsourcing contracts, with a special focus on software. It examines the national, and briefly, the European legal framework relating to these defects, highlighting the legal and practical implications for the parties involved. Through practical examples, it provides an integrated perspective on how these vices may influence contractual relationships and legal responsibilities in the IT sector.

KEYWORDS: *outsourcing; apparent defects; hidden defects; commercial contracts; defects; software programs;*

1. Introduction

Accelerated digitization and the widespread use of information technologies have transformed the way organizations manage their business. In this context, IT outsourcing has become a strategic solution, allowing companies to outsource software development and maintenance to specialized suppliers. However, the quality of the software products delivered under these contracts is essential to achieve the proposed objectives.

One of the major risks associated with outsourcing contracts is compromising the quality of the products or services delivered. Outsourcing only achieves its purpose if the project meets the quality standards expected by the beneficiary. Unfortunately, this can be difficult to achieve with unreliable or unreliable suppliers. In order to minimize these risks, it

∗ *Ph.D. Student, "Titu Maiorescu" University, Bucharest, Romania.*

is essential to choose a reliable partner as well as clear and detailed communication of the quality standards required in the project[1].

In practice, software programs may have defects that affect their performance or usability. In Romanian and European law, these defects are categorized into apparent defects, which are obvious at the time of delivery, and hidden defects, which become visible only after prolonged use or detailed technical analysis. These problems can lead to conflicts between the parties, especially in the absence of well-defined contractual clauses and consistent testing both during the execution of the contract, at various stages of the project, and at the end of the project and handover.

This paper analyzes the issue of apparent and hidden defects in the context of IT outsourcing contracts, focusing on software programs. The aim is to define and explain these categories of defects, highlight the applicable legal framework in Romania and the European Union, as well as to present the practical implications. Through a theoretical approach and practical examples, the paper aims to provide a solid basis for the legal management of these complex situations.

2. Presentation of the legal framework and types of defects.

2.1. Definitions and legal framework

Definition of apparent and hidden defects. Apparent defects are those defects that can be easily identified at the time of delivery of the product or service. They are obvious and do not require detailed technical analysis to be discovered. Typical examples in the IT domain include obvious coding errors that prevent the application from working; incomplete or non-functional graphical user interfaces; or missing certain modules or functionality specified in the contract.

Hidden defects, on the other hand, are defects that cannot be identified by a normal inspection at the time of delivery and require the use of the software under real-life conditions or a more detailed technical examination. A hidden defect is a defect which, at the time of delivery, could not have been discovered by a prudent and diligent purchaser without expert assistance. In IT, for example, such a defect can be exemplified by

[1] 8 risks of IT outsourcing and ways to avoid those – https://diceus.com/risks-of-it-outsourcing-how-to-manage-them/

scalability or performance problems that only occur under conditions of heavy use; security vulnerabilities (e.g. backdoors) or incompatibilities with other systems that were not initially tested.

The seller's obligation to deliver goods in conformity is also applicable to services and software products and article 1710 of the Civil Code defines hidden defects as those defects which could not have been discovered by the buyer through normal inspection and which render the product unfit for its intended purpose or which so diminish its value or use that if the buyer had known of the defect(s) he would not have bought the good or would have paid a lower price. Articles 1707-1715 of the Romanian Civil Code regulate the supplier's obligation to deliver goods in conformity and to be liable for defects, as well as the remedies available to the buyer.

According to Article 1707 para. 2 of the Civil Code, it refers to the defect of consent which consists in an error as to the substance of a good, i.e. an essential quality of the good. If the buyer has not been able to purchase the desired good because of this defect, he is entitled to have the contract annulled. If the error relates to certain qualities of the good and the good delivered is unfit for use because of hidden defects, the buyer can bring an action against the seller under a guarantee[2].

Legal practice emphasizes a clear difference between errors of substance and latent defects. The former allows an action for rescission where the error affects the very nature of the performance, while latent defects entitle the buyer to choose between rescission of the contract and a reduction in the price[3].

Hidden defects, commonly referred to as "redhibitory" defects, refer to defects which, in Roman law, were of such importance that the seller was obliged either to replace the goods or to refund the price paid. The seller's liability for such defects is subject to the cumulative fulfillment of certain requirements: the defects must be hidden, have existed from the time of delivery of the goods and be sufficiently serious to significantly impair their use[4].

In IT outsourcing contracts, defects or non-conformities in the delivered software products are essential for assessing the quality of the services

[2] Garanția pentru vicii ascunse în cazul vânzării – https://www.avocatmateigabriel.ro/garantia-pentru-vicii-ascunse-in-cazul-vanzarii/.

[3] *Ibidem.*

[4] *Ibidem.*

provided. From both a legal and a technical point of view, we are of the opinion that any "bug", as it is called in practice, is likely to fall into one of the two categories of defects defined above.

Notice periods and liability for defects are regulated according to the nature of the defect. In practice, and also often contractually, apparent defects must be claimed within a reasonable time after delivery and most often even during delivery or testing when we are talking about software products, while for defects the buyer is obliged according to art. 1709 para. 1 of the Civil Code to bring them to the seller's attention within a reasonable time, and if the seller is a professional, a hypothesis fully applicable in an outsourcing contract between two commercial companies, then the term is 2 working days according to art. 1709 para. 2 Civil Code.

The European Union imposes strict user protection standards for digital products, including software. Directive 2019/770, implemented in Member States by January 1, 2022, sets legal requirements for the conformity of digital content and defines the responsibilities of providers in case of non-compliance. It has been transposed by Law 365/2002 on e-commerce indirectly regulates the conformity of digital products, emphasizing user protection and the supplier's obligation to remedy defects within a reasonable time.

Key provisions include the supplier's obligation to ensure the functionality, interoperability and security of software products for a reasonable period of use, or to classify technical defects as hidden defects if they are not detectable at the time of delivery.

In practice, differentiating between apparent and hidden defects can become complex, especially in the field of software development where i. software delivery often involves incomplete versions or prototypes, or ii. problems can be attributed to testing gaps or implementation mistakes. For example, in the case of a contract to develop a mobile application, an error that prevents the application from opening would be considered an apparent defect. In contrast, a subsequently discovered security problem that allows unauthorized access to data would be classified as a hidden defect.

2.2. Apparent defects in IT outsourcing contracts

As mentioned above, apparent defects are those faults in a product or service that can be easily identified by the recipient at the time of delivery,

without requiring in-depth technical knowledge or further investigation. In IT outsourcing, such defects are often related to missing functionalities explicitly specified in the contract; user interface errors (e.g. unresponsive buttons, incomplete menus); obvious visual defects (e.g. misaligned displays or incorrect colors); obvious technical problems when launching or running the application (e.g. frequent crashes, missing essential files for installation).

Practical example: software intended for human resources management is delivered without the option to generate reports, an essential functionality clearly indicated in the requirements documentation. This type of problem would be classified as an apparent defect, as it can be immediately identified during initial testing.

The legal implications of apparent defects are manifold, but they are quickly resolved at the time of testing the software products, i.e. when they are received. Most often, the beneficiary will ask the supplier to remedy, within a contractually agreed or negotiated timeframe, all deficiencies found during testing.

Of course, due regard must be paid to the contractual time limits and good faith in relation to the nature of the contract and the complexity of the product or service delivered, bearing in mind that failure to respect this time limit may lead to the loss of the beneficiary's right to invoke the non-conformity.

In IT outsourcing contracts, notification of apparent defects is essential in order to allow the supplier to rectify them or to initiate negotiations on price reduction or product replacement, although in practice, when developing a software product for which considerable sums have been spent to create, it is not in the interest of the beneficiary to request product replacement but only its correction or payment of late payment penalties.

Also, as a matter of good faith, we believe that courts should weigh the reasonableness of the reasonable time against the complexity of the software and the actual possibility of detecting defects. For example, for simple applications, the reasonable time may be a few days, while for complex software, it may be extended to several weeks.

In order to avoid conflicts regarding the identification and notification of apparent defects, IT outsourcing contracts usually include specific clauses governing the inspection period, which is that the beneficiary may be obliged to inspect the product or service within 5 working days, or may go up to 15-30 calendar days after delivery, and the notification obligation

that the beneficiary must communicate in writing all apparent defects identified during the inspection period. Failure to comply with these above clauses on failure to notify apparent defects within the time limit may exonerate the supplier from any liability for such defects.

It should also be noted that the signing of the acceptance documents, i.e. the completion of the product testing phase, as well as the fulfillment of any possible warranty period, subsequently discharges and absolves the supplier from any liability[5].

Practical applications. An illustrative example of a dispute might be where a software supplier delivers a financial management application that could not import data from a format specified in the original requirements. The beneficiary notifies this problem three weeks after delivery and the court considers the deadline reasonable given the complexity of the project. Another hypothetical case could be that of an e-commerce platform that has display errors when running on different browsers. The beneficiary will notify the defect two days after delivery, and the court confirms that the deadline has been respected, obliging the supplier to remedy the problem at no extra cost.

European Union Directive 2019/770 on the supply of digital content and digital services provides that the recipient must inform the provider of any detected non-compliance within a reasonable time after its discovery. The applicability of this term is interpreted according to the nature of the software product and the contractual specifications.

Also, guidelines issued[6] by organizations such as ISO (International Organization for Standardization) recommend establishing clear processes for testing and verification of software prior to acceptance of delivery to minimize the risks associated with apparent defects. These standards define essential characteristics of software such as performance, security and reliability.

To effectively manage apparent defects in IT outsourcing contracts, it is recommended to: i. establish clear testing and acceptance procedures for software products, allowing the identification of apparent defects before

[5] For more legal implications regarding the signing without objections of the handover documents, as well as the final handover process, see : Decision No. 1156/2008, delivered on March 20, 2008 in Case No. 3845/2/2006 of the High Court of Justice of Romania.

[6] ISO/IEC TS 33061:2021, Information technology – Process assessment – Process assessment model for software life cycle processes – https://www.iso.org/standard/80362.html.

delivery is finalized; ii. define in the contract the terms and modalities for notifying apparent defects and the remedies available in such situations; iii. document in detail the software specifications and requirements to facilitate the identification of possible non-conformities at the time of delivery. Applying these measures can help to reduce disputes and ensure effective collaboration between the parties involved in IT outsourcing contracts.

2.3. Hidden defects in IT outsourcing contracts

Defects that cannot be identified at the time of delivery of the product or service, either by normal examination and with expert help, are hidden defects. They become apparent only after extensive use or detailed technical analysis.

In IT, hidden flaws can have multiple causes, including performance problems that only become apparent under real-world usage conditions, such as application slowdowns under heavy load. Security vulnerabilities, such as breaches in systems that allow cyber-attacks, are also a common source of these flaws. Other causes can be technical incompatibilities, such as the inability to integrate the software with other existing systems, or design errors, exemplified by inefficient algorithms that affect the functionality of the application. Example: an apparently functional inventory management system may show major errors in inventory calculation only after several months of intensive use. This type of defect is a hidden flaw.

A key issue is the notification period, which is often hard negotiated during the pre-contractual phase, and the penalties that apply to both parties if hidden defects are discovered. The seller of a software product could be exonerated if he was not notified in time and was unable to take certain measures which might have been required. On the other hand, the buyer could claim late payment penalties or damages for the period during which he cannot use the software product. All this of course also has an effect on the period for cure. In practice, the more severe the defect complained of, or the more severe the defect is, the more the buyer will require the remedy to take place immediately. Otherwise, the period within which the remedy is reasonable varies according to the nature of the product and the complexity of the defect.

In order to manage hidden defects effectively, IT outsourcing contracts usually include the following clauses regarding the extended warranty

period where the supplier undertakes to remedy hidden defects discovered within a specified period after delivery ; the notification and remedy procedure where the beneficiary must notify defects in writing and allow the supplier to propose remedies and limitation of liability clauses whereby the supplier may seek to limit liability for certain categories of hidden defects, provided that these clauses are not abusive.

Regarding the practical applications of these clauses and existing legislation, one can imagine the case of an IT provider who delivered an internet banking application that seemed to work correctly. A few months after implementation, a cyber-attack revealed a security hole in the authentication algorithm. The bank claimed that the provider was liable for this hidden flaw. The court ruled that the supplier was liable because the breach was caused by a design flaw that should have been anticipated.

Another hypothetical situation could be the case of a company that has purchased an ERP system which, after installation, proved to be incompatible with the existing hardware systems. The beneficiary will seek damages in court for the additional costs incurred by the need to change the hardware infrastructure. The court concluded that the supplier was responsible for the hidden defect because the incompatibility could have been avoided by a detailed preliminary analysis.

2.4. Legal liability for defects

Liability according to Romanian law. In Romania, liability for hidden defects is governed by the Civil Code, which sets out the rights and obligations of the parties to a contract of sale-purchase or provision of services. According to article 1707 and the following articles, the buyer, or often the software service provider in our case, is obliged to guarantee against hidden defects of products or services delivered under a software purchase-sale contract or an outsourcing contract.

In the case of apparent defects, most often contractual, an obligation is imposed on the recipient to inspect the good or service and notify the defects within a reasonable time. For hidden defects, however, the period starts to run from the time of discovery.

It is not without reviewing a relevant decision[7] of the Court of Cassation in a case concerning claims arising out of an alleged breach of contractual obligations by a contractor in a business-undertaking case.

The analyzed case reflects the complexity of legal situations involving apparent and hidden defects in the context of works contracts. Court rulings throughout the entire procedural cycle have emphasized the importance of compliance with contractual deadlines and procedures, as well as the decisive role of final acceptance in exonerating the contractor from liability. Acceptance without any objections or reservations on the part of the beneficiary was considered equivalent to acceptance of the works and discharge of the contractor from liability for apparent defects in accordance with the contract terms.

At the same time, the technical expert's report demonstrated that the quality deficiencies were local and visible, and therefore not hidden defects, and that the correct application of the contractual clauses and legal provisions was decisive in establishing the relationship between the parties. This case underlines the importance of rigorous management of the acceptance process and warranty periods, as well as the use of clear contractual clauses to protect the interests of both parties involved.

The warranty for defects, stipulated under article 1710 of the Civil Code, gives the buyer the right to request various remedies to eliminate the negative consequences of hidden or apparent defects in the purchased good. These legal effects are designed to restore the contractual balance and ensure that the good fulfills the purpose for which it was purchased. Thus, depending on the seriousness of the defects and the specific situation, the buyer may, depending on the seriousness of the defects and the specific situation, obtain the removal of the defects by the seller or at the seller's expense, the replacement of the good with a similar but defect-free good, a reduction in the price corresponding to the reduction in the value of the good or, in more serious cases, rescission of the sale.

In addition, the law gives the court the possibility to adapt the legal remedies to the circumstances of the case. At the seller's request, the court may order a different remedy from that requested by the buyer, taking into account the seriousness of the defects, the purpose for which the contract was concluded and other relevant circumstances. This flexibility ensures a

[7] Decision No 1156/2008, delivered on March 20, 2008 in Case No 3845/2/2006 of the High Court of Justice of Romania.

fair resolution of disputes and protects the interests of both parties in accordance with the principles of good faith and proportionality.

Liability according to European legislation. At the European level, Directive 2019/770 on the supply of digital content and digital services harmonizes the liability rules for hidden defects, including for software products. Under this Directive the supplier is liable for non-conformities for a reasonable period of time, which may be longer than the standard two-year period, depending on the nature of the digital product.

Article 11 of Directive 2019/770 regulates the liability of the trader in case of non-delivery or non-compliance of digital content or digital services. According to the provisions, the trader is liable for any non-delivery in accordance with the requirements laid down in Article 5. Where the contract stipulates a single act of supply or a series of individual acts of supply, the trader's liability extends to any lack of conformity existing at the time of supply, in accordance with Articles 7, 8 and 9, subject to the provisions of Article 8(2)(b).

Also, according to national law, if the trader's liability for lack of conformity is limited to a certain period from the time of supply, this period may not be less than two years from the date of supply, without contravening Article 8(2)(b). This legal framework ensures the protection of consumers and clearly sets out the responsibilities of the trader in the case of the supply of non-compliant digital products or services.

At the same time, the beneficiary must inform the supplier of defects within a reasonable time of their discovery and, last but not least, the manufacturer or supplier cannot exclude or limit liability for defects concealed by improper concealment, even if the contract includes such clauses.

In the IT sector, outsourcing contracts often include detailed clauses to cover liability for defects, both apparent and hidden. These clauses may specify extended warranty periods tailored to the nature of the software product. They also provide clear procedures for notification and resolution of defects, including strict deadlines for remedies. Limitations on the supplier's liability for certain categories of defects (e.g. minor errors that do not affect essential functionality) are not without interest and are not absent.

If a dispute arises, the parties can opt for mediation, arbitration or court settlement. Disputes over hidden IT defects are often complex, requiring

detailed technical expertise to determine the cause and impact of the defects.

A practical example could be a situation where an IT vendor delivered a CRM system that functioned properly during testing, but experienced major performance problems after integration with the customer's existing database. The beneficiary notified the defects six months after delivery, claiming liability for hidden defects. The court may decide in favor of the beneficiary, considering that the supplier should have anticipated these problems at the design stage.

3. Conclusions

Apparent and hidden flaws in IT outsourcing contracts reflect a complex issue that combines technical and legal dimensions. Software plays an essential role in the day-to-day operations of companies, technical defects can lead to significant financial losses, reputational damage and even major legal risks.

From the perspective of Romanian law, we consider the Civil Code to be insufficient, even though it provides a basis for protecting beneficiaries against defects in the case of sale-purchase contracts, which could be extended to defects in software products. Apparent defects have to be notified promptly, while hidden defects are protected by extended warranties, which provide remedies or compensation for deficiencies that occur later. It is essential, however, that the contractual terms are drafted precisely, clarifying the obligations of the supplier and the rights of the recipient in the event of defects.

From a practical point of view, the paper highlights some key steps for parties involved in IT outsourcing contracts. The beneficiary should pay particular attention to the process of testing and verification of software products before acceptance. Defects notification and remediation procedures should be well defined in the contract, avoiding ambiguous interpretations or liability gaps.

Software vendors must also invest in rigorous quality assurance processes, following international standards such as ISO/IEC 25002:2024[8],

[8] ISO/IEC 25002:2024, Systems and software engineering – Systems and software Quality Requirements and Evaluation (SQuaRE) – Quality model overview and usage https://www.iso.org/standard/78175.html.

which define the fundamental requirements for software products. These include performance, security and reliability, essential criteria for reducing the risks associated with hidden defects.

In addition, interdisciplinary collaboration between IT and legal specialists is important. Lawyers involved in drafting and negotiating contracts need to understand the technical complexities of software products, while IT developers need to be aware of the legal implications of non-conformity of delivered products.

Finally, the paper emphasizes the importance of adopting a proactive approach, not only pre-contractual but also during the execution of the contract, in managing apparent and hidden defects, both through preventive measures and effective solutions in case of deficiencies. The success of IT outsourcing contracts depends primarily on clear communication between the parties, compliance with contractual obligations and ensuring high quality of delivered products.

In this way, by better understanding the legal regulations and applying IT best practices, stakeholders can minimize risks and create a contractual environment conducive to innovation and performance.

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THE ROLE OF THE PROSECUTOR IN SELECTING PREVENTIVE MEASURES IN THE CONTEXT OF HUMAN RIGHTS PROTECTION

Elena Larisa TUFAN[*]

ABSTRACT

The prosecutor plays a central role in the criminal process, ensuring the balance between public interest and the protection of fundamental human rights. The selection of preventive measures is a critical stage in the criminal procedure, as these measures can significantly impact individual rights, particularly the right to liberty and security. This article explores the prosecutor's role in selecting preventive measures from a human rights perspective, emphasizing the prosecutor's duty to comply with national and international human rights standards.

KEYWORDS: *prosecutor; preventive measures; human rights; criminal procedure;*

1. Introduction

Preventive measures are essential instruments in criminal proceedings, designed to ensure the proper administration of justice by preventing interference with evidence, witness tampering, or the escape of the accused. However, such measures have significant implications for the fundamental rights of individuals, particularly the right to liberty guaranteed by both the European Convention on Human Rights (ECHR) and the Constitution of Romania.

The prosecutor, as a key figure in the criminal justice system, bears the responsibility of recommending preventive measures in accordance with the principles of necessity, legality, and proportionality. This responsibility demands not only a thorough evaluation of the circumstances but also strict adherence to international and national human rights standards. The role of the prosecutor becomes even more critical in the context of systemic issues such as prison overcrowding, which exacerbates the risk of degrading detention conditions and poses additional challenges for respecting human dignity.

* *Ph.D. Student, "Titu Maiorescu" University, Bucharest, Romania.*

This paper aims to analyze the prosecutor's role in selecting preventive measures, focusing on legal obligations, practical challenges, and the broader implications for human rights protection.

2. Preventive Measures in Criminal Procedure Law

Preventive measures are defined in specialized literature as procedural criminal law institutions of a coercive nature, through which the suspect or defendant is prevented from undertaking certain actions that could negatively impact the conduct of the criminal trial or the achievement of its objectives[1].

The preventive measures provided in the Code of Criminal Procedure include detention, judicial control, judicial control on bail, house arrest, and preventive detention.

These measures can restrict, to varying degrees, the right to liberty, a right protected by the Romanian Constitution and the European Convention on Human Rights (ECHR).

According to Article 23 of the Romanian Constitution, individual freedom and personal security are inviolable. Searches, detentions, or arrests are permissible only in cases and under procedures prescribed by law.

Under Article 5 of the ECHR, restrictions on liberty must be proportional and justified. The prosecutor must demonstrate the necessity of applying preventive measures, and such restrictions should be justified only when less restrictive measures are insufficient to ensure the proper conduct of the criminal trial.

When formulating a proposal for preventive detention, the prosecutor must analyze whether the general and specific conditions stipulated in the Code of Criminal Procedure, in light of international standards, are met.

The restriction of liberty through preventive measures, particularly preventive detention, must be proportional and adhere to legality criteria. The prosecutor must justify the choice of such a measure based on solid evidence, demonstrating that the accused poses a danger to public order or to the proper conduct of the criminal trial. The abusive or arbitrary application of preventive measures can lead to violations of human rights.

[1] Grigore Gr. Teodoru, *Drept procesual penal român. Partea Specială,* Universitatea A.I. Cuza, Facultatea de Drept, Iași, 1974, p. 194.

Thus, in a criminal case, it is analyzed whether the essential conditions stipulated under Article 223 of the Code of Criminal Procedure in conjunction with Article 202(1)-(3) are met. This involves assessing whether there are sufficient evidence or strong indications leading to a reasonable suspicion that the defendant committed the alleged offense; whether one of the situations outlined in Article 223(2) is present, indicating that deprivation of liberty is necessary to remove a state of danger to public order; and whether preventive detention is proportional to the seriousness of the accusation and necessary to achieve its purpose, namely ensuring the proper conduct of the criminal trial, preventing the defendant from evading prosecution or trial, or preventing the commission of other offenses.

The prosecutor must establish that the legally administered evidence during the investigation confirms the existence of objective facts, as per Article 5(1)(c) of the European Convention on Human Rights, which would convince any objective and impartial observer that it is possible the defendant committed the alleged offense. The notion of reasonable suspicion does not necessarily imply evidence of the same level as required for a conviction but rather that the evidence is sufficient to persuade an objective observer that it is possible the defendant committed the offense they are charged with.

3. Responsibilities of the prosecutor in the assessment of preventive measures

The prosecutor is considered a guarantor of public interest, yet they must also act as a defender of the fundamental rights of the accused individuals. This dual responsibility requires a constant balance between protecting public order and ensuring respect for human rights. Thus, the prosecutor should propose preventive measures only when justified by the need to protect the general interests of society while avoiding abuse or unjustified restrictions on individual liberty.

The Romanian Constitution and international human rights norms mandate that any restriction on liberty must be strictly necessary and proportional to the intended purpose[2].

Article 5 of the European Convention on Human Rights (ECHR) stipulates that any deprivation of liberty must be justified by legitimate

[2] Art. 53, Romanian Constitution.

reasons and applied in accordance with legal procedures. In this context, the prosecutor is obligated to adhere to both domestic laws and international standards, ensuring that any preventive measure respects fundamental rights.

The principle of proportionality[3] is central to this process. The choice of measures must correspond to the severity of the offense, and less restrictive alternatives should be considered before implementing preventive detention. Arbitrary application of preventive measures can result in violations of fundamental human rights.

The discretion afforded to the prosecutor in choosing preventive measures is a critical element of the criminal process, but this discretion must be exercised prudently and responsibly. The prosecutor has the authority to decide on the appropriateness of proposing a preventive measure, and this decision must always be well-founded and comply with the principles of legality and proportionality.

Exercising discretion involves a complex evaluation of all case elements, including available evidence, social danger posed by the accused, and their behavior. The prosecutor must avoid the automatic application of the most restrictive preventive measures, such as preventive detention, in the absence of real and justified necessity. In many cases, less restrictive alternatives can adequately protect public interest without disproportionately infringing on the accused's liberty.

Judicial control serves as an example of a preventive measure that balances the need to protect public order with respect for individual fundamental rights. The prosecutor may impose this measure when there is a risk of the accused interfering with the investigation, but the danger they pose does not justify a more restrictive measure.

By applying judicial control, the movement of the accused can be restricted without completely depriving them of liberty. This measure respects the principle of proportionality and helps prevent abuses.

Before adopting a preventive measure[4], the prosecutor must evaluate the severity of the offense, the degree of social danger posed by the offender, the likelihood of reform, potential interference with the investigation, and the risk of the accused evading prosecution.

[3] S. Diaconescu, *Măsurile preventive în procesul penal. Garanții și principii*, Universul Juridic Publushing House, Bucharest, 2020.

[4] The Council of Europe Guidelines on the Application of Preventive Measures, 2017.

Article 223(2) of the Code of Criminal Procedure specifies the offenses for which preventive detention or house arrest can be ordered, particularly those involving severe penalties, such as those with a minimum sentence of five years imprisonment.

Regarding the social danger posed by the offender, the prosecutor must assess whether the accused represents a social threat justifying the restriction of their liberty. This assessment takes into account the prior behavior of the accused, criminal records, and the likelihood of committing new offenses during the investigation.

Another criterion is the risk of the accused interfering with the investigation. This risk includes the possibility of destroying evidence, influencing witnesses, or obstructing the discovery of the truth. In this context, Article 202(1) of the Code of Criminal Procedure emphasizes that preventive measures may be taken to prevent such actions.

Additionally, the prosecutor must evaluate the likelihood of the accused attempting to flee jurisdiction to avoid prosecution. In such cases, preventive measures like detention or judicial control with restrictions on leaving the country or locality may be necessary.

3.2. Choosing Preventive Measures in the Context of Prison Overcrowding

Prison overcrowding represents a major structural issue in Romania's justice system, with direct implications for the application of preventive measures. In this context, prosecutors must take a proactive role in selecting preventive measures that balance the protection of public interest with the respect for fundamental rights, particularly in cases where alternatives to pretrial detention can prevent the worsening of existing problems in the penitentiary system.

Prison overcrowding in Romania is a long-standing issue[5] acknowledged by both national authorities and international bodies such as the European Committee for the Prevention of Torture (CPT) and the European Court of Human Rights (ECHR). Romanian prisons have been repeatedly criticized, and the country has faced numerous convictions for

[5] S. Lemke, "Prison Overcrowding and Article 3 ECHR: European Standards on Human Dignity", in Journal of European Human Rights Law, 2020, vol. 9(2), pp. 34-47.

violations of Article 3 of the European Convention on Human Rights, which prohibits inhuman and degrading treatment.

According to a TPC 2022 report, Romania has significant challenges related to overcrowding, poor detention conditions, and limited access to rehabilitation programs.

Recent news[6] highlights that prison unions have sounded the alarm again, emphasizing that Romanian prisons have become "schools of crime", where inmates, instead of being rehabilitated, become more violent and dangerous.

In this context, the prosecutor's role becomes even more critical, as they must consider the impact of their decisions on an already fragile system. Pretrial detention, being the most restrictive preventive measure, directly contributes to prison overcrowding, further straining a penitentiary system that cannot adequately meet current demands.

For this reason, prosecutors are called upon to analyze even more responsibly the necessity of preventive measures, particularly when less restrictive alternatives could achieve the same outcomes.

Beyond the legal principle of proportionality mentioned earlier, applying pretrial detention in a context of prison overcrowding may be deemed a disproportionate and even counterproductive measure. Not only does it further burden the penitentiary system, but it also exacerbates the deterioration of detention conditions and, consequently, the fundamental rights of detainees.

Prosecutors, considering the realities of the penitentiary system, should prioritize alternative measures such as judicial control or house arrest in cases where the risks of flight, witness tampering, or reoffending can be managed through less restrictive means.

Judicial control and house arrest are critical solutions that prosecutors can propose instead of pretrial detention, especially in cases where the offense committed is not particularly severe, and the social risk posed by the accused is minimal. These measures allow authorities to monitor suspects without completely depriving them of liberty, thereby reducing pressure on the penitentiary system.

Additionally, such measures enable defendants to continue daily activities, such as employment or maintaining social and family relation-

[6] Digi24, "Sindicaliștii din penitenciare anunță proteste: Închisorile din România, școli de criminalitate", 2024. Disponibil la: digi24.ro.

ships, which can contribute to reducing recidivism. Moreover, these measures align more closely with international standards for respecting human dignity and fundamental rights, while also preventing the exacerbation of prison overcrowding[7].

In the context of a penitentiary crisis, proposing alternative preventive measures becomes not only a valid legal option but also a practical and moral necessity to maintain a balance between security and human rights.

The decisions made by prosecutors regarding preventive measures affect not only the accused but also society and the penitentiary system[8]. When large numbers of individuals are placed in pretrial detention, the prison system faces an increase in the inmate population without corresponding adjustments in infrastructure or resources. This directly impacts detention conditions, which become increasingly degrading, exposing detainees to higher risks of violence and criminal activity.

By adopting alternative measures, prosecutors can contribute to alleviating the crisis in the penitentiary system while upholding the principles of justice, proportionality, and respect for human rights.

3.3 International Standards and ECHR Jurisprudence

The European Court of Human Rights (ECHR) has established strict standards regarding the application of preventive measures, particularly pretrial detention. According to the ECHR jurisprudence, pretrial detention should only be applied when other preventive measures are insufficient to ensure the progress of the criminal proceedings.

The *Kudła v. Poland* case[9] is a significant reference in the European Court of Human Rights (ECHR) jurisprudence concerning the rights of persons detained preventively. The ruling clarified the application of Article 5 (Right to Liberty and Security) and Article 3 (Prohibition of Inhuman or Degrading Treatment) of the European Convention on Human Rights.

Essentially, Jan Kudła, a Polish citizen, was placed in pretrial detention in 1991 under accusations of fraud and other economic crimes. His preventive detention lasted for approximately 3 years and 9 months, being

[7] R. Duminică, *Reforma sistemului penitenciar din România: Perspective juridice și sociale*, Publishing House Universitară, Bucharest, 2019.

[8] G. Vasilescu, "*Alternative la detenție: Perspective europene și aplicabilitatea în România*", in Revista Română de Drept Penal, 2019, vol. 15(2), pp. 78-92.

[9] CEDO, *Kudła vs. Polonia* (2000), Hotărârea din 26 octombrie 2000.

extended several times by the Polish authorities. Kudła challenged the extension of his detention, arguing that the duration was excessive and that there were insufficient grounds to justify his deprivation of liberty[10]. He invoked a violation of Article 5 of the Convention, claiming that the length of pretrial detention was unreasonable and disproportionate, and of Article 3, alleging inhumane conditions in Polish prisons, citing inadequate medical assistance due to his mental health issues.

In its judgment of October 26, 2000[11], the Court emphasized that the duration of pretrial detention must be reasonable, and national authorities must present solid and relevant reasons for extending this measure. In the case of Kudła, the nearly 4-year period of pretrial detention was deemed excessive and unreasonable.

The ECHR criticized the fact that Polish courts had not adequately considered less restrictive alternatives, such as release on bail or judicial control measures.

Although a direct violation of Article 3 was not found in this case, the ruling set an important precedent regarding the obligation of states to provide adequate medical care during detention.

The *Kudła v. Poland* case was essential in strengthening the ECHR's jurisprudence on protecting the rights of persons deprived of liberty[12]. The ruling highlighted the importance of a thorough analysis of each case by national authorities and the need to respect the principle of proportionality when applying preventive measures. This case laid the foundations for clear legal standards regarding the reasonable duration of pretrial detention and protection against inhuman or degrading treatment, influencing the evolution of human rights jurisprudence.

Prosecutor's Responsibilities in Evaluating Preventive Measures is essential to balancing the protection of the public interest with respect for the fundamental rights of the accused person. The application of preventive measures must be based on a thorough and objective analysis of the circumstances of the case, in accordance with the principles of proportionality and necessity. ECHR jurisprudence provides clear guidance

[10] Harris D., O'Boyle M. & Warbrick C. (2018). *Law of the European Convention on Human Rights*. Oxford University Press.

[11] Judgement of the Court in Case 30210/96, Strasbourg, 2000, on https://www.echr.coe.int.

[12] Schabas W.A., *The European Convention on Human Rights: A Commentary*, Oxford University Press, 2015.

on the application of these measures, emphasizing that deprivation of liberty should be a last resort.

The *Bragadireanu v. Romania* and *Iacov Stanciu v. Romania* cases represent landmarks in the European Court of Human Rights jurisprudence regarding detention conditions, highlighting chronic issues in Romanian prisons such as overcrowding, poor sanitary conditions, and limited access to medical services.

The *Bragadireanu v. Romania case* (2008)[13] was one of the most relevant in highlighting the serious deficiencies in the Romanian penitentiary system. The European Court of Human Rights ruled that the applicant was subjected to inhuman and degrading treatment, contrary to Article 3 of the European Convention on Human Rights, which explicitly prohibits torture and degrading or inhuman treatment.

One of the main issues raised by the applicant was extreme overcrowding. The personal space allocated to inmates in Romanian prisons was far below the international minimum standards recommended by the European Committee for the Prevention of Torture (CPT), which stipulates a minimum of 4 square meters per inmate. The lack of personal space contributed to degrading living conditions, causing stress and physical discomfort for those detained.

Additionally, the sanitary conditions were inadequate, reflecting a lack of access to decent sanitation facilities and the absence of regularly provided hot water. This had a significant impact on the personal hygiene of detainees, increasing the risk of diseases and infections. Penitentiary authorities did not take sufficient measures to ensure compliance with hygiene standards necessary for decent living conditions.

Limited access to medical services was another central point of the complaint. During detention, the applicant's health deteriorated, and the authorities failed to provide adequate medical treatment, thus violating the obligation to protect the health and life of persons in custody. The lack of effective medical intervention was seen by the Court as an example of systematic neglect.

The Court found that such conditions not only violated Article 3 of the European Convention on Human Rights but also reflected a lack of an effective strategy by the authorities to address persistent structural

[13] *Bragadireanu c. României,* cererea nr. 22088/04, hotărârea din 6 decembrie 2008, https://www.echr.coe.int.

problems within the penitentiary system. This ruling highlighted the need for urgent reforms to improve conditions in Romanian prisons and uphold the fundamental rights of detainees[14].

In the *Iacov Stanciu v. Romania* case[15], the applicant presented a series of deficiencies in the detention conditions in Romanian prisons, emphasizing their impact on the quality of life and health of detainees. One of the central problems was severe overcrowding. Prisons constantly exceeded their official capacity, and inmates were forced to share extremely cramped spaces, directly affecting their physical and mental well-being. The lack of personal space necessary for a dignified existence was considered a determining factor in the degrading conditions in prisons.

Furthermore, inadequate ventilation and lighting in the detention cells contributed to the worsening living conditions. The cells were poorly ventilated, leading to the accumulation of unpleasant odors and increased humidity, creating an unhealthy environment. Additionally, the lighting was insufficient, depriving inmates of adequate access to natural or artificial light, which affected their well-being and mental health. These deficiencies not only increased discomfort but also posed direct risks to physical and mental health.

Regarding sanitary conditions, the applicant highlighted limited access to running water and poorly maintained toilets. Detainees did not have regular access to clean water for personal hygiene, and the available sanitation facilities were often insufficient and in a state of advanced deterioration. This situation increased vulnerability to various infections and contributed to the perpetuation of an unhealthy living environment.

Another major issue was the lack of measures to prevent communicable diseases, such as tuberculosis (TB). Overcrowding, lack of ventilation, and unsanitary conditions facilitated the spread of these diseases among detainees. In the absence of effective prevention programs and adequate treatment measures, prisons became a breeding ground for contagious illnesses, jeopardizing the health of detainees and prison staff.

The European Court of Human Rights concluded that these detention conditions, taken as a whole, represented a violation of Article 3 of the

[14] Curtea Europeană a Drepturilor Omului, *Manual de jurisprudență privind articolul 3 din CEDO*. Strasbourg, 2020.

[15] CEDO, *Iacov Stanciu c. României,* cererea nr. 35972/05, hotărârea din 4 iulie 2012, https://www.echr.coe.int.

European Convention on Human Rights[16], prohibiting inhuman and degrading treatment. Its ruling emphasized the need for effective measures to address the deficiencies in the Romanian penitentiary system.

Conclusions

We appreciate that the prosecutor's role in adopting preventive measures is essential for maintaining the balance between protecting the public interest and respecting fundamental rights, as the prosecutor is obliged to adhere to international standards, including ECHR jurisprudence, and assess the proportionality of proposed measures to avoid abuse.

The prosecutor must prioritize less restrictive alternative measures, such as judicial control or house arrest, when they can ensure the protection of the public interest without contributing to overcrowding in the penitentiary system. By adopting a balanced and responsible approach, the prosecutor can protect human rights and contribute to the improvement of conditions in prisons and the effective rehabilitation of the accused individuals.

Furthermore, we consider that the adoption of alternative measures to pretrial detention, where possible, significantly contributes to reducing overcrowding in prisons and protecting the rights of persons deprived of liberty. In a penitentiary system with structural problems, such as those in Romania, these decisions become not only a legal requirement but also a moral obligation.

The prosecutor must have an individualized and responsible approach, promoting solutions that prevent unnecessary detention, support social reintegration, and ensure a fair and humane justice system.

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ANTI-COMPETITIVE PRACTICES AND THE CLOSURE OF THE COMPETITION COUNCIL'S INVESTIGATION THROUGH THE COMMITMENTS PROCEDURE

Marcel VASILE[*]

ABSTRACT

This article analyzes anti-competitive practices and the alternative way for the Competition Council to close an investigation through the commitments procedure.
Anti-competitive practices are the main breaches of competition rules, and the discovery, investigation and sanctioning of such practices are crucial to ensure a normal competitive environment. These anti-competitive practices can affect the final consumer, who may have to pay a higher price than that which would have been freely determined by the supply and demand game. For this reason, these behaviours are considered illegal and are sanctioned with very harsh fines by the Competition Council. However, at the request of the companies under investigation, the Competition Council can close an investigation regarding a possible infringement of the competition rules through possible anticompetitive practices without imposing sanctions, by using the commitments procedure.

KEYWORDS: *anticompetitive agreements; concerted practices; infringement by object; commitments;*

I. Anti-competitive practices

1.1. Introductory considerations

Competition is fundamental to the functioning of the market economy. Under competitive pressure, businesses are forced to become efficient and to offer a wider range of products and services at lower prices, thereby contributing to consumer welfare and stimulating innovation.

To ensure fair conditions in the competition between undertakings for attracting customers, the Competition Law no. 21/1996, as amended and supplemented ("Competition Law") and the Treaty on the Functioning of the European Union – Treaty of Lisbon from December 13, 2007

* *Ph.D. Student, "Titu Maiorescu" University, Bucharest, Romania.*

("TFEU") prohibit practices between undertakings which restrict, prevent or distort competition.

Romania's membership to the European Union entails the direct application of the provisions of the Lisbon Treaty, and the field of competition law is the exclusive competence of the European Union (Article 3 TFEU). Therefore, all Member States apply the same competition rules necessary for the functioning of the internal market.

The legal norms of competition law are part of the economic public policy of direction, and the **economic public policy of direction** "*means all the provisions which provide the administrative, financial, fiscal or of other nature which the State may use to guide, conduct and direct the contractual life, so that it may be as much in accordance with the economic and social utility*"[1].

Article 5 para. (1) of the Competition Law, which transposes into national law the provisions of Article 101 para. (1) of the TFEU, provides that: '*any agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition on the Romanian market or any part of it shall be prohibited*'. When investigating possible infringements of Article 5, the Competition Council will also apply Article 101 TFEU, if there is a possibility of affecting trade between EU Member States[2].

Anti-competitive practices can consist of actions that: "*a) directly or indirectly fix purchase or selling prices or any other trading conditions; b) limit or control production, markets, technical development or investment; c) share markets or sources of supply; d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts"*[3].

The anticompetitive practices described above may therefore restrict competition by object or by effect. The distinction between an infringe-

[1] Liviu Pop, *Ordinea publică clasică și ordinea publică modernă*, Universul Juridic Premium no. 5 of 2023, available on *www.sintact.ro.*

[2] See Article 3 of the Competition Law.

[3] Art. 5 para. (1) of the Competition Law; see also Art. 101 para. (1) TFEU.

ment by object – *per se* – and an infringement by effect is particularly important in practice, especially from an evidentiary point of view.

Thus, "*anticompetitive object is taken to mean the potential of an act committed by the undertakings to affect competition, even if the objective pursued by the undertakings was not to restrict competition and even if the agreement would not be in the interest of the undertakings involved. In practice, infringements by object imply the existence of an absolute legal presumption of infringement of Art. 5 para. (1) of the law / Art. 101 para. (1) TFEU, once there is sufficient evidence of coordination between competitors*"[4].

The category of infringements by object includes, as a rule, the acts referred to in Article 7 para. (4) of Competition Law, such as: (i) fixing the prices at which products are sold to third parties, (ii) limiting production or sales, or (iii) sharing markets or customers[5].

"*The anticompetitive effect must relate to the actual or potential harm to consumers, and this harm must be appreciable, taking into account the de minimis thresholds*"[6] provided by Art. 7 para. (1), (2) and (3) of the Competition Law. Therefore, in the case of an infringement by effect, there is no presumption of anticompetitive effects, the competition authority having the task of proving not only the existence of the infringement, but also the existence of actual anticompetitive effects.

1.2. Anti-competitive agreements

"An anti-competitive agreement is an express agreement by undertakings to distort competition in one of the ways set out in para. (1) of Article 5 or in another similar way"[7].

According to the Competition Council, an agreement within the meaning of Article 5 para. (1) of the Competition Law, "*exists when the parties, explicitly or implicitly, jointly adopt a plan that determines the course of their actions (or inactions) on the market. The agreement may be explicit or it may be inferred from the behavior of the parties, since a certain conduct may demonstrate the existence of the agreement.*

[4] Valentin Mircea, *Legislația concurenței – comentarii și explicații*, C.H. Beck Publishing House, Bucharest, 2012, p. 33.

[5] *Ibidem.*

[6] *Ibidem,* p. 34.

[7] *Ibidem,* p. 30.

Moreover, it is not necessary that the participants have previously agreed on a detailed common plan. An agreement within the meaning of Art. 5 para. (1) does not require a level of certainty similar to that required for the implementation of a commercial contract"[8].

Anti-competitive agreements can take various forms, such as commercial contracts, company articles of incorporation, agreements made through electronic correspondence (e-mail exchanges), as well as "*an agreement that has only moral significance (such as, for example, a gentleman's agreement)*"[9].

In practice, by Decision No. 39/14.09.2015, the Competition Council sanctioned a clothing manufacturer and 19 of its distributors for an anti-competitive agreement which consisted in restricting the distributors' freedom to set their own resale prices for the products purchased from the manufacturer[10].

1.3. Decisions of associations of undertakings

For the purposes of applying the competition rules, an association of undertakings is defined as "*an association of several natural persons, organized either as authorized natural persons, sole proprietorships or family businesses, or as legal entities, which pool their material contribution, their know-how or their labor input, in order to carry out activities in the common/general interest*"[11].

According to a classification by the Competition Council, there are 3 categories of associations that have to comply with competition law rules: (i) trade associations, also called business or employers' associations (consisting of companies with common commercial interests), (ii) professional associations (forms of organization for: lawyers, doctors, notaries, archi-

[8] Competition Council Decision No 59/18.11.2011, para. 20.2, available at: https://www.consiliulconcurentei.ro/wp-content/uploads/2012/01/decizie_taxi_mm_site.pdf.

[9] Ioan Lazăr, *Dreptul Uniunii Europene în domeniul concurenței*, Universul Juridic Publishing House, Bucharest, 2016, p. 161.

[10] Competition Council Decision No 39/14.09.2015, p. 11, available at: https://www.consiliulconcurentei.ro/uploads/docs/items/bucket10/id10570/decizie_secuiana_publicare.pdf.

[11] Guidelines on compliance with competition rules by associations of undertakings issued by the Competition Council, p. 3, available at: https://www.consiliulconcurentei.ro/wp-content/uploads/2021/02/Ghid-FINAL-ian-2021-SITE.pdf#page=9&zoom=100,92,733.

tects, auditors, assessors, accountants, etc.) and (iii) associations with a self-regulatory role in the field of advertising practices (they issue and enforce codes of good practice for their members)[12].

For example, decisions by associations of undertakings that may infringe competition law may relate to price fixing[13], market or customer sharing, bid rigging or limiting output and/or sales.

1.4. Concerted practice

A concerted practice is a form of coordination between undertakings "*which, without having reached the stage of actual agreement (by signing a written contract or reaching a verbal agreement), consciously reduce the competitive pressure on the market*"[14].

In Romania, by Decision no. 63 /20.11.2018, the Competition Council sanctioned 9 insurance companies for breach of competition rules for a concerted practice aimed at increasing the RCA insurance policies tariffs, the practice being carried out by exchanging commercially sensitive information on the increase in tariffs[15].

1.5. Sanctioning anti-competitive practices

The Competition Law stipulates that facts related to the intentional or negligent breach of the provisions of Article 5 are deemed offences and are sanctioned by a fine of 0.5% to 10% of the total worldwide turnover of the undertaking or association of undertakings in the financial year prior to the sanctioning[16] .

If the turnover achieved in the financial year preceding the year in which the sanction is imposed cannot be determined, the turnover for the financial year in which the undertaking achieved the turnover in the year

[12] *Ibidem*, p. 5-6.

[13] See Competition Council Decision No 76/20.12.2018, available at: https://www.consiliulconcurentei.ro/wp-content/uploads/2019/11/decizia_76_din_2018.pdf.

[14] Valentin Mircea, *op. cit.*, p. 32.

[15] Competition Council Decision No 63/20.11.2018, p. 297, available at: https://www.consiliulconcurentei.ro/wp-content/uploads/2020/01/decizie_63_2018_site_final_v1.pdf.

[16] Art. 55 para. (1) of the Competition Law.

immediately preceding the reference year for the calculation of the turnover for the purposes of the sanction will be taken into account[17].

As an exception to the above-mentioned rule, in the case of a newly established undertaking, which has not registered a turnover in the year preceding the sanction, it will be sanctioned with a fine from 15.000 lei to 2.500.000 lei[18].

Fines for anti-competitive practices constitute "*the main instrument for ensuring the objective pursued by this law* (Competition Law*) and announced in Article 1: the protection, maintenance and stimulation of competition and a normal competitive environment, in order to promote the interests of consumers"*[19] .

According to Art. 52 para. (1) of the Competition Law, any agreements or decisions prohibited by Articles 5 and 101 of the TFEU, i.e. any commitments, agreements or contractual clauses relating to an anti-competitive practice, are null and void.

The nullity is absolute, which is why it can be invoked by any interested person, by way of action or exception, and deprives of legal effect the agreements or contractual clauses by which the anti-competitive practice was carried out.

II. Closing the competition Council's investigation through the commitments procedure

2.1. Introductory considerations

According to Art. 49 para. (1) of the Competition Law *"during the investigation procedure regarding a possible anti-competitive practice, the undertakings under investigation may propose commitments with the aim of eliminating the situation that led to the initiation of the investigation".*

Therefore, when the competition authority is investigating a possible infringement of the competition rules, there is an alternative (and exceptional) way to close the investigation through the commitments procedure.

[17] Art. 56 para. (1) of the Competition Law.
[18] Art. 56 para. (2) letter b) of the Competition Law.
[19] Valentin Mircea, *op. cit.*, p. 202.

Within the meaning of the Guideline of the Competition Council on the conditions, time-limits and procedure for the acceptance and assessment of commitments in case of anti-competitive practices from 28.12.2010 ("Commitments Guideline") anti-competitive practices mean agreements, decisions of associations of undertakings and concerted practices falling under Art. 5 of the Competition Act/Article 101 TFEU, and unilateral conduct falling under Art. 6 of the Competition Act/Article 102 TFEU[20].

Less serious violations of Art. 5 of Competition Law, e.g. in the form of vertical anti-competitive cartels, as well as violations of Art. 6 of Competition Law (abuse of a dominant position) may be subject to commitment proceedings if the restoration of the normal competitive environment is possible.

The commitment procedure is usually applied for less serious infringements of the law or serious infringements in the form of vertical anti-competitive agreements, as well as in cases of abuse of a dominant position, where it is possible to quickly restore the normal competitive environment.

In the case of violations of the competition rules by object – fixing the prices at which products are sold to third parties, limiting output or sales or sharing markets or customers – it is very difficult to accept commitments that would lead to the removal of the situation that triggered the investigation.

The commitments procedure is of an exceptional nature, which is why commitments are only used in cases where they lead to a more rapid and sustainable restoration of the normal competitive environment than would have been achieved through the imposition of a fine and/or other corrective measure by the Competition Council[21].

The Competition Council has a wide margin of discretion, both as to whether to enter discussions with undertakings that have expressed their intention to offer commitments and as to whether to accept them.

During the discussions on the acceptance of commitments, the conduct of the investigation is not suspended and the formulation of a commitment proposal will not constitute an admission by the undertaking that an anti-competitive practice has taken place[22].

[20] Section 6 of the Commitments Guideline.
[21] Section 9 of the Commitments Guideline.
[22] Section 4 and Section 31 of the Commitments Guideline.

According to section 14 of the Commitments Guideline, any proposal for commitments must fulfill the following requirements:

(i) it shall be made in writing and signed by the legal representative of the undertaking or by a person expressly authorized for that purpose;

(ii) it shall be submitted within the deadline set by the Competition Council;

(iii) it shall represent a serious, firm, unequivocal, precise, complete, unconditional and irrevocable offer during the period of consideration by the Competition Council of the proposals made. The proposal must contain sufficient details to enable the competition authority to make a full assessment;

(iv) it shall contain an explanation as to how the commitments will lead to the removal of the situation that triggered the investigation and the proposed timeframe for fulfilling those commitments;

(v) where appropriate, it shall contain a proposal for a monitoring method and monitoring agents. Monitoring agents may also be proposed at a later date, at the latest by the time foreseen for the market test.

(vi) it shall be accompanied by a non-confidential version to be used by the Competition Council for consultation of interested third parties.

2.2. Steps in the commitments procedure

According to the Commitments Guidelines, the commitments procedure involves the following steps: (i) initiating and conducting discussions on commitment proposals, (ii) prima facie approval of commitments and market testing, (iii) decision on acceptance of commitments and (iv) monitoring the fulfillment of commitments.

(i) Initiating and conducting discussions on commitment proposals

The initiative to initiate the commitments procedure rests solely with the undertakings under investigation, which may apply in writing to the Competition Council to verify the authority's willingness to enter into discussions about accepting commitments in the case under investigation[23].

Undertakings may address themselves to the Competition Council no later than the date on which the authority transmits the investigation

[23] Section 20 of the Commitments Guideline.

report. However, it is advisable that commitments are formulated as soon as possible after the opening of the investigation as they will be more readily accepted, given that the main purpose of commitments is to restore the normal competitive environment[24].

The Competition Council will inform the undertakings under investigation in writing whether or not commitments discussions can be initiated within a maximum of 3 months of receipt of the request[25].

If it agrees to initiate discussions, the Competition Council may organize, ex officio or at the request of the undertakings, a single meeting to detail the competition concerns raised by the possible anti-competitive practice under investigation.

In practice, this meeting takes place in most cases and, following the meeting, the Competition Council sends to the undertakings a document called a "letter of concerns", which includes the competition concerns that are the subject of the investigation, and communicates the deadline by which they have to submit in writing their commitments proposal[26].

Upon receipt of the proposal, the Competition Council "*shall make a preliminary assessment of the formal requirements and shall, one time only, give the undertaking the opportunity to complete the proposal within a period not exceeding 30 days*"[27].

(ii) Prima facie approval of commitments and market test

The Competition Council will carry out a preliminary analysis of the commitments and, if it finds the commitments acceptable prima facie, will publish on its website a summary of the case and the main content of the proposed commitments in order to carry out the market test. The Competition Council will set a deadline, which may not be less than 30 days, within which interested third parties will be able to comment. The competition authority may also ask certain natural or legal entities, institutions or public authorities to submit observations on the proposed commitments[28].

The Competition Council will consider any observations received from third parties and may, if appropriate, require the undertaking to amend its

[24] *Ibidem.*
[25] Section 21 of the Commitments Guideline.
[26] Section 30 of the Commitments Guideline.
[27] Valentin Mircea, *op. cit.*, p. 184.
[28] Section 35 of the Commitments Guideline.

commitments proposal within a period that may not exceed 15 days[29]. Subsequently, the investigation team will draw up a report on the assessment of the commitments and present it to the Competition Council Plenary for discussion.

(iii) Decision on acceptance of commitments

If the Competition Council finds that the proposed commitments are sufficient to protect competition and that their implementation can credibly lead to the removal of the situation that triggered the investigation, it will issue a decision making the commitments proposed by the undertakings binding[30]. The decision to accept the commitments will be communicated to the parties.

As a general rule, the decision accepting the commitments provides for a period of time during which the commitments are binding on the undertaking. This obligation shall automatically be terminated at the end of that period.

If the competition authority rejects the commitments, it will inform the undertaking in writing of the reasons for the rejection of the commitments proposal and will continue the investigation procedure[31].

(iv) Monitoring the fulfillment of commitments

As a rule, the monitoring of the commitments is carried out by the Competition Council. However, if the commitments are complex, the Competition Council may require the parties to appoint a monitoring agent (trustee) to oversee the observance of the commitments[32].

The trustee may be a management, consultancy, auditing or other similar institution which is independent of the Competition Council and the undertaking concerned and has the necessary qualifications and benefits from a good reputation.

The monitoring agent will conclude a mandate contract with the undertaking, the final form of which will be approved by the Competition Council and will be obliged to keep confidential any business secrets of

[29] Section 36 of the Commitments Guideline.
[30] Section 37 of the Commitments Guideline.
[31] Section 40 of the Commitments Guideline.
[32] Section 42 of the Commitments Guideline.

the parties and third parties, except for any information sent to the Competition Council[33].

The activity of the trustee will consist in submitting periodic reports on the fulfillment of the commitments, additional information and/or reports to the Competition Council, as requested by the authority. The monitoring will be finalized in a monitoring report to be submitted to the Competition Council[34].

2.3. The decision-making practice of the Competition Council

An eloquent example regarding the closure of the investigation through the commitment procedure can be found in Competition Council Decision No. 17/29.03.2021[35]. The Competition Council has investigated the Association of Operational Leasing Companies ("AOLC") and 14 leasing companies regarding "*a possible coordination of commercial policies, through price fixing and/or market sharing, realized through an exchange of information on the volumes realized on the market by each operational leasing company*"[36] which could have breached the provisions of Art. 5 para. (1) of the Competition Law.

The leasing companies have mainly given commitments not to publish in the press current/recent (up to 12 months) individual data of a strategic nature which is likely to reduce uncertainty in the market and reduce the companies' incentive to compete, as well as commitments not to publish forward-looking data, i.e. not to disclose individualized and specific intentions as to their future behavior with regard to (i) prices or (ii) quantities. AOLC, in turn, mainly undertook commitments to remove from its statutes the provisions requiring its members to provide certain information and to publish only reports containing aggregated information.

[33] Section 46 of the Commitments Guideline.

[34] Section 48 of the Commitments Guideline.

[35] Competition Council Decision No 17/29.03.2021, available at: https://www.consiliulconcurentei.ro/wp-content/uploads/2021/09/Decizie-17_2021-angajamente-leasing-operational-publicare.pdf.

[36] Competition Council press release August 2021, available at: https://www.consiliulconcurentei.ro/wp-content/uploads/2021/08/angajamente-Leasig-op-aug-2021.pdf.

2.4. Penalties for non-compliance with commitments

If the undertaking that has been investigated does not fulfill or does not adequately fulfill the commitments specified in the decision of the Competition Council accepting the commitments, it may be sanctioned with a fine of between 0.5% and 10% of the turnover of the previous financial year, according to the provisions of Article 55 letter e) of the Competition Law.

The Competition Council may impose comminatory fines of up to 5% of the average daily turnover in the financial year preceding the sanctioning, for each day of delay, calculated from the date set by the decision, in order to compel the investigated undertaking to comply with the undertook commitments, in accordance with Article 59 para. (1) letter. c) of the Competition Law.

Moreover, the Competition Council may, upon request or ex officio, reopen the investigation procedure when: "*(a) there is a material change regarding any of the facts on which the decision was based; (b) the undertakings act contrary to the commitments entered into; (c) the decision was based on incomplete, incorrect or misleading information provided by the parties*"[37].

V. Conclusions

Breaches of competition rules through anti-competitive practices have a significant impact on the economy, mainly affecting consumers who will have to pay higher prices for products and services. For this reason, these behaviors are severely sanctioned by the Competition Council, with fines ranging from 0.5% to 10% of the company's turnover in the financial year preceding the sanctioning.

As an alternative to the sanction of a fine, the Competition Law provides for the possibility for the investigated undertakings to resort to the commitments procedure, which allows the closure of the Competition Council's investigation without finding that an anti-competitive deed has been committed and through which the normal competitive environment is quickly and sustainably restored.

[37] Art. 49 para. (5) of the Competition Law.

Commitments proceedings can only be initiated by the undertakings under investigation, which also propose the content of the commitments, and the competition authority has a wide discretion as to whether to enter discussions with the undertakings that have expressed their intention to offer commitments and whether to accept them.

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FREEDOM OF ASSEMBLY AS A TOOL FOR SHAPING THE DEMOCRATIC SPACE IN THE CASE OF *ECKERT V. FRANCE*: SOME OBSERVATIONS ON THE POSSIBLE LIMITATIONS OF THE APPLICATION OF ARTICLE 11 OF THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Maria-Beatrice BERNA*

ABSTRACT

Based on the circumstances of the Eckert v. France *case, the commentary explores the scope of freedom of assembly and how its application has a transformative effect on the national democratic space. The legal status of freedom of assembly creates the preconditions for the affirmation of individual autonomy and strengthens solidarity around a common axiological framework. Although freedom of assembly is intrinsically linked to the requirements of a democratic society, it is not absolute. However, identifying the appropriate way of perceiving and applying the limits of freedom of assembly must be undertaken with the utmost caution and by taking into account undeniable referential factors such as the protection of public order, national security or respect for the rights and freedoms of others. In any case, peace is the main guiding principle to be considered in the context of the application of freedom of assembly. Ensuring the peaceful exercise of freedom of assembly ensures that social differences are overcome and a state of inclusion is achieved.*

KEYWORDS: *freedom of assembly; democratic society; peaceful exercise; limitations and restrictions;*

Descriptio jus or the premises of analysis

Among the guarantees set out in the European Convention for the Protection of Human Rights and Fundamental Freedoms, freedom of

* *Lecturer Ph.D., "Titu Maiorescu" University, Bucharest, Romania. Diplomat Romanian Ministry of Foreign Affairs.*

assembly, as set out in Article 11, has some characteristics that make it unique.

Firstly, freedom of assembly is exercised peacefully, which is the only context in which it can be emphasised in democratic and inclusive societies.

Second, the autonomy of freedom of assembly cannot be denied: although the subject matter of Article 11 opts for a combined regime with freedom of association, each of the two freedoms is recognised as having a distinct legal identity. In this respect, the wording of the second paragraph of Article 11 reiterates the inclusion within its scope of both freedom of assembly and freedom of association, both of which are subject to the same potential restrictions in their exercise. Although directly linked by the rule, freedom of assembly and freedom of association are subject to different nuances. Freedom of association tends to generate a solidarity effect around a common ideal. In support of this hypothesis, we note that freedom of association, in order to be effective, is closely linked both to political pluralism and to the protection of persons belonging to vulnerable groups to which the (political-normative) decision-maker should be directed.

Exempli gratia, persons belonging to national minorities, women, children, persons with disabilities, including through peaceful assemblies, call for measures to accommodate their particularities in an open and participatory democratic climate.

In this context, freedom of assembly materialises solidarity between members of a group united by common values, ideals and ideas.

Thirdly, freedom of assembly is inextricably linked to freedom of expression and freedom of thought, conscience and religion. It is clear that the manifestation of freedom of assembly is nothing other than the result of a process of individual reflection on one's own existence and on one's relationship with the environment to which one belongs. There is no doubt that freedom of assembly can, to a certain extent, express a collective assessment of a social situation when individual perceptions of the reality being analysed become compatible.

Freedom of assembly thus evokes a form of expression of a view held by members of a segment of society – hence the probable link between Article 11 and Article 10 of the Convention. Freedom of assembly also fulfils the function of externalising a certain meditative perspective on controversial issues in society.

Contextualising the application of freedom of assembly in the factual and legal context of *Eckert v. France*

In the case of *Eckert v. France*[1], the focus of the analysis of the freedom of assembly lies in observing the limitations on its exercise. The case concerned the prohibition of a demonstration in view of the violent climate in which previous episodes of such demonstrations had taken place in the past. The starting point was the demonstrations organised under the aegis of the 'yellow vests' movement, which was loosely structured and brought together people from different social backgrounds who were the bearers of various social demands, such as an improvement in living standards or a reduction in prices. The demonstrations had taken place regularly since November 2018. The Prefect issued an order banning demonstrations on public roads in part of the city centre of Bordeaux, given the failure to comply with the legal conditions (mainly the requirement to declare the identity of the organisers), as well as the foreshadowing of a violent climate that would most likely characterise a new series of demonstrations in the continuation of the protests that accompanied the "yellow vest" movement in the past. In justifying the ban, the Prefect of the Department of Gironde highlighted the following aspects: (1) the failure to comply with the legal requirements for holding a demonstration, given the lack of prior notification of the demonstration and the absence of an identified organiser; (2) the main consequence of the demonstrators' failure to comply with the aforementioned legal requirements for peaceful demonstrations is that the public authorities are unable to take preventive measures to ensure the smooth running and security of the event; (3) the violent antecedents of the demonstrations under the aegis of the "yellow vests"; (4) the creation of a state of danger to national security and public order; (5) the active role of the public authorities in reconciling the exercise of freedom of assembly with the imperatives of public order[2].

As can be seen from the descriptive elements in the above lines, the prohibition contained in the administrative order was intended for the future (the act was issued on 10 May 2019 and concerned the meetings on

[1] Judgment of the European Court of Human Rights in the case of *Eckert v. France*, judgment of 24 October 2024, application no. 56270/21.

[2] See in detail para. 4-6 of the judgment of the European Court of Human Rights in the case of *Eckert v. France*, judgment of 24 October 2024, application no. 56270/21.

11 May 2019) – as it was foreseen that new meetings would take place without prior notification or identification of an organiser. The complainant was fined for taking part in a prohibited demonstration. She then unsuccessfully challenged the sanction imposed on her at national level. Referring to the jurisdiction of the European Court of Human Rights after exhaustion of domestic remedies, the author argued that the criminalisation of the act of participating in a prohibited assembly and the criminal sanction constituted a violation of freedom of expression (under Article 10 of the Convention) in conjunction with a violation of Article 11, which governs freedom of assembly.

In the face of the applicant's arguments, the European Court of Justice has shown the correct way of interpreting the dynamics of the two freedoms and of delimiting, from a legal point of view, the spheres of each of them. Thus, the Court recognises a special role for the rule contained in Article 11 of the Convention – assimilating it to the lex specialis in relation to the freedom of expression contained in Article 10. In other words, freedom of assembly is a particular form of freedom of expression and acts as a specific legal instrument for its realisation. In exercising freedom of assembly, individuals communicate their views on the subject matter of the demonstration in the public space. In this context, a feature of axiomatic value emerges from European jurisprudence: the exercise of freedom of assembly is aimed at the expression of personal opinions and seeks to create a space for public debate or the open expression of dissent[3].

The peaceful nature of the freedom of assembly as a condition and limit of its exercise

The essence of the legal debate in the present case does not necessarily lie in the correlation between freedom of assembly and freedom of expression (although this aspect is tangential), but must be sought in the typology of freedom of assembly falling within the scope of Article 11 of the Convention. As the Court emphasised in its analysis of the case, not every assembly is protected under Article 11. The condition that demonstrations must be peaceful is indispensable for the recognition of the protected freedom. This gives rise to a further uncertainty which depends

[3] See in detail para. 29-32 of the judgment of the European Court of Human Rights in the case of *Eckert v. France* judgment of 24 October 2024, application no. 56270/21.

directly on the way in which the peaceful nature of assemblies is conceptualised, namely the systematisation of the criteria for verifying *in concreto* the crystallisation of the peaceful nature.

In its case law, the European Court of Human Rights has provided a test of the criteria for the appropriate assessment of "peaceful assembly". In the case of *Shmorgunov and Others v. Ukraine*[4], the Court identified the legal forms that freedom of assembly can take and the circumstances that can make or break its legal existence. Thus, assemblies are not peaceful *if the organisers or participants have violent intentions, incite violence or reject fundamental aspects of a democratic society*[5]. Therefore, the peaceful nature of assemblies does not end strictly with the hypothesis of a state of violence per se, which visibly and directly affects the surrounding reality. Similarly, the existence of the elements necessary to create a climate of danger to democratic stability diminishes the peaceful nature of assemblies.

On the other hand, when assessing the peaceful nature of meetings, it is necessary to distinguish between the individual and the collective dimension: sporadic violence not caused by the organiser cannot be attributed to him, as long as he remains peaceful in his intentions and actions throughout the meeting. Limited acts of violence that do not detract from the overall peaceful atmosphere in which an event takes place cannot be attributed to individual participants. Similarly, the collective nature of a demonstration (determined by the joint exercise of freedom of assembly) cannot lead to collective responsibility for possible isolated acts of violence by individuals[6].

The possible anticipation of a state of conflict is not a sufficient reason to remove the demonstration from the scope of Article 11 of the Convention. Nor can the possibility that a public demonstration may lead to disorder be such as to nullify the freedom of assembly covered by Article 11 of the European Convention. This is also the conclusion reached by the European Court in the case of *Kudrevičius and others v. Lithuania*,

[4] As set out in para. 490 of the judgment of the European Court of Human Rights in the case of *Shmorgunov and Others v. Ukraine* judgment of 21 January 2021, application no. 15367/14 and others.

[5] More extensively, judgment of the European Court of Human Rights in the case of *Sergey Kuznetsov v. Russia*, judgment of 23 October 2008, application no. 10877/04.

[6] Judgment of the European Court of Human Rights in the case of *Primov and others v. Russia*, judgment of 12 June 2014, application no. 17391/06.

which questions the peaceful nature of the assemblies in the context of the blockade of motorways by protesting farmers[7].

The peaceful nature of assemblies is not only a substantive requirement for a particular assembly to fall within the scope of Article 11. The absence of peaceful assembly is also an indicator of possible interference by public authorities in the exercise of freedom of assembly. The relationship between non-peaceful assemblies and State interference is inversely proportional: the more diluted the peaceful character, the more legitimised the interference by the national authorities.

Returning to the circumstances of the case and the assessment of this report, the French Council of State considers that respect for freedom of assembly must be reconciled with the need to maintain public order. It is up to the public authority to assess the risk of violence associated with a possible demonstration and, in the event of a violent climate that could accompany the demonstration, the public authority will intervene in one of the following ways: either by taking measures to prevent an assembly that could disrupt the way it is conducted or, if necessary, by deciding to ban the demonstration if such a measure is appropriate, necessary and proportionate to the circumstances. Thus, the adoption of a prohibition measure with regard to the freedom of assembly can only exist as *ultima ratio* and only in the context of a real and serious risk of creating a climate of violence that could undermine public order. On the other hand, the justification for interfering with the exercise of freedom of assembly cannot be absolutely based on a possible state of danger. The latter entails certain difficulties of assessment[8].

In the present case, the assessment of the risk of a violent demonstration is a matter for the national authorities, and the European Court is bound by the principle of subsidiarity. Accordingly, the European Court cannot substitute its view of the potential danger of a future demonstration for that of the national authorities. The Court can only intervene in the critical analysis of the way in which the competent national authorities have taken decisions in relation to Article 11 of the Convention, within the limits of their margin of discretion. In other words, the assessment made by the

[7] Judgment of the European Court of Human Rights in the case of *Kudrevičius and Others v. Lithuania*, judgment of 15 October 2015, application no. 37553/05, para. 91-99.

[8] See in detail para. 20 et seq. of the judgment of the European Court of Human Rights in the case of E*ckert v. France*, judgment of 24 October 2024, application no. 56270/21.

European Court will be based in particular on two aspects: (1) whether the respondent State exercised its discretion reasonably, prudently and in good faith; (2) whether the alleged interference with the exercise of freedom of assembly was proportionate to the legitimate aim pursued and whether, having regard to all the circumstances of the case, the reasons put forward by the national authorities to justify the interference are relevant and sufficient[9].

Analysing restrictions on freedom of assembly by assessing interference

The justification for restrictions on freedom of assembly depends directly on the nature of the interference. For interference with the exercise of freedom of assembly to be justified, it must be provided for by law. The legal basis for the interference is a condition that must be addressed as a matter of priority, especially since its invalidation would invalidate all the other conditions that make up the test of the justification of the interference. The legality of the interference is examined from two points of view: (1) the formal one – given that the measure constituting the interference must be provided for in domestic law, and (2) the substantive one – which reiterates the qualities subsumed in the legal provisions. The latter requires some further explanation. Accessibility and predictability characterise, in principle and without ambiguity, any rule that assumes a legal identity. Moreover, in a constitutional state in which the rule of law is a fundamental requirement, the law cannot deviate from autonomy, accessibility and predictability. If there were a gap between the law and the standards of autonomy, accessibility and predictability, the rule of law would cease to exist as a reference and would lose its legitimacy. Consequently, we can say that the requirements of the rule of law come to life under the fundamental condition of accepting autonomy, predictability and accessibility as intrinsic and inherent elements of the law[10].

In its case law, the European Court of Human Rights has consistently taken the view that the requirements of accessibility and predictability of

[9] Judgment of the European Court of Human Rights in the case of the *Christian Democratic Party v. Moldova*, 2 February 2010, no. 25196/04, para. 23 et seq.

[10] See in detail para. 4-6 of the judgment of the European Court of Human Rights in the case of *Eckert v. France*, judgment of 24 October 2024, Application No. 56270/21.

the law must be reconciled with legal formulations that are sufficiently clear and precise to enable individuals to regulate their own conduct. In addition, the law must indicate with sufficient clarity the scope of any power of action/assessment conferred on the authorities and the manner in which that power is to be exercised. From a technical point of view, the level of precision of the national law will depend directly on the content of the legal instrument, the field it regulates and the category/status of the addressees[11].

With regard to the lawfulness of the interference and in the light of the facts of the case, the applicant's conviction was based on the provisions of the French Criminal Code and the prefect's order prohibiting demonstrations. Moreover, the domestic courts did not interpret the domestic provisions prohibiting assemblies in an arbitrary or unpredictable manner. While it is true that the criminal provisions applicable in this case are supplemented by the provisions of the Security Code, the European Court considers that such a technique is not incompatible with the predictability of the law. The only requirement that can provide guarantees of predictability is to ensure that the rules of criminal law and the rules laid down in the Security Code, taken together, are such as to enable the person liable to be tried to adapt his conduct in a foreseeable manner. According to the European Court of Justice, this objective is achieved for the following reasons: (1) the rules prohibiting a meeting clearly define the temporal and spatial coordinates in which the meeting could take place; (2) the prohibition of a meeting is closely linked to the failure to comply with the condition of prior notification; (3) furthermore, only a meeting which is likely to disturb public order can be prohibited and this decision can only be taken as a last resort; (4) given that the measure prohibiting demonstrations is subject to judicial review by an administrative court or, exceptionally, by a criminal court, it can be said that national law clearly and unambiguously defines the scope and modalities of the discretion granted to the national authorities[12].

[11] See in detail the judgment of the European Court of Human Rights in the case of *Hasan and Chaush v. Bulgaria*, Judgment of 26 October 2000, application no. 30985/96, para. 84.

[12] See in detail para. 50-60 of the judgment of the European Court of Human Rights in the case of *Eckert v. France*, judgment of 24 October 2024, application no. 56270/21.

In assessing the interference with the exercise of freedom of assembly, the European Court of Human Rights can decide the situation by analysing the interference in relation to the pursuit of a legitimate aim, the satisfaction of a pressing social need, the proportionality to the aim pursued and the relevant and sufficient reasons put forward by the national authorities to justify it. Together, these elements give expression to the condition of "necessity in a democratic society". As the European Court of Justice has stated in its own case law, democracy is characterised by the resolution of problems through dialogue, peacefully and without recourse to violence. Irrespective of the nature of the issue under discussion or the public reaction to it, it is essential for a democratic society to discuss it in meetings. Accordingly, although the meeting must be peaceful in order to come within the protection of Article 11 of the Convention, the peaceful nature of the meeting is not determined by the nature of the ideas discussed. Ideas that are controversial or likely to shock or alarm the general public fall within the scope of Article 11 of the Convention and do not alter the peaceful nature of the meeting[13].

At the same time, the requirement of necessity in a democratic society leads to a straightforward discussion about the seriousness of the interference and the requirement of proportionality between the interference and the aim pursued. In the present case, the meeting which the applicant wished to attend was banned and the applicant was subjected to the most serious form of interference with the exercise of the right to freedom of assembly – criminal conviction. At the same time, assemblies held under the aegis of the 'yellow vests' were subject to the requirement of prior authorization. In the light of the above, the interference must be seen in terms of the dissuasive nature of the penalties imposed and the consequences for the content of freedom of assembly. The dissuasive nature cannot produce effects converging towards interference with the content of the freedom of assembly. In its case law, the European Courts have often pointed out that the type of interference and the proportionality between the interference and the aim pursued may be characterized by the nature and severity of the sanctions applied. The peaceful nature of the assembly relativizes the punitive conduct of the State: in the case of peace-

[13] See in detail the judgment of the European Court of Human Rights in the case of *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, judgment of 2 October 2001, application no. 29221/95.

ful assemblies, the public authorities must show a certain degree of tolerance so as to preserve the very substance of the freedom provided for in Article 11 of the Convention. The criminal sanction imposed on a peaceful assembly for failure to comply with the requirement of prior authorisation implies a formalistic approach to respect for freedom of assembly. On the other hand, preventive interference (proven by the violent history of the meeting or demonstration) can be more strictly defined, even taking the legal form of a criminal sanction, on the basis of the legitimate aim pursued (protection of public order or national security)[14].

If we add to this reasoning the requirement of prior authorisation of the assembly, it is necessary to reiterate the previous case-law of the Court, according to which the requirement of prior authorisation is not in itself contrary to the spirit of the provisions of Article 11, especially since it is based on the criteria of maintaining public order and national security. The prior authorisation of a demonstration also has a preventive character which must be assessed in context. In general, any public demonstration is likely to disrupt social life and create hostility within the community in which it takes place. However, the violent antecedents of a demonstration reinforce the premise of an uprising and serve as a justification for intervention, such as a ban on demonstrations or the application of criminal sanctions in the event of non-compliance. Per a contrario, a peaceful assembly may be subject to interference on the basis of the general consideration that any demonstration is likely to involve risks of violence. However, in the case of peaceful assemblies, the absence of prior authorisation (although it may be considered an unlawful situation under domestic law) does not, on the face of it, give rise to a violation of the Convention and, implicitly, of Article 11 of the Convention[15].

In the case under review, the interference with the exercise of the freedom of assembly was demonstrated on two coordinates: (1) the prohibition of the demonstration of 11 May 2019 in the light of the previous violence that accompanied the protests of the "yellow vests" movement;

[14] For further details see: Judgment of the European Court of Human Rights in the case of Akgöl *and Göl v. Turkey*, Judgment of 17 May 2011, applications no. 28495/06 and 28516/06, para. 43; Judgment of the European Court of Human Rights in the case of Öztürk *v. Turkey*, judgment of 28 September 1999, application no. 22479/93, para. 70.

[15] In accordance with the judgment of the European Court of Human Rights in the case of *Oya Ataman v. Turkey*, judgment of 5 December 2006, application no. 74552/01, para. 37-44.

(2) the imposition of a sanction consisting of a criminal fine on the applicant who participated in the prohibited assembly. With regard to the first point, the European Court found that the "yellow vests" demonstrations carried out before 11 May 2019 resulted in violence, damage to property, injuries to persons and disturbances of public order. In the light of these considerations, the Court notes the legitimacy of the national courts' assessment that there is a serious risk at national level of violent clashes between the police and demonstrators if new 'yellow vest' demonstrations are authorised. The European Court also points out that the prevention of risks of social violence in the context of the exercise of freedom of assembly constitutes a pressing social need. Faced with the failure to comply with the obligation to give prior notice of the organisation of the "yellow vests" rally, the European Court adopted a flexible approach based on the primacy of the protection of public order and national security. In the relationship between the restriction of the freedom of assembly by imposing the obligation of prior notification and the protection of public order, the latter element takes precedence. It is precisely the need to guarantee the substance of freedom of assembly that reduces the weight of the prior notification requirement. If the prior notification/declaration procedure enables the authorities to exercise a preventive function, i.e. to avert possible violence, then these measures can be examined through the lens of appropriateness and reasonableness. Given the planned nature of the demonstration on 11 May 2019 and the violent context of previous demonstrations, the prior declaration requirement is not excessive in relation to the correlation of these circumstances[16].

In the present case, the applicant was progressively subjected to sanctioning measures (removal from the premises, identity check, administrative fine and then criminal fine) for attending a prohibited meeting. Of all the sanctions listed, the application of the criminal fine requires particular scrutiny in view of its particularly serious nature. In the same sense, with regard to the fine imposed in the present case, the European Court of Justice noted the light nature of the sanction in relation to its amount (EUR 150) and its purely financial nature[17].

[16] According to the judgment of the European Court of Human Rights in the case of *Eckert v. France*, judgment of 24 October 2024, application no. 56270/21, para. 66 et seq.

[17] According to the judgment of the European Court of Human Rights in the case of *Eckert v. France*, judgment of 24 October 2024, application no. 56270/21, para. 73-75.

Some conclusions on the public authorities' responsibility to ensure a climate conducive to the exercise of freedom of assembly

In the present case, the European Court of Justice has reiterated the importance of preserving the core of freedom of assembly in the context of the risk it may pose to public order. The balance between freedom of assembly and the guarantee of public order lies in leaving the public authorities a margin of discretion which is wide enough to allow them to choose the appropriate means of prevention, but which is sufficiently limited so as not to undermine the very essence of freedom of assembly. Once again, the case law of the European Courts has shown that freedom of assembly must be peaceful in order to be protected by Article 11 of the Convention. The potential for violence remains the strongest argument for restricting assemblies by appropriate intervention to ensure public order and national security.

The State's approach to ensuring freedom of assembly brings into focus the scope of its positive and negative obligations. Among the positive obligations, the European Court of Human Rights states that the State must ensure the conditions necessary to guarantee the peaceful nature of assemblies. This is not, therefore, a result attributable solely to the organisers of the meetings, but a natural consequence of the State's action, which must promote, by agreed means, a tolerant and conciliatory attitude. It is true that the means of action are within the power of the State; it is no less true that there are no absolute means of guaranteeing a peaceful climate and protecting the integrity of citizens. Therefore, the positive obligation to guarantee the peaceful nature of assemblies is, from a legal point of view, an obligation of means and not of result[18].

Mutatis mutandis, the distinction between positive and negative obligations also applies specifically to the UN system in relation to freedom of assembly, which provides guidance and orientation in relation to the conventional European system. Positive obligations have the advantage of flexibility in that their scope defies strict delimitation. In essence, the positive obligations of states that are adjacent to the guarantee of freedom of assembly are subsumed under the creation of a non-discriminatory climate. Substantially, States must ensure that national laws and policies

[18] European Court of Human Rights, Guide to Art. 11 of the European Convention on Human Rights. Freedom of Assembly and Association, 2021, p. 12 et seq.

do not allow the manifestation of discriminatory situations for the exercise of freedom of assembly, regardless of race, colour, ethnicity, gender, language, etc. Violence against participants in demonstrations is in itself a form of discrimination. Conversely, negative obligations focus on the prohibition of unjustified interference with the substance of freedom of assembly. Any restrictions that may affect the freedom of assembly must be neutral with regard to the identity of the participants or their relationship with the national authorities. The reasons for derogating from the negative obligations must be well-founded and subordinate to a legitimate aim[19].

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10. Judgment of the European Court of Human Rights in the case of *Kudrevičius and others v. Lithuania*, judgment of 15 October 2015, application no. 37553/05.
11. Judgment of the European Court of Human Rights in the case of *Christian Democratic Party v. Moldova*, judgment of 2 February 2010, application no. 25196/04.
12. Judgment of the European Court of Human Rights in *Hasan and Chaush v. Bulgaria*, judgment of 26 October 2000, application no. 30985/96.
13. Judgment of the European Court of Human Rights in the case of *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, judgment of 2 October 2001, application no. 29221/95.

Tratat de drept civil.
Succesiunile și liberalitățile

Ediţia a 2-a

DAN CHIRICĂ

ISBN 978-606-27-0968-6
150 de lei, 592 de pagini

Lucrarea *Tratat de drept civil. Succesiunile și liberalitățile* este o lucrare complexă ce dezvoltă într-o manieră accesibilă și o structură propice înțelegerii cu ușurință materia succesiunilor și liberalităților, astfel cum a fost reglementată de vechiul Cod civil și cum este reglementată de noul Cod civil.

De ce o nouă ediție la un interval relativ scurt de timp de la cea dintâi? În principiu pentru că, „în intervalul de timp de la prima ediție și până în prezent, unele aspecte ale punctelor noastre de vedere exprimate în prima ediție au avut onoarea să se bucure de interesul și atenția altor autori, care, uneori, au exprimat alte puncte de vedere, punând lucrurile într-o altă perspectivă, care se cerea a fi examinată cu atenție, în ideea cristalizării într-un final a soluțiilor cele mai judicioase care să fie urmate de practică în viitor”.

Așadar, pe lângă ilustrarea traseului parcurs de normele juridice specifice succesiunilor și liberalităților de-a lungul timpului; completarea analizei normelor juridice naționale cu noțiuni de drept comparat, examinându-le în relație cu normele juridice asemănătoare din dreptul din Québec, dreptul francez, italian și german; argumentarea și explicarea aplicabilității normelor preluate în cadrul sistemelor juridice originare; analizarea diverselor situații juridice atât sub aspectul reglementării vechiului Cod civil, cât și a noului Cod civil; această nouă ediție aduce noi lămuriri și opinii în scopul clarificării problemelor dificile existente în această materie.

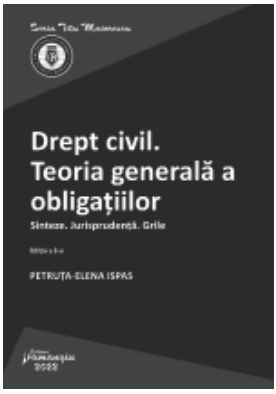
Acest *Tratat de drept civil. Succesiunile și liberalitățile* este indispensabil oricărui student la drept în promovarea examenelor și în special oricărui practician dornic de a evolua și de a înțelege în profunzime instituțiile prezentate.

Drept civil. Teoria generală a obligațiilor

Sinteze. Jurisprudență. Grile

Ediţia a 2-a

Petruța-Elena Ispas



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Prin lucrarea *Drept civil. Teoria generală a obligațiilor. Sinteze. Jurisprudență. Grile* s-a urmărit structurarea intuitivă a materiei teoriei obligațiilor civile, prin expunerea configurativă a noțiunilor și a sferei lor de aplicare, atât pe plan teoretic, cât și pe plan practic.

Aplicarea și interpretarea normelor juridice aferente teoriei generale a obligațiilor civile trebuie să aibă drept început cunoașterea și înțelegerea lor. Astfel, în prima etapă a studierii acestei materii, informațiile prezentate în sinteze și maniera în care sunt structurate creează baza fundamentală pentru asimilarea noțiunilor și situațiilor reglementate, în principal, de Codul civil.

Soluțiile jurisprudențiale relevante prezentate în cadrul fiecărei instituții reprezintă aplicarea practică a informațiilor deja parcurse, precum și problemele juridice care pot fi puse în discuție. În cele din urmă, testele grilă inserate contribuie la asimilarea informației și la verificarea cunoștințelor juridice deja acumulate.

Prezenta ediție este îmbogățită cu informații care să completeze sau să aducă lămuriri asupra anumitor instituții ale teoriei obligațiilor civile, extrase din jurisprudența instanțelor naționale, precum și teste grilă.

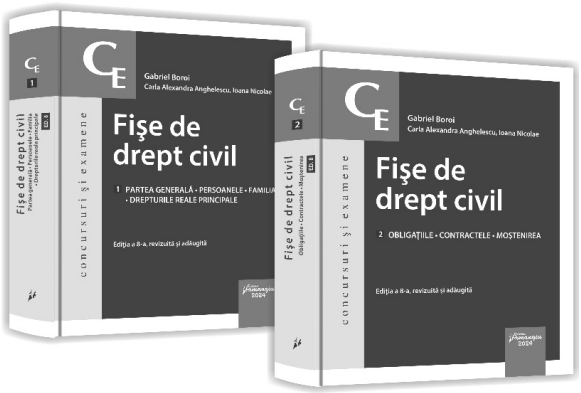
Materialul redat în acest curs corespunde programei din planul curricular al facultăților de drept și vine în sprijinul studenților, masteranzilor și a practicienilor dreptului. Totodată, lucrarea se adresează și absolvenților facultăților de drept ce caută o sintetizare a materiei obligațiilor civile, în vederea susținerii examenului de licență sau a examenelor de admitere în profesiile juridice.

GABRIEL BOROI, CARLA ALEXANDRA ANGHELESCU, IOANA NICOLAE

Fișe de drept civil

Partea generală. Persoanele. Familia. Drepturile reale principale. Obligațiile. Contractele. Moștenirea

Ediția a 8-a, revizuită și adăugită



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Prezenta ediție (a 8-a) a fost revizuită și adăugită cu numeroase precizări, corelări cu alte instituții, exemple practice și spețe recente, având în vedere atât modificările legislative intervenite în ultimii doi ani, cât și problemele dezbătute în literatura de specialitate sau soluționate de practica judiciară.

Ediția a 8-a a *Fișelor de drept civil* cuprinde:

- **41 de fișe** din toate materiile dreptului civil: Partea generală, Persoanele, Drepturile reale, Obligațiile, Contractele, Moștenirea, Familia;
- tematica pentru examenele de admitere la INM și în magistratură, de primire în profesia de avocat (avocat stagiar), precum și cel de admitere în notariat (notari stagiari);
- trimiteri la jurisprudența obligatorie relevantă în materie civilă, respectiv deciziile Curții Constituționale, precum și deciziile Înaltei Curți de Casație și Justiție pronunțate în recursuri în interesul legii și cele privind dezlegarea unor probleme de drept în materie civilă;
- explicații complete, exemple și cazuri variate din practica judiciară, precum și tabele comparative ce înlesnesc procesul de învățare/reținere și înțelegere, antrenează și dezvoltă procesul de interpretare și aplicare a normelor de drept civil, pentru susținerea cu succes a probelor constând în teste-grilă, spețe sau alte subiecte de verificare a cunoștințelor juridice, teoretice și practice.