LESIJ - LEX ET SCIENTIA

International Journal

No. XXVI, vol. 2/2019

Published by "Nicolae Titulescu" University of Bucharest and
"Nicolae Titulescu" Foundation for Law and International Relations

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”Nicolae Titulescu” University Publishing House

Phone: 004.021-330.90.32, Fax: 004.021-330.86.06

Calea Văcăreşti, nr. 185, Sector 4, Bucureşti, România

E-mail: editura@univnt.ro

ISSN: 1583-039X

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LESIJ - Lex ET Scientia International Journal

IMPLICATIONS OF CJEU JURISPRUDENCE ON THE DELIMITATION OF WORKING TIME BY REST TIME IN THE COLLABORATIVE ECONOMY

Răzvan ANGHEL*

Abstract

*The specificity of the collaborative economy has raised a number of issues with regard to the qualification of legal relationships between workers, final beneficiaries and the online platform that mediates the provision of work, respectively whether between the platform and the worker there is an employment relationship or there is a commercial relationship between the platform, self-employees and consumers. In particular, the question arises whether, in the case of these workers, the working time regulations apply and, if so, how they can be applied in concrete manner. The article contains an analysis on how some principles derived from the CJEU case law can be used to determine whether and under what conditions workers in the collaborative economy can benefit from protection by limiting working time and how can work time be delimited by rest time in their case, given the specificity of their work condition, in order to ensure an effective protection.***

Keywords: *working time, rest time, collaborative economy, workers, employees, self-employees.*

1. Introduction

The development of information and communication technology has led to the emergence of new forms of work and working time arrangements, and has made it possible to increase the degree of labor flexibility, driven by economic, but also social and personal needs. The phenomenon is not very new, appearing in the early 1970s in first forms and developing along with the development of mobile communications and information technology, especially in the last 30 years, after the emergence and development of the INTERNET[1].

In present time work is also done in what is called the "*collaborative economy*" or "*the gig economy"* in which the worker is essentially directly linked to the client via a platform accessible on the INTERNET[2],

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** This work is a result of the research conducted by the author during the doctoral program followed within the Doctoral School of Law of the Faculty of Law of the University of Bucharest.

[1] See for this evolution: Jon Messenger, Luty Gschwind – *Three Generations of Telework*, Conference paper – 17th ILERA World Congress, 7-11.09.2015, Cape Town, South Africa, available at https://www.ilera2015.com/dynamic/full/IL156.pdf (accesed 13.03.2019).

[2] See for details, for example: A. Donini, *Il lavoro digitale su piattaforma*, Labour & Law issues, no. 1/2015, pp. 50-71; *E. Dagnino*, Il lavoro nella *on-demand economy*: esigenze di tutela e prospettive regulatorie, Labour & Law issues, no. 2/2015, pp. 87-106; *A. Aloisi*, Il lavoro „a chiamata" e le piattafrme online della *collaborative economy*: nozioni e tipi in cerca di tutele, Labour & Law issues, no. 2/2016, pp. 18-56; *G. Friedman*, Workers without employers: shadow corporations and the rise of the gig economy, *Review of Keynesian Economics* 2.2/2014, pp. 171-188; A. Aloisi, *Commoditized workers: Case study research on labor law issues arising from a set of on-demand/gig economy platforms*, Comp. Lab. L. & Pol'y J. 37/2015, p. 653; J. Hamari, M. Sjöklint, A. Ukkonen, *The sharing economy: Why*

which rises in the first place the question of whether such a worker has the status of worker or employee and, consequently, the question whether or not he/she enjoys the protection guaranteed to employees, which is still unclear in the European case-law.

It can be noticed a return to task-oriented work, to a result that must be achieved at a certain time, at least in certain areas of activity, the classic concept of working time remaining still largely applicable in the industrial field[3].

The use of information technology has allowed work to be unspatialised, and the physical space of its deployment has become less relevant in this context[4].

The notion of collaborative economy includes business models in which activities are facilitated by online platforms that generate an open market for the temporary use of goods or services provided by individuals[5].

In the collaborative economy, work is organized in two main forms: *crowdwork* - the creation of micro-tasks for which a global offer is launched through an on-line platform and can be done anywhere; *on-demand* services - performing services in a certain area, hired through an on-line application[6].

There is a difference in the organization of working time between the two forms of work arrangements. In the case of crowdwork, the worker has greater autonomy and can work at any time in principle, while in the case of on-demand work, the on-line platforms exercise greater control over the services provided by setting quality standards and limiting providers' freedom to choose tasks and customers[7].

The delimitation of working time from rest time and the limitation of the first when working in the collaborative economy presents numerous difficulties, the boundary between working time and rest time being very difficult to determine, porous[8], in this case, the rest time being affected by interspersed periods of activity[9], and the carrying out of the activity may involve the

people participate in collaborative consumption, Journal of the Association for Information Science and Technology 67.9/2016, pp. 2047-2059; J. Schor, *Debating the Sharing Economy, Journal of Self-Governance & Management Economics* 4.3/2016; B. Cohen, J. Kietzmann, *Ride on! Mobility business models for the sharing economy*, Organization & Environment 27.3/2014, pp. 279-296; H. Heinrichs, *Sharing economy: a potential new pathway to sustainability*, GAIA-Ecological Perspectives for Science and Society 22.4/2013, pp. 228-231.

[3] It has been shown that the limit between working time and rest time becomes more unclear as a result of the increasing variability of the work program on the one hand and the increasing task orientated work which results in a bigger pressure to work the hours required to perform the task – J. Rubery, *Working time in the UK*, Transfer: European Review of Labour and Research 4.4/1998, p. 672.

[4] Răzvan Anghel – *Noua reglementare privind telemunca. Probleme specific privind delimitarea timpului de lucru de timpul de odihnă în cazul telesalariaților*, Curierul Judiciar, no. 4/2018, p. 211.

[5] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - *A European agenda for the collaborative economy*, Brussels, 2.6.2016 COM (2016) 356 final, available at: https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-356-EN-F1-1.PDF, p. 3, accessed on 13.03.2019.

[6] Jon Messenger – *Working time and the future of work, International Labour Organization*, ILO Future of Work Research Paper Series, 2018, p. 22; see for the evolution and the definition of crowdwork: Janine Berg, Marianne Furrer, Ellie Harmon, Uma Rani, M Six Silberman – *Digital labour platforms and the future of work* – Toward decent work in the online world, International Labour Organization, 2018, p. 3.

[7] Jon Messenger – *Working time and the future of work*, cited, p. 23.

[8] A. Supiot, *Temps de travail: pour une concordance des temps*, Droit social, 1995, pp. 949-950.

[9] J.-Y. Boulin, *Working time in the new social and economic context*, Transfer: European Review of Labour and Research 7.2/2001, p. 204.

alternation of intensive work periods with inactive periods[10].

It has been shown that "the normal working time pattern, which characterized Ford's standardized, industrial, mass production, loses its force," and "for much of the labor force over the last two decades, working time has become not just shorter but also more flexible and heterogeneous", being noticed that "the variable forms of working time take the place of uniform ones"[11].

Thus, in the labour relations that were born in the mass industrialization process, there was a difference between the "paid time" for which the employee received financial compensation - the salary - and the "free time" at his disposal[12]. If in the conception of the industrialization era on the organization of labour, working time was a spatial time in which the collective of workers was placed in a community of place, time and action[13], the new possibilities of modelling the organization of the working time and the labour offered by the information technology, have raised new problems regarding the delimitation of working time by rest time[14].

Also, the subordination of the worker to the employer, which is characteristic of the traditional model of the employment relationship, has been gradually replaced in many areas by the assignment of tasks and objectives and the granting of greater autonomy to the employees, by applying flexible procedures for their coordination[15], which resulted in the transfer of working time control from the employer to the employee and the increasing difficulty of delimiting working time from rest time.

In the collaborative economy, the worker's autonomy is considered to be defining although there is no solid empirical evidence in this respect[16]. On the contrary, it is highlighted a blurred boundary between working time and privacy time[17] and lack of control over working time[18].

The degree of autonomy of the worker, expressed in the possibility to choose the task to be performed, the time used for this purpose and the way of organizing and performing the work, differs significantly depending on the control exercised by the platform administrator and the type of activity[19].

At the same time, the space boundaries are blurred in the sense that space for work is increasingly entering the space for private life; at the same time, it is remarked that work is space-independent[20].

At the present, understanding and defining working relationships in the

[10] J.-Y. Boulin, G. Cette, D. Taddéi, *Le temps de travail: une mutation majeure*, Futuribles 5/1992, p. 8.

[11] H. Seifert, *Flexibility through working time accounts: reconciling economic efficiency and individual time requirements*, WSI - Diskussionspapiere, no. 130/2004, p. 1.

[12] J. Rubery, K. Ward, D. Grimshaw, H. Beynon, *Working time, industrial relations and the employment relationship*, Time & Society 14(1)/2005, p. 91.

[13] P. Bouffartigue, J. Bouteiller, *A propos des normes du temps de travail, Revue de l'IRES no. 42/2003*, 2. p. 8.

[14] Răzvan Anghel – *Noua reglementare privind telemunca...*, cited, p. 213.

[15] C.A.Moarcăș, *Impactul globalizării asupra reglementărilor din domeniul muncii. Posibile schimbări în sistemul relațiilor industriale*, Public Law Review, no.1/2005, pp. 28- 29.

[16] Jon Messenger – *Working time and the future of work*, cited, pp. 23-24.

[17] Jon Messenger – *Working time and the future of work*, cited, pp. 21, 24, 25.

[18] EUROFOUND – *Work on demand: Recurrence, effects and challenges*, Publications Office of the European Union, Luxembourg, 2018, p. 4.

[19] for a classification of activities provided through on-line platforms and the way they are provided see EUROFOUND, Employment and working conditions of selected types of platform work, Publications Offices of the European Union, Luxemburg, 2018, pp. 5, 21.

[20] Jon Messenger – *Working time and the future of work*, cited, p.19.

collaborative economy are deficient, although the key issue in their analysis and in the analysis of working time organization is their classification[21], as it is essential to determine whether they are employment relationships or business relationships.

The work done within the framework of the collaborative economy generates problems regarding the protection of the persons carrying out such activities, including the problem of limiting the working time for the purpose of protection of health and safety at work, but also for ensuring a balance between professional life and personal life.

But in order to solve this problem, it must first be determined whether the legal rules that require working time limitation are applicable. In the next stage, in order to ensure the protection offered by these normative acts, the working time must be firstly delimited by the rest time, as it can only be limited something defined and determined; as a result, it has to be checked whether this delimitation process is possible in practice and by what methods.

The legal framework applicable in the European Union on the organization of working time is Directive 2003/88 and the sectoral directives, as well as the internal rules for transposing them. The jurisprudence of the Court of Justice of the European Union may provide benchmarks to determine whether and how these legal acts can be enforced, even if the Court has not yet expressly addressed those issues.

2. Applicability of rules on the organization of working time

2.1. General aspects

The Working Time Directives are, as a rule, applicable to workers, an autonomous concept of EU law, with the exception of Directive 2002/15 on road transport, which also applies to self-employed workers.

By reference to Article 2 (1) of Directive 89/391 / EEC, to which Article 1 (3) of Directive 2003/88 / EC refers, the latter applies to all areas of activity[22]. It is true that Article 2 (2) of Directive 89/391 / EEC excludes from its scope activities which have inherent characteristics which are inevitably inconsistent with the provisions of the Directive but only if they form part of the public administration so those activities in the collaborative economy that are activities in the private domain, cannot be excluded[23].

In the judicial practice, more and more have raised the issue of the nature of the legal relationships established in the collaborative economy between those who provide the work and the operators of the on-line platforms that put the first ones in contact with the clients. The problem is generated by the fact that, viewed globally, it seems that a feature of the collaborative economy is that service providers are often individuals who occasionally offer goods or services from individual to individual, but, in the mean time collaborative platforms are increasingly used by micro-enterprises and small entrepreneurs[24].

[21] Jon Messenger – *Working time and the future of work*, cited, p. 22; EUROFOUND – Work on demand.., cited, p. 3.

[22] see, among many others, CJEU, Judgment of 14.10.2010, 2nd Chamber, case C-428/09, Union syndicale Solidaires Isère c. Premier ministre, Ministère du Travail, des Relations sociales, de la Famille, de la Solidarité et de la Ville, Ministère de la Santé et des Sports, ECLI: EU: C: 2010:612, par.21, 22; Judgment of 5.10.2004, Pfeiffer e.a., C-397/01-C-403/01, Rec., p. I-8835, par.52, www.curia.eu.

[23] As fear was expressed: Alan Bogg, *Foster parents and fundamental labour rights*, www.uklabourlawblog.com, 25.07.2018, par.16.

[24] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - *A European agenda for the collaborative economy*, cited, p. 5.

Thus, on-line platform operators claim that it is a commercial relation, and those that do the work are self-employed, professionals that are leading their own business, while some of them who have filed a complaint with the courts claim that they are employees engaged in a labour relations.

This issue must be addressed with priority, since working time rules apply only if the person who performs the work has the status of a worker, otherwise, if it is a commercial relationship, these rules are not applicable as only workers enjoy protection by limiting working time and also benefit of guaranteed rest periods, considering the relationship of subordination with the employer, as opposed to an independent professional who is in a tie with the contractual partner.

If the person who performs the work in the collaborative economy is considered to be an independent service provider, the provisions of Directive 2006/123, which generally define service providers, or special directives such as Directive 86/653 / EEC on self - employed commercial agents, are applicable and those regulations do not provide for protection measures with regard to the organization of working time, assuming that the self - employed is free to organise the work to do. Only Directive 2002/15 also applies to self-employed workers.

It is important, however, that the attribution of the status of a worker does not depend on the classification of the legal relationships in which he/she is part according to the national law, being an autonomous notion of Union law[25].

However, it is essential if there is a subordinate relationship between the on-line platform operator and the worker. The first element of this subordinate report implies that the platform operator has control over the organization of the activity.

So, in order to determine the nature of these legal relationships, two aspects need to be considered:

- if the services offered to the beneficiaries are an activity of the operator of the on-line platform or belong to the natural person providing the work and the platform acts only as an intermediary between the service provider and the beneficiary offering only the frame for the demand to meet the offer; if the on-line platform merely provides intermediation services between professionals and customers, the work done does not belong to it, but belongs to the professional so that it is excluded that the operator of the platform is considered an employer and, as a consequence, the person who provides the work to be considered a worker;
- If the activity is considered to be organized and to belong to the operator of the on-line platform, it should be analysed whether the natural persons performing the work are commercial partners, subcontractors of the operator of the platform, or have the status of employees of the platform, i.e. workers.

It is acknowledged, however, that in the context of the collaborative economy there are increasingly blurred boundaries between the category of workers employed

[25] CJEU (Grand Chamber), judgement of 20.11.2018, in case C-147/17, Sindicatul Familia, par.41; Judgment of 14.10.2010, Isère, C‑428/09, cited, par. 28; CJEU, (5th Chamber), Judgment of 21.02.2018, case C‑518/15, Matzak, par.28 and 29, www.curia.eu; Judgment of 20.09.2007, Kiiski, C-116/06, EU:C:2007:536, par. 26 and the case-law cited there; Judgment of 1.12.2005, case C-14/04, Abdelkader Dellas, Confédération générale du travail, Fédération nationale des syndicats des services de santé et des services sociaux CFDT, Fédération nationale de l'action sociale Force ouvrière c. Premier ministre, Ministre des Affaires sociales, du Travail et de la Solidarité, ECLI:EU:C:2005:728, par. 44, and also the case-law cited there.

under an individual labour contract and that of self-employed workers[26].

2.2. Criteria regarding the responsibility of organizing the activity

The CJEU has been called to address this issue in an administrative case concerning the authorization of certain activities, being asked to determine whether an online platform through which public transport services are provided has the status of a public transportation service provider, with the consequence of being subject to specific authorization requests, or has the status of information service.

Although the issue of work relations between the on-line operator and service providers has not been addressed in this case, the decision sets out several principles that may be useful in determining whether an on-line platform can be considered as responsible for organizing the activity, or a simple intermediary between and customers and the service providers.

Thus, in Case C-434/15[27], the Court held that "a brokerage service which, by means of an application for smart phones, has the purpose of linking, for the purpose of obtaining remuneration, unreachable drivers using their own vehicle with persons wishing to travel urbanely, must be regarded as being indissociably linked to a transport service and as falling within the scope of the qualification as a "transport service within the meaning of Article 58 (1) TFEU".

In this case, the difference between information society services and classical services has been made.

The Court has identified the following elements defining the service provided as a transport service (par.37-39):

- the service is not limited to a brokerage service consisting of connecting, through a smartphone application, a non-professional driver using his own vehicle and a person wishing to make an urban journey;
- the provider of this brokerage service creates at the same time an offer of urban transport services which it makes accessible especially by means of computer tools such as the used application;
- the provider of this brokerage service organizes the general operation of the application in favour of persons wishing to make use of this offer;
- the intermediation service is based on the selection of non-professional drivers using their own motor vehicle to which this company supplies an application, in absence of which, on the one hand, those drivers are not in a position to provide transport services and, on the other hand, the person who wants to make an urban journey would not access the services of those drivers;
- the supplier of the service exercises a decisive influence over the conditions of service provided by those drivers, such as: the fact that it determines, by means of the application used, at least the maximum price per race; that the company collects that price from the customer and retain a part of it before paying the rest to the driver and that it exercises a certain control over the quality of the motor vehicles and their drivers, as well as the behaviour of the latter, which may lead, if necessary, to their exclusion.

Therefore, in order to determine whether it is an information society service within the meaning of Article 1 (1) (b) of Directive 2015/1535[28] or a service providing direct benefits to consumers, it must first be ascertained whether this is only a brokerage

[26] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - *A European agenda for the collaborative economy*, cited, p. 12.

[27] CJEU (Grand Chamber), Judgement of 20 December 2017, EU: C: 2017:981, Asociación Profesional Elite Taxi vs. Uber Systems Spain SL, www.curia.eu.

[28] Former art. 1, par. 2 of Directive 98/34, referred by art. 2 (a) of Directive 2000/31.

service. Such a service offers to the users, both consumers and physical service providers, a virtual meeting place in which demand and supply meet freely, and workers choose freely to carry out an activity and agree with the beneficiary on the remuneration requested, collecting the price directly or with minimal involvement of the platform that offers only an electronic payment system and retains a commission just for the money transfer service.

On the contrary, if through the on-line platform its operator exercises a certain level of control, manifested in providing the service on its own behalf, controlling the level of charges, collecting and distributing the remuneration to the providers of work, controlling the professional qualities of those, their behaviour, it should be considered as a classical service provider, who retains responsibility for organizing the activities.

2.3. Criteria defining the status as worker of individuals who work through on-line platforms

CJEU has had the opportunity to rule on a number of cases, including some concerning the interpretation of the provisions of Directive 2003/88, on the notion of worker in European Union law by laying down rules to determine whether a person performing the work has this status or not .

At the same time, the Court has also ruled on provisions defining concepts which exclude the status of worker, such as the notion of a service provider within the meaning of Directive 2006/123 or a commercial agent within the meaning of Directive 86/653 / EEC.

Thus, for a person who performs an activity involving the conclusion of contracts with service and product recipients, in order to be a commercial agent within the meaning of Article 1 (2) of Directive 86/653, the activity performed must be independent.

The Court has held[29] in this regard that, in order to retain that status, this essential requirement must be fulfilled (paragraph 23); it further pointed out that the circumstance that the worker performs the activity on the principal's premises, alone, does not exclude the independent character of the work (par. 28, 32); however, if the worker's independence is impaired, he/she loses the status of a commercial agent, that happening by subordinating to the instructions of the principal and by the ways of carrying out the tasks performed (par.32), under the latter aspect, being possible to be relevant that the work is carried out from the headquarters of the principal. Thus, being in the immediate proximity of that principal, by virtue of his presence at his seat, that agent may be subject to the instructions of that principal and, at the same time, by having material advantages connected with that presence, such as the provision of a workspace or the access to the organizational facilities of that head office, it cannot be ruled out that the agent in question is in fact in a situation which prevents him from carrying out his activity independently from the point of view of organizing this activity or the associated economic risks (par.33).

Consequently, if those elements are fulfilled and the individual does not enjoy total independence, he/she can only have the status of worker, so that judgment is relevant in this respect.

The CJEU had the opportunity to analyse the notion of worker even in cases concerning the organization of working time.

The Court held that Directive 2003/88 did not refer either to Article 3 (a) of Directive 89/391 (which defines the concept

[29] CJEU, (4th Chamber), judgement of 21.11.2018, C-452/17, EU: C: 2018:935, in case Zako SPRL.

of 'worker') or to the definition of a worker as is apparent from the legislation and /or national practices[30] and, for the purposes of its application, that notion cannot be interpreted differently according to the national legal systems but has a specific autonomous meaning to Union law[31] and must not be interpreted restrictively[32].

In the Court's view, the concept of a worker must be defined according to objective criteria characterizing the employment relationship, taking into account the rights and obligations of the persons involved[33] and the *sui generis* legal nature of a labor relationship from the perspective of national law cannot have any effect on the status of worker within the meaning of Union law[34]. For example, the Court has held that the fact that a person who performs work is not subject to the Labour Code in his country of employment cannot be decisive for assessing the existence of an employment relationship between the parties, that generating a legal situation *sui generis*[35].

The CJEU also stated that it is for the national court to determine whether the applicant falls within the concept of a worker, in which case it must conclude based on objective criteria and assess in its entirety all the circumstances of the case before it, which are connected with the nature of both the activities in question and the relationship between the parties concerned[36]. In that analysis, the national court must in particular verify whether the work actually provided by the person concerned can be regarded as normally belonging to the labor market, taking into account not only the status and practices of the beneficiary of the work concerned but also the purpose of the activity and the nature and the arrangements for the performance of work[37].

The Court has held in many cases that an essential characteristic of the employment relationship is the fact that a person performs the work in return of remuneration for a certain period of time in favour of another person and under that

[30] CJEU (2nd Chamber) Judgment of 14.10.2010, case C-428/09, Isère, cited, par.27; CJEU, 1st Chamber, Judgement of 26.03.2015, case C 316/13, Gérard Fenoll c. Centre d'aide par le travail „La Jouvene", Association de parents et d'amis de personnes handicapées mentales (APEI) d'Avignon, ECLI:EU:C:2015:200, par.24, www.curia.eu.

[31] CJEU, Judgment of 14.10.2010, 2nd Chamber, case C 428/09, cited, par.28; CJEU, 1stChamber, Judgement of 26.03.03. 2015, case C 316/13, cited, par.25; CJEU, (5th Chamber), Judgment of 21.02.2018, in case C‑518/15, Matzak, par.28, www.curia.eu.

[32] CJEU, 5th Chamber, Ordinance of 7.04.2011, case C-519/09, Dieter May c. AOK Rheinland/Hamburg – Die Gesundheitskasse, ECLI:EU:C:2011:221, par.21, www.curia.eu.

[33] CJEU, Judgment of 14.10.2010, 2nd Chamber, case C 428/09, cited, par.28; CJEU, 1st Chamber, Judgement 26.03.2015, case C- 316/13, cited, par.27.

[34] CJEU, Judgment of 14.10.2010, 2nd Chamber, case C 428/09, cited, par.30; see Judgment of 20.09.2007, Kiiski, C-116/06, Rep., p. I 7643, par. 26 and the case-law cited; CJEU, 1st Chamber, Judgement of 26.03.2015, case C-316/13, cited, par.31; Judgement Trojani, C-456/02, EU: C: 2004:488, par. 16; CJEU, (5th Chamber), Judgment of 21.02.2018, in case C‑518/15, Matzak, par.29, www.curia.eu.

[35] CJEU, 1st Chamber, Judgement of 26.03.2015, case C -316/13, cited, par.30.

[36] CJEU, Judgment of 14.10.2010, 2nd Chamber, case C 428/09, cited, par.29; CJEU, 1st Chamber, Judgement of 26.03.2015, case C 316/13, cited, par.29; Judgement Trojani, C 456/02, EU:C:2004:488, par. 17.

[37] CJEU, 1st Chamber, Judgement of 26 .03. 2015, case C 316/13, cited, par.42; see mutatis mutandis, Judgement Trojani, C-456/02, EU: C: 2004:488, par. 24 (in this case, the question arises whether the applicant can claim a right of residence as an employed or self-employed person or a provider of services in the situation where work is done under a social-professional re-integration program run by a non-profit organization).

person direction[38]. As a result, it has been shown that a 'worker' must be considered to be any person who carries out real and effective activities in order to obtain remuneration[39], except for activities which are so small that they appear to be purely marginal and accessories[40]. In this regard, it was appreciated that in the context of collaborative economy, when a person provides purely marginal or ancillary services using on-line platforms, this would indicate that that person does not have the status of worker while the provision of stable work leads to the qualification of that person either as a worker or as self employed according to the analysis of other facts[41].

In the Court's view, neither the higher or lower productivity of the person concerned, nor the origin of the resources for remuneration, or the limited level of remuneration, can have consequences on the status of worker within the meaning of Union law[42]. Also, in the Court's view, the existence of an employment relationship is not excluded either by the overall reduced duration of the activity[43] or the reduced duration of the daily activity[44]. Also, the CJEU has held that this status is not excluded by the fact that the worker enjoys a considerable margin of appreciation in the day-to-day exercise of his duties or that the mission attributed is a "trust mission"[45].

In the recent case of Matzak, the CJEU also held[46] that "any person who carries out real and effective work is to be regarded as a" worker ", except for activities that are so small that they appear to be purely marginal and accessories" and "the characteristic element defining a report of work consists in the fact that a person performs work in return for which he receives a remuneration, for a certain period of time, for another person and under his direction[47].

In an earlier judgment, the Court has already held that must be regarded as a worker within the meaning of European Union law also a person who has concluded a contract on the basis of which she/he provides occasional work, on request and for irregular periods of time, being paid only for

[38] CJEU, Judgment of 14 .10. 2010, 2nd Chamber, case C-428/09, cited, par.28; see mutatis mutandis, for article 39 CE, Judgment of 3.07.1986, Lawrie Blum, 66/85, Rec., p. 2121, par. 16 and 17, and also Judgment of 23 .03. 2004, Collins, C-138/02, Rec., p. I 2703, par. 26; CJEU, 5th Chamber, Ordinance of 7.04.2011, case C 519/09, cited, par.21; see especially the Judgment of 3 .07. 1986, Lawrie Blum, 66/85, Rec., p. 2121, par. 16 and 17, Judgment of 23 .03. 2004, Collins, C- 138/02, Rec., p. I 2703, par. 26, and Judgment of 7.09.2004, Trojani, C-456/02, Rec., p. I 7573, par. 15; CJEU, 1st Chamber, Judgement of 26.03.2015, case C 316/13, cited, par.27; Judgment of 20.09.2007, Kiiski, C 116/06, par.25; CJEU, (5th Chamber), Judgment of 21.02.2018, in case C‑518/15, Matzak, par.28, www.curia.eu.

[39] Judgement Trojani, C-456/02, EU:C:2004:488, par. 17.

[40] CJEU, 5th Chamber, Ordinance of 7.04.2011, case C 519/09, cited, par.21; CJEU, 1st Chamber, Judgement 26 .03. 2015, case C 316/13, cited, par.27; CJEU, (5th Chamber), Judgment of 21 .02. 2018, in case C‑518/15, Matzak, par.28, www.curia.eu.

[41] Communication from the Commission to the European Parliament, the Council, *the European Economic and Social Committee and the Committee of the Regions - A European agenda for the collaborative economy*, cited, p. 14.

[42] CJEU, 1st Chamber, Judgement 26.03.2015, case C 316/13, cited, par.34; see Judgement Bettray, 344/87, EU:C:1989:226, par. 15 and 16, Judgement Kurz, C-188/00, EU:C:2002:694, par. 32, and also Judgement Trojani, C 456/02, EU:C:2004:488, par. 16.

[43] CJEU (Sixth Chamber), Judgment of 6 November 2003, in Case C-413/01, Franca Ninni-Orascheand Bundesminister für Wissenschaft, Verkehr und Kunst, par.25.

[44] CJEU, Judgment of 3 June 1986, in case C-139/85, R. H. Kempf v Staatssecretaris van Justitie, par.13.

[45] see for this opinion CJEU, Judgment of 10.09.2014, Haralambidis, C-270/13, EU:C:2014:2185, par. 39-41, and Judgment of 9.07.2015, Balkaya, C-229/14, EU:C:2015:455, par. 41.

[46] CJEU, (5th Chamber), Judgment of 21.02.2018, in case C‑518/15, Matzak, www.curia.eu.

[47] For the same opinion see Judgment of 26 .03. 2015, Fenoll, C-316/13, EU:C:2015:200, par. 27 and the case law cited.

the work actually done, and without any obligation for the employer to actually request the work[48].

However, the Court held that, in order to determine whether the activity was real and not a purely marginal activity, the national court may have regard to the irregular nature and limited duration of the work actually performed, which may indicate that it is a marginal activity; it is very important, however, that the CJEU has held in this context that another important element in the analysis of national courts is whether the person concerned must remain at the disposal of the employer to perform the work if so requested[49].

In a recent ruling[50], the CJEU reiterated its previous jurisprudence on the elements defining the notion of worker. Accordingly, it follows from the case-law of the CJEU:

- the essential characteristic of the employment relationship is the fact that a person performs work in return for which she/he receives a remuneration in a given period for another person and under his direction[51];
- an employment relationship requires a relationship of subordination between the worker and his employer, but the existence of such a link must be assessed on a case-by-case basis in the light of all the elements and circumstances of the relationship between the parties[52];
- the natural persons, in relation to the company with which they have contractual relations, are in a subordination relation materialized by the continuous supervision and evaluation of their activities by the respective company in relation to the requirements and the criteria specified in the contract, in order to carry out the activity[53].

It should also be noted that the CJEU has analysed the issue of organizing working time, including in the case of an independent self-employed worker who was working on demand[54]. The applicant in the main proceedings did not work under an individual employment contract but had the status of self-employed, performing work according to a contract on the basis of which he was remunerated only by a commission for the work carried out, very similar to the situation of the persons supplying work based on orders received through an electronic platform. For this reason, the employer did not consider that it should grant him leave of absence and a leave allowance as to an employee on the basis of an employment contract. However, in its decision the Employment Tribunal considered that the applicant was to be classified as a 'worker' within the meaning of Directive 2003/88. It is true that in its judgment the CJEU did not consider whether or not the plaintiff in the main proceedings had the status of a worker within the meaning of Directive 2003/88, which is an autonomous concept of EU law. It can be argued that the CJEU has started from the

[48] CJEU, Judgment of 26 February 1992, in case C-357/89, V. J. M. Raulin v Minister van Onderwijsen Wetenschappen, par.9.

[49] CJEU, Judgment of 26 February 1992, in case C-357/89, V. J. M. Raulin v Minister van Onderwijsen Wetenschappen, par.14.

[50] CJEU (Grand Chamber), judgement of 20.11.2018, in case C-147/17, Sindicatul Familia.

[51] CJEU, (Grand Chamber), judgement of 20.11.2018, in case C-147/17, Sindicatul Familia, cited, par.41; Judgment of 14.10.2010, Isère, C-428/09, cited, par. 28 and the case-law cited.

[52] Judgment of 10.09.2015, Holterman Ferho Exploitatie and others, C-47/14, EU:C:2015:574, par. 46.

[53] CJEU (Grand Chamber), judgement of 20.11.2018, in case C-147/17, Sindicatul Familia, cited par.45.

[54] CJEU (5th Chamber), Judgment of 29.11.2017 în case C-214/16, *Conley King vs. The Sash Window Workshop Ltd*, Richard Dollar.

presumption of the relevance of the reference for a preliminary ruling to the national court[55], on the basis of the British court's conclusion that the applicant was a worker. However, it is noteworthy that the CJEU was in no way obliged to accept this conclusion and could have started the analysis of the referral with the verification of the applicability of Directive 2003/88 and of whether the situation of the applicant falls within its scope; the fact remains that the CJEU had no objection to the classification of the applicant as a worker within the meaning of Directive 2003/88 by the referring court[56].

This judgment may be of great relevance in the future as a precedent in the classification of legal relationships between workers through an electronic order distribution platform and the owner of such a platform.

From the perspective of national law, there is the question of the qualification of the legal relations established between the parties, namely whether they are employment relationships or trade relations between professionals.

On this regard, there are already different solutions given by the EU courts on the basis of a case-by-case analysis. For example, given that workers using an electronic platform are registered as self-employed, in some cases they were qualified as employees[57] while in other cases they were considered not to have this status[58]. Recently, the bond of subordination, defining for the labour relation, was found in a situation where the on line application was equipped with a system of geolocation allowing the real-time monitoring by the company of the position of the courier and the accounting of the total number of kilometres travelled and, secondly, the company had power of sanction with respect to the courier[59].

The Romanian High Court of Cassation and Justice – the Panel for preliminary clarification on legal aspects, by Decision no. 37 of November 7, 2016, found that in the event of a failure by the parties to conclude a written employment contract, the natural person who has worked for and under the authority of the other party has the possibility to ask the court to acknowledge the existence of the employment relationship and its effects even if the employment relationship ceased prior to the filing of the petition to the court.

In order to analyse the nature of legal relationships in the frame of which work is done, there may be relevant the provisions of art. 7 of Law no. 227/2015 on the Fiscal Code, defining independent and dependent activities as follows:

- **dependent activity** - any activity carried out by a natural person in an income-generating employment relationship;
- **dependent activity on the main job** - any activity performed on the basis of an individual employment contract or a special legal status, declared to the employer as a main job by the employee; if the activity is carried out for several employers, the employee is obliged to declare only to the chosen employer that the place in question is the place where he performs the function

[55] See for example CJEU- Judgment of 6.09.2016, in case C-182/15, EU:C:2016:630, par. 20 and the case-law cited there.

[56] Răzvan Anghel - *Working time and rest time in recent CJEU case law (July 2017 - February 2018)*, Revista EuRoQuod no.2/2018, pp. 77-78.

[57] United Kingdom Employment Appeal Tribunal London, [2018] IRLR 97, [2017] UKEAT 0056_17_1011, [2018] ICR 453, [2017] WLR (D) 809, par.124, available: www.bailii.org, accessed 18.04.2018.

[58] Among others, Conseil de Prud'hommes de Paris, n° RG: F 16/11460, sentence of 29.01.2018.

[59] „Cassation Court, Social Chamber, Public audience of Wednesday, 28 November 2018, no.: 17-20079, www.legifrance.gouv.fr.”.

he/she considers to be the main job;

- **self-employment** - any activity carried out by a natural person for the purpose of obtaining income, which meets at least 4 of the following criteria:
- the individual has the freedom to choose the place and way of working, as well as the work schedule;
- the individual has the freedom to work for more than one client;
- the risks inherent in the activity are assumed by the natural person carrying out the activity;
- the activity is done by using the patrimony of the natural person who performs it;
- the activity is performed by the individual by using the intellectual capacity and / or the physical performance of the person, depending on the specificity of the activity;
- the natural person is part of a professional body / order with the role of representing, regulating and supervising the profession, according to the special normative acts regulating the organization and the exercise of the respective profession;
- the natural person has the freedom to carry out the activity directly, with employed person or through collaboration with third parties under the law.

Thus, when the activity does not meet the criteria to be qualified as independent, the income obtained is qualified by the Fiscal Code as salary income and assimilated to salaries precisely to eliminate the possibility of dissimulation of employment relationships in self-employment.

Per a contrario, if there are not met at least four of the criteria set out in Art. 7 of Fiscal Code, the activity cannot be considered as independent, so that it can be considered that in fact the activity was performed in an employment relationship even without the conclusion of an individual contract of employment in written form.

Therefore, it could be considered as elements which, once proven, would lead to the conclusion that a work relationship exists, among others, the following:

- the individual does not have the freedom to choose the place and the way of doing the work, as well as the work schedule, as established by the beneficiary's indications;
- the risks inherent in the activity are assumed by the person benefiting from the activity;
- the activity is done by using the beneficiary's goods;
- the natural person does not have the freedom to carry out the activity directly, with employed personnel or through collaboration with third parties under the law[60].

3. The practical difficulties of delimiting working time from rest time in the collaborative economy

With regard to the delimitation of working time from rest time for individuals who work in other areas than those belonging to the employer, the CJEU offered a solution, pointing out that “it is up to the employer to use the necessary control tools to avoid possible abuses” of employees who

[60] Răzvan Anghel, *Procedura soluționării conflictelor individuale de muncă – Ghid pentru practicieni, Ediția a II-a, revizuită și adăugită*, C.H. Beck Publishing House, Bucharest, 2018, pp. 308-309.

work outside their premises[61], such as the use of credit cards dedicated exclusively to the payment of fuel needed for the professional use of vehicles made available by the employer[62].

In the French case-law, for example, it has been held in several cases that a worker's geolocation system, which has a certain freedom in the organization of work, can be used by the employer to determine the working time but only if there is no other means of that control to be carried out and only if the employee and the competent administrative authority are informed, since the rights and freedoms of the employee can only be affected if the measure is justified by the aim pursued and proportionate to it[63], so that another solution was even in the sense that such a measure it is not justified in the particular case of such an employee[64].

In the situation where the working time can no longer be delimited by reference to the time a worker is at the workplace determined by the employer, the work being done anywhere and at any time, it becomes relevant the actual performance of the work so that the durations of the work itself must be clearly determined. For this purpose, electronic means of monitoring the employee activity can be used, ranging from cameras and systems to monitor access to a work area or to monitor the energy consumption of some equipment and continuing with the means of modern information technology such as internet traffic monitoring, computer keyboard monitoring, replication of desktop activity, verification of information that reflects software activity, electronic communications control, social networking activities, geolocation systems, dedicated software monitoring the activity of mobile devices, and so on[65]. Employers may wish to use these technical means to control the employee's behaviour and thus to be able to delimit working time from rest time[66] in order to determine remuneration and to verify employee compliance with service obligations.

Using these means of remote monitoring and control of employees' work poses, however, serious and numerous issues concerning the protection of employees' personal data, the protection of their privacy and dignity, especially in the context where the traditional and clear limit between working time and personal time is becoming more blurred with the development of flexible forms of work organization[67].

It is important that CJEU has already established that a record of working time which implies the indication of the hours at which each worker begins and ends the working day, as well as the interruptions or appropriate breaks, is part of the concept of

[61] CJEU, 3rd Chamber, Case C-266/14, Judgment of 10.09.2015, Federación de Servicios Privados del sindicato Comisiones obreras (CC.OO.) c. Tyco Integrated Security SL, Tyco Integrated Fire & Security Corporation Servicios SA, ECLI:EU:C:2015:578, par. 40 (*www.curia.eu*).

[62] *Idem*, par. 41.

[63] Cour de Cassation, Chambre sociale no. 10-18036, public audience of 3.11.2011 (*www.legifrance.gouv.fr*).

[64] Cour de Cassation, Chambre sociale no. 13-23645, public audience of 17.12.2014, ECLI:FR:CCASS:2014:SO02387 (*www.legifrance.gouv.fr*).

[65] Răzvan Anghel – *Noua reglementare privind telemunca...*, cited, p. 215.

[66] See also *A. Fabre*, Le temps de trajet des travailleurs nomads devant la Cour de justice: la mobilité vue de plus haut, Droit Social 1/2016, p. 61 (*https://search.proquest.com/openview/93c636846dc716af2978ca28f35137c5/1*).

[67] *T.A. Coelho Moreira*, The electronic control of the employer in Portugal, in Labour & Law Issues, vol. 2, no. 1/2016, p. i.4.

"personal data" in the meaning of art.2 (a) of Directive 95/46 / EC[68].

Next, however, the question is whether the period of availability, in which the employee does not actually work but only awaits the orders of the employer or the orders of its clients to carry out certain activities, must be considered working time.

The problem arises in the context in which the CJEU has determined that the availability time should be considered as working time only when the worker is present in the workplace or in another place imposed by the employer[69], but not when at his/her own home[70] or in another location not set by the employer[71] unless the way in which the activity is organized makes it impossible for them to devote themselves to their own activities[72].

As a result, new elements for delimiting working time from rest time must be identified for workers in the collaborative economy, where working time is no longer defined by the presence in a certain space.

For example, a British appeal court has determined that the working time of employees using an online order platform for potential clients can be determined by reference to the time the application provided by the employer is active, which means that the employee is at his disposal to take orders[73].

However, availability time differs in its qualities depending on the type of activity and on-line platform. If work on demand in a given location may involve periods of availability in which the worker cannot devote himself to other activities, crowdwork, which allows more freedom in choosing tasks to be performed and the moment of fulfilment, may imply that periods of waiting for a new task does not constitute real periods of availability but rest periods that do not constitute working time.

At the same time, provisions on the protection of personal data may prevent the use of means of supervising the activity of the employee if they interfere with his private life in the context in which he carries out the work including in private premises belonging to him and during periods of time which are interspersed with periods affected by private interests. This also creates a further difficulty in determining working time, which affects mainly the worker who finds himself faced with a very difficult choice: to renounce the protection of privacy or to renounce the protection of health and safety at work by limiting working time in relation to the employer.

Conclusions

The new ways of labour supply in the collaborative economy rise primarily the question of the status of the individual that do the work, whether he/she is a worker or a self-employed worker, essential being the verification of the fulfilment of the condition of subordination, which has several defining elements: the one who performs the work

[68] CJEU, 3rd Chamber, Case C-342/12, Judgment of 30.05.2013, *Worten – Equipamentos para o Lar SA c. Autoridade para as Condições de Trabalho (ACT)*, ECLI:EU:C:2013:355 (*www.curia.eu*).

[69] For example, CJEU (5th Chamber) – Ordinance of 11.01.2007 in case C 437/05, Jan Vorelvs. Nemocnice Český Krumlov, EU:C:2007:23.

[70] CJEU, Judgement of 03.10.2000 in case C-303/98, Sindicato de Médicos de Asistencia Pública (SIMAP) c. Conselleria de Sanidad y Consumo de la Generalidad Valenciana, EU:C:2000:528.

[71] CJEU (4th Chamber) Judgement in case C-87/14, *European Comission* vs. *Ireland*, EU:C:2015:449.

[72] CJEU, (5thChamber), Judgment of 21 .02. 2018, in case C‑518/15, Matzak, cited.

[73] United Kingdom Employment Appeal Tribunal London, 2018, IRLR 97, 2017, UKEAT 0056_17_1011, 2018, ICR 453, 2017, WLR(D) 809, par. 124 (*www.bailii.org*) accessed 18.04.2018.

must act under the leadership of the on-line platform, which determines the nature of the activity, the remuneration and the working conditions[74]; any activity performed outside a relationship of subordination from the point of view of working and remuneration conditions must be regarded as a self-employed activity for which the individual is solely responsible[75]. At the same time, the activity must be a consistent one to define a working relationship and not at such a low level as to be purely marginal and auxiliary precisely because in the collaborative economy, many people provide occasional, isolated activities for additional non-essential income.

The spatialization of work and the determination of working time by reference to the duration of the worker's presence in an area imposed by the employer in the exercise of his prerogative of controlling and disciplining the work has generated in the jurisprudence, including the case-law of the CJEU, the concern to find criteria for delimitation of working time from rest time by reference to the space.

In this context, without removing from the definition of working time the periods in which the worker actually carries out the work, the CJEU has established criteria for delimiting working time from rest time by reference to the presence of worker to the work place in order to include inactive periods when the worker is at the employer disposal, exercising the duties of work so that the Court was not asked with preliminary questions concerning the delimitation of working time by the rest time, according to the criterion of actual work, as in the classical way of work organization the employer supervision and control was presumed to be exercised so no problems of determining the actual time of work were of interest.

In the context of the new way of organizing work, mainly results-oriented, abandoning the employer's constant supervision and of work despatialization, the CJEU's case law no longer provides clear rules for the delimitation of working time by rest time, especially as regards inactive availability periods, but only principles and hints for future possible solutions.

Practically, if a worker is awaiting orders from the employer, in a freely chosen place, according to CJEU's case law, that period should not be considered working time. But if the period of actual work performance cannot be determined, although obviously the work has been done, the interpretation should be in favour of the employee, presumed to be in a vulnerable position, so that the entire period of availability to be considered as working time especially that, according to the case-law of the CJEU, the qualification of a period as working time does not depend on the intensity of work[76] and there is no intermediate category between working time and rest time so that if a period cannot be considered rest time it must automatically be considered working time, as the two notions are mutually exclusive[77]. To assess whether a period is rest time, all the specific elements

[74] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A European agenda for the collaborative economy, cited, p. 13.

[75] CJEU, Judgment of 20 November 2001, in case C-268/99, Aldona Malgorzata Jany and Othersand Staatssecretaris van Justitie, www.curia.eu, accessed 13.03.2019, par.33, 34, 37.

[76] CJEU, Judgment of 1.12.2005, case C-14/04, Dellas, cited, par.43 and 58 of the judgement.

[77] CJEU, Judgement of 3.10.2000, in case C-303/98, SIMAP, cited, par.47, CJEU, 2nd Chamber, Judgment of 1.12.2005, case C-14/04, Dellas, cited, par.43, *www.curia.eu*; CJCE, 5th Chamber , Ordinance of 11.01.2007, case C-437/05, Jan Vorel c. Nemocnice Český Krumlov, ECLI:EU:C:2007:23, www.curia.eu, par.25; CJEU, 6th Chamber, Ordinance of 4.03.2011, case C 258/10, Nicuşor Grigore c. Regiei Naţionale a Pădurilor Romsilva –

of the activity must be analysed, especially if the worker must be in a certain area to respond to the orders and whether she/he is under the obligation to start work shortly after receiving the order[78] .

Such an interpretation is able to determine employers to adopt effective means of quantifying the working time, which is such as to ensure adequate protection for workers.

Furthermore, the fact remains that Article 17 (1) of Directive 2003/88 allows Member States to derogate from Articles 3 to 6, 8 and 16 where, based on the specific characteristics of the activity pursued, the length of working time is not measured and predetermined or can be determined by the workers themselves.

However, these exemptions must be adopted by states through normative acts, as the provision in the directive is not enough[79]. Although it cannot derogate from the provisions of Article 2 which include the definition of working time, the derogation from the provisions of Article 6 on maximum weekly working time makes it useless to delimit working time from rest time as this is relevant only for limitations of working time.

The new forms of working in the collaborative economy will further pose many problems on working time organization and regarding the delimitation of it from rest time.

The analysis on whether working time regulations are applicable and how will have to be done on a case by case approach, depending of the particular and ever changing conditions of work imposed by the on-line platforms, even in the case of the same platform if the terms and conditions of use are changed.

From the CJEU previous case law some principles may be detached for finding the legal solution to working time problems, generated by innovative work arrangements, as those questions were not addressed in a preliminary question on the subject, and such a possible future answer, anyway may not be applicable to all the possible situations. All those principles are useful on the condition to find first the essence of every work arrangement in the collaborative economy and then find the applicable principle.

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[78] Mutatis mutandis CJEU, (5th Chamber), Judgment of 21.02.2018, in case C‑518/15, Matzak, cited.

[79] CJEU, (2nd Chamber) Judgement of 21.10.2010 in case C-227/09, *Antonino Accardoe v.Comune di Torino*, par.46 and 51, www.curia.eu.

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THE LEGAL DIFFICULTIES GENERATED BY THE ALTERATION OF THE PROVISIONS REGARDING THE HEARING OF WITNESSES BY THE COURT WITHIN THE CIVIL PROCEDURAL CODE

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Abstract

Since Law no. 310/2018 has altered the legal provisions of the Civil procedural code regarding the way in which witness testimony is to be obtained, a certain number of difficulties have been generated due to the fact that the actual hearing of witnesses has to occur in a radically different manner, thus imposing on the court some obligations which may prove troublesome in the future. The paper aims to establish some proper practices, in terms of ensuring for all parties a fair trial whilst also abiding by the new legal solutions.

Keywords: *Civil procedural code Problems Witness Testimony Hearing Proper Conduct of the Court.*

1. Introduction

1.1. What matter does the paper cover?

The article shall endeavour to establish a preliminary point of view regarding the effects of Law no. 310 which was adopted in 2018 on the plaintiff, the defendant but also on what it implies for the judge should it apply the new provisions to the letter.

It shall also attempt to identify potential solutions needed to avoid legal difficulties generated by the new alterations to the Civil procedural code, including interpreting the text in accordance with the other relevant legal provisions, analysing the opportunity of a *de lege ferenda* effort and ultimately the necessity of implicating the Constitutional Court of Romania into the matter at hand.

1.2. Why is the studied matter important?

The study matter is paramount because there are a great deal of cases in which witnesses are heard by the court. It should always ensure that witness testimony is obtained in a legal mannor and in accordance to both the national legal provisions but also the European Court of Human Rights case law. The impact of witness testimony on the outcome of trials cannot be refuted and hence the necessity of identifying a workable legal method of administering the evidence, in circumventing potential problems which may arise.

1.3. How does the author intend to answer to this matter?

It is hoped to reach the objective of offering a very detailed outlook on the

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effects of the alteration via the analysis of the legal texts which are applicable, the point of view of both the legal authors which have analysed the effects of the new alterations but also that of prominent legal authors who have offered a clear perspective on the institution in general prior to the new law. By analysing the consequences of the altered legal text in-depth, it is hoped to achieve some results in offering the reader a viable option in terms of applying the specific legal provisions.

1.4. What is the relation between the paper and the already existent specialized literature?

The specialised literature has addressed the institution of witness testimony in general and there are also some legal authors who have attempted to shed some light on the new modifications. The paper shall attempt to utilise their insight and further advance the topic in gaining a perspective as detailed as possible of what it means for future trials for the judge to enforece the will of the legislator.

2. The legal applicable texts

Firstly, our national Civil procedural code[1] outlined in Article no. 321 the initial legal framework regarding the method in which the hearing of witnesses took place: " *Each witness will be listened separately, and without the presence of those who are have been yet heard.*

(2) The order of hearing witnesses shall be fixed by the President, taking into account the request of the parties.

(3) The witness shall first answer the questions of the chairman and then the questions asked, with his consent, by the proposing party as well as by the opposing party.

(4) After the hearing, the witness shall remain in the sitting room until the end of the investigation, except if the court decides otherwise.

(5) At the hearing, the witness shall be allowed to freely express his testimony, without being allowed to read a previous written answer; but he can employ the use of notes, with the President's approval, but only to specify figures or names…".

The procedure was also regulated in Article no. 322 and 323 of the Civil procedural code[2]: " *Witnesses can be asked again if the court finds fit.*

(2) Witnesses whose statements do not fit can be confronted.

(3) If the court finds that the question raised by the party can not lead to solving the case, is offensive or tends to prove a fact whose proving is forbidden by the law, it will dismiss it. The court will, ***at the request of the party****, shall write down both the question and the reason why it was not approved.*

Art. 323. - (1) The testimony shall be written by the clerk, after the dictation of the president or the delegated judge, and shall be signed on each page and at the end of it by the judge, the clerk and the witness, after he has become aware of the contents. If the witness refuses or can not sign, it will be mentioned at the end of the minute.

(2) Any additions, deletions or changes in the testimony must be approved and signed by the judge, the clerk and the witness, under the sanction of not being taken into account.

[1] Law no. 134 of July 1, 2010 regarding the Civil Procedure Code, republished in the Official Journal of Romania no. 247 of April 10, 2015.

[2] Law no. 134 of July 1, 2010 regarding the Civil Procedure Code, republished in the Official Journal of Romania no. 247 of April 10, 2015.

(3) Unfilled places in the statement must be barred with lines so that no additions can be made.

(4) The provisions of art. 231 par. (2) shall apply accordingly. "

However, with the advent of Law[3] no. 310 passed in 2018, certain alterations have been made to these legal texts: " *(1) Each witness will be listened separately, and without the presence of those who are have been yet heard.*

(2) The order of hearing witnesses shall be fixed by the President, taking into account the request of the parties.

(3) The witness shall first answer the questions of the chairman and then the questions asked, with his consent, by the proposing party as well as by the opposing party.

(4) After the hearing, the witness shall remain in the sitting room until the end of the investigation, except if the court decides otherwise.

(5) At the hearing, the witness shall be allowed to freely express his testimony, without being allowed to read a previous written answer; but he can employ the use of notes, with the President's approval, but only to specify figures or names.

(6) If the court finds that the question raised by the party can not lead to solving the case, is offensive or tends to prove a fact whose proving is forbidden by the law, it will dismiss it. ***In this situation, the court will write down the name of the party and the question asked and the reason why it was not approved.***

(7) If the question is approved, the question, together with the name of the party who formulated it, followed by the witness's response, shall be literally recorded in the witness statement according to the provisions of Art. 323 par. (1).

Art. 322. - (1) Witnesses may again be asked, if the court finds fit.

(2) Witnesses whose statements do not fit can be confronted.

(3) 'repealed'

Art. 323. - (1) The testimony shall be written by the clerk, ***who shall record the witness's statement in a exact and literal manner****, and shall be signed on each page and at the end of it by the judge, the clerk and the witness, after he has learned of the contents . If the witness refuses or can not sign, it shall be mentioned at the end of the statement.*

(2) Any additions, deletions or changes in the testimony must be approved and signed by the judge, the clerk and the witness, under the sanction of not being taken into account.

(3) Unfilled places in the statement must be barred with lines so that no additions can be made.

(4) The provisions of art. 231 par. (2) shall apply accordingly. "

Also, very relevant to the issue at hand are the findings of the Constitutional Court of Romania[4] in terms of the similar obligation to write down the exact testimony of the defendant during a criminal trial:" *465. In analyzing the criticized legal text, the Court notes that it provides the obligation to* ***literally record the suspect or defendant's statements by the judicial body or by the court****. According to the Explanatory Dictionary of the Romanian language, "exactly" has the meaning "exactly the same", and "literally" has the meaning "that is done, is reproduced word by word,*

[3] Law no. 310/2018 for amending and completing the Law no. 134/2010 on the Civil Procedure Code, as well as for amending and completing other normative acts published in the Official Journal of Romania no. 1174 of November 25, 2008.

[4] DECISION no. 633 of 12 October 2018 on the objection of unconstitutionality of the provisions of the Law for amending and completing the Law no. 135/2010 on the Criminal Procedure Code, as well as for amending and completing the Law no. 304 / 2004 on the judicial organization.

letter by letter; textual, exact". Therefore, the statement must be worded word for word reproduces exactly what the suspect or defendant conveys.

466. However, under the procedural provisions mentioned above there are sufficient safeguards to properly record the suspect's or the defendant's statements, and Article 110 (2) of the Code of Criminal Procedure provides that if he should agree with the content of the written statement, the suspect or defendant shall sign it, and if there are any additions, corrections or explanations to be made, they can be indicated in the end of the statement, followed by the signature of the suspect or the defendant. The newly introduced obligation appears not only as excessive and burdensome for the authorities but it is likely to create difficulties in the enforcement work, with consequence of delaying or blocking the act of justice.

467. The Court therefore considers that the criminal procedural provisions in force contain sufficient safeguards to respect the rights of the defense suspect or defendant, so that the provisions of art. I, item 55, related to paragraph (1) of the Code of Criminal Procedure, are unconstitutional with respect to the phrase "exactly and literally", which is likely to prejudice the parties right to a fair trial, within a reasonable time. "

3. The opinion of the legal authors

Bozeșan was among the first to notice that it is the obligation of the court to request to the clerk to write down the question of the party *ex oficii* and not only when it is formally solicited by one of the parties.[5]

He has also commented regarding another key difference, in terms that it is the obligation of the court to literally write down witness testimony but without being able to raise any criticisms regarding this change.[6]

In terms of in which cases is the judge obligated to proceed according to the new guidelines, it has been noted that in relation to article 26 paragraph 2 of the Civil procedure code the administration of evidence is to be conducted in accordance to the law at that particular moment in time. [7]

A collective of prominent authors have put together a study regarding the modifications to the Civil procedural code[8] stating that that the new alterations are applicable even to cases iniated prior to the entry into force of the law when it comes to the procedure regarding witness testimony.

They have also delved into the necessity of using technical support in order to further ensure that the procedure is followed as smoothly as possible: "*In any case, we believe that it would be appropriate either for witness testimony to be recorded audio-video and technical storage support would constitute the means of proof, which would alleviate some inconveniences of the*

[5] Bozeșan, V. (2019), "*Codul de procedură civilă actualizat la 10 ianuarie 2019*", Solomon Publishing House, Bucharest, p. 108.

[6] Bozeșan, V. (2019), "*Codul de procedură civilă actualizat la 10 ianuarie 2019*", Solomon Publishing House, Bucharest, p. 108.

[7] Bozeșan, V. (2019), "*Codul de procedură civilă actualizat la 10 ianuarie 2019*", Solomon Publishing House, Bucharest, p. 109.

[8] Traian Cornel BRICIU, Mirela STANCU, Claudiu Constantin DINU, Gheorghe-Liviu ZIDARU, Paul POP", *Comentarii asupra modificării noului Cod de procedură civilă prin Legea no. 310/2018. Între dorința de funcționalitate și tendința de restaurație"*, last modification 12.02.2018. https://www.juridice.ro/essentials/2901/comentarii-asupra-modificarii-noului-cod-de-procedura-civila-prin-legea-no-310-2018-intre-dorinta-de-functionalitate-si-tendinta-de-restauratie#_ftn3.

re-examination of testimony by the superior court, respectively whether the judge sums up the witness's statement as a precedent or gives it a more concise and intelligible form, as the parties and the witness himself can of course challenge, as before, the concrete way of dictating and recording the witness's statement. "[9].

Traditionaly, other important legal authors[10] have refrained from expressing any views regarding the necessity for the solution to be implemented by the legislative authorities.

The most prominent author[11] in the field has offered a most useful definition of the testimony: " The testimony, could be defined as the oral statement made by a natural person, before the court, regarding **to a precise and pertinent fact he is personally aware of**. ".

4. The interpretation of the author

Firstly, the analysis should begin with the actual definition of the testimony provided by the most prominent author in the field who has clearly and explicitly stated that is deals with precise and pertinent facts that the witness has come into contact.

Despite the fact that the definition has been provided by the author prior to the alterations made to these legal texts it is still very much applicable even to the new situation.

This one first important issue, which can be derived from the opinion of the legal authors in full accordance to the legal text, is the fact **that the court is called upon to decide what specific issues in the witness speech can be integrated** in the *stricto sensu* notion of testimony.

Indeed, the parties should be allowed to express their views regarding the opportunity to write down certain facts which could prove more relevant further on in the trial.

However, the judge is the soul actor in this particular play which is allowed to decide how much of what the witness speaks about can be actually integrated in the witness testimony.

This is paramount, and is one of the reasons why the article deals with this aspect first.

There can be no doubt that the judge should be allowed to censor or limit what the witness actually speaks about, in terms of limiting the number of words in the witness testimony so as to ensure a proper continuity and a trial which lasts a reasonable amount of time.

Failure to do so can and would actually result in chaos in the courtroom, since most often than not witnesses do not know what the judge is actually interested in.

For example, the witness may choose to express his views regarding the relationship between the plaintiff and the defendant in general whereas the judge **may be interested in details regarding a specific period**.

It should come as no surprise for the reader that the judge is still entitled to this right, namely to decide which aspects of the witness statement can actually be referred to as witness testimony.

[9] Traian Cornel BRICIU, Mirela STANCU, Claudiu Constantin DINU, Gheorghe-Liviu ZIDARU, Paul POP*", Comentarii asupra modificării noului Cod de procedură civilă prin Legea no. 310/2018. Între dorința de funcționalitate și tendința de restaurație"*, last modification 12.02.2018. https://www.juridice.ro/essentials/2901/comentarii-asupra-modificarii-noului-cod-de-procedura-civila-prin-legea-nr-310-2018-intre-dorinta-de-functionalitate-si-tendinta-de-restauratie#_ftn3.

[10] Răducanu, G., Dinu, M., *" Fișe de Procedură Civilă "*, Hamangiu Publishing House, Bucharest, 2016, p. 208.

[11] Boroi, G. (ed.), (2013), *"Noul Cod de Procedură Civilă Comentat, vol.2 " [The Commented New Civil Procedural Code, vol. 2]*,: Hamangiu Publishing House, Bucharest, p. 639.

In terms of the obligation for the court to write down all the questions addressed to the witness by each party in particular, it's application is very clear but it's consequences are more than open to discussion.

This is when the opinion of the Constitutional Court of Romania becomes extremely relevant. When it was asked to provide insight into whether or not the obligation to literally write down the accused' statement word for word was in fact unconstitutional.

There is no reason why this line of thinking is not applicable also for the civil trial.

The right of the parties for both a fair but also swift trial as stated in article 6 of the Civil procedure code is clearly infringed upon with the advent of this new alteration.

One mal-intended party may choose to create chaos in the courtroom by addressing a great number of questions to the witness so as to obligate the judge to make the clerk write down each and every one of them.

Should the judge refrain from doing so would result in a direct breach of a clearly formulated legal provision.

However, should the judge apply that legal provision as formaly as possible would also result in an infringement of the rights provided by article 6 of the parties to enjoy a trial in a period as short as possible.

It is a significant issue, able to generate far more legal difficulties than it would have solved.

One possible solution would be to alter it in terms of a *de lege ferenda* effort on the part of the legislative authority.

Should it not occur in a reasonable amount of time, another, more direct approach would be to address the Constitutional Court of Romania.

Given the fact that during the criminal trial this was viewed as a problem and the provisions were blatantly considered as unconstitutional a similar solution for the civil trial would seem appropriate.

The problematic provisions are also applicable in cases which have been initiated prior to entry into force of Law no. 310 adopted in 2018, since the administration of evidence is to be conducted in accordance to the legal provisions at that actual moment.

A scenario can be conceived in which should the plaintiff have known about the problem created by the alteration, he would not have resorted to addressing the court with that particular claim and might have sought to resolve the legal conflict in another way, such as adressnig a mediator.

However, since the solution is legally binding, the party is obligated to suffer consequences that he may not have accepted or even known prior to addressing the court.

It is thus also a question of a lack of predictability for the law and one could argue that it could be viewed as an infringement into the right to a fair trial.

Indeed, the court is entitled to apply a fine, as a sanction for the party who chooses to exercise it's legal rights without *bona fide* but this has no bearing on its obligation to make sure that every word spoken by the witness is to be jotted down on a piece of paper.

Also, the necessity for such a alteration is not stringent, given the fact that the whole proceedings are audio recorded. Should any omission committed by the court occur, which may affect on outcome of the trail, it can be easily by simply analysing the audio material later on, during the appeal.

The parties are free to request a copy of the audio file. They are also able to appeal the solution of the first instance court. They need only indicate a specific issue which the witness has pointed out but which the court omitted to analyse in passing it's judgement.

The system initiated after the adoption of the Civil procedure code worked.

New alterations, without a proper analysis, provided is extremely detrimental for all the participants in the trial.

Moving on to the opinion of the legal author in terms of employing technical support so as to make sure that the trial takes place smoothly, can be viewed as a very welcomed idea.

It should be implemented as fast as possible in terms of purchasing for all the courts in Romania dictation software so as to make it easy to abide by the new provisions, should they remain unchanged.

The provisions also make it more difficult for the court to address its control questions to the witness, since everything has to be written down.

Thus, the lawyer of one of the parties, in future cases will have direct access to the method in which the judge verifies the credibility of the witness. He can anticipate what those control questions would be and he can use the information in future trial so as prepare the witness for addressing them in the hopes of validating his credibility, despite it lacking.

Overall, these provisions are detrimental in this respect and in the long term may affect the right of the parties to a fair trial in the future since a most important tool of the judge, namely the process of verifying the credibility of testimonies may be hindered severely.

This is not in the best interests of any of the parties and can lead to very problematic situations in which the witness who is not expressing the truth has been prepared prior to his testimony to answer those specific control questions which are to be addressed by the diligent judge.

Thus, it would be far easier for the witness to pass this most important checkpoint during the trial and later to provide false testimony, which would greatly disadvantage the opposing part.

Consequently, the legislator, without knowledge, may have hindered these very necessary efforts left in the care of the judge and may have severely damaged the right to a fair trial for future parties who will be at the mercy of false testimonies and malevolant lawyers.

Thus, it becomes very clear that the actions previously mentioned must be taken by both the judge and the other diligent participants in the trial in addressing this issue, which has the potential to create very problematic outcomes that are not in the interests of anyone.

It is normal for the plaintiff to initiate the trial but also for the defendant to participate in it, knowing that the judge has an arsenal of methods at its disposal intended to verify the authenticity of the witness testimony.

Conclusions

Summary of the main outcomes

As the analysis is about to be concluded, it is evident that some of the alterations are unuseful and should be rectified as soon as possible, either by means of a new modifying law or with the intervention of the Constitutional Court of Romania.

For the moment the effects of the modifications are somewhat limited but as time passes by it will become more evident that in the long term its effects are ill.

Now is the time to act to address the issue at hand and minimise the effects as much as possible in order to protect the rights of the party who sooner or later may suffer an infringement.

The expected impact of the research outcomes

It is hoped that the reader of the article shall endeavour on his own to analyse the

effects of the alterations and reach his or her own conclusions regarding the issue at hand.

Should he find the conclusions offered in the paper as valid, it is expected that he joins the effort of addressing the alterations particularly in terms of minimising the negative impact as much as possible. Time is of the essence.

Suggestions for further research work.

Future research work could be focused on potential modifying efforts undergone by the legislator or even the applicability of a potential decision of the Constitutional Court of Romania regarding this issue.

As time passes by, new potential effects which have not been taken into consideration in the early stages after the law was adopted could be the subject of further research in terms of analysing the outcome for both the defendant and the plaintiff, but also what it means for the court to obey its legal obligations stemming from the altered Civil procedural code.

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THE EFFECT OF TRADITIONAL AND MODERN POLICIES ON TERMINATION OF EMPLOYMENT CONTRACT[*]

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Abstract

This paper is looking for the best model of articulating termination rules of employment contract by referring to the most popular policies on this regard. Meanwhile, it tests how the provisions of such policies affect termination rules in terms of rigidity and flexibility. An acceptable degree of rigidity and flexibility of termination rules can be tested based on the possibility of combination between the basic argumentations of job security policy and what has been promoted by labour market flexibility in a new era. The policy of job security in regards to the termination of employment has taken a various forms. One form is termination costs including severance pay, notice periods for employees and compensation for dismissal based on the seniority. From an individual perspective, it is crucial for employees to be protected from the employers' arbitrariness, while, from an economic perspective, the rate of employment and job turnover can be affected negatively. A balance, then, is needed by reducing the degree of job security provisions to an acceptable level according to the policy of flexibility in the labour market.

Keywords: *job security, workers' right, flexibility, termination rules, employment composition, severance pay.*

1. Introduction

The formulation of rules and regulations is highly effected by policies and regimes followed by a state in reaction of political, cultural, economics, and social needs from time to time. Philosophically, the law can be investigated within the context of above categories to examine its root and the logic of its adaptation. From this point, the governmental policies and patterns for the process of articulating law also might be analyzed in light of political and social needs, meaning that the distinguish between different policies which impact formulating law in a state to another, depends on social, economic and political changes.

The variety of policies, however, can serve different aspects, and reflect the strategy of government in dealing with labour markets. In this regard, the number of regimes and policies that could affect regulating the subject of termination of employment contract is numerous.[1] Accordingly, termination rules of employment contract may differ in terms of rigidity and flexibility due to the different policies involved with labour markets. Rigidity and flexibility in termination rules, then, can be interpreted by referring to adopted policy in responding to the social variables. The classification of involved

[*] The study was made under the scope of the Ministry of Justice's programmes on aiming the strengthening of the quality of legal education.

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[1] Axel, B., Bengt, F., & Leif, J., (1997) "*Labour Market Regimes and Patterns of Flexibility: A Sweden-Canada Comparison*", Archiv Förlag, p. 35.

policies at that area to distinguish between the traditional and modern one, rely on the historical background of emerging those policies in the past and ongoing effect on the future of enactment towards sustainable developments.

It is apparent that the major policies provided in the field of labour law, are the policy of "job security" and "labour market flexibility" in which the termination rules of employment contract, internationally or locally, can be regulated. Though, the boundaries between job security and labour market flexibility are complex, and debatable, theories and justifications concerning both of them are clear. It is worth mentioning that job security initiates from the point aims at providing more protections to workers, in contrast, labour market flexibility tends to reduce the level of protections based on different argumentations.[2] An examination of the basic elements of job security and labour market flexibility, with examining the necessity of emerging such those policies, will respond the real questions about how rules of termination of employment contract have been changed and developed in different ways and in multiple periods between states. Another question also could be answered is to what extent should employees be protected under those policies from not been fired unfairly in the job, and the negative or positive impact for providing such a high protection of employees on labour market activities.

2. "Job Security" and Termination of Employment Contract

The most common policy that would impact termination of employment contract is the policy of job security, which establishes its argument based on the necessity of providing social and legal protections for employees in their relationship with employers. It is essentially intended to provide protection for employee, since loss of his job will causes loss of his and his family's livelihood.[3] In general, job security requires government imposing adequate regulations to reduce the ability of employers to hire and fire employees.[4] Considering what has been said above, Molz has defined employee job security as "the degree to which an employee can be certain of retaining his job in the future."[5]

Accordingly, this policy is used "to protect workers against labour market risks"[6] where the protection legislations are needed to protect workers against arbitrary dismissal. The term of employment protection legislations (EPL), then, refer to the entire set of legislations, regulations, and court rulings that place some restrictions to the employers' willing in the employment contract. Such those regulations and restrictions are, of course, serving workers in

[2] Tamas Gyulavari, Gabor Kartyas, (2015), *"The Hungarian Flexicurity Pathway? New Labour Code after Twenty Years in the Market Economy"*, Pazmany Press – Budapest, p. 47.

[3] See Termination of employment instruments, Background paper for the Tripartite Meeting of Experts to Examine the Termination of Employment Convention, 1982 (no. 158), and the Termination of Employment Recommendation, 1982 (no. 166), prepared by; International Labour Organization, International Labour Standards Department, Geneva, 18–21 April 2011, p. 3.

[4] Adriana D. Kugler. (2004). *The Effect of Job Security Regulations on Labor Market Flexibility. Evidence from the Colombian Labor Market Reform*. University of Chicago Press, Volume ISBN: 0-226-32282-3, p. 183. Available at: https://www.nber.org/chapters/c10070.pdf. Accessed: 28-02-2019.

[5] Molz, R. (1987). *Employee Job Rights: Foundation Considerations.* Journal of Business Ethics, 6(6), 449-458. Retrieved from http://www.jstor.org/stable/25071683 Accessed: 27-03-2019.

[6] Clark, A., & Postel-Vinay, F. (2009). *Job Security and Job Protection*. Oxford Economic Papers, 61(2), new series, 207-239. Retrieved from http://www.jstor.org/stable/20529416. Accessed: 27-02-2019.

one hand, and negatively impact labour market on the other hand.

The significant factors of job security and the root of its foundation can be analyzed by referring to the humanitarian aspects and the nature of employment contract. Many scholars have argued the linkage between job security and human rights which are fundamental for human being.[7] The historical background of how the policy of job security has been arisen for employees over the decades in the past may support this outlook and justify joining between job security and human right issues. It is also evident that the number of violations committed by employers against employees' rights was the main factor to elaborate much protective legislation based on the necessity to provide enough protection to employees' rights. Perhaps this connection is the strongest argument that has been taken into consideration in enacting international rules[8] and regional or national regulations relating to termination of employment contract.

Another argumentation may contribute at that area is concerned with sole property rights in the job, an early argumentation that examines the laws of termination of employment by exploring property rights whether it belongs to employee or employer.[9] The influence of property rights assumptions can extremely help to underpin the different perspectives of employment termination laws that otherwise such those laws seem to be conflicted, and remain unanswered.

Thus, the argumentations used to support and legalize job security, as well as to analyze rules and regulations codified based on the policy of job security, can be reached in the following points:

2.1. An Argumentation Related to the "Humanitarian Aspects"

Discourse on job security in this regard is always involved with the basic concept of human rights. Analyzing job security from humanitarian perspective is an essential starting point to reach out the fundamental roots of this policy. This argument is based on the notion that economic interests and managerial prerogatives of employer do not justify violation of fundamental rights of workers in job. In this sense the basic aim of job security is to enhance the employee's right to be treated with dignity and to not be offended at work.[10] It requires, then, the notion of 'good faith' and 'mutual trust and confidence' in the contractual period between employer and employees.[11] Another perspective that would be raised in this respect is so-called 'Industrial democracy' by focusing on workers' right of information and consultation prior to dismissal.[12] This means that mutual trust and good faith imply the obligation of informing and consulting employee, otherwise the termination of his/her contract will be void.

[7] See, for example, Shabannia Mansour M., Hassan K. (2019) *Job Security and Temporary Employment Contracts: A Theoretical Analysis*. In: Job Security and Temporary Employment Contracts. SpringerBriefs in Environment, Security, Development and Peace, vol 9. Springer, Cham. https://doi.org/10.1007/978-3-319-92114-3_1 Accessed: 21-03-2019.

[8] Such as international standards of employment termination set by ILO through the Termination of Employment Convention, 1982 (no. 158) ratified by 36 states, and the Termination of Employment Recommendation, 1982 (no. 166).

[9] Catherine Barnard, Simon Deakin, Gillian Morris, (2004), "*The Future of Labour Law Liber Amicorum Sir Bob Hepple QC*" Oxford and Portland Oregon, p. 101.

[10] Wanjiru Njoya, (2007), "*Property in Work: The Employment Relationship in the Anglo-American Firm*" Industrial Law Journal, Volume 36, Issue 4, December 2007, ISBN 0-7546-4587-8, p. 6.

[11] Johnson v Unisys [2003] 1 A.C. 518; Eastwood v Magnox Electric plc [2004] 1.R.L.R 733.

[12] Wanjiru Njoya (2007), previous source at 7.

In the past, termination rules of employment have been frequently analyzed by concentrating on employees' right to have dignity in life and a decent work promoted by social justice and equality in the life of workers. Going back to the historical point of view, the cruel situation of workers and how they were treated by employers indicates the need of labour laws to be integrated with job security provisions to protect workers, and ensure their basic rights to life and decent work. In the middle ages, for instance, the employment relationship has quite renounced from the humanitarian trends when the worker had been treated by the employer as commodities needed for work.[13] This posture was continued till embarking renaissance era in which values of humanism have been integrated with employment relationship and reformulate the concept of this relationship in the light of modernity "including ideas of work as a source of dignity … and to facilitate participation in society and the dignity of family life."[14]

An early contribution to connect job security of employees with basic human rights is made by a significant numbers of philosophers and scholars in reaction to changes that occurred in the ideology of employment relationships. Perhaps, the contribution of Mayo,[15] Abraham Maslow,[16] and Frederick Herzberg[17] are quite enough to share in this respect. To rebut Tylor's theory,[18] Mayo proved that workers are encouraged by having their social needs, rather than only by payment in a job, and he claimed that the best motivation of employees is by creating a circumstances where managers and employees have engaged in better communications with mutual trust and feeling safe in job.[19] Mayo's theory, finally, recommended that recognition, a sense of belonging, and job security are main factors to motivate employees at work.[20] Maslow also has emphasized on decent work and human motivations of employees at work.[21] He started his famous theory[22] with the view that individuals have multiple needs, particularly; five needs of individuals must be accomplished.[23] Physiological needs, which they are required for survival, come in the first level, such as water, food, and oxygen. Once physiological needs have been

[13] „Adnan Al-Abed, Yousif Elyas, (2013), Labor Law, Al-Atek for publishing, first edition, Cairo."

[14] Blyton, Paul Robert and Turnbull, Peter John 2004. The dynamics of employee relations. 3rd ed. Management, Work and Organisations, Basingstoke: Palgrave Macmillan, p. 5.

[15] Elton Mayo was an Australian born (26 December 1880 – 7 September 1949). He was psychologist, organizational theorist, and industrial researcher.

[16] Abraham Maslow was an American by birth (April 1, 1908 – June 8, 1970). He is a famous psychologist who was best known for providing Maslow's hierarchy of needs.

[17] Frederick Herzberg was an American psychologist (April 18, 1923 – January 19, 2000). His most famous theory is Motivator-Hygiene theory, and his most famous book is "One More Time, How Do You Motivate Employees?".

[18] Frederick Winslow Taylor was an American by birth (March 20, 1856 – March 21, 1915). He was a mechanical engineer who sought to improve industrial efficiency. His theory is based on the idea that workers are motivated mainly by payment neglecting the other factors, such as job security.

[19] T. Christopher Greenwell, Leigh Ann Danzey-Bussell, David Shonk, (2014), "*Managing Sport Events*" Human Kinetics, p. 55.

[20] *Ibidem.*

[21] Sari Edelstein, (2011), "*Nutrition in Public Health*" Jones and Bartlett Learning, Third Edition, p. 362.

[22] The theory is known as "Maslow's hierarchy of needs." Even though the theory focused on motivations in workplace, it corporated with psychological needs of employees as a basic human needs at work.

[23] Ranjay Gulati, Anthony J. Mayo, Nitin Nohria, (2014), "*Management*" South-Western Cengage Learning, First Edition, p. 465.

satisfied, the safety and security needs come in the second level and become a second motivational factor.[24] To motivate employees at work, therefore, they must feel that their jobs are secure because if they notice a lot of lay off in job, they will have a fear of losing their job, this is mean employees no longer being able to satisfy employers just for being unmotivated at work.[25] Job security, thus, is one of the most important security need for employees in this level. The third level will take place after satisfying physiological and safety needs, and this is what call "Belonging and Love" according to Maslow.[26] Employees in this level seek to feel comfortable with others at work, especially, managers and supervisors. "Self-Esteem" and "Self-Actualization" are coming in the highest levels of needs, in which employees will be motivated to be productive and to do what exactly expected by employers.[27] In sum, Maslow's theory tells us that employees cannot be operated properly unless their foundational needs are met and treat them as a human being, a worker will not grow or move to higher levels of welfare without these essential needs including secure job. Frederick Herzberg developed the argument, and he presented job security as a hygiene factor surrounded the work, rather than the work itself which he called motivational factors.[28] According to Herzberg the hygiene factors such as job security and working conditions are satisfiers and essential for the existence of motivations in workplace where dissatisfaction observed if they do not exist.[29] Despite the fact that Maslow's theory and the other mentioned theories are not without flaws, but still they are valuable for assessing human basic needs and employees as well.[30]

Job security from this perspective must be recognized by modern states as a certain social and labour rights at work, which states are bound to respect. An action towards this realization requires states three levels of obligation: (1) respect the right of job security is an obligation from the first level; (2) protect the right of job security comes from the second level: (3) fulfill this right is in the third level.[31] The first level can be achieved through acknowledgement and legal articulating by state to promote job security in the related legislations. Moreover, the state must not interfere with any action which may impose limitations or restrict the right without a compelling justification.[32] Whereas, the second and third level require states to do more action, especially, by preventing violations from third parties (e.g. employers) either by imposing commitments on employers or providing remedies in case of violation.[33]

[24] Pieter A. Grobler, (2006), "*Human Resource Management in South Africa*" Thomson, Human Resources in South Africa, 3rd edition, p. 217.

[25] Taormina, R., & Gao, J. (2013). *Maslow and the Motivation Hierarchy: Measuring Satisfaction of the Needs*. The American Journal of Psychology, 126(2), 155-177. doi:10.5406/amerjpsyc.126.2.0155.

[26] Primeaux, P., & Vega, G. (2002). *Operationalizing Maslow: Religion and Flow as Business Partners*. Journal of Business Ethics, 38(1/2), 97-108. Retrieved from http://www.jstor.org/stable/25074781. Accessed: 29-03-2019.

[27] Adler, S. (1977). *Maslow's Need Hierarchy and the Adjustment of Immigrants*. The International Migration Review, 11(4), 444-451. doi:10.2307/2545398. JSTOR, www.jstor.org/stable/2545398. Accessed: 29-03-2019

[28] Harold Koontz, (2010), "*Essentials of Management*" Tata McGraw-Hill Education, eighth Edition, p. 291.

[29] Charles A. Sennewald, (2003), "*Effective Security Management*" Butterworth-Heinemann, Fourth Edition, p. 120.

[30] Yvonne A. Unrau, Peter A. Gabor, Richard M. Grinnell, (2007), "*Evaluation in Social Work: The Art and Science of Practice*" Oxford University Press, p. 125.

[31] Bob Hepple, "*Rights at Work*" International Institute for Labour Studies Geneva, p. 21.

[32] *Ibidem.*

[33] *Ibidem.*

2.2. An Argumentation Related to the "Property Right over the Job"

At this level the argument for drafting termination of employment rules in accordance with the policy of job security depends on defining job as a property right for employees, this means the argument will be switched from the basic human needs in a decent work to the property right itself such as the other assets that humans may own. Likewise the other properties, the job cannot be retaken from the possession of employees unless by a spectrum of legal procedures established by law. Therefore, the same legal safeguards enshrined for real property should be provided to the job as an intangible personal property of employees. This argumentation has been often used to prevent unfair termination of employment because it requires due process in which an employee could not be fired without being notified for the reasons; otherwise, wrongful dismissal seems to be claimed.[34]

As regards to the ownership of job in favor of employees, the best contribution was made by Collins, when he gave grounds for job security by referring to 'the property rights in the job for employees,' and justified the idea that workers should enjoy greater job security, compared to what has been accorded to them based on the doctrine of 'termination at will' in the common law system.[35] Moreover, he found three levels surrounded to the job security elements by indicating to what can be arisen from property rights; firstly, inappropriate taking of the job by the employer could be challenged and counted as void where a natural right of reinstatement must be considered, secondly; the forceful taking of the right causes a compensation and a demand for the loss of economic value derived from the right, thirdly; such the right also impliedly requires fair procedure in case of taking the property[36].

Some theorists denounce the notion of property rights in the job for employees, and they argue from the side of owner's right over the capital and physical assets in an enterprise, which entitles owner the right to apply or withdraw those assets from the production process[37]. An economist's view has also contributed in that respect considering worker as a small part of production process[38]. Even though, this view is immoral that makes no difference between the worker and the raw materials of production process, it has influenced judicial assumptions in many cases relating to employment law. This is why counter argument exist at that point, and an assumption of the property rights in job for employers is underpinned by some judicial statements. To understand many UK judges' attitude, for instances, the assumptions of the property rights of employers in different cases can help to explain an implementation of easier standards to determine fairness of the dismissal, rather than what required by ILO standards[39]. In Malik v BCCI, the court held that "the implied obligation as formulated is apt to cover the great diversity

[34] Molz, R. (1987). *Employee Job Rights: Foundation Considerations*. Journal of Business Ethics, 6(6), pp. 449-458. Retrieved from http://www.jstor.org/stable/25071683 Accessed: 27-03-2019.

[35] Collins, H. (1992), *Justice in Dismissal: The Law of Termination of Employment* Oxford, Clarendon Press, p. 88.

[36] *Ibidem.*

[37] Coleman, J. L. (1984), *Economics and the Law: A Critical Review of the Foundations of the Economic Approach to Law*, Ethics (July), pp. 649-679.

[38] Jensen, M. G and W. H. Meckling, (1979), *Rights and Production Functions: An Application to Labor-Managed Firms and Codetermination*, Journal of Business (October), pp. 469-506.

[39] Catherine Barnard, Simon Deakin, Gillian Morris, (2004), *The Future of Labour Law Liber Amicorum Sir Bob Hepple QC*, Oxford and Portland Oregon, p. 103.

of situations in which a balance is struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited."[40] On the one hand, the holding in that case seems to be just and quite fair due to considering a balance of the implied term. But on the other hand, the factors of balancing interests indicate that the court's primary consideration for this balance is the property rights of employer in an enterprise as a dominant factor. In practice, the management of business as the employer sees fit will provide a wide scope for managerial prerogative because the ownership of business according to this judicial thinking is vested solely to the employer. The ownership in this context, then, gives the employer the right to manage not only over the physical property, but rather on the entire body of the firm including employees. A further, the right of managing business can be balanced only by not practicing it unfairly to not exploit the employee, which may not require a strict standard to review by the court due to the right of employer in managing his/her business.

From another side of view, a property right as described by legal systems empowers its holder to practice all the core rights; including an exclusive use and prevent others from interference as well as a right to dispose of one's property. These prerogatives of the right holder derived from the nature of the property right, which consists of a spectrum of rights against other people as well as create implied obligations from the side of other people towards the right holder.[41] This is may extend the control of property right owners over employees, particularly, from the sense of an economic outlook that states "the work is done in return for a wage."[42]

In the context of employment relationship, the impact of the property rights of employers could be used as a basic analysis that underpins an acceptance of employment at will, in which employers are free to enter into contracts, they are also free to terminate contracts[43]. The concept of termination at will doctrine was absolutely endorsed and governed the rights of employees in many jurisdictions, such as in the U.S. until recent decades, when constraints on firing workers involved in certain court decisions to restrict the will of employers and to minimize the circumstances of worker dismissal[44]. According to the variety of court rulings, therefore, restricting the employer's prerogative to discharge workers has constituted legal exceptions on employment at will. The established exceptions by common law system can be introduced in three main categories; an exception related to 'implied contract,' another one concerned with 'public policy,' and the last one related to 'covenant of good faith and fair dealing.'[45] What notably important in the exceptions is, the traditional meaning of employment at will doctrine has been explicitly changed in a way requires the employer to be bound by at least not to discharge workers for reasons prohibited by

[40] [1997] IRLR 462, HL.

[41] Harris, J. W. (1996), *Property and Justice* Oxford: Clarendon Press, p. 130.

[42] Catherine Barnard, Simon Deakin, Gillian Morris, (2004), *The Future of Labour Law Liber Amicorum Sir Bob Hepple QC*, Oxford and Portland Oregon, p. 104.

[43] Cochran, T. G. (1972), *Business in American Life: A History*, (Mcgraw-Hill, New York).

[44] Miles, T. (2000). *Common Law Exceptions to Employment at Will and U.S. Labor Markets*. Journal of Law, Economics, & Organization, 16(1), 74-101. Retrieved from http://www.jstor.org/stable/3555009 Accessed: 10-04-2019.

[45] *Ibidem*.

law.[46] Such exceptions also gradually integrated between employment at will doctrine and the minimum standards of due process in favor of employees. This is simply because the employer will adhere to respect statutory rights of workers in the workplace, and the workers will have a guarantee against arbitrary treatment.[47]

By taking both sides into consideration, the assumption of property rights in the job for employees or for employers, one can notice that the argument from both sides will not go far away from the need of workers to job security. Since the due process is an essential factor of job security to protect workers from being cruelty fired in the job, the discussion from both of the sides indicates the necessity of articulating due process in case of termination of employment. From the assumption of the property rights in the job for employees, it is self-evident that employees must not be separated from their personal assets unless by fair procedures recognized by the law. Any violating of fair procedures by the employer in taking employee's property, particularly, in taking away the job from his/her possession in this case; will lead to an employee's inherent right to reinstatement.

As we have noted, the due process still can be raised from the assumption of the property rights for employers which is one of the basic justification of 'employment at will' wherein employees may get dismissed from the job even for no reason. This is due to several exceptions made on the absolute right of the employer to terminate the contract. The exceptions are not merely restrictions but provide a level of guarantee and the right of workers to challenge the termination decision within fair procedures. It is also noted that the right of due process here is not based on the employee's property rights but rather depends on the right to be treated fairly in the workplace.

However, the employees' due process rights may be violated either by taking the job as their own property right without legal procedures or by terminating them arbitrarily from the job as a sole property right for the employer. In such a case, the employee can have a valid claim for wrongful termination. These standards lastly will guarantee a high level of job security in articulating the rules of termination of employment contract.

2.3. An Argumentation Related to the Nature of "Employment Contract"

A further discussion to support job security of employees is the nature of the employment contract itself and the way of implementing this contract, in which the parties have unbalanced power. The employment relationship, then, is characterized by "inequality of bargaining power" between the parties.[48] At the first glance, inequality of bargaining power can be seen at the time of holding the contract, whereas the employer to bargain a contract or agreement has more and better choices than the worker.[49] A good example of that situation is a common case in which a worker applies for an exclusive job in his/her

[46] Roehling, M. (2003). *The Employment At-Will Doctrine: Second Level Ethical Issues and Analysis*. Journal of Business Ethics, 47(2), 115-124. Retrieved from http://www.jstor.org/stable/25075131 Accessed: 11-04-2019.

[47] Robert K Robinson, Geralyn McClure Franklin. (2015). *Employment Regulation in the Workplace: Basic Compliance for Managers*. Routledge, 2nd edition, p. 350.

[48] The phrase of "inequality of bargaining power" has been used for the first time by the British philosopher, John Beattie Crozier in his famous book "The Wheel of Wealth: Being a Reconstruction of the Science and Art of Political Economy on the Lines of Modern Evolution" (1906) Part III, chapter 2, 'On the tendency to inequality', p. 377.

[49] Shell, G. Richard. (1993) *Contracts in the Modern Supreme Court*. California Law Review, vol. 81, no. 2, pp. 431–529. JSTOR, www.jstor.org/stable/3480756. Accessed: 24-04-2019.

specialist at a company, but the company has a great number of applicants with the same specialty. This normally vests greater power to the company in negotiating on the agreement and the chance to reject the deal considering the huge number of applicants in mind. In addition, the company in that bargaining will gain a position seems to be superior for imposing favorable terms and conditions. And then, the worker has no chance to discuss for being reluctantly agreeable on, otherwise, he/she will lose the chance to obtain the job.

The concept of inequality of bargaining power was soon described as a dominant attribute of employment contract, and recognized by a significant number of legal scholars and court's ruling. In describing the notion, Kahn-Freund[50] wrote,

"The relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination, however much the submission and the subordination may be concealed by the indispensable figment of the legal mind known as the 'contract of employment'. The main object of labour law has been, and ... will always be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship."[51]

Kahn-Freund has rightly pointed out that inequality of bargaining power is inherent in the employment contract that paves the way to dominate the power of the employer over the employee. The condition of subordination in this contract is another application of this fact that restrict the freedom of workers and require them the duty to obey rules made by employers. Therefore, inequality of power also exists between employers and employees in terms of the rights and obligations derived from the contract. The managerial prerogatives always empower employers to command, and the condition of subordination enforces workers to obey the rules that have been established by employers to govern their entities.[52] Kahn-Freund has also truly reached out to the main objective point of labour law that must focus on the limiting of inequality of power to not be abused in practice.

The fear of misusing inequality of power by the employer apparently exists from the commencement of the contract, if the law does not limit its range. In the first place, it can be seen within arbitrary conditions stipulated in the contract, such as arbitrary conditions for terminating the contract that may compel the worker to not terminate the job even under unusual circumstances. By contrast, the contract may include such terms that allow the employer to terminate the agreement in an easy way without any cost. A further fear in this contract that will likely turn to the reality comes from the dependence, the condition that obliges the worker to compliance the rules and regulations of the employer in an enterprise, otherwise non-obedience may justify terminating an employee from the job.

[50] Sir Otto Kahn-Freund was a professor in labour law and competitive law at the London School of Economics and the University of Oxford.

[51] Cited by Sue Richardso, (1999) *Reshaping the Labour Market: Regulation, Efficiency and Equality in Australia*, Cambridge University Press, p. 79.

[52] Rajah, M. (2019). *From Third World to First*: *A Case Study of Labor Laws in a Changing Singapore*. Labor Law Journal, 70(1), 42–63. Retrieved from http://search.ebscohost.com/login.aspx?direct=true&AuthType=ip,uid&db=lgs&AN=135012247&site=eds.

Since the employment contract is portrayed by inequality of bargaining power at the time of holding the contract, and then by subordinating condition at the time of operation, the contract needs to be balanced by law. This nature of the contract has been considered for a long time as a justification for the implication of compulsory terms into the employment relationship.[53] It has also become a justification for a variety of court's ruling in non-enforcement of the contract, particularly, when the contract includes arbitrary terms against the worker.[54] This interference by law in the employment relationship is logically and morally accepted because the nature of the contract undermines the freedom of contract, resulting from the principle of agreement must be kept "Pacta Sunt Servanda."[55] Such the principle basically requires having a proportionate amount of freedom between contractual parties. This is what does not exist in the employment contract, where bargaining power is continuously unequal. From this end, the worker often must be secured by law and enjoy a great level of job security articulated by law, rather than the contract. Otherwise, the possibility for termination at any time, and at the initiative of the employer is extremely high.

3. "Labour Market Flexibility" and Termination of Employment Contract

The term of flexibility in the labour market has emerged along with economic efficiency as an economic approach in response to the rigidity in the market resulted from the policy of job security. Later, the term has become a dominant modern policy considered by the government with respect to labour law.[56] Generally speaking, the argumentation over labour market flexibility has begun in the 1980s within the European Union as reaction for high levels of unemployment rate in those member states that adopted social protections of employees in a form which obstacle the operation of labour markets.[57] The policy, then, requires reducing the range of job security provided to workers through a spectrum of protection legislation. In regards to that point, evidence from numerous European countries, has proven that firms under fewer regulations regarding hiring and firing will provide more job opportunities for workers. In the United States, where employers are free –with rare exceptions- to terminate the employment contract, the debate on labour market flexibility was not extremely exist compared to Europe.[58] This means that Americans were already familiar with the flexible

[53] *Ibidem.*

[54] Frankel, R. (2014). The Arbitration Clause as Super Contract. Washington University Law Review, 91(3), 531–587. Retrieved from http://search.ebscohost.com/login.aspx?direct=true&AuthType=ip,uid&db=lgs&AN=95833539&site=eds-live (Accessed: 23-0402019).

[55] Davison-Vecchione, D. (2015) 'Beyond the Forms of Faith: Pacta Sunt Servanda and Loyalty', German Law Journal, 16(5), pp. 1163–1190. Available at: http://search.ebscohost.com/login.aspx?direct=true&AuthType=ip, uid&db=lgs&AN=110647350&site=eds-live (Accessed: 24 April 2019).

[56] Rajah, M. (2019). "From Third World to First": A Case Study of Labor Laws in a Changing Singapore. Labor Law Journal, 70(1), 42–63. Retrieved from http://search.ebscohost.com/login.aspx?direct=true&AuthType=ip,uid&db=lgs&AN=135012247&site=eds-live (Accessed: 23-04-2019).

[57] Simon Deakin, Hannah Reed, *The Contested Meaning of Labour Market Flexibility: Economic Theory and The Discourse of The European Integration*, ESRC Centre for Business Research, University of Cambridge, Working Paper no. 162, p 1. Available at: https://www.cbr.cam.ac.uk/fileadmin/user_upload/centre-for-business research/downloads/working-papers/wp162.pdf (Accessed: 24-04- 2019).

[58] Carlo Dell Aringa, (1991). *Labour market flexibility: The case of Italy*, International Institute for Labour Studies, P.O. Box 6, CH-1211 Geneva 22, Switzerland.

approach in labour market, and they "believe that a layoffs and a weak job security are the price that must be paid for a healthy economy."[59]

However, the first question that soon comes to mind is whether the policy of labour market flexibility is an alternative to job security and could replace it in modern labour law. In other words, the question can be asked, does the approach of labour market flexibility inhibit job security? The answer to that question depends on whether the establishment of this policy is to defeat the argumentation of job security policy, or it just to undermine the range of its scope. What is clear from the historical background is the emergence of flexibility in the market did not rely on conflicted argumentations with what discussed for job security. Rather, it relies on some basic economic argumentations, and its approach can be rationalized from a purely economic perspective. One can notice the approach of flexibility in the market is to re-examine the scope of employment protections based on job security, rather than dampen it. From the reasons that led to the construct of this approach, our hypothesis can be more proven, and those reasons could be discussed in the following points;

3.1. Unemployment and Worker Turnover

In the early 80s, the job security regulations have been tested with a variety of challenges considered by economic perspective.[60] The challenges have initiated with examining provisions that aim to decrease the ability of firms to hire and fire employees. While severance pay, compensation for dismissal, and other job security regulations were purposely enacted to protect workers and to prevent employers from unfair termination, these regulations have also negatively impacted workers by reducing their ability to find new jobs.[61] The assumption that job security forms to hire and fire workers will reduce employment is widely accepted; by contrast, the demand for labour market flexibility by reviewing these laws is strongly enhanced. This is an outcome of restrictive rules which drive employers to think about costs in case of the dismissal, and taking on new staff.[62] Then, the result will be, of course, lower levels of job vacancies and labour turnover.

To be more specific, the job security regulations and its negative influence on the employment dynamics can be pointed out by referring to the challenges that countries face while promoting job creation. Such challenges will be arisen along with the application of regulations backed by job security, particularly, the application of regulation of fixed-term contracts, the average costs of notice periods, and severance payment for employees as a compensation for termination.

Some specific research shows that fixed-term contracts are essential for employment growths, since they offer many job opportunities and allow business to respond the unforeseen fluctuations in the

[59] Houseman, Susan N. *Job Security v. Labor Market Flexibility: Is There a Tradeoff?* Employment Research 1(1): 1, 3. https://doi.org/10.17848/1075-8445.1(1)-1 (Accessed: 25-04-2019).

[60] Adriana D. Kugler, (2004). *The Effect of Job Security Regulations on Labor Market Flexibility; Evidence from the Colombian Labor Market Reform*, University of Chicago Press, Volume ISBN: 0-226-32282-3, URL: http://www.nber.org/chapters/c10070 (Accessed: 27-04-2019).

[61] *Ibidem.*

[62] Hogan, S., & Ragan, C. (1995). *Job Security and Labour Market Flexibility*. Canadian Public Policy / Analyse De Politiques, 21(2), 174-186. doi:10.2307/3551592. JSTOR, www.jstor.org/stable/3551592. (Accessed: 26-04-2019).

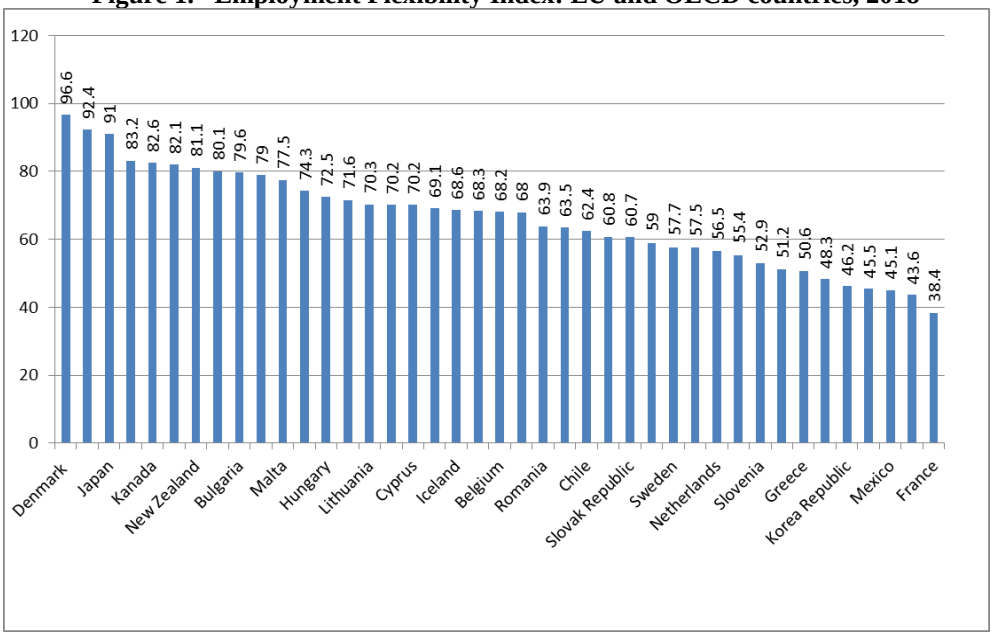
labour market.[63] With fixed-term contracts, firms can replace employees on maternity or sick leave, holiday, and hire employees with developed skills to accomplish specific projects.[64] In addition, this type of contract induces employers to hire unskilled workers, especially young people who have been under struggle to find job, this pave a way for new workers to entry the job easily, allowing them to obtain "experience and giving access to professional networks that will eventually help them to find permanent jobs."[65] While fixed-term contracts have these benefits to dynamic the market and to promote job creation, strict regulations on fixed-term contracts as enhanced by job security will distort such benefits and decrease the rate of employment. This is the plausible reason that makes some European countries cope with fixed-term contract even for works that have permanent nature which provide more flexibility in market, such as Denmark, United Kingdom, Germany, and Ireland.[66]

From another side, the average costs of severance pay and notice periods for employees who have been terminated from the job make employers to assess termination costs based on those factors, and to calculate how termination costs are expensive. The assessment of termination costs will be more expensive in those countries where termination rules require more compensation in case of unjustified dismissal. In Spain, for instance, the maximum compensation can be reached to 12 months' salary of the worker, if the employer can justify the dismissal, while the amount might be increased up to 42 months' salary when the employer has failed to provide sufficient reasons for dismissal, and turns to be unjustified.[67] The termination costs, then, are the most fear that employers take it into account in firing employees. The situation could be more difficult in case of redundancy where a group of workers might be fired following the downturn of the economy; this situation increases costs more and more. Consequently, the higher redundancy costs reflect a negative impact on employers's dicision when hiring new staff during an upturn of economy, because firms may think about redundancy costs when they are forced to lay off workers in the future.[68] This is what curbed hiring new workers and decrease the rate of employment under job security regulations.

The World Bank[69] released a data titled "Employment Flexibility Index: EU and OECD countries, 2018" reflecting a quantitative comparison of regulatory approaches on employment regulation in EU and OECD countries. The data depends on hiring policy, the ability to access fixed-term contracts, working hours, termination rules and redundancy costs.[70] It aims to classify EU and OECD countries based on specific criteria of employment flexibility. According to the data, higher ranks of the "Employment Flexibility Index" indicate more flexible labor provisions.

[63] ILO. *Flexibilizing Employment: an Overview*. International Labor Office, Geneva, 2003.
[64] Employment Flexibility Index 2018, Lithuanian Free Market Institute, p. 4.
[65] *Ibidem* at 5.
[66] *Ibidem* at 23.
[67] European Commission Directorate General Employment, Social Affairs and Equal Opportunities Unit D2, (2006) *Termination of employment relationships Legal situation in the Member States of the European Union*, p. 78.
[68] Dolado, J., García-Serrano, C., & Jimeno, J. (2002). *Drawing Lessons from the Boom of Temporary Jobs in Spain*. The Economic Journal, 112(480), F270-F295. Retrieved from http://www.jstor.org/stable/798375 Accessed: 23-05-2019.
[69] An international organization, consists of five institutions, and mainly aims to aims to reduce poverty in the developing world.
[70] Employment Flexibility Index 2018, Lithuanian Free Market Institute, pp. 4-5.

Figure 1. "Employment Flexibility Index: EU and OECD countries, 2018"[71]



The data ultimately shows that many European Countries have started flexibilize regulatory policies on employment strategy and reduce the level of protection, particularly, in regards to regulation on fixed-term contracts, termination rules and redundancy costs. In the total ranking, Denmark, the United Kingdom, Ireland, Czech Republic, Bulgaria and Switzerland possess from the top ten positions. Meanwhile, some European Countries, especially, France, Luxembourg, and Portugal remain in the lowest level due to retain many restrictive rules on hiring and firing policy with high level of protections provided to employees.

By taking Denmark as a sample, it is noted that it ranked first for labor legislation flexibility, mostly due to the following reasons:

- Fixed-term contracts are absolutely allowed even for permanent works, there are laso no limitations on the duration of such contracts;
- No compulsory rules apply on minumum wage;
- Redundancy is allowed based on the law and does not require any costs;
- Employers are not forced to retain or reassign workers in cases of redundancy;
- No requirements exist for employers to inform and to get approval from the competent authorities so they can dismiss employees up to nine people[72].

In contrast, by taking France as a European Country that maintains lowest rank from the perspective of flexibility approach, the reasons mainly are underlining in the following points:

- Fixed-term contracts are absolutely banned for permenant tasks, it is merely allowed for temporary tasks;
- Even for temporary tasks, the duration and the renewal of fixed-term contracts are

[71] *Ibidem* at 6.
[72] *Ibidem* at 8.

restricted up to maximum 18 months;

- Employers are required to retrain or reassign workers before dismissal;
- Mandatory rules are in force to inform or consult a competent authorities before terminating a group of nine redundant workers;
- Employer are also restricted by priority rules in case of reemployment after redundancy;
- The average costs of notice period is provided by law which is equivalent to "8.7 salary weeks for workers with 5 or 10 years of tenure";
- Severance pay also exist for redundant workers equivalent to 8.7 salary weeks for workers with 5 or 10 years of tenure.[73]

3.2. Dualism in Employment Composition

As we have seen in the first level, how job security provisions minimize job creation and then negatively impact on the rate of employment by limiting the ability of workers to access new jobs. Further debate in this area has been made from the corner of job security provisions and its negative impact on the employment structure as a whole. The structure of employment under job security will be gradually divided between young and old workers in a manner that bias employment in favor of old ones.[74] This impliedly means that job security provisions may stand against young workers and discriminatory treat the different categories of workers in the outcome.

Researches show that negative influence of job security on youth employment refers to the linkage between termination costs and tenure.[75] A significant number of literatures examine the impact of job security on youth employment from this regards. Lazear (1990) points out to some evidence that prove inverse relationship between job security provisions and the rate of employment from young-to-older workers[76]. Later on, Nickell (1997) adds further evidence on employment partiality towards young workers in countries where job security provided in a high level.[77] Bertola, Blau, and Kahn (2002) also insist on that the rate of employment under job security will be decreased for young workers relative to other groups.[78]

The fact that the linkage between terminations costs and tenure bias employment against young workers can be tested in many countries where the period of notice and severance pay increase with job tenure. The test may consider how termination costs increased in such countries based on the seniority of workers and give more protection to senior workers. On the other hand, this means that young workers, who have shorter tenure relative to others in firms, are less protected. In practice, firms always tend to fire workers with a minimum costs, especially, when firms are reluctant to

[73] *Ibidem* at 17.

[74] Carmen, P., & Claudio, E., (2007), "Job Security and the Age Composition of Employment: Evidence from Chile", Estudios de Economía. Vol. 34 - Nº 2, Diciembre 2007. Págs. 109-139. Available at: https://scielo.conicyt.cl/pdf/ede/v34n2/art01.pdf?fbclid=IwAR229HF6mJJKwa92CPXIh9OtrhQIRTo3RROLnYWyZnaRKvV7uDBbrG7DGTI Accessed: 24-05-2019.

[75] *Ibidem*.

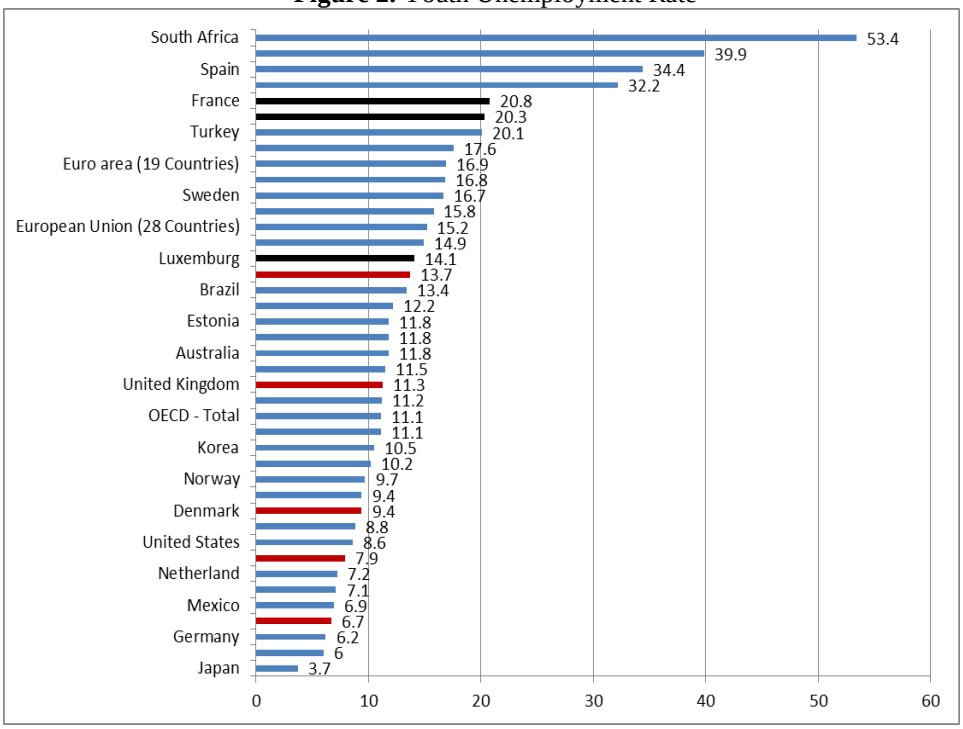
[76] Avner, B., & Anat, L., (1993) "Job Search by Employed Workers: The Effects of Restrictions" World Bank Publications, p. 15.

[77] Edited by Tito, B., Agar, B., & Lars, C., (2001), "The Role of Unions in the Twenty-first Century: A Report for the Fondazione Rodolfo Debenedetti", Oxford University Press, p. 205.

[78] Francine D. Blau, Lawerence M. Kahn, (2002) "At Home and Abroad: U.S. Labor Market Performance in International Perspective", Russell Sage Foundation, p. 149.

downsize the employment during downturn. The consideration of minimum costs, of course, inspires firms to terminate workers with shorter tenure who cost less severance payment. Thus, termination costs based on tenure and seniority rules as designed pursuant to job security requirements are likely to have a contribution in increasing the potentiality of dismissal for young workers. The following data may test and prove what have been said in this section.

Figure 2. Youth Unemployment Rate[79]



The data proves the fact that job security provisions bias employment in favor of old workers and increase the rate of youth unemployment, considering two groups of European counties in conjunction with figure 1. Even though, the data indicates the rate of youth unemployment in 41 member states of OECD, we only focus on two small groups of states that deemed to be relevant with our purpose in this study. The first group (Red colored) includes Denmark, the United Kingdom, Ireland, Czech Republic and Switzerland in the top ten ranks of employment flexibility, particularly, in respect of redundancy and termination costs, while the second group (Black colored) includes France, Luxemburg, and Portugal that have the lowest rank of employment flexibility according to figure 1.

[79] Annual data released by OECD in 2018 on youth unemployment rate in OECD countries. Available at: https://data.oecd.org/unemp/youth-unemployment-rate.htm#indicator-chart Accessed: 27-05-2019.

Table 1. Youth unemployment rate in the first group countries in 2018

Flexible countries in figure 1.	Youth unemployment rate according to figure 2.
Denmark	9.4 %
United Kingdom	11.3 %
Ireland	13.7 %
Czech Republic	6.7 %
Switzerland	7.9 %

Table 2. Youth unemployment rate in the second group countries in 2018

Rigid countries in figure 1.	Youth unemployment rate according to figure 2.
France	20.8 %
Luxemburg	20.3 %
Portugal	14.1 %

Generally speaking, the comparison between table 1 & 2 proves that unemployment rate among young workers is much higher in second group countries where job security provisions are highly valuable and requires too much costs in case of terminating workers based on tenure. Comparatively, the rates get decreased in the first group countries in which the flexibility approach restricts the provisions of job security. Ultimately, this proves the hypothesis telling that job security regulations bring the dualism in employment composition by treating young and old workers in different manner.

Conclusion

Based on what have been discussed in this paper, it is evident that the policy of job security and labour market flexibility both have notably impacted on the articulation of termination rules of employment contract in most countries. The rigidity or flexibility of termination rules refers to the state preference on adaptation one of these policies and its argumentations. It is also evident that both policies have been emerging out as reaction to the social needs and economic changes in the market. The policy of job security gets involved with termination rules and has elaborated its requirements along with human rights issue of employees at work. The notion of human rights at work initiated from the workers' desire to have decent work, where they should be treated as a human being, and to not be abused by the employer's prerogatives. This is what brought strict requirements for termination of employment in order to prevent the employers from unfair termination. While some court's ruling insists on employees' fundamental right in retaining their job, the application of some job security provisions (not all) may clash with purposeful expectations of enterprises in reducing unemployment and providing equal opportunities for workers regardless the age. With taking the both sides of argumentations into consideration, this paper finds and suggests:

1. The policy of job security and labour market flexibility cannot be introduced as counter policies each against other. They rather indicate governmental reactions under different circumstances, where the adaptation of each one of them is necessary for answering those circumstances in that stage.

2. The basic argumentations of job security are quite different in logic and principles from the augmentations that brought the policy of flexibility into force. The policy of job security, mainly, depends on the human rights argumentations of workers, which require protection rules for workers, so they could not be terminated from the job unfairly, whereas, the flexibility in the market depends on the argumentations of labour market fluctuations with the application of job security provisions.
3. The policy of job security might not be abandoned by the government due its connection with the employees' fundamental rights at work and the nature of employment contract. It rather should be balanced by the policy of labour market flexibility in scope of its application.
4. In order to making a balance between the both policies, it is a governmental function relying on the relevant institutional reports to specify which provisions of job security are the most controversial and restrictive rules in the market that should be reduced to a lower degree.
5. Termination costs in the various labour laws inside and outside European countries are one of the most controversial provisions from the perspective of labour market flexibility. It is suggested by this paper to be removed or at least to be reduced till the degree that would be acceptable and does not rigid the labour market activity, as described in many countries through empirical data.
6. The best model of termination rules of employment contract is a balanced model, in which the employees feel their basic rights are safe and they can struggle the employers for unfair termination or wrongful dismissal, meanwhile they have the ability to access flexible market and have the chance to find a job based on the equal requirements which do not benefit a specific group of workers.

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SOCIAL DIMENSION OF THE EU – THE PILLAR'S IMPACT ON EUROPEAN LABOUR LAW*

Nóra JAKAB**

Abstract

Over the past decades, the world of work has been changed. The concept of flexicurity was to provide answers to the challenges that arised. What has happened with security in the European Labour Law, what can be discerned as the European Pillar of Social Rights has been adopted? How has the social dimension of the EU been altered? The article attempts to give an overview of the Pillar from a point of view, according to which the Pillar is an employment model and a social and labour market program in itself.

Keywords: *labour law regulation, flexicurity, social and labour market program, European Pillar of Social Rights, social dimension of the EU.*

1. Broad context of the social dimension

The world of work has evolved significantly since the adoption of Directive 91/533/EEC on an employe's obligation to inform employees of the conditions applicable to the contract or employment relationship („Written Statement Directive"). The last 25 years have brought about a growing flexibilisation of the labour market. In 2016 a quarter of all employment contracts were for „non-standard" forms of employment and in the last ten years more than half of all new jobs were „non-standard". Digitalisation has facilitated the *creation of new forms of employment* whereas demographic changes have resulted in a greater diversity of the working population. The flexibility coming with new forms of employment has been a major driver of job creation and labour market growth. Since 2014, more than five million jobs have been created, of which almost 20% in new forms of employment. The adaptability of new forms of employment to changes in the economic context has enabled *new business models* to develop, including in the *collabourative economy*, and has offered entry into the labour market to people who previously would have been excluded. The employment level in the EU is an all-time high, with 236 million men and women employed[1].

However, these trends have also led to *instability* and an increased *lack of predictability* in some working

* "The described article/presentation/study was carried out as part of the EFOP-3.6.1-16-2016-00011 "Younger and Renewing University – Innovative Knowledge City – institutional development of the University of Miskolc aiming at intelligent specialisation" project implemented in the framework of the Szechenyi 2020 program. The realization of this project is supported by the European Union, co-financed by the European Social Fund."

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[1] COM (2017) 797: Proposal for a Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union. Brussels, 21.12.2017

relationships, especially for workers in the most precarious situations. Inadequate legal frameworks can subject workers in *non-standard employment* to *unclear or unfair practices* and make it difficult to enforce their rights. *More flexible work arrangements can create uncertainty as to applicable rights*[2].

Under these social and economic circumstances where the security could be found? How does the social dimension of the European Union change follow up the challenges the regulation faces?

I suppose there is a change in the focus of social dimension of the European Union, and this change can be discerned in the *European Pillar of Social Rights*. On this bases, it is going to be presented how this change might be inherently in this decalaration if the „players of social policy" became devoted to it.

2. Introduction to the current trend

The traditional interpretation of labour law is confronted with new economic challenges, the requirements of competitiveness and supranational economic liberalization. The change in the social dimension of the European Union shall be therefore a response to the complex reality of globalization, new labour market trends, the European Union and the enlargement of the euro area as mentioned in the borad context of the examination.

The changes in the economic and social environment are immensely mapped out in the development of the social dimension of the European Union, when the deregulation efforts in the 1980s did not contribute to the strengthening of the social Europe. In 1993, the European Social Policy came to a critical point with the Green Paper. The aim was to tackle high unemployment, and the Green Paper has made it clear that we need to think at national and European level to solve the problem, and to define the new direction of social policy (including labour law). In the European Social Strategy, a compromise between flexibility and security, which was firstly based on soft law and then on regulation, seem to be excellent. It is also true that one of the driving forces behind the social dimension of the Union has been the principle of equal treatment.

Before moving on towards the analysis of the Pillar we shall to look closer of the felxicurity concept. Protection regulation can be implemented by *flexicurity* as a *social and labour market program*[3] and the relating transit labour market program through a system of social security, job search and rehabilitation services. This approach to protection thus contributes to the creating protection not only for employees but also *workers, working people*.

[2] Between 4 and 6 million workers are on on-demand and intermittent contracts, many with little indication when and for how long they will work. Up to 1 million are subject to exclusivity clauses, preventing them from working for another employer. Only a quarter of temporary workers transition to a permanent post, and the rate of involuntary part-time had reached some 28% by 2016. EU Labour Force Survey (EU-28, 2016). Commission Communication A European Agenda for the Collabourative Economy COM(2016)356 final.

[3] Auer Peter – Gazier Bernard: Social and labour market reforms: four agendas. In: Ralf Rogowski – Robert Salais – Noel Whiteside (ed.): Transforming European Employment Policy. Labour Market Transitions and the Promotion of Capability. Edward Elgar, Cheltenham, UK, Northampton, Ma, USA, 2011. Auer and Gazier present flexicurity as a social and labour market program such as the flexibility, capability, and transitional labour market. This approach is holistic based on systematic thinking. See more in: Rogowski, R. – Salais, R. – Whiteside, N. (ed.) Transforming European Employment Policy. Labour Market Transitions and the Promotion of Capability. Edward Elgar, Cheltenham, UK, Northampton, MA, USA, 2011. European Commission 1998: Transformation of labour and future of labour law in Europe. Final Report, June 1998.

It is therefore clear that, when applying the principle of equal treatment, the status of vulnerable groups is a wider employment issue. *Employability* includes employment rehabilitation, labour safety, employment policy, education policy, labour inspection rules and measures, job search support system, active labour market policy and the operation of a sustainable social care system.

Upon this approach the Pillar is a new stage in the European Union's social dimension, in which the Delors' social space is expanding and there is a much greater chance of *influencing European labour law* than ever before. The principles laid down in the Pillar aim to develop an employment model, in which the degree of compromise between flexibility and security has become apparent[4]. The Pillar states that the European Union considers the minimum level of social protection in order to maintain and enhance competitiveness, as Member States can promote social rights in a more ambitious way than the rights laid down in Pillar. According to the Pillar it can be stated that the realization of economic and social development being in compliance with the social and economic environment could be achieved according to the following principles: *equal opportunities and employment rights, fair working conditions, social protection and social inclusion.* These can be considered as pillars of the employment relationship while building up a new employment model in which flexicurity and security compromise. The *„Fair Work Conditions" section sets out the basic rules of the labour law*, which includes the principles and rights of the pillars: *safe and flexible employment, wage protection, information on employment conditions, protection against dismissal, social dialogue and employee rights. participation, work-life balance, a healthy, safe and well-designed working environment and data protection.*

The Pillar's Preamble emphasizes that *„Economic and social progress are intertwined, and the establishment of a European Pillar of Social Rights should be part of wider efforts to build a more inclusive and sustainable growth model by improving Europe's competitiveness and making it a better place to invest, create jobs and foster social cohesion.*" [5]

We can say that *the Pillar goes beyond* the scope of the Community Charter, redefining the areas concerned, but is based on the principles and rights enshrined in the EU Charter of Fundamental Rights and Solidarity. However, in my opinion, the rights and principles set out in the Pillar so as in the EU Charter of Fundamental Rights are formulated *as the Union's social and labour market agenda*. Looking at fair working conditions, it is obvious that flexibility and security provisions can be set out. All this gives us a picture of *how the protection of workers can be strengthened in the social dimension of the Union*, as flexibility can make the worker unprotected. Therefore, the need for a minimum level of protection is clearly needed to keep flexibility and security. In fact, this defense approach shall transcend the whole Pillar, so the Pillar's fair working conditions shall certainly have a serious impact on European labour law.

Inside labour law, according to Auer and Gazier's reasoning, the inner side of

[4] See more on the core labour rights in: Kaufmann, C.: *Globalisation and Labour Rights. The Conflict between Core Labour Rights and International Economic Law*. Hart Publishing, Oxford and Portland, Oregon, 2007.

[5] Commission Recommendation of 26.4.2017 on the Europen Pillar of Social Rights; 11. https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights/european-pillar-social-rights-20-principles_en).

security is the right minimum wage, the principles of predictability of wage setting, the promotion of indefinite employment, the prohibition of misuse of atypical contracts, the reasonable period of probation, the reasonable period of notice, flexible working in case of childbirth, flexible work services.[6] It seems to be that the Pillar's spirit cannot be different, as efforts must be made to spread innovative forms of work with a minimum level of protection. *Social dialogue and employee participation* can be an *effective measure* of achieving both flexibility and security. Applying these tights *in an innovative way* means that the parties aknowledges the need for new types of bargaining[7]. This gives the opportunity to change working conditions *in a predictable way* when *the employer has to react quickly*.

As a result, it is clear that the collective will, and thus the partnership principle, is of enormous importance in finding a compromise between flexibility and security.

3. The Pillar's Principles and Rights - a New Framework for the Social Dimension

While analysing the Pillar, it is already obvious that we are talking about *principles* and not rights. The development of the social dimension, which has been emphasized since the Paris Declaration, is therefore a precondition for a competitive and sustainable Europe, in which the principles laid down in Pillar aim to develop an employment model. What is this model like? I'm looking for the answer ti this question below.

The Pillar provides guidance to meet the basic needs of people. If a principle applies to employees, it affects all working people, regardless of their employment or woking status, the way and duration of employment. In my view, the minimum level of working life has been formulated in this document, in which the value of work is unquestionable. A work-based society can truly remain competitive in the 21st century. The way in which this should be done, the conditions under which it should be implemented, the European Commission has provided a guide by means of the Pillar. The European Commission has carried out a serious control over Member States with regard to economic governance. The question is whether it manages to influence the social dimension of the Union.

The role of the social partners has been constantly evolving over the last sixty years (since the adoption of the Treaty of Rome in 1957). In the Pillar, it is clearly stated that the social partners have a very important role to play in the development of the employment model, so the freedom of organization and the right to take collective action can also be regarded as the core of the Pillar rights.

The employment model outlined by the Pillar shall be looked at as a social and labour market program. From now on, I will examine the Pillar from this point of view.

[6] See more Auer Peter – Gazier Bernard: Social and labour market reforms: four agendas. In: Ralf Rogowski – Robert Salais – Noel Whiteside (ed.): Transforming European Employment Policy. Labour Market Transitions and the Promotion of Capability. Edward Elgar, Cheltenham, UK, Northampton, Ma, USA, 2011. 34-46. See more: Mélypataki Gábor: Social Innovation and Civil Service Law. Lex et Scientia, XXVI (1), 7-19. Jakab Nóra – Mélypataki Gábor: The Separation and Reflexivitiy of Civil Service Law. Currentul iuridic, XXII (2), 2019, 46-56. Mélypataki Gábor: A közszolgálati jog és a politika kapcsolata, Közjogi Szemle, 3, 2017, 33-39.

[7] See more on the need for new partner relatioships: Blainpain, R. – Hendricks, F. (2011) (ed.): *Labour Law between Change and Tradition*. Liber Amicorum Antoine Jacobs. Kluwer Law International, The Netherlands. Time to move up a Gear The European Commission's 2006 Annual Progress Report on Growth and Jobs, 6. Council and Commission Joint Employment Report 2005/2006, 6, 12-13. http://aei.pitt.edu/40091/1/COM_(2006)_30_3.pdf (2014.06.24.).

In my opinion, in the Pillar such an employment model has been developed, which has shown the degree of compromise between flexibility and security. The Pillar states that the European Union considers the minimum level of social protection in order to maintain and enhance competitiveness, as Member States can promote social rights in a more ambitious way than the rights laid down in Pillar. Based on the Pillar it can be stated that the realization of economic and social development can be acieved according to the following principles: equal opportunities and employment rights, fair working conditions, social protection and social inclusion. These can be considered as the pillars of the employment relationship in the development of the employment model.

The social and labour market program includes several areas: labour law regulation, support for job seekers, and the operation of the social protection system. In fact, the principles and rights of the Union are a good example of the Union's social and labour market program. This employment model is based on equal opportunities. Furthermore, everyone has the right to actively support employment, and finally, we have come to the employment policy within the social and labour market program. It is clear from the provisions that job seekers should be provided with services that help them to return into the labour market as soon as possible. The principles of the transit labour market are also formulated in this section.

The Fair Working Conditions section sets out the basic rules of labour law, which include the following principles and rights: safe and flexible employment, wage protection, information on employment conditions, protection against dismissal[8], social dialogue and employee rights, participation, work-life balance, a decent, secure and well-designed working environment and data protection.

In addition to the employment policy and labour law regulations within the social and labour market programme, the social protection system is also emerging. I regard employment policy as part of the social protection system, but it seems to be separate here. Social protection and social inclusion are important building blocks of the social dimension.

4. Game rules of labour law

In my opinion, the section of fair working condition clarifies the rules of the labour law in the *new game* regarding secure and adaptable employment, wages, information about employment conditions and protection in case of dismissals, social dialogue and involvement of workers, work-life balance, and healthy, safe and well-adapted work environment and data protection.

In the Pillar, the Community Charter of Fundamental Social Rights for Workers appears almost entirely. It lays down more principles for the salary part, since the fair minimum wage - fair wage in the Charter - is one that ensures that the needs of the worker and his family are met, while ensuring access to employment and the promotion of work. The principles of flexibility and security have been formulated in a novel way in the Pillar linked to the

[8] See more: Tóth, H.: Rugalmas biztonság elve a munkaviszony megszüntetése során, *Miskolci Jogi Szemle: A Miskolci Egyetem Állam- és Jogtudományi Karának Folyóirata*, XII (2), 2017, 620–630. . Prugberger, T. – Szőllős, A. - Tóth, H: The Development of the Hungarian Labour and Public Service Laws After the Regime Change, *Polgári Szemle: Gazdasági és Társadalmi Folyóirat*, 14, 2018, 337–351.

improvement of the living and working conditions of the Community Charter.[9]

We can say that Pillar goes beyond the scope of the Community Charter, redefining the areas concerned, but is based on the principles and rights enshrined in the EU Charter of Fundamental Rights's part about Equality and Solidarity. However, in my opinion, the rights and principles of the EU Charter of Fundamental Rights are formulated in the Pillar as the Union's social and labour market agenda. Thus, in the Charter of Fundamental Rights of the EU, children, the elderly and people with disabilities included in the Equality section are included in Pillar's social protection. In the EU Charter of Fundamental Rights, the rights and principles enshrined in the Solidarity Section are included in the Pillar Fair Working Conditions, so workers' rights in the enterprise are the right to information and consultation, collective bargaining and action, the right to use agency services, protection against unjustified dismissal, decent and fair working conditions, the prohibition of child labour and the protection of young people at work, family and work. In the EU Charter of Fundamental Rights, the section on Solidarity includes social security and social assistance, health protection; access to services of general economic interest, now it is part of Pillar's social protection and social inclusion.

Most vizsgáljuk meg, hogy a tisztességes munkafeltételek részből milyen következtetések vonhatók le.

Looking at fair working conditions, I found it interesting to set up flexibility and security provisions. All this gives us a picture of how the protection of workers can be strengthened in the social dimension of the Union, as flexibility can make the worker unprotected. Therefore, the need for a minimum level of protection is clearly needed to keep flexibility and security at the same time. In fact, this defense approach overpins the whole of Pillar, so it might be sure that Pillar's fair working conditions in European labour law have a serious impact.[10]

The followngs can be considered a novel formulation of the internal side of safety in labour law regulation: appropriate minimum wage, principles of predictability of wage setting, support for employment of indefinite duration, prohibition of abuse of atypical contracts, a reasonable period of probation, the notice period is reasonable, and in the case of childbirth, access to flexible work and care services.

As principles serving flexibility, I appreciate the need to promote innovative forms of work that provide quality working conditions. Entrepreneurship and self-employment should be encouraged. Occupational mobility should be facilitated. Obviously, this principle supports the interoperability between independent and dependent work relationships. However, the Pillar's spirit cannot be different, as efforts must be made to spread innovative forms of work only with minimum protection. When EU activities to promote self-employment and policies are designed, it is important to distinguish between different types of self-employment, either to encourage self-employment or to protect self-employed

[9] The spirit of the Community Charter is present throughout Pillar, such as freedom of social protection, association and collective bargaining, vocational training, equal treatment of men and women, the right of workers to information, consultation and participation, health and safety at work, children, juveniles and protecting the elderly.

[10] (1) Everyone has the right to education and to participate in vocational training and further training.

(2) This right includes free participation in compulsory education.

(3) The freedom to establish educational institutions on the basis of democratic principles and the right of parents to provide education to their children in accordance with their religious, philosophical or pedagogical beliefs shall be respected in accordance with the national laws governing the exercise of these rights and freedoms.

more effectively[11]. Digitization is expected to further increase the existing diversity.[12]

I also consider it important to pay attention to avoiding work relationships that lead to the exclusion of workers, precarious work[13] even as a result of improper exercise of atypical contracts[14]. In practice, these two statements may be counterproductive, as a study by the Committee on Employment and Social Affairs in 2016 suggests that work without precariousness, insecurity, and labour rights guarantees often affects self-employed workers, whether self-employed or self-employed without an employee. At the same time, if the goal is to achieve decent working conditions in the Pillar, all self-employed workers should benefit from minimal protection.

Social dialogue and employee participation can be an effective means of achieving both flexibility and security. This gives the opportunity to change working conditions in a predictable way when the employer has to react quickly. Consequently, it is clear that the collective will, and thus the partnership principle, is of enormous importance in finding a compromise between flexibility and security.

The Pillar shall be handeld together with two other EU legislative actions, which ar in compliance with the Pillar's provisions

[11] Eurofound (2016), *Exploring the fraudulent contracting of work in the European Union*, Publications Office of the European Union, Luxembourg. Ecexutive summary, 2. A Digitalizáció hatását megerősíti más jelentés is: Eurofound (2017), *Aspects of non-standard employment in Europe*, Eurofound, Dublin. 3. Lásd erről még:

De Stefano, V. (2016): The rise of the "just-in-time workforce": on-demand work, crowd work and labour protection in the "gig-economy". *Comparative Labour Law and Policy Journal*, Vol. *37 (3)* 471-503; Finkin, M. (2016): Beclouded Work in Historical Perspective. *Comparative Labour Law and Policy Journal*, *37 (3)* 603–618; Kovács, E. (2017): Regulatory Techniques for 'Virtual Workers'. *Hungarian Labour Law E-Journal*, 2. 1-15; Schiek, D. – Gideon A. (2018): Outsmarting the gig-economy through collective bargaining – EU competition law as a barrier? *International Review of Law Computers & Technology*, *32 (3)* 1-20, https://www.researchgate.net/publication/324449617_Outsmarting_the_gigeconomy_through_collective_bargaining_-_EU_competition_law_as_a_barrier_to_smart_cities; Smith, R. – Leberstein, S. (2015): *Rights on Demand: Ensuring Workplace Standards and Worker Security in the On-Demand Economy*. New York, National Employment Law Project, http://www.nelp.org/content/uploads/Rights-On-Demand-Report.pdf 2015; Florisson, R. – Mandl, I. (2018): *Digital age Platform work: Types and implications for work and employment – Literature review*. Eurofound, Publications Office of the European Union, Luxembourg 1; Cherry, M. – Poster, W. (2016): *Crowdwork, Corporate Social Responsibility, and Fair Labour Practices*. Saint Louis University Legal Studies Research Paper no. 2016-8, https://ssrn.com/abstract=2777201.

[12] On the definition of self-employment and labour law protection see: Szekeres, B.: Munkajogon innen - munkaviszonyon túl. Miskolci Egyetem, Deák Ferenc Állam- és Jogtudományi Doktori Iskola, 55-68. Szekeres, B.: A foglalkoztatási jogviszonyok átalakulása, a jogalkalmazás (és jogalkotás) előtt álló kihívások. In: Quid Juris? Ünnepi kötet a Munkaügyi Bírák Országos Egyesülete megalakulásának 20. évfordulójára. 2018, 472-484. Szekeres, B.: Gondolatok a munkavállalóhoz hasonló jogállású személyek helyzetéről - a munkajog és a polgári jog kapcsolatáról, Miskolci Jogi Szemle, 12. (2.) 2017, 561-569. Szekeres, B. A munkavállalóhoz hasonló jogállású személy státuszának jogkövetkezményei – a magyar javaslat és a német megoldás részletei. Munkajog 2, 4, 2018, 24–31. Szekeres, B.: A változó munkavégzés megjelenése és megítélése a bírói gyakorlatban, Miskolci Jogi Szemle: A Miskolci Egyetem Állam- és Jogtudományi Karának Folyóirata, XIII. (1.), 2018, 128–144. Szekeres, B.: A munkavállalóhoz hasonló jogállású személyek munkajogi és kötelmi jogi védelme a német jogrendszerben

In: Keresztes, Gábor (ed.) Tavaszi Szél 2016 = Spring Wind 2016. Tanulmánykötet. III. kötet: Közigazgatástudomány, matematika- és informatikai tudomány, műszaki tudomány, művészeti és művészettudomány, nyelvtudomány, orvos- és egészségtudomány, Budapest, Magyarország : Doktoranduszok Országos Szövetsége, 2016, 356-361.

[13] See more: *Social protection rights of economically dependent self-employed workers;* Study; (2013); Directorate General for internal policies; Policy department A: Employment policy; 14.

[14] See more „Commission Recommendation of 26.4.2017 on the Europen Pillar of Social Rights; https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights/european-pillar-social-rights-20-principles_hu (access on 5th March 2018).

as "*Employees have the right to be informed in writing of their employment rights and obligations, including the probationary period, upon commencement of employment. … Employees, regardless of the type and duration of their employment, and self-employed workers under similar conditions are entitled to adequate social protection.…*"

The Pillar is a guideline for a renewed upward convergence of social standards, with a view to changing the realities of the world of work, providing guidance on the supposed balance of flexible and secure employment. One of the great manifestations of this is the Proposal for a Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union, notably in relation to Pillar 5 („Secure and flexible employment") and 7 („Information on conditions of employment and protection in the event of dismissal"). The proposal for a directive, in connection with the Pillar, expands the content of the information, thereby strengthening the protection of the worker. The proposed Directive will also contribute to the implementation of the following principles set out in the European Pillar of Social Rights: education, training and lifelong learning, gender equality, secure and flexible employment, education, training and lifelong learning, gender equality, information on the conditions of employment and protection in the case of dismissal, social dialogue and employee participation[15].

An important message of the transit labor market program is the proper management of transitions between different life situations or workplaces, labor market status, by protecting and retaining acquired rights. All this is essential when a person's job profile changes several times during their lifetime. In certain working conditions and in the periods between them, social protection of the worker is indispensable, which in my interpretation means the external side of safety and protection[16].

Article 153 (1) (c) of TFEU allows the Union to support and complement Member States' activities in the field of social security and social protection of workers, and the Council Recommendation on access to social protection for workers and self-employed workers is clarified. The broad consensus behind the recommendation is that shortcomings in access to social protection due to the labor market situation and the type of employment may hamper the use of the transition from one labor market situation to another, if it leads to loss of entitlements, and ultimately reduce labor productivity growth. Thus, these shortcomings do not support entrepreneurship as well as hinder competitiveness and sustainable growth. In the long run, the social and economic sustainability of national social protection systems is at stake.

[15] See more: Toumieux, C. (2016) 72-74.

[16] At the international level, it is important that the International Labor Organization's 2012 recommendation on minimum social protection be adopted. *„The social protection floors referred to in Paragraph 4 should comprise at least the following basic social security guarantees:*

(a) access to a nationally defined set of goods and services, constituting essential health care, including maternity care, that meets the criteria of availability, accessibility, acceptability and quality;

(b) basic income security for children, at least at a nationally defined minimum level, providing access to nutrition, education, care and any other necessary goods and services;

(c) basic income security, at least at a nationally defined minimum level, for persons in active age who are unable to earn sufficient income, in particular in cases of sickness, unemployment, maternity and disability; and

(d) basic income security, at least at a nationally defined minimum level, for older persons."

Principle 12 of the Pillar explicitly states that regardless of the nature and duration of employment, self-employed workers under the same conditions are entitled to adequate social protection. The aim of the Recommendation is to contribute to the implementation of this principle and to the implementation of other parts of the pillar, such as safe and flexible employment, unemployment benefit, access to healthcare and old age income and old age pensions.

The Recommendation explicitly states that the aim of the initiative is to support self-employed and atypical workers who, due to their employment contract or their status in the labor market, are not adequately covered by unemployment protection, sickness, maternity, paternity, accidents at work and occupational disease, provided by social protection systems, in the case of disability and old age. With this, Supiot's labor market status theory is confirmed[17].

It is important to note that this recommendation applies to sectors of social protection that are more closely related to labor market status or to the type of employment relationship, and mainly to protection against loss of work-related income when certain risks arise. The Recommendation complements existing EU guidelines on social services and support and, more broadly, guidelines on the active inclusion of people excluded from the labor market.

5. Concluding remarks

I believe that the Pillar will have a major impact on the changes to European labour law, and this assumption can be considered justified if the information directive is adopted. The proposal for a directive, in connection with Pillar, expands the content of the information, thereby strengthening the protection of the worker. The rights laid down are based on provisions aimed at overcoming the shortcomings in the implementation of Directive 91/533/EEC and on implementing measures arising from other elements of the EU acquis in similar situations. The proposed directive will provide basic universal protection for all existing and future employment contracts.

In my opinion, the Proposal defines the minimum level of protection of this labour law, seeking a compromise between flexibility and security. Helping parallel employment and shifting to another form of employment is in any case in the direction of flexible working arrangements. As a result, I believe that European labour law is clearly turning to safer employment, as has been the case in the earlier Kampelmann and Lange cases relating to the Information Directive.

I believe that the proposal for a directive on information provides answers to the labour law issues raised by new forms of employment. Clearly provide the opportunity for flexible employment within the framework of security. Thus, Pillar's flexible and safe employment model outlines the future direction of European labour law if the European Court of Justice is to treat Pillar as a reference. This is a matter of political consensus.

The employment model outlined in Pillar is also united by the spirit of the recommendation on access to social protection for workers and self-employed workers. Although self-employed workers are not subject to conditions of decent working conditions, the protection of workers on the basis of equal treatment seems to be achieved by ensuring adequate social protection.

[17] Over the years, an EU legal framework for the protection of rights has been created through the directives on temporary agency work and agreements between the social partners in the field of temporary agency work, through the directives on part-time employment and fixed-term employment has also been realized. However, as the guidelines apply to employment conditions, their impact on social protection has been very limited.

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PERSONAL DATA PROTECTION ISSUE REFLECTED IN THE CASE-LAW OF THE CONSTITUTIONAL COURT OF ROMANIA

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Abstract

Over the past few years, data privacy became more and more an issue that stirred on European level lots of debates and determined the adoption of a new set of rules, imposed with the compulsory force of a European regulation. Thus, the EU General Data Protection Regulation (GDPR) replaced the Data Protection Directive 95/46/EC and reshaped the way the data are managed in various fields of activity. In Romania, the Constitutional Court had to bring light over important areas that involved the use of personal data and developed a relevant case-law regarding the concordance with the essential standards implied by the protection of private life enshrined both in the Romanian Basic Law and in the European Convention on Human Rights. The paper intends to depict the main challenges that faced the constitutional review and the measure that the Romanian vision over this problem is consistent with the European landmarks set in this field.

Keywords: *right to privacy, personal data, European regulation, constitutional review, constitutional case-law.*

1. Introduction

The digital age that reigns nowadays has changed not only the way people interact, but also the way the states themselves position their legislation towards the technological progress. Day by day, due to the constant increase of accessibility of various kind of electronic devices, more efficient and attractive the electronic communications become and more complex and diverse are the tasks and activities that ordinary people can be involved in. Consequently, the higher becomes the risk of privacy breaches. The so-called 'datacraty' imposed its authority over the quasi-entirety of the social life[1]. In order to avoid the negative effects of exposure of the citizens' personal data, a set of rules meant to diminish this risk has been implemented at the European Union level.

The main idea that is in the core of all these rules is the protection of the right to respect for private life, also referred to the right to privacy. The right to personal data protection derives in a logical manner from the first mention right. Each state has also created a national system of protection, taking into consideration the European general framework.

This European framework also includes the Council of Europe's system, as well. In this regard, the European Convention on Human Rights (ECHR), one of the first major regulations at the European level, provides, in Article 8, that everyone has the right to respect for his or her private and family life, home and correspondence.

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[1] Relevant in this direction is, for instance, the fact that the famous review "Pouvoir" has dedicated a whole number to this topic. See Pouvoir, La datacratie, no.164/2018.

Interference with this right by a public authority is prohibited, except where the interference is in accordance with the law, pursues important and legitimate public interests and is necessary in a democratic society. An iconic judgement of the European Court on Human Rights recognised in 2017 that Article 8 of the ECHR, that grants the right to respect for private life also "provides for the right to a form of informational self-determination" (ECtHR, Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland, no. 931/13, 27 June 2017, para. 137).

Romania has embraced the European normative spirit. The legal provisions adopted to this end have made the object of the constitutional review performed by the Constitutional Court. It played an important role in correcting the deviations from the principles of the Romanian Basic Law which grants the right to private life, also keeping in mind the European philosophy in this field. The present paper will focus on the case-law of the Romanian Constitutional Court in the area of protection of personal data, trying to offer a comprehensive view on this topic. The paper will integrate the overview on the fore-said case-law with the case-law of Court of Justice of the European Union and other constitutional courts in Europe.

2. Content

2.1. Legal framework at the European level

A clear view over this topic requires a brief presentation of the legislative acts that regulates over the time and some of them still regulate the mechanism of personal data protection.

At the European level, the basic provisions in this field are represented by **Article 16 of the Treaty on the Functioning of the European Union** that recognize to everyone the right to the protection of personal data concerning them.

This right is further provided by **Charter of Fundamental Rights of the European Union** (the Charter), **Article 8** (right to protection of personal data). It details its content, stressing, in the second paragraph, that such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. It also grants to everyone the right of access to data which has been collected concerning him or her, and the right to have it rectified.

For quite a long period of time, **Directive 95/46/EC** on the protection of individuals with regard to the processing of personal data and on the free movement of such data[2] (Data Protection Directive) has been the source of inspiration for all the member states in what concerns this issue. It has been in effect until May 2018, when the new General Data Protection Regulation entered into force.

Of great importance was also the **Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006** on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks.

The fore-said directives co-existed with the **Council Framework Decision 2008/977/ JHA** on the protection of personal data processed in the context of police and judicial cooperation in criminal matters[3], which was in effect until May 2018.

[2] Official Journal of EU, 1995, L 281.
[3] Official Journal of EU, 2008, L 350.

The overwhelming development of electronic communications raise the need of a more complex and more safeguarding set of rules. Thus appeared the **Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016** on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (the so-called General Data Protection Regulation (GDPR)[4]. It regulates the processing by an individual, a company or an organization of personal data relating to individuals in the European Union. It means that EU data protection rules apply also to organizations and other entities that are not established in the EU, if they process personal data and offer goods and services to data subjects in the Union or monitor the behavior of such data subjects.

To complete the European legal framework a last directive has been adopted: **Directive (EU) 2016/680** on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data.

All these European normative acts have shaped the member states of the EU have re-configured their national regulations in this field. Accordingly, Romanian Parliament has adopted several laws that took over the provisions of the cited directives.

2.2. CJEU's relevant case-law regarding the personal data protection issue:

The introduction in the European Union's normative acts wouldn't be complete if we do not mention the European Court's of Justice judgement that declared void the main directive dedicated to the protection of personal data.

Thus, Directive 2006/24/EC was declared invalid through ***the Judgment of Court of Justice of the European Union of 8 April 2014, pronounced in the joint cases C-293/12 — Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources and others — and C-594/12 — Kärntner Landesregierung and others***. Through the above-mentioned judgment, the European court found that the analyzed directive violated the provisions of Article 7, Article 8 and Article 52 (1) of the Charter of Fundamental Rights of the European Union**.**

The Court of Justice of the European Union concluded that the measures stipulated by Directive 2006/24/EC, although they are able to achieve the pursued objective, represent an interference with the rights guaranteed by Articles 7 and 8 of the Charter, which does not comply with the principle of proportionality between the taken measures and the protected public interest.

The Court noted in this regard that the data which made the object of the invalidated directive's regulation led to very precise conclusions on the private life of the persons whose data have been retained, conclusions that may relate to the habits of everyday life, the places of permanent or temporary residence, the daily movements or other movements, the activities, the social relations of these persons and the social environments frequented by them (paragraph 27) and that, in these conditions, even if it is prohibited to retain the content of the communications and pieces of information consulted by using an electronic communications network, those data retention can affect the use by subscribers or

[4] Official Journal of EU, 2016, L 119.

by registered users of the communication means stipulated by this directive and, therefore, their freedom of expression, guaranteed by Article 11 of the Charter (paragraph 28)**).**

The Court of Justice of the European Union also indicated that the interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter, caused by the provisions of Directive 2006/24/EC, was wide-ranging and must be considered as being particularly serious, and the circumstance that data retention and their subsequent use were performed without the subscriber or registered user being informed about this was likely to generate in the minds of the persons concerned the feeling that their private life makes the object of a constant supervision (paragraph 37)**.**

It was also alleged that Directive 2006/24/EC did not stipulate objective criteria to limit to the absolute minimum the number of persons who have access and can subsequently use the retained data, that the access of national authorities to stored data is not conditioned by the prior control performed by a court or by an independent administrative entity, limiting this access and their use to the absolute minimum for the achievement of the pursued objective and that the obligations of Member States to establish such limitations is not stipulated (paragraph 62).

2.3. The Constitutional Court's of Romania case-law regarding the personal data protection

2.3.1. One of the most worthy details to be mentioned when approaching this issue is the fact that prior to the fore-cited judgment of the CJUE, the Constitutional Court of Romania had rendered a decision, **Decision no. 1.258 of 8 October 2009**[5]**,** by which it stated that the Law no. 298/2008 on the retention of data generated or processed by the providers of publicly available electronic communications services or of communications networks, which was the first transposition in the national legislation of the Directive 2006/24/EC, was inconsistent with the provisions of the Romanian Basic Law.

We notice the clairvoyant attitude of the Romanian Constitutional Court that has foreseen the radical solution adopted by the CJUE five years later. We also underline that on the 2nd of March 2010, soon after the Romanian Constitutional Court, Federal Constitutional Court of Germany has also rejected the German legislation requiring electronic communications traffic data retention that implemented the similar EU Directive[6].

By Decision no. 1.258 of 8 October 2009, the Court held that Article 1 (2) of Law no. 298/2008 also included in the category of traffic and location data for individuals and legal entities *"the related data necessary for the identification of the subscriber or registered user"*, without expressly defining what is meant by the phrase *"related data"*. It was indicated that the absence of precise legal rules that would determine the exact scope of those data needed to identify the user - individuals or legal entities, left room for abuse in the work of retention, processing and use of data stored by providers of publicly available electronic communications services or of public communications networks and that the restriction on the exercise of the right to intimate life, secrecy of correspondence and freedom of expression must also occur in a clear, predictable and unequivocal manner, as to be removed, if possible, the occurrence of arbitrariness or abuse of authorities in this area.

[5] Published in the Official Journal of Romania, Part I, no. 798 of 23 November 2009.
[6] http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg10-011.

Likewise, the Constitutional Court noted the same ambiguous wording, not compliant with the rules of legislative technique, also as concerns the provisions of Article 20 of Law no. 298/2008, reading as follows, "*In order to prevent and counteract threats to national security, State bodies with responsibilities in this area, in the terms set forth by the laws governing the activity of protection of national security, can have access to data retained by service providers and public electronic communications networks"*. The legislature does not define what is meant by *"threats to national security"*, so that in the absence of precise criteria of delimitation, various actions, information, or normal activities, of routine, of natural and legal persons can be considered, arbitrarily and abusively, as having the nature of such threats. Recipients of the law may be included in the category of suspects without knowing it and without being able to prevent, by their conduct, the consequences that their actions may entail and that the use of the expression *"can have"* also leads to the idea that the data covered by Law no. 298/2008 are not retained solely for the use thereof only by State bodies with specific powers to protect national security and public order, but also by other persons or entities, since they *"can have"*, and not just *"have"*, access to such data, according to the law.

By the same decision, the Constitutional Court has found that Law no. 298/2008, as a whole, established a rule regarding the continuous retention of personal data, for a period of 6 months as from the time of their interception. Or, in the matter of personal rights, such as the right to personal life and the freedom of expression, as well as of processing of personal data, the widely recognized rule is to ensure and guarantee their observance, respectively of confidentiality, the State having, in this respect, mostly negative obligations, of abstention, by which should be avoided, insofar possible, its interference in the exercise of such right or freedom. It was underlined that exceptions are restrictively allowed, in the terms expressly provided by the Constitution and the applicable international legal instruments in the field, and Law no. 298/2008 represents such an exception, as it results from the title itself.

The Court has also found that the obligation to retain data covered by Law no. 298/2008, as an exception or derogation from the principle of protecting personal data and confidentiality thereof, by its nature, extent and scope, deprived this principle of content, as it was guaranteed by Law no. 677/2001 for the protection of individuals concerning the processing of personal data and free circulation of such data and Law no. 506/2004 on the personal data processing and protection of private life in the electronic communications sector. Or, it is widely recognized in the caselaw of the European Court of Human Rights, for example, by Judgment of 12 July 2001, rendered in *the case of Prince Hans-Adam II de Lichtenstein v. Germany*, paragraph 45, that the Contracting States under the Convention on Human Rights and Fundamental Freedoms have assumed such obligations to ensure that the rights guaranteed by the Convention are practical and effective not theoretical and illusory, the legislative measures adopted following the effective protection of rights. But the legal obligation that requires the continuous retention of personal data makes the exception to the principle of effective protection of the right to personal life and freedom of expression, absolute as a rule. The right appears to be regulated in a negative fashion, its positive side losing its predominant character.

Therefore, the regulation of a positive obligation on a continual limitation on the exerciser of the right to a private life and

secrecy of correspondence cancels the very essence of the right by removing the guarantees applying to its exercise. Natural and legal persons, mass users of publicly available electronic communications services or of public communications networks are continually subject to the interference in the exercise of their personal rights to private correspondence and free expression, without any possibility of a free, uncensored manifestation, only under the form of direct communication, to the exclusion of the main means of communication currently used.

Likewise, through Decision no. 1.258 of 8 October 2009, the Court held that in a natural logic of this analysis the examination in this case of the principle of proportionality was also necessary, which represents another mandatory requirement needed to be respected in cases of limitation on the exercise of the rights and freedom strictly provided for by Article 53 (2) of the Constitution. This principle states that the extent of restriction must be in line with the situation that led to its implementation and also that it must cease once that cause determining it disappeared. Law no. 298/2008 requires retention of data continuously from the time of entry into force, respectively of its application (i.e. 20 January 2009, respectively 15 March 2009 as concerns traffic data of location corresponding to the services of access to Internet, email and Internet telephony), without considering the need to terminate the restriction once the cause that has led to this measure has disappeared.

The Court held that, although Law no. 298/2008 referred to data of a predominantly technical nature, the same were retained in order to provide information and the person and his private life. Even though according to Article 1 (3) of the law, it shall not apply also to the content of communication or information accessed while using an electronic communications network, the other data stored, aimed at identifying the caller and the called party, namely the user and recipient of information communicated electronically, of the source, destination, date, hour and duration of a communication, type of communication, the communication equipment or devices used by the user, the location of mobile communication equipment, as well as of other "related data" — undefined in the law —, were likely to prejudice, to interfere with free expression of the right of communication or expression.

It was indicated that the legal guarantees for use in particular cases of data retained — concerning the exclusion of content of the communication or information consulted, as object of data storage, by the prior and reasoned authorization of the president of the court entitled to judge the offence for which criminal proceedings have been initiated, as provided by Article 16 of Law no. 298/2008 and implementing penalties covered by Articles 18 and 19 of the same — were not sufficient and adequate as to remove the fear that personal rights, of private type, are not violated, so that their occurrence would take place in an acceptable manner.

Thus, the Constitutional Court did not deny the purpose in itself considered by the legislature in adopting the Law no. 298/2008, in that it is an urgent need to ensure adequate and effective legal means, consistent with the continuous process of modernization and technologization of the media, so that crime can be controlled and prevented. This is the reason for which individual rights cannot be exercised *in absurdum*, but can be subject to restrictions that are justified by the aim pursued. Limiting the exercise of certain personal rights in consideration of collective rights and public interests, aimed at national security, public order or prevention of crime, was always a sensitive operation in terms of

regulation, so as to maintain a fair balance between the interests and rights of the individual, on the one hand, and those of the society, on the other. It isn't less true, as noted by the European Court of Human Rights in the Judgment of 6 September 1978 rendered in *the case of Klass and others v. Germany*, paragraph 49, that taking surveillance measures, without adequate and sufficient guarantees, can lead to "destruction of democracy on the ground of defending it".

2.3.2. Another decision that had a very strong echo in the society was the **Decision no. 440 of the 8th of July 2014** on the exception of unconstitutionality of the provisions of Law no. 82/2012 on the retention of data generated or processed by providers of public electronic communications networks and by providers of publicly available electronic communications services, as well as for the amendment and supplementing of Law no. 506/2004 on personal data processing and protection of private life in the sector of electronic communications[7].

The Court noted that the Law no. 82/2012 represented the second transposition into national legislation of Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006. In its analisis, the Court considered necessary for a precise understanding of the retention of the data mechanism, to distinguish between two different stages. Noting that the data in question relate mainly to traffic and location data of persons and data necessary to identify a subscriber or registered user, the mechanism covered involves two stages, the first being that of the retention and storage of data and the second, that of access to the data and their use.

The retention and storage of data, which is the first operation from the chronological point of view, is in the responsibility of providers of public communications networks and publicly available electronic communications services. This operation is a technical one and it is conducted automatically on the basis of software as long as the law obliges providers designated by law to retain those data. Whereas both under Directive 2006/24/EC and under Law no. 82/2012, the purpose of the retention and storage is a general one and thereby ensuring national security, defense, prevention, investigation, detection and prosecution of serious crime, retention and storage not being linked and determined by a particular case, it appears as obvious the continuing nature of the obligation of providers of public electronic communications network and service providers to retain data on the entire period expressly provided for by the legislative framework in force, namely for a period of 6 months, under Law nor.82/2012. At this stage, as only the retention and storage of a mass of information are concerned, identification or location of those who are subjects of electronic communications are not actually carried out, this will take place only in the second stage, after being granted access to the data and their use.

The Court stated that given the nature and specificities of the first stage, since the legislature considers necessary the retention and storage of data this operation by itself is not contrary to the right to personal, family and private life, or to the secrecy of correspondence. Neither the Constitution nor the Constitutional Court case-law prohibit preventive storage of traffic and location data, but on condition that access to the data and their use be accompanied by guarantees and be made in compliance with the principle of proportionality.

Consequently, the Court considered that only in relation to the second stage, that

[7] Published in the Official Journal of Romania, Part I, no. 653 of 4 September 2014.

of access and use of such data, it arises the question of compliance of legal regulations with the constitutional provisions. Examining the provisions of Law no. 82/2012, concerning the access of the judiciary and other State bodies with tasks in the field of national security to data stored, the Court found that the law did not give the necessary guarantees for protection of the right to personal, family and private life, secret correspondence and freedom of expression of individuals whose stored data are accessed.

As it was stated earlier, under Article 1 of Law no. 82/2012, prosecution bodies, courts and State bodies with tasks in the field of national security have access to data retained under this law. However, according to the provisions of Article 18 of Law no. 82/2012, only the prosecution bodies are obliged to comply with the provisions of Article 152 of the Code of Criminal Procedure, as this requirement does not cover also the State bodies with tasks in the field of national security, which can access these data in accordance with "special laws", as provided by Article 16 (1) of Law no. 82/2012. Therefore, only the request by the prosecution bodies to the providers of public communications networks and providers of publicly available electronic communications services for the transmission of retained data is subject to the prior authorization of the judge of freedoms and rights.

Requests for access to data retained for use for a purpose designated by law made by State bodies with tasks in the field of national security are not subject to authorization or approval of the court, thereby lacking the guarantee of effective protection of the data retained against the risk of abuse and against any unlawful access and use of such data. That situation is liable to constitute an interference with the fundamental rights to personal, family and private life and secrecy of correspondence and thus contravene the constitutional provisions which enshrine and protect these rights.

Having examined the "special laws in the matter", mentioned in Article 16 (1) of Law no. 82/2012, the Court found that State bodies with tasks in the field of national security can access and use data stored without the need for court authorization. Thus, Law no. 51/1991 on the national security of Romania establishes, in Article 8, the State bodies with tasks in the field of national security, i.e. the Romanian Intelligence Service, the Foreign Intelligence Service and the Protection and Guard Service and in Article 9 it states that the Ministry of National Defense, the Ministry of the Interior and the Ministry of Justice organize own intelligence structures with specific tasks in their respective areas of activity. The Court also noted that, according to Article 13, let. e) of the law, the bodies responsible for national security, while there is a threat to national security of Romania, as defined in Article 3 of Law no. 51/1991, may request the obtaining of data generated or processed by providers of public electronic communications networks or providers of publicly available electronic communications services, other than their content, and retained by them according to the law, and neither this Article nor Article 14 of the law provides that such a request must be authorized by a judge.

The Court noted, moreover, that according to Article 9 of Law no. 14/1992 on the organization and functioning of the Romanian Intelligence Service *"in order to determine the existence of threats to national security provided for in Article 3 of Law no. 51/1991 on national security of Romania, as amended, intelligence services may carry out checks in compliance with the law, by: [...] e) obtaining data generated or processed by providers of public*

communications networks and providers of publicly available electronic communications services other than their content, and retained by them in accordance with the law". But, like the provisions of Law no. 82/2012 and of Law no. 51/1991, the provisions of Law no. 14/1992 do not impose the obligation of such intelligence service to obtain the authorization of the judge to have access to data stored.

At the same time, the Court noted that Law nor.1/1998 on the organization and operation of the Foreign Intelligence Service, provides in Article 10 (1) that *"the Foreign Intelligence Service is allowed to use undercover legal persons established in accordance with the law, to use specific methods, to establish and maintain appropriate means for obtaining, verification, assessment, protection, recovery and storage of data and information relating to national security"*, and, according to paragraph (3) of the same Article, *"use of the means of obtaining, verification and recovery of data and information must not adversely affect any rights or fundamental freedoms of citizens, private life, honor or reputation or to make them subject to unlawful restrictions"*. Furthermore, according to Article 11 of Law no. 1/1998, *"the Foreign Intelligence Service shall be entitled, under the conditions laid down by law, to request and obtain from the Romanian public authorities, economic agents, other legal persons and natural persons the information, data and documents necessary for the performance of its tasks"*. The Court therefore found that Law no. 1/1998 does not regulate in a distinct manner the access of the Foreign Intelligence Service to data retained by providers of public communications networks and providers of publicly available electronic communications services, this access is however covered by Article 13 of Law no. 51/1991, unencumbered therefore by the prior authorization of a court.

However, the lack of such authorization has been criticized, inter alia, by the Court of Justice of the European Union by the Judgement of 8 April 2014, i.e. such lack is equivalent to the insufficiency of procedural safeguards necessary to protect privacy and other rights enshrined in Article7 of the Charter of fundamental rights and freedoms and the fundamental right to the protection of personal data, enshrined in Article 8 of the Charter (par. 62). III. For all of those reasons, the Court upheld the exception of unconstitutionality and noted that the provisions of Law no. 82/2012 on the retention of data generated or processed by providers of public electronic communications networks and by providers of publicly available electronic communications services and amending and supplementing Law no. 506/2004 concerning the processing of personal data and the protection of privacy in the electronic communications sector are unconstitutional.

In what concerns the effect of this decision, the Constitutional Court itself has stressed (paragraph 78 and 79) that at the publication in the Official Gazette of Romania, Part I, of this decision, becoming lacked of legal basis from the point of view of the European law, as well as of the national law, the activity of retention and use of data generated or processed regarding the supply of publicly available electronic communications services or of public communications networks. Specifically, it means that since the publication of the decision of the Constitutional Court of Romania, the providers of public electronic communications networks and of publicly available electronic communications services *do not have the obligation anymore, nor the legal possibility to retain certain data* generated or processed within their

activity *and to put them at the disposal of judicial bodies* and of those with powers to protect national security. By exception, these providers can only retain the data necessary for invoicing or payments for interconnection or other data processed for marketing purposes only with the prior consent of the individual whose data are processed, as stipulated by Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 on the processing of personal data and protection of confidentiality in the sector of public communications (Directive on confidentiality and electronic communications), in force.

Accordingly, until the adoption by the Parliament of a new law on data retention, to comply with constitutional provisions and exigencies, as they were highlighted in this decision, the judicial bodies and State bodies with powers to protect national security do not have access anymore to data that have been already retained and stored pursuant to Directive 2006/24/EC and to Law no. 82/2012 in view of their use within the activities defined by Article 1 (1) of Law no. 82/2012. Likewise, the judicial bodies and those with powers to protect national security lack a legal and constitutional basis for the access and use of data retained by the providers for invoicing, payments for interconnection or for other commercial purposes, to be used within the activities for the prevention, research, discovery and criminal prosecution of serious crimes or for the settlement of cases with disappeared persons or for the execution of an arrest warrant or a penalty enforcement warrant, precisely because the character, nature and different purpose thereof, as stipulated by Directive 2002/58/EC. Moreover, even Law no. 82/2012 establishes at Article 11 that these latter retained data are exempted from the legal provisions, having another legal regime, being submitted to the provisions of Law no. 506/2004 on the processing of personal data and the protection of private life in the sector of electronic communications.

2.3.3. Another important decision is **Decision no. 461 of 16 September 2014** on the objection of unconstitutionality of the provisions of the Law amending and supplementing Government Emergency Ordinance no. 111/2011 on electronic communications[8].

The Emergency Ordinance implements a number of directives regulating the authorization of electronic communications networks and services. It essentially regulates the rights and obligations of providers of electronic communications networks and services, the regime of limited resources, the rights of end-users, the universal service, the obligations of providers of electronic communications services and networks with significant market power.

The changes envisaged by the new regulation are aimed at the registration of users of prepaid cards, the identification of users connected to Internet access points provided by legal persons, the collection and storage of data concerning the users of communications services, the conditions for specific technical operations and corresponding responsibilities incumbent upon providers of electronic communications services, the personal data retention period and the imposition of penalties for breaches of legal obligations. The legislative initiative was motivated by the need to adopt measures to facilitate criminal investigation activities or those aimed at identifying, preventing and countering risks or threats to national security.

By the impugned rule, the legislature has expressly regulated the data necessary to

[8] Published in the Official Journal of Romania, Part I, no. 775 of 24 October 2014.

identify a subscriber or user, by providing, in addition to the name and telephone number or communications service identifier, the personal identification code, the series and number of the identity document and the issuing country with regard to individuals, respectively the tax identification code, with regard to legal persons. It should be stressed that Law no. 82/2012 did not provide the obligation to retain the personal identification code, the series and number of the identity document, respectively the tax identification code needed to identify a subscriber or a user, and the database set up according to the provisions of Article 4 of this law refers, both for fixed line and mobile telephone networks and for Internet access services, electronic mail and voice over Internet Protocol, only to the telephone number, as well as to the subscriber or registered user's name and address. Therefore, in the light of the reasons held by the Court in Decision no. 1.258 of 8 October 2009, the challenges on the accuracy and foreseeability of rule no longer subsist as the new rule precisely determines the area of the data necessary for the identification, but, by taking into account the supplementing of data required to the subscriber or to the user, as well as their strictly personal nature, the amending legal provisions should have been properly supplemented by provisions ensuring high standards in terms of their protection and security throughout the entire process of retention, storage and use, precisely so as to minimize the risk of infringement of the right to personal, family and private life, the secrecy of correspondence, as well as the citizens' freedom of expression. However, the Court noted that the Law amending and supplementing Government Emergency Ordinance no. 111/2011 does not make any change regarding the protection of these rights, therefore the reasons on which the decision of unconstitutionality of Law no. 82/2012 was based, are all the more justified in this case.

The amending rule widens the category of persons who must identify the users of electronic communications services, by expressly providing the obligation of legal persons providing Internet access points to public to retain the users' identification data: the telephone number or the identifier of the communications service with advance and subsequent payment; the surname, forename and personal identification code, the series and number of the identity document, respectively the issuing country – for foreign persons; the identification data obtained through bank card payment; any other identification procedure which, directly or indirectly, ensures that the user's identity is known. The retention obligation is doubled by the obligation to store the data for a period of 6 months as from the time of their retention.

The Court noted that currently, legal persons providing public Internet access points are private legal entities, especially in commercial and recreational facilities, cafeterias, restaurants, hotels, airports etc., or legal persons governed by public law – public institutions that give citizens direct and rapid access to information of public interest (including those distributed on their own webpages), like town halls, educational institutions, health clinics, public libraries, theatres, etc. The imposition of the obligation incumbent upon such persons to retain and store personal data requires, correlatively, the specific regulation of adequate, firm and unequivocal measures, ensuring citizens' trust that the manifestly personal data that they make available are recorded and kept confidential. In this respect, the law merely establishes the measures of retention and storage of data, without amending or supplementing the legal provisions with regard to the

guarantees that the State must provide in the exercise of its citizens' fundamental rights.

However, the regulatory framework in such a sensitive field must be clear, predictable and devoid of confusion, so as to remove, as much as possible, the possibility of abuse or arbitrariness in relation to those called upon to apply the legal provisions.

The Court mentioned that the provision that identification is achieved through "any other identification procedure" ensuring, directly or indirectly, that the user's identity is known, represents an imprecise regulation likely to create the prerequisites for certain abuses committed in the process of retention and storage of data by the legal persons covered by this rule.

Data retention and storage clearly constitutes a limitation of the right to the protection of personal data, respectively of the constitutionally protected basic rights relating to personal, family and private life, secrecy of correspondence and freedom of expression. Such a limitation may operate solely in accordance with Article 53 of the Constitution, which foresees the possibility of restricting the exercise of certain rights or freedoms only by law and only if necessary, as the case may be, to protect national security, public order, public health or morals, citizens' rights and freedoms, for conducting a criminal investigation, preventing the consequences of a natural disaster or an extremely severe catastrophe. The restriction measure can be ordered only if necessary in a democratic society, it should be proportional to the situation having caused it and applied without discrimination and without infringing upon the existence of such right or freedom.

However, given that the measures adopted by the law subject to constitutional review are not accurate and foreseeable, that the interference of the State in the exercise of the abovementioned rights, although laid down by law, is not clearly, rigorously and exhaustively formulated so as to offer confidence to citizens, that its strictly necessary nature required in a democratic society is not fully justified, and that the proportionality of the measure is not ensured through the regulation of appropriate guarantees, the Court ascertained that the provisions of the Law amending and supplementing Government Emergency Ordinance no.111/2011 on electronic communications violate the provisions of Article 1(5), Articles 26, 28, 30 and 53 of the Constitution. Therefore, the limitation of the exercise of such personal rights by considering certain collective rights and public interests related to national security, public order or criminal prevention, breaks the right balance which should exist between the individual interests and rights, on the one hand, and those of the society, on the other hand, as the impugned law cannot regulate sufficient guarantees to ensure the efficient protection of data against the risks of abuse and any unlawful access or use of personal data.

2.4. Relevant decisions rendered by foreign constitutional jurisdictions in the matter of personal data protection

This sesitive issue concerned many other constitutional courts which performed a consistent constitutional review of the respective legislation. In this regard, are considered particularly relevant the decisions of the Federal Constitutional Court of Germany, of the Czech Constitutional Court and of the Supreme Administrative Court of Bulgaria.

By the **Judgment of 2 March 2010, the Federal Constitutional Court of Germany** declared unconstitutional the provisions of Articles 113a and 113b of Law on the new regulation of the telecommunications surveillance of 21 December 2007, and of Article 100g of

the Criminal Procedure Code of Germany, indicating that they violate Article 10 (1) of the Constitution of Germany on the secrecy of telecommunications.

As for the unconstitutionality of the provisions of Articles 113a and 113b of the Law on the new regulation of the telecommunications surveillance of 21 December 2007 it was indicated that the storage without a special occasion of traffic data in telecommunications does not make the object of the strict prohibition of preventive storage of data according to the case-law of the Federal Constitutional Court and that, if attention is paid to this intervention and it is adequately realized, the proportionality requirements can be met.

It was underlined the importance of the storage of traffic data of the telecommunications sector for preventive purposes, but also the necessity of certain regulations sufficiently strict and clear on the security of data and the limitation of their use, in order to ensure transparency and legal protection. It was emphasized however that such storage represents a wide-ranging interference even while the content of the communications does not make the object of storage, as the retained data make possible a detailed knowledge of the intimate sphere of the individual, especially as concerns the social or political affiliation, preferences, inclinations and weaknesses of individuals, allowing the preparation of some relevant profiles and creating the risk of submitting some citizens, who give no reason to be submitted to investigations, to be exposed to such actions.

It was found that the provisions of Articles 113a and 113b of the Law on the new regulation of the telecommunications surveillance of 21 December 2007 violates the principle of proportionality, not being accomplished the constitutional requirements referring to data security and the transparency of their use, nor those on the protection of individuals. To this effect, it was hold that the impugned legal provisions refer only to the necessary diligence, generally, in the field of telecommunications, but relativize the security requirements, leaving them at the choice of the telecommunications operators, who are not required to comply with sufficient high standards in ensure the security level and for which higher penalties are established for breach of the storage obligation than for the violation of the security data.

It was also held that the provisions of Article 100g of the Criminal Procedure Code also allow the access to data in other cases than the individual ones, without the judge's agreement and without the person concerned being informed, for which reason they are unconstitutional.

Similarly, the **Constitutional Court of the Czech Republic, through Decision of 22 March 2011**, found the unconstitutionality of the provisions of section 97 paragraphs 3 and 4 of the Act no. 127/2005 on the electronic communications and amendments referring to related normative acts (Act on electronic communications) of the Decree no. 485/2005 on data retention regarding the traffic, location, date and duration of communications, as well as the form and method of delivery of these ones to authorized authorities.

In the content of this decision the Court held that the impugned texts do not offer to citizens sufficient guarantees regarding the risk of abusive use of stored data and arbitrary. It was found that the examined normative acts do not define at all or insufficiently and ambiguously define the rules on the compliance with the requirements on the security of data retention and restriction of third parties' access to retained data. On this occasion is was underlined the importance in the context

of the current level of development of the society of traffic data retention in the field of communications, but also the need to maintain a balance between public and individual interests. By the same decision it was also found the lack of definition of the means that should be put at the disposal of the affected persons in order to benefit of an efficient protection against arbitrary and abusive use of stored data.

Finally, **the Supreme Administrative Court of Bulgaria**, through **Decision no. 13.627 of 11 December 2008**, has annulled an Article of the national law on data retention that allowed the Ministry of Internal Affairs the access to retain data in the computers' ter qa3minals and, also, the supply of access to such data to security services and to other law enforcement institutions, without the authorization of a judicial body, motivating that the annulled legal provisions did not provide any guarantee for the protection of the right to private life and that no mechanism was established in order to guarantee this protection against illegal interferences, so as to avoid the breach of honor, dignity or reputation of an individual.

3. Conclusions

The emergence of the massive computer use and the huge variety of activities based on the internet services brought unexpected risks to the right to respect for private life. Consequently, the need to protect it has led to the new set of rules meant to focus on the collection, storage and use of personal data.

The new General Data Protection Regulation (GDPR), acronym that already entered into the linguistique patrimony of all member states of the European Union[9], is the most recent and also modern instrument meant to provide a set of guarantees in what concerns the privacy of the individuals when it comes to processing and storage of their personal data.

The role of constitutional jurisdiction is crucial in improving and strengthening of all the safeguards attached to the right to the private life, intimacy and, last but not least, freedom of consciousness. Their statements bring light over the legal provisions and benefit to the quality of legislation. Accordingly, the Constitutional Court of Romania has already proved its important role in high-lightening the values of democracy, in respect of fundamental human rights. Considering the outstanding process of technical development, the chances of further requests of reviewing the constitutionality of subsequent normative acts are significant. The Court will have to keep in mind both the European compulsory regulation and also the national Basic Law's provisions granting the full exercise of fundamental human rights.

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[9] Augustin Fuerea, *Aplicarea Regulamentului General privind Protecția Datelor*, în Dreptul no.7/2018, p. 101.

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- Decision no. 461 of 16 September 2014 on the objection of unconstitutionality of the provisions of the Law amending and supplementing Government Emergency Ordinance no. 111/2011 on electronic communications.

COMPARISON BETWEEN THE LEGAL PARTICULARITIES OF ROMANIA'S AND THE UNITED KINGDOM'S MEMBERSHIP OF THE EUROPEAN UNION

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Abstract

Since its early accession to the European Economic Community (the predecessor of the European Union), the United Kingdom has, at times, shown itself reluctant to fully integrate and adopt the acquis communautaire. The UK has chosen to negotiate several opt-outs – more than any other Member State – regarding certain EU policies, with notable examples being the Monetary Union and the Schengen Agreement. Despite being granted such exemptions, the UK has remained a more sceptical member of the EU and has become the first to ever invoke the applicability of Article 50 of the Treaty on European Union, starting the process of withdrawal from the organisation. According to the terms provided by Article 50, the completion of said process should take place in the first half of 2019, coinciding with the rotating Presidency of the Council being taken over by Romania, who only joined the EU in 2007. Its legal standing is noticeably different compared to that of the UK: Romania's participation in the aforementioned EU policies, which the UK has opted out of, is mandatory, but conditioned by the fulfilment of specific criteria. Romania is also, alongside Bulgaria, the object of certain safeguard measures designed to address the specific issues faced by the two states.

The purpose of this article is to compare certain legal particularities that characterise Romania's and the United Kingdom's membership of the EU, and to determine their consequences with regard to each of the two states' relationship with the organisation, as well as to the complex position the EU finds itself in during the first half of 2019.

Keywords: *Opt-out – Integration – Area of Freedom, Security and Justice – Schengen Agreement – Economic and Monetary Union.*

1. Introduction

The United Kingdom, while a strong proponent of the free market and of the liberalisation of trade, has often been considered one of the more reticent Member States with regard to the integration process and the transfer of powers toward the European Union, starting with its refusal to participate in the founding of the European Communities[1] - a decision which has since been called a mistake by some historians[2] – and continuing, after the UK's eventual accession, with its attempts to steer the organisations towards enlargement, as opposed to the deepening of the integration

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[1] The United Kingdom decided not to take part in the Schuman Plan, that lead to the establishment of the European Coal and Steel Community (ECSC) in 1952, and later withdrew from the negotiations held at Messina regarding the creation of the European Economic Community (EEC) and the European Atomic Energy Community (Euratom). The UK finally joined the European Communities in 1973; its first application to join the European Communities had been made in 1961, and its second in 1967, but both had been vetoed by France.

[2] Helen Parr, *Britain's Policy towards the European Community. Harold Wilson and Britain's world role, 1964–1967*, Routledge, 2006, p 1.

process[3]. Several times, when other Member States agreed upon a new or enhanced form of integration, the UK chose not to participate and was granted an opt-out. While not the only state to enjoy such benefits, it became the Member State with most opt-outs[4], regarding the Schengen Area, the Economic and Monetary Union, the Charter of Fundamental Rights of the European Union and the area of freedom, security and justice. This feeling of detachment from the European Union, reflected in the general population, became more and more accentuated over the years and culminated, in 2016, with the referendum regarding the UK's withdrawal from the EU[5], when a little under 52% of the voters decided that they wanted the state to leave the organisation. This decision came about despite the fact that, a few months prior to the referendum, the UK's government had negotiated with the EU and had managed to obtain several desired changes regarding EU legislation[6].

A state that has benefited from the UK's push toward the enlargement of the European Communities is Romania, who became a Member State in 2007, alongside Bulgaria, following a general move toward integrating countries from Eastern Europe in the EU[7]. Upon its accession to the organisation, Romania was made the subject of a series of special conditions and its participation in the Schengen Area and in the Monetary Union was deferred until the state would fulfil the necessary conditions. Twelve years after its accession, Romania has still not become a member of the Schengen Area and has not adopted the Euro.

This article will present and compare the relationship between the EU and the United Kingdom and Romania, respectively, with regard to these areas of policy where the process of integration has proven more complicated, either due to the state's reticence to fully participate, in the UK's case, or the state's failure to fulfil the required conditions, in Romania's case, with a view to identify the causes and potential solutions to this state of affairs.

2. The Schengen Area

The European Communities were founded in the 1950s and took the Member States through an intense process of integration that involved significant changes in national legislation, an economic boom, and several clashes between European leaders based on the differing views regarding the future direction of the

[3] The United Kingdom's preference for a less involved form of cooperation lead to its founding of the European Free Trade Association, in 1960, as an alternative to the EEC. It soon became clear, however, that the UK's economic interests would be better served as part of the integration-based EEC, especially due to the fact that trade with the Commonwealth countries – who had traditionally been the UK's preferred economic partners – had entered a decline. See Helen Parr, *op. cit.*, p. 122.

[4] Three other Member States currently have opt-outs: Denmark has three (regarding Defence, the Economic and Monetary Union and the Area of freedom, security and justice), the Republic of Ireland has two (regarding the Schengen Agreement and the Area of freedom, security and justice) and Poland has one (regarding the Charter of Fundamental Rights of the European Union). Noticeably, all opt-outs concern the same few areas of competence.

[5] It was not the first referendum the UK held regarding this issue. In 1975, two years after the UK had become a member of the European Communities, a referendum was called regarding said membership. That referendum had a significantly different outcome: two-thirds of the electorate expressed support for the UK's accession to the Communities.

[6] For more on the results of these negotiations, see Andrew Glencross, *Why the UK Voted for Brexit. David Cameron's Great Miscalculation*, Palgrave Macmillan, 2016.

[7] Ten states, most of them from the former Soviet area of influence, had joined the organisations in 2004.

Communities[8]. In comparison to this eventful and tumultuous period in European history, the late 1970s and the first half of the 1980s have been called "a period of relative political stagnation in the EEC".[9] While the first steps towards the realisation of the single market had been taken by the implementation of the free movement of goods between 1957 and 1968, the free movement of capital, services and persons were properly put into practice only through the Treaty of Maastricht.[10]

An important step was taken in 1985, with the signing, on 14 June, of the Schengen Agreement by five Member States of the European Communities: France, Germany and the Benelux Economic Union (comprised of Belgium, Luxembourg and the Netherlands). This Agreement was the result of several debates regarding, in particular, the free movement of people between the Member States and the definition of this concept, as well as that of the concept of citizenship[11]. Some Member States held the view that the freedom of movement applied only to their own citizens, which meant that border controls needed to be upheld. Other Member States considered that the freedom of movement should be applied to other citizens as well, and that the territory of the European Communities should be frontier-free.[12] This would necessitate, in turn, particularly thorough controls at the external borders of the European Economic Community (presently, of the EU) as well as the establishment of a common policy regarding visas, asylum and the status of refugees.[13] The Agreement defined several important notions, regulated the way border controls were to be carried out and laid out several rules on the matter of visas, but was not part of the European *acquis* and was not mandatory for the Member States of the Communities who had not signed it.

The Schengen Agreement was later supplemented by the Schengen Convention,[14] signed on 19 June 1990, which concerned the Agreement's implementation. The Convention was integrated in 1999 in the EU's legal framework by means of a Protocol annexed

[8] The French President, Charles de Gaulle, envisioned an intergovernmental Community, where the interests of the Member states took precedence, while German-born Walter Hallstein, one of the founding fathers of the Communities and the first President of the Commission of the EEC, supported a supranational approach and a federal Europe.

[9] Paul Craig, Gráinne de Búrca, *EU Law: Text, Cases, and Materials*, Sixth Edition, Oxford University Press, 2015, p. 7

[10] Paul J. J. Welfens, *An Accidental Brexit. New EU and Transatlantic Economic Perspectives, Palgrave Macmillan*, 2017, p. 265.

[11] With regard to the notion of citizenship, the Court of Justice stated that the matter remains strictly in the competence of the Member States and must be settled in accordance with their national law. See Massimo Condinanzi, Allessandra Lang, Bruno Nascimbene, *Citizenship of the Union and Free Movement of Persons*, Martinus Nijhoff Publishers, 2008, p. 6. The United Kingdom defined the term "national", referring to those who enjoyed freedom of movement, as including "British citizens; persons who are British subjects and have the right of abode in the United Kingdom, and British Dependent Territories citizens who acquire their citizenship from a connection with Gibraltar. Consequently, other British Dependent Territories citizens and British overseas citizens are excluded". In a unilateral declaration, Denmark stated that EU citizenship is different from the concept of Danish citizenship, as defined by its national law.

[12] Augustin Fuerea, *Manualul Uniunii Europene*, Sixth Edition, Universul Juridic, 2016, p. 50.

[13] Massimo Condinanzi, Allessandra Lang, Bruno Nascimbene, *op. cit.*, p. 205.

[14] Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders.

to the Treaty of Amsterdam[15] and allowed for the elimination of all border controls between Member States and the creation of a single external border, where all controls would be carried out according to a unified procedure.[16] Consequently, the policy regarding visas, asylum and border control were included in the *acquis communautaire*[17] as part of the area of freedom, security and justice, and all Member States, except those with opt-outs, became legally bound to join the Schengen Area upon fulfilling the technical requirements.

Since 1985, almost all other Member States of the Communities have integrated the Schengen *acquis*, starting with Italy, in 1990, and even the states that are part of the European Free Trade Association[18] have decided to participate. However, when signing the Treaty of Amsterdam, the Republic of Ireland and the United Kingdom obtained opt-outs regarding the Schengen *acquis*.[19] The Member States negotiated protocols saying they could decide, on a case by case basis, whether to participate in certain acts adopted regarding this matter and to implement them (in the case of the latter two states, the unanimous vote of all states that are party to the Agreement would be necessary). In 1999, the UK asked to participate in certain provisions of the Schengen *acquis*, such as police cooperation, and its request was approved in 2000.[20] The Republic of Ireland followed with a similar request, which was approved in 2002.[21]

The UK's reasoning regarding its decision to opt out of the Schengen *acquis* was that, being an island nation, it had the possibility to better control the access of third country nationals onto its territory.[22] Moreover, an inquiry held by the UK's House of Lords Select Committee on the European Communities had found that, while the abolition of internal frontiers with respect to goods, services and capital was fully possible and advantageous, the elimination of border controls on persons would represent a security risk.[23]

At present, the only Member States of the European Union – excluding the ones who have opt-outs – who do not participate in the Schengen Area are Cyprus[24], Bulgaria, Romania and Croatia. All four states are legally bound to integrate the

[15] The Treaty of Amsterdam was signed in 1997 and entered into force in 1999.

[16] Augustin Fuerea, *op. cit.*, p. 54.

[17] The Schengen *acquis* was defined by the Council Decision 1999/435/EC concerning the definition of the Schengen acquis for the purpose of determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the acquis.

[18] Iceland, Liechtenstein, Norway and Switzerland.

[19] Denmark is a special case. Despite being party to the Schengen Agreement, it is not legally bound by its provisions and can refuse to implement them. See Augustin Fuerea, *op. cit.*, p. 62.

[20] Council Decision 2000/365/EC concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis. For more information, see Augustin Fuerea, *op. cit.*, p. 63.

[21] Council Decision 2002/192/EC concerning Ireland's request to take part in some of the provisions of the Schengen acquis.

[22] Elspeth Guild, "The Single Market, Movement of Persons and Border", *The Law of the Single European Market*, Catherine Barnard, Joanne Scott (eds.), Hart Publishing, 2002, p. 295.

[23] Elspeth Guild, *op. cit.*, p. 298.

[24] Cyprus is legally bound to join the Schengen Area, but has been prevented to do so by the territorial dispute regarding the island's northern part.

Schengen *acquis*, according to the Treaties of Accession.[25]

Romania's request to participate in the Schengen Area was approved by the European Parliament in 2011, but was denied by the Council, with particular opposition from the Dutch and Finnish representatives. In December 2018, the European Parliament once again voted – unanimously – in favour of allowing both Bulgaria and Romania to join the Schengen Area. A unanimous decision from the European Council is needed in order to achieve this aim.

While it is to be expected that a recently joined state will not have yet fulfilled the requirements for integrating the Schengen acquis, the debates in Romania's case have been centred on political arguments as much as on technical ones and, as such, the possibility of its joining the Schengen Area remains hard to predict.

3. The Economic and Monetary Union

The signing and ratifying of the Single European Act (SEA) was another sign of the quickening pace of European integration, with its stated objective being that of creating, by the end of 1992, a single market where all impediments to the free movement of goods, persons, services and capital were removed[26]. The SEA was signed in 1986 by all Member States, despite the differing views on the relevance of the Treaty: France and Germany saw it "as a means of advancing the cause of political, economic and monetary integration". This view was strongly supported by the Commission, led by French-born Jacques Delors, who proposed, in 1989, "a three-stage plan for full economic and monetary union" and "a social charter of workers' and citizens' rights".[27]

These plans were debated in 1990 and led to the signing, in Maastricht, of the Treaty on European Union (TEU), bringing about several significant reforms, such as "provisions for a Social Chapter (previously known as the Social Charter) and for a common foreign and security policy (CFSP) which envisaged a more influential role for the EU in the international system".[28] Of particular relevance was the Economic and Monetary Union (EMU), which would be built in three stages. The final stage would have to be reached no later than 1999, with as many members as were found to satisfy the convergence criteria for joining the Euro area.[29] The idea of the EMU had existed for many years, but it was always considered that its realisation would necessitate a stronger political union and deeper integration – something that would be achieved through the Treaty of Maastricht.[30]

The signing of the Treaty of Maastricht showed how opposed the UK was to further integration.[31] During the negotiations regarding the Economic and Monetary

[25] For more information regarding Romania's accession to the EU and the Treaty concerning the accession of the Republic of Bulgaria and Romania to the European Union in particular, see Augustin Fuerea, *op. cit.*, Chapter VII.

[26] David Gowland, Arthur Turner, Alex Wright, *Britain and European Integration Since 1945: On the Sidelines*, Routledge, 2010, p. 102.

[27] David Gowland, Arthur Turner, Alex Wright, *op. cit.*, p. 103.

[28] *Idem*.

[29] A presentation of the convergence criteria can be found on the European Commission's website: https://ec.europa.eu/info/business-economy-euro/euro-area/enlargement-euro-area/convergence-criteria-joining_en.

[30] David Gowland, Arthur Turner, Alex Wright, *op. cit.*, p. 120.

[31] Augustin Fuerea, *BREXIT – trecut, prezent, viitor*, Curierul judiciar, no. 12/2016, C.H.Beck, Bucharest, p. 631.

Union, the United Kingdom expressed its desire to be excluded from the obligation to adopt the Euro, asking for an opt-out.[32] Most Member States disagreed with this request, but after extended debates it was decided that the UK would be exempt from participating in the final stage of the EMU, on the condition that it would not hamper the other Member States in furthering integration in this area.[33] Considering the fact that the Treaties do not, at present, provide for a legal procedure of opting out of the Monetary Union, it is widely considered that adopting the Euro is a legal obligation for all Member States who fulfil the convergence criteria, especially considering the fact that "for candidate countries, adherence to the aims of economic and monetary union constitutes one of the prerequisites for accession to the EU."[34]

British opposition to the adoption of a single currency had first been expressed by Margaret Thatcher.[35] Her successor, John Major, shared her interest in creating a strong single market and her reticence toward further integration and transfer of national sovereignty, opposing the idea of a single currency.[36] Their position was partially motivated by recent international events that had had a serious impact on the UK's economy: "That Britain joined the EC when the latter was going through one of its periodic bouts of radical change scarcely facilitated a smooth entry. […] The collapse of the Bretton Woods fixed exchange system in 1971, followed by a fourfold increase in international oil prices during 1973-74, triggered off a new phase of monetary instability and sluggish economic activity. So far as Britain was concerned, the situation was aggravated by the impact of the 1974 miners' strike and the major sterling crisis that blew up in 1976. […] All the available evidence conclusively showed that Britain's economic performance was significantly worse than it had been in the years immediately before entry to the EC. It also remained inferior to that of most other Member States."[37]

According to Romania's Accession Treaty, upon joining the European Union, the state became a member of the Economic and Monetary Union, with a derogation from the obligation to adopt the Euro until it would fulfil the convergence criteria. As of 2019, Romania has yet to be considered as having satisfied said criteria and, unlike the case of its participation in the Schengen Area, the arguments against its adopting the euro are of a technical, rather than political, nature.

[32] The United Kingdom also obtained an opt-out regarding the Social Chapter of the Treaty of Maastricht, but eventually decided to integrate the *acquis* on this issue. For more on this subject, see Andrew Duff, John Pinder, Roy Pryce (eds.), *Maastricht and Beyond. Building the European Union*, Routledge, 1994.

[33] Roy Price, "The Treaty Negotiations", *Maastricht and Beyond. Building the European Union*, Andrew Duff, John Pinder, Roy Pryce (eds.), Routledge, 1994, p. 50. A similar Protocol was agreed on regarding Denmark.

[34] Niamh Nic Shuibhne, Laurence W. Gormley, *From Single Market to Economic Union. Essays in Memory of John A Usher*, Oxford University Press, 2012, p. 23. Sweden presents an interesting case: while satisfying the other convergence criteria, the state has yet to comply with the formal requirement of participating in the Exchange Rate Mechanism, effectively barring itself from joining the Euro area.

[35] Lee McGowan, *Preparing for Brexit. Actors, Negotiations and Consequences*, Palgrave Macmillan, 2018, p. 19. Margaret Thatcher was Prime Minister of the United Kingdom from May 1979 to November 1990. She was succeeded by John Major, who occupied the office until May 1997. The UK – England, specifically – under Margaret Thatcher has been called "the most centralized state in Europe" and was the state "against which most legal action had been filed at the European Court of Human Rights". See Paul J. J. Welfens, *op. cit.*, p. 142.

[36] David Gowland, Arthur Turner, Alex Wright, *op. cit.*, p. 105.

[37] *Ibidem*, p. 79.

4. The Area of Freedom, Security and Justice

The Treaty of Amsterdam spoke of the importance of creating an Area of Freedom, Security and Justice (AFSJ) comprised of the policy on visas, asylum, emigration and other provisions regarding the free movement of people, as well as the Schengen *acquis*. Following the reforms brought about by the Treaty of Lisbon,[38] the AFSJ forms the subject of Title V of the Treaty on the Functioning of the European Union and has been expanded to include not only the policy on border controls, asylum and immigration, but also police and judicial cooperation in criminal and civil matters.

When signing the Treaty of Amsterdam, the United Kingdom and the Republic of Ireland negotiated another Protocol, distinct from the one that contained the opt-out regarding the Schengen *acquis*. According to this second Protocol, the two Member States were not bound by the provisions concerning the AFSJ, but "could choose whether or not to opt in to proposed measures in this area", in a three-month term. If they did not express an option, they would be considered as having opted-out.[39] The Treaty of Lisbon preserved the Protocol[40] and extended it to the entirety of the ASFJ, in its expanded form, providing that it also applies to "amendments to measures in relation to which those states have previously opted in", which could, if put into practice, render those measures inapplicable and lead to certain complications.[41] As before, the two Member States can decide to opt-in at any time.

Contrary to the UK, Romania is a relatively eager participant in the Area of Freedom Security and Justice, being one of the Member States who agreed, in 2017, to establish the European Public Prosecutor's Office as a form of enhanced cooperation.[42]

5. The Charter of Fundamental Rights of the European Union

The decision to draw up a Charter of Fundamental Rights was taken in June 1999, during the European Council in Köln, with further details regarding its elaboration being agreed upon a few months later, during the European Council in Tampere.[43] The Charter was drawn up in less than a year, was proclaimed by the European Parliament, the Council and the Commission and was unanimously approved by the European Council in Biarritz, in October 2000. Following the adoption of the Treaty of Lisbon, the Charter of Fundamental Rights gained the same legal status as the Treaties, taking precedence over secondary EU law and all national legislation.[44] Despite the fact that the drawing up and the approval of the Charter did not encounter any hurdles, when the time came to integrate its provisions through the Treaty of Lisbon two Member States, the United Kingdom and Poland[45], negotiated a Protocol meant to

[38] The Treaty of Lisbon was signed in 2007 and came into force in 2009.

[39] Paul Craig, Gráinne de Búrca, *op. cit.*, p. 978.

[40] Lisbon Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice.

[41] Paul Craig, Gráinne de Búrca, *op. cit.*, p. 978.

[42] See Article 86 TFEU and Council Regulation (EU) 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO').

[43] Augustin Fuerea, *Manualul Uniunii Europene*, p. 91.

[44] Paul Craig, Gráinne de Búrca, *op. cit.*, p. 394.

[45] In October 2009, the provisions of the Protocol were extended to the Czech Republic, at its request.

limit the legal effects of the Charter.[46] While this Protocol has been considered an opt-out, it has been debated whether its effect is anything more than declaratory. The Court of Justice of the European Union answered the question by ruling that "Protocol No 30 does not call into question the applicability of the Charter in the United Kingdom or in Poland, a position which is confirmed by the recitals in the preamble to that protocol."[47] Said Preamble states that the purpose of the Protocol is that "of clarifying the application of the Charter in relation to the laws and administrative action of Poland and of the United Kingdom and of its justiciability within Poland and within the United Kingdom." This, correlated with the fact that a Member State could not opt-out of the values enshrined in Article 2 of the Treaty on European Union, made the CJEU's ruling unavoidable. [48]

6. The safeguard clauses provided by the Treaty of Accession of the Republic of Bulgaria and Romania

Bulgaria and Romania's Treaty of Accession included three safeguard clauses intended to solve certain issues arising from the states' joining of the EU: a general safeguard clause, an internal market safeguard clause, and a justice and home affairs safeguard clause.[49]

In addition to these three provisions, which can also be found in the Treaty of Accession of the ten Member States who joined the organisation in 2004, a special safeguard clause, specific to Bulgaria and Romania, was introduced. According to this clause, the accession of either of the two states could have been postponed by one year, to 1 January 2008, if there had been clear evidence of them "being manifestly unprepared to meet the requirements of membership by the date of accession of 1 January 2007 in a number of important areas". Furthermore, Romania's accession could have also been postponed if "serious shortcomings" had been observed in its fulfilment of "one or more of the commitments and requirements" regarding the area of justice and home affairs and that of competition.

Upon Bulgaria and Romania's accession, the safeguard clause regarding the area of justice and home affairs was invoked and a Cooperation and Verification Mechanism was created by the Commission, in order to monitor the progress of the two states and to ensure that they fulfilled their obligations. While the Accession Treaty states that such measures should be taken in a period of up to three years after the

[46] Protocol (No) 30 on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom. The Protocol contains two articles. The first states that "The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms" and that "nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law." Article 2 provides that "To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom." For more on these Protocols, see Augustina Dumitrașcu, *Dreptul Uniunii Europene și specificitatea acestuia*, Second Edition, Universul Juridic, 2015.

[47] Paul Craig, Gráinne de Búrca, *op. cit.*, p. 395. See also Massimo Condinanzi, Allessandra Lang, Bruno Nascimbene, *op. cit.*, p. 248.

[48] Niamh Nic Shuibhne, Laurence W. Gormley, *op. cit.*, p. 349.

[49] For more on these safeguard clauses, see Augustin Fuerea, *op. cit.*, p. 304, and European Commission MEMO/05/396, available at http://europa.eu/rapid/press-release_MEMO-05-396_en.htm.

accession and should "be maintained no longer than strictly necessary", it also allows for them to be applied "beyond the period specified in the first paragraph as long as these shortcomings persist". As of 2019, twelve years after the two states joined the EU, the Cooperation and Verification Mechanism is still in effect.

On the whole, it is noticeable that in the case of Romania (and Bulgaria), the other Member States have provided the possibility of stricter measures being taken with regard to the fulfilment of obligations and the adoption of the *acquis communautaire*.

Conclusions

For the UK, every step taken towards further integration has meant the necessity of finding a balance between national interests (which have been considered as diverging from those of the EU), the traditional preference of many British politicians for a less-involved participation, and the interests and well-being of the European Union[50]. While trying to slow down the process of deepening integration in certain areas, like that of social policy or the elimination of internal borders, [51] the UK has been an active supporter of the development of the single market and of the liberalisation of trade.[52] This duality of interests has resulted in the UK being the Member State with most opt-outs. The EU's willingness to allow this can partially be explained by its desire to keep the UK as a Member State, due to its important role on the international stage, its economic power and its shared history and values with the other European states. Yet, following the Brexit referendum, it has become clear that these opt-outs were less effective than hoped for: the UK's desire to maintain greater control over certain areas of competence was apparently not satisfied to a sufficient degree and, at the same time, the integration process between the other Member States was unnecessarily slowed down.

The process has been further hampered by the fact that newer members of the EU have not been able to join the Schengen Area and the Monetary Union, either due to a failure to fulfil the required criteria or, in certain cases, to political circumstances. The idea of a "multi-speed" Europe is not a new one – it was debated as early as the Fontainebleau European Council, in June 1984, when the Member States of the EEC, France in particular, suggested that the states who were prepared to integrate further should be allowed to do so, with the rest joining them at a later date.[53] However, the evolution of the UK's relationship with the EU suggests that, in the future, in order to avoid the fracturing of the European Union, a deeper integration should be prioritised for all Member States, in order to ensure that they do not feel either overlooked by, or disconnected from the rest of European Union

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[50] David Gowland, Arthur Turner, Alex Wright, *op. cit*, p. 79.
[51] Paul J. J. Welfens, *op. cit.*, p. 266.
[52] Paul J. J. Welfens, *op. cit.*, p. 260.
[53] David Gowland, Arthur Turner, Alex Wright, *op. cit*, p.103.

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- Council Decision 2000/365/EC concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis
- Council Decision 2002/192/EC concerning Ireland's request to take part in some of the provisions of the Schengen acquis.

THE PRECAUTIONARY PRINCIPLE'S 'STRONG CONCEPT' IN THE CASE LAW OF THE CONSTITUTIONAL COURT OF HUNGARY*

János Ede SZILÁGYI**

Abstract

The present article focuses on the application and interpretation of the precautionary principle by the Constitutional Court of Hungary, especially concentrating on Decision 13/2018. (IX.4.) of the Constitutional Court of Hungary, in which the Constitutional Court of Hungary developed a considerably strong concept of the precautionary principle. In this article, the so-called strong concept of the precautionary principle in the case law of the Constitutional Court of Hungary means that the proper implementation of the precautionary principle is a strict condition for the Hungarian lawmakers. Namely, if the Hungarian lawmakers (e.g. parliament, government, ministers) do not take the precautionary principle into account in an appropriate way during the adoption of a legal provision, this situation shall cause a lack of conformity with the Hungarian constitution (i.e. the so-called Fundamental Law) and the Constitutional Court of Hungary shall annul the affected legal provision. In this article, the case law of the Constitutional Court of Hungary is assessed in the context of the genesis and development of the precautionary principle at international, European and Hungarian levels.

Keywords: *precautionary principle, non-derogation principle, Hungarian constitutional law, environmental law, Constitutional Court of Hungary (CCH).*

1. Introduction

"Although there are a number of different interpretations of the precautionary principle, it generally describes an approach to the protection of the environment or human health that is based around taking precautions even if there is no clear evidence of harm or risk of harm from an activity or substance. […] In other words, the principle provides a framework for any discussion about how to 'trade off' the risk of environmental harm as against other considerations, but it does not necessarily provide any 'right' answer."[1]

In environmental law, the so-called 'precautionary principle' and the 'prevention principle' are not the same; namely, the precautionary principle is different from the prevention principle, because the precautionary principle delivers the level of sureness and confidence of the expected consequences of a human activity from certainty to scientific uncertainty or

* The described article was carried out as part of the EFOP-3.6.1-16-2016-00011 "Younger and Renewing University – Innovative Knowledge City – institutional development of the University of Miskolc aiming at intelligent specialisation" project implemented in the framework of the Széchenyi 2020 program. The realization of this project is supported by the European Union, co-financed by the European Social Fund.

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[1] Stuart Bell, Donald McGillivray, and Ole W. Pedersen, *Environmental Law* (New York: Oxford University Press, 2013), 68.

probability.[2] In law, the principles of environmental protection have different effects. Some of them merely orientate and help the interpretation of legal norms; others include binding rules. Additionally, their effects and roles also vary from country to country and from international level to national level. As for the precautionary principle, the situation is the same: "the concept of precaution appears to mean different things in different contexts".[3] Nowadays, there are numerous types of the precautionary principle at both international and national levels. However, in the present article concentrating especially on the Hungarian national law, the author deals with a quite unusual and extraordinary type of precautionary principle, which determines rigorous requirements for the Hungarian lawmakers.[4]

The present article particularly focuses on the Constitutional Court of Hungary (hereinafter referred to as CCH) Decision 13/2018. (IX.4.) (hereinafter referred to as CCH Decision 13/2018). The precautionary-principle-aspects of CCH Decision 13/2018 have numerous antecedents in Hungarian law and in the case law of the CCH, however, before CCH Decision 13/2018, the CCH has not previously interpreted the precautionary principle in detail, and the CCH has never based its decision at this rate on the precautionary principle. Additionally, CCH Decision 13/2018 determined a quite 'strong' concept and version[5] of the precautionary principle.

As for the content of the present article, firstly, the genesis and development of the precautionary principle is analysed; secondly, the Hungarian aspects, especially the CCH case law is assessed. As far as the international and European levels are concerned, the article does not endeavour to present and interpret the precautionary principle in detail, but to provide a minimum comparative nexus for the assessment of the Hungarian case.

2. The genesis of the precautionary principle in international law and in EU law

In connection with the origin of the principle, *Ludwig Krämer* notices that the "[o]rigin and content of the precautionary principle are unclear."[6] Besides, some authors emphasize the difference between 'precautionary principle', 'precautionary

[2] Bándi Gyula, "Gondolatok az elővigyázatosság elvéről," *Jogtudományi Közlöny* 68, no. 10 (2013): 479. Fodor László, *Környezetjog* (Debrecen: Debreceni Egyetemi Kiadó, 2014), 86. See furthermore Farkas Csamangó Erika, *Környezetjogi szabályozások* (Szeged: SZTE ÁJK ÜJI, 2017), 43–44 and 47–48.

[3] Patricia Birnie, Alan Boyle, and Catherine Redgwell, *International Law and the Environment* (New York: Oxford University Press, 2009), 155. C.f. James Cameron and Juli Abouchar, *The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Global Environment*, Boston College International and Comparative Law Review 14, no. 1 (2000): 2.; Rosie Cooney, *Biodiversity and the Precautionary Principle: Risk and Uncertainty in Conservation and Sustainable Use* (Gland – Cambridge: IUCN, 2005), ix.; Elizabeth Fisher, *Precaution, Precaution Everywhere: Developing a 'Common Understanding' of the Precautionary Principle in the European Community*, Journal of European and Comparative Law 9, no. 1 (2002): 7–8, 13.; Nicolas de Sadeleer, "The Enforcement of the Precautionary Principle by German, French and Belgian Courts," *Reciel* 9, no. 2 (2000): 144–51.; Peter H. Sand, *The Precautionary Principle: A European Perspective*, *Human and Ecological Risk Assessment* 6, no. 3 (2000): 445–52.

[4] On the constitutional law aspects of the precautionary principle in the US law, see in detail Adrian Vermeule, "Precautionary Principles in Constitutional Law," *Journal of Legal Analysis* 4, no. 1 (2012): 181–222.

[5] This approach of the precautionary principle might also be called as a 'more extreme', 'highly prohibitive', 'restrictive' or 'protectionist' version of precaution (the "when in doubt, don't" approach); the opposite approach of the principle is the so-called 'weak' version of the principle; Cooney, *Biodiversity and the Precautionary*, x, 6–8.

[6] Ludwig Krämer, *EU Environmental Law* (London: Sweet & Maxwell, 2012), 22.

approach' and 'precautionary measures': "European treaties and the EC law generally refer to the precautionary principle, whereas global agreements more often refer to the precautionary approach or precautionary measures"[7]. At the beginning of the 1990s (e.g. in the Rio Declaration), the "'precautionary approach' was […] preferred, in the belief that the 'approach' offers greater flexibility and will be less potentially restrictive than the 'principle'. Few commentators regard the difference in terminology as significant, although one view is that the precautionary *principle* applies in situations of high uncertainty with a risk of irreversible harm entailing high cost, whereas precautionary *approach* is more appropriate, it is argued, where the level of uncertainty and potential costs are merely significant, and the harm is less likely to be irreversible. However, actual use of the terms in treaties contradicts any such distinction".[8]

As far as the origin of the precautionary principle is concerned, *Gyula Bándi*[9] calculates with a minimum of three opportunities: first, the German national law and environmental policy of the 1970s and 1980s (i.e. the development of the so-called *Vorsorgeprinzip*); second, in the 1970s and 1980s, the international laws and regulations concerning marine environment and dangerous substantives; third, a natural response of humankind to the industrial revolution from about the XVIIIth century.[10] As to the German[11] Vorsorgeprinzip, Mr Bándi emphasizes that, by virtue of the concept of the German principle, decision makers needed to move in the direction of minimizing environmental damage. Referring to the Vorsorgeprinzip, the German government was also able to defend its policy of stricter environmental regulations. The Vorsorgeprinzip also includes the application of the best available technology (BAT).[12]

In this part of the article, the author deals with the genesis of the precautionary principle, on the one hand, in the political and legal documents of international law and European Union (EU) law, and on the other hand, in the international and European case

[7] Birnie, Boyle and Redgwell, *International Law*, 155.

[8] Birnie, Boyle and Redgwell, *International Law*, 155. C.f. Bell, McGillivray and Pedersen, *Environmental Law*, 69–70.; Cooney, *Biodiversity and the Precautionary*, 6.; See furthermore opinion of Judge Laing at the International Tribunal for the Law of the Sea, Case New Zealand v Japan; Australia v Japan [2001] ILR 148 (i.e. the Southern Bluefish Tuna case).

[9] Professor Gyula Bándi is the *doyen* of the Hungarian environmental jurisprudence and the Deputy Commissioner for Fundamental Rights Ombudsman for Future Generations, who had a great effect on the development of the precautionary principle in the case law of the Constitutional Court of Hungary; see Bándi Gyula, "Az elővigyázatosság elvének mai értelmezése," presentation, in *Új kutatási irányok az agrár- és környezetvédelmi jog területén*, organised by University of Szeged, Hungarian Association of Agricultural Law and Association of Hungarian Lawyers, 16.05.2019, Szeged, University of Szeged.

[10] Bándi Gyula, "Gondolatok," 472. C.f. Timothy O´Riordan and James Cameron, ed., *Interpreting the Precautionary Principle* (London – New York: Earthscan, 1994), 16–18.; Alexander Kiss and Dinah Shelton, *International Environmental Law* (Ardsley, New York: Transnational Publishers, 2004), 207.; Poul Harremoes et al, eds, *Late lessons from early warnings: the precautionary principle 1896-2000* (Copenhagen: European Environment Agency, 2001), 11–16.; Kenneth R. Foster, Paolo Vecchia and Michael H. Repacholi, "Science and the Precautionary Principle," *Science* 288, no. 5468 (1991): 979 and 981.

[11] Beside German national law, other authors also note the Swedish environmental law and policy as a national origin of the precautionary principle; see Birnie, Boyle and Redgwell, *International Law*, 154. C.f. Jan H. Jans and Hans H.B. Vedder, *European Environmental Law: After Lisbon* (Groningen: Europa Law Publishing, 2012), 43.; McIntyre, Owen, and Thomas Mosedale. *The Precautionary Principle as a Norm of Customary International Law*. Journal of Environmental Law 9, no. 2 (1997), 221.

[12] Bándi, "Gondolatok," 472. C.f. Bell, McGillivray and Pedersen, *Environmental Law*, 68.

law (i.e. in connection with the application of the principle by the legal practice).

2.1. The genesis of the precautionary principle in political and legal documents

Below, the history of the precautionary principle at international level and at EU level will be detailed in a chronological order.

The *World Charter for Nature*[13], adopted in 1982, is merely a soft law document, however, it determined an essential aspect of the precautionary principle in a non-explicit (i.e. non-*expressis verbis*) way[14] in its Chapter 11: "Activities which are likely to pose a significant risk to nature shall be preceded by an exhaustive examination; their proponents shall demonstrate that expected benefits outweigh potential damage to nature, and where potential adverse effects are not fully understood, the activities should not proceed."

As for the origin of the precautionary principle in international law, numerous authors also mention the 1984 *Bremen Declaration* adopted by a conference on the North Sea.[15]

One of the first hard laws (i.e. as an international treaty) referring explicitly to the precautionary principle is the *Vienna Convention for the Protection of the Ozone Layer* (Vienna, 22 March 1985), however, it is worth emphasizing that merely the preamble of the Convention refers to the so-called 'precautionary measures': "Mindful also of the precautionary measures for the protection of the ozone layer which have already been taken at the national and international levels".[16] Namely, this part (i.e. the preamble) of the Convention is mostly a help in the interpretation of the main, binding part of the Convention.

Undisputedly, the Rio Declaration adopted on the Rio Conference of the United Nations (UN) had an essential role in connection with the acceptance of the precautionary principle in environmental policy at international level. In advance of the Rio Conference (1992), there was a series of regional meetings among which the 1990 *Bergen Conference* on Sustainable Development attended by the environment ministers of 34 countries and the European Community's Commissioner for the Environment had a significant status to determine important aspects of the precautionary principle: "In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation."[17] Some authors[18] also regard a *European Community's initial draft*[19] as an important antecedent of the Rio Declaration. Taking the experience of the Bergen Conference

[13] United Nations General Assembly. *World Charter for Nature*. A/RES/37/7, 48th plenary meeting, 28.10.1982.

[14] Bándi, "Gondolatok," 472. It is worth noticing that in Chapter 12, the World Charter for Nature applies 'precaution' connected to discharge of radioactive or toxic wastes in a quite narrow sense.

[15] See Kiss and Shelton, *International*, 207.; Birnie, Boyle and Redgwell, *International Law*, 154.; Bell, McGillivray and Pedersen, *Environmental law*, 68–69.

[16] Gyula Bándi noticed that the Hungarian translation of the preamble refers only to 'preventive measures', namely, the Hungarian version of the Convention is not correct in this sense; Bándi, "Gondolatok," 473.

[17] Bergen Declaration, Principle 7, 15 May 1990; cited by Kiss and Shelton, *International*, 207.

[18] Birnie, Boyle and Redgwell, *International Law*, 154.

[19] See UN Doc A/Conf 151/PC/WG 111/L 8/Rev 1 (1991).

into consideration, *Principle 15 of the Rio Declaration* provides: "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."[20] As to the legal status[21] of the precautionary principle determined by the Rio Declaration, some authors stress the 'complex' feature of the principle, that is the precautionary principle is not merely a scientific or a legal issue but also a political one: "As formulated in Principle 15 of the Rio Declaration, the precautionary approach helps us identify whether a legally significant risk exists by addressing the role of scientific uncertainty, but it says nothing about how to control that risk, or about what level of risk is socially acceptable. Those are policy questions which in most societies are best answered by politicians and by society as a whole, rather than by courts or scientists."[22] "[D]etermining whether or how to apply 'precautionary measures', states have evidently taken account of their own capabilities , their economic and social priorities, the cost-effectiveness of proposed measures, and the nature and degree of the environmental risk when deciding what preventive measure to adopt. They have in other words value judgements about how to respond to environmental risk, and have been more willing to be more precautionary about ozone depletion, […] than about fishing".[23]

Since 1990 the precautionary principle has been adopted by a growing number of international treaties, dealing with marine pollution, international watercourses, persistent organic pollutants, air pollution and climate change, transboundary trade in hazardous waste and endangered species, biosafety, furthermore the conservation of biological diversity and marine living resources.[24] "[H]owever, each convention tends to contain a slightly different formulation of the principle, which makes it difficult to identify an interpretation with which all states can be said to agree implicitly as a matter of binding international law."[25] "While extensive analysis has focussed on whether the precautionary principle has "crystallized" into a principle of customary international law, it may conservatively be said that while it is not unequivocally accepted as having the status of customary international law (e.g. Marceau, 2002), it can probably be described as customary international law in some sectors (Gehring and Cordonnier-Segger, 2002".[26]

As to the European Union, the precautionary principle was incorporated in

[20] United Nations General Assembly, *Rio Declaration on Environment and Development*. Annex I of the Report of The United Nations Conference on Environment and Development. A/CONF.151/26 (Vol. I), 12.08.1992. On the interpretation of the Principle 15, see furthermore: Cooney, *Biodiversity and the Precautionary*, 7–8.

[21] About the interpretation of the Principle 15 of Rio Declaration, see "Report of the Expert Group Meeting on Identification of Principles of International Law for Sustainable Development," Geneva, Switzerland, 26-28 September 1995.; Bándi, "Gondolatok," 471.

[22] Birnie, Boyle and Redgwell, *International Law*, 161.

[23] Birnie, Boyle and Redgwell, *International Law*, 163.

[24] Birnie, Boyle and Redgwell, *International Law*, 157. C.f. Cooney, *Biodiversity and the Precautionary*, 12–24.; James E. Hickey and Vern R. Walker, "Refining the Precautionary Principle in International Environmental Law," *Virginia Environmental Law Journal* 14, no. 3 (Spring 1995): 424, 431–36.; Sand, "The Precautionary Principle," 445–46.

[25] Bell, McGillivray and Pedersen, *Environmental Law*, 69.

[26] Cooney, Biodiversity and the Precautionary, 12.

the primary law of the EU by the Maastricht Treaty[27] in 1992, determining that Community policy on the environment shall be based on the precautionary principle. Nowadays, Article 191(2) of the Treaty on the Functioning of the EU (TFEU) is the legal basis of the principle. "Since no definition exists in the Treaties, the principle is open to broad interpretation."[28] Because of this uncertainty, the European Commission's communication[29] concerning the interpretation of the precautionary principle has a great significance. According to this communication, "The precautionary principle should be considered within a structured approach to the analysis of risk which comprises three elements: risk assessment, risk management, risk communication. The precautionary principle is particularly relevant to the management of risk […]. The precautionary principle, which is essentially used by decision-makers in the management of risk, should not be confused with the element of caution that scientists apply in their assessment of scientific data […]. Judging what is an 'acceptable' level of risk for society is an eminently political responsibility. Decision-makers faced an unacceptable risk, scientific uncertainty and public concerns have a duty to find answers. Therefore, all these factors have to be taken into consideration […]. Where action is deemed necessary, measures based on the precautionary principle should be, inter alia: proportional to the chosen level of protection, non-discriminatory in their application, consistent with similar measures already taken, based on an examination of the potential benefits and costs of action or lack of action (including, where appropriate and feasible, an economic cost/benefit analysis), subject to review, in the light of new scientific data, and capable of assigning responsibility for producing the scientific evidence necessary for a more comprehensive risk assessment."[30]

As to the interpretation of Article 191(2) TFEU, Ludwig Krämer has a quite characteristic opinion. He highlights: "[s]ometimes it is argued that the adoption of the precautionary principle requires a scientific assessment of risks. This argument seems to stem more from political efforts to reduce the field of application of this principle as far as possible; indeed, art. 191(2) TFEU does not contain any such condition and the abovementioned examples show the political character of these arguments: if for precautionary measures a scientific risk assessment is necessary, it would be necessary for any measures. However, such a requirement could only be introduced by way of legislation. Similar considerations apply to other requests to limiting the application of the precautionary principle to cases where there is the

[27] Gary E. Marchant and Kenneth L. Mossman, Arbitrary and Capricious: The Precautionary Principle in the European Union Courts (London: International Policy Press, 2005), pp. 21, 25.

[28] Krämer, EU Environmental Law, 22. C.f. Theofanis Christoforou, "The precautionary principle and democratizing expertise: a European legal perspective," Science and Public Policy 30, no. 3 (2003): 206. About the numerous ways of the interpretation of the principle, see Jans and Vedder, European Environmental Law, p. 43.; Marchant and Mossman, Arbitrary and Capricious, p. 25.

[29] COM (2000)1, Communication from the Commission on the precautionary principle, Brussels 2.2.2000. Later, this communication was endorsed by the Nice European Council Resolution on the precautionary principle 7-10. December 2000.

[30] COM (2001)1, points 4–6. C.f. Council of the European Union, Review of the EU Sustainable Development Strategy (EU SDS), document 10917 of 26 June 2006, 5. In the opinion of Gyula Bándi taking the CJEU case law into consideration, the precautionary principle determined in the Article can be considered as a real legal principle, not merely a political one, because the precautionary principle became a real legal background in the practice of the CJEU for a long while; see Bándi, "Gondolatok," p. 477.

possibility of an extreme, irreversible hazard, where there is a need to adopt measures urgently or to limit it to provisional measures only. None of these conditions are found in art. 191(2) TFEU, which demonstrates the political rather than legal character of these arguments."[31]

In secondary law of the EU, the precautionary principle could be found in numerous legal provisions; for example in Directive 2001/18 on genetically modified organisms,[32] Directive 2010/75 on industrial emissions,[33] etc.[34]

2.2. The genesis of the precautionary principle in the case law

At the beginning of this chapter, it is worth noticing that some authors emphasize the great differences in the interpretation of the principle by the international courts, tribunals and other dispute settlement bodies. In the opinion of these authors, the differences occur because "there is no consistent application of the principle in international conventions (there are differing obligations and formulations of the principle) and partly because, as a *principle*, it is, by nature, incapable of being prescribed as anything other than a general guide to action. Another factor is likely to be the specific nature of some of the courts and tribunals interpreting the principle and the often specific context in which they deliver their decisions and judgements. […] The application of the principle depends largely on evidence about the nature of the risk and the correct 'trigger' point or standard at which it is invoked."[35] In the present chapter, primarily,[36] the case law of the International Court of Justice (ICJ), the dispute settlement body (DSB) of the World Trade Organisation (WTO) and the Court of Justice of the EU (CJEU; previously called as the European Court of Justice, ECJ) will be presented.

2.2.1. The case law of the ICJ and the precautionary principle

First of all it is worth noticing that, in connection with the case law affecting the application of the precautionary principle, some authors notice: "[l]ike sustainable development, precaution has found only limited judicial support so far in international law, this despite many commentators arguing that it has reached the status of a principle of customary international law."[37]

In the present subsection, the following ICJ-cases connected to the precautionary principle are highlighted.

[31] Krämer, EU Environmental Law, p. 23.

[32] Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms.

[33] Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control).

[34] C.f. Andrada Truşcă, *Documents Preceding the Adoption of Directive 2004/35/EC Transposed in the Romanian Law by Government Emergency Ordinance no. 68/2007 on Environmental Liability*, Lex et Scientia 17, no. 2 (2010):p. 83.

[35] Bell, McGillivray and Pedersen, Environmental Law, p. 69.

[36] On the relevant cases of other courts and tribunals, e.g. the Southern Bluefin Tuna case (at the International Tribunal for the Law of the Sea; hereinafter referred to as ITLOS) and the MOX Plant case (at the ITLOS), see Bell, McGillivray and Pedersen, Environmental Law, 70–71. Note: the MOX Plant case is not the same as the MOX Plant Arbitration; the latter was ruled by the Permanent Court of Arbitration. In connection with the case law of the European Court of Human Rights, see Kiss and Shelton, International, p. 211.

[37] Bell, McGillivray and Pedersen, Environmental Law, pp. 69–70.

In a dissenting opinion[38] connected to the *New Zealand v France* case challenging the right of France to implement nuclear tests close to New Zealand (i.e. in the South Pacific), judge *Weeramantry* considered the precautionary principle as "a principle which is gaining increasing support as part of the international law of the environment",[39] and the judge also stated that "New Zealand has placed materials before the Court to the best of its ability, but France is in possession of the actual information. The principle then springs into operation to give the Court the basic rationale for considering New Zealand's request and not postponing the application of such means as are available to the Court to prevent, on a provisional basis, the threatened environmental degradation, until such time as the full scientific evidence becomes available in refutation of the New Zealand contention."[40]

As to the *Gabçikovo-Nagymaros* case,[41] in which Hungary and Slovakia had a debate connected to a hydropower dam system rejected by Hungary on the ground of environmental harm, *Kiss* and *Shelton* stress that „the International Court of Justice [ICJ] did not accept Hungary's argument that a state of necessity could arise from application of the precautionary principle".[42] The author of the present article also shares the above mentioned opinion of Kiss and Shelton, and this conclusion of the ICJ's judgement is elementary in connection with the interpretation of CCH Decision 13/2018.

Both the judgement and a separate opinion of the so-called *Pulp Mills* case[43] have a great importance in connection with the precautionary principle. The judgement links the precautionary principle and the burden of proof, furthermore, the ICJ considers the environmental impact assessment to be a practical application of the principle.[44] As to the separate opinion of Judge *Trindade*, the outstanding judge and professor considered the precautionary principle as a 'general principle of international *environmental* law'.[45]

[38] International Court of Justice, Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case, Dissenting Opinion of Judge Weeramantry, I.C.J. Reports 1995, p. 317.

[39] New Zealand v France case, Dissenting Opinion of Judge Weeramantry, p. 342.

[40] New Zealand v France case, Dissenting Opinion of Judge Weeramantry, p. 343.

[41] International Court of Justice, Case concerning the Gabçikovo-Nagymaros Project (Hungary/Slovakia), Judgement, I.C.J. Reports 1997, p. 7. See paras. 97 and 113 of the judgement.

[42] Kiss and Shelton, *International*, p. 210.

[43] International Court of Justice, Case concerning Pulp Mills on the River Uruguay (Argentine c. Uruguay), Judgement, I.C.J. Reports 2010, p. 14.

[44] In the case, "Argentina brought a complaint alleging that the authorization and construction of two pulp mills on the Uruguayan side of the Uruguay River was a breach of a bilateral treaty […] [T]he complaint primarily centred on a lack of prior notification and impact assessments […] Argentina contended that the treaty adopted a precautionary approach which meant that the burden of proof was on Uruguay to establish that the mills would not cause harm to the river and the environment. This claim was in general terms contrary to the established procedures before the Court whereby the burden of proof usually falls on the party seeking to assert a particular claim. The Court held that 'while a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute, it does not follow that it operates as a reversal of the burden of proof'." Bell, McGillivray and Pedersen, *Environmental Law*, 71.

[45] International Court of Justice, Case concerning Pulp Mills on the River Uruguay (Argentine v. Uruguay), Separate Opinion of Judge Cançado Trindade, I.C.J. Reports 2010, p. 135. See paras. 62–92 of the separate opinion.

2.2.2. The case law of the DSB of the WTO and the precautionary principle

As for the WTO case law, especially Articles 3.3 and 5.7 of the Agreement on Sanitary and Phytosanitary Measures (SPS), Articles 2.2 and 5.4 of the Agreement on Technical Barriers to Trade (TBT), Articles III and XX of the General Agreement on Tariffs and Trade 1994 (GATT) and Article XIV of the General Agreement on Trade in Services (GATS) provide the proper 'gateway'[46] for the interpretation of the precautionary principle.

One of the first reports in which the Appellate Body assessed the precautionary principle on the merits is the so-called *Beef Hormones* case.[47] In this case, the Appellate Body analysed whether the precautionary principle or approach has become a part of customary international law. The Appellate Body stated that "[t]he status of the precautionary principle in international law continues to be the subject of debate among academics, law practitioners, regulators and judges. The precautionary principle is regarded by some as having crystallized into a general principle of customary international *environmental* law. Whether it is widely accepted by Members as a principle of general or customary international law appears less than clear. We consider, however, that it is unnecessary and probably imprudent, for the Appellate Body in this appeal to take a position on this important, but abstract, question."[48] In its interpretation, the Appellate Body also referred to the Gabçikovo-Nagymaros case of the ICJ.[49]

In the *Japan – Agricultural Products II* case,[50] the Appellate Body determined the application way of the precautionary principle in its practice. The interpretation was summarized in a proper way by Kiss and Shelton: "dispute settlement panels have agreed that in case where it is not possible to conduct a proper risk assessment, Article 5(7) of the […] SPS […] Agreement allows members to adopt and maintain a provisional or precautionary SPS measure. According to the GATT Panel and Appellate Body, this provision incorporates the precautionary principle to a limited extent, when four cumulative criteria are met: (1) the relevant scientific information must be insufficient; (2) the measure should be adopted on the basis of available pertinent information; (3) the member must seek to obtain the additional information necessary for a more objective assessment of risk; (4) the member must review the measure accordingly within a reasonable period of time established on a case by case basis depending on the specific circumstances, including the difficulty of obtaining additional information needed for

[46] Ilona Cheyne, *Gateways to the Precautionary Principle in WTO Law*, Journal of Environmental Law 19, no. 2 (2007): 157–58.

[47] On the summary of the case, see Bell, McGillivray and Pedersen, *Environmental Law*, 70. C.f. Kiss and Shelton, *International*, 211.

[48] WTO DSB Appellate Body, European Communities – Measures Concerning Meat and Meat Products [Beef Hormones case], WTO Doc. WT/DS/26/AB/R and WT/DS/48/AB/R (18.08.1997), para. 123.

[49] "In [*Gabçikovo-Nagymaros* case, the ICJ] recognized that in the field of environmental protection `… new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight …´ However, we note that the Court did not identify the precautionary principle as one of those recently developed norms. It also declined to declare that such principle could override the obligations of the Treaty between Czechoslovakia and Hungary". WT/DS/26/AB/R and WT/DS/48/AB/R (18.08.1997), footnote 93.

[50] WTO DSB Appellate Body, Japan – Varietals, Measures Affecting Agricultural Products, WTO Doc. WT/DS76/AB/R (22.02.1999), paras. 92-93.

review and the characteristics of the SPS measures".[51]

2.2.3. The case law of the CJEU/ECJ and the precautionary principle

At the EU level,[52] the *Sandoz* case of the European Court of Justice (ECJ; nowadays: Court of Justice of the European Union, CJEU) might be the first case in which the ECJ referred to certain aspects of the precautionary principle. According to the judgement of the ECJ: "It appears from the file that vitamins are not in themselves harmful substances but on the contrary are recognized by modern science as necessary for the human organism. Nevertheless, excessive consumption of them over a prolonged period may have harmful effects […]. According to the observations submitted to the court, however, scientific research does not appear to be sufficiently advanced to be able to determine with certainty the critical quantities and the precise effects […]. Those principles also apply to substances such as vitamins which are not as a general rule harmful in themselves but may have special harmful effects solely if taken to excess as part of the general nutrition, the composition of which is unforeseeable and cannot be monitored. In view of the uncertainties inherent in the scientific assessment, national rules prohibiting, without prior authorization, the marketing of foodstuffs to which vitamins have been added are justified on principle within the meaning of article 36 of the treaty on grounds of the protection of human health."[53]

The importance of the *Bettati* case[54] is that the ECJ has established the role of the principle in law-making.[55] Nevertheless, some authors stated that the Bettati case "did little to define what the principle might mean in European law."[56]

The first judgements in which ECJ explicitly referred to the precautionary principle might be cases C-157/96[57] and C-180/96[58] (the latter one is the so-called *mad cow disease* case); "though the English version referred to the prevention principle only, whereas the German and other languages mentioned the precautionary and prevention principles".[59] In the mad cow disease case, the European Commission banned the export of the British beef, among others, because of the possible link between the *bovine spongiform encephalopathy* (BSE or mad cow disease) and a human disease (i.e. *Creutzfeldt-Jakob* disease): "Although there is no direct evidence of a link, on current data and in the absence of any credible alternative the most likely explanation at present is that these cases are linked to exposure to BSE".[60] The ECJ held that, "[h]aving regard, first, to the uncertainty as to the adequacy and effectiveness of the measures previously

[51] Kiss and Shelton, *International*, 211.

[52] In connection with the European Free Trade Association, see Case-E-3/00; see furthermore Kiss and Shelton, *International*, 209.

[53] European Court of Justice, Case 174/82, Criminal proceedings against Sandoz BV [1983] ECR 2445, paras. 11, 17.

[54] European Court of Justice, Case C-341/95, Bettati v Safety Hi-Tech Srl [1998] ECR I-4355.

[55] On similar situation, see Case C-318/98, *Fornasar et al. v. Italy*, 2000 E.C.R. I-4785 (2000), furthermore on the assessment of this case, see Marchant and Mossman, *Arbitrary and Capricious*, 49–51.

[56] Bell, McGillivray and Pedersen, *Environmental Law*, 72.

[57] European Court of Justice, Case C-157/96, The Queen v Ministry of Agriculture, Fisheries and Food [1998] ECR I-2211, paras. 63–64.

[58] European Court of Justice, Case C-180/96, United Kingdom v. Commission [1998] ECR I-2265, paras. 99–100.

[59] Krämer, *EU Environmental Law*, 23.

[60] Case C-180/96, para. 9.

adopted by the United Kingdom and the Community and, second, to the risks regarded as a serious hazard to public health (see paragraph 63 of the order of 12 July 1996 in Case C-180/96 R United Kingdom v Commission, cited above), the Commission did not clearly exceed the bounds of its discretion in seeking to contain the disease within the territory of the United Kingdom by banning the export from that territory to other Member States and to third countries of bovine animals, meat of bovine animals and derived products." [61] The court added that "the reasons for the export ban were sufficiently demonstrated by the uncertainty as to the risk, by the urgency and by the provisional nature of the measure".[62]

The more detailed assessment of the precautionary principle by the ECJ can be found in the *Pfizer* case.[63] The background of the Pfizer case is that, utilizing a scientific analysis, the European Commission banned the use of antibiotics as additives in animal feed on the grounds that there was a risk of increasing resistance to antibiotics both in animals and humans. In its judgement, the ECJ stressed that "where there is scientific uncertainty as to the existence or extent of risks to human health, the Community institutions may, by reason of the precautionary principle, take protective measures without having to wait until the reality and seriousness of those risks become fully apparent".[64] In other words, "under the precautionary principle the Community institutions are entitled, in the interests of human health to adopt, on the basis of as yet incomplete scientific knowledge, protective measures which may seriously harm legally protected positions, and they enjoy a broad discretion in that regard."[65] A "preventive measure cannot properly be based on a purely hypothetical approach to the risk, founded on mere conjecture which has not been scientifically verified[. … A] preventive measure may be taken only if the risk, although the reality and extent thereof have not been `fully' demonstrated by conclusive scientific evidence, appears nevertheless to be adequately backed up by the scientific data available at the time when the measure was taken."[66] "The precautionary principle can therefore apply only in situations in which there is a risk, notably to human health, which, although it is not founded on mere hypotheses that have not been scientifically confirmed, has not yet been fully demonstrated."[67] "Consequently, […] the purpose of a risk assessment is to assess the degree of probability of a certain product or procedure having adverse effects on human health and the seriousness of any such adverse effects."[68]

In connection with the Pfizer case, some authors emphasized that "[w]hile the decision in Pfizer was an important step towards defining the parameters of the application of the [p]recautionary [p]rinciple, it leaves a lot of issues undetermined, in particular, there is the problem of the trigger point for the application of the principle. It is clear that it

[61] Case C-180/96, para. 62.
[62] Case C-180/96, para. 73. See furthermore paras. 98-100 of case C-180/96; c.f. Kiss and Shelton, *International*, 208–209.; Bándi, "Gondolatok," 477–478.
[63] Court of the First Instance, Case T-13/99, Pfizer Animal Health SA v Council of the European Union [2002] ECR II-3305. See Bándi, "Gondolatok," 478.
[64] Case T-13/99, para. 139.
[65] Case T-13/99, para. 170.
[66] Case T-13/99, paras. 143–144.
[67] Case T-13/99, para. 146.
[68] Case T-13/99, para. 148.

applies in cases in which there is more than 'zero' risk; what was not made clear in the judgement was the point at which uncertainty would demand a precautionary response. In addition, […] the European courts have been stretching the margins of precaution, from applying it to scientifically established risk to using it in relation to unquantifiable uncertainties that cannot be ruled out".[69]

As a next level of the interpretation concerning the precautionary principle, the "General Court considered it a 'general principle of Community law'"[70] in the *Artegodan* case.[71] Namely, "although the precautionary principle is mentioned in the Treaty only in connection with environmental policy, it is broader in scope. It is intended to be applied in order to ensure a high level of protection of health, consumer safety and the environment in all the Community's spheres of activity. […] It follows that the precautionary principle can be defined as a general principle of Community law requiring the competent authorities to take appropriate measures to prevent specific potential risks to public health, safety and the environment, by giving precedence to the requirements related to the protection of those interests over economic interests. Since the Community institutions are responsible, in all their spheres of activity, for the protection of public health, safety and the environment, the precautionary principle can be regarded as an autonomous principle stemming from the abovementioned Treaty provisions."[72]

Beside cases concerning pharmaceutics and human health, more and more cases connected to the precautionary principle from other fields, for example related to genetic modified organisms (GMOs).[73]

In case C-333/08,[74] the Court determines the so-called '*correct application of the precautionary principle*', namely: "A correct application of the precautionary principle presupposes, first, identification of the potentially negative consequences for health of the proposed use of processing aids, and, secondly, a comprehensive assessment of the risk to health based on the most reliable scientific data available and the most recent results of

[69] Bell, McGillivray and Pedersen, *Environmental Law*, 73.

[70] Krämer, *EU Environmental Law*, 23.; Bándi, "Gondolatok," 478–479.

[71] Court of the First Instance, Joined Cases T-74/00, 76/00, 83/00, 84/00, 85/00, 132/00, 137/00 and 141/00, Artegodan GmbH and others v Commission [2002] ECR II-4945.

[72] Cases T-74/00 and others, paras. 183–184.

[73] One of the first cases was: European Court of Justice, Case C-236/01, Monsanto Agricoltura Italia and Others v Presidenza del Consiglio dei Ministri [2003] ECR I-8105; c.f. Bándi, "Gondolatok," 479. In another GMO case, the precautionary principle was called as a 'fundamental principle' of environmental protection; see European Court of Justice, Case C-121/07, France v. Commission [2008] ECR I-9159, para. 74; c.f. Jans and Vedder, *European Environmental Law*, 44. In one of the topical GMO-cases, the CJEU interpreted the precautionary principle in order to extend the existing legislation to the genome editing applied in agriculture; see Court of Justice of the European Union, Case C-528/16, Confédération paysanne and Others v Premier ministre and Ministre de l'agriculture, de l'agroalimentaire et de la forêt, ECLI:EU:C:2018:583; c.f. Fodor László, "A precíziós genomszerkesztés mezőgazdasági alkalmazásának szabályozási alapkérdései és az elővigyázatosság elve," *Pro Futuro* 8, no. 2 (2018): 57–62. C.f. Harnócz Dorina, *New plant breeding techniques and genetic engineering: legal approach*, Journal of Agricultural and Environmental Law 13, no. 25 (2018), 85–90, https://doi.org/ 10.21029/JAEL.2018.25.81;

[74] Court of Justice of the European Union, Case C-333/08, Commission v. France [2010] ECR I-0757, para. 92. The antecedent of this interpretation: European Court of Justice, Case C-192/01, Commission v. Denmark [2003] ECR I-9693, para. 51.

international research." In case C-77/09,[75] the CJEU concluded "[w]here it proves to be impossible to determine with certainty the existence or extent of the alleged risk because of the insufficiency, inconclusiveness or imprecision of the results of studies conducted, but the likelihood of real harm to public health persists should the risk materialise, the precautionary principle justifies the adoption of restrictive measures, provided they are non-discriminatory and objective".

Some authors draw the attention to the importance of the CJEU's case law even in connection with the interpretation of Article 191(3) TFEU. The first sentence of Article 191(3) TFEU "provides that in preparing its policy on the environment, the Union shall take account of 'available scientific and technical data'. In the 'old' days, this could easily have been used by the Union as a ground for not acting until there was absolute proof of the causes of certain undesirable environmental effects. Such an interpretation would now be at odds with the precautionary principle."[76] Taking the ECJ/CJEU case law into consideration,[77] the authors also emphasize the relationship between the precautionary principle and the safeguard clauses: "the Court also acknowledge the importance of the precautionary principle in applying so-called 'safeguard clauses' in directives."[78] In the opinion of *Jans* and *Vedder*, "[t]he case law on the precautionary principle is also relevant with respect to the application of Article 114(5) TFEU. This provision requires 'new scientific evidence' in order to accept Member States' introducing environmental legislation derogating from internal market measures. Article 114 TFEU should be interpreted in the light of the precautionary principle."[79] Nevertheless, referring to the case law of the ECJ,[80] the authors also notice that "of course, this does not mean that the precautionary principle implies that the conditions for application of that provisions do not have to be met at all." [81]

2.3. Some features of the precautionary principle

Taking the above mentioned documents and juridical practice into consideration, consequently, some of the elementary aspects[82] of the interpretation and application of the precautionary principle are the following: (a) the scope of the principle (e.g. whether concentrating merely on environmental issues); (b) the characteristic and determination of harm; (c) level of scientific certainty; (d) the nature of applicable measures; (e) the burden of proving whether a risk exists or not; (f) the legal and / or the political status of the precautionary principle.

3. The precautionary principle in the Hungarian law

In the present chapter, the relation of Hungarian law to the precautionary principle

[75] Court of Justice of the European Union, Case C-77/09, Govan Comérció Internacional e Servicos [2010] ECR I-13533, para. 76. C.f. Case C-333/08, para. 93. C.f. European Court of Justice, Case C-192/01, Commission v. Denmark [2003] ECR I-9693, para. 52–53.

[76] Jans and Vedder, European Environmental Law, 44.

[77] E.g. Case C-236/01, paras. 112–113.

[78] Jans and Vedder, European Environmental Law, 44.

[79] Jans and Vedder, European Environmental Law, 45–46.

[80] Court of the First Instance, Joined Cases T-366/03 and T-235/04, Land Oberösterreich and Austria v Commission [2005] ECR II-4005, para. 71.

[81] Jans and Vedder, European Environmental Law, 46.

[82] Birnie, Boyle and Redgwell, International Law, 158–160.; Bándi, "Gondolatok," 474–476, 479–480.; etc.

will be analysed. On the one hand, the legislation will be presented, on the other hand, the case law of the Constitutional Court of Hungary (CCH) will be assessed.

3.1. The precautionary principle in the Hungarian legislation

The precautionary principle has been an organic part of the Hungarian law expressis verbis for a long while. It can be found in Act LIII of 1995 on the General Rules of Environmental Protection as a 'basic principle for the protection of the environment', namely: "The environment shall be used by observing the principle of precaution, by respecting and efficiently using environmental components, by reducing the generation of wastes and by making every effort to recycle and re-use natural and manufactured materials."[83] As to this section of the Act, it is worth noticing that Act LIII of 1995 stipulates an obligation concerning the precautionary principle merely for the users of environment, but not for the decision-makers. The precautionary principle is explicitly regulated also, for example, in Act CLXXXV of 2012 on Waste in connection with the so-called 'life-cycle thinking'[84] and the content of the so-called 'waste management permit'.[85] In a non-explicit way, the precautionary principle also has an effect on other regulations, for example on the Hungarian GMO-rules.

However, the precautionary principle is not explicitly regulated in the Hungarian constitution[86] (i.e. the so-called Fundamental Law of Hungary), in the opinion of the author of the present article, the 'GMO-free-agriculture' concept[87] of the Fundamental Law of Hungary can be interpreted as a kind of constitutional manifestation of the precautionary principle. A similar interpretation was issued by the Parliamentary Commissioner for the Future Generation as well: "The Hungarian Constitution declares with the clear prohibition of agricultural use of genetically modified organisms that – according to the precautionary principle – it does not aim at turning the country and its inhabitants into a test-site, especially with regard to the fact that the results of these experiments may only become visible after decades."[88] It is worth emphasizing that, in this statement, the Parliamentary Commissioner for the

[83] § 6(2) of Act LIII of 1995.

[84] "'Life-cycle thinking' shall mean a comparative approach in the prevention and management of waste designed for the assessment of the overall environmental, human health, economic and social impacts taking into account the general environmental protection principles of precaution and sustainability, technical feasibility and economic viability, as well as the protection of resources"; § 2(1) of Act CLXXXV of 2012.

[85] "The waste management permit issued by the environmental protection authority shall *inter alia* contain the following information: […] *e)* the requirements for the safety and precautionary measures to be taken"; § 80(1) of Act CLXXXV of 2012.

[86] On the environmental aspects of the Hungarian constitution, see Horváth Gergely, "The renewed constitutional level of environmental law in Hungary," 56, no. 4 (2015): 302–316, https://doi.org/10.1556/026.2015.56.4.5; Raisz Anikó, "A Constitution's Environment, Environment in the Constitution," *Est Europa* special edition 1 (2012): 37–70.

[87] In connection with the so-called *green (a.k.a. agricultural) genetic engineering regulation*, the conception of 'GMO-free-agriculture' was defined in Article XX of the Hungarian constitution (a.k.a. Fundamental Law). According to Article XX of the Fundamental Law, Hungary shall facilitate the enforcement of the right to physical and mental health by – beside many other ways – *ascertaining that the agricultural sector is free of all genetically modified organisms*. About a more detailed interpretation of the concept, see Szilágyi János Ede, Raisz Anikó, and Kocsis Bianka Enikő, "New dimensions of the Hungarian agricultural law in respect of food sovereignty," *Journal of Agricultural and Environmental Law* 12, no. 22 (2017): 167–175.

[88] Statement no. 258/2011 of April 25, 2011 on state responsibility resulting from the new Constitution's provisions on environmental protection and sustainability, point 7; translated by: Raisz Anikó, and Szilágyi János Ede, "Development of agricultural law and related fields (environmental law, water law, social law, tax law) in the EU, in countries and in the WTO," *Journal of Agricultural and Environmental Law* 12, no. 7 (2012): 111, 137.

Future Generation essentially derived the precautionary principle from Article XX in the Fundamental Law of Hungary concerning the right to physical and mental health. Article XX includes the GMO-free-agriculture concept as well.

3.2. The genesis of the precautionary principle in the case law of the CCH

In the present subsection, the case law of the CCH will be presented in the following aspects. First, the so-called 'non-derogation' principle as the core environmental principle of the CCH will be analysed. Second, the first expressis verbis appearance of the precautionary principle in the CCH case law will be assessed. Third, the article details CCH Decision 13/2018 which determined a quite strong concept and version of the precautionary principle. Finally, the afterlife of CCH Decision 13/2018 will be interpreted.

Before the above-mentioned presentation, it is worth noticing that the CCH was established in 1989 and it is a guarantee of the rule of law by practicing the constitutional review of legal provisions. The CCH performs both posterior and ex ante constitutional review. Other important competences are the examination of legislative omissions and the interpretation of the constitution. In 2011, Hungary adopted a new constitution: the Fundamental Law. It entered into force on 1st January 2012. The Fundamental Law and the new Act on the Constitutional Court (Act CLI of 2011) have introduced significant changes. After the fourth amendment of the Fundamental Law, which entered into force on 1 April 2013, the CCH was, in a certain sense, forced to revise its previous legal practice, i.e. the previous case law shall not automatically be applied in a new case unless the CCH reinforces and verifies the previous practice.

3.2.1. Antecedent: the non-derogation principle

In environmental cases, the CCH typically bases the reasoning of the CCH decisions on the principle of non-derogation.[89] The original non-derogation principle was developed by CCH Decision 28/1994. (V.20.) on the ground of Articles 18 and 70/D of the Hungarian Constitution which was in force until 2011.[90] The non-derogation principle means that the law-maker (e.g. parliament, government) shall not adopt a legal provision which is capable to decrease the existing protection level of the environment. Until the adoption of CCH Decision 16/2015. (VI.5.), the CCH had applied the non-derogation principle merely in connection with substantive and procedural norms. After a deep reinterpretation of the non-derogation principle, CCH Decision 16/2015 was the first case when the CCH also based its decision on the non-derogation principle connected to an organisation-determining norm (in the concrete case the decision-maker endeavoured to transfer a nature conservation competence from national parks to the agricultural land fund). The non-derogation principle is a '*sine qua non*'

[89] About the detailed assessment of the principle, see Bándi Gyula, "Környezeti értékek, valamint a visszalépés tilalmának értelmezése," *Iustum Aequum Salutare* 13, no. 2 (2017): 159–181.; Bándi Gyula, "A visszalépés tilalma és a környezetvédelem," in *Honori et virtuti*, ed. Gellén Klára (Szeged: Iurisperitus, 2017), 9–23.; Fodor László, "A visszalépés tilalmának értelmezése a környezetvédelmi szabályozás körében," *Collectio Iuridica Universitatis Debreceniensis* 6 (2006): 109–31.

[90] On the environmental assessment of the CCH case law based on the previous Hungarian Constitution, see Fodor László, *Környezetvédelem az Alkotmányban* (Budapest: Gondolat – Debreceni Egyetem, 2006).

concept of the CCH practice and jurisdiction in environmental cases.

3.2.2. The first appearance of the precautionary principle in the CCH case law

As for the first appearance of the precautionary principle in the CCH case law, CCH Decision 3223/2017 (IX.25.), CCH Decision 27/2017 (X.25.) and, furthermore, CCH Decision 28/2017 (X.25.) shall be analysed.[91]

In CCH Decision 3223/2017, the CCH noted that "essentially, the explanation of the non-derogation [principle] as the rule of law-making is that failure to characterize nature and the environment can lead to irreversible processes; therefore, during the adoption of an environmental protection regulation, the precautionary and prevention principles shall be taken into account."[92] Here already appears the precautionary principle as a requirement for environmental protection legislation. Nevertheless, the phrase 'shall be taken into account' does not automatically mean that the adopted law shall completely meet all requirements of the precautionary principle. The legislator shall merely take the precautionary principle into consideration but shall not rigorously follow it.

As far as CCH Decision 27/2017 is concerned, the CCH stated that "according to the precautionary principle which is considered as a generally-accepted principle of environmental law, the state shall provide that a certain measure would not cause derogation in the topical status of the environment."[93] Thus, the cited paragraph of the decision defines the precautionary principle as a 'generally-accepted principle in environmental law'. However, this decision confuses and intermingles the precautionary principle and the non-derogation principle.[94]

As for CCH Decision 28/2017, first, the CCH repeated its opinion adopted in CCH Decision 3223/2017, namely that during the adoption of an environmental protection regulation, the precautionary principle shall be taken into consideration.[95] Second, as a new aspect, the CCH created a kind of constitutional definition concerning the precautionary principle: "taking the scientific uncertainty into account as well, the state shall prove that a certain measure will not cause the degradation of environment".[96] Third, the CCH referred to

[91] It should be noted that, beside CCH Decision 16/2015, CCH Decision 27/2017 and CCH Decision 28/2017 also connected to the land transfer issues. In connection with the assessment of these decisions, see Olajos István, "The special asset management right of nature conservation areas, the principal of the prohibition of regression and the conflict with the ownership right in connection with the management of state-owned areas," *Journal of Agricultural and Environmental Law* 13, no. 25 (2018): 157–173, https://doi.org/10.21029/JAEL.2018.25.157; Csák Csilla, "Constitutional issues of land transactions regulation," *Journal of Agricultural and Environmental Law* 13, no. 24 (2018): 15–18, https://doi.org/10.21029/JAEL.2018.24.5; Sulyok Katalin, "Az Alkotmánybíróság előzetes normakontroll döntése a nemzeti park igazgatóságok vagyonkezelői jogkörének csorbítása tárgyában," *Jogesetek Magyarázata* 6, no. 4 (2015): 17–26.; Csák Csilla, Hornyák Zsófia, and Olajos Isván, "Az Alkotmánybíróság határozata a mezőgazdasági földek végintézkedés útján történő örökléséről," *Jogesetek Magyarázata* 9, no. 1 (2018): 5–19.

[92] CCH Decision 3223/2017, para. 27.

[93] CCH Decision 27/2017, para. 49.

[94] Szilágyi János Ede, "Az elővigyázatosság elve és a magyar alkotmánybírósági gyakorlat," *Miskolci Jogi Szemle* 13, no. 2/2 (2018): 79–80. In the opinion of Gyula Bándi, the definition of the precautionary principle determined in CCH Decision 27/2017 would rather fit the prevention principle; see Bándi, „Az elővigyázatosság".

[95] CCH Decision 28/2017, para. 75.

[96] CCH Decision 28/2017, para. 75.

the legal sources[97] in which, in the opinion of the CCH, the precautionary principle was accepted or applied. These cited legal sources are the following.

CCH Decision 28/2017 refers to some examples of the international legal sources. Namely, the Convention on Biological Diversity, the Framework Convention on Climate Change and the Cartagena Protocol on Biosafety. It is quite interesting that, as to the international case law, CCH Decision 28/2017 did not refer to the jurisdiction of universal forums but merely to a regional case, namely the *Tatar v. Romania* case[98] of the European Court of Human Rights (ECHR). In connection with the *Tatar v. Romania* case, it is worth noticing the following. First, the primary legal ground of the ECHR, namely the European Convention on Human Rights, does not explicitly determine the right to environment (neither the precautionary principle). Taking this fact into consideration, the environmental jurisdiction of the ECHR is a consequence of the own activity of the ECHR[99] significantly based on Recommendation No R 1614 (2003) on Environment and human rights adopted by the Parliamentary Assembly of the Council of Europe. Second, it should be noted how the ECHR identified the precautionary principle in its practice. Previously, the ECHR also referred to other outside legal sources, namely, to the Rio Declaration, which itself is a non-binding document, to the Gabçikovo-Nagymaros case of the ICJ, in which the ICJ did not accept Hungary's argument that a state of necessity could arise from application of the precautionary principle, and, finally, to the Romanian national law.

It is also interesting that CCH Decision 28/2017 refers to Article 191 TFEU but not to the case law of the CJEU, which has a significant practice connected to the precautionary principle.[100] Finally, in CCH Decision 28/2017, the CCH cites the definition of the precautionary principle determined in the Hungarian Act LIII of 1995 on the General Rules of Environmental Protection. It has to be repeatedly stated that this Act does not stipulates a rigorous constitutional obligation for the decision-makers in connection with the precautionary principle.

3.2.3. CCH Decision 13/2018: the precautionary principle as a strict constitutional condition

In this subsection, the background and the precautionary-principle-aspects of the CCH decision are analysed. Before the presentation of these, on the one hand, the author of the present paper intends to emphasize that the author agrees with the conclusion of the CCH Decision 13/2018, namely that, in an ex ante constitutional review, the CCH annulled some paragraphs of the amendment of Act LVII of 1995 (on water management) on the ground that the amendment, which was adopted by the Hungarian parliament, but not promulgated by the president of Hungary, had violated the following Article of the Fundamental Law: Article P) on the protection of natural

[97] CCH Decision 28/2017, para. 75.

[98] European Court of Human Rights, Tatar v. Romania case (application no. 67021/01), 27 January 2009.

[99] Raisz Anikó, "A környezetvédelem helye a nemzetközi jog rendszerében," *Miskolci Jogi Szemle* 6, no. 1 (2011): 103–06.

[100] See also Bándi Gyula, Csapó Orsolya, Kovács-Végh Luca, Stágel Bence and Szilágyi Szilvia, *Az Európai Bíróság környezetjogi ítélkezési gyakorlata* (Budapest: Szent István Társulat, 2008).

resources,[101] and Article XXI on the right to environment.[102] In the author's opinion,[103] it would have been sufficient if the CCH had based its opinion merely on the violation of the non-derogation principle in the reasoning of the decision. On the other hand, the author of the present article also a supporter[104] of a stricter application of the precautionary principle taking the serious global and local environmental problems into account. Besides, the author speculates in the present paper whether the establishment of the strong constitutional concept of the precautionary principle by the CCH was necessary to annul the amendment of the Act LVII of 1995, and what might be the consequences of CCH Decision 13/2018 in the long run.

3.2.3.1. The background of the case

The affected legal document, namely the amendment of Act LVII of 1995 on water management (hereinafter referred to as Amendment), was submitted by the Hungarian Government with the original number 'T/15373' at the Hungarian Parliament in 2017. After the parliamentary election in 2018, the Amendment got a new number, i.e. 'T/384'. The Amendment essentially affected the status of groundwater.

The protection of groundwater is a rather new field of the Hungarian water protection law.[105] In 2009, there was a significant debate connected to the re-injection of energy-related thermal waters into groundwater, in which debate the president of the Hungarian Republic initiated higher standards serving the sustainable development more properly.[106] However, finally, the president merely sent the accepted act back to the Hungarian parliament for a reassessment of the law and not to the CCH for an ex ante constitutional review.

As to the present case, according to the Amendment, the decision-maker endeavoured "to establish a regulation that does not require authorization or notification procedures for wells up to a depth of 80 m."[107] In the opinion of groundwater-experts, *Péter Szűcs* and *Csaba Ilyés*, "[i]f this were to happen, no set-up information would be available for the shallow groundwater that are above than 80 meters or the operation and impact of the wells. Expected negative impacts may affect the relevant groundwater resources in quantitative and qualitative terms. It would render reliable river basin management

[101] "Natural resources, in particular arable land, forests and the reserves of water; biodiversity, in particular native plant and animal species; and cultural artefacts, shall form the common heritage of the nation, it shall be the obligation of the State and everyone to protect and maintain them, and to preserve them for future generations." Fundamental Law, Article P) (1).

[102] "Hungary shall recognise and endorse the right of everyone to a healthy environment." Fundamental Law, Article XXI (1).

[103] The author of the present paper had previously published his opinion; see Szilágyi János Ede, *Vízszemléletű kormányzás – vízpolitika – vízjog* (Miskolc: Miskolci Egyetemi Kiadó, 2018): 180 and 194–96; Szilágyi János Ede, Baranyai Gábor and Szűcs Péter, "A felszín alatti vízkivételek liberalizálása az Alaptörvény és az európai uniós jog tükrében," *Hidrológiai Közlöny* 97, no. 4 (2017): 17–19 and 22–23.

[104] See Szilágyi János Ede, "A zöld géntechnológiai szabályozás fejlődésének egyes aktuális kérdéseiről," *Miskolci Jogi Szemle* 6, no. 2 (2011): 36–54. See furthermore Szilágyi, "Az elővigyázatosság elve," 76–77.

[105] Among others, the topical legal basis of the groundwater's protection is 219/2004. Government decree.

[106] The number of the initiative of the president of the Hungarian Republic: no. T/9194/8 parliamentary document, Budapest, 1 July 2009.

[107] Szűcs Péter, and Ilyés Csaba, *Groundwater – an invisible natural resources*, Journal of Agricultural and Environmental Law 14, no. 26 (2019), 303, https://doi.org/10.21029/JAEL.2019.26.299.

planning impossible and abolish groundwater resource management. It would endanger the world-famous drinking water of our country today."[108] Due to this problematic Amendment, the Deputy Commissioner for Fundamental Rights Ombudsman for Future Generations issued a statement concerning the protection of groundwater on 24 May 2017. Although, in his statement, the ombudsman also noticed the importance of the precautionary principle, the ombudsman finally determined the constitutional objection concerning the Amendment on the ground of violation of the non-derogation principle. Afterwards, in 2018, the Hungarian parliament adopted the Amendment, and the parliament sent the Amendment to the President of Hungary for promulgation. The President of Hungary also assessed the Amendment and, on 30 July 2018, he noted that, in his opinion, the Act had not been professionally substantiated, it had not been verified by impact studies and the president stated that the Amendment "violated the Article P) (1) of the Fundamental Law especially taking the requirements derive from the non-derogation principle and the precautionary principle into account." With this, the president initiated an ex ante constitutional review procedure at the CCH.[109] A novelty of the president argument was that he derived the precautionary principle from the Article P) (1) of the Fundamental Law. In his constitutional interpretation concerning the precautionary principle, the president also referred to the above-mentioned CCH Decision 28/2017. It is worth noticing that CCH Decision 28/2017 originally did not link the precautionary principle to the Article P) (1) of the Fundamental Law, therefore the president's interpretation was quite progressive in this sense. Before its decision, the CCH requested the scientific position of the Hungarian Academy of Sciences (HAS). The HAS drew the attention to the risk and uncertainties connected to the Amendment.[110]

3.2.3.2. The assessment of the case taking the precautionary principle into account

After the above-mentioned antecedent, the Constitutional Court adopted CCH Decision 13/2018, in which the CCH established a strong constitutional concept of the precautionary principle. The most significant aspects of this strong constitutional concept are the following.

a) The CCH referred to the precautionary-principle-viewpoints of the Ombudsman[111] and the President of Hungary,[112] and furthermore, to the previous jurisdiction of the CCH, namely CCH Decisions 3223/2017,[113] 27/2017[114] and 28/2017.[115]
b) In the reasoning of the CCH Decision 13/2018, the CCH interpreted the so-called National Avowal of the Fundamental Law (that is the name of the preamble of the Hungarian constitution), Article P) and Article XXI of the Fundamental Law. As for

[108] Szűcs, and Ilyés, "Groundwater," 303.
[109] The number of the president's proposition at the CCH: I-1216/2018/0.
[110] The number (at the CCH) of the HAS position adopted on 7 August 2018: I-1216/2018/9.
[111] CCH Decision 13/2018, para. 49.
[112] CCH Decision 13/2018, para. 4.
[113] For example CCH Decision 13/2018, paras. 19–20.
[114] For example CCH Decision 13/2018, paras. 20, 62, 72.
[115] For example CCH Decision 13/2018, paras. 13–14, 15, 71–72.

Article P) (1) of the Fundamental Law, similarly to CCH Decision 28/2017, the CCH determined the three main obligations of the present generations to protect and preserve the natural resources. According to these obligations, "in the context of preserving natural resources for future generations, the present generation is bound to preserve choice, preserve the quality potential and preserve access."[116] The CCH determined the constitutional components of the precautionary principle connected to the detailed three obligations as well.

c) The CCH defined the elementary constitutional components of the precautionary principle. Namely, "The responsibility deriving from the Fundamental Law for future generations requires *the legislator to assess and calculate the expected impact of its actions on the basis of scientific knowledge*, in accordance with the precautionary principle and the principle of prevention."[117] And similarly, "in Article P) (1), the Fundamental Law also explicitly mentions the obligation to preserve the common heritage of the nation for future generations, and in general expects the law to take into account not only the individual and collective needs of the present generation when legislating, but also the living conditions of future generations; and, when considering the expected impact of each decision, *it should act in accordance with the precautionary and preventive approach, based on the current state of science*."[118] Consequently, in CCH Decision 13/2018, the CCH required a legislative activity in accordance with the precautionary principle, and not merely taking the precautionary principle into account. The CCH derived this obligation from the obligation 'to preserve the common heritage of the nation for future generations' of Article P) (1) of the Fundamental Law. Additionally, according to the CCH's interpretation, the application of the precautionary principle is beyond the narrow-sense field of the environmental protection, and the interpretation shall be applied, beyond Article XXI (1) of the Fundamental law, in general.[119]

d) The CCH determined *two types of the precautionary principle*. The first is connected to the non-derogation principle, contrarily, the other one is autonomous and independent from the non-derogation principle: "As a result of the precautionary principle, if a regulation or measure could affect the state of the environment, the legislator must prove that the regulation does not constitute a retrograde step and, as a result, does not cause irreversible damage or the opportunity of such damage. When regulating previously unregulated cases, the precautionary principle is not only applied in the context of the non-derogation principle but also independently. Thus, in the case of measures that do not formally cause derogation, but may affect the state of the environment, the measure is also limited to the precautionary principle,

[116] For example CCH Decision 13/2018, para. 13
[117] CCH Decision 13/2018, para. 13.
[118] CCH Decision 13/2018, para. 14.
[119] CCH Decision 13/2018, para. 14.

in the context of which the legislator has a constitutional obligation to take into account, in the scientific viewpoint, risks with a high probability or certainty when making a decision. Contrarily, the prevention principle connotes the obligation to act before the pollution occurs at the source of the potential pollution, that is, to ensure that processes that may harm the environment do not occur."[120]

e) The CCH also dealt with the *burden of proof*. In CCH Decision 27/2017, the CCH had already stated: "the state shall provide that a certain measure would not cause derogation in the topical status of the environment."[121] As a novelty, in CCH Decision 13/2018, the CCH added that "the legislator must prove that a planned regulation does not constitute a retrograde step and thus does not cause irreparable damage or the possibility of such damage in principle."[122] As far as 'the possibility of such damage in principle' is concerned, referring to the CCH Decision 16/2015, the CCH declared that "in line with the precautionary principle, violation of the non-derogation principle may be founded not only on the actual worsening of the state of the environment, but even on the risk of it."[123]

f) In connection with the precautionary principle, the CCH attached great importance to national strategic documents, for example the National Environmental Protection Program, the National Water Strategy, the National Rural Development Strategy. These 'public law regulatory instruments' "oblige their decision-maker, and these are also the starting points for medium- and long-term planning and predictable legislation, taking into account the precautionary principle and the prevention principles, especially in the case of components of the common heritage of the nation regulated in the Article P) (1) of the Fundamental Law. Accordingly, ignoring these professional content strategies in the constitutional review procedure of a law-amendment should be assessed separately for regulatory subject affecting the nation's common heritage."[124] Otherwise, the CCH also considered the position of the HAS on a scientific basis to be of great importance.[125]

Finally, in connection with the Amendment the CCH found that by establishing the possibility of unauthorized extraction of groundwater it violates the principle of non-derogation, and furthermore, Article P) (1) and Article XXI (1) of the Fundamental Law. It is worth noticing that, in this final conclusion, the CCH did not refer to the precautionary principle. Despite this, in CCH Decision 13/2018, the CCH created the strong constitutional concept of the precautionary principle as a rigorous constitutional obligation for the law-maker. It should be noted that some judges (e.g. *András Varga Zs.*) attached their dissenting opinions in which these judges, among others, drew

[120] CCH Decision 13/2018, para. See furthermore CCH Decision 13/2018, para. 21.
[121] CCH Decision 27/2017, para. 49.
[122] CCH Decision 13/2018, para. 62.
[123] CCH Decision 13/2018, para. 65.
[124] CCH Decision 13/2018, para. 40.
[125] CCH Decision 13/2018, para. 59.

attention to the logical difficulty of incorporating the precautionary principle into constitutional law.[126]

3.2.4. The afterlife of CCH Decision 13/2018 in the case law of the CCH

It seems that the strong constitutional concept established in CCH Decision 13/2018 has a serious effect on the further jurisdiction of the CCH. The CCH also applied the precautionary principle in connection with the protection against noise and vibration in CCH Decision 17/2018,[127] and in connection with the procedure before authorities affecting environmental protection and nature conservation issues in CCH Decision 4/2019.[128] In the opinion of *István Olajos*, the "annulment of certain parts of the Regulation reviewed in CCH Decision 17/2018 could be based on the non-derogation principle, and the non-derogation principle could be supported by the principles of prevention and precautionary."[129]

4. Conclusions

In its decisions, the CCH created a strong constitutional concept of the precautionary principle. This raises the question whether the CCH can consequently insist on its new precedent in future cases, taking into account the numerous new and risky technologies (genetically modified organisms, artificial intelligence, self-driving cars, etc.) and, moreover, the uncertain economic,[130] environmental[131] and social situations of the XXIst century;[132] namely, under these circumstances, a lot of situations may raise the question of the application of the precautionary principle. Besides, if the CCH did not properly apply the strong constitutional concept of the precautionary principle, the principle could become the new instrument of a double standard. Apart from the determination of the precautionary principle by the CCH merely in its jurisdiction, of course, there is an opportunity to define the precautionary principle in the constitution itself. In other words, a further question that can be raised on the ground of the separation of powers is whether the Hungarian Constitutional Court exceeded its competence and power to interpret the text of the constitution and whether it grabbed a law-making power in CCH Decision 13/2018. Otherwise, the debates also showed that the precautionary principle is neither a merely political issue nor a legal one but an ambiguous mixture of them. However, it is worth noticing that the other constitutional concept of the Hungarian environmental law, i.e. the non-derogation principle, exists alone in the practice of the CCH without an explicit definition or mention in the Hungarian constitution. In the opinion of the present article's author, a certain combination of the CCH-juridical and the Fundamental-Law-determined types of the precautionary principle is also imaginable.

In 2018, the Hungarian prime minister announced the revision of the Fundamental

[126] CCH Decision 13/2018, paras. 107–142.
[127] CCH Decision 17/2018, paras. 87–92.
[128] CCH Decision 4/2019, paras. 69, 74, 79, 93, 99–100, 123.
[129] Olajos István, *The precautionary principle in the practice of the Hungarian Constitutional Court and connected agricultural innovations*, under review at Zbornik radova Pravnog fakulteta Novi Sad.
[130] See Nagy Zoltán, "Energy Taxation and Its Problems of Regulation," *Curentul Juridic* 18, no. 1 (2015): 128–148.
[131] E.g. the climate change; see Nagy Zoltán, and Beáta Gergely, "The Hungarian Regulation on the Emission Trading system," *Lex et Scientia* 24, no. 1 (2017): 70–78.
[132] See Nagy Zoltán, *Környezeti adózás szabályozása a környezetpolitika rendszerében* (Miskolc: Miskolci Egyetem, 2013), 8–35.

Law. In the opinion of the author of the present paper, this ongoing constitutional revision even means an outstanding opportunity for the decision-makers to consider the expressis verbis determination of the precautionary principle in the Fundamental Law. If so, several questions may be raised: where to define the precautionary principle in the present text and context of the Fundamental Law; which concept of the precautionary principle (by way of explanation, a strong, a weak or a transitional concept) should be defined; whether the constitution-based concept should focus merely on the environmental and human health fields or should concentrate on a more general scope; which components of the precautionary principle should be determined in the constitution; or whether different kinds of the precautionary principle should be determined for different situations?

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THE SIZE AND THE IMPORTANCE OF THE EVIDENCE GOVERNED DURING THE PROSECUTION IN REM

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Abstract

The jurisdiction developed on the edge of the implementation of the provisions of Code of Criminal Procedure, relating to the verification of the legality of the referral to the court, the legality of the management of evidences and documents of the prosecution, has proved the fact that in front of the judges of preliminary chamber has come, not infrequently, the request of the exclusion of the evidences governed during the criminal prosecution in rem, on the ground that these evidences have been managed either in total or in the majority of them, at this stage absolutely secret of the criminal prosecution, even though the offender of the deed was known and in this way, the future suspect or charged, has been deprived of any realistic and concrete possibility to defend himself, to assist with the help of a lawyer in the management of theses evidences and to combat them by appropriate procedural means.

This raises the question which is the size of the evidences that reasonably can be taken during the criminal proceedings in rem, thus the suspect/ defendant should not be harmed in his procedural rights, in particular with regard to his right of defence.

To search for an answer to this matter, this is very present in the proceedings in front of the judge of preliminary chamber, legal provisions must be primarily examined that implicitly separates the criminal prosecution in rem from the moment of further performing of the prosecution towards a certain person.

Keywords: *Evidence, prosecution, in rem, procedural, suspect, defendant.*

1. Introduction

The criminal process represents the activity, through which the specialized bodies of the state discover the criminal offences, identify and catch the criminals, gather and manage the samples, accomplish the penal liability and apply the penalties.[1]

The judicial bodies carry out a complex activity which exceeds the strict limits of the resolution of criminal case within the framework of the jurisdictional detent, executing a series of legal procedures in order to conduct the act of justice in good conditions.

On the basis of succession of judicial activities carried out by the competent bodies for the sole purpose of making the truth and pull the penal liability of persons who committed crimes found the samples, the nature of the evidence and processes of evidence.

Underlying succession of judicial activities carried out by the competent

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[1] Nicolae Volonciu, „*Tratat de procedură penală Vol I*", Paideia Publishing House, 1993, p. 9.

bodies for the sole purpose of finding out the truth and criminal responsibility of individuals who committed crimes find evidence, evidence and evidence procedures.

2. The proof. General considerations

2.1. Evidences, means of evidence and proceedings of evidence.

The legislator defines the notion of *proof* in the content of the provisions of Article 97 (1) as being "any element of fact which serves at the disclosure of the existence or non-existence of an infringement, at the identification of the person who committed it and at the knowledge of the necessary circumstances for the fair resolution of the cause and which contributes to finding out the truth in the criminal trial."

The means of the proof represents the means of investigation or of discovery of the evidences and the management of the evidence in the criminal trial.[2]

The evidence is obtained in the criminal trial by the following means that sample: the declarations of the suspect or of the defendant, the declarations of the injured person, the declarations of the civil party or of the responsible party from a civil point of view, the declarations of the witnesses, expert reports or findings, reports, photos, material means of sample or by any other means of sample which is not forbidden by law.

2.2. The object of the evidence and the aim of the evidence

The object of the evidence represents all the facts and the circumstances which have to be proved, for the purpose of solving the criminal cause and also shows the limits of the judicial research and the performance of the evidence.

According to the article 98 of the Code of Criminal Procedure, the object of the proof is constituted by tye existence of the offence and its commission by the defendant, the facts concerning civil liability, when there is a civil part, the facts and the circumstances of fact which depends on the enforcement of the law and any necessary circumstance for a fair resolution of the case.

The charge of the proof mainly belongs to the prosecutor in the criminal proceedings, civil parts or, as the case may be, the prosecutor who pursues the civil action in the case in which the injured person lacks the capacity of exercise or has a capacity of limited exercise.

The suspect or the defendant benefits of the presumption of innocence, not being obliged to prove his innocence, and he has the right not to contribute to his own indictment. Thus, in the case in which the prosecution fails to fully overturn the presumption of innocence, the fact will be interpreted as an evidence in favour of the innocence of the defendant (*in dubio pro reo).* According to the judicial practice, even if the defendant reports himself the Court cannot order his sentencing, if the presumption of innocence has not been overturned during the criminal trial, whereas any doubt takes advantage of the defendant and the defendant's admission does not have absolute evidential value.

[2] V. Dongoroz, *Curs de procedură penală*, Bucharest, 1942, p. 207.

3. The management of the evidences during the prosecution stage

3.1. The beginning of the criminal proceedings and the continuation of the criminal prosecution against a person

The informed body of the criminal prosecution by denunciation or complaint has the obligation to check in the first stage the fulfilment of *the conditions of form of the information* and respectively of the mentions from the content of the information which relates to the way of describing the deed, in order to establish, if the conditions of form are met, on the one hand, and, on the other hand, if the description of the deed is complete and clear. The verification of the criminal prosecution body has a judicial result in refunding the denunciation or the complaint through administrative way to the petitioner, where the conditions relating to the form or conditions relating to the description of the deed are not fulfilled.

The article 305 (1) from the Code of Criminal Procedure provides that "When the document of information accomplishes the conditions laid down by the law, the criminal prosecution body disposes the beginning of the criminal prosecution relating to the committed deed or whose commitment is prepared, even if the author is shown or known."

According to the article 305 (3) from the Code of Criminal Procedure "When there are evidences indicating reasonable suspicion that a certain person has committed the deed for which the the criminal prosecution has started and there is not one of the cases provided by the article 16 (1), the criminal prosecution body disposes that the criminal prosecution should be carried out in front of him, who acquires the quality of suspect. The measure ordered by the criminal prosecution body shall be carried out within 3 days of the confirmation of the prosecutor who supervises the criminal prosecution, the criminal prosecution body being obliged to present the prosecutor even the case file. "

The fact that it is not immediately possible the acquisition of the official quality of suspect as soon as the criminal prosecution bodies were informed relating to the commitment of a criminal deed by one or more people represents a guarantee justified by the necessity to protect the rights of the people against whom such a referral was made, in order they may not be the subject of such criminal charges without a minimum verification of support, to the effect of indicating both the existence of the deed and the non-existence of a case which prevents the exercise of the criminal action, and the reasonable suspicion that they have committed a deed prescribed by the penal law.

Reported to the administration of numerous evidences and sometimes of all evidences in the stage of criminal prosecution *in rem* and to the existence or not of a physical injury of the right of defence of the suspect/ defendant, by the impossibility to assist through a lawyer, I their management, especially in the conditions in which after further criminal prosecution *in personam*, the request of re-administration of the evidences was rejected by the prosecutor, different solutions have been pronounced in jurisprudence.

3.2. The management of the evidences within criminal prosecution *in rem*

Thus, in a case, in which the defendant, in the procedure of preliminary chamber requested the exclusion of the evidences managed before being brought to the attention the charge and the beginning of the criminal prosecution against him (criminal investigation that began three years ago,

without being brought to attention of the charge meanwhile), the judge of the preliminary chamber kept in mind that the sanction that would be incident in this case is that of relative nullity, only that this penalty cannot operate because the defendant has not proved the existence of a physical injury which could not be removed otherwise than the cancellation of the procedural act concerning the management of the evidences and the exclusion of all evidences thus managed.

It was argued the solution through which the criminal prosecution is characterized by the lack of advertising and contradiction, which means that although the defendant had, at least virtually, the possibility of assisting by the defender at the interrogation of the witnesses, this fact did not suppose for the defender an active interrogation of the witnesses. Especially that during the criminal prosecution the prosecutor meets in his person the functions of process of accusation, defence and resolution of the case and in very few exceptions, such as for example, the confrontation, and all parties are present at the same time to carry out the criminal prosecution.

It was also noted that the nullity may not interfere only if the physical injury cannot be removed differently or, in case, the remedy is given by the possibility of re-interrogation of the witnesses directly by the Court, during the judicial investigation and that the criminal law of process does not restrict the administration of all evidences only after disposition of further carrying out of the criminal prosecution, the contrary conclusion leading to the necessity of re-administration of all managed evidences in the stage of criminal prosecution *in rem, or* this is not the purpose of the legislator.

Therefore, it was concluded that the defendant was not caused any physical injury to found the request of exclusion of the evidences.

To the contrary, the Court has decided in a supreme decision of the case, prior to coming into force of the new criminal provisions of process, but the reasons remain valid and they are fully applicable in relation to the new provisions[3].

Thus, the Supreme Court held that the provisions of art. 6 paragraph 3 (c) of the European Convention of the human rights, European standard of protection in the field of the right to dispose of the necessary time and facilities to prepare the defence, it also applies at the stage of criminal prosecution, being an element of the notion of fair trial, to the extent that the initial failure of this right might compromise the fair character of the criminal trial. (imbroscia against Switzerland, 1993)

The Supreme Court, taking into account that the injured person and the majority of the witnesses have been interrogated in the stage of prior acts (the correspondent of the criminal prosecution *in rem*), the request of re-interrogation has been rejected on the grounds that they were interrogated by the prosecutor respecting all the guarantees and thus being managed the most important evidences in the preceding act stage, stated that the equality of arms has been violated, the accused being placed in a position where he no longer can present the cause in such way as not to be disadvantaged compared to the incrimination (case S against Switzerland 1991). The Court held that the presence of the lawyer in the administration of these evidences would have conferred the right to make requests, conclusions, and complaints according to the rights conferred by extension of the sphere of judicial assistance in criminal prosecution stage including the possibility granted by the prosecutor to ask questions on the occasion

[3] Decizia penală nr. 242/3 decembrie 2012 a Înaltei Curți de Casație și Justiție, disponibilă pe www.juridice.ro.

of the interrogation of the injured person and of witnesses.

He further held that the hearing of the injured person and of witnesses on the occasion of judicial research cannot complete the obligation of the prosecutor to manage the evidences with the respect of the rights of defence.

In a third case[4], clarifying for the problem in question, from my point of view, it was held that the evidences managed between the moment of the beginning of the criminal prosecution *in rem* and the moment of the disposition by the prosecutor to continue to carry out the criminal prosecution against the suspect and, respectively, bringing to the attention of this person the quality of suspect, cannot be stuck by nullity, as long as the time intervals between the two moments mentioned above, reported to the dates and the circumstances of the case, are justified, a condition which the judge considered as being fulfilled in question, since it is a period of time of only 15 days. It was held that in the lack of an obvious abuse in the timing of the stages of process during the criminal prosecution, the judge cannot censure the way in which the body of the criminal prosecution has planned the beginning and the continuation of the criminal prosecution, not having data in the file to the effect that the prevention of the defendant in the exercise of the right of the defence had been sought.

3.3. The continuation of the criminal prosecution against a person. The phrase "reasonable suspicion"

In the recent doctrine[5] drawn up on the New Code of Criminal Procedure, it was stated the opinion according to which the order of the carrying out of a further criminal prosecution against the suspect in the case in which the conditions provided by the article 77 and art. 305 (3) of the Code of Criminal Procedure are fulfilled constitutes a positive procedural obligation of the body of criminal prosecution, and not a faculty of this one, being regulated in order to ensure an effective guarantee of the right to defence of the people accused in criminal proceedings. The precise determination of the moment of the formulation of an accusation in criminal matters (the notion of accusation in criminal matters signifying the official notification issued by an authority accusing a person of committing an offence, fact that attracts important repercussions on that person) is of particular importance because the respective person becomes the holder of rights and obligations at this point, having guaranteed the rights provided in art 6 of ECHR. It was shown next that the acquisition of the quality of suspect interferes with ex law, when the conditions provided by article 77 and art 305 (3) of the Code of Criminal Procedure are fulfilled which impose the body of criminal prosecution on acknowledging the existence of a charge in criminal matters and to order the carrying out of the further criminal prosecution against the suspect and on bringing to the attention of the rights. The violation of the positive procedural obligation, by carrying out the criminal prosecution *in rem* beyond the moment when it could be made a charge in criminal matters in a reasonable way, may lead to a significant and substantial injury of the right of a fair trial for the defendant, such as to draw the incidence of the penalty of relative nullity provided in art 282 of the Code of Criminal Procedure, relating to act of process or the evidences managed after this moment, being essential for the retaining of the injury of process, being as after a further criminal prosecution *in personam* , the right to defence may have been affected in its

[4] Încheierea penală nr. 345/CO/CP/2.09.2016 a Curţii de Apel Bucureşti, secţia a II-a penală, nepublicată.
[5] M. Udroiu, *Procedură penală, Partea specială,* Ediţia a 4-a, C.H.Beck Publishing House, Bucharest p. 52.

essence by the impossibility of obtaining the re- administration of the evidences or the participation at other acts of process.

It was also stated the opinion that the prolongation of the criminal prosecution *in rem* beyond the time when there are evidences to the effect of reasonable suspicion that a certain person committed the deed for which the penal prosecution was initiated is a procedural abuse.[6]

The European Court, in its jurisprudence[7] has stated that a person acquires the quality of suspect that draws the application of the guarantees provided for in the art. 6 ECHR, not from the moment in which the quality is notified to him,but from the moment in which they had plausible reasons to suspect the concerned person of committing the offence.

The European Court has stated that even at the time of the preceding acts, according to the Code of Criminal Procedure of 1968, the art guarantees were applicable 6 of the ECHR even if they were not provided for national law.

The European Court has shown that, at the time of the Acts prior to, according to the Code of penal procedure in 1968 was applicable to guarantees of Article 6 of the European Court for Human Rights in Strasbourg, even if there were laid down in national law.

It was shown in the case of Argintaru against Romania that the delay in the fulfilment of the obligation to provide further criminal prosecution against the suspect, and consequently, the extension of the placement of the person to whom there is a penal accusation in concreto apart from the penal trial, constitutes an infringement of the right fair trial.

The European Court has shown that even at the time of the fulfilment of the preceding acts, according to the Code of Criminal Procedure from 1998, the guarantees were applicable in art. 6 of ECHR, even if they were not provided in national law.[8]

In our opinion, this issue was, in principle, discovered in the recitals of the Decision no. 236/2016 of the Constitutional Court[9], by which, although the exception of unconstitutional of the provisions of art. 305 (1) and (3) of The Code of Criminal procedure were rejected as unfounded, it was held that "the interval of time that separates the moment of the beginning of the criminal prosecution *in rem* from the moment of the beginning of the criminal prosecution *in personam* is not strictly and expressly determined by the provisions of the Code of Penal Procedure." However, the criminal provision of process states that the prosecutor provides that the criminal prosecution should be further carried out to a person, when the existing dates and the evidences in question have effect in reasonable clues that this one has committed the deed for which the criminal prosecution has started. Thus, the prosecutor is obliged that, in the moment when there are reasonable clues that a person has committed the deed for which the criminal prosecution has started, to provide further criminal prosecution towards this person. This has the effect from the use of the legislator of the verb at imperative mood "provide", and not "may provide", so that it could be interpreted that there is a faculty of the prosecutor to postpone the time of the beginning of the criminal prosecution *in personam* until the necessary fulfilment of the probation for the

[6] Viorel Pașca, *Principiul egalității armelor în procesul penal roman-O realitate sau o ficțiune*, Revista Universul Juridic.

[7] Cauza Brusco contra Franței, Hotărârea din 14 octombrie 2010, cauza Sobko împotriva Ucrainei.

[8] Curtea Europeană a Drepturilor Omului, cauza Argintaru contra Romîniei, decizia din 8 ianuarie 2013.

[9] Decizia CCR nr. 326/19 aprilie 2016, publicată în M.Of. nr. 426/7 iunie 2016.

beginning of the penal action and the direct order of this measure.

In principle, the existence of reasonable clues is concomitant with the formulation of an accusation *in personam* which has the valences of an accusation in criminal matters. However, there may be situations in which the two elements do not have a simultaneous existence. To the extent in which, in disagreement with the above provisions, the prosecutor does not comply with those requirements, then, in the case of issuing the bill of the indictment, the suspect has become a defendant and may submit to the censorship of the judge of preliminary chamber the examination of the legal administration of the evidences and the carrying out of the acts by the bodies of criminal prosecution, thus according to the art. 342 and art. 345 (1) and (2) of the Code of Criminal Procedure, in the filter procedure, the judge of preliminary chamber has the possibility to ascertain the nullity and to exclude the acts of criminal prosecution and the managed evidences with breaking the law which confers ,among other things, an effective right to defence.

The Court has noted in this respect that the provision of the art. 282 (1) of The Code of Criminal Procedure establish that breaking the legal provisions determine the nullity of the act when by the failure to comply with the legal requirements was brought a harm of the rights of the parties or of the main subjects of process that cannot be removed other than by the abolition of the act. Therefore, whenever all or most of the evidences from the criminal prosecution stage have been managed only during the criminal prosecution *in rem* , then the aspects of implementation of law with overlooking of the specific guarantees to the right to a fair trial can be called into question, such as the right of the suspect to be informed regarding the deed for which he is investigated and the legal classification of this one, the right to consult the file, under the law, to have a chosen lawyer or one of the office for cases of compulsory assistance, to propose the administration of evidences, to raise exceptions and to put conclusions, to make any other requests relating to the resolution of the civil and penal side of the case, to appeal to a mediator, in cases allowed by law, to be informed regarding his rights, or to the right to benefit from other rights stipulated by law. As long as depending on the particularities of each case it is proved the suspects/ defendants are deprived of the rights conferred by the Code of Criminal Procedure, being severely affected the right of defence during the criminal prosecution, then the evidences and the documents drawn up with the failure to comply with the legal requirements may be removed until the completion of the procedure of the preliminary chamber.

Towards the evolution of the jurisprudence of the European Court on the matter of the right to defence, towards the vision of the Constitutional Court on the fair interpretation of the provision of art 305 (1) and (3), the conclusion that is drawn up is that, in the event of ordering a further criminal prosecution against a person beyond the moment at which the body of criminal prosecution had to order in this respect in a reasonable way with the consequence of the lack of the suspect of the rights conferred by law, in particular that one to be able to assist, through a lawyer, at the interrogation of the parties, of procedural subjects, of witnesses, to be able to take part in carrying an expertise, etc., the compensatory in such situation would be the re-administration of the managed evidences in the criminal prosecution stage in rem or the removal from the appreciation of those evidences managed in the breach of the rights of the suspect.

Conclusions

Thus, to the question which is "the quantity" of evidences that can reasonably be managed in the criminal prosecution stage in rem, from the corroborated interpretation of the provisions of art 305 (3) of the Code of Criminal Procedure and art 99 paragraph 3letter c of the ECHR, the answer is that, in the criminal prosecution stage in rem must not be administrated only those strictly necessary evidence to provide reasonable clues that a person committed the offence with which the body of criminal prosecution has been referred to, not being necessary to have evidences at the level of those who found the sentencing to court.

Under no circumstances at this stage may not be administrated all the evidences during the criminal prosecution, in such a case, the injury caused to the suspect being not only evident but also irremediable. In such a case, even the re-administration of the evidences can no longer constitute a remedy for the removing the injury, because in case of a contradiction of the evidences, there will be a tendency for the body of criminal prosecution to take into account those administrated at the stage in rem. Neither the re-administration of these evidences at the judicial research stage is a remedy, such as some courts have stated, because the progress of the proceedings in compliance with the procedural guarantees in the criminal prosecution stage is essential, being possible that on the conditions of the management of the evidences with the full respect of the right to defence, the result of the criminal prosecution should be other than that of a made research without compliance with those guarantees. On the other hand, the administration of the evidences in this manner sometimes deprives the defendant of the possibility to use the simplified procedure, because it is possible to wish to admit the deed but at the same time he may invoke the existence of certain mitigating legal circumstances, of some causes of non- immutability, for which in front of the court, legally it is no longer possible to request evidences.

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PROSECUTING CHARGES FOR THE ACCOMPLISHMENT OF CERTAIN LEGAL ACTIVITIES. PROTECTION, GUARANTEES AND LIMITS IN THE PRACTICE OF THE LAWYER PROFESSION

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Abstract

In any democratic society the lawyer plays an essential role in defending the rights and freedoms recognized by law. The actual accomplishment of his mission can expose the lawyer to some risks and pressures exerted by the same judicial authorities called to ensure compliance with the law.

The current article aims to analyse the possible implications of prosecuting charges against a lawyer for facts that represent nothing but concrete ways to perform some legal activities. The limits within which such accusations can be formulated, the potential consequences of the criminal judicial activity from the perspective of the basis of the accusations brought and the possible forms of protection available to the lawyer will be considered.

Keywords: *lawyer, protection, risks, guarantees, charges.*

Introduction:

The study has as a starting point the concrete situation of a Romanian lawyer who has been the subject of a criminal investigation for the way in which he fulfilled his professional obligations. The peculiarity of the case is given by the fact that the lawyer did not act in his own name, but as a member of a top law firm. Starting from this factual premise, the analysis aims to identify and test the effectiveness of the legal protection that any lawyer should benefit from when practising the profession as well as the effective guarantees through which this protection should be realized. The article will follow not only the national forms of the legal protection of the lawyer, but, in particular, the supranational legal instruments, capable of providing an effective set of guarantees.

1. Preliminary aspects regarding the pluralism of the notion of lawyer in the Romanian judicial system.

Despite the apparent semantic evidence, given by the widespread use of the term, the technical meaning of the notion of *lawyer* was no longer easy to establish with the entry into force of the New Romanian Code of Criminal Procedure. For the legal practitioners, the semantic area of the concept has always had a complex dimension given that it was expressed in two different registers that often interfere. Thus, the quality of lawyer has a *substantial* but also a *procedural component.* As the lawyer capacity is expressed dynamically, the two dimensions involved by his judicial manifestation often overlap and create confusion about the content and limits of each of them. This was the reason for which, in the former regulation, the two dimensions

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of the term were expressed by different names: *lawyer,* for the substantial one and *defender,* for the procedural one.

From a substantial perspective, the lawyer is the only person who is able to practice the profession of lawyer, free and independent profession with autonomous organization and functioning. This dimension of the notion of lawyer evokes a professional category consisting of persons who have acquired, under the law, the right to practice the profession in one of the forms and by one of the modalities provided by law. Even if in this sense a genre seems to be rather expressed, only the vocation for the practice of the profession is of general order, the effective quality being always exclusive. In this respect, according to the provisions of article 1 paragraph (2) of Law no. 51/1995 on the organization and practice of the profession of lawyer, in Romania the profession of lawyer can be practiced only by lawyers registered with the table of lawyers of the bar to which they belong, bar member of the National Association of the Romanian Bars (UNBR), being forbitten to have bars established and functioning outside UNBR. The interdiction to establish other bars is absolute, the acts of constitution and registration of these entities being null and void. Thus, the substantial quality of lawyer necessarily precedes the procedural one, being its essential premise, and is acquired as a result of meeting the material conditions (regarding the admission to the profession and acquiring tenure, seniority, incompatibilities, etc.) provided in the Law and in the By-laws of the lawyer profession - Decision no. 64/2011 (published in the Official Gazette no.898 of December 19, 2011).The quality of lawyer, once acquired, gives the holder the vocation to practice one of the activities through which specific activities may be performed, according to the law, activities that are always listed almost exhaustively. Considering the substantial dimension of the quality of lawyer, the lawyer is protected by law, but only in the practice of the profession and in relation to it.

In principle, the need for protection and the tools through which it is provided by the national authorities, are set out in article 7 of the By-laws of the lawyer profession which transposes provisions provided for in the European Union's Code of Conduct – the Decision no. 1486/2007. These provisions state that in a society based on the values of democracy and the rule of law, the lawyer plays an essential role. The lawyer is indispensable to the justice and the litigants and has the task of defending their rights and interests, acting both as adviser and defender of his client. In the practice of the profession, the lawyer may not be subjected to any restrictions, pressures, constraints or intimidation from the public authorities or institutions or other natural or legal persons. The freedom and independence of the lawyer are guaranteed by law. The analysis of these provisions showed that *independence is the essence of the profession of lawyer, being a fundamental principle of the organization and the practice of the profession*[1].

The independence of the lawyer cannot harm the interests of his client. The lawyer is obliged to give the client legal advice corresponding to the law and to act only within the limits of the law, the current by-laws and the code of conduct, according to his professional belief. In Romania, the

[1] TC Briciu, The main changes to the Law no. 51/1995 for the organization and the practice of the lawyer's profession, www.juridice.ro. The author states that "the purpose of the lawyer's activity is to promote and defend the rights, freedoms and legitimate interests of the individuals. This purpose may, in some cases, conflict with the interests of the state or public authorities. The client could ask for help against an abuse committed by the authorities themselves."

lawyer is not criminally liable for the claims made orally or in writing before the courts, other bodies of jurisdiction, prosecutors or other authorities, if these claims are related to the defence and are necessary to establish the truth. The criminal prosecution and the arraignment of the lawyer for criminal acts committed in the practice of the profession or in connection with it can be done only in the cases and the conditions provided by the law. Regarding this generic protection, it has been shown in the doctrine that the *lawyer is generally protected for statements made in order to defend the interests of his clients during the court proceedings in the courtroom, even when the hearing is public and the information can thus reach the general public knowledge.*[2]

From a procedural perspective, the lawyer is a procedural subject, a participant in the trial. In criminal matters, the lawyer is not a party to the trial. The lawyer is a distinct procedural subject, essential[3] in carrying out the judicial activity, exercising also, in addition to the procedural rights of the party he assists or represents, his own procedural rights. Despite these own procedural rights, the lawyer is a procedural subject that never has a *causal legitimacy*, in the sense of his own interest in the exercise of the judicial action. The lawyer has exclusive *procedural legitimacy*, as owner of procedural rights and obligations. These rights and obligations have, first and foremost, a derivative character because they are exercised in the name and in the interest of their primary holder (party in the trial or other procedural subject), not being excluded, as we have shown, the possibility of the lawyer to be the holder of his own procedural rights. However, by exercising the procedural rights of the party he/she defends, the lawyer is in the same procedural position as the party.[4]

Thus, according to article 31 Code of criminal procedure, the lawyer assists or represents the parties or the procedural subjects, according to the law. I consider that the current provision, by its clarity, resolves a practical controversy in our national system arising in relation to the possibility of the lawyer to provide legal assistance to a secondary procedural subject as well, such as the witness. The text uses the term of *procedural subjects* without limiting the category of those who can benefit from legal assistance in criminal matters, so that in this category must be included the persons expressly mentioned in art. 34 Code of criminal procedure: the witness, the expert, the interpreter, the procedural agent and any other persons having rights or obligations within the criminal judicial proceedings. In these circumstances, as a distinct procedural subject, the lawyer is called to provide legal assistance to the participants in the trial. The defence made by the lawyer, as a legal professional, based on a legal assistance contract concluded between him and the litigant, is known as a technical defence.[5] By its nature, the lawyer is called to compensate the difference in terms of specialization between the parties involved in the criminal judicial conflict since the *prosecution* is

[2] M. Udroiu, S. Răduleţu in M. Udroiu (coordinator), *Criminal Procedure Code. Commentary on articles*, 2nd edition, CH Beck Publishing House, Bucharest 2017, p. 350.

[3] By exercising his own procedural function and actively contributing to the achievement of the purpose of the criminal trial, the lawyer is one of the main participants in the criminal case - I. Neagu, M. Damaschin *Criminal Procedure Treaty. General part*, Universul Juridic Publishing House, Bucharest, 2014, p. 229.

[4] N. Volonciu, *Treaty of Criminal Procedure. General Part Vol. I*, 3rd edition, Paideia Publishing House, Bucharest, p. 122.

[5] A. Crișu, *Criminal Procedure Law. General part*, 3rd edition, revised and updated, Hamangiu Publishing House, 2018, p. 165.

always supported by specialized magistrates from the Public Ministry.

Currently, in Romania, the substantial and the procedural quality of lawyer are both designated by the same name, suggesting the legislator's exclusive preference for the professional category called to grant legal assistance in the criminal trial. Moreover, considering the natural interdependence between these qualities, it was stated that the legal assistance granted in the criminal trial by a person who did not acquire the capacity of lawyer under the conditions of Law no. 51/1995 is equivalent to the lack of defence.[6]

In the procedural sense, the lawyer acquires legitimacy or capacity in order to provide legal assistance to a party or to a procedural subject either as a result of his election, by the conclusion of a legal assistance contract, or as a result of his appointment, ex officio. In civil matters also, the contract of legal assistance expressly provides for the extension of the powers that the clients confer on the lawyer. According to this contract (which has the nature of a mandate), the lawyer legitimizes himself to third parties through the power of attorney.[7]

The protection that the law grants to the lawyer at the procedural level is specific to this capacity, which always involves an individual exercise. Thus, the contact between the lawyer and his client cannot be impeded or controlled, directly or indirectly, by any state body. The arrested or detained person has the right to contact the lawyer, being ensured that confidentiality of the communications is respected, in compliance with the necessary measures of visual surveillance, protection and security, without having their conversation being intercepted or recorded. The right to freedom of expression of the lawyer is a distinct right, recognized by the European Court and concerns the freedom of expression of the lawyer not only in the courtroom, but also outside it.[8] Thus, the lawyer's freedom and the confidentiality of the client-lawyer communication are the main guarantees of an effective defence. If a lawyer could not consult his detained client and could not receive confidential instructions without supervision, legal aid would loose from its utility and the European Convention guarantees practical and effective rights. Moreover, confidentiality concerns not only communication in prison but also in the courtroom (*ECHR,* Hodorkovsky v. Russia, Decision of May 31, 2011).

Therefore, considering these general explanations, in Romania, the concept of lawyer includes both a substantial meaning that evokes a specific category, composed of persons who have the ability to perform the activity of lawyer in one of the modalities provided by law, as well as a procedural meaning that designates the holder of a punctual legitimacy that allows him to participate in a criminal or civil trial. In both manifestations, the lawyer's mission can only be achieved by having his independence guaranteed. At the principle level, the law is generous regarding the content of the legal protection it grants to the lawyer.

The effectiveness of this protection must, however, be checked *in concreto* because, although absolute in its normative form, the prohibition to intervene through pressure on the independence and freedom of the lawyer, instituted also in the charge of

[6] High Court of Cassation and Justice, United Sections, Decision no. XXVII / 2007 admitting the appeal in the interest of the law, with applicability and at present, in the Official Journal no.772 / November 14, 2007.

[7] G. Boroi, M. Stancu, *Civil Procedural Law*, 4th edition Revised and Added, Hamangiu Publishing House, Bucharest 2017, p. 166.

[8] M. Udroiu, *Criminal procedure. The general part*, 5th edition, revised and supplemented, CH Beck Publishing House, Bucharest 2018, p. 925.

the judicial authorities, may become relative in some of its procedural manifestations.

2. Assessment of the lawyer's activity from a criminal perspective. The limits of the control of the activity of a lawyer by the judicial authorities. Case Study.

In order to verify the effectiveness of the protection assumed at the declarative level, we will analyse the situation of a lawyer against whom criminal charges have been formulated for facts that represent exclusively ways of performing the lawyer's activity. The analysis will not cover aspects related to the merits of the accusations being made because it does not seek to replace the only authorities called to establish the guilt of those sent to court. The purpose of the analysis is focused on identifying the set of guarantees offered at the legislative level and evaluating their effectiveness in concrete, so as to find out if there are limits in the legal protection offered to lawyers. Undoubtedly, no internal or supranational legal instrument for the protection of the legal profession can be judged as a form of absolute immunity. This is the reason why, beyond the problem of the innocence of the accused lawyer (which can only be determined by the competent courts), more important in this endeavour is to identify the limits within which the judicial authorities can manifest themselves when evaluating the exercise of a free and independent profession.

What are the factual premises that led to the formulation of criminal charges against a lawyer? In the analysed case, a judicial authority with a material competence specialized in investigating the corruption facts ordered the arraignment of a heterogeneous group composed of civil servants, businessmen, real estate experts, but also a lawyer for the manner in which the real estate retrocession was carried out for some real property taken abusively by the state during the communist period. Regarding the situation of the lawyer arraigned, by the writ of summons, the fact of complicity in the crime of abuse of office was retained, among others. From the material point of view, the lawyer was accused of having helped a civil servant to defectively exercise his duties of service in connection with the possession of a forestland real property, which would have caused the damage to the Romanian state with a significant amount of money.

Specifically, the aid would have materialized by issuing notifications - on behalf of the law firm to which the lawyer belong - to the units holding the real property in order to comply with the provisions of irrevocable court decisions by which it was decided to return the real property and by appointing another lawyer within the law firm to participate in the actual activities of re-possession of the real property. Another complicity in the crime of abuse of office was held in the responsibility of the lawyer due to the fact that he helped the civil servants of another holding unit to proceed with the restitution of a real property (land) to the person who had requested it, knowing that the applicant is not entitled person. Specifically, the aid granted by the lawyer consisted in attending two meetings of the Board of Directors of the holding unit (entity with majority state capital) in which he expressed his legal opinion regarding the applicant's right to the restitution of the building, legally assisting and representing his client. Also, the lawyer was also charged for the crime of complicity to money laundering, being imputed to him that, in order to hide both the illicit nature of the agreement between the persons involved and the criminal origin of the goods obtained from it, the lawyer assisted in the conclusion of several legal acts (either directly or

indirectly, by coordinating other lawyers within the company) - assignment contracts for the litigation rights and additional documents to them, notarized contracts for the sale of real property. Last but not least, the lawyer was also charged with the offense of trafficking in influence, stating that he determined the person who apparently had the right to request the restitution of the buildings taken abusively to conclude a litigation rights contract with other subjects, although, in fact, the lawyer only performed lawyers' activities: presenting the law firm he was a part of, performing a due-diligence report.

It can be observed that although from a material point of view all the activities imputed to the lawyer are nothing but ways of practising the profession of lawyer, recognized and protected as such by the law, in the view of the Public Ministry, the thing that confers an criminal connotation to the activity carried out as a lawyer is exclusively his mental attitude - the subjective position regarding the non-justification of the person requesting the return to acquire the claimed goods. However, although the prosecution considers that this mental attitude was formed following the assessment of the legal situation of the person requesting the goods, as a professional, as lawyer (one of the many lawyers involved in this project), no rational explanation is offered for the exclusive way in which he is charged. No other lawyer, neither within the company in which he was a member, nor from other companies, was charged for issuing opinions that coincided with those expressed by the lawyer arraigned. First of all, in the context of such accusations, which is the way in which a lawyer performing his activity within a law firm can protect himself against the judicial authorities accusing him of carrying out activities not in his own name but on behalf of the company, activities that performed not individually but with other lawyers?

In this respect, one must not neglect the provisions of article 185 of the By-laws of the profession of lawyer (the form in force in the year when the alleged acts were committed), according to which *"the civil legal relationship is born between the client and the professional civil society, the professional services to be performed by any of the lawyers appointed by the coordinating lawyer, without asking the client's option, except when the professional services consist of legal assistance and representation in courts, prosecutor's offices, criminal investigation bodies or other authorities, when in the legal assistance contract the name of the lawyer designated or accepted by the client is mentioned, as well as the lawyer's right or prohibition to substitution"*. Thus, all the documents concluded and the activities carried out as a lawyer in this case, were performed not in the lawyer's own name, but in the name of the law firm in which the lawyer performs his activity, and which was a party to the legal assistance contracts concluded with clients.

Regarding the legal opinions issued in relation to the claims of the person requesting the goods, it should be noted that these were the result of legal analyses, as well as of thorough documentation, initially made by a team of more than 10 lawyers. As a result of these analyses and documentations carried out, the *Legal Audit Report* was prepared. Subsequently, the analysis covered each litigation or administrative file, an activity in which 62 lawyers were involved. In this context, how can a lawyer be effectively protected against him being charged by withdrawing from the group in which he practices the profession?

Secondly, if the only element that can give criminal relevance to a lawyer's activity is *his mental attitude* towards the legal issue on which he was called to rule, then the risk of arbitrary judgments by the judicial

authorities is very difficult to remove. For an element of a subjective nature whose assessment naturally depends on the impression or conviction of the judicial body, the absence of objective standards, materially verifiable in the documents and papers of the file, contributes significantly to diminishing the real protection of the lawyer against external interference and pressure. In this context, in order to identify a set of effective guarantees that will protect the lawyer, we must first refer to the legal provisions according to which the standard of professional good faith can be established or at least anticipated, respectively those texts on the legal nature of the rules regarding the professional conduct:

1. Law no. 51/1995 for the organization and the practice of the profession of lawyer ("Law no.51/1995 ")[9]:

- Article 2 paragraph (2): *"the lawyer promotes and defends the human rights, freedoms and legitimate interests"*.

2. The by-laws of the lawyer profession from 25.09.2004 (the "By-Laws")[10]:

- Article 2 paragraph (1): *"the purpose of practicing the profession of lawyer is to promote and defend the rights, freedoms and legitimate interests of natural persons and legal persons, of public and private law"*.

- Article 6 paragraph (1): *"The freedom and independence of the lawyer profession are principles based on which the lawyer promotes and defends the legitimate rights, freedoms and interests of the clients according to the law and the present by-laws. These principles define the professional status of the lawyer and guarantee his professional activity"*.

- Article 2.7. The client's interest: *"subject to strict observance of legal and deontological rules, the lawyer has the obligation to always defend the interests of his client as best he can, even in relation to his own interests or the interests of his colleagues"*.

3. United Nations Basic Principles on the Role of the Lawyer ("UN Principles"), adopted at the Eighth United Nations Congress on Crime Prevention and Treatment of Offenders, Havana (Cuba), August 27-September 7, 1990[11]:

- Principle no.16: "*Governments shall ensure that lawyers: (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened*

[9] Published in the Official Journal of Romania no.116 / 09.06.1995, republished in the Official Journal of Romania no. 113/2001 as amended including by the Law no. 255/2004 published in the Official Journal no. 559 of June 23, 2004 and GEO no. 190/2005 for the implementation of necessary measures in the process of European integration, published in the Official Journal of Romania no. 1179 / 28.12.2005. Subsequently, the Law no. 51/1995 was amended by the Emergency Ordinance no. 159/2008, found as unconstitutional by the Decision no. 109/2010 of the Constitutional Court.

[10] Published in the Official Journal no.45/13.01.2005. It was subsequently amended by the Decision of the National Association of The Romanian Bars from 30.06.2007 and subsequently by the Decision no. 15 / 15.09.2011. The By-laws was published in the Official Journal no. 898 / 19.12.2011.

[11] Available for consultation online at the following web address: [last accessed October 4, 2018]. These principles are used by the European Court of Human Rights when interpreting the lawyer's freedom of expression, being referred to the section "Relevant international documents" or "Relevant domestic and international law": see Hajbeyli and Aliyev v. Azerbaijan (para. 40, the Judgment of April 19, 2018) or Morice v. France (para. 57, decision of April 23, 2015, the Grand Chamber).

with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics" [italics mine]

- Principle no.18: "*Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.*" [italics mine].

- Principle no.19: "*No court or administrative authority before whom the right to counsel is recognized shall refuse to recognize the right of a lawyer to appear before it for his or her client unless that lawyer has been disqualified in accordance with national law and practice and in conformity with these principles.*".

- Principle no.20: "*Lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority*."

However, the clearest provisions regarding the role of the rules of deontology are those to which the writ of summons itself refers to, respectively those included in the Code of conduct of the lawyers in the European Union, the sanction for their non-observance, if it exists, being of a disciplinary nature:

"*1.2.1 Rules of professional conduct are designed through their willing acceptance by those to whom they apply to ensure the proper performance by the lawyer of a function which is recognised as essential in all civilized societies. The failure of the lawyer to observe these rules must in the last resort result in a disciplinary sanction.*

1.2.2. The particular rules of each Bar or Law Society arise from its own traditions. They are adapted to the organisation and sphere of activity of the profession in the Member State concerned and to its judicial and administrative procedures and to its national legislation. It is neither possible nor desirable that they should be taken out of their context nor that an attempt should be made to give general application to rules which are inherently incapable of such application. The particular rules of each Bar and Law Society nevertheless are based on the same values and in most cases demonstrate a common foundation."

The rules regarding professional deontology have as purpose the protection of the client's private interest, either natural or legal person requesting legal services, and the eventual violation of these norms, attracts disciplinary sanctions. The infringement of the professional deontology does not constitute, *per se*, an offense, neither directly nor indirectly - by removing the exonerating cause of liability as an effect of finding an alleged infringement.

The opposite reasoning would lead to the conclusion that a lawyer has, *ab initio*, latent criminal conduct in any case in which he has the capacity of defender. This thesis would be contrary to the UN Principles cited above, equivalent to a *de facto* ban on practicing the profession of lawyer.

It is therefore natural, in relation to the legal nature of the deontological norms, but also to their specificity ("*each bar has its own specific rules"*) that the competent bodies to verify their compliance to be those within the profession and not the criminal investigation bodies, regardless of the matter analysed by them.

From the perspective of the competence of verifying the respect of professional deontology, it is absolutely natural that only the organs of the profession have such an attribute, as long as the lawyer's profession is a liberal and independent profession, subject to the observance of the norms that it has imposed

and an essential means of defence of human rights before the State and other powers in the society, as shown in the Code of Conduct of the Lawyers in the European Union.

Moreover, the national judicial practice has also been pronounced in the sense of recognizing the competences of the professional bodies in the matter.[12]

However, against the lack of any referral or proceedings before the bar where the accused lawyer was a member, it is necessary to establish that the competent professional bodies, according to the law, to verify the observance of the professional deontology have not established, by specific acts, the presence of a situation of violation of the rules governing the exercise of the profession of lawyer, the prosecutor's office not being able to substitute the competence to make such an analysis and to establish alleged violations of the deontological rules, without violating the mentioned provisions.

At the same time, it should be emphasized that the justification of a criminal procedure against a lawyer by the alleged non-observance of the rules of the profession is explicitly forbidden by the national and international law.

Thus, according to the Law no. 51/1995 *"in the exercise of the profession and in relation to it the lawyer is protected by the law."* According to the By-laws of the lawyer profession:

Article 37 paragraph (1)

"In the exercise of the profession, the lawyers are protected by the law, without being assimilated to the civil servant or to another employee. [...]

(6) The lawyer is not criminally liable for the claims made orally or in writing, in the appropriate form and in compliance with the provisions of para. (5), before the courts, the criminal investigation bodies or other administrative bodies of jurisdiction and only if these claims are related to the defence

[12] "According to articles 115 - 116 of the By-laws of the profession of lawyer, the obligations of a defender are obligations of diligence and not of result, and, the good faith the lawyer must prove in defending the interests of the person to whom he provides legal assistance, according to art. 116 - 117 of the By-laws of the profession of lawyer and art.38 of Law no. 51/1995 must be analysed by the management bodies of the bar and not by the judicial bodies, such a fact not being criminalized by the criminal law, but qualified as a disciplinary infringement by the last thesis of art. 38 from the Law no.51/1995. Moreover, the petitioner addressed the management of Iasi Bar Association for restitution of the fee, his complaint being rejected by the Decision no. 30 of November 24, 2011". (Iași Court of Appeal - Criminal and Minors Section, Criminal Judgment no. 101/2012 on www.rolii.ro).

"The mere non-recognition of compliance with the obligation assumed by the respondent through the legal assistance contract concluded, cannot constitute an element of misleading the petitioner, as the defence tries to assert. According to art. 228 para. 4 Code of criminal procedure in relation with art. 10 lit. b from the Code of criminal procedure, the initiation of the criminal action cannot be exercised under the conditions in which the act is not provided by the criminal law.

Instead, the petitioner can file a complaint with the Bucharest Bar, competent to analyse the existence or non-existence of the provisions of art. 38 of Law no. 51/1995." (Bucharest Court of Appeal, 1st Criminal Section, Criminal Sentence no. 375/2009 on www.rolii.ro).

"It was correctly ordered not to start the criminal prosecution in terms of the committed crime as foreseen by art.215 Criminal Code, considering that there is no evidence to establish the existence of a misleading action in the sense of the provisions from art. 215 Criminal Code, in the opinion of the petitioner, there is a breach, or a defective fulfilment of the contractual obligations of judicial assistance, actions that cannot incur a criminal liability and which can only be analysed by the management bodies of the Bucharest Bar." (Bucharest Court of Appeal, 1st Criminal Section, Criminal Sentence no. 100/2010)

"(…) examining the quality of the legal assistance granted by the lawyer and his professional competence represent the duties of the representatives of the bar associations.

In analysing the allegations made to the respondent, the Court finds that the case prosecutor correctly considered that the alleged offense does not exist". (Iași Court of Appeal - Criminal Section and for cases with minors, final criminal sentence no. 38/2012 on www.rolii.ro).

in that case and are necessary to establish the truth."[13]

Even clearer norms from this point of view are included in the international instruments, cited above, respectively the Principles no. 16 and no. 18 of the UN Principles.

It is easy to see that in this case the provisions cited were seriously infringed, the lawyer being subjected to a criminal proceeding on the assumption that his client had no rights, neither substantive, and therefore neither procedural, and the actions taken would take due to this reasons, a criminal connotation. Regarding the other charges, they are the result of a violation of another principle, that of the prohibition of assimilating the lawyer with his client (UN Principle no.18 - cited above).

Regarding the evolution in time of the analysed regulations, (during the period in which the professional activities qualified as illegal by the Prosecutor's Office were carried out, this problem was regulated in the article 37 paragraph (6) of the Law no. 51/1995, but also in the article 7 paragraph (5) of the By-laws), some observations are required:

- In its original form, the lawyer's liability was dismissed for any claims "*in connection with the defence and necessary for the case entrusted to him*".

- In 2004, the text of the law provided that the lawyer's liability was removed for the claims made "*in the proper form, in relation to the defence in that case and necessary to establish the truth*".

- Subsequently, starting with 2014[14], the text has been modified again and provides that the lawyer's claims must be made in the "*appropriate form [...] if they are related to the consultations offered to the litigants or to the formulation of the defence in that case, if they are made in compliance with the rules of professional deontology* ".

- The guarantees offered to the lawyer on the basis of this legal text have been strengthen by the legislator with the introduction, by the Law no. 25/2017 regarding the modification and completion of the Law no. 51/1995 for the organization and exercise of the profession of lawyer, of a new paragraph (5) of the art. 38 (new number): *"(5) The legal opinions of the lawyer, the exercise of rights, the fulfilment of the obligations provided by law and the use of legal means for the effective preparation and realization of the defence of liberties, rights and legitimate interests of his /her clients do not constitute a disciplinary offense nor can they attract other forms of legal liability of the lawyer.*"

The initial form, the current form, but also the evolution of the text, they all denote the legislator's firm intention to establish a guarantee of the lawyer's independence. Regardless of the nature of this provision (justifying cause / non-punishing cause), the

[13] By the Law no. 270/2010 para. 61 was also introduced with the following content: "The lawyer is not criminally liable for the professional recommendations and opinions he communicates to his client nor for the legal acts he proposes to his client, followed by the client committing a deed foreseen by the criminal law. This paragraph does not apply in the case of the offenses provided by the Criminal Code at art. 155 - art. 173, art. 174 - art. 192, art. 197 - art. 204, art. 205 - art. 206, art. 236 - art. 244, art. 273 - art. 277, art. 279 - art. 281, art. 303 - art. 307, art. 308 - art. 313, art. 314 - art. 316, art. 317 - art. 330, art. 331 - art. 347, art. 348 - art. 352, art. 353 - art. 355, art. 356 - art. 361."

[14] As a result of the modifications made by the Law no. 286/2009 regarding the Criminal Code, published in the Official Journal of Romania no.757 / 12.11.2012.

conclusion is just one: as long as the lawyer provides the services listed in the law and the by-laws and fulfils his/her primary mission of serving his/her client, he/she will be able to plead for his/her benefit such legal provisions. It results from the rules and recommendations applicable to the profession that the lawyer has both the right and the obligation to protect and optimize the client's legitimate rights and interests. This principle is closely related to the lawyer's first assignment, as a consultant to his client, thus contributing decisively to the existence of a balance in the relations between the court and the state authorities. The principle is expressed by the following legal provisions: art. 2 paragraph (2), art. 3, art. 38 of the Law no. 51/1995[15] and art. 89, art. 90, art. 91, art. 116, art. 138 paragraph (2) and (3), art. 145 paragraph (1), art. 216 paragraph (1) of the By-laws.

At the same time, this principle is provided by point 3 of the Recommendation[16] , art.1.1, art. 2.7. of the EU Code of Conduct. This principle involves the following activities, characteristic for the lawyers' activity: the right / obligation to keep his client informed (otherwise, article 145 paragraph (1) of the By-laws establishes an express rule in this respect), to offer the client legal consultations [art. 3 paragraph (1) letter a) of Law no. 51/1995, art. 89 of the By-laws], to represent the client in front of the authorities, to draft legal acts that express arguments in the client's favour. In these conditions, the facts retained in the Indictment (informing the client about the status of the files, meetings with the client at the law firm's headquarters, in relation to the forest-land, making notifications based on irrevocable court decisions regarding the real property, representation before the authority that solved the request for restitution and the expression of legal opinions related to the situation of the good) represent precisely the services performed within the lawyer profession.

In addition, as we have shown above, the legal and statutory provisions do not consecrate a simple vocation of the lawyer in carrying out such activities, but a professional obligation whose violation constitutes a disciplinary infringement (the final thesis of the article 38 of the Law no.51/1995). Therefore, it is the failure to perform these activities that would be the equivalent of improper / faulty fulfilment of the lawyer's mandate and of the due diligence obligations that were assumed and not their performance as the prosecution claims. Analysing the role of the lawyer in a

[15] Article 2 paragraph (3): "The lawyer has the right to assist and represent the natural and legal persons before the courts and other bodies of jurisdiction, the criminal prosecution bodies, the public authorities and institutions, as well as before other natural or legal persons, who have the obligation to allow and assure the lawyer the unrestricted conduct of his activity, according to the law".

Article 3 paragraph (1): "[a] the activity of the lawyer is accomplished through: [...]

(b) legal assistance and representation before the courts, [...] public administration bodies and institutions, as well as other legal persons, according to the law;

(c) drafting legal documents [...];

(e) the defence and representation with specific legal means of the legitimate rights and interests of the natural and legal persons in their relations with public authorities, institutions and any Romanian or foreign persons".

Art. 38: "[a] the lawyer must study thoroughly the cases that have been entrusted to him, when hired or appointed ex officio, to be present at each term to the courts or to the criminal investigation bodies or to other institutions, according to the mandate entrusted, to show conscientiousness and professional probity, to plead with dignity towards judges and the parties in the process, to submit written conclusions or hearing notes whenever the nature or difficulty of the case requires it or the court orders it. Failure to comply with these professional duties constitutes a disciplinary offense."

[16] Principle III. The role and duties of lawyers. Point 3: "the lawyer's duties towards the client include: [...] c) taking legal measures to protect, respect and exercise the rights and interests of their clients."

democratic society based on the rule of law, the European Court of Human Rights has ruled in several occasions in the sense of the need to impose effective guarantees to protect the opinions of a lawyer, even when such guarantees are either in minority or contrary to those advanced by the authorities or even include an exaggeration.

In this regard, with applicability in this case, the Court indicated in Nikula v. Finland (31611/06) that "*assessing the relevance and usefulness of a defence argument should be the lawyer's privilege, subject to the court's assessment, without being affected by a possible 'chilling effect' that may be produced even by a relatively light criminal penalty or by the obligation to pay damages for the damage caused and the costs incurred*." (italics mine) (paragraph 54).

In the same perspective, the Court reiterated in Steuer v. the Netherlands (39657/98) the principle that the mere threat given by the possibility of *ex post facto* control of the claims formulated by a lawyer in the exercise of his representation function could be very difficult to reconcile with the obligation to defend the interests of his own client: "[…] *even so, the threat of an ex post facto control of his critics regarding the way in which a proof was obtained from his client is difficult to reconcile with the obligation to defend the interests of the client and could have a "chilling effect" on the practice of the profession"* [italics mine] (paragraph 44).

Further, in the case of Radobuljac v. Croatia (51000/11), the Court was called upon to provide further clarification on the link between the freedom of expression and the independence of the legal professions, showing that lawyers are obliged to defend their clients in a zealous manner:

" 60. The specific status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts. They therefore play a key role in ensuring that the courts enjoy public confidence. However, for members of the public to have confidence in the administration of justice they must have confidence in the ability of the legal profession to provide effective representation (see Morice, cited above, § 132). That special role of lawyers, as independent professionals, in the administration of justice entails a number of duties, particularly with regard to their conduct. Whilst they are subject to restrictions on their professional conduct, which must be discreet, honest and dignified, they also enjoy exclusive rights and privileges that may vary from one jurisdiction to another – among them, usually, a certain latitude regarding arguments used in court (ibid., § 133).

61. Therefore, the freedom of expression of lawyers is related to the independence of the legal profession, which is crucial for the effective functioning of the fair administration of justice (ibid., § 135). Lawyers have the duty to defend their clients' interests zealously, which means that they sometimes have to decide whether or not they should object to or complain about the conduct of the court (ibid., § 137)." [italics mine]

Then, in a January 2018 ruling in Ceferin v. Slovenia (40975/08), the Strasbourg Court again noted that "it should be up to the lawyers themselves, subject to court evaluation, to assess the relevance and usefulness of a defence argument. *The court reiterates that freedom of expression "is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb"* (paragraph 61).

Finally, in a September 2018 ruling in Tuğluk and Others v. Turkey (30687/05 and 45630/05), the Strasbourg judges stated *expressis verbis* that the lawyer is an intermediary between the litigants and the

courts, occupying a central position in the administration of justice and having a key role in ensuring public confidence in the courts, their mission being, therefore, fundamental in a democracy and a rule of law[17].

The entire European jurisprudence, cited above, reinforces a number of principles applicable with priority to the case:

a) The lawyer must be ensured full sovereignty and discretion on the opinions / arguments that are useful to the defence of a client. Any *ex post facto* control procedure of these claims, which are nonetheless subject to the assessment of an authority / jurisdiction has every chance to be contrary to the fundamental right to freedom of expression, all the more essential considering the central role of the lawyer in a democratic society.

b) However, the establishment of an *ex post facto* control procedure on the lawyer's claims may question the effectiveness of practicing this profession. Moreover, the establishment of the option to criminally charge the defences and arguments issued by a lawyer when supporting a client's case represents a violation of art. 10 of the Convention.

c) In the interest of ensuring full freedom of expression and considering the central role that the lawyer's profession plays in a democratic society, lawyers benefit from a wide margin of appreciation in the expression of opinions, being even allowed to them to formulate minority ideas / arguments, divergent in relation to a majority, ideas /arguments that may shock or disturb.

d) Defending, "zealously" even, the interests of the client is not an option, but a duty of the lawyer[18].

To decide the opposite would mean that in all criminal cases in which the defence lawyer contradicts the opinion of the prosecutor expressed in the indictment, he would commit an offense whenever he knows that his client is supporting an apparently uncertain factual thesis. At the same time, whenever a client's rights involve probative or legal difficulties, the lawyer should give up the client in violation of his

[17] "First, the Court recalls the principles of its case-law applicable in this case, according to which the specific status of lawyers, intermediaries between the justices and the courts, makes them occupy a central position in the administration of justice. For this reason, they play a key role in ensuring that the public has confidence in the action of the courts, which have a fundamental mission in a democracy and a rule of law [.]".

[18] „Unlike the situation of the representatives of other powers or of the representatives of the general public, the activity of influencing the judge also comes within the scope of the profession of lawyer. We do this every day, by the way we present our cases in court, we contradict the evidence of the opponents or we support legal bases. The lawyer provides the judges with information, arguments and grounds of law. Judges will reject or consider what they hear in the courtroom. The dispute is a necessary influence on the judges and part of the way in which the judge reaches a final decision. This influence must be exercised by independent lawyers. (…) The citizen has the right to be assisted by a lawyer, both in criminal cases and in civil cases. To ensure the right of the person to assistance, the service provided must be of a certain quality. The legal profession is regulated to ensure public trust in lawyers. The rules, whether they are international recommendations or national legislation, will focus on the need to ensure the independence of the legal profession. Quality is defined not only by the level of legal powers held by the person concerned, but also by his ability to act independently." Berit Reiss-Andersen A Speech from a Lawyer in Practice: The Independence of the Judiciary and the Independence of the Legal Profession - Dependent on Each Other in Regulating Judicial Activity in Europe, A Guidebook to Working Practices of the Supreme Courts, Elgar Publishing House, 2014, at pp. 209-210 citate.juridice.ro [last accessed on January 19, 2019].

professional obligations.[19] To bring an action in court (on behalf of the client and based on a mandate) is nothing more than the exercise of a fundamental right guaranteed by the fundamental law itself. Similarly, the request for the entering into possession of a building on the basis of rights recognized by the courts represents the exercise of a right. All these legal activities represent the expression of a legal opinion in the appropriate procedural framework, on behalf and in the name of the client. Or, the lawyer is bound by the obligation to perform - in order to comply with the deontological rules - all the diligences that are useful for defending the interests of his client. Thus, the lawyer must and has the obligation to invoke all the operative reasons to make such a defence. In the same sense, and recently, in March 2018 in the Mikhaylova v. Ukraine (10644/08), the Strasbourg Court has shown that the infringement of a lawyer's freedom of expression can lead to violations of Article 6 of the Convention, if such a breach concerns the claims made by a lawyer in a trial[20].

In accordance with the above-mentioned case law of the ECHR, the case law of the High Court of Cassation and Justice and of other highest courts has emphasized on several occasions that the expression of opinions regarding the legal classification of a client's factual situation under no circumstances cannot lead to criminal liability, this being a vocation of any lawyer by virtue of Law no.51/1995. At the same time, it has been shown that the exercise of activities that are confined to the duties of the lawyer under the Law no. 51/1995 cannot justify criminal charges such as the support of a criminal group. *In this sense we show:*

a) *"Analysing the documents submitted with the file, the court found that in the case there are no indications leading to the conclusion that the respondent committed acts of criminal nature.*

As defender of the administrative-territorial unit, he exercised its powers in accordance with the provisions of the Law no. 51/1995, and especially those provided by the civil procedural rules, the defences formulated in the above mentioned case not being restricted by anyone else than the court. It is the task of the court that has to settle the case having as object "land fund" to establish the procedural quality of the parties, the reconstitution of the property rights of the parties, the way in which this will be ordered, and so on following the probationary assembly administered by motivated admission or dismissal of the defences formulated by one side or the other, on the occasion of its judgment." (HCCJ, Criminal Decision no. 243 / 26.01.2012)[21].

b) *"In his capacity as lawyer, the respondent appellant, L.E. has filed legal actions and claims based on the legal assistance contracts concluded*

[19] "If the lawyers were to take no action until they were sure that it was fair, an individual would be completely stopped by a trial over his claim, although, if it was examined judicially, it could be found to be a very fair claim"- Dr. Samuel Johnson, Journal of a Tour to the Hebrides, 1773.

"In no case does the whole evil lie on one side, and only the good on the other." - Thierry Massis, Lwe principe de verité et l'avocat (the Principle of truth and the lawyer) in Mélanges en l'Honneur d'Yves Mayaud: Entre tradition et modernité: le droit penal en contrepoint, Dalloz, June 2017, p. 659.

[20] The Court considers that an interference with the freedom of expression during a trial could raise a problem based on art. 6 of the Convention on the right to a fair trial. Although freedom of expression of the parties should not be unlimited, the "equality of arms" and other equity considerations may advocate for a free exchange of arguments between the parties (see Nikula case, cited above, § 49, and Mariapori case , cited above, § 63)."

[21] http://www.scj.ro/1093/Details case law?customQuery% 5B0% 5D.Key = id & customQuery% 5B0% 5D.Value = 68 344.

with SC 'CI' SRL, the judicial activity being carried out, as it results from the judicial decisions in the file, in the conditions and in compliance with the provisions of the Law no. 51/1995 for the organisation and the practice of the lawyer's profession and the civil procedural rules incident in the cases brought to trial. [...] It is also worth mentioning that the court decisions in the file, which dissatisfied the petitioner the Administration of the Real Estate Fund and which are not considered enforceable against other party, can be censured, according to the law, by ordinary and extraordinary means of appeal" (HCCJ, Criminal Decision no. 877 / 07.03.2011)[22] .

c) "*In this regard, it is found that it was correctly held that one of the constituent elements of the offense is missing, as the material element of the misrepresentation (forgery) offence cannot consist in the lawyer's pleadings, made during the practice of his profession, whose nature involves the submission of all due diligence to ensure the interests of the party he represents in a trial. Moreover, the solution is pronounced by the court on the basis of all the probative material in the file, the possible false claims or writings of the lawyer being unable to constitute the basis for pronouncing the decision.*

The petitioner's critics regarding the solution pronounced in the civil case can be invoked through the exercise of legal remedies, where there is the possibility to have them verified by the judicial control courts.

Moreover, the dissatisfaction of any person regarding the performance of lawyers can be invoked under the conditions expressed by the Law no. 51/1995, at the bar association to which the lawyers are registered with, specific sanctions for this liberal profession being provided." (HCCJ, Criminal Decision no. 849 / 04.03.2010)[23] .

d) "*(...) no evidence was presented in the present case showing that the lawyers from SCP xxxx have tried to mislead the court. According to art. 174 para. 4 of the By-laws, at any time the lawyer should not knowingly submit false information or mislead. As mentioned above, the procedural documents… were based on: legal provisions, existing information in public registers (BPI), documents issued by the respondent debtors…, legal acts invoked by the appellant – claimant in the present case… Or, the interpretation of the legal provisions / of the contractual clauses is subject to the censorship of the court. At the same time, the exceptions / claims / defences formulated by the parties are verified by the court in relation to the legal / contractual provisions and to the evidence administered. As such, there is no evidence to show that, by the procedural documents performed on the occasion of the appeal judgment, SCP xxxx would have knowingly presented false information or would have tried to mislead the court*". (Bucharest Court of Appeal, 5th Civil Section, Civil Decision no. 839 / 05.21.2015).

[22] http://www.scj.ro/1093/Detaliijurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=75380.

[23] http://www.scj.ro/1093/Detaliijurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=52227.

e) *"(...) Certainly, these claims of the petitioner cannot lead to the criminal liability of the magistrates who have pronounced the respective judgments, nor of the prosecutors who carried out criminal proceedings or verifications of the respective solutions, being unable to reach the extension of the area of active subjects of the offenses for which the petitioner has filed a criminal complaint, with the consequence of circumventing the legal provisions regarding the exercise of the remedies and respectively of the res judicata of the judgments given in Romania.(...) Regarding the respondent lawyers..., the claims of the petitioner according to which, by granting the legal assistance, the respondents would be guilty of committing the offenses of deception, abuse in service against the interests of persons and false testimony, because they would have defended with deceit and by criminal association with the magistrates; such claims are obviously contrary to the legal provisions and cannot lead to the criminal liability of the respondents. This is because they were hired to provide legal assistance. As consequence, applicability was made in terms of the provisions of art. 37 of the Law no. 51/1995 for the organization and the practice of the lawyer's profession, with the subsequent amendments and completions. This article establishes in paragraph 6 that the lawyer does not answer criminally for the claims made orally or in writing before the court or other bodies, if these claims are related with the defence and necessary to the cause entrusted to the lawyer.*

Also, according to para. (1) of article 37 of the same normative act, while practicing the profession, the lawyers are protected by the law and cannot be assimilated to the civil servants or to another employee. Thus, as during the execution of the preliminary acts, it was not established that the respondents violated any provision foreseen by the Law no. 51/1995 or by the By-laws of the profession of lawyer, in force, it follows that the simple statements of the petitioner, made in the context of a case pending in the court, cannot give rise to a legal criminal law relationship, more so, as free access to justice is guaranteed to any person according to the constitutional provisions." (Ploieşti Court of Appeal, 5th Civil Section, Civil Decision no. 123 / 18.07.2011).

f) "*In terms of assessing the legal situation of the defendants and their contribution to the alleged criminal activity, it should be mentioned that, the analysis of the typical elements of the deed is done for each defendant and in particular, the activities carried out by them in the accomplishment of the objective side of the alleged committed offence are taken into account. Or, in the case, from the administered evidence it results that the defendant H. carried out, within the SC T.T.T.T.T. SRL, only activities that are confined to the duties that were incumbent to him and for which he was hired (the certification as a true copy of the mediation contracts, the declarations of acceptance and declarations on their own responsibility) and not (actions) to support the activity of an organized criminal group or the exploitation through work of the 15 injured persons. At the same time, evidence was administered in connection with the activities carried*

out by the defendant H., during the reference period, which the defendant himself detailed and proved with the documents filed in the defence, but all these evidence support the appreciation that the acts performed by the accused are in compliance with the legal norms and his attributions and cannot outline the material elements of the objective side of the facts of constituting an organized criminal group and human trafficking." [italics mine] (HCCJ, Criminal Decision no. 435 / A / 04.11.2016).

These findings of the highest court can be found even in the case law of the Brașov Court of Appeal:

g) "*Moreover, the provisions of art. 37 paragraph 6 of the Law no. 51/1995 (the updated form of the law) provide that the lawyer is not criminally liable for the claims made orally or in writing, in the appropriate form and in compliance with the provisions of para. (5), before the courts, the criminal investigation bodies or other administrative bodies of jurisdiction and only if these claims are related to the defence in that case and are necessary to establish the truth.*

The assertions made in the written conclusions are confined to the aforementioned provisions, being related to the defence in that case and were necessary to establish the truth, the defender being able to formulate interpretations of the legal provisions in favour of the party he represents, in order to ensure a real defence for that party." [italics mine] (Brașov Court of Appeal, Criminal Judgment no. 44 / F / 27.04.2009)

h) "*The court has the professional obligation to verify the claims made by the lawyers and to take them into account or to dismiss them according to the evidence that is administered in the file.*

According to the law no. 51/1995, as correctly stated, the lawyer has the right to make oral or written statements according to his professional beliefs in order to defend the interests of the client he assists. The lawyer is defended from the criminal liability, by law, for the claims made before the courts during the professional activity because otherwise it would be impossible to practice this profession, insofar as the expression of a point of view could have consequences of criminal order. On the other hand, it should not be lost sight of the fact that the lawyer is obliged to defend the interests of his client and to make statements only in his interest.[24]" [italics mine] (Brașov Court of Appeal, Criminal Judgment no. 40 / F / 04.05.2009).

i) "*The Court holds that the statement of defence is the procedural act by which the defendant responds to the sue petition, seeking to defend himself against the applicant's claims.[...] The party's assessment of the case is subjective in nature and is not decisive in the decision that the invested panel of judges should make. The judges of the case have the obligation to verify the parties' claims by reference to the evidence administered in the case, and when deliberating they will keep the facts that have been proven, they will analyse if those fact fall within the rule of probable law, established during the debates and, if so, they will draw the necessary conclusion, ruling on the claims raised before them, thus settling the dispute between the parties.*

Therefore, the facts or circumstances attested in the court decision are due to the

[24] http://www.rolii.ro/hotarari/58933600e490098434000c89.

judge's assessment of the relevance and cogency of the means and reasoning proposed by the parties, and the rule "the matter subjected to judgement is deemed to be true" has been interpreted even since the Roman law in the sense that "the ruling given by the judge is not the truth, but it shall be deemed as the truth." (Brașov Court of Appeal, Criminal Judgment no. 27 / 20.04.2010)[25].

Actions such as informing the client about the evolution of the file, the meetings with the client, do not constitute violations of professional ethics. On the contrary, their lack of would have constituted not only an infringement of professional ethics, but also of the elementary norms concerning the duties of the lawyer profession, which impose a certain discipline regarding the lawyer's relationship with the client.

The situation is similar with regard to the two buildings to which, in the analysed case, the activity of the lawyer is reported. In relation to the forest land, it is not conceivable that making notifications in the virtue of an irrevocable restitution decision and a possession decision would be contrary to the profession's ethics or an illegal practice. A contrary claim would be equivalent not only to denying the essence of a deontological behaviour (the lawyer does not support his client to execute a favourable judicial act), but also with a challenge of the judiciary (legitimizing the lawyer to ignore not only the client's interests, but also the result of a dispute). Any notification regarding the enforcement of a decision does not contain only the request itself, because it would be redundant (the decisions should be executed voluntarily, without the need for insistence from the interested parties); the role of such proceedings is precisely to bring to the attention of the party at fault the sanctions provided by law if such a decision is continuously ignored, despite its definitive and binding character.

Finally, with regard to the second building - there is no norm to incriminate:

- the representation before the authority that solved the restitution application; on the contrary, in addition to the above-mentioned statutory norms, there were special provisions in 2008: according to art. 23 paragraph (2) of Law no. 10/2001, "*the entitled person has the right to bring before the management bodies of the unit holding the request for restitution in kind. To this end, the entitled person will be invited in writing, in due time, to take part in the works of the management body of the holding unit*".

- the submission of a document that summarizes the client's arguments

- the issuance of legal notes related to the situation of the good. These notes are not even nominated by the prosecution, being addressed in a generic way. However, as we have shown, the writing of notes expressing the legal opinion of a lawyer constitutes a specific legal activity, which cannot lead to criminal liability. Likewise, informing the client about the identification and existence of certain risks related to possible alternative, unfavourable interpretations of the law, is confined to a usual legal and deontological legal advice activity. No professional lawyer will offer the client certain, absolute guarantees regarding the way the law will be interpreted, the factual situation deduced from the analysis of public institutions or the courts[26]. In practice, the

[25] http://www.rolii.ro/hotarari/5893360ae490098434002503.

[26] This principle was also ascertained regarding the activity of other legal professions: "… This aspect only confirms that the text in question is susceptible to different interpretations, its formulation allowing a wide margin of appreciation. Therefore, it cannot be held that the case prosecutor acted out of gross negligence, as long as the

client is always informed about the identification of possible divergent opinions and the Legal Audit Report submitted to the client has proven this.

All these aspects relate to the thorough preparation of exchanges of legal ideas and can never have criminal relevance. There are numerous normative texts that can offer different interpretations[27], and in terms of the text that is the object of the prosecutor's criticisms, even the highest court showed that there was a "*non-unitary practice of the courts in the matter of the Law no.10/2001* "(Court resolution no.338 / 11.03.2016 of the High Court of Cassation and Justice - p. 39). Moreover, the lack of a unitary practice in the matter of the Law no. 10/2001 appears without denial even from the rulings delivered in the appeals in the interest of the law that had as object different provisions of this law[28]. Likewise, it is obvious that the expression of legal opinions during various consultations, written documents, and procedural documents can under no circumstances lead to criminal liability. The jurisprudence confirmed these principles[29]. In relation to the legal documents presented by the lawyers within the law firm involved in the course of the retrocession proceedings, we recall the Romanian doctrine that held that *"the lawyer is not a body of investigation, cannot abolish a legal act vitiated by absolute nullities more than apparently, nor does he own an active procedural legitimation, the limits of the practice of his activity being strictly regulated by the Law no. 51/1995 and the By-laws of the lawyer profession."*[30]

formulation of the legal texts under discussion allows interpretations that lead to two diametrically opposed conclusions, both plausible. (…) "- Bucharest Court of Appeal, 8th Section of administrative and fiscal litigations, Civil Sentence no. 480 / 16.02.2016, published in the Bulletin of the Courts of Appeal no. 10/2016, p. 7, CH Beck Publishing House.

[27] "… the text in question is susceptible to different interpretations, its formulation offering a wide margin of appreciation. Therefore, it cannot be held that the case prosecutor acted with serious negligence, as long as the formulation of the legal texts under discussion allows interpretations that lead to two diametrically opposed conclusions, both plausible. "- Civil Sentence no. 60 / 16.02.2016 pronounced by the Bucharest Court of Appeal - cited in the Bulletin of the Courts of Appeal no. 10/2006, p. 7.

[28] Such as the Decision no. 27 of November 14, 2011 and Decision no. 1 of January 19, 2015.

[29] "The Prosecutor General further stated that the petitioner DM did not present arguments .....It is not possible to withhold the responsibility of the offender PN for the alleged offences. She exercised her profession in good faith, she assisted the party in all the procedural cycles, the acts and the facts deduced to the court were not considered illegal by any of the courts that have investigated the case. It is known that the profession of lawyer is free and independent, has autonomous organization and functioning. According to art. 39 para. 1 of Law no. 51/1995 for the organization and the practice of the profession of lawyer republished in the exercise of the profession, the lawyers are protected by law without being able to be assimilated to the public official or to another employee, and according to art. 39 para. 7 the lawyer does not answer criminally for the claims made orally or in writing, in an appropriate form, respecting the solemnity of the court hearing, before the courts, as long as the claims concern the defense in that case and are necessary to establish the truth. "- Ploiești Court of Appeal, Sentence no. 91 / 09.05.2011. - http://www.rolii.ro/hotarari/5899c2c3e4900990330019b0.

"*The petitioner argues that those reported and presented by the lawyer in these conclusions are unreal, but, as the prosecutor also noted, the lawyer can exercise his prerogatives and set out his own opinions in conclusions (written or oral) filed in a civil, criminal case, etc.. The lawyer may use the arguments he considers relevant and conclusive according to his legal logic to perform the defence, and these statements and defences cannot be considered as offenses of forgery in statements and use of forgery. Nor the respondents (defendants in the civil case) can be held criminally liable for the defence made by their chosen lawyer. In these conditions, it is only the court, where the case is pending, that will analyze and assess the merits of the defences made by the chosen lawyer of the (respondent) defendants* " - Ploiești Court of Appeal, Sentence no.74 / 04.04.2011 - http://www.rolii.ro/hotarari/5899c2c0e490099033001402.

[30] In this regard, see PhD Candidate Constantin Neacșu, Lawyers are asking – the exercise of a right ", justifying cause for the lawyer who draws up subsequently acts used for committing crimes, available on

In conclusion, considering that the activity of a lawyer, a member of a law firm, performed with other lawyers in compliance with the mandate granted to the firm based on the legal assistance contracts signed by clients and in full compliance with all legal, statutory and deontological rules regarding the fair exercise of the profession of lawyer, can be considered of a criminal nature only as a result of a personal interpretation that a judicial authority makes about the good faith of the lawyer means to ignore all the national and supranational protection instruments that guarantee the freedom and independence of the lawyer's profession. The lawyer must be guaranteed the freedom to perform defences according to his conviction, in relation to the elements that he considers to be in favour of his client and in relation to the chances that he has to have his pleadings accepted[31].

Conclusions

The exercise of the lawyer's profession, especially in cases in which significant financial, political, economic or even social interests are involved, is likely to generate a real vulnerability for any member of the Bar association. The potential risks, whatever their nature or the authority that causes them, can act in a discouraging or dissuasive way for the lawyer, which really affects the way the profession is practiced and the independence that should characterize the lawyer's activity. The identification of an effective set of guarantees and the possibility of having real protection from the authorities contributes significantly to removing these risks.

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[31] C. Ghigheci in N. Volonciu et al., *Criminal Procedure Code Commented*, 3rd edition, revised and added, Hamangiu Publishing House, 2017, p. 36.

EUROPEAN AND CANADIAN PROVISIONS ON KEEPING CONTACT BETWEEN THE PERSON DEPRIVED OF HIS LIBERTY AND HIS FAMILY, DIFFERENCES AND SIMILARITIES

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Abstract

Every democratic society seeks to create a stable environment for its members, trying to identify the needs of citizens, in all aspects, creating legal norms to ensure the proper functioning of society as a whole is one of the needs. The family as an institution, but also as a form of people's approach, requires maintaining a balance in the family relations, a desideratum pursued by both society and its members. Situations where a family member is deprived of liberty following a final court decision raise various questions about the family situation and the links between the family and the person in custody. The European states, as well as Canada, have recognized the importance of the family in the life of a person deprived of liberty by adopting rules in the field of penitentiary that contribute to the desideratum of the proper functioning of the family. But these rules also present, carefully scrutinized.

Keywords: *family, convicted, Canada, European states, rules.*

Introduction

Man and the satisfaction of his needs have always been objectives pursued by each democratic society for its members, both in identifying needs and in meeting them.

The testimony of the efforts made by the European states and not only, in the attempt to establish as general rules, the rights considered as fundamental and on which the EU Member States report in the creation of the general framework of the rights of their citizens, stands "THE FUNDAMENTAL RIGHTS OF A EUROPEAN UNION" proclaimed by the European Commission, the European Parliament and the Council of the European Union on 7 December 2000 at the Nice European Council[1].

Since the Preamble to the Charter, the direction that the European states want to embrace, namely "the peoples of Europe, establishing an ever closer union among them, have decided to share a peaceful future based on common values", the common values representing even the fundamental rights in the Charter, which concern inter alia the right to live, respect for private and family life, marriage and the founding of a family, family life and freedom and the principle of non-discrimination in accordance with Union law and international law established by international conventions to which the Union or all the Member States are parties, in particular the European Convention for the Protection of Human Rights and Fundamental Freedoms and the constitutions of the Member States.

The existence of the principle of non-discrimination shows the equal treatment

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[1] https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:12012P/TXT&from=PT.

that the European Union, through its states, applies to its citizens with regard to the rights they enjoy, irrespective of the legal situation in which they are in the state of liberty or imprisonment.

The need for behavioral recovery of prisoners has far greater valences than just in respect of whom are personally need to be pursued and the impact of their actions on their families and society in general.

Just as society in its essence is constantly moving and evolving, the legal and behavioral norms must follow its course through periodic changes and improvements in order to shape its citizens' behavior to create a climate of order and safety.

It is true that in most cases the state of affairs determines the normative changes, but trying to identify the norms with the best and obvious results in different legal systems can lead to the creation of a new and adapted idea that will result in beneficial changes in the field under consideration.

The rationale for choosing Canadian legislation alongside the European one as regards the existence of the rights of detainees to stay in touch with the family was based on the recognition of the Canadian system with extensive democratic valences, from which new elements could be identified to ensure respect for the rights of individuals incarcerated, as well as identifying good practices in a non-European state. The study of the European and Canadian legal provisions relating to keeping contact between the person deprived of his liberty and his family in identifying the differences and similarities between them could support the need to recover the imprisoned persons and to maintain their families united.

European Provisions

I. On 1 September 2015, 1 483 126 people were imprisoned in the prisons on the territory of Europe[2] according to the Annual Penal Statistics Center, but according to the same source, the number of imprisoned persons increased to 2016.

The presence of so many incarcerated persons as well as the tendency to increase their number arises the interest of companies in identifying the situations and conditions that favor the increase of crime in order to counter this phenomenon as well as the negative consequences generated for the society in its whole as well as on each individual individual.

Man is a social being (Aristotle, Politics)[3], for which his isolation as a result of committing antisocial deeds, though necessary, produces in himself confused feelings that can seriously affect him sometimes without possibility of recovery.

At European level, over the years, there has been identified the need to establish rules that directly address the situation of imprisoned persons, in relation to their large number, and the fact that after the incarcerated there are many more people who are subject to conditions of suffering as a result of the incarceration of a family member.

Thus, on January 11, 2006, at the 952nd Meeting of Delegates Ministers, the Committee of Ministers adopted the RECOMMENDATION OF THE COMMITTEE OF MINISTERS OF THE MEMBER STATES, REGARDING THE EUROPEAN PENALTY RULES OF REC (2006) 2[4].

In addition to the general principles, rules on health, order and safety etc., and conditions of detention have been

[2] https://www.coe.int/en/web/prison/space- Council of Europe Annual Penal Statistics SPACE I – Prison Populations Survey 2015 UPDATED ON 25TH APRIL 2017.

[3] https://www.scribd.com/doc/146325879/Man - human being.

[4] https://rm.coe.int/16804c8d9a.

established, being inserted in Art. 24 even in Title II, where the detainees were allowed to keep in touch with the outside.

According to art. 24 detainees will be allowed to communicate, as often as possible, by mail, telephone or other means of communication with their families, third parties and representatives of outside bodies, and receive visits from such persons, so that any restriction or oversight of the communication or visits, however, allow a minimum acceptable contact level.

At point 4 of art. 24 states that "*The arrangements for making visits should allow detainees to maintain and develop their relations with their families as normally as possible*", which shows the recognition of the importance of family life in the prisoner's life and vice versa, as also confirmed by the following of the same art. 6. „*The detainee should be immediately informed of the death or serious illness of a close relative. 7. Whenever possible, the detainee should be allowed to leave the prison either under escort or free to visit a sick relative, attend funeral or other humanitarian reasons. 8. Detainees should be allowed to immediately notify their families of imprisonment or transfer to another prison as well as of serious illness or injury. 9. Even if the detainee requests or not, the authorities will immediately inform the detained spouse of the detainee / detainee or close relative or a person previously designated by the prisoner of death, illness or serious injury or transfer of the detainee to a detainee, another penitentiary or a hospital*".

Conscious of the natural differences between men and women, in full compliance with the principles of equality before the law, the European states have included special rules on the situation of women and children in REC (2006) 2 Recommendation on detention conditions.

Thus, Article 34 provides that *1. In addition to the specific provisions of these rules, the authorities must respect the needs of women in detention, paying particular attention to physical, occupational, social and psychological needs, when making decisions that affects the aspects of their detention. 2. Particular efforts must be made to allow access to special services to those with special needs, such as those who have suffered physical, mental or sexual violence. 3. Detainees will be allowed to give birth outside the penitentiary, but if a child is born in the penitentiary, the prison management will provide the necessary support and facilities.*

The Member States' interest in specifically regulating the right of women to benefit from private, physical, occupational, social and psychological needs does not constitute a violation of the principle of equal treatment between men and women under the Charter of Fundamental Rights of the European Union, from the physiological and anatomical point of view, the two genres are different and implicitly have different needs in certain situations.

The regulation of the possibility of the child's birth within the penitentiary can only be seen as a normality situation that was required to be mentioned, given the human condition.

It is worth noting that the normative act contains special provisions regarding the small children, specifying in the art. 36 that "*Small children may remain in prison with a detained parent only if it is in their best interest. They will not be considered "inmates". 2. When a young child can stay in the penitentiary with one of the parents, there must be a nursery with qualified staff, where the child can stay when the parent participates in an activity that is not allowed for small children. 36. 3. A special infrastructure must be set up to protect young children.*

The normative text is intended to keep the child with one of the parents, not

necessarily with the mother, as can be seen from par. 1 and 2 of art. 36, where it is mentioned that a small child can stay in the penitentiary with one of the parents if it is in his / her best interest.

Under such circumstances a nursery with qualified staff must be provided.

This provision is of particular importance, once again applying the principle of equality between men and women, in this case between father and mother, as is the role of both parents in the child's life.

However, some cases call for the need to regulate certain categories of persons, in particular juveniles, so that in Art. 35 of Recommendation Rec (2006) 2 provides for special conditions applicable to persons under the age of 18. *"In exceptional cases where children under the age of 18 are imprisoned in an adult penitentiary, the authorities will ensure that in besides the services available to all inmates, detained children will have access to social, psychological and educational services, religious education and recreational programs or their equivalent available to children in the community. 2. All child prisoners enrolled in the compulsory education process will have access to it. 3. Additional assistance will be provided to the prison-released children. 4. In exceptional cases where children are imprisoned in an adult penitentiary, they shall be accommodated in a separate area from that visited by adults except in cases where this is not in the interest of the child.*

The special treatment applicable to minors in providing access to social, psychological and educational services, religious education and recreational programs can only be regarded as a necessary norm for their harmonious development despite the special situation in which they are at the time of execution punishment.

The execution of punishments must not interfere with the compulsory schooling stages, but instead the penitentiary system must make efforts to maximize the time spent by the juvenile in custody for its education and re-socialization.

The child's superior interest should be the primary motivation in everything that concerns the minor both in the penitentiary and after the release from the penitentiary, given the fragile balance generated as well as the possible family deficiencies.

The additional assistance mentioned in the normative act should be considered more than merely counseling but should consist in the effective monitoring of children who have been identified with more serious behavioral problems as well as those from families where there is no sound morally or material support.

The special situation of life in the penitentiary has demonstrated the need for direct regulations of the way of life and the execution of the punishment, as well as the ongoing transformation of the way in which the existing society must be approached at the level of a penitentiary.

Even at the end of REC (2006) 2, it is stated that *"European Prison Rules need to be reviewed regularly"*, recognizing the need for frequent changes in how to address the situation of people deprived of their liberty.

Continued concern over the situation of people deprived of their liberty following the execution of a prison sentence led to the European Parliament's elaboration of resolutions on prison systems and prison conditions.

European Parliament resolution of 5 October 2017 on prison systems and prison conditions (2015/2062 (INI)) (2018 / C

346/14) The European Parliament[5] (hereinafter referred to as the Resolution) contains guidance to Member States on the link between detainees and their families, as well as the situation of imprisoned women or imprisoned minors.

Thus, in paragraph 26 of the Resolution, it is proposed that Member States pay particular attention to the needs of women in prisons during pregnancy but also after they have given birth by providing adequate facilities for skilled and specialized breastfeeding and care, reiterating that it is necessary to analyze the application of alternative models that take into account the living conditions of prison children, considering that automatic separation of the mother of a child creates major emotional disturbances in children and can be considered as an additional punishment affecting both the mother and the child.

By their very nature, women are created to give birth, but also nurture the newborn, being essential for the baby's harmonious development of close proximity to the mother and the nutrition she provides by breastfeeding.

The mother's ability to keep her child along with her during the execution of the punishment must first be seen as a necessity for the well-being of the child and ensuring a normal development, the sanction being applied only to the mother in the execution of a punishment, not to the newborn.

At the same time, the possibility of keeping the child by the mother can also benefit from its behavior, leading to the adoption of appropriate behavior to social norms and thus creating the premises of release from the prison depending on the circumstances of each case.

Paragraph 28 of the Resolution demonstrates that family life in detainees' lives is of particular value and states must be encouraged to create the conditions necessary to keep in touch with the family.

Member States are therefore encouraged to ensure that detainees have regular contacts with their families and friends, giving them the possibility to execute their sentences in establishments near their homes and by promoting visits, phone calls and the use of electronic communications, subject to authorization to the judge and under the supervision of the prison administration, in order to maintain family ties.

The law maker, through these recommendations, does not lose sight of the fact that the notion of a family should not be seen in the strict sense, but in its broad sense, concluding that it was intended to create the possibility for detainees to keep in touch with persons with whom they did not necessarily have a blood link or as a result of the conclusion of civil acts.

This approach is quite natural, as reality confirms that the notion of family is in a continuous transformation or rather a complement, in such a way that the limitation of the access of detainees to certain persons, whom civil law qualifies as part of the notion of "family," would prevent them from being able to keep in touch with people with whom they developed strong relationships but who can not fit into the "classical" family notion.

However, the way to set up legal rules is to give people the opportunity to exercise their rights in accordance with law and good morals but without creating unnecessary constraints and not resulting from the consequences of committing crimes, a lack of attention or legal indifference.

Also in support of maintaining the connection between the detainee and the

[5] https://eur-lex.europa.eu/legal content/RO/TXT/PDF/?uri=OJ:C:2018:334:FULL, Official Journal of the European Union C343 Year 61 27 September 2018 European Parliament Resolution of 5 October 2017 on prison systems and prison conditions (2015/2062 (INI)) 2018 / C 346/14, p. 94".

family, paragraph 29 of the resolution states that the policy of placing detainees in prisons dispersed in the territory is condemned, as this is an additional punishment for their families, some of which may even constitute an infringement of Article 8 of the European Convention on Human Rights (right to respect for private and family life).

Points 30-37 continue to provide guidance to Member States on the situation of minors in prisons.

Thus, it is reiterated the importance of ensuring that children are treated in prison taking into account their superior interest, by separating adults from the mainstream, in order not to be exposed to the risks of abuse and violence or negative behavioral patterns, trying not to be deprived of specific care that such a vulnerable group needs, including during transfers of detainees, giving them the right to maintain contact with the family, unless there is a judgment to the contrary, and mentioning the need to create special teenage centers.

Life in the penitentiary is more difficult as minors do not have a life experience to help them identify hazards, so that without markers they become safe victims in the hands of "life-spanning" adults.

Each child should receive care, protection and all the necessary personal assistance - social, educational, vocational, psychological, medical and physical - which it may need depending on age, gender and personality, encouraging Member States to promote centers closed-school education to provide pedagogical and psychological support to minors, rather than resorting to deprivation of liberty.

Regular and meaningful contacts with parents, family and friends are encouraged through visits and correspondence, both to help the child not to feel ashamed, but also to identify possible harmful family environments in order to be able to act on them and subsequently release the minor and reintegration into the family, identifying problems and finding solutions.

It is reiterated the importance of paying full attention to minors in terms of their emotional and physical needs, and it is necessary to apply programs to prepare them in advance to return to their communities, to manage relationships with their families, in those situations where problems in the support family have been found, identifying opportunities for tuition and employment, as well as socio-economic status.

It has not been forgotten that there are situations where children whose parents are in custody are discriminated against by other members of society simply because they have their parents in custody, so that these children have to be monitored to strengthen social integration and build a fair and inclusive society.

This resolution recognizes the right of children to maintain direct contact with their detained parent and, at the same time, reiterates the right of the inmate to be a parent, considering, in this regard, that prisons should be provided with adequate childcare facilities, where they should be supervised by well-trained guards, social workers and volunteers from NGOs who can help children and their families during their visits to prisons.

In other words, the detainees' right to keep in touch with the family and to be present at important moments in the education of their children is recognized, thus protecting the interests of minors, but also the right of the family to keep in touch with the person imprisoned.

It is natural to think of this, especially since the family, especially children, should not be punished for the deeds of their parents, nor should they be subjected to the loss of a parent by being imprisoned and away from the family.

Another recommendation made by the European Parliament in the above-mentioned resolution is concerning detained persons in a Member State other than the State of residence which encounters more difficulties in maintaining contact with their families and it is necessary to have electronic communication facilities with families, to give them opportunities, even if less, to keep in touch with the family.

Canadian Provisions

II. At Canadian level, the regulation of the fundamental rights and freedoms of persons is found in the Canadian Charter of Rights and Freedoms of 1982, which mentions fundamental rights, democratic rights, movement rights, legal rights and the right to equality for Canadian citizens.

It is worth noting that the protection of the rights mentioned in the Charter is ensured only in cases of violation of rights by state institutions, not in cases where citizens' rights are violated by other individuals or private institutions[6].

Canada being a constitutional monarchy, consisting of 10 provinces, according to the Correctional Law and conditional release[7], a proper regime for the execution of sentences, so that detainees serving a prison sentence of 2 years or more are held in federal penitentiaries, while those serving prison sentences of less than 2 years remain in state detention centers.

The rights of detainees are also provided under the Correctional and Exempting Law[8], which includes the right of the imprisoned persons to keep in touch with children, the right to leave the penitentiary under escort or [9] to temporarily leave the penitentiary without escort, and the right to family visits without the use of barriers.

At the same time, in 1995, the Canadian Correctional Service, an institution responsible for overseeing the execution of punishment by the detainee and ensuring its re-socialization, implemented the Mother-Child Program, which allowed children under 4 years of age to remain with their mothers in the penitentiary permanently, while for those aged 4-6 the program provided the possibility of spending a half-hour program in their mother's company.

According to art. 71 of the Correctional and Exemplary Law, detained persons have the right to keep contact with the society, to receive visits and to make correspondence with family, friends, and other persons outside the penitentiary.

At the same time, the same normative act in art. 77 provides the particular rules applicable to imprisoned women as regards the application of specific programs for women as well as working groups with other women.

As a novelty and peculiarity of the Canadian system to European regulations, there is a system of volunteers in Canada that engages in the social recovery of detained persons, facilitating the keeping of links between detainees and their families as well as between parental detainees and their children.

The right to be visited by the family allows detainees to spend time with them for up to 72 hours inside the penitentiary.

The Canadian Correctional Service[10] plays a key role in the Canadian enforcement system, which, from the time the person is placed in prison (in the case of those serving

[6] https://www.chrc-ccdp.gc.ca/eng/content/human-rights-in-canada.
[7] https://laws.justice.gc.ca/eng/acts/C-44.6/page-9.html#h-30.
[8] https://laws-lois.justice.gc.ca/eng/acts/C-44.6/page-9.html#h-31.
[9] https://laws-lois.justice.gc.ca/eng/acts/C-44.6/Corrections and Conditional Release Act, S.C. 1992.
[10] https://www.csc-scc.gc.ca/correctional-process/002001-1000-eng.shtml.

the sentence in federal prisons), draws up a correctional plan based on the information provided by the detainee, police officers, courts, detainees' family and other detainees, as appropriate.

It can be noticed that in the Canadian system, the attempted remodeling behavior of the incarcerated individual is based on his individual supervision, both during and after punishment, for the purpose of liberating a balanced person into society that can reintegrate into system and in public life.

While there is a right in the Canadian state's legislation to the detainees' right to visit, correspondence and contact with family and close relatives, it is worth mentioning that the attempt to resocialize the detainee, both in society and in the family, relies heavily on oversight institutional behavior of the detainee, both by specialists and by volunteers, than on the support of family presence and contact.

What also needs to be mentioned is that the detainees' supervision system includes special provisions for female prisoners for the purpose of including them into programs and activities specific to the female nature.

A peculiarity in the Canadian law system is given by the existence of the population and the category of aborigines, which led to the introduction in the Correctional Law and conditional release of certain articles for this category, so that in Articles 70-84 the notion of aboriginal (as indian, inuit or metis) as well as the aboriginal community is defined.

It is foreseen that between the Minister of Public Security and the aboriginal communities, agreements can be concluded to provide specific corrective services to aboriginal detainees, such as the creation of special programs addressing the needs of aboriginal detainees.

At the same time, the legal rules regulate the fact that in those situations where an aboriginal detainee executes a sentence in federal jails and he demands transfer to a community prison, he may be granted this right.

In order to identify the needs of the aboriginal persons who were imprisoned, the National Aboriginal Advisory Commission was established, which advises the Community Correctional Service to identify the needs of aboriginal persons.

Conclusion.

The attempt of the society to maintain a balance between its protection against the antisocial acts committed by the offenders who were later incarcerated and the need to reform those persons and to maintain their connection with their families and the outside environment of prison life is not easy to achieve.

However, the attempt continues to identify the needs of imprisoned persons and their families in different forms, either as a result of maintaining family-owned contact at a level that can bring behavioral and developmental benefits to those involved (the European system) or through continuous monitoring of the prisoner, both during and after the execution of the punishment (Canadian system), using the institution of volunteering, can only be necessary to maintain a functioning society, benefiting both the detainee and the family in particular, as well as for the society of which the detainee and his family are in general.

From the analysis of the systems that were at the bottom of this paper, it can be concluded that a mixture of the two types could be beneficial, as maintaining the link between the detainee and the family can only have beneficial effects (in those situations where no disruptive elements are identified at the family level), the more so as the family should not be penalized for the offense

committed by its member and isolated from it, but also the supervision of the detainee during the execution of the punishment and more, after the release, in order to ensure that he understood the consequences of his actions and changed, can only be necessary for the protection of the society and, why not, the person of the detainee.

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POLYGRAPH INVESTIGATION TECHNIQUE (LIE DETECTOR), A LEGAL FICTION FROM THE PROBATIVE FORCE POINT OF VIEW- POSSIBILITIES AND LIMITS -

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Abstract

Although generally the results of the polygraph test are not admitted to the courts unless a convention is reached and the lawyer's consent is obtained, the test can be very useful for investigators during the investigation of the crime. In Romania, the first study on the opportunity and efficiency of polygraph insertion into police activity was made in 1976. This was done for a year, using the classic methods of police work with the polygraph method in parallel.

Keywords: *polygraph technique, polygraph diagrams, psychophysiological changes, informed consent.*

1. Introduction

With over 25 years of use in Romanian forensics and over 54 years of consecration in the world, USA[1], Japan[2], Israel, Serbia, Croatia, Canada, etc., the polygraph technique is reasonably disputed even today.

Permanently, as well as the specialists in the field, between appreciation and contestation, the sinuous road of simulated behaviours investigation was littered with both smashing failures and remarkable successes.

We will not insist on them, the last 25 years of professional practice in the field, done by psychologists and prosecutor authors, with good and bad, assimilated to the lessons we have learned from them and on which we still reflect.

Asked by courts, prosecutions, defences to speak out about the specialist opinions of some distinguished specialists in the field, we are facing challenges that we are called to detail hereinafter:

Arguments of the current vulnerability of the polygraph technique

a) *The polygraph technique has been extensively / exponentially popularized in the sense of satisfying the freedom of information* of the general public, exposing in details a series of intimacies - thus losing its "infallibility" and mystery / surprise aura, psychologically necessary to the pre- test phase of waiting, charging, emotional mounting on the issue "criticizes the memory of the criminal act" absent / present in the cognitive / emotional memorial matrix of the

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[1] See John Reid, Fred Inban, Lye Detection and Criminal Investigation, 1942, Baltimore, USA.

[2] See Tanemoto Furuhata, Le detector de mensonges (polygraph) au service de la police japonaise, Revue Internationale de police criminalle, mars, Paris, 1966, pg. 62.

persons included in the suspects pools (see TV talk shows - mass media, radio, advertising etc.) full of ironic / comic, pseudo-scientific - improvisations, arrangements, etc.).

b) *The strengths of polygraph technique have been revealed (*see the role of the control question, the stimulation test, the tension peak, etc.) and the operative moments of the polygraph investigation are sometimes superficially prepared, the findings of the tests being not always supported by procedural activities capable of professional corroboration specific to qualified, classic evidence (search, confrontation, special means exploitation, person recognition, filing, investigations, interrogations) capable of probing facts (their recognition, exposing the accomplices, delivering corpus delicti, etc.).

c) *Broad dissemination of elements of examination tactics and procedure* (consent, medical-psychological approval, rules to be respected during examination, etc.) increasingly inspire (especially recidivists) a series of measure to counter-attack the simulation detection (mental evasion, somato-physiological self-control attempts, induction of parasitic elements, movements / contractures, invocation of psycho-medical suffering, self-administration of neuroleptics or sedatives, refusal of examination etc.)

d) *The technique has been eroded permanently* either between the absolutisations of some (capable at one time to encumber it with the force of evidence) or between the denials and the discredits of others (capable to fully repudiate it) both of them taking care that after exploitation of the orientative clues offered by the polygraph, the identification of the authors, and solving of complex causes, to temporarily marginalize it enough to hyperbolize their own contributions willing to be ephemerally and undeservedly congratulated.

e) *Among "technical specialists", there are not once all sorts of "university hybrids" or* (see in the practice of some US schools) simply high school graduates who "intensively" trained in less than a few weeks are declared experts in total disregard for the clinical sense specific to the forensic psychologist, leading to the danger and at the same time the excuse for the possible errors by completely transferring the responsibilities of the findings to the computer processing.

f) *The polygraph technique is gaining more and more connotations than those that have consecrated it in justice filed,* partly abandoning the requirements of the formidable classical school in the field, being "heavily" used in management and human resources, selection of personnel, recruitment of the workforce, etc., subjects being declared "fit" on a roll (in part having personal experiences in some recruiting companies in Israel).

2. Vulnerability perspective due to erosion of the scientific support on which the method is based

In this respect, we should discuss the explanation for the absence of significant retroactivity and the synergistic support of the route changes, in that the objective psycho-behavioural footprint as a reminder of the deed committed and preserved in the stored memory of the individual in the form

of the criminal algorithm (a sort of objective psycho-dynamic criminal matrix) begins to be more and more solidly expressed and more inconsiderably stored by more and more suspects along with the moral, ethical and legal values, the morals versatility, the continuous disturbance of status criteria and the roles of success-assuring behaviours, the accentuation of lack of credibility in the state institutions and the roles of success-assuring behaviours, the accentuation of one-direction motivation exclusively to the sole target that is the money at any price, the individual (as an expression of the social environment in which he/she develops), he/she also changes, the criminal algorithm becoming in turn drained by his/her affective-mental energy support, a consequence of a barely spotted controversial conflict with the increasingly tolerant and anaemic moral algorithm (in the Durkheimian perspective).

For example, ask if they have stolen!? Embezzled!? Taken bribe! Raped!? Eluded taxes!? Scammed!? Etc. The perpetrators deny with serenity committing the deeds as long as in terms of moral algorithm (moral matrix) as a representation of guilt, inter-projections about sanction, guilt, shame of lying, moral sense of consciousness, etc. – interferes a more and more anaemic and pale criminal algorithm expressed in its affective composition, absolutely necessary for the appearance of emotional stress objectionable in the psychophysiological changes of pulse, BP, bioelectric (GSR) and respiratory routes.

The individual refers to the social models of the ethical, aesthetic, moral, legal conditions, etc. subject to socio-historical conditions at a given moment.[3] In our opinion, the activity of the routes and the absence of identification of the synergic changes is the consequence of the acceptance in the offenders' conscience of the equivalence of the moral and criminal algorithm, while the thieves, the rapists, the embezzlers, the components of the organized criminal groups etc. are running free, not ashamed of their deeds, but on the contrary they make fortunes, enjoy social success, show a contemptuous opulence, enjoy mass media, public blame or stigma delaying in showing, penitentiaries becoming every day real hotel prions.

In the context of the penitentiary's reality as a holiday "and the elimination of the so-called "labelling" as a reflexion in socius of the "moral patrimony of the detainee, fear and shame as functional and mental references specific to the criminal matrix algorithm are absolutely eliminated"…" So we ask ourselves where is the cognitive – affective potential for the psycho-emotional reactivation against lie ... "

Emile Durkheim gives the necessary explanations in the field, the revolutions, the transitions offering the natural experiment of the moral drifting which unfortunately also reaches the efficiency of this rewarding anti - crime replica, because anyway ... "the technique cannot be saved by insinuating fetishes meant to throw on computer processing the responsibility for blubbering findings... "

3. Current Study - Opinions on scientific justification and probative force of polygraph investigation

a) *The operation of this technique of psychophysiological investigation* of emotion is based on the assumption that a conscious lie, in addition to the mental effort required to prepare it, produces a certain state of emotional tension (fear of being discovered).

[3] Tudorel Butoi și colab. *Psihologie judiciară*, Șansa Publishing House, Bucharest 2000, pp. 263-264.

b) *The production of emotional tension is identified in the changes in the psychophysiological routes of the diagrams* (BP pulse, respiratory (thoracic) abdominal), GSR (galvanic skin reflex), which is supposed to originate in involuntary emotional neuro-vegetative triggers concurrent to the awareness of the danger and the activation by it of fear energized by the preservation instinct itself.[4]

c) *The use of the polygraph* is only possible after obtaining the informed consent of the subject and the agreement of the parties.

d) *It is taken into account that the processing of emotional tension can be due* (and hence the obligation to interpret specialist opinions in a reasonable probabilistic credibility register) also to other etiological sources, frential / disturbing factors (other than simulated behavior) that can influence on the test accuracy, which does not give it the character of the certainty of the prediction by penalizing it for vulnerability/ imprecision and representing a 85/95% percentage of accuracy / success.[5]

An extremely serious issue is that if we can afford, in relation to the challenges of the act of justice and in relation to the current scientific state of the method, to grant the findings of the polygraph investigations a probative force of their own!

From this perspective, so that a means of probation to be effective as judicial evidence, it must be:

1. *solidly scientifically substantiated* (or the polygraph technique operates only with presumptions and probable data, resulting from psychophysiological reactivity processing subjected to affective / emotional factor instability).
2. *the findings should be "erga omnes opposable"* - completely admissible and opposable to third parties (or the polygraph technique offers only specialized opinion reasonably disputed among lawyers and psychologists)
3. *the test must be meaningful, realistic, useful and legal* (or the polygraph opinion is questionable at least in terms of admissibility as evidence, interference with freedom of expression, etc.)

From this practical point of view, we are faced with the following situations that exploit (including indirectly as derived probative force) the findings of the polygraph investigations.

4. In the polygraph diagrams, psychophysiological changes of routes (specific to the emotional factor) are identified - but the subject does not recognize the facts for which he/she is examined.

- the specialist opinions (conclusions) alone have no probative value, remaining in the area of uncertainty of subject involvement.

5. *in the polygraph diagrams, psychophysiological changes of routes* (specific to the emotional factor) are not identified, and the subject (in pre-test) or after (post-test) recognizes the facts but cannot provide evidence, corpus delicti, corpses, does not show witnesses, does not show accomplices etc .

- the specialist opinions (conclusions) have no probative value,

[4] See R. Gorni, Microwave Respiration Measurement for "Lie detector" Department of criminal Investigation, Israel, Tel Aviv 1973.

[5] See experiments - Ion Ciofu, *Comportamentul simulat*, Romanian Academy Publishing House – Cercetări psihofiziologice experimentale – Bucharest, 1974.

remaining in the area of uncertainty of subject involvement.

6. *in the polygraph diagrams, psychophysiological changes of routes* (specific to the emotional factor) are identified and the subject (pre-test) or after the (post-test) recognizes the facts for which he/she is examined by offering corpus delicti, corpses, witnesses, accomplices etc.

- the specialist opinions (conclusions) have certain derived evidence value, indirectly corroborating with material evidence offered by the subject.

7. *in the polygraph diagrams, psychophysiological changes of routes* (specific to the emotional factor) are not identified, and the subject (in pre-test) or after (post-test) does not recognizes the facts

- the expert opinions (conclusions) have no probative value of indictment, at most the exclusion of the subject from the suspects pool is under discussion.

4. Opinions, options in the matter

Adhering to prof. Aurel Ciopagra PhD's opinion, we fully quote "the use of the results of the polygraph examination in the criminal trial is considered reluctant by the courts because the detection of an individual's sincerity or dishonesty can be subject to error, which would affect values of a special social, moral and legal significance. ..." or"... in a judiciary system characteristic of the rule of law where the rights and freedoms of individuals occupy a central position, it is not accepted (some jurists argue) that by a "legal fiction" this form of investigation to be included "in the category of evidence - ciopraga 1996, quoted by Ioan Buş, Daniel David," "Investigația psihologică în practica judiciară" edit. Pres Univ. Cluj 1999/82.[6]

With the utmost scientific decency, we support the court's appreciation of the limits and vulnerabilities of polygraph technique in terms of prudent credibility solely in the initial approach to criminal prosecution of reasonable suspicions of insincerity, and which are confirmed or denied exclusively by corroborating the classical evidence "erga omnes opposable".

For that matter, "the polygraph does not identify lies but measures reactions, expressions" ... the lie detector is a convenience not a science, "said Raymond Nelson, president of the US Polygraph Association for Business Insider.

The former head of Interpol[7], Marcel Sicot, in his paper "A la barre de l'Interpol" Paris 1961 pg. 170 underlined ... "it seems to me in the current state of works that they (the findings of polygraph examination) should be classified in the category of clues resulting from police technique rather than criminal proceedings. They certainly do not have the value of traces taken on-site, and still less the probative force of fingerprints recognized today universally ... "

We therefore fully support the decision of the High Court of Cassation and Justice no. 184/2012 as follows: ... "[8] it was also pointed out to the Courts of Appeal that testing of the defendant's sincerity with the polygraph test should not be overestimated ... it cannot be a certainty of the guilt or innocence of the defendant and, on the other hand, many times, it is imperfect, dependent on many factors. The findings of the polygraph test cannot be considered as evidence provider in the procedural sense of the notion, since the polygraph is not as it

[6] Ioan Buș, Daniel David "*Investigația psihologică în practica judiciară*" Edit. Press Univ. Cluj, 1999 pg. 82.
[7] Marcel Sicot, Ala barre de l'Interpol, Paris 1961, pg. 170 și următoarele.
[8] Decision of the High Court of Cassation and Justice no. 184/2012.

was shown an evidence means. These can be exploited for a solution only as indicators that corroborated with other factual elements lead to a certain conclusion ... / "(http://legeaz.net/spețe-penal-iccj-2012/decizia-1894-2012)[9]:

We appreciate the professionalism and competence in the interdisciplinarity of the "search for evidence" by the Supreme Court of Cassation and Justice, which judged in file no. 952/1/2016 of February 20, 2016; by the conclusion no. 162 on the Criminal Investigation Report no. 330613 of 18.01.2016 polygraph test subject Ovidiu Marian - referring to the substance vulnerability of the examination as follows: ... "or when the conclusions are formulated by comparing the physiological responses to the control questions, the way the latter were determined (for none of them being sure of a true answer) may influence the outcome of the test "...[10]

In Germany (Bundesgeritsthof: Entscheidunghe von 17.12.1998, 1 p. 156/98, 1 p. 258/59 ..), the German Federal Court of Justice decided that polygraph evidences are inherently unconvincing and can not be accepted by court. Requests for prosecution and / or defence to perform polygraph tests will be rejected in all situations ..."[11]

Similarly, the Court of Appeal of Craiova in file no. 1925/54/2014 - the defendant being Dumitrescu Dragoş Dan, decides…."[12] Regarding the request for the expertise in the field of clinical judicial psychology and the testing with the polygraph apparatus of the defendant Dumitrescu Dragoş Dan, the Court considers that it is not necessary to carry out such probative procedures, because they cannot be retained as relevant evidence involving elements of interpretation of the emotional factor not being certain of the guilt or innocence of a defendant, being known the imperfections of such tests such as increased emotions, nervousness, other positive or negative deficiencies of the subject. .. "- page 13/14 - chairman Gherhe Bârnău - clerk Robert Frumuselu.

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On this issue, we submit to your appreciation the words of Prof. Gordon Barland, **"... not taking into account the findings of the polygraph investigations is just as serious as giving them a total credit or completely ignoring them ...**"

Conclusions

Polygraph testing aims to measure the physiological responses / reactions produced by the fear / concern experienced by the communicator and not on identifying the simulated behavior by observing the person's behavior or by psychologically analyzing his speech.

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[9] http://legeaz.net/spețe - penal- iccj-2012/decizia -1894-2012.

[10] Decision of the High Court of Cassation and Justice no. 952/1/2016 (conclusion 162).

[11] German Federal Court of Justice - polygraph evidences are inherently unconvincing and can not be accepted by court.

[12] See the Decision of the Court of Appeal of Craiova - file no. 1925/54/2014.

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