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DIGITAL TOOLS FOR JUDICIAL COOPERATION ACROSS THE EU - THE BENEFITS OF DIGITAL TECHNOLOGIES IN JUDICIAL PROCEEDINGS

Gabriela FIERBINȚEANU[*], Vasile NEMEȘ[**]

Abstract

Digital technologies have great potential to improve efficiency and access to justice, with the European Commission and the EU Council collaborating on a number of cross-border digital justice initiatives as a result of the political commitment to make national and European e-Justice more accessible. The COVID-19 crisis posed a serious challenge to the smooth functioning of justice systems, confirming that digital technologies are essential to ensure seamless and timely access to justice for citizens and businesses, thus contributing to building resilient national systems. The Joint Roadmap for Recovery[1]*, endorsed by the European Council on 23 April 2020, recognises digital transformation, alongside the green transition, as having a central and priority role in re-launching and modernising the EU economy. As underlined in the Council Conclusions "Access to justice - "Access to Justice – Seizing the Opportunities of Digitalisation"*[2] *adopted in 2020, access to justice is a fundamental right and a central element of the rule of law, which is one of the core values on which the European Union is founded under Article 2 of the Treaty on European Union and which are common to the Member States. The document also reaffirms that the digital development of the justice sector should be human-centred and should always be guided by the fundamental principles of judicial systems concerning the independence and impartiality of the courts, the guarantee of effective judicial protection and the right to a fair and public trial within a reasonable time.*

Keywords: *cross-border justice initiatives, access to justice, digitalisation of judicial cooperation, digital by default, fundamental rights.*

1. Introduction

The topic of digitalisation of the area of justice is a priority at EU level, with the European Commission Communication of 27 May 2020 " Europe's moment: Repair and Prepare for the Next Generation"[3] highlighting that digitalisation of justice systems can improve access to justice and the functioning of the business environment. The European Commission's 2021 Rule of Law Report of 20.07.2021[4] also underlined that strengthening the resilience of judicial systems through structural reforms and digitalisation is a priority under the Recovery and Resilience Mechanism, and a number of Member States have included this in their national recovery and resilience plans.

It should be noted that efforts on accessibility of justice systems are not a

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[1] roadmap-for-recovery-final-21-04-2020.pdf (europa.eu).
[2] https://data.consilium.europa.eu/doc/document/ST-11599-2020-INIT/en/pdf.
[3] https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1590732521013&uri=COM:2020:456:FIN.
[4] https://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:52021DC0700&from=EN.

recent development. A first result of the political commitment to make access to national and European e-Justice easier and more accessible was the adoption of the first multi-annual e-Justice Action Plan 2009-2013. This first instrument identified a series of priority actions for joint activities.Following its finalisation, an e-Justice Strategy and Action Plan for 2014-2018 was adopted. These ended in 2018 and were in turn replaced by the e-Justice Strategy[5] and Action Plan 2019-2023[6].One of the most tangible results towards digitalisation of justice so far is the European e-Justice Portal, a one-stop-shop for all aspects of justice in the Member States of the Union, including a number of online tools. The EU Council conclusions "Access to justice - seizing the opportunities of digitalisation" set out ambitious directions inviting the European Commission to assess possible actions in the area of judicial cooperation in civil and commercial matters, building on the progress already made towards modernising cross-border exchanges between authorities through digitalisation and the use of information technology, as in the context of the regulations on service of documents and taking of evidence[7], and going on to examine the potential for modernisation in line with the "digital by default" principle. In criminal matters, the focus should have been on the analysis of judicial cooperation tools to which the electronic digital exchange of evidence system (eEDES), which already supports procedures relating to European investigation orders and mutual legal assistance between Member States, could be extended. For both strands of reflection, e-CODEX (e-Justice communication via online data exchange) is the preferred tool whose use was encouraged.

A crucial aspect for the success of these policies will also be determined by the approach to user panels. Promoting digital competences in the justice sector is of paramount importance. Also, initiatives to raise awareness and increase digital literacy among citizens will provide the opening to use the benefits of implementing these strategies. The use of digital technologies in justice systems will not diminish procedural safeguards for those who do not have access to such technologies.

As pointed in one of the studies[8] dedicated to different aspects related to the digitalisation of communication between courts/competent authorities of Member States and between those authorities and the parties to the proceedings in the areas of EU civil, commercial and criminal law, including the possibility for using videoconferencing systems in cross-border proceedings, individuals and legal entities can easily find themselves in litigation before a court in another EU country. Access to justice across borders is also particularly problematic for victims of crimes and defendants. Victims may be discouraged to file a complaint in another country by the fact that they do not know the legal system of that country.Access to

[5] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019XG0313(01).

[6] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019XG0313(02).

[7] Regulamentul (UE) 2020/1784 al Parlamentului European și al Consiliului din 25 noiembrie 2020 privindnotificareasaucomunicareaînstatelemembre a actelorjudiciare și extrajudiciareînmateriecivilăsaucomercială (notificareasaucomunicareaactelor) (reformare) și Regulamentul (UE) 2020/1783 al Parlamentului European și al Consiliului din 25 noiembrie 2020 privindcooperareaîntreinstanțelestatelormembreîndomeniulobținerii de probe înmateriecivilăsaucomercială (obținerea de probe) (reformare).

[8] European Commission, Directorate-General for Justice and Consumers, *Study on the digitalisation of cross-border judicial cooperation in the EU : final report*, 2022, https://data.europa.eu/doi/10.2838/174474.

justice across borders is challenging also for defendants who are unfamiliar with the legal system of another Member State. It is known that the threshold of accessing a court by individuals and legal entities is high, due to complexity and costs.

2. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Digitalisation of justice in the European Union. A toolbox of opportunities

A first response from the European Commission has been provided in the text of its Communication **Digitalisation of justice in the European Union A toolbox of opportunities**[9], launched on 2.12.2020, in which it carried out an in-depth analysis and mapping of the digitalisation of justice in all Member States. Of interest for the proposed presentation are the intentions to promote legislative initiatives requiring Member States to implicitly use digital channels for cross-border communication and data exchange between competent national authorities; the application of the principle that an electronic document is not denied legal effect and the possibility to be accepted as evidence in legal proceedings solely on the grounds that it is in electronic format; the exploitation of the possibilities offered by electronic identification and electronic signatures/stamps. In addition, the modernisation of digital tools for judicial cooperation and information exchange in criminal investigations and proceedings within the EU was also indicated as essential in view of security threats and technological developments. In non-legislative matters, one of the most important initiatives foreshadowed by the European Commission's Communication (to be completed by 2023) is the posting on the eJustice Portal of a collection of links aimed at facilitating access to available electronic services provided by the judiciary and relevant public authorities, through an access point entitled "My eJustice Space". This should also facilitate access to justice in EU cross-border proceedings, in particular the European Small Claims Procedure[10] and the European order for payment procedure.[11]

3. Legislative initiatives launched by the European Commission in the field of judicial cooperation in criminal matters

In anticipation of the legislative intervention in the text of the Communication on the digitalisation of justice (2020), the European Commission launched on 1st of December 2021 a legislative package whose components dealing with judicial cooperation in criminal matters will be briefly presented in this section.

[9] https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2020:710:FIN.

[10] Regulamentul (CE) nr. 861/2007 al Parlamentului European și al Consiliului din 11 iulie 2007 de stabilire a uneiprocedurieuropene cu privire la cererile cu valoareredusă (JO L 199, 31.7.2007, p. 1).

[11] Regulamentul (CE) nr. 1896/2006 al Parlamentului European și al Consiliului din 12 decembrie 2006 de instituire a uneiprocedurieuropene de somație de plată (JO L 399, 30.12.2006, p. 1).

3.1. Proposal for a Regulation of the European Parliament and of the Council establishing a collaboration platform to support the functioning of Joint Investigation Teams and amending Regulation (EU) 2018/1726[12]

Joint Investigation Teams (JITs) are teams set up for specific criminal investigations and for a limited period of time, established by the competent authorities of two or more Member States and possibly non-EU countries (third countries). The legal basis for setting up a JIT is Article 13 of the European Union (EU) Convention on Mutual Assistance in Criminal Matters[13] and Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams[14].The main difficulties faced by these structures relate to the secure electronic exchange of information and evidence (including large files), the secure electronic communication with other members of the joint investigation team and with the competent bodies, offices and agencies of the Union, such as Eurojust, Europol and the European Anti-Fraud Office (OLAF), and the joint day-to-day management of such a team. The overall objective of the proposal is to provide technological support to those involved in joint investigation teams in order to increase the efficiency and effectiveness of their cross-border investigations and prosecutions. The legal basis for the proposal is Article 82(1)(d) of the Treaty on the Functioning of the European Union (TFEU), which gives the EU the power to adopt measures to facilitate cooperation between judicial or equivalent authorities of the Member States in criminal matters. In order to achieve these objectives, a dedicated IT platform is proposed, consisting of both centralised and decentralised components, accessible to all actors involved in JIT proceedings. The platform would be composed of a centralised IT system, which would allow for the central temporary storage of data, and communication software, a mobile application, which would facilitate communication and storage of data from local communications.

Although the platform would operate over the internet to provide flexible means of access, the emphasis would be on ensuring confidentiality from the moment of design, it would use encryption algorithms to encrypt data in transit or at rest.

3.2. Proposal for a Regulation of the European Parliament and of the Council amending amending Regulation (EU) 2018/1727 of the European Parliament and the Council and Council Decision 2005/671/JHA, as regards the digital information exchange in terrorism cases[15]

Since 2005, the importance of exchanging information between Member States as well as with Europol and Eurojust has become imperative. Directive (EU) 2017/541[16] on combating terrorism amended Council Decision 2005/671/JHA[17] , to ensure that information is shared

[12] https://ec.europa.eu/info/sites/default/files/3_1_178497_regul_jit_en.pdf.pdf..
[13] JO C 197, 12.7.2000, p. 3.
[14] JO L 162, 20.6.2002, p. 1.
[15] https://ec.europa.eu/info/sites/default/files/2_2_178485_regul_counter_terr_en.pdf.pdf.
[16] Directiva (UE) 2017/541 a Parlamentului European și a Consiliului din 15 martie 2017 privind combaterea terorismului și de înlocuire a Deciziei-cadru2002/475/JAI a Consiliului și de modificare a Deciziei2005/671/JAI a Consiliului (JO L 88, 31.3.2017, p. 6).
[17] Decizia 2005/671/JAI a Consiliului din 20 septembrie 2005 privind schimbul de informații și cooperarea referitoare la infracțiunile de terorism (JO L 253, 29.9.2005, p. 22).

between Member States in an effective and timely manner, taking into account the serious threat posed by terrorist offences.One of the key aspects of Eurojust's work in this area is the European Counter-Terrorism Judicial Register (CTR) launched in September 2019, based on Council Decision 2005/671/JHA. For the CTR, Member States provide information on judicial proceedings relating to terrorist offences under their jurisdiction, with the data being stored and cross-checked in the Eurojust Case Management System (CMS) in the same way as operational data on ongoing judicial cooperation cases supported by Eurojust. Based on the findings of the Digital Criminal Justice Study[18], improving the functioning of the CTR has been indicated as a priority for European criminal law. The proposal aims to facilitate Eurojust's more efficient identification of links between parallel cross-border investigations and prosecutions of terrorist offences and to provide proactive feedback on these links to the Member States concerned by making the exchange of data between Member States, Eurojust and third countries more efficient and secure. The legislative instrument will ensure legal certainty on the scope of the obligation to exchange information in terrorism cases and the relationship with Council Decision 2005/671/JHA.

4. Horizontal legislative initiative launched by the European Commission in the area of digitalisation of judicial cooperation and access to justice

Building on the objectives set out in the Communication on the digitalisation of judicial cooperation, the European Commission has included in the legislative package launched on 1 December 2022 also a horizontal instrument aimed at improving access to justice and increasing the efficiency and resilience of communication flows inherent in cooperation between judicial and other competent authorities in cross-border cases in the EU, namely the *Proposal for a Regulation on the digitalisation of judicial cooperation and access to justice in cross-border procedures in civil, commercial and criminal matters and amending certain acts in the field of judicial cooperation*[19].

The proposal establishes a dedicated and secure decentralised IT system, composed of the IT systems of the Member States and of Justice and Home Affairs agencies and bodies, which will be interconnected through interoperable access points (based on the e-CODEX system). Where Member States do not have existing national IT systems, they could use, free of charge, a Commission-developed reference implementation solution. The Commission will develop a European access point, free of charge, hosted on the e-Justice Portal and each person will be able to create an account and file all types of submissions both to national judicial authorities and to those of other Member States. Where national IT portals, platforms or orher electronic channels for electronic communication in EU civil law matters exist, they can continue to be used

One of the most important provisions of the proposal (Article 2) establishes the obligation of electronic communication between courts and competent authorities, through a secure and reliable decentralised

[18] European Commission, Directorate-General for Justice and Consumers, *Cross-border digital criminal justice : final report*, Publications Office, 2020, https://data.europa.eu/doi/10.2838/118529.

[19] https://ec.europa.eu/info/sites/default/files/law/cross-border_cases/documents/1_1_178479_regul_dig_coop_en.pdf.pdf.

computer system consisting of interoperable IT systems and access points operating under the individual responsibility and management of each Member State, each JHA agency and each EU body. In addition, Article 5 requires the courts and competent authorities of the Member States to accept electronic communication from natural and legal persons in judicial proceedings, but the choice of electronic means of communication is left to the discretion of natural and legal persons. We note in this context, translating the reasoning in the interest of this study, the opinion of the Constitutional Court[20] called to rule on the constitutionality of the Law to supplement Government Ordinance No 2/2001 on the legal regime of contraventions. The Court notes that the assessment which the court must make when granting the requested measure (i.e. the holding of court hearings by audiovisual telecommunications) essentially concerns two categories of issues: technical and legal. The technical assessment does not require any special rules, since it involves examining clearly defined objective conditions - the existence or otherwise of the infrastructure necessary for the conduct of court hearings by audiovisual telecommunications means. However, given the scope of the law, the legal assessment is highly complex and requires a precise regulatory framework. However, the law at issue does not lay down any criteria for the court to decide whether or not to grant the offender's request to hold court hearings exclusively by audiovisual telecommunications systems. Accordingly, in accordance with the criticisms made, the Court holds that the admissibility of requests for the hearing of cases in matters relating to administrative offences by means of audiovisual telecommunications must be determined by clear and precise rules, in the light of the requirements laid down by Article 20 of the Constitution, with reference to Article 6 - Right to a fair trial - of the Convention on Human Rights.

Article 6 of the proposed regulation also requires the competent authorities to accept electronic communication from natural and legal persons by making electronic transmissions equivalent to paper transmissions. With regard to the value of applications submitted to the civil court by electronic means, the case law of the High Court of Cassation and Justice[21], faced with a hypothetical situation in which it was necessary to clarify the legal value of the electronic signature, held that an electronic signature is data in electronic form which is attached to or logically associated with other data in electronic form and which serves as a method of identification. Accordingly, where a party intends to submit applications to the court in electronic form, the existence of a scanned signature of the signatory is not sufficient, in view of the special provisions laid down by Law No 455/2001, which lays down the legal regime governing electronic signatures and electronic documents and the conditions for the provision of electronic signature certification services. In such cases, where applications are submitted to the courts in electronic form, the digital signature links the electronic identity of the signatory to the digital document and cannot be copied from one digital document to another, which gives the document authenticity (it attests that the document belongs to the signatory and the author of the document cannot claim responsibility for the content of the document with a valid electronic signature). In practice, the valid

[20] Decizia 19/2022 [A] asupra obiecţiei de neconstituţionalitate a Legii pentru completarea Ordonanţei Guvernului nr. 2/2001 privind regimul juridic al contravenţiilor, Monitorul Oficial nr. 183 din 2022.

[21] Decizie nr. 520/2019 din 07-mar-2019, Inalta Curte de Casatie si Justitie Bucuresti.

electronic (digital) signature provides the court with a guarantee that the message or digital document is created by the person who signed it and that the content of the message or digital document has not been altered since its issuance.

In conclusion, the use of the digital channel will be voluntary for natural and legal persons. The Regulation also lays down rules on the use and recognition of electronic trust services, on the legal effects of electronic documents, on the use of videoconferencing or other means of distance communication for the hearing of persons in civil, commercial and criminal matters (Articles 7 and 8).

As regards electronic payment of fees, Article 11 of the proposal provides that Member States shall provide for the possibility of electronic payment of fees, including from Member States other than where the competent authority is situated. Member States shall provide for technical means allowing the payment of the fees also through the European electronic access point.

5. e-CODEX (e-Justice Communication via Online Data Exchange)

e-CODEX (e-Justice Communication via On-line Data Exchange) was launched under the multiannual e-Justice action plan 2009-2013, to promote the digitalisation of cross-border judicial proceedings facilitating the communication between Member States' judicial authorities. The long-term sustainability, the increased use and operational management of e-CODEX were a priority for the Union. The e-CODEX system was managed by a consortium of Member States and other organisations, financed by an EU grant but using further action grants to manage the system was not a sustainable solution that could allow e-CODEX to become the default system for cross-border civil and criminal proceedings in the future. The Commission launched a proposal for a Regulation as the proposed legal instrument to establish the e-CODEX system at EU level, and is entrusting the eu-LISA Agency with the system's operational management. To this effect, the proposal amended Regulation (EU) 2018/1726 establishing eu-LISA[22].

The Council presidency and the European Parliament reached a provisional agreement on the proposal for a regulation on the e-CODEX system on the 8 th of December 2021.

6. Conclusions

The possibility for natural and legal persons to lodge applications and communicate digitally with the courts and competent authorities and the possibility to participate in hearings by videoconferencing or other means of remote communication technology will ensure improved access to justice in cross-border proceedings.Furthermore, the package of legislative initiatives prepared on the basis of the consultation with Eurojust would, if adopted, have an enormous impact on how Eurojust can support cross-border judicial cooperation. On the other hand, the role of general principles of EU law in regulating the operation of new technologies may also require the emergence of new ones that

[22] Regulation (EU) 2018/1726 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA), and amending Regulation (EC) No 1987/2006 and Council Decision 2007/533/JHA and repealing Regulation (EU) No 1077/2011 (OJ L 295, 21.11.2018, p. 99).

correspond to new market conditions. Thus, today, the principles structuring the EU's digital single market have the potential not only to bring about further integration of the internal market, but also to remove barriers to the movement of factors of production within the digital spaces of Member States, societies and economies.[23]At the same time, it is necessary to balance the need to implement innovative technologies in the area of justice with the protection of fundamental rights, given that, as noted in the literature, in the face of the expansion of the use of ICT in most areas of social life, a number of fundamental rights (the right to privacy, family and private life, freedom of expression, secrecy of correspondence) have been exposed to risks, some inherent (related to cyber security, for example), others determined by the intrusive action of the state.[24]

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[23] P. E. GILL, A. ZEMSKOVA, X. GROUSSOT, Spre principii generale 2.0: aplicarea principiilor generale ale dreptului Uniunii Europene *în societatea digitală*, Revista Romana de Drept European (Comunitar) 4 din 2019.

[24] E. S. TANASESCU, S. SANDRU, Impactul tehnologiei informaţiei şi a comunicaţiilor asupra drepturilor şi libertăţilor fundamentale în România*, Revista Romana de Drept European (Comunitar) 3 din 2021.

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THOUGHTS ABOUT THE CONTRACT law IN COMPARISON OF HUNGARIAN AND CANADIAN LAW

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Abstract

It is widely known that Hungarian and Canadian legal systems differ from each other in many ways, but people are generally not aware of the fact that there are striking similarities as well that can be derived from the development of ancient culture and traditions. Our research is seeking for answers to certain questions regarding different aspects of managing contracts – the creation, performance, amendment, and the termination. What can even be called a contract in Hungary and in Canada? What are the most common types of contracts in these countries? What are the governing rules and principles of the creation, performance, and termination of the agreements? The cultural differences and similarities affect the different stages of contracts even more than we might think.

Keywords: *Hungarian and Canadian legal systems, managing contracts, cultural differences,and similarities.*

Introduction

We are writing our article on cultural specialties of managing contracts and agreements with Hungarian firms compared to Canadian ones.

First, we would like to identify the questions arising in connection with this topic. It is possible to identify three different stages of the 'lives' of contracts, being the first one is the creation. The second stage is the performance and amendment of contracts. While the last stage is their termination. In our article we are going to follow this common 'route' of the contracts and introduce the Hungarian and Canadian specialties of these phases.

Our aim is also to answer the question that even what is the definition of a contract in Canada and in Hungary? What are the most common types of contracts in the two countries from a civil law perspective? How is a binding contract (or agreement) made in Hungary and in Canada between the parties, what are the possible forms of agreements? Also, what are the governing rules regarding the creation of a contract. Naturally, the cultural differences between the two countries, Hungary, and Canada that in some ways affect the creation, performance, amendment, and termination of agreements in these countries.

To answer the above questions - and mainly the question that how a contract is made in Hungary and in Canada - we must take into consideration the simple fact that the cultural background of the two countries is pretty much different. Therefore, their legal systems have always been different as well.

The Hungarian legal system is based on the continental Roman-law (*ius Quiritium*) tradition which originates from the fifth century before Christ and its first appearance was the so called Twelve Tables

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(*Lex duodecim tabularum*). Then, this tradition was further developed by the Justinian codification and finally took its shape by the editor Dionysius Gothofredus in the so-called work Corpus Iuris Civilis in 1583 in Geneva. It is possible to categorize the survival of the Roman Law on different regions of Europe and the world. The first category is its continuous survival, while the second is the rebirth of the Roman Law, and the third is its so-called reception.

The Roman-law – and the many legal institutions of the Roman public law – is connected to the law in force, in which not only it lives further but it is determined by it as well. It is particularly true for Europe, which is going through unification, as the basis of the European Law is the Roman Law itself, which - according to the statement of *Theodor Heuss* [1]– forms one of the three tiers of European culture besides the Bible and Greek philosophy.

The civil law of the Hungarian legal system – that is nowadays – have been affected and therefore shaped by different continental legal instruments, e.g. the French Code Civil of 1804, which is the most significant of the French codes. It contained the principle of equality of rights and, among other things, abolished the special rights of the orders. Its central issue was the sanctity of property. With its principles of freedom of contract and will, it dynamized the hitherto static concept of property. It consists of 2281 sections, an introduction and three books. A long-standing, modern-day code is still in force in France, but also in other areas (e.g., Quebec, Canada, or Louisiana, USA), and the case law has been successfully developed so that a comprehensive revision has proved unnecessary to this day.

The survival of the Roman Law is also embodied by the German BGB (*Bürgerlisches Gesetzbuch*) 1900 or the Austrian ABGB (*Allgemeines bürgerlisches Gesetzbuch*) published after forty years of preparation in 1811, which is purely an act on private law and does not contain any public law elements.

The Hungarian civil law literature was therefore built on the above antecedents when for example the draft of the old Hungarian Civil Code (Act IV of 1959) entered into force – the provisions of which are not effective today, and when its amendment was enacted – Act V of 2013 on the Civil Code – as well.

While, the Canadian legal system was shaped by the scheme of the Common Law, except for Québec, which – being the only one having this kind of quality - has its own civil code.

The province of Quebec was ceded to Great Britain by France in 1763, but the law previously in force - that had been built on *Coutume de Paris* - was still applied in its territory. The so-called Code civil de la province de Québec (its original, official name was *Civil Code of Law Canada*) entered into force in 1866. The model of its first three books was the French *Code Civil*. The fourth book of the Code deserves special attention because at that time it was still a rare exception to regulate civil and commercial law in a single code. The drafters of the Civil Code relied more heavily on the tradition of the *Coutume de Paris* and the works of a lawyer, *Robert-Joseph Pothier* than the editors of the Code

[1] Theodor Heuss, was a liberal democratic legislator, first president of West Germany, author, and leader of the Free Democratic Party. He also helped draft a new constitution for postwar West Germany. After receiving a political science degree from the University of Munich (1905), Heuss was an editor on several newspapers and taught at the Hochschule für Politik in Berlin.
https://www.britannica.com/biography/Theodor-Heuss (Date of access: 20.11.2021).

Civil, but the common law tradition also left its marks on the Code. After nearly four decades of preparations, the new Civil Code (Code civil de Québec), entered into force in 1994. The Code civil of Québec consists of ten books and essentially preserves the continental traditions rooted in Roman Law. The fifth book of the Codex on obligations contains both the contracts of the territory of civil law and commercial law.[2]

The creation of an agreement in Hungary and Canada

Naturally, other basic principles of law – for instance Principle of good faith and fair dealing; Principle of generally expected standard of conduct; and Prohibition of abuse of rights also need to be taken into consideration and obeyed both during the contract negotiations and after it. It is important to note that only a lawful aim of the contract may be considered valid.

What are the most common types of contracts in the two countries from a civil law perspective? The four most common types of contracts in Canada are the contract of sale, the lease and hire of services, the lease and hire of things and the mandate contract. We can note that these types of contracts are very common in Hungary as well.

In both Hungary and Canada, the contract law is described by the fact that a contract is a legally binding promise.

In Hungary, according to the provisions of the Act V of 2013 on the Civil Code we can state that for the creation of a contract a so-called offer and an acceptance are needed.

What is the definition of a contract?

According to Section 6:58 of the Act V of 2013 on the Civil Code (hereinafter: Ptk.) [The contract] *The contract is the mutual and concordant juridical act of the parties from which the obligation to perform the service and the entitlement to claim the service arises.*[3] Section 6:59 [Freedom of contract] (1) *The parties shall be free to enter a contract and shall be free to choose the other contracting party.* (2) *The parties shall be free to determine the content of the contract. With their concordant intent, they may depart from the rules of contracts concerning the rights and obligations of the parties, if such derogations are not prohibited by this Act.*'

Before concluding an agreement, it is obligatory for the Parties to comply with some principles of law. For example, Section 6:62 of the Ptk provides that *'the parties shall be required to cooperate during contract negotiations, upon the conclusion of the contract and during its existence and dissolution and shall inform each other with respect to any important circumstances concerning the contract.'*[4] This obligation affects all the three phases of a contract, that is, both formation, performance, and termination of it as well.

We would like the summarize the Hungarian rules based on the article of Wellmann György[5]. As far as the conclusion of the contract is concerned, the new Civil Code is still based on the principle of

[2] FÖLDI ANDRÁS – HAMZA GÁBOR: *A római jog története is institúciói, (The history and the institutions of the Roman law)*, Eszterházy Károly Egyetem Oktatáskutató és Fejlesztő Intézet, 2018., p. 128.

[3] Hungarian Civil Code, Polgári törvénykönyv, (in abbreviation: Ptk.) Section 6:58 of Act V of 2013.

[4] Ptk. Section 6:62 of Act V of 2013.

[5] WELLMANN GYÖRGY: A szerződések általános szabályai az új Ptk.-ban- II. rész (The general rules of the contracts in the new Hungarian Civil Code – II.Part)
https://ptk2013.hu/szakcikkek/wellmann-gyorgy-a-szerzodesek-altalanos-szabalyai-az-uj-ptk-ban-ii-resz/3611 (Date of access: 20.11.2021).

consensual contracts, i.e. the conclusion of the contract does not require the transfer of the goods or any other real act, but it is sufficient to express the will of the parties in a reciprocal and consistent way (consensus). The consensus shall cover relevant issues which are considered relevant by either Party. The question on which the party has clearly stated that it does not wish to conclude the contract in the absence of agreement on the matter shall be deemed to be 'material'. Agreement on remuneration is always an important issue, without which the contract is not concluded. Nevertheless, the new Hungarian Civil Code contains an auxiliary rule to facilitate the conclusion of the contract in cases where it can be concluded that an agreement between the parties on remuneration has apparently been reached, even though no actual agreement has been reached on its exact extent or method of calculation. According to Article 6:63(3): *"If the contract has been concluded but the parties have not clearly determined the level of the consideration or have stipulated a market price as consideration, the median price at the time of performance shall be paid on the market corresponding to the place of performance"*. The content of the contract may be freely determined by the parties, within the limits of the cogent legal provisions. However, the contractual content, which is mandatory by law, becomes part of the contract. This means, on the one hand, that the parties do not have to agree separately on matters settled by law and, on the other hand, that the contract is concluded with mandatory legal content even if the parties do not have to deal with it differently, despite the prohibition. In the case of long-term business relationships, it is common for the parties to refer only to the habits and practices already established between them, or to follow a practice regularly even without a contractual provision. Therefore, the law stipulates with a new rule [Article 6:63(5)] that: "*The content of the contract becomes the content of all customs in the application of which the parties have agreed on their previous business relationship and all practices which have been established between themselves. Furthermore, the content of the contract shall become the content of any custom widely known and regularly applied in the relevant business by the subjects of a contract of a similar nature, unless its application between the parties would be unjustified, subject to their previous relationship.*' 'Practice' is what the parties have developed in their relations with each other, while 'custom' can be between the parties and may be independent of them in the business. The conclusion of the contract requires the making of an offer and its acceptance. A legal declaration clearly expressing the intention to enter a contract, covering the relevant issues, which entails a contract constraint. As a rule of discretion, a tendering obligation may still be excluded, but such a legal declaration, which does not have a legal obligation, does not constitute an offer but is merely an invitation to tender. The tenderer may determine the time of the contract constraint and it shall commence when the tender becomes effective. A new termination case between the rules for the termination of the tender obligation (§ 6:65) is the rejection by the other party, and the regulation of the withdrawal of the offer is also new. An offer that has not yet become effective may be withdrawn but may be withdrawn only until the other party's acceptance statement has been sent and only if the offer did not include that it was irrevocable. And if the tender has set a time limit for acceptance, it cannot be withdrawn beforehand. The offer may be accepted by a legal declaration expressing agreement with it. A statement of acceptance, like any other legal declaration, may be made orally, in writing or by implied conduct. However,

silence shall be deemed to be acceptance only based on an express prior agreement between the parties. The old Civil Code provides that acceptance with a content other than the offer shall be considered as a new offer. However, the new Civil Code [§ 6:67 (1)–(2)] breaks with this rigid approach and gives the possibility of so-called "amended acceptance": a legal declaration expressing agreement with the offer constitutes acceptance even if it contains an additional or different condition that does not constitute an important issue, does not affect it. In the event of a derogation on non-material matters, the contract shall be concluded with the content as stated in the acceptance declaration. However, the tenderer may, on the one hand, exclude the possibility of amended acceptance in the tender and, on the other hand, even in the absence thereof, prevent the additional or different terms from becoming contractual content if he objects to them without delay. In business, it is common for a contract concluded orally to cover only the essential elements of the agreement, but one of the parties shall, without delay after the conclusion of the contract, write the agreement in detail and send it to the other party. The new Civil Code settles the case where such written "confirmation" differs from the oral agreement. If the derogation (addition, amendment) relates to issues that do not constitute materiality, it becomes part of the contract, provided that the other party does not object to it without delay.[6]

The contract shall be concluded in writing only if it is ordered by law or if the parties expressly agree to it. Tenders and acceptance declarations may only be made in writing for the conclusion of a contract concluded in written form. A contract with a written form must be drawn up in a document, but it is not necessary that a single document contains the legal declarations of all parties, but it is also sufficient for the parties' legal declarations, contained in a separate document, to contain together their mutual and consistent declarations of will. A document is not only a paper document, but also an electronic document, but the latter only fulfils the criterion of writing if it is equipped with an advanced electronic signature and a time stamp. Consequently, a contract with a written form cannot be validly concluded e.g. by e-mail exchange. If the contract is in written form, at least the essential content of the contract must be written, and the contracting parties must sign the document. In the case of documents issued in several copies, it is sufficient for each party to sign a copy intended for the other. The contract for violating formality is null and void. In the case of a formal contract, not only the conclusion of the contract, but also its modification and termination shall be valid only in the specified form. Contracts may also be concluded by means of a representative.[7]

The obligation to enter a contract may be based on a legal requirement and on the agreement of the parties. Since the freedom of the parties to conclude contracts is in line with the requirements of a market economy, legislation (law) may impose a contractual obligation only in exceptionally justified cases (e.g. in the case of a monopoly situation or for some purpose of public interest). For example, the obligation to conclude contracts for utility companies or public transport companies, or the imposition of compulsory liability insurance in certain occupations. If the law imposes an obligation to conclude a contract and the party who is liable for this obligation refuses

[6] Section 6:67(3).
[7] The rules of representation are set out in Articles 6:11 to 20.

to conclude the contract, the court may, based on the action of the other party, establish the contract, and determine its content.

The pre-contract is a case of contractual obligation based on the agreement of the parties. This legal institution is maintained by the new Civil Code with significantly amended rules. The court shall have the possibility to establish the contract even if the pre-contract did not contain an agreement on the essential aspects of the contract and to establish it by amending the terms laid down in the pre-contract. The new Civil Code (§ 6:73) therefore authorizes the court only to establish the contract on the terms laid down by the parties at the request of one of the parties. The conditions for refusing to conclude a contract, i.e. the applicability of the 'clausula rebus sic stantibus' principle, are also substantially tightened. This can only be done, as is the case with the conditions for a change in the court contract, if the party refusing to conclude the contract proves that the conclusion of the contract would harm his substantial legal interests because of a change in a circumstance which he did not cause, is not part of his business risk and was not foreseeable at the time of the conclusion of the pre-contract.

A new solution is that the Civil Code regulates the conclusion of contracts through a competitive tendering procedure, recognising that such procedures can take place outside the scope of cases regulated by special laws (e.g. Public Procurement Act, Public Finance Act, Concession Act, National Land Fund Act, etc.). The general rules of the Civil Code (§ 6:74-76) will effectively apply to the so-called "private competition", since these special laws fully contain the rules of each tendering procedure, so the Civil Code rules cannot be "threaded" there. As a rule, a call for tenders in a competitive tendering procedure means the undertaking to conclude a contract: the caller must conclude the contract with the tenderer of the most favourable tender, unless the right to refuse to conclude the contract has already been stipulated in advance in the invitation. Furthermore, the obligation to conclude a contract is made quite illusory by the rule that the party making the invitation may withdraw his invitation until the expiry of the time limit indicated in the invitation, since this way he can legally avert the conclusion of the contract even in the light of the tenders already received. If the tenderer does not conclude the contract with the most favourable bidder without having provided for this possibility, the establishment of the contract may be requested from a court. The 'auction', i.e. the tendering procedure for the price only, is specific to the general rules of competition in that the contract is concluded by the announcement of the winner ('by knocking down') at the purchase price obtained (i.e. the evaluation of the tenders and the conclusion of the contract with the 'winner').

After the main regulations of the Hungarian Civil Code in connections with the contracts, we would like to summarize the characteristics of the Canadian contract law by the publication of Jean-Louis Baudouin. In Canada, the four most common types of contracts are: the contract of sale, whereby a person acquires the ownership of property in return for payment; the lease and hire of services, whereby a person offers his services to another in return for payment; the lease and hire of things, whereby a person is temporarily granted the use of property (e.g., an apartment) in return for a price (rent); and the mandate, whereby a person gives another the power to represent her. Unlike other agreements, a contract is a legally binding promise. If one of the parties fails or refuses to fulfil its promise without

a valid reason recognized by law, the party suffering the consequence of this breach of promise may call upon the courts either to force the defaulting party to carry out its promise (specific performance) or to demand compensation in the form of damages. Quebec civil law and Canadian common law generally follow similar rules in this regard: a contract legally entered represents a legal bond between the parties. Parties are free to contract whenever and for whatever reason they wish. The only limits to absolute contractual freedom are certain restrictions imposed by legislation and by accepted ethics. Contracts contrary to a statutory law such as the Canadian Criminal Code are null and void. (Examples of this might include a work contract for a professional killer, or for a sex trade worker). The same is true for a contract that goes against accepted ethics, or in civil law, public order.

Civil Code regulations governing contracts in Quebec[8] are derived mainly from French civil law. (French civil law is sourced from Roman law.) In other provinces, regulations governing contracts are based mostly on jurisprudence (previous court decisions) and on traditional British common law.

Many provinces, however, have adopted legislation codifying the rules of certain contracts. This is particularly true of sales and consumer contracts. Although Canada's two major legal systems differ in certain respects for contract law, the practical solutions they provide are very similar when not identical.

For a contract to be valid and therefore legally binding, five conditions must be met.

First, there must be the mutual consent of both parties. No one can be held to a promise involuntarily made. When consent is given by error, either under physical or moral duress, or because of fraudulent practices, the contract may be declared null and void at the request of the aggrieved party. In certain types of contractual relationship, the law demands that the consent of the party be both free and informed. This is the case, for instance, with contracts involving medical treatment.

The second is contractual capacity — the mental ability to keep the promise one has made. A young child, a person suffering from a serious mental disorder and in some cases a minor is all considered incapable of contracting.

The third condition is that the contract should have an object or a purpose. It must concern a specific and agreed-upon good or service.

The fourth condition is '*lawful cause*' in civil law; or a so called '*valuable consideration*' in common law. In this area, important technical differences exist between the two legal systems. Briefly, according to this fourth condition, the promise made must be serious and each obligation assumed by one of the parties must find a corresponding (but not necessarily equivalent or equal) promise made by the other party. A person may thus legally sell goods at a price that does not represent their actual market value. The contract would still be a valid one.

The fifth condition, which is not required in all cases, is the compliance in certain circumstances to formalities provided by law, such as a valid written instrument. In general, this condition holds for contracts that may have serious consequences for the parties; or those for which certain measures of publicity are required."[9]

[8] Articles 1377, 1456 of the Québec Civil Code – QCC.
[9] JEAN-LOUIS BAUDOUIN: *Contract law in Canada*

Generally spoken, we can state that none of the countries' legislation requires a contract to be written to be legally binding to the Parties concluding it. However, in certain cases described by the law it is necessary to conclude the contract in writing to be legally binding – e.g., this is the situation in the case of Real Estate Sale and Purchase Agreements.

Furthermore, we can note that the creation of a written agreement is often beneficial for the contracting Parties as later they can read their own copy of it and remind themselves of the content of the contract and the obligations they have taken on. Also, when one of the Parties would like to sue the other contracting Party, it is much easier to prove the existence of a contract by having a written document.

Hungarian legislation in Act CXXX of 2016 on the Code of Civil Procedure (hereinafter: Pp.) differentiates between different forms of official documents as follows:

Pp provides the definition of Public deeds under Section 323 as follows: *'[Public deeds] (1) A public deed means a paper-based or electronic document, which was issued in accordance with the legal provisions by a court, a notary, or other authority or administrative organ acting within its scope of responsibilities. (2) A public deed shall be deemed original unless proven to the contrary, but the court may ex officio call upon the entity issuing the deed to make a statement regarding its authenticity.'*

Private deed of full probative value: Section 325 of Pp: 'CXXX A private deed shall have full probative value, if a) the deed was written and signed by the issuing person with his own hand, b) two witnesses confirm that the issuing person signed the deed not written with his own hand in whole or in part, or acknowledged his signature as his own, in front of them; for confirmation, the deed shall be signed by both witnesses, indicating their name and, unless otherwise provided by an Act, domicile or, in the absence thereof, place of residence, in a legible manner, c) the signature or initials of the issuing person on the deed is authenticated by a judge or a notary, d) the deed is signed by a person entitled to represent the legal person, in accordance with the rules pertaining to him, e) the deed was drafted and countersigned in the proper manner by an attorney-at-law or a registered in-house legal counsel, confirming that the person signing the deed signed the deed drafted by another person with his own hand or acknowledged a signature as his own in front of that attorney-at-law or registered in-house legal counsel, f) the person signing the deed affixed to the electronic deed his qualified electronic signature or seal, or advanced electronic signature or seal based on a qualified certificate, as well as a timestamp, if required by law, g) the electronic deed is authenticated by the signatory through the Document Authentication Based on Identification service specified in a government decree, or h) it is created through a service, specified by an Act or government decree, where the service provider attributes the deed to the issuing person through the identification of the issuer, and certifies the attribution to a person together or on the basis of data that can be traced back clearly to a signature

https://www.thecanadianencyclopedia.ca/en/article/contract-law?gclid=CjwKCAjwiY6MBhBqEiwARFSCPoDVk20W2DBQz4FEVrufPmW9276nHy1oZCfbG0G4wVJ_AaBXUuOsOhoCt5IQAvD_BwE, (Date of access: 20.11.2021) Further reading:

JOHN MCCAMUS, The Law of Contracts, 2nd ed. (2013).

ANGELA SWAN, JUKAB ADMASKI AND ANNIE Y. NA, Canadian Contract Law, 4th (2018).

made by the issuer with his own hand; furthermore, the service provider records a certificate of clear attribution to a person into a clause attached to and forming an inseparable part of the electronic deed, and signs it and the deed with at least an advanced electronic seal and at least an advanced timestamp.[10]

The performance and amendment of agreements

To introduce the existence of the current practice related to the performance and amendment of agreements, it is necessary to highlight that there are different universal governing principles adopted by both legal systems – Hungary and Canada – that affect the performance of agreements concluded in both countries.

One of these principles is the *Pacta sunt servanda* and another principle is *Clausula rebus sic stantibus*. According to the principle of *Pacta sunt servanda*, the agreements concluded must be kept. It means that the obligations taken on by the agreement must be duly performed. This principle is also provided by the Section 6:34 which is among the general provisions related to the performance of obligations in the Ptk – the *General rule of performance*: 'The service shall be performed in accordance with the content of the obligation.'[11]

On the other hand, principle *Clausula rebus sic stantibus* provides us further details regarding the obligation performance expectation of the law: it means that in some instances the obligation to perform according to contract might still change according to certain conditions.

This latter principle is embodied by Section 6:192 of the Ptk as follows: *'[Amendment of the contract by court] (1) Any of the parties may request the court to amend the contract if, in the permanent legal relationship between the parties, due to a circumstance that occurred after the conclusion of the contract, the performance of the contract with unchanged conditions would harm his substantial legal interest, and a) the possibility of a change in the circumstances was not foreseeable at the time when the contract was concluded; b) the change in circumstances was not caused by him; and c) the change in circumstances falls outside his normal business risk. (2) The court may amend the contract from the date determined by it, but not earlier than from the date when the claim for the amendment of the contract was enforced at court, and in a manner which prevent the change in circumstances from harming the substantial legal interest of any of the parties.'*[12]

Obligation to provide information in connection with obstacles forms fundamental principle related to the performance of contracts which is provided by Section 6:126 of the Ptk: 'The parties shall be required to notify each other if the performance of an obligation undertaken in the contract is expected to be affected by an obstacle unless the other party should have known of this obstacle even without such notification. (2) The defaulting party shall be liable in accordance with the rules on liability for damage caused by breach of contract for the damage he caused by not complying with the obligation to provide information in connection with the obstacles.[13]

[10] Section 325 of CXXX of 2016 on the Code of Civil Procedure (Pp).
[11] Section 6:34 of Act V of 2013 (Ptk).
[12] Section 6:192 of Act V of 2013 (Ptk).
[13] Section 6:126 of Act V of 2013 (Ptk).

Special provisions in agreements

In our article we would like to spare a separate chapter for the topic of special provisions in contracts as these special provisions might be crucial for the Parties. For instance, the use of General Terms and Conditions is widespread and is becoming more and more accepted when signing a contract. What makes this acceptance so special is that the party signing the agreement does not read the whole text of General Terms and Conditions, but states that he or she has read and has understood it in all parts. The signature of the contract itself makes another – maybe not even known – list of terms and conditions (that is another contract or a whole system of contracts) binding to the Party.

In accordance with their increasing frequency and importance in economic life, the new Civil Code contains in a separate chapter the rules for concluding contracts under standard contractual clauses.[14] This is the most common of the special forms of contracting. Its main feature is that it lacks the classic bilateral bargaining process. Its main applications are mass-scale business turnover and consumer-to-business contracts (e.g. consumer loan agreements). A standard contractual term is a contractual term that is unilaterally predetermined by its employer for the purpose of concluding several contracts without the involvement of the other party and which has not been individually negotiated by the parties. The new Civil Code regulates the conclusion of contracts under standard contractual clauses in substance in accordance with the rules of the old Civil Code, which were already harmonised with EU law (Directive 93/13/EEC) in 2006. However, the new Civil Code also contains new rules, such as the rule on the becoming contractual content of an additional claim against the consumer, which also meets the requirement of an EU directive, or the rule on the conflict of general terms and conditions (the so-called 'battle of the blankets'), which is the codification of paragraph III of Resolution GK 37 of the Supreme Court.

The new Hungarian Civil Code expresses the increasing importance of electronic communication by including the special rules for the conclusion of contracts by electronic means as one of the special cases of contracting.[15] In this context, the Civil Code contains, in accordance with the provisions of Act CVIII of 2001 on certain aspects of e-commerce services and information society services, the rules on the obligation of the electronically providing party to provide information, the correction of data entry errors, the effective entry into force of the electronic contract declaration and its confirmation. These rules on the conclusion of electronic contracts are dispositive, but in the case of the conclusion of a contract between the consumer and the entrepreneurs are cogens, since the law declares an agreement other than those which are different from them null and void. The rules governing the conclusion of electronic contracts apply only to contracts concluded online (by clicking) and do not apply to contracts concluded by electronic mail or equivalent individual means of communication (e.g. sms).

Also, different clauses in business-related contracts, for instance the full payment guarantee clause is often used. In this case its signatory takes on the obligation to perform an obligation which had originally been shouldered by another person, but in the instance, it fails to perform, the signatory of the full payment

[14] Articles 6:77 to 81.
[15] Articles 6:82 to 85.

guarantee would perform. This obligation is directly enforceable if it is signed in an appropriate form determined by law, therefore it can be particularly dangerous from a business law perspective to the signatory of the clause, however it is extremely beneficial for the entitled contracting Party.

One of the most used special provision of contracts that hold great importance is the clause in which the Parties choose applicable jurisdiction and exclusivity of a certain court in case their legal relationship does not end in an amicable way and – as it is quite often happens – one of the Parties sues the other.

Termination of agreements

In Hungary, as well as in Canada, the list of the ways of termination of contracts starts with the performance. It might also happen however that the contract is terminated without performance or only by partial performance of the obligations. This can happen by the consent of the Parties by an agreement; or by one-sided statement; judicial order; order made by an authority; and in other ways such as 'confusio' – in this case, the entitled and the obliged Parties become identical. Also, by death or in case the aim of the contract becomes impossible – in this case it cannot be expected in any circumstances from the obliged Party to perform its obligations according to provisions of the contract.

Chapter XXVI of the old Civil Code dealt with certain cases of termination of the contract and the statute of limitations (§ 319-327). It not only contained provisions for the termination of the contract by mutual agreement between the parties, unilateral declarations of rights (withdrawal and termination) that led to it, but also stipulated that the contract would terminate if the same person was entitled and the obligated (confusio) and arranged when death would terminate the contract. In the structure of the new Civil Code, the XIII. Title deals exclusively with the parties' methods of termination by agreement and unilateral declaration of will, as well as the termination of the contract by the court, and places other methods of termination elsewhere, mostly within the common rules of obligations. Thus, confusio can be encountered in section 6:3(b), the death or termination of the debtor without legal successor in Section 6:3(c), the death or termination of the rightholder without legal successor in Section 6:3(d), the impossibility in Section 6:179(1). The statute of limitations was given a separate chapter in the Sixth Book (Chapter IV, § 6:21 – 6:25).[16]

The new Civil Code did not bring about any change in the fact that the contract may be terminated or terminated ex tunc with ex nunc effect, i.e. for the future, by mutual agreement of the parties, with effect retroactive to the date of conclusion of the contract. In both cases, the termination of the contract without performance will result in the termination of the rights and obligations arising from the contract. As a new rule, the law stipulates that termination of the contract is possible only if the services performed can be refunded in kind, otherwise they are reversible. In this case, the original state must be restored. The restoration of the original state, in accordance with the consistent principle of the law, means the reimbursement in kind of

[16] Az új Ptk. magyarázata V/VI. , Kötelmi Jog, Első és Második Rész; HVG-ORAC Lap- és Könyvkiadó Kft., 2013., 346.-372. o.
http://projektjeink.birosag.hu/sites/default/files/allomanyok/ptk_e_learning/ptk8/lecke13_lap1.html.

the services provided. If the situation before the conclusion of the contract cannot be restored because any service is irreversible, the rules governing the termination of the contract with ex nunc effect shall apply. The form of the termination and termination contract based on the consensus of the parties is considered in the formality of the original contract concluded (Section 6:6(2)). However, pursuant to Article 6:94(2), in principle, if the law does not require the inclusion in an authentic instrument or a private document of full probative value and the contract is not intended to transfer ownership of immovable property, the termination or termination of the contract without compulsory formality also applies if the corresponding actual condition is of the same will of the parties.[17]

In addition to the termination of the contract by mutual consent, the new Civil Code, exceptionally but in several places, still allows for the unilateral termination of the contract by means of a legal declaration addressed to the other party. If this is done with retroactive effect from the conclusion of the contract, withdrawal, if it is effective for the future, we are talking about termination. To avoid repetitions, the legislation draws parallels between the cases of termination of the contract with a unilateral declaration and the agreement of the parties: termination resulting in termination with ex nunc effect shall be subject to the rules of termination, while termination shall apply to termination with effect ex tunc. However, since the termination of the contract requires the restoration in kind of the situation at the time of the conclusion of the contract, the party is entitled to withdraw only in the case of reversible services, i.e. on condition that he offers to return the service he received at the same time. The justification of the law also stipulates, somewhat, that the party can return the service. In the event of a dispute, the court shall act correctly if it makes that ability the subject of an investigation. As regards the formality of withdrawal and termination, the terms of the contract shall apply mutatis mutandis to the termination of the contract by agreement. Finally, it should be noted that the law does not distinguish between normal withdrawal or termination in this place, as in the old Civil Code, i.e. without justification, and extraordinary, reasoned withdrawals or terminations, which can usually be applied as a result of serious breaches of contract by the other party. It also does not contain any provision here as to whether the termination of the contract by unilateral declaration of rights has immediate effect or whether there is an interval (period of notice) between the date on which the declaration is made, and the legal effect is set. However, the interpretation of the provision must consider the provision concerning the validity of legal declarations (§ 6:5).[18]

The provisions on termination of the contract shall apply mutation to the termination of the contract by the court. The court shall act if the parties disagree on unilateral termination and give a judgment on the termination of the contract.[19]

[17] Az új Ptk. magyarázata V/VI. , Kötelmi Jog, Első és Második Rész; HVG-ORAC Lap- és Könyvkiadó Kft., 2013., 346.-372. o
http://projektjeink.birosag.hu/sites/default/files/allomanyok/ptk_e_learning/ptk8/lecke13_lap2.html.

[18] Az új Ptk. magyarázata V/VI. , Kötelmi Jog, Első és Második Rész; HVG-ORAC Lap- és Könyvkiadó Kft., 2013., 346.-372. o
http://projektjeink.birosag.hu/sites/default/files/allomanyok/ptk_e_learning/ptk8/lecke13_lap3.html.

[19] Az új Ptk. magyarázata V/VI. , Kötelmi Jog, Első és Második Rész; HVG-ORAC Lap- és Könyvkiadó Kft., 2013., 346.-372. o

In Canada, according to Common Law, there are generally four ways of termination of agreements: by performance, by agreement, by breach of contract, by the law of frustration. The performance is the simplest and best way contracts can be terminated as this way the contract 'runs its course'. When the Parties end the contract by agreement, naturally it involves the consent of all the contracting Parties. When we speak about termination by breach of contract, we mean that the innocent Party has a right of termination for breach of contract when the obliged Party does not deliver what was originally promised and therefore this Party which fails to fulfill its obligations is in a so-called repudiatory breach or another agreed standard of breach. Under the expression 'termination by law of frustration' we mean that the underlying circumstances of contract change which materially alter the performance requirements of the contract.

This case is like the before mentioned *'clausula rebus sic stantibus'* as in this case the circumstances have changed significantly, which results in the change of expected performance of a given obligation or obligations by the obliged Party participating in the contract.[20]

Conclusion

In our article we sought answers to the following questions: What is the definition of a contract in Canada and in Hungary? What are the most common types of contracts in the two countries from a civil law perspective? How is a binding contract (or agreement) made in Hungary and in Canada between the parties, what are the possible forms of agreements? Also, what are the governing rules regarding the creation of a contract. we found it useful also to include certain special provisions that contracts often contain, and the way of termination is a significant part of this topic as well.

Comparing the legal and therefore cultural background of the two countries in our point of view it is quite surprising to notice the vast influence of Roman Law, as even in Common Law countries its traces can be found. This way of development of Roman tradition and law resulted in striking similarities – e.g. the originally Roman Law principle of *'clausula rebus sic stantibus'* and the situation connected to it is also considered in Hungary and Canada even today.

Naturally, there are also differences. In our aspect, these differences which are the result of continuous change and development of the culture and the law, make the legal systems of the two countries truly unique.

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- Sections 6: 34; 6:58; 6:62; 6:126; 6:192 of Act V of 2013 (Ptk);
- Section 325 of CXXX of 2016 on the Code of Civil Procedure (Pp).

THE PROCEDURE OF REIMBURSEMENT OF THE COSTS INCURRED IN A TRIAL, IN A SUBSEQUENT TRIAL

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Abstract

Costs incurred in a dispute may be claimed in that dispute or the parties may choose to claim them separately, in another trial. Although, apparently, the claim for costs after the trial in which they were incurred is not difficult, in fact, the initiation of a new litigation determines the initiation of the entire procedural mechanism related to any trial. Thus, like any other litigation, the one having as object the obligation of the defendant to pay the court expenses incurred in another case, will start by introducing the petition. The petition will have to comply with all the conditions set out in the Code of Civil Procedure, including those relating to the payment of fees. Although many issues related to the claim for costs in another case have been clarified in case law or doctrine, further practice shows us that a legal issue can never be definitively clarified. From a logistical point of view, it would clearly be preferable for the parties to claim costs in the dispute in which they were incurred, given that the judge of the case knew all aspects of the dispute directly, but also for to avoid the agglomeration of the courts with other litigations. On the other hand, given that certain costs can be determined only after the end of the proceedings, the request for costs in another litigation may be an appropriate solution.

Keywords: *costs, trial, jurisprudence, procedural, reimbursement.*

1. Introduction

Given the fact that court costs have become very important in a lawsuit, being a real claim, this article seeks to clarify certain controversial issues related to the claim for costs in another trial, by presenting the jurisprudence or opinion of the doctrine in this matter. Also, even at the level of the European courts, there have been decisions that are relevant on the subject addressed by this article.

One aspect that is relevant to the claim for costs is that if the claim is made in the very litigation which gave rise to the costs, it is an accessory request, and if the costs are claimed in another trial, the claim is a main one, the procedural effects being significant.

Another aspect that should be mentioned is that, sometimes, court fees have a higher amount than the value of the summons. In these cases, it is necessary for the court to analyze the proportionality and reasonableness of the costs.

In doctrine and case law, it is unanimously accepted that the costs of a dispute may be claimed in a new trial. However, A controversial situation is the one in which, although the party initially requested costs in the process in which they were made, later, it changes its opinion and wants to request them in another process. Is this a waiver of this request? Or, according to art. 406 paragraph 4 of the Code of Civil Procedure[1], the consent of the opposing

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[1] Art. 406 paragraph (4) Code of Civil Procedure If the plaintiff waives the trial within the first term at which the parties are legally summoned or after this moment, the waiver can be made only with the express or tacit consent of

party would be required in order for a waiver to be taken. Also, if the party is represented in the process, it would be necessary to have a special mandate, according to art. 406, second paragraph, of the Code of Civil Procedure, in order to make this act of disposition. In practice, however, the courts are not overly strict in this regard, being rather permissive and merely taking note of the party's request for costs separately.

Another problem that arises in practice is that some parties require certain categories of court costs in the litigation that gave rise to them (such as judicial fees) and other costs separately (such as attorney's fees). Since there is no legal rule prohibiting this practice, and civil liability for tort is based on the principle of full reparation of the damage, I consider that there is no impediment to proceeding in such a manner.

2. Legal regulation

The award of costs is governed by the provisions of articles 451-454 of the Code of Civil Procedure. According to art.451, the court costs consist of the judicial fees, the fees of the lawyers, of the experts and of the specialists appointed under the conditions of art. 330 para. (3), the amounts due to witnesses for travel and losses caused by the need to be present at the trial, the costs of transport and, where applicable, accommodation, as well as any other expenses necessary for the proper conduct of the proceedings. From the very definition of costs, it can be seen that some of them, such as lawyers' final fees, transport and accommodation costs, could be known to the parties only after the dispute has been settled, so that at least those costs are justified to be requested in another trial.

2.1. Court costs consisting of lawyers' fees

According to art. 30 paragraph 1 of Law no. 51/1995 which regulates the organization and exercise of the profession of lawyer, for his professional activity the lawyer has the right to a fee and to cover all expenses incurred in the procedural interest of his client. Several legal provisions regarding lawyers' fees are provided in the Statute of the legal profession. Thus, according to art. 130 of the Statute, the lawyer is prohibited from fixing his fees on the basis of a quota litis agreement. The quota litis pact is an agreement concluded between the lawyer and his client before the final settlement of a case, an agreement which fixes exclusively the lawyer's total fees according to the judicial outcome of the case, regardless of whether these fees consist of a sum of money, a good or any other value. Therefore, a legal aid contract is valid, which provides for both a success fee and a fixed, pre-established fee, a conclusion also upheld by the High Court of Cassation and Justice in resolving an appeal[2]. On that basis, if the parties provided for both a fixed fee and a success fee, the latter could be determined only at the end of the dispute, depending on the solution in question. Also, in case the parties of the legal aid contract would provide an hourly fee, per working hour, in accordance with the provisions of art. 129 of the Statute of the legal profession[3], the party has no way

the other party. If the defendant is not present at the time when the plaintiff declares that he is giving up the trial, the court will give the defendant a period within which to express his position on the request for waiver. Failure to respond by the deadline is considered a tacit agreement to waive the judgment.

[2] Decision no. 2131/2013, File no. 10873/63/2011.

[3] Art.129 of the Statute of the legal profession

(1) The fees may be set as follows:

to prove, at the latest at the close of the debates, as required by article 452 C.pr.civ[4], of the costs, because, practically even at the last trial session, the lawyer would represent the party, so he would owe a fee for this activity as well. Moreover, if the ruling is postponed and the lawyer draws written conclusions, it is clear that the party cannot claim these costs in this first dispute. Even the provisions of art. 451 (2) of the Code of Civil Procedure[5] could not be applicable because the court did not know the total amount of the costs represented by the lawyer's fee. Regarding the provisions of art. 451 paragraph 2 of the Civil Code, the Constitutional Court, being notified with the exception of unconstitutionality of this provision, decided that, in connection with the obligation to pay court costs, including the lawyer's fee, by the losing party, by Decision no. 401 of 14 July 2005, the Court held that the prerogative of the court to censure, in determining the costs, the amount of the agreed legal fee, in view of its proportionality to the breadth and complexity of the activity submitted, is all the more necessary as that fee, converted in order to pay the costs, he is to be borne by the opposing party if he has fallen into claims, which necessarily presupposes that he is opposable to him. However, its opposability to the opposing party, which is a third party in relation to the agreement to provide legal services, it is the consequence of its acquisition by the court decision by the effect of which the claim acquires a certain, liquid and due character"[6].

In other decisions of the Constitutional Court, concerning the same legal provisions, it held that the lawyer, by exercising his profession, carries out an economic activity, which consists in offering goods or services on a free market (Judgment of the Court of Justice of the European Union of 19 February 2002, in Wouters and Others, paragraph 49), but any economic activity is carried on "in accordance with the law". Consequently, the legislature considered that the amount of the fee must be proportionate to the service provided, thus establishing the possibility of limiting it if

a) hourly fees;
b) fixed fees (flat rate);
c) successful fees;
d) the fees formed by the combination of the criteria provided in letters a) -c).

(2) The hourly fee is established per working hour, respectively a fixed amount of monetary units due to the lawyer for each hour of professional services he provides to the client.

(3) The fixed fee (flat rate) consists of a fixed amount due to the lawyer for a professional service or for categories of such professional services that he provides or, as the case may be, he provides to the client.

(4) The hourly and fixed fee (flat rate) is due to the lawyer regardless of the result obtained by providing professional services.

(5) The lawyer may receive from a client periodic fee, including in the form of a flat rate.

(6) The lawyer has the right to request and obtain a successful fee in addition to the fixed fee, as a supplement, depending on the result or the service provided. The success fee consists of a fixed or variable amount set for the attorney to achieve a certain result. The success fee can be agreed with the hourly or fixed fee.

(7) In criminal cases, the success fee may be applied only in connection with the civil side of the case.

[4] The party claiming costs must prove, in accordance with the law, their existence and extent, at the latest at the end of the closing of the debate on the merits of the case.

[5] The court may, even of its own motion, reasonably reduce the part of the court costs representing lawyers' fees, when this is clearly disproportionate to the value or complexity of the case or to the work carried out by the lawyer, taking into account the circumstances of the case. The action taken by the court will have no effect on the relationship between the lawyer and his client.

[6] Decision no. 165 of March 27, 2018.

there is no fair balance between the lawyer's service and the fee charged[7].

On the other hand, it is the court which settles the main action which is the best able to examine the merits, proportionality and reasonableness of the costs, since it is the court which, at least in the case of the fees of the lawyers, is directly aware of the work of the lawyers. However, regarding the reduction of lawyers 'fees recently, the European Court of Human Rights ruled that Article 1 of Protocol 1 to the European Convention on Human Rights had been violated, by the fact that the court ordered the reduction of ex officio lawyers' fees[8].

There are, therefore, benefits to claiming costs in the very litigation in which they were incurred, but the reality is that in many cases this is impossible. If the party is to be ordered to pay the costs of the proceedings in a new litigation, certain procedural issues need to be clarified.

3. Procedural aspects

3.1. The court fees for the claim

In the first place, if the parties requests the fees from another trial, in a subsequent trial, then they have to pay another judicial fees for this second claim[9].

Obviously, the procedure chosen by the applicant is also important, as we will see below, as court fees are also determined by this choice. The High Court of Cassation and Justice has ruled in a decision in an appeal in the interest of the law[10] that claims requiring the award of costs separately are the main claims subject to court fees, which are calculated on the basis of the amount of the claims brought before the court, even if the claims which were the subject of the dispute from which those costs came were exempted from paying fees. Thus, even if, in the situation in which the costs are required in the process which gave rise to them, it is not necessary to pay the court fee for this claim, always, if these costs are claimed separately, it is necessary to pay the fees on the grounds that the legal basis for the application for recovery of costs is distinct from that of the process were the costs incurred.

As an exception, however, we mention the situation in which it is requested to award the costs separately by a public institution, among those provided in art. 30 paragraph 1 of the Government Emergency Ordinance no. 80/2013[11]. In this case, no legal fees will be paid in any case, regardless of the procedure followed.

The exemption from the payment of judicial fees for the accessory claim having as object the court costs, is based, mainly, on the provisions of art. 35, second paragraph of Government Emergency Ordinance no. 80/2013 which stipulate that unless the law provides otherwise, the applications submitted during the trial and which do not change the taxable value of the

[7] Decision no. 471 of June 27, 2017.

[8] Case 54780/15 (Dănoiu and Others v. Romania).

[9] Article 3 of the Government Emergency Ordinance no.80/2013.

[10] DECISION no. 19 of November 18, 2013 regarding the appeal in the interest of the law, regarding the interpretation and application of the provisions of art. 1, art. 2 para. (1) and art. 15 lit. p) of Law no. 146/1997, with subsequent amendments and completions.

[11] Art. 30 paragraph 1 of the Government Emergency Ordinance no. 80/2013 Actions and requests are exempted from the judicial fee, including appeals formulated, according to the law, by the Senate, the Chamber of Deputies, the Romanian Presidency, the Romanian Government, the Constitutional Court, the Court of Accounts, the Legislative Council, the People's Advocate, the Ministry Public and by the Ministry of Public Finance, regardless of their object, as well as those formulated by other public institutions, regardless of their procedural quality, when they have as object public revenues.

application or the character of the initial application shall not be taxed. Also, the High Court of Cassation and Justice, the panel for resolving the appeal in the interest of the law, decided that in the unitary interpretation and application of the provisions of art. 28 referred to in art. 35 para. (2), art. 9 and art. 34 para. (3) of the Government Emergency Ordinance no. 80/2013 on court fees, with subsequent amendments and completions, appeals are not subject to court costs when they concern the decisions of the previous courts on the accessory request made in the process by the parties, which have as object the award of court costs[12].

3.2. The competent court

Secondly, the court which will be competent to solve the claim having as an object the fees from another trial, it is determined in accordance with the ordinary rules of jurisdiction. Thus, it is not relevant which of the courts judged the litigation that generated the court costs, but it is necessary to determine the competent court according to art. 94 et seq. of the Code of Civil Procedure. Moreover, it may even be the case that the court which will decide the case for the award of costs in another dispute is of a different degree from the one which settled the dispute where the costs incurred.

3.3. Legal basis

With regard to the legal basis of the claim, as stated in case law and doctrine, the claim for costs separately is based on civil liability for tort, being necessary to determine exactly the damage caused, compared to the principle of full reparation of damage[13].

It should also be noted that the procedure before the court may be different depending on how the plaintiff chooses to apply for costs in accordance with the common law procedure, the small claims procedure (art. 1026 et seq. of the Code of Civil Procedure) or the payment order procedure (art. 1016 et seq. of the Code of Civil Procedure). Regardless of the procedure chosen, I consider that the only useful and relevant evidence is that of the documents, so the duration of the trial should be limited to a single session, unless other procedural incidents occur.

3.4. Costs

With regard to the costs incurred in the litigation concerning the award of costs, the High Court of Cassation and Justice ruled that in the cases having as object the obligation of the defendant to bear the claim consisting in the court costs generated by another definitively settled litigation, the provisions of art. 453 para. (1) of the Code of Civil Procedure remain applicable[14].

In the same decision it was held that the plaintiff cannot be at fault when he exercises his right, and the defendant, who loses the lawsuit and who does not manifest himself within the limits of art. 454 of the Code of Civil Procedure, cannot be considered innocent in connection with the litigation having as object the payment of the costs related to a previous litigation. On the other hand, the costs incurred in the context of this second dispute should no longer be required in the course of a new dispute, precisely in order to interrupt an unjustified series of disputes and to prevent any abuse of procedural law. As the complexity of the case is somewhat predictable, all costs could be determined

[12] Decision no. 2 of January 20, 2020.
[13] Art. 1385 paragraph (1) of the Civil Code.
[14] Decision no.59/2017.

before the close of the proceedings on the merits.

Although rare, it would not be out of the question that in the main proceedings the claim was upheld in part and both parties applied for costs separately, in the dispute concerning the award of costs, the defendant may file a counterclaim claiming the costs incurred in the first proceedings.

3.5. Limitation periods

Being a main claim having as object claims based on civil liability for tort, the legal provisions regarding the limitation periods become incidental. Thus, according to art. 2528, paragraph 1 of the Civil Code, the limitation period for reparation for a damage caused by an unlawful act begins to run from the date when the injured party knew or should have known both the damage and the person responsible for it. In view of these provisions, we need to determine when the limitation period starts to run. However, the party is aware of the damage and the person responsible for it, from the moment of communication of the final decision by which the dispute that generated the court costs was settled. On the other hand, if certain costs are known to him later because, for example, the lawyer issues the invoice with the total amount of the fee, after the communication of the final decision, from that moment the limitation period begins to run.

4. Conclusions

Lately, judicial costs have become increasingly important as a result of the development of the legal professions, so there are few cases in which the parties are not represented by lawyers or legal advisers. Also, there are many cases where the parties try to prove their claims through the expert test.

Due to the multitude of situations in which the parties wished to obtain through another trial the costs of a first trial, it was necessary to intervene in the doctrine and case-law in order to clarify the incidents which had arisen and which were not yet settled. Although in practice there will always be problems with claiming the costs of a trial, at this time many questions have been answered, and the parties can make an informed choice as to what is most advantageous to them.

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THEORETICAL QUESTIONS AND MODELS OF COURT ADMINISTRATION

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Abstract

The separation of public administration and the administration of justice took place in Hungary more than one and a half centuries ago in line with Act IV of 1869. Yet, we may still identify numerous necessary or expedient points of contact in the legal system between the two organizational forms. In public law thinking the administration of justice and public administration have been linked in multiple ways for centuries. There are substantial differences in terms of why and especially how the two branches of law examine the administration of courts, while European scholars of public law also think differently about the issue. In this paper, I aim to introduce exactly these segments: namely what the opinion of Hungarian scholars of public law has been about the separation and the interconnections between the two areas, moreover, the factors based on which they tried to separate the law application activities carried out by jurisdiction and public administration, as well as the theoretical questions that may arise in view of this in connection with the administration of courts.

Keywords: *separation of powers, administration of justice, judicial independence, quasi jurisdiction, efficiency.*

Introduction

The separation of public administration and the administration of justice took place in Hungary more than one and a half centuries ago in line with Act IV of 1869. Yet, we may still identify numerous necessary or expedient points of contact in the legal system between the two organizational forms. One of these involves administrative jurisdiction but we may also mention the quasi-judicial activity of public administration that is discussed in scholarly publications as a special aspect of public administration which at the same time also represents the exception from the principle of the monopoly of jurisdiction by judges. The administration of courts is also one of the related areas with a 1991 resolution of the constitutional court[1] arguing that it represented a special, "relatively independent" field of public administration. At the same time, publications in the area of constitutional law also scrutinize this topic in a necessary and justified way, while the regularities of court administration are among the classic questions of public administration, including the differentiation between external and internal administration. When discussing the topic from the perspective of public administration, the question of the independence of judges also makes up a necessary starting point, such research,

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[1] Rationale of Constitutional Court resolution no. 53/1991. (X. 31.) II. 2., Magyar Közlöny 1991. p. 120.

however, focuses primarily on studying the tools of administration and management.

It is already clear form the above that there are substantial differences in terms of why and especially how the two branches of law examine the administration of courts, while European scholars of public law also think differently about the issue. In this respect, the starting point itself is not specified enough in connection with the organizations belonging to jurisdiction[2] but in public law thinking the administration of justice and public administration have been linked in multiple ways for centuries. In this paper, I aim to introduce exactly these segments: namely what the opinion of Hungarian scholars of public law has been about the separation and the interconnections between the two areas, moreover, the factors based on which they tried to separate the law application activities carried out by jurisdiction and public administration, as well as the theoretical questions that may arise in view of this in connection with the administration of courts.

1. The Comparison of Jurisdiction and Public Administration In View of the Principle of Separation of Powers

It is a distinct preliminary question related to the topic what the attitude of works on public law has been towards the confluence of the branches of power in different eras. Although separation of powers represents one of the cornerstones of the rule of law, from the era of Dualism (1867-1918) all the way to today all studies have mentioned it as a fact in connection with courts that judicial activities are also performed by other, especially public administration bodies and there may also be other overlaps between public administration and justice.

The principle of separation of powers has been adapted in Hungarian works on public law in two ways. The classic trichotomy is associated with the name of Montesquieu in theoretical works in French and Latin states as well as in Hungary. The problems related to the practical implementation of the separation, however, appeared early on, what is more, they were already present in the original work[3], thus especially in German publications a dual system also appeared based on the differentiation of public will and action[4] which distinguished only between the legislative and the executive branches, whereby the latter also included administration and justice.[5]

An early description of the separation of powers in Hungarian publications on public law was written by Győző Concha in *Politica* in which he argued that the judicial power had already been separated but compared to the legislative and executive power its separation was only relative.[6] Concha also acknowledged the significance of judicial independence, however, he did not address the relationship between public

[2] Berthier, Laurent – Pauliat, Hélène: Administration and management of judicial systems in Europe, Study by the Observatoire des Mutations Institutionnelles et Juridiques (Observatory of Institutional and Legal Change–OMIJ, EA 3177) University of Limoges, Euroepan Commission for the Efficiency of Justice (CEPEJ), this document is available online at https://rm.coe.int/european-commission-for-the-efficiency-of-justice-cepej-administration/168078829f (last access 02.12. 2020.) p. 2.

[3] C.f. Montesquieu, Charles, A törvények szelleméről [The Spirit of the Laws], Osiris, Budapest, 2000, p. 253.

[4] For example, Lorenz von Stein.

[5] In more detail: Ernő Nagy, Magyarország közjoga: államjog [Public Law in Hungary: Constitutional Law], Budapest, Eggenberger, 1897, p. 196.

[6] Győző Concha, Politica vol. 1. Budapest, 1905, p. 291.

administration and the courts in detail and thus he did not specifically deal with jurisdiction by particular bodies of public administration and its perception in constitutional law. Later, this was explained by Gábor Máthé in a way that the separation would have involved the transformation of public administration, the implementation of which was unlikely in practice due to the municipia.[7] József Eötvös, also based on the theory of Montesquieu, differentiated between legislative, governing, judicial, royal, and public administrative powers from which he considered the first two to be decisive and which he referred to as state will and action based on the analogy of human nature.[8]

During the era, the name of Károly Csemegi was also closely associated with Act IV of 1869. Csemegi not only considered separation to be necessary but also realized that only the establishment of the guarantees of judicial independence may provide a constitutional guarantee.[9] János Martonyi integrated administrative jurisdiction into the theory of the separation of powers by, besides the classic triad, also considering the power of the head of state to be remarkable[10] Martonyi also acknowledged the opinion deriving from Locke according to which the activities of the executive and judicial branches greatly resemble each other in terms of their regulation by legislation and the nature of the activity itself. Due to the different character of the objective of the function, according to which public administration pursues public interest, while the courts only guarantee the rule of law, he also considered organizational differentiation to be necessary. [11] Although by this time several European states had stated *expressis verbis* the need for the separation of public administration and justice[12], Martonyi also highlighted that in practice separation only took place partially. As examples of *quasi iurisdictio*, he mentioned the court established for the disciplinary matters of administrative officials, the bodies acting in connection with compulsory retirement, as well as those cases when public administration makes a decision on a preliminary question, and last but not least, criminal justice by the police as well as municipal justice. Based on all these, he concluded that the organizational differentiation of the two branches of power were imperfect and thus separation might take place based on the nature and objective of the activities.[13]Martonyi also introduced the other types of links between branches of power besides quasi jurisdiction.[14]

Compared to others before him, István Bibó provided a novel interpretation of the theory of separation of powers. He pointed out that the theory was simultaneously descriptive and normative as it was created partly because the authors wished to

[7] Gábor Máthé, A magyar burzsoá igazságszolgáltatási szervezet kialakulása 1867-1875 [The Emergence of the Hungarian Bourgeois Judicial Organistaion 1867-1875], Akadémiai Kiadó, Budapest, 1982, p. 17–26.

[8] József Eötvös, A XIX. század uralkodó eszméinek befolyása az államra II. [The influence of the dominant ideas of the 19th century on the state II.], Magyar Helikon, Budapest, 1981, p. 145-147.

[9] Gábor Máthé, A bírói hatalom gyakorlásáról szóló 1869: IV. tc. létrejötte és jelentősége a dualizmus jogrendszerében [The creation and significance of Act IV of 1869 on the Exercise of Judicial Power in the legal system of dualism]. Gazdaság és Jogtudomány 3. (1969. 1-2.) p. 137.

[10] János Martonyi, A közigazgatás jogszerűsége a mai államban [The legality of public administration in the modern state], Budapest, 1939, p. 14.

[11] Martonyi: op. cit., 11.

[12] See the history of French law referred to by Martonyi, Martonyi, op. cit., p. 12.

[13] Martonyi, op. cit., p. 19 and 21.

[14] For details see Martonyi, op. cit., p. 14-21.

systematize the different segments of state powers and partly to create a model. Bibó referred to the teachings of Aristotle as well as the English constitution whereby the separation of public administration and jurisdiction barely took place. Bibó, however, did not see a contradiction in this respect but the confirmation of the idea that the essence of Montesquieu's triad did not involve the complete and overall separation of the branches of power but its goal was to avoid the concentration of power by establishing adequate guarantees.[15] Bibó partly also touched upon the substantive differentiation of public administration and executive actions in connection with the critique of the division of power. Its so to say idealist critique primarily criticized the functional division which was based on the realization that the application of law represented a decisive activity for both powers. According to Bibó, such a realization could not be considered as new as Locke had already argued that jurisdiction was a part of the executive power, which was, however, surpassed by Montesquieu.[16]

2. The Assessment of Common Points in Studies of Public Law[17]

The practical impossibility of the strict separation of branches of power appeared relatively early and in an obvious manner based on the above. Therefore in Hungary the general opinion was that due to the unity of state power, the theory of separation of powers cannot be interpreted in a rigid way.[18] During the debates of the act stipulating the separation of public administration and jurisdiction[19] in 1869 several people argued that the judicial powers of administrative bodies should be maintained. István Tisza also proposed that the legislation should stipulate that the county competence was to be preserved at the lowest level[20], which, however, did not yet happen at that time. Therefore the impossibility of complete and consistent separation already presented itself at this time on the level of legislation and jurisprudence. According to the scholars of public law at the time, it was not simply about the insufficiency of the regulation and a kind of solution that was to be maintained for the time being, but in certain areas it had become some kind of a requirement that quasi jurisdiction should also survive.

Besides Ernő Nagy[21], Károly Kmetty also referred to considerations of

[15] István Bibó, Válogatott tanulmányok. Vol. II. 1945-1949. [Selected Studies. Vol. II. 1945-1949.], Magvető, Budapest, 1986, p. 369-392.

[16] Bibó: op.cit., 388.

[17] In connection with this chapter, see: Zsuzsanna Árva, A quasi bíráskodás megközelítési lehetőségei [Approaches to quasi jurisdiction], Pro Futuro, 2013. 3. p. 120-135.

[18] Nagy Ernő, op.cit., 195.

[19] On the relationship between public administration and executive actions see András Varga Zs., "Közigazgatás és jogalkotás" [Public Administration and Legislation] in Csehi Zoltán – Koltay András – Landi Balázs – Pogácsás Anett (eds.), (L)Ex cathedra et praxis, Ünnepi kötet Lábady Tamás 70. születésnapja alkalmából [(L)Ex cathedra et praxis, Festive Volume on the Occasion of the 70th Birthday of Tamás Lábady], Budapest, Pázmány Press, 2014, p. 546. or György Gajduschek, "A közigazgatás szervezeti jellemzői – összehasonlító aspektusból" [Organisational characteristics of public administration - a comparative perspective] in Szamel Katalin – Balázs István – Gajduschek György – Koi Gyula (eds.), Az Európai Unió tagállamainak közigazgatása [Public administration in the Member States of the European Union], Budapest, CompLex, 2011, p. 39.

[20] Máthé, op. cit., 146.

[21] Nagy E., op.cit., 195.

expediency when explaining jurisdiction by administrative bodies with regard to misdemeanors, police, disciplinary or other cases that was maintained at that time by several European states.[22] Even though the most important scholars of public law in Hungary, Móric Tomcsányi and István Csekey[23], recognized the significance of separating the branches of state power, also due to reasons related to expediency[24], they did not consider it to be necessary by all means.[25] Thus separation was expressly implemented only at the level of law. The judicial activity of administrative bodies was maintained, among others, in the case of misdemeanors[26], in civil lawsuits with a lower litigation value[27], in affairs of craftsmen[28] and servants[29], as well as in disciplinary matters[30], but municipal jurisdiction was also a recognized exception[31], along with the procedures of guardianship and orphans authorities[32] discussed in works on public administration. While in the case of courts not only the law application activities of a public administration type represented an exception but the administration of the courts also.

3. Theoretical Questions Related to Court Administration

The topic of the administration of courts typically appears in more recent public law publications despite the fact that its connection with the separation of executive action as well as public administration and justice is beyond doubt. In terms of the theoretical issues related to court administration, the paper focuses primarily on those elements which should also be considered as part of an international comparison and which have dogmatic significance. Due to the limitations in terms of its length, however, it does not wish to provide an evaluation of current administration systems either in Hungary or abroad.

[22] Károly Kmetty, A magyar közigazgatási jog kézikönyve [Handbook of Hungarian Administrative Law], Politzer-féle Könyvkiadóváll. kiadása, Budapest, 1905, p. VI.

[23] István Csekey, Magyarország alkotmánya [Constitution of Hungary], Renaissance, Budapest, 1943. p. 191–192.

[24] "The practically identical nature of public administration and jurisdiction also manifested itself in the complete merger of these two activities over the centuries. In most cases the same bodies were responsible for all acts of the executive power, including both public administration and jurisdiction. However, exactly the circumstance that jurisdiction is always bound by law and is an activity that is intolerant of external instructions, made the organizational separation of jurisdiction justified from public administration that is partly driven by considerations of a political nature and expediency." Translation mine. István Egyed quoted in: Gyula [Tusnádi] Élthes, A rendőri és jövedéki büntetőjog. Az ezeréves magyar kihágási jog története és a mai állapota. [Police and excise criminal law. The history and present state of the thousand-year-old Hungarian law of misdemeanour] Fővárosi Nyomda, Budapest, 1935, p. 578.

[25] Móric Tomcsányi, Magyarország közjoga [Public Law of Hungary], Királyi Magyar Egyetemi Nyomda, Budapest, 1940, p. 15.

[26] Nagy E., op. cit., p. 292., Csekey, op. cit, p. 191., Kmety op. cit., p. VI. and 723., István Egyed, Közjogi alapismeretek [Basics of Public Law], Budapest, Grill Kiadó, 1937, p. 159., Martonyi, op. cit. p. 19.

[27] Nagy E., op. cit., p. 292., Csekey, op.cit., p. 191., Kmety, 1905, op. cit. p. VI.

[28] István Stipta, A magyar bírósági rendszer története [History of the Hungarian Court System], DUP, Debrecen, 1997, p. 156. or Kmety, op. cit., p. 722-723.

[29] Nagy E., op. cit.., p. 292., Egyed, op.cit., p. 159.

[30] Csekey, op. cit., p. 191., Kmety, op.cit., p. VI. and p. 723., Martonyi, op.cit., p. 19.

[31] Kmety op. cit., p. 722-723.

[32] Kmety, op. cit., p. 499-503.

3.1. Preliminary Questions

When studying the administration of courts, it is an essential preliminary question whether one can establish a uniform international standard for the administration of jurisdiction. International studies examining this question call attention to several problems. One of these involves the issue of differences deriving from the use of legal language and terminology closely related to the legal system of each country. Thus the member states define the scope of bodies belonging to the organizational system of justice as a branch of power differently, and what is more, research considers the administration of courts to be closely associated with the standard of jurisdiction, which, however, is difficult to measure based on empirical and/or exact research.[33] Similarly to the measurement of the external efficiency of public administration, we face the same problems in the case of the administration of justice as well.[34] In each country there is one such an organizational system which may be identified as jurisdiction and thus the comparison may only take place on a different chronological basis or from an international perspective. In the former case differing historical circumstances need to be taken into consideration, while in the latter the features of the given country's legal system may act as influential forces. As a result, it is difficult to find such points of reference that may serve as the basis of truly exact comparisons and would thus be suitable for the assessment of the regularities of administration. Exactly because of those above, just as in the case of the assessment of the external efficiency of public administration, in the case of the standard of the operation of jurisdiction the opinion of the general public on the operation of the courts has a significant role. The assessment of this may be facilitated by the annual reports and the evaluation of other indices that may provide a solution in connection with factors like the acceleration of procedures or the improvement of certain sub-processes, however, when talking about the operation of the system as a whole, the results need to be examined with adequate care and great caution exactly because of the independence of the courts.

The administration of courts, however, is associated in all rule of law countries with the principle of the independence of courts and its guarantees may not be infringed by the rules related to administration either. The principle is declared by numerous international and national documents, including the national constitutions.[35] This is exactly why it is important to specify what qualifies as administration and what those elements are that are related more to the procedural rules of the courts and the compliance with them. The borderline between management and administrative functions is especially important also because both tasks typically belong to the same bodies and heads of courts. At the same time, it is administration itself that links justice with the two other branches of power, the executive and legislative ones, the most. In the case of the latter, the connection is provided not only by the definition of the legal framework but also the acceptance of the budget closely related to court administration.

[33] Berthier – Pauliat op. cit. p. 5-6.

[34] Lajos Lőrincz, A közigazgatás alapintézményei [The basic institutions of public administration], HVGOrac, Budapest, 2007. p. 59-69.

[35] László Trócsányi – Attila Badó, Nemzeti alkotmányok az Európai Unióban [National constitutions in the European Union], Complex, Budapest, 2005.

Based on the above, it is clear that there are essential points of contact between courts and public administration also on a theoretical level. And even though it might seem easy to differentiate between the two institutional systems, this is not always straightforward because of the related functions.[36] Similarly to Hungarian publications, international legal studies also attempt to separate the two systems based on functions, however, it is not difficult to notice that both organizational systems carry out the application of law. This is exactly the reason why certain factors have appeared in legal studies based on which the two types of law application may be differentiated. These may be the following:

3.2. Delimitation Criteria for the Application of Law by Courts and Public Administration

Although some of the delimitation criteria of the application of law by public administration and courts are also discussed by textbooks in public administration law[37], it is worth discussing some of the differences that are significant from a dogmatic perspective here as well. One of these differentiating segments (although mentioned less frequently today) is based on the distinction of classic public law and private law as well as public interest and private interest. According to this, public administration represents the public interest due to its nature, while the court represents private interest. Such distinction, however, is immediately upset by the classification of criminal law as opinions differ about its public or private law nature.[38] In Hungarian studies Lajos Szamel emphasized that the private interest of the customer may come to the foreground also in the classic application of law by a public administration authority as certain individual rights may not be revoked by the authority and the principle of rights acquired and exercised in good faith often appears.

The discretionary power of public administration is another often mentioned criterion as opposed to the courts that are strictly bound by law. In this respect, however, Lajos Szamel pointed out that both bodies applying the law have a certain degree of discretionary power necessary for such application of law. It is not the prohibition of deliberation by the court that derives from the fact that judicial activity is bound by law but the constitutional guarantee of judicial independence. At the same time, the principle of being bound by law also prevails in connection with the activities of public administration[39]. János Martonyi, when studying discretionary power, concluded that one of the key differences between the law application activities of courts and administrative bodies is that the application of law by courts covers two areas. One of them involves establishing the facts of the case, while the other is the legal qualification of a specific historical fact pattern. As opposed to this, public administration besides these also takes into consideration factors of

[36] Berthier – Pauliat op. cit. p. 5-7.

[37] See István Balázs (ed.), Közigazgatási eljárások [Administrative procedures], DE ÁJK, Debrecen, 2019, p. 15-22.

[38] Lajos Szamel, Törvényhozás – bíráskodás – közigazgatás – kísérlet a bíráskodás fogalmának megközelítésére a törvényhozástól, illetve a közigazgatástól való elhatárolással [Legislation - judiciary - administration - an attempt to approach the concept of judiciary by distinguishing it from legislation and administration], Állam és Igazgatás, 38 (1988. 8.), p. 704.

[39] Lajos Lőrincz, A közigazgatás alapintézményei [The basic institutions of public administration], HVGOrac, Budapest, 2005, p. 64-65. and at this point he makes a distinction between deliberation within the scope of task-setting norms as well as official law application norms. Szamel: op. cit., p. 705.

expediency, which is not typical of the courts.[40]

It is already visible based on the above that a key feature involves the position of the authority in relation to the parties, and in the case of courts, judicial independence. Based on the principle of independence, the position of the court should always be neutral, while such a uniform organizing principle is not typical in administrative cases. In certain cases that may involve legal disputes (as for example in the case of the application of law for offenses) we may consider the body to be neutral, however, this is not entirely straightforward either. This is especially true because among acting authorities there are also administrative bodies the majority of which operate within a hierarchical system whereby the superior body may influence decision-making while adhering to the principle of the prohibition of the withdrawal of powers.[41]

In view of the decisions of the Constitutional Court, we may also identify a significant difference between the question of judicial independence and the fact that the position of the administrative procedure is not always neutral towards the parties. Of course, this in reality represents the merger of several factors that are addressed well by studies in constitutional law through the separation of different segments of independence, including the personal independence of the acting judge and the independence of the organization itself. From the perspective of the topic at hand this is truly significant as it is beyond doubt that the independence of the judicial organization itself is declared by the constitution, while this is not true for public administration as a whole.

Although judicial independence according to the general view applies exclusively to courts, in publications from the era of dualism and the beginning of the 20th century such opinions were also voiced that argued that in the process of criminal justice by the police the legislator created an institution that resembles judicial independence[42]. This was deduced from two factors: one of them was the principle of the free deliberation of evidence and the other involved the provision among the rules of police conduct according to which the police criminal judge exercises judgment independently. This opinion, however, was not accepted at that time either as, for example, another specialist of criminal justice studying misdemeanors, József Tóth, criticized the system of misdemeanor jurisdiction because it necessarily breaches the principle of judicial independence due to the procedure of administrative bodies.[43]

3.3. Basic Types of Court Administration Internationally

International publications fundamentally attempt to separate the judicial branch from the executive one through the use of both the organizational and functional approach, with judicial independence playing a central role in this respect as well. Exactly because of this independence, two main opinions have emerged in international studies in terms of whether the administration of courts is part

[40] János Martonyi, A diszkrecionális mérlegelés kérdései [Issues of discretionary assessment]. Acta Jur. et Pol., Szeged, Tom. XIV, Fasc. 5, 1967, p. 8.

[41] Szamel: op.cit., p. 706.

[42] Gyula Élthes clearly interprets legislation in a way that they also provide judicial independence for the administrative authorities applying misdemeanor law. Élthes: op. cit., p. 523–525.

[43] József Tóth, A rendészeti ténykedés alakjai [Shapes of Law Enforcement Actions], Szent János Nyomda, Eger, 1939, 186–187. See also Árpád Szakolczai, A közigazgatási hatóságok mint bíróságok [Administrative Authorities as Courts], Jogtudományi Közlöny, 1894. 15. p. 113.

of the organizational system or not. According to one of these, the main task of judges and courts involves the administration of justice in view of which administration cannot be a part of the organizational system. Such an approach is represented by Finland or Bulgaria. Based on the other approach, administration should also be in the hands of the heads of courts or placed within the organizational system as the exercising of certain administrative powers (with special regard to financial ones) may threaten the independence of the courts. Such an opinion is visible in Belgium and the Netherlands. In France, we can see an in-between model where the head of the court relies on administrative bodies in connection with certain activities.

It is already clear from this that the different member states of the EU use completely different systems, however, it is a shared feature of all that they do so for the purposes of preserving judicial independence, which is also guaranteed on the level of the constitution[44] and they also consider the separation of administrative work from the administration of justice to be necessary. At the same time, the constitutional solutions also differ in terms of how the protection of independence is defined. Based on these differences, the judicial councils also have different roles in the various systems, based on which we may distinguish between the following models:

According to the unitary model, administration may only belong to the ministry of justice and it also includes management and the distribution of budgetary resources. In such a system the judicial councils have no role as the division of power is based on functional separation whereby jurisdiction is also a kind of a state function that is a part of execution. This at the same time is reminiscent of the dual theory of the separation of powers.

There is an intermediate decentralized model in which the branches of power somewhat compete with each other and the minister of justice and the judicial bodies both play a role in administration. Such a model is followed by the great majority of European countries and although the distribution of management powers varies, it is generally true that the more significant part of competences is centered in the hands of the minister of justice. These include functions related to the advancement of judges, disciplinary matters or vocational training, as well as budgetary and other management powers. Due to the competing powers, however, it is typical that in the above issues the judicial courts formulate recommendations or express their opinion on the ideas of the ministry. A temporary rearrangement of the particular powers is also typical, while in certain cases there may be a lack of clarity in terms of certain competences which means that the given power may be exercised by the ministry as the legal regulations usually define the tasks and competences of the judicial bodies in an exhaustive manner.

The third model is represented by the autonomy-oriented or management model in which the administrative rights almost exclusively belong to the judicial bodies. This is typical of Denmark, the Netherlands, and Sweden. In the case of the latter, a body operating as a public administration authority is responsible for the administration of the courts. There may be several types of these bodies as well but it is common in all of them that they operate within jurisdiction as a general regulatory authority.

Based on efficiency, however, two other models may also be outlined. One of

[44] See Trócsányi – Badó, op. cit.

the south European solutions considers the personal independence of the judge to be the guarantee of efficiency, while in the northern model the independence of the judicial organization is considered to be cardinal. The opinion of the Council of European Judges published in 2007 recommended the implementation of the autonomy model[45]. The Consultative Council, in line with Article VI of the European Convention on Human Rights, argued that a judicial council would benefit both the justice system and the protection of the independence of the judges themselves, which together would promote the efficiency and quality of justice and also reinforce public confidence in the justice system. Therefore, the task of the body is to participate in the evaluation of the quality of the administration of justice and the implementation of techniques aimed at the improvement of the efficiency of judges' work and therefore should also have certain budgetary powers.[46]

4. Theoretical Questions Related to Court Administration in Decisions of the Hungarian Constitutional Court

After the change of regime in Hungary, questions related to the administration of courts arose more sharply in the period preceding the reform of 1997. Several decisions touched upon the issue of court administration, based on which the following dogmatic elements may be outlined. In connection with the 1972 Act on Court Organization that gave the task of court administration to the minister of justice, the Constitutional Court in its decision no. 53/1991. (X. 31.) pointed out that the essence of judicial activities involves the administration of justice and the guarantees of judicial independence are also related to this. At the same time, the body also called attention to the fact that continental rights consistently wish to separate the administrative activities of courts from the administration of justice. These include, according to the court, the provision of the personal and material conditions of the activity or the monitoring of the order of administration, which at the same time also ensure operation. In this respect, however, the Government may also have certain powers as the protection of the constitutional order as specified by Article 35, Section (1), points a) and b) of the then effective Constitution or the execution of laws are closely related to the operation of the courts. In terms of the latter, they argued that these activities do not represent a subordination of the judicial organization to the executive power. The decision also called attention to the fact that the separation of powers does not mean that the branches of power could not be limited by each other. In the case of the judicial power, the only limitation to this is exactly judicial independence.

Overall, the decision considered the administration of courts to represent a special branch of public administration, which is relatively independent, however, it also argued that not only the administrative duties related to courts belonged here but also the provision of the execution of court decisions as well as the tasks related to notaries and lawyers. At the same time, the Constitutional Court also called attention to the fact that the legislator had relative freedom in terms of the organization of

[45] Opinion No. 10 (2007) of the Consultative Council of European Judges for the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society. This document is available online at https://rm.coe.int/168074779b (last access: 10.10. 2021).

[46] Berthier – Pauliat op. cit. p. 11-13.

administration as part of which it might also consider factors of expediency within a constitutional framework. Constitutional Court Justices Antal Ádám and Imre Vörös also pointed out that in connection with the administration of courts we may distinguish between internal and external administration typical of public administration. They believe that the former includes the control of the court proceedings and administration, while the latter involves the provision of the conditions needed for operation and the control of leaders.

The Constitutional Court in its resolution no. 13/2013. (VI. 17.) also with reference to Constitutional Court resolution no. 97/2009. (X. 16.) stated it in its decision related to the legitimacy of the National Judicial Office that there were no international standards concerning the administration model of justice. This statement was considered to be governing by the Constitutional Court also after the Fundamental Law took effect (13/2013. (VI. 17.), Constitutional Court resolution, rationale [61]]. It was also at this point that the body referred to the fact that prevalence of separation of powers and judicial independence were not defined by the relationship between the judicial organization and the two other branches of power as well as other organizations (including the non-governmental, political, and social players), and the legislator continues to have extensive freedom in the establishment of the details of the court administration system.[47]

The Constitutional Court in its resolution no. 22/2019. (VII. 5.) briefly addressed the introduction of international administration models. In harmony with those mentioned above, it differentiated the models based on administration by the minister, judicial councils, and the mixed models, claiming that several subtypes of these may be distinguished. In connection with the ministerial model, it highlighted that the administration tasks related to the courts were performed by an external body, typically the minister of justice. According to the decision, this also prevailed in Austria and before 1997 Hungary had also used this model. In the case of administration by elected judicial courts different solutions are possible in terms of the composition of the councils, thus in certain cases the councils work only with judges as members, while in other cases there are also members who are not judges. In the mixed model, the tasks related to administration are divided between the minister of justice and the elected judicial court. They also highlighted it that the selection of the administration model might always be based on the specific features of the country, in connection with which the most important factor is that the independence of the court, the judicial organization should not be substantially influenced by the given model. This is a governing requirement for both the external and the judicial administration. The court also mentioned it as an additional requirement that transparency and efficiency should be improved and social control should be ensured.

The decision also noted that after the change of regime in Hungary the legislator experimented with several models of administration. They also mentioned and quoted from the resolution of the Venice Commission made at its plenary meeting on March 15–16, 2019 [CDLAD(2019)004], from which they highlighted it that although the commission was "supportive of independent judicial councils with decisive influence over decisions on the appointment and career of judges, it has not ruled out systems with a decision-making process

[47] 13/2013. (VI. 17.) Constitutional Court resolution, rationale [61]].

within the sphere of a minister for justice accountable to Parliament, provided that effective guarantees are in place to avoid such systems negatively affecting judicial independence." The Venice Commission at the same time stressed the role of judicial councils in providing effective checks and balances but also pointed out that as opposed to the heads of courts, it is the minister of justice who is responsible to Parliament.[48]

5. Conclusion

Thus based on those mentioned above it can be stated clearly that the ideas of a given state on the separation of powers are closely related to the selection to the specific model of court administration. Similarly to international studies, the Constitutional Court mentioned the same models and in line with the opinion of the Venice Commission it stated that there was no single solution for court administration in case the guarantee of judicial independence was implemented. In this respect we should mention it again that in the process of establishing the administration model all countries make their decisions in consideration of their social, historical, economic, and legal environment, as a result of which the different solutions cannot be adapted as such in other countries and their different sub-elements may also be used only in consideration of how they may fit into the system as a whole.

Although the recommendations of the European judicial councils prefer the use of judicial councils it can still be stated that there are no uniform international standards in the establishment of the administration systems of courts. It is an important factor, however, in all cases that the precise content and sub-elements of administration should be made clear and the administrative powers specified, which together may contribute to the improving efficiency of courts. In connection with the latter, however, the elements of public administration get a significant role, which may permeate the entire administration and management system.

At the same time, innovative elements also appear in the administration of jurisdiction, not only in terms of the system as a whole but also in connection with specific powers. As the Constitutional Court also pointed out, since the change of regime Hungary has experimented with several administrative models. These modernization attempts may at any given time serve the purposes of the renewal of jurisdiction and the catalysis of innovative practices.

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[48] 22/2019 (VII. 5.) Constitutional Court resolution, rationale [76] - [107].

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LABOUR MIGRATION IN GERMANY

Thazin KHAING MOE*

ABSTRACT

European Union member states are preferring to address the single labour market's benefits, and thus establishing the various forms of regulations for the labour migration within EU. Among the member states, Germany labour rules are in the great norms and the good history which makes the fair and just legislation between the national workers and migrant workers. The very interesting regulations in Germany are the Key Role of Hartz Reform with the Convincing on the Effectiveness of Profound Labour Market which gets the German labour policies to be developed. Active labour market policies are the principal play in Europe as far as the workers' rights through the labour market, and so all European member countries also have to implement ALMP supporting to their national labour legislations. Germany had been trying to set active labour market policies as their best in lieu of demanding the skilled workers only, since after the Second World War.

Keywords: *European Union, Labour Migration, Migrant Workers, Trade Unions, Irregular.*

Germany is a member country, supporting to the EU most and with the great systems of labour migration. It can highly stand and exits as a brilliant country in resolving the obstacles among the EU member states. Germany labour policies and how to get up from the economic crisis are really interesting around Europe. How could the Germany succeed the crisis situation? What are their labour migration policies? We need to trace back the history and evaluate for the answers of those questions.

First of all the German Employment Law is the substantial factor for managing the labour systems: how to control the workers and the employers not to get the disadvantages and the side effects. German Employment law especially gives the protection the employees against unlawful dismissal in order to avoid the recent past infringement of this kind of cases, various social rights for the employees and the co-determination rights for them through the Works Council with the rights of being a member in the union. Since 1960s a large number of social rights are included. In Germany there is a Works Council which is established with the workers, who have to opt out the representative every four years, and the employers are responsible to inform all the employment-relevant matters for getting the Works Council's consent but when it happens in dispute, the employers may request the labour court to substitute a Works Council under the rules. Sometimes co-determination is needed with the support of the employment lawyers.[1]

From the Employment Law of Germany, there are some rights for all the employees who need to be pointed out; types of employment contract, remedies of employees, working time and equal opportunities. There are two kinds of employment contracts which are permanent

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[1] Aspatore, Navigating Employment Law in Europe: Inside The Minds, 2011, page 53-57.

contract and fixed-term contract that is for 2 years in the maximum level. The employees have the remedies relating to the cases of employers' break of the contractual duties, which means that if the employers are breaking their contract regulations, they are entitled to take legal action, to claim their damages, to withhold their work, to terminate the contract without any notice and lastly to apply the interim injunction. The working time are that the employees have to be asked to work two hours at least during the night, they are entitled to take a rest 11 hours continuously in each day, and they have the right to get holidays on Sunday and public holidays. In the performance of the equal opportunities (especially equal treatment), two means are still being applied: General Equal Treatment Act and constitutional right to equal treatment.[2] Under the Employment Law, one more interesting and effective thing is pension right; which all the employers and the worker usually pay the compulsory contribution money for the pension program, but most of the companies offer the workers for the cooperation of this program. Since before, Germany always focus on the skilled workers for the effectiveness of their economy, therefore, the recruitments from the European Member states are still being served in order to fill the vacant. The German people also welcome the foreign workers outsides of European Union.[3] Those are the summary of German Employment Law all the workers and employers have to apply. In monitoring of the law, Germany's target is to finish their economic processes effectively without delaying at all and to find the skilled workers from the local, from the region and from the third countries. Their concept is simple that they have no desire to use the low skilled workers made their business delayed. The Works Council is also a kind of great options which can prevent the infringement of the workers' rights in conformity of their EU Charter and Human Rights. Not only the government servants but also other workers will get the pension if they work faithfully in their employment.

In mid-1950, the recruitment of foreign labours was emerged with respect of the labour shortage of the high demand and then in spite that the foreign worker population was about 200,000 until 1961, the recruitment was stopped in 1973. It was a kind of incentive for the foreign workers to stay in Germany permanently, which is why the employers also needed to keep their workers in case of working long time. Between 2000 and 2004, Green Card was issued; for the recruitment of IT specialists. In 2005 the new immigration law was enacted. The vital migrant workers from Germany are Turkey, Italy, and Poland at the time. But 60% from EU member states; one-quarter from Poland, 11% from Romania and 4% from Turkey , and 24% from non-European countries were existed in 2010. Later EU Blue Card for non-EU migrants was introduced and had been in force in 1st of August of 2012. EU Blue Card means that he/she will get a work permit for two to four years for owning a resident permit in terms of social security and the employment law, additionally, after three years, he/she will be granted to live in Germany with the settlement permit. Since 1st of April, 2012, foreign education certificates have been recognized.[4] The main intention to change the policies in Germany is to preserve the foreign workers with a long term and high skilled level to be

[2] Constanze Moorhouse and Elizabeth field, Employment Law in Europe, 3rd Edition, 2013, page 455-472.
[3] Aspatore, Ibid.
[4] WERNER EICHHORST and FLORIAN WOZNY, Migration Policy in Germany, 2012, page 2-5 and 8-10.

permanent and to obstruct the high demand of labours without any hesitation of the businesses. The Green Card and EU Blue Card were created for the inducement of the temporary migrant workers in Germany.

There were over 80 million residents in Germany, however, many emigrants left with the reasons of some affairs, which was made Germany alert to improve their systems. Germany recruited the foreign workers from the southern Europe and the Mediterranean Region in 1955[5], then for getting back the recovery was started with the agreement of Italy; "Agreement on Recruiting and Placement of Workers" depending on the negotiation in 1955. After the first agreement with Italy, Greece, Spain, Morocco, Portugal, Tunisia, and Yugoslavia also followed and carried out the recruitment of workers in the good cooperation. Those started Germany labour force in filling out of the demand in the employments and made the immigrants increased after 1959. Guest workers population is much more than permanent foreign workers, but they had to work in the positions for the unskilled owing to non-recognition of foreign certificate. In the post-war Germany became habitual with the recession and can try to get the growth although the economic crisis affects Germany negatively. On 23rd November, 1973, there was a directive, Recruitment Ban, which fully blocked the guest workers who are not the members of the European Economic Community. It looks deterring the temporary working and preferred the permanent workers within the country. After that, Germany gave the opportunities to them the dual citizenship. Besides, the new Immigration Law was enacted in 2005 which includes the temporary resident permit and permanent resident permit for the people who entered with different purposes.[6] The process mentioned above is the steps to control and change the systems with their immigration law. The strange thing is that Germany had to face the shortage of workers and the problem that many people left before the crisis. After the crisis, Germany could carry on steadily with their carefulness by learning their past lessons. With the new Immigration Law, Germany showed that it is a kind of immigration country.

One of the integration methods is the enactment of a new Alien Act in 1990; the allowance of the family reunification. In 2000, the citizenship law was established; the right to born the children in Germany or on the other hand the birth-right citizenship which means that this kind of baby gets the right to be a German citizenship. [7] In 2005, almost 7% of all and 4.5% of the highly-skilled employees in Germany have a foreign nationality.[8] The shortage of foreign workers was persuaded by allowing all the guest workers to call their family reunification, a kind of labour integration. It is clear that Germany was trying to change their system of integration to get better of their economic crisis as their economy also depends on the foreign workers in their labour demands of the employments and the very first reason for facing this problem is that their national workers are not enough to circle of their machinery of the productivity.

[5] Federal Ministry of Interior, Building and Community, Labor Migration, https://www.bmi.bund.de/EN/topics/migration/immigration/labour-migration/labour-migration-node.html.

[6] DOMid, Essay: Migration History in Germany, https://www.domid.org/angebot/aufsaetze/essay-migrationsgeschichte-in-deutschland.

[7] Sude Ünal, Labour Migration to Germany and its Effects on German Politics of Cultural Diversity, 2019, page7-8.

[8] Burkert, Carola; Niebuhr, Annekatrin; Wapler, Rüdiger, Regional disparities in employment of high-skilled foreigners: Determinants and options for migration policy in Germany, HWWI Research Paper, No. 3-7, 2007, page 5.

That's why the migrant workers have to be replaced without being vacant.

With the current conditions of labour migration in Germany, there is a new rule, Skilled Immigration Act, which was in force on 1st of March, 2020; the summary is that

1. what the skilled worker is the worker with University Certificate or vocational training certificates (but at least two years training),

2. Generally the work visa is issued after four weeks of applying,

3. The foreign workers can apply the immigration with job offer or work contract despite of not recognition of the qualification lower than two years vocational training level,

4. The duration of the residency in the work visa is four years or depending on their employment contract,

5. The permanent resident permit can be applied after four years of residency,

6. If the skilled foreign workers are older than 45 years, they need to prove that they can earn 3685 Euro per month,

7. The skilled professionals, for instance medical doctors, nurses, etc. don't need to show their certificate but just five years working experiences.[9]

It is clear that Germany always is offering the workers to be skilled workers in their employment and their productivities because they just want the high skilled workers from the abroad. But the foreign workers always had to work in the position of the low skilled workplace in Germany employment in the past. It was a problem for the migrant workers although the german workers get the high opportunities like the high positions and the high skilled level positions within the countries. The employers in Germany always preferred to call their german workers in their business for giving the high salaries but for the migrant workers they didn't want give the high salaries instead of their German workers. they had a reason that the foreign workers had no skills and not effective in working in their business and they would not allow and recognize their certificates and their educations of their original countries. But there was an Immigration law in 2005 which also divided into two parts for the foreign workers as the temporary workers and permanent workers and a new Immigration Law has been promulgated on 1st of March in 2020 which is calling the high skilled workers from abroad, on the other hand, the Germany is giving the another opportunities to the migrant workers to get the higher positions in their employment and their productivities. It is a kind of protection for their country, which means that they will not face the shortage of the workers in the future because they had already faced in the past about the workers' problem and they had to accept the guest workers. Moreover, they already faced that many workers left Germany because of some affairs and obstacles of Germany. It looks preventive for their workers in their country and the german workers have to be motivated, for example, if the german workers are not working with high skilled in their employment, they will lose their opportunities in the employment and they can lose their jobs easily and it will be for the foreign workers. According to the EU laws and regulations for the migrant workers, the Germany also has the responsibilities for obeying their EU standards and human right protection in the case of labour migration. Since the past till today Germany is a country of Immigration even though the government denied it under

[9] Sabine Kinkartz, Germany's New Labour Migration Law Explained, https://www.dw.com/en/germanys-new-labor-immigration-law-explained/a-52575915.

most of the discussion or debates. Nevertheless, Germany labour laws is a kind of great law and regulations among European member states as the other member states should imitate and use the norms in their national labour laws. All member states have the responsibilities for the protection of the workers. German language speaking is also essential for the foreign workers, and it can make them to be more last long living there and get a better opportunities.

How Germany sets their policies differently in their active labour market policies as an EU member state

Active labour market policies are the principal play in Europe as far as the workers' rights through the labour market, and so all European member countries also have to implement ALMP supporting to their national labour legislations. Germany had been trying to set active labour market policies as their best in lieu of demanding the skilled workers only, since after the Second World War.

The Key Role of Hartz Reform with the Convincing on the Effectiveness of Profound Labour Market

Before German ALMP currently, so-called Hartz Reform needs to be acknowledged; which is the outset of active labour market policies reform in Germany. When was ALMP come out? A compulsory unemployment insurance was established in 1927 and ALMP in 1970s whilst in a high rate of unemployment. In 1990, the active labour market policies got famous as an important role, which was administered by the federal employment office. At that time, the unemployment benefits were relying on the workers' previous unemployment duration and wage; the employers and the workers had to share the unemployment insurance, however, in the comparison of other countries Germany ALMP expenditures were higher and with long duration. Till 1990s its unemployment rates got worse and worse, and its financial services collapsed. Therefore Germany needed to change a comprehensive reform, notwithstanding anything, it was still controversial with so many criticisms in every systems. In fact, from 1990s to the early of 2000s Germany was in the weakest situation in Europe in the reasoning of higher unemployment, too slow growth, public debt and budget deficit, afterwards the Hartz Reform could change the hardest condition and brought to the better position by changing in their labour market regulations. [10]The government initiated a Commission for Modern Labour Market Services which created Hartz Reform implemented in 2002-2005, with three aims which are the increasing effectiveness and efficiency of labour market, activation the unemployed and fostering employment demand by labour market deregulation.[11] Especially Hartz Reform was performed with four stages. It was organized with eight experts; two academics, two trade unionists, the representative from the employer organization, the representative from management consultant, company borads and government. It can be said that the Hartz Reform resulted positively and negatively by evaluating the past conditions that within three years from 2005 the unemployment rate fell down from 11% to 7.5%, otherwise, that it could make the unemployment

[10] Thomas Beissiger, Nathalie Chusseau and Joel Hellies, Offshoring and Labor Market Reforms in Germany: Assessment and Policy Implication, Economic Modelling Journal 53, 2016, Page 314.

[11] Lena Jacoba and Jochen Klave, Before and After Hartz Reform: The Performance of Active Labour Market Policies in Germany, Discussion Paper No. 2100, 2006, page 1-7.

decreased and the employed people increased but most of the people were in the low-quality employment conditions.[12] Somehow, it is clear that the main objective of Hartz Reform is to reduce unemployment rates. It is such an efficient way to control and tackle the labour issues in Germany. It can be said that in learning the systems of labour legislation in Germany the Hartz Reform plays a vital innovation to change the better situation and no one can deny and reject this Hartz Reform though there were some defeats or weaknesses and low-quality employment was high by virtue of getting free from the unemployment obstacles at least.

Hartz Reform stages put into practice with the dissimilar goals that Hartz I was leading to the setting up new personnel service agency, the support the vocational trainings and the deregulation of temporary work sector, Hartz II with the commencement the subsidy for one-person companies and low paid jobs (Mini and Midi jobs), Hartz II in the restructuring of the federal labour office and the last stage in the changing of unemployment assistance and social assistance. Meanwhile, the Reforms could cease the regulation on temporary agencies, reorganize the federal employment agency, reshape the unemployment insurance, and tighten job search obligations.[13] Nevertheless Hartz IV has a controversial case between the economists' comments, for instance Launov and Wälde argued that Hartz I to III could led to the effective systems but Hartz IV is not efficient with the reason that it was leading to too much high unemployment benefits as the incentives of the unemployed people, however, which made the labour market inefficient and too rigid. [14] Gianna C. Giannelli, Ursula Jaenichen and Thomas Rothe (2013) mentioned the disadvantages of the Hartz Reform IV concerning with the decreasing of the employment rate though Hartz I, II and III could make the rate of unemployment reduced, the combination of the unemployment and social assistance into one means-tested unemployment benefit type II, depending on the previous wage, duration and other household members' income.[15] As the situation and the reviews of some others, Hartz Reform IV is a kind of reduction of the benefits compared to the previous benefits range by the terms of the depending on the working wage and duration and on the income of the other family members and a type of forcing the workers to be long lasting in a workplace and to keep their chances not by quitting the job. The worst thing is the Hartz IV making the other I, II and III effort advantages to be down and mitigated the high rate of the employment.

Germany unemployment range is lower than EU27 as the percentage of Germany unemployment was 5.5% while EU27 range of unemployment was 8.1% in 2012. Germany could reduce their rate level from 13% in 2003 to 7.5% in 2008, besides; during the economic crisis in 2008/2009 Germany could preserve not to effect on their labour market with their Hartz reforms. Overall evaluation of Germany unemployment reduction reasons is because

[12] Center for Public Impact A BCG Foundation, The Hartz Employment Reforms in Germany, 2nd September, 2019. https://www.centreforpublicimpact.org/case-study/hartz-employment-reforms-germany.

[13] Niklas Engbom, Enrica Detragiache, and Faezeh Raei, The German Labor Market Reforms and Post-Unemployment Earnings, IMF Working Paper/15/162, 2015, page 3-8.

[14] Innovation Reports, Hartz Reform IV did not reduce the Unemployment rate, 2013, https://www.innovations-report.com/social-sciences/hartz-iv-reform-reduce-unemployment-germany-222355/.

[15] Gianna C. Giannelli, Ursula Jaenichen and Thomas Rothe, Doing Well in Reforming the Labour Market? Recent Trends in Job Stability and Wages in Germany, 8/2013, page 3-5.

of their job creation on the Mini jobs and Midi jobs which are especially for the women more effective than men in lieu of two-third of mini jobbers of women or the expansion of the female labour force. What is Gemany Mini jobs nature and its aims? For this question, the main features of mini jobs need to be mentioned; the maximum earning money with 450 Euros monthly or less, just 30% of the employer's payment of tax, and without supporting of living accommodion and social insurance rights for the workers. Therefore, the mini jobs workers are not entitled to the social insurance contribution but the midi jobs are not the same with Mini Jobs nature; which the workers will be entitled to the right of getting lower social insurance when their monthly earnings reach 850 Euros.[16] To sum up the overall review on the Germany labour market it runs with the non-standard employment with low wages owing to the Hartz Reforms.[17]

Expression of the role of Migrant Workers in the Labour Market in Germany

In the past of labour market regulation in Germany, the migrant workers who were outsides of EU had to work in the industrial sectors arduously with low social status. Some authors referred three reasons in the former labour market in Germany; the migrant workers with low education in comparing of the domestic education, non-stable working or movement from one country to another country prospectively and working temporarily which was why the employers did not want to invest the job training for them. Tracing back to 1960s-1970s, 70% of migrants were employed in the industrial sectors while the national workers were in the service sectors, though, 50% of migrants were employed in the less-skilled manufacturing jobs in a long-term in 1990. Between 1992- 2008, the industrial employment declined with the growing of service sector employment. The comprehensive monitoring was going to the remark that the labour market became worse and made the rate of unemployment population raised, thus the wage pay and working conditions were also to the down clearly which was especially on the foreign workers or non-EU workers. Hence the foreign workers had to work in low-wage jobs (1 in 3 workers) and then up to 35% before 2015.[18] In 2020, over 11 million foreign people entered into Germany; 5% from EU member states and 5% from non-EU countries. Among Non-EU foreign people, 259000 were for the employment.[19] Nevertheless the foreign workers from third countries were not easy to get job which is why the old immigration law gave the job opportunities where the national workers and EU workers cannot work at all. But later the foreign workers have the opportunities in working in Germany if they have the qualifications or University degrees which can compare to the Germany education or are skilled workers under the new Immigration law which named "Skilled Immigration Act". However if the foreign workers don't have the qualified education or vocational training but have the job offer or contract from the company founded in Germany, they are entitled to get the rights

[16] TRÉSOR-ECONOMICS No. 110, 2013, page 3.

[17] Janine Leschke, Labor Market Development, Non-standard Employment and Low Wages in Germany, ISSN:2339-5793, 2014, Vol 2, Page 67-78.

[18] Torben Krings, 'Good' Bad Jobs? The Evolution of Migrant Low-Wage Employment in Germany (1985–2015), 2021,page 527-533.

[19] Jan Schneider, Toward An EU Toolbox for Migrant Workers: Labour Mobility and Regularization in Germany, Italy and Spain , 2020, page 3.

staying in Germany for six months (the visa for job seekers) while the employers are evaluating his trial working in the employment. Additionally the foreign students also have the chances to work in Germany for 18 months after their study duration.[20] Nevertheless Germany decided to receive the foreign workers with low skills, and then they can be trained with the vocational trainings.[21] Comparing to the past with the present policies in Germany, the restricted rules for the non-EU workers were so serious and hard to enter into the labour market, on the other hand, the possibility to work only where the national workers neglected or didn't choose, but in the later situations the workers can work in the high position if they have high skilled qualifications which can compare to the Germany quality. It is obvious that Germany are just concentrating on their great productivity and exports competitive the global market and EU market , and they don't have any desire to go back their bad past situation which was in a low dignity in Europe. The Hartz Reform cannot effect on the foreign workers because they can only be accepted with the high skilled qualification. Under the Hartz Reforms the local workers are with the employment from the unemployment position in working every sector.

The percentage of foreign workers is the same with the EU-workers in Germany in accordance with the factors mentioned above. Although Germany doesn't want to get any bad impact for their economic or productivity quality, the foreign workers also support their economic from their perspective and with the same population of EU national workers. Those migrant workers need to have the same protection and social insurance together with the EU national workers. There is one chance which is likely to be most; job seeker visa with 6 months. That duration is not short that's why the migrant workers have time to find jobs and the tendency to get jobs. If so, what are the social security rights for the migrant worker? For this question, the next topic will explain with the provided policies.

Social Rights in terms of the Laws in Germany

Germany is also a member state of EU which provides some social rights for the migrant workers within EU with the conventions and Regulations, hence it has the responsibility to obey the regulations and policies of EU in the protection of the migrant workers because Germany entails one of the states it runs with the migrants in their machinery of the economics. In 1967, the Federal Republic of Germany gives the migrant workers in the following:

- Sickness benefits,
- Maternity benefits,
- Death grants,
- Accidents at work and occupational disease,
- Pensions,
- Unemployment.[22]

For all the social security benefits, the workers are responsible for paying the contribution for their social insurances. But the limitations of the social rights rely on different situation and rights of the workers. Jean-Michel Lafleur referred the Germany social system into two kinds: through the contributions of workers and employers and through the tax (but it is restricted more for the foreign workers). The insurance systems

[20] Amar Ali, The New Skilled Immigration Law in Germany, 11/2020, https://immigrationlawyers-london.com/blog/the-new-skilled-immigration-law-in-germany.php.

[21] Jan Schneider,page 6.

[22] European Communities, Social Security for Migrant Workers in Germany, 1967, page 19.

involve five categories which are public pension, health care, unemployment, work-related injuries, and long term care insurance Social insurance is concerning with the labour market status and the job type, somehow the migrant workers need to get the work permit and the formal employment importantly.[23]

The social benefits for migrants in Germany Currently are:

Unemployment: Whoever working in Germany and temporarily abroad is covered, by the deduction of 165 € from their income remuneration. They will get 60% for the persons without the children and 67% for the persons with the children. After paying the contributions for 12 months and become unemployed, the unemployment benefits for six months will be covered. Moreover, pensions, health care, and long-term care have the right to be covered during the benefit of the unemployment. [24]

Health-Care: 80% of the population in Germany is supported with the health care system. Normally there are two types of health care benefits; in-kind medical treatment and sickness pay after six weeks of sickness leave. Deloitte expresses "All workers in Germany with the regular annual remunerations less than € 64,350 must be enrolled in the compulsory health insurance scheme. And the contributions are 2.4% of the gross salary half by the employer and the workers. For the long term nursing care and disability insurance, the contributions are 3.05% half by the employer and the worker." [25] Three options of health insurance are categorized in Germany which are the government-regulated public health insurance schemes (GKV), the private health insurance from a German or International Insurance Company (PKV), and a combination of GKV and PKV, for all the workers employing in Germany. If the gross salary is less than 62550 Euros per year, the worker will be mandatory to be membership of GKV, however, while the annual salary is higher than 625550 Euros, he/she may opt out the PKV.[26]

Pensions: three divisions are split out mainly with old age, disabilities, and survivors. Germany pension system has three main pillars; mandatory state pension, company or occupation pension and private pension. [27]Germany is working with the pay-as-you-go system for the pensions benefit. For the pensions, all residents comprising of non-EU citizens who are residing in EU and having German public pension record, are allowed to pay the contributions in the waiting for 5 years at least. After 5 years, they have the right to get the pension depending on the sum of their earnings.[28] If the workers work in an employer who contributes for the pensions, they are eligible to get pension in Gemany. [29]

Family Benefits: EU citizens are sure to get the family benefits than non-EU citizens relying on the resident permit. EU citizens get six weeks before and eight

[23] Jean-Michel Lafleur and Daniela Vintila, Migration and Social Protection in Europe and Beyond(Vol I): Comparing Access to Welfare Entitlements, IMISCOE Research Series, 2020, page 179-194.

[24] Jean-Michel Lafleur and Daniela Vintila, Ibid.

[25] Deloitte, Working & Living in Germany: Moving together and making together, 2021, Page 9.

[26] Cathy J. Matz-Townsend, Health Insurance Option in Germany, 2020, page 2-3.

[27] EXPATICA, The German State Pensions: Guide to the German Pension System, https://www.expatica.com/de/finance/retirement/pensions-in-germany-831124/#GermanPensionSystem

[28] Jean-Michel Lafleur and Daniela Vintila, Ibid.

[29] EXPATICA, The German State Pensions: Guide to the German Pension System, https://www.expatica.com/de/finance/retirement/pensions-in-germany-831124/#GermanPensionSystem.

weeks after the pregnant, and child allowance even if they are abroad and the parents are still in Germany. This allowance will end when the parents leave Germany and their income tax stops.[30] Both EU citizens and non-EU citizens also have the parental benefits in terms of their working time (30 hours/ a week) and their annual net income.[31]

Minimum Income Benefits: EU employed nationals with the income below the social minimum income can accept a supplementary minimum income benefits, if they are employed for one year continuously, they will be treated like the Germans in this case if they become unemployed. For non-EU citizens can also get the minimum income benefits with the entering into Germany with the employment but not the asylum seeker. [32]

The migrant workers also have the right to get the fundamental social security rights in Germany according to the German legislation and EU regulations. In comparing of the EU nationals and non-EU nationals, it cannot be resumed non-EU national workers struggle with the discriminations in the social systems in lieu of the fair system, they have options to choose to be valid of getting the social insurance once they are holding the valid resident permit and can work in the harmony of the labour policies of Germany.

Trade Unions Rights regarding to the migrants

The migrant workers require getting the right to be membership in trade unions in Germany. German Constitution entails to have the right to freedom of association in Article 9 in the following:

"All Germans shall have the right form corporations and other associations."

In accordance with the rule mentioned above, only the Germans have the right to the freedom of associations. In 2018, 78 million people were with the trade union memberships. [33]Prior to the course of the membership of migrant workers in the trade unions in Germany, First of all, the potential question should be stated: what is the general trade unions situation in Germany? In general, there are three main biggest trade unions confederation in Germany, which are the German Confederation of Trade Unions (DGB), Geman Civil Service Federation (DBB) and the German Christian Trade Unions Confederation (CGB). Moreover, other trade unions also exist without comprising of these three confederations and the total member people are 280000 in 2014 by WIS. The German biggest trade unions are slightly concerning with the politicians. But DGB was partly close to the political party; currently they are defined as non-partison, that's why they don't have any financial support from the political party. The other two DBB and CGB are a little connection politically; therefore, they get the financial support from them. [34] By viewing those factors, most of the employees are going with three biggest trade unions federations. Getting the main support of the trade unions relies on whether of cooperating with the political parties due to the cause of financial support from them in the improvement of trade unions rights. It is a matter if the workers get the membership of famous big trade unions or

[30] Jean-Michel Lafleur and Daniela Vintila, Ibid.
[31] Deloitte, Working & Living in Germany: Moving together and making together, 2021, Ibid.
[32] Jean-Michel Lafleur and Daniela Vintila, Ibid.
[33] Heiner Dribbusch and Peter Birke, Trade Unions in Germany Challenges in a Time of Transition, 2019.
[34] Heiner Dribbusch and Peter Birke, Trade Unions in Germany Challenges in a Time of Transition, 2019. And Trade Unions in Germany, Organization, Environment and Challenges, 2012.

non-famous trade union, with the reason why they think that the biggest trade unions can only guarantee to give the protection and security of their lives.

The German Confederation of Trade Unions (DGB) is the first biggest trade unions confederation in Germany, with eights affiliated trade unions members, over six millions people with 20% pensioners, 5% unemployment, and 35% women workers in 2018, founded in 1949.[35] Eight affiliated trade unions members are Industrial Union Mining, Chemicals, Energy (IG, Berghau, Chemie, Energie) (IG BCE) with the members 274.182, Industrial Union Construction, Agriculture, Environment (IG Bauen-Agrar-Umwelt) (IGBCE) with the members 632.389, Union For Education and Science (Gewerkschaft Erziehung und Wissenschaft) with the members 279.389, Industrial Union for Metal Workers (IG Metall) with the members of 2,270595, Union for Food, Beverages, and Catering (Gewerkschaft Nahrung-Genuss-Gaststatten NGG) with the members 198.026, Police Union (Gewerkschaft Der Polizei GDP) with the members 190.931, Railway and Transport Union (Eisenbahn-und Verkehrsgewerkschaft EVG) with the members 187.396 and United Service Union (Vereinte Dienstleistungsgeuerkschaft) with the members 1,969.043.[36] DGB financial affair is managed with the union membership fees. [37] The German Civil Service Federation (DBB) is the second largest trade unions organization with 40 affiliated trade unions members and the total members with 1,317000 in 2018, 32% of women, and 11% of young workers. The Christian Trade Unions Confederation of Germany (CGB) is the third biggest organizations in Germany with 13 individual trade unions members, the gross member with 270,000 in 2017 and under 24% of women. CGB is a bit different with the other two unions with the reason that it is with a distinct politician orientation.[38] Nevertheless, the civil servant workers are not entitled to the right of collective bargaining and right to strike through those trade unions once their salaries are fixed by the government. No one can deny that the three biggest trade unions are leaned on by most of the workers in Germany in the condition of memberships and running faster than other trade unions in reviewing their success and well-known service or performances.

In the case of migrant workers in German trade unions, the recruitment system for them was started in 1950s, and the first largest trade union DGB was accepting the migrants in terms of the government labour migration policies, as the second class people, in the unskilled jobs not same with the German workers but not allowing the permanent residence. In fact, the German government and all trade unions were going with the migrant workers as the equal memberships like the nationals from the outset. But the foreign workers were participating in the Spontaneous Strike Movement 1973 mainly which caused the German government decision changed to not allow the foreign workers entering into the trade unions with the support of DGB. After 1982, the Christian Democratic Union party (CDU) got the power in the country: which has different policies for the migrant workers, DGB also went along with its policies leading to the integration and better

[35] Heiner Dribbusch and Peter Birke, Page 7.
[36] DGB Member Unions, https://en.dgb.de/member-unions.
[37] Heiner Dribbusch and Peter Birke, Ibid.
[38] Heiner Dribbusch and Peter Birke, Page 6-9.

rights for the migrants. [39] In fact, DGB gave the agreement to focus on the trade union representations of migrants and non-migrants, thus, it founded a Central Office for the Foreign Workers in Hamburg but existed only until 2000s; which functioned the meetings between the migrant workers and trade unions. In 1984 the foreigners' committee was established in IG Metall with the purposes of the solving the affairs of the foreigners. In 1985 to the government promulgated the complicated policies for the acceptance of the migrant workers.[40] One of the internal studies of IG Metall stated that over 3000 foreign works council's representatives, 400 works council leaders and 7500 foreign shop stewards currently exist. German trade unions are in an effort to combat anti-racist by engaging with some association such as "Kumpel" association though the foreign workers have in less rights. The government also confirmed to accept the refugees from Syrian in 2015, made trade unions to change their focusing point, for instance DGB built an advice center for the migrant workers, which means that German trade unions are working in accordance with the Government policies by means of accepting the refugees.[41] In fact, DGB was province the foreign workers with their commitment and consensus, for the stance on their sides, nonetheless, it targeted to support the policies of the government. Trade unions in Germany seem standing to carry out the government's decisions without targeting to the migrant labour's equal rights though they are not participating with the political parties clearly.

How to manage the concern of Germany in the occasion of Irregular Migration for working

Irregular migration affairs become worse and more important since 1990s till currently, especially Germany seems mostly faced from EU borders and member states. Barbara Laubenthal and Patricia Pielage argued that the Government amended German Residence Law a lot of times but not untouched the part of the irregular migration.[42] The migrants from EU countries which joined EU before 2004 have the right to stay unlimited in Germany but the ones from non-EU countries need to get the work permit or resident permit. If it does not meet with the factors mentioned, illegal residence will be deserved and those migrants will be deported by the government. Despite the legal status of living in Germany, they will be fine if they works in the irregular employment and then the employers will also get the punishment of the imprisonment in the fact that they hire the illegal workers. The German authorities had been trying to detect the illegal employment since before in conformity with "Law to Combat Undeclared Work" in 2004 and some amendments of "Fourth Social Law Book", to ensure that all workers need to have their passport, moreover, the punishment level was raised.[43]

[39] Stephen Castles, Labour migration and the trade unions in Western Europe, Center for Multicultural Occasional Paper, 1990, page 7-9.

[40] Lisa Carstensen, Challenging the Trade Union Agenda: Migrants' Interest Representation and German Trade Unions in Hamburg in the 1970s and 1980s, 2021.

[41] Mark Bergfeld, International Unions Rights, Vol 28, No 1, 2021, page 6-7. https://www.ictur.org/pdf/IUR281_BERGFELD.pdf.

[42] Barbara Laubenthal and Patricia Pielage, European Task Force on Irregular Migrations: Country Report (Germany), 2011, page 14.

[43] European Community Programme for Employment and Social Solidarity PROGRESS, Illegal Works of Migrants on European Union, 2013, page 23-28.

Around by 1990s Germany served actively of setting the common policies in EU regarding to the irregular migration, then tried to transpose two directives, the Directive 2008/115/EC on common standards and procedures in member states for returning illegally staying third-country nationals and the Directive 2009/52/EC providing for minimum standards on sanction and measures against employer of illegally staying third-country nationals, into its internal legislation by virtue of the "Return Home" policy in 2011. Hence the government issued a first draft for the first directive in the case of illegal migrants to be detained for 18 months in a maximum, got the criticizing from the NGO and a second draft for the second directive in the event of the sanction to the employer who employed the irregular migrants, on the other hand, the fundamental rights of the irregulars are endeavored to give at least under the political federal System, which is that all the cities in Germany have different system for controlling and managing of those migrants. In spite of different policies in the several cities, generally they are focusing on the social dilemma on the illegal migrants, for instance Munich which regulates right to education and health and Freiburg regulating to the right of education relating to the irregulars and their children and some other cities, Bonn, Leipzig, Menschen, Nurnberg, Augsburg, Stuttgart and Gelsenkirchen were reporting to the federal government for the access of the social and human rights.[44] Social rights are essential to all human beings and substantially right to health care is necessitated more to be reliable on the right to life (UDHR Art -1). Under International labour standards, all workers have to get the fundamental human rights in the employment country, furthermore, EU standards also compatible to the global norms. It is such a type of greatest humanitarian to treat all humans equally and horizontally that Germany goes to the general social rights in the cities once Munich and Freiburg are the sample cities in the condition of right to education for the irregular migrants and their children.

There is a regularization system for the irregular migrant people in European Union member states including. In 2010 2% of the foreign population had been regularized in Germany, since 2000s the government specified several measures of regularization based on the humanitarian ground with the extent that the employability was their main criteria in the system.[45] Three kinds of target were focused on asylum seekers who entered before 1990 in 1990, asylum seekers who entered before 1993, and 8 years residency in 1999 and long term tolerated persons in 2000.[46] In this case only the irregular people, entered into Germany legally but become illegal once their resident permit expire, will get this kind of opportunities, nevertheless, the people who are entering into the country illegally already commit under Resident Act.

Summary

Germany is a country which faced the big labour shortage than other EU members before their labour regulations had been provided in the past. Therefore, the recovery for getting back the fulfillment of the labour demand was tried with the Hartz reforms

[44] Barbara Laubenthal and Patricia Pielage, page 16-18.

[45] Albert Kraler, Regularization of Irregular Migrants and Social Policies: Comparative Perspectives, Journal of Immigrant & Refugee Studies, 2018, page 99-107. https://doi.org/10.1080/15562948.2018.1522561.

[46] Kate Brick, Regularizations in the European Union: the Contentious Policy Tool, 2011, page 11. https://www.migrationpolicy.org/sites/default/files/publications/EURegularization-Insight.pdf.

which totally transferred into the best situation of labour shortage issues. Among four Hartz steps, the fourth step has a controversial problem regarding to the social security rights differently of the other three steps. Before that, the treatment of the past defeat was started with the cooperation of Italy, Greece, Spain, Morocco, Portugal, Tunisia, and Yugoslavia by accepting the migrant workers from those countries. Then German government blocked the foreign workers migrating into the country because of some cases in 1973. In 2005 the new immigration law was issued. Later EU Blue Card for non-EU migrants was introduced and had been in force in 1st of August of 2012. The new Skilled Immigration Law was in force on 1st of March, 2020.

The Hartz Reform cannot effect on the foreign workers because they can only be accepted with the high skilled qualification. Under the Hartz Reforms the local workers are with the employment from the unemployment position in working every sector. Regarding social security rights, , they have options to choose to be valid of getting the social insurance once they are holding the valid resident permit and can work in the harmony of the labour policies of Germany. If the German Constitution is viewed, there is no trade unions right for the migrant workers but just for nationals. Virtually they also have the right to be membership in Germany in lieu of the government policies and different trade unions regulations. Among three biggest trade unions, DGB mostly accepts the foreign workers in the membership despite the breaking of the commitment to stand up for the migrant workers in the past, built an advice center for the mobile workers and is part of Federal Employment Agency which gives the job opportunities for the migrant workers. Trade unions in Germany seem standing to carry out the government's decisions without targeting to the migrant labour's equal rights though they are not participating with the political parties clearly.

Till today Germany is a famous and good country in the systematic policies comparing to EU members once it could stand up strongly with their great rules and policies without falling down in the last recession 2007/2008. In the case of foreign workers Germany set their rules distinctly for the labour migration that can allow the skilled immigrant workers and not giving the chances the foreign workers easily to enter and work in Germany. The high skilled workers, the high qualified productivity, and the more lasting rules to preserve are only intended. But if the employers give the job offering or work permit to the foreign workers, the workers can enter and work in Germany easily, though they won't get the high remuneration. Owing to the new Skilled Immigration Law, the foreign workers' entrance is restricted setting on the skills of the foreign workers and giving to the equal rights like the nationals relying on their skills. Regarding the regularization system, Germany never allows the irregular migrants, entered firstly into the country illegally, transforming into the legal status, though the people who enter into the country legally and become irregular due to their expiration of the resident permit, are only given to the regularization chance with the document of the suspension of removal order. Moreover they also have the right to education and health care within the country based on the humanitarian ground by virtue of the EU directives.

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CONSTITUTIONALITY AND REFERRAL IN THE INTERESTS OF THE LAW

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Abstract

Currently, in the Romanian legal system, the judge interprets and adapts law to the actual realities, remedies normative gaps and discovers remedies to inspire the legislator. In this regard, we should emphasize the role of the judicial precedent substantiated by means of the decisions of the High Court of Cassation and Justice, ruled within the referral in the interests of the law, given that, such judgments create general rules of interpretation and application of the legal provisions which generate non-unitary practices. There are situations in which the interpretation of the legal texts, offered by the High Court of Cassation and Justice, is subject to a constitutional review exercised by the Romanian Constitutional Court.

Keywords: *referral in the interests of the law, High Court of Cassation and Justice, source of law, supremacy of the Constitution, interpretation, unitary application, exception of unconstitutionality.*

1. Introduction

Whether and to what extent case-law is a source of law has been and remains a controversial topic. This is also because, generally speaking, a paradoxical situation is quite obvious: on the one hand, the inevitable insufficiency of law and its often delayed reaction to changes in social life requires the contribution of the case-law to the fulfillment, adjustment, update, restriction or extension of its normative position, corresponding to the "reality" or "matter" regulated or which is subject to regulation; on the other hand, in the re-accredited and terminus logic of the separation of powers, the exclusivism of the legislative activity of the Parliament seems to have acquired new accents[1]. Currently, in the Romanian legal system, the judge interprets and adapts law to the actual realities, remedies normative gaps and discovers remedies to inspire the legislator.[2]

Without reference to the obligation provided by art. 124 item 3 of the Constitution of Romania, according to which the judge is independent[3] and is subject only to the law, without being bond to the judgments pronounced in other similar cases by other judges or even by themselves, it is worth noting the role of the judge to cover, by the pronounced judgments, potential legislative gaps, as well as to create *de lege ferenda* proposal in the process of interpretation and application of the law, by cooperating with the legislative power, in the spirit of the principle of separation of powers, to the harmonization of legislation with social realities.

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[1] I. Deleanu, *Construcția judiciară a normei juridice*, „Dreptul", no. 8/2004, p. 12.

[2] S. POPESCU, *Introducere în studiul dreptului*, UNEX-AY-Complex Universitar, Bucharest, 1991, p. 158.

[3] Furthermore, the doctrine showed that: "*In what concerns our country, the revised Constitution of Romania expressly regulates the principle of the independence of the judicial power in relation to the executive and legislative power*" (E. E. Ștefan, *Răspunderea juridică. Privire specială asupra răspunderii în dreptul administrativ*, Pro Universitaria Publishing House, Bucharest, 2013, p.191).

In this regard, we should emphasize the role of the judicial precedent substantiated by means of the decisions of the High Court of Cassation and Justice, ruled within the referral in the interests of the law, given that, such judgments create general rules of interpretation and application of the legal provisions which generate non-unitary practices.

In accordance with the provisions of art. 126 para. (3) of the Constitution. "The High Court of Cassation and Justice ensures the unitary interpretation and application of the law by the other courts, according to its jurisdiction." The decisions pronounced in the procedure of the referral in the interests of the law are the main way in which the Supreme Court fulfills the constitutional attribution to ensure the unitary interpretation and application of the law. Therefore, the referral in the interests of the law is not only a civil and criminal procedural institution, but, at the same time, is an institution which is legally based on the aforementioned constitutional regulation.

Given the constitutional provision, the legislator shall be bound to regulate in the Codes of civil and criminal procedure, the legal instrument by which the High Court of Cassation and Justice can fulfill its constitutional duty to ensure the unitary interpretation and application of the laws by all the courts of law. The constitutional provision referred to in art. 126 para. (3) of the Constitution is also a guarantee of the fundamental law. Given the principle of the compliance of the entire law with the constitutional regulations, the legislator cannot regulate the material jurisdiction of the Supreme Court without establishing the procedural instrument by which it ensures unitary interpretation and application of the laws by all courts of law. The relevant provisions are found in art. 471 and the following of the Code of criminal procedure and in art. 514 and the following of the Code of civil procedure, the referral in the interests of the law is not a remedy at law with effects on the situation of the parties to the trial, but aims to ensure the unitary interpretation and application of the substantive and procedural laws throughout the country. Therefore, the scope of the legal institution of the referral in the interests of the law is to ensure the unitary observance, at the level of the whole country, of the will of the legislator expressed in the spirit and letter of the law.

The decisions of the High Court of Cassation and Justice – United Divisions, whereby the referrals in the interests of the law are settled, shall be binding and shall be published in the Official Gazette of Romania, part I, being brought to the notice of the Ministry of Justice. The unitary interpretation and application of the matters of law shall be pronounced only in the interests of the law, shall have effect neither on the judgments that have been pronounced differently in the adjudicated matter not on the situation of the parties to the trial. According to the provisions of art. 474 para. 4 of the Code of criminal procedure and to the provisions of art. 517 para. 4 of the Code of civil procedure, the settlement of the legal matters which are judged shall be mandatory for the courts of law. In criminal matters, the decisions whereby the referral in the interests of the law is admitted cannot represent a ground for the exercise of the appeal against enforcement or levy of execution.[4]

The decision pronounced in the settlement of the referral in the interests of the law is part of the category of "norms" of domestic law, therefore it falls under the category of the "*provisions […] of the*

[4] I. Neagu, M. Damaschin, A.V. Iugan, *Codul de procedură penală adnotat. Volumul II. Partea specială,* Edition 2, revised and supplemented, Universul Juridic Publishing House, Bucharest, 2021, p. 341.

domestic law" referred to in art. 148 para. (2) of the Constitution.

The question which arises is whether the decisions pronounced by the Supreme Court in this procedure are formal sources of law. Constantly, in the specialized literature, the term of source of law[5] is defined as being "the forms of expression of the legal norms which are determined by the way of enacting or sanctioning them by the state"[6]

The law provides the mandatory nature of these decisions. The courts must comply with the interpretation of the law rendered by the supreme court, on the contrary, a judgment pronounced in violation of the solutions established by the decisions pronounced in the procedure of the referral in the interests of the law is illegal, with all the consequences arising from it.

In this respect, we appreciate as useful the distinction made in the specialized literature between the sources of law and the roots of the law, which we intend to address in a future study. The obligation established by the law for this category of decisions of the Supreme Court confers them the quality of source of law. On the same grounds, the decisions of the Constitutional Court, which according to the provisions of article 147 para. (4) of the Constitution "are generally binding and have power only for the future", are also a source of law.

2. The Principle of the Supremacy of the Constitution

The concept of supremacy of the Constitution is normatively expressed by the provisions of art. 16 para. (2) of the Constitution: "No one is above the law". The specialized literature provided the following: "The supremacy of the constitution is therefore a complex notion, the content of which includes political and legal features and elements (values) that express the superior position of the constitution, not only in the legal system, but in the entire social and political system of a country. This special position in the socio-political system implies a complex normative content, but also important state and legal consequences"[7]. As a law, the constitution is the expression of the will of the rulers, of the people, the will closely linked (conditioned, determined) by the economic, social, political and cultural context, more precisely of the society in which it is enacted. This feature explains the content and form of the constitution. The supremacy of the constitution is explained by its functions, and the expression of the will of the rulers is the very function of state power. There is very clear the connection between the constitution and power, which is precisely the organized power of the rulers to express and achieve their will as a general will binding on the entire society.

There are legal consequences of the supremacy of the constitution. Our analysis is focused on one of them, namely: the conformity of the whole law with the fundamental law[8].

[5] As example on the sources of law, see E. E. Ștefan, *Manual de drept administrativ Partea I Caiet de seminar*, Edition 4, revised, supplemented and updated, Universul Juridic Publishing House, Bucharest, 2019, pp.43-47.

[6] Nicolae Popa, Elena Anghel, Cornelia Beatrice Gabriela Ene-Dinu, Laura-Cristiana Spătaru-Negură, *Teoria generală a dreptului. Caiet de seminar*, Edition 2, C.H. Beck Publishing House, Bucharest, 2014, p. 137.

[7] Ioan Muraru – coordonator, Andrei Muraru, Valentina Bărbățeanu, Dumitru Big, *Drept contituțional și instituții politice. Caiet de seminar*, C.H. Beck Publishing House, Bucharest 2020, p. 57.

[8] Elena Anghel, *Involvement of the Ombudsman institution in the mechanism of constitutional justice*, publicat in proceedings-ul CKS-eBook 2021, pag. 559-563, http://cks.univnt.ro/articles/15.html.

Any legal act must be in compliance with the constitutional norms, both in what concerns the form, but also the content. Furthermore, the failure to comply with this consequence entails the nullity of the provisions in question, contained in any legal act. "Any deviation from this concordance is considered a violation of the constitution and its supremacy, leading to the nullity of the legal provisions in question"[9].

3. The Constitutionality of the Approach of the High Court of Cassation and Justice in Pronouncing the Referral in the Interests of the Law

The issue on the right of the High Court of Cassation and Justice to ensure the unitary interpretation of the law by means of the decisions issued in the referral in the interests of the law, as well as of the interpretative nature of these decisions pronounced by the High Court of Cassation and Justice has been raised in practice several times.[10] In this respect, we make notice to the decision to reject the exception of unconstitutionality[11] **which claimed that this approach of the High Court of Cassation and Justice violates art. 123 of the Constitution.**

In the substantiation of the exception of unconstitutionality, the author claims that the provisions of art. 329 last paragraph final thesis of the Code of civil procedure are contrary to the constitutional provisions referred to in: art. 58 para. (1), regarding the Parliament as the sole legislative authority of the country, art. 123 regarding the administration of justice, as well as art.125 para. (2), regarding the courts of law, as they impose "a delegation of legislative jurisdiction, in matters of interpretation laws, from the Parliament to the United Divisions of the Supreme Court of Justice", "affects the authority of the courts of law", "imposes the United Divisions of the Supreme Court of Justice as an extraordinary court with legislative powers".

The President of the Chamber of Deputies considers that the constitutional ground of the referral in the interests of the law is in the content of art. 51 of the Fundamental Law, according to which *"The compliance with the Constitution, its supremacy and the laws is mandatory"*, given that "by ruling on a referral in the interests of the law, the Supreme Court of Justice gives effect to this constitutional text. By resolving only matters of law, without focusing on the factual issues of a case, the supreme court contributes to ensuring the supremacy of the Constitution and of the laws". It is also shown that, on the other hand, the referral in the interests of the law comes under the effort to ensure the equality in rights of the citizens, in accordance with art. 16 para. (1) of the Constitution. Finally, there is the belief that, in such circumstances, the independence of the judge is not affected, therefore, the provisions of art. 329 of the Code of civil procedure are constitutional.

The Government, in its point of view, also considers that the exception is unsubstantiated, as the scope of the referral in the interests of the law is precisely that to

[9] I. Muraru, E.S. Tănăsescu, *Drept constituțional și instituții politice*, C. H. Beck Publishing House, Bucharest, 2003, vol. I, p. 6.

[10] Elena Anghel, *Judicial precedent, a law source*, publicat în proceedings-ul CKS-eBook 2017, pag. 364-368; *The reconfiguration of the judge`s role in the romano-germanic law system*, în Lex Et Scientia International Journal LESIJ nr. XX vol. 1/2013, pag. 65-72.

[11] Decision no. 93 pronounced by the Constitutional Court on May 11 2000 and published in the Official Gazette no**.** 444 of September 8th, 2000.

ensure the unitary interpretation and application of the law on the entire territory of the country. The right conferred by the law to the Supreme Court to ensure, in accordance with the provisions of the Code of civil procedure, the unitary interpretation of certain legal texts does not contradict the idea of the administration of justice defined by art. 125 of the Constitution, by taking into account the position of the High Court of Cassation and Justice in the court system, as well as its role.

The Constitutional Court, by examining the notification ruling, the statements of the author of the exception, the points of view communicated by the president of the Chamber of Deputies and by the Government, the report drawn up by the reporting judge, the conclusions of the prosecutor, the objected legal provisions, in relation to the provisions of the Constitution, as well as the provisions of Law no. 47/1992, notes that the object of the exception of unconstitutionality is represented by the provisions of art. 329 last paragraph final thesis of the Code of civil procedure, as drafted at the time of the analysis.

The author of the exception considers that the provisions referred to in the last paragraph final thesis regarding the binding nature of the *"settlements of law"* of the decisions pronounced in the referral in the interests of the law are unconstitutional, due to the fact they are contrary to the provisions of art.58 para.(1), art.123 and art.125 para.(2) of the Fundamental Law.

By examining the exception of unconstitutionality, the Court notes that the objected provisions do not prejudice the claimed constitutional provisions, due to the fact that the scope of the regulation of the referral in the interests of the law is to ensure unitary interpretation and application of the law on the entire territory of the country. In order to achieve this scope, the High Court of Cassation and Justice rules on the matters of law which were differently settled by the courts of law. According to the same text, the settlement of these matters of law given by the Supreme Court shall be binding on the courts of law. With a view to promoting fair interpretation of the legal norms in force and not the development of new norms, the decisions pronounced by the United Divisions of the High Court cannot be regarded as a duty aimed at the field of lawmaking, situation in which the aforementioned legal wording would contravene the provisions of art.58 para.(1) of the Constitution.

Furthermore, in case of the exercise of the remedies at law, *"settlements of law"* shall be mandatory in case of the retrial of the merits. The administration of justice determines that, in case of cassation, the judgments of the court of appeal on the settled legal matters to be mandatory for the judges of the merits. Not only that this provision does not prejudice the constitutional principle of the administration of justice, but on the contrary, contributes to its achievement.

On the other hand, the Constitutional Court notes that the interpretation of laws is a rational operation, used by any subject of law, in order to apply and comply with the law, with a view to clarifying the meaning of a legal norm or of its field of application. The courts necessarily interpret the law in the process of resolving the cases which were referred to them. In this respect, the interpretation is the needful phase of the law enforcement process. According to a judgment of the European Court of Human Rights (case "*C.R. v. United Kingdom"*, 1995) "No matter how clear the text of a legal provision is, there is inevitably an element of judicial interpretation in any legal

system […]"[12]. The complexity of a case can sometimes lead to different application of the law in the practice of the courts of law. In order to eliminate potential errors in the legal qualification of certain de facto situations and to ensure the unitary application of the law in the practice of all courts, the legislator created the institution of the referral in the interests of the law. The interpretation decision pronounced in such cases is not *extra-legal* and moreover, cannot be *contra legem.*

By ruling on a referral in the interests of the laws, the supreme court contributes to ensuring the supremacy of the Constitution and of the laws, by means of their unitary interpretation and application on the entire territory of the country, which would materialize another fundamental principle, provided by art.16 para.(1) of the Constitution, according to which: *"Citizens are equal before the law and public authorities, without any privilege or discrimination."* Therefore, it is inadmissible for persons in equal legal situations to be subject to different legal regulations.

The Constitutional Court also notes that the interpretative solutions given in the referral in the interests of the law, referred to as *"settlements of law"*, cannot be considered sources of law, in the common meaning of this concept. The institution of the referral in the interests of the law confers on the judges of the Supreme Court the right to provide a certain interpretation, thus unifying the differences of interpretation and application of the same text of law by the lower courts. Such interpretative settlements, which are constant and unitary and do not concern certain parties and have no effect on previously pronounced solutions, which have entered the power of the *res judicata*, are claimed by the doctrine as "judicial precedents", being considered by the legal literature as "secondary sources of law" or "interpretative sources".

4. The Analysis of the Constitutionality of the Decisions of the High Court of Cassation and Justice – United Divisions, Whereby the Referrals in the Interests of the Laws Are Settled

In the conception of the Romanian constituent legislator, the sole scope of the constitutional control performed by the Constitutional Court is the law, as legal act of the Parliament, or normative acts with a legal force equal to that of the law. In this regard, the doctrine states that the issue of the constitutional control has different terms of that for legal acts with administrative nature or legal acts of the courts of law. The compliance control[13] and implicitly the constitutionality control of the legal acts issued by the administrate authorities or by the courts of law shall be performed within the legal control, according to the material jurisdiction of the courts of law.

Although the fundamental law does not provide *expressis verbis* this possibility, the Constitutional Court proceeded with an analysis, from the perspective of constitutionality, of the interpretation that the High Court of Cassation and Justice granted to certain legal texts by means of the referral in the interests of the law procedure.

By Civil Decision no. 984A of 4 April 2019, pronounced in case no. 10.529/302/2018, Bucharest Tribunal – Civil Division III notified the Constitutional

[12] About the European Court of Human Rights, please see L.-C. Spataru-Negura, *Protectia internationala a drepturilor omului*. *Note de curs*, Hamangiu Publishing House, Bucharest, 2018, p. 81 and following.

[13] On the compliance control on administrative acts, see E. E. Ștefan, *Drept administrativ Partea a II-a Curs universitar*, edition 4, revised and updated, Universul Juridic Publishing House, Bucharest, 2022, pp.110-177.

Court on the exception of unconstitutionality of the provisions of art. 527 para. (2) and art. 529 para. (1) and of the Civil Code, in the interpretation given by Decision no. 21 of 19 October 2015, pronounced by the High Court of Cassation and Justice – the Panel with jurisdiction to judge the referral in the interests of the law.

The author of the exception of unconstitutionality shows, in essence, that the interpretation given by Decision no. 21 of 19 October 2015, pronounced by the High Court of Cassation and Justice – the Panel with jurisdiction to judge the referral in the interests of the law on the "interpretation and application of the provisions of art. 527 para. (2) and art. 529 para. (1) and (2) of the Civil Code in relation to the provisions of art. 2 para. (4) and art. 4 para. (4) of Government Ordinance no. 26/1994 (...)", which would allow the removal from the calculation basis of the maintenance support for meal allowance, if it was recognized as "net monthly income" by a final court decision, prior to the publication in the Official Gazette of Romania, Part I, of Decision no. 21 of 19 October 2015, given by the High Court of Cassation and Justice - the Panel with jurisdiction to judge the referral in the interests of the law.

It is argued that the interpretation given by the aforementioned decision creates discriminatory treatment for persons who have applied for an increase in the amount of the maintenance support after the pronouncement of the supreme court (situation in which the author of the exception is found), unlike the persons who benefited from the calculation of the maintenance support in relation to meal allowance before the pronouncement of the same decision.

The settlement of the Constitutional Court for the exception raised was: "Rejects as unsubstantiated the exception of unconstitutionality raised by Anamaria Bianca Drăghici in Case no. 10.529/302/2018 of Bucharest Tribunal – Civil Division III and finds that the provisions of art. 527 para. (2) and of art. 529 para. (1) and (2) of the Civil Code, in the interpretation conferred by Decision no. 21 of 19 October 2015, pronounced by the High Court of Cassation and Justice – the Panel with jurisdiction to judge the referral in the interests of the law, are constitutional in relation to the formulated objections."[14].

The aspect of interest in this study is the legal ground on the basis of which the Constitutional Court proceeded with the assessment of the constitutionality of the interpretation conferred by the High Court of Cassation and Justice in the procedure of the referral in the interests of the law. The following are noted in the content of the Decision: "By examining the act of referral, the report drawn up by the reporting judge, the conclusions of the prosecutor, the objected legal provisions, in relation to the provisions of the Constitution, as well as Law no. 47/1992, republished, the Court notes the following: The Constitutional Court has been legally notified and, according to the provisions of art. 146 letter d) of the Constitution, as well as of art. 1 para. (2), art. 2, 3, 10 and 29 of Law no. 47/1992, republished, has the jurisdiction to settle the exception of unconstitutionality." The reference to art. 146 letter d as a ground of the constitutional control, as well the terms used in the title of the Decision of

[14] Decision no. 851 of 14 December 2021 on the exception of unconstitutionality of the provisions of art. 527 para. (2) and of art. 529 para. (1) and (2) of the Civil Code in the interpretation conferred by Decision no. 21 of 19 October 2015, pronounced by the High Court of Cassation and Justice – the Panel with jurisdiction to judge the referral in the interests of the law, published in OFFICIAL JOURNAL no. 454 of 6 May 2022.

unconstitutionality "the exception of unconstitutionality of the provisions of art. 527 para. (2) and of art. 529 para. (1) and (2) Civil Code, in the interpretation conferred by Decision no. 21 of 19 October 2015, pronounced by the High Court of Cassation and Justice – the Panel with jurisdiction to judge the referral in the interests of the law" ensured a "legal shield" for the Constitutional Court which could therefore examine on the merits the exception raised, otherwise the settlement adopted would have been an inadmissibility, not a rejection as unsubstantiated of the exception of unconstitutionality.

We state this due to the fact that, apparently, the object of the exception of unconstitutionality is represented by the provisions of art. 527 para. (2) and of art. 529 para. (1) and (2) of the Civil Code, aspect that falls within the rigors provided by art. 146 letter d of the Constitution, although the essence of the constitutionality control is the interpretation conferred to the regulations provided by Decisions no. 21 of 19 October 2015, pronounced by the High Court of Cassation and Justice – the Panel with jurisdiction to judge the referral in the interests of the law. Furthermore, the entire motivation of the Decision pronounced by the Constitutional Court is based on the interpretation of the normative acts by the referral in the interests of the law. Practically, the Constitutional Court examines the constitutionality of the interpretation given by the High Court of Cassation and Justice in the referral in the interests of the law.

If we follow this perspective, the constitutionality control performed by the Court by Decision no. 851 of 14 December 2021 exceeds the constitutional provisions.

5. Conclusions

The decisions pronounced by the Supreme Court in this procedure can have unconstitutional valences under the adopted settlements.

The reality of a potential unconstitutional valence of the decisions pronounced in the referral in the interests of the law is obvious. This is the reason why other European[15] states provided in the constitutional legislation the jurisdiction of the constitutional courts to exercise constitutional control not only over the laws, but also over other categories of individual or normative acts. Therefore, the Constitutional Court of Belgium has jurisdiction to exercise control over the notification of a jurisdiction on the compliance of the rules for the distribution of powers between the state authorities. The German Constitutional Tribunal has jurisdiction to exercise subsequent actual control over judicial or administrative acts at the notification of the court or at the direct notification of the citizens, by means of the constitutional appeal. Similarly, Spanish Constitution of 1978 provides the jurisdiction of the constitutional court to verify the constitutionality of final judgments by way of an "amparo" appeal. The example of Hungary, a country in which the Constitutional Court exercises abstract or actual *a posteriori* control over delegated acts and over ministerial acts, is also of great importance.

The unconstitutionality of these legal acts could consist in the unjustified restriction of the exercise of some fundamental rights and freedoms defined and guaranteed by the Constitution.

Specialized literature notes that the lack of constitutional control, exercised by

[15] In this respect, it would be interesting to analyse disturbing factors of the European Union legal order, please see L.-C. Spataru-Negura, *Dreptul Uniunii Europene – o noua tipologie juridica*, Hamangiu Publishing House, Bucharest, 2016, p. 234 and following.

means of the Constitutional Court, on decisions pronounced in the procedure of the referral in the interests of the law is likely to allow excessive power in the activity of the supreme court, with serious consequences for the compliance with the requirements of the rule of law and with fundamental rights and freedoms of citizens.

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THE REGULATORY BACKGROUND OF AGE DISCRIMINATION

Dóra TAKÁCS*

Abstract

The aim of my research is to carry out a problem-focused examination of the employment law aspects of age-based discrimination, a topic less frequently addressed in Hungarian legal literature so far, thereby exploring the anomalies inherent in the legislation as well as the resulting practice. Such research can help in adapting effectively to the challenges posed by the demographic changes currently taking place in our society. The fight against discrimination requires, above all, a stable regulatory background, which I undertake to present in the framework of this paper. The majority of age-based anti-discrimination legislation are at supranational, primarily EU level; however, in the course of my analysis, naturally I will also deal with Hungarian legislation.

Keywords: *Age discrimination, European Union law, Hungarian Law, labour law, regulation.1.*

Introduction

Age as a protected characteristic has been a leading cause of discrimination throughout the past ten years in Hungary,[1] and it is the third most common cause of discrimination worldwide, following race and gender, and yet it receives very little attention,[2] especially in the literature in Hungary. The situation is well illustrated by the fact that while the Hungarian language versions of the words "racism" ("rasszizmus") and "sexism" ("szexizmus") used in relation to racial and gender-based discrimination are widely known and are even incorporated into everyday language, "ageism," the phrase describing age-based discrimination, only appeared with a considerable delay abroad, and its established Hungarian equivalent has not been created ever since, although the use of the term "aggizmus" has already been proposed in 2007.[3]

In the light of the statistical data mentioned above, there can be no question that an examination of the issue of age-based discrimination from the point of view of employment law is very topical, and effective legal action against it is necessary. At the same time, in my view, this issue will become increasingly cardinal in the near future in the field of employment law, as the current demographic changes will gradually redefine the age structure of European

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[1] Mária Neményi – Bence Ságvári – Katalin Tardos, A diszkrimináció személyes és társadalmi észlelése és az egyenlő bánásmóddal kapcsolatos jogtudatosság, Kutatási eredmények 2019, Egyenlő Bánásmód Hatóság, Budapest, 2019, p. 3., this document is available online at https://www.researchgate.net/publication/342833262_A_diszkriminacio_szemelyes_es_tarsadalmi_eszlelese_es_az_egyenlo_banasmoddal_kapcsolatos_jogtudatossag_Kutatasi_eredmenyek_2019 (last access: 24.03.2022).

[2] Mentioned in the preface by Nelson. – Todd D. Nelson, *Ageism – Stereotyping and Prejudice against Older Persons*, MIT Press, Cambridge, Massachussets 2002.

[3] See Mariann Pecze, *Aggizmus – sztereotípiák és előítéletek az idősekkel szemben*, "Educatio", vol. 2007/1, pp. 160-163.

societies, and the effects of these changes in terms of regulations will be perhaps most pronounced in the field of employment law.

By exposing the problem, I am seeking to ascertain whether the regulation in place can be regarded as appropriate and effective in the light of the relevant legal acts, given the established hypothesis that the more effective the regulatory framework is, the more it is capable of cushioning the disadvantageous aspects of the labour market situation, which primarily affects older people, and the better chances older people have in employment, and therefore, I mainly consider these factors as a measure of effectiveness. The main question is therefore whether the legislator can keep pace with, as well as respond to social and demographic processes and problems through adequate regulation, thus providing effective protection against age-based discrimination.

In order to find the answer, I will examine the relevant international and EU legal acts, as well as the products of Hungarian legislation, through the analysis of the relevant passages. Among the legislative provisions, particular attention will be paid to the "exemption clause", a special feature of Hungarian law,[4] which has been transposed from EU law,[5] although not with word-for-word accuracy. This specific rule, by giving the employer the possibility of exemption, creates additional tension, as well as a contradictory situation, as it makes the regulation flexible on the one hand and somewhat uncertain on the other hand. For this reason, the examination of the grounds for exemption is of cardinal importance from the point of view of the research, as the determination of the existence of equal treatment very much depends on it. Given the stratified, multi-level structure of the Hungarian regulation, I also intend to provide a comparative discussion of the individual provisions. I will conclude my paper with an analysis and comparison of the partial results of each section, and by formulating possible answers to the question raised and offering some possible *de lege ferenda* proposals.

In the following, I will move on to providing an outline of the regulatory system, presenting first the relevant international and then domestic legal acts, as well as highlighting their most important relevant provisions.

2. The international regulatory structure

The principle of equal treatment was first formulated in the framework of Convention No. 100 of the International Labour Organisation (ILO), on 29 July 1951. The aim of the Convention was to overcome the often significant pay gap between women and men. Expressly or tacitly, equal treatment to be enforced in the field of remuneration subsequently contributed to the development of the other areas of the principle of equal treatment, and therefore we can identify this as the first step.

The foundations laid down by the ILO have been taken further by the European Union in the area of equal rights for workers. The principle of equal treatment already appeared in the Treaty of Rome in 1957, in a sectoral form, specifically based on the requirement of equal pay, including the

[4] See: Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities (hereinafter: Equal Treatment Act), § 22.

[5] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Article 2 (2) and Article 4.

prohibition of discrimination on the grounds of sex.[6]

In the EU's legislative processes, the principle of equal treatment until the Treaty of Amsterdam meant only equality between women and men,[7] which clearly made it difficult to apply it in general in employment relationships. However, in connection with the substance of the principle, it should be noted that, despite the initial narrow approach, the Court of Justice of the European Union (hereinafter: CJEU) explained already at an early stage that, notwithstanding the particular nature of the principle of equal treatment, it would be regarded as a general requirement, which greatly facilitated the later revolution of the principle.

As regards discrimination on the grounds of age in particular, the EU's case law started with the Mangold ruling,[8] in 2005. The CJEU concluded in that ruling that "the principle of non-discrimination on grounds of age must thus be regarded as a general principle of Community law,"[9] and this has since become of the most dynamically developing areas of law.[10]

In the course of describing the relevant legal provisions, keeping the hierarchy of sources of law, I will start here, within the category of primary legislation, with a discussion of the relevant legal provisions of the Treaties, and specifically of the Treaty on the European Union (hereinafter: TEU) and the Treaty on the Functioning of the European Union (TFEU).

Within the scope of "Provisions Having General Application", the TFEU provides that "in all its activities, the Union shall aim to eliminate inequalities and to promote equality between men and women."[11] What is even more important, Article 19 of the TFEU states that the Council may take appropriate action to combat discrimination based on age.[12] Article 19 was incorporated into the TFEU by the Treaty of Amsterdam, and therefore, it was for a long time the first and only provision of primary legislation that explicitly mentioned the prohibition of discrimination on grounds of age.

Among primary sources of law, it is worth mentioning the Charter of Fundamental Rights of the European Union (hereinafter: Charter), Article 21 (1) of which states that any discrimination based on any ground, including age, shall be prohibited. Furthermore, under Article 21 (2) of the Charter, within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.

[6] Treaty of Rome, Part Three; Title III; Chapter 1; Article 119: "Each Member State shall, from the first stage, ensure and maintain the application of the principle of equal pay for equal work for men and women"; and Article 6 of the Convention on Social Policy: "Each Member State shall ensure the application of the principle of equal pay for equal work for men and women workers." – Márton Leó Zaccaria, *Az egyenlő bánásmód elvének érvényesülése a munkajog területén a magyar joggyakorlatban*, HVG-ORAC Lap- és Könyvkiadó Kft., Budapest, 2015, pp. 27-28.

[7] See Directives 75/117/EEC, 76/207/EEC, 79/7/EEC and 86/378/EEC.

[8] C-144/04. Werner Mangold v Rüdiger Helm, Judgment of the Court (Grand Chamber) of 22 November 2005. (ECLI:EU:C:2005:709).

[9] Point 75 of the judgment.

[10] Nikolett Hős, *Az általános jogelvek és az Alapjogi Charta szerepe az Európai Bíróság életkoron alapuló hátrányos megkülönböztetéssel kapcsolatos joggyakorlatában*, "Magyar Munkajog E-Folyóirat", vol. 2014/1, p. 50.

[11] Article 8 (former Article 3(2) of the EC Treaty).

[12] „Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.".

Since the entry into force of the Treaty of Lisbon, under which the Charter became binding,[13] references to various provisions of the Charter have increased in the case-law of the CJEU.[14] It should be added that even before the Charter became binding, the advocates-general and the judges already invoked certain provisions of the Charter in various cases. We could say that, by the time when the Charter became binding, reference to it in the interpretation of EU law has become, in essence, natural in the case-law of the CJEU. However, once the Treaty of Lisbon has made the Charter binding, this has brought noticeable changes in the CJEU's practice in cases concerning discrimination. It can be stated with certainty that the binding nature of the Charter has made the argument based on fundamental rights much more visible and stronger in the case-law.[15]

In connection with Community law, we can conclude that the primary legislation has few provisions on the requirement of equal treatment, and the relevant detailed rules are rather governed by secondary legislation, in particular by directives.[16] The directives lay down a general framework for the principle of equal treatment, thus defining the characteristics of the prohibition of discrimination, the concept of discrimination, as well as providing for the possibility of justifying differences of treatment in certain cases and for the burden of proof in the event of an infringement of the principle. However, it is important to point out that these directives primarily impose requirements on Member States, which must be complied with when transposing them and adopting national legislation as described in the directives. Thus, in disputes between individuals no direct reference can be made to the directives.[17]

Over the past decades, the European Union has gradually implemented and developed this principle, complemented by the practice of the CJEU and with the

[13] See Article 6(1): 'The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted in Strasbourg on 12 December 2007; this Charter shall have the same binding force as the Treaties.

[14] For an overview, see in particular: Sara Iglesias Sánchez, *The Court and the Charter: the impact of the entry into force of the Lisbon Treaty on the ECJ's approach to fundamental rights*, "Common Market Law Review", vol. 2012/49, pp. 1565-1612. and Gyula Berke, *Az Európai Unió Alapjogi Chartájának alkalmazása munkajogi (szociálpolitikai) ügyekben*, "Lex HR Munkajog", vol. 2013/11, pp. 8-14.

[15] Edit Duró, *A munkajog területén megvalósuló egyenlő bánásmód követelménye, valamint megsértésének módjai az Európai Bíróság és a magyar bírói gyakorlat tükrében*, "Debreceni Jogi Műhely", no. XI, vol. 2014/3-4.

[16] The most important among these are: Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, and Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC.

[17] Although the CJEU rejects the horizontal scope of directives, in case C-555/07 Seda Kücükdeveci v. Swedex GmbH & Co. KG, it has come closer to recognising such scope of the directive's provisions. The CJEU stated that the directive itself did not lay down the principle of equal treatment in the course of employment, but that the principle stems from various international agreements, the common constitutional traditions of the Member States, and further that Article 21 (1) of the Charter of Fundamental Rights of the European Union, now a binding legal act, also includes a general prohibition of age discrimination. – Ernő Várnay – Mónika Papp, Az Európai Unió joga, CompLex, Budapest 2010, p. 327.

resulting solutions in the Member States, and has often taken a different approach to achieving a consistent development. Within this framework, it is the task and responsibility of the Member States to continue to ensure equal treatment in the context of employment and, although these solutions may be quite diverse, they must in principle have an effect in the same direction, which is to build a system of protection of workers' rights, as effectively as possible, in the context of the prohibition of discrimination.[18] In the following, I will move on to the discussion of the solution of a specific Member State, i.e. the relevant Hungarian legislation.

3. The Hungarian tripartite structure

Domestic regulation follows and aims to comply with supranational, international and EU guidelines, based on the principle of the primacy of international and EU law. The structure of the regulation is essentially tripartite, in which the framework providing a protection of the basic rights is determined by the Fundamental Law (Constitution), the general requirements of conduct in the field of employment are laid down in Act I of 2012 on the Labour Code (hereinafter: Labour Code),[19] while the detailed rules are in the Hungarian antidiscriminatory law, Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities (hereinafter: Equal Treatment Act).[20] In the following, I will examine the relevant provisions of these three sources of Hungarian law.

3.1. The relevant provisions of the Fundamental Law

Article M) of the Fundamental Law provides that the economy of Hungary shall be based on work which creates value, and on freedom of enterprise, from which it also follows that the requirement of equal treatment is necessary for both of these to be achieved. The right to work and the freedom to enterprise are constitutional values, and at the same time secondary generation rights.

Article I of the Fundamental Law mentions respect for the inviolable and inalienable fundamental rights of humans, and accordingly, the right to equality unquestionably falls within that scope. Equality as a concept is used as a keyword in the world of work in many places; for example, we encounter this concept in connection with the principle of equal pay for equal work, equal opportunities plans. as well as the so-called "positive measures" aimed at promoting equal opportunities.

Article II of the Fundamental Law declares the inviolable right to human dignity and to life. Treatment with equal dignity cannot not be overlooked in the course of employment either, and it must be a guarantee that one's age, religious beliefs, sex, sexual orientation, disability, or other protected properties and characteristics listed in the Equal Treatment Act would not be grounds for discrimination against employees.

Article XV of the Fundamental Law provides that everyone shall be equal before

[18] Zaccaria, ibid. pp. 31-39.

[19] See § 12 of the Labour Code.

[20] On the multifaceted – or to borrow the phrase from Tamás Tarcsák, "curlicued" – nature of the Hungarian rules of equal treatment, see: Tamás Tercsák, Túlzott ambíciók. Megjegyzések az egyenlő bánásmód törvényi szabályozásához és munkajogi illeszkedéséhez, In: Lajos Pál (ed.), *Az egyenlő bánásmód szabályozásáról, A Magyar Munkajogi Társaság 2020. február 5-i vitaülésén elhangzott előadások, hozzászólások,* HVG-ORAC Lap- és Könyvkiadó Kft., Budapest, 2021. pp. 9-69.

the law, and every human being shall have legal capacity. Paragraph (2) provides an illustrative list of the characteristics on the basis of which discrimination most frequently occurs; however, it is not an exhaustive list of all the qualities,[21] situations, characteristics or situations in connection with which an individual or group of individuals may suffer negative discrimination.

Paragraph (5) provides for specific legal protection for certain social groups, including the elderly. It is essential to protect these groups in the area of employment since, as mentioned above, older employees, especially those over the age of 50, are more frequently and more easily excluded from the labour market because of their status and situation. It is therefore essential, in order to reintegrate protected groups into the labour market, to introduce such measures on the national level that encourage employers to hire and employ members of such groups with more favourable terms.

3.2. The main provisions of the Equal Treatment Act

The Equal Treatment Act is general anti-discrimination legislation the scope of which covers all areas of law and all protected characteristics. However, the provisions on the requirement of equal treatment laid down in specific legislation – e.g. in the Labour Code – must be applied in accordance with the provisions of the Equal Treatment Act.[22] This means that, in employment relationships falling under the scope of the Labour Code, the provisions of the Equal Treatment Act are also applicable in legal disputes relating to equal treatment.[23]

The scope of the Equal Treatment Act covers various forms of employment both under the Labour Code or the Civil Code, but there is a debate in the literature as to whether the weaker position of the employee that would justify protection also exists in the case of employment relationships subject to the Civil Code, such as agency or service contracts.[24]

In the various legal relationships aimed at the performance of work, direct negative discrimination, indirect negative discrimination, harassment, unlawful segregation or retribution constitute violations of the requirement of equal treatment, if they are are based on any of the protected characteristics laid down by law, on the part-time or fixed-term nature of the legal relationship, or the affiliation of the worker with a trade union or other advocacy organisation.

In addition to the above, it is important to discuss here also the rules of the unique system of evidence laid down by the Equal Treatment Act. In contrast with the general formula, in cases of discrimination, the burden of proof is reversed, or at least it is split, because under Section 19 of the Equal Treatment Act, it is sufficient for injured parties to show that they were likely to suffer a disadvantage and that they have some

[21] It also includes the concept of "other situations". – For the interpretation of the other situation, see: Szilvia Halmos, Az „egyéb helyzet" alapján történő diszkrimináció a foglalkoztatásban – a magyar gyakorlat elemzése az elmélet, a nemzetközi jog és az alkotmánybírósági gyakorlat tükrében. In: Márta Ábrahám (ed.), Mailáth György Tudományos Pályázat – Díjazott dolgozatok OBH, 2016, pp. 603-672., this document is available online at https://birosag.hu/sites/default/files/2018-08/mailath-2016_1.pdf (last access: 24.03.2022).

[22] See § 2 of the Equal Treatment Act.

[23] Zaccaria, ibid. pp. 57-59.

[24] Réka Bonnyai, *Az egyenlő bánásmód elve az Európai Unió jogrendszerében és a magyar jogrendszerben*, "Jogi Fórum Publikáció" September 2014, p. 38., this document is available online at https://www.jogiforum.hu/files/publikaciok/bonnyai_reka__az_egyenlo_banasmod_elve_az_eu_es_magyar_jogrendszerben%5bjogi_forum%5d.pdf (last access: 24.03.2022).

protected characteristic. Thus, it is for the other party to prove that the circumstances established by the injured party as likely do not exist, or that the requirement of equal treatment has been complied with, or that the other party was not obliged to comply with the requirement in the legal relationship concerned, i.e, there are some grounds of exemption in place from establishing the fact of discrimination.[25] Such grounds of exemption, and the specific exemption clause related to age will be discussed in more detail in a later part of this paper.

If the infringement has already occurred, the law also deals with the detailed description of the procedure that can be initiated in order to enforce a claim.[26] In this latter respect, in addition to the courts, the Equal Treatment Authority (hereinafter: EBA) also played a significant role. The EBA acted as an autonomous forum for legal remedies guaranteeing human dignity and the implementation of the principle of equal treatment. In this context, however, the most recent news is that, at its session held on 1 December 2020, the Parliament of Hungary adopted Act CXXVII of 2020 on the Amendment of Certain Acts with a view to a More Effective Enforcement of the Principle of Equal Treatment,[27] which primarily affected the EBA. Pursuant to the amendment, the EBA ceased to exist on 1 January 2021, and its tasks were taken over by the commissioner for fundamental rights. For the time being, it remains a question to what extent this change will be able to contribute to the more effective enforcement of the principle and to enhance the level of legal protection provided, as intended by the original legislative intention, but it will only be possible to answer this question at a later stage, in the light of practical experiences.

3.3. The regulation of the Labour Code

The Labour Code of Hungary contains provisions on the requirement of equal treatment on the level of basic principles, among the general rules of conduct, under point 6, in Section 12. Thus, the principle of equal treatment is not only a guiding principle under which the parties are required to act in the performance of an employment contract, but an obligation of principle and also at the same time a practical obligation, under which the party that is the subject of the provision has the burden to perform certain specific and substantial obligations.

The Labour Code follows the positive approach of the Equal Treatment Act, and provides a summary of the employment law aspect of the principle of equal treatment. However, beyond the essential wording of the basic principle, the Labour Code does not contain any further provisions,[28] but it further elaborates on the principle only according to the aspects related to the performance of work, i.e. in several points of the law there are specific provisions concerning this requirement.

In view of the fact that this principle is intended to be specified in the Equal Treatment Act, Section 12 (1) of the Labour Code lays down the requirement of equal treatment only as a framework provision. Pursuant to Section 12, in connection with employment relationships, such as the

[25] In this respect, see Curia opinion no. 4/2017. (XI.28.) KMK on certain aspects of employment lawsuits related to non-compliance with the requirement of equal treatment, as well as decision of principle no. EBH2015. M.24.

[26] See Charter 2 of the Equal Treatment Act.

[27] Promulgated in Magyar Közlöny (Official Gazette), vol. 2020, issue 268 (on 3 December 2020), pp. 8908-8913.

[28] As Zaccaria points out, this would not necessarily be justified, since, with the establishment of the Equal Treatment Act, the detailed rules of the principle of equal treatment were regulated in general terms. – Zaccaria, ibid. p. 69.

remuneration of work, the principle of equal treatment must be strictly observed. Section 12 (1) thus declares the most important obligation, namely the general obligation to observe the principle of equal treatment, while at the same time specifying one of its areas – the remuneration of work[29] – so that, in essence, the area of equal pay becomes a special case of the principle of equal treatment.[30]

In addition to remuneration, other provisions of the Labour Code are also worth mentioning, in particular, from the aspect of anti-discrimination efforts on the basis of age. Such age-related rules are found primarily in the context of termination of employment, and the common feature of these provisions is that they affect retired workers.[31] In the following, I provide a brief description of these relevant provisions.

First of all, in connection with the legal institution commonly referred to as "protected age", which is by definition a restriction on termination by dismissal,[32] since during this protected period – which is five years before reaching the retirement age – the employer may exercise the right of dismissal, but only with more difficulty in comparison with the general rules. An employer may only terminate the indefinite-term employment of a worker who is not yet past the retirement age by way of dismissal, with reference to the conduct of the worker, in accordance with Section 66 (4) and (5), if the employee, wilfully or by gross negligence, commits a grave violation of any substantive obligations arising from the employment relationship, or otherwise engages in conduct that would render the maintenance of the employment relationship impossible. The employment may also be terminated for reasons related to the employee's ability or the employer's operations. This is subject to the condition that at the workplace specified in the contract of employment[33] there is no other vacant position corresponding to the ability, qualifications or experience required for the job occupied by the employee, or that the employee rejects the offer for employment in that position.[34]

Another relevant provision is Section 66 (9) of the Labour Code, pursuant to which the employer is not required to give reasons for the dismissal if the indefinite-term employment of a retired worker is terminated. The absence of an obligation to provide reasons is based on the existential security of retired workers. If a retired worker's employment is terminated by dismissal, he or she will not be left without income, as the loss of the job does not mean the loss of the right to the pension payments. The fact that such cases are not discriminatory has been confirmed on several occasions in the legal practice in

[29] Zaccaria takes the view that it seems somewhat arbitrary to emphasise remuneration of work in this context, and he mentions that such an approach may also constitute a specific "replacement" of the lack of a constitutional guarantee. – Zaccaria, ibid. pp. 72-73.

[30] The reasons to the minister's legislative proposal no. T/4786 on the Labour Code, it is explained why it is necessary to highlight the area of remuneration as a special area. – Zaccaria, ibid. pp. 75-76., Reasons to the minister's legislative proposal no. T/4786. p. 103., this document is available online at http://www.parlament.hu/irom39/04786/04786.pdf (last access: 24.03.2022).

[31] Section 294 (1) of the Labour Code clarifies who falls within this category of persons.

[32] Bankó shares this view. – Zoltán Bankó, *A munkáltatói hatalom korlátai a munkaviszony megszüntetése során – a felmondási tilalmak és korlátozások a magyar munkajogban*, "Jura", vol 2015/2, pp. 5-11.

[33] Or, in the absence of the above, at the workplace where the employee customarily performs work. – See the Curia's decision no. EBH2016. M.29.

[34] In connection with the obligation to offer position, see the Curia's decisions no. EBH2017. M.6. and EBH2016. M.29.

Hungary.[35] Of course, the absence of an obligation to provide reasons does not affect the rules relating to written form; in other words, a notice of dismissal cannot be lawfully communicated orally to a retired employee either.

Finally, it is necessary to mention the Section 77 (5), point a) of the Labour Code, on the basis of which an employee shall not be entitled to receive severance pay if he or she is recognized as a retired worker at the time when the notice of dismissal is delivered or when the employer is terminated without a legal successor. The legal rationale for the absence of severance pay is based on the dual nature of the severance pay. On the one hand, severance pay fulfils a social function for employees, providing assistance during the transitional period after the end of secure income. Secondly, it rewards the employee's loyalty on the basis of the length of time spent with the employer. According to the reasons to the minister's legislative proposal "the Act excludes entitlement to severance pay for workers who have acquired the right for or already receive pension benefits. In those cases, the social reasons for the payment of the severance pay do not apply, since in each case the worker already receives adequate benefits."[36]

4. The "*differentia specifica*" of the regulation, the exemption clause

When examining the principle of equal treatment, it is necessary to address cases in which a breach of the principle is formally committed, but in the light of the conditions laid down in the legislation, it cannot be classified as an infringement of the principle of equal treatment. The areas in which a difference in treatment is accepted or expected are defined separately in both the EU directives and the Equal Treatment Act.

The difference in treatment may be based, on the one hand, a possibility and, on the other, on an obligation. The former includes: occupational requirements,[37] positive measures,[38] public security, measures necessary for the maintenance of public order, the prevention of criminal offences, the protection of health and the protection of the rights and freedoms of others,[39] as well as the case of objective justification.[40] The latter, in turn, includes the obligation of the Member States to take reasonable measures to accommodate the needs of persons with disabilities, as defined in Article 5 of Directive 2000/78/EC.

In the following, I will present the EU directive's rule of the exemption clause, and then analyse the provisions as transposed into national law.

4.1. The exemption clause in EU law

In the case law of the CJEU,[41] exemption under the Directive has been formulated on three different grounds: based on Article 2 (5), on Article 4 (1) and on Article 6 (1). In addition, a further requirement has also been established to the effect that a Member State's measure must be justified, appropriate and necessary in order to achieve the objectives set out in the

[35] See: Constitutional Court Decision no. 11/2001. (IV.12.) and the Curia's decision of principle no. EBH2019. M.14.
[36] A similar opinion was also adopted by the Constitutional Court in its Decision no. 600/B/2000.
[37] Article 4 of Directives 2000/43/EC and 2000/78/EC.
[38] Article 5 of Directive 2000/43/EC and Article 7 of Directive 2000/78/EC.
[39] Article 2 (5) of Directive 2000/78/EC.
[40] Article 6 of Directive 2000/78/EC.
[41] Based on case C-447/09. Reinhard Prigge and Others v Deutsche Lufthansa AG. Judgment of the Court (Grand Chamber) of 13 September 2011. (ECLI:EU:C:2011:573).

Directive. Furthermore, it can be established on the basis of the case law that an exemption may be provided for prior to the conclusion of the contract of employment (e.g. setting an upper age limit for persons who are higher), during the term of the employment contract (e.g. pay or leave according to age), and also after the employment contract (e.g. period of notice).[42]

However, in connection with age, Directive 2000/78 EC allows, in addition to the above, the justification for unequal treatment, which shows the specific place of discrimination on grounds of age among the other forms prohibited by the Directive. Accordingly, differences of treatment on the basis of age do not constitute discrimination if – within the context of national law – they are objectively and reasonably justified by a legitimate purpose, including employment policy, labour market and vocational training objectives, and if the means of achieving that purpose are appropriate and necessary.[43] By way of example[44], the Directive identifies three areas[45] where the difference of treatment may be justified and therefore an exemption may be possible.

However, the exact level of protection afforded by EU law and its interpretation of those grounds of exemption depend primarily on the proportionality test applied by the CJEU, and therefore the assessment of whether the application of the law is capable of providing effective protection against discrimination following a coherent interpretation of the law is possible only in the light of the relevant court rulings.[46]

4.2. The exemption clause of the Equal Treatment Act

Pursuant to Section 7 (2) of the Equal Treatment Act, the principle of equal treatment is not breached by such provisions where a) the provision restricts the fundamental right of the party suffering a disadvantage in an unavoidable case in order to enforce another fundamental right, provided that the restriction is suitable and proportionate for achieving the objective, or b) in cases not covered by point a), the restriction has a reasonable justification directly related to the legal relationship in question. However, in accordance with Subsection (3), in case of direct negative discrimination and unlawful segregation based on the characteristics referred to in Section 8, points b) to e) of the Equal Treatment Act, Subsection (2) cannot be applied, meaning that all these cases constitute a violation of the principle of equal treatment.[47]

Section 22 of the Act provides further rules concerning the exceptions, defining the cases under which the employee may be exempted from the obligation to apply equal treatment. Accordingly, the principle of equal treatment is not violated if the discrimination is proportional, justified by the characteristic or nature of the work and is based on all relevant and legitimate terms and conditions, or the discrimination arises directly from a religious or other ideological conviction, or national or ethnic origin, fundamentally determining the nature of the organisation, and it is proportional and

[42] Dúró, ibid.
[43] Article 6 (1).
[44] The fact is noted that the Directive uses the term "among others", thereby not excluding further cases either.
[45] Article 6 (1) a), b), and c) points.
[46] For an overview of this, see: Tamás Gyulavári, *Age discrimination: Recent case law of the European Court of Justice, "*ERA Forum", vol. 14, issue 3, pp. 377-389.
[47] Dúró, ibid.

justified by the nature of the employment activity or the conditions of its pursuit.[48]

While the Act sets out the objective of compliance with the Directive,[49] it can be seen that the exemption clause laid down by the Equal Treatment Act is rather incomplete in comparison with the provisions of the Directive; in other words, a verbatim, precise implementation has not been achieved[50], and the latter deficiency can be seen in the practice, an example of which was the forced retirement of Hungarian judges.[51] However, this inaccuracy of legal harmonisation is by no means a problem to be neglected, since it may seriously undermine the entire system of evidence and thereby the effectiveness of the enforcement of rights, and therefore, it would in any event be justified and recommended if the legislator corrected that anomaly.

5. Conclusions

The fundamental issues of age-based negative discrimination have already been examined in legal literature from several aspects, and as issues continuously in the forefront of attention, they require a new perspective in the academic discourse from time to time.[52] Age-based discrimination – either the version affecting young people, those at the start of their careers, or the more typical version affecting older persons – is a phenomenon on the labour market the existence of which would be a mistake to deny, but finding a solution to the problem is very difficult. I fully agree with the opinion of Rab and Zaccaria that the prohibition of discrimination on the grounds of age has gone far beyond both gender-based discrimination, which had served in recent years as its model, as well as its own body of rules.[53] For this reason, it is essential to analyse the body of legislation at hand, as well as the revision of individual provisions in the interest of eliminating the anomalies identified.

In the present paper, my aim was to outline the regulatory structure of age-based discrimination, presenting the most important legal provisions at both international and national levels. I fundamentally wanted to find answers to the questions whether, in the light of the relevant legal acts, the current regulations can be regarded as appropriate and effective; in other words, are they capable of reducing age-based discrimination, given the established hypothesis that the more effective the regulatory framework is, the more it is able to cushion the disadvantageous labour market situation, which primarily affects older people, and the

[48] Bonnyai also mentions a third case: "The third exception is the reference by the employer to the fact that positive discrimination is being applied, which is also supported by evidence." – Bonnyai, ibid. p. 40.

[49] Article 65 point g) of the Equal Treatment Act.

[50] For more details on the the shortcomings of legal harmonisation and the elements of the system of rules requiring "fine-tuning", see: Tamás Gyulavári, *Három évvel az antidiszkriminációs szabályozás reformja után*, "Esély", vol. 2007/3, pp. 3-35.

[51] The question was examined on several fronts, at domestic level the Constitutional Court (Decision no. 33/2012. (VII.17.), an on the international level the CJEU (European Commission v. Hungary) and the European Court of Human Rights (J.B. and Others against Hungary, Application no. 45434/12) also issued rulings.

[52] For a new approach to the issue based on a social perspective, see: Sára Hungler, A szociális partnerek szerepe az életkor szerinti diszkriminációval szembeni küzdelemben (The role of social partners in combating age-based discrimination). Online workshop, 22.07.2021, Short summary of the workshop is available online at https://jog.tk.hu/esemeny/2021/07/muhelyvita-hungler-eletkor-szerinti-diszkriminacio (last access: 24.03.2022).

[53] Henriett Rab – Márton Leó Zaccaria, *Elősegítheti-e a munkaerőpiaci egyensúlyt az életkori alapú diszkrimináció tilalma?*, "Miskolci Jogi Szemle", no. XII, vol. 2017/1, pp. 46-58.

better chances older people have in employment.

The body of law concerning age-based discrimination shows an extensive, multi-level, and detailed system of protection, which is essentially well defined. At the same time, particularly with regard to the exemption clause, it is striking that there are also several small "cracks" in the regulation, in the light of which its effectiveness is even more questionable. However, in my view, this efficiency cannot be judged purely on a theoretical level, but there is also a need to explore the case law, which has not been carried out in the context of the present work, especially in view to the constraints of space. A key area of analysis is the system of exemptions, as it defines the boundary on which the evaluation of discrimination fundamentally much depends. However, precisely what constitutes justified discrimination that is based on a professional condition, follows a legitimate purpose and is proportionate depends on the interpretative activity of those applying the law, whether they be Hungarian and EU bodies.

In the light of the foregoing, in my view, a clear answer to the question raised can only be given in the light of the case law, demonstrating thereby that legislation and practice form an integral whole with regard to anti-discrimination legislation. At the same time, it also follows from the above that the solution of the labour market problem that is mainly caused by age discrimination cannot be expected only from those applying the law, as it is essential to ensure that the body of provisions of constantly "maintained", the "cracks" and any other anomalies are eliminated, as an effective legal practice can only be guaranteed this way. Only such a productively operating system of protection can tackle the increasingly challenging problem of age-based employment discrimination.

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LEGISLATIVE UPDATES ON PUBLIC SERVICES

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Abstract

Meeting general interest needs has always been a concern of public authorities. The performance of the activity, both in the public and in the private sector was challenged to continuous adjustment in order to meet social needs and to provide certain services. On this occasion, on first sight, public medical services stood out as important from the rest of the public services, due to the fact that the concern of the authorities for the protection of public health was globally highlighted in the foreground. From this point of view, it is all the more necessary to have a coherent legal framework to regulate in an unitary way the general legal regime of public services, as there is a tendency to digitize public administration. Therefore, we are urged by the regulation of public services in the Administrative Code to analyze the legislator's perspective on this matter. At the same time, the states are concerned to transpose European normative acts, acts with binding legal force, into the national legislation. In this respect, this paperwork will be focused on certain public services, by way of a case study, namely it will analyze the way of transposing the European legislation on road transport into our national legislation. Finally, we will draw the conclusion that emerge from the documentation of the proposed topic.

Keywords: *Administrative Code, public service, public authority, directive, road transport.*

1. Introduction

We resume the topic dedicated to public services[1] from another perspective, topic on which we have reflected on another occasion. This time, the adoption of the Administrative Code in the summer of 2019, by our legislator, gives us the opportunity to present the regulation of public services in the content of this normative act. We refer to G.E.O. no. 57/2019 on the Administrative Code[2], a normative act that managed to bring a new spirit in this field.

The fact that this work of codifying the administrative law has been successful is undoubtedly a factor in the progress of the normative regulation. In terms of the content, we note that the Administrative Code, in its substance, regulates basic concepts necessary to understand the legal framework applicable to public administration[3], such as: public authority, public domain, public service, administrative liability etc. According to the doctrine: "in order to extend the jurisdiction of the administrative tribunals, the concept of public service has been used in France,

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[1] E.E. Ștefan, *Brief considerations on deconcentrated public services as a consequence of coming into force of the Emergency Ordinance number 37 from 22.04.2009 concerning certain measures of improving the activity of public administration*, in Lex et Scientia International Journal nr.2/2009, pp. 239-252.

[2] G.E.O. no. 57/2019 on the Administrative Code, published in Official Journal no. 555 of 5 July 2019, with latest amendments by G.E.O. no. 1/2022 for the amendment and supplementation of G.E.O. no. 121/2021 on the establishment of measures at the level of the central public administration (...), published in Official Journal no. 41 of 13 January 2022.

[3] See R.M. Popescu, ECJ case-law on the concept of „public administration" used in article 45 paragraph (4) TFUE, in the proceedings of CKS e-book 2017, pp. 528-532.

with the scope of designating any activity of a public body the purpose of which is to satisfy a general interest need: post office, rail transport, public education, national defense"[4].

The structure of the paperwork is to highlight the regulation of public services[5] in the Administrative Code, on the one hand and to present the stage of the transposition into the national legislation of the *Posting Directive* in the field of road transport, and at the same time to analyze the requirement of *good repute*, by using methods[6] specific to the research in the field of the law.

2. Paperwork content

2.1. Regulation of public services in the Administrative Code

The structure of the Administrative Code comprises 10 parts and public services are regulated in two such parts, as follows: the 4th Part – *The Prefect, the Prefect's Institution and Deconcentrated Public Services, (*art. 277-283) *and* the 8th Part– *Public Services*, Title I – *Principles and Classification of Public Services*; Title II – *Regulation and Establishment of Public Services*; Title III – *Public Service Management*, (art. 580-596).

The Administrative Code defines public service in art. 5 letter kk) as being: "*the activity or the set of activities organized by a public administration authority or by a public institution or authorized or delegated by it, in order to satisfy a general need or a public interest, on a regular and continuous basis*". Previously, Law no. 554/2004 on the contentious administrative defined in its content public service in art. 2 para. (1) letter m.): "*an activity organized or authorized by a public authority for the purpose of satisfying a legitimate public interest*".

The specific principles applicable to public services are provided by the legislator in art. 580 of the Administrative Code as follows: "the establishment, organization and provision of public services are carried out according to the specific principles applicable to public services, namely: transparency, equal treatment, continuity, adaptability, accessibility, responsibility and provision of public services to quality standards[7].

The specific principles[8] applicable to public services are defined by the Administrative Code:

transparency principle represents the observance by the public administration authorities of the obligation to inform on the way of establishing the component activities and scopes, on the regulation, organization, functioning, financing, provision and evaluation of public services, as well as on the measures to protect users and the mechanisms used to settle claims and litigations.

a) *principle of equal treatment* in the provision of public services means the elimination of any discrimination against the

[4] T. Drăganu, Introducere în teoria și practica statului de drept, Dacia Publishing House, Cluj Napoca, 1992, p. 150.

[5] See M.C. Cliza, Drept administrativ Partea a-II-a, Universul Juridic Publishing House, Bucharest, 2012, pp.218-227.

[6] On the construction of the legal regulation, N. Popa (coord.), E. Anghel, C. Ene-Dinu, L.-C. Spătaru-Negură, Teoria generală a dreptului. Caiet de seminar, 3rd edition, C.H. Beck Publishing House, Bucharest, 2017, pp. 197-202 or M. Bădescu, Teoria generală a dreptului, Sitech Publishing House, Craiova, 2018, pp.167-187.

[7] For a more detailed analysis of the principles of law, see E. Anghel, *General principles of law*, in LESIJ.JS XXIII no. 2/2016, Lex ET Scientia International Journal - Juridical Series, pp.364-370.

[8] For a more detailed analysis of the topic, see E.L. Cătană, *Drept administrativ*, 2nd edition, C.H.Beck Publishing House, Bucharest, 2021, pp.487-492.

beneficiaries of public services based, as the case may be, on ethnic or racial criteria, on religion, age, gender, sexual orientation, disability, as well as the application of identic rules, requirements and criteria for all authorities and bodies providing public services, including in the process of delegating public service.

b) in the provision of public services, public authorities, as well as public service providers shall be bound to ensure *continuity* (...).

c) *adaptability principle*. The authorities and public administration institutions shall be bound to meet the needs of the society in order to fulfill the scopes.

d) *accessibility principle* involves ensuring access to public services for all beneficiaries, especially to those services that meet their basic needs; accessibility requires taking into account, even from the substantiation phase of public service establishment, the aspects related to cost, availability, adaptation, proximity.

e) *principle of responsibility* for the provision of public service represents the existence of a public administration authority, the competence of which is to provide the public service, independent of its management and provision to the beneficiary[9].

f) *principle of providing public services* at a high-quality standard represents the establishing and monitoring of the quality indicators for each public service, throughout the term of the provision thereof. Public administration authorities shall be bound to meet quality and/or cost standards established for public services".

In what concerns *public service classification*, the following are referred to in the Administrative Code:

- "services of general economic interest and services of general non-economic interest, depending on the content of the activity;
- public services of national interest and public services of local interest, in terms of the territorial competence to meet public interest needs;
- public services provided in an unitary manner, either by a public administration authority, or by a public service provider and public services provided by one or more public administration authorities or by one or more bodies providing public services, depending on the ways in which the service is provided".

The doctrine states that: "in the European legislation, public services are known as public services of general interest (SGI). These are services which the public authorities of the Member States consider to be of general interest and which are subject to specific public service obligations. This term refers to both economic activities, and to non-economic services[10]". "Non- economic services are not contemplated by the specific legislation of the European Union and do not fall under the scope of the rules on the domestic market and competition[11] provided by the Treaty of Lisbon[12]". In recent years,

[9] For other details on the topic, from another perspective: E. Anghel, *The responsibility principle*, article published in the proceedings of CKS-eBook 2015, pp.120-130.

[10] V. Negruț, *Serviciul public. Proprietatea publică,* C.H. Beck Publishing House, Bucharest, 2020, pp.9-10.

[11] For other details on this topic, see Cornelia Ene-Dinu, The term of „Relevant Market", as element of dominant position, provided by art. 102 of Treaty on the functioning of the European Union, în LESIJ Lex ET Scientia International Journal, No. XXVI, ISSN 1583-039X, eISSN 2066-1886. vol. 1/2019, pp. 77 – 83 or L. Lazăr, Abuzul de poziție dominantă. Evoluții și persepective în *dreptul european și național al concurenței,* C.H.Beck Publishing House, Bucharest, 2013, p.2 and the following.

[12] V. Negruț, *op.cit.*,2020, p.10.

there has been a growing trend towards digitization targeted by the activity of public authorities, such as the collection of taxes[13] and fees by electronic means.

2.2. Case study

Within the European Union[14], Directive (EU) 2020/1057 of the European Parliament and of the Council of 15 July 2020 laying down specific rules with respect to Directive 96/71/EC and Directive 2014/67/EU for posting drivers in the road transport sector and amending Directive 2006/22/EC as regards enforcement requirements and Regulation (EU) no.1.024/2012[15] was adopted. This directive is also called the *Posting Directive* which provides the transposing rules in art. 9 para. (1)[16]: "Member States shall apply the respective provisions as of 2 February 2022".

Posting Directive was transposed into our national legislation by means of Government Ordinance no. 12/2022 for the amendment and supplementation of certain normative acts in the field of road transport[17]. Furthermore, from public information, it appears that: "until 7 February 2022, the countries that have implemented *Posting Directive* are Belgium, Denmark, Finland, France, Slovakia, Norway (although it is not an EU Member State and Directive (EU) 2020/1057 is not applicable, the payment of minimum wage for certain transport operation applies), Romania[18]".

In this regard, we also mention Regulation (EU) no. 2020/1.055 of the European Parliament and of the Council of 15 July 2020 amending Regulations (EC) No 1071/2009, (EC) No 1072/2009 and (EU) No 1024/2012 with a view to adapting them to developments in the road transport sector[19]. We do not intend to detail the content of the European normative acts or the case-law of the CJEU[20] in the field of transport, but we consider to analyze the conditions on the *requirement of good*

[13] For other details, see R. Ciobanu, Z. Varga, *Romanian and hungarian fiscal systems. Regulations and fiscal apparatus*, Transilvania University of Brașov. Bulletin. Series VII: Social Sciences, Law, pp.307-317, 2020.

[14] For other details on this topic, see A. Fuerea, *Manualul Uniunii Europene*, 4th edition, revised and supplemented after the Treaty of Lisbon (2007/2009), Universul Juridic Publishing House, Bucharest, 2010, pp. 13 and the following; L.-C. Spătaru – Negură, *Dreptul Uniunii Europene - o nouă tipologie juridică*, Hamangiu Publishing House, Bucharest, 2016, p.104 and the following.

[15] Directive (EU) 2020/1057 of the European Parliament and of the Council of 15 July 2020 laying down specific rules with respect to Directive 96/71/EC and Directive 2014/67/EU for posting drivers in the road transport sector and amending Directive 2006/22/EC as regards enforcement requirements and Regulation (EU) no. 1.024/2012, published in OJEU of 31.07.2020, L249/17, available online at https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=celex%3A32020L1057, visited on 19.02.2022.

[16] From another perspective, see M.-C. Cliza, L.-C. Spătaru-Negură, *Towards a Cleaner Planet – The Implementation of the Deposit Guarantee System in Romania*, in Perspectives of Law and Public Administration, vol. 10, no. 1/2021, pp.54-64, online at http://www.adjuris.ro/revista/articole/an10nr1/5.%20Cliza,%20Spataru.pdf., visited on 19.02.2022.

[17] G.O. no. 12/2022 for the amendment and supplementation of certain normative acts in the field of road transport, published in Official Journal no. 98 of 31 January 2022.

[18] Public information, available online at https://detasaretransport.ro/, visited on 19.02.2022.

[19] Regulation (EU) no. 2020/1.055 of the European Parliament and of the Council of 15 July 2020 amending Regulations (EC) No 1071/2009, (EC) No 1072/2009 and (EU) No 1024/2012 with a view to adapting them to developments in the road transport sector, published in OJEU of 31.07.2020, L 249/17, available online at https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=celex%3A32020R1055, visited on 19.02.2022.

[20] For further details on the topic: A.M. Conea, *Politicile Uniunii Europene*, Universul Juridic Publishing House, Bucharest, 2020, pp. 71-82.

repute[21], respectively the administrative procedure on the loss of good repute, by noting how important is for the European legislator the good repute in the field of public services[22] in the sector of transport, but not only. Specifically, we refer to art. 6 of Regulation (EC) no.1.071/2009, as amended by Regulation (EU) 2020/1.055.

According to the national legal framework, in compliance with the European legislation, in order to fulfill the requirement of good repute, the transport undertaking and the transport manager shall comply with the following conditions (art. 14 of G. O. no.12/2022):

"a. the transport undertaking and/or transport manager have not been convicted or sanctioned according to the provisions of art. 6 para. (1) of Regulation (EC) no. 1.071/2009;

the transport undertaking and/or transport manager have lost good repute for serious infringements referred to in the 4th Appendix to Regulation (EC) no. 1.071/2009 being declared unfit to manage transport activities according to art. 14 of Regulation (EC) no.1. 071/2009 and rehabilitation has occurred".

Furthermore, "in the case referred to in para. (1) letter b), the transport undertaking and/or transport manager shall be considered rehabilitated after a period of at least one year as of the loss of good repute and only after the transport manager proves that it has passed an examination (…) to regain the certificate of professional competence". Unless and until a rehabilitation measure is taken "in accordance with the provisions of para. (2) the certificate of professional competence of the transport manager declared to be unfit, shall no longer be valid in any Member State".

G.O. no. 12/2022 provides that: "The body designated to issue the administrative procedure on the loss of good repute of the transport undertaking/manager referred to in art. 6 para. (2) of Regulation (EC) no. 1.071/2009 shall be I.S.C.T.R. (State Inspectorate for Road Transport Control)". This administrative procedure shall be approved by order of the Minister of Transport and Infrastructure, by taking into account at least the following: "a check performed at the premises of the undertaking and the assessment of the sanctions applied to the transport undertaking/manager".

Therefore, this procedure on the loss of good repute of the transport undertaking/transport manager is approved by means of an administrative act[23] of the line ministry, respectively Order of Minister. Furthermore, the French doctrine showed that "*the unilateral administrative act* is an act, taken either by an administrative authority, in the exercise of public power prerogatives, or by a private person who has been entrusted with the execution of a public service within the mission the person in question is invested with"[24]. The normative act referred to in by the legislator is Order of the Minister of

[21] From another perspective of good repute analysis, see I. Muraru (coord.), A. Muraru, V. Bărbățeanu, D. Big, *Drept constituțional și instituții politice. Caiet de seminar*, C.H. Beck Publishing House, Bucharest, 2020, pp.159-160.

[22] Regarding public services prior to current regulations, see Roxana-Mariana Popescu, *Serviciile de interes general. Scurte considerații*, Annals of the University, Law series, Pro Universitaria Publishing House, 2006, pp.135-142.

[23] Other details on the administrative acts in M.C. Cliza, C.-C. Ulariu, *Limitele controlului judiciar asupra aprecierii oportunității în materia actelor administrative*, in Dreptul no.7/2021, pp.93-108 or P.–I. Nedelcu, *Puterea discreționară a administrației publice și legalitatea*, Revista de Științe Juridice no. 1/2014, Universul Juridic Publishing House, pp.240-243.

[24] C. Debbasch, J.C. Ricci, *Contentieux administratif*, Precis Publishing House, Paris, 2000, p. 107 *apud* I. Lazăr, *Jurisdicții administrative în materie financiară,* Universul Juridic Publishing House, Bucharest, 2011, p. 83.

Transport and Infrastructure no. 980/2011 approving the Methodological Norms on the application of the provisions regarding the organization and performance of road transports and their related activities established by Government Ordinance no 27/2011 on road transport[25].

The Methodological Norms (…) provide the following in art.12: "following the application of the administrative procedure, I.S.C.T.R. shall draw up a report motivating the decision to withdraw the good repute or the failure to do so". Finally, "the administrative procedure shall be deemed completed after the report has been signed by the Chief State Inspector, after the report has been registered and after all the entries on good repute have been completed in the national electronic register of road transport operators" (art. 13 of the Norms).

Conclusions

We consider the proposed objective of the paperwork achieved, more precisely that of presenting the current legal framework applicable to public services and we hereby refer to the Administrative Code which dedicates several articles to this topic in the 4th Part – *The Prefect, the Prefect's Institution and Deconcentrated Public Services* and in the 8th Part – *Public Services*. Therefore, this topic was presented in a personal manner, by detailing specific aspects in the field of road transport, such as the administrative procedure on the loss of good repute, in accordance with the European legislation. On this occasion, we noted that our country transposed Directive (EU) 2020/1057 of the European Parliament and of the Council of 15 July 2020, also known as the *Posting Directive*, by adopting Government Ordinance no.12/2022.

In conclusion, as evidenced by the documentation of the topic, the body designated to issue the administrative procedure on the loss of good repute of the transport undertaking/ manager referred to in art. 6 para. (2) of Regulation (EC) no. 1.071/2009 is I.S.C.T.R. and the line ministry approves it by means of order. The topic remains open for analysis in future research on public services, from the jurisprudential perspective and maybe, in the not-too-distant future, the legislator will also adopt the Code of administrative procedure[26] which will complete the legal framework applicable to public administration.

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[25] Order of the Minister of Transport and Infrastructure no. 980/2011 approving the Methodological Norms on the application of the provisions regarding the organization and performance of road transports and their related activities established by Government Ordinance no 27/2011 on road transport, published in Official Journal no. 854 of 2.12.2011, with the latest amendment by Order no. 1.049/2021 of the Minister of Transport and Infrastructure (…), published in Official Journal no. 776 of 11 August 2021.

[26] For further information, see I. Nedelcu, *Considerații privind necesitatea adoptării unui Cod de procedură administrativă cu trimiteri la instituții juridice civile*, in Revista de Științe Juridice no. 2/2006, Craiova, p.116.

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NEW TRENDS IN EMPLOYMENT

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Abstract

Receantly, we have been hearing more and more about changes in the area of employment. All of these changes stem from one thing, namely digital change. In the world of work, technical progress has brought many changes that have a greater or lesser impact on labor law regulation and the employment relationship. These effects changed the work tools and the place to work and much more. Digital devices and the Internet allow for the global flow of labor, bridging geographical distances. Teleworking is an increasingly common form of work. The digital space has opened up many new opportunities in the labor market, which employers and employees are trying to exploit in a variety of ways. One of the most significant manifestations of this is the emergence of platform work forms and crowdwork. These new variants well reflect the tendency of the parties to create increasingly different forms of employment in the field of employment. It can be concluded, therefore, that we can see another wave of the fact that actors in the world of work are increasingly looking for atypical employment relationships both inside and outside labor law. In the present work, I want to map possible directions for the future of labor law. Among other things, I am looking for an answer to the question, what effect do new types of work have on labor law regulation? Is there a need for labor law renewal? What trends are expected in the future? Expanding the scope of atypical employment relationships, strengthening classical labor law, or possibly examining beyond it to take a closer look at the role of labor law embedded in the digital world. The nature of the regulation and the relationship between the parties is increasingly determined by the flexibility that has an impact the employee protected elements.

Keywords: *digitization, flexibility, atypical employment, platform work.*

1. Introduction

The advent of the internet has brought us nothing less than the 4th Industrial Revolution, we may witness it ourselves. With the recent industrial revolution in the Internet propulsion forward, the availability of not only humans but also machines to communicate with each other in the cyber-physical system.[1] It is beyond dispute that the spread of personal computers and the advent of the Internet has completely transformed our daily lives. Thanks to technological innovations, there may no longer be an area where their impact would not be felt. Modern agricultural production already uses intelligent machines that also communicate with each other, using the Internet as well as sensors to gather as much information for precision termination. Digital information education is also becoming more prevalent in education, further strengthens by the coronavirus epidemic. Testing of self-driving cars and convoy trucks is already in full swing. With the techniques used in industrial production and the digital devices that intertwine our daily lives, the line can be continued for a long time. In the few examples mentioned,

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[1] Nagy Judit: *Az ipar 4.0 fogalma, összetevői és hatása az értékláncra*, Budapesti Corvinus Egyetem Vállalatgazdaságtan Intézet, Műhelytanulmányok, 2017. p. 10.

the common point available is that the internet mediates or even lays the foundation for the technology that surrounds us. And just as internet impact to agriculture, industry, transportation, education, and many other areas have an important impact also on the area of law. It all follows from the fundamental item that the law regulates certain living conditions. So the law can do nothing but respond to new societal factors emerging on the horizon, such as the Internet and related technology. As we network all areas of our lives on the Internet, it is no exaggeration to say that it interweaves also all areas of law. Of course, there could be a long debate about which area of law the Internet and related technology has brought the most significant changes, but I would like to examine the field of labor law in the context of the present study. One can say for sure that the Internet has brought many changes in the world of labor law as well. Think of teleworking, the "home office" phenomenon, platform work[2], the emergence of the digital job market. These, in turn, raise several regulatory and many other issues in the field of labor law. The changes show a multifaceted and varied picture, but it is certain that the Internet and the issues it brings to life represent the future of labor law. Recently, a series of studies examining the future of work and labor law have appeared. All this is due to the further intensification of the effects that the new industrial revolution is generating around it. There is increasing pressure on the legislator to respond appropriately to each of the guidelines. And the recurring and well-known question is nothing more than the question of a person with a status similar to that of a employee.[3] One of the important issues today is in the labor law professional literature and the legal status of the platform works, or the legal status of the persons of such work. There have been several studies in the field regarding the classification of platform workers or why similar to the emloyee status.[4] In the context of the present study, I do not wish to address the issue of legal personality, but I undertake to examine possible directions for employment along the classification issues that arise during the platform work. In the wake of platform-based work, the emergence of a new work group has created a space deemed empty. As a result, it is difficult to choose the legal relations related to this type of work, to classify them dogmatically. This, in turn, causes some confusion, which almost demands and forces the renewal of labor law, in order to provide an explanation for the placement of these types in a specific system. In this context, it is important to wish to outline and examine the future of labor law as a function of platform-type work. In the course of my research, I examine the positions found in the literature, of which I describe the most decisive points of view.

[2] I intend to use the term platform-based work as a collection category in this study. In this category, I include, among other things, the forms of work in which the parties communicate with each other via online platforms. Employees usually perform tasks, provide services, work through a website or application, but in some cases the activity itself takes place only indirectly through the Internet interface.

[3] "Economically vulnerable work" or "economically dependent work" See: Az Európai Közösségek Bizottsága, Brüsszel, Zöld Könyv, 2006, A munkajog korszerűsítése szembenézve a XXI. század kihívásaival;

A munkavállalóhoz hasonló jogállású személy fogalmát lásd még: Gyulavári Tamás: A gazdaságilag függő munkavégzés szabályozása: Kényszer vagy lehetőség? Magyar Munkajog E–Folyóirat 2014/1, p. 1–25.

[4] See: Rácz Ildikó: *A digitalizáció hatása a munkajog egyes alapintézményeire*, PhD értekezés, Károli Gáspár Református Egyetem Állam– és Jogtudományi Doktori Iskola, 2020.

2. Challenges of labor law

The work initially meant meeting people's own needs, but even with the low standard of technology, was spread the working for others interests. One type of work is the production of a product for others interests and the provision of a service. Such work activities embody the relationship between people through the goods that appear in the market. In this case, autonomy includes a de jure independent appearance, both for the provider and the recipient of the service. The service provider - the contractor - appears in the legal transaction independently, under his own name, and the essence of the contractor is the production of some result (opus) for the other party - the customer. The other option is to do work for another person using one person's own workforce.[5] It is important to emphasize that labor law restricts the parties' freedom to choose the type. The parties have the possibility to establish within the legal framework that the given activity is performed within the framework of an employment contract or other civil law contract (enterprise, assignment). The most important of these constraints is the catalog of employment criteria. It can be reaffirmed that an employment contract or employment relationship can be established to carry out any kind of work activity, but it is not true the agency agreement.[6] This, in turn, leads us to the fact that labor law traditionally regulates the dependent work. It is worth emphasizing that in Hungarian and international labor law, the primary subject of regulation is the traditional typical or standard employment relationship. This vital employment contract of indefinite duration, full-time, the employment contract is concluded between one employer and one emloyee, and work is performed at the place and time specified by the employer, using the employer's assets.[7]

The advent of the Internet, the rapid development of technology, the conscious and almost violent coercion of innovation are inducing a rapidly changing environment. And in this system, the competition that is the engine of a market economy is intensifying and intensifying. Increasing economic competition for the implementation of globalization puts constant pressure on labor law regulations, which are later felt by weaker and stronger "erosion effects".[8] Actors in the world of work have therefore been forced to adapt. A prerequisite for them to stay in the market is to be able to compete and be able to use the changing market needs on a daily basis more quickly and efficiently. The current trend in labor law reflects exactly the processes mentioned above. Named atypical employment relationships[9] are gaining more and more prominence and growing in popularity. Workers and employers are increasingly seeking to take advantage of the opportunities offered by the legal relationship in order to be able to adapt as much as possible to sudden and rapidly changing circumstances. Employers are increasingly faced with "employability", which means nothing more than the ability to remain at a high level of work in the face of the ever-changing challenges of the world

[5] Kiss György: *Munkajog*, Dialóg Campus, Budapest, 2020, p. 20.
[6] Kiss György: *Munkajog*, Osiris, Budapest, 2005, p. 90–95.
[7] Ferencz Jácint: *Az atipikus munkaviszonyok komplex megközelítése*, Doktori értekezés, 2014. Győr, p. 12.
[8] Petrovics Zoltán: *A biztonság árnyékában, A munkajogviszony megszüntetésével szemben védelem alapkérdései*, Doktroi értekezés, Budapest, 2016. p. 56.
[9] Although other names have survived (e.g., flexible jobs or, as the first approach suggested: fragile, vulnerable jobs), the term "atypical" has become more common. In: Laky Teréz: *Az atipikus foglalkozásokról*. Struktúra Kiadó, Budapest, 2001. p. 16.

of work.[10] The subjects of the legal relationship are pushing the boundaries more and more, just think of flexible working hours,[11] the home office phenomenon, the use of shorter full-time working hours. It can also be observed that the broad right of command, control and control characteristic of the employer in the employment relationship is loosen.[12] Coupled with all this is the application of platform work, which allows for a global flow of labor. According to typical labor law doctrines, the service provider makes labor available to others for a fee, in return for which it receives wages.[13] Here I would like to note that the XXI. century, time became even more appreciated than in earlier eras. All this is clearly related to the rise of global economic processes. Closely related to this factor is the Internet as a basic condition for the development of the global labor market. Today's theories of labor law slip in part or in whole over the time factor, and an essential element of the employment relationship is that the person performing the work and providing the service provides not only his labor, but also his time. Nothing proves the legitimacy of the time factor in employment law better than the legal institution of on-call time. The time factor in the changed environment, on the one hand, leads to the issue of remuneration, ie wages, and, on the other hand, marks the fact that availability and the provision of (free) time are also the main features of the legal relationship, which seems to be appreciated.

I would definitely like to highlight a common feature of the elements listed. Namely, that there is flexibility behind each endeavor. All this can be attributed primarily to the changed economic environment around us.

As described above, Tamás Prugberger and Jácint Ferencz have a similar position. According to them, atypical working relationships are rooted in flexibility combined with efficiency and savings. Tamás Prugberger emphasizes that employers strive to share the risks arising from employment with employees. From a legal dogmatic point of view, these factors lead to that will be in the background dependent work, as opposed to work that of a more informal, looser controlled contract of employment.[14] Another factor that can be highlighted is that the sometimes slow response or resistance of labor law diverts the partyes into the world of non-labor law relations.[15]

One of the latest forms of employment that falls outside the scope of labor law is platform work, which in itself is a special phenomenon with plenty of interesting implications.[16] In my view, platform work is

[10] Szekeres Bernadett: *Munkajogon innen – munkaviszonyon túl*, A gazdaságilag függő önfoglalkoztatás és annak munkajogi védelme, PhD értekezés, 2019. Miskolc, p. 31.

[11] Increasing the sovereignty of workers 'working time is important for flexibility. In: ILO: Work for a brighter future global comission on the futureof work, p. 51.

[12] Jakab Nóra – Rab Henriett: *A munkajogi szabályozás foglalkoztatási viszonyokra gyakorolt hatása a szociális jogok és a munkaerőpiac kapcsolatának függvényében*, Pro Futuro, 2017/1, p. 26–40.

[13] Kiss György: *Munkajog*, Dialóg Campus, Budapest, 2020, p. 20.

[14] Prugberger Tamás: *Az atipikus szolgálati/munkaszerződések jogdogmatikai és rendszerezésbeli kérdései, különös hangsúllyal a munkaerőpiac legújabb igényeire*, Miskolci Jogi Szemle 15. évfolyam (2020) 2. szám, p. 44–66.

[15] Kiss, György: *A magyar munkajog megújulásának esélye az Európai Unió munkaügyi politikájának tükrében*, Pécsi Munkajogi Közlemények, 2008/1, p. 7–33.

[16] See details in: Tóth Hilda: *A munkajog új kihívásai: a "gig" gazdaság munkavállalói csoportjai*, In: Szikora Veronika – Török Éva (szerk.) Ünnepi tanulmányok Csécsy György 65. születésnapja tiszteletére. 396 p. Debrecen: Debreceni Egyetem Állam- és Jogtudományi Kar, 2017. p. 381-388.

forcing the renewal of labor law. As I have highlighted above, the fundamental - and recurring - problem in the field of labor law is caused by the addition of another group and type of workers who are excluded from labor law regulation. The specialty of the platform's employment relationship is, among other things, that it arises through a specific combination of labor law and civil law, which are inseparable. Thus, by examining the primary and secondary qualification protocols[17] applied in the field of labor law, we cannot work to classify them as employment or to establish that they do not qualify as such. However, the problem of a person with a similar legal status to an employeehas a much older history.[18]

One of the major dogmatic challenges of labor law has been the question of why, in some cases, work-related activity can be carried out in a civil law relationship and sometimes not.[19] This question was reflected - more or less - in the theory of economic dependence and then in the theory of personal dependence, followed by an increasingly rational explanation of the subject of the service. This is nothing more than whether or not the service is specifically defined within the legal relationship. In the case of an employment relationship, the service is de jure not a result (product) produced independently by the service provider, but the performance of work for the employer (not the customer) under its control.[20]

The essence of the problem is that while in one case labor law protects the party providing the service with many protective and guarantee rules, in the other case these additional protection rules are mostly lacking. And the difficulty of similarity and demarcation is mainly due to the private law roots of the employment contract. According to Prugberger, it is essentially situated between an employment contract and a business contract with an employment contract (service contract), which has two types in Western European law. One of the so-called "Free service contract," while the other is the so-called "depending Work".[21]

According to him, on the one hand, the employment contract is of the "facere" type, the obligation oriented to carry out an activity and does not work in the same way as the undertaking or the assignment. And the cyclically recurring theme, which can be called a classic, is the hidden business - free-form forms of freelance work - self-employed, platform workers, "gray zone" accessories - who are often forced to work and only formally work as entrepreneurs,

[17] 7001/2005. (MK 170.) FMM–PM együttes irányelv a munkavégzés alapjául szolgáló szerződések minősítése során figyelembe veendő szempontokról.

[18] The dual model distinguishes between work and self-employment, or dependent and independent work, and the triple model distinguishes between work, work-like employment and self-employment, i.e., dependent, quasi-dependent and independent work. In: Jakab Nóra: *Munkavégzők a munkavégzési viszonyok rendszerében*, Jogtudományi Közlöny, 2015. p. 421–432.

[19] As Zoltán Bankó points out, the basic problem - which does not only arise in connection with teleworking - is that if a given work activity can be performed in several legal relationships, then the freedom of the parties to conclude contracts can extend to choose between different types of contracts. In: Bankó Zoltán: *A távmunkával kapcsolatos jogalkotási, jogalkalmazási és foglalkoztatáspolitikai tapasztalatok Magyarországon*, Magyar Munkajog E–folyóirat 2016/2, p. 49–61.

[20] Kiss György: *Munkajog*, Dialóg Campus, Budapest, 2020, 20. p.

[21] Prugberger Tamás: *A kiszolgáltatottabb fél védelmének kérdése az új magyar Polgári Törvénykönyv Koncepciójának kötelmi jogi részében*, PJK, 2002/3., p. 36–41.

with the longest deadlines and full-time dependent work.[22]

After a brief overview of the platform workers and the self-employed problems, the question may rightly arise in us as to whether these tendencies endanger labor law? After all, it is evidenced by the processes that the partyes of the world of work can't to keep employment within the framework of the employment relationship. The basic premise remains that if the parties receive a cost reduction by choosing the type of contract, it is the normal and rational behavior of the labor market operator to turn to the cheapest type of contract.[23] In this case, is it only the reduction of costs and the fact that efficient operation is at the heart of the choice of legal relationship? Do the parties really want to get rid of the squeeze of labor law? In my view, we do not witness the escape from labor law, but we reached the point of the market economy where we further increase terminality and productivity with a high degree of flexibility. This flexibility is true of the activity to be performed, the qualities expected, as well as the regulation and the nature of the legal relationship.

From all this, it can be concluded that the practicing processes surrounding labor law require more for labor law to respond to these impulses. It follows that the need to renew labor law does arise. Hereinafter I looking for the answer to the question, what are the possible directions for the renewal of labor law?

3. Trends in future labor law

The lesson of the previous chapter is that flexible working activities presuppose flexible regulation and legal relations. As we have seen, a marked manifestation of this means that parties in the world of work are constantly looking for opportunities that they often find outside labor law. With regard to the future of labor law, the raison of labor law, or at least the retention of its traditional role, is increasingly being raised. All this is due to the fact that parties in the world of work are pushing the boundaries of labor law along the possibilities provided by technology, changed needs and freedom of contract.[24] In general, the question is whether or not labor law can retain its traditional role and relative autonomy? Of course, I would like to discuss much more nuanced issues and directions in this chapter.

I would like to state that, for my part, I am firmly of the view that there is a need for labor law regulation that has been apostrophized as traditional in the future as well. However, the currently labor law role needs to be new direction, in some respects need to be renewed. As part of this, its relationship with private law needs to be strengthened in some respects.

[22] Prugberger Tamás: *Az atipikus szolgálati/munkaszerződések jogdogmatikai és rendszerezésbeli kérdései, különös hangsúllyal a munkaerőpiac legújabb igényeire*, Miskolci Jogi Szemle 15. évfolyam (2020) 2. szám, p. 44–66.

[23] Gyulavári Tamás: A szürke állomány. A gazdaságilag függő munkavégzés a munkaviszony és az önfoglalkoztatás határán, Pázmány Press, Budapest, 2014, p. 110.

[24] The enforcement of the contractual principle in civil law obligations requires the absence and passivity of state intervention, while in labor law the - adequate - state intervention is necessary for the same.

The principle of contractual freedom prevails in labor law, but specifically, at one level even more than at the level of collective self-determination. Indeed, collective agreements could play the full role of shaping the labor market as originally intended by the legislative idea, which would reduce Hungarian labour law regulation constrain which means that a state of equilibrium can emerge based on a market self-regulatory mechanism. In: Bodó László: A polgári jog és a munkajog összehasonlítása az alapelvek tükrében, Debreceni Jogi Műhely, 2012. évi (IX. évfolyam) 4. szám, p. 13–21.

According to György Kiss, we can distinguish three main ways in terms of possible future directions of labor law. One is to maintain the position of traditional labor law spiced up with a number of concessions and flexibility. The other option is based on almost complete freedom of employment and occupation. This includes the effects on labor law of "non-classical", "atypical" employment methods. György Kiss also lists a third direction, which he analyzes in detail. This is nothing more than a return to classical contract principles using the specifics of an employment contract.[25] In the following, I intend to examine and supplement each option along the outlined division.

3.1. Maintaining the status quo

Regarding this line, György Kiss explains that the adherence to the values of the social space to be created in Europe in the 1970s can still be observed today, but he believes that the effects that break the framework of labor law based on artificial balance cannot be avoided. He believes that the covert tendency to go back to the institution of the contract instead of the employment contract should be discovered, but in his view, the established dogmas have not been sufficiently criticized to this day.[26] I have previously referred to the fact that the subject of labor law is dependent work. As György Kiss points out, labor law is primarily "the right" of those who do not have independence that would not require the use of their labor in other ways. Thus, labor law can only display a certain "debtor-creditor" position.[27] The basic mission of labor law, that contracts in a subordinate position in the employment relationship can be settled between the parties, compensates for the existing imbalance. This basic theorem thinks the future should also be the starting point for the legal relationship. However, over time, the rules that protect researchers define the employment relationship in such a way that it has generated a constraint that is important primarily to the employer. From this, the phenomenon already mentioned several times can be observed, namely, that employers "flee from labor law".[28] In the special context of employment, this dilemma is attempted to be reflected in the concept of flexicurity, which seeks to combine the existential security of labor market law with the principle of economic and labor efficiency-seeking employment flexibility in neoliberal globalization.[29] The idea is especially welcome and the concept has brought several successful solutions. Nevertheless, it can be said that flexibility is usually not, or not as, associated with the security promised by the concept. Thus, in the legal relationship, only one element is usually realized by maintaining or, in some cases, exacerbating the hierarchical

[25] Kiss György: A foglalkoztatás rugalmassága és a munkavállalói jogállás védelme (Egy lehetséges megközelítés a munkajogviszony tartalmának vizsgálatához), Wolters Kluwer Hungary, Budapest, 2020, p. 29.

[26] Kiss György: A foglalkoztatás rugalmassága és a munkavállalói jogállás védelme (Egy lehetséges megközelítés a munkajogviszony tartalmának vizsgálatához), Wolters Kluwer Hungary, Budapest, 2020, p. 32.

[27] Kiss György: Az új Ptk. és a munkajogi szabályozás, különös tekintettel az egyéni munkaszerződésekre, PJK, 2000/1., p. 3–17.

[28] Prugberger Tamás – Kenderes György – Mélypataki Gábor: A munka– és közszolgálati jog intézményrendszerének kritikai és összehasonlító elemzése, Egyetemi tankönyv, Novotni kiadó, Miskolc, 2012, p. 194.

[29] Prugberger Tamás – Kenderes György– Mélypataki Gábor: A munka– és közszolgálati jog intézményrendszerének kritikai és összehasonlító elemzése, Egyetemi tankönyv, Novotni kiadó, Miskolc, 2012, p. 194.

relationship.[30] Usually, safety refers to the permanence of a legal relationship, it includes guarantee elements related to its termination, such as notice period, dismissal, severance pay. However, little is said about material and existential security, another aspect of security. It is not just the legal relationship and the durability of the legal relationship that can be the only way to strengthen security. Security can be strengthened through remuneration, and thus through wages, at least more easily in line with flexibility. On this basis, I consider it conceivable to differentiate the rules of labor law in a way that allows a greater degree of flexibility in certain matters, which rests primarily on the will of the parties, but at the same time comes at a price that is embodied in the level of remuneration. With this, to make the labor law regulation even more multi-speed, to implement further differentiation within the regulation.

In addition to whether or not we agree with the strengthening of the so-called 'classic' role of labor law, another big question arises as to whether this is to be achieved globally through universal rights, or whether a national rule is needed. The first suggestion is that it is the solution that best facilitates the flow of free labor in the global labor market. On the other hand, there are indisputable differences at the national level in the field of labor law due to certain historical and cultural peculiarities, which are difficult for individual nations to overcome.

3.2. Strengthening non-classical employment methods

In this part, György Kiss primarily reflects on the problem of platform-based forms of work, which, in her opinion, annuls or can annul all institutions of labor law.[31]

In my view, the emergence of platform jobs and the ongoing work they trigger could jeopardize the existence of labor law, as the rise of flexible working activities and the weight of employment go beyond the framework of civil law to ensure a successful market presence. György Kiss distinguishes two possible directions of development in this field. One of these is that a form of work may emerge that is similar in several respects, or even identical with labor law, but operates outside labor law, beyond its limits. The other direction, that new forms are to be incorporated into labor law, which is included in its scope of regulation.[32]

In my view, this causes several more difficulties. The starting point is that civil law allows the parties, on the basis of the principle of freedom of choice, to determine the content of the contract freely, but also it also allows the parties to the contract to shape the content of the contract themselves. Derogation is not possible only if it is prohibited by law. Consequently, the parties may not only enter into the contracts specified in the Civil Code. but also contracts with the most varied content that best suit the market and traffic conditions can be created. Thus, it is possible to creation of mixed contracts in which the parties contain several new contracts and combine their content elements. These

[30] According to György Kiss, the two components of flexicurity - flexibility, which is related to the fundamental right of freedom of enterprise, and security, which is the existential interest of the worker - are difficult to combine. In: Kiss György: Koncepcióváltás a magyar munkajogban? Megjegyzések a 2012. évi I. törvényhez. Az új Munka Törvénykönyve dilemmái c. konferencia utókiadványa, p. 19.

[31] Kiss György: A foglalkoztatás rugalmassága és a munkavállalói jogállás védelme (Egy lehetséges megközelítés a munkajogviszony tartalmának vizsgálatához), Wolters Kluwer Hungary, Budapest, p. 2020, 33.

[32] Kiss György: A foglalkoztatás rugalmassága és a munkavállalói jogállás védelme (Egy lehetséges megközelítés a munkajogviszony tartalmának vizsgálatához), Wolters Kluwer Hungary, Budapest, 2020, p. 33.

restrictions are not necessary to be void because they either exist according to the content of the contract, which predominates in the content of the agreement (in the case of mixed contracts), or are governed by the general rules of civil law (not in the case of new contracts).[33] Although the platform work has labor law characteristics, but in my view, it cannot be such as to allow a break from the bond of civil law without any problems. Among other things, because of the principle of freedom of contract described above, I do not agree with the view that, in these cases, the correct legislative course of action would be to bring new types of work under the auspices of labor law. Furthermore, here I would like to draw a parallel between the situation of platform work and the quality of teleworking in self-employment. Based on the statement of Zoltán Bankó, the teleworker must meet two combined conditions (entrepreneur, agent) qualified as a self-employed person: a part of the working time and the definition of the job may be the possibility of a teleworker, and the existential condition: he must appear on the market independently.[34] In the case of platform workers, the right to schedule working hours belongs to the party performing the work activity. The party providing the platform merely orients the activity provider, but does not determine the working hours. The place of work are also predominantly decided by the platform worker. Thus, based on the above finding, we can conclude that platform workers perform their activities as self-employed workers.

For my part, I would add a possible third direction to the range of possible trends, with a focus on protecting the person doing the work. In the event that new forms of work are still treated on a civil law basis - and we want to avoid the dogmatic problems - I consider it feasible to reduce the vulnerability of employed groups in private law as in the case of consumer status.[35] At the same time, I am of the view that the duality of employment, which makes it possible to work within the framework of labor law and civil law, can continue to coexist in the future. However, the reform of labor law mentioned in the previous point, which focuses on increasing flexibility, is needed in order to maintain a balance between the two systems of relations. In addition, it is worth noting that the current Labor Code[36] has brought about a significant conceptual change, which also focuses on flexibility. I would like to point out that the current Mt. also provides the parties with more opportunities to flexibly shape the legal framework and the content of the employment contract, but parties often not avail this possibility. In this context, it is worth highlighting the example of teleworking. I am not thinking here of the transitional rules that have been put in place in connection with the pandemic, but only of the phenomenon that the legal conditions for the spread of telework were in place in the previous period. However, the epidemic, as a catalyst, has initiated this process and many employers, having faced the functionality of the system and found it effective, intend to continue to apply it in the future. Many other options and legal institutions are in similar shoes. The parties do not dare to change, they treat non-traditional agreements with reservations,

[33] Kiss György: Munkajog, Dialóg Campus, Budapest, 2020, p. 93.

[34] Bankó Zoltán: A távmunkával kapcsolatos jogalkotási, jogalkalmazási és foglalkoztatáspolitikai tapasztalatok Magyarországon, Magyar Munkajog E–folyóirat 2016/2, p. 49–61.

[35] See more: Rab Henriett: A munkavállalói státusz egyes kérdései, A fogyasztóvédelmi jogról másképpen – Előképek, közjogi és munkajogi vetületek, Debrecen, 2019. p. 121–138.

[36] A munka törvénykönyvéről szóló 2012. évi I. törvény (hereafter: Mt., Hungarian Labour Law Code).

although this can be a guarantee of competitiveness, if necessary. Learning from this, I definitely see the need for a wide range of information and education for employers and employees and for the opportunities offered by labor law to be "promoted". Employers 'and employees' organizations must play a key role in this.

Linked to platform work, but going beyond this framework, in this subsection I would also like to talk about the solution that is related to labor law but to it through atypical legal relationships. In my view, in order to strengthen the position of labor law, it is necessary for the legislator to expand the scope of atypical employment relationships. This is based on the assumption that the contracting parties prefer finished and prefabricated types much more. Furthermore, in some cases, pre-production may be practical in order to make it easier to balance the legal relationship between the parties. To do all this, it is worth clarifying, first of all, where to draw the line between including certain forms in the framework of labor law and leaving others under the jurisdiction of civil law. This is based on defining and narrowing down the delimiting criteria of labor law[37] that can function as the organizing principle of typical and atypical employment relationships. In my opinion, among the essential and delimiting criteria of labor law, the broad right to give instructions and the obligation to be available are the two criteria along which delimitation is possible, yet provide a flexible framework for shaping the legal relationship.

In the light of the foregoing, the question must therefore be asked, what is the reason why the parties nevertheless choose employment within the framework of an employment relationship over other forms? The legislator may have several answers to this and several tools are available, of which either obligation or orientation can be considered. In my view, the future and competitiveness of labor law, as opposed to forms of employment based on civil law, can only be achieved in a system of labor law based on mutual benefits. This, in turn, involves a trade-off, as the employer's interest is only linked to the form of employment under employment law if it brings at least as many benefits to it as it entails an additional burden. This may therefore lead to a slight reduction in the level of protection of employees, but at the same time it can protect the employee with far more guarantee elements than in the case of work under other subordinate legal relationships.

3.3. Return to classical contract principles

This concept has also led us back to a well-known issue in the field of labor law. This is nothing more than a dilemma of strengthening in private or public law. The development history of labor law shows some cyclicality in terms of the impact of private and public law elements on labor law. Labor law has already reached both extremes in this regard. The starting point and one of the extremes is total contractual freedom based on private law. However, this complemented the principles of a market economy and led to an imbalance between the parties. The deterioration and exploitation of the labor situation has triggered the process of enriching labor law with public law elements. Then, in some countries, labor law regulation went the other sider, as labor law in socialist countries was determined by a high number of elements of public law. In the period following the change of regime, it also brought a strengthening of private law in the

[37] See:12. Footnote.

field of labor law, which continued in Hungary in the second code after the change of regime. And here we are in the XXI. in the fourth quarter of the twentieth century, when regulation seems to be too rigid, static and public law for actors in the world of work, as employment takes place before our eyes in the direction of civil law. This trend leads, among other things, to the following concept.

György Kiss mentions the peculiarities of the employment contract as a possible future way of labor law, the use of which returns to the principles of classical contracts. Central to this concept is the theory of relation contract, a term used in the contractual sphere of economic life. A relation contract presupposes a long-term, lasting legal relationship based on a mutual interest of the parties. Within the framework of the contract, a high degree of co-operation is realized, which ensures the long-term co-operation of the parties resulting from the development of each presumed contractual environment. All this in such a way that the legal relationship and the parties are able to react flexibly to unforeseen circumstances at the moment of conclusion. However, this creates a system based primarily on trust, which is based on the enforcement of internal "socio-economic" interests and presupposes continuous negotiation skills and cooperation between the parties.[38] Appropriate debate resolution techniques are also needed to maintain a lasting relationship. For my part, however, I can maximally identify with the theory, which gives the concept its strength, in a sense it also means its weak point. Namely, that the system of relations between the parties is based on a high level of cooperation and information obligation based on contractual principles. In my view, this requires a high degree of cooperation, which may not be appropriate for the parties in all circumstances. In this context, the legal culture, mostly determined by history, which determines the attitude of a given society to the law, cannot be neglected. These factors can greatly determine the successful operation of a design.

4. Conclusions

In today's changing economic environment, traditional flexicurity institutions operate less and less efficiently. The establishment of a new system of flexicurity institutions is absolutely necessary, but this requires a re-examination of the relationship between labor law and civil law, as well as the coherence of certain elements of labor law, without legal policy "emotions".[39] The contractual freedom of the parties and the right to form a high degree of contract provide a high degree of flexibility for the parties. All this can be a threat in the field of labor law, but there are also opportunities for further development. The dilemma is, in part, what the framework should be for the parties' contractual freedom in the field of employment.

Some see the solution in expanding the dimension of dependent and non-dependent work in labor law. The category of personal employment relationships reflects this, which covers a contractual relationship that focuses on the worker who works for other consideration.[40] This clearly broadens the

[38] Kiss György: A foglalkoztatás rugalmassága és a munkavállalói jogállás védelme (Egy lehetséges megközelítés a munkajogviszony tartalmának vizsgálatához), Wolters Kluwer Hungary, Budapest, 2020, p. 36.

[39] Kiss György: Foglalkoztatás gazdasági válság idején – a munkajogban rejlő lehetőségek a munkajogviszony tartalmának alakítására (jogdogmatikai alapok és jogpolitikai indokok), Állam– és jogtudomány, 2014, p. 36–76.

[40] Mark Freedland – Nicola Kountouris: The Legal Construction of Personal Work Relations, Oxford Monographs on Labour Law 2011. p. 304–308.

scope of labor law. The proposed classification is a typology consisting of flexible, loose legal categories. According to them, standing on the basis of the existing traditions, but exceeding them, the following categories are distinguished: secure work, autonomous or freestanding work and precarious work.

We could continue the line with other trends, such as the idea called Transnational Private Labor Regulation (TPLR). The focus is on creating a "regulatory space". Based on this, (transnational) labor law is not a well-defined right, but rather a complex, hybrid, experimental regulatory space, different variants - classic versus innovative, "hard" versus "soft" law, "state" versus "non- state ", etc. - filled by a cavalcade of control methods.[41]

But we could even mention the idea of the European Commission, which would increase safety and working in a wide range of legal relationships by creating a catalog of minimum rights.[42]

Pushing the boundaries of dependent work is closely linked to issues of classification and legal personality. According to some views, there are basically three ways in defining the boundaries of dependent work in the European labor law system: the first is the extension of the concept of emloyee, the second is the creation of new (third) type of worker (tertium genus), the third is the creation of extension of certain rights to certain broad categories.[43]

In conclusion, I wanted to shed more light on the fact that in addition to the main directions listed in the study, there are many other possible solutions. One thing is for sure, however, that labor law has reached another milestone.

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[41] Globális szabályozás a munkajogban, 2016., this document is available online at https://jogaszvilag.hu/cegvilag/globalis–szabalyozas–a–munkajogban/ (last acces: 2021. március 28.).

[42] Gyulavári Tamás: *Szürke Zóna, A munkaviszony és az önfoglalkoztatás közötti jogviszonyok Európában és Magyarországon*, Habilitációs értekezés, Budapest, 2010, p. 65.

[43] Jakab Nóra: Európai és magyar munkajogi szabályozás a változó gazdasági viszonyok között, különös tekintettel a magyar munkajogi kodifikációra, Bíbor Kiadó, Miskolc, 2018, p. 30.

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PROCEDURAL DIFFICULTIES ENCOUNTERED BY ROMANIAN COURTS IN APPLYING EUROPEAN UNION LAW IN THE MATTER OF UNFAIR TERMS IN CONSUMER CONTRACTS

Marian GOCIU[*]

Abstract

While the Member States of the European Union have similar legal systems, they also have many specific procedural differences. This is the reason why the Council Directive 93/13/EEC on unfair terms in consumer contracts states the general provisions, mostly of substantive law nature, and offers the essential criteria to determine if a contractual term is unfair. It becomes the Member State's duty to transpose the Directive into the national legal framework and to regulate adequate and effective specific means to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers. Romanian authorities didn't provide a minimum harmonization of the national law with the principles of the Council Directive 93/13/EEC by regulating accurate legal provisions to ensure that there are effective remedies in the light of article 7 of the Directive, by adapting the guidelines of the directive to the national legal framework and by amending the national rules that didn't comply with the principles of the Directive, they just took over the text of the Directive, with minor additions, and the list of the terms which may be regarded as unfair. Having at their disposal only the general criteria offered by the Directive, Romanian courts encountered many issues in the course of proceedings that determined some of them to turn to the Court of Justice of the European Union case law, while other courts made use of the preliminary ruling procedure found in article 267 of the Treaty on the Functioning of the European Union to unify their practice. Identifying the problem is the first step in solving it. This study analyzes the difficulties that the national courts stumbled upon in applying European Union Law in the matter under discussion and the various ways they found to overcome them. The study can be a very useful instrument both for Romanian and Member States practitioners.

Keywords: *legal qualification, jurisdiction, admissibility, the ex officio principle, statute of limitation.*

1. Introduction

During the period of the Romanian Social Republic, the concept of "property" almost disappeared from individual consciousness due to communist principles such as restricting private property (through nationalization, expropriation and confiscation) and restricting, nationalizing and centralizing the essential services. At the same time, the banking services were provided by the state, by nationalizing the banks and centralizing the banking activity, eliminating the competitive system that could have benefited the consumers.

The legislative framework in the specific matter of consumer protection appeared in Romania after the Revolution of December 1989, in a new socio-political context, determined by the change of power in the state, the emergence of private banks and the desire of the population to have more and more goods and to benefit from services similar to those offered by the other Member States.

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Due to the trauma created by the shortcomings they have suffered for so long, people have adopted a coping mechanism which consisted in the excessive purchase of goods and services, a mechanism doubled by the lack of financial education and relaxation of lending conditions which involved even the granting of loans only by presentation of the identity card.

The banking entities established in Romania after the year 1990 took advantage from this context and drafted pre-formulated standard contracts (that usually contained unfair terms) so as the consumer wouldn't have the possibility to influence the substance of the terms.

All of these changes have increased the need of the state to intervene in the contractual relation between professionals and consumers, in order to protect the consumers (taking into account that they are in a lower position of power than the professionals[1]) and to improve the banking products on the market by stimulating competition.

The legislative framework in the matter of consumer protection in Romania started with the issuance of Government Ordinance no. 21/1992 on consumer protection, and has experienced a slow, but constant, evolution over time, also determined by the process of joining the European Union. Subsequently, the Romanian Parliament passed Law no. 193/2000 on unfair terms in contracts concluded between professionals and consumers, enforcing the provisions of Council Directive 93/13/EEC (although, at that time, Romania was not yet a Member State), thus aligning with the European principles on the matter.

These provisions were amended later on by Law no. 363/2007 (which included also the statement on the transposition of the Council Directive 93/13/ EEC), by Law no. 76/2012, by Government Ordinance no. 34/2014 and by Government Ordinance no. 58/2022. Several legal provisions have been introduced in accordance with the case law of the Court of Justice of the European Union and the amendments to Council Directive 93/13/ EEC by Directive (EU) 2019/2.161 of the European Parliament and of the Council.

In 2004, the Romanian Parliament passed the Consumer Code by Law no. 296/2004 and by Government Emergency Ordinance no. 50/2010 the Romanian authorities transposed the provisions of Directive 2008/48/EC of the European Parliament and of the Council on consumer credit agreements. Also in 2004, was regulated the Government Ordinance no. 85/2004 on consumer protection when concluding and executing distance contracts on financial services. Government Emergency Ordinance no. 52/2016, on credit agreements offered to consumers for real estate, amended the Government Emergency Ordinance no. 50/2010 and transposed the provisions of Directive 2014/17 / EU of the European Parliament and of the Council.

As we observe from the legislative framework presented, The Romanian authorities concentrated mostly on the substantive law of the matter at hand and neglected to regulate adequate procedural

[1] The system of protection introduced by Directive 93/13/EEC is based on the same idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge (C.J.E.U. decision from 14 June 2012, in the case C-618/10, Banco Español de Crédito SA vs. Joaquín Calderón Camino, paragraph 39, which can be found online at https://curia.europa.eu/juris/document/document.jsf;jsessionid=5A6382CAD6D9275E8BB1387C90708F71?text=&docid=123843&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1108490 , last access 29.05.2022).

provisions to adapt the general rules of the Council Directive 93/13/EEC to the specifics of national provisions. This situation created inconsistent judicial practice among which the matter of legal qualification of the application, jurisdiction, active role of the judge, the admissibility of the application and statute of limitation.

This study examines the main issues that created inconsistent judicial practice in the matter of unfair terms in consumer contracts, in Romania, it analyses the applicable national legislation, the solutions adopted by national courts and possible solutions by applying the C.J.E.U. case law.

The matter covered by the present paper is different than the ones analyzed by the existent specialized literature because it gathers the main difficulties in the Romanian courts practice in one study and offers the point of view of a practitioner in accordance with the C.J.E.U. jurisprudence. The purpose of the paper is to provide law practitioners from Romania a simple answer to possible procedural problems when dealing with unfair terms in consumer contracts and also to provide law practitioners from other Member States a general view of how Romanian courts applied the European law and jurisprudence in the matter under discussion.

2. The legal qualification of the claim.

If a party wrongly invokes a legal text, the judge is not bound by the respective legal text, but, after informing the parties of that fact and inviting each of them to set out its views on that matter, the judge may and must apply the incidental legal provision to the factual situation legally substantiated by the party; also, in the same conditions, the court may qualify a request wrongly named by the party[2]. The accurate legal qualification of the submitted application prevents many of the errors that currently appear in the judicial practice during civil proceedings (concerning jurisdiction, admissibility, limitation periods), being necessary for the judge of the case to exercise his active role in this respect.

While a part of the applications/claims is filed by applicants by ordinary way of addressing the courts[3] (common law in terms of procedure), the other part is submitted using the special procedure of opposition to enforcement of an enforceable title[4] (usually a credit contract), in both of the cases with the request that the court shall establish the unfair nature of a certain term in a consumer contract.

In the first case, some of the complainants entitle their claims as "a request to determine a contractual term as unfair", while others name them "a request for declaring the annulment of the unfair term". This way of naming the claims misled a part of the Romanian courts which resulted in rendering wrong judgments, because the legal regime of the two types of applications is different in terms of effects.

In reality, regardless of the title, the request has a pecuniary character, because the applicant seeks to remove the effects of the unfair term and not only for the court to declare a term as being unfair. Furthermore,

[2] Gabriel Boroi, Mirela Stancu, „*Drept Procesal Civil*", second edition, Hamangiu Publishing House, Bucharest, 2015, p. 23.

[3] Based on Article 14 of Law no. 193/2000 : "*Consumers prejudiced by contracts concluded in violation of the provisions of this law have the right to address the courts in accordance with the provisions of the Civil Code and the Code of Civil Procedure".*

[4] Article 712, paragraph 1, Romanian Code of Civil Procedure : "*Against the procedure for the enforcement of an enforceable title, as well as against any enforcement act issued by the bailiff, an opposition may be addressed by those interested or prejudiced by the procedure*".

the type of nullity is absolute and not relative, because Article 6 of the Council Directive 93/13/EEC contains mandatory provisions[5] in the public interest[6]. This distinction is very important, because it determines the statute of limitation for submitting the claim. While the request of declaring relative nullity is limited to a certain period of time, 3 years, the request of declaring absolute nullity can be submitted irrespective of a period of time[7].

In the second case, when the complainant addresses the court using the special procedure of opposition to enforcement, he is submitting two claims: the request to declare a contractual term as unfair and the request to annul the enforcement procedure as a consequence of the first request. Both of them were qualified as main claims by the majority of national courts, but the civil proceeding must be viewed in a unitary way.

In view of the nature and importance of the public interest underlying the protection which Directive 93/13 confers on consumers, Article 6 of the directive must be regarded as a provision of equal standing to national rules which rank, within the domestic legal system, as rules of public policy. The determination by a court that such a term is unfair must, in principle, have the consequence of restoring the consumer to the legal and factual situation that he would have been in if that term had not existed. It follows that the obligation for the national court to exclude an unfair contract term imposing the payment of amounts that prove not to be due entails, in principle, a corresponding restitutory effect in respect of those same amounts. Article 2(b), Article 6(1) and Article 7(1) of Council Directive 93/13 must be interpreted as precluding a judicial interpretation of the national rule according to which the legal action for reimbursement of amounts unduly paid on the basis of an unfair term in a contract concluded between a consumer and a seller or supplier is subject to a three-year limitation period which runs from the date of full performance of the contract, where it is assumed, without need for verification, that, on that date the consumer should have known about the unfair nature of the term in question or where for similar actions, based on certain provisions of national law, that same period starts to run only from the time when a court finds there to be a cause of those actions.[8].

Therefore, the consequence of determining a contractual term as unfair under article 6 of the Council Directive 93/13/EEC is equivalent to determining absolute nullity of that contractual term according to Romanian legal provisions and the consumers right to file a claim to seek reimbursement of amounts unduly paid on

[5] C.J.E.U. decision from 21 February 2013, in the Case C-472/11, Banif Plus Bank Zrt, paragraph 20; this document is available online at https://curia.europa.eu/juris/document/document.jsf?text=&docid=134101&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1396165 (last access: 29.05.2022).

[6] C.J.E.U. decision from 26 October 2006, in the Case C-168/05, Mostaza Claro, paragraph 38; the document is available online at https://curia.europa.eu/juris/liste.jsf?language=ro&jur=C,T,F&num=C-168/05&td=ALL (last access: 30.05.2022).

[7] According to article 4 of the Government Ordinance no. 58/2022 : "By derogation from the provisions of the Civil Code that regulates the statute of limitations, the action seeking a finding of nullity of an unfair term is not subjected to a time limit.".

[8] C.J.E.U. decision from 9 July 2020, in the joined Cases C-698/18 and C-699/18, SC Raiffeisen Bank SA, BRD Groupe Société Générale SA , par. 51, 54 and 84; the document is available online at https://curia.europa.eu/juris/document/document.jsf?text=&docid=228365&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2473743 (last access: 30.05.2022).

the basis of an unfair term in a consumer contract is limited to a 3 years period[9].

The author's opinion is that the three-year limitation period runs from the date since the judgment which determined the nullity of the contractual term remained final - res judicata (as being the date the right arose), in order to comply to the principle of equivalence and the principle of effectiveness stated in the Council Directive 93/13/EEC.

3. Establishing substantive and territorial jurisdiction.

The jurisdiction provisions at the European Union level, in the matter of unfair terms in consumer contracts, are stipulated in Regulation (EU) no. 1215/2012 of the European Parliament and of the Council and are relevant only in relation to cross-border proceedings.

Regarding national legal provisions in the matter at hand, Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers[10]. Thus, Member States have the obligation to regulate provisions that establish rules of substantive jurisdiction (distribution of national proceedings vertically between courts of different levels) and territorial jurisdiction (distribution of national proceedings horizontally between courts of the same level) and organize remedies so as to ensure that the consumer has effective access to the proceedings and does not create additional burdens which would make it impossible or excessively difficult to exercise the rights which litigants have under European law[11].

In Romania, regarding the substantive jurisdiction, the legal qualification of the claim determines the competent court. As we clarified before, the claim to determine a contractual term as unfair using the common procedure represents a pecuniary claim[12] and, according to article 94, paragraph 1, letter k) and article 95 of the Code of Civil Procedure, local courts have jurisdiction over claims under 200.000 RON inclusive, as first courts notified, while municipal tribunals have jurisdiction over claims that exceed this amount.

Some of the national courts qualified the claims as being non-pecuniary because of the title that the complainants gave to them ("application to determine a contractual term as unfair") and applied only article 95 par.1 of the Code of Civil Procedure[13], concluding that only the municipal tribunals have jurisdiction to settle this type of claims. In result, they didn't comply with the substantive jurisdiction provisions, aspect analyzed by

[9] According to article no. 2517 of the Romanian Civil Code.

[10] Article 6 of the Council Directive 93/13/EEC; this document is available online at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31993L0013&from=RO#d1e39-29-1 (last access: 29.05.2022).

[11] In this regard, C.J.E.U. decision from 5 December 2013, in the Case C-413/12, Asociación de Consumidores Independientes de Castilla y León, paragraph 39; this document is available online at https://curia.europa.eu/juris/document/document.jsf?text=&docid=145247&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2110215 (last access: 29.05.2022).

[12] Decision no. 32 dated 09.06.2008, issued by the High Court of Cassation and Justice - United Sections, this document is available online at https://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=86093#highlight=## (last access: 29.05.2022).

[13] According to article 95 paragraph 1 of the Code of Civil Procedure "The tribunal settles, in the first instance, all the claims that are not given by law in the jurisdiction of other courts".

higher level courts in the special procedure of settling conflicts of jurisdiction[14].

However, when the complainants are using the special procedure of opposition to enforcement to invoke an unfair term in a consumer contract, only the enforcement court (local court) has the jurisdiction over such claims, according to article 651, par. 1 and article 714, par. 1 of the Code of Civil Procedure, regardless of the pecuniary threshold mentioned.

Another distinction must be made between the claims filed by consumer complainants, and those submitted by the National Authority for Consumer Protection or other legal institutions with responsibilities in the matter, pursuant to article 12, paragraph 1 of Law no. 193/2000. In the latter case, the claims are settled, in first instance, by specialized sections in civil matters (litigation with professionals) within the municipal Tribunals from the domicile or from the registered office of the vendor or supplier and not by local courts[15]. The possibility for an organization or body with a legitimate interest in consumer protection to bring a lawsuit to court, to prevent the use of unfair terms in consumer contracts was initially stipulated in article 7, paragraph 1 of the Council Directive no. 93/13.

When establishing the territorial jurisdiction, the following legal provisions shall be taken into account: article 113, paragraph 1, point 8 and article 121 of the Code of Civil Procedure, as well as article 17 and article 18 of Regulation (EU) no. 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (in relation to cross-border proceedings). In all of these cases, the general rule is that claims submitted by a vendor or supplier against a consumer may be brought to justice only in the court of the consumer's domicile/abode.

If the parties stipulate an attributive clause of jurisdiction, it produces its effects only after the birth of the right to compensation, according to article 126, paragraph 2 of the Code of Civil Procedure. Also, article 19 of Regulation (EU) no. 1215/2012 stipulates that the parties may derogate from the provisions of article 17 and article 18 only in three cases: by agreements after the dispute has arisen, by agreements which allows the consumer to bring proceedings in courts other than those indicated in this Section or by agreements concluded between the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which confers jurisdiction on the courts of that Member State, provided that such an agreement is not contrary to the law of that Member State.

Concerning the attributive term of jurisdiction, national courts must order ex officio measures of inquiry to determine whether a clause conferring exclusive territorial jurisdiction, which is stipulated in a consumer contract, falls within the scope of Directive 93/13 and, if so, must assess of its own whether such term is unfair[16].

[14] Judgment no. 20 dated 25.02.2015, issued by the Pitesti Court of Appeal, which can be found online at http://www.rolii.ro/hotarari/5895de70e49009340f00039d (last access: 30.05.2022).

[15] Decision no. 24/2015, appeal in the interest of the law, issued by the High Court of Cassation and Justice; this document is available online at https://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=126173#highlight=## (last access: 30.05.2022).

[16] C.J.E.U. decision from 09.11.2010, in the Case C-137/08, VB Pénzügyi Lízing Zrt., paragraph 57; the document is available online at https://curia.europa.eu/juris/document/document.jsf;jsessionid=

In the practice of Romanian courts, the contractual term according to which only the court of the bank's registered office was determined to be competent, was considered unfair[17].

A contractual term, previously drafted by a seller or a supplier, which has not been the subject of an individual negotiation, that confers exclusive jurisdiction on the court in the territorial jurisdiction of which the seller or supplier has his principal place of business, may be considered to be unfair. In small claims litigation, the costs of appearing in court could be daunting and could lead the complainant to waive any legal action or defense[18].

4. The ex officio principle (by its own motion).

National courts are required to examine, of their own motion, the unfairness of a contractual term which falls within the scope of Directive 93/13, compensating in this way for the imbalance which exists between the consumer and the seller or supplier[19].

The national court which has found of its own motion that a contractual term is unfair is not obliged, in order to be able to draw the consequences arising from that finding, to wait for the consumer, who has been informed of his rights, to submit a statement requesting for that term to be declared invalid. However, the principle of „audi alteram partem" (let the other side be heard as well – the adversarial principle), as a general rule, requires the national court which has found of its own motion that a contractual term is unfair to inform the parties to the dispute of that fact and to invite each of them to set out its views on that matter, with the opportunity to challenge the views of the other party, in accordance with the formal requirements laid down in that regard by the national rules of procedure[20].

A part of the Romanian Courts interpreted this jurisprudence as being the same with the active role of the judge, stipulated in article 22 of the Romanian Code of Civil Procedure.

The author's opinion is that the general principle according to which the judge should have an active role in civil proceedings implies also to comply with the principle of maintaining the equality of arms. In civil proceedings regarding the unfairness of a term in a consumer contract, the premise situation is that there is an imbalance between the consumer and the

D093584B8181BF4C4EC72825D924F437?text=&docid=79164&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1638471 (last access: 30.05.2022).

[17] For example: Decision no. 2938 dated 27.09.2013, issued by the High Court of Cassation and Justice – Civil Section II, conflict of jurisdiction; this document is available online at http://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=82841#highlight=## (last access: 30.05.2022) and Decision no. 634 dated 14.09.2016, issued by Timisoara Court of Appeal, Civil section II, mentioned in the book written by Adriana Pena, „*Clauzele abuzive în contractele de credit*", Hamangiu Publishing House and Litteris e-Publishing, Bucharest, 2017, p. 116.

[18] C.J.E.U. decision from 4 June 2009, in the Case C-243/08, Pannon GSM Zrt., paragraph 45; the document is available online at https://curia.europa.eu/juris/document/document.jsf?text=&docid=74812&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1655065 (last access: 30.05.2022).

[19] C.J.E.U. decision from 26 October 2006, in the Case C-168/05, Mostaza Claro, paragraph 38; the document is available online at https://curia.europa.eu/juris/liste.jsf?language=ro&jur=C,T,F&num=C-168/05&td=ALL (last access: 30.05.2022).

[20] C.J.E.U. decision from 21 February 2013, in the Case C-472/11, Banif Plus Bank Zrt., paragraph 42; the document is available online at https://curia.europa.eu/juris/document/document.jsf?text=&docid=134101&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1658568 (last access: 30.05.2022).

seller or supplier and this imbalance should be compensated by the intervention of the court. Thus, the equality of arms is reestablished by the court's intervention. The European principle stated above was interpreted autonomous of national regulations and it implies that national courts should exercise their active role more than their national legal provisions allow, in order to comply with the principle of effectiveness stipulated by the Directive. Nonetheless, national legal provisions cannot offer less protection to the consumer than the protection stipulated in the Council Directive 93/13/EEC.

The Court of Justice of the European Union has frequently ruled that the Council Directive no. 93/13 opposes a national provision under which the national court addressed does not have the option, either on application by the consumer or of its own motion, to examine whether the terms in a consumer contract are unfair within the meaning of the directive[21].

5. The admissibility of the claim.

Regarding the plea of inadmissibility, it has been frequently raised in relation to the definition of the notions „consumer" and "seller or supplier".

From the perspective of European law „consumer" means any natural person who, in contracts covered by the Council Directive 93/13/EEC, is acting for purposes which are outside his trade, business or profession. „ Seller or supplier" means any natural or legal person who, in contracts covered by this Directive, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned.[22]

In the national jurisprudence, some courts have interpreted that the issue of defining the two concepts above concerns the legal standing of the complainant or the defendant[23] to bring a claim to court. The author's opinion is that it is a matter of admissibility of the claim, because it represents a „sine qua non" condition (something absolutely indispensable) to bring a civil proceeding, like the one in question, to court.

The national courts have held that these legal provisions defining the consumer and the vendor or supplier are not of exclusive application, as long as the Council Directive 93/13 does not define the activities which the two actors are related with. Therefore, the two concepts are determined in relation to the activities actually carried out by them, in accordance to the national provisions[24].

A professional is a person who exploits an enterprise and an enterprise is the systematic exercise, by one or more persons, of an organized activity consisting in the production, administration or sale of goods or the supplying of services, whether or not for profit (according to article 3, paragraph 2 and 3 of the Romanian Civil Code).

[21] C.J.E.U. decision from 26 June 2019, in the Case C-407/18, Addiko Bank, paragraph 69; the document is available online at https://curia.europa.eu/juris/document/document.jsf?text=&docid=215509&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1667791 (last access: 30.05.2022).

[22] Article 2 of Council Directive 93/13/EEC, which can be found online at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31993L0013 (last access: 30.05.2022).

[23] Judgment no. 536 dated 07.02.2014, issued by the Bucharest Tribunal – Civil Section IV, this document is available online at http://www.rolii.ro/hotarari/587bb545e49009dc34006d6c (last access: 30.05.2022).

[24] For example: Decision no. 1987 dated 06.10.2015, issued by the High Court of Cassation and Justice – Civil Section II; this document is available online at https://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=129111#highlight=## (last access: 31.05.2022).

For example, a natural person who has concluded several credit agreements with a bank for the purpose of refinancing other loans obtained from another bank, for acquiring real estate, which he subsequently leased, does not fall into the category of „consumers" under the protection of Council Directive 93/13/EEC, because the activity carried out is of commercial nature[25].

In the C.J.E.U. case-law, The Court has ruled that Articles 1(1) and 2(b) of Council Directive 93/13/EEC must be interpreted as meaning that the directive can be applied to a contract of guarantee or a contract providing security concluded between a natural person and a credit institution in order to secure contractual obligations owed by the commercial company to the credit institution under a credit agreement, where that natural person acted for purposes outside his trade, business or profession and has no link of a functional nature with that company[26]. The same conclusion was reached with regard to the situation of the co-debtor[27] and to the situation of the debtor exercising the profession of lawyer, as long as the credit agreement is not related to his professional activity[28].

A natural person who has close professional ties with a company, such as its management or holding a majority of shares in a company, cannot be considered a consumer within the scope of the Directive, when endorsing a promissory note issued to guarantee the company's obligations under a credit agreement[29].

On the contrary, a company cannot be classified as a "consumer", because the notion refers exclusively to natural persons[30].

The plea of inadmissibility has also been raised from the perspective of article 4, paragraph 2 of the Council Directive no. 93/13/EEC, according to which „Assessment of the unfair nature of the terms shall relate neither to the definition of

[25] Decision no. 441 dated 02.03.2016, issued by the High Court of Cassation and Justice – Civil Section II; this document is available online at https://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=128554#highlight=## (last access: 31.05.2022).

[26] C.J.E.U. decision from 19 November 2015, in the case C-74/15, Tarcău, par. 31; the document is available online at https://curia.europa.eu/juris/document/document.jsf;jsessionid=38DDA2576AACE781C0AFC52C017F63F6?text=&docid=172182&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2670438 (last access: 31.05.2022).

[27] C.J.E.U. decision from 9 July 2015, in the case C-348/14, Bucura, par. 67; the document is available online at https://curia.europa.eu/juris/document/document.jsf?text=&docid=165660&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=2672031 (last access: 31.05.2022).

[28] C.J.E.U. decision from 3 September 2015, in the case C-110/14, Costea, par. 31; the document is available online at https://curia.europa.eu/juris/document/document.jsf?text=&docid=166821&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2672511 (last access: 31.05.2022).

[29] C.J.E.U. decision from 20 September 2012, in the case C-419/11, Česká spořitelna; the document is available online at https://curia.europa.eu/juris/document/document.jsf?text=&docid=127263&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2684753 (last access: 31.05.2022).

[30] For example: Decision no. 321 dated 11.02.2016, issued by the High Court of Cassation and Justice – Civil Section II; this document is available online at https://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=128558#highlight=## (last access: 31.05.2022); C.J.E.U. decision from 22 November 2001, in the joined Cases C-541/99 and C-542/99, Idealservice Srl; the document is available online at https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX:61999CJ0541 (last access: 31.05.2022).

the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplies in exchange, on the other, in so far as these terms are in plain intelligible language."

Romanian authorities have transposed the provisions listed above in art. 4, paragraph 6 of Law no. 193/2000, without stipulating a higher degree of protection for the consumer. Therefore, Romanian courts cannot examine the unfair nature of the contractual terms related to the definition of the main subject matter of the contract, nor the adequacy of the price and remuneration, if they are drafted in plain intelligible language, but only when these terms are not drafted in clear and precise language[31].

Finally, the admissibility of the claim was called into question when the request has been submitted using the special procedure of opposition to enforcement. In the past few years, a lot of debtors have requested the annulment of unfair contractual terms in consumer contracts, which, together with the lack of harmonization of national legislation, has led to an inconsistent jurisprudence on the admissibility of such request.

A part of the national courts considered that such request is not admissible by using the procedure of opposition to enforcement, as long as the application can be filed using the common procedure, in accordance with

Article 713, paragraph 2 of the Romanian Code of Civil Procedure. The other part considered the claim admissible on the grounds of the obligation of the national court to examine ex officio the unfair nature of the contractual term and by virtue of the effectiveness principle established in the jurisprudence of the Court of Justice of the European Union.

The opinion of The Romanian National Institute of Magistracy on the subject, expressed during the meeting of the presidents of the specialized sections (former commercial) of the High Court of Cassation and Justice and Courts of Appeal, held in Bucharest, on 15 December 2020, was that the courts notified with procedure of opposition to enforcement must remove, ex officio, the application of the provisions of article 713 paragraph 2 of the Romanian Code of Civil Procedure, without waiting for their removal by law or as a result of a constitutional procedure, the control of the unfair character of the contractual terms being admissible and mandatory[32]. The participants at the meeting unanimously endorsed this opinion.

The Court of Justice of the European Union reached the same conclusion in the case C‑75/19, BNP Paribas Personal Finance Paris SA – Bucharest Branch, Judgment rendered on 6 November 2019, and in the case C‑725/19, Impuls Leasing Romania IFN SA, Judgment rendered on 17 May 2022.

Following the C.J.E.U. case-law and national jurisprudence, The Romanian Government issued the Emergency Ordinance no. 58/2022 for the amendment of several national legal provisions in the matter of consumer protection, which entered into force on 28.05.2022. According to article 1, point 4 from the stated ordinance: „after paragraph 4 of article 13

[31] Decision no. 2875 dated 26.09.2013, issued by the High Court of Cassation and Justice – Civil Section II; this document is available online at https://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=102674#highlight=## (last access: 31.05.2022).

[32] The document is available online at http://inm-lex.ro/wp-content/uploads/2021/01/Minuta-intalnire-litigii-cu-profesionisti-si-insolventa-15-decembrie-2020_Bucuresti.pdf , page 40 (last access: 31.05.2022).

Law no. 193/2000, five new paragraphs are inserted […]: (8) By derogation from art. 713 paragraph (2) of the Code of Civil Procedure, the enforcement court has the possibility to examine in the procedure of opposition to enforcement, at the request of the consumer or ex officio, whether the terms of a contract concluded between a professional and a consumer constituting an enforceable title are unfair, and such a claim can be filed without limitation period."

6. Conclusions

Although the Romanian Parliament passed Law no. 193, on unfair terms in contracts concluded between professionals and consumers, in the year 2000, enforcing the provisions of Council Directive 93/13/EEC, it took almost 22 years for the Romanian authorities to provide a minimum harmonization of the national procedural law with the principles of the Council Directive 93/13/EEC and only after the national courts identified a series of issues in the matter and brought them to the attention of the executive and the Parliament. The first amendment to the Law no. 193/2000 was regulated after 7 years by Law no. 363/2007 and stipulated the possibility for a consumer to address the court with a request to determine if a vendor or a supplier is guilty of unfair business practices, but it didn't stipulate rules regarding substantive and territorial jurisdiction (article 10).

Law no. 76/2012 modified article 12 of the Law 193/2000 stipulating that claims submitted by the National Authority for Consumer Protection or other legal institutions, with responsibilities in the matter, are settled, in first instance, by the municipal Tribunals from the domicile or from the registered office of the vendor or supplier. These provisions didn't answer the questions which section from the Tribunal is competent in this case and which court is competent to settle the claims filed by consumers, generating again inconsistent judicial practice.

The Romanian Code of Civil Procedure (Law no.134/2010) entered into force on 15.02.2013 and established the territorial jurisdiction for settling claims submitted by de consumer, as analyzed in the section 2.2 of the paper, but the substantive jurisdiction has been the subject of different interpretations in the national jurisprudence.

The issues of admissibility of the claim when the request has been submitted using the special procedure of opposition to enforcement, the application of the ex officio principle and the statute of limitation have been resolved recently by Government Emergency Ordinance no. 58/2022. The other procedural difficulties analyzed in this study have been resolved by the national jurisprudence and C.J.E.U. case-law.

The process of harmonization of the national procedural law with the principles of the Council Directive 93/13/EEC was slow, but in the present, with the contribution of the national courts, almost all of the important procedural issues have been covered and there is a certain stability and predictability.

Nevertheless, there is still another important part to research and cover in the future, the process of harmonization of the national substantial law with the principles of the Council Directive 93/13/EEC.

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MEDICALLY ASSISTED SUICIDE AT THE LIMIT BETWEEN CRIME AND LAW

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Abstract

One of the most debated topics in the world is the legalization or non-legalization of euthanasia and medically assisted suicide, a fact that has given rise to many questions starting from extreme situations, whom both legislators and health professionals, as well as patients tried to give answers of the most diverse seemingly, but which have in view only a few attributes that are reduced to ethics, morality, religion. This analysis is therefore interdisciplinary, for the elucidation of which it is necessary that professionals of several professions express their point of view. Last but not least, we appreciate that the one who must be the center of the analysis is the patient, the one who is in a desperate and unsolved medical situation and needs this last release.

Keywords: *medically assisted suicide, right to die, criminal liability*

1. Brief considerations on the etymology of the word „euthanasia"

According to the explanatory dictionary of the Romanian language[1], the word „euthanasia" has its origins in the Greek „I" which means *good*, and „*thanatos*" which means *death*. Thus, we can define euthanasia as a *painless death*, as well as *the method of provoking (by the doctor) a painless early death to an incurable patient, in order to end a long and hard suffering.*

Starting from these origins, the Romanian legislator criminalized from a criminal point of view, euthanasia as, according to the provisions of art. 190 of the Penal Code, *the murder committed at the explicit, serious, conscious and repeated request of the victim who was suffering from an incurable disease or a serious illness certified medically, causing permanent and unbearable suffering.* However, we will frame this method under the aspect of a common medically assisted suicide and in the provisions of art. 191 Penal Code as the act (...) of facilitating the suicide of a person by the help that a doctor would give to a patient. It is important to note that there are two kinds of euthanasia. Namely, active by committing acts with a view to causing death such as decommissioning of a device, administration of a drug in a lethal dose, administration of lethal dose of a medicine, as a result of a repeated request and a long reflection of a patient. Passive euthanasia involves not giving or stopping the treatment knowing that this will result in the death of the patient in question, especially if there is a possibility of keeping a patient alive through aggressive and unnecessary

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[1] Dicționar explicativ al limbii române, ed. a II-a, Ed. Univers Enciclopedic, București, 1996, p. 352.

treatment - a practice otherwise condemned by medical ethics, the more the person in question refused this treatment.[2]

2. Incidental medical legislation in Romania

From the point of view of medical legislation, there are two instruments to be listed, namely the Romanian Code of Medical Deontology and Law no. 46/2003 on patient rights.[3]

With reference to the Romanian Code of Medical Deontology, we present a first observation, namely that it does not include precise references regarding the doctor's obligation to prolong the patient's life in any circumstance on one hand, and on the other hand we note the provisions of art. 22 lit. a) and of art. 11 of the above-mentioned instrument, which, together with those in the law on patient rights, we reproduce below.

Art. 11. Granting and withdrawing consent (Romanian Code of Medical Deontology)

No health intervention may be performed until the data subject has given his or her free and knowingly consent.

Under the same conditions, the consent may be withdrawn at any time by the data subject.

The provisions regarding the withdrawal of consent are also valid with regard to the consent expressed, in accordance with the law, by a person or institution other than that person.

Art. 22. Non-deontological facts and acts (Romanian Code of Medical Deontology)

The following acts, in particular, are contrary to the fundamental principles of the medical profession:

a) practicing euthanasia and eugenics[4]; (...)

Art. 13. The patient has the right to refuse or to stop a medical intervention assuming, in writing, the responsibility for his decision; the consequences of refusing or stopping medical treatment must be explained to the patient. *(Law no. 46/2003 on patient rights)*

Art. 14. When the patient cannot express his will, but an emergency medical intervention is necessary, the medical staff has the right to deduce the patient's consent from a previous expression of his will. *(Law no. 46/2003 on patient rights)*

Art. 15. In case the patient needs an emergency medical intervention, the consent of the legal representative is no longer required. *(Law no. 46/2003 on patient rights)*

Art. 16. If the consent of the legal representative is required, the patient must be involved in the decision- making process as far as his understanding ability allows. *(Law no. 46/2003 on patient rights)*

From the analysis of the legal provisions given above, especially those that regulate patient rights, we find a situation that may arise in practice, namely when the patient is unable at a particular time to express his will in his process of treating one/some condition he expressed in the past a number of different views on his

[2] L.M. Stănilă, Drept penal partea specială, Infracțiuni contra persoanei, Infracțiuni contra patrimoniului, Ed. Universul Juridic, București, 2018, p. 22.

[3] Published in the Official Monitor n. 51/29 January 2003.

[4] According to DEX, eugenia is the discipline that study the practical application of the biology's heredity in the genetic improvement of the individual; the set for methods that underlie this discipline.

willingness to intervene urgently to save his life.

The question arises to which option should the doctor choose in this case, or more precisely what and how exactly this agreement of the patient should be deduced.

We appreciate that the wording of this text of the law should be revised because at present it is susceptible to different interpretations to the detriment of both the doctor and the patient.

We also appreciate the fact that the provisions of art. 15 of the same law can create confusion in practice as long as, however, for an emergency intervention the doctor can act as he considers without the consent of the legal representative.

So, reading these provisions, we notice how the two actually differ (art. 14 from art. 15) because they rather regulate similar situations separately. Of course, a concrete review and analysis based on the cases of doctors who have faced such situations would only be welcomed, and thus would accurately address possible cases of malpractice occurring from the application of these provisions in the treatment / healing / rescue of a patient process.

Although, it is still important to make the same statement, as other researchers that, euthanasia is the deliberate act of ending a patient's life with the intention of ending his suffering. However, medically assisted suicide is a *distinct euthanasia procedure* and consists of self-inflicting the death (self-killing) of a patient with the direct help of a doctor. The legalization of euthanasia, but also of medically assisted suicide, provoke heated ethical, medical, legal and religious debates, practically questioning the extent to which the protection of the life right must be exercised.[5]

3. Brief considerations about „suicide"

We note that this term was introduced into the Oxford Dictionary by the doctor and philosopher Walter Charleton (1619-1707). However, it was actually used in France in 1737 by the abbot Desfontaines (1685-1745), originally a historian and journalist.[6]

According to the Explanatory Dictionary of the Romanian language, this word comes from the French language, from the verb *suicider* which translates to *taking one's own life, to kill oneself*. As pointed out by experts, two words actually merge into one, namely *self*, that is, actually the self, the physical, spiritual entity in particular, and *to kill*. Likewise, *the suicider* is the one who took or only tried to take his own life.

Studying the Dictionary of Psychology we find the definition of suicide as being a specific *form of deviant self-destructive behavior, which does not aim so much death, self-destruction*[7]*, but especially the escape from life, the way it presents itself in the given conditions*. The Health Dictionary also offers a definition by which suicide is the disorder of the conservation instinct, by which the person destroys himself, choosing a physico-

[5] L. Stănilă, Obsesia terapeutică. Pro și contra eutanasiei – noi provocări ale legislației românești, publicat în Project ID 133255 (2014), co-financed by the European Social Fund within the Sectorial Operational Program Human Resources Development 2007-2013.

[6] T. Butoi, V. Iftenie, A. Boroi, M. Costescu, A. Butoi, C. Iftenie, Sinuciderea, subtila enigmă a unui sumbru paradox, Ed. ProUniversitaria, 2019, p. 9.

[7] P.P. Neveanu, Dicționar de psihologie, Ed. Albatros, București, 1978, p. 661.

chemical method (hanging, drowning, electric shock).

Another definition is given by the World Health Organization, as it is states in the Dictionary of Psychiatry, *so suicide is the act by which an individual seeks to destroy himself, with more or less genuine intention to lose his life, being more or less aware of his reasons*.

From a criminal point of view, as mentioned above, the incidental provisions regarding suicide are those stipulated by the provisions of art. 191 of the Penal Code, as well as those of art. 218 para. (4) Penal Code and art. 219 para. (3) Penal Code, which we will report below:

Art. 191 Determining or facilitating suicide

(1) The act of determining or facilitating the suicide of a person, if the suicide took place, shall be punished by imprisonment from 3 to 7 years.

(2) When the deed provided in par. (1) was committed against a minor aged between 13 and 18 years or against a person with diminished discernment, the punishment is imprisonment from 5 to 10 years.

(3) The determination or facilitation of suicide, committed against a minor who has not reached the age of 13 or against a person who could not realize the consequences of his actions or inactions or could not control them, if the suicide took place, is punishable by imprisonment from 10 to 20 years and the prohibition of the exercise of certain rights.

(4) If the acts of determination or facilitation provided in par. (1) - (3) were followed by a suicide attempt, the special limits of the punishment are reduced by half.

Article 218 para. (4) If the deed resulted in the death of the victim, the punishment is imprisonment from 7 to 18 years and the prohibition of the exercise of certain rights.

Article 219 para. (3) If the deed resulted in the death of the victim, the punishment is imprisonment from 7 to 15 years and the prohibition of the exercise of certain rights.

Of course, these regulations cannot miss the appreciation that the criminal law specialist Vintilă Dongoroz made in his paperworks, according to which, *suicide is the act by which a lucid man, **being able to live**, causes his own death, out of any etical obligation.* Analyzing the above provisions, it appears that medically assisted suicide is that type of suicide in which a medical staff intervenes for medical reasons, of course, the quality of life becoming non-existent.

For our scientific approach, which only involves analyzing the national and international legal framework in which this type of suicide can take place without the intervention of criminal liability, it is important to emphasize, as other authors did, that, by incriminating the murder at the request of the victim, "the legislator responds to an effervescent controversy regarding the availability of the life right and the legal significance of active euthanasia as a particular form of murder on demand".

We can observe that the adopted text of the law had as a source of inspiration the provisions of art. 468 C.pen. 1936, but also the dispositions of other states such as Germany - par. 216 C.pen. German, Austria - par. 77 C.pen. Austrian, Spain - art. 143 para. (4) C.pen. Spanish, Portugal - art. 134 C.pen. Portuguese, Switzerland - art. 114 C.pen. Swiss, Norway - par. 235 C.pen. in Norwegian. We also appreciate the fact that by analyzing the typicality of the deed, the text moves away from a simple murder at the request of the victim and is, as already

mentioned, an attenuated form of active euthanasia.

4. In pursuit of our scientific purpose, a few references to the jurisprudence of the European Court of Human Rights.

Thus, the European Court of Human Rights established in its decisions two categories of cases, on one hand those in which the complainants or their relatives claimed the right to die under the Convention, and on the other hand the cases in which the complainants challenged the administration or permanent cessation of a treatment.

We also list by way of example some cases in which the plaintiffs invoked incurable diseases claiming the right to a dignified death: the case of Sanles Sanles v. Spain, the plaintiffs invoking art. 6, 8, 9, 14 of the Convention; Pretty v. the United Kingdom, the applicants relying on Art. 2, 3, 8, 9 and 14 of the Convention; Haas v. Switzerland, the applicants relying on Art. 8 of the Convention. In all these cases, the European Court did not find any right to be infringed. With regard to the *right to life*, the European Court of Human Rights has emphasized that *the recognition of this right cannot confer a diametrically opposite right, namely the right to die; that it cannot create a right to self-determination according to which an individual could choose death instead of life*.

Moreover, the Court has ruled that *states nevertheless have a margin of appreciation in regulating euthanasia or medically assisted suicide*. This observation comes from the Court's conclusion that "in the medical field, refusal to accept a particular treatment could inevitably lead to a fatal outcome, but the imposition of medical treatment without the patient's consent, if he is an adult and in complete mental faculties, would be equivalent to a violation of the physical integrity of the person concerned, which may call into question the protected rights of the patient. art. 8 para. (1) of the ECHR. As it has been accepted in domestic case law, a person may claim the right to exercise his or her choice to die, refusing to agree to a treatment which could have the effect of prolonging his or her life. The dignity and liberty of a person represent the essence of the Convention itself. Without denying in any way the principle of the sacred character of life, protected by the European Convention on Human Rights, the Court considers that the notion of quality of life acquires meaning from the perspective of art. 8. In a time when we are witnessing an increase in the complexity of medicine and life expectancy, many people fear that they will not be forced to stay alive until a very old age or in a state of advanced physical or mental degradation, in contrast to the firm perception they have of themselves and their personal identity".

What is also important to mention here is The Recommendation 1418 (1999) of the Parliamentary Assembly of the Council of Europe *regarding the protection of the human rights and human dignity of the incurable and dying people*, sounding the alarm for Member States to consider creating a legal framework to protect these categories of patients from dangers or fears such as the artificial prolongation of the disease course.

Furthermore, it is recommended that the dignity of terminally ill or dying patients be respected by advocating a ban on the intentional suppression of their lives, outlining the fact that a person's desire to die is not a legal ground for the death caused by a third person.

Of course, our scientific approach has to present some references to euthanasia and medically assisted suicide from the perspective of other states in the world. Thus, we observed, for example, that voluntary euthanasia has been legalized in countries such as the Netherlands (2002), Belgium (2002), Luxembourg (2008), Canada (2016).

In Colombia, for example, in May 1997, the Constitutional Court allowed voluntary euthanasia of ill patients who demanded to end their lives.

Medically assisted suicide is legal in countries such as Canada, the Netherlands, Luxembourg, Switzerland, the Australian state of Victoria and parts of United States. In the United States, there are assisted laws or court decisions that are limited to terminally ill adults, such as Oregon, Montana, Washington, Vermont, Maine, New Jersey, Hawaii, California, Colorado, Washington DC. The legislation of these states requires that the patient's attending doctor certify the existence of the patient's discernment.

Spain is the latest country to legalize euthanasia and medically assisted suicide, the patient being able to administer the lethal dose needed to interrupt his life. Spanish law provides two alternative situations that may justify this choice, namely *the serious incurable disease* or *the chronic pain that puts him in a situation of incapacity* and that wants to stop *an intolerable suffering*. Also, the Spanish legislature established that the person requesting this procedure must be *able and aware* when making the request, without *external pressure*, and that it is necessary that the original request be renewed after fifteen days. Another interesting and noteworthy provision is the doctor's possibility of refusing to comply with the patient's request, either for reasons related to non-compliance with the law conditions, either for reasons of ethics, morals or conscience. He cannot be sanctioned for his choice not to end the life of the dying requester. The patient's claim will follow a double-checked procedure if we can call it like that, because after the "doctor's approval", the request will be submitted for approval by another doctor, as well as by an evaluation committee. The Belgian legislature adopted a similar procedure.

5. Instead of conclusions

What we deduce from the above statements is that the issue of euthanasia or medically assisted suicide is still considered beyond the rules of ethics, given the fact that a multitude of states have understood to regulate these incidents that can occur in the life of any person when facing an incurable disease.

The aim of this paper is to bring back to the attention of the scientific community an issue that is becoming more pressing, especially since Romania is facing legislative lacuna, suitable for various interpretations regarding the qualification of patients' rights and to what extent and medical decisions must be made when a person's health is endangered.

Moreover, we cannot ignore a report of the Ministry of Health from 2020 which shows that 4.3 million Romanian citizens care for a person, a patient suffering from an incurable disease in advanced or final stages. So, we can easily deduce what the approximate number of these patients would be.

Of course, a standardization of domestic law based not only on legislative instruments, but also on effective judicial practice with reference here to cases of malpractice incident to the legal provisions referred to above, but also to the circumstances which gave rise to the

criminalization of killing at the request of the victim, in conjunction with the study of the population's perspective on the legislation of medically assisted suicide would be the most valuable ways in which the legislator could respond to this issue as painful, as necessary.

Finally, of course, we cannot ignore the religious part, with a view to which a researcher emphasized its essence in a few words, as follows: *The question facing*

Christian ethics is one facing other ethical approaches as well, namely, "What exceptions to our moral rules and our traditional moral understanding—our common agreements on such issues—are possible when modern technologies have made dying difficult and have interfered with natural death?" This question will continue to be significant for Christian ethics as well as for religious ethics grounded in other traditions and secular-philosophical ethics.[8]

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THE COMPETENCE OF THE TRAINEE PROSECUTOR IN THE CRIMINAL JUSTICE SYSTEM

George Gabriel BOGDAN[*]

Abstract

This article deals with and analyzes the competence of the trainee prosecutor, related to the provisions of art. 23 para. (2) of Law 303/2004 on the status of judges and prosecutors, according to which trainee prosecutors have the right to draw conclusions in court, to perform and sign procedural acts, under the coordination of a full power prosecutor. If the law seems clear with regard to the prosecutor in terms of functional competence and describes the acts or measures that he can take or approve, the situation is different in the case of the trainee prosecutor. First of all, what kind of act is the coordinating act of the prosecutor, how does it materialize in the criminal case and what is the competence of the coordinator in relation to the criminal investigation activity carried out or conducted by the trainee prosecutor? The procedural criminal law states clearly concerning the way of coordinating the trainee prosecutor's solutions, by countersigning them, the situation of coordinating the procedural acts or that of the conclusions before the court is not the same. It should be noted that during the internship, the prosecutor does not enjoy independence in taking measures and resolving cases, but only in stability, carrying out his activity under the coordination of a full power prosecutor. However, the law does not state how the coordinating prosecutor actually exercises this coordination of the trainee prosecutor, respectively if he issues a procedural act or countersigns the trainee prosecutor's procedural acts, or if he has the possibility to overturn the act which, according to common law, is an exclusive attribute of the hierarchically superior prosecutor. Secondly, how is the requirement of predictability of the law fulfilled in relation to the „coordination act" of the full rights prosecutor? In other words, if the coordinating prosecutor does not issue an act, as seems to suggest disp. art. 23 para. (2) of Law 303/2004, in what way can an interested person become aware of the content of the coordination that he/she exercises, and how can he/she concretely challenge it? What is the limit beyond which coordination becomes the supervision and conduct of criminal proceedings, thus removing the competence of the trainee prosecutor and to what extent are the instructions issued by the coordinator mandatory for the trainee prosecutor?

Keywords: *trainee prosecutor, jurisdiction, hierarchical control, predictability of the law, coordination act, legal detention, function of criminal investigation.*

1. Preliminary aspects

The prosecutor is the judicial body with constitutional status that represents the general interests of society and defends the rule of law, as well as the rights and freedoms of citizens[1]. The prosecutor is part of the judicial[2] authority, given that the role and status of the prosecutor are regulated in Section 2, called „Public Prosecution Service" in Chapter VI - „Judicial Authority". Although the prosecutor does not do

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[1] Article 131 para. (1) of the Romanian Constitution republished.

[2] Derived from the verb to judge, with the etymology in Latin - jūdicāre, iūdicāre, the long infinitive form of the verb iūdicō - to judge, to pass / pass judgment.

justice, which is done exclusively by the courts, the of the Criminal procedure code refers to the prosecutor as a judicial body, along with the judge, respectively the criminal investigation bodies[3].

In the General Part of the Of the Criminal procedure code, the legislator established both the general principles on the basis of which the criminal proceedings are conducted and the general rules of procedure common to the three categories of judicial actors. Each of these bodies will make its own assessment of the facts, acting on the basis of expressly established powers.

The prosecutor initiates and exercises the criminal action in the criminal process, constructing the accusation that he brings to the defendant, carrying out, directly or through the criminal investigation bodies[4], the criminal investigation activity - an investigative approach that involves a set of evidentiary proceedings, establish a plausible factual situation in order to determine whether or not there are grounds for prosecution[5].

According to art. 300 para. (1) of the Of the Criminal procedure code, *the prosecutor, in the exercise of his power to lead and supervise the activity of criminal investigation bodies, ensures that the acts of criminal investigation are carried out in compliance with the legal provisions*, which means that the prosecutor has the functional power to refute the documents drawn up by the criminal investigation bodies and to bring the criminal proceedings back into the sphere of legality.

As such, given that the criminal justice system plays a key role in protecting the rule of law[6], it is necessary for the prosecutor, as the sole holder of the Criminal action, to conduct his activity freely, unaffected by intrusion, in accordance with the principles of legality[7], impartiality and hierarchical control, as it appears from the content of art. 132 para.

(1) of the Romanian Constitution.

These three principles are a corollary of the work of the Public Ministry and are closely linked. Although the principle of legality has constitutional validity[8], it is repeated in the Criminal procedure code[9], and the legislator expressly states the reason for its establishment, consisting in the fact that *the rules of criminal*

[3] Art. 30 The specialized bodies of the state that carry out the judicial activity are:
a) criminal investigation bodies;
b) the prosecutor;
c) the judge of rights and freedoms;
d) the judge of the preliminary chamber;
e) the courts.

[4] Article 55 para. (6) of the Criminal procedure Code, The criminal investigation bodies of the judicial police and the special criminal investigation bodies carry out the activity of criminal investigation under the leadership and supervision of the prosecutor.

[5] Art. 3 para. (4) of the Criminal procedure Code.

[6] Considerations from Recommendation (2000) 19 of the Committee of Ministers of the Member States on the role of prosecution in the criminal justice system.

[7] According to the Decision no. 385/2010of the Constitutional Court, M. Of. no. 317 / 14.05.2010, the principle of legality is, in the sense assigned by the Basic Law, specific to the activity of prosecutors, who, by virtue of it, have the obligation that, in exercising the powers provided by law, must follow the provisions of law act on the basis of opportunity criteria, either in the adoption of measures or in the choice of procedures. Thus, acting on the principle of legality, the prosecutor cannot refuse to initiate criminal proceedings or initiate criminal proceedings in other cases than those provided by law, nor does he have the right to request the court to acquit a defendant guilty of a crime, on reason that political, economic, social or other interests make it inappropriate to condemn him.

[8] Article 1 para. (5) of the Romanian Constitution, interpreted and developed by the Constitutional Court.

[9] Art. 2 of the Code of Criminal Procedure The criminal trial is conducted according to the provisions of the law.

procedure seek to ensure the effective exercise of the powers of the other participants in the criminal proceedings, so as to respect the provisions of the Constitution, of the constitutive treaties of the European Union, of the other regulations of the European Union in criminal proceedings, as well as of the pacts and treaties on fundamental human rights to which Romania is part of[10]. Consequently, the measure of compliance with the principle of legality is given by the observance of the rights of the parties and of the other participants in the criminal proceedings.

The principle of legality is complemented by the principle of hierarchical control, also regulated at a

constitutional level, as well as at the level of organic law, which means that against the acts and measures taken by the prosecutor or as a result of his provisions, the person whose rights or legitimate interests have been affected may address a complaint to the hierarchically superior prosecutor[11].

Two elements are of particular importance, namely: the concrete identification of the act or measure taken, which violates the rights and freedoms of the person, respectively the holder of the act or measure allegedly illegal. These issues provide the future framework for resolving the complaint, by establishing the general and abstract procedural provisions applicable to the challenged act or measure, to which the hierarchically superior prosecutor will refer and which he will use as a standard in the matter.

2. Inaccuracies regarding the legislation of the competence of the trainee prosecutor

If the law seems clear with regard to the full power prosecutor in terms of functional competence and describes the acts or measures that he can take or approve, the situation is different in the case of the trainee prosecutor. Thus, in accordance with art. 23 para. (2) of Law 303/2004 on the status of judges and prosecutors, *trainee prosecutors have the right to draw conclusions in court, to perform and sign procedural and procedural acts, under the coordination of a full power prosecutor*, and in accordance with para. (22) of the same article, *trainee judges and prosecutors do not have the right to order custodial or restrictive measures*.

Regarding the solutions that the trainee prosecutor can pronounce, art. 23 para. (3) of Law 303/2004 provides that *the solutions of trainee prosecutors are countersigned by the prosecutors who coordinate them*. Also relevant is art. 21 para. (8) of the same law, according to which *trainee judges and trainee prosecutors enjoy stability*.

As art. 286 para. (1) of the Criminal procedure code states, *the prosecutor decides on the acts or procedural measures and solves the case by ordinance, unless the law provides otherwise*, and in para. (4) it is shown that *the criminal investigation bodies dispose, by ordinance, on the procedural acts and measures and formulate proposals through the report*. The prosecutor is also the one *in charge and supervised the*

[10] Article 1 para. (2) of the Romanian Constitution.

[11] Regarding the notion of hierarchically superior prosecutor, see Decision no. 18 of June 19, 2020, pronounced by the High Court of Cassation and Justice - Panel for resolving legal issues in criminal matters, published in the Official Gazette of Romania, Part I, no. 869 of September 23, 2020; G.G. BOGDAN, Short assessments regarding the functional competence of the hierarchically superior prosecutor, in „Law" Magazine no. 10/2021.

activity of the Criminal investigation bodies - art. 299 para. (1) and 300 para. (1) Of the Criminal procedure code - *and may request for verification any file from the criminal investigation body* - art. 300 para. (4) of the Criminal procedure code.

From the corroboration of art. 23 para. (2) and art.

(22) of Law nr. 303/2004 on the status of judges and prosecutors with the provisions cited above in the Of the Criminal procedure code, will result in the following conclusions: the trainee prosecutor is competent to carry out the criminal investigation and to supervise the activity of the Criminal investigation bodies of the judicial police, judicial activity, which he carries out under the coordination of a full power prosecutor, but do not have the right to order measures depriving or restricting the liberty of the person.

In the exercise of the judicial function of criminal investigation, provided by the legislator at art. 3 para.

(1) letter. a) in relation with art. 299 para. (1) of the Of the Criminal procedure code, *the trainee prosecutor verifies the legality and validity of the acts performed by the criminal investigation bodies of the judicial police*. The verification is performed not only upon notification of a party or interested person, but also *ex officio*, as the sole holder of the Criminal action. If he finds that an act or measure is unlawful, the trainee prosecutor is obliged to order the annulment of the act, a *legal mechanism that represents the guarantee of the defendant, the injured person and the other parties to a fair trial.*

The verification mechanism implies that *the trainee prosecutor continuously exercises the supervision of the Criminal investigation bodies*, and not exceptionally, when the file is in his possession, and when he finds violations of the law, he immediately takes measures to remedy it. Any violation of the legal provisions in which either the legislator establishes the existence of an injury or the court finds *ex officio* or upon request, must be remedied, with the application of expressly provided sanctions, which are intended to bring the criminal proceedings into the sphere of preeminence of law and ensure the parties have the

right to a fair trial, provided by art. 6 of the Convention, in all its components, as interpreted by the European Court of Human Rights.

There is a real doubt about the two essential elements we referred to earlier, namely the holder of the act or measure taken, respectively the act or measure taken, given that, according to the legal provisions, the trainee prosecutor has the functional competence shared with a coordinating prosecutor. Several issues need to be addressed and treated separately.

First of all, what kind of act is the coordination act of the full power prosecutor, how does it materialize in the criminal case and what is the competence of the coordinator in relation to the criminal investigation activity carried out or conducted by the trainee prosecutor?

The analyzed text concerns a norm of competence of the trainee prosecutor, in fact being included in law no. 303/2004 on the status of judges and prosecutors, a competence that radiates on the manner of exercising the judicial function of criminal investigation, reason for which the predictability and accessibility of the law are mandatory[12]. Essentially, the correspondence between the acts exercised

[12] ECtHR, Judgment of 22 November 1995 in the case of S.W. c. Great Britain, par. 34-36, according to which: the law must first be adequately accessible. The accessibility of the law takes into account the possibility of the

by the trainee prosecutor and the rules of jurisdiction established by the legislator will provide the measure to exercise the specific judicial function and will produce the foreseeable effects, consisting either in pronouncing a solution of dismissal, waiver or prosecution, or in application of specific sanctions, directly by the trainee prosecutor, by the hierarchically superior prosecutor or by the judge of the preliminary chamber, as the case may be.

Therefore, as noted, on one hand, the law must comply with constitutional and human rights standards, ant to provide very clear procedural rules, and on the other hand, it is necessary that the acts be performed in accordance with the law. The principle of legality imposes on the legislator the obligation to provide the procedural rules in an organic law or emergency ordinance, as well as to draft the text clearly and predictably, so that any person can realize which procedural activities falls under the influence of the law and are performed by the judiciary[13].

If the manner of coordination in the case of the trainee prosecutor's solutions is a clear and explicit one, by countersigning them, the situation of coordinating the procedural acts or that of the conclusions before the court is not the same. It should be noted that during the internship, the prosecutor does not enjoy independence in taking measures and resolving cases, but only stability, carrying out his activity under the coordination of a full power prosecutor. However, the law does not state how the full power prosecutor actually exercises this coordination of the trainee prosecutor, respectively if he issues a procedural act, countersigns the procedural acts of the trainee prosecutor, or if he has the possibility to overturn the act which, according to primary legal provisions, it is instructions issued by the coordinator mandatory for the trainee prosecutor?

3. The relevant legal standard

We consider that the wording „under the15an exclusive attribute of the hierarchically superior coordination of a full power prosecutor" is at least prosecutor.

The discrepancy becomes even more obvious at a comparative analysis of the way in which the legislator regulated the competence of the trainee judge, at art. 23 para. (1) and (1^1) of Law no. 303/2004, where it is expressly indicated which are the cases he or she can hear, respectively in what is the shared competence – the trainee judge also attends court hearings with other types of cases than those provided in para. (1) (...), or *prepares an advisory report on the case and may draft the decision, at the request of the president of the panel*[14].

person to know the content of the legal provisions. Secondly, the law must be predictable, that is to say, it must be drafted with sufficient precision in such a way as to allow any person - who may, if necessary, to seek specialist advice - to correct his conduct.

[13] Decision no. 51/2016 of the Constitutional Court, in which it embraced the jurisprudence of the European Court.

[14] Article 23

(1) The trainee judges hear:

a) the actions of the possessor, the requests regarding the registrations and the rectifications in the civil status registers;

b) the patrimonial litigations having as object the payment of a sum of money or the delivery of a good, in case the value of the object of the litigation does not exceed 10,000 lei;

c) the complaints against the minutes of ascertaining the contraventions and of applying the contravention sanctions, if the maximum contravention sanction provided by law is 10,000 lei;

Secondly, how is the requirement of predictability of the law fulfilled in relation to the „coordination act" of the full power prosecutor? In other words, if the coordinating prosecutor[15] does not issue an act, as seems to suggest art. 23 para. (2) of Law no. 303/2004, in what way can an interested person become aware of the content of the full power prosecutor's coordination, and how can he or she concretely challenge it? What is the limit beyond which coordination becomes the supervision and conduct of criminal proceedings, thus removing the competence of the trainee prosecutor and to what extent are the unclear, but it has important procedural implications regarding the legality of the Criminal investigation activity. The Constitutional Court has held in its jurisprudence that any normative act must meet certain qualitative conditions, including predictability, which implies that it must be sufficiently precise and clear to be enforceable[16]. The Constitutional Court has also ruled that the meaning of *predictability* depends to a large extent on the content of the text in question and the scope it covers, both in reference to the case law of the European Court of Human Rights[17].

In the same vein, the European Court of Human Rights has ruled that the law must indeed be *accessible* to the litigant and *predictable* in terms of its effects. In order for the law to satisfy the requirement of predictability, it must specify with sufficient clarity the extent and manner of exercising the discretion of the authorities in that area, taking into account the legitimate aim pursued, so that to provide the person

d) the low value applications, provided in art. 1,026-1,033 of Law no. 134/2010 on the Code of Civil Procedure, republished, with subsequent amendments;

e) the requests having as object the replacement of the contravention fine with the sanction of performing an activity for the benefit of the community;

f) requests for abstention and recusal, as well as requests for review and appeals for annulment in cases falling within their competence;

g) rehabilitation;

h) finding the amnesty or pardon intervention;

i) the offenses provided by Law no. 286/2009 on the Criminal Code, with subsequent amendments and completions, and the special laws, for which the criminal action is initiated upon the prior complaint of the injured person, except for the offenses provided in art. 218 para. (1) and (2), art. 219 para. (1), art. 223, art. 226 and 227, as well as art. 239-241 of Law no. 286/2009, as subsequently amended and supplemented, including complaints against non-prosecution or non-prosecution, requests for confirmation of waiver solutions and requests for confirmation of reopening of criminal proceedings in cases involving such offenses.

(1 ^ 1) The trainee judges also attend court hearings with other types of cases than those provided in par. (1), by rotation, to panels of the court consisting of final judges, established by the president of the court. In the cases he attends, the trainee judge shall draw up an advisory report on the case and may draft the judgment at the request of the full power judge.

[15] The conclusion of 29.10.2020, pronounced in the file no. 13174/236/2020/ a1 by the judge of the preliminary chamber within the Giurgiu Court of First Instance, by which the Constitutional Court was notified with the except of unconstitutionality of the provisions of art. 23 para.

(2) of law 303/2004 on the status of judges and prosecutors in relation to the provisions of art. 1 para. (5) of the Romanian Constitution, invoked ex officio, unpublished.

[16] See, in this sense, Decision no. 189 of March 2, 2006, published in the Official Gazette of Romania, Part I, no. 307 of April 5, 2006, Decision no. 903 of July 6, 2010, published in the Official Gazette of Romania. , Part I, no. 584 of August 17, 2010, or Decision no. 26 of January 18, 2012, published in the Official Gazette of Romania, Part I, no. 116 of February 15, 2012.

[17] See Cantoni v. France, para. 35, Dragotoniu and Militaru-Pidhorni v. Romania, para. 35, Sud Fondi - SRL and Others v. Italy, para. 109.

with adequate protection against arbitrariness[18].

Decision no. 302/2017 of the Constitutional Court may be relevant regarding the powers to coordinate the criminal investigation, stated in art. 1 para. (5) of the Romanian Constitution, in which it held that, in its jurisprudence, it ruled that *the legislator must regulate from a normative point of view both the framework of the Criminal process and the competence of the judicial bodies and the concrete way of accomplishing each subdivision, each stage of the Criminal process,* as a consequence of the provisions of art. 1 para. (5) of the Basic Law, which stipulates the obligation to respect the Constitution, its supremacy and the laws. Thus, the Court found that the legislature must set out exactly the obligations of each judicial body, which must be circumscribed by the concrete manner in which they perform their duties, by establishing unequivocally the operations which they perform in exercising their duties[19].

The Court found that the regulation of the powers of the judiciary is an essential element deriving from the principle of legality, which is a component of the rule of law. This is because an essential rule of law is that the powers or competences of the authorities are defined by law. The principle of legality implies, in essence, that the judiciary acts on the basis of the power conferred on it by the legislature, and subsequently assumes that they must comply with both substantive and procedural provisions, including of the rules of jurisdiction. In this sense, the provisions of art. 58 of the Of the Criminal procedure code regulates *the institution of the verification of competence by the criminal investigation body, which is obliged to verify its competence immediately after the notification, and if it finds that it is not competent to carry out or supervise the criminal investigation, to immediately order the declination of competence or to send the case immediately to the supervising prosecutor, in order to notify the competent body.*

On the other hand, as regards the legislator, the principle of legality - a component of the rule of law - obliges to be very clear when regulating the competence of the judiciary. In this regard, the Court has ruled that the law must specify with sufficient clarity the extent and manner of exercising the discretion of the authorities in that area, having regard to the legitimate aim pursued, in order to provide the person with adequate protection against arbitrariness[20]. However, the Court considers that the task of the legislator cannot be considered to be fulfilled only by the adoption of regulations relating to the jurisdiction of the judiciary. Given the importance of the rules of jurisdiction in criminal matters, the legislator has the obligation to adopt provisions to determine its compliance in the legal practice, by regulating appropriate sanctions applicable otherwise. This is because the effective application of the law can be obstructed by *the absence of appropriate sanctions, as well as by insufficient or selective regulation of the relevant sanctions*.

Moreover, the lack of clarity of the law determines a situation of inequity, in which the person harmed in his rights or

[18] See Judgment of 4 May 2000 in Rotaru v. Romania, paragraph 52, and Judgment of 25 January 2007, in Sissanis v. Romania, paragraph 66.

[19] See Decision no. 23 of January 20, 2016, published in the Official Gazette of Romania, Part I, no. 240 of 31 March 2016, paragraphs 15, 16.

[20] See Decision no. 348 of June 17, 2014, published in the Official Gazette of Romania, Part I, no. 529 of 16 July 2014, paragraph 17.

legitimate interests will be unable to challenge the act of coordination and the reasons underlying it. Of course, it can be argued that the person concerned can challenge the procedural act of the trainee prosecutor, but this compromise does not cover all the situations that may arise and that impose a direct control of the hierarchically superior prosecutor. An eloquent example could be that the trainee prosecutor draws up an act under the coordination of the full power prosecutor, which is subsequently challenged. Like the person concerned, the hierarchically superior prosecutor will be limited and will exercise strict hierarchical control over the act of the trainee prosecutor, being unable to verify the „coordinating act", which forms a common body with the coordinated act.

Likewise, there is no procedural act drafted, act regulated by the legislator, upon which the judge of rights and freedoms or the judge of the preliminary chamber can exercise a legal analysis and, possibly, sanction it as such. It should be noted that this manner of regulating cannot, in any way, ensure the right to a fair trial for parties, so that the activity of criminal prosecution to fall within the established constitutional grounds.

Also, will the coordinating prosecutor be able to lead and supervise directly the activity of the Criminal investigation bodies, with concern to the limitation given by art. 64 para. (4) of law 304/2004[21]? Considering this last legal provision, the answer seems to be that the trainee prosecutor is the only one who supervises the activity of the Criminal investigation bodies, given that there was a provision for the distribution of the case by the hierarchically superior prosecutor. However, the use of the term „under coordination" seems to suggest increased powers conferred to the coordinating prosecutor, without specifying in particular the modalities of coordination. In this case, is it still necessary for the hierarchical prosecutor to assign the case, which in practice remains obsolete?

The doubt is an essential one, as it affects the competence of the prosecutor and criminal investigation bodies, whose violation is sanctioned with absolute nullity, according to art. 281 para. (1) letter b) Of the Criminal procedure code, read in the light of the Decision no. 392/2017 of the Constitutional Court. Such a situation could be the case of the detention of the suspect/defendant by the criminal investigation body. Will the trainee prosecutor be able to supervise the criminal investigation activity in such a case?

4. Implications concerning the fair and debatable application of the law

In accordance with disp. art. 209 para. (13) of the Of the Criminal procedure code, if the detention was ordered by the criminal investigation body, it has the obligation to inform the prosecutor about the taking of the preventive measure, immediately and by any means. Thus, the prosecutor verifies the legality of the preventive measure of deprivation of liberty taken by the police against the suspect/defendant, and in case of finding the illegality of the detention measure, orders the immediate revocation and release, according to art. 209 para. (14) 2nd thesis of the Of the Criminal procedure

[21] The case file assigned to one prosecutor may be transferred to another prosecutor in the following situations:
a) suspension or termination of the capacity of prosecutor, according to the law;
b) in its absence, if there are objective causes that justify the urgency and that prevent its recall;
c) leaving the case unjustifiably unresolved for more than 30 days.

code. Moreover, the legislator expressly provided in par. (14) of the same art. 209 of the Code of Procedure that *against the order of the Criminal investigation body by which the detention measure was taken, the suspect or defendant may file a complaint to the prosecutor supervising the criminal investigation, before its expiration, and the prosecutor shall immediately rule by order*.

Continuing the reasoning, it can be stated that the trainee prosecutor has a „hierarchically superior" position to the criminal investigation body, based on which the trainee prosecutor leads and supervises the criminal investigation activity, gives guidance and instructions to the investigative body, as shown in art. 55 para. (6) of the Of the Criminal procedure code: *the criminal investigation bodies of the judicial police and the special criminal investigation bodies carry out the activity of criminal investigation under the leadership and supervision of the prosecutor*.

It is easy to conclude and there can be no doubt that it is necessary for the trainee prosecutor to have the functional competence to perform these acts on his own, by taking the case in his own criminal investigation, according to the principle *qui potest plus, potest minus*. On the contrary, if the trainee prosecutor cannot perform an act or take a measure on his own, being expressly exempted by the legislator, even less will he be able to carry out the verification of legality and validity of the act or measure taken by the police body.

In such a case, the trainee prosecutor exercises the activity of supervising the criminal investigation carried out by the criminal investigation bodies, but in a limited way, only with regard to the acts of investigation and criminal investigation which he may take or dispose of directly, and in the example provided, strictly regarding the acts performed or the measures taken prior to the detention of the suspect/defendant. After this moment, the trainee prosecutor cannot concretely carry out the activity of supervising the criminal investigation and does not exercise the judicial function of criminal investigation, according to the competences. This is due to the fact that the trainee prosecutor does not have the functional competence to take the measure of detention, as it results from disp. art. 23 para. (22) of Law 303/2004, reproduced above, so that it cannot carry out any verification of the legality and validity of this measure.

This conclusion is based on disp. art. 209 para. (13) and (14) of the of the Criminal procedure code in the light of art. 286 para. (1) and art. 299 para. (1) of the of the Criminal procedure code, from which it follows that the starting point of the non-existence of the concrete supervision of the Criminal investigation is the one when the criminal investigation body notifies the trainee prosecutor regarding the taking of the detention measure against the suspect/defendant. The legislator expressly provided for this way of exercising control by the prosecutor precisely in order to limit as much as possible a possible illegally deprivation of liberty, by remedying the deficiencies.

Moreover, there are serious questions about how the suspect/defendant can complain against the detention measure taken by the criminal investigation body, respectively in which the trainee prosecutor appointed in the case can rule and resolve the complaint, given the limitation of competence established by art. 23 para. (22) of law 303/2004. Objectively, at the moment of notification, the trainee prosecutor is deprived of any leverage to control the legality by which to revoke the measure, in contradiction with the will of the legislator, as it was materialized in art. 209 para. (13) and (14) Of the Criminal

procedure code. Consequently, the situation is equivalent to that in which the criminal investigation body did not notify the full power prosecutor, and who did not verify the legality of the measure and did not resolve the complaint against it.

The same conclusion is required in the situation where the trainee prosecutor draws up the report with a proposal to take the measure of pre-trial detention, that is used to notify the court, in which he considers fulfilled the conditions stated at art. 223 para. (1) or (2) Of the Criminal procedure code. In this act, the trainee prosecutor makes an assessment of a preventive measure, which the legislator has expressly excluded

from its powers, by art. 23 para. (22) of Law no. 303/2004. Also, by drawing up the report, the trainee prosecutor indirectly concludes that the acts performed by the criminal investigation bodies are legal, that the evidence from which the reasonable suspicion results is legally administered, respectively that the measure of pre-trial detention is necessary and proportionate, including the order of taking the detention measure, which, according to the argument, did not have the functional competence to verify it.

Although there have been opinions in judicial practice according to which the competence of the trainee prosecutor exclusively implies the impossibility of taking a custodial or restrictive measure of liberty[22], we consider that the lack of a verification of legality and validity of the detention measure causes serious violations of human rights. The detention measure is a deprivation of liberty and represents a strong interference with the rights and legitimate interests of the suspect/defendant, and in the absence of verification, the measure will remain in force until the expiration of the 24-hour period. If the prosecutor chooses not to notify the judge of rights and freedoms with a proposal for pre-trial detention, the suspect/defendant will have been under the power of a preventive measure of deprivation of liberty without any appeal, and the jurisdiction to assess the need for the measure will rest exclusively with the police.

It should be noted that the detention implies the fulfillment of the conditions established by art. 5 para.

(1) letter c) of the Convention, according to which *no one shall be deprived of his liberty, unless he has been arrested or detained for the purpose of bringing him before the competent judicial authority, where there are reasonable grounds for believing that he has committed a crime or when there are compelling reasons to prevent him or her from committing a crime or fleeing after committing it*.

In other words, the detention has as a premise the need to bring the person before the competent judicial authority, before a judge or another magistrate empowered by law with the exercise of judicial powers, as shown in para. (3) of the same Article 5. However, in the present case, the trainee prosecutor before whom the person is brought does not have, as it was argued before, functional competence to revoke the preventive measure. In this situation, the state of detention will become contrary not only to the Convention but also to national law.

5. Conclusions

As the trainee prosecutor's jurisdiction has been established, he will not be able to

[22] The conclusion pronounced by the panel of the preliminary chamber of the Giurgiu Tribunal in file no. 13174/236/2020 / a1.1, admitting the appeal of the prosecutor's office against the decision.

take the measure of deprivation of liberty of detention or the restrictive measure of freedom of judicial control, which concerns only certain limitations of rights, such as a ban on exceeding a certain territorial limit or to move to certain places established by the judicial body. Following a corroboration of the legal texts, it can be reasonably stated that if the trainee prosecutor cannot find that the conditions for taking the measure of judicial control are met, which is a restrictive and not a custodial one, even less can he find that the conditions for taking the measure of pre-trial detention by the judge of rights and freedoms are met, as a result of the referral by report.

Of course, it can be argued that the trainee prosecutor performed the act under the coordination of a full power prosecutor, but the argument would be unfounded and without substance. According to the above arguments, the law does not specifically states the manner in which this coordination is carried out with regard to the order confirming the continuation of the Criminal investigation and the initiation of criminal proceedings, which first of all must respect the principle of legality, and secondly, that of hierarchical subordination.

Moreover, the thesis that the detention measure was verified by the coordinating prosecutor is not resistant to criticism, as he was not expressly appointed by the higher hierarchical prosecutor to supervise the activity of the Criminal investigation bodies in the case, but the trainee prosecutor. The criticism becomes even more sustainable, given that the distribution of cases is made by the hierarchically superior prosecutor after an analysis based on expressly provided criteria[23], and the distribution of case files to another prosecutor takes place in strictly regulated by law situations, also after the same analysis by the hierarchically superior prosecutor. Without a written statement of intent from the coordinating prosecutor, the hierarchically superior prosecutor is deprived of the attribute of hierarchical control, which is meant to lead to unity of action on the part of the Public Ministry and to ensure the rule of law.

Based on the above arguments, we consider that it is necessary to amend the provisions governing the competence of the trainee prosecutor, in a manner similar to the competence of the trainee judge, by exhaustively listing the cases he can resolve. The express limitation of jurisdiction is recommended both to bring clarity and predictability to the way in which the trainee prosecutor exercises the function of a criminal prosecutor, and to increase the awareness of the work and individual decision-making. On the contrary, the division of the competence of the trainee prosecutor with a full power prosecutor coordinating prosecutor, even exclusively in the way of countersigning the solutions, will continue to raise doubts about the stability of the trainee prosecutor, which can be guaranteed and supported exclusively by the hierarchically superior prosecutor, which is mandatory in the Public Ministry.

[23] According to art. 19 para. (3) lit. b) of the Rules of Procedure of the Prosecutor's Offices of November 14, 2019, criminal cases and other works are distributed to prosecutors based on the following objective criteria: specialization, skills, experience, number of cases in progress and their degree of complexity, the specifics of each case, the cases of incompatibility and conflict of interest, insofar as they are known, as well as other special situations.

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