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# LABOUR AND SOCIAL SECURITY IN THE THIRD MILLENNIUM – THE TOUCHSTONE OF THE KNOWLEDGE SOCIETY

**Claudia-Ana MOARCĂȘ**[*]

## Abstract

***'**The end of the world' has been predicted in many ways: one claimed the conscious robots would turn against the humans. 'The end of the world as we know it' is less murderous, yet worrying enough, because it means a radical change in one of man's defining features: labour, with the Fourth Industrial Revolution as one of its causes. Structural challenges to the labour environment and tools set the background for this development. Labour's fundamental components like who is performing it; how its results impact on the human being that performs it; and what laws must govern the interactions among labourers and society are all subject to change hereafter. The increasing role of technology, knowledge-based economy, and the continuous diversification of man's needs and aspirations to safeguard the paramount human dignity outline the mandatory demand of adapting the labour law and social security law to these developments. Automation and robotisation are unavoidable and are to be implemented by continuously observing said needs and aspirations. Competence and ever higher levels of professionalism are mandatory for present and future lawyers and legislators in this domain.*

**Keywords:** *artificial intelligence, automation, globalization, labour law, social security, robots.*

## 1. Introduction

Several assumptions envisaged the Third Millennium as including the world's end to be caused by cosmic facts, like the alignment of planets, on May 5, 2000; or by technology faults like the infamous Y2K, also called 'the millennium bug', which was supposed to crash computers and any other electronic devices in the first seconds of the year 2000; or by the prophecy of the widely publicized, and equally widely misinterpreted, Mesoamerican Long Count calendar that on December 21, 2012 a worldwide change was to happen, either cataclysmic, or just transformative, so that a 'New Age' would begin. Moreover, the *„Rise of the Machines"* blockbuster, released in 2003, emphasized what the first instalment of *The Terminator* series had anticipated in 1984, with conscious robots murderously turning against the humans and establishing their domination over mankind, even if the end-goal of this struggle was far from being clear.

On a less cinematic plan, a cursory examination of how, and whether, the end of the world should happen, would reveal competing outlooks between religious interpretations like what many see in *The Book of Revelation* of the New Testament; and less faith-related writings of authors more concerned by the future of the world rather than by its termination. In modern times, this latter category of works exceeds the science-fiction genre as intellectual products based on proven data and trends strive to outline possible, and probable, courses of developments; it is no coincidence that these writings first appeared basically in the wake the First

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Industrial Revolution in the 18th century, even if examples may be found earlier[1].

Science and technology are unanimously recognized as major drivers for the progress of human society: ever since our ancient predecessors tied a roughly polished piece of flint to a stick in order to better dig the ground, or to hunt, even kill another being, man's life took a most important step towards a new stage. One is at pains nowadays to consider this a technological breakthrough, and even less a result of applied science. However, a long and slow string of events of similar nature recorded moments in the evolution of the hominis' brain cells that triggered a dramatic change in the size of the brain and, later, supposedly in its 'wiring', which was an even more consequential mutation for the human being's cognitive capacity[2]. All these happened some 300,000 years ago, apparently at roughly the same time when usage of fire became a daily habit.

Around 230,000 years had to pass until another development shaped 'the Cognitive Revolution' and marked 'the beginning of history'; and then, a 'shorter' period of 58,000 years was needed for the Agriculture Revolution to take place.[3] The record of the sequence of every and all epoch-making moments that followed reveals that the closer in time to the present day, the shorter the periods between them; truly, humankind seems to hurl itself at increasing speed on the time-flow, driven by the unescapable urge of gaining more knowledge in a seemingly geometrical ratio - and often without giving full consideration to what the consequences of this acquired knowledge are.

Ethics and morals deal with the causes of this questionable behaviour. History is witness to statements that highlight prescient warnings, and regrets, either explicit, or implicit, related to inventions that had been meant to be useful to humanity's progress, but turned to be key factors in jeopardizing it, to the extreme limit of ending its very existence. One only needs to remember Alfred Noble's remarks on his invention of the dynamite and Oppenheimer's quote of the Bhagavad Gita: '*Now I become Death, the destroyer of worlds.*' In both cases, what had made these brilliant scientists reconsider their breakthrough inventions and discoveries could do next to nothing from preventing their use to purposes and with results they tried to prevent from coming to pass. However, as it is well known, those dramatic developments did have positive effects, albeit less than perfect, with the partly successful attempts to reach international agreements on limiting, sometimes utterly banning, the misuse of the research results.

Man's quest for knowledge bears on deeper philosophical issues like Gaugin's masterpiece *Where do we come from? What are we? Where are we going?* presents in powerful, yet enigmatic and thought-provoking ways. It may be that the second and third questions are what makes humanity advance, the obsession of the end of the road notwithstanding; because it is the journey, i.e., what one does, that allows for

[1] Around 1771, Louis-Sébastien Mercier, a French author, wrote *L'An deux mille quatre cent quarante*, which depicts an Earth-based utopian society venerating science in the 25th century. It is considered among the first writings that placed a future society on Earth, not on some imaginary planets.

[2] Anneline Pinson *et alii, Human TKTL1 implies greater neurogenesis in frontal neocortex of modern humans than Neanderthals*, in Science, September 9, 2022, Vol. 377, Issue 6611, https://www.science.org/doi/10.1126/science.abl6422, *apud* Carl Zimmer, *What Makes Your Brain Different From a Neanderthal's?* The New York Times, September 8, 2022, https://www.nytimes.com/2022/09/08/science/human-brain-neanderthal-gene.html

[3] Yuval Noah Harari, *Sapiens – A Brief History of Humankind*, Vintage, 2015, pp. IX-X.

the finding the answers to these questions. And it is the realization of this quest that makes humans strive for accomplishing their becoming dignified, respected beings, while simultaneously respecting others and fulfilling their destiny.

The lines above may seem hardly suited for a paper that addresses the relationship among labour, social security, and knowledge-based society. The explanation is to be found in the increasingly complex interactions among knowledge, which is the eternal foundation of human society, so much so that it has become its *defining* characteristic; labour, which is the means of both acquiring knowledge and putting it to use, irrespective of it being manual, or intellectual; and security, which is a *sine qua non* condition for progress and prosperity of the human society and which has itself developed to become the overall *social* feature, since humans are *social beings* by their very nature. All these components of the everyday life develop along the fourth dimension, which is time; and time is 'distributed' in sequences, which are more or less definite. When keeping in mind what Heraclitus said: '*panta rei*' ('everything flows', to be completed with 'and nothing stays'), and relating this constant to the ever more speeder ratio of change, one arrives at the conclusion that humans need to adapt ever faster to equally fast changing new circumstances throughout their existence to extents unbeknown so far.

## 2. Challenges of the advance of technology…

The knowledge-based society as heralded by the Fourth Industrial Revolution is under the pressure of the unknow; it is not by chance the Future of Life Institute chose its mission to be *Steering transformative technology towards benefitting life and away from extreme large-scale risks*.[4] Last March, it released an open letter that read, *inter alia: 'Should we automate away all the jobs, including the fulfilling ones?'*[5]. An apparent prescient answer had been provided: '*Nobody knows for sure what sort of impact machine learning and automation will have on different professions in the future, and is extremely difficult to estimate the timetable of relevant developments, especially as they depend on political decisions and cultural traditions as much as on purely technological breakthroughs*.'[6]

In 1959, a researcher published a paper widely considered to be the 'birth certificate' of '*machine learning*', which is '*the field of study that gives computers the ability to learn without explicitly being programmed*', and which, in time, became a field of the AI; both terms are now understood and used interchangeably and there is a general acceptance of their presence and impact in most, if not all, domains of human life – and this makes it mandatory to realize '*the social, societal, and ethical implications*' of machine learning and/or AI.[7]

Some implications are addressed later in this paper. At the same time, mapping those '*relevant developments*' would go far beyond its scope; suffice to note that the combined actions of the sides of the triangle

[4] The Future of Life Institute, https://futureoflife.org/, accessed on April 25, 2023.

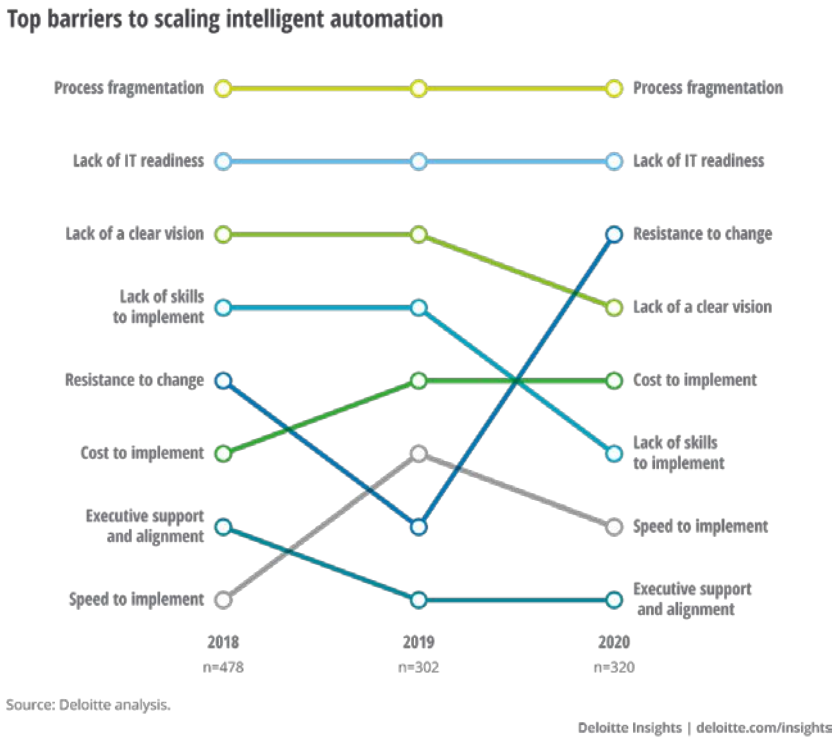
[5] Quoted in ***, *How to worry wisely about artificial intelligence*, The Economist, April 20, 2023, https://www.economist.com/leaders/2023/04/20/how-to-worry-wisely-about-artificial-intelligence.

[6] Yuval Noah Harari, *21 Lessons for the 21st Century*, Jonathan Cape, Penguin Random House, 2018, p. 33.

[7] Sarah Brown, *Machine learning, explained*, MIT, April 21, 2021, https://mitsloan.mit.edu/ideas-made-to-matter/machine-learning-explained. See also *What is machine learning?*, IBM, https://www.ibm.com/topics/machine-learning.

made of '*political decisions, cultural traditions and technological breakthroughs*' focus on *professions*, which means basically the receiving parties of the impact of machine learning and automation. At this stage of the technological evolution, those parties are overwhelmingly represented by human beings, commonly known as 'employees', or 'labourers', or 'workers', largely irrespective of their hierarchical status in their organizations – for top managers themselves are not spared by this impact. Moreover, it is the decisions made by the latter group that play the decisive role in implementing the Robotic Process Automation (RPA), as the dedicated studies call it.

Indeed, the 2020 Deloitte's annual survey of executives[8], reveals that, of all respondents '*78 per cent are implementing Robotic Process Automation and 16 per cent plan to do so in the next three years*'. Integrating automation and Artificial Intelligence (AI) successfully and… intelligently calls for several conditions to be met – like acknowledging that transformation is needed and a comprehensive strategy to implement 'the art of the possible' and promote change across the board, to prevent the fragmentation of the process. It also listed obstacles to the process (see the figure below).




[8] Justin Watson *et alii*, *Automation with intelligence*, Deloitte Insights, November 25, 2020, https://www2.deloitte.com/us/en/insights/focus/technology-and-the-future-of-work/intelligent-automation-2020-survey-results.html.

It is noteworthy that, out of eight obstacles the '*lack of IT readiness*' stayed on the same level, while '*resistance to change*' shot up between 2019 and 2020: it was the only hindrance to record this evolution. Meanwhile '*the clear vision*' seemed to have become 'clearer' and the '*lack of skills to implement*' was apparently lessened – perhaps due to appropriate training and/or hiring the necessary human resources. Be that as it may, half of the entries in that graph are directly human-related, meaning that employees and employers alike were the main 'builders' of those barriers.

The survey covered the period when the pandemic was raging, and one may easily suppose that implementing the RPA was regarded with a lot of suspicion, particularly by the employees who were already severely constrained by lockdowns, interdictions, and related burdens in many economies. One remembers the wide-raging debates on the immediate and medium-term consequences the pandemic on the overall status of labour, from the labour-place itself, with the impact of the 'remote labour' phenomenon, to the doubts haunting the fate of offices and the surge of 'gig-workers'[9]. In this respect, a McKinesy report identified three areas that *'not only emerge from the COVID-19 crisis but thrive in the post-pandemic world'* and enumerates: *'Temporary changes in response to crisis* […]*; Permanent changes to the day-to-day work* […]; *New types of work'*[10].

Automation and robotization have become every-day words and are increasingly perceived as an unavoidable, if inextricable, trend: quoted among the reasons are '*the covid-19* [that] *has created social changes which look likely to endure'*, such as '*the "Great Resignation", in which millions around the world have quit their jobs, may in part be a consequence of lockdowns creating new opportunities for home working'*; and *'that the bots are getting better. Instead of just moving goods in warehouses to human "pickers", who then put items into bags for home delivery, they are learning to do the picking and packing for themselves.'*[11]

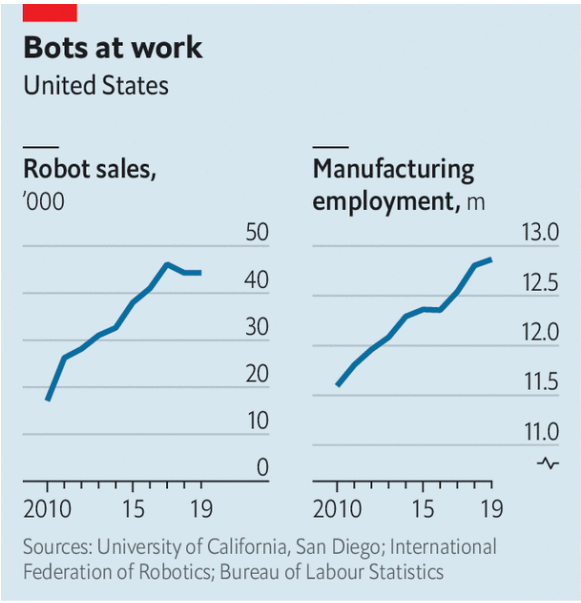
However, it looks that the advent of a 'machine-ruled' world, which sometimes has a doomsday spin, is not that imminent, nor is its ominous feature unavoidable. Data published a little more than a year ago introduce a different picture[12]:

[9] See, *inter alia*, Claudia-Ana Moarcăș, *The Contemporary Architecture of The Labour Relationship: Experiences and Challenges*, in AUBD 2/2022, pp. 41-56; Claudia-Ana Moarcăș *Impactul pandemiei asupra sănătății și securității lucrătorului. Viitorul muncii* (*The impact of the pandemic on the employee's security and health. The future of work*). Remarks at the Craiova conference on "Sistemul juridic între stabilitate și reformă" (The judicial system between stability and reform), October 15, 2021.

[10] Marino Mugayar-Baldocchi, Bill Schaninger, Kartik Sharma, *The future of work: Understanding what's temporary and what's transformative*, McKinsey & Company, May 17, 2021, https://www.mckinsey.com/capabilities/people-and-organizational-performance/our-insights/the-organization-blog/the-future-of-work-whats-temporary-and-whats-transformative.

[11] ***, *Covid has reset relations between people and robots*, The Economist, February 25, 2022, https://www.economist.com/science-and-technology/covid-has-reset-relations-between-people-and-robots/21807815.

[12] *Ibidem*.




The Economist

A recent study that covered over 800 companies with around 11.3 million employees found they 'will need new workers to help them implement and manage AI tools. Employment of data analysts and scientists, machine learning specialists and cybersecurity experts is forecast to grow 30% on average by 2027'; and among the domains that are expected to witness the highest growth-rates the report listed 'education, agriculture and digital commerce and trade'[13]. Likewise, the International Federation of Robotics noted that 'even South Korean firms, by far the world's keenest robot-adopters, employ ten manufacturing workers for every industrial robot […]. In America, China, Europe and Japan the figure is 25-40 to one.'[14]

**… to all components of the human life**

As far back as some 40 years ago, Charles Handy noted 'new patterns of work […] on their way whether we like them or not' and added: ''By early 1980s, the direction of some of those patterns of work was becoming clearer'; among them ''labour' and 'manual skills' were yielding to knowledge as the basis for new businesses and new work'; and 'the one-organization career was becoming rarer, job-mobility and career changes more fashionable'.[15] This

[13] ***, *The Future of Jobs Report 2023*, World Economic Forum, April 30, 2023, https://www.weforum.org/reports/the-future-of-jobs-report-2023/. See also the many-authored paper: *The AI Index 2023 Annual Report*, AI Index Steering Committee, Institute for Human-Centered AI, Stanford University, Stanford, CA, April 2023, https://aiindex.stanford.edu/wp-content/uploads/2023/04/HAI_AI-Index-Report_2023.pdf.

[14] ***, *Don't fear an AI-induced jobs apocalypse just yet*, The Economist, March 3, 2023, https://www.economist.com/business/2023/03/06/dont-fear-an-ai-induced-jobs-apocalypse-just-yet.

[15] Charles B. Handy, *The Future of Work: A Guide to a Changing Society*, B. Blackwell Publication, January 1, 1984, p. ix-x.

reference is meant to both reveal the relatively early beginning of the structural changes in the patterns of work, and their steady advancement as the progress of technology was increasingly influencing the very basics of human life. It may seem superfluous to emphasize that technological breakthroughs, in particular, and technological progress, in general, are indestructibly related to the human drive to well-being, prosperity, and safety; it is also difficult to ignore the relentless tidal wave of information, especially of the fake- and deep-fake kind, that has nurtured the post-truth concept to an almost unthinkable extent. Reality has never been a concept to be taken lightly, and thousands of years of philosophical thinking attest this elementary fact; however, the dignity and fulfilment of man's aspirations and ideals are crucial factors that determine this reality, the spectacular expansion of 'virtual reality' notwithstanding.

The pace of change of, and challenges to, this reality seems more often than not breath-taking. Only two years and several months ago the world was in turmoil because of the pandemic, and the brief above-mentioned reminders of what happened then point to the lasting, and yet, unfinished effects of those developments. The increasing demand for AI-related professional skills is one of them, while the general impact it is supposed to have on society is clearly more complex: according to the head of the New-York based Future Today Institute, '*artificial intelligence could go in one of two directions over the next 10 years: in an optimistic scenario,* […] (t)*he technology serves as a tool that makes life easier and more seamless, as AI features on consumer products can anticipate user needs and help accomplish virtually any task.';* whereas the '*catastrophic scenario involves less data privacy, more centralisation of power in a handful of companies and AI that anticipates user needs - and gets them wrong or, at least, stifles choices.*' The scientist reckons the first scenario has only a 20% chance[16].

However, it would be wrong to be overwhelmed and subdued by the complexity of the challenges AI and automation rise in front of us. One should remember that there were times when the speed of trains traveling at some 20 km/h was deemed fatal for the passengers; and the Luddites movement seemed to threaten the course of the First Industrial Revolution. If history is any guide for the topic of this paper, the slim chances of the above-mentioned optimist scenario are likely to be wide of the mark. Answers to such concerns have been given already and the increasing number of studies bearing on the impact of the Fourth Revolution on society at large, and on business and growth is testimony to that.

### 3. New rules and updated ones

Initiatives and decisions aiming at regulating the use of technology in terms of addressing its disruptive effects on society are increasingly sought and efforts in this direction are neither easy, nor necessarily consistently structured. Harari's confession about the unknown impact of some basic components of technology on professions, as mentioned at the beginning of this paper, may be substantiated by recalling that there was no knowing of what Guttenberg's printing machine was to cause – just like it is only now, around three decades since the internet and the World Wide Web entered our daily life, that we begin to realize how

[16] Quoted in Anthony Zurcher, *AI: How 'freaked out' should we be?*, BBC, March 16, 2023 https://www.bbc.com/news/world-us-canada-64967627.

deeply they have changed this life across the board. The Internet of Things is a continuously expanding reality, and trivial things like programming the coffee-maker to start working autonomously are simultaneous to labourers wondering whether the shift to robots at their working-place shall cause them lose their and their family's livelihood. To put it otherwise, it seems odd to dedicate no small amount of energy and intellectual efforts to address the consequence of such a deeply structural, all-encompassing transformation as caused by the expanding use of AI only; however, the option of 'wait-and-see' proves to be a hardly commendable, not least because said transformations occur at so wide a scale, in terms of sheer numbers of individuals that are exposed to their impact; and because their comprehensive scope in terms of domains of human activity. Moreover, the consequences taking shape already most probably belong to the category of long-term effects, which renders them a disquieting no-return feature.

It is well-known, if not necessarily usually observed, that new challenges can hardly be successfully addressed by resorting to old methods. The knowledge-based society might be considered a figment of one's intellectual imagination: society has *always* been based on knowledge, as even during the so-called Dark Ages there were those who *knew* how to organize their lives, even as they brutally took advantage of others. The obvious stark difference is provided by the width and contents of knowledge; and the quest for knowledge has been the defining feature of man's evolution since the very beginning. There is no natural barrier between human knowledge and human society and one cannot advance when the other regresses; one would surmise there is no way that society could ever be taken over by machines.

And yet, these statements seem less obvious when one considers, for instance, that the famous Three Laws of Robotics that Isaac Asimov posited in his fascinating books have never been seriously considered in real life; yet, even he felt the need to eventually add the Zero Law, which allowed his humanoid robots to pass judgments and choose between saving *one* human and protecting *humanity*. This literary sci-fi divagation aside, the mandatory requirement of issuing regulations to be implemented on the internet and AI is a high-profile exercise. Papers and books of respected authors have been multiplying of late in this respect and, in the wake of the spread of the ChatGPT-4 – the latest of generative AI-tools – Garry Marcus and Anka Reuel noted that '*One of the key issues with current AI systems is that they are primarily black boxes, often unreliable and hard to interpret, and at risk of getting out of control.*'; moreover, they argued: '*In the past year alone 37 regulations mentioning AI were passed around the globe; Italy went so far as to ban ChatGPT. But there is little global co-ordination. Even within some countries there is a hodge-podge, such as different state laws in America, or Britain's proposal to eschew a central regulator, leaving oversight split among several agencies. An uneven, loophole-ridden patchwork is to no one's benefit and safety.*' In their view, the foundation of an international agency for artificial intelligence is urgently needed, to the likes of the International Civil Aviation Organization '*in which member countries make their own laws but take counsel from a global agency.*'[17]

[17] *The world needs an international agency for artificial intelligence, say two AI experts*, The Economist, April 18, 2023, https://www.economist.com/by-invitation/2023/04/18/the-world-needs-an-international-agency-for-artificial-intelligence-say-two-ai-experts.

The relationship between the on-going transformative process of AI and of the implementation of AI-related tools in ever more domains, as well as the attempts to regulate their use are most visible in the communication sector, not least because of the intimate link between this technology and the cognitive component of our nature. This relationship is equally relevant in another defining domain for the human being, which is labour, in its entirety: *who* is performing it; *where* it is done; *how* it is developing; and *what rules* are to be followed when about its organization, its conditions, and, most important of all, the achievement of its ultimate goal in terms of human dignity, respect and prosperity.

### 4. Labour law and social security

In the 1960s, Herbert Simon, the 1978 Nobel-prize winner for economy, anticipated that machines shall develop to the extent that would enable them to perform whatever man would do in twenty years[18]; although this has not quite come to pass, the impact of AI on virtually anything is no longer imaginary, as briefly reviewed above; likewise, '*Many projections see this industry growing over the next ten years, from an estimated global market size of USD 2.4 billion in 2021 to over USD 11 billion by 2031'* [19].

The questions bearing on how labour and social security are influenced are increasingly intense, not least because there are instances when the use and, more gravely, abuse, of advanced technology and/or AI tools may lead to consequences that are most harmful to society and its members. Discrimination in hiring and salaries, disregard of suitable working conditions, lack of transparency and participation in the decision-making processes that are relevant to employees' rights, surveillance at the working-place, including under teleworking circumstances are several aspects where over-reliance on AI tools are conducive to predominantly negative consequences and call for appropriate regulations and rules to be conceived and implemented. Moreover, one of the most worrying possible developments that would harm the well-being and prosperity of labourers may be found when resorting to AI and its tools with a view to obtaining increased profits at the expense of social security-related aspects of the employees, under the pretext of lowering production costs; in this respect, a working paper published by the International Labour Office (ILO) warned that '*even if a Universal Basic Income were introduced, the existence of managerial prerogatives would still warrant the existence of labour regulation since this regulation is about much more than protecting workers' income*' [20]

Awareness of these challenges resulted, *inter alia*, in a proposal the ILO Director-General had put forward in 2013, which paved the way to the 'Centenary Declaration on the Future of Work' that was adopted in 2019[21]. A year later, the

[18] Quoted by Victor Storchan in introducing *Sam Altman: la loi fondamentale de l'IA*, Le Grand Contient, April 14, 2023, https://legrandcontinent.eu/fr/2023/04/14/sam-altman-la-loi-fondamentale-de-lia./. .The sentence needs to be completed with his emphasis that this might be true technologically speaking only.

[19] K. Portillo Chavez, J. Bahr, T. Vartanian, *AI has made its way to the workplace. So how have laws kept pace?*, OECD, AI Policy Observatory, December 6, 2022, https://oecd.ai/en/wonk/workplace-regulation-2022.

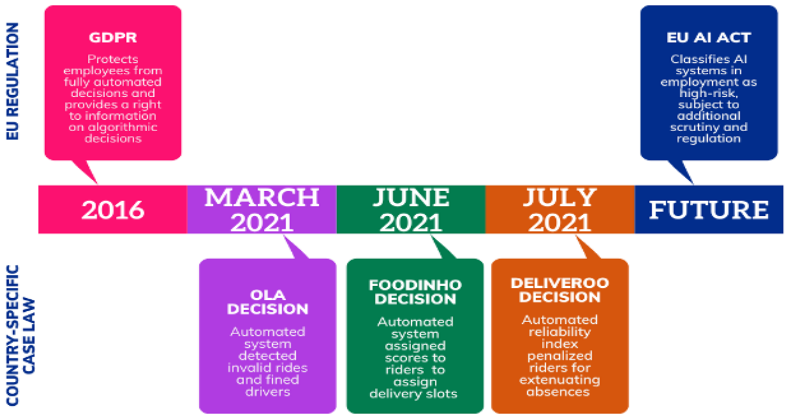
[20] Valerio De Stefano, '*Negotiating the Algorithm: Automation, artificial intelligence and labour protection*, International Labour Office, Geneva, 2018, https://www.ilo.org/employment/Whatwedo/Publications/working-papers/WCMS_634157/lang--en/index.htm.

[21] See ILO: *The future of work*, https://www.ilo.org/global/topics/future-of-work/lang--en/index.htm .

European Trade Union Institute recalled '(the) *European Commission recently stating that 'artificial intelligence with a purpose can make Europe a world leader'. For this to happen, though, the EU needs to put in place the right ethical and legal framework […] that […] must be solidly founded on regulation – which can be achieved by updating existing legislation – and that it must pay specific attention to the protection of workers. Workers are in a subordinate position in relation to their employers, and in the EU's eagerness to win the AI race, their rights may be overlooked. This is why a protective and enforceable legal framework must be developed, with the participation of social partners.*'[22] In this respect, several domains ought to be considered[23]:

- safeguarding worker privacy and data protection;
- addressing surveillance, tracking and monitoring;
- making the purpose of AI algorithms transparent;
- ensuring the exercise of the 'right to explanation' regarding decisions made by algorithms or machine learning models;
- preserving the security and safety of workers in human–machine interactions;
- boosting workers' autonomy in human–machine interactions;
- enabling workers to become 'AI literate'.

Earlier, in 2016, the EU had adopted the General Data Protection Regulation[24] that is a most important legislation on privacy and a consistent implementation of human rights under the circumstances as created by the new technologies. (see below an image of the process and components of this regulation[25]).




[22] Aida Ponce Del Castillo, *Labour in the Age of AI: why regulation is needed to protect workers*, The European Trade Union Institute, Foresight Brief #8, February 8, 2020, https://www.etui. org/ publications/foresight-briefs/labour-in-the-age-of-ai-why-regulation-is-needed-to-protect-workers.

[23] ***, *Is specific labour protection needed in the digital age?* – Eurofound, 15 December 2021, https://www.eurofound.europa.eu/data/digitalisation/policy-pointers/is-specific-labour-protection-needed-in-the-digital-age.

[24] Please see https://gdpr-info.eu/.

[25] K. Portillo Chavez, J. Bahr, T. Vartanian, *op.cit*.

The complexity of the unavoidable endeavour of building the knowledge-based economy and society is joined by the equally mandatory demand that relevant laws and regulations bearing on labour and social security be prepared and enforced under the new circumstances as sketched in previous pages. Like the general option of addressing both existing legislations, and updating it, the tasks of training and developing the intellectual capabilities of the present-day society to manage the emerging challenges of this reality need to find the right course of action in universities and post-graduate education without any further delay. As mentioned in more than one occasion, this situation appears whenever an epoch-making change occurs, in whatever decisive domain: if it were to extrapolate Schumpeter's cycle of 'creative destruction' to training and education, it would follow that the expected Ai-generated radical transformation of labour should call for abandoning whatever legacies related to the 'old' circumstances and replace them with new rules, and law, and practices – sometime, even with little, or no regard at all to the historical and cultural heritage, in the name of the alleged 'unifying, levelling effect' of transborder integration and globalization.

A closer look at what society has achieved in its continuous drive to adapt to new circumstances that itself created unquestionably denies the soundness of this option. It is true that momentous transformations are most probably going to a radical impact on our life as we know it. No rocket-scientists are needed to realize the unparalleled communication leap that humanity took 20 years ago only – that means less than the time needed for obtaining a university degree – when the first smartphone was invented: and by November 2022, data read that around 6.84 billion smartphones were in use – i.e., 85% of the 8 billion global population[26], albeit grossly unevenly distributed all over the world; and similar developments may be found elsewhere. However, there is a continuum in this process that underpins the human nature itself and cannot undo the values of dignity and mutual respect unless society embarks heedlessly on the way to chaos and self-destruction – and therefore questions the very supreme goal, and right, of finding happiness and accomplishment.

Returning to the specific domains of labour and social security, it is to be expected that their normative framework be aimed first and foremost at strengthening their structural roles of being the touchstones of the knowledge-based society, rather than weakening, even voiding them of this mission, whatever the alleged reasons. Multidisciplinary dialogues among experts in labour law, social security, AI, management, human resources, education and training would be welcome to address these issues *sine ira et studio.*

## 5. Instead of conclusions

The present and the future of the labour law are not only linked, they are also complementary to each other. This seems to be a common, self-evident assertion, very much like the statements that the present is the result of the past and that whoever ignores one's own history would risk to have no future. However, it is generally agreed that self-evident findings are not less relevant: like Schumpeter warned, '*nothing is so treacherous as the obvious*'[27].

[26] ***, *Number of smartphone mobile network subscriptions worldwide from 2016 to 2022, with forecasts from 2023 to 2028*, Statista, https://www.statista.com/statistics/330695/number-of-smartphone-users-worldwide/.

[27] Joseph A. Schumpeter, *Capitalism, Socialism and Democracy*, Routledge, 2010, p. 272.

In the interconnected world of labour, jobs and qualifications that shall be characteristic to the post-pandemic age, a mix of professional abilities are needed, because new technologies lead to new jobs that differ from classic ones, as they are to rely on knowledgeably operating electronic means. At the same time with the division of labour between man and Artificial Intelligence the transition to future occupations and the image of future professions shall raise significant challenges to labourers, employers, and governments alike.

The post-pandemic age shall need to put forward a legal framework for digitalization, and mainly for platform labour and cross-border workers. The ILO Global Commission on the Future of Work calls member states to set up an international system to govern digital platforms. The initiative focuses on: (i) remuneration, labour conditions, data protections and intimacy; (ii) fair and transparent, not 'masked' contracts; (iii) social protection, mainly paid leaves and pensions; and (iv) the freedom of association, representation of employees, and consultations. We posit that the bi- and/or tri-partite social dialogue should play a major role in reaching an agreement on this issue.

Under these circumstances, the impact of the normative process on labour relations, that is to say of labour law on economic life, cannot be contested, nor can it be ignored. Labour legislation is a fundamental tool of economic policy including the amount of salaries, the possible income redistribution by possible social security means (mainly pensions and unemployment benefits), stimulating labour force to get involved in production, the overall benefits of the labour market, securing and operation of employment services, immigration policies a.s.o.

The modern economy is more reliant on the cognitive component than on materials and physical labour. In order to cope with challenges issuing from the new forms and organisation of economy, employers have to create jobs as needed in a dynamic society that is based on knowledge and progress of production means and goods. This calls for substantial investments in education and science, as well as in employment policies. Results of research, in general, and of technological advancement, in particular, are ever more rapidly associated with growing crisis phenomena in all directions and with ever wider enlargement of their scope, because of deepening globalization-stimulated interaction. Indeed, to some extent, one may talk about the butterfly effect being turned into an everyday reality.

To conclude, present-day society facing unprecedented diversification of challenges in the labour domain and, implicitly, in social life, makes it mandatory to be creative, flexible, and open to conceptual and institutional, and equally teaching, innovation; and this attitude, which is itself a challenge, needs to be built even as it focuses on the Man's personality and becoming with a view to reaching full accomplishment in all the fields of this social life. The school, in the high sense that is provided by the functional and semantic coincidence with the *academia* of the ancient Greeks, is called to fulfil the noble and not-at-all simple task of permanently preparing the members of human society for the future – as well as for its present: as Pope John Paul II said: '*the future starts today, not tomorrow*'.

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# NEW ASPECTS IN THE MATTER OF PROTECTION MEASURES FOR PEOPLE WITH INTELLECTUAL AND PSYCHOSOCIAL DISABILITIES

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## Abstract

*In order to comply with the Decision of the Constitutional Court no. 601/2020, the Law no. 140/2022 on some protection measures for persons with intellectual and psychosocial disabilities and amending and completion of some normative acts was adopted. According to article 26 of the Law, most of its provisions entered into force 90 days after the date of publication in the Official Gazette of Romania, i.e. on August 18, 2022, except for the provisions of article 20 paragraph (6) thesis III and of article 23, which entered into force 3 days after publication. The measure of placing under judicial interdiction has been replaced, the current study aiming to analyze the new legal instruments of support and protection that are addressed to these categories of vulnerable persons that were created by Law no. 140/2022. The adoption of this normative act, whose solutions we will present in this study, is welcome and long awaited because the lack of a legislative framework in this important matter starting with the date of the publication of the Constitutional Court Decision left open the way for the courts to issue divergent solutions in cases having as object the "judicial interdiction". Within 3 years from the entry into force of Law no. 140/2022, the ex officio re-examination of the injunction measures by the courts is carried out, in the sense of ordering either their replacement with the protective measures provided for by the new regulation, or the lifting of the measure, and the fulfilment of the deadline does not remove the obligation of the courts to re-examines, further, ex officio, all the measures of placing under judicial interdiction.*

**Keywords:** *persons with intellectual and psychosocial disabilities, assistance for concluding legal documents, judicial counselling, special guardianship, protection mandate.*

## 1. Introduction

According to article 164 paragraph (1) of the Civil Code, in the form prior to the amendments made by Law no 140/2022, "A person who lacks the discernment necessary to look after his or her own interests, due to alienation or mental debility, shall be placed under a judicial interdiction." The doctrine extracted the following features of the judicial interdiction: a civil law protection measure; a measure taken by judicial means; it applies absolutely strictly only to natural persons lacking discernment due to alienation or mental debility; its effect consists in depriving the natural person of exercise capacity and establishing guardianship[1]. The singular criticisms that were expressed in the doctrine related to this regulation were rightfully aimed at the fact that "for the most part, the New Civil Code would merely resume, almost unchanged, the provisions of the Family Code of 1953 with regard to the substantive aspects of the

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[1] O. Ungureanu, C. Munteanu, *Drept civil. Persoanele în reglementarea noului Cod civil (Civil law. Persons under the new Civil Code)*, Hamangiu Publishing House, Bucharest, 2011, p. 264. For a presentation of the judicial interdiction, see also M. Nicolae (coordinator), V. Bîcu, G-A Ilie, R Rizoiu, *Drept civil. Persoanele (Civil law. Persons)*, Universul Juridic Publishing House, Bucharest, 2016, pp. 239-251.

measure, and the New Civil Procedure Code on those of Decree no. 32/1954, regarding the procedure for taking this measure, or, given the age of the Family Code and Decree no. 32/1954, it is obvious that since then concepts have evolved and practical needs demanded a more modern and flexible regulation, as is the case in most modern states, as well as other legal systems"[2].

The need for a paradigm shift in the matter was imposed in order to align the national legislation with the standards provided for by article 12 of the Convention on the Rights of Persons with Disabilities, signed by Romania on September 26, 2007 and ratified by Law no. 221/2010[3] which enshrines certain guarantees that must accompany the protection measures instituted regarding persons with disabilities and provides in point 1 that "persons with disabilities have the right to recognition, wherever they may be, of their legal capacity". Ever since 2018, the Commissioner for Human Rights of the Council of Europe has requested the Romanian authorities to take measures to replace the system of "substituted decision-making" with that of "assisted decision-making", which would ensure these people some independent assistance, away from conflicts of interest and subject to regular judicial control[4].

By Decision no. 601[5] of July 16, 2020, the Constitutional Court found that the provisions of article 164 paragraph (1) of the Civil Code, as stated above, are unconstitutional. The Court held that in the absence of the establishment of the guarantees that accompany the measure of protection of the placing under judicial interdiction, prejudices are brought to the constitutional provisions of article 1 paragraph (3), of article 16 paragraph (1) and of article 50, as interpreted according to article 20 paragraph (1) and in the light of article 12 of the Convention on the rights of persons with disabilities. For the compliance with the Decision of the Constitutional Court no. 601/2020, the Law no. 140/2022 on some protection measures for persons with intellectual and psychosocial disabilities and amending and completion of some normative acts was adopted[6].

The adoption of this normative act, solutions of which we will present below, is welcome and long awaited because the lack of a legislative framework in this important matter starting with the date of the publication in the Official Gazette of the Constitutional Court Decision no. 601/2020 left open the way for the courts to issue

[2] C. Chirică, *Ocrotirea anumitor persoane fizice prin măsura punerii sub interdicție judecătorească în lumina dispozițiilor Noului Cod Civil și a Noului Cod de Procedură Civilă (The protection of certain natural persons by means of a measure of injunction in the light of the provisions of the New Civil Code and the New Code of Civil Procedure)*, in Law Review no.1/2012, p. 55.

[3] Published in the Official Gazette of Romania, Part I, no. 792 of November 26, 2010. The Convention on the Rights of Persons with Disabilities was adopted in New York by the United Nations General Assembly on December 13, 2006 and opened for signature on March 30, 2007. See also General Comment no. 1/2014.

[4] Commissioner for Human Rights of the Council of Europe, Dunja Mijatović, Report following her visit to Romania from 12 to16 November 2018, paragraph 53 of the Report.

[5] Published in the Official Gazette of Romania, Part I, no. 88 of January 27, 2021. For a presentation of the jurisprudence of the Constitutional Court on the matter, see also I. Bratiloveanu, *The judicial interdiction. Special review on the jurisprudence of the Constitutional Court*, in CKS 2021 (Challenges of the Knowledge Society), Bucharest, 2021, pp. 569 – 579.

[6] Published in the Official Gazette of Romania, Part I, no. 500 of May 20, 2022. For a presentation of the new legal framework in this matter, see also R.M. Roba, *Considerations regarding Law no. 140/2022 on some protection measures for persons with intellectual and psychosocial disabilities and amending and supplementing some normative acts*, in Legal Current no. 2(89)/2022, pp. 82-89.

divergent solutions in cases having as object the "judicial interdiction"[7]. Within 3 years from the entry into force of Law no. 140/2022, the ex officio re-examination of the injunction measures by the courts is carried out, in the sense of ordering either their replacement with the protective measures provided for by the new regulation, or the lifting of the measure, and the fulfillment of the deadline does not remove the obligation of the courts to re-examines, further, ex officio, all the measures of placing under judicial interdiction[8]. The new regulation provides for the organization by the National Institute of Magistracy with priority of continuing professional training actions for judges and prosecutors for the years 2022-2024 in this field[9].

## 2. Assistance for concluding legal documents

The new support measure of assistance for the conclusion of legal documents is regulated in Chapter I of Law no. 140/2022, articles 1-6, being a non-jurisdictional measure under the competence of the notary public that does not affect the exercise capacity of the major person.

The measure of assistance for the conclusion of legal documents is addressed to the major person who, due to an intellectual or psychosocial disability, needs support to take care of his person, manage his patrimony and to exercise, in general, his rights and civil liberties. It is a priority measure; the judicial protection measures (judicial counseling and special guardianship) are subsidiary in nature and will not be able to be instituted if the protected person can be adequately protected through assistance for the conclusion of legal documents[10].

As well as the duration, the measure of assistance for the conclusion of legal documents is ordered for a maximum of 2 years, which can be renewed. Law no. 140/2022 does not include provisions limiting the number of renewals. The measure is free of charge, but the major person is obliged to reimburse the assistant for the reasonable expenses advanced by the latter in the performance of his task.

The assistant is authorized to act as an intermediary person between the major person who benefits from the assistance and third parties. According to the law, it is presumed that the assistant acts with the consent of the major person in granting the assistance, it being a simple presumption. The personal assistant can transmit and receive information on behalf of the major person and can communicate the decisions related to him to third parties, but he does not conclude the documents on behalf of the assisted major person nor approve the documents that the assisted major person concludes alone. By virtue of this role, the assistant must act in relations with third parties according to the preferences and wishes of the assisted major person.

According to article 4 paragraph (1) of Law no. 140/2022, the quality of assistant can be held by a person who can be appointed guardian; being applicable the

[7] I-A Filote-Iovu, *Divergențe jurisprudențiale în cauzele având ca obiect "punere sub interdicție judecătorească*" (*Differences of case-law in cases concerning "injunctions"*), available at https://www.juridice.ro/750387/divergente-jurisprudentiale-in-cauzele-avand-ca-obiect-punere-sub-interdictie-judecatoreasca.html.

[8] According to article 20 paragraphs (2) and (6) of Law no. 140/2022.

[9] According to article 25 of Law no. 140/2022.

[10] According to article 164 paragraphs (3) and (5) of the Civil Code, as amended by article 7 point 22 of Law no. 140/2022.

cases of incompatibility with the quality of guardian provided in article 113 paragraph 1) letter a)-d), f) and paragraph 2) of the Civil Code. It is about the following cases of incompatibility: the minor, the person who benefits from special guardianship or judicial counseling, assistance for the conclusion of legal acts, who has been granted a protection mandate or placed under guardianship; also, the person deprived of the exercise of parental rights or declared incapable of being a guardian; the person whose exercise of civil rights was restricted and the one with bad behavior that must be recognized as such by the court; the person who was removed from the exercise of guardianship under the conditions of article 158 of the Civil Code[11], and, finally, the person who, due to conflicting interests with those of the represented minor, could not be his guardian. As can be noted, the case of incompatibility determined by the state of insolvency of the person provided for by letter e) was excluded. Also, the case provided for by letter g) was excluded from the incompatibility with the quality of assistant, according to which the person who was removed by authentic document or by will by the parent who exercised alone at the time death the parental authority cannot be a guardian.

Regarding the control mechanisms of the measure, article 5 of Law no. 140/2022 stipulates the role of the guardianship authority to which the assistant is obliged to submit an annual report or, as the case may be, at the end of the term for which he was appointed regarding the fulfillment of his task and the role of the guardianship court in whose territorial jurisdiction he is domiciled or the residence of the major person who benefits from the measure of assistance that will resolve the complaints that any person can make regarding the activity of the assistant harmful to the major. The complaint regarding the activity of the assistant is urgently resolved by the court of guardianship, through an executive order, with the summoning of the parties and the hearing of the assisted major person, the order being communicated to the notary public and the guardianship authority[12].

Finally, article 6 paragraph (1) letters a) - e) of Law no. 140/2022 lists the cases in which the measure of assistance for the conclusion of legal documents ceases. Thus, this measure ceases upon the expiration of the term for which it was ordered. Also, the assisted major person can make a request for the termination of the assistance that he addresses to the notary public. Another case of termination of assistance concerns the situation in which a protective measure is ordered against the major person or the assistant. The measure of assistance also ceases if the guardianship court admits the complaint regarding the activity of the assistant harmful to the major person. Finally, the assistance ends on the date of the death of the major person or the assistant, as well as by the express resignation of the assistant.

It should be noted that the appointment of the assistant and the termination of the assistance are registered in the National registry of support and protection measures taken by the notary public and the guardianship court[13]. In case of replacing the assistant, according to article 6 paragraph (2) of Law no. 140/2022, it is sufficient to

[11] Article 158 of the Civil Code with the marginal name *"Removal of the guardian"* provides: *"Apart from other cases provided by law, the guardian is removed if he commits abuse, serious negligence or other acts that make him unworthy to be a guardian, such as and if he does not properly fulfill his task"*.

[12] Article 5 paragraphs (3) – (5) of Law no. 140/2022.

[13] According to article 138[4] paragraph (2) of the Law on public notaries and notarial activity no. 36/1995, republished, amended by article 9 point 5 of Law no. 140/2022.

register the new assistant in the aforementioned register.

The procedure for appointing the assistant for the conclusion of legal documents is regulated in Chapter V, Section $7^1$-a, articles $138^1$-$138^5$ of the Law on notaries public and notarial activity no. 36/1995[14], as supplemented by article 9 point 5 of Law no. 140/2022, to which we will refer further.

The application for appointment made by the major person together with the person to be appointed assistant includes the identification data of the applicants, the reasons on which it is based, a summary inventory of the assets of the major person, as well as any other relevant documents that justify the institution of the measure. According to article 15 letter $f^1$) from Law no. 36/1995, the notary public in the notary office located in the jurisdiction of the court where the major person has his domicile or residence is competent.

From a procedural point of view, the notary public sets a deadline for resolving the request and communicates it, in a copy, to a person from the major's family so that he or she can raise objections to the institution of the measure. At the request of the major, a person with whom he lives can be cited, even if he is not his relative. The law provides that any other concerned person can participate in the procedure of appointing the assistant, provided that the major person does not object.

According to article $138^2$ of Law no. 36/1995, it is mandatory to listen to the major person, in the presence of the person to be appointed assistant, and in terms of the obligations of the notary public, he must check if the major person understands the meaning of the procedure and if he is able to express his wishes and preferences.

The request for the appointment of the assistant is resolved by a reasoned conclusion that is communicated to the major person, the assistant, the guardianship authority specifying that in addition to the conclusion, the guardianship authority will receive copies of the documents attached to the request and the National register of records of support and protection measures taken by the notary public and the guardianship court.

Art. $138^5$ of Law no. 36/1995 lists the situations in which the notary public rejects the request to appoint an assistant, the most common in practice being the one provided for in letter a), respectively when there are serious doubts about the major's understanding of the meaning of the request. The other situations, as provided for in letter b) - e) refers to the existence of serious doubts regarding the possibility for the major to express his wishes and preferences, the fear that he will suffer damage by appointing the assistant, the formulation of objections by a member of the major's family or another interested person and, finally, failure to fulfill the legal conditions for appointment.

According to the law, the major person or the person indicated in the application can file a complaint against the decision rejecting the application within 30 days of its communication. The guardianship court in whose territorial constituency the major person who requested the appointment of the assistant resides is competent to resolve the complaint. The complaint is resolved by a decision that is not subject to any appeal[15].

[14] Republished in the Official Gazette of Romania, Part I, no. 237 of March 19, 2018, with subsequent amendments.

[15] Art. $138^5$ of the Law of Public Notaries and Notarial Activity no. 36/1995.

### 3. Judicial counselling and special guardianship

Depending on the degree of deterioration of his/her mental faculties, the adult person can benefit from the measure of judicial counselling or the measure of special guardianship, as regulated in Book I, Title III, Chapter III of the Civil Code whose name was changed from *"Protection of the court-ordered interdiction"* to *"Protection of the major person through judicial counselling and special guardianship"*. The measure of assistance for the conclusion of legal documents is a priority, being followed by judicial counselling and, last but not least, by special guardianship. A measure of protection cannot be taken toward a major person unless it is necessary for the exercise of his/her civil capacity.

A person can benefit from judicial counselling if the deterioration of his/her mental faculties is partial and it is necessary to be constantly advised for the exercise of his/her rights and freedoms. Such a protection measure is ordered for a period that cannot exceed 3 years. As far as the scope of the persons who can benefit from the measure of judicial counselling is concerned, it is about adults or minors with restricted capacity to exercise their rights, with the clarification that in the case of the latter, the measure can be ordered one year before reaching the age of 18 and begins to take effect from this date.

A person can benefit from special guardianship if the deterioration of his/her mental faculties is total and, as the case may be, permanent and it is necessary to be constantly represented in the exercise of his/her rights and freedoms. Such a protection measure is ordered for a period that cannot exceed 5 years. However, according to the law, if the damage to the protected person's mental faculties is permanent, the court can order the extension of the special guardianship measure for a longer period that cannot exceed 15 years. Both adults and minors with restricted exercise capacity can benefit from the measure of special guardianship.

In the following, the effects of judicial protection measures will be exposed in terms of the legal capacity of the natural person, some of which are common to both measures, others being specific to each of them.

If the law does not provide otherwise, in the case of the person who benefits from judicial counselling, the rules regarding the guardianship of minors who have reached the age of 14 are applied, and in the case of the person who benefits from special guardianship, the rules regarding the guardianship of minors who have not over the age of 14[16]. So, pursuant to the decision based on which the protection measure was instituted, the guardianship court shall establish, depending on the degree of autonomy of the protected person and his/her specific needs, the categories of documents for which approval is necessary or, as the case may be, his/her representation. Therefore, the guardianship court can order that the protective measure concerns even only one category of documents. In addition, the court can order that the protection measure refers only to the person under protection or only to his/her assets. The order of the protective measure shall not affect the capacity of the protected person to conclude the legal deeds for which the court has established that the consent of the protector or, as the case may be, his/her representation is not necessary.

In the matter of non-patrimonial relations, with regard to the marriage of the person who benefits from a judicial

[16] According to article 171 of the Civil Code as amended by article 7 point 29 of Law no. 140/2022.

protection measure, article 276 of the Civil Code, as amended by article 7 point 41 of Law no. 140/2022, establishes a possible preventive control by regulating the obligation of the person who benefits from judicial counselling or special guardianship to notify in advance, in writing, the guardian who can formulate opposition to the marriage, in which case the guardianship court will decide on the validity of the opposition. Article 275 of the Civil Code, as amended by article 7 point 40 of Law no. 140/2022, establishes the impediment to marriage based on guardianship status. The protected person can conclude or modify a matrimonial agreement only with the consent of the legal guardian and with the authorization of the guardianship court[17]. The court can pronounce the separation of assets when this is in the interest of the protected person and the request is made by the guardian of the protected spouse or the family council[18]. Article 375 paragraph (3) of the Civil Code, as amended by article 7 point 51 of Law no. 140/2022, stipulates that divorce by the consent of the spouses cannot be admitted by the agreement of the spouses by administrative means or by notarial procedure; the new regulation, unlike the previous one, allows divorce by agreement of the parties only through the courts, specifying that there can be no agreement on requests ancillary to the divorce[19].

If one of the parents benefits from the measure of special guardianship, according to article 507 of the Civil Code, as amended by article 7 point 57 of Law no. 140/2022, he retains the right to supervise the child's upbringing and education, as well as the right to consent to his adoption, unless he is unable to express his will due to lack of discernment, this being, in our opinion, a case of unilateral exercise of parental authority.

If with respect to one of the parents, judicial counselling was instituted, according to article 503 paragraph $1^1$ of the Civil Code, introduced by article 7 point 56 of Law no. 140/2022, the guardianship court can decide that the rights and duties regarding the child's assets are exercised by the other parent, and if the protected adult exercises parental authority alone, the court orders, depending on the circumstances, on the continuation of the exercise of parental authority or establishing guardianship over the child.

In the matter of patrimonial relations, the person protected by the measure of judicial counselling, having limited exercise capacity, can conclude the legal documents that the minor who has reached the age of 14 can also do. The rule is that the legal acts are concluded by the protected major through judicial counselling with the consent of the guardian, and in the cases provided by law[20], also with the authorization of the guardianship court. Article 41 paragraph (3) of the Civil Code lists the legal acts that he can conclude on his own, without any approval or authorization: conservation acts, administrative acts that do not prejudice him, acts of acceptance of an inheritance or acceptance of liberalities without encumbrances as well as dispositional acts of small value, current and which execute on the date of their conclusion.

[17] Article 337 of the Civil Code, the form in force from August 18, 2022.

[18] Article 370 paragraph (1) of the Civil Code introduced by article 7 point 48 of Law no. 140/2022.

[19] Article 930 paragraph (2) of the Civil Procedure Code, as amended by article 8 point 22 of Law no. 140/2022.

[20] These are the acts of disposal provided for in article 144 paragraph (2) of the Civil Code: acts of alienation, division, mortgage or encumbrance with other real charges, relinquishment of patrimonial rights and any act that goes beyond the administration acts.

Regarding the person for whom the special guardianship is established, the legal acts are concluded in his name by the guardian, it being forbidden to conclude them directly by the protected person. The categories of acts that the person protected by this measure can conclude alone, are listed in the content of article 43 paragraph (3) of the Civil Code: the specific acts provided by law, conservation acts and disposition acts of small value, current in nature and executed at the time of their conclusion.

Regarding the sanction applicable to acts concluded with non-compliance with the legal provisions by the major person who benefits from a measure of judicial protection, article 172 paragraph (1) of the Civil Code[21], provides that acts are voidable or benefits arising from them can be reduced, even without proof of damage and even if at the time of their conclusion he had discernment. Herewith, testamentary dispositions of the protected adult are considered valid, provided they are authorized or confirmed by the guardianship court[22]. On the other hand, the legal acts concluded before the establishment of the protection measure are voidable or the benefits arising from them can be reduced only if the condition provided by article 172 paragraph (2) of the Civil Code is met that "*on the date when they were concluded, the lack of discernment was notorious or known to the other party*". The new regulation[23] gives the possibility to the co-contractor of the protected adult, even if he knew about the establishment of the judicial protection measure, to request the maintenance of the contract, to the extent that it offers balancing benefits, by reducing or increasing his own benefit; he cannot oppose the annulment of the contract, nor can he exercise the action for annulment. Paragraph (1) of article 1205 of the Civil Code remained unchanged, according to which *"The contract concluded by a person who, at the time of its conclusion, was, even if only temporarily, in a state that made him unable to realize the consequences of his act is voidable"*.

Regarding civil liability in tort, the law distinguishes depending on the measure of protection instituted and the discernment of the protected person at the time of the commission of the offence; thus, by the provisions of article 1366 of the Civil Code, as amended by article 7 point 66 of Law no. 140/2022, the relative legal presumption regarding the lack of tortious capacity of the person benefiting from special guardianship and the relative legal presumption regarding the tortious capacity of the person benefiting from judicial counselling were established.

For the benefit of the protected person, the new regulation contains a series of guarantees such as the regular revaluation of the chosen protection regime or the possibility of the permanent individualization of the protection measure by the guardianship court, considering the specific situation of the adult person in question. Thus, article 168 paragraph (6) of the Civil Code, as amended by article 7 point 26 of Law no. 140/2022, orders that the guardian or the legal representative of the protected person to have the obligation to notify the guardianship court whenever there are data or circumstances justifying the revaluation of the measure, as well as at least 6 months before the expiry of the duration for which it was ordered, with a view for its revaluation. The guardianship authority has the role of verifying the fulfilment of this duty. In case of non-fulfilment, the

[21] Amended by article 7 point 29 of Law no. 140/2022.
[22] Article 172 paragraph (3) of Law no. 140/2022.
[23] According to article 46 of the Civil Code as amended by article 7 point 7 of Law no. 140/2022.

guardianship authority shall notify the guardianship court, which can order, following the same procedure, the extension, the replacement or lifting of the protection measure.

In the new regulation, considering the inner features that animate them, the protection of the disabled adult remains primarily the responsibility of the family. Thus, article 170 paragraph (2) of the Civil Code, as amended by article 7 point 28 of Law no. 140/2022, stipulates as follows: *"In the absence of an appointed guardian, the guardianship court shall appoint, as a matter of priority, in this quality, if there are no valid opposite reasons, the spouse, the parent, a relative or in-laws, a friend or a person who lives with the protected person if the latter has close and stable ties with the protected person, able to fulfil this task, taking into account, as the case may be, the bonds of affection, the personal relationships, the material conditions, the moral guarantees presented by the person considered to be appointed guardian, as well as the proximity of their homes or residences"*. As a novelty, it is also considered the situation in which none of these persons can assume guardianship, in which case the guardianship court shall appoint a personal representative, aiming to create a profession for the personal representative[24]. Upon the appointment of the guardian, the guardianship court shall take into consideration the preferences expressed by the protected person, his/her usual relationships, the interest expressed with regard to his/her person, but also any possible recommendations formulated by the people close to him/her, as well as the lack of interests contrary to the protected person[25].

Article 174 paragraph (2) of the Civil Code, as amended by article 7 point 32 of Law no. 140/2022, lays out in detail the legal guardian's duties that emphasize his/her role as a person who provides permanent support to the protected person, namely: to take into account, as a matter of priority, the will, the preferences and the needs of the protected person, to provide the support necessary in establishing and expressing of his/her will and to encourage his/her to exercise his/her rights and fulfil his/her obligations alone; to cooperate with the protected person and to respect his/her private life and dignity; to ensure and to allow, whenever possible, the information and the clarification of the protected person, in a manner adapted to his/her condition, about all the acts and the facts that could affect him/her, about their utility and degree of urgency, as well as about the consequences of a refusal from the part of the protected person to conclude them; to take all necessary measures in order to protect and to achieve the rights of the protected person; to cooperate with natural and legal persons with duties in the care of the protected person; to maintain, as far as possible, a personal relationship with the protected person; in the cases provided by law, to undertake all the necessary steps for the preparation of evaluation reports and notification to the guardianship court.

The protected person can be cared for at home, in a social department or in another institution. According to article 174 paragraph (3) of the Civil Code, as amended by article 7 point 32 of Law no. 140/2022, the guardianship court will decide the place of care after listening to the protected

[24] Article 170 paragraph (3) of the Civil Code, the form in force from August 18, 2022. The provisions of article 118 paragraph (2) and article 170 paragraph (3) of Law no. 287/2009 regarding the Civil Code, republished, with subsequent changes, as they were regulated, respectively modified by Law no. 140/2022 will enter into force on the date provided by the special law regarding the personal representative.

[25] Article 170 paragraph (4) of the Civil Code, the form in force from August 18, 2022.

person, taking the opinion of the family council and consulting the medical, psychological evaluation and social investigation surveys. The authorization of the guardianship court shall be necessary to change the place of care.

Article 177 paragraph (1) of the Civil Code, as amended by article 7 point 35 of Law no. 140/2022, lists the causes of termination of the protection measure: 1) death of the protected person; 2) expiration of the duration; 3) the replacement of the measure; and 4) lifting the measure.

Furthermore, we shall present the changes brought by Law no. 140/2022 regarding the procedure for establishing judicial counselling and special guardianship.

By article 8 point 25 of Law no. 140/2022, Chapter I of Title II, Book VI, articles 936 - 943, with the generic name *"Procedure for the establishment of judicial counselling or special guardianship"* was introduced in the Civil Procedure Code[26].

Law no. 140/2022 has not brought any changes with regard to the territorial competence of the courts that must rule on the protection measure, the request for the establishment of judicial counselling or special guardianship falling within the competence of the guardianship court in the jurisdiction of which is located the domicile[27].

In addition to the elements provided for by common law (Article 194 of the Civil Procedure Code), the request for the establishment of the protective measure shall include the facts from which it results the deterioration of his/her mental faculties, the means of evidence, the data related to the family, social and patrimonial situation of the person, any other elements regarding his/her degree of autonomy, as well as the name of his/her attending physician, to the extent that they are known to the applicant, the purpose of the rule being that the court could form, from the very beginning of the process, an accurate and exhaustive picture of the situation of the person in question.

Given that the protective measures must correspond to the degree of incapacity and be individualized according to the needs of the protected person, a favourable provision for the person in question is also that the court is not restricted by the object of the application and can institute a protective measure different from the one requested.

As in the previous regulation[28], the procedure for establishing the protective measure goes through the following phases: the pre-judgment phase, non-contentious[29]; the trial phase, contradictory phase[30] and the

[26] Law no. 134/2010 regarding the Civil Procedure Code, republished in the Official Gazette of Romania, Part I, no. 247 of April 10, 2015, with subsequent amendments and additions.

[27] For the interpretation according to which the notion of "domicile" can have no other meaning than that assigned by the rules of the Civil Code, see I. Ilies Neamt, I.-A. Filote-Iovu, *O analiză a orientărilor jurisprudențiale privind competența teritorială a instanțelor învestite cu soluționarea cererilor având ca obiect ocrotirea persoanei fizice (An analysis of case-law guidelines on the territorial jurisdiction of the courts dealing with applications for protection of the individual)* in Family Law Review no. 2/2022, pp. 164 – 190.

[28] For a presentation of the procedure of placing under judicial interdiction, see A. Tabacu, *Drept procesual civil (Civil Procedural Law)*, Universul Juridic Publishing House, Bucharest, 2019, pp. 542 – 547; M. Fodor, *Punerea sub interdicție în reglementarea Noului Cod Civil și a Noului Cod de Procedură Civilă (The injunction under the New Civil Code and the New Code of Civil Procedure)*, in Law Review no. 2/2013, pp. 29 - 47; G. Boroi, M. Stancu, *Drept procesual civil (Civil Procedural Law)*, 5th edition, revised and added, Hamangiu Publishing House, 2020, pp. 962 – 967.

[29] Article 938 et seq. of the Civil Procedure Code.

[30] Article 940 of the Civil Procedure Code.

phase of the communication of the decision[31].

In the preliminary phase, the president of the court notified with the request for the establishment of the measure of judicial counseling or special guardianship shall order to communicate to the person of whom the establishment of the protection measure is requested the copies of the application and from the attached documents, the same communication being made to the prosecutor, when the request was not introduced by him. As a novelty, in this procedure, shall be to the benefit of the person in respect of whom the establishment of the protection measure is requested the provisions of article 938 paragraph (2) of the Civil Procedure Code which allow the appointment of a lawyer ex officio in case the person in question did not choose a lawyer.

In this phase, the prosecutor shall carry out the necessary research, among which, he shall order the performance of a medical and a psychological evaluation[32], for the person hospitalized in a health institution, he will order the drawing up a report and he shall order the preparation of a social survey report by the guardianship authority.

With regard to the person in respect of whom the establishment of the protection measure is requested, involuntary temporary hospitalization can be ordered pursuant to the conditions of article 939 of the Civil Procedure Code, as amended by article 8 point 29 of Law no. 140/2022. The prosecutor, upon notification of the physician who performs the medical evaluation, shall request, on solid grounds, the guardianship court to take this measure. Involuntary temporary hospitalization in a specialized health institution shall be ordered in case of need for a longer observation of the health condition of the person whose protection is required, which cannot be carried out otherwise, and the person refuses hospitalization. As a novelty brought by Law no. 140/2022, it is stipulated that the measure of involuntary temporary hospitalization can be taken for a maximum of 20 days, compared to 6 weeks which was the maximum duration in the procedure of placing under judicial interdiction and it is ordered only after listening to the person whose protection is requested. The involuntary temporary hospitalization is ordered on solid ground and proportionally to the goal pursued. The measure restricting the freedom of the person and being ordered for the period of carrying out the evaluation reports, the provisions of article 939 paragraph (6) of the Civil Procedure Code according to which the specialized health institution immediately proceeds to the discharge of the person whose protection is requested, are to be welcomed, if it is established before the expiration of the duration of the temporary involuntary hospitalization, that this measure is no longer necessary. The court shall issue a decision that is only subject to appeal, within 3 days[33], an appeal that is to be settled within 5 days from its submission, the legislator establishing short deadlines considering the

[31] Article 941 of the Civil Procedure Code.

[32] Also see *The joint order of the Ministry of Health and the Ministry of Labor and Social Solidarity no. 3423/2128/2022 regarding the approval of the methodology and the medical and psychological evaluation report of persons with intellectual and psychosocial disabilities* published in the Official Gazette, Part I, no. 1128 of November 23, 2022. It must be said that this medical and psychological evaluation report constitutes a very important evidence because it includes conclusions regarding the nature and degree of severity of the mental condition and its foreseeable evolution, the extent of the person's needs and the other circumstances in which he is found, as well as mentions regarding the necessity and opportunity of establishing a protective measure for its benefit.

[33] The term flows from the pronunciation for those present and from the communication for those absent.

maximum duration of involuntary hospitalization.

In the next phase, the trial phase, after receiving the documents prepared in the preliminary phase, the trial term is fixed. If the law did not provide a time limit for the execution of the procedure of placing under interdiction, this being carried out according to the provisions of the common law[34], article 940 paragraph (2) of the Civil Procedure Code provides that the judgment of the application for taking new protective measures to be done urgently and as a matter of priority. On the date set for the judgment, the court is obliged to hear in the Council Chamber the person in respect of whom the protective measure is requested, asking him/her questions in order to ascertain the necessity and the advisability of instituting a protective measure, as well as to find out his/her opinion with regard to the protective regime and the person of the protector. If the court deems it to be in his/her interest, he/she can be heard at his/her home, where he/her is taken care of, or in any other place deemed appropriate by the court. Upon hearing him/her, a trustworthy person can also be present. We consider that this provision is in agreement with the overall vision of Law no. 140/2022 which emphasizes the trial: the will and the preferences of the protected person, but also his/her specific needs. If, in the case of the establishment of the measure of special guardianship, the hearing of the person whose protection is requested is mandatory, by way of exception, article 940 paragraph (5) of the Civil Procedure Code provides that the extension of the measure of special guardianship for a period longer than five years can be ordered without hearing the protected person if the medical report states that his/her hearing may be likely to affect his/her state of health or he/she is not able to express his/her will. The prosecutor attending the trial shall be mandatory. The new regulation provides that when the plaintiff waives the trial, the prosecutor can ask for the continuation of the trial, the criterion being that of the interest of the person whose protection is requested. Finally, the obligation to inform the person whose protection is requested is maintained for the entire duration of the procedure.

After the decision to institute the protective measure has remained final, the court that ruled it (First Instance or Court of Appeal) shall immediately communicate the decision in a certified copy to the institutions mentioned in article 941 of the Civil Procedure Code, as amended by article 8 point 31 of Law no. 140/2022, namely: the Local Public Community Service for Personal Records where the birth of the one placed under protection is registered, in order to make some mention on the birth certificate; to the competent health service, in order to establish a permanent supervision; the competent Office of Cadastre and Land Registration, for the registration in the Land Register, if applicable; the Trade Register, if the person placed under protection is a professional; and, the newly established National registry of support and protection measures taken by the notary public and the guardianship court.

## 4. Conclusions

Law no. 140/2022, taking over the recommendations of the Constitutional Court made on the occasion of delivering Decision no. 601/2020 brings the modern solutions which I have exposed in this study in order to appropriately respond to the

[34] A. Tabacu, *Drept procesual civil. Legislație internă și internațională. Doctrină și jurisprudență (Civil procedural law. Domestic and international law. Doctrine and case law)*, Universul Juridic Publishing House, Bucharest, 2019, p. 543.

needs of people with intellectual and psychosocial disabilities, by adopting this normative act aiming at combating social exclusion and discrimination, encouraging the active participation, under equal conditions, of these categories of people in civil life, as well as their social and economic reintegration, with beneficial effects including on their health condition. The solutions offered by the new regulation are perfectible, its application is to be subject to monitoring for a period of 3 years from its entry into force, at the end of which the National Authority for the Protection of the Rights of Persons with Disabilities and the Superior Council of Magistracy will draw up impact assessment reports and formulate proposals to improve the legislation.

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# UNDERSTANDING THE REJECTION OF PRESENTED DOCUMENTS PERIOD IN UCP 600

**Le Thuc Linh BUI***

## Abstract

*This article covers aspects relating to the documentary rejection period in letters of credit after the examination period in the Uniform Customs and Practice for Documentary Credits. After briefly outlining the primary purposes and functions of letters of credit, the author will discuss the time frame following the bank's determination that the submitted documents do not meet the criteria of the letter of credit, including consulting with the applicant, the window for issuing a rejection, and post-notice obligations of the bank.*

**Keywords:** *Uniform Customs and Practice for Documentary Credit, rejection, a notice of rejection, documents, letters of credit.*

## 1. Introduction

A letter of credit is a kind of financial mechanism that often serves as a payment guarantee in an international transaction. Initially, the purpose of the letters of credit was to provide a trustworthy payment confirmation from a different financial third party. A third party, generally a bank, distributes the letter of credit. The bank providing this financial instrument is obligated to pay for documents that appear to meet the specifications of the letter of credit. Otherwise, the bank shall refuse to honour the presented documents. Letters of credit have grown in reputation as a reliable financial mechanism by providing sellers with payment certainty and buyers with goods upon delivery.

The documents are the core for the stability and reputation of letters of credit. As a result, after having a certain amount of time to review the provided documents, the bank must decide whether to accept or dishonour them once it determines that they do not correspond with the letter of credit's conditions. In either case, further bank duties are triggered. In its professional judgement, the bank could contact the applicant for a waiver considering Article 16 of UCP 600. The notification of rejection will be given to the presenter by the bank once the denial has been decided. The transaction of the letter of credit is not yet complete even after the presenter receives the notification of refusal from the bank. A few standards must be fulfilled regarding the formal, contextual, and post-notice obligations of the bank in the rejection period under the regime of UCP 600. These requirements concerning the notice of rejection and post-notice obligations are not usually mentioned and might be violated by the bank in case the presenter is not familiar with the regulations in UCP 600. The presenter should be well informed about the regime of UCP 600 regarding these obligations of the bank so that he can protect himself from being taken advantage of. Article 16 of UCP 600

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specifies 3 types of banks, so any of the three banks may be referred to when one of the banks is mentioned in this context. Naturally, where it is necessary to distinguish between various circumstances, either in the UCP or in reality, the author will also particularly analyse the legal position faced by a certain bank. Consequently, this article will focus on the steps required in practice to reject a documentary presentation under the provision of UCP 600. After briefly introducing the significance of the rejection, the author shall discuss the specific steps when the notice of refusal period runs. The criteria for the formality and substance of the refuse notification shall be carefully reviewed, and the author will address the next steps after receiving the notice of rejection to specify it.

## 2. The mechanism of letters of credit

### 2.1. Introduction

Letters of credit are a special type of negotiable instrument used to guarantee one party's performance toward another [1]. A probable financial instability of the promisor- the bank- shall issue such an instrument. This letter of credit is considered the third agreement in a series of transactions. The first agreement is the agreement between the person whom the letter of credit favours, or called the beneficiary, and the bank's customer who asks for the letter of credit. This contract involves a promise from the customer to pay the beneficiary in a sale or a service agreement[2].

The issuing bank[3] and its client enter a second arrangement. The customer[4] needs to apply to have a letter of credit, which outlines the requirements of such a letter and includes a pledge to refund the issuing bank upon the receipt of acceptable documents. When the beneficiary presents the documents, such documents must meet the requirements listed by the customer in the second contract with the issuer. If the submitted documents are proper, the issuer has to pay, and the customer cannot interrupt this obligation[5]. In other words, the letter of credit is a commitment from the customer to the beneficiary to support the customer's agreement to pay money stipulated in the first contract.

It is significant to note that the issuer of the letter of credit is primarily concerned with the document and whether they meet the letter of credit's conditions. The

[1] UCP 600 Article 3. According to Article 3 of UCP 600, the letter of credit is irrevocable, except there is another requirement. The irrevocable letter of credit is the binding promise of the issuer that once the letter of credit is issued, it requires consent and writing to cancel.

[2] The modern form of letters of credit are the commercial letters of credit, or documentary credit, and the standby letters of credit, which is considered the most utilized type of credit.

[3] According to Article 2 of UCP 600, the issuing bank is the bank, which is required to issue the letter of credit, which can be called the issuer.

[4] The client of the bank is now called applicant in the letter of credit transaction.

[5] UCP 600 Article 4 provides:

"a. A credit by its nature is a separate transaction from the sale or other contract on which it may be based. Banks are in no way concerned with or bound by such a contract, even if any reference whatsoever to it is included in the credit. Consequently, the undertaking of a bank to honour, negotiate or fulfil any other obligation under the credit is not subject to claims or defences by the applicant resulting from its relationships with the issuing bank or the beneficiary.

A beneficiary can in no case avail itself of the contractual relationships existing between banks or between the applicant and the issuing bank.

b. An issuing bank should discourage any attempt by the applicant to include, as an integral part of the credit, copies of the underlying contract, proforma invoice and the like."

performance obligations in the underlying contract are not under the basic tenet of letter-of-credit law. The independent principle, one of the key tenets of the letter of credit, serves as the foundation for this special utility. The independent principle, as stated in Article 4 of UCP 600, permits the bank to stay in its area of competence and is neither required nor authorised to be concerned with the actual functioning of the underlying transaction. The letter of credit is designed to make it simpler to get the necessary absolute certainty. It would defeat the purpose of such a payment instrument to compel or engage the issuing bank in any of the numerous performance issues resulting from the underlying contract.

The Uniform of Customs and Practices for Documentary Credits

The Uniform of Customs and Practices for Documentary Credits (hereinafter referred to as "UCP"), which was developed by the International Chamber of Commerce (hereinafter referred to as "ICC"), was an attempt to condense international customs into a set of written international standards for letters of credit. The UCP has undergone several revisions and is regarded as a collection of rules. The UCP gained widespread acceptance beginning in 1983[6]. This 1983 edition put more emphasis on a variety of topics, including the new letter of credit types, and the use of cutting-edge transmission technologies like SWIFT[7]. From this version, UCP presented two types of letters of credit which are standby and commercial letters of credit. Due to the fact that banks rejected roughly 50% of the paperwork submitted, the UCP was changed once more in 1993 and is known as UCP 500. The newest version, known as UCP 600, is valid through 2007.

The success of UCP may be attributed to its efforts to unify financial standards with those of international commerce and to remove technological obstacles that impede letters of credit from operating efficiently. Today, UCP apply to the majority of letters of credit[8]. Despite being generally acknowledged in many nations throughout the world, the UCP is still not regarded as a legal document[9].

## 3. The rejection period of the presented documents

### 3.1. Significance of the rejection period

In letters of credit, the issuing and the confirming banks have a responsibility to first review the provided documents. This commitment entails several general exams as well as unique requirements. Once "reasonable care" has been taken to evaluate the documents, the banks are compelled to honour or negotiate them. The banks must deliver a single rejected notification by the end of the fifth business day following the presentation if the documents do not meet the criteria in the letter of credit[10]. The next

[6] G. Xiang and R. P. Buckley, *The Unique Jurisprudence of Letter of Credit: Its Origin and Source*, San Diego International Law Journal, vol. 4, 2003, p. 110.

[7] E. Ellinger, *The Uniform Customs- Their nature and the 1983 Revision*, Lloyd's Mar. & Com. L.Q.,1984, p. 582. SWIFT stands for "Society for Worldwide Interbank Financial Telecommunications".

[8] G. Xiang and R. P. Buckley, *The Unique Jurisprudence of Letter of Credit: Its Origin and Source*, San Diego International Law Journal, vol. 4, 2003, p. 112.

[9] E. Ellinger, *The Uniform Customs- Their nature and the 1983 Revision*, Lloyd's Mar. & Com. L.Q.,1984, p. 578.

[10] UCP 600 Article 14 (b) provides:

"b. A nominated bank acting on its nomination, a confirming bank, if any, and the issuing bank shall each have a maximum of five banking days following the day of presentation to determine if a presentation is complying.

obligations regarding the rejection of the bank shall be triggered in the next stage.

Clarifying the particular banks engaged in the duties regarding rejection is important before moving to the next part. The issuer, the confirmer, and the nominated bank are the three different sorts of banks that are referenced in Article 16 of UCP 600. However, if one carefully reads Article 16(b) of UCP 600[11], the only bank that requests a pre-refusal waiver referred is the issuing bank. In addition, only the confirming bank and the issuing bank have explicitly been included in Article 16(f) of UCP 600[12]. Under many conditions, it appears that the legal parties may change regularly. However, the goal of the author in this article is to discuss all the banks' responsibilities regarding the rejection of discrepant documents. Therefore, it could be any one of the three banks to be referred to when a bank is mentioned.

### 3.2. Consultation with the applicant

According to a survey by Professor Mann[13], while the applicant's rate of waiver is high (over 90%), compliance with the documents is fairly poor (as low as 27%). Although most applicants indeed tend to waive the discrepant papers, it is never advisable for the bank to confer with them before asking for a waiver. The issuer may, in professional judgement, ask for a waiver from the applicant in line with Article 16(b) of UCP 600. It can be seen that only the issuer has the opportunity to request a waiver from the applicant before sending the rejection.

Even if the bank gets a waiver from the applicant, the decision on the presentation will ultimately be made by the bank alone. Although Article 16 (b) of UCP 600 would seem to give the issuer a choice, in reality, Article 16(b) pushes the bank to make its own decisions, which might have a dual effect on the bank. This indicates that during the entire process of requesting the client for a waiver, a bank must examine and decide on a presentation using its sole discretion. The bank is also constrained by the window of opportunity for approaching the applicant, which permits no more than five banking days in the UCP600. In other words, the bank has discretion, but it still needs to fulfil the duties outlined in the UCP.

As long as the bank bases its decision solely on its judgement, it is the right, not the obligation, to request a waiver from the applicant[14]. As a result, considering the independent principle in Article 4, the bank is therefore exempt from contacting its client to request the waiver. Even after obtaining a waiver, the bank retains the authority to manage the submission in accordance with its exclusive discretion. The bank is not obligated to follow the waiver, according to the ICC Banking Commission. Obviously, the bank has no obligation to inform the

This period is not curtailed or otherwise affected by the occurrence on or after the date of presentation of any expiry date or last day for presentation."

[11] UCP 600 Article 16 (b) provides:

"b. When an issuing bank determines that a presentation does not comply, it may in its sole judgement approach the applicant for a waiver of the discrepancies. This does not, however, extend the period mentioned in sub-article 14 (b)."

[12] UCP 600 Article 16 (f) provides:

"f. If an issuing bank or a confirming bank fails to act in accordance with the provisions of this article, it shall be precluded from claiming that the documents do not constitute a complying presentation."

[13] R. J. Mann, *The Role of Letters of Credit in Payment Transactions*, Michigan Law Review, vol. 98, no. 8, 2000, pp. 2503-2504.

[14] *Bankers Trust Co. v. State bank of India* [1991] 2 Lloyd's Rep 443 (CA) 455.

applicant of the deadline or to contact them in any other way[15].

There is a further question to be represented in this circumstance whether the confirming or nominated bank has the right to ask the applicant for a waiver. According to the judge from the case *Total Energy Asia Ltd v. Standard Charter Bank (Hong Kong) Ltd*, the answer is positive. The judgement acknowledged that the only legitimate party to request a waiver from the applicant is the issuer, but the Court went on to admit that there is nothing to prevent the confirming bank, in reality, to find the procurement "of a waiver from the applicant"[16]. The only notable difference between the position of a nominated bank[17] and that of an issuing bank is the nominated bank must request to obtain a waiver from both the issuer and the applicant within the permitted time frame. If the nominated bank cannot meet the time limitation requirement, the preclusion rule will be put into effect. The applicant and the issuer must be contacted in five banking days if a nominated bank wishes to request a waiver. Despite the anomalies that the applicant has previously agreed to waive, the issuing bank may nevertheless have the right to reject the presentation[18].

Additionally, the UCP 600 does not specifically forbid the nominated banks from getting in touch with the applicant and requesting the waiver. The nominated banks must also consider the viewpoint of the issuing bank by seeking its advice on discrepancies if they intend to request a waiver from the applicant. Due to the time restriction requirement, it would be preferable for the nominated banks to just reject the documents[19].

### 3.3. Time for giving notice of refusal

The beneficiary of the letter of credit has a greater chance of receiving payment by submitting the required documents within a specific period. By meeting its responsibilities on schedule, the bank would be successful in getting reimbursement from its customer. When the bank decides to dishonour a presentation because the documents fail to meet the criteria of the letter of credit, a refusal notification to inform the presenter within a specific period should be served when the bank decides to dishonour such presentation.

Since Article 16(d) of UCP 400, which specified the bank must deliver a refusal notification "without delay" after a decision is made, this practice has been mandated[20]. According to Article 14(d)(i) of UCP 500[21], the bank shall notify the customer "without delay but no later than the conclusion of the seventh banking day" once the bank chooses to refuse the documents. The term "without delay" has been removed from Article 16(d) of UCP 600, which now calls for delivering notice of rejection "no later than the closing of the fifth banking day after the day of presentation.". The judgement in *Seaconsar*

[15] Department of Policy and Business Practices, *Examination of Documents, Waiver of Discrepancies and Notice under UCP 500*, 9 April 2002. This document is available online at: https://iccwbo.org/content/uploads/sites/3/2002/04/Examination-of-Documents-Waiver-of-Discrepancies-and-Notice.pdf. (Last accessed 14 April 2022).

[16] *Total Energy Asia Ltd v Standard Charted Bank (Hong Kong) Ltd* [2007] 1 HKLRD 871; [2006] HKCU 2134 [122].

[17] The nominated bank here are the non-nominated bank and the confirming bank.

[18] Due to the independent principle, the applicant's waiver and the nominated bank's opinion are not binding on the issuing bank.

[19] UCP 600 Article 14 (b).

[20] UCP 400 Article 16 (d).

[21] UCP 500 Article 14 provides the outer time limit is seven banking days.

*(Far East) Ltd v. Bank Markazi Jomhouri Islami Iran* interpreted "without delay" as providing a notice of refusal[22]. The court's decision in this instance indicated that the documents were dishonoured at or near "the close of business" on Friday, hence it is anticipated that the rejection notification shall be provided on the next banking day, which was Monday. The Court further stated that "It may well be that in other cases the obligation requires notice to be given on the same day as the decision is taken"[23]. Even though the notice was delivered on Tuesday, the Court in this instant case unexpectedly stated that the defendant's bank had promptly provided the notice. The plaintiff was unable to demonstrate any unjustifiable reason for the delay between the time of determination and notification, which was the cause. According to others, "without unreasonable delay" was the real standard that the Court backed[24]. In other words, it indicates that even if a delay is brought on by circumstances outside the bank's control, the bank nonetheless fulfils its commitments promptly.

The notification must be given latest by the end of the fifth banking day after the presentation day, as per Article 16(d) of UCP 600. The timeline for taking the exam and deciding is the same in Articles 14(b) and Article 16(b) of UCP 600, hence it is advisable that all three articles be studied together[25]. Adopting this interpretation, the bank must review the given documents, determine whether to accept or reject such submission and deliver the refusal notification if it chooses to do so within five banking days or by the end of the fifth banking day. Otherwise, the bank shall lose its right to reimbursement.

### 3.4. The notice of rejection

#### 3.4.1. A single notice of rejection

A single notification must be provided to the presenter if the bank chooses to reject the presented documents in accordance with Article 16(c) of UCP 600[26]. The term "a single notification" is implemented so that the bank can only declare its points of view on each document presentation once. A single notification is crucial to avoid undue confusion and issues caused by many alerts, allowing the beneficiary to quickly remedy the discovered discrepancies and make a fresh presentation.

In case the bank sends several notifications concerning the discrepant documents, only the first notification would

[22] This case is considered leading case since UCP 400 and was introduced again in UCP 500 and UCP 600.

[23] *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1999] 1 Lloyd's Rep 36 (CA).

[24] *Rafsanjan Pistachio Producers Cooperative v Bank Leumi (UK) Ltd* [1992] 1 Lloyd's Rep 513 (QB).

[25] P. Ellinger and D. Neo, *The Law and Practice of Documentary Letters of Credit*, 1st ed., vol. 1, Hart Publishing, Bloomsbury Publishing, 2010, p. 242.

[26] UCP 600 Article 16 (c) provides:

"c. When a nominated bank acting on its nomination, a confirming bank, if any, or the issuing bank decides to refuse to honour or negotiate, it must give a single notice to that effect to the presenter.

The notice must state:

i. that the bank is refusing to honour or negotiate; and

ii. each discrepancy in respect of which the bank refuses to honour or negotiate; and

iii.

a) that the bank is holding the documents pending further instructions from the presenter; or

b) that the issuing bank is holding the documents until it receives a waiver from the applicant and agrees to accept it, or receives further instructions from the presenter prior to agreeing to accept a waiver; or

c) that the bank is returning the documents; or

d) that the bank is acting in accordance with instructions previously received from the presenter."

be valid for the bank to reply to, the other subsequent notifications containing more discrepancies shall not be taken seriously[27]. Hence, in other words, even when the first notice is ignored or transmitted in error, the second notice cannot replace the first one[28]. Nonetheless, the second notice is presumably acceptable in case it clarifies the first notice's main points, and the first notification continues to be effective under its original terms[29].

It is important to keep in mind that not all notifications sent from a bank concerning the discrepancies in the documents would qualify as refusal notifications under Article 16(c) of UCP 600, and some of them are essentially discrepancy alerts[30]. It is challenging to precisely identify what should be included in a relevant notification. The Court in the case *Total Energy Asia Ltd v. Standard Chartered Bank (Hong Kong) Ltd* had expressed that the first fax with the list including all errors and a subsequent phone call expressing rejection and disposal of the document was considered a genuine rejection under UCP 500[31]. In view of the specific requirement of Article 16(c) of UCP600 for "a single notification," it is recommended for the bank send a single notice of rejection in order to avoid any risks and conflicts caused by multiple communications[32].

### 3.4.2. The statement of notice of rejection

Within the notice, the bank is required, considering Article 16(c) of UCP 600, to "state that the bank is refusing to honour or negotiate". In contrast to the UCP500, which did not have such a clear criterion, it is an extra step. According to Professor James Byrne, it was enough that the notification clearly stated that the documents were being rejected under Article 14 (d) of UCP 500[33]. Instead of reporting the applicant's waiver to the presenter, it is advised that the refusing bank disclose its purpose of denial[34]. The aim of the refusing bank will be debatable and disputed in the absence of an explicit statement of rejection. For example, in the case *Voest-Alpine Trading USA Corp. v. Bank of China*, the rejection was not openly written in the notice of the bank. In their statement, the bank informed that they were reaching the applicant and the bank was "holding documents at your risks and disposal"[35]. Due to the open potential that the allegedly incorrect documents may have been approved in the future, this notice was viewed as just "a status report" instead of a legitimate refusal notification[36]. The aim of rejection must be stated in the notification, even though using the word "refuse" explicitly is not necessary.

[27] Department of Policy and Business Practices, Examination of Documents, Waiver of Discrepancies and Notice under UCP 500, 9 April 2002. This document is available online at: https://iccwbo.org/content/uploads/sites/3/2002/04/Examination-of-Documents-Waiver-of-Discrepancies-and-Notice.pdf. (Last accessed 14 April 2022).

[28] *Cooperative Centrale Raiffeisen-Baerenleenbank BA v Bank of China* [2004] HKC 119 [66].

[29] *Kumagai-Zenecon Construction Pte Ltd v Arab Bank Plc* [1997] SGCA 41, [1997] 2 SLR (R) 1020 [29]-[31].

[30] *Cooperative Centrale Raiffeisen-Boerenleenbank BA v Sumitomo Bank (The Royan)* [1988] 2 Lloyd's Rep 250 (CA) 254.

[31] UCP 500 Article 14.

[32] UCP 600 Article 16 (c).

[33] J. E. Byrne, *Comparison of UCP 600 & UCP 500*, 1st Edition ed., vol. 1, International Chamber of Commerce, 2007, p. 147.

[34] *Bayerische Vereinsbank AG v National Bank of Pakistan* [1997] 1 Lloyd's Rep 59 (QB).

[35] *Voest-Alpine Trading USA Corp v Bank of China* 288 F 3rd 262 (5th Cir 2000) 266.

[36] *Korea Exchange Bank v Standard Chartered Bank* [2005] SGHC 220, [2006] 1 SLR 565 [12].

### 3.4.3. Each discrepancy

Within the single notice, considering Article 16(c) of UCP 600, it is required to include "each discrepancy in respect of which the bank refuses to honour or negotiate.". With the term "each discrepancy", Article 16(c) wants to emphasize that the bank only has one opportunity to send the notice of rejection[37]. This regulation supports the provision of "a single notice" that intends to increase the effectiveness of documenting activities while also giving the beneficiary additional opportunity in presenting complying documents. Likewise, the bank shall bear the burden of unlawful rejection regarding originally unjustified inconsistencies. The bank can only be entitled to claim for uncured errors stipulated in the notice of rejection rather than any new flaws which were not indicated in a such single notice.

Even though UCP 600 has not mentioned the identification of the inconsistencies to be listed sufficiently precisely and clearly in the notification of rejection, this responsibility of the bank must be mentioned. This specification is really in line with the intention of the "each discrepancy" provision. Such criterion intends to disclose all discrepancies in the presented documents and allow the presenters to remedy the errors as soon as possible. The Court in the case of *Korea Exchange Bank v. Standard Chartered Bank* held that the claiming of the bank stating that the original certificate A "show inconsistent with other documents" was flawed. The reason behind this ruling was that the notice of rejection lack of clarity about what needed to be fixed, which caused the presenter confusion[38]. It might raise the argument that the necessity of "a single notice" will preclude the bank from delivering a follow-up message that clarifies the points which are stated in the initial notice. Hence, the bank must precisely and thoroughly disclose each consistency with precision[39].

### 3.5. The disposal statements

Once the bank forwards the notice of rejection, no matter whatever alternative the bank chooses, it must follow the disposal statement. For instance, the preclusion rule is stated in Article 14(e) of UCP 500 and is to be triggered when the bank "fails to hold the documents at the proposal of or return them to the presenter"[40]. In the instance of *Credit Industriel et Commercial v. China Merchant Bank*, the post-notice responsibility was subjected to the preclusion provision of UCP 500. The issuer nevertheless refused to release the documents because of a security concern even though the presenter had given his "return" instructions. According to the Court's decision, the security consideration was an invalid rationale, and by failing to take the proper step, the issuing bank had breached the disposal statement. The issuer was unable to respond to any apparent inconsistencies as a result[41].

[37] UCP 600 Article 16 (c).

[38] *Korea Exchange Bank v Standard Chartered Bank* [2005] SGHC 220, [2006] 1 SLR 565 [12].

[39] Department of Policy and Business Practices, *Examination of Documents, Waiver of Discrepancies and Notice under UCP 500*, 9 April 2002. This document is available online at: https://iccwbo.org/content/uploads/sites/3/2002/04/Examination-of-Documents-Waiver-of-Discrepancies-and-Notice.pdf. (Last accessed 14 April 2022).

[40] UCP 500 Article 14 (e).

[41] *Credit Industriel et Commercial v China Merchants Bank* [2002] EWHC 973 (Comm).

The preclusion provision in Article 16(f)[42] of UCP 600 has eliminated several terms to be more concise than Article 14 (e) of UCP 500. Nonetheless, very little in Article 16 of UCP 600 refers to the consequences of the bank neglecting to keep the documents or giving them back to the presenter. Surprisingly, the intentional removal of the terms sparks unwarranted debates and a range of scepticism in academics. The wording of Article 16(f) is quite broad to encompass any deficiency, according to Professor Ellinger, who claims that "the omission could be due to the inclusion of two additional options in Article 16(c)(iii)."[43].

The Court of case *Fortis Bank and Stemcor UK. Limited v Indian Overseas Bank* had clarified the UCP 600's post-notice requirements for the bank. Despite having provided notice of rejection in this instance, the issuing bank failed to promptly arrange for the document return to the presenter in accordance with its disposal statement[44]. Both the First-instance Court and the Court of Appeal came to the conclusion that the issuing bank's subsequent acts or inactions to a "return/hold" notification should be subject to the requirements demonstrated in Article 16 of UCP 600. As a result, the issuer would be prevented from asserting the non-complying documents since it had not acted in accordance with its disposal statements. It is obvious that both courts reached the appropriate judgement, such a conclusion that would meet market expectations and adhere to the spirit of the UCP 600.

Another aspect of the disposal statements which should be mentioned is the timing and method to dispose of. The rejecting bank is advised that in accordance with its disposal statements, it must give the documents back right away or follow any instructions the presenter gives within a certain time span. In the case of *Fortis Bank*, the finding basically recognised the views of experts and applied them to the duties of the bank in UCP 600. According to Hamblen J in Commercial Court, considering Article 16 of UCP 600, the issuing bank was obligated to follow through on its disposal declaration and restore the submitted documents as soon as possible. Hamblen J also described the extent of the post-notice responsibilities in relation to a "return" or "hold" notification[45]. It should be understood that the stage of “the issuing bank is *returning* the document” is not equal to “it is already in the process of doing so”. For the same reason, the “hold” notification does not specify that it has established “means for prompt compliance with any future instruction for the return of the documents”, it just means that the issuing bank must quickly comply with new orders and provide the documents by effective means[46].

Additionally, Jonathan Hirst suggested that “in the absence of special extenuating”, three banking days is the base practice for the bank to successfully “act with reasonable promptness” in order to balance factors between the "five banking days" of the

[42] Article 16 (f) of UCP 600 provides: “If an issuing bank or a confirming bank fails to act in accordance with the provisions of this article, it shall be precluded from claiming that the documents do not constitute a complying presentation.”

[43] P. Ellinger and D. Neo, *The Law and Practice of Documentary Letters of Credit*, 1st ed., vol. 1, Hart Publishing, Bloomsbury Publishing, 2010, p. 245.

[44] *Fortis Bank v Indian Overseas Bank* [2011] EWCA Civ 58, [2011] 2 All ER (Comm) 288 [55].

[45] *Fortis Bank v Indian Overseas Bank* [2011] EWCA Civ 58, [2011] 2 All ER (Comm) 288 [55].

[46] *Fortis Bank v Indian Overseas Bank* [2011] EWCA Civ 58, [2011] 2 All ER (Comm) 288 [55].

bank[47] and the consequence of restoring the documents to the presenter[48].

Despite the fact that the *Fortis Bank* case significantly improved the timeliness of the post-notification requirements, it made no mention of how to submit the documents or how to adhere to subsequent directions. In consideration, the methods of returning the documents could be the same as the methods of dispatching documents. In order to fulfil the responsibilities, the issuing bank should use a courier or, if that is not feasible, another quick method. Nonetheless, the bank shall not be liable for the timely and secure delivery of the documents[49]. Force majeure provision in Article 36 of UCP 600 may be invoked by the bank under certain conditions as a justification for events beyond its control[50].

### 3.6. Conditions of the returned documents

The profit and safety of both merchants and banks are deeply linked with the condition of the documents that are rejected, for example, the bills of lading which are documents that function as documents of title. Even though the UCP does not directly mention the status of the returned documents, it is clear that the bank should restore all documents at once and at the very least, in the same status as when they were acquired[51]. The presenter's instructions should not, however, serve as a justification for the bank to keep the documents since Article 16(e) of UCP 600 clearly states that when the bank selects a "hold" notice, it implies that the documents can be returned to the presenter at any moment[52].

It is now debatable whether it is necessary to re-endorse the documents that were rejected. If the refusing bank returns a bill of lading that has previously been endorsed in the favour of the presenter, there is no clear obligation under Article 16 of UCP 600 that it must do so again. The ICC Opinions R214 can be used as a reference for the information pertaining to the circumstances of the returned documents. There was an opinion of the expert in the ICC Opinion R214 that “the confirming bank has no right to object to the procedure followed by the issuing bank, and the confirming bank cannot expect the issuing bank to endorse documents which it has not agreed to take up under the documentary

[47] The duties of investigation and determination should be distinct from the post-notice obligations, and the time limit should be counted against the time limit in Article 14(b) separately.

[48] *Fortis Bank v Indian Overseas Bank* [2011] EWCA Civ 58, [2011] 2 All ER (Comm) 288 [55].

[49] The issuing bank is not required to guarantee that the documents will be delivered in a reasonable amount of time. The bank is just required to select the fastest delivery methods.

[50] UCP 600 Article 36 provides:

“Force Majeure

A bank assumes no liability or responsibility for the consequences arising out of the interruption of its business by Acts of God, riots, civil commotions, insurrections, wars, acts of terrorism, or by any strikes or lockouts or any other causes beyond its control.

A bank will not, upon resumption of its business, honour or negotiate under a credit that expired during such interruption of its business.”

[51] *Credit Industriel et Commercial v China Merchants Bank* [2002] EWHC 973 (Comm). The Banking Commission emphasised that in this particular instance, the bank that personally endorsed the applicant's rejected bill of lading had violated the provisions of Article 16 (c) (iii) of UCP 600 because it was unable to return the rejected documents in the same form as when they were first received.

[52] *Credit Industriel et Commercial v China Merchants Bank* [2002] EWHC 973 (Comm). The Court states that the authorisation from the applicant was not evidence for the issuer to keep the documents.

credit."[53]. Furthermore, the bank is not permitted to alter the rejected documents because they are acknowledged as the presenter's property.

Hamblen J made an effort to differentiate between the facts and the contemporary circumstances in the case of *Fortis Bank*. He accepted that, concerning Opinion R214, the bank cannot claim non-endorsement after receiving the documents[54], but Hamblen J determined that because the request was made before the documents were returned, the presenter was permitted to get re-endorsed documents in the current instance[55]. Unfortunately, the Court derived this decision from its examination of the specific details of the instant case and did not state that the bank was required to re-endorse the documents that had been rejected in accordance with the presenter's instructions.

### 3.7. The preclusion rules

Considering Article 16(f) of UCP 600, if the issuing and the confirming bank fail to operate with the regulations in Article 16, they will "be precluded from claiming that the documents do not constitute a complying presentation."[56]. This regulation means that the banks are only permitted to turn the presented documents down by a single notice, once they fail to comply with this provision, the banks shall lose their right to allege that the submitted documents do not conform to the requirements in the letter of credit. The preclusion rule's application will require the bank strictly abide by the UCP regulations and provide the presenter additional chances to re-present the corrected documents. The preclusion rule can nonetheless speed up the process of releasing the rejected documents to the presenter even if the differences raised by the bank cannot be resolved[57]. Consequently, from a business standpoint, the preclusion rule with severe repercussions has precisely met the demands of markets, from a business standpoint, the preclusion rule with its severe repercussions has precisely met the demands of markets.

The most contention about the applicability of the preclusion provision is whether the checking period specified in UCP600 Article 14(b) should be taken into consideration under the preclusion rule. According to UCP 600, it appears that the time requirements in Article 16(d) and the period of checking documents in Article 14(b) coexist. Given that all of them have a maximum total of five banking days, it is advised that Article 14(b) be read in conjunction with Articles 16(b) and 16(d). However, the language of the preclusion rule has previously stated that it applies to only the provisions of Article 16.

The regulation relating to time was regulated in only one article under UCP 400[58], and the preclusion rule under UCP 400 was covered in one article. Then this

[53] ICC Banking Commission, *Failure to endorse a bill of lading (ICC Opinion R214)*, ICC Publising Inc., 1995-2001.

[54] *Ibidem.*

[55] *Fortis Bank v Indian Overseas Bank* [2011] EWCA Civ 58, [2011] 2 All ER (Comm) 288 [55].

[56] UCP 600 Article 16 (f).

[57] *Fortis Bank v Indian Overseas Bank* [2011] EWCA Civ 58, [2011] 2 All ER (Comm) 288 [55].

[58] Article 16 (c) of UCP 400 required the bank to review the documents in a reasonable amount of time, and Article 16 (d) of UCP 400 required the bank to promptly notify the presenter by sending a notice of refusal. Both of the aforementioned elements were specifically covered by the preclusion rule in UCP400 Article 16 (e).

problem only surfaced after the UCP500[59]. The lingering impact of the UCP400 was still significant even if the clause pertaining to the period of the evaluation was removed from the application of the UCP500's preclusion rule. The majority of commentators thought that the UCP500's wording was flawed and that the preclusion rule may still be applied in cases of late examination under the terms of another article [23]. The only situation in which this argument could be applied, even if the late examination was covered by the UCP500's preclusion provision, was when it took more than a permissible reasonable period but no longer than seven banking days.

Additionally, nothing was changed or made clearer in the UCP 600; on the contrary, the use of the word "maximum" instead of the phrase "appropriate duration" has made things much murkier. The continuous use of the single pronoun "this article" in Article 16(f) of UCP 600 indicates that the writers of the UCP 600 did not intend to apply the preclusion rule to Article 14 of UCP 600 [16, p. 134]. Additionally, the preclusion rule has less leeway to be applied due to the revised time frame in Article 14(b) of UCP 600. Failing to complete the documentary checking in five banking days would violate the next process for issuing a refusal notification under Article 16(d) of UCP 600, which would automatically trigger the preclusion rule.

In the author's opinion, Article 16(d) of UCP 600 and the preclusion rule's applicability have the same five banking days has confirmed the drafter's objective for a defined term. By isolating the examination period from Article 16 which is subject to the preclusion rule, the UCP may attempt to separate the examination obligation through the following processes. Therefore, Article 14(b) could not be covered by the preclusion rule in UCP600; nevertheless, it might be argued that if the time restriction in Article 16(d) is violated, the same outcome will be achieved.

## 4. Conclusion

Due to the independence of the letter of credit, the issuing bank is able to make an independent decision regarding the conformance of the submitted documents without consulting the problems arising from the underlying contract. The bank will determine whether to dishonour or reject the provided documents after the discrepancies in the documents are discovered. The applicant may now be consulted by the bank for granting a waiver. A single notice of denial will then be given within five banking days to the presenter if the bank decides to dishonour the discrepant documents, regardless of whether the applicant issues a waiver. However, the requirements for sending the notice of rejection are strict. The notification must contain all discrepancies and may only be delivered once, and the banks' duties go beyond just delivering the notification. The requirements regarding the notification of rejection and other post-notice obligations of the bank shall be triggered in the next stage and should be considered carefully. These obligations include the disposal of the documents, conditions of returned documents and the preclusion provisions. However, these obligations of the bank are not usually mentioned, hence, the presenter might not know about these obligations. As a consequence, the rights of the presenter might be affected. Hence, the author decides

[59] The Article 13 (a) of UCP 500 brought forth the requirement for the period of examination; nevertheless, Article 14 (d) of UCP 500 gave the time for delivering the rejection notice, and Article 14 (e) stated the preclusion rule.

to present the specific details of the rejection of the presented document under the regime of UCP 600 in an effort to introduce the specific steps after the bank decides that the documents do not conform with the letter of credit. Furthermore, the author has identified certain benefits and shortcomings with regard to the current UCP 600 regime by comparing it to earlier UCP amendments and case law. Regarding the theoretical and practical problems surrounding the UCP regulations, the author also sought to provide compliments. The regulations regarding the rejection notice period in the regime of UCP 600 are recognised compared to its predecessors.

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# CONSIDERATIONS REGARDING CLASSIFICATION AS JOBS PERFORMED IN SPECIAL WORKING CONDITIONS OF THE JOBS CARRIED OUT BY THE STAFF OF THE ANATOMIC PATHOLOGY AND FORENSIC DEPARTMENTS WITHIN LEGAL MEDICINE INSTITUTIONS

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## Abstract

*This paper focuses on issues dealing with inclusion under the difficult working conditions regime of the jobs carried out by the staff of the Anatomic Pathology and Forensic Departments within legal medicine institutions, following adjudication as unconstitutional of the legislative solution referred to in Article 22 of Law no. 104/2003 on the handling of human corpses and the harvesting of organs and tissues from corpses for transplantation purposes, republished, under Decision no. 53/2020 issued by the Constitutional Court of Romania. Analyzing the tortuous evolution of the laws and regulations applicable in the matter under consideration, this paper seeks to clarify the issue of bringing under the difficult working conditions regime the jobs done by the personnel working in the anatomical pathology and forensic departments of the legal medicine institutions, in comparison with the personnel carrying out identical jobs within hospitals and with the staff of the Cellular Biology, Anatomy, Histology and Pathological Anatomy departments within universities. We do not intend to cover all of the topics that make up this overarching theme, but to simply focus on the current legal status of the staff who work in the anatomic pathology and forensic departments of the legal medicine institutions, highlighting, at the same time, the legislative shortcomings of the Romanian medical system. We then conclude this paper with a few considerations on the practice of the courts and with formulation of proposals aimed at mending what we consider to be a failure of the lawmaker in regulating a legal issue which, although it originates from employment relationships, has legal effects in terms of employees' pension rights.*

**Keywords:** *special working conditions, pension right, unconstitutional, legal medicine institutions, pathological anatomy and forensic (prosecution) services.*

## 1. Introduction

This paper examines the main aspects related to inclusion under the special working conditions regime of the jobs carried out by the staff of the pathological anatomy and forensic departments within legal medicine institutions. With regard to the legal issue that is the subject matter of this paper, it should be noted that, although the issue of job classification originates from employment relationships, the seat of the matter is the social insurance legislation. Such a classification generates legal effects on the employee's pension rights plan - materializing in the granting of additional periods to their length of service, which represents contribution periods, the decrease in the retirement age in relation to the length of service in difficult working conditions, as

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well as the increase of the monthly scores achieved in the respective periods – subject to a condition which must be fulfilled during the contribution period, namely that of withholding and paying social insurance contributions that are differentiated on a percentage basis depending on the type of working conditions.

The issue dealt with in this paper is of utmost importance, given the inconsistent interpretation and application of *Law no. 104/2003 regarding the handling of human corpses and the harvesting of organs and tissues from corpses for transplantation purposes*, republished (hereinafter referred to as "**Law no. 104/2003**"), a mishap that was generated by a regulatory omission, be it intentional or not. More specifically, the legislative solution referred to in Article 22[1] of Law no. 104/2003 was seen, on the one hand, as a privilege granted by the lawmaker to a certain category of personnel, namely the staff working in the pathological anatomy and autopsy departments of the hospitals, as well as the staff of the Anatomy, Histology, Pathological Anatomy and Cellular Biology Departments within universities, and, on the other hand, as a completely unjustified disadvantage in the case of the staff who carry out identical activities within the forensic medicine institutions.

In other words, Law no. 104/2003 has established a special regulation, derogating from the common law in the matter of public pension system – i.e. Law no. 19/2000 regarding the public pension scheme and other social security rights, in force at that time, and Law no. 263/2010 on the unitary public pension scheme, in force at the date of this paper – regarding classification of certain jobs under the special working conditions regime, in the sense that Law no. 104/2003 classifies *ope legis* these jobs as jobs performed under special working conditions, without any preliminary evaluation procedures, based on the degree of occupational hazards the personnel carrying out jobs in the pathological anatomy and autopsy departments of hospitals are exposed to, compared to the staff of the Anatomy, Histology, Pathological Anatomy and Cellular Biology departments in universities.

Despite the fact that the lawmaker has intended to regulate in favor a certain category of employees – based on obvious data, in the sense that, no matter what steps are taken to reduce or eliminate the risks factors associated with handling human corpses, such risks cannot possibly be completely eliminated – in disregard of the principle of equal rights[2], the lawmaker has in fact managed to create a discrimination between the category of employees nominated by the law and the employees of the legal medicine institutions, who carry out activities that are identical with those referred to in Article 22 of Law no. 104/2003.

(Un)fortunately, this situation has ultimately called for examination by the Constitutional Court of Romania of the constitutionality of the legal provision concerned, with the Court holding, by its Decision no. 53 of February 4, 2020[3] (hereinafter referred to as "**Decision no. 53/2020**"), paragraph 34, that "*the criticized*

[1] Article 22 of Law no. 104/2023 reads as follows: "Jobs performed by the staff working in the pathological anatomy and autopsy departments of hospitals, as well as the staff of the Anatomy, Histology, Pathological Anatomy and Cellular Biology Departments within universities fall under the category of jobs performed in special working conditions".

[2] Under incidence of Article 16 (1) of the Constitution, which reads as follows: "All citizens are equal before the law and public authorities and are entitled without any privileges or discrimination to the protection of the law".

[3] Published in the Official Journal of Romania, Part I, no. 199 of March 12, 2020.

*legal provisions are discriminatory, creating an unreasonable divide in legal treatment, in terms of the legal measures regarding the security and health of employees, between the personnel who carry out their jobs under similar working conditions, for which reasons the legal provisions concerned are adjudicated as unconstitutional*."

Until present, there has been no specialized literature addressing the legal issues related to inclusion under the special working conditions regime of the jobs performed by the staff of the pathological anatomy and forensic departments of the legal medicine institutions, or dealing, at least, with the current legal standing of the staff referred to in Article 22 of Law no. 104/2003, in a situation where, although more than three years have passed since the publication of Decision no. 53/2020, the lawmaker has not bothered to review the criticized legal provisions and make them compliant with the decision of the Constitutional Court of Romania, fact that has led to inconsistencies in the interpretation and application of Law no. 104/2003, including the provisions regarding the personnel referred to by the law under consideration.

## 2. Legislative evolution

It is worth noting that there has been a tortuous evolution of the applicable legal norms in the matter under consideration, marked by the transition from an approach whereby the task of job classification was left with the employers (with a potential fault of the employer affecting directly the employees) to the *ex lege* classification of jobs under the special working conditions regime in the case of staff carrying out pathological anatomy and forensic activities within hospital settings, within legal medicine institutions and within the Anatomy, Histology, Anatomic Pathology and Cellular Biology Departments of universities.

### 2.1. Regulations applicable between April 1, 2001 and April 3, 2003

From the historical and teleological interpretation of the legal texts that are incident in this field, it should be noted that, after April 1, 2001, when Law no. 19/2000 regarding the public pension scheme and other social insurance rights (hereinafter referred to as "**Law no. 19/2000**") came into force, the former system, according to which jobs had been classified under work groups I, II and III on the basis of a procedure that was the employer's responsibility, was abandoned. Under the new regulation, jobs were defined and classified as follows: jobs performed under difficult conditions, jobs performed under special conditions and jobs performed under normal conditions, based on criteria established by the law.

In essence, the correspondence between the former special work groups and the difficult working conditions was established under Article 15 of Government Decision no. 261/2001 regarding the criteria and methodology for classification of jobs performed under difficult conditions (hereinafter referred to as "**Government Decision no. 261/2001**")[4], according to which jobs, activities and professional categories that had been classified under the work groups I and II until the entry into force of the new normative act were considered activities carried out under difficult conditions, except for those that, according to the provisions of Law no. 19/2000, were classified as activities carried out in working

[4] Currently repealed.

environments characterized as special working conditions.

Thus, the activity that had previously been performed in a higher work group was a necessary yet not a sufficient condition for its classification under the category of job performed in difficult conditions, since, from the corroborated interpretation of the provisions of Article 19 (2) and (5) of Law no. 19/2000 and Article 16 of Government Decision no. 261/2001, it follows that the classification of jobs under the special working conditions regime could be carried out by the employer provided only that, following application of the methodologies established by the aforementioned decision, the employer managed to obtain approval by the administrative body, and only for the jobs expressly specified in the approval.

The approval for classification of jobs as jobs performed under difficult (special) conditions had to include a set of relevant information and was granted on the basis of the documents expressly provided for in Article 4 (1) of the Government Decision no. 260/2001: determinations of occupational health hazards carried out by the authorized laboratories listed in Annex no. 1 of the Decision in the presence of labour inspectors, findings of the territorial labour inspectorates and copies of the list of occupational diseases or the summary of medical analyzes and the evaluation sheet referred to in Annex no. 2 or 3 to the said Decision.

Although it is beyond the scope of our analysis, it is worth noting that Government Decision no. 260/2001 was in force until its repeal by Government Decision no. 246/2007 establishing the methodology for renewing the approvals for job classification under the special working conditions regime (hereinafter referred to as "**Government Decision no. 246/2007**")[5], a normative act that established the methodology for renewing the approvals regarding classification of jobs under the special working conditions regime, whose scope covered the employers who were holding valid approvals at the time, because, after the entry into force of the Government Decision no. 246/2007, the granting of new approvals was no longer possible, so the only procedure allowed was the renewal of approvals that had already been issued.

### 2.2. Regulations applicable after April 3, 2003

On April 3, 2003, Law no. 104/2003, republished in 2014, was enacted, which is the general legal framework that regulates on the handling of human corpses and the harvesting (procurement) of organs and tissues from corpses, and in particular on the specialized activity carried out in hospital settings, though specific legislation was in place at the time in the forensic medicine field.

Examining the content of Article 22, one may notice that the lawmaker classifies under the special working conditions regime the jobs carried out by the personnel working in the pathological anatomy and morgue departments of hospitals, as well as the personnel of the Anatomy, Histology, Pathological Anatomy and Biology departments of universities, while ignoring the jobs of the anatomic pathologists and forensic specialists working with legal medicine institutions, despite the fact that the activities carried out by forensic institutions are identical or at least comparable to the similar activities carried out in hospital settings, though the occupational hazards associated with handling human corpses and examining biological samples are present in both cases.

[5] Currently repealed.

By Decision no. 24/2019[6] of the High Court of Cassation and Justice – the Panel dealing with the review for the uniform interpretation of the law – the Court held that "for *a uniform interpretation and application of the provisions of Article 22 of Law no. 104/2003 regarding the handling of human corpses and the harvesting of organs and tissues from corpses for transplantation purposes, republished, the jobs of the staff working in the pathological anatomy and morgue departments of hospitals, as well as the staff working in the Anatomy, Histology, Pathological Anatomy and Cellular Biology departments of universities shall be treated ex lege as jobs performed under special working conditions, without the obligation to apply the methodology established by Government Decision no. 261/2001 regarding the criteria and methodology for classification of jobs as jobs performed in special working conditions, with subsequent amendments and additions, and, by Government Decision no. 246/2007, respectively, regarding the methodology for renewing the approvals for classification of jobs as jobs performed under special working conditions, with subsequent amendments and additions, as regard the criteria and methodology for such classification*".

Therefore, in view of the rulings by the High Court of Cassation and Justice, after the entry into force of Law no. 104/2003, the employer is required to pay to the state budget the social insurance contributions corresponding to the special working conditions, to the knowledge of the territorial pension houses, without having to go through formalities for obtaining approvals from the territorial labour inspectorate, as we have shown above.

The same Decision has also shown that, when drafting Law no. 104/2003, account was taken of the need to regulate the pathological anatomy and forensic activities carried out in hospitals and to protect the doctors and the patients during performance of the medical acts, as well as of the need to regulate on the legal and ethical conditions for performing necropsies and collection of corpses by the higher medical education institutions, for teaching or scientific purposes.

The High Court of Cassation and Justice also held that the phrase "*special working conditions*" should be interpreted in a consistent manner, both from the perspective of the fact that the lawmaker had automatically eliminated by law the possibility that the jobs concerned be classified as jobs performed in normal working conditions, as well as from the perspective of the rights and obligations of the employees and of the employer, with practical consequences on salary level and on the amount of contributions payable to the public pension scheme. As a matter of fact, one of the reasons why the employer was required, according to Law no. 19/2000 (until the entry into force of Law no. 104/2003), to obtain approval for placing jobs under the special working conditions regime, was the fact that the decision-makers involved in this procedure were constantly looking for an improvement, a normalization of the working conditions, so as to prevent work accidents and occupational diseases, a goal that is actually impossible to achieve when it comes to the specialized personnel referred to in Article 22 of Law no. 104/2003.

It should also be noted that the activities of forensic and anatomic pathology autopsies are carried out only in hospitals or within forensic medicine institutions, according to Article 7 of Law no. 104/2003, so the law has emphasized the

[6] Published in the Official Journal of Romania, Part I, no. 1001 of 12.12.2019.

special nature of the working conditions associated with the performance of the jobs of the specialized personnel specified under Article 22 of the aforesaid normative act.

Insofar as the Government Ordinance no. 1/2000 regarding the organization of the activity and the functioning of legal medicine institutions, republished, does not grant forensic doctors the same rights that Article 22 of Law no. 104/2003 grants to the personnel working in the pathological anatomy and autopsy departments of hospitals and to the staff of the Anatomy, Histology, Pathological anatomy and Biology departments of universities, the establishment of a different legal treatment for forensic doctors is unsubstantiated.

Moreover, this law-making method is hard to understand, given that, as Decision no. 24/2019 itself has stated, there should be a correlative compensation for the efforts and occupational hazards to which the people working in pathological anatomy and forensic departments are exposed to, such compensation to also include the granting of benefits upon exercising their pension rights.

This discriminating regulation has generated disputes among the medical staff, as well as labour conflicts between the staff working in the pathological anatomy and forensic departments within legal medicine institutions and their employers and has eventually led to a review of the constitutionality of the legal provision concerned by the Constitutional Court of Romania, with the Court holding in its Decision no. 53/2020 that the legislative solution referred to in Article 22 of Law no. 104/2003 is unconstitutional.

In its considerations, the Constitutional Court has shown that "*medical and educational activities involving the handling of human corpses and the harvesting of organs and tissues from corpses for transplantation purposes are benefiting from a special regulation, which establishes specific rights for the personnel who carry out these type of activities, such as, for example, the right to inclusion of their jobs in the category of jobs performed under special working conditions. These jobs are also a part of the duties of the legal medicine institutions. However, considering the specifics of these institutions, namely their contribution to the administration of justice by establishing the truth in criminal, civil or other matters, forensic medicine is covered by a separate regulation, i.e. by Government Ordinance no. 1/2000. However, the Court considers that the pathological anatomy and forensic activities carried out within these institutions are exposed to the same occupational hazards as the similar activities carried out in hospitals. Therefore, application of a distinct legal treatment to the staff of legal medicine institutions that carry out activities of this kind, by precluding them from enjoying the benefits associated with classification of their jobs as jobs performed in special working conditions, appears to lack any objective and reasonable grounds. The fact that the activity of forensic medicine institutions contributes to the administration of justice cannot be regarded as an objective and by no means as a reasonable ground for enactment of a distinct set of rules, with discriminatory consequences, given that the occupational hazards based on which such jobs are classified as jobs performed under special working conditions are identical with the hazards attached to the jobs performed by the forensic staff within the legal medicine institutions, such risk deriving from the very nature of this specific type of activities, as we have held above. Therefore, the Court considers that the criticized legal provisions are discriminatory and create an unfounded divide in legal treatment, in terms of the legal measures concerning the health and safety of employees, between the different*

*types of personnel carrying out jobs in similar working conditions, which is why the criticized provisions are adjudicated as unconstitutional."*

By Decision no. 53/2020, the Constitutional Court did not find the provisions of Article 22 of Law no. 104/2003 to be unconstitutional in their entirety, nor did the Court held that some of the provisions concerned should be eliminated from the text of law, but the Court limited its judgment to adjudicating as unconstitutional the legislative solution of excluding the staff from legal medicine institutions, who carry out medical activities involving handling of human corpses, from the category of personnel performing jobs that are classified as jobs performed in special working conditions.

Obviously, the manner in which the Constitutional Court of Romania has understood to settle the plea of constitutional challenge of the legal provisions under considerations has an impact also on the legal effects that the admission of the plea generates in terms of application of the provisions of Article 22 of Law no. 104/2003, such effects to be analysed by taking into account, on the one hand, the fact that we are in the presence of an *a posteriori* review of constitutionality and, on the other hand, the fact that the decision is of an interpretative nature.

The specialized literature has shown that interpretive decisions are decisions which, while they do not expressly establish that a given piece of legislation is unconstitutional, they nevertheless attach a certain meaning to the criticized norms, in an attempt to make those norms compatible with the Romanian Constitution by the way the norms are interpreted and in consideration of the grounds presented. An interpretive decision, as the author emphasizes, does not adjudicate a piece of legislation as absolutely constitutional or unconstitutional; instead, it leaves room for interpretation by using the wording "*to the extent that*", with the legal norm following to be interpreted as the Constitutional Court of Romania may decide[7].

We will not embark here on an elaborate analysis of the typology of Decision no. 53/2020, which would rather be more appropriate for a monograph. Instead, we will emphasize the fact that, as the case law has consistently held[8], from the analysis of the considerations of the aforesaid decision, it does not appear that the constitutional court considered a solution in the sense that, given the existence of an unjustified discrepancy in legal treatment between the category of staff expressly mentioned in Article 22 of Law no. 104/2003 and the staff carrying out similar jobs within forensic medicine institutions, the legal provisions concerned should no longer apply. Instead, the constitutional court has attached to the legal norm concerned a meaning that is in accordance with the Fundamental Law.

In fact, the Constitutional Court ruled that, regardless of the interpretations that may be given to a text of law, when the Court decides that only a certain interpretation is in accordance with the Romanian Constitution,

[7] C. Ionescu, I. Chelaru, *Considerations on the Decisions of the Constitutional Court and Their Legal Effects*, Law Review, Issue 9, 2015.

[8] See in this regard Decision no. 3947 of November 3, 2020 pronounced by the Bucharest Court of Appeal – Section VII in cases dealing with labour disputes and social insurance, Decision no. 2578 of April 19, 2022 pronounced by the Bucharest Court of Appeal - Section VII in cases dealing with labour conflicts and social insurance, Decision no. 3704 of June 9, 2022 pronounced by the Bucharest Court of Appeal - Section VII in cases dealing with labour disputes and social insurance, Decision no. 5415 of October 17, 2022 pronounced by the Bucharest Court of Appeal - Section VII in cases dealing with labour disputes and social insurance.

thereby maintaining the presumption of constitutionality of the text in its interpretation, then the law courts and the administrative bodies must comply with the Court's decision and apply it as such.

This being said, it follows that, although Article 147 (1) of the Constitution establishes that the provisions of the laws, orders and regulations in force, which are found to be unconstitutional, should cease to produce legal effects 45 days after publication of the Decision of the Constitutional Court of Romania, unless the parliament or the government, as the case may be, does not reconcile within the said timeframe the unconstitutional provisions with the provisions of the Constitution, in the present case, the text of law under consideration cannot be considered to have been removed from the legislation insofar as it is still applied in the interpretation established by the Constitutional Court.

On the other hand, like any other decision of the Court, interpretative decisions are generally binding, according to the provisions of Article 147 (4) of the Constitution [9]. As a matter of fact, the specialized literature says that it is precisely the constitutional enshrining of the general binding nature of the Court's decisions which establishes that they should be imposed on all the subjects of law, in the exact same manner as a normative act, unlike the decisions of the law courts, which are binding only *inter partes litigants*[10].

### 3. Conclusions

At least at first glance, the intervention of the Constitutional Court seems to be intended to put an end to the disputes regarding interpretation of the provisions of Article 22 of Law no. 104/2003, in the sense that the jobs of the staff working in the pathological anatomy and forensic departments of legal medicine institutions should be included *ex lege* in the category of jobs performed in special working conditions, without the need to apply the methodology established by Government Decision no. 261/2001 and Government Decision no. 246/2007, respectively, and should benefit from the same treatment applicable to the personnel carrying out their jobs in the pathological anatomy and morgue departments of hospitals.

However, the confrontation of the legal norm with the reality has revealed that certain aspects related to the inclusion under the special working conditions regime of the activity of the staff of legal medicine institutions carrying out medical activities involving the handling of human corpses call for improvement or additions, such aspects being presented in this paper as *de lege ferenda* propositions.

Thus, even if the constitutional court has decided how to interpret the provisions of Article 22 of Law no. 104/2003 in accordance with the rules of the Fundamental Law, we believe that the choice of the Romanian lawmaker to not expressly provide under Article 22 of Law no. 104/2003 that the jobs performed by the staff working in the pathological anatomy and forensic departments of the legal medicine institutions are included *ex lege* in the category of jobs performed under special working conditions, should be amended by expressly regulating on this matter accordingly.

[9] Article 147 (4) of the Constitution reads as follows: “Decisions of the Constitutional Court are published in the Official Journal of Romania.” From the date of publication, the decisions are generally binding and are effective only for the future”.

[10] C. Ionescu, I. Chelaru, *op. cit.*

In fact, it has happened quite often in practice that the requests for establishing the classification of such jobs as jobs performed in special working conditions, as well as the request for the payment of social insurance contributions in relation to the special working conditions, formulated by the staff working in the pathological anatomy and morgue departments of medical institutions to be rejected by employers, relying on lack of an express legal regulation in this field, with employees being thus forced to turn to justice.

A more serious ground for concern is the fact that, validating the idea according to which Article 22 of Law no. 104/2003 ceased to produce legal effects as of April 26, 2020 because the lawmaker had not amended the challenged provisions, we might expect to witness to some bizarre situations, to say the least, where the jobs carried out by the personnel working in pathological anatomy and autopsy departments of hospitals and the jobs of the staff working in the Anatomy, Histology, Pathological Anatomy and Biology departments of universities are excluded from the category of jobs classified as jobs performed in special working conditions.

On the other hand, we appreciate the fact that the lawmaker has left out of the scope of Article 22 of Law no. 104/2003 the personnel who carry out medical activities involving the handling of human corpses, but who are assigned to other divisions/departments within forensic medicine institutions, such as the toxicology laboratory personnel. Given that they carry out activities under working conditions similar to those referred to in Article 22 of the aforementioned normative act, we propose that, *de lege ferenda*, the lawmaker should consider the fact that equal rights should be granted to this latter category of personnel as well.

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- Law no. 19/2000 regarding the public pension scheme and other social security rights;
- Law no. 263/2010 on the unitary public pension scheme;
- Decision no. 53/2020 issued by the Constitutional Court of Romania;
- Government Decision no. 261/2001 regarding the criteria and methodology for classification of jobs performed under difficult conditions;
- Government Decision no. 246/2007 establishing the methodology for renewing the approvals for job classification under the special working conditions regime;
- Decision no. 24/2019 of the High Court of Cassation and Justice – the Panel dealing with the review for the uniform interpretation of the law;
- Government Ordinance no. 1/2000 regarding the organization of the activity and the functioning of legal medicine institutions.

# NATIONAL AND INTERNATIONAL LEGAL AND CONSTITUTIONAL ORDER. CONVERGENT AND DIVERGENT

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## Abstract

*The relationship between the national law and the law of the European Union is interpreted differently, there are several doctrinal concepts and different jurisprudence solutions. One school of thought asserts the supremacy of the Constitution, including over European Union law, even if it accepts the priority of application of the latter, in its mandatory rules, over all other rules of domestic law, and another the priority of unconditional application of all the provisions of the law of the European Union compared to all the rules of the internal law, including the constitutional rules.There are European constitutional jurisdictions that have established that they have the competence to control the constitutionality of European Union law, integrated into the internal legal order, by virtue of the principle of the supremacy of the Fundamental Law. The Romanian Constitution enshrines two principles of a different nature and with specific implications whose effects are convergent but also divergent: the supremacy of the Constitution and the priority of European Union law. In this study we analyse the interferences between the principle of priority of European Union law and the principle of supremacy of the Constitution with reference to the relevant doctrine and jurisprudence in the matter.*

**Keywords:** *National legal and constitutional order / International legal order/ Principle of priority of European Union law / Principle of the supremacy of the Constitution / Obligation of legal norms of the European Union / Conformity national law with European Union law.*

## 1. Introduction

One of the most important defining elements of the European Union is the existence of its own system made up of principles, written norms and rules established by jurisprudence. Therefore, it is important to clarify the relations between the European Union law and national law. The solution to this problem is found in a set of rules that are not explicitly provided in the Constituent Treaties but were developed by the Court of Justice through several decisions, some of them controversial. The constitutions of the Member States of the European Union state rules of principle regarding the relationship between European Union law and national law.

In practical terms, the interference between European Union law and national law occurs especially when there are contradictions between the legal norms belonging to the legal systems. Of course, the problem of the relationship between the two categories of legal norms is of interest not only in such a situation, but also in cases where a court can apply a norm of European Union law. One of the most important aspects of this issue is the relationship

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between the supremacy of the constitution, and, on the other hand, the priority principle of the law of the European Union as well as the competences of the constitutional jurisdiction in the matter of application and interpretation of the rules stated by the legal acts of the European Union.

We believe that this issue can be analysed on two levels: 1. the relationship between domestic law (other than the constitutional law) and the European Union law; 2. the relationship between the constitutional norms of the Member States, and, on the other hand, the law of the European Union.

One of the most interesting discussions, jurisprudential and doctrinal, involving the constitutional courts of the member states of the European Union, concerns the cooperation mechanisms with the Court of Justice of the European Union. The jurisprudence of the Court of Justice of the European Union, the doctrine, but also the internal legislation refers to the principle of priority or supremacy, primacy, pre-eminence of European Union law over the national law systems.

## 2. Content

The relationship between the constitutional norms and European Union Law is interpreted differently, there are several doctrinal conceptions. One current of thought affirms the supremacy of the Constitution, including over the European Union law, even if it accepts the priority of applying the latter, in its mandatory norms, over all other norms of domestic law, and another the priority of systematic and unconditional application of all the provisions of the European Union Law in relation to all the norms of the internal law, including the national constitutions. Some traditional European constitutional jurisdictions have reached, at certain moments and historical contexts, the conclusion that it is within their competence to control the constitutionality of the European Union law, integrated into the internal legal order, by virtue of the principle of the supremacy of the fundamental law (for example, the German Constitutional Tribunal).

The Court of Justice reached the development of the principle of priority of the European Union law, considering the rule of public international law, according to which "A party cannot invoke the provisions of his domestic law to justify the non-execution of a Treaty". Another source was represented by the provisions of art. 10 of the Treaty of the European Community, modified by the Treaty of Lisbon. The norm contained in the provisions of art. 10, however, remained unchanged until now and establishes the obligation of the member states to take all the necessary measures to ensure the fulfilment of the obligations resulting from the treaties and acts of the Community institutions. The same provisions impose the negative obligation of the Member States to refrain from taking measures that would endanger the achievement of the Treaty's goals. These are not the only regulations from the European Union Treaties that underpin the principle of priority of the European Union law over the national law.

The principle of priority and obligation of the Law of the European Union was built especially through jurisprudence. In this matter, the historical jurisprudence of the Court of Justice of the European Union is relevant, which marks a certain evolution of the affirmation of this principle in relation to the national law.

A significant moment is represented by the *Costa v. Enel* case[1]. The Italian court submitted two requests for interpretation, one to the Constitutional Court of Italy and the other to the Court of Justice of the European Union. The Constitutional Court considered that the Treaty establishing the European Community can only have a normative value to the extent that it is incorporated into the law national through a law. At the same time, it was admitted that a national law can derogate from the provisions of the Treaty.

The Court of Justice had a different opinion expressed in the pronounced decision: "It follows from these considerations that the legal system born from the Treaty, an independent source of law, cannot, due to its special and original nature, be superseded by the internal legal norms or that would be their legal force, without being deprived of its community law feature and without the very legal foundation of the Community being called into question".

Another moment of the evolution of the jurisprudence of the Court of Justice in this matter is represented by the "International H" cases[2]; "Simmenthal I[3] [35/76, Simmenthal SpA (1976) ECR 1871] and Simmenthal II"[4].

The following considerations from the decision pronounced in the *Simmenthal II* case are relevant for our research topic: "as such, any provision of the national legal order or any practice, legislative, administrative or judicial, which would have the effect of being incompatible with the requirements inherent in the nature of the Community law diminishing the effectiveness of the Community law by refusing the competent judge to apply it, the power to do, at the very moment of this application, all that is necessary to remove the national legal provisions that, possibly, would represent an obstacle to the full effectiveness of community norms. Therefore, the answer to the first question is that the national judge tasked, according to his competence, to apply the provisions of Community law, has the obligation to ensure the full effectiveness of these rules, leaving unapplied, *ex officio*, if necessary, any provision contrary with the national legislation, even later, without requesting or waiting for its prior legislative elimination or by any other constitutional procedure" (para 22 and 24 of the decision).

Moreover, the Court considered that the national courts have the power to constrain and even sanction the legislative power and the executive power in order to guarantee the full efficiency of the principle of priority of European Union law over national law.

This principle must also be understood from the perspective of the rule of obligation of community acts. The *regulation* has general applicability and is mandatory in all its elements. In contrast, the *directive* is addressed to some or all of the Member States and is mandatory with regard to the result to be achieved, leaving for the national authorities the competence regarding the form and the means they use to achieve the set objectives. The *decision* is binding in all its elements on the addressees it indicates.

The rule of direct application that characterizes some of the legal acts of European Union law is of interest to the understanding and application of the priority principle of the European Union law. The

[1] 6/64 Costa c. Enel (1964) ECR 585.
[2] 11/70, Internationale H., (1970) ECR 1125.
[3] 35/76, Simmenthal SpA (1976) ECR 1871.
[4] 106/77, Simmenthal (1978) ECR 629.

regulations have direct application because they do not require transposition into national law. As the court indicated in its jurisprudence, Member States do not have to adopt national legislation to take over the regulations. Their provisions can be invoked by natural and legal persons directly before the national courts. In contrast, the directive is not directly applicable. It must always be transposed into the legal system of each Member State to which it is addressed. The domestic normative act transposing the directive is the one through which the content of the directive will enter the national legal system.

The principle of priority of the European Union law over the national law must also be understood according to the criterion of the possibility of direct invocation of community acts before national courts. The phrase "direct effect" denotes the attribute of a community normative act to create in the patrimony of natural and legal persons rights that they can invoke directly before the national courts. Without going into details, we emphasize that under certain conditions, regulations, directives and decisions can have a direct effect.

One of the consequences of the principle of priority of the European Union law is the obligation of national courts to interpret domestic law in accordance with the European Union law. In an attempt to ensure the effectiveness and uniformity of the law of the European Union, the Court of Justice of the European Union established several means to stimulate the states to implement the directives correctly and on time and to ensure their implementation. One of these means is the creation of the doctrine of direct vertical effect of directives.

In the hypothesis in which the provisions of an unimplemented or incorrectly implemented directive cannot have a direct vertical effect because they do not meet the condition of being sufficiently clear, precise and unconditional, in order to be able to deduce the right that the litigant wishes to exploit before the courts national, the Court established the obligation, for the national judge, to interpret the national legislation in relation to the content of the directive.

Among the first cases in which this obligation was expressly stated was the *Van Colson* case. The Court held in the considerations of the pronounced decision that the national legislation limits the right to reparation of persons who have been the object of discrimination in the case of exercising the right to work. Such a situation does not comply with the requirements of the effective transposition of Directive 76/207. Therefore, the court in Luxembourg ruled: "It follows that in the activity of applying the national law and in particular the provisions of a national law specially introduced in order to apply Directive 76/207, the national court is required to interpret the national law in the light of the text and the finality of the directive to obtain the result provided for in art. 189 para 3) of the TCE". Consequently, the Court specified: "It is in the competence of the national court to issue laws adopted in order to apply the directive, to the extent that the national law grants it a margin of appreciation, an interpretation and an application in accordance with the requirements of Community law".

The decision of the Court of Justice of the European Union, pronounced in the case of *Seda Kücükdeveci v. Swedex GmbH & Co.*[5], is also edifying. The Court reaffirms the existence of the principle of non-

[5] Decision C-555/07.

discrimination on grounds of age, as well as the role of the national court in its application. The German regulation which stipulates that periods of work completed before the age of 25 are not taken into account for the calculation of the notice period is contrary to the principle of non-discrimination on grounds of age, as provided by Directive 2000/78. In this situation, the national court must remove, if necessary, any contrary internal regulation, even in the context of a dispute between individuals.

From the considerations of this decision, it follows that Directive 200/78 concretizes the principle of equal treatment in the field of employment. The principle of non-discrimination on grounds of age is a general principle of the Union law. Therefore, the national court referred to a dispute in which the principle of non-discrimination on grounds of age, as provided by Directive 2000/78, is brought into question, is obliged to ensure, within the framework of its competences, the legal protection arising for justiciable in Union Law and to guarantee the full right of this principle, removing, if necessary, the application of any provision, possibly contrary, of the national law.

In accordance with these conclusions of the Court of Justice of the European Union, it follows that the Romanian courts, in the situations where they will apply the provisions of a national law implementing a directive, interpret it in accordance with the text and purpose of the directive. From the jurisprudence of the Court, it follows that the national court is obliged, when it has to apply a law implementing a directive, to take into account not only that law, but the whole set of national law rules and to interpret them in accordance with the requirements the respective directive, in order to pronounce a solution in accordance with the purpose pursued by the community act.

Given that the Romanian law is characterized by excessive procedural formalism and especially by significant inconsistencies and contradictions, the realization of this obligation by the national courts will be very difficult.

Moreover, in its jurisprudence the Court of Justice of the European Union considers that this obligation of the national courts is subject to certain limits. The obligation to interpret domestic law taking into account the text and purpose of the directive exists only to the extent that national law grants a margin of appreciation to the court. In this sense, the Court held the following in the Papino case: "The principle of interpretation in the light of the directive cannot serve as a foundation for a *contra legem* interpretation of national law"[6].

We believe that whenever the national law confers on the court a "related competence" that excludes the existence of a margin of appreciation, the aforementioned obligation does not exist for the national judge. By way of example, some of the procedural normative provisions can be included in this category. Also, in criminal matters, the national courts cannot aggravate the criminal liability of persons in the event that they commit an act criminalized by a directive, if it has not been implemented in domestic law.

Another important issue is the relationship between the constitutional norms, the decisions of the Constitutional Court, and on the other hand the law of the European Union.

Constantly, the constitutional courts of some Member States, especially Germany, Italy and France, considered that the principle of priority of the European Union law does not apply in relation to the

[6] Decision C-105/03.

regulations included in a constitution, because the fundamental law of a state expresses the identity and national sovereignty. This solution particularly concerned the regulations regarding fundamental human rights and freedoms. Until December 1, 2009, when the Treaty of Lisbon and the Charter of Fundamental Rights of the European Union entered into force, the European Union law did not include a coherent normative system for guaranteeing fundamental human rights. Consequently, the courts of the Member States invoked the internal constitutional regulations in such situations.

Moreover, the practice of the courts of the Member States of the European Union does not offer many examples of conflict between the rules of the European Union law, and on the other hand, the constitutional regulations. This situation is explained by the fact that, following the process of joining the European Union, the Member States adapted their constitutional regulations of principle to the specific requirements of the European Union law and established in one form or another the principle of priority of this legal system against domestic law whenever there is a contradiction between the rules of the two categories of legal norms. Of course, this problem remains open and is far from being solved. We note that in the jurisprudence of the Constitutional Council and the French Council of State in recent years, the concept of "constitutional national identity" has been developed. According to this principle, the national courts will always apply the internal constitutional norms, but also the rules inscribed in the ordinary legislation whenever they have no counterpart in the European Union law.

The Romanian Constitution makes the distinction between the principle of the supremacy of the fundamental law, and on the other hand, the principle of the priority of European Union law over national law. Thus, the provisions of Art 1 Para 5 of the Constitution enshrine the principle of the supremacy of the fundamental law: "In Romania, compliance with the Constitution, its supremacy and the laws is mandatory". This principle cannot be mistaken with that of the priority of the law of the European Union over the contrary regulations of the internal laws enshrined in Art 148 Para 2 from the Constitution.

The jurisprudence of the Constitutional Court of Romania reflects this difference.

By DCC no. 148 of April 16, 2003 regarding the constitutionality of the legislative proposal to revise the Romanian Constitution, our constitutional court clearly distinguishes between the supremacy of the Constitution and the principle of priority of the European Union law, stating: "The consequence of accession starts from the fact that the Member States of the European Union have understood to place the communitarian acquis, the constitutive treaties of the European Union and the regulations derived from them in an intermediate position between the Constitution and the other laws when it comes to binding European normative acts". In the specialized legal literature, with reference to the provisions of Art 148 of the Constitution and in accordance with Decision no. 148 of April 16, 2003, it was stated that "Therefore, it can be stated that in the internal legal order, the legal act by which Romania joins the European Union has a legal force inferior to the Constitution

and constitutional laws, but superior to organic and ordinary laws"[7].

In its subsequent jurisprudence, the Constitutional Court seems to have renounced this distinction, basing its decisions only on the principle of the priority of the European Union law[8].

However, by DCC no. 1258 of October 8, 2009[9], which we consider to be of historical importance in subsequent constitutional jurisprudence, the Court finds that an internal law transposing a directive of the European Union into internal law is unconstitutional. Such a solution, in our opinion, enshrines the principle of supremacy of the Constitution and the obligation to respect it in relation to the principle of priority of the European Union law.

Through the decision with the number above, the constitutional court found that the provisions of Law no. 298/2008 (Official Gazette no. 780 of November 21, 2008) are unconstitutional. From the considerations of the decision, it follows that Law no. 298/2008 was adopted to transpose into national legislation the Directive 2006/24/EC of the European Parliament and of the Council of March 15, 2006, regarding the retention of data generated or processed in connection with the provision of publicly accessible electronic communication services or public communication networks. The Court refers to the legal regime of such community acts, emphasizing that: "(...) it imposes its obligation on the Member States of the European Union in terms of the regulated legal solution, not in terms of the specific methods by which this result, the states benefiting from a wide margin of appreciation in order to adopt them according to the specifics of national legislation and realities". Examining the content of the Law no. 298/2008, the Court found that this normative act is likely to affect the exercise of rights or fundamental freedoms, namely the right to intimate, private and family life, the right to secrecy of correspondence and freedom of expression. The constitutional court considers that the restriction of the exercise of these rights does not correspond to the requirements established by art. 53 of the Romanian Constitution[10].

DCC no. 80 of February 16, 2014[11], on the legislative proposal regarding the revision of the Romanian Constitution is relevant for our research topic. Regarding the interpretation of the provisions of Art 148 regarding integration into the European Union, the Court notes that: the "constitutional provisions do not have a declarative character, but represent mandatory constitutional norms, without which the existence of the rule of law, provided for by Art 1 Para 3 from the Constitution. At the same time, the Basic Law represents the framework and extent in which the legislator and the other authorities can act; thus, the interpretations that can be brought to the legal norm must take into account this constitutional requirement, included in Art 1 Para 4 of the Fundamental Law, according to which in Romania the

[7] M. Constantinescu, A. Iorgovan, I. Muraru, E.S. Tănăsescu, *Constituţia României revizuită – comentarii şi explicaţii (Revised Romanian Constitution - comments and explanations)*, All Beck Publishing House, Bucharest, 2004, p. 331.

[8] DCC no. 308/2006, published in the Official Gazette no. 390/5 May 2006; DCC no. 59:2007, published in the Official Gazette no. 98/8 February 2007; DCC no. 1042/2007, published in the Official Gazette no. 12/8 February 2008 and DCC no. 1172/2007, published in the Official Gazette no. 54/23 January 2008.

[9] Published in the Official Gazette no 798/23 November 2009.

[10] DCC no. 17/21 January 2015, published in the Official Gazette no. 79/30 January 2015 through which our constitutional court established the unconstitutionality of the law on Romania's cyber security.

[11] Published in the Official Gazette no 246/7 April 2014.

compliance with the Constitution and its supremacy is mandatory".

Another aspect analyzed in the constitutional jurisprudence refers to the application of the Charter of Fundamental Rights of the European Union within the framework of the constitutional review. Our constitutional court ruled that, in principle, this is applicable within the framework of constitutionality control "to the extent that it ensures, guarantees and develops the constitutional provisions in the matter of fundamental rights, in other words, to the extent that their level of protection is at least at the level of constitutional norms in the field of human rights"[12].

Also in connection with the application of the European Union norms, regarding human rights within the framework of constitutionality control, it was stated that the reporting of the provisions contained in an act having the same legal force as the constitutive treaties of the European Union must be done according to the provisions of Art 148 of the Constitution, and not those stated by Art 20 of the Basic Law, which refers to international treaties on human rights, other than those of the European Union[13]. Our constitutional court ruled that the provisions of Art 41 of the Charter of Fundamental Rights of the European Union, regarding the right to good administration, can be invoked through the prism of Art 148, and not Art 20 of the Constitution[14].

Also, in the constitutional jurisprudence it was established that it is not within the competence of the Constitutional Court to analyze the conformity of a provision of constitutional law with the text of the Treaty on the Functioning of the European Union, through the prism of Art 148 of the Constitution. Such a competence, namely that of determining whether there is a contradiction between the national law and the treaty, belongs exclusively to the court, which also has the possibility to formulate a preliminary question to the Court of Justice of the European Union. It is interesting that the constitutional court considers itself incompetent to verify the conformity of a provision of national law with the text of the constituent treaties of the European Union and for the fact that, if it were to arrogate such competence, a possible conflict would be reached of jurisdiction between the Constitutional Court of Romania and the Court of Justice of the European Union, which, at this level, is considered inadmissible[15].

Regarding the cooperation between the Constitutional Court and the Court of Justice of the European Union, our constitutional court stated that it remains at its discretion, in the application of the judgments of the Court of Justice of the European Union or the Court's formulation of questions preliminary in order to establish the content of the European norm. "Such an attitude is related to the cooperation between the national and the European constitutional court, as well as to the judicial dialogue between them, without bringing into discussion aspects related to the establishment of a hierarchy between these courts".

The Court of Justice of the European Union, in its recent jurisprudence, has a different opinion and ruled the supremacy of the legal order of the European Union Law,

[12] DCC no. 871/25 June 2010, published in the Official Gazette no. 433/28 June 2010.

[13] DCC no. 967/20 November 2012, published in the Official Gazette no. 853/18 December 2012 and DCC no. 206/6 March 2012, published in the Official Gazette no. 254/17 April 2012.

[14] DCC no. 12/22 January 2013, published in the Official Gazette no. 114/28 February 2013.

[15] DCC no. 1249/7 October 2010, published in the Official Gazette no. 764/16 November 2010 and DCC no. 137/25 February 2010, published in the Official Gazette no. 182/22 March 2010.

over the internal legal order and even over the constitutional order.

Thus, through the Judgment delivered on May 18, 2021[16], the Court of Justice of the European Union rules on a series of reforms in Romania regarding the judicial organization, the disciplinary regime of magistrates, as well as the patrimonial liability of the state and the personal liability of judges for judicial errors.

Six requests for a preliminary decision were made before the Romanian constitutional court in the context of the disputes between legal entities or natural persons, on the one hand, and authorities or bodies such as the Judicial Inspection, the Superior Council of the Magistracy and the Prosecutor's Office attached to the High Court of Cassation and Justice, on the other hand. The main disputes are in the context of a far-reaching reform in the field of justice and the fight against corruption in Romania, a reform that has been subject to monitoring at the level of the European Union since 2007, based on the cooperation and verification mechanism established by Decision 2006/928[17] with the occasion of Romania's accession to the Union (hereinafter referred to as "CVM").

In this context, the referring courts raised the issue of the nature and legal effects of the CVM, as well as the scope of the reports drawn up by the Commission pursuant to it. According to these courts, the content, legal nature and temporal extent of the mentioned mechanism should be considered circumscribed by the Accession Treaty, and the requirements formulated in these reports should be binding for Romania. In this regard, however, the respective courts mention a national jurisprudence according to which the Union law would not prevail over the Romanian constitutional order, and Decision 2006/928 could not constitute a reference rule in the framework of a constitutionality review, since this decision was adopted prior to Romania's accession to the Union, and the issue of whether the content, nature and scope of Decision 2006/928/EC falls within the scope of the Accession Treaty has not been the subject of any interpretation by the Court.

Regarding the legal effects of the Decision 2006/928, the Court found that it is binding in all its elements for Romania from the date of its accession to the Union and obliges it to achieve the reference objectives, also mandatory, which appear in the annex to this. The respective objectives, defined as a result of the deficiencies noted by the Commission before Romania's accession to the Union, aim, among other things, to ensure compliance by this member state with the value of the rule of law. Romania is thus obliged to take the appropriate measures in order to achieve the mentioned objectives and to refrain from implementing any measure that risks compromising the achievement of the same objectives.

The Court ruled that the principle of the supremacy of the Union law opposes a national regulation of constitutional rank that deprives a lower court of the right to leave unapplied *ex officio* a national provision that falls within the scope of Decision 2006/928 and which is contrary to the Union law. The Court recalls that, according to established jurisprudence, the

[16] Decision in connected cases C-83/19, the Association "The Forum of Judges in Romania"/Judicial Inspection, C-127/19, the Association "The Forum of Judges in Romania" and the Association "The Movement to Defend the Status of Prosecutors" and OL/Prosecutor's Office attached to the High Court of Cassation and Justice – General Prosecutor of Romania and C-397/19, AX/Romanian State – Ministry of Public Finances.

[17] 2006/928/EC: Commission Decision of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption (OJ 2006 L 354, p. 56, Special Edition, 11/vol. 51, p. 55).

effects associated with the principle of the supremacy of the Union law are imposed on all organs of a Member State, without the internal provisions relating to the distribution of judicial powers, including constitutional ones, being able to prevent this. Also recalling that national courts are obliged, as far as possible, to give domestic law an interpretation that complies with the requirements of the Union law or to leave unapplied *ex officio* any contrary provision of national legislation that could not be subject to such a compliant interpretation, the Court notes that, in the event of a proven violation of the EU Treaty or Decision 2006/928, the principle of supremacy of the Union law requires the referring court to leave the provisions in question unapplied, regardless of whether they are of legislative or constitutional origin.

Through the Decision of December 21, 2022[18], the Court of Justice of the European Union ruled that the Union law opposes the application of a case law of the constitutional court to the extent that it, in conjunction with the national provisions on prescription, creates a systemic risk of impunity.

The supremacy of the Union law requires that national judges have the power to leave unenforced a decision of a constitutional court that is contrary to this right, without being exposed to the risk of being engaged in disciplinary liability.

In the reasoning of the Decision, the following is essentially noted:

In these cases, the question arises as to whether the application of the jurisprudence resulting from various decisions of the Constitutional Court of Romania (Romania), regarding the rules of criminal procedure applicable in matters of fraud and corruption, is likely to violate the Union law, in particular the provisions of this law that aim to protect the financial interests of the Union, guarantee the independence of judges and the value of the rule of law, as well as the principle of the supremacy of the Union law.

The Court, gathered in the Grand Chamber, confirmed its jurisprudence resulting from a previous decision, according to which the CVM is binding in all its elements for Romania[19]. Thus, the acts adopted before accession by the institutions of the Union are binding for Romania from the date of its accession. This is the situation of Decision 2006/928, which is binding in all its elements for Romania as long as it has not been repealed. The benchmarks that aim to ensure respect for the rule of law are also binding. Romania is thus required to take the appropriate measures to achieve these objectives, taking into account the recommendations formulated in the reports drawn up by the Commission[20].

The Union law opposes the application of a jurisprudence of the Constitutional Court that leads to the annulment of judgments handed down by illegally composed panels of judges, to the extent that this, in conjunction with the national provisions on prescription, creates a systemic risk of impunity for acts that constitute serious crimes of fraud affecting the Union's financial interests or corruption.

It was also noted that in this case, the application of the jurisprudence of the Constitutional Court in question has the consequence that the respective cases of fraud and corruption must be re-judged, if necessary, several times, at first instance

[18] Decision for the connected cases C-357/19 Euro Box Promotion et al., C379/19 DNA – Oradea Territorial Service, C-547/19 Association "The Forum of Judges", C-811/19 FQ et al., and C-840/19 N.

[19] Decision of 18 May 2021, the Association "The Forum of Judges" et al., C-83 C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 (see also CP no. 82/21).

[20] Pursuant to the principle of loyal cooperation, enshrined in Article 4(3) TEU.

and/or on appeal. Given its complexity and length, such a retrial inevitably has the effect of prolonging the duration of the related criminal proceedings.

The Court recalls that, taking into account the specific obligations incumbent on Romania under Decision 2006/928, national regulation and practice in this matter cannot have the consequence of extending the duration of investigations into corruption offenses or weakening the fight against corruption in any other way. On the other hand, taking into account the national statutes of limitation, the retrial of the cases in question could lead to the statute of limitations of the crimes and could prevent the sanctioning, in an effective and dissuasive way, of the persons who occupy the most important positions in the Romanian state and who were convicted of committing acts of serious fraud and/or serious corruption in the exercise of their functions. Therefore, the risk of impunity would become systemic for this category of persons and would call into question the objective of combating high-level corruption.

In the reasoning, the supremacy of the European Union law is invoked and it is noted that the principle of the supremacy of the Union law prevents national courts from being able, at the risk of applying disciplinary sanctions, to leave unapplied the decisions of the Constitutional Court contrary to the Union law.

The Court recalls that, in its jurisprudence regarding the EEC Treaty, it established the principle of the supremacy of Community law, understood in the sense that it enshrines the prevalence of this right over the law of the Member States. In this regard, the Court found that the establishment by the EEC Treaty of a legal order of its own, accepted by the Member States on the basis of reciprocity, has as a corollary the impossibility of the mentioned states to prevail against this legal order, a subsequent unilateral measure or to oppose to the right born from the EEC Treaty norms of national law, regardless of their nature, otherwise there is a risk that this right will lose its community character and that the legal foundation of the Community itself will be called into question.

In addition, the executive force of the Community law cannot vary from one Member State to another depending on subsequent domestic laws, otherwise there is a risk that the achievement of the objectives of the EEC Treaty will be jeopardized, nor can it give rise to discrimination on the grounds of citizenship or nationality, prohibited by this treaty. The Court thus considered that, although it was concluded in the form of an international agreement, the EEC Treaty constitutes the constitutional charter of a community of law, and the essential features of the community legal order thus constituted are in particular its supremacy in relation to the law of the Member States and its direct effect of a whole series of provisions applicable to Member States and their nationals.

According to the Court, the effects associated with the principle of the supremacy of Union law are imposed on all organs of a member state, without the internal provisions, including constitutional ones, being able to prevent this. National courts are required to leave unapplied, *ex officio*, any national regulation or practice contrary to a provision of Union law which has direct effect, without having to request or wait for the prior elimination of that national regulation or practice by legislative means or by any another constitutional procedure.

On the other hand, the fact that national judges are not exposed to procedures or disciplinary sanctions for having exercised the option to refer the Court under Art 267 TFEU, which belongs

to their exclusive competence, constitutes an inherent guarantee of their independence. Thus, in the hypothesis in which a national common law judge would come to consider, in the light of a Court decision, that the jurisprudence of the national constitutional court is contrary to Union law, the fact that this national judge would leave the said jurisprudence unapplied cannot engage his disciplinary liability.

### 3. Conclusions

In the opinion of our constitutional court, to consider that the law of the European Union is applied without any differentiation within the national legal order, not distinguishing between the Constitution and the other internal laws, is equivalent to placing the Fundamental Law in a secondary plan compared to the legal order of the European Union. The legitimacy of the Constitution is the will of the people itself, which means that it cannot lose its binding force, even if there are inconsistencies between its provisions and the European ones. Moreover, it was emphasized that Romania's accession to the European Union cannot affect the supremacy of the Constitution over the entire internal legal order.

The Constitutional Court has established that the mandatory acts of the European Union are norms introduced within the framework of constitutionality control[21]. At the same time, the lack of constitutional relevance of the European law norm, interposed in constitutional reference norms within the framework of constitutionality control, was emphasized. In this case, it is inadmissible to refer the Court based on non-compliance with the provisions of Art 148 Para 4 of the Constitution[22]. Through the same decision, the Court established that it is necessary for the legal norm of the European Union law to be circumscribed to a certain level of constitutional relevance, so that its normative content supports the possible violation by the national law of the Constitution – "the only direct norm of reference in within the framework of constitutional control". The constitutional court consecrated, just like the French Constitutional Council, the concept of "national constitutional identity", by which it understands the relevance of the supremacy of the constitution whenever the question of compliance of internal laws with the European Union acts arises[23].

The Constitutional Court of Romania, in a press release, stated the following, with reference to the recent Decisions of the Court of Justice of the European Union issued recently regarding the relationship between the internal constitutional order and, on the other hand, the law of the European Union: according to Art 147 Para 4 of the Constitution, the decisions of the Constitutional Court are and remain generally binding.

Moreover, the CJEU also recognizes, in its Decision of December 21, 2021, the binding feature of the decisions of the Constitutional Court. However, the conclusions of the CJEU Decision according to which the effects of the principle of the supremacy of the EU law are imposed on all organs of a member state, without internal provisions, including those of a constitutional order, being able to prevent this, and according to which national courts are required to leave unapplied, *ex officio*, any regulation or national practice contrary

[21] DCC no. 668/18 May 2011, published in the Official Gazette no. 487/8 July 2011.
[22] DCC no. 157/19 March 2014, published in the Official Gazette no. 296/23 April 2014.
[23] DCC no. 64/24 February 2015, published in the Official Gazette no. 286/28 April 2015.

to a provision of the EU law, assumes the revision of the Constitution in force.

In practical terms, the effects of this Decision can be produced only after the revision of the Constitution in force, which, however, cannot be done as a matter of law, but exclusively at the initiative of certain legal subjects, in compliance with the procedure and under the conditions provided for in the Romanian Constitution itself.

We fully agree with the opinion expressed by the Constitutional Court.

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- DCC no. 157/19 March 2014, published in the Official Gazette no. 296/23 April 2014;
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# PREDICTABILITY AND ACCESSIBILITY OF THE LAW

**Elena ANGHEL**[*]

## Abstract

*"Where the force of the laws and the authority of their defenders cease, there can be neither liberty nor safety for any", wrote Shakespeare. The rule of law presupposes the obligation to respect the Constitution and the laws, as provided by the provisions of art. 1 paragraph (5) of the Constitution. In order for the law to be accepted and respected, it must present a certain legal security, assuming the requirements of accessibility and predictability, logical coherence and stability, features designed to capture the trust of citizens in its provisions. The need to match laws with time and not time with laws has been emphasized since antiquity. But, as we will show in the present study, the belief in the perfectibility of the law was gradually deprived of rights. The lack of accessibility and predictability of legal provisions is increasingly invoked before the Constitutional Court, which ruled, in numerous cases, on the violation of these requirements, by reference to the jurisprudence of the European Court of Human Rights, as the existence of interpretation problems and law enforcement is inherent in any legal system, given the fact that, inevitably, legal norms have a certain degree of generality. As the Constitutional Court ruled in its jurisprudence, the obligation to respect the laws does not imply, by its content, the provision of an inflexible legislative framework. Legislative intervention is necessary both to adapt the normative acts to the existing economic, social and political realities, but also to ensure a unitary legislative framework, which contributes to a better application of the law and to the removal of any ambiguous situations or inequities in the application of the law*[1].

**Keywords:** *law, predictability, accessibility, jurisprudence, interpretation.*

## 1. Introduction

The law means legal order, according to Mircea Djuvara; the necessity of the law arises from a principle of the justice: the need for security of the society. "Nothing can more easily give rise to injustice than the arbitrary liberty of the one applying the law, to enforce it in an invariable manner, according to one's discretions. It is actually one of the most important needs which ensures the legal order, that everyone knows, as far as possible, what rule will be applicable and not to be left prey to personal inspirations and the instability they can lead to, in one's activity".

There has been constantly stated in the case-law of the court of contentious constitutional that the rule of law is a mechanism the operation of which entails the establishment of a climate of order, in which the recognition and valorization of an individual's rights cannot be conceived in an absolute and discretionary way, but only in relation with the observance of the rights of

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[1] Decision no. 1237/2010, published in M. Of. no. 785 on 24 november 2010.

the others and of the community as a whole[1]. The rule of law entails the obligation to observe the Constitution and the laws, as provided by art. 1 para. (5) of the Fundamental Law.

## 2. Paper content

Considering the principle of general applicability of laws, the Strasbourg Court[2] held that their wording cannot have an absolute precision. One of the standard regulatory techniques is to resort to general categories rather than exhaustive lists. Therefore, a great number of laws use, by force of nature, more or less ambiguous formulas, the interpretation and application of which depend on practice. No matter how clearly a legal[3] rule is drafted, there is an inevitable element of legal interpretation in any legal system[4].

The need to clarify unclear points and adapt to changing circumstances will always exist. Again, although certainty is highly desirable, it might entail excessive rigidity, but the law must be able to adapt to changing circumstances. The decision-making role given to the courts aims precisely to remove the doubts that persist when interpreting the rules, the progressive development of criminal law by means of the case-law as a source of law being a necessary and well-rooted component in the legal tradition of the member states[5].

But how can we bring together the society need for security and belief in the accessibility and predictability of the law[6], in logical coherence and stability with the risks represented by legislative inflation, the cult of impermanence or with the current tendency to regulate and deregulate everything? These phenomena led to a crisis of conscience and a real reflex of the individual to reject law. The current state suffers from "legislative bulimia": the legislative system "disperses" itself in regulations that do not have enough time to crystallize, therefore they are poorly drafted and poorly coordinated with the rest of the legal system[7].

Modern legislator has significantly moved away from Rousseau, the creator of the modern term of law, the one who has essentially contributed to the development of the rule of law concept: "I therefore give the name "Republic" to every State that is governed by laws, no matter what the form of its administration may be: for only in such a case does the public interest govern, and

[1] Decision no. 659/2010 on the constitutional challenge of art. 9 of Law no. 10/2001 regarding the legal regime of certain buildings taken over abusively during 6 March 1945-22 December 1989, published in Official Journal number 408 of 18 June 2010.

[2] For more information on the predictability and accessibility of the law under the magnifying glass of the European Court of Human Rights, please see Laura-Cristiana Spătaru-Negură, *Protecția internațională a Drepturilor Omului – Note de curs* (*International Protection of Human Rights – Course Notes*), Hamangiu Publishing House, Bucharest, 2019, pages 155, 164, 168, 173 and 178.

[3] For more about legality, see E.E.Ștefan, *Legalitate și moralitate în activitatea autorităților publice (Legality and morality in the work of public authorities)*, in Public Law Review no 4/2017, Universul Juridic Publishing House, Bucharest, pp. 95-105.

[4] E. Anghel, *The reconfiguration of the judge`s role in the romano-germanic law system*, in CKS 2013 proceedings.

[5] Decision no. 297/2018 on the constitutional challenge of art. 155 para. (1) of the Criminal Code, published in Official Journal number 518 of 25 June 2018.

[6] Please also see M.-C. Cliza, C.-C. Ulariu, *Drept administrativ. Partea generală* (*Administrative Law. General Part*), C.H. Beck Publishing House, Bucharest, 2023, p. 186.

[7] Dan Claudiu Dănișor, Ion Dogaru, Gheorghe Dănișor, *Teoria 70eneral a dreptului (General Theory of Law)*, C. H. Beck Publishing House, Bucharest, 2006, p. 381.

the res publica rank as a reality". He shared the belief in the cult of the law, a concept that reigned in France starting from the era of the French Revolution: "It is to law alone that men owe justice and liberty. It is this salutary organ of the will of all which establishes in civil rights the natural equality between men".

There were cases when the belief in the predictability of the law was forfeited. Francois Gény campaigned for the release of the judge from the strict letter of the law. The author reacted against the doctrine of that time which considered the law as the only source of the law[8]. By means of his scientific endeavors, Gény wanted to put an end to the "fetishism of the written law" and the belief in its sufficiency, by considering that it is incomplete and that "no matter how much acuity we adjudicate to it, the human mind is not capable of fully comprehending the image of the world in which it moves". The law cannot satisfy all the requirements of social life, it cannot keep up with the dynamics of the society. This is why, when the law does not offer solutions, the judge, helped by the doctrine, must discover them by free scientific research, in terms of habits and in what Gény called *la nature des choses positives*[9].

In order for the law to be accepted and observed, it must demonstrate a certain legal security, assuming the requirement of approachability, logical coherence, stability and predictability, features meant to capture the trust of the citizens in its provisions. The legal security of the individual directly depends on the legal security of the community in which he lives. In this regard, art. 4 of the Constitution is not limited to voice that the *state* is based on the unity of the Romanian people and the solidarity of its citizens, but establishes that Romania is the common and indivisible *homeland* of all its citizens.

We are wondering, however, how the simple citizen, lacking specialized knowledge, can obey the law, when it changes frantically, is obscure, inconsistent or reveals so many deficiencies of legislative technique? In an ideational vision, which reminds us of Socrates, the answer is simple: the good citizen must also obey the bad laws in order not to encourage bad citizen to break the good ones. In Socratic conception, obedience to the law is a duty and his end stands testimony to this.

Nowadays, the excess of normativism, incoherence of laws, the violation of the principle of normative hierarchy[10], instrumentalization of law, the interference of politics in the legal field and the "juristocracy" unjustifiably complicate the implementation of the law. Paradoxically, beyond the normative avalanche, we are often faced with a legislative vacuum. The citizen can only be perplexed and outraged, as his absorption capacity is limited[11].

In order to demonstrate the aforementioned, we shall analyze a specific case: the legislator's passivity and the non-unitary jurisprudential interpretation of a

[8] For more about the source of the law, see E.E. Ștefan, *Drept administrativ Partea I, Curs universitar (Administrative Law Part I, University Course)*, 3rd edition, revised, supplemented and updated, Universul Juridic Publishing House, Bucharest, 2019, pp. 40-49.

[9] For more information, see N. Popa, E. Anghel, C. Ene-Dinu, L. Spătaru Negură, *Teoria generală a dreptului. Caiet de seminar (General Theory of Law. Seminar booklet)*, 3rd edition, revised and supplemented, C.H. Beck Publishing House, Bucharest, 2017.

[10] For more informatios about the principle of normative hierarchy, see E.E. Ștefan, *Drept administrativ Partea a II-a, Curs universitar (Administrative Law Part II, University Course)*, 4th edition, revised and supplemented, Universul Juridic Publishing House, Bucharest, 2022, pp. 59-61.

[11] See also E. Anghel, *General principles of law*, in Lex ET Scientia International Journal, no. 2/2016.

legal text - art. 155 para. (1) of the Criminal Code – generated in practice a sequence of decisions that are difficult to apply and assimilate, which failed to shed light in an area that required a lot of legislative strictness: the area of criminal liability.

The first step made in the effort to clarify the controversial issues involved by this law text consisted in submitting it to the constitutional review, in order to verify the compliance with the Basic Law and the fundamental principles and values it comprises[12]. Therefore, the Constitutional Court was notified on the constitutional challenge of art. 155 para. (1) of the Criminal Code, motivated by the fact that the phrase "*any act of procedure*" lacks clarity, precision and predictability[13], by violating the provisions of art. 1 para. (5) of the Constitution. The authors of this constitutional challenge raise the issue of the acts by which the course of criminal liability limitation can be interrupted, arguing that not every procedural act should have the aforementioned effect. In this respect, reference is made to the legislative solution regulated by the Criminal Code of 1969, according to which the term of the limitation was interrupted by the performance of any act which, according to the law, had to be communicated to the defender in the course of a criminal trial.

The Criminal Code in force, unlike the Criminal Code of 1969, does no longer provide that the procedural act carried out must be communicated to the defendant in order to produce the effect of interrupting criminal liability limitation, according to art. 155 para. (1) of the Criminal Code, and that, in all investigated case-files that have almost reach the expiry of the criminal liability statute of limitation, formal procedural acts could be carried out in order to prevent the effect triggered by the challenged text.

The Constitutional Court held that, in order to obtain the removal of the criminal liability, the statute of limitation must run without the intervention of any act of nature to bring back the committed facts to the public consciousness. In this regard, art. 155 para. (1) of the Criminal Code provides the interruption of the criminal liability statute of limitation by fulfilling any act of procedure in the case, and according to the provisions of para. (2) of the same art. 155, a new statute of limitation starts running after each and every interruption.

Criminal law, as a whole, is subject both to the requirements of the quality of the law, established by the constitutional provisions of art. 1 para. (5), as well as those of the principle of legality of incrimination and punishment, as regulated by art. 23 para. (12) of the Constitution. These provisions require not only the clear, precise and predictable regulation of the facts that constitute crimes, but also the conditions under which a person can be held criminally liable for committing them. However, the criminal liability limitation is part of the regulations that aim to engage criminal liability.

[12] For details regarding the constitutional review procedure, see, for instance: I. Muraru, N.M. Vlădoiu, A. Muraru, S.G. Barbu, *Contencios constituțional (Constitutional Litigation)*, Hamangiu Publishing House, Bucharest, 2009; I. Muraru, N.M. Vlădoiu, *Contencios constituțional. Proceduri și teorie (Constitutional Litigation. Procedures and Theory)*, 2nd edition, Hamangiu Publishing House, Bucharest, 2019; S.G. Barbu, A. Muraru, V. Bărbățeanu, *Elemente de contencios constituțional (Elements of Constitutional Litigation)*, C. H. Beck Publishing House, Bucharest, 2021.

[13] For more information about clarity, precision and predictability of the law, see R.-M. Popescu, *Claritatea, precizia și previzibilitatea - cerințe necesare pentru respectarea Constituției, a supremației sale și a legilor în România (Clarity, precision and predictability - necessary requirements for the respect of the Constitution, its supremacy and laws in Romania)*, Law Review no. 7/2017, pp. 78-87.

The statute of limitation is provided by the general part of the Criminal Code. In this regard, art. 154 of the Criminal Code in force provides criminal liability statute of limitation, established by the legislator by reference to the severity of the incriminated facts, and consequently, to the special limits of the criminal penalties provided for the regulated offenses. As the criminal liability limitation is a substantive criminal law institution based on time, the legal provisions regulating criminal liability statute of limitation and the modality of their application are of considerable importance, both for the activity of the judicial bodies of the state, and for individuals who commit crimes.

Taking into account all these considerations, it is necessary to guarantee the predictable nature of the effects of the provisions of art. 155 para. (1) of the Criminal Code on the individual who committed a fact provided for by the criminal law, including by ensuring the possibility of knowing the aspect of the intervention of the interruption of the criminal liability limitation and the beginning of a new statute of limitation. However, according to the case-law of the Constitutional Court, a legal provision must be precise, unequivocal and establish clear, predictable and accessible norms the application of which does not allow arbitrariness or abuse, and the legal norm must regulate in a unitary and uniform manner and establish minimum requirements applicable to all its recipients[14].

Notwithstanding, the Constitutional Court noted that the provisions of art. 155 para. (1) of the Criminal Code establish a legislative solution likely to create for the person having the capacity of suspect or defendant an uncertain legal situation regarding the conditions of his/her criminal liability for the committed facts. For these grounds, it notes that the provisions of art. 155 para. (1) of the Criminal Code are unforeseeable and, at the same time, contrary to the principle of legality of incrimination, since the phrase "any procedural act" in their content also includes acts that are not communicated to the suspect or defendant, by not allowing him/her to know the aspect of the interruption of the limitation and the beginning of a new statute of limitation.

The Constitutional Court noted that the legislative solution provided by the old Criminal Code met the conditions of predictability as it provided for the interruption of the criminal liability limitation only by fulfilling an act that, according to the law, had to be communicated in the case in which the person in question had the capacity of suspect or defendant.

Given these considerations, by means of Decision no. 297/2018, the Constitutional Court admitted the constitutional challenge and noted that the legislative solution providing the interruption of the criminal liability statute of limitation by fulfilling "any procedural act in the case", in the content of the provisions of art. 155 para. (1) of the Criminal Code was not constitutional.

However, after the pronouncement of this admission decision, the High Court of Cassation and Justice was referred to with a referral in the interests of the law[15] after it

[14] Decision no. 637 of 13 October 2015 on the constitutional challenge of art. 26 para. (3) of Law no. 360/2002 on the Statute of the Policeman, published in the Official Journal of Romania, Part I, no. 906 of 8 December 2015, paragraph 34.

[15] For more information, see C. Ene-Dinu, *Constitutionality and referral in the interests of the law*, in Lex ET Scientia International Journal no. XXIX, vol. 1/2022, pp. 66-74.

was found that the interpretation and application of the provisions of art. 155 para. (1) of the Criminal Code is not carried out in an unitary manner.

The first jurisprudential orientation appreciated that, currently, as an effect of declaring the unconstitutionality of the provisions of art. 155 para. (1) of the Criminal Code, the interruption of the criminal liability limitation is no longer possible. It was shown that, by not defining the causes of the interruption of the criminal liability limitation, the court shall be bound to apply the provisions on the criminal liability limitation provided by art. 154 of the Criminal Code, since it cannot apply law by analogy or to substitute the lack of a regulation, and the rewording of the norm of the old Criminal Code would entail a reactivation of a provision that was expressly repealed by the enforcement of the new Criminal Code. Furthermore, the courts of law do not have the jurisdiction to supplement the provisions of art. 155 para. (1) of the Criminal Code, this being an exclusive prerogative of the legislator.

The second majority jurisprudential orientation held that, essentially, the effects of Decision no. 297/2018 of the Constitutional Court do not extend to the entire institution of the interruption of the criminal liability statute of limitation, but, according to the considerations of the decision of the constitutional court, the cause of interruption is incidental only in the case of procedural documents which, according to the law, must be communicated to the suspect or the defendant. Therefore, the provisions of art. 155 para. (1) of the Criminal Code remained in the active background of the legislation and continue to produce effects, but the only acts that can have the effect of interrupting criminal liability limitation are those to be communicated to the suspect or defendant.

Although the legal issue interpreted in a non-unitary manner raises controversies, unfortunately it could not be settled by way of the referral in the interests of the law[16], this being dismissed as inadmissible by Decision no. 25/2019 in the interests of the law motivated by the fact that the High Court of Cassation and Justice does not have the jurisdiction to rule on the effects of the decision of the Constitutional Court or to issue binding rulings that contradict the decisions of the Constitutional Court [17].

In 2022, the Constitutional Court was referred to again in order to pronounce on the provisions of art. 155 para. (1) of the Criminal Code. The authors of the challenge showed that, after the pronouncement of Decision no. 297/2018,whereby the Constitutional Court noted that the legislative solution providing the interruption of the criminal liability statute of limitation by fulfilling "any procedural act in the case" was not constitutional, the courts of law had to note that the provisions of art. 155 para. (1) of the Criminal Code ceased their legal effects, 45 days after the publication of the admission decision. But in practice, the courts ruled that the decision of the Constitutional Court is an interpretive decision, and not a pure and simple one of immediate application. In this context, it was shown that the challenged provisions of the law were not clear, foreseeable and predictable, as they did not allow the

[16] For more information, see C. Ene-Dinu, *Rolul practicii judecătorești în elaborarea dreptului (The role of judicial practice in the development of law)*, Universul Juridic Publishing House, Bucharest, 2022.

[17] Decision no. 25/2019 on the referral in the interests of the law for the interpretation and application of the provisions of art. 155 para. (1) of the Criminal Code on the interruption of the criminal liability limitation by fulfilling any act of procedure in the case, after the publication in the Official Journal of Decision no. 297 of 26 April 2018 of the Constitutional Court.

defendant to know under what conditions and by means of what acts the criminal liability limitation was interrupted.

By means of Decision no. 358/2022[18], the Constitutional Court showed that it had established that a decision was simple/extreme or interpretive/subject to interpretation, also revealed the answer to the question whether the intervention of the legislator was necessary/mandatory in order to agree with the Constitution, in respect of those found by the court of contentious constitutional, of those provisions found to be unconstitutional. Therefore, it was considered that, as a rule, the establishment of the nature of the decision, i.e. simple/extreme determines the necessity/obligation of the legislator to intervene from the legislative point of view, while the assignment of the nature of interpretative decision/ subject to interpretation does not give rise to such an obligation, but rather determines an obligation of the judicial bodies (and the other bodies called to apply the law) to interpret the Court's decision and establish its effects in order to apply it to the specific case.

The Court holds that Decision no. 297/2018 sanctions the "legislative solution" contained by the challenged text of law, therefore, by applying traditional/classical criteria, it shall no longer fall within the category of interpretative/subject to interpretation decision. Furthermore, the operative part of the decision does not even include the phrase specific to a decision by which the constitutional interpretation of the norm is established.

The Court also notes that paragraph 34 of Decision no. 297/2018, highlighted the reference points of the constitutional conduct that the legislator, and not the judicial bodies, being bound to fall in with, with the obligation, established under art. 147 of the Constitution, to intervene from the legislative point of view and to establish clearly and predictably the cases of interruption of the criminal liability limitation.

However, the Court notes that, due to the legislator's silence, the identification of cases of interruption of criminal liability limitation remained an operation carried out by the judicial body, reaching a new situation lacking clarity and predictability, a situation which also determined the different application to similar situations of the challenged provisions (confirmed by the fact that the High Court of Cassation and Justice found the existence of a non-unitary practice). Therefore, the lack of intervention of the legislator determined the need for the judicial body to replace it by outlining the applicable normative framework in the event of the interruption of the of criminal liability limitation and, implicitly, the application of the criminal law by analogy. However, the Court constantly held in its case-law that, the provisions of art. 61 para. (1) of the Constitution establish that "the Parliament is the supreme representative body of the Romanian people and the sole legislative authority of the country", and its legislative competence regarding a certain field cannot be limited if the law thus adopted complies with the requirements of the Fundamental Law[19]. Furthermore, the Court ruled that allowing the person who interprets and

[18] Decision no. 358/2022 on the constitutional challenge of art. 155 para. (1) of the Criminal Code, published in Official Journal number 565 of 9 June 2022.

[19] Decision no. 308 of 28 March 2012 on the notification of unconstitutionality of the provisions of art. 1 letter g) of Lustration Law on temporary limitation of access to some public offices for persons who were part of the power structures and the repressive apparatus of the communist regime during 6 March 1945 –22 December 1989, published in Official Journal of Romania, Part I, no. 309 of 9 May 2012.

applies the criminal law, in the absence of an express rule, to establish himself the rule according to which he is going to solve a case, taking as a model another ruling pronounced in another regulated framework, represents an application by analogy of the criminal law.

Therefore, the Constitutional Court finds that the normative set in force does not provide all the legislative elements necessary for the foreseeable application of the norm sanctioned by Decision no. 297/2018. Therefore, although the Constitutional Court referred to the old regulation, by highlighting the reference points of a constitutional conduct that the legislator was bound to fall in with, by applying the provisions of the Court, this fact cannot be interpreted as a permission granted by the court of contentious constitutional to the judicial bodies to establish themselves the cases of interruption of the criminal liability limitation.

Consequently, the Court notes that, under the conditions of establishing the legal nature of Decision no. 297/2018 as simple/extreme decision, in the absence of the legislator's active intervention, mandatory according to art. 147 of the Constitution, during the period between the date of publication of the respective decision and until the enforcement of a normative act that clarifies the norm, by expressly regulating the cases capable of interrupting the criminal liability statute of limitation, the active background of the legislation does not include any case that allows the interruption of the criminal liability limitation.

Such a consequence is the result of the legislator's failure to comply with the obligations incumbent on him according to the Fundamental Law and his passivity, even despite the fact that the decisions of the High Court of Cassation and Justice have announced the non-unitary practice resulting from the lack of legislative intervention since 2019. In this background, the Court finds that the situation created by the legislator's passivity, following the publication of the aforementioned admission decision, represents a violation of the provisions of art. 1 paragraph (3) and (5) of the Fundamental Law, which enshrines the rule of law nature of the Romanian state, as well as the supremacy of the Constitution. This is because the prevalence of the Constitution over the entire normative system represents the crucial principle of the rule of law[20]. The guarantor of the supremacy of the Fundamental Law is the Constitutional Court itself, by means of the decisions it pronounces, therefore neglecting the findings and provisions contained in its decisions causes the weakening of the constitutional structure that must define the rule of law[21].

In order to restore the state of constitutionality, it is necessary for the legislator to clarify and detail the provisions regarding the termination of the criminal liability statute of limitations.

### 3. Conclusions

A paradox of modern democracy results from this analysis: we lose ourselves in an avalanche of normative acts, in a frightening instability caused by a frantic

[20] For more see E.E. Ștefan, *Răspunderea juridică. Privire specială asupra răspunderii în dreptul administrativ (Legal liability. A special look at liability in administrative law)*, Pro Universitaria Publishing House, Bucharest, 2013, pp. 63-64.

[21] Decision no. 230 of 28 April 2022 on the constitutional challenge of art. 14 letter a) and of art. 26 letter d) of Law no. 51/1995 for the organization and practice of the lawyer's profession, published in Official Journal of Romania, Part I, no. 519 of 26 May 2022.

tendency to reform. This legislative inflation is naturally accompanied by qualitative deficiencies[22] of the regulations, resulting in the devaluation of the legislative system. The weakening of the valorization function of the law has repercussions on its voluntary realization, because the law cannot be imposed by force, but by its persuasive value. In this context, the words of Hegel are particularly relevant: "In ancient times, respect and reverence for the law were universal. But now the fashion of the time has taken another turn, and thought confronts everything which has been approved"[23].

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[22] For an example on the lack of previsibility of law, please see Marta-Claudia Cliza, Dragoș-Cătălin Borcea, Laura-Cristiana Spătaru-Negură, *To Be or Not to Be Plagiarism? Unconstitutionality Criticisms of Article 170 Para. (1) of the Romanian National Education Law*, published in CKS 2022 Proceedings, Publishing House of Nicolae Titulescu University, Bucharest, 2022, pp. 233-240.

[23] G. W. F. Hegel, *Principiile filosofiei dreptului (Principles of philosophy of law)*, Paideia Publishing House, Bucharest, 1998, p. 12.

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# THE MATTER OF PENSIONS IN THE LIGHT OF THE LEGISLATION, THE DECISIONS OF THE CONSTITUTIONAL COURT AND THE NEW SOCIAL REALITIES

**Marta-Claudia CLIZA**[*]

**Abstract**

*The public pension system has always raised many questions marks, firstly for its beneficiaries. Additionally, the Romanian legislation through which this system has been implemented has been objected against and the constitutional challenge has arrived on the bench of the Romanian Constitutional Court. This study wants to analyse the pension system starting from the economic background and ending with the legal one. In relation to the current system, the position of the Constitutional Court has been and is extremely clear, so that any legislative amendment, either at the initiative of the Parliament or at the initiative of the Government, by emergency ordinance, must take into account the constitutional requirements.*

**Keywords:** *action, court, public pension, Romanian Constitutional Court.*

## 1. Introductory considerations

The realities of our days show that the issue of the pensions, of the retirement age and the economic implications of this matter is a subject of present-day. Only if we take a look at what is happening in France nowadays and see where the street protests have reached, it is enough to understand that from a simple legislative initiative, obviously dictated by economic realities, we have reached the threshold of a civil war.

However, it is equally true that life expectancy has increased exponentially in the West, that we have completely different realities of the labour market, which is translated into the need to reform pension system, right from its grounds. This also appears in the governing program of all European chancelleries, on the background of the general policies required from Brussels.

In Romania, in addition to these matters, a specific issue was also raised, generated by the existence of "special pensions", namely those categories of pensions which certain social professional categories that had a special status in their activity benefit from, such as magistrates, soldiers and policemen.

All these cumulated problems have generated extensive discussions related to the reform of the pension system, contribution, special pensions, taxation.

The legislator sought and is still seeking various solutions to adjust, for example, special pensions or pensions with a high amount.

Notwithstanding, not infrequently, these legislative solutions are dismissed by the Constitutional Court[1], such as the

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[1] See Barbu Silviu Gabriel, Muraru Andrei, Barbateanu Valentina, *Elemente de contencios constitutional* (*Elements of constitutional litigation)*, C.H. Beck Publishing House, Bucharest, 2021, p. 16 and the following.

example that we have proposed for analysis in this study.

## 2. The particularities of the provisions of art. XXIV and art. XXV of GEO no. 130/2021 regarding the reintroduction of the obligation to pay health insurance contribution on pension income

The end of 2021 brought as a legislative adjustment solution the reintroduction of the obligation to pay the health insurance contribution on pension income.

Therefore, according to the provisions of **art. XXIV** of GEO no. 130/2021:

*"Law no. 227/2015 on the Fiscal Code, published in the Official Journal of Romania, Part I, no. 688 of 10 September 2015, as further amended and supplemented, shall be amended and supplemented as follows:*

*2. Article 100, paragraph (1) shall be amended and shall read as follows:*

*"(1) The monthly taxable income of pensions shall be established by deducting from pension income the monthly non-taxable amount of RON 2,000 and, as the case may be, the health insurance contribution due according to the provisions of title V – National insurance contributions."*

*11. In article 153 paragraph (1), after letter $f^1$) two new letters shall be introduced, namely $f^2$) and $f^3$), which shall read as follows:*

*"$f^2$) National House of Public Pensions, by means of the territorial houses of pensions, as well as sector houses of pensions, for persons who obtain income derived from pensions;*

*$f^3$) the entities that pay income derived from pensions, other than those provided for by letter $f^2$);".*

*12. In article 154 paragraph (1), letter h) shall be amended and shall read as follows:*

*"h) retired natural persons, for income derived from pensions up to the amount of RON 4,000 per month including, as well as for income derived from intellectual property rights;".*

*13. In article 155 paragraph (1), after letter a) a new letter shall be introduced, letter $a^1$) which shall read as follows:*

*"$a^1$) the income derived from pensions, defined according to art. 99, for the part that exceeds the monthly amount of RON 4,000;".*

*14. In title V "National insurance contributions" chapter III, title of section 3 shall be amended and shall read as follows:*

*SECTION 3 "The basis for calculating health insurance contribution due in case of persons who derive income from salaries or assimilated to salaries, income from pensions, as well as in case of persons under the protection or in the custody of the state"*

*16. After article $157^2$, a new article shall be introduced, namely article $157^3$, which shall read as follows:*

*"Art. $157^3$. – The monthly basis for calculating health insurance contribution for natural persons who derive the income referred to in art. 155 para. (1) letter $a^1$)*

*The monthly basis for calculating health insurance contribution for natural persons who derive income from pensions is represented by the part exceeding the monthly amount of RON 4,000, for each pension right."*

*17. In title V "National Insurance Contributions" chapter III, title of section 4 shall be amended and shall read as follows:*

*SECTION 4 "Establishing, paying and reporting health insurance contribution in case of income derived from salaries and similar to salaries, as well as the income from pensions "*

*18. In article 168, paragraphs (1), (5), (7) and ($7^1$) shall be amended and shall read as follows:*

*"(1) Natural persons and legal entities who have the capacity of employers or assimilated to this capacity, as well the income payers referred to in art. 153 para. (1) letter $f^2$) and $f^3$) shall be bound to calculate and withhold health insurance contribution due by natural persons who obtain income derived from salaries or similar to salaries or income derived from pensions.*

*(…)*

*(5) The calculation of the health insurance contribution shall be performed by applying the rates provided for by art. 156 on the monthly basis of calculation referred to in art. 157, $157^1$ or $157^3$, as the case may be.*

*(…)*

*(7) If there were granted amounts representing salaries/balances or differentials in salaries/balances, established by the law or under final and irrevocable Court decisions/final and enforceable Court decisions, including those granted according to the decisions of the court of first instance, which are enforceable in law, as well as in case such judgments have ordered the reemployment of persons, the respective amounts shall be broken down by the months they relate to and the rates of health insurance contributions in force at the time shall be used. Health insurance contributions due in accordance with the law shall be calculated, withheld on the date of payment and paid on or before the 25$^{th}$ day of the month following the month in which they were paid.*

*($7^1$) If there were granted amounts representing pensions or pension differentials, established by law or on the basis of final and irrevocable judgments/final and enforceable court judgments relating to periods for which individual health insurance contribution / health insurance contribution as the case may be, is due, the contribution rates in force for those periods shall be used for the respective amounts. Health insurance contributions due in accordance with the law shall be calculated, withheld on the date of payment and paid on or before the 25$^{th}$ day of the month following the month in which they were paid."*

*19. In article 169 paragraph (1), letter a) shall be amended and shall read as follows:*

*a) natural persons and legal entities who have the capacity of employers or assimilated to this capacity, as well the income payers referred to in art. 153 para. (1) letter $f^2$) and $f^3$);".*

*20. After article $169^1$, a new article is introduced, namely article $169^2$, which shall read as follows:*

*"Art. $169^2$. - Reporting obligations for individuals deriving pension income from abroad under Article 155 letter $a^1$)*

*Individuals who derive pension income from abroad for which health insurance contributions are due are required to submit the declaration provided for by Article 122, in compliance with the provisions of the applicable European legislation in the field of social security, as well as the agreements on social security systems to which Romania is a party."*[2].

According to the provisions of art. XXV of GEO no. 130/2021:

*„(1) By way of derogation from the provisions of Article 4 of Law no. 227/2015, as further amended and supplemented, the provisions of Article XXIV shall enter into force on the date of publication of this Emergency Ordinance in the Official*

[2] Text available at https://legislatie.just.ro/Public/DetaliiDocumentAfis/249349.

*Journal of Romania, Part I, with the following exceptions:*

*a) the provisions of items 22-25 shall enter into force on 1 January 2022;*

*b) the provisions of items 1, 8, 9, 15, 21 shall apply as from the income of the month following the publication of this Emergency Ordinance in the Official Journal of Romania, Part I;*

*c) the provisions of items 2, 3, 4, 7, 12, 13, 16, 18 regarding paragraphs (1) and (5) of art. 168 and item 19 shall apply to income derived as of 1 January 2022;*

*d) the provisions of item 20 shall apply as from the income earned in 2022.*

*(2) The provisions of Article 291 para. (3) letter o) of Law no. 227/2015, as further amended and supplemented, shall apply to heat deliveries made as of 1 January 2022.*"[3].

We consider that the aforementioned provisions are unconstitutional by reference to the provisions of Article 1 paras. (3) and (5), Art. 16 para. (1), Art. 56, Art. 115, Art. 138 and Art. 147 para. (4) of the Constitution of Romania.

Therefore, former magistrates (judges or prosecutors) who are currently retired would be entitled to the rights recognised by Law no. 303/2004 on the status of judges and prosecutors ("*Law no. 303/2004*").

According to the provisions of **art. 73** of Law no. 303/2004:

"*When establishing the rights of judges and prosecutors, one shall take into account*

*the place and role of the Judiciary under the Rule of Law, of the responsibility and complexity of the offices of judge and prosecutor, of the interdictions and incompatibilities provided by the law for these offices and shall aim at safeguarding their independence and impartiality.*"[4].

in this respect, according to art. 82 of Law no. 303/2004:

"*(1) The judges, prosecutors, assistant-magistrates within the High Court of Cassation and Justice and assistant-magistrates within the Constitutional Court, judicial specialised personnel equated to judges and prosecutors, and also the former financial judges, prosecutors and account councillors from the jurisdictional section, who exercised their duties at the Accounts Court, having at least 25 years' length of service in the positions mentioned before, may retire at their request and shall enjoy, upon reaching the age of 60 years, a service pension, amounting up to 80% of the average of gross income with any other benefits for the last month of activity before the date of retirement.*

*(2) The judges, prosecutors, assistant-magistrates within the High Court of Cassation and Justice and the Constitutional Court, judicial specialised personnel equated to judges and prosecutors, and also the former financial judges, prosecutors and account councillors from the jurisdictional section, who exercised their duties at the Accounts Court shall be able to retire, at their request, before reaching the age of 60 years and shall enjoy the pension in paragraph (1), if they have at least 25 years' length of service only in the office of judge, prosecutor, magistrates within the High Court of Cassation and Justice and the Constitutional Court and judicial specialised personnel equated to judges, as well as the office of judge within the Constitutional Court, financial judges, prosecutors and account councillors from the jurisdictional section, who exercised their duties at the Accounts Court. The time while a judge, prosecutor, assistant-magistrate or judicial specialised personnel*

[3] *Ibidem.*

[4] Text available at https://legislatie.just.ro/Public/DetaliiDocument/64928.

*equated to judges and prosecutors, as well as the judge of the Constitutional Court, the financial prosecutors and account councillors from the jurisdictional section of the Accounts Court practiced as lawyer, judicial specialised personnel within the former state arbitration committees or legal adviser shall be included into this period of 25 years.*

*(8) The pension provided for by this article has the jurisdictional regime of a pension for age limit.*"[5].

Last but not least, according to art. 79 paras. (8) and (9) of Law no. 303/2004:

"*(8) Working or retired judges and prosecutors, as well as their spouses and dependent children, are entitled to free medical care, medicines and prostheses, subject to compliance with the legal provisions on the payment of social insurance contributions.*

***(9)*** *The conditions for free granting of medical care, medicines and prostheses shall be established by means of Government Resolution. These rights are not salary-related and are not taxable.*"[6].

According to the provisions of art. 99 para. (1) of Law no. 227/2015 on the Fiscal Code ("*Fiscal Code*"):

"*Pension income represents amounts received as pensions from funds established from national insurance contributions made to a social insurance system, including those from voluntary pension funds and those financed from the state budget, differential in pension income, as well as amounts representing their updating by the inflation index.*"[7].

Pension income, according to the legislation in force, before the amendments made by GEO no. 130/2021 were exclusively subject to income tax, as clearly resulting from the analysis of the provisions of art. 61 letter e) in conjunction with art. 64 para. (1) letter e) in conjunction with art. 100 para. (1), with art. 101, art. 137, art. 153 and art. 155, all of the Fiscal Code.

Furthermore, art. 154 para. (1) letter h) of the Fiscal Code (form in force, before the amendments made by GEO no. 130/2021) expressly provided as follows:

"*The following categories of natural persons shall be exempt from the payment of the health insurance contribution: h) retired natural persons, for income derived from pensions, as well as for income derived from intellectual property rights;*".

It is important to point out that, according to the provisions of Article 100 of the Fiscal Code (the form in force at the date of entry into force of this normative act, i.e. 2015):

*„(1) Monthly taxable pension income is determined by deducting from pension income, in order, the following:*

*a) individual health insurance contribution due according to the law;*

*b) non-taxable monthly amount of RON 1,050*.".

Therefore, at that point in time, as resulting from the provisions of art. 155 of the Fiscal Code (the form in force on the date of the enforcement of this normative act, i.e. 2015) the obligation to pay health insurance contribution for pension income was provided.

Subsequently, both the provisions of art. 100 and of art. 153, of art. 154, respective of art. 155, all of the Fiscal Code, were amended by Government Ordinance[8]

[5] *Ibidem.*

[6] *Ibidem.*

[7] Text available at https://legislatie.just.ro/Public/DetaliiDocument/171282.

[8] On the constitutional regime of emergency ordinances, see Elena-Emilia Stefan, *Curs de drept administrativ. Manual de drept administrativ (curs si caiet de seminar)* [*Administrative law course. Manual of administrative law (course and seminar booklet)]*, Part I, Universul Juridic Publishing House, Bucharest, p. 149.

no. 79/2017 for the amendment and supplementation of Law no. 227/2015 on the Fiscal Code, in force on 01.01.2018 ("*GEO no. 79/2017*").

The obligation to pay health insurance contribution for pension income was removed by the enforcement of GEO no. 79/2017, this exemption being maintained including after the amendments brought by Emergency Ordinance no. 18/2018 on the adoption of certain fiscal-budgetary measures and for amending and supplementing certain normative acts (in force on 23.03.2018), as well as following the amendments brought by Law no. 296/2020 for the amendment and supplementation of Law no. 227/2015 on the Fiscal Code (in force on 24.12.2020).

Notwithstanding, GEO no. 130/2021 makes the reversal to the form available before the enforcement of GEO no. 79/2017, the obligation to pay health insurance contribution for pension income being re-established.

According to the provisions of art. 9 paras. (1) and (5) of Law no. 554/2004:

"*(1) A person whose right or legitimate interest has been harmed by a Government Order or parts thereof may take legal action before the Administrative Litigations Court, raising the exception of unconstitutionality, insofar as the main object of the action is not a finding on the unconstitutionality of the Order or a stipulation in the Order.*

*(...)*

*(5) The action stipulated in this Article can be a claim for compensation for damage caused*

*by means of Government Orders, cancellation of administrative acts issued on the basis of such Orders and, as the case may be, compelling a given public authority to issue an administrative act or to perform a specific administrative operation.*"[9].

We will present our arguments in detail below.

In our opinion, GEO no. 130/2021, in what concerns the provisions of art. XXIV and art. XXV which regulate the reintroduction of the obligation to pay health insurance contribution for pension income is unconstitutional, by violating the provisions of art. 115 paras. (4) and (6) in conjunction with art. 138 para. (2), both of the Constitution of Romania.

According to the provisions of art. 115 para. (4) of the Constitution of Romania:

"*(4) The Government can only adopt emergency ordinances in exceptional cases, the regulation of which cannot be postponed, and have the obligation to give the reasons for the emergency status within their contents.*

(...)

*(6) Emergency ordinances cannot be adopted in the field of constitutional laws, cannot affect the status of fundamental institutions of the State, the rights, freedoms and duties stipulated in the Constitution, the voting rights, and cannot establish steps for transferring assets to public property forcibly.*"[10].

According to art. 138 para. (2) of the Constitution:

"*(2) The Government shall annually draft the State budget and the State social insurance budget, which shall be submitted separately to Parliament for approval.*"[11].

Therefore, as we shall see below, the unconstitutionality of the provisions of GEO No 130/2021, viewed from the perspective of Articles 115 and 138 of the Constitution, derives from the fact that:

[9] Text available at https://legislatie.just.ro/Public/DetaliiDocument/57426.
[10] Text available at https://www.ccr.ro/constitutia-romaniei/.
[11] *Ibidem.*

(i) GEO no. 130/2021 was not issued as a result of an extraordinary situation the regulation of which could not be postponed;

According to the provisions of art. 115 para. (4) of the Constitution:

"*(4) The Government can only adopt emergency ordinances in exceptional cases, the regulation of which cannot be postponed, and have the obligation to give the reasons for the emergency status within their contents.*"[12].

Therefore, according to its case-law[13], the Government may adopt emergency ordinances under the following cumulative conditions:

- the existence of an extraordinary situation;
- its regulation cannot be postponed and
- the emergency is motivated in the content of the ordinance.

The extraordinary situations express a high degree of deviation from the ordinary or common and have an objective nature, in the sense that their existence does not depend on the will of the Government, which, in such circumstances, is compelled to react promptly to defend a public interest by means of an emergency ordinance[14].

Furthermore, according to Decision no. 258 of the Constitutional Court of 14 March 2006[15]:

"*the non-existence or failure to explain the emergency of regulating extraordinary situations [...] clearly represents a constitutional barrier to the adoption of an emergency ordinance by the Government [...]. To decide otherwise is to empty of content the provisions of Article 115 of the Constitution on legislative delegation and to leave the Government free to adopt, as a matter of emergency, normative acts with the force of law, at any time and - taking into account the fact that an emergency ordinance may also regulate matters covered by organic laws - in any field*"[16].

Furthermore, the Court, by means of Decision no. 421 of 9 May 2007[17], provided as follows:

"*the emergency of the regulation is not the same with the existence of an extraordinary situation, and operational regulation can also be achieved by means of the common legislative procedure". Therefore, the issuing of an emergency ordinance requires the existence of an objective, quantifiable de facto situation, independent of the will of the Government, which endangers a public interest. In Decision no. 255 of 11 May 2005, cited above, the Court held that "the invocation of the element of expediency, by definition of a subjective nature, which is given a determining contributory efficiency of the emergency, which, implicitly, converts it into an extraordinary situation, requires the conclusion that it does not necessarily and unequivocally have an objective nature, but it can also give expression to subjective factors [...]*".

From the analysis of the aforementioned case-law, only the existence of some elements of an objective nature, which could not be foreseen, can determine

[12] *Ibidem.*

[13] For example, Decision no. 255 of 11 May 2005, published in Official Journal of Romania, Part I, no. 511 of 16 June 2005 and Decision no. 761 of 17 December 2014, published in Official Journal of Romania, Part I, no. 46 of 20 January 2015.

[14] See *mutatis mutandis* Decision no. 83 of 19 May 1998, published in Official Journal of Romania, Part I, no. 211 of 8 June 1998.

[15] Published in Official Journal of Romania, Part I, no. 341 of 17 April 2006.

[16] See also Decision no. 366 of 25 June 2014, published in Official Journal of Romania, Part I, no. 644 of 2 September 2014.

[17] Published in Official Journal of Romania, Part I, no. 367 of 30 May 2007.

the emergence of a situation whose regulation is urgently required.

These elements shall be established by the Government, which shall be obliged to state the reasons for its intervention in the preamble to the adopted legislative act.

Therefore, the appropriateness of the enactment is limited to the decision on whether to adopt the normative act, to act actively or passively, provided that the elements of objective, quantifiable nature provided for by art. 115 para. (4) of the Constitution are demonstrated.

In other words, the decision of the enactment[18] belongs exclusively to the delegated legislator, who shall be bound to comply with the constitutional requirements if he decides on the regulation of a certain legal situation[19].

Therefore, by returning to the texts we consider unconstitutional, we believe it is important to make an analysis of the reasons behind the elimination of the obligation to pay the health insurance contribution on pension income, established by GEO no. 79/2017, so that we can have a clear picture of the (il)legality of the reintroduction of this obligation by GEO no. 130/2021.

We believe that the provisions of art. XXIV and XXV of GEO no. 130/2021 are constitutional, from the point of view of the fulfilment of the conditions for adoption, only if clear reasons are given, on the one hand, for the disappearance of the reasons which made it no longer compulsory to pay the social health insurance contribution on pension income, introduced by GEO no. 79/2017 (and maintained by successive legislative acts), and, on the other hand, for the extraordinary and urgent situation which could no longer be postponed, which made it necessary to reintroduce this contribution on pension income.

The analysis of the reasons for the Government's adoption of GEO no. 79/2017 (and implicitly of the conditions under which legislative delegation may operate according to Article 115 of the Romanian Constitution) was performed by the Constitutional Court in the recitals of Decision no. 46/01.07.2020[20] on the dismissal of the constitutional challenge of the provisions of art. I items 40-91 of Government Emergency Ordinance no. 79/2017, according to which:

"*The Court is to examine to what extent, by adopting Government Emergency Ordinance No 79/2017, the Government has complied with the constitutional requirements concerning the demonstration of the existence of an extraordinary situation, the regulation of which cannot be postponed, and the reasoning of the emergency in the content of the legislative act.*

*58. In this case, the Court finds that the recitals of the emergency ordinance under consideration focuses on the existence of situations which pose a threat to the social rights of citizens. Therefore, the preamble of Government Emergency Ordinance no. 79/2017 points out, inter alia, that the promotion of this legislative act is mainly driven by the need to reform Romania's public social insurance systems with a view to increasing the collection of revenue for the state social insurance budget and making employers responsible for the timely payment of compulsory insurance contributions owed by both employers and*

[18] Please see Nicolae Popa, Elena Anghel, Cornelia Gabriela Beatrice Ene-Dinu, Laura-Cristiana Spataru-Negura, *Teoria generala a dreptului. Caiet de seminar* (*General Theory of Law. Seminar Booklet)*, Hamangiu Publishing House, Bucharest, 2017, p. 168.

[19] See also Decision no. 68 of 27 February 2017, published in Official Journal of Romania, Part I, no. 181 of 14 March 2017.

[20] Published in Official Journal of Romania no. 572 of 1 July 2020.

*employees. In this respect, the number of compulsory social contributions shall be reduced, and the employer shall continue to determine, withhold, report and pay the obligations due. Furthermore, the need to draft the State Social Insurance Budget Law and the State Budget Law for 2018 was taken into account in this context.*

*59. We took into account the fact that the failure to adopt Government Ordinance no. 79/2017 could have negative consequences, in the sense that the correlative amendments to the labour and health legislation could not be promoted by the specialised institutions as from the same date, i.e. 1 January 2018, amendments which brought benefits to employees in the budgetary system. Furthermore, the failure of the economic operators to fulfil their obligation to pay social insurance contributions to the state would have led to the non-fulfilment of the budget execution plan and, implicitly, to the violation of citizens' social rights, which are fundamental rights laid down in the Constitution itself. However, the challenged measure was aimed at transferring social contributions from the employer to the employee, with the aim of recovering for the benefit of the employee all the social insurance contributions due in respect of the income earned, but also of increasing the collection of income for the social insurance budget and making employers responsible for paying them on time.*

*61. In the light of the above, the Court finds that the Government has fulfilled its obligations under art. 115 para. (4) of the Constitution, by reasoning the emergency in the preamble of the normative act and demonstrating the existence of an extraordinary situation the regulation of which cannot be postponed, on the occasion of the draw up of the normative act.".*

Starting from the above and returning to the challenged normative act, we note that the preamble of GEO no. 130/2021 does not motivate the need to reintroduce the obligation for retired individuals to pay health insurance contribution in the light of the measures that led to the exclusion of pension income from this obligation by GEO no. 79/2017, the only explanation being that:

"*the failure to adopt the measure on the removal of the exemption from the payment of health insurance contributions for individuals who are retired for pension income exceeding RON 4,000 would lead to maintaining the current situation regarding the insufficient funds available to the budget of the Unique National Health Insurance Fund in the background of the current health crisis caused by the epidemiological situation in Romania generated by the spread of the SARS-CoV-2 coronavirus.*".

Notwithstanding, on the one hand, this reason, is not able to remove the grounds which represented the basis for the adoption of GEO no. 79/2017, and on the other hand, is not a real one since the same GEO no. 130/2021 provides measures that affect the Unique National Health Insurance Fund, respectively the following are ordered:

"*the increase of the non-taxable ceiling not included in the basis for calculating compulsory social insurance contributions from 150 lei to 300 lei per person and per event in case of gifts in cash and/or in kind*"[21].

Moreover, the substantiation note of GEO no. 130/2021 does not indicate any extraordinary situation requiring urgent enactment to reintroduce the obligation to pay health insurance contributions on pension income.

The aspects claimed in the substantiation note are general, in brief and with reference to the need to draw up the

[21] Text available at https://legislatie.just.ro/Public/DetaliiDocumentAfis/249349.

budget for 2022, without there being the slightest concern to indicate and argue the exceptional situation justifying the enforcing of health insurance contributions, especially as we are also talking about separate budgets: state budget, on the one hand, and health insurance contributions which are paid into the Unique National Health Insurance Fund, according to art. 220 of Law no. 95/2006 on health reform, on the other hand.

Last but not least, the Legislative Council also expressed the same view in its opinion no. 592 of 17.12.2021 on draft GEO no. 130/2021, specifically noting that:

"*In accordance with the provisions of art. 115 para. (4) of the Constitution of Romania, republished, as well as with the case-law of the Constitutional Court in the field, we recommend that the preamble to the emergency ordinance should be supplemented in order to mention the elements that define the existence of an extraordinary situation the regulation of which cannot be postponed, by describing the quantifiable and objective situation that deviates significantly from the usual and that requires to resort to this regulatory procedure for all the areas regulated by the draft law*"[22].

Therefore, please find that the introduction of the obligation to pay social security contributions on pension income by means of GEO no. 130/2021 was not the result of an extraordinary situation the regulation of which could not be postponed, the normative act being clearly unconstitutional as it violates the provisions of art. 115 para. (4) of the Constitution of Romania.

(i) GEO no. 130/2021 violates rights, freedoms and obligations provided by the Constitution.

Given the provisions of art. 115 para. (6) of the Constitution, according to which:

"*Emergency ordinances cannot be adopted in the field of constitutional laws, or affect the status of fundamental institutions of the state, the rights, freedoms and duties stipulated in the Constitution, the voting rights and cannot establish steps for transferring assets to public property forcibly.*"[23].

In conjunction with those of art. 138 para. (2) of the Constitution, according to which:

"*(2) The Government shall annually draft the State budget and the State social security budget, which shall be submitted separately to Parliament for approval.*"[24],

it is very clear, on the one hand, that when legislative amendments concern rights, freedoms or duties laid down in the Constitution, they cannot be operated by means of emergency ordinances, and, on the other hand, that when amendments have an impact on the draft state budget or social insurance budget, they must be approved by Parliament.

Both the right to a pension and the obligation to pay contributions are laid down in the Constitution, in articles 47, 56 and 139 which is why we believe that any amendment affecting these rights must be contemplated by a law adopted by Parliament.

The regulation of the public service pension benefit for judges and prosecutors had grounds justified by the legislator and reinforced by a constant case-law of the Constitutional Court[25] through the

[22] See by visiting http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?cam=2&idp=19793 or https://www.senat.ro/legis/lista.aspx#ListaDocumente.

[23] Text available at https://www.ccr.ro/constitutia-romaniei/.

[24] *Ibidem.*

[25] See CCR Decision no. 873 of 25 June 2010.

constitutional status of magistrates which requires the granting of the service pension as a component of the independence of justice.

The status of judges and prosecutors is constitutionally regulated in art. 125 – for judges and in art. 132 – for prosecutors, provisions which are included in Title III "*Public authority*", chapter VI "*Judicial authority*", section 1 "*Courts of law*" (art. 124-130), section 2 "Public Ministry" (art. 131 and 132) and section 3 " *Superior Council of Magistracy*" (art. 133 and 134).

At the infra-constitutional level, the status of magistrates is regulated by Law no. 303/2004, according to which judges are independent, they only obey the law and must be impartial, prosecutors appointed by the President of Romania enjoy stability and are independent, under the law, and assistant magistrates enjoy stability.

In what concerns public service pension, in its case-law, the Constitutional Court has held, as a matter of principle, that it is granted to certain socio-professional categories subject to a special status, namely persons who, by virtue of their profession, trade, occupation or qualification, build up a professional career in that field of activity and are bound to be subject to the requirements of a professional career undertaken both professionally and personally[26].

The case-law of the Constitutional Court in the field stated that it was established in order to stimulate stability in service and the formation of a career in magistracy.

The introduction of a public service pension for magistrates is not a privilege, but is objectively justified as a partial compensation for the disadvantages resulting from the rigours of the special status to which magistrates are subject.

Therefore, this special status established by Parliament by law is much stricter, more restrictive, imposing obligations and prohibitions on magistrates that other categories of insured persons do not have.

Indeed, they are forbidden to engage in activities which could provide them with additional income, which would enable them to create a material situation in order to maintain a standard of living after retirement as close as possible to that which they had during their working life[27].

In what concerns the provisions of art. 82 paras. (2) and (3) of Law no. 303/2004, the Court ruled by Decision no. 433 of 29 October 2013, published in Official Journal of Romania, Part I, no. 768 of 10 December 2013, and Decision no. 501 of 30 June 2015, published in Official Journal of Romania, Part I, no. 618 of 14 August 2015, holding that the legislator regulated in art. 82 of Law no. 303/2004, the conditions under which the judges and prosecutors can benefit from the public service pension.

When granting this benefit, the legislator took into account the importance for society of the activity carried out by this socio-professional category, an activity marked by a high degree of complexity and responsibility, as well as specific incompatibilities and prohibitions.

By means of Decision no. 1.189 of the Constitutional Court of 6 November 2008[28], the Court held that the legal meaning of the verb "to affect" within the content of art. 115 para. (6) of the Constitution is "*to abolish*", "*to prejudice*", "*to harm*", "*to injure*", "to

[26] See Decision no. 22 of 20 January 2016, published in Official Journal of Romania, Part I, no. 160 of 2 March 2016.

[27] See in this respect, Decision no. 20 of 2 February 2000, published in Official Journal of Romania, Part I, no. 72 of 18 February 2000.

[28] Published in Official Journal of Romania, Part I, no. 787 of 25 November 2008.

bring out negative consequences" by pointing out that emergency ordinances can be adopted only if the regulations they entail have positive consequences in the fields in which they take action[29].

Therefore, the overall view of the text under consideration is that the emergency ordinance should not entail negative consequences, should not harm or prejudice the fundamental institutions of the State, the rights, freedoms and duties provided for by the Constitution and the voting rights.

In this case, the provisions challenged as unconstitutional affect the right to pension in that they abolish it by unlawfully introducing (by means of an emergency ordinance), additional contributions, respectively health insurance contribution of 10% on pension income exceeding RON 4000.

The Constitutional Court also ruled in this regard by means of Decision no. 82 of 15.01.2009 noting the unconstitutionality of GEO no. 230/2008 for the amendment of certain normative acts in the field of public system pensions, state pensions and public service pensions, on the grounds that:

"*Taking into account the provisions of art. 115 para. (6) of the Constitution, according to which government ordinances cannot affect the rights and freedoms provided by the Constitution, the Constitutional Court is to find that the provisions of Government Emergency Ordinance no. 230/2008 are unconstitutional because they affect the fundamental rights referred to above.*"[30].

More specifically, art. 82 para. (1) of Law no. 303/2004 clearly states that the public service pension is of 80% of the calculation basis represented by the gross monthly employment allowance or the gross monthly basic salary, as the case may be, and the bonuses received in the last month of service before the date of retirement, therefore no modification of this amount can be performed by emergency ordinance (but only by means of a law adopted by the Parliament).

By means of Decision no. 900 of 15.12.2020, the Constitutional Court held that:

"*although the amounts paid as social insurance contributions do not represent a time deposit and therefore, they cannot entail a right of claim against the state or social insurance fund, they entitle the person who derived income and paid the contributions to the state social insurance budget to benefit from a pension reflecting the level of income earned during his or her working life. The amount of the pension established in accordance with the contribution principle is an earned right, so that its reduction cannot be accepted even temporarily.*"[31].

Last but not least, the provisions of art. 79 para. (8) and para. (9) of Law no. 303/2004 are also relevant in this respect:

"*(8) Working or retired judges and prosecutors, as well as their spouses and dependent children, are entitled to free medical care, medicines and prostheses, subject to compliance with the legal provisions on the payment of social insurance contributions.*

*(9) The conditions for free granting of medical care, medicines and prostheses shall be established by means of*

[29] See *mutatis mutandis* Decision no. 297 of 23 March 2010, published in Official Journal of Romania, Part I, no. 328 of 18 May 2010, Decision no. 1.105 of 21 September 2010, published in Official Journal of Romania, Part I, no. 684 of 8 October 2010, or Decision no. 1.610 of 15 December 2010, published in Official Journal of Romania, Part I, no. 863 of 23 December 2010.

[30] Text available https://legislatie.just.ro/Public/DetaliiDocumentAfis/101426.

[31] Text available at https://www.ccr.ro/wp-content/uploads/2020/11/Decizie_900_2020.pdf.

*Government Resolution. These rights are not salary-related and are not taxable.*"[32],

which underlines the unlawfulness of the challenged provisions, since it is contrary to the principle of legal certainty that, on the one hand, the right to health care is provided free of charge and, on the other hand, the respective right is conditioned by the payment of the health insurance contribution.

Furthermore, by analysing the provisions of art. 138 para. (2) of the Constitution, the only conclusion that can be drawn is that when changes have an impact on the draft state budget or social insurance budget, they must be approved by the Parliament but, amending the Fiscal Code in terms of provisions having an impact on National Budgets obviously has a decisive influence on the draft budgets in question, in which case Parliament's approval is always required.

In the absence of such approval, legislative intervention implemented by means of the mechanism of the Emergency Ordinance is unconstitutional.

In this respect, we also note the provisions of art. 16 para. (1) letter a) of Law no. 500/2002, according to which:

"(1) *The state budget, the state social insurance budget, the budgets of special funds, the budgets of autonomous public institutions, the budgets of foreign loans contracted or guaranteed by the state, the budgets of non-refundable foreign funds, the state treasury budget and the budgets of public institutions are approved as follows:*

*a) state budget, state social insurance budget, budgets of special funds, budgets of foreign loans contracted or guaranteed by the state and budgets of non-refundable foreign funds, by law;*"[33].

Therefore, by taking into account the constitutional provisions, in accordance with art. 56 of the Constitution in conjunction with art. 115 para. (6) of the Constitution and with art. 138 para. (2) of the Constitution, both the Emergency Ordinance affecting the rights and duties stipulated in the Constitution and the Emergency Ordinance amending laws with impact on national budgets (without being approved by the Parliament) are unconstitutional.

3. GEO no. 130/2021, in what concerns the provisions of art. XXIV and art. XXV which regulate the reintroduction of the obligation to pay health insurance contribution for pension income is unconstitutional, by violating the provisions of art. 1 paras. (3) and (5) in conjunction with art. 56 para. (2), all of the Constitution of Romania.

According to art. 1 paras. (3) and (5) of the Constitution of Romania:

*"(3) Romania is a democratic and social state, governed by the rule of law, in which human dignity, the citizens' rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values, in the spirit of the democratic traditions of the Romanian people and the ideals of the Revolution of December 1989, and shall be guaranteed.";*

*(5) "In Romania, the observance of the Constitution, its supremacy and the laws shall be mandatory*"[34].

Therefore, starting from the provisions of art. 1 paras. (3) and (5) of the Constitution of Romania, the Constitutional Court has recognised in its case-law *the principle of legal certainty.*

[32] Text available at https://legislatie.just.ro/Public/DetaliiDocument/53074.
[33] Text available at https://legislatie.just.ro/Public/DetaliiDocument/37954.
[34] Text available at https://www.ccr.ro/constitutia-romaniei/.

The emergence of the principle of legal certainty is a specific consequence of modern law which, both because of its complexity and the rapid succession of rules over time, becomes difficult to be perceived by its addressees.

Although the ultimate aim of any regulation must be to protect fundamental rights and freedoms, the paradoxical situation arises where overly complex regulation tends in fact to infringe them.

The Constitutional Court provided the following:

"*The principle of legal certainty is implicitly established by art. 1 para. (5) of the Constitution and which essentially expresses the fact that citizens must be protected against risks that come from the law itself, against an insecurity that the law has created or risks to create, requiring that the law be accessible and predictable*"[35].

Furthermore, the Court provided that the principle of legal certainty:

"*It is a concept which is defined as a complex of guarantees of a constitutional nature or with constitutional valences inherent in the rule of law, in view of which the legislator has a constitutional obligation to ensure both the natural stability of the law and the best enjoyment of fundamental rights and freedoms.*"[36].

As the doctrine has pointed out[37], the case-law of the Constitutional Court of Romania on the principle of legal certainty can be structured according to three essential components of this principle: approachability and predictability of the law, ensuring uniform interpretation of legal provisions and non-retroactivity of the law.

The principle of mandatory compliance with laws[38] is established both in the Constitution of Romania, and in most of the constitutions of the European states, but in order to be complied with by its addressees, the law must fulfill certain requirements of precision, clarity and predictability.

In this respect, the Court holds that[39], where a legal text may give rise to different interpretations, it is bound to intervene whenever those interpretations give rise to violations of constitutional provisions.

Furthermore, "*the Court provided that a legal provision must be precise, unequivocal, establish clear, predictable and accessible rules, the application of which does not enable arbitrariness or abuse. The legal rule must regulate in a unitary, uniform manner, setting minimum requirements applicable to all its addressees*".[40]

Furthermore, the Constitutional Court has ruled in a great number of decisions[41] that the lack of regulation of essential elements which make the rule clear and predictable amounts to an infringement of art. 1 para. (5) of the Constitution of Romania.

The requirement of predictability therefore implies that the legal rule must be stated with sufficient precision, in order to enable citizen to control his/her conduct, to be able to foresee, to a reasonable extent in the circumstances of the case, the

[35] CCR Decision no. 238/2020, §45; Decision no. 51/2012.

[36] CCR Decision no. 238/2020, §45.

[37] Ion Predescu, Marieta Safta, *The principle of legal certainty, the foundation of the rule of law. Case law*, in Bulletin of the Constitutional Court no. 1/2009.

[38] On matters regarding the general principles of law, please see Elena Anghel, *General principles of law*, in Lex ET Scientia International Journal, XXIII, no. 2/2016, pp. 120-130, available at http://lexetscientia.univnt.ro/download/580_LESIJ_XXIII_2_2016_art.011.pdf.

[39] See CCR Decision no. 1092 of 18.12.2012, published in Official Journal, Part I, no. 67 of 31.02.2013.

[40] CCR Decision no. 454/2020, §32.

[41] See for example, CCR Decision no. 230/2022.

consequences which might result from a given act, even if he/she has to seek expert advice on the matter.

By analysing the legal provisions challenged for unconstitutionality, in the light of the provisions of art. 1 paras. (3) and (5) of the Constitution, we note the following:

(i) they make no distinction between contributory pensions and public service pensions and

(ii) they violate the principle of fiscal predictability established by the provisions of art. 4 of the Fiscal Code.

First of all, as mentioned before, magistrates' pensions are included in the category of public service pensions and benefit from a special regulation, which can be found in the provisions of Law no. 303/2004.

Unlike the aforementioned pensions, contributory pensions are regulated by Law no. 127/2019 on public pension system.

The Constitutional Court held that

"*public service pensions enjoy a different legal regime from pensions granted under the public pension system. Therefore, unlike the latter, public service pensions are composed of two elements (...) namely: contributory pension and a supplement from the State which, when added to the contributory pension, reflects the amount of the public service pension laid down in the special law. The contributory part of the public service pension is paid from the state social insurance budget, while the part exceeding this amount is paid from the state budget.*"[42].

We consider that, in order for the provisions of GEO no. 130/2021 to be deemed to meet the requirements of appropriateness and predictability, they should have expressly provided for the categories of pensions to which they apply.

This obligation is imperative if we consider the fact that the introduction of compulsory payment of health insurance contribution on pension income derived by magistrates by means of the provisions declared unconstitutional is contrary to Law no. 303/2004, which expressly provides that this category of retired individuals shall benefit from free health care.

More precisely, according to the provisions of art. 79 paras. (8) and (9) of Law no. 303/2004:

"*Working or retired judges and prosecutors, as well as their spouses and dependent children, are entitled to free medical care, medicines and prostheses, subject to compliance with the legal provisions on the payment of social insurance contributions.*

*(9) The conditions for free granting of medical care, medicines and prostheses shall be established by means of Government Resolution. These rights are not salary-related and are not taxable.".*

Therefore, it still remains unclear what is meant by this gratuity following the introduction of compulsory payment of social insurance contributions on pension income derived by former magistrates.

Therefore, we consider that all these inconsistencies between the amendments introduced by GEO no. 130/2021 and the legal texts in force strongly affect the clarity and predictability of the law, by affecting the provisions of art. 1 paras. (3) and (5) of the Constitution.

Secondly, the amendment of the Fiscal Code by way of derogation from the provisions of art. 4 of this normative act affects the principle of legal certainty from the perspective of legal stability, creating, at

[42] See CCR Decisions no. 871 and no. 873 of 25 June 2010, published in Official Journal no. 433 of 28.06.2010.

the same time, difficulties of application and legal uncertainty, as we shall note.

According to the provisions of art. 4 paras. (1) – (3) of the Fiscal Code:

"*(1) This code shall be amended and supplemented by law, which shall enter into force within at least 6 months as of the publication in the Official Journal of Romania, Part I.*

*(2) If new taxes, fees or mandatory contributions are introduced by law, the existing ones are increased, the existing facilities are eliminated or reduced, they shall enter into force on 1 January of each year and shall remain unchanged at least during the respective year.*

*(3) In the event that the amendments and/or supplementations are adopted by ordinances, shorter terms of entry into force may be provided, but not less than 15 days from the date of publication, except for the situations provided for by para. (2).*".

Therefore, analysing the legal provisions, we note that in order not to affect the stability and predictability of the legal circuit that originates from fiscal law relationships (as a necessity of the constitutional obligation of fair settlement of fiscal burdens - art. 56 of the Constitution), the legislator provided for the possibility of amending the Fiscal Code by means of Emergency Ordinances, except for cases when following the introduction (for example) of new contributions, unfavourable situations are created for taxpayers, in that situation the regulation can only be performed by law, in compliance with the provisions of art. 4 paras. (1) and (2) of the Fiscal Code.

This interpretation is the right one and represents the transposition at the level of the infra-constitutional laws of the provisions of art. 139 para. (1) of the Constitution, according to which:

"*(1) Taxes, duties and any other revenue of the State budget and State social security budget shall be established only by law.*"[43].

Therefore, it is obvious that the legislator's will, in case of the amendments concerning taxes, duties and contributions, established by the exception in art. 4 para. (3), was to exclude from the scope of the Emergency Ordinances the possibility of making changes that are unfavourable to the taxpayer, i.e. the introduction of or increases in taxes, duties or contributions or the elimination or reduction of tax benefits.

This also results from the analysis of art. 3 letter e) of the Fiscal Code, which governs the principle of predictability of taxation, according to which:

"*predictability of taxation ensures the stability of taxes, duties and compulsory contributions for a period of at least one year, during which there can be no changes in terms of increase or introduction of new taxes, duties and compulsory contributions.*".

In this respect, the doctrine points out that:

"*There are two exceptions from this rule (*stated in the two first paragraphs of art. 4*), justified by the urgency of the amendment, which, acting by means of ordinances, may enter into force within at least 15 days: however, the law provides that by the conjunction of para. (3) with para. (2), no amendments unfavourable to taxpayer can be performed by means of ordinances, respectively the introduction of or increases in taxes, duties or contributions*

[43] Text available at https://www.ccr.ro/constitutia-romaniei/.

*or the elimination or reduction of tax benefits."*[44].

Furthermore, even if we accept the possibility of introducing contributions by means of emergency ordinances, GEO no. 130/2021 did not even meet the 15-day deadline (art. 4 para. 3 of the Fiscal Code), as we have noted, the normative act entered into force on 18 December 2021 and the obligation to pay the contributions became due from 01.01.2022, thus violating the provisions of art. 1 para. (5) of the Constitution, according to which the observance of the laws shall be mandatory.

As we have already mentioned, the rules in art. 4 of the Fiscal Code are meant to ensure effective publicity *in tax matters,* from at least two perspectives:

(i) on the one hand, the publicity of the measures proposed by the Government or the parliamentarians was considered, by establishing the obligation to promote the law amending the Fiscal Code or the Fiscal Procedure Code 6 months before their entry into force and its debate within the legislative procedure;

(i) on the other hand, the publicity of the amendments and supplementations adopted by the Parliament was taken into account, by establishing a "reflection period" represented by the period between the adoption of the amending law and 1 January of the following year.

It should be noted that in another Member State of the European Union[45], Poland, the Constitutional Court[46] assessed as necessary the existence of a period of *vacatio legis* in fiscal matters, of one month from the publication of the law in the Official Journal, starting from the principle enshrined in art. 2 of the Constitution of Poland, namely the rule of law principle in a democratic state. This principle was specifically established by the Polish constitutional court by means of several rules:

- establishing a balance between the exclusive right of the state to establish fees and taxes for the realization of budget revenues and the rights and interests of taxpayers, by regulating some procedural guarantees in favour of the "weak part" of this relation;
- the loyalty of the state in relation to the recipients of the legal norms enacted, by formulating predictable and accessible regulations, published in the Official Journal with a reasonable time interval before their application;
- legal security, i.e. maintaining the decreed provisions for a certain period of time, so that there are no legal effects that could not be foreseen at the time the taxpayer made important decisions in fiscal matters.

Given all these, the following were noted, including in the doctrine:

*"Based on these elements, we believe that the Parliament should reject any emergency ordinance that does not meet the constitutional requirements. This is all the more necessary in the fiscal field, where the*

[44] Radu Bufan, *Tax code commented at 01-nov-2020,* Wolters Kluwer, comment on art. 4 of the Fiscal Code, available at https://sintact.ro/#/commentary/587237121/1/bufan-radu-codul-fiscal-comentat-din-01-nov-2020-wolters-kluwer?cm=URELATIONS.

[45] Roxana-Mariana Popescu, *Interpretation and enforcement of article 148 of the Constitution of Romania republished, according to the decisions of the Constitutional Court*, in Challenges of the Knowledge Society, (Bucharest, 17th - 18th May 2019, 13th ed.), available at http://cks.univnt.ro/articles/14.html, p. 711 and following.

[46] See Cosmin Flavius Costaş in Radu Bufan, Mircea Ştefan Minea (coord.), *Tax code commented*, Wolters Kluwer Publishing House, Bucharest, 2008, p. 114 -115, pt. 175.

*principle of legal security requires ensuring stability, certainty, predictability*"[47].

In conclusion, in our opinion, there is no doubt that the provisions of art. XXIV and art. XXV of GEO no. 130/2021 are unconstitutional, by being issued in violation of the provisions of art. 1 paras. (3) and (5) in conjunction with art. 56 para. (2), all of the Constitution of Romania.

**4. GEO no. 130/2021, in what concerns the provisions of art. XXIV and art. XXV which regulate the reintroduction of the obligation to pay health insurance contribution for pension income is unconstitutional, by violating the provisions of art. 56 and art. 16 para. (1) of the Constitution of Romania.**

According to the provisions of art. 16 para. (1) of the Constitution:

"*(1) Citizens are equal before the law and public authorities, without any privilege or discrimination.*"[48].

According to the provisions of art. 56 of the Constitution:

*"(1) Citizens are under the obligation to contribute to public expenditure, by taxes and duties.*

*(2) The legal taxation system must ensure a fair distribution of the tax burden.*

*(3) Any other dues shall be prohibited, except those determined by law, under exceptional circumstances.*"[49].

The violation of the principle of equality by the provisions of GEO no. 130/2021 are substantiated by the fact that the obligation to pay health insurance contribution is established only for pensions that exceed RON 4000, exclusively on the difference that exceeds this ceiling.

This legislative intervention creates different legal regimes for identical social situations.

The constitutional right to pension takes shape after the fulfilment of the retirement conditions and reflects the result of the person's contribution (material and/or professional/vocational), which is recognized throughout his or her active working life to the state funds created for this purpose.

The different amount of the pension does not represent a benefit granted by the state and on which the state can intervene at any time and in any way, but it is an earned right of the person, recognized as a result and to the extent of the contributions paid throughout life in relation to the income obtained or the qualities held (through a legal assessment of the interference of the professional activity exercised in the interest of all, in the private life of the taxpayer), on which it is not possible to intervene.

Beyond this aspect, even if we admit the possibility of an intervention restricting these rights, this intervention must be a unitary one affecting, equally, all pensions, regardless of the value of these rights, otherwise the principle of equality is obviously affected.

Therefore, given that the challenged provisions affect only pension income exceeding RON 4000, we consider that the principle of equality laid down in Article 16 of the Constitution is infringed.

GEO no. 130/2021, by means of the provisions subject to unconstitutionality control, makes a clear differentiation in the application of health insurance contributions, the new "tax" being established only on high value pensions,

[47] Radu Bufan, *Tax code commented at 01-nov-2020,* Wolters Kluwer, comment on art. 4 of the Fiscal Code, available at https://sintact.ro/#/commentary/587237121/1/bufan-radu-codul-fiscal-comentat-din-01-nov-2020-wolters-kluwer?cm=URELATIONS.

[48] Text available at https://www.ccr.ro/constitutia-romaniei/.

[49] *Ibidem.*

respectively for the amounts exceeding RON 4000 in what concerns income derived from pensions, by applying a percentage of 10%.

This also infringes the provisions of art. 56 of the Constitution from the perspective of the principle of tax fairness.

As regards the fair assessment of the tax burden, the Constitutional Court[50] held that taxation must be not only lawful but also proportional, reasonable and fair and must not differentiate taxes according to groups or categories of citizens.

Therefore, in connection with all the aforementioned, it is obvious that this uneven application of health insurance contribution in relation to the value of salary entitlements is an infringement of the provisions of art. 16 and art. 56 of the Constitution.

**5. GEO no. 130/2021, in what concerns the provisions of art. XXIV and art. XXV which regulate the reintroduction of the obligation to pay health insurance contribution for pension income is unconstitutional, by violating the provisions of art. 147 para. (4) of the Constitution of Romania**

According to the provisions of art. 147 para. (4) of the Constitution:

"*(4) Decisions of the Constitutional Court shall be published in the Official Journal of Romania. As from their publication, decisions shall be generally binding and effective only for the future.*"[51].

By means of Decision no. 900 of 15.12.2020, the Constitutional Court pointed out the following:

"*although the amounts paid as social insurance contributions do not represent a time deposit and therefore, they cannot entail a right of claim against the state or social insurance fund, they entitle the person who derived income and paid the contributions to the state social insurance budget to benefit from a pension reflecting the level of income earned during his or her working life. The amount of the pension established in accordance with the contribution principle is an earned right, so that its reduction cannot be accepted even temporarily.*"[52].

More specifically, art. 82 para. (1) of Law no. 303/2004 clearly provides that public service pension is 80% of the calculation basis represented by the gross monthly employment allowance or the gross monthly basic salary, as the case may be, and the benefits received in the last month of service before the date of retirement, therefore, any modification of this amount, in the sense of an indirect reduction as a result of the introduction of compulsory payment of the health insurance contribution, violates the provisions of art. 147 para. (4) of the Constitution.

**6. Final considerations**

In conclusion, for all the arguments of fact and law set out above, we consider that these legal norms are contrary to the constitutional norms above mentioned.

In relation to the current system, the position of the Constitutional Court has been and is extremely clear, so that any legislative amendment, either at the initiative of the Parliament or at the initiative of the Government, by Emergency Ordinance,

[50] See, for example, Decision no. 6 of 25 February 1993, published in Official Journal of Romania, Part I, no. 61 of 25 March 1993 and Decision no. 940 of 6 July 2010, published in Official Journal of Romania, Part I, no. 524 of 28 July 2010.

[51] Text available at https://www.ccr.ro/constitutia-romaniei/.

[52] Text available at https://www.ccr.ro/wp-content/uploads/2020/11/Decizie_900_2020.pdf.

must take into account the constitutional requirements.

Last but not least, given the European Commission's criteria for granting funds to Romania under the National Recovery and Resilience Plan, discussing the issue of special pensions is highly topical.

We are waiting to see what legislative changes the Parliament will propose and how they will pass through the filter of the Constitutional Court.

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# THE IMPLICATIONS AND PREDICTED IMPACT OF THE DIGITAL SERVICES ACT IN ROMANIA

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## Abstract

*Increased transparency in the online environment is a theme that runs throughout the Digital Services Act, circumstance which has led to the writing of this paper, intended to be an overview of this "old but new" and comprehensive set of rules, with the authors' personal notes. Building on the premise that the responsible and diligent behaviour of intermediary services is essential for a safe, predictable and trustworthy online environment, the Digital Services Act harmonizes, by means of a directly applicable legal act, the provision of information society services in the form of intermediary services, by preserving, in principle, the main rules regulating the (exemption from) liability of the intermediary services providers, while also regulating an extensive set of due-diligence and transparency obligations for the later. Such harmonization is desirable bearing in mind that online platforms are part of the macro-system that determines future innovations and consumer choice. To what extent the DSA will succeed in doing its part in transforming digital space into a safer one, where the fundamental rights of users (and especially of consumers) are protected, remains to be seen. Meanwhile, the authors are nevertheless assured that the impact will be significant, especially on the topics consciously chosen to be addressed hereafter.*

**Keywords:** *digital services act, intermediary services, marketplace, digitalization, transparency, consumer protection, neutrality test, good Samaritan protection, online platforms.*

## 1. Introduction

27 October 2022 marks the day when the long-awaited Regulation (EU) 2022/2065 of the European Parliament and of the Council on a Single Market for Digital Services and amending Directive 2000/31/EC[1] (hereinafter referred to as "Digital *Services Act"* or "*DSA"*) has been published in the Official Journal of the European Union.

DSA has entered into force on the twentieth day following that of its publication and shall become directly applicable into the national legislation of the Member States, including in Romania, starting with 17 February 2024. Specific provisions of DSA, as expressly indicated, are nevertheless applicable since 16 November 2022.

DSA modifies Directive 2000/31/EC of the European Parliament and of the Council on certain legal aspects of

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[1] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce).

information society services, in particular electronic commerce, in the Internal Market (hereinafter referred to as the "*e-Commerce Directive"*), by eliminating Articles 12 – 15 of the normative act.

However, the principles under which the intermediary service providers could be held responsible for the content provided through acts of '*mere conduit'*, '*caching'* or '*hosting'*, as previously regulated through Article 12 – 15 of the e-Commerce Directive, are not forgotten. The main rules governing the liability of intermediary services are incorporated into the DSA legal framework, thus seeking to preserve the intermediary liability framework of the e-Commerce Directive, but also to clarify certain elements, by considering the case law of the Court of Justice of the European Union (hereinafter referred to as "*CJEU*").

The necessity of a new legal framework aiming at regulating, through a directly applicable normative act, the liability of the intermediary services, arose from at least two perspectives. On the one side, the transposition of the e-Commerce Directive in the Member States left room for divergences in both the law-making and the application of the legislation at the national level. On the other side, clarity and coherence in regulation were required, especially having regard to the case-law built by the European Union's (hereinafter referred to as "*EU*") Court of Justice under the provisions of Articles 12 – 15 of the e-Commerce Directive[2].

This paper aims at presenting, while also opening the floor for further debates on, the conditions under which the providers of online platforms allowing consumers to conclude distance contract with traders may be held liable toward the consumers for the content stored within the online platform, at the request of the trader, as a recipient of the service.

The legal regime of the responsibility the providers of online platforms allowing consumers to conclude distance contract with traders have toward the consumers, is a subject of utmost importance in a context where intermediary services in e-commerce sector, as a sub-category of information society services, have become a part of the daily life of citizens in EU.

The focus of this paper however is to identify and excite the appetite for further discussions in relation to the main challenges the DSA, as directly applicable in the national legislation in Romania, may pose in the context of its implementation and enforcement, considering its proclaimed complementarity with the existing consumer protection legislation in force, both at the EU and national level.

As acknowledged in the DSA Explanatory Memorandum, the rules set out in the normative act *will be complementary to the consumer protections acquis and specifically with regard to Directive (EU) 2019/2161 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU which established specific rules to increase*

[2] Preamble (16) of DSA specifically states in the sense that "*(T)he legal certainty provided by the horizontal framework of conditional exemptions from liability of providers of intermediary services, laid down in Directive 2000/31/EC, has allowed many novel services to emerge and scale up across the internal market. The framework should therefore be preserved. However, in view of the divergences when transposing and applying the relevant rules at national level, and for reasons of clarity and coherence, that framework should be incorporated in this Regulation. It is also necessary to clarify certain elements of that framework, having regard to the case-law of the Court of Justice of the European Union*".

*transparency as to certain features offered by certain information society services*[3].

In addition, Article 2 paragraph 4 of the DSA specifically states that the DSA is without prejudice to the rules laid down by EU law on consumer protection and products safety.

With a desire to ensure full consistency with the existing EU policies, the DSA is construed based on a horizontal approach in relation to a series of existing EU legislative instruments that the first would leave unaffected and with which it would be consistent[4].

Based on the consistency purpose, the direct applicability of the DSA into the national legislation in Romania would inherently involve the necessity of identifying the corresponding mechanisms and solutions as to ensure the implementation of the DSA requirements in the context of the existing legislative framework (including in the field of consumer protection).

While the core legislative framework in the field of consumer protection at the national level resides in normative acts that transpose the EU pieces of legislation, it is important to bear in mind that the central legislative act that governs the business-to-consumers relationships subject to the national legislation in Romania, at the moment when this piece of paper is made available, resides in Government Ordinance no. 21/1992 on consumers protection, as republished (*"GO no. 21/1992"*).

## 2. Liability of online platforms allowing consumers to conclude distance contracts with traders under the DSA Regulation

### 2.1. Territorial scope of the Digital Services Act.

As specifically stated, the DSA is intended to apply to intermediary services offered to recipients of the service that have their place of establishment or are located in the EU, irrespective of where the providers of these intermediary services have their place of establishment.

Under the DSA, the *recipient of the service* shall designate *any natural or legal person who uses an intermediary service, in particular for the purpose of seeking information of making it accessible.* As indicated through the Preamble to the DSA, the recipients of the service shall encompass business users, consumers and other users.

Thus, the DSA chooses one interesting solution in establishing its territorial scope, by reference to the place of establishment or location of the recipients of the intermediary services providers, regardless of the place of establishment of the intermediary services provider.

### 2.2. Material scope of Digital Services Act. Status qualification of online platforms allowing consumers to conclude distance contracts with traders.

The DSA shall govern the provisions of intermediary services consisting in one of the following information society services:

[3] European Commission, *Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, COM (2020) 825 final (European Commission, December 2020), p6 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0825&from=en.

[4] Caroline Cauffman, Catalina Goanta, *A New Order: The Digital Services Act and Consumer Protection*, https://www.cambridge.org/core/journals/european-journal-of-risk-regulation/article/new-order-the-digital-services-act-and-consumer-protection/8E34BA8A209C61C42A1E7ADB6BB904B1.

*"mere conduit", "caching"* and "*hosting"* services.

The *hosting* service shall designate the activity of the intermediary service provider which ensures the storage of information provided by, and at the request of, a recipient of the service.

Furthermore, within the broader category of providers of hosting services, the DSA specifically sub-categorizes the online platforms allowing consumers to conclude distance contracts with traders (simply put, business-to-consumer ("*B2C*") online marketplaces), as providers of *hosting* services, since those platforms not only store information provided by the recipients of the service at request, but also disseminate that information to the public upon request of the recipients of the service.

Thus, the B2C online marketplaces shall observe a set of extended requirements, considering the layered regulatory model governing their legal regime under the DSA. Specific obligations imposed to online platforms, in general, and to online platforms allowing consumers to conclude distance contract with traders, in particular, are built on the general requirements set forth for the hosting services providers to observe.

In order to avoid disproportionate burdens however, providers that are micro or small enterprises, as defined in Commission Recommendation 2003/361/EC[5], are exempted from various requirements regulated by DSA while large and very large online platforms are subject to specific additional obligations, as to ensure the management of systemic risks.

### 2.3. Between the principle of neutrality and extended due-diligence obligations imposed through DSA.

The uninterrupted growth of the early Internet has been built on a set of regulatory assumptions. Unnecessary regulation should be avoided, the e-commerce should be promoted, and the intermediaries should be given a neutrality status from a liability regime standpoint[6].

#### 2.3.1. To be or not to be liable, as a hosting service provider.

In the context of the legal regime established through the provisions of the DSA for hosting services providers, including B2C online marketplaces, it is worth mentioning that the EU legislation only aims at covering the exemption criteria under which the hosting services provider would not incur liability. Situations in which a hosting services provider may be held liable however are to be subject to other EU or national laws[7].

As expressly stated through the preamble to the DSA, the rules that frame the liability regime of the hosting services providers are not meant to provide *a positive basis* for establishing when a provider can be held liable, and only to determine the exemptions under which the service provider cannot be held liable in relation to

[5] Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises.

[6] Andrej Savin, *The EU Digital Services Act: Towards a More Responsible Internet (Copenhagen Business School Law),* https://research.cbs.dk/en/publications/the-eu-digital-services-act-towards-a-more-responsible-internet.

[7] Caroline Cauffman, Catalina Goanta, *A New Order: The Digital Services Act and Consumer Protection*, https://www.cambridge.org/core/journals/european-journal-of-risk-regulation/article/new-order-the-digital-services-act-and-consumer-protection/8E34BA8A209C61C42A1E7ADB6BB904B1.

illegal content provided by the recipients of the service.

It should be noted that **the DSA does not harmonize what content or behavior counts as illegal. Thus, the qualification and interpretation of the "illegal content" remains under the sovereignty of Member States.**

### 2.3.2. Neutrality of the hosting service provider.

The situations under which the hosting service provider is exempted from liability are expressly provided in Article 6 of the DSA, namely:

(i) the provider does not have actual knowledge of illegal activity or illegal content, or

(ii) upon obtaining such knowledge or awareness, the provider acts expeditiously to remove or to disable access to the illegal content.

The exemptions, however, do not apply in cases where the recipient of the service is acting under the authority or the control of the provider.

To put it simple, in order for the liability exemption to be applicable, the behavior of the hosting services provider shall pass the neutrality test. This is not a novelty brought by the DSA, since the issue has been extensively analyzed by the CJEU under the e-Commerce Directive.

In its case-law, CJEU formulated the core criterion to be fulfilled by the hosting services providers in order to pass the neutrality test. Thus, the hosting service provider may rely on the exemption from liability provided by the EU law if they took a neutral position in relation to their users'[8] content, which would involve that no active role is played as to confer them knowledge of or control over that content[9].

As CJEU has stated:

(i) the mere fact that the operator of an online marketplace store offers for sale on its server, sets the terms of its service, is remunerated for that service and provides general information to its customers cannot have the effect of denying it the exemptions from liability[10];

(ii) the exemption applies in the case where the service provider has not played an active role of such a kind as to give it knowledge of, or control over, the data stored; the service provider cannot be held liable for the data which it has stored at the request of an advertiser, unless, having obtained knowledge of the unlawful nature of those data or of that advertiser's activities, it failed to act expeditiously to remove or to disable access to the data concerned[11].

The principles established by the CJEU case law have been now codified in Recital 17 and Recital 18 of the DSA. The DSA follows, in particular, the CJEU's ruling in L'Oréal v. eBay. The clarifications provided in L'Oréal v. eBay (para. 115-116) are that storing offers for sale, setting the terms of service, being remunerated for the service and providing general information to users do not make a hosting service provider "*too active*". The ruling also clarifies that

[8] Given the wording of the relevant provisions, online platforms may need to take into account users beyond just those registered with accounts (where relevant).

[9] Folkert Wilman, *The Evolution of the DSA's Liability Rules in Light of the CJEU's Case Law*, (Putting the DSA into Practice: Enforcement, Access to Justice, and Global Implications), https://verfassungsblog.de/dsa-preservation-clarification/.

[10] C-324/09 L'Oréal SA and Others v eBay International AG and Others ECLI:EU:C: 2011:474.

[11] Joined Cases C-236/08 to C-238/08, Google France SARL and Google Inc. v Louis Vuitton Malletier SA (C-236/08), Google France SARL v Viaticum SA and Luteciel SARL (C-237/08) and Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL and Others (C-238/08), EU:C:2010:159.

this would be different, however, where a provider optimizes the presentation of the offers for sale or promotes those offers.

The national courts in Romania have followed in turn the rationale expressed by CJEU and also stated in the favor of the neutrality principle by not holding liable those intermediary services providers that did not remove *ex officio* the alleged illicit content, without a specific request to be submitted in this respect, as to ground that the intermediary services provider would have become aware of the illicit character of the said content[12].

Nonetheless, one should not ignore the fact that the above case law conveys that intermediary service providers (our note: predominantly hosting service providers) can play an active role to some extent, provided such role is not likely to give them knowledge of or control over the content that they share or store for their users.

### 2.3.3. Good Samaritan Exemption.

As opposed to the applicable legal regime in the United States[13], in the EU, the e-Commerce Directive did not explicitly protect internet intermediaries involved in good faith measures against illegal or inappropriate content.

DSA comes with an update and regulates the so-called "*Good Samaritan*" protection rule, through the provisions of Article 7, stating that voluntary own-initiative investigations or other measures taken by the providers of intermediary services, aiming at detecting, identifying and removing, or disabling access to, illegal content, or simply measures that are necessary as to comply with requirements of EU law and national law in compliance with EU law, shall not preclude the exemptions from liability regulated by the DSA in relation to hosting services providers[14].

It is important to underline that the "*Good Samaritan"* protection is dependent on the intermediary service provider acting in good faith and in a diligent manner.

Considering the wording of Article 7 of the DSA and the provisions of Recital 26[15], it has been underlined that the principle of good faith and diligence are meant to strike a balance between the interests of the intermediary services provider and the fundamental rights of internet service users[16].

At least in theory, the codification of the "*Good Samaritan*" protection rule through the DSA seems to be welcomed by the stakeholders, since it appears as a firm confirmation of the recent judgment delivered by the CJEU in the *YouTube*

[12] First Civil Division of High Court of Cassation and Justice, Decision no. 338/2021; Ploiesti Court of First Instance, Civil Division, Decision no. 2082/2021.

[13] For a very insightful contextual presentation of the relevant legal provisions in the United States that ground an exemption from liability for internet intermediaries in relation to any voluntary actions taken in good faith against certain types of objectionable content, see Aleksandra Kuczerawy, *The Good Samaritan that wasn't: voluntary monitoring under the (draft) Digital Services Act*, https://verfassungsblog.de/good-samaritan-dsa/.

[14] To be borne in mind however that the so-called "*Good Samaritan*" protection rule is regulated as to apply for all the information society services covered by the DSA (*mere conduit*, *caching* and *hosting*).

[15] Recital 26 specifically states in the sense that "*(…) The condition of acting in good faith and in a diligent manner should include acting in an objective, non-discriminatory and proportionate manner, with due regard to the rights and legitimate interests of all parties involved and providing the necessary safeguards against unjustified removal of legal content, (…).*"

[16] Jacob van de Kerkhof, *Good Faith in Article 6 Digital Services Act (Good Samaritan Exemption* (The Digital Constitutionalist, 15 February 2023), https://digi-con.org/good-faith-in-article-6-digital-services-act-good-samaritan-exemption/?utm_source=rss&utm_medium=rss&utm_campaign=good-faith-in-article-6-digital-services-act-good-samaritan-exemption.

case[17], whereby the CJEU specifically expressed itself in the sense that if an intermediary undertakes technological measures aimed at detecting content which may infringe the applicable legal requirements in force (the case under discussion was expressly referring to infringement of copyrights) does not mean, by itself, that said operator plays an active role, giving it knowledge of and control over the content uploaded by a service recipient.

Going further, it is worth mentioning that the final thesis of Article 7 of the DSA, when specifically stating that the liability exemption provided for intermediaries remains applicable also in cases where the intermediaries take the necessary measures to comply with the requirements of the EU law or national law, including the requirements established by the DSA, should not be undermined under a potential "stating the obvious" rationale.

As it has been pointed out, the final thesis of Article 7 of the DSA, regulating the "*Good Samaritan"* protection rule, may prove to be an opportune regulatory inventive for those who would need to be reassured that compliance with the extensive due-diligence obligations will not lead, by itself, to failing the neutrality test and thus, becoming "*too active"*[18].

### 2.3.4. The specific case of hybrid marketplaces

It has been statistically shown that consumers are increasingly buying goods online and the e-commerce marketplace is inherently growing, thus including more and more examples of hybrid marketplaces also[19].

The DSA covers, in terms of liability, the specific situation of online hybrid marketplaces, by expressly stating that platform that allow consumers to conclude distance contracts with traders are not exempted from liability provided by Article 6 of the DSA where such an online platform presents the specific item of information or otherwise enables the specific transaction at issue in a way that would lead an average consumer to believe that the information, or the products or services that is the object of the transaction, is provided either by the online platform itself or by a recipient of the service who is acting under its authority or control[20].

The specific case of hybrid marketplaces' liability has been subject to a very recent judgment of the CJEU. While the judgment has been rendered following the adoption of the DSA, with the joined cased being however submitted with CJEU before the moment of the DSA adoption, the rationale of the Court of Justice follows and are mirrored into the regulatory mechanism chosen by the DSA.

The judgment of the CJEU highlights a set of essential criteria to be considered when analyzing whether a hybrid marketplace may fall under the scenario provided for through Article 6 paragraph 3 of the DSA, scenario that impedes the application of the liability exemption regulated through Article 6 paragraph 1 of the Digital Services Act.

[17] Joined Cases C-682/18 and C-683/18, Frank Peterson v. Google LLC, YouTube Inc., YouTube LLC, Google Germany GmbH (C-682/18) and Elsevier Inc. v. Cyando AG (C-683/18), EU:C:2021:503.

[18] Folkert Wilman, *The Evolution of the DSA's Liability Rules in Light of the CJEU's Case Law*, (Putting the DSA into Practice: Enforcement, Access to Justice, and Global Implications), https://verfassungsblog.de/dsa-preservation-clarification/.

[19] European E-commerce Report 2022, https://ecommerce-europe.eu/wp-content/uploads/2022/06/CMI2022_FullVersion_LIGHT_v2.pdf.

[20] Article 6 paragraph 3 of the DSA.

CJEU points out that, when establishing if a hybrid online market place leaves room for confusion among consumers in relation to the identity and/or characteristics of the trader providing the products and/or services made available on the online marketplace, the following are relevant: the marketplace using a uniform method of presenting the offers published on its website, displaying both the advertisements relating to the good sold by the marketplace in its own name and on its own behalf and those relating to good offered by third-party sellers on that marketplace, the fact that the marketplace offers third-party sellers, in connection with the marketing of goods bearing the sign at issue, additional services consisting inter alia in the storing and shipping of those goods[21].

The criteria provided by CJEU are to be, of course, analyzed and applied on a case-by-case basis.

Under the national legislation, however, various challenges may be predicted in relation to the application of Article 6 paragraph 3 of the DSA. One of the many challenges would reside in the interpretation conferred to the *average consumer*, especially considering the lack of any express definition or specific criteria provided by the national legislation in this respect, on the one hand, and the restrictive approach endorsed by the national authorities in the field.

**2.3.5. Extended due-diligence obligations under the DSA.**

The B2C online marketplaces would be bound to observe an extensive set of due-diligence requirements under the DSA, including (without being limited to) transparency and reporting obligations, compliance-by-design requirements, especially in relation to a general prohibition of using dark patterns, traceability obligations in relation to traders, as recipients of the intermediary services provided by the B2C online marketplace.

Especially in the field of the extended due-diligence obligations set forth in the DSA for online platforms, the implementation and enforcement of the legal requirements at the national level in each Member State, including in Romania, is clearly highly dependent on the way the designated national authorities will understand to use their enforcement powers[22].

One of the main challenges we anticipate that the B2C online marketplaces will confront at the national level, in Romania, resides in the manner in which the priority of the specialized norms regulated through the DSA, as a directly applicable legal act, would be recognized and endorsed within the practice of the competent national authorities in the field of consumers protection.

This prediction follows a long standing practice of the competent national authorities revealing an obvious reluctance in giving full effect to the specialization requirement when comes to the general –

[21] Joined Cases C-148/21 and C-184/21, Christian Louboutin v. Amazon Europe Sarl (C-148/21), Amazon EU Sarl (C-148/21), Amazon Services Europe Sarl (C-148/21), Amazon.com Inc (C-184/21), Amazon Services LLC (C-184/21), EU:C:2022:1016.

[22] For a strong point of view on the codependency between the DSA's success and its enforcement within the Member States, along with a parallel with GDPR (weak) enforcement over the past several years, please see, Julian Jaursch, *Platform Oversight. Here is what a Strong Digital Services Coordinator Should Look Like* (Putting the DSA into Practice: Enforcement, Access to Justice, and Global Implications), https://www.stiftung-nv.de/en/publication/platform-oversight-what-strong-digital-services-coordinator-should-look.

special law relationship and thus, getting to enforce the specialized norms (even in case of harmonized specialized norms at the European Union level) in light of the general legal provisions applicable in the field of consumers protection in Romania, mainly codified through Government GO no. 21/1992 on consumers protection, as republished.

A strong point of reference in the DSA enforcement should reside however in the practice that the European Commission is expected to crystallize within the market. Thus, the monitoring and enforcement actions that will be conducted by the European Commission in relation to the online platforms are reasonably expected to constitute, for the national legislators, enforcement bodies and courts of law, the main landmark of good practice when talking about monitoring the activity and behavior of an online platform[23].

Moreover, in order for the Member States to provide the necessary support and reaction as to ensure that the harmonization goal of the DSA is properly achieved, the national legislators, enforcement bodies and even the courts of law should be opened to make use of the instruments offered by the EU, in this case, especially of those instruments designed to gather and analyze data on online platforms' activity and general behavior, data which would be further translated in feedback to be considered and recommendations and guidelines to be followed under the main scope of improving the online environment and make it safer for both the business users and consumers[24].

## 3. Conclusion

The DSA is a shield of legal liability that aims to incentivize companies to be more proactive and legally assertive when moderating the content on their online platform. DSA will apply across online marketplaces, social networks, app stores, travel and accommodation platforms, and many others.

On one note, as an EU Regulation, the DSA's provisions are directly applicable in every Member State and enforcement will be split between national regulators and the European Commission, whilst interested parties will be having access to dispute resolution mechanisms in their own country, where the implementation and enforcement modalities of the DSA are effectively judicially clarified.

On another note, clarifications on the intermediary liability regime and service providers' active role tend to build on existing CJEU case law and will, undoubtedly, along the way generate new case law. DSA's rules on matters as due

[23] It is worth mentioning that, at the date when this research paper is written, the European Commission has already launched its proposal on a Commission Implementing Regulation on detailed arrangements for the conduct of certain proceedings by the Commission pursuant to the Regulation (EU) 2022/2065 of the European Parliament and of the Council ("Digital Services Act"). For consulting the current form of the proposal, along with detailed information on the legislative procedure status and future outcomes, please see: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13565-Digital-Services-Act-implementing-regulation_en.

[24] A very useful and somehow underrated instrument resides in the *Observatory on the Online Platform Economy*, which monitors the evolution of the online platform economy to advise and support the Commission in its policy making in relation to online platforms. The Observatory aims to contribute to an environment of fair and trusted cooperation between business users and online platforms. However, the outcome delivered to the consumers is also under the scrutiny of the Observatory. An interesting piece of paper delivered by the Observatory, along other expert groups, which includes some good remarks on the dark patterns and their incidence in the online platform, with negative effects on the consumers, may be consulted here: https://op.europa.eu/en/publication-detail/-/publication/ee55e580-ac80-11eb-9767-01aa75ed71a1/language-en/format-PDF/source-206332284.

diligence and risk assessments signal without question a different approach adopted by the European legislator in terms of liability-related matters.

Besides, a legal foresight might materialize – more precisely, the concept of "intermediary service provider" may well change by virtue in view of the differing contextualization under the DSA umbrella – whereas under the e-Commerce Directive the liability exemption was rather the common rule.

Furthermore, what emerges from the foregoing study is that a major importance in the application of DSA's Article 6 is the "*diligent economic operator test*" applied by the CJEU in the past, which should also be considered going forward in distinguishing active intermediaries from passive ones. This test resembles the reasonable person test stemming from tort law, which essentially asks what a reasonable person of ordinary prudence would have done under the same or similar circumstances.

As such matter is left to domestic courts to decide under their applicable common civil law, divergent interpretations and applications of the test will not be inevitable. The highest risk in practice will consist in having a uniform understanding of the term "diligence" which will consequently, most likely, lead to fragmented applications across the EU - until the CJEU perhaps will further clarify this notion and will clearly set up the "*standard of care*" viewed under Article 6 of the DSA.

Nevertheless, it should be underlined that Article 6 does not protect intermediaries against the fact that voluntary actions could lead intermediaries to have "actual knowledge" of illegal content. Hence, the provision protects an intermediary only from being considered "active" solely based on actions taken to remove illegal content voluntarily. The "Good Samaritan" clause on the other hand, illustrates the difficulties of trying to hold on to the legal distinction between passive and active service providers in the moderated online world. This aspect will be left, in any case, firstly, to the assessment of the consumer protection bodies and, secondly, to the assessment of the national courts that would settle disputes arising in this legislative context.

It may be particularly difficult to prove in court when and if we are discussing "actual knowledge" of illegal content on the platform in certain situations where online platforms are highly automated - for example, it remains to be seen how the situation will be judicially assessed when discussing the fact that online platforms are largely AI-moderated using algorithms designed to identify, filter and eliminate certain "risks", even if it could be proven that the algorithms were set in a very diligent way[25].

DSA is still novel, so new but old legal issues will arise, and it will be worth observing how will DSA adapt also in the context of national law.

It is therefore of paramount importance to point out that private individual remedies, such as claims for damages, injunctive reliefs or preliminary injunctions, do not follow the obligations set out in the DSA. Injured parties will continue to rely on national civil (tort or contractual) law provisions when claiming damages, which is not favored by the exemption from liability.

Certainly, many questions of a procedural nature will also emerge when it

[25] Miriam C. Buiten, Alexandre De Streel and Martin Peitz, *Rethinking Liability Rules for Online Hosting Platforms Rethinking Liability Rules for Online Hosting Platforms*, (2019) 27 International Journal of Law and Information Technology (IJLIT) 139.

comes to litigation arising out of the infringements underpinning DSA. One may think for instance of the situation of preliminary injunctions against intermediaries - who in certain circumstances should be considered as the persons who have standing and an interest in being ordered to temporarily remove certain online content or to take other temporary measures (i.e., they may be treated as accountable), although this would not mean that they should also be liable for damages on the merits (i.e., they may be treated as not liable).

The DSA is yet another tangible proof of the fact that the legislation regulating digital technologies is emerging gradually and is likely to produce a major impact on the way we have been applying and interpreting the legislation so far. All actors thus involved in the practical implementation or enforcement of the DSA, need to equip themselves with a new mindset that must be compatible both with the technological progress perceptible day by day, as well as with the rule-making requirements for providing effective protection to services users and beyond.

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# ARE WE SAYING THE SAME THING, BUT ACTUALLY SOMETHING DIFFERENT? - EXTRACTS FOR A THEORY OF LEGAL INTERPRETATION IN LABOUR LAW[1]

**István HERDON**[*]

## Abstract

*As a cross-cutting area of law, labour law presents many difficulties in interpretation. Although legal interpretation issues are essentially dealt with in legal theory, the specificities of labour law raise a number of issues that need to be treated specifically from a labour law perspective. One feature of labour law, which practitioners and the literature no longer dispute, is that it mixes private and public law norms, which can provide a number of novae for research into the methodology of interpretation. Labour law is a status law, which is meant that it seeks to regulate exclusively the organized work of the human being. The interpretative horizon of labour law is affected by the fact that this area of law is regulated at several levels. While the classical private law framework is dominated by national sources of law, labour law is also extensively influenced by the products of European Union law. There is no doubt that the private law roots of contract-based labour law are still dominant, but there is a growing trend towards the use of legal interpretation methods derived from EU law, which is devoid of private law doctrine. There is often a conflict of terminology and interpretative methods between domestic and international law, including EU law, which cannot be resolved by classical methods. In light of the above, my essay will focus on the legal interpretation methods of labour law, with particular attention to both theoretical and practical positions. Among the methods of interpretation, I will examine their relevance and prevalence at the EU and national level, and attempt to draw conclusions from these findings for the sustainability of labour law.*

**Keywords:** *legal interpretation methods, European Union law, Hungarian Law, labour law, soft law.*

## 1. Introduction

Legal theory basically deals with methods of legal interpretation. This finding, although debatable, suggests that those dealing with individual areas of law often tend to ignore the methodological analysis of the interpretation performed by the legal practitioner. In my opinion, this is also true in the field of labour law, even though this is precisely the overarching legal field that contains a miscellany of many private and public law norms[1], as a result of which the research on the methodology of interpretation can provide many new academic findings. Recently, however, a number of valuable academic publications

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[1] Manfred Weiss, *The future of labour law in Europe, Rise or fall of the European social model?,"*European Labour Law Journal", Vol. 8/4, p. 346.; György Kiss, *Az új Ptk. és a munkajogi szabályozás, különös tekintettel az egyéni munkaszerződésekre. (The new Civil Law Code and labor law regulations, with particular regard to individual employment contracts.)* "Polgári Jogi Kodifikáció", vol. 2000/1, p. 15.

have been published, which have refuted the idea of the exclusivity of legal application along the lines of classical hard law and outlined an interpretation based on principles that go beyond the textual positivist interpretation of individual codes or other legislation.[2] Labour law, academically proven to be [3] – at least relatively speaking –an independent field of law, can be an excellent breeding ground for the emergence of other legal norms, or extra-legal values, in the interpretation of individual norms in addition to hard law. Labour law is a status law[4], by which I mean that it strives for the exclusive arrangement of the organized work element of the human form of existence. I do not claim that all forms of organized work are regulated by labour law, but at the same time it can be stated that, due to the protection mechanisms, in some cases the aim is for it to be implemented in this form.[5]

The purpose of labour law is not only to conclude an employment contract and create an employment relationship based on this, but at the same time to take care of the employee beyond the payment of compensation.[6] The duty of care differs from one legal system to another, so it is not easy to identify even who is the object of care in an international context. Because of the previously described differentia specifica of labour law, targeted application of the law is required to examine and interpret individual written - or even unwritten - norms belonging to labour law through this lens. However, the application of labour law is not in an easy situation from several points of view, because at some levels - for example in the relationship between the European Union and the member states - the objects, goals and "recipients" of the application of the law are different from each other.[7] It should be

[2] See, for example, M. Antonio García-Muñoz Alhambra – Beryl ter Haar – Attila Kun, *Soft on the Inside, Hard on the Outside, An Analysis of the Legal Nature of New Forms of International Labour Law,* "International Journal of Comparative Labour Law and Industrial Relations" vol. 27/4, pp. 337 – 363.; Mario Vinković, *The Role of Soft Law Methods (CSR) in Labour Law.* https://mta-pte.ajk.pte.hu/downloads/mario_vinkovic.pdf (last access: 13.11.2022.); Attila Kun, *A puha jog (soft law) szerepe és hatékonysága a munkajogban − Az új Munka Törvénykönyve apropóján, ((The role and effectiveness of soft law in labor law - Concerning the new Labor Code)* "Pázmány Law Working Papers", vol. 2012/41.

[3] Nóra Jakab, *A munkajog és a polgári jog kapcsolata a jogpolitika tükrében, (The relationship between labor law and civil law in the light of legal policy),* "Magyar Jog", vol. 62/1, pp. 18-20.

[4] Zoltán Petrovics, *Munkajogviszony - kontraktustól a státusz felé? (Employment law relationship - from contract to status?),* In: Ádám Auer – Gyula Berke –István György –Zoltán Hazafi (eds.), *Ünnepi kötet a 65 éves Kiss György tiszteletére, (Festive volume in honor of 65-year-old György Kiss),* Dialóg Campus Kiadó, Budapest, 2018, pp. 749-757.

[5] Tamás Gyulavári, *A gazdaságilag függő munkavégzés szabályozása, kényszer vagy lehetőség? (Regulation of economically dependent work: constraint or opportunity?),* "Magyar Munkajog E-folyóirat", vol. 2014/1, pp. 1-25., https://hllj.hu/letolt/2014_1/01.pdf (last access: 19.12.2022.).

[6] Péter Sipka, *A munkáltatói gondoskodás a jelenlegi és jövőbeli munkajogi kihívások tükrében, (Employer care in the light of current and future labor law challenges),* In: Lajos Pál – Zoltán Petrovics (eds.), Visegrád 18.0, A XVIII. Magyar Munkajogi Konferencia szerkesztett előadásai, (The Edited Lectures of the 18 th Hungarian Labor Law Conference.), Wolters Kluwer Hungary, Budapest, 2021. pp. 211-212.; Laura Berényi, *Gondolatok a munkajog dogmatikai fejlődéséről, különös tekintettel a munkáltatói koncepció alakulására, (Thoughts on the dogmatic development of labor law, with particular regard to the evolution of the employer concept),* "Polgári Szemle", vol. 17/4–6, p. 426.

[7] It is interesting to note the CJEU's statement that "the nature of the employment relationship under national law is of no consequence as regards whether or not a person is a worker for the purposes of EU law". With this, the CJEU essentially does not express its disapproval of the fact that the national concept of employee differs; it merely declares that the EU definition is different due to the different purpose of EU law. See Emanuele Menegatti, *Taking*

noted, however, that even the same legal text and context, or even the same procedural environment, does not guarantee that the interpretation of individual norms will be the same, or that individual legal disputes will end with the same result.

In my opinion, the examination and research of legal interpretation in labour law is important because labour law is an extremely dynamically developing legal regulation of a mixed nature that is present at several levels. What is more, in addition to the previously mentioned responsibility of care, it encompasses several areas of law, such as sociology, statistics or economics.[8] These can have a significant role in the interpretation of labour law, so their investigation cannot be neglected. From my point of view, the analysis of legal philosophy research narrowed down to the analysis of legal interpretation methods should be used during the research of all areas of law; at the same time, it is already the task and responsibility of the given field of law to use the results of general legal theory in its own field and draw attention to its importance there, as well.

In this paper, my primary goal is to apply the general methods of legal interpretation already revealed by legal wisdom in relation to the field of labour law. In this context, I intend to point out that the possibilities of legal interpretation do not exist apart from the law, but are themselves part of the law, even if they do not belong to the scope of classic hard law. Furthermore, it should be pointed out that the legitimate interpretation of law does not qualify as a law created by a judge. In addition to all this, my aim is to show that labour law in the European Union exists on two levels in terms of legal interpretation, as a result of which, in some cases, there is a difference between the legal interpretation at the Member State level and the EU level. Finally, the aim of the paper is also to examine the sustainability of different methods of legal interpretation from the perspective of legal uncertainty. However, the purpose of my research is not to repeat the essential content elements of legal interpretation methods developed by legal wisdom, nor to examine the background and consequences of the different legal interpretations of the member state and the Court of Justice of the European Union (hereinafter: CJEU) from a public law perspective.

## 2. Additions to the concept of legal interpretation

In the most general approach, legal interpretation means that the legal practitioner explores the meaning and purpose of the legal norm for a certain specific case and applies it to that given case. In my view, in this approach, the legal practitioner should be understood not only as the courts, but all persons who have an interest in the interpretation of the law. In relation to a contractual provision - in the case of an employment contract, for example - the contracting parties must also be regarded as interpreters of the law. Citing the literature, some authors[9] state that the necessity of legal interpretation arises in the event that the nature or content of the legal norm is not clear. At the same time, in my opinion, legal interpretation is necessary in

*EU labor law beyond the employment contract, The role played by the European Court of Justice*, European Labor Law Journal, Volume 11, Issue 1, p. 9.

[8] Szilvia Halmos – Zoltán Petrovics, *Munkajog, (Labor law)*, Nemzeti Közszolgálati Egyetem Közigazgatás-tudományi Kar, Budapest, 2014., p. 15.

[9] Mihály Maczonkai, *A pragmatikus jogértelmezés és az Európai Bíróság gyakorlata. Ph.D. értekezés. (Pragmatic legal interpretation and the practice of the European Court. PhD thesis).* Pécs, 2004, p. 2.

every case, since judging the clarity of a legal norm also requires interpretation. Clarity refers not only to the generally accepted meaning of the words, but also to the fact that no other legitimate interpretation can really be attributed to the given legal norm in the given legal case. The question can be raised as to whether this is possible in this case in the absence of legal interpretation? In my opinion, the answer is no.

In many cases, legal interpretation appears in academic publications as an organizing principle outside or above the law, which seeks the essence of the applicable legal norms in the given case. In my opinion, this approach is debatable, and instead it is more appropriate to consider legal interpretation itself as part of the concrete, actual legal discourse. However, individual methods of legal interpretation can be part of hard law just as much as part of soft law. In relation to legal interpretation, Hungary's Basic Law already sets expectations, according to which the courts interpret the text of legislation primarily in accordance with its purpose and with the Basic Law when applying the law. It is important that the Basic Law also provides guidance on what the legal practitioner must take into account when determining the purpose of the legislation.[10] The interpretation guidelines laid down by the Basic Law are not unknown at the EU level, although only the Charter of Fundamental Rights of the European Union provides such a guide. The guide states that if the Charter contains rights that correspond to the rights provided for in the freedoms and protections contained in the relevant European Convention, then the content and scope of these rights shall be considered the same as those contained in the said Convention. Furthermore, the basic rights derived from the common constitutional tradition of the member states recognised by the Charter must be interpreted in accordance with the recognized common traditions of the member states.[11] In addition, EU law gives the CJEU a completely free hand to interpret EU law using the methodology it deems effective.[12]

It can be seen that, overall, both the Hungarian and EU legislators know or prefer certain methods of legal interpretation, but it is not laid down that the legal practitioner has the opportunity to interpret the given legal issue only within these frameworks.

In the light of the above, in my opinion, it is important that - if we take into account the constitutional requirement of the separation of powers - the legal practitioner is always obliged to interpret the law according to some method, and may also take into account a method of legal interpretation that was not prescribed for him by the legislator. Otherwise, the division of powers could not be fulfilled, because even if the applier of the law does not interpret, then he/ she applies an abstract legal norm created by the legislator in a specific case, with which at the same time the applier of the law would be the "representative" of the legislator; moreover, there must also be the possibility for a legal practitioner to apply a legal interpretation method not prescribed for him/her.

On the other hand, it should be mentioned here that the absolute limit of legal interpretation is the law created by the judge. Regarding the latter aspect, however, it should be emphasized that both the

[10] Magyarország Alaptörvénye 28. cikk (Article 28 of the Basic Law of Hungary).
[11] Article 52 of the Charter of Fundamental Rights of the European Union. Paragraphs (3)-(4).
[12] Koen Lenaerts-José A. Gutiérrez-Fons, *Az Európai Unió Bíróságának jogértelmezési módszerei, (The Legal interpretation methods of the Court of Justice of the European Union)*, HVG-ORAC, Budapest, 2022. p. 23.

decisions of the Hungarian courts and the decisions of the European Court of Justice are regularly based on a significant number of previous case decisions, which suggests that "judge-made law" may still play a role in some way. In connection with many decisions, it can be observed - regardless of the precedent system or the Hungarian limited precedent system - that the judgments are mostly organized around existing practice and non-legal norms. In general, it can therefore be stated that even legally established legal rules can lead to completely different results in the case of different interpretations.[13]

### 3. What should be interpreted in labour law?

Regarding labour law, it can be said that it is developing dynamically both at the national and EU level.[14] It can be considered a happy coincidence that, like national law enforcement, EU law also recognizes[15] the basic principle that labour law has its roots in private law - according to several academic points of view, it is an integral part of private law - and that labour law is a contractual area of law.[16] In my opinion, these two principles are in essence able to determine the framework within which legal interpretation is placed in relation to labour law. The point of view that, since labour law is part of private law, "in labour law, it is not the enforcement of private law principles, but in some areas, their absence which must be justified" is apt and to the point.[17] In this way it is clearly visible, that labour law interpretation must take into account the "rules" and principles of private law to a certain extent. Of course, it can be a subject of theoretical and practical debate as to what and to what extent the written norms or unwritten principles of private law can be applied in connection with labour law. Since labour law is part of private law[18], the other important conclusion can be made that the basic framework of labour law interpretation must be the legal declaration made by the party or parties. Because even according to those who otherwise take a position in favor of the primacy of the broader public law content of labour law and the greater disregard of private law principles, the subjects of labour law have the capacity to

[13] András Osztovits, *Bevezető gondolatok az Európai Szerződési Jogi Alapelvekről, (Introductory thoughts on the Basic Legal Principles of European Contractual Law),* "Európai Jog" (European Law), no. 3-4, vol. 2002/1. number 3-4.

[14] Bercusson Brian, *European Labour Law in Context, A Review of the Literature*. "European Law Journal", vol. 5/2, p. 97.

[15] See, Cavalier Georges – Robert Upex, *The concept of employment contract in European Union Private Law*. "International & Comparative Law Quarterly" vol. 55/3. 587-608.

[16] Kiss (2014), op. cit. 44-46.

[17] Kiss refers to this idea from the author Reinhard Richardi. György Kiss, *Foglalkoztatás gazdasági válság idején - a munkajogban rejlő lehetőségek a munkajogviszony tartalmának alakítására, (Employment in times of economic crisis - the opportunities inherent in labor law to shape the content of the employment relationship (legal dogmatic foundations and legal policy reasons),* "Állam- és Jogtudomány", vol. 2014 /1, p. 38,; Reinhard Richardi, Das Arbeitsrecht als Teil der sozialen Ordnung in Münchener Handbuch Arbeitsrecht (Munich, C.H. Beck 1992) 2. § 1 rdnr. 26; ed., "arbeitsrecht als sonderprivatrecht oder teil des allgemeinen zivilrechts" in Gebhard köbler [et al.] (ed.), FS für Alfred Söllner zum 70. Geburtstag (Munich, C. H. Beck 2000) 957–972.

[18] Kiss (2000), op.cit., p. 3.; György Kiss, *Néhány gondolat az alapjogok munkajogra gyakorolt hatásáról., Vertikális-horizontális, közvetett-közvetlen hatály, (Some thoughts on the impact of fundamental rights on labor law: Vertical-horizontal, indirect-direct effect),* In: Károly Tóth (ed.), *Tanulmányok dr. Nagy László egyetemi tanár születésének 90. évfordulójára, (Studies on the 90th anniversary of the birth of university professor Dr. László Nagy),* Szegedi Tudományegyetem, Szeged, 2004, p. 236.

form law.[19] On the other hand, it can be deduced from this that legal formation - i.e. the creation, termination or modification of a legal status or legal relationship - can include an element that serves as the basis of legal interpretation in the case of certain legal issues. During the interpretation of labour law, the so-called hard law and the underlying soft law must also be interpreted in this way, as well as the declaration of rights of the subjects of labour law.

## 4. Typical legal interpretation methods of labour law and their basic problems

As stated in the introduction, I do not wish to repeat the concept of interpretation methods developed by legal theory, and their main meanings, because this is what legal philosophy deals with. At the same time, I consider it important that the propositions worked out by legal theory can actually be applied in relation to labour law, so I will primarily deal with this issue in what follows.

Legal theory now refers to the five so-called classical methods of interpretation: literal (grammatical), logical, systematic, historical, and teleological (purpose-based) interpretations.[20] It is also not disputed that there are many subspecies of the five basically recognized methods of interpretation just cited, the general description of which exceeds the scope of this work. In addition to these basic methods of interpretation, there are several other methods that primarily emphasize interdisciplinarity, in connection with which the question can be raised as to whether there are actually independent methods of interpretation or whether they can be classified as a subtype of one of the five classic interpretation options already described. Such additional methods can include legal dogmatic, statistical, sociological or even economic interpretations, but in some cases it is also customary to refer to fundamental principle or fundamental law or constitutional interpretation methodologies.[21] The question may rightly arise as to where a legal practitioner gets to know about the methods of interpretation he or she can use to interpret the labour law norms, and what the interpretational rules actually are, and which are the interpretive methods that can lead to a "legitimate" end result in relation to a given legal issue. It is also not incidental to examine the extent to which legal entities can be expected to follow a legal norm, the multiple, legitimate interpretations of which can lead to multiple outcomes. In my opinion, it is true for few areas of law that the special mixing[22] of private law cogent-, private law dispositive-, and public law

[19] Tamás Gyulavári, *A szürke állomány, Gazdaságilag függő munkavégzés a munkaviszony és az önfoglalkoztatás határán, (Grey matter; economically dependent work on the border between employment and self-employment)*, Pázmány Press, Budapest, 2014, pp. 117-118.

[20] Zoltán Tóth J, *A dogmatikai és a jogirodalmi értelmezés a magyar felsőbírósági gyakorlatba*n, *(Dogmatic and legal literature interpretation in the practice of the Hungarian supreme court)*, In: Mátyás Bódig – Zsolt Ződi (eds.), *A jogtudomány helye, szerepe és haszna, Tudománytörténeti és tudományelméleti írások, (The Place, Role and Use of Legal Sciences: Writings on Scientific History and Theory)*, OPTEN Informatikai Kft., MTA Társadalomtudományi Kutatóközpont, Jogtudományi Intézet, Budapest, 2016.

[21] Viktor Botos, *A bírói jogértelmezés útjai a Legfelsőbb Bíróság gyakorlatában (munkajogi BH-k elemzése), (The paths of judicial legal interpretation in the practice of the Supreme Court (analysis of labor law Judicial Decisions))* "Jogelméleti Szemle", vol. 2000/3. http://jesz.ajk.elte.hu/botos3.html (last access: 19.12.2022.).

[22] It is important that, due to the content of the cogen, a norm is not certain to be classified as public law. See, Tibor Nochta, *A jogi személy létesítésének magánjogi és közjogi feltételeiről, (On the private and public law conditions for establishing a legal entity)*, Gazdaság és Jog, vol. 2017/10, pp. 3-4.

rules, and the interpretation of certain legal norms can also be carried out within a broad framework (this applies to labour law). Furthermore, in the case of classic economic labour law relations, the biggest problem is not the possible uncertainty, but the fact that the burden of this kind of interpretive uncertainty rests exclusively with "private parties".[23] In addition to this, the question may also arise as to whether individual methods of interpretation are above the legal norms, or whether they are actually implicit contents of the governing norms.

### 4.1. The relativization of the limits of labour law, or the scope of labour law

Based on Act I of 2012 on the Labour Code (hereinafter: the Labour Code), the personal scope of the Hungarian labour law rules includes, among others, the employer and the employee. As a result, the scope of Hungarian labour law can be imagined in relation to the person in the case of the above statuses.[24] At the same time, a careful analysis shows that this status can be secondary in certain cases, but not in all cases. Already from this point of view, it can be established that different methods of interpretation lead to different results regarding the scope of labour law. If we take the legal dogmatic interpretation as a basis, then the basic principles of contract theory and legal relations are emphasized. Based on this, the status of employer and employee is linked to a contractual obligation, according to which the two subjects of the employment contract are the employer and the employee. The employment relationship - which requires actual performance on the part of the subject - is established with an employment contract. So, in order for labour law rules to be applicable, from a legal dogmatic point of view, an existing employment contract must exist between the parties, even if it is not valid or effective.[25] The employment contract is the exclusive transactional causa on the basis of which we can define the parties as employer and employee. In my opinion, in addition to the legal dogmatic interpretation, we can reach the same conclusion based on the classical, literal, systematic and logical interpretation. On the other hand, with another method or methods of interpretation, we can reach the result that the possibility of establishing the status of employee or employer, as well as the employment relationship, exists in a sui generis manner without any form of employment contract having been established between the parties, or reference to the establishment of the contract being demonstrated.

In terms of methodology, there are, in my opinion, substantial differences in this field between EU law enforcement and national – in this case, Hungarian – law enforcement. In the training of the EU law enforcement officer, it is clear for the literature[26] that in such cases the CJEU

[23] György Kiss, *Alapjogok kollíziója a munkajogban, (The collision of fundamental rights in labor law),* Justis Bt, Pécs, 2010, 3, p. 125.

[24] Nóra Jakab, *A munkavállalói jogalanyiság és a személyi hatály jelentősége, (The importance of employee legal ownership and personal scope),* Publicationes Universitatis Miskolcinensis Sectio Juridica Et Politica, Miskolc, 2016, 211-214.

[25] Márton Leó Zaccaria, *Evidenciák és dilemmák a munkaszerződés és a munkaviszony jogi természete körül, (Evidence and dilemmas regarding the legal nature of the employment contract and the employment relationship),* In: Lajos Pál – Zoltán Petrovics (eds.), Visegrád 19.0 - A XIX. Magyar Munkajogi Konferencia szerkesztett előadásai, (Visegrád 19.0 - The Edited Lectures of the 20 th Hungarian Labor Law Conference), Wolters Kluwer, Budapest, 2022.

[26] Koen Lenaerts – José A. Gutiérrez-Fons, *Az Európai Unió Bíróságának jogértelmezési módszerei* (Legal Interpretation Methods of the Court of Justice of the European Union), HVG-ORAC, Budapest, 2022, p. 65.

carries out a teleological interpretation of law, based on which the purpose of the given EU legal provision - or the legislator with the provision - is, or was, that the employment guaranteed by the employment relationship protection should be available as widely as possible, so the employment relationship and employee status should be established, where applicable, independently of the contractual legal declarations, and even without national legal provisions that are not in line with this. On the other hand, in my opinion, the national legal practitioner in Hungary cannot legitimately refer to a purposive approach if it reaches a final result similar to that of the CJEU in the case of a specific legal dispute. Taking the national legal provisions into account, it can be established that, compared to the previously effective Labour Code, the currently effective Labour Code in principle provides a narrower framework - or, according to certain points of view, provides no guaranteed framework – for the establishment of an employment relationship and employee status based on the actual performance between the parties, rather than on a civil legal relationship.[27] It was recorded by the former Labour Code[28] that, regardless of the name given to the type of contract, all the circumstances of the case - including, in particular, the negotiations of the parties prior to the conclusion of the contract, the legal declarations made during the conclusion of the contract and during work, the nature of the actual work, and the rights and obligations of the parties - must be judged or established. While the old Labour Code allowed the circumstances of the performance of the contract - or rather the legal relationship - to be examined during the classification, the current regulations only deal with the issue of invalidity, which can only arise at the time of the conclusion of the contract, so the conditions of performance are irrelevant in this regard.[29]

It can be seen that the legislator's presumptive intention extends to the fixing of the conceptual boundaries of the employment relationship, or possibly its future narrowing, so basically it is not possible to use a teleological interpretation method to come to the conclusion that the legislator's goal was to broaden the scope of the employment relationship and the employee status. Section 14 of the Act CXLVII of 2012 on the itemized tax of low-tax enterprises and the small business tax, which is no longer in force, and which in principle was a legal fact that served as the basis of a classification under tax law, suggests the same. However, in practice it was also a reference in many cases in connection with the fact that the legal relationship established between the parties is of a civil law and not a labour law nature. Moreover, this referenced provision contained the point that the legal presumption relating to the existence of an employment relationship could easily be overturned by a person actually in an employment relationship.[30] By illustrating

[27] Gyulavári, *op.cit.*, p. 114.

[28] Mt. 75/A. § (2) bekezdés, (Labour Code 75/A § (paragraph 2).

[29] István Herdon – Márton Leó Zaccaria, *A Kúria munkaügyi határozatának megállapításai a munkaszerződés érvénytelensége és a foglalkoztatás jogellenessége közötti fogalmi eltérésről, Érvénytelenségi okok bekövetkezése a szerződéses jognyilatkozatok megtételét követően, (Findings of the Kúria's labor decision on the conceptual difference between the invalidity of the employment contract and the illegality of the employment: Occurrence of invalidity reasons after the contractual legal declarations have been made),* "Jogesetek Magyarázata", 13/1. pp. 44-46.

[30] Sipka Péter - Zaccaria Márton Leó, *Kísérlet a magyar munkaviszony-fogalom újragondolására az NMSZ 198. számú ajánlásának fényében, (An attempt to rethink the concept of the Hungarian employment relationship in the light of NMSZ recommendation No. 198),* "Miskolci Jogi Szemle", 2019/1, pp. 60-61.

the above, in addition to the teleological interpretation, it can also be rejected that the legislator conducts a literal, logical, systematic, legal dogmatic or even historical interpretation in the course of a qualified legal dispute. Furthermore, based on grammatical and dogmatic interpretation, the provisions of the effective Labour Code regarding the creation of the employment contract and the employment relationship, as well as the invalidity of the agreement, prove to be so clear that it may be necessary to apply an interpretation method that legitimizes the formally contra legem final result. In this context, the approach would not be rejected either, if the legal practitioner, from a constitutional point of view, referring to the primacy of EU law, reaches the conclusion in every case that a given legal relationship is classified as an employment relationship by examining the circumstances of its performance. This is because the national legal provisions in Hungary do not formally create an opportunity for this. In the case of reference to the primacy of EU law over national law, however, the acting legal practitioner legitimately takes into account binding CJEU practice and its justification - including even the sociological content - and accordingly can reach a conclusion that apparently goes against national law. However, from the point of view of systematic and dogmatic interpretation, one must proceed with caution in this context, since a legitimate argument is that labour law as a contractual area - the essential element of which is the freedom of contract[31] – is part of private law, and aslo that in the case of concrete claims, classic labour lawsuits can basically be classified as civil lawsuits, so the substantive and procedural rules of private law also have a well-founded claim to be placed here. In addition, despite the mandatory EU practice, there are areas where, in my opinion, legal harmonization is not even indirectly achieved, so excessive activism carries extreme legal uncertainty, even in addition to the different interpretation methods. However, the tendency of interpretation currently points in the direction that the scope of labour law should be interpreted as broadly as possible, so that, for example, based on international comparative interpretation, the wide scope of the employment relationship can be recognized.[32] Recent EU and international documents also point in this direction.[33]

### 4.2. Interpretation of rules within the scope of labour law

By interpretation under the scope of labour law, I mean that the relevance of the rules of labour law in the given case is not in question, since labour law must be applied in the given legal issue. In my opinion, this case should be treated separately from the interpretation of the concept of labour law,

[31] József Cséffán, *Az érvénytelenség munkajogi szabályozása, Melléklet az Érvénytelenség a munkaviszonyban című joggyakorlat-elemző csoport által készített véleményhez, (Labor law regulation of invalidity. Addendum to the opinion prepared by the legal practice analysis group entitled "Invalidity in the employment relationship"),* https,//kuria-birosag.hu/sites/default/files/joggyak/ervenytelenseg_a_munkaviszonyban_osszefoglalo_velemeny_am_0.pdf (last access: 27.12.2022.) pp. 67-68.

[32] Márton Leó Zaccaria, *A munkavállaló fogalmának dinamikus értelmezése, (The dynamic interpretation of the concept of an employee),* In: Lajos Pál – Zoltán Petrovics (eds.), Visegrád 16.0, A XVI. Magyar Munkajogi Konferencia szerkesztett előadása, (Visegrád 16.0: The Edited Lectures of the 16 th Hungarian Labor Law Conference.), Wolters Kluwer, Budapest, 2019, pp. 261–277.

[33] See, for example, NMSZ 198. számú ajánlása; Javaslat, az Európai Parlament és a Tanács irányelve a platformalapú munkavégzés munkakörülményeinek javításáról.

because completely different goals and methodologies come into play in this case. In the case of interpretation within labour law, the governing principle is definitely labour law, its additional norms, principles and practice. In this context, we can also talk about legal harmonization, according to which the EU legislator tries to bring the rules of individual member states closer to each other to some extent. The primary instrument of labour law harmonization is the directive.[34] Here, however, legal interpretation has an indisputable role, because even the national legislature is already burdened with the obligation of interpretation, since it is only after this has been carried out that there can be talk of effective transposition. Furthermore, in the areas affected by harmonization, the legal interpretation of the CJEU and that of the member states' law enforcement officers may be present in parallel.

A detailed analysis of all the aforementioned areas exceeds the scope of this paper, but some of them must be highlighted. Serious questions of legal interpretation often arise around the concepts of working time and rest time. In this context, the CJEU adheres to the purposive interpretation already described. A typical point of departure for the interpretation of EU law is that the aim of the directive is clearly to lay down certain minimum requirements, where applicable in a way that ensures more effective protection of the safety and health of employees at work by providing the latter with a minimum - especially daily and weekly - rest period, as well as providing adequate breaks, and setting an upper limit for the duration of weekly working hours.[35] The CJEU also notes that a restrictive interpretation in connection with the directives cannot be accepted, given that when the directive implements minimum harmonization, it essentially seeks to restrict itself.[36] The CJEU declares as a matter of principle that the concepts of "working time" and "rest time" are EU legal concepts, which must be defined based on objective characteristics, taking into account the system and purpose of the directive.[37]

It should be noted that the so-called objective characteristics just cited can certainly be a starting point, since in another decision the CJEU itself makes corrections among the characteristics said to be objective, and also states that, in certain cases, based on a careful judicial assessment of the circumstances of performance, it can be established that the given activity is classified as working time.[38]

On the other hand, the CJEU carries out a clear grammatical interpretation when it states that, according to the directive, "working time" is the period during which the employee works, is available to the employer, and performs his activity or task. The same directive defined the concept of "rest time" negatively, so it includes all periods that are not considered working time. Since these two concepts are mutually exclusive, the employee's on-call time must therefore be classified as either "working time" or "rest time" in his/her application,

[34] Tamás Prugberger, *A munkajog kialakulása és fejlődése a gazdaságszociológiai folyamatok tükrében, (The formation and development of labor law in the light of economic sociological processes),* "Competitio", vol. 4/1, p. 4.

[35] C-580/19. RJ kontra Stadt Offenbach am Main, paragraph 26.

[36] C-214/20 - MG kontra Dublin City Council, paragraph 37.

[37] See, for example, C-518/15. - Ville de Nivelles kontra Rudy Matzak, paragraph 62; C-580/19. RJ kontra Stadt Offenbach am Main, paragraph 32.

[38] C-214/20 - MG kontra Dublin City Council, paragraph 41.

since the directive does not provide for an intermediate category.[39]

Within labour law, a non-competition agreement can be interpreted as basically a contractual obligation under private law. Furthermore, the just-mentioned internality of labour law can also be interpreted literally, as the Hungarian Kúria also took the position that civil law legal institutions can only be applied in the governing labour law environment and in accordance with labour law rules, since the contractual form is only a framework, which the according to the norms of labour law, can and must be filled with content, taking into account the specific relationship between employer and employee.[40] In this regard, the literature[41] emphasizes that, in connection with the non-competition agreement, this clearly means the intention of creating labour rights.

In my view, the purposive interpretation within the rules of Hungarian labour law is very rare, this is also pointed out by previous researchers.[42] At the same time, there is a norm in the Labour Code in connection with which the literature calls attention to the importance of teleological interpretation. The employer regulations fixed by section 17 of the Labour Code are also the kind of legal institution which represents a special unilateral legal declaration. Since the unilateral declaration of rights is governed by the rules of the agreement according to the Labour Code - and not specifically of the employment contract -, therefore, in terms of grammar, system and dogma, deviations of the employer's regulations from the rules of the employment relationship are not allowed, even in favor of the employee.[43] On the other hand - as the literature notes -, consistent judicial practice[44] also recognizes that the legislator's goal in this field must be taken into account as on the basis of the interpretation of this rule, it is possible to arrive at the point where the regulation can deviate only in favor of the employee from the dispositive rules of the Labour Code and the provisions of the collective agreement.[45]

A more obvious example of teleological interpretation than the former can be the case of principled interpretation, when we interpret certain legal provisions from the point of view of the requirement of the proper exercise of law. The effective Labour Code does not establish this basic principle, but the prohibition of the abuse of rights, which is practically the "other side of the coin". The purpose of this general behavioral requirement is to ensure that certain legal provisions - from which a subject right arises - are interpreted in connection with their purpose and regulatory nature. It is particularly interesting that the legal practitioner came to the conclusion through a dogmatic interpretation of the law

[39] See, for example, C-344/19, - D. J. kontra Radiotelevizija Slovenija paragraph 29; C-107/19 - XR kontra Dopravní podnik hl. m. Prahy, a.s., paragraph 28; C-214/20 - MG kontra Dublin City Council, paragraph 35.

[40] EH 2013.07.M14, Kúria Mfv. II. 10.573/2012.

[41] Tamás Prugberger - Márton Leó Zaccaria, *A versenytilalmi megállapodás elméleti és gyakorlati problémái a megváltozott munkajogi környezetben, (Theoretical and practical problems of the non-competition agreement in the changed labor law environment),* "Jogtudományi Közlöny", vol. 2015/5, p. 255.

[42] György Kiss, *Új foglalkoztatási módszerek a munkajog határán – az atipikus foglalkoztatástól a szerződési típusválasztási kényszer versus típusválasztási szabadság problematikájáig, (New employment methods at the border of labor law - from atypical employment to the problem of the forced choice of contract type versus freedom of choice),* "Magyar Jog", vol. 2007/1, pp. 5-8.

[43] Tamás Gyulavári –Attila Kun, *A munkáltatói szabályzat az új Munka Törvénykönyvében, (The employer regulations in the new Labor Code),* "Magyar Jog", vol. 2013/9, pp. 559-560.

[44] BH 2001.10.494.

[45] Tamás Gyulavári –Attila Kun, *op.cit.*, p. 560.

that the abuse of labour law can only be invoked against a subject right.[46] At the same time, it must be seen that this principle as an independent fact ensures that a situation does not arise through a grammatical or dogmatic interpretation of subject rights by referring to this method of interpretation, in which the purpose of the law determined by the legislator is not realized. This may be the case when the legal entity employer notifies the employer's termination only about two years after the decision of the highest body authorized to make the decision, thus keeping the employee in an uncertain situation for a long time and thus not fulfilling the legislative requirement regarding the timeliness of the termination.[47] It is also not possible to issue a legal dismissal by the employer on the basis that the employee publishes professional criticism of the employer, which is later proven to have been correct.[48] In labour law, the employee's opinion cannot be restricted. But the employee, unlike the consumer in the Civil Code, does not lack information, but "lacks power" compared to the other party,[49] so, in my opinion, a professional opinion that is not public and does not violate or endanger personal rights and legitimate economic interests cannot be a legitimate reason for an employer's dismissal.

The corrective function of the general requirements of conduct, including the principle of good faith and honesty, is supported by the practice developed under the old Labour Code, according to which the procedure in which a fixed-term employment relationship is established many times in a row must be considered contrary to basic principles and therefore contrary to the law. Previously, this was mistakenly referred to as an abuse of rights, although in this context, since it is a contract, the subject right does not even arise.[50] With the currently effective Labour Code this is no longer a question of principle, as the law stipulates that the extension of a fixed-term employment relationship or the re-establishment of a fixed-term employment relationship within six months after the termination of a fixed-term employment relationship is only possible if there is a legitimate interest of the employer.

Based on the above examples, it can be established that the general behavioral requirements in Hungarian labour law are those that can legitimately provide the legal basis for teleological legal interpretation.

Apart from the interpretation according to the purpose of the norm, the other classic methods of legal interpretation already occur in greater numbers in Hungarian labour law. In my opinion, given the nature of the Labour Code, it is not necessary to separately justify the scope of the grammatical interpretation, since thanks to the conceptual explanations, this should be considered the basic method of interpretation. According to the point of view of the literature, the dogmatic or doctrinal method of interpretation is similar

[46] 5/2017.(XI.28.) KMK vélemény, *a joggal való visszaélés tilalmának megsértésével kapcsolatos munkaügyi perekben felmerült egyes kérdésekről (KMK opinion: concerning certain issues raised in labor lawsuits related to the violation of the prohibition of abuse of rights)*; Tercsák Tamás, *A joggal való visszaélés, (Abuse of the law), Budapest*, HVG-ORAC, 2018. pp. 512-513.

[47] EBH 2014.M.20.

[48] BH 2008.100.

[49] György Kenderes, *A munkajog jogági elhelyezkedésének problematikája, (The problem of the legal location of labor law)*, "Miskolci Jogi Szemle", vol. 9/2, pp. 9-10.

[50] István Herdon, *A joggal való visszaélés a munkaügyi bíróságok ítélkezési gyakorlatában, (Abuse of rights in the jurisprudence of the labor courts),* In: Országos Bírósági Hivatal (ed.), Mailáth György Tudományos Pályázat 2019, Díjazott dolgozatok. Országos Bírósági Hivatal, Budapest, 2020., pp. 564-569.

to grammatical interpretation. According to this, dogmatic interpretation uses the special legal meaning of words, unanimously accepted and recognized by lawyers, to solve the interpretation problem raised in a specific case.[51] Based on a dogmatic interpretation, we can come to the conclusion that if, like a civil law contract, we wish to invoke invalidity in connection with an employment law agreement, the reference to invalidity can only be justified if the circumstance referred to already existed at the time of the agreeing of the contract.[52]

In Hungarian labour law, the Labour Code is considered a legal source, which means that it establishes the basic rules of employment in the framework of economic employment relationships based on a specific system. The system can be divided in several ways, so we can usually distinguish the chapters themselves, or instead we can talk about distinctions according to their content. This could be the relationship between the so-called "first part" that does not allow deviations and the rest of the Labour Code, or the system of provisions regarding individual and collective labour law, or perhaps the relationship between typical and atypical forms of work within individual labour law. When the systematic method is used as a basis for interpretation, it is necessary to see, for example, the above connections. The legal practitioner took such an interpretation as a basis when it recorded that the court of second instance, based on the systematic and grammatical interpretation of section 124.(3) of the Labour Code concluded that the application of this provision is not an obligation for the employer, but only an option that the defendant did not use in the case at trial.[53] Based on a systematic interpretation, we can also come to the conclusion that the stipulation of punitive damages by the parties is only allowed in the context of non-competition agreements and study contracts in Hungarian labour law.[54]

## 5. Legal interpretation as soft law

There is no generally accepted concept of soft law. According to established practice, the reference to soft law means that the given legal norm is not binding, but still contains content that does (or does not) meet a normative demand, i.e. soft law legal sources have a quasi-legal relevance.[55] In several cases, the listed methods of interpretation have content that enables them to be categorised as soft law. This is least true of the five basic methods of interpretation - literal (grammatical), logical, systematic, historical, and teleological (purposeful) interpretation - but at the same time, it is very relevant in the case of, for example, human rights, sociological, and economic interpretations, among others. In these cases, the interpretation is made in the light of a written or unwritten, mandatory or soft norm. It is important that, in my opinion, the norm does

[51] Zoltán Tóth J, *A dogmatikai és a jogirodalmi értelmezés a magyar felsőbírósági gyakorlatba*n, *(Dogmatic and legal interpretation in the practice of the Hungarian Supreme Court)*, In: Mátyás Bódig – Zsolt Ződi (eds.), *A jogtudomány helye, szerepe és haszna, Tudománytörténeti és tudományelméleti írások, (The Place, Role and Use of Legal Sciences: Writings on Scientific History and Theory)*, OPTEN Informatikai Kft., MTA Társadalomtudományi Kutatóközpont, Jogtudományi Intézet, Budapest, 2016. p. 225.

[52] BH2021.6.173.

[53] BH2020.3.84.

[54] Zoltán Petrovics, *A polgári jog egyes rendelkezéseinek alkalmazása a munkaviszonyban, különös tekintettel a kötbérre, (The civil law the application of its provisions in the employment relationship, with particular regard to penalty payments)*, "Munkajog", vol. 2019/4, p. 19-20.

[55] Kun(2012), op. cit. 1.

not necessarily have to be soft - see, for example, the principled interpretation, whose principles are binding - but in fact the subject of soft law here is why the interpretation took place in the light of the given norm. By way of example, why is the presumed subordination between the employee and the employer the core of the interpretation instead of the employer's distressed economic situation? The question may be relevant, because as Szalai notes,[56] Armen A. Alchian and Harold Demsetz "attack the concept of hierarchy precisely because, according to them, there is nothing special about the employment relationship: according to their claim, the employee is not more "vulnerable", nor more strongly "subordinated" than the service provider who is "vulnerable" to the customer". This is the circumstance that can cause uncertainty and unpredictability in many cases. Here, the difficulty is not finding the hard or soft norms and values of labour law, but the organizing principle that states which one should be brought out, or rather prioritized, in which legal issue.[57] Legal interpretation can therefore be considered not only a part of law, but in many cases a part of soft law. Most of the classic five methods of legal interpretation can also be listed here, but – as mentioned – there are some, such as the purposive interpretation according to the Basic Law, which enjoy priority through a hard legal norm. It can be said that soft law is not only a guide for the interpretation of hard law[58], but also the method of interpretation itself is soft law.

### 6. Sustainability of labour law

Based on the above dilemmas, it is easy to draw the conclusion that the scope of labour law as a field of law is not crystal clear, and many different methods of legal interpretation have gained ground in connection with the practical applicability of labour law. It is not possible to clearly say how far the boundaries of labour law extend; they primarily change within a short time and dynamically, depending on the legal interpretation methods used. Due to the above, it is not only in recent years, but rather since the dynamic development of the 1990s that the issue of the sustainability of labour law has been constantly in the spotlight. It is important that in this context, by sustainability, I am not referring to the topic of social security and employee welfare, but rather to the sustainability issues of the labour law itself, whether soft or hard, as substantive legal provisions. Most academic literature[59] primarily deals with social and societal aspects of labour law and employment - such as fair remuneration, equal treatment, the balance between work and private life, and environmentally friendly working methods. At the same time, it cannot be overlooked that the topics just mentioned are already primarily - but, taking into account certain human rights and constitutional norms, not exclusively - valid

[56] Ákos Szalai, *A gazdasági szervezetek jogáról és közgazdaságtanáról, (On the law and economics of economic organizations),* "Pázmány Law Working Papers", vol. 2018/17, p. 55.

[57] László Blutman, *Egy empirikus jogértelmezéstan szükségessége,* "Jogtudományi Közlöny", *(The necessity of an empirical legal interpretation),* vol. 63/1, p. 9.

[58] Anne Peters – Isabella Pagotto, *Soft Law as a New Mode of Governance,* A Legal Perspective. University of Basel, 2006, p. 23.

[59] See, Joachim Gschwinder, *Sustainability and labour law*. In: 6. FEB International Scientific Conference, Challenges in Economics and Business in the Post-COVID Times, 16–20 May 2022, Maribor, Slovenia, proceedings. University of Maribor University Press, Maribor, 2022. pp. 207-216.; Neha Vya, *'Gender inequality-now available on digital platform', an interplay between gender equality and the gig economy in the European Union. "*European Labour Law Journal", vol. 12/1, p. 46.

within labour law, the framework of which has not been clear for a long time, even within jurisprudence. One of the basic pillars of sustainability is precisely that the frameworks of cogent legal regulations, both international and domestic, are also sufficiently clarified in many cases. In relation to sustainability, it is necessary to formulate arguments, primarily in relation to the sustainability of the regulatory structure. The question may arise as to when we can talk about sustainable labour law standards based on the above. Following Prugberger, the literature[60] examines in this context "whether the current and known future labour law regulations related to the place of work meet the requirement of sustainability, that they create work conditions for employees that are predictable in terms of content and combine flexibility with safety".

Due to market processes and technological innovation, labour law, which initially proved to be tough, was forced to relax - through atypical forms of work - as the subjects were clearly looking for flexibility in it. The earlier sustainability of labour law was made possible by serving this desire for flexibility, so the protective umbrella of labour law was able to survive by fulfilling the needs of the subject of labour law.[61]

The current trends[62] show, however, that the previous flexibility was only suitable to dampen market sentiments for a short period of time. Currently, digital employment, which is so often at the center of literature and practice, and the related "smart solutions" force us to re-evaluate the way of defining the group of employees to be protected. It is certainly to be welcomed that labour law tries to follow economic changes, but at the same time it can be stated that this process has not been completed even after many years. The potential subjects of labour law are not indifferent to the outcome of these issues, because the classic labour law framework also includes public law obligations that both the employer and the employee must be aware of.[63]

Since the results of legal interpretation presented above, which in many cases are completely different, can lead to legal uncertainty, it can be concluded that the current regulatory structure of labour law is not sustainable in general. Here, the first step is not to assess the content and goals of the substantive legal provisions of labour law, but whether the substantive legal provision itself can be properly calculated, transparent, and understood. In my opinion, legal norms that increase uncertainty are not suitable for promoting voluntary legal compliance, a point which is otherwise supported[64] by the results of labour (employment supervision) inspections and the related data reported in

[60] Bernadett Szekeres, *Távolodás a stabil munkajogtól – gondolatok a munkavégzés helyéhez köthető bizonytalan szabályozás kérdéseiről, (Moving away from stable labor law – thoughts on the issues of uncertain regulation related to the place of work),* "Miskolci Jogi Szemle", vol. 17/2, p. 393.

[61] Zoltán Bankó, *Az atipikus munkajogviszonyok. A munkajogviszony általánostól eltérő formái az Európai Unióban és Magyarországon, (Atypical labor law relations. Different forms of the employment relationship in the European Union and Hungary),* Pécs, 2008, p. 15.

[62] Tamás Prugberger – Bernadett Szekeres, *Az új típusú foglalkoztatási formák és azok kihatása a tevékenységgel összefüggő szerződések dogmatikájára, (New types of employment and their impact on the dogmatics of activity-related contracts),* "Állam- és Jogtudomány", vol. 2022/2, pp. 76-79.

[63] Karl E. Klare, *Public/private distinction in labor law*. "University of Pennsylvania Law Review", vol. 130/6, p. 1363.

[64] Attila Kun, *Az új munka törvénykönyve, (The new labor code),* In: András Jakab – György Gajduschek (eds.), A magyar jogrendszer állapota, (The state of the Hungarian legal system), MTA Társadalomtudományi Kutatóközpont, Jogtudományi Intézet, Budapest, 2016, p. 411.

the literature. At the same time, in addition to the aforementioned sensitization and awareness, transparent regulation should also play a more significant role in this context, because economic actors cannot be expected to take a meaningful role in the day-to-day academic and labour law discussions, or at least only follow them.

## 7. Final thoughts

Several conclusions can be drawn from the above research. One of the first things to mention is that, in my opinion, the legal interpretation of labour law carries many more sources of problems than the classic civil law interpretation present in civil law. The basis for this can be found in the legal location of labour law. Although, according to the prevailing jurisprudential positions, labour law is a part of private law, it is becoming more and more obvious that a significant change of direction has been noticeable for quite some time at the level of legal interpretation. Some people attribute this to the larger number of cogent provisions present in labour law, but we should not ignore the fact that, in addition to cogent provisions, public law elements have also appeared in labour law, at least at the level of legal interpretation.

While cogency merely prohibits deviations from the legal norm, the public law elements of labour law create the norm itself, so that labour law fulfills a certain function intended by the legislator. Although it is an interesting question which legislator's goals - the EU or the national one - are the ones that are being followed by the current trends, it is certain that due to the development of EU law and the deepening of harmonization, the examination of this issue is currently relevant. The implementation of the directive ensuring the balance of work and private life is also a legislative product that can definitively drive a wedge between classical private law and labour law. Regardless of all this, the main problem, in my opinion, is not the content of the normative text contained in the substantive law, but whether this content can be interpreted in an excessively broad spectrum. In this context, however, I do not consider the public law approach to be particularly advantageous, because while the state is at least on one side in the case of public law legal relations, in the current situation, in the classic economic employment relationship, two private parties are involved, who are obliged to tolerate the anomalies and uncertainties associated with the interpretation of the law . In my view, EU and national labour law provisions that exist on multiple levels and between different systems of considerations cannot be effectively enforced in the event that legal interpretation requires such an effort from the legal entities that there is no realistic chance of doing so. Although the legal literature enables many academic discourses in the current situation, it can also be said that the judicial path cannot be avoided during interpretation, so there will be no realistic possibility to resolve legal disputes "before the law".

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# SUSTAINABLE INVESTMENT LEGAL FRAMEWORK IN EUROPEAN UNION AND ASEAN: UNDERSTANDING POLICY VARIATIONS BETWEEN TWO REGIONAL ORGANISATIONS

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## Abstract

*The impact of climate change is experienced all over the world. The effort to mitigate the impact continues to be made in a wide range of sectors, including the financial industry. The concept of sustainable investment in the financial services industry is one of the strategies to address climate change. However, sustainable investment is not limited to national jurisdictions. At the regional levels organisations such as the European Union (EU) and the Association of Southeast Asian Nations (ASEAN) have also established definite guidelines. The EU has adopted hard law in the form of regulations on sustainability disclosure and taxonomy that facilitate sustainable investment. ASEAN has also introduced soft law in the form of the ASEAN Taxonomy for Sustainable Finance. The purpose of this study is to examine and provide a comparison of the regulation of sustainable investment in both regional organisations that have distinct integration characteristics. This paper argues that the distinctive characteristics of integration have an influence on the choice of legal instruments and their binding force on member states. The comparative study revealed that both the EU and ASEAN adopt the common principles of environmental protection and climate change mitigation. However, the EU and ASEAN have different ways of defining these principles in their respective legal instruments. In addition, the research also reveals that the different choice of legal instruments also has an effect on the advantages and limitations of implementing sustainable finance. Finally, this study proposes that the EU and ASEAN share a common vision in the implementation of sustainable finance in line with the growing economic relations between the two regions.*

**Keywords:** *EU, ASEAN, climate change, comparative, sustainable investment.*

## 1. Introduction

As a global phenomenon, climate change has impacted various sectors of human life. The financial sector was also impacted, on further developments the terms ‘green investment', 'sustainable finance', and 'green finance' emerged into a discourse that continues to be discussed and debated in many international forums.[1] In addition, the adoption of Sustainable Development Goals (SDGs) by the United Nations in 2015 became a catalyst for implementing sustainable principles in the financial sector in many countries.

The SDGs are inseparable from the development of the concept of 'sustainability' The concept of sustainable development is popularly debated at various academic and industrial levels. The concept historically has strong roots in the

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[1] Wei Yin, *Integrating Sustainable Development Goals into the Belt and Road Initiative: Would It Be a New Model for Green and Sustainable Investment?*, Sustainability (Switzerland) 11, no. 24/2019, p. 1.

development of the world economy.[2] Furthermore, the concept of sustainable development has become a discourse that has been debated and discussed throughout the modern era.[3] The echo of the dissemination of this concept throughout the world was the Brundtland Commission Report to the UN in 1987.[4] In later developments, the aforementioned document became a reference that was generally cited to define the concept of sustainability.

Throughout 2021, green investment grew by more than 55% and is expected to continue to grow more rapidly in the following year, in line with the growth of the world economy after the COVID-19 pandemic.[5] In its development, international organisations such as the European Union (EU) and the Association of Southeast Asian Nations (ASEAN) have also adopted legal instruments that regulate the implementation of sustainability principles in the financial sector, especially investment.

The EU adopted secondary legislation through two hard law legal instruments that applied legally binding to member states, namely Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector (EU Regulation 2019/2088) and Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment (EU Regulation 2020/852). These two regulations are an important legal basis for developing sustainable investment in the European region. However, unlike the EU, ASEAN adopts a soft law in the form of the ASEAN Taxonomy for Sustainable Finance (ATSF). A very interesting legal issue in the EU hard law and ASEAN soft law is the obligation of environmental impact disclosure in sustainable investment. The existence of this obligation is an effort to mitigate and identify the impact that investment will have on the environment.

The EU and ASEAN have a long history of mutually beneficial interactions and relationships. In addition, several studies also mention that the EU exerts a significant influence on the development of ASEAN as a legal entity and organisation. The European Green Deal (EGD), one of the flagship programs during the von der Leyen Commission period, also significantly influenced mainstreaming of environmental issues, especially in the ASEAN region. Therefore, comparative studies on environmental impacts in the EU and the ASEAN sustainable investment legal framework are relevant.

A comparative study of the sustainable investment legal frameworks adopted by the EU and ASEAN is important and relevant for two reasons. First, the EU and ASEAN represent regional organisations with different integration characteristics. Second, the difference in integration affects the legal form adopted to regulate environmental protection, especially in relation to sustainable investment.

[2] Justice Mensah, *Sustainable Development: Meaning, History, Principles, Pillars, and Implications for Human Action: Literature Review*, Cogent Social Sciences, no. 1/2019, p. 6.

[3] Ulrich Grober, *Deep Roots: A Conceptual History of Sustainable Development (Nachhaltigkeit)*, WZB Discussion Paper, P 2007-002, no. February/2007, p. 3.

[4] Jacobus A. Du Pisani, *Sustainable Development – Historical Roots of the Concept*, Environmental Sciences, Vol. 3, no. 2/2006, p. 92.

[5] Jennifer Wu, *Five Reasons Why the Future of ESG Investing Is Long Term*, JP Morgan Asset Management ESG outlook 2022: The future of ESG investing, 2022, this document is available online at https://am.jpmorgan.com/dk/en/asset-management/liq/investment-themes/sustainable-investing/future-of-esg-investing/ (last access: 08.12.2022).

Scholars from various disciplines and perspectives, especially the social sciences, have classically conducted comparative studies between the EU and ASEAN. In addition, some scholars studied sustainable investment or green finance from the perspective of the EU or ASEAN separately. For example, de Sadeleer conducted a study on the development of the EU sustainable development legal framework.[6] The study conducted by Ahlström and Monciardini discusses the dynamics of EU sustainable finance regulations.[7] Another study by Conea focuses on the EU Taxonomy and the development of the concept of 'sustainability' and the adoption of the term 'green' in various EU legal instruments.[8]

The study on sustainable investment in ASEAN was conducted by Hieu, who examined the effect of green investment and environment tax on carbon dioxide emissions and economic growth of Southeast Asian countries.[9] Another study was conducted by McLaughlin, who digested 371 bilateral investment treaties agreed upon by ASEAN and its member states. This study revealed that the principle of sustainable development is only partially recognised in bilateral agreements.[10]

This paper will attempt to fill the gap in the study of sustainable investment from a comparative standpoint of the EU and ASEAN legal frameworks. The research makes three significant contributions. First, it provides a complete understanding of the regulatory pattern of sustainable investment in two regional institutions with distinct characteristics. Second, this paper connects the results of studies on sustainable investment from the perspective of the EU and ASEAN into a coherent and comprehensive comparative study. Finally, this paper contributes to the debate and discourse on sustainable investment from a comparative perspective of two contrasting legal systems. Therefore, the contribution of this paper to the debate and discourse on sustainable investment from the comparative perspective of two different legal systems will certainly provide new insight into the study of the development of the sustainable investment.

This paper is organised into four sections. After the introduction parts, the next section will discuss the sustainable investment in the EU and ASEAN legal framework respectively. Furthermore, the two legal frameworks will be analysed from a comparative perspective to obtain complete and comprehensive knowledge and information about the sustainable investment legal framework, particularly the environmental impact disclosure obligations. Finally, the conclusion part will sum up this article.

## 2. EU Sustainable Investment Legal Framework: Progress and Development

The EU does not define sustainable development in its primary law. However, the term appears six times in the Treaty of the European Union (TEU) and the Treaty of Functioning of the European Union

[6] Nicolas de Sadeleer, *Sustainable Development in EU Law: Still a Long Way to Go*, Jindal Global Law Review, Vol. 6, no. 1/2015.

[7] Hanna Ahlström and David Monciardini, *The Regulatory Dynamics of Sustainable Finance: Paradoxical Success and Limitations of EU Reforms*, Journal of Business Ethics, Vol. 177, no. 1/2022.

[8] Alina Mihaela Conea, *EU Taxonomy: Qualifying As Green*, Lex ET Scientia International Journal, Vol. 2, no. XXIX/2022.

[9] Vu Minh Hieu, *Influence of Green Investment, Environmental Tax and Sustainable Environment: Evidence from ASEAN Countries*, International Journal of Energy Economics and Policy, Vol. 12, no. 3/2022.

[10] Mark McLaughlin, *Mapping Sustainable Development in Investment Treaties : An Analysis of ASEAN State's Practice*, Asian Journal of WTO & International Health Law and Policy, Vol. 17, no. 1/2022.

(TFEU).[11] Nonetheless, Art. 11 TFEU (Ex Art. 6 TEU) determines that environmental protection and sustainable development play an important role in every policy and activity of EU organisations. In addition, the principle of sustainable development is also recognised in the preamble of the European Union Charter of Fundamental Rights (EUCFR) and Art. 37 related to environmental protection. The existence of sustainable development clauses in the EU Primary Law provides a strong constitutional basis for technical implementation in various sectors.[12] The finance and investment sector is one such sector for its policy implementation in various sectors, such as finance and investment.

Sustainable investment plays a key role in the European economy, particularly in ensuring the consistent implementation of sustainability principles.[13] Although investment is an important part of mitigating the impacts of climate change, the flow of financing to environmentally friendly projects will affect the mitigation process.[14] The EGD also confirms that green investment is one pathway to achieving carbon emission reduction targets.[15] In addition to being a guideline for the EU to achieve carbon emission reductions, the EGD is also a milestone in the EU's strong determination to deliver sustainability in the region in a measurable way.[16]

To further discuss sustainable investment in the EU, the discussion will focus on the disclosure concepts in the EU Regulation 2019/2088 and EU Regulation 2020/852. In general, the scope of the EU regulation on environmental disclosure is to harmonise regulations for money market participants and financial advisors, especially related to the transparency of financial products.[17] Both regulations signal the EU's strong ambition to achieve a sustainable economy by establishing specific standards, primarily in compliance with the climate targets.[18]

The main principle in environmental impact disclosure in the EU legal framework is to do no significant harm.[19] This principle is also the minimum standard to be met in any financial or economic investment in all EU member states.[20] The principle of doing no significant harm was originally applied in international water law, which was later developed into a principle used in development by various world countries.[21]

[11] Conea, *EU Taxonomy: Qualifying As Green*, p. 27.

[12] de Sadeleer, *Sustainable Development in EU Law: Still a Long Way to Go*, p. 41.

[13] Dirk A. Zetzsche and Linn Anker-Sørensen, *Regulating Sustainable Finance in the Dark*, European Business Organization Law Review, Vol. 23, 2022, p. 81.

[14] Friedemann Polzin and Mark Sanders, *How to Finance the Transition to Low-Carbon Energy in Europe?*, Energy Policy, Vol. 147, no. July/2020, p. 3.

[15] Communication from the Comission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions 2019 (The European Green Deal), this document is available online at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2019%3A640%3AFIN (last access: 09.11.2022).

[16] Alicja Sikora, *European Green Deal – Legal and Financial Challenges of the Climate Change*, ERA Forum, Vol. 21, no. 4/2021, p. 687.

[17] Art. 1 EU Regulation 2019/2088.

[18] Alessio Maria Pacces, *Will the EU Taxonomy Regulation Foster a Sustainable Corporate Governance?*, Sustainability (Switzerland), Vol. 13/2021, p. 9.

[19] Art. 2a EU Regulation 2019/2088.

[20] Art. 18 EU Regulation 2020/852.

[21] Joyeeta Gupta and Susanne Schmeier, *Future Proofing the Principle of No Significant Harm*, International Environmental Agreements: Politics, Law and Economics, Vol. 20, no. 4/2020, p. 733.

Furthermore, this principle is widely used by national, regional and international court decisions.[22] To implement this principle, investment companies and financial advisers must present transparent information in nine aspects.

The first transparency is that investment companies and financial advisers must provide information and policies on the sustainability risk.[23] Furthermore, it is related to the transparency of adverse impacts likely to arise in investments at the entity and product levels.[24] The transparency that must be presented next is about integrated sustainability risks, including remuneration policies.[25] The process of transparency about sustainability and risks is also required in the promotional and marketing activities of investment products.[26] Transparency in sustainable investment is essential to support the achievement of climate targets set by the European Green Deal.[27] This transparency makes all parties interested in investing and responsible for realising climate targets.

Furthermore, there are quite interesting provisions in the EU Regulation 2019/2088 and EU Regulation 2020/852, namely the existence of pre-contractual disclosure obligations. There are two substances in pre-contractual disclosure: promoting environmental or social characteristics and sustainable investment. The first substance in pre-contractual disclosure is to promote environmental aspects in investment.[28] The second substance is related to sustainable investment in financial investment products.[29] Therefore, the existence of this pre-contractual disclosure obligation, on the one hand, provides an opportunity for investors or the public to find out the contribution of investments or financial products to climate or environmental policy. On the other hand, this provision also examines investors' commitment to sustainable investment and climate change. In other words, this provision can also balance the parties' interests before agreeing to a contract.[30] Furthermore, pre-contractual disclosure provisions can also be an 'early exit door' for parties who cannot enforce the terms of the contract.[31]

Based on the above, the EU Sustainable Investment legal framework has provided guidelines for financial industry players to meet environmental requirements. This guideline is not only at the time of execution of investment contracts but also at the existence of initial commitments through transparency and pre-contractual disclosure. If this provision is implemented properly, corporate governance will be under the EU's commitment as a leading global actor in

[22] Mara Tignino and Christian Bréthaut, *The Role of International Case Law in Implementing the Obligation Not to Cause Significant Harm*, International Environmental Agreements: Politics, Law and Economics, Vol. 20, no. 4/2020, p. 632.

[23] Art. 3 EU Regulation 2019/2088.

[24] Art. 4 and Art. 7 EU Regulation 2019/2088.

[25] Art. 5 and Art. 6 EU Regulation 2019/2088.

[26] Art. 10 and Art. 11 EU Regulation 2019/2088.

[27] Franziska Schütze et al., *EU Taxonomy Increasing Transparency of Sustainable Investments*, Deutsches Institut Für Wirtschaftsforschung, Vol. 10, no. 51/2020, p. 492.

[28] Art. 8 EU Regulation 2019/2088 and Art. 6 EU Regulation 2020/852.

[29] Art. 9 EU Regulation 2019/2088 and Art. 7 EU Regulation 2020/852.

[30] Dagmar Waldzus and Buse Heberer Fromm, *Germany – Pre-Contractual Disclosure Requirements and Relevant Case Law*, International Journal of Franchising Law, Vol. 12, no. 5/2014, p. 4.

[31] Pierre Legrand, *Pre-Contractual Disclosure and Information : English and French Law Compared*, Oxford Journal of Legal Studies, Vol. 6, no. 3/1986, p. 323.

climate change issues.[32] On the other hand, if it is not implemented, the policy will only become a greenwashing tool for investors who do not commit to environmental issues.[33]

This paper argues that the EU has adopted significant actions to achieve sustainable finance by internalisation to member states. This effort was made by adopting EU Regulation 2019/2088 and EU Regulation 2020/852. Both regulations provide clarity to the financial industry on the concepts of 'green' and 'sustainable.' The advantage of clear and legally binding regulations is that environmental protection and climate change mitigation become integral to investment. Directly or indirectly, this condition will give incentives to investors so that economic activities can be sustainable and avoid risks caused by natural forces.[34]

However, the EU's adoption of sustainable investment regulations is not without its limitations. This study argues that the EU strictly limits investment to industries that do not fulfil the 'green' and 'sustainable' indicators. Therefore, the private sector faces the challenge of meeting the standards set to become an investor of choice. In addition, the EU faces the challenge of much misinformation about an industry's activities, especially regarding its 'green' and 'sustainable' status.[35] Therefore, monitoring the implementation of the provisions of EU Regulation 2019/2088 and EU Regulation 2020/852 is essential so that regulators and the private sector can have a common understanding.

## 3. The ASEAN Soft Law for Sustainable Investment: Consensus and Informality

Unlike the EU, ASEAN does not adopt a binding hard law on sustainable investment to the member states. Since its establishment in 1967, the role of soft law in ASEAN organisations has become very significant.[36] Even in the ASEAN Charter 2008, the main principles mentioned in the lawmaking process are consultancy and consensus.[37] However, the clause creates a new problem, namely inconsistencies in the legal nomenclature of the instrument and its interpretation at the ASEAN level.[38] The legal instrument that regulates sustainable investment is also in the form of a soft law which is an agreement of member states in the ASEAN Taxonomy Board (ATB) forum. The function of the ATSF is as a guide to promote the transition to a more environmentally friendly economy.[39] The transition to a greener economy is critical for ASEAN member states that are largely directly affected by climate change.[40] Therefore, the role of the ATSF is vital to

[32] Pacces, *Will the EU Taxonomy Regulation Foster a Sustainable Corporate Governance?*, pp. 17–18.
[33] *Idem*, p. 10.
[34] de Sadeleer, *Sustainable Development in EU Law: Still a Long Way to Go*, p. 60.
[35] Zetzsche and Anker-Sørensen, *Regulating Sustainable Finance in the Dark*, p. 48.
[36] Yoshifumi Fukunaga, *Use of Legal Instruments in the ASEAN Economic Community Building*, Journal of Contemporary East Asia Studies, Vol. 10, no. 1/2021.
[37] Art. 20 (1) the ASEAN Charter.
[38] Nattapat Limsiritong, *The Problems of Law Interpretation under ASEAN Instruments and ASEAN Legal Instruments*, MFU Connexion, Vol. 5, no. 2/2016.
[39] ASEAN Taxonomy Board, *ASEAN Taxonomy for Sustainable Finance*, 2021, p. 3, this document is available online at https://asean.org/wp-content/uploads/2021/11/ASEAN-Taxonomy.pdf. (last access: 18.10.2022).
[40] Rabindra Nepal, Han Phoumin, and Abiral Khatri, *Green Technological Development and Deployment in the Association of Southeast Asian Economies (ASEAN)—At Crossroads or Roundabout?*, Sustainability (Switzerland), Vol. 13, no. 2/2021, p. 1.

usher ASEAN into a region that has resilience and can adapt economically to climate change.

ATSF uses five high-level principles: harmony, relevance and contextual, inclusive, credible, and aligned with the market.[41] This principle is generally implemented through two substantial components: environmental objectives and essential criteria. Environmental objectives include climate change mitigation and adaptation, protection of healthy ecosystems & biodiversity, and promoting resource resilience and transition to the circular economy. While the essential criteria consist of the do not significantly harm principle and remedial measures to transition.[42] The ATSF also details the various industrial sectors contributing to greenhouse gas emissions.

Furthermore, ATSF classifies these industrial sectors in the foundation framework (FF) and standard (PS) categories.[43] FF classification uses qualitative assessment analysis methods of industrial activity. Meanwhile, the PS classification uses metrics and thresholds to determine the status of industrial and investment activities.[44] FF and PS classifications further use green, amber, and red colour codes to describe the status of a particular sector in the taxonomic scheme. The green indicates that an industry's investment contributes positively to climate change mitigation.[45] One of the contributions of green investment in mitigating climate change is reducing carbon dioxide gas produced in economic activity.[46]

The next colour code is amber, which indicates that the industry has not made a direct impact in mitigating climate change. Therefore, investment in this industry requires further assessment to determine the factors that hinder such mitigation efforts. The last is the red colour code which indicates that the industry has no contribution to climate change mitigation or even has a significant negative impact on the environment. Therefore, investments in industries that get the red colour code cannot be categorised as sustainable investments.

The compiler of the ATSF, namely the ATB, has stated that the document is a guideline or guide. Therefore, the ATSF is a living document that can change at any time based on the principles of consultancy and consensus according to ASEAN organisational procedures. Thus, the ATSF has two opposing sides. Namely, as a soft law that does not have legally binding force, there is no compulsion for ASEAN member states to implement it. However, the existence of ATSF is necessary for ASEAN

[41] See *ASEAN Taxonomy for Sustainable Finance*, 2021, p. 20. The whole principle is as follows: (i) The ASEAN Taxonomy will be the overarching guide for all ASEAN Member States, providing a common language and complementing their respective national sustainability initiatives. (ii) The ASEAN Taxonomy will take into consideration widely used taxonomies and other relevant taxonomies, as appropriate, and shall be contextualised to facilitate an orderly transition towards a sustainable ASEAN. (iii) The ASEAN Taxonomy shall be inclusive and beneficial to all ASEAN Member States. (iv) The ASEAN Taxonomy shall provide a credible framework, including definitions, and where appropriate, be science-based. (v) The ASEAN Taxonomy will be aligned with the sustainability initiatives taken by the capital market, banking and insurance sectors, or at least not in conflict. This document is available online at https://asean.org/wp-content/uploads/2021/11/ASEAN-Taxonomy.pdf. (last access: 18.10.2022).

[42] ASEAN Taxonomy Board, *ASEAN Taxonomy for Sustainable Finance*, p. 23.

[43] *Idem*, 40.

[44] *Ibidem.*

[45] *Idem*, 42.

[46] Hieu, *Influence of Green Investment, Environmental Tax and Sustainable Environment: Evidence from ASEAN Countries*, p. 232.

member states to ensure sustainable investment at the regional level. Moreover, the nature of ASEAN soft law based on informality, consensus, and trust makes ATSF a guide and a manifestation of ASEAN member states to protect the environment and climate shock in each national jurisdiction.[47]

This paper argues that there are three advantages of the soft law adopted by ASEAN to regulate sustainable investment. First, the ATSF is a general guideline subject to modification following the needs and economic conditions of the ASEAN member states. Second, there is flexibility for member states to regulate further the substance of the ATSF in national jurisdiction with the appropriate form of the instrument under the adopted legal system being. Finally, member states can freely amend or adjust the ATSF standards in their national legislation. However, there are also shortcomings or limitations of the ATSF. Firstly, since it is a soft law, there is no obligation for ASEAN member states to implement the ATSF consequently. The second is that related to the first disadvantage, and there are also no legal consequences for member states that do not comply with the provisions of the ATSF. As there are no standards that apply uniformly at the regional level, there will be a vulnerability condition for ASEAN member states to claim sustainable investment.[48]

Based on this perspective, the existence of the ATSF raises serious doubts, particularly its contribution to environmental protection and climate change mitigation at the regional scale. Moreover, the ATSF also faces the challenge of a significant difference in sustainable investment literacy among ASEAN member states.[49] Nevertheless, ASEAN's initiative to develop and adopt the ATSF is a significant effort to pursue a sustainable economy at the regional level.

## 4. EU and ASEAN Sustainable Investment Legal Framework: Common Goal in a Different Mechanism

This section will explore the EU and ASEAN sustainable investment legal frameworks from a comparative viewpoint. As discussed in the introduction section, the EU and ASEAN have different integration profiles. In addition, the typologies and enforceability of legal instruments are also significantly different. Nonetheless, this paper will focus on the similarities and differences in the sustainable investment legal framework, especially regarding essential principles, including environmental protection and climate change mitigation.

The comparative examination presented in this section compares two *de lege lata* in two contrasting legal systems.[50] Comparing the current laws of the EU and ASEAN has its challenges. On the one hand, the EU is a supranational institution that has been properly integrated into an economic, political and legal framework. On the other hand, ASEAN is a multilateral institution

[47] Further reading for ASEAN informality, consensus dan trust principles please refers to Winfried Huck, *Informal International Law-Making in the ASEAN: Consensus, Informality and Accountability*, "ZaöRV", Vol. 80/2020, p. 115.

[48] McLaughlin, *Mapping Sustainable Development in Investment Treaties : An Analysis of ASEAN State's Practice*, p. 135.

[49] Lydia Ivana Kumajas et al., *Kontradiksi Sustainable Finance : Sebuah Literatur Review*, EMBA, Vol. 10, no. 2/2022, p. 5.

[50] Juha Karhu, *How to Make Comparable Things: Legal Engineering at the Service of Comparative Law*, in *Epistemology and Methodology of Comparative Law*, ed. Mark Van Hoecke, Oxford and Portland: Hart Publishing, 2004, p. 80.

that has decided not to achieve full integration. In addition, the EU also has a well-developed legal system with a legal instrument nomenclature accepted as legally enforceable. In contrast, ASEAN does not recognise a specific format of legal instruments. Hence it is quite common to find a wide variety of legal instrument titles in the ASEAN legal regime.

In the previous section, it was mentioned that the EU and the ASEAN sustainable investment legal framework have fundamental differences, namely in the form of legal instruments and legally binding. The next question is, why is it still relevant to do such comparative studies? To answer this question, it is necessary to look at the existence of 'good faith' and long-term goals in adopting legal instruments for sustainable investment. Mitigating the impacts of climate change is a long-term goal to be achieved by adopting sustainable investment. The EU and ASEAN go in different ways with the characteristics of their respective organisations. The EU adopts a form of hard law as a supranational organisation quite well integrated. Meanwhile, ASEAN, whose organisation is based on consultation and consensus, chose to adopt a soft law. Although the mechanisms are different, the purpose of the two organisations is similar, namely that investment is directed to industries that support climate change targets.

ATSF has something in common with the EU Sustainable Investment Legal Framework: it adheres to the principle of doing no significant harm as an essential criterion.[51] This principle is essential in protecting the environment, especially amid climate change. The existence of the do no significant harm principle has been known since the seventeenth century and increasingly has an important role in international law.[52] In subsequent developments, many state entities of the world recognised and applied this principle in the jurisdiction of their national environmental laws. In general, the principle of do no significant harm protects an entity from harm inflicted by other entities.[53]

The EU and ASEAN legal framework also provide their respective definitions of this principle. The EU defines the do no significant harm principle as an activity that does not hinder achieving sustainable investment goals.[54] In addition, this principle is also defined by the EU as activities that do not hinder or even hinder climate change mitigation and adaptation, sustainable development goals, circular economy, and protection of biodiversity.[55] Like the EU, ASEAN also defines the implementation of the do no significant harm principle as an economic activity under the environmental protection objectives and does not make efforts to destroy the environment.[56] The approach taken by the EU and ASEAN for implementing the do no significant harm principle is the intervention and involvement of the state to ensure that

[51] Art. 2a EU Regulation 2019/2088, Art. 17 EU Regulation 2020/852, ASEAN Taxonomy Board, ASEAN Taxonomy for Sustainable Finance, p. 23.

[52] Owen McIntyre, *The Current State of Development of the No Significant Harm Principle: How Far Have We Come?*, "International Environmental Agreements: Politics, Law and Economics", Vol. 20, no. 4/2020, p. 603.

[53] Otto Spijkers, *The No Significant Harm Principle and the Human Right to Water*, "International Environmental Agreements: Politics, Law and Economics", Vol. 20, no. 4/2020, p. 704.

[54] Art. 2a EU Regulation 2019/2088.

[55] Art. 17 EU Regulation 2020/952.

[56] ASEAN Taxonomy Board, *ASEAN Taxonomy for Sustainable Finance*, p. 28.

economic activity does not damage the environment.[57]

The EU and ASEAN have significant differences in promoting sustainable investment. The EU adopts pre-contractual disclosure, whereas ASEAN does not use this mechanism in the ATSF. The paper argues that the existence of pre-contractual disclosure provisions is an attempt by the EU to encourage transparency from the outset before investment contracts are concluded. The approach taken by the EU sustainable investment legal framework is before, during and after the contract is agreed. Meanwhile, the approach taken by ASEAN is an assessment to assess an investment, followed by providing a certain colour code to determine the sustainability of an investment.

On the one hand, the EU employed a more comprehensive and significant approach with pre-contractual disclosure provisions and adopted strong legal instruments. As a supranational organisation, the effectiveness of implementing this regulation is certainly a must and has become the main goal. On the other hand, based on the principle of consultation and consensus, ASEAN ultimately agrees that the effectiveness of the ATSF implementation should be based on each member state's initiatives.

Another difference is in the aspect of monitoring the implementation of legal instruments. The EU implements periodic monitoring and reporting. Monitoring, reporting, and evaluating data are the central policies of every legal instrument, especially those related to the EGD.[58] Therefore, monitoring all its stages is an important instrument in the EU climate change governance.[59] The ATSF regulates monitoring and reporting, but it is not an integral and major policy. In addition, the reporting and sanctions mechanisms are not very clear. These differences are also affected by the organisational structure, the characteristic of integration, and the organisation's necessities.

Both the EU and ASEAN have challenges in mainstreaming sustainable investment legal frameworks at the regional scale. Regulators must ensure that the legal framework is successfully implemented and has a significant positive impact on environmental protection and climate change mitigation. In addition, the EU and ASEAN must consider a common vision regarding sustainable investment between the two regional organisations as trade relations continue to increase.

## 5. Conclusions

The EU and ASEAN, as regional organisations, have adopted different sustainable investment legal frameworks according to their specific requirements and mechanisms. Nonetheless, the EU and ASEAN share the common objective of establishing a comprehensive legal framework for sustainable investment practice. The commonality between the EU and ASEAN legal frameworks is the adoption of the principle of “do no significant harm” as an essential requirement in achieving sustainable investment. The adoption of this principle shows a high level of commitment to environmental protection and climate

[57] Nils Holtug, *The Harm Principle*, in *Ethical Theory and Moral Practice*, Kluwer Academic Publishers, 2002.

[58] Jonas J. Schoenefeld, *The European Green Deal: What Prospects for Governing Climate Change with Policy Monitoring?*, Politics and Governance, Vol. 9, no. 3/2021, p. 376.

[59] Jonas J. Schoenefeld and Andrew J. Jordan, *Towards Harder Soft Governance? Monitoring Climate Policy in the EU*, Journal of Environmental Policy and Planning, Vol 22, no. 6/2020.

change mitigation. Furthermore, there are particular differences in the pre-contractual disclosure mechanism adopted in the EU legal framework and not available in the ATSF. The further distinction is the monitoring and reporting mechanism, which is covered in more detail in the EU legal framework and is generally covered in the ATSF. Such differences and similarities are associated with regional integration, organisational necessity and the internal mechanism.

Despite these similarities and differences, the EU and ASEAN have made a strong and significant endeavour as regional institutions to achieve sustainable investment. The member states of respective organisations have a vital and significant contribution to play in implementing the legal frameworks adopted by the EU and ASEAN. The significance of this comparative study can be applied to assess the implementation of sustainable investment in the EU and ASEAN member states. This paper argues that the legal frameworks provided by the EU and ASEAN play a significant role and can be a powerful catalyst for member states concerning green investment in their national jurisdictions.

Comparing the legal frameworks of two different regional organisations could also be a first step towards harmonising sustainable investment terms. Therefore, further studies could address this opportunity. The strong influence of the EU as a global actor in climate change issues is a potential factor for such harmonisation. Another aspect that can be addressed in future studies is the implication of the differences in the EU and ASEAN sustainable investment legal framework on climate change mitigation.

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# CYBERSPACE ETHICS: FINDING AN EQUILIBRIUM BETWEEN FREEDOM AND PROTECTIONISM

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## Abstract

*Cyber freedom refers to an approach at regulating cyberspace that opposes state monopoly over cyberspace regulatory making. A compelling argument for this concept could be argued by the nature of the most known cyberspace instrument: the internet. According to Lessig, the internet was designed for research, not the concealment of information. In the meantime, many states believe that limiting the cyberspace is a way forward. By exercising jurisdiction to constituting cyberspace facilities, data governance, and cyber operations, the sovereign will be able to protect cyberspace from harm and unnecessary chaos. Practically put, states are divisive in adopting between favouring a multi-stakeholder approach and a government centred authority. Despite owing the nature of cyberspace to be borderless and limitless, human beings are still the inherent subject and bearer of responsibility and liability of every conduct in cyberspace. Human naturally possess values of norms and ethics. As the creator and centrepiece of every activity in the virtual world, cyberspace is built on the foundations of ethics. The priority to serve basic human needs, respect for privacy and freedom, equality, and inclusivity, as well as to protect and not destroy are the four-fundamental ethics of cyberspace. This article attempts to validate the existence of those ethics, despite the different normative approaches each state may adopt. To that end, it also suggests an innocent proposal to how the freedom of cyberspace may be limited, and how the protectionist is able to unshackle restrictions to position cyberspace on a purposive scale for every human need.*

**Keywords:** *cyberspace, ethics, equilibrium freedom, protection.*

## 1. Introduction

Cyberspace has been a point of interest in the digital age because of its utility. According to Stückelberger, cyberspace is a whole virtual reality space that is parallel and has uncountable interactions with the physical world[1]. Muhamad Rizal and Yanyan M. Yani stated that cyberspace is a new world brought by the internet—beyond computer systems—which enables various people to connect with anyone and anywhere[2]; widening the sope of cyberspace. According to Dysson, there are five characteristics of cyberspace: (1) it

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[1] Stuckelberger Christoph and Duggal Pavan, *Cyber Ethics 4.0: Serving Humanity with Values*, ed. Ignace Haaz and Samuel Davies (Geneva: Globethics.net, 2018), 23.

[2] Muhamad Rizal and Yanyan Yani, *Cybersecurity Policy and Its Implementation in Indonesia, JAS (Journal of ASEAN Studies)* 4, no. 1 (August 2016): 61, https://doi.org/10.21512/jas.v4i1.967.

operates virtually; (2) it is rapidly dynamic; (3) borderless and not limited to territorial boundaries; (4) it enables people to be anonymous; (5) it contains public information.[3]

In cyberspace, people around the world interact in various activities. These people are often called 'netizens' which means citizens of the internet.[4] Netizens are individuals who use the internet for different purposes and collectively it connotes the citizen of the internet.[5] As a jargon, 'netizen' means professional use of the internet for meritorious motives.[6] Generally, netizens' various use of the internet includes using electronic mail, online chatting, instant messaging, internet forums, blogging, commenting in various platforms, file sharing, information creating, surfing, and others.[7] The activities done by netizens include them to be a part of the cyber society, due to the link and influence that it has on every individual.[8]

Unfortunately, activities in cyberspace do not conform with cyber ethics. Cyber ethics is a field of applied ethics which examine moral, legal, and social issues in the use and development of cyber technology. Cyber ethics does not only focus on good practices that are safe and polite in cyberspace, but also concerns itself with moral, legal, and social issues related to computers and the internet as a platform for human interaction.[9] Indonesian netizens 'protested' the removal of Indonesian badminton team by filling the All England Instagram account with inflammatory comments in the new posts—and the All England changed their Instagram account not long after.[10] This was one of the contemporary cases of unethical practices by netizens in Indonesia. A similar 'online ambush' reoccurred in February 2021 to Microsoft because Microsoft published a report which placed Indonesian citizens as one of the most impolite netizens in South East Asia.[11] More general and global examples include unsolicited e-mail advertising and spam,[12] cyberbullying,[13] and other unethical behaviour such as fantasy of illegality in the virtual world and virtual theft.[14]

[3] Ahmad Rudy Fardiyan, Etika Siber Dan Signifikansi Moral Dunia Maya, in *Prosiding Seminar Nasional Komunikasi: Akselerasi Pembangunan Masyarakat Lokal Melalui Komunikasi Dan Teknologi Informasi.* (Lampung: Universitas Lampung, 2016), p. 334.

[4] Michael Seese, *Scrappy Information Security*, ed. Kimberly Wiefling (Silicon Valley: Happy About, 2009), p. 130.

[5] Femi Richard Omotoyinbo, *Online Radicalisation: The Net or the Netizen?*, *Social Technologies* 4, no. 1 (2014), pp. 51-61, https://doi.org/10.13165/ST-14-4-1-04.

[6] Omotoyinbo, p. 54.

[7] Chai Lee Goi, *Cyberculture: Impacts on Netizen*, Asian Culture and History 1, no. 2 (July 1, 2009), p.141, https://doi.org/10.5539/ach.v1n2p140.

[8] Stuckelberger Christoph and Duggal Pavan, *Cyber Ethics 4.0: Serving Humanity with Values*, ed. Ignace Haaz and Samuel Davies (Geneva: Globethics.net, 2018), p. 15.

[9] Fardiyan, *Etika Siber Dan Signifikansi Moral Dunia Maya*, p. 334.

[10] M. Hafidz Imaduddin, *Akun Instagram 'Baru' All England Langsung Diserbu Netizen Indonesia*, Kompas, 2021, https://www.kompas.com/badminton/read/2021/03/20/15491538/akun-instagram-baru-all-england-langsung-diserbu-netizen-indonesia?page=all.

[11] CNN Indonesia, *Sebut Netizen RI Paling Tidak Sopan Akun Microsoft Diserang*, CNN Indonesia (Jakarta, 2021), https://www.cnnindonesia.com/teknologi/20210226140821-192-611309/sebut-netizen-ri-paling-tidak-sopan-akun-microsoft-diserang.

[12] Alfreda Dudley et al., *Investigating Cyber Law and Cyber Ethics: Issues, Impacts and Practices*, ed. Lindsay Johnston Kristin Klinger Erika Carter, Myla Harty, and Sean Woznicki, 1st ed. (Hershey: IGI Global, 2012).

[13] Dudley et al., p. 69.

[14] Dudley et al., pp.118-119.

Law and morality are two normative systems that has been regulating and controlling powers over the behaviours of individuals, aiming to maintain a harmonious state between individuals who recognize each other's rights. Additionally, both systems, although in some ways very different, have a complementary relationship in which morality lessens the rigid implementation of positive law and law compensates for the weaknesses of morality in its functions and implementation.[15] Concurrently, law has an ongoing impact on morality, vice versa, since morality is historically contingent and law is an influential factor in the contention on morality.[16] Morality and ethics are linked together, although both are somewhat different. Ethics, ideally, is a code of law that prescribes the correct behaviour universally, one that differentiates between good and evil,[17] and are governed by experts and professionals (external factors) while morality transcends through cultural norms and are governed by oneself. Moreover, ethics can have no morals and one could violate ethical principles to maintain one's moral integrity. Consequently, there should be a main goal on the implementation of ethics with morals in the world of cyberspace through laws.

With the aforementioned characteristics of cyberspace, it can be confirmed that it inherits multilingual, multicultural, multireligious, and multilateral components of individuals belonging to different nationalities.[18] Thus, ethics in cyberspace is global, interconnected, multicultural, multireligious and multiphilosophical. Despite such diversity, common grounds are found by extracting values from the sources of different countries and international organizations.[19] The international community, through the United Nations, have agreed upon that all cyber related activities have to be measured against the benchmark of Sustainable Development Goals (SDGs).[20] Some of the thresholds include that cyberspace has to prioritize to serve basic human needs; respect privacy and freedom; increase equality and inclusivity; as well as protect and not destroy life.[21] The manifestation of these values are centred upon the perception that the purpose of technology is to serve human beings. In this context, it is inarguable that human—as the prime regulatory body—has full control in guiding how we exist in cyberspace. The link between rule of ethics for visions, orientations, and community, and rule of law for reliability, trust, and control of power ought to be implemented in every regulating sector from education, commerce, health care, and security. An initial question then appears: how does ethics guide the legal framework of cyberspace?

When observing the legal framework for cyberspace, a division is made between cyber liberalism and cyber protectionism.

[15] Willy Moka-Mubelo, *Law and Morality*, in Reconciling Law and Morality in Human Rights Discourse: Beyond the Habermasian Account of Human Rights, vol. 3 (Cham: Springer International Publishing, 2017), pp. 51–88, https://doi.org/10.1007/978-3-319-49496-8_3.

[16] George P. Fletcher, *Law and Morality: A Kantian Perspective*, Columbia Law Review 87, no. 3 (April 1987), pp. 533-558, https://doi.org/10.2307/1122670.

[17] Zygmunt Bauman, *Morality without Ethics*, *Theory, Culture & Society* 11, no. 4 (November 29, 1994), pp. 1–34, https://doi.org/10.1177/026327694011004001.

[18] Christoph and Pavan, *Cyber Ethics 4.0: Serving Humanity with Values*, p.16.

[19] Ibidem.

[20] International Telecommunication Union, *ICTs for a Sustainable World #ICT4SDG*, International Telecommunication Union, 2021, https://www.itu.int/en/sustainable-world/Pages/default.aspx.

[21] International Telecommunication Union.

With the prior opts for complete freedom and unlimited use and exploitation of cyberspace, while the latter prefers the suppression of such freedoms. Cyber protectionism is a broad term that refers to a wide range of barriers to digital trade (e-commerce) and cross-border data flows,[22] with examples such as censorship, filtering, localization measures and regulations to protect privacy.[23] Meanwhile, cyber liberalism, also known as cyber freedom mainly comprises the right to internet access, freedom of expression and information, and freedom from internet censorship. The relevance of these concepts stem from its different manifestation in regulations. The different types of regulation will determine different user behaviours reacting to the limits of their activities. These regulations, however, take off from a positivist orientation, which often leaves out crucial philosophical basis of such norms. Here, the need for cyber ethics presence itself. By determining the fundamental ethics of cyberspace, a threshold for liberalizing and limiting the breadth of user activities through regulation is hoped to be accommodated.

Ethics are dependent on oneself, although it is relatively consistent within a certain context, it still varies from one person to another considering that every human being has their own ethical standards. Therefore, ethics can be deemed as borderless. In cyberspace, a borderless virtual reality that is parallel with the physical world,[24] law and morality should always be inherent and applied by society. This concept is derived from the maxim "ubi societas, ibi ius" which means, wherever there is society, there is law. Thus, wherever there's society, there is law and there are ethics. All three are co-dependent with each other in both physical and virtual worlds. Furthermore, after researching the concerning condition of cyberspace this paper aims to straighten out and deepen the research on ethics, moral, and law of cyberspace, specifically on cyber ethics and cyber law, finding the equilibrium between cyber freedom and cyber protectionism. In doing so, the analysis of this research is limited to the scope of examining cyber ethics that are manifested in regulations and how it may affect user activities in cyberspace. The issue of cybercrime will not be extensively discussed, as opposed to the normative governance of international and national framework of a few countries such as the United States and China.

Herein, two literary works are referenced. The first in regards with cyber ethics fundamentals that has been presented by Christoph Stückelberger and Pavan Duggal.[25] Out of the 25 chapters that are discussed in their work, the novelty that this article brings is the discussion of cyber ethics between the freedom of cyberspace and protectionism. The second is referred to Andrew Power and Gráinne Kirwan where their discussion of ethics and legal aspects of virtual worlds gives extensive highlights on cybercrime and legal enforcement.[26] This will not be considered since the issue of enforcement and criminal law is humbly reserved for future discussion.

This research applies a philosophical-normative approach, which mainly analyses

[22] Susan Ariel Aaronson, *What Are We Talking about When We Talk about Digital Protectionism?*, World Trade Review 18, no. 4 (August 6, 2019), pp. 541-577, https://doi.org/10.1017/S1474745618000198.

[23] United States International Trade Commission, *Digital Trade in the U.S. and Global Economies*, Part 1, 2013, p. 21.

[24] Christoph and Pavan, *Cyber Ethics 4.0: Serving Humanity with Values*, p. 23.

[25] *Idem*, p.16.

[26] Dudley et al., *Investigating Cyber Law and Cyber Ethics: Issues, Impacts and Practices*, pp.117-131.

the background and core values to cyberspace in relation to relevant legal framework of different states. This paper primarily assesses international law, national law, as well as literature relating to ethics, cyberspace, and cyber governance. The analysis is elaborated through a qualitative method on how ethics, in the context of cyberspace acts as pillars and foundations of the legal framework for governance and regulations both internationally and nationally. Two main legal perspectives will be analysed; from countries that adopts a more liberal orientation towards cyberspace, and its protectionist counterpart. From this comparative analysis, it is hoped to conclude that the essence of ethics is found in both approaches, despite the differences in its formulation into the relevant legal framework.

Thus, an urgency exists to create limits and regulations against the negative use of cyberspace that is built based on cyber ethics. Much like laws and regulations that apply in the real world, ethical principles that govern human acts and conduct should also need to be applied equally in cyberspace. By finding the balance between cyber freedom and cyber protectionism, cyber ethics will guide a rational value-driven legal framework, for individual's engagement for the fruitful use and presence of cyberspace.

## 2. Roots of Ethics in Cyberspace

The cyberspace is a borderless domain and was free from regulations and restrictions that epitomize the real world.[27] This statement would have been somewhat accurate if it was resented a few decades ago. Due to the immaculate progress and development, it has gone through, cyberspace is no longer free. where most of the credit is given to globalization and commercialization. In the sense that its intellectual commons are shared among states,[28] prevalent filtering,[29] increased awareness in privacy and anonymity,[30] and an active engagement for cyber sovereignty.[31] But has it always been this way? or has these boundaries been put in place and its exposure are delayed. One essence is of certain; ethics and moral values are inseparable from the cyberspace.[32]

In the era where information is an essential commodity, the inception of ethics prevents the cyberspace to be used in an ill-mannered way.[33] A normative regime for cyberspace must be equipped with values that are inherent to human. Thus, not only the absence of normative regime in cyberspace will allow malicious actors to

[27] Richard A Spinello, *Code and Moral Values in Cyberspace*, Ethics and Information Technology 3, no. 2 (2001), pp. 137–50, https://doi.org/10.1023/A:1011854211207.

[28] Jean Buttigieg, *The Common Heritage of Mankind From the Law of the Sea to the Human Genome and Cyberspace*, Symposia Melitensia 8, no. Special Issue (2012), pp. 81-92.

[29] UNGA, *United Nations General Assembly Resolution, The Right to Privacy in the Digital Age, UN Doc A/RES/68/167* (2014), UNHRC, *United Nations Human Rights Council Decision, Panel on the Right to Privacy in the Digital Age, A/HRC/DEC/25/117* (2014); UNHRC, *United Nations Human Rights Council Decision, The Right to Privacy in the Digital Age, A/HRC/28/L.27*, (2015).

[30] Joel Trachtman, *Cyberspace, Sovereignty, Jurisdiction, and Modernism*, Indiana Journal of Global Legal Studies 5, no. 2 (1998), pp. 561-581.

[31] Christoph and Pavan, *Cyber Ethics 4.0: Serving Humanity with Values*, p. 23.

[32] Nneka Obiamaka Umejiaku and Mercy Ifeyinwa Anyaegbu, *Legal Framework for the Enforcement of Cyber Law and Cyber Ethics in Nigeria*, International Journal of Computers & Technology 15, no. 10 (2016), pp. 7130-7139, https://doi.org/10.24297/ijct.v15i10.12.

[33] UNGA, *United Nations General Assembly Resolution, Combating the Criminal Misuse of Information Technologies, A/RES/55/63*, (2001).

operate in a grey area, but the chances of misuse are immeasurable if values are not embedded in such framework. But where did these ethical values come from? Was it created at the same time computers were invented? Or did it come at a later stage once human discovers the limitless that they can do on the internet?

If we look back to 1992, the Computer Ethics Institute came up with 10 commandments of computer ethics,[34] which include to not use computer to harm other people, interfere with others work, snoop, steal, or lie; to not use software illegally; to not use unauthorized computers, claim others' work, and to use computers in a respectful manner. This was a decade after the invention of the internet, when the use of cyberspace was still uncommon. But it is already observed that humans wanted to have the internet to be put to good use, despite knowing the possibilities of harm that it could also create. Clearly, a basic understanding of right and wrong had already been established.

Today, cyberspace has become a domain of its own. It consists of inter-connected networks, people from across nations, fusing cultures and languages from all ages and occupation supplying and demanding information which can be transmitted in a matter of seconds.[35] Despite this transformation, it is considered that the much-recognized ethics of today are re-inventions of the old.[36] The difference lies where some values have been incorporated into binding laws. This assumes that some ethics are still on the basis of self-responsibility and self-regulation within the conscious of individuals that exist in cyberspace. In differentiating one from another, Stùckelberg have divided it into fundamental premise, fundamental values, contextual values, and discretionary decisions.[37] This hierarchy is presented based on the binding character of norms, from the strongest to weakest respectively. Ethics that are manifested into laws, both national and international, are placed on the position of contextual values. Thus, it is bound by a context of particular space and time; and binding upon specific subjects.[38]

As a representation of collective goals and aspirations of the international community, the United Nations Sustainable Development Goals (SDGs) are indispensable from the roots of ethics.[39] A reason to why it is centered on human rights norms. For the goals of the SDGs to be realized by the member states, public trust and confidence is centered on the basis of ethics.[40] Within this context, it is to be understood that the cyberspace as the heart for the flow information, like any other essential commodity must also be governed by ethics. The four ethical values presented in the beginning of this paper were by means of Stückelberger and Duggal's generous analysis. Since 'to serve basic human needs' and 'protect and not destroy life' are obvious and broad elements, we have selected the remaining three: respect for privacy and freedom, equality, and inclusivity.

It is acknowledged that the UN SDGs, formalized through the General Assembly is of non-binding character, and thus absent

[34] Diane Bailey, *Cyber Ethics*, 1, New York: The Rosen Publishing Group, 2008, p. 10.
[35] Fuentes-Camacho Teresa, *Introduction: UNESCO and the Law of Cyberspace*, in The International Dimensions of Cyberspace Law, 2nd ed., Routledge, 2000, pp. 27-36.
[36] Christoph and Pavan, *Cyber Ethics 4.0: Serving Humanity with Values*, p. 36.
[37] *Idem*, p. 39.
[38] *Idem*, p. 40.
[39] Jerome Amir Singh, *Sustainable Development Goals: The Role of Ethics*, Sight Life 29 (2015), pp. 56-61.
[40] *Ibidem*.

from any compliance of accountability mechanism. The legal binding nature of such an instrument will not be the subject of debate within this paper. Because despite positioning the UN SDGs as a main source of contextual values, other treaties, customs, principles, and documents of international law have also reiterated similar values.

Classical human right treaties have represented a general consensus on the vitality for the right of privacy, and access to information.[41] Other set of regional agreements also reaffirms the right of everyone to hold opinions without interference, as well as the freedom of expression, to seek, receive, and impart information and ideals of any kind, rights concerning the respect for privacy.[42] On the outskirts of these values, it can be concluded that the threshold for the right to privacy and freedom must be on the balance between the interest of law enforcement and respect for fundamental human rights.[43]

As a common heritage of mankind,[44] cyberspace should be open and utilized for the benefit of every living individual and future generations. Equality and inclusivity of access must be guaranteed by every nation. Despite the flow of information might arguably be subject to sovereignty, a complete blockade from it should not. This value is emphasized numerous times during the General Assembly meetings. Member States have understood that the free flow and universal access to information goes hand in hand with global cyber security, protection of critical information structure, and the development of ICTs.[45] Unfortunately, the concept and manifestation between ethics and the law that have been presented is an expectation of the ideals. Despite cyberspace existing virtually as a single-integrated domain, individuals are still subject to the sovereignty and jurisdiction of every state. Having each sovereign varying from their legal system, culture, social structure, political and economic environment, cyberspace too is inevitably governed in a different way. The nature of this governance

[41] UNGA, *Universal Declaration of Human Rights*, United Nations, 1949, Articles 12 and 19; Council of Europe, *European Convention on Human Rights* (1950), Articles 8 and 10; UNGA, *International Covenant on Civil and Political Rights* (1966), Article 17.

[42] Organization of American States, *American Convention on Human Rights*" (1969), Article 11; League of Arab States, *Arab Charter on Human Rights* (2004), Articles 16 and 21; ASEAN Secretariat, *ASEAN Human Rights Declaration and Phnom Penh Statement on the Adoption of the ASEAN Human Rights Declaration* (Phnom Penh: Association of Southeast Asian Nations, 2012), Article 21; Council of Europe, *Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data* (European Treaty Series - No. 108)" (1981); Council of Europe, *Directive 2016/680 of the European Parliament and the Council on the Protection of Natural Persons with Regard to the Processing of Personal Data by Competent Authorities for the Purposes of the Prevention, Investigation, Detection or Prosecution of Criminal Offences or the Execution of Criminal Penalties, and on the Free Movement of Such Data, and Repealing Council Framework Decision 2008/977/JHA*, Official Journal of the European Union § (2016).

[43] Council of Europe, *Budapest Convention on Cybercrime* (European Treaty Series - No. 185), (2001), pt. Preamble.

[44] Haekal Al Asyari, *Cyberspace as a Common Heritage of Makind: Governing Jurisdictional Limitations of the Internet by Virtue of International Law*, (University of Debrecen, 2020).

[45] UNGA, United Nations General Assembly Resolution, *Combating the criminal misuse of information technologies*, A/RES/55/63; UNGA, *United Nations General Assembly Resolution on the Creation of a Global Culture of Cyber Security, A/RES/57/239* (2003); UNGA, *United Nations General Assembly Resolution Creation of a Global Culture of Cybersecurity and the Protection of Critical Information Infrastructures, A/RES/58/199* (2004); UNGA, *United Nations General Assembly Resolution on the Creation of a Global Culture of Cybersecurity and Taking Stock of National Efforts to Protect Critical Information Infrastructures, A/RES/64/211* (2010), https://doi.org/10.1680/jdare.16.00049; International Telecommunication Union, *World Summit on the Information Society Outcome Documents, Geneva 2003 - Tunis 2005*, (Geneva; Tunis, 2005).

is split between one that prefers it to be free, and the other prioritizing its protection.

Declan McCullagh believes that the government is the enemy of cyberspaces vitality and openness.[46] In contrast, Lessig maintains that government policy will be needed as a corrective to private parties who seek to undermine the liberating technology; particularly those that are changing the internet's character. Spinello, who supported Lessig's claim, believes that the cyberspace will still attain its freedom if moderated and guided by government policy sensitive to human rights and freedom-enhancing values.[47] Our stance stands close to the later, freedom on the cyberspace has to be guaranteed by law; where such rules and regulations are inherent to fundamental ethics.

### 3. Freedom of cyberspace: a theoretical paradox?

The advancement of technology strongly influences the development of ethics. Technology was made, and is continually evolving, to ease human lives. However, it cannot be constituted as ethically 'neutral' since technology essentially shapes and reveals what humans value.[48] Technology continually reshapes the global distribution of power, justice, and responsibility; distributing both negative and positive impacts unevenly.[49] In order to ensure that the great benefits of technology and exposure to their risks are distributed properly, it entails the necessity of justice, which is fundamentally an issue of ethics.[50] In this case, the technology at hand is manifested in the form of cyberspace—the absence of it is closely linked to the normative framework.

More than fifty declarations, regulations, and guidelines were adopted in the last decades in regards to internet governance.[51] However, only one third of such documents show the necessity and importance of ethics in regards to the use of cyberspace.[52] The lack of governance on ethics proves on the absence of ethics in cyberspace first and foremost before even diving into relevant cases on such issue. Without ethics controlling and limiting the actions of users, cyberspace becomes the place chaos.

The main causes of the absence of ethics, that were already detected in the 1990s and are still relevant today, lie in the freedom in cyberspace. First, the freedom of access to information results in a vast amount of information being easily accessible and downloaded by individuals for their own interest such as copying, printings, scrutiny, and show.[53] Freedom of access to information also results to "information wants to be free" which causes the corrupted expectation of not being obligated to pay for information with its

[46] Spinello, *Code and Moral Values in Cyberspace*, p. 137.
[47] *Idem*, p. 139.
[48] William J Rewak and Shannon Vallor, *An Introduction to Cybersecurity Ethics* (Santa Clara: Santa Clara University, 2018), p. 3.
[49] Rewak and Vallor, p. 3.
[50] Rewak and Vallor, p. 4.
[51] Rolf H. Weber, *Ethics as Pillar of Internet Governance*, Jahrbuch Für Recht Und Ethik / Annual Review of Law and Ethics 23 (2015), p. 95.
[52] Rolf H Weber, *Principles for Governing the Internet: A Comparative Analysis*, Paris: UNESCO Publishing, 2015, p. 54.
[53] Roger Clarke, *Ethics and the Internet: The Cyberspace Behaviour of People, Communities and Organisations*, Business and Professional Ethics Journal 18, no. 3 & 4 (1999), p. 159, https://doi.org/10.5840/bpej1999183/423.

appropriate price. There is countless amount of book piracy committed online, enabling users all over the world to illegally download different kinds of books. Unfortunately, only one of many examples that constitutes as normal practice today that are not properly dealt with. The second lies the in the freedom to act anonymously, leading to uncontrollable actions.[54] Studies have suggested that anonymity can significantly increase aggression[55] and the likelihood of regulations being broken,[56] due to its nature of acting as a mask for the users. Anonymity prevents the identification of the culprit of any crime or misdemeanours, not able to hold them accountable. Particularly, freedom to access information and to act anonymously enhance some of the characteristics of cyberspace—operating virtually, its borderless nature and not limited to territorial boundaries, and the ability to be anonymous.[57] Hence, this research will further discuss on the vast and continuous effects of the freedoms, acting as a double edged sword in the realm of cyberspace.

Four integral issues have become apparent in the world of cyber ethics in which are free speech, intellectual property rights protection, privacy, and security.[58] These four issues emerge as cyberspace does not only become the tool for research and communication, but also for entertainment, commerce, and social media; creating and expanding more platforms, thus giving more space to commit various actions, both negative and positive. Consequently, with the absence of ethics, threats arising from those issues become blatant as their negative effects influence the cyberspace into becoming a place of negativity and unsafe territory.

Cyberspace lets individuals exercise the freedom of expression, enabling features for users to contribute to various platforms. Due to freedom of online expression, free speech branches out many different types of negative effects such as hate speech, harassment, bullying, spam, discrimination, pornography.[59] Those effects are evident in forms of racism, misogyny, sexism, and xenophobia—in which all are still blatant until today. 'Memes' are one of the modern examples that can embody the negative impacts of free speech,[60] where it is a very powerful tool that can go viral easily. Memes in most cases are harmless and have the purpose to entertain. However, if it contains negative and degrading content and with its nature of easily going viral, it can ruin the lives of people and/or institutions. Unfortunately, cases of free speech are hard to investigate, and perpetrators are often left unaccountable due to the nature of cyberspace, turning such fundamental right into a double-edged sword. Limitations of free speech are written in many laws and regulations both in national and international levels. However, due to the nature of

[54] *Ibidem.*

[55] Philip G Zimbardo, *The Human Choice: Individuation, Reason, and Order versus Deindividuation, Impulse, and Chaos*, in *Nebraska Symposium on Motivation*, University of Nebraska Press, 1969, pp. 237-249.

[56] M E Kabay, *Anonymity and Pseudonymity in Cyberspace: Deindividuation, Incivility and Lawlessness Versus Freedom and Privacy*, in Annual Conference of the European Institute for Computer Anti-Virus Research (EICAR) (Munich, 1998), pp. 1-40.

[57] Fardiyan, *Etika Siber Dan Signifikansi Moral Dunia Maya*, p. 334.

[58] Richard A. Spinello, *Ethics in Cyberspace: Freedom, Rights, and Cybersecurity*, in *Next-Generation Ethics*, Cambridge University Press, 2019, p. 446, https://doi.org/10.1017/9781108616188.029.

[59] Spinello, p. 447.

[60] Nicolle Lamerichs et al., *Elite Male Bodies: The Circulation of Alt-Right Memes and the Framing of Politicians on Social Media*, Journal of Audiences& Reception Studies 15, no. 1 (2018), pp. 1–27.

cyberspace, it becomes difficult and taxing to handle.

The notion "information wants be free" made by scholars goes against and at the same time redefines intellectual property protection law. Intellectual property rights protect the author's right of any scientific, artistic, or literary work, protecting their moral and economic rights. Unfortunately, intellectual property rights are hard to maintain in cyberspace, due to its nature and the absence of ethics. The borderless nature of cyberspace significantly increases the ability to make and distribute copies of music, books, and videos, resulting to violations of intellectual property law that are not seriously dealt with. Humans indeed have the right to access their basic need of information, but this becomes controversial in a way violating those who owns or obtained the intellectual property rights. Although some states heavily regulate intellectual property rights, handling cases of violations become tedious and difficult with the fast-moving and borderless nature of cyberspace.

Privacy in cyberspace is best described as a virtual space where individuals can be free from interruption or intrusion and where they can control the time and manner of the disclosure of their personal information.[61] Privacy is a fundamental human right. However, privacy in cyberspace is hard to maintain because every action always leaves a digital footprint. Digital technology becomes the driving force of the development privacy in which when cyberspace is included in the formula of processing of personal data, it shifts the notion to a new dimension that includes the notion of data protection.[62] Internet cookies, as one of the modern forms of data collection in cyberspace, are made to track, personalize, and save information about the users.[63] They are created to identify users and process their data based on their digital footprints, thus sparking threat against privacy when misused. Loose privacy enforcement regulations are also evident in how major technology companies like Facebook, Google, and Amazon constantly monetize the flow of information by turning them into profits.[64] Once again, due to the nature of cyberspace, maintaining privacy becomes strenuous and difficult, thus holding perpetrators of violations against privacy accountable becomes harder. The lack of ethics in its regulations further prove this notion.

Cybersecurity entails the safeguarding of computer networks and the information they contain from penetration and from malicious damage or disruption.[65] However, due to the open nature of cyberspace, users become vulnerable to cybersecurity threats. Cybersecurity threats aim to damage data, steal data, or obstruct digital life in general in the forms of data breaches, viruses, or cyber-attacks. Cybercrimes have increased by 600% during the pandemic and continue

[61] S. K. Verma and Raman Mittal, *Legal Dimensions of Cyberspace*, ed. S K Verma and Raman Mittal, New Delhi, Indian Law Institute, 2004, p. 451.

[62] Danilo Doneda and Virgilio A.F. Almeida, *Privacy Governance in Cyberspace*, IEEE Internet Computing 19, no. 3 (May 2015), p. 3, https://doi.org/10.1109/MIC.2015.66.

[63] Kaspersky, *What Is a Cookie? How It Works and Ways to Stay Safe*, Kaspersky, 2021, https://www.kaspersky.com/resource-center/definitions/cookies.

[64] Dan Craigen, Nadia Diakun-Thibault, and Randy Purse, *Defining Cybersecurity*, Technology Innovation Management Review 4, no. 10 (October 30, 2014), pp. 14-21, https://doi.org/10.22215/timreview/835.

[65] James A. Lewis, *Cybersecurity and Critical Infrastructure Protection*, Center for Strategic & International Studies, 2006.

to increase as years pass by,[66] growing at an unprecedented pace, making cybersecurity a prevalent issue. Various laws and regulations on cybersecurity have been made and implemented in numerous jurisdictions. However, those lack focus on ethics of its users.

The free regime of cyberspace–operating virtually and containing public information, is rapidly dynamic, borderless, and anonymous–offers many opportunities for its users. Four main sectors that are boosted by the free regime of cyberspace are the economy, information, and communication sectors. These four sectors have increased its quality and use at an unprecedented pace as cyberspace continues to evolve.

Cyberspace plays a critical role in the global economy, making economy rely greatly on cyberspace infrastructure and establishing digital revolution.[67] Cyberspace has affected the economy in three major interrelated ways.[68] First, cyberspace promotes equality and inclusion in a way that it lowers the cost of information and expands the market as a result—making a mutually beneficial transaction easier for everyone. E-commerce platforms gives opportunities to all business, from big to small, to find customers. Second, cyberspace has made vast number of efficient improvements in which transactions between sellers and customers are made cheaper, faster, and more convenient—raising productivity. Details of transactions are easily collected and organized through better information processing in cyberspace, helping business owners, retailers, and logistic companies. Third, cyberspace makes enormous innovation for the economy where opportunities to open businesses using the internet platform cost little to none. Digital products such as digital music (e.g. Spotify, Apple Music, Tidal), e-books, and online news and data have also boosted the growth of economy.

Access to information is a fundamental human right.[69] Cyberspace as a platform gives access to information in a more efficient, faster, and cheaper way. Cyberspace today has access to digital libraries, encyclopaedias, news, art galleries, online classes, and many other sources of information from anywhere in the world in a matter of a few clicks, promoting education, awareness, and health. Cyberspace has enabled users to take an active role in choosing what, how, and when information is gained. Information in this platform can comprise images, videos, sound, and/or text; making information easier to be spread and understood.

Many aspects of communication have outstandingly improved with the existence of cyberspace; mainly speed and time, cost, job creations, globalization, entertainment, spread of information, and business opportunities. Through cyberspace, communication becomes cheaper and faster with messages being sent and received instantly within a few clicks, which also saves the cost of communication. The improved and new form of communication creates jobs, some even new such as computer programmers, web designers, software developers, system analysts, and many more. Furthermore, the existence of

[66] Purplesec, *2021 Cyber Security Statistics The Ultimate List Of Stats, Data & Trends*, Purplesec (Purplesec, 2021), https://purplesec.us/resources/cyber-security-statistics/.

[67] U M Mbanaso and E S Dandaura, *The Cyberspace: Redefining A New World*, IOSR Journal of Computer Engineering 17, no. 3 (2015), p. 18.

[68] World Bank, *World Development Report 2016: Digital Dividends* (Washington District Columbia: World Bank, 2016), p. 42, https://doi.org/10.1596/978-1-4648-0671-1.

[69] UNGA, *Universal Declaration of Human Rights*, Article 19.

social media platforms (e.g. Twitter, Facebook, Tiktok, Youtube, Instagram) not only significantly improves communication, the spread of information, and freedom of speech, but also provides entertainment for users. And as stated and explained above, cyberspace continually improves the communication, spread of information, and management within business and the education sectors.

Although opportunities from cyberspace have impacted the human lives immensely for decades, the absence of ethics in cyberspace will greatly imbalance these opportunities. This will result in negative effects having a greater impact than the positive impacts for the users within cyberspace. Without ethics, the misuse of those opportunities will cause more damage and destruction to humans. Cyberspace, made to improve human lives, would become an unsafe and treacherous place. The reflection of cyberspace, which is its unethical users, will be a great danger and threat especially with the fast advancement of technology when paired with the slower paced development of laws and regulations, as ethics are fundamental for the law at issue. There exists an urgency on ethics being implemented more in the use of cyberspace, as it has been proven on how ethics are only shown its necessity in one third of documents in relation to internet governance.

## 4. Between Freedom and Protection

To understand where ethics is positioned within the normative framework of cyberspace governance, two respective approaches must be analyse: the cyber freedom (cyber liberalist) and the cyber protectionist. Both perspectives will be contextualized in the example of the governance model of the United States and China. The first part of this section will deal with the cyber freedom, before proceeding to the protectionist. Only then where we will be able to seek for an ideal place to position the ethical aspects.

The history of Cyber Freedom laid in the foundation of the internet wherein 1960s, researchers from the US military established the fundamentals of the internet.[70] Since then, universities, private institutions, and private entities have joined in a haphazard, organic, and decentralized manner.[71] However, countries, including the US, have a significant role in regulating it despite its inclusive nature.[72] Within this article's context, 'cyber freedom' is understood as a multi-stakeholder governance approach for the cyberspace. Multi-stakeholder governance is popular among countries in which libertarian ideas are popular. Its factions include Free Culture, Global Public Good (GPG), Maximalist, and Anti-Marketization.[73] Aside from the US, the United Kingdom (UK), Canada, and the European Union members (EU) are known proponents of the multi-stakeholder regime.[74]

[70] Zhixiong Huang and Kubo Mačák, *Towards the International Rule of Law in Cyberspace: Contrasting Chinese and Western Approaches*, Chinese Journal of International Law 16, no. 2 (June 1, 2017), para. 29, https://doi.org/10.1093/chinesejil/jmx011.

[71] *Ibidem*.

[72] *Idem*, para. 30.

[73] Jean Marie Chenou, *From Cyber-Libertarianism to Neoliberalism: Internet Exceptionalism, Multi-Stakeholderism, and the Institutionalisation of Internet Governance in the 1990s*, Globalizations 11, no. 2 (2014), p. 209, https://doi.org/10.1080/14747731.2014.887387.

[74] Huang and Mačák, *Towards the International Rule of Law in Cyberspace: Contrasting Chinese and Western Approaches*, para. 33.

The discourse on how to regulate the internet enters a libertarian popular outlook in the 1990s with the statement of David Clark, an MIT computer science professor. He expressed a government-free governance model for the internet as the overall outcome for internet regulation.[75] At that time, the internet has less than a million users.[76] The popularization of multi-stakeholder governance gains global recognition in UNGA Resolution, 57/239 of 2002. Known stakeholders include "*…governments, businesses, other organizations and individual users who develop, own, provide, manage, service and use information systems and networks…*".[77] Multi-stakeholder governance is famous for its inclusive and representative principles where stakeholders could produce norms and set standards, and define penalties and repercussions for violations.[78]

The multi-stakeholder approach is so popular that it influences current discourse in the UN about cyberspace governance. Recent developments within UN discussions are the roles of these stakeholders. These roles consist of stakeholders as influencers of opinions, problem solvers, contributors, decision-makers, sponsors of national engagement, and whistle-blowers.[79] Aside from the UN, the US also utilizes a multi-stakeholder approach in its 'Internet Freedom' diplomacy to increase the protection of human rights in cyberspace.[80] All of these is credited to the libertarian influence in the US during the 90s for influencing the internet regulatory approach. Four stakeholders are contributing to the libertarian system in regulating cyberspace: the learned society which develops and manages internet since its inception; corporates that defends an unregulated and private-sector-led market creation process; US political institutions that desire a leading role in internet policy; transnational actors intending to internationalize and take part in internet governance.[81]

It is essential to keep in mind that although cyber freedom is associated with the US by their multi-stakeholder practice, the US does not embrace it fully as they need to strike a balance that suits their interests. The US PATRIOT Act encourages ISPs (Internet Service Providers) to block website contents inconsistent with US public interest, turn over emails that reveal suspicious intent, and encourage telecommunications companies to conduct data mining on anti-terrorism grounds.[82] A real-life example is the US's blocking of three Iraq television stations in 2010 because its contents are 'anti-American'.[83]

Nevertheless, Americans are hostile to censorship, and the attitude of the US government remains receptive to unfiltered information if it does not contradict national security. All these thanks to a cornerstone value within US society: freedom of

[75] Huang and Mačák, para. 30.

[76] A Liaropoulos, *Exploring the Complexity of Cyberspace Governance: State Sovereignty, Multi-Stakeholderism, and Power Politics*, Journal of Information Warfare 15, no. 4 (2016), p. 18.

[77] Liaropoulos, p. 20.

[78] *Ibidem.*

[79] Bruno Lete, *Shaping Inclusive Governance In Cyberspace*, Washington, 2019, pp. 6-10.

[80] Bureau of Democracy Human Rights and Labor, *Internet Freedom*, 2019.

[81] Chenou, *From Cyber-Libertarianism to Neoliberalism: Internet Exceptionalism, Multi-Stakeholderism, and the Institutionalisation of Internet Governance in the 1990s*, p. 210.

[82] Barney Warf, *Geographies of Global Internet Censorship*, GeoJournal 76, no. 1, February 23, 2011, p. 18, https://doi.org/10.1007/s10708-010-9393-3.

[83] Binxing Fang, *Cyberspace Sovereignty*, 1st ed., Singapore, Springer Singapore, 2018, p. 97, https://doi.org/10.1007/978-981-13-0320-3.

expression. Freedom of expression is a freedom enjoyed by individuals as a medium of political orientation and culture.[84] Such values are central to US national history and collective consciousness,[85] a factor contributing to the growth of libertarian ideas in the US. For instance, citizens of the US are free to criticize their government. The US government does not take punitive action and even supports the medium of cyberspace as a place of criticism.[86] Indeed, the First Amendment of the US Constitution guarantees freedom of expression except for fraud, obscenities, defamation, and incitement.[87] US is even laxer in cyberspace, as the US government immunizes content providers (YouTube, Facebook, etc.) from the actions of their users should consider an exception to freedom of expression occurs.[88]

Yet two controversies exist from the cyber freedom concept implemented under the US. First, the US government's controversial actions in the implementation of cyber freedom policies. Second, concept of cyber freedom and the US' actions upon it. First, there is evidence that media outlets in the US, while not criminalized for expressing their views, are pressured financially and politically on their news coverage.[89] Hence, manipulating the right to free expression to the financer's interests. Another issue is the FISA Amendments Act of 2008 that permits the US government to conduct surveillance on foreigners outside the US.[90] Second, on the controversy of cyber freedom itself. While it is indeed morally 'good' to implement the cyber freedom concept to national policies, a question arises whether it is justified to pressure other countries to do so? Especially for a country with cyberspace restrictions such as the US compared to EU countries with no internet ban.[91] Another issue is the disinformation potentials and bots that manipulate public opinion in cyberspace.[92] The issue of criminalizing disinformation and bots is a challenge to proponents of cyber freedom.

Unlike cyber freedom, what we termed as the cyber protectionist concept is that countries must govern cyberspace instead of applying sovereignty in cyberspace. Cyber protectionist here is also known as cyber sovereignty proponents. The idea is popular in China, where it relies on two principles: unwanted influence in country's cyberspace must be banned and shifting internet multistakeholder governance to an international forum.[93]

The history of the cyber protectionist idea began in 2002. During the UN's World Summit on the Information Society (WSIS), there are confrontations on governing

[84] Mauricio J. Alvarez and Markus Kemmelmeier, *Free Speech as a Cultural Value in the United States*, Journal of Social and Political Psychology 5, no. 2 (2018), pp. 725-726, https://doi.org/10.5964/jspp.v5i2.590.

[85] Alvarez and Kemmelmeier, *Free Speech as a Cultural Value in the United States*.

[86] Bureau of Democracy Human Rights and Labor, *Internet Freedom*.

[87] Fernando Nunez, *Disinformation Legislation and Freedom of Expression*, UC Irvine Law Review 10, no. 2 (2019), pp. 789-790.

[88] Nunez, *Disinformation Legislation and Freedom of Expression*.

[89] Ayhan Dolunay, Fevzi Kasap, and Gökçe Keçeci, *Freedom of Mass Communication in the Digital Age in the Case of the Internet: 'Freedom House' and the USA Example*, Sustainability 9, no. 10, October 7, 2017, p. 18, https://doi.org/10.3390/su9101739.

[90] Dolunay, Kasap, and Keçeci, *Freedom of Mass Communication in the Digital Age in the Case of the Internet: 'Freedom House' and the USA Example*.

[91] Dolunay, Kasap, and Keçeci, *op. cit.*, p. 13.

[92] Nunez, *Disinformation Legislation and Freedom of Expression*, pp. 791-794.

[93] Niels Nagelhus Schia and Lars Gjesvik, *China's Cyber Sovereignty (Policy Brief)*, Olso, 2017, p. 1, https://doi.org/10.13140/RG.2.2.30512.15360.

cyberspace between multistakeholder and their opponents.[94] There are two problems: the Internet Corporation for Assigned Names and Numbers' (ICANN) ability to make Domain Name System (DNS) policies and ICANN's special authority held by the United States ( US) as ICANN is the US made institution.[95]

The core philosophy in applying sovereignty to cyberspace is similar to the traditional notions of sovereignty. Proponents of cyber protectionism argue for using state jurisdiction to constituting cyberspace facilities, carrying data, and operations of data in cyberspace where state judicial and administrative institutions could exercise their power over cyberspace.[96] Hence, every sovereign state has the right and duties to not interfere with other states' cyberspace and protect its cyberspace against aggression.[97] Cyber protectionists are composed of several factions, including reformists, neoliberal proponents of cybersecurity, and sovereigntists.[98]

Proponents of the cyber protectionist concept emerge as a reaction to the cyber freedom multistakeholder approach, including countries such as China, Russia, Cuba, Iran, Saudi Arabia, Bahrain, United Arab Emirates (UAE), Iraq, and Sudan.[99] Countries, such as China, viewed the multistakeholder approach as defective in the platform with limits to authorization, function, and interest equity.[100] Furthermore, the multistakeholder approach framework is lacking in both design and coordination.[101] Hence, because of perceived defects in the cyber freedom concept, some countries prefer a protectionist attitude to cyberspace to be the way forward. China, Brazil, South Africa, and India advocates in removing ICANN's existing organization and power, then integrating it into the UN, and sharing internet jurisdiction but were unsuccessful due to multistakeholder proponents from western countries' rejection.[102] US actions on the duration of WSIS in embedding internet infrastructure to its national interest show a hegemonic condition in this supposedly free multistakeholder approach.[103] The US views for hegemony by confirming its role in internet servers' supervision.[104]

Subsequent years followed by attempts from developing countries and proponents of a multilateral approach to revoke US' control over cyberspace and several so-called 'authoritarian' states to block and filter the internet.[105] Yet, the multistakeholder approach is the championed cause by proponents' states and heavily influences the UN discourse. The overwhelming power of the multistakeholder system does not

[94] Milton L. Mueller, *Against Sovereignty in Cyberspace*, International Studies Review 22, no. 4, November 26, 2020, p. 3, https://doi.org/10.1093/isr/viz044.

[95] *Ibidem.*

[96] Fang, *Cyberspace Sovereignty*, pp. 85-86.

[97] *Idem*, p. 86.

[98] Chenou, *From Cyber-Libertarianism to Neoliberalism: Internet Exceptionalism, Multi-Stakeholderism, and the Institutionalisation of Internet Governance in the 1990s*, p. 209.

[99] Roxana Radu, *Negotiating Internet Governance*, Oxford, Oxford University Press, 2019, p. 199; Huang and Mačák, *Towards the International Rule of Law in Cyberspace: Contrasting Chinese and Western Approaches*, paras. 36–37.

[100] Huang and Mačák, para. 35.

[101] *Ibidem.*

[102] Fang, *Cyberspace Sovereignty*, pp. 94-95.

[103] Fang, p. 95.

[104] *Ibidem.*

[105] Fang, pp. 95-96; Mueller, *Against Sovereignty in Cyberspace*, p. 3.

prevent multilateral proponents from working with the existing platform, such as the Internet Governance Forum (IGF).[106]

Current developments of the cyber protectionist agenda are domain name jurisdiction, data ownership rights, big data, different judging legality principles, and cyber-attacks.[107] Yet, there is indeed a concern about the nature of cyber protectionism itself. Should the role of countries become too big, this may disturb day-to-day social life due to the current interconnected nature of this globalized world. Potential problems include the defunct Autonomous Systems (AS) due to varying state regulations, removal of transnational organizations from domain administration, the emergence of national online checkpoints, the overabundance of certification demand, and strict data localization requirements.[108] It is crucial to balance state sovereignty and practicality for cyber protectionist proponents.

One could argue that China's receptiveness' to empower their cyberspace sovereignty was a product of the Confucian influence. Confucian principles are both traditional Chinese philosophical and ethical systems. Confucian principles lead to a paternalistic governance method where political leaders live by example. It attaches the government to govern with virtuous actions. As a consequence, the people could 'overturn' the government for not fulfilling their obligations according to Confucian principles.[109] Hence, government care and performance in adhering to the Confucian principles are more important than political freedom, such as fair and free elections.[110]

Chinese attitudes to censorship are mixed. The dissenters argue that censorship is a repressive measure employed by the Chinese government to maintain social control.[111] Censorship also could be used to downplay health crisis as what happened in HIV/AIDS and SARS incidents in China.[112] Furthermore, censorship makes it difficult for ordinary citizens to communicate and seek information in their everyday lives.[113] Aside from negatives, there are proponents among ordinary Chinese citizens on censorship policies even if they mostly dislike it personally.[114]

The censorship policy becomes ineffective if a citizen uses substitute words such as typos, emoticons, and wordplay, making communication somewhat more fun.[115] Moreover, censorship is not universal in all online activities, but merely concerns political events and government decisions and hence is not too intrusive.[116] There are

[106] Radu, *Negotiating Internet Governance*, p. 126; Fang, *Cyberspace Sovereignty*, p. 96.
[107] Fang, pp. 105-114.
[108] Mueller, *Against Sovereignty in Cyberspace*, pp. 14-15.
[109] Yubo Kou, Bryan Semaan, and Bonnie Nardi, *A Confucian Look at Internet Censorship in China*, in Lecture Notes in Computer Science (Including Subseries Lecture Notes in Artificial Intelligence and Lecture Notes in Bioinformatics), vol. 10513 LNCS, 2017, p. 380, https://doi.org/10.1007/978-3-319-67744-6_25.
[110] Kou, Semaan, and Nardi, p. 380.
[111] Lydia Khalil, *Digital Authoritarianism, China and COVID*, Lowy Institute Analysis (Sydney, 2020), pp. 6-7; Kadri Kaska, Hendrick Beckvard, and Tomáš Minárik, *Huawei, 5G and China as a Security Threat*, The NATO Cooperative Cyber Defence Centre of Excellence, Tallinn, 2019, p. 11.
[112] Alana Maurushat, *The Benevolent Health Worm: Comparing Western Human Rights-Based Ethics and Confucian Duty-Based Moral Philosophy*, Ethics and Information Technology 10, no. 1 (2008), p. 14, https://doi.org/10.1007/s10676-008-9150-1.
[113] Kou, Semaan, and Nardi, *A Confucian Look at Internet Censorship in China*.
[114] Kou, Semaan, and Nardi, *op. cit.*, p. 385.
[115] *Idem*, p.385-386.
[116] *Idem*, p.386.

even instances where censorship proves to be beneficial for Chinese citizens.

Ordinary Chinese citizens saw benefits in government policy of censorship. On one occasion, a student posts an online hoax that the city child traffickers are rife. Before government clarification, parents came to their children's school to take their children home in droves, causing traffic jams in the process.[117] Another recurring issue is the attitudes of Chinese citizens, especially young people who act recklessly on the internet. This recklessness results in harmful internet interactions and discord among citizens, which were better left unsaid.[118] Finally, China did listen to its citizens to govern criticism as online information and opinions are the sources to improve governance and gain legitimacy—Chinese censorship is not draconian as what was voiced by dissenters.[119]

However, there is a legitimate concern over China's cyber sovereignty measures regarding cyber protectionist concept policies. These issues range from cyber espionage, intrusive authoritarian policies currently employed by China, and potential discourse on cyber sovereignty. On cyber espionage, China has a policy of media warfare which boldened after Snowden's revelations in 2013.[120] A prominent case in this is Huawei espionage allegations which the US could not prove but heavily suspect.[121] The US cannot prove espionage even as the law states that Chinese companies must cooperate with Chinese authorities for national security and intelligence reasons.[122] China also implements intrusive policies for cyberspace information system providers. It has the most extensive surveillance system globally. It monitors citizens by a geographic information system, linking cameras by IoT (smartphones, vehicles, television, etc.) to be part of the public surveillance system.[123] China's social credit system could also deter criticism against the government, nullifying censorship benefits.[124] These shortcomings could lead to an overweight of sovereignty in cyber protectionist discourse. Instead of state protection, cyberspace would be a draconian tool to control the masses.

## 5. The way towards equilibrium

As reiterated earlier, ethics in cyberspace expect a system of standards that enforces moral values, signifying the preservation of freedom of expression, intellectual property, and privacy. Governments must question whether the legal framework has sufficed to guarantee these standards but still at the same time respects their boundaries for sovereignty. The core values that shall be embedded in cyberspace must always refer to equality and inclusivity. There is a need for better moderation and steps to be taken in order to resolve differences in the governance model, role of state in cyberspace, developing an information culture between governments to suit the needs of filters and censorships.

The preeminent starting line will obviously be given for the right to privacy

[117] *Idem*, p. 388.
[118] *Idem*, p. 389
[119] Aimin Qi, Guosong Shao, and Wentong Zheng, *Assessing China's Cybersecurity Law*, Computer Law & Security Review 34, no. 6, December 2018, p. 1353, https://doi.org/10.1016/j.clsr.2018.08.007.
[120] Emilio Iasiello, *China's Three Warfares Strategy Mitigates Fallout From Cyber Espionage Activities*, Journal of Strategic Security 9, no. 2, June 2016, p. 54, https://doi.org/10.5038/1944-0472.9.2.1489.
[121] *Ibidem.*
[122] Khalil, *Digital Authoritarianism, China and COVID*, p. 9.
[123] *Idem*, p. 10.
[124] *Idem*, pp. 11-12.

and freedom are fundamental human rights. The right to privacy hinders the government and private actions from breaching the privacy of individuals where they are free from interruption or intrusion and can control the time and manner of the disclosure of their personal information.[125] Freedom in cyberspace, on the other hand, encompasses many different types of freedom, with freedom of expression as one of the core freedoms in cyberspace. Despite the utmost importance of privacy, rights and freedom of expression, limitations to both must be written and drawn clearly.

Freedom of expression is regulated under the International Covenant on Civil and Political Rights (ICCPR), stating the right to freedom of expression where this right includes freedom to seek, receive, and impart information and ideas of all kinds through any media.[126] Consequently, the article further permits limitations on such rights where the limitations must be provided by law, in order to ensure legality, and necessary for respect of the rights or reputations of others, for the protection of national security, public order, or public health or morals.[127] Furthermore, there are a range of rights that may be possible justifications for limitations on the freedom of expression,[128] such as freedom from discrimination, freedom from cruel, inhuman, or degrading treatment, the right of children to special protection, and the freedom of privacy. When freedom of expression endangers and/or violates the freedoms listed previously, the limitations on the freedom of expression shall be deemed as justified and lawful.

Right to privacy is also regulated under ICCPR where it states that no one shall be subjected to arbitrary or unlawful interference with their privacy and everyone has the right to the protection of the law against such interference.[129] Even if limitations to the rights to privacy are not explicitly stated in the ICCPR, those limitations still exist and are provided by the United Nations General Assembly (UNGA). The limitations provided have several criteria where, first, it must be provided by the law and such law must be accessible sufficiently, clear, and precise so that any individual may be certain who is authorized to conduct limitations of privacy rights when looking at the law. Second, most importantly, the limitation to privacy rights must be consistent with human rights.[130] The limitations furthermore must be necessary for reaching a legitimate aim, is proportionate to the aim, and must be the least intrusive option available.[131] If the limitations do not meet these criteria, the limitations would be deemed as unlawful and/or the interference to privacy shall be deemed as arbitrary.

Cyberspace promotes equality and inclusivity, as seen in the threshold upheld

[125] Verma and Mittal, *Legal Dimensions of Cyberspace*, p. 451.

[126] UNGA, *International Covenant on Civil and Political Rights,* Article 19 (2).

[127] UNGA, Article 19 (3).

[128] Australian Human Rights Commission, *4 Permissible Limitations of the ICCPR Right to Freedom of Expression*, Australian Human Rights Commission, Australian Human Rights Commission, 2011, https://humanrights.gov.au/our-work/4-permissible-limitations-iccpr-right-freedom-expression.

[129] UNGA, *International Covenant on Civil and Political Rights,* Article 17.

[130] Office of the High Commissioner for Human Rights, *The Right to Privacy in the Digital Age: Report of the Office of the United Nations High Commissioner for Human Rights,* (Office of the High Commissioner for Human Rights, June 30, 2014, para. 23.

[131] UNHRC, *General Comment No. 27 - Freedom of Movement*, 1999, paras. 11–16; UNHRC, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, A/HRC/14/46*, 2010, pp. 17-18.

by United Nations,[132] as well as with the characteristics cyberspace itself which helps by providing access towards information for every of its users. The notion of equality and inclusivity in cyberspace, however, will of course result in perpetrators who violate such rights, committing cybercrimes. Cybercrimes vary from hacking, spreading hate, and misusing personal information to distributing child pornography, grooming and terrorism.[133] Penalties for cybercrimes are also similar in many countries such as large amount of fine, imprisonment depending on the severity of the cybercrime, and also the obligation to provide restitution for the victims in some countries like in the United States,[134] and reparation like in Europe.[135]

No one should be excluded from cyberspace nor be deprived from the right to access cyberspace even if one is or was a perpetrator of cybercrime. However, there are few cases where people are deprived of such right, fully and partially. The first case occurs in North Korea where its people are fully prevented from accessing the internet, having gone through extreme lengths where the government fully controls and limits the access.[136] Second, in China, the internet is available, but most used platforms—such as Google, Facebook, Instagram, Twitter—are not accessible and need virtual private network (VPN) in order to access those.[137] There have been no news of other states, other than North Korea and China, excluding its people partially nor fully from cyberspace, even as a form of punishment.

China's example of cyberspace governance shows that there are policies in pursuing a multilateralism approach that needs moderation on the extent of rights to privacy and freedom. The goal in moderating protectionist policies is urgent to prevent a possibility of an excessive role by the state that sacrifices inclusivity in governing cyberspace, which could result in cyberspace becoming a population control tool instead of a means to protect the state in this digital era. Solutions to moderation are present in the discourse between multilateral and multi-stakeholder approaches.

First, to resolve differences in governance models, each proponent must coordinate and negotiate. Coordination and negotiation between proponents are possible because the differences between multilateral protectionist methods and the multi-stakeholder libertarian approach are not about governance but rather the role of state government in the governance structure.[138] Mutual coordination and negotiation in international forums could be the bedrock to build global cyberspace governance methods using the medium of cyberspace convention and creating a sustainable

[132] International Telecommunication Union, *ICTs for a Sustainable World #ICT4SDG*.

[133] Government of the Netherlands, *Forms of Cybercrime*, Government of the Netherlands, 2021, https://www.government.nl/topics/cybercrime/forms-of-cybercrime.

[134] Adam M. Bossler, *Cybercrime Legislation in the United States*, in The Palgrave Handbook of International Cybercrime and Cyberdeviance, Cham, Springer International Publishing, 2020, pp. 257-280, https://doi.org/10.1007/978-3-319-78440-3_3.

[135] Jean-Claude Juncker, *Strengthening Victims' Rights: From Compensation To Reparation For a New EU Victims' Rights Strategy 2020-2025*, Luxembourg, 2019.

[136] Robert R. King, *North Koreans Want External Information, But Kim Jong-Un Seeks to Limit Access*, Center for Strategic & International Studies, 2019.

[137] Alice Su and Frank Shyong, *The Chinese and Non-Chinese Internet Are Two Worlds. Here's What It's like to Use Both*, Los Angeles Times, June 3, 2019.

[138] Chinese Academy of Cyberspace Studies, *International Cyberspace Governance*, in World Internet Development Report 2019, Singapore, Springer Singapore, 2021, p. 148, https://doi.org/10.1007/978-981-33-6938-2_8.

cyberspace environment by coexistence.[139] A real example of coordination and negotiation is present during UN World Summit on Information Society in 2015, where the event outcome document includes the multilateral approach as a compromise.[140]

Second, to further check the state role in cyberspace, inclusivity is paramount. Inclusivity does not mean changing to a bottom-top governance model but rather empowering cyberspace civil societies. A method to empower cyberspace civil societies is by guaranteeing formal and substantive equality for their role as a watchdog. Formal equality means treating cyberspace civil societies alike[141] by making legal stipulations to ensure their right to criticize the government. Substantive equality means ensuring results where equality is manifest.[142] A way to create results is to prevent possible criminalization when a citizen exercise their right to criticize. Two steps are essential to ensure a successful application: to develop an open culture within government to accept criticism and then to revoke or modify laws that could hinder civil societies from criticizing government actions.[143]

Developing a culture within the government to accept criticism could happen by making sure the civil societies and citizens are free from consequences over a critic, especially for a country that mandates real name online personas such as China and South Korea.[144] For affairs in modifying or revoking laws that could potentially penalize critics, examples of such laws include the Chinese Cybersecurity Law Article 48, which obliges individuals and organizations not to share information forbidden by laws or administrative regulations.[145] Yet, it is still unclear which information is permissible and not; this creates a chilling effect on critics.[146] Another example is the Indonesian Information Technology and Electronics Law 2016 *jo* 2008 (UU ITE), where its Articles 27(1), 27(3), and 28(2) have extensive interpretations that threaten legal sanction over critics.[147]

Third, it is crucial for governments to conduct measures to censor as little information as possible and are unintrusive to citizens' daily life. An example of that situation was prevalent in China, where citizens could not access information because of 'political sensitivity' locally but could access such information from their friends abroad.[148] This loophole renders censorship measures redundant and only intrude on citizens' daily life. While regarding unintrusive censorship, citizens must be free from long-term consequences of their violation of censorship rules. For

[139] Asoke Mukerji, *The Need for an International Convention on Cyberspace*, Horizons: Journal of International Relations and Sustainable Development SPRING, no. 16 (2020), pp. 198–209; Chinese Academy of Cyberspace Studies, *International Cyberspace Governance*.

[140] Huang and Mačák, *Towards the International Rule of Law in Cyberspace: Contrasting Chinese and Western Approaches*, para. 37.

[141] Jonathon Penney, *Virtual Inequality: Challenges for the Net's Lost Founding Value*, Northwestern Journal of Technology and Intellectual Property, 10, no. 3, 2012, para. 56.

[142] Penney, para. 56.

[143] Qi, Shao, and Zheng, *Assessing China's Cybersecurity Law*, p. 1353.

[144] *Ibidem.*

[145] *Ibidem.*

[146] Kou, Semaan, and Nardi, *A Confucian Look at Internet Censorship in China*, p. 381.

[147] Nur Rahmawati, Muslichatun Muslichatun, and M Marizal, *Kebebasan Berpendapat Terhadap Pemerintah Melalui Media Sosial Dalam Perspektif Uu Ite*, Widya Pranata Hukum : Jurnal Kajian Dan Penelitian Hukum 3, no. 1, 2021, p. 73, https://doi.org/10.37631/widyapranata.v3i1.270.

[148] Qi, Shao, and Zheng, *Assessing China's Cybersecurity Law*, p. 373.

example, there should not be a behavior-inducing tool that prevents citizens from critics. China Social Credit System (SCS) is an unfortunate example where a tool was designed for rendering commercial trustworthiness,[149] and is expanding to be a tool of political censorship.[150] Hence, censorship measures must be minimal, reserved for information threatening the state's livelihood, and not be behavior-inducing so as not to deter critics and unintrusive.

## 6. Conclusion

From a quick glance, cyberspace may merely seem a personal computer connected to the internet. However, if a broader outlook is taken, there are political, social, economic, cultural, and financial elements that have their own significant portions in the cyberspace. The borderless nature and flexibility of cyberspace requires a balance in its governance, that neither prevails absolute freedom nor authoritarian restraints. The regulability of cyberspace refers to the ability of a government to regulate the behavior of its citizens on the internet. Internet governance includes issues directly related to the technical administration of electronic resources, including private entities, as well as any and all actions performed by state authorities using legal instruments and international organizations exerting a direct impact on activities performed using the electronic medium, including those outside a regulating state

This article has analyzed the inherent relationship that exists between cyber ethics and its governance. It is impossible to emit moral values from any normative framework if one government seeks to control it. Order can only emerge from incepting the appropriate human values that will act as a tool for virtual control between netizens in cyberspace. In this sense, the ideal model would balance between giving the liberty for users to access and utilizing cyberspace to the greatest of their benefits. Concurrently, it is necessary to also limit such liberty so that it would not create chaos. This refers to four integral issues that become a problem between freeing and protecting internet users in the areas of: free speech, IPR, privacy, and security.

Fortunately, there are two noticeable approaches that has been taken by countries such as the US and China, where the prior emphasizes on freedom, and the later stresses its protection. We have discovered that even the most liberalizing governance still encounter problems with their multi-stake holder approach, particularly with the issues of disinformation and free speech. On the contrary, protectionist countries are faced with cyber espionage, intrusive authoritarian policies that endanger the citizen's right to access information and privacy. We propose that two concepts must be harmonized, in that an urgency for moderating the freedom and protection would be put on balance. Our solutions have taken a general approach which covers the needs for states to resolve their differences in their governance model by conducting further coordination and negotiation between government and stakeholders, re-affirming the role of governments in exercising sovereignty, and developing a culture of equality and inclusivity within the cyberspace.

[149] Fan Liang et al., *Constructing a Data-Driven Society: China's Social Credit System as a State Surveillance Infrastructure*, Policy & Internet 10, no. 4, December 2018, p. 416, https://doi.org/10.1002/poi3.183.

[150] *Idem*, pp. 435-436.

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criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, Official Journal of the European Union, 2016;

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# REFLECTIONS REGARDING THE WITNESS'S RIGHT AGAINST SELF-INCRIMINATION

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## Abstract

*Considered for a long time as the "eyes and ears of justice", the witness has become a procedural subject around which several controversies have arisen since the entry into effect of Law No. 135/2010 on the Code of Criminal Procedure. The suspected witness, the one against whom further criminal prosecution has not been ordered yet, has acquired a distinct position, shaped by the case-law of the European Court of Human Rights and redefined by Decision No. 236/2020 of the Constitutional Court of Romania. Although the European Court of Human Rights has repeatedly ruled that the guarantees of fairness in proceedings apply once an accusation is formulated, it has also recognized the same guarantees for individuals who are heard as witnesses, but are simultaneously suspected of committing offences. Even after the official release of the contentious constitutional court's decision, there are a series of aspects that generate debates and controversies, the most important one being whether there is a genuine right for the witness to remain silent. Has the phrase "cannot be used against him/her" in Article 118 of the Code of Criminal Procedure become predictable and, at the same time, a barrier against potential abuses? Can a "right to silence and privilege against self-incrimination" be recognized ab initio? The balance between the general interest for a good performance of the criminal proceedings and the rights of the "suspected" witness has required and continues to require practical solutions from the judicial authorities, so that the right to defence and the right to a fair trial are observed.*

**Keywords:** *criminal case, witness, statement, privilege against self-incrimination, right to remain silent, perjury.*

## 1. Introduction

The roots of this right can be found among the principles of the Roman law - the "*brocard nemo tenetur se ipsum accusare*" (no man is bound to accuse himself), having a practical application as of the 17th century in England, as a response to the 16th century royal inquisition, where the accused individuals were required to answer under oath to the questions of the court, without knowing the facts they were being charged of[1].

The right to silence and the right against self-incrimination do not have a long-standing tradition in the Romanian criminal procedural law. They were first regulated in the provisions of the criminal procedural law once with the amendment of the Code of Criminal Procedure in 1969 by means of Law 281/2003[2]. Thus, article 70

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[1] Ripan, Alexandru Dabin, *The Right to Silence. Legal Nature and Who Can Invoke It*, www.avocatripan.ro.
[2] Published in Official Journal no. 468/1 July 2003.

paragraph (2) of the Code of Criminal Procedure (1969)[3] provided the obligation of the judicial authorities to inform the accused on the right to silence, a right that was recognized not only during the actual hearing, but also during the procedures of detention and pretrial arrest, in Article 143 paragraph (3) of the Code of Criminal Procedure[4]. Later on, the legislator made a corresponding amendment to the Cde of Criminal Procedure regarding the stage of judicial investigation through Law 356/200[5], within the provisions of Article 322 of the Code of Criminal Procedure[6].

The new Code of Criminal Procedure, which came into effect on 1 February, 2014, continued to regulate these procedural guarantees for the suspect and for the defendant, providing similar provisions within Article 10 paragraph (4)[7], Article 83 letter a)[8], Article 209 paragraph (6)[9], Article 225 paragraph (8)[10] and Article 374 paragraph (2)[11] of the Romanian Code of Criminal Procedure.

As a novelty, this Code of Criminal Procedure also regulated the witness's right against self-incrimination within the provisions of Article 118, which state that the testimony given by a person who, within the same case, had or subsequently acquired the status of suspect or defendant, cannot be used against him or her. In conjunction with the witness's right, the obligation of the judicial authorities to mention the previous procedural status when recording the witness's statement was provided.

In order to assess whether the guarantee established by law in favour of procedural fairness regarding the witness operates with full effectiveness, this work aims to address, on one hand, the perspective of the European Court of Human Rights regarding this guarantee, considering that the case-law of the Strasbourg Court played a crucial role in shaping the new regulation,

[3] Article 70 paragraph (2) of the Code of Criminal Procedure: "The accused or the defendant shall be informed (...) on the right to remain silent, while being duly cautioned that anything he/she declares may be used against him/her."

[4] Article 143 paragraph (3) of the Code of Criminal Procedure: "The prosecutor or the criminal investigation body shall inform the defendant or the accused that (...) he/she has the right to remain silent, and shall draw the attention on the fact that everything he/she declares may be used against him/her."

[5] Published in Official Journal no. 677/7 August 2006.

[6] Article 322 of the Code of Criminal Procedure: "The presiding judge (...) explains to the accused the nature of the charges against him/her. At the same time, the accused is informed of the right to remain silent, and draw the attention on the fact that everything he/she declares may be used against him/her."

[7] Article 10 paragraph (4) of the Code of Criminal Procedure: "Before being questioned, the suspect and the accused must be advised that they have the right to remain silent."

[8] Article 83 paragraph (a) of the Code of Criminal Procedure: "During the criminal proceedings, the accused has the following rights: a) the right to remain silent throughout the criminal proceedings, with the warning that if he/she refuses to make statements, he/she will not suffer any adverse consequences, but if he/she do makes statements, they may be used as evidence against them."

[9] Article 209 paragraph (6) of the Code of Criminal Procedure: "Before the hearing, the criminal investigation body or the prosecutor is obliged to inform the suspect or the accused that he/she has the right to be assisted by a chosen or appointed lawyer and the right to remain silent, except for providing information regarding his/her identity, and he/she is warned that everything he/she declares may be used against him/her."

[10] Article 225 paragraph (8) of the Code of Criminal Procedure: "Before proceeding with the interrogation of the accused, the judge of rights and freedoms informs of the accused on the offense he/she is charged of and his/her right to remain silent, warning him/her that everything he/she declares may be used against him/her."

[11] Article 374 paragraph (2) of the Code of Criminal Procedure: "The presiding judge explains to the accused the nature of the charges against them, notifies them of their right to remain silent, warning them that anything they declare may be used against him/her, as well as the right to question co-defendants, the injured party, other parties, witnesses, experts, and provide explanations throughout the judicial investigation when deemed necessary."

and on the other hand, the case-law of the national courts, especially of the contentious constitutional court.

**2. The justification of the right to silence and the right not to incriminate oneself in the case-law of the European Court of Human Rights. The situation of the suspected witness**

At the level of regulation, this right is provided for in the International Covenant on Civil and Political Rights - Article 14 paragraph (3) letter (g), which states that the right not to be compelled to testify against oneself or to acknowledge guilt is among the guarantees of a person accused of a crime.

At the European level, the right to silence of a suspect or a person accused of committing a crime is provided for in Directive (EU) no. 2016/343 of the European Parliament and of the Council of 9 March 2016 regarding the strengthening of certain aspects of the presumption of innocence and the right to be present at trial in criminal proceedings. Article 7 paragraph (1) of the Directive states that Member States must ensure that suspects and accused persons have the right to remain silent in relation to the offence they are suspected or accused of having committed. Moreover, Member States ensure that suspects and accused persons have the right not to incriminate themselves, but the exercise of this right shall not prevent the competent authorities from gathering evidence which may be lawfully obtained through the use of legal powers of compulsion and which has an existence independent of the will of the suspects or accused persons.

In the preamble of the Directive, it is specifically stated that its measures should apply to individuals who are suspects or accused persons in criminal proceedings, even before the person is informed by the competent authorities of a Member State, through official notification or by other means, that the person is a suspect or accused person. It is further acknowledged that the right against self-incrimination is an important feature of the presumption of innocence, and when asked to make a statement or answer questions, suspects and accused persons should not be compelled to provide evidence or documents or communicate information that could lead to self-incrimination. It is also mentioned that the exercise of the right to remain silent or the right against self-incrimination should not be used against the suspect or accused persons and should not be considered, in itself, as evidence that the person has committed the alleged crime.

Although the European Convention on Human Rights does not expressly provide for this right, the European Court has developed a plentiful case-law from which the reasons for this guarantee can be derived: (i) protecting the accused person from potential abuses by judicial authorities in obtaining self-incriminating evidence, and (ii) ensuring the fair resolution of the case by avoiding judicial errors generated by the coercion of the suspect/accused person of committing an offence[12].

Indeed, the Court has held that the privilege against self-incrimination requires prosecutors to prove the accusations raised in criminal proceedings without using the evidence obtained through coercion against the will of the accused person. This protected right is closely related to the presumption of innocence. Therefore, the privilege against self-incrimination

[12] Voicu Puşcaşu, *Right to Silence and Right Against Self-Incrimination. Ratio essendi*, available at https://drept.uvt.ro.

primarily refers to comply with the choice of the accused person to remain silent[13].

As it is well known, the European Court of Human Rights has established in its case-law that the guarantees of the right to a fair trial provided for in Article 6 of the Convention become applicable when an accusation is made in a criminal matter, as stated in the judgment rendered in the case of *Engel and Others v. the Netherlands*[14].

In this regard, including the situation where a person suspected of committing an offense is questioned as a witness has been indicated as the moment of formulation of an accusation, therefore of the applicability of the guarantees of the right to a fair trial[15]. It is the so-called **suspected witness**[16], in relation to whom the criminal prosecution bodies have not ordered the continuance of the criminal investigation yet, but there is a suspicion that the person in question has committed the offence for which he is being heard as a witness. This refers to the witness who, under French law, is referred to as "*temoin assisté*" (assisted witness), an intermediate status between the one of a witness and a suspect, who can be heard in this capacity when there is a possibility based on available data that the witness may have been involved in some way in the commission of the offence (Article 113-2 of the French Code of Criminal Procedure)[17]. In this capacity, the assisted witness has the right to refuse to provide statements, the right to engage a lawyer, and the right to examine the case files.

The European Court of Human Rights has recognized the right of the assisted witness, who is called for a hearing in relation to his own acts, and not to acts of which he is aware and in which he did not participate, not contribute to his own self-incrimination and to remain silent.

In the judgment of October 20, 1997, in the case of *Serves v. France*[18], it was held that assigning the status of a witness to a person and hearing him in that capacity, under circumstances where a refusal to provide statements would result in sanctions, is contrary to Article 6 paragraph (1) of the Convention. Furthermore, a witness who fears that he may be interrogated regarding potential incriminating elements has the right to refuse to answer questions about the facts.

In the judgment of 18 December 2008, in the case of *Loutsenko v. Ukraine*[19], and respectively in the judgment of 19 February 2009, in the case of *Shabelnik v. Ukraine*[20], the European Court of Human Rights has emphasized the vulnerable position of the witnesses compelled to disclose everything they know, even at the risk of self-incrimination. The Court held that a person

[13] *Saunders v. United Kingdom*, application no. 19187/91, judgment of 17 December 1996, available in English at https://hudoc.echr.coe.int/eng?i=001-58009.

[14] *Engel and Others v. the Netherlands*, application no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, judgment of 23 November 1976 available in English at https://hudoc.echr.coe.int/eng?i=001-57478.

[15] *Kalēja v. Latvia*, application no. 22059/08, judgment of 5 October 2017, available in English at https://hudoc.echr.coe.int/eng?i=001-177344.

[16] In this regard, Georgiana Sas, *The Right of the Witness against Self-Incrimination and the Right to Legal Assistance*, in the Cluj Bar Journal No. 1/2020.

[17] In this regard, V. Constantinescu in M. Udroiu et alii, *The Code of Criminal Procedure. Commentary on Articles*, 3rd Edition, C.H. Beck Publishing House, Bucharest, 2020, p. 836.

[18] *Serves v. France*, application no. 82/1996/671/893, judgment of 20 October 1997, available in English at https://hudoc.echr.coe.int/eng?i=001-58103.

[19] *Lutsenko v. Ukraine*, application no. 30663/04), judgment of 18 December 2008, available in English at https://hudoc.echr.coe.int/eng?i=001-90364.

[20] *Shabelnik v. Ukraine*, application no. 16404/03, judgment of 19 February 2009, available in English at https://hudoc.echr.coe.int/eng?i=001-914011.

who has been heard as a witness, based on his request to bring certain facts to the attention of the judicial authorities, on the occasion of which he self-denounced the commission of a murder offense, had the status of "accused" person and was entitled to all the guarantees of the right to a fair trial, including the right to remain silent and the right against self-incrimination. In this regard, the Court did not accept the argument put forward by the state that the status of a suspect would only be acquired after certain verification of the procedures following the self-accusation.

A turning point decision in this regard is the case of *Brusco v. France*[21], where the Court found that, erroneously, the individual was only regarded as a witness and, therefore, was compelled to take an oath, whereas in reality, a "criminal charge" was being brought against him and he should have been afforded the right against self-incrimination. The Court also held that the plaintiff was not informed at the beginning of the interrogation of his right to remain silent or the possibility of not answering questions. At the same time, the accused person was only able to have contact with his/her lawyer 20 hours after the charge was formulated, which prevented the lawyer from informing the accused person about his/her procedural rights and providing assistance during the interrogation, as required by Article 6 of the Convention.

In the case of *Heany and McGuinness v. Ireland*[22], the European Court of Human Rights held that the statements obtained through coercion violated the applicants' right to silence, while they were being interrogated under a criminal charge, yet there was no evidence in the file to prove the initiation of criminal proceedings against them. The two applicants were arrested on charges of terrorism. After being informed of their right to remain silent, the police officers, based on Article 52 of law of 1939 on offences against the state, requested them to provide details about their location at the time the offences in question were committed. The applicants declined to answer these questions, and due to their refusal to provide information about their location at the time of the events, they were sentenced to six months of imprisonment under the same provision of the law of 1939.

The Court held that the applicants were being charged with criminal offenses, as they were detained and interrogated regarding certain crimes, even though there were no formal acts to initiate criminal proceedings against them and no such procedure had been started. The Court considered that the applicants' right to remain silent was completely nullified by the application of that legal disposition since they were left with the choice of either speaking and potentially incriminating themselves or facing criminal sanctions. The Court found that such domestic law led to obtaining statements through extremely harsh coercion, which contradicted the right to silence, and that concerns for security and public order could not justify such a legal provision. Therefore, the presumption of innocence and the right to a fair trial of the applicants were violated.

The Court also held that in the situation where a person is heard as a witness under oath, but especially under the criminal penalty for perjury, regarding facts or

[21] *Brusco v. France*, application no. 1466/07, judgment of 14 January 2011, available in French at https://hudoc.echr.coe.int/eng?i=001-100969. Please also see Lucian Criste, *The right to silence and the right to be assisted by a lawyer. ECHR, Brusco v. France* at https://www.juridice.ro/126078/dreptul-la-tacere-si-dreptul-de-a-fi-asistat-de-un-avocat-cedo-brusco-vs-franta.html.

[22] *Heaney and McGuinness v. Ireland*, application no. 34720/97, judgment of 21 December 2000, available at https://hudoc.echr.coe.int/eng?i=001-59097.

circumstances that could incriminate him (the theory of the difficult choice), it is not reasonable to ask that person to choose between being sanctioned for refusing to cooperate, providing authorities with incriminating information, or lying and risking being convicted for it[23].

### 3. Some guidelines regarding the applicability of domestic norms in relation to the witness' right against self-incrimination

#### 3.1. The case-law of the Constitutional Court of Romania

The recently introduced national regulations regarding the right of the witness against self-incrimination under Article 118 of the Code of Criminal Procedure stipulate that a witness statement given by a person who, in the same case, prior the statement, acquired the capacity of suspect or defendant cannot be used against him. At the same time, judicial authorities are bound to mention the previous procedural status when recording a statement.

Given the lack of tradition regarding this procedural guarantee in the domestic legal system, as it has been borrowed from *common law*, the difficulties in interpreting the newly introduced norm have been and remain almost inevitable.

Before examining some of the jurisprudential approaches concerning the interpretation of this witness's right against self-incrimination, we believe that it is important to recall the perspective of the contentious constitutional court regarding the content and limits of this right, within the constitutional review conducted by it.

In 2017, the Romanian Constitutional Court, when challenged on the unconstitutionality of the aforementioned provisions, arguing that the phrase "against him" contained therein is unconstitutional since the witness statement given by a person who subsequently becomes a defendant in the same case cannot be used against him but can be used against co-defendants, dismissed the constitutional challenge[24], concluding that the dispositions of Article 118 of the Code of Criminal Procedure are constitutional in relation to the raised criticisms.

Essentially, in the reasoning of its decision, the Court stated, in paragraphs 13-18 of Decision no. 519/2017, that:

(i) the provisions of Article 118 of the Code of Criminal Procedure regulate a new legal institution within the existing criminal procedural law, namely the right of the witness against self-incrimination;

(ii) the national criminal procedural law, through the challenged norm, does not regulate the right of the witness to refuse to give statements, therefore, it does not establish an actual right of the witness against self-incrimination, on one hand, and it does not fall under the scope of the institution of excluding evidence from criminal proceedings, on the other hand;

(iii) the purpose of the norm is that a witness statement - given by a person who, in the same case, had previously made a statement or subsequently became a suspect or defendant - is not excluded from the case file and can be used to establish factual circumstances unrelated to the witness himself. This is expressly regulated in the last paragraph of Article 118 of the Code of Criminal Procedure, which imposes an

[23] *Weh v. Austria*, application no. 38544/97, judgment of 8 April 2004, available in English at https://hudoc.echr.coe.int/eng?i=001-61701.

[24] Decision no. 519 of the Constitutional Court of 6 July 2017, published in Official Journal of Romania, Part I, No. 879 of 8 November 2017.

obligation on the judicial authority to mention the witness's previous procedural status when recording the statement;

(iv) the provisions of Article 118 of the Code of Criminal Procedure constitute a guarantee of respecting the right to a fair trial of the person testifying, who, before or after making the statement, had or acquired the capacity of suspect or defendant on a potential charge, preventing his/her own statements from being used against him/her;

(v) the self-incriminating statements of the witness are, at the same time, necessary for resolving the case concerning another accused person since a fundamental principle of criminal proceedings is the discovery of the truth in order to achieve the purpose of criminal proceedings, which is the complete and accurate knowledge of the material facts and the person who committed them, thereby holding the latter criminally responsible;

(vi) admitting self-incriminating evidence in criminal proceedings against a witness who, before or after making the statement, had or acquired the capacity of suspect or defendant, and excluding self-incriminating statements of the witness concerning another accused person, would affect the fairness of the criminal trial and discredit the administration of justice.

By Decision no. 236/2020[25], a new constitutional challenge was raised and the court found that the legislative provision contained in Article 118 of the Code of Criminal Procedure, which does not regulate the right of a witness to remain silent and to the right against self-incrimination, is unconstitutional.

The Constitutional Court held that in its current form, subject to examination, Article 118 of the Code of Criminal Procedure regulates the "right of the witness against self-incrimination" as a negative procedural obligation of the judicial body, which cannot use the statement given as a witness against the person who, after the statement, had or acquired the capacity of suspect or defendant in the same case. Thus, the Court found that the challenged text considers two hypotheses, namely: (i) the hypothesis in which the person is questioned as a witness after the initiation of the criminal investigation regarding the act, and subsequently acquires the status of a suspect, and (ii) the hypothesis in which the person already has the capacity of a suspect or defendant and subsequently the judicial body orders the separation of the case, and in the newly formed file, the person acquires the status of witness.

It was therefore noted that compared to the current wording, Article 118 of the Code of Criminal Procedure does not allow the application of the right against self-incrimination similar to the suspect or defendant. At the same time, the witness does not have the possibility to refuse to provide a statement under Article 118 of the current criminal procedural law, being bound to declare everything he/she knows, under the penalty of committing the offence of perjury, even if through his statement incriminates himself/herself.

The Court thus found that a person summoned as witness, who tells the truth, can incriminate himself, and if he/she does not tell the truth, avoiding self-incrimination, he/she commits the offence of perjury. With regard to the first hypothesis provided for in Article 118 of the Code of Criminal Procedure, in the absence of a regulation of the right of a witness to remain silent and to the right against self-incrimination, the criminal investigation authorities are not obliged to give effect to this right concerning the *de facto* suspect who has not acquired the status of a *de jure*

[25] Published in Official Journal no. 597 of 8 July 2020.

suspect yet. Therefore, this situation leads to the charging of the person heard as a witness, even in the hypothesis where, prior to the hearing, the criminal investigation authorities had information indicating his/her involvement in the commission of the offence that was the subject of the hearing as a witness, and the lack of official suspect status may result from the lack of will on the part of the judicial authorities, who do not issue the order under the conditions of Article 305 paragraph (3) of the Code of Criminal Procedure.

As for the second hypothesis regulated in Article 118 of the Code of Criminal Procedure, when the person has already acquired the capacity of suspect or defendant, and subsequently the judicial body orders the separation of the case, and in the newly formed file, the person acquires the capacity of witness, even if the criminal procedural law allows for the questioning of a participant in the commission of the offence, as a witness, in the separated case, he/she cannot be a genuine witness. The genuine witness is the one who did not participate in any way in the commission of the offence, but only has knowledge of it, specifically knowledge of essential facts or circumstances that determine the fate of the trial.

Moreover, the Constitutional Court noted that the High Court of Cassation and Justice - Panel for the resolution of legal issues in criminal matters, by Decision no. 10 of 17 April 2019[26], ruled that "a participant in the commission of a crime who has been separately tried from the other participants and subsequently questioned as a witness in the separated case cannot have the status of an active subject of the offence of perjury, provided for in Article 273 of the Criminal Code".

The Constitutional Court held that in a separate case, a participant who has been finally convicted can be heard as a witness in the cases of other participants in the same offence. However, his/her new statement continues to retain the "original" traces of a statement made as a suspect or accused person, even though formally, the person has the status of a witness in the new procedural framework.

The Court further noted that, from a procedural standpoint, the witness is vulnerable, as he/she cannot bear the capacity of secondary passive subject of the offence of abusive prosecution, as regulated in Article 280 of the Criminal Code. The protection under criminal law only applies to individuals who are under a criminal investigation or in the course of a trial. The same vulnerable situation may persist if a person heard as a witness has limited access to a lawyer. Additionally, Article 118 of the Code of Criminal Procedure does not settle the right of a witness to have access to a lawyer, or the obligation of the judicial authorities to inform him in this regard or to appoint a lawyer *ex officio* in particular situations.

Therefore, the proper guarantees for a person heard as a witness are missing. The witness's protection is limited only to the obligation of the judicial authorities not to use his statement against him. The witness does not have a level of protection similar to that enjoyed by a suspect or accused person.

At the same time, the Court noted that the norm does not make any reference to the subsequent effects of such a statement. It can be used to obtain other means of evidence, and the derived evidence, in the absence of a contrary provision, can be used against the witness and influence the subsequent procedural conduct of the judicial authorities. However, such procedural

[26] Published in Official Journal, Part I, No. 416 of May 28, 2019.

conduct of the judicial authorities cannot be sanctioned under the provisions of Article 102 paragraph (4) of the Code of Criminal Procedure since a witness statement is not included in the scope of illegally obtained evidence.

Therefore, the criminal procedural provisions of Article 118 of the Code of Criminal Procedure do not establish an effective protection for the witness in relation to a potential criminal liability. Also, they do not regulate adequate procedural and substantive guarantees for a person heard as a witness, and do not prohibit the use of evidence indirectly obtained, based on his/her own statement. The only evidence against which the witness is protected is his/her own statement.

It was concluded that the legislative solution contained in Article 118 of the Code of Criminal Procedure, which does not regulate the witness's right to silence and against self-incrimination, is unconstitutional, being contrary to the provisions of Article 21(3), Article 23 paragraph (11), and Article 24 paragraph (1) of the Romanian Constitution, as well as to Article 6 paragraphs (1) and (2) of the Convention for the Protection of Human Rights and Fundamental Freedoms.

Considering the manner in which the Constitutional Court has defined the content, meaning and guarantees of the witness's right against self-incrimination, in light of extensive case-law of the European Court of Human Rights, it is necessary to further analyse how the courts have applied this right in practice, following the publication of the aforementioned decision in the Official Journal.

### 3.2. The case-law of the High Court of Cassation and Justice and other judicial courts

**I)** By the criminal decision of 14 March 2023, rendered by the Court of Appeal of Galați, the appeal filed by the Public Ministry against the criminal judgment of 8 November 2022, pronounced by the Court of Galați, whereby defendant AA was acquitted for the offence of perjury under Article 273 paragraph (1) of the Criminal Code, was dismissed on the grounds that the act is not provided for by the criminal law.

The criminal investigation authorities charged the defendant with making false statements on 4 January 2019, when he was heard as a witness in criminal case no. 9/D/P/2019 of the Directorate for Investigating Organized Crime and Terrorism (DIICOT) - Galați Territorial Office. He falsely declared that he did not know defendant BB, who was under investigation for the offence of trafficking in high-risk drugs under Article 2 paragraph (1) of Law no. 143/2000, and that he had not purchased drugs from him, although in reality, he knew him and had bought drugs from him on multiple occasions.

In the considerations of the acquittal decision, the court found that even without a detailed analysis, it became evident that if defendant AA had stated that he had purchased drugs from BB, there would have been a possibility of his incrimination for the offence under Article 4 paragraph (1) of Law no. 143/2000, an offence in which the material element is provided for alternately, the legislator listing a series of actions including the purchase of high-risk drugs.

Thus, defendant AA had to choose between affirming the purchase of drugs, exposing himself to the risk of a new criminal investigation for the offence under Article 4 paragraph (1) of Law no. 143/2000,

for which he had previously been fined, and denying the purchase of drugs, which led to his prosecution and indictment for the offence of perjury.

The court noted that from the content of the statement recorded during the criminal investigation, it does not appear that the criminal investigation authorities informed witness AA of his right against self-incrimination. The mention in the standard declaration on page 30, stating that he was informed of his right to refuse to give statements as a witness, is formal and devoid of substance, as it does not indicate the basis on which this aspect was brought to his attention or the reason why he could refuse to provide such statement.

The court found that although two years have passed since Constitutional Court Decision no. 236/2020, the legislator has not adopted an appropriate legislative solution as a consequence of admitting the constitutional challenge (neither Article 273 of the Criminal Code, nor Article 118 of the Code of Criminal Procedure have undergone any changes since the existing form at the time the constitutional challenge was pronounced), therefore, we find ourselves, to some extent, in a situation similar to the decisions of unconstitutionality concerning Article 155 of the Criminal Code, regarding the statute of limitation of criminal liability.

Therefore, in light of this constitutional flaw, the case-law is obliged to analyse and apply the provisions of Article 273 of the Criminal Code and Article 118 of the Code of Criminal Procedure in relation to Decision no. 236/2020 of the Constitutional Court, as stated, among others, in paragraph 84 of the aforementioned decision.

In conclusion, in the light of the above, the court stated that the witness enjoys the right to remain silent and not contribute to his own incrimination, to the extent that his statement could incriminate him, under Article 6 of the European Convention on Human Rights (ECHR) and the case-law of the European Court of Human Rights (ECtHR). Decision no. 236/2020 of the Constitutional Court is considered as a more favourable criminal law for individuals who were not informed of their right to remain silent and against self-incrimination, and who were subsequently charged with perjury.

The judicial authority cannot use a person's statement made in the capacity of witness against the accused person, but only in favour of the suspect or defendant. The obligation to inform the witness of his right against self-incrimination shall be incumbent on the judicial authority that was in the possession of data giving rise to suspicions that the witness was involved in the commission of a criminal offence. A person summoned as a witness, who tells the truth, may incriminate himself, and if he does not tell the truth to avoid self-incrimination, he may commit the offence of perjury. In reality, this mechanism leads to the prosecution of the person who was questioned as a witness, which is unfair if the criminal investigation authorities had indications of his involvement in the offence under investigation before his testimony as a witness.

Analysing the chronology of events in this case, it can be noted that at the time of the questioning of defendant AA's as a witness, the criminal investigation authorities had plausible reasons to suspect his involvement in the potential offence of drug trafficking for personal use, especially considering that the defendant had previously been convicted for such an offence. Moreover, even in the hypothesis that they proceeded with his questioning, the criminal investigation authorities had the obligation to inform him of the consequences that arise when the information provided indicates involvement

in a crime, including his right against self-incrimination.

With reference to these considerations, the court concluded that in the specific situation of defendant AA, he does not meet the required quality of an active subject under the incriminating norm, which is an essential condition for the offence of perjury. Therefore, since the condition of typicality has not been met, the offence of perjury held against him is not provided for by the law, and the acquittal decision must be adopted.

**II)** According to the criminal sentence issued on 10 February 2022, by the Court of Constanța, defendants AA, BB, and CC were acquitted of the offence of perjury, as provided under Article 273 paragraph (1), paragraph (2) letter (d) of the Criminal Code, because the act is not covered by criminal law.

In order to reach this decision, the court noted that the defendants were indicted by the Public Prosecutor's Office attached to the Court of Constanta for the offence of perjury, as provided under Article 273 paragraph (1) of the Criminal Code. They were heard as witnesses in a case pending before the Tribunal of Constanța, involving a defendant (a police officer) who was indicted for corruption offences. During their testimony, the defendants made false statements regarding the essential facts and circumstances about which they were questioned.

Based on the evidence adduced, the court found that the defendants in the respective case were not genuine witnesses in the case where the police officer was indicted for the offence of bribery. There were reasonable suspicions that they had also committed the offence of bribery as regulated under Article 290 of the Criminal Code.

Considering the aspects highlighted by the criminal investigation authorities, the defendants were in a situation where they had to provide false statements or withhold information, which would attract criminal liability for the offence of perjury, or to declare everything they knew, which would attract criminal liability for the offence of bribery.

The court appreciated that this situation was analysed in an abstract manner in the considerations of the aforementioned decision by the Constitutional Court, which concluded that this situation violates the defendants' constitutional right against self-incrimination.

Therefore, the court concluded that the conditions required by law for convicting the defendants were not met, and it ordered their acquittal considering that the committed act is not provided for by criminal law, invoking the provisions of Article 16 paragraph (1) letter (b), first paragraph of the Code of Criminal Procedure.

**III)** Through conclusion no. 299 issued on 4 October 2021, by the judges of the preliminary chamber of the Tribunal of Suceava, the appeal against the conclusion of the judge of the preliminary chamber of the Court of Câmpulung Moldovenesc was admitted. The contested conclusion was completely annulled, and upon retrial, the exception of nullity regarding multiple pieces of evidence and acts of criminal investigation was admitted, including the witness statements given by AA on 27 November 2017 and 28 November 2017, ordering their exclusion from the case.

From the documents in the case file, it was held against the defendant that on 27.11.2017, at around 4:00 a.m., while driving his VW Passat on public roads, he was involved in a road accident resulting only in material damage and being tested with a breathalyzer, the result was a concentration of 0.68 mg/l pure alcohol in the breath and a blood alcohol content above the legal limit.

By the order of the criminal investigation authorities dated 27 November 2017, the criminal investigation *in rem* for the offence of driving a vehicle under the influence of alcohol or other substances, as provided under Article 336 paragraph (1) of the Criminal Code, was initiated.

Furthermore, the defendant was heard as a witness on 27 November 2017, and 28 November 2017. Subsequently, through the order dated 22 March 2018, confirmed on the same date, the further prosecution of the defendant was ordered regarding the offence of driving a vehicle under the influence of alcohol or other substances, as provided under Article 336 paragraph (1) of the Criminal Code. After the initiation of the criminal action, the defendant was indicted for the commission of the mentioned offence.

Referring to Decision no. 236/02.06.2020 of the Constitutional Court, the judges of the preliminary chamber noted that the prosecutor cannot attribute the status of witness to a person whom he knows to be involved in the commission of a criminal offence, solely for the purpose of using the mechanism described in the recitals of the constitutional court's decision[27], in order to formulate a criminal charge.

Based on these theoretical considerations, the judges have found that indeed, on 27.11.2017 and 28.11.2017, when defendant AA was heard as a witness, the prosecutor had sufficient information that he was the presumptive author of the offence, as he was questioned regarding the materiality of the act. However, the defendant was heard as a witness, despite the fact that a witness is bound, under penalty of criminal liability for the offence of perjury, to declare the truth in the matter.

In this situation, the defendant, in his capacity as a witness, could not use the right against self-incrimination, a prejudice which cannot be covered during the judicial proceedings. His statements were used as evidence in the order initiating criminal proceedings no. 1405/P/2017 dated 20.05.2021, the confirmation order for the further conduct of the criminal investigation no. 1405/P/2017 dated 22.03.2018, and the order for the further conduct of the criminal investigation no. 1405/P/2017 dated 22.03.2021, as well as in the reasoning of the indictment, mentioned in Chapter II "Means of evidence."

**b.4) A judgment contrary to the aforementioned was pronounced by the Court of Appeals of Cluj (criminal decision no. 413/A/22 March 2021).**[28]

In fact, defendant P.G.D. was heard as a witness regarding the offences of disturbing public order and possession or use of dangerous objects without authorization, committed by defendant B.I.P. At the time of his testimony, P.G.D. cooperated with the criminal investigation body, disclosing everything he knew, with one notable exception. When asked whether defendant B.I.P. had a knife on him (a knife that defendant B.I.P. indeed had on him and that P.G.D. picked up from the ground), P.G.D. falsely declared that such knife did not exist. Before the first instance and the court of appeal, defendant P.G.D. stated that he lied to protect himself from potential criminal liability for helping defendant B.I.P., by attempting to conceal the knife.

By criminal decision no. 413/A/2021 dated 22 March 2021, the Court of Appeal of

[27] A person subpoenaed to be heard as a witness, with the obligation to tell the truth, may be charged if he/she incriminates himself/herself. On the other hand, if he/she does not tell the truth to avoid self-incrimination, he/she would commit the offence of perjury.

[28] Răzvan Anghel, *Critical Note on Criminal Decision No. 413/A/22 March 2021 of the Court of Appeal of Cluj*, in "Caiete de Drept Penal" (Notebooks of Criminal Law), No. 2/30 June 2021.

Cluj rejected the appeal of defendant P.G.D., stating that his petition for acquittal cannot be admitted. In support of this ruling, the Court indicated that the defendant was heard in accordance with the legal norms in force at the time of the hearing and that the defendant did not invoke the right to remain silent at that time, choosing instead to make false statements. Additionally, the Court, referring to the case law of the European Court of Human Rights, the supreme court, and the Constitutional Court, held that the witness's right against self-incrimination is not absolute, essentially stating that having been heard in relation to offences committed by another person, he was not entitled to make false statements.

Defendant B.I.P. was indicted for the offences of possession or use of dangerous objects without authorization and disturbing public order, while defendant P.G.D. was charged with perjury. According to the indictment, defendant B.I.P. was inside Club N., located in Cluj-Napoca, and got into a conflict with witness B.F.A. The security guard asked the defendant to leave the premises and accompanied him until he left the club. However, at the exit, the defendant became unruly, taking out a knife from his pants pocket and gesturing towards the security guards. They subsequently restrained the defendant and during this procedure, defendant P.G.D. dropped the knife on the ground, which was then picked up by defendant P.G.D.

By being heard as a witness, defendant P.G.D. partially confirmed the statements of other witnesses regarding the existence of an incident. As for the existence of the knife, he claimed not to have seen any such object on the defendant and not to have picked up any knife from the ground. It was held that the witness' statement was false, as surveillance camera footage showed him picking up the knife that defendant B.I.P. had.

The trial court noted that the defendant referred to Decision no. 236/02.06.2020 of the Constitutional Court of Romania, which declared unconstitutional the legislative resolution contained in Article 118 of the Code of Criminal Procedure, which did not regulate the witness' right against self-incrimination.

However, the Court considered that the witness' testimony was given in compliance with the law, as he was made aware of the provisions of Article 118 of the Code of Criminal Procedure (which were unaffected at that time by the aforementioned decision, which was rendered later).

Decision no. 236/02.06.2020 of the Constitutional Court of Romania was published in Official Journal no. 597 of 8 July 2020, and it started to produce effects, according to Article 26 of Law no. 47/1992, as of the moment of publication and only for the future.

Secondly, the court found that defendant P.G.D. was informed on the subject of the investigation ("the incident at club N") and the person under investigation (defendant B.I.P.). P.G.D. was not involved in that incident (did not cause the incident or commit any acts of violence) and did not use the knife (he only picked up the knife after it was dropped by defendant B.I.P., without using it in any way).

It cannot be accepted that the defendant felt compelled to lie in order to avoid criminal responsibility for acts he did not commit (acts that do not exist) and for which he was not under investigation or accused.

Furthermore, the court found that the defendant did not commit the offence of perjury by refusing to give statements or by concealing details, but rather presented a deliberately false and obviously favourable state of affairs for defendant B.I.P.

The Court of Appeal of Cluj dismissed the defendant's appeal as unsubstantiated,

stating that the witness statement was taken in accordance with the law, and the provisions of Article 120 paragraph (2) letter d) of the Code of Criminal Procedure were brought to his attention. P.G.D. was not involved in the incident (did not cause the incident or commit any acts of violence) and did not use the knife (he only picked up the knife after it was dropped by defendant B.I.P., without using it in any way).

The judicial authorities, at the time of his testimony as a witness, had no indication/information/data regarding his involvement in the incident under investigation. P.G.D. did not have the status of a suspect/defendant in the case being investigated for the offenses of unauthorized use of dangerous objects and disturbance of public order prior to or after giving his witness statement. Finally, the defendant did not invoke the right to remain silent at the time of the hearing and did not refuse to make statements.

Additionally, it was noted that the witness' right to remain silent and right against self-incrimination must be analysed in each specific case and cannot be recognized *ab initio*, without any distinction, as a general and absolute right. It should be assessed based on the particularities of each case, especially in relation to whether the judicial authority has plausible reasons to believe that the statements of the witness could incriminate him, i.e., whether the judicial authority has minimal indications that the witness may be involved in the facts about which he is being questioned.

In this decision, a separate opinion was also formulated, advocating for the acquittal of defendant P.G.D. based on the grounds of Article 16 letter b) of the Code of Criminal Procedure. The difference of opinion in this litigation essentially revolves around the interpretation of Decision no. 236/2020.

Contrary to those held by the majority opinion, the separate opinion considers that the correct interpretation of this decision is to grant any witness who is heard, regardless of the nature or object of the case, an absolute right to remain silent and the right against self-incrimination.

It was noted that according to the case-law of the European Court of Human Rights (ECtHR), it is not natural to request the alleged perpetrator to choose between being punished for refusing to cooperate, providing incriminating information to the authorities, or lying and risking conviction for perjury[29]. In conjunction with Decision no. 236/2020 of the Constitutional Court, three conclusions can be drawn: no one can be punished for exercising the right to remain silent, regardless of his formal role in the trial; no one can be compelled to provide incriminating information to the authorities; no one can be punished for lying to avoid self-incrimination. The decisions of the Constitutional Court, as in case of legal norms, are mandatory and must be observed, and direct censorship of these decisions performed by the courts can only occur in exceptional circumstances.

Defendant P.G.D. faced these three difficult decisions at the time of the commission of the offence. This is certain, just as it is certain that he chose to lie about those details which he believed could incriminate him, details that were known to the judicial authorities from the rest of the evidence adduced to the case.

The court held that it must be determined whether the fact that the defendant lied to conceal the possible commission of a separate offence, rather than the offence for which he was being heard, is relevant. In this context, it was stated that although it is extremely important to rely on the testimony of witnesses, it is

[29] See the case of *Weh v. Austria* cited above.

essential to recognize their right against self-incrimination or self-denounce. It is undeniable that the witness's right to remain silent cannot be exercised arbitrarily and absolutely, just as the "right to lie" cannot be used in this way.

However, the only limitation should be the proof that, *in abstacto*, the witness could not incriminate himself by telling the truth.

The second issue that arises is whether the statement made by defendant P.G.D., assuming he was not lying, could have incriminated him. The analysis of this issue should remain concise and abstract, as the court is not called upon to judge the potential offense of aiding the perpetrator. In this regard, it has been held that it is sufficient to determine that, in the abstract, the concealment of a weapon used in the commission of a crime, immediately after the commission of the crime, could meet the constituent elements of the offence of aiding and abetting the offender.

In conclusion, at the time of his testimony during the criminal investigation, defendant P.G.D., without knowledge of his right not to make statements that could incriminate him (Decision no. 236/2020 being subsequent to this moment), was put in a situation where he had to choose between self-incrimination, refusal to testify (which at that time could lead to a reasonable presumption that he would be held criminally liable for perjury), and lying (which at that time could also lead to a reasonable presumption that he would be held criminally liable for perjury, with the mention that he believed there was a possibility that his action would not be discovered).

On a spur of the moment, the defendant chose to lie. However, beyond the more or less moral nature of this choice, in light of Decision no. 236/2020 of the Constitutional Court and the case-law of the European Court of Human Rights, this choice was made in a forced context where there was no right choice from the defendant's perspective on the one hand, and it cannot be criminally sanctioned, on the other hand.

In the critical note to this decision, it was pointed out that through Decision no. 651/2018, the contentious constitutional court had stated that decisions pronounced by the Constitutional Court must also have the power to apply retroactively, as a form of criminal law decriminalization.

However, by transforming the right to remain silent and the right against self-incrimination into an absolute right, a series of conducts that previously met the elements of the offence of perjury were decriminalized. The fact that the defendant was not heard as a witness in a case where an offence committed by him was being investigated cannot be considered a reason to disregard the right to remain silent or against self-incrimination.

The interpretation given by the court, which did not take into account the possibility of multiple separate offences being committed in a closely related context by different individuals (some of which could easily come to light through self-incrimination or even self-denunciation), is unacceptable. Regarding this issue, it was considered that the separate opinion clearly demonstrates why such an approach is incorrect. Essentially, it would ignore the entire case-law of the European Court of Human Rights, which has shaped the concept of a (in fact) witness.

Moreover, such an interpretation would encourage a return to abusive practices of interrogating the perpetrator as a witness, only with the mention that this interrogation would be related to another person or a different legal classification of offences.

It was held that the judicial authorities acted unlawfully when they heard P.G.D. as

a witness. The judicial authorities, even in the absence of the Constitutional Court's decision, in light of the European Court of Human Rights case-law, could and should have informed the witness that if he believed that by disclosing certain facts he could incriminate himself, he had the right to remain silent. It is indisputable that concealing a weapon used in the commission of a crime immediately after the offence can meet the elements of the offence of abetting the perpetrator.

The judicial authorities not only failed to inform P.G.D. that he could exercise his right to remain silent, even though at that stage of the criminal investigation they were aware of his action of taking the knife and attempting to hide it, but they even asked him questions explicitly related to this aspect.

The defendant's choice to provide false information was considered by the court as a reason for conviction, arguing that the defendant should have chosen not to declare anything. Apart from the fact that such a statement contradicts the real possibilities that a person heard as a witness has, most of the time it also contradicts the objective reality of the case, given that the defendant was not informed of his right to remain silent.

Furthermore, it is of the essence of the theory of the three difficult choices that the witness faced with this choice has the possibility to exercise any option without suffering consequences.

**b.5) A different solution regarding the analysed aspect was ruled by the supreme court, which upheld the decision pronounced by the judge of the preliminary chamber of the Court of Appeal of Bucharest, Criminal Division I (High Court of Cassation and Justice, Criminal Division, conclusion no. 508 of 20 May 2021, of the panel of 2 judges of the preliminary chamber).**

Thus, by the conclusion of 23 November 2020, the Court of Appeal of, Criminal Division I, based on Article 346 paragraph (2) in conjunction with Article 345 paragraphs (1) and (2) of the Code of Criminal Procedure, dismissed as unsubstantiated the requests and exceptions formulated, among others, by defendants A and B regarding the legality of the court's referral, the performance of procedural acts, and the evidence adduced in the criminal investigation phase. It found the legality of the court's referral, as well as the legality of the performance of procedural acts and the evidence adduced in the criminal investigation phase, and ordered the initiation of the trial.

The judge of the preliminary chamber of the court of first instance noted that the indictment of the National Anticorruption Directorate dated 20 July 2020, referred to the following defendants: defendant A, charged with the offences of abuse of office if the public official obtained an undue benefit for himself or another person, in the form of instigation, as provided by Article 297 paragraph (1) of the Criminal Code, related to Article $13^2$ of Law no. 78/2000, with the application of Article 47 of the Penal Code, and continuous intellectual forgery in the form of instigation, provided by Article 321 paragraph (1) of the Penal Code, in conjunction with Article 35 paragraph (1) of the Criminal Code, with the application of Article 47 of the Criminal Code, both with the application of Article 38 paragraph (2) of the Criminal Code; defendant B, for complicity in the use, in any way, directly or indirectly, of non-public information or allowing unauthorized persons access to such information, as provided by Article 48 paragraph (1) of the Criminal Code, related to Article 12 letter b) of Law no. 78/2000.

In the preliminary chamber procedure, defendant A, through his chosen defence

counsel, invoked, among other things, requests and exceptions concerning the fact that the statements of the named Z and the statement given as a witness by defendant W were unfairly obtained since, although those statements concerned their own actions, they were not informed of their right against self-incrimination before the hearing, as required by Decision no. 236 of the Constitutional Court of 2 June 2020.

Regarding the reason invoked by defendant A through his lawyer, the judge of the preliminary chamber found it unsubstantiated, and the lawyer's request to establish the unfair manner of obtaining the statements and to exclude them from the overall evidence of the case is unsubstantiated.

Regarding the witness statements of Z and the statement given as a witness by defendant W, which were obtained without informing the persons questioned of their right against self-incrimination, as established by Decision no. 236 of the Constitutional Court of 2 June 2 2020, the judge of the preliminary chamber found that the conditions for applying the relative nullity sanction, provided for in Article 282 paragraph (1) of the Code of Criminal Procedure, are not met for the following reasons.

Regarding the witness Z, it was essentially noted that a decision to close the case was taken against her in the indictment. Therefore, in relation to what was established by the contentious constitutional court in Decision no. 236/2020 (published in Official Journal no. 597 of 8 July 2020), her questioning without being informed by the prosecutor of the right to remain silent and the right against self-incrimination, as procedural rights recognized in favour of the "accused person," did not cause her any concrete harm, given that those statements were never used against her.

Regarding the statement given as a witness by defendant W, by not being informed about the right to remain silent and against self-incrimination, it is not affected by any grounds for relative nullity under Article 282 of the Code of Criminal Procedure. On the one hand, at the time of this questioning by the prosecutor himself, based on the evidence in the case, the prosecutor did not have sufficient conclusive information to suspect the possible involvement of defendant W in the investigated offences, so it could not be considered that W had already acquired the status of "accused person" in the autonomous meaning of this term, as laid in the case-law of the European Court of Human Rights.

On the other hand, from the examination of the content of this statement, it does not appear that the holder of the statement made incriminating statements against herself or other defendants in the case, and the aspects recorded in that statement were not used by the prosecutor to prove the factual situation described in the indictment.

Against this ruling, within the legal deadline, various parties, including defendant A, filed appeals, reiterating the objections raised before the judge of the preliminary chamber of the court of first instance, arguing that the ruling pronounced by the judge was unsubstantiated, illegal, and inadequately motivated.

Examining the legality and validity of the appealed conclusion, based on the grounds of appeal invoked and *ex officio* within the limits conferred by Articles 347 paragraph (4) and 281 of the Code of Criminal Procedure, the High Court, with a panel of two judges, considered the appeals to be unsubstantiated for the following reasons.

The objection of defendant A regarding the legality of obtaining evidence

from the perspective that the statements of witness Z and defendant W, given as witnesses, were obtained unfairly by violating their right against self-incrimination was deemed unsubstantiated.

The High Court noted that the witness statements of the two persons were made on 12 March 1 2020, prior to the publication of Decision no. 236 of the Constitutional Court of 2 June 2020 (in the Official Journal, Part I, no. 597 of 8 July 2020), which recognized the unconstitutionality of the legislative solution provided in Article 118 of the Criminal Procedure Code, which does not regulate the witness's right to remain silent and against self-incrimination. In this context, it was noted that the decision of the constitutional contentious court cannot, unconditionally, invalidate these means of evidence without the risk of producing retroactive effects.

According to Article 147 paragraph (4) of the Constitution of Romania, republished, "Decisions of the Constitutional Court shall be published in the Official Journal of Romania. From the date of publication, the decisions shall be generally binding and shall only have future effect.".

On the other hand, the right of a witness to remain silent and right against self-incrimination is intended, in principle, to protect the freedom of any person questioned to choose whether to speak or remain silent when interrogated by the police regarding illicit activities in which he may have been involved. This freedom of choice is compromised when, suspecting the possible contribution of the person questioned to the illicit activities under investigation, the authorities resort to the subterfuge of questioning him as a witness (obliged to provide complete statements) and fail to inform him not only of the suspicions against him but, more importantly, of his procedural right not to contribute to his own incrimination.

From the analysis of the provisions of Article 282 of the Code of Criminal Procedure regarding relative nullity, in relation to the considerations of Decision no. 236 of the Constitutional Court of 2 June 2020, the right to remain silent and against self-incrimination belongs to the person who provided the statement as a witness, as she is the holder of the procedural interest in giving statements only when fully aware of their value and purpose in the proceedings, in order to effectively benefit from all the guarantees of a fair trial.

Given the circumstances, the alleged violation of the right against self-incrimination was not invoked by the witnesses themselves, namely Z and W, but rather by defendant A, who does not justify a specific procedural interest in relation to the analysed provisions of criminal procedure. Furthermore, in accordance with the preliminary judge at the trial court, upon examining the content of the witness statements in question, the court of appeal held, at a formal analysis level inherent to the preliminary stage, that these statements do not appear to provide incriminating information regarding appellant A. Therefore, the preliminary judge of the court of first instance correctly concluded that the conditions for applying the sanction of relative nullity, as provided by Article 282 paragraph (1) of the Code of Criminal Procedure, are not met in this case with regard to the witness statements of Z and W.

## 4. Conclusion

Based on the aforementioned, it can be concluded that Decision no. 236/2020 of the Constitutional Court has significantly changed judicial practice regarding the witness's right to remain silent and against self-incrimination. Although there was already a rich case-law of the European Court on this matter, its application has been

somewhat timid, perhaps indicating the need for a stronger impetus, which was which was given with the jurisprudential revival of the Constitutional Court.

However, the debate still remains open regarding the temporal application of the aforementioned decision and the practical method of recognizing the witness' right to remain silent. The identified case-law allows us to draw the conclusion that, although the witness' right to remain silent has been created, more or less explicitly, it is not recognized *ab initio*, even when viewed from the perspective of the *de facto* defendant.

At least for now, it seems to be the responsibility of the preliminary judge to determine whether, with respect to the witness, the investigating authorities had sufficient evidence at the time of the hearing to conclude that the witness could potentially incriminate himself through his statements, thus facing a difficult choice.

The current state of the law, as interpreted by the Constitutional Court, requires a careful examination of the specific circumstances of each case to assess the potential violation of the witness's rights. The role of the preliminary judge is crucial in evaluating whether there were enough proofs for the witness to be put in a position where his statements could potentially lead to self-incrimination.

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# SYMBOLIC CRIMINAL LEGAL TOOLS IN THE HUNGARIAN FIGHT AGAINST IRREGULAR MIGRATION

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## Abstract

*In the 21st century countries worldwide have had to face new security challenges. The fight against terrorism, the pandemic, migratory pressure and other issues, and furthermore political circumstances all over the world have spurred internal legislators to pursue more active legislation. In many cases, legislation has become symbolic and statutory definitions had been adopted and inserted into the system of the substantive criminal law that have caused serious concerns not only for theory but also for practice. There has been an increase in the number of crimes which are regulated by the internal criminal codes but either did not appear in the criminal statistics or turned up only at extremely low levels. Similar legislation can be seen in 2015 in Hungary, when the government decided on stopping irregular migratory flow by using criminal legal tools. Three new elements of crime analysed by the paper were inserted into the Hungarian Criminal Code whose application has only reached low levels in the last six years. These crimes are called "crimes against the border barrier" in the Hungarian criminal law, are the following: unlawful crossing of the border barrier, damaging the border barrier and obstruction of construction work on the border barrier. The aim of the paper is to present the legal situation and its anomalies as an example of symbolic criminal law.*

**Keywords:** *symbolic legislation, Hungarian Criminal Code, irregular migration, crimes against the border barrier, principle of legality, Hungarian criminal statistics.*

## 1. Introduction

The continuous expansion of criminalisation, and in accordance with it the expansion of criminal liability, is hardly a new phenomenon in the Hungarian criminal law. In line with the international and European trends, meeting in part the constantly increasing international criminal legal requirements to define new crimes, a wave of creating new statutory definitions in the criminal law began in 1990, which –so far has not reached yet its resting point in Hungary. This trend has been enhanced in the current decade, during which the European Member States have had to face demanding difficulties arising from irregular migration,[1] the pandemic and the Russian-Ukrainian armed conflict. In such circumstances, the main problem is the increasingly strong symbolic legislation, which can be linked to serious constitutional concerns.[2]

In 1995, the famous Hungarian criminal lawyer Ferenc Irk pointed out the content of symbolic legislation, interpreting it as an additional act of the state whose sole purpose is to convey the message to citizens

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[1] Galateanu, Oana, *Illegal Migration and the Migration Phenomenon at the Frontiers of Romania*, Contemporary Readings in Law and Social Justice, no. 9, vol. 2/2017, p. 601.

[2] Ferenc, Nagy, *Régi és új tendenciák a büntetőjogban és a büntetőjog-tudományban*, Akadémia Kiadó, Budapest, 2013, pp. 126-131.

that the state does everything to protect them.[3] The problem, however, is on the one hand that these laws are not enforced in practice and on the other hand that the regulation is also characterised by disharmony.[4] Therefore, symbolic legislation is a form of legislation that can be interpreted as a pretence, which is especially important to deal with if it prevails in the area of criminal law. In other words, the symbolic legislation results in at least two legal problems: the violation of criminal procedural principle of legality and the normative disharmony.

It shall be underlined that criminal law is not entitled to regulate such situations or elements of crimes in which the chance of "uselessness" can arise at the time of entering into force. Approached another way, the criminal law, as the last protecting line of the sanctions system, cannot have the task and the function only to reassure the citizens; furthermore, it cannot be a means of legislation for symbolising the state's "protecting umbrella" over its citizens. It must be emphasised that to regulate crimes for which either the intention for practical application or the potential possibility of it is already absent at the time of adoption is a situation to be avoided.

This study examines the question mentioned above from the perspective of the Hungarian criminal legislation aimed at curbing irregular migration, considering that in the last decade the examined symbolic legislation can be seen in the criminal steps. The study aims to shed light on the fact that despite the created new crimes, authorities use the tools of law enforcement[5] rather than criminal law to react to irregular migration, owing to its higher efficiency and cost effectiveness. In other words, the Hungarian authorities – and we hope this will be underlined by the data – prefer immigration enforcement tools to criminal legal measures. Using the Hungarian literature and the criminal statistical data, we will analyse evidence to support our claim that the regulation concerning the crimes against the border barrier is a pretence and can be considered as a good example of symbolic legislation.

In this paper, we will use statistical data to present the problem, based on information published between 2015 and 2023 by the Hungarian Police Force and the Unified Hungarian Statistics of the Investigation Authorities and the Prosecution. Although numerous studies deal with the dogmatics of crimes relating to the border barrier in the Hungarian literature, only a few emphasise their illusory nature. We would like to strengthen this list by showing that the statutory definitions created in the fight against irregular migration are the products of symbolic legislation, and in accordance with this fact they represent a serious constitutional problem in the substantive criminal legal system, mainly from the point of view of the principle of legality.

## 2. The Hungarian criminal legal framework and its antecedents

In 2015, when Hungary was in the centre of the migratory flow, a political decision on taking the necessary criminal measures to stop the irregular migrants was made by the Hungarian Government. In

[3] Ferenc, Irk, *Súlypontok a kriminálpolitikában*, Kriminológiai Közlemények, vol. 52/1995. p. 131.

[4] The products of the symbolic legislation are called redundant statutory definitions in the Hungarian literature. See: Erzsébet, Molnár, *Dogmatikai határzár. Dogmatikai és kriminálpolitikai elemzés a határzárral kapcsolatos bűncselekményekről*, Állam- és Jogtudomány, vol. 4/2019. pp. 64-68.

[5] In this paper, the law and border enforcement method means the measures of the Hungarian Police Force which can be considered as non-criminal procedural measures.

many European countries, including in Hungary, public opinion relating to irregular migration forced the legislators to take the necessary and effective measures against it. In Hungary the criminal law and the criminal procedure law have been the focus of these efforts. The Hungarian Criminal Code (hereinafter: HCC) was amended from 15 September 2015 with three new crimes: damaging the border barrier, unlawful crossing of the border barrier and obstruction of construction work on the border barrier. These crimes are called in Hungarian practice "crimes against the border barrier". In this paper we are also going to use this phrase.

Irregular migration generally appears in the European internal legal systems as a misdemeanour, or a legal phenomenon which shall be handled on the level of the administrative law or by law enforcement tools. Considering that the public security can be influenced by this phenomenon, different legal measures have been adopted by the Member States to be able to control the irregular migratory flow[6]. However, it is necessary to emphasise that the degree of *de jure* criminalisation is limited in the European Union – in most Western countries illegal residence or irregular entry are not qualified as crimes[7]. However, irregular migration is often described as a threat to state sovereignty and to public security[8]. This unfavourable effect was recognised by the Hungarian Government in 2015, and at the peak of the migratory pressure the government decided on using criminal legal tools in the fight against irregular migration. In Hungary – although irregular migration is a multifaceted phenomenon[9] and therefore the legal responses affected many parts of the internal legal system – law enforcement, border enforcement and the criminal law were the main approaches used.

The first step was the construction of the physical border fence. As the Hungarian legislator pointed out in 2015, "the state borders can be protected only by the installation of ever more serious facilities. The function of these facilities is not only to complete the state's self-defense, but also to signal that the state has the right to self-defense, and that right must be respected by everyone"[10]. The first stage in the process for realisation of this legal policy was Government Decree No. 1401/2015, which set a deadline of 1 July 2015 to "prepare for the construction of a 4-meter-high border barrier on the Serbian-Hungarian border at about 175 km length"[11] and to make the necessary legal measures to protect it. The construction of the border barrier began in early July 2015, and it was completed on Monday, 14 September 2015. After the first step of the construction works were finished by the Serbian-Hungarian border, Hungary continued – as a second step –construction

[6] Broaders, Dennis, Engbersen, Gottfried, *The fight against illegal migration. Identification Policies and Immigrants' Counterstrategies*, American Behavioral Scientist, no. 50, vol. 12/2017.

[7] Guild et alii, *Irregular Migration, Trafficking and Smuggling of Human Beings: Policy Dilemmas in the EU*, CEPS Paperback, 22 February 2016, pp. 24-25.

[8] Koser, K., *Irregular migration, state security and human security*, GCIM, 2005, pp. 10-11.

[9] Mátyás, Hegyaljai, *2016: Migráció, bűnügy, nemzetközi kitekintés*, in. Hautzinger Zoltán (ed.): A migráció bűnügyi hatásai. Magyar Rendészettudományi Társaság Migrációs Tagozat, Budapest, p. 12.

[10] Part of the general legislative justification of Act CXL of 2015. This act was the legal tool with which the government tried to handle mass irregular migration in Hungary and which concerned not only the criminal law and criminal procedure law but also the civil law, the Act on State Borders and the refugee law.

[11] There were a number of legal measures promulgated in order to form the mentioned internal policy, for example: the following resolutions of the Ministry of the Interior: 50/2015. (IX.16.) BM r.; 51/2015. (IX.20.) BM r.; 56/2015. (X.17.) BM r.; 60/2015. (XI.16.) BM r.; 3/2016. (I.20.) BM r.; 6/2016. (II.18.) BM r.

works along the Croatian-Hungarian border[12].

As a third step the Hungarian Government declared the aim to protect the construction of the border fence. Due to this the Government adopted Resolution No. 213/2015 in August which punished by fine[13] acts which violated partly the construction site of the border fence and partly its construction.[14] An interesting fact is that the legislator in this period deemed the administrative law suitable for protecting the border fence, but after 15 September 2015 already not, and prefered the criminal law – without any appropriate reason – to the branch of law mentioned above.

After the completion of the construction works, the Hungarian Parliament adopted the legal framework on protection of the border barrier, by the Act CXL of 2015. The Hungarian legal response concerned widely the Hungarian legal system - among others - three new statutory definitions were inserted into the HCC: the unlawful crossing of the border barrier (Art. 352/A of HCC)[15], the damaging of the border barrier (Art. 352/B of HCC),[16] and the obstruction on construction work on border barrier (Art. 352/C of HCC).[17] The unlawful crossing of the border barrier is typically committed either by damaging the physical border fence -– rarely by crossing it without using violence against it – or by entering unlawfully the border fence damaged earlier by someone else. Therefore, if a person is caught in the act by the authorities in territory of Hungary near the border fence, or not so far from it, there is reasonable cause to believe that this person entered Hungary irregularly – in violation of the border fence – and therefore committed the crime mentioned. As for the crime of damaging of the border barrier, the legal object protected by the legislator is not only the territorial integrity of Hungary, but also the protection of the border barrier. The reason for creating this crime is that it is required to punish the perpetrator who, with his conduct, endangers the protection function of the border barrier built by the

[12] Interestingly, after Hungary closed the Hungarian-Serbian border the number of the irregular migrants entering Hungary decreased to only 315 in November and to 270 in December 2015 (this document is available online at www.police.hu (last access: 20.03.2023).

[13] The fine – depending on its gravity – was from HUF 30,000 to 500,000.

[14] The scope of these practices is set out in Sections 2 and 3 of the decree: (a) entry into the area of the temporary closing of border during its construction and maintenance; (b) obstructing construction work in any form; (c) introducing a drone or other unmanned remote control device into the construction site; (d) obstructing the access of persons working in the area of the closing of border; (e) obstructing the access of vehicles and means of transport to the area affected by the construction of the boundary lock.

[15] Anybody can commit this crime who enters unlawfully – across the border barrier – the territory of Hungary.

[16] "Any person who damages or destroys the border barrier and its devices" commits the damaging of the border barrier. The act is punishable in case the act does not result in a more serious crime. Therefore, in contrast to the unlawful crossing of the border barrier, this crime can be considered as a subsidiary statutory definition according to the Hungarian criminal law. However, there are three qualified cases which are linked to the statutory definition of unlawful crossing of the border barrier and to the crime of damaging of the border barrier. Both crimes are punishable more severely if they are committed by force or arms; or by deadly weapons; or as a member of a mass riot.

[17] According to Art. 352/C of HCC "any person who obstructs the construction or the maintaining work of the border barrier" also commits a crime, insofar as the act did not result in another criminal offence. This crime is also a subsidiary statutory definition; however, it hasn't got qualified case.

state.[18] Furthermore, as for the last crime against the border barrier, it shall be underlined that any conduct by which the perpetrator can obstruct the works on the border closure may constitute according to the above-mentioned section.[19]However, it shall be emphasised that the Hungarian legislator amended not only the Special Part of the HCC but also its General Part, concretely the rules of expulsion. According to Art. 60. par. (2a), the perpetrator who is guilty of a crime against the border barrier must be expelled from the territory of Hungary if he or she has been sentenced to imprisonment (it does not matter if the sentence is suspended one or not)[20].

As for the aim of the legislature, by creating these new crimes it endeavoured to enforce the political purpose not to let the mass movement of irregular immigrants threaten the state borders and Hungarian public security. To ensure the rapidity and efficiency of the criminal procedure relating to the crimes against the border barrier, the Hungarian legislature inserted a new chapter[21] into the former Code on Criminal Procedure, which also entered into force on 15 September 2015. The criminal-political aim mentioned above was also important throughout the legislative procedure of the new Hungarian Code on Criminal Procedure (Act XC of 2017) and therefore these special criminal procedural rules are also part[22] of the new Criminal Procedure Code. The special criminal procedural legal regulations on crimes against the border barrier can be found between Art. 827 and Art. 836 of the new Criminal Procedure Code[23]. The name "special criminal procedure" means that only special rules are regulated in this chapter, which are different than the general ones. Regarding the rules not regulated in the chapter mentioned above, the general procedural rules are to be applied.[24]

### 3. The symbolic nature of the criminal legal regulations

After the amendments mentioned above entered into force, according to the report of the Unified Hungarian Criminal Statistics of the Investigation Authorities and Prosecution, the number of the registered unlawful crossings of the border barrier was in total 936 for the 2015–2016 period, while the number of the registered incidents of damaging the border barrier was in total 4386 in 2015–2016[25]. Interestingly, no criminal procedure has been conducted for obstruction on construction work of the border barrier since its entering into force, in comparison with the thousands of irregular crossings that were prevented, and thousands of detained migrants were

[18] Zoltán, Hautzinger: Büntetőjogi tényállások a külföldiség és a migráció vonzásában. *In. Zoltán, Hautzinger (edit.): A migráció bűnügyi hatásai.* Magyar Rendészettudományi Társaság Migrációs Tagozat, Budapest, 2016. pp. 191-192.

[19] Sándor, Madai: „A tömeges bevándorlás okozta válsághelyzet" kezelésének büntető anyagi jogi eszközei hazánkban. *In. Hautzinger, Zoltán (edit.): A migráció bűnügyi hatásai.* Magyar Rendészettudományi Társaság Migrációs Tagozat, Budapest, 2016. p. 253.

[20] There are some exceptions relating to this rule, for instance, refugees or perpetrators who have citizenship of one of the countries of the European Union.

[21] This was the Chapter XXVI/A. of the Act XIX of 1998 (Art. 542/D -Art. 542/U).

[22] Art. 827-Art. 836 of the Act XC of 2017 on Criminal Procedure.

[23] We do not wish to deal with presenting these procedural regulations because the symbolic legislation in the Hungarian substantive criminal law is the focus of our paper.

[24] We would like to point out that since the work deals with the symbolic nature of substantive criminal legal rules, we refrain from a detailed description of the rules of the special criminal procedure.

[25] Source: https://bsr.bm.hu.

redirected to the security gates.[26]. Although the published statistics also include the migration data relating to the Russian-Ukrainian armed conflict, and concern not only the border barrier, but it can also still clearly show how the high level of the migratory pressure had affected the Hungarian border.[27]

To ensure the rapidity of the redirecting processes[28], the Act on State Border was amended by the Hungarian legislator in 2016. According to this modification, if an irregular migrant is detained by a police officer within 8 kilometres of the Hungarian-Serbian or the Hungarian-Croatian border (the Schengen external borders), the authority shall redirect this migrant to the border barrier to ensure that the migrant returns to the country he or she unlawfully entered from. If we look at the statistical data, we can see how the migratory routes have changed[29] because of creating the border barrier and how the number of criminal procedures has changed for the past years in the context of the legal amendment mentioned above.

As we mentioned, the Hungarian Police Force published weekly the data relating to the irregular migratory situation between 2017 and 2022. The data published concerned not only the number of irregular crossings hindered, but also the number of detained migrants who were redirected to the gates established at the fence and the number of arrested migrants against whom criminal procedures had been started. According to the data there were far more crossings than there were people charged with crimes against the border barrier furthermore, it is not in accordance with the real content of the principle on legality. In contrast to the migratory data – mentioned in the footnote number 27 – in 2017 the number of the registered crimes against the border barrier was in total 885, till 1 July 2018 it was 91, and from that date till the writing of this paper (March of 2023) it is 494. It shall be emphasised that criminal procedures due to the obstruction of construction work on the border barrier have not been started between 2015 and March of 2023.[30] However, evaluating them, it is a problem that the data provided by the Hungarian Police Force, following different statistical criteria, differ from each other. Namely, there is another set of criminal statistics released by the Hungarian Police Force also available on its website, in which the data relating to the crimes against the border barrier can also be found. According to this, between January 2017 and September 2022 the number of these crimes is in total 50[31]. However, no

[26] This document is available online at https://www.police.hu/hu/hirek-es-informaciok/hatarinfo/illegalis-migracio-alakulasa. The data exceeds 20,000 only in 2016 (last access 20.03.2023.).

[27] For example, between 2017 and 2022 the Hungarian Police Force published weekly the data concerning the number of irregular crossings hindered by the authorities, migrants held up and redirected to the border gates, and captured and arrested migrants. The number of these migrants was in total: 19,524 (in 2017), 6507 (in 2018), 16,924 (in 2019), 46,335 (in 2020), 121,790 (in 2021), and 268,795 (in 2022). This document is available online at https://www.police.hu/hu/hirek-esinformaciok/hatarinfo/illegalis-migracio-alakulasa?weekly_migration_created%5Bmin%5D=2018-01-01+00%3A00%3A00&weekly_migration_created%5Bmax%5D=2019-01-01+00%3A00%3A00) (last access 20.03.2023).

[28] Róbert Bartkó, *Criminal Legal Tools in the Fight Against the Irregular Migration in Hungary*, Jog-Állam-Politika, vol. 2/2021, p. 103.

[29] In connection with this topic, see the data on detection of illegal border crossings in the EU between 2014 and 2019 published by FRONTEX. See *Annual Risk Analysis for 2015-2020* (https://frontex.europa.eu).

[30] This document is available online at https://bsr-sp.bm.hu (last access 20.03.2023).

[31] The data is available at https://www.police.hu/sites/default/files/HatarrendeszetSK%202022_11_.pdf (last access 22.03.2023).

matter which one we take as a basis, it is clearly visible that the number of criminal proceedings initiated is not in accordance with the irregular migratory data, and due to this fact, this trend violates *the principle of legality* not only concerning the substantive criminal law but also the criminal procedure law.

According to the fundamental criminal procedural rule, the principle of legality, a criminal procedure shall be initiated and conducted, and the defendant shall be punished, if the act committed can be qualified as a crime, if the defendant is punishable. Namely, if there is a reasonable cause to believe that the act committed by the perpetrator could be qualified as a crime according to the Hungarian Criminal Code, the authorities must conduct the procedure, and must examine the elements of the crime committed. This means that the investigating authorities must investigate the circumstances of the crime, the prosecutor must arraign against the perpetrator – if there is not any other opportunity to carry out the criminal procedure – and the judge must sentence the defendant if the perpetration is proved, and the defendant is punishable.

If we look at the real meaning of the data published concerning the Hungarian migratory situation, a migrant who is detained or arrested or hindered during or after an irregular crossing of the border fence or is caught in the act during the attempt of crossing, commits at least the unlawful crossing of the border barrier which is qualified as a crime by the Hungarian Criminal Code. Otherwise, how could the irregular migrant get to the Hungarian territory within 8 kilometres of the border, if not by committing at least the crime mentioned above? Therefore, our statement is the following: the amendment of the Act on State Borders caused changings in the authority's method, and it moved from the strict application of the principle on legality towards the law and border enforcement methods. From 2017 the Hungarian Police Force preferred mainly this way due to its rapidness, efficiency, and cost-effectiveness. Furthermore, if we add to this the fact that no perpetration had been detected due to the crime called obstruction on construction work of the border barrier, even the whole system of crimes against the border barrier can be questioned and can be considered as a symbolic one.

Considering the statistical data, one of the biggest weaknesses of symbolic legislation, the marginalisation of the principle of legality, can be clearly established. If we examine the number of irregular border crossing attempts published by the Police Force, as well as the number of registered crimes related to border closures in the recent years, the weightlessness of the principle of procedural legality is striking, and clearly shows not only the changing migratory routes but also the changes in the attitude of the authorities[32]. In addition to the data presented in our paper, the question rightly arises of whether it is justified to retain such elements of crimes in a system of the substantive criminal law in a case in which the authorities consider it more effective to use the law enforcement or immigration enforcement tools instead of the criminal legal ones, enforcing literally the principle of ultima ratio[33] with it.

At the same time, the quality of the legislation, and the jurisprudence developed along it, are a good example of the strong *normative disharmony* in these crimes presented by the paper. The legal approach

[32] Zoltán, Hautzinger, *Idegen a büntetőjogban*, AndAnn Kft, Pécs, 2016, pp. 57-65.

[33] According to this principle, the branch of the criminal law can be applied only in such cases – as an ultimate tool – when the other branch of the law is ineffective.

of border crossings conducted by damaging the border fence is not related to the real intent of the perpetrators.[34] The crime of damaging the border barrier is completely unjustified in its current form[35] because the criminal legal protection of the border fence could also appear within the framework of other statutory definitions (e.g., vandalism). There is also no rational reason for regulating the obstruction of construction work related to the border barrier as a crime – not only since no criminal proceedings have been initiated against anyone for this act, but also because the legislature had already during the period of the previous construction works qualified the same act as a breach of rules subject to an administrative fine. Knowing these antecedents, its regulation in the HCC is not justified. Furthermore, considering the criticism expressed in the Hungarian legal literature, the interpretation of some elements such as "facility ensuring the order of the state border" or "mass riot" is also problematic during the application of these crimes[36]. A similar dogmatic problem arises concerning the mandatory expulsion rule for this crime in the General Part of the HCC. According to this, the person who commits the crime related to the border barrier, as a "persona non grata", must be expelled from the territory of Hungary if the perpetrator has been sentenced to imprisonment[37], thereby setting up an irrebuttable presumption. This is a worrisome rule based on not only the Hungarian Constitution but also on the HCC, because in these cases, the legislator does not expect the judge to examine the preliminary conditions of expulsion, although the judge should do iso because the obligation on consideration clearly comes from the general rules and this sanction shall not be applied automatically.

## 4. Conclusions

In the paper, we tried to demonstrate the futility of the criminal legal rules regulated by the Hungarian legislator to stop irregular migration. After the entry into force of these statutory definitions, the authorities used the system of criminal legal measures in a relatively large number of cases during the fight against the migratory pressure. At the same time, it is clear from the statistical data that after the amendment of the Act on the State Borders, essentially from 2016–2017, the application of law enforcement tools prevails on the southern borders of Hungary. Criminal proceedings are initiated in a much smaller, even insignificant number, although, based on the numbers related to migratory pressure, much more should or could have been initiated. The authorities moved from the use of criminal legal tools towards the use of quick

[34] The Hungarian literature takes an unified position regarding this. According to this statement, if the perpetrator commits the illegal crossing by damaging the border barrier, this conduct cannot be evaluated as a multiple offence. The act can be qualified as only damaging of the border barrier. Regarding this see the following publications: László, Király Balázs, *Gondolatok a határzárral kapcsolatos bűncselekményekről*, in Hautzinger Zoltán (ed.): *A migráció bűnügyi hatásai.* Magyar Rendészettudományi Társaság Migrációs Tagozat, Budapest, 2016. p. 280; Pál, Sinku, *A közigazgatás rendje elleni bűncselekmények*, in Belovics Ervin, Molnár Gábor, and Sinku Pál, *Büntetőjog II. Különös Rész, Nyolcadik hatályosított kiadás*, HVG-ORAC Lap-és Könyvkiadó Kft, Budapest, 2021, pp. 659-662.

[35] The qualifying circumstances regulated in connection with this crime are also very hypothetical ones. For instance, there is no reasonable cause to believe that this crime can cause death on the basis of the causal relationship between the damaging and death.

[36] Sándor, Madai, '*A tömeges bevándorlás okozta válsághelyzet' kezelésének büntető anyagi jogi eszközei hazánkban*, in. Hautzinger, Zoltán (ed.), *A migráció bűnügyi hatásai*. Magyar Rendészettudományi Társaság Migrációs Tagozat, Budapest, 2016, pp. 250-252.

[37] See Art. 60 par. (2a) of the HCC.

law enforcement tools, in line with efficiency and cost-saving aspects, thus abandoning the principle of legality, which is one of the most important principles in criminal procedure law. In addition, the regulatory anomalies that can be seen in the statutory definitions called crimes against the border barrier also result in serious normative disharmony.

Due to the omitted legal matters, the statutory definitions are burdened with several dogmatic problems, and these are – unfortunately – based on legal interpretation and demarcation difficulties. Therefore, it can be considered a normal reaction of the authorities to try to avoid the application of these statutory definitions in practice. The inapplicable elements of crimes challenge the main substantive legal principle of legality and the command of procedural legality. If the criminal policy of the state constantly emphasises the importance and effectiveness of stricter and expanding criminal legal actions, it actually – paradoxically – sacrifices criminal legal legality on the altar of symbolic criminal legislation. In accordance with this, there is no use in for keeping these statutory definitions in the HCC and no legal reason to do so Therefore, we trust that the criminal legal policy of the legislature will also change in the future, and after repealing these crimes it will give more space to law enforcement and immigration enforcement tools.

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# IS IT MANDATORY FOR THE CRIMINAL PROSECUTION BODY TO ISSUE A CRIMINAL INDICTMENT ORDER?

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## Abstract

*Pursuant to the legal provisions, in view of facilitating the criminal prosecution of persons who commit criminal offences, the filing of a Crime Information Report as a result of which the perpetrator is indicted triggers the remission by half of the sentence limits applicable to the criminal offence (or criminal offences) the Informant is charged with. The crucial element is that the Crime Information Report may only trigger the remission of the sentence if the person concerned by the Crime Information Report is indicted, time-wise, before the closing of the criminal proceedings in which the accused person who filed the Crime Information Report is tried. In this context, it is paramount for the Informant who has the status of an accused person that the filed Crime Information Report be materialised at least in the indictment of the person concerned by the Crime Information Report by the time the judgement in the trial of the accused has become final. This study was based on a practical situation which, in the summary, presented the following characteristics: a) the accused person, who was prosecuted for having committed drug offences, filed a Crime Information Report concerned with the commission of drug trafficking offences; b) after having been notified by means of a Crime Information Report, the criminal prosecution bodies collected clear evidence from which it followed that the person concerned by the Crime Information Report was indeed committing drug trafficking offences. Against this background and having analysed the framework of the criminal procedural law, we concluded that the indictment of the person concerned by the Crime Information Report (who, after further prosecution, was conferred the status of a suspect) was mandatory. Furthermore, as to when the criminal charges were brought against the person concerned by the Crime Information Report (so as to materialise the Crime Information Report into concrete action), the case-law pointed out to the existence of relatively short periods - a few days to maximum 1 year - from the time inculpatory evidence was collected and until criminal charges were brought.*

**Keywords:** *criminal charge, further prosecution, criminal indictment, notification of the criminal prosecution bodies by means of a Crime Information Report, remission of sentence limits.*

## 1. Introduction

In the Romanian criminal proceedings, a person's criminal indictment takes place during the criminal prosecution phase, by means of a procedure that can be conducted both by the investigating bodies of the judiciary police, as well as by the prosecutor, mainly depending on the nature of the offence which is subject of the criminal case, but also on the status of the person in question, under certain assumptions. Slightly redundant, the criminal charge is brought on 2 occasions, both through the conduct of the further prosecution procedure

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(at which point the accused person acquires the status of a suspect), as well as through criminal indictment (as a result of which the person against whom charges are brought acquires the status of an accused person). Beyond the importance of informing the person of the criminal charge brought against him/her, the further prosecution causes significant criminal consequences also against third parties who are not involved in the case file in which the perpetrator acquired the status of a suspect.

We are working under the assumption that, pursuant to the provisions of Article 19 of Law no. 682/2002 on witness protection[1], the person who committed an offence may be granted a remission by half of the sentence limits provided for by the law if, before or during the criminal prosecution or proceedings, the person in question files a Crime Information Report and facilitates the identification and prosecution of other persons who committed offences[2].

**2. Requirements for granting the remission by half of the sentence limits.**

As a consistent method of exercising the right of defence through a significant remission of the sentence prescribed by law, the filing of Crime Information Report triggering the prosecution of another person has been given various interpretations in the practice of the criminal judicial bodies. The most important issues in respect of which varying opinions may be encountered in the criminal judicial practice include, inter alia: a) whether the effects of granting the remission by half of the sentence, in the circumstances where the accused person facilitated the identification and prosecution of the person concerned by the filed Crime Information Report in a different case, apply to all criminal cases pending before the courts, without limitation; b) who are the beneficiaries of the remission by half of a sentence limits prescribed by law; c) whether the provisions of Article 19 of Law no. 682/2002 may be construed as grounds for sentence remission within the meaning of Article 598 (1) (d) of the Criminal Procedure Code; d) whether the granting of remission by half of the sentence limits to the accused person who is an informant in a criminal case is conditional upon further prosecution *in personam* or upon criminal indictment or whether it is sufficient to initiate criminal prosecution *in rem* in the case in which the accused person is a witness who filed a Crime Information Report.

To sum up, as to limiting the effect of remitting the sentence limits prescribed by the law, the High Court of Cassation and Justice, in its ruling on a question of law, held that the effects of the legal grounds for sentence remission shall exclusively occur in the specific criminal case having as subject one or several offences committed by the person who, before or during the criminal prosecution or proceedings in respect of the case in question, filed a Crime Information Report and facilitated the prosecution of participants to the commission of serious offences; the author of the Crime Information Report may not be granted a remission by half of the special sentence limits in different criminal cases, even if those cases are concerned with

[1] Law no. 682 of 19 December 2002 on witness protection was republished in the Official Gazette no. 288 of 18 April 2014.

[2] The provisions of Article 19 of Law no. 682/2002 can also be partly found in Article 15 of Law no. 143/2000 on prevention and control of illicit drug trafficking and use, according to which "the person who committed one of the criminal offences provided for in Articles 2-9 and, during his/her criminal prosecution, files a Crime Information Report and facilitates the identification and prosecution of other persons who committed drug-related offences, shall be granted a remission by half of the sentence limits prescribed by law".

concurrent offences committed by the said author[3].

As to the potential beneficiaries of the provisions of Article 19 of Law no. 682/2002, the Constitutional Court found that limiting such beneficiaries strictly to persons having the status of a witness who filed a Crime Information Report and who have committed a serious offence was unconstitutional; consequently, the persons who have not committed serious offences were also included in this category[4].

It was also held that the provisions of Article 19 of Law no. 682/2002 may not be construed as grounds for sentence remission within the meaning of Article 598 (1) (d) of the Criminal Procedure Code, therefore leading to the conclusion that the materialisation of a Crime Information Report may no longer trigger the remission by half of the sentence once the decision has become final in the case in which the witness who filed a Crime Information Report has the status of an accused person[5].

Last, but not least, also ruling on a question of law, the supreme court determined that granting the remission by half of a sentence limits to the accused person who is an Informant in a criminal case is conditional upon further prosecution *in personam* in the case in which the accused is a witness who filed a Crime Information Report[6].

The two aspects of importance for this study are as follows: the Crime Information Report may trigger the remission by half of the sentence limits only if it is materialised before the decision concerning the accused having the status of a witness who filed a Crime Information Report has become final; the expression „facilitates the identification and prosecution of other persons who committed offences" means the criminal indictment of the person concerned by the Crime Information Report subsequent to issuing a further prosecution order.

Against this background, the following question arises: what happens under the assumption that the accused person files a Crime Information Report against another person and the prosecutor, despite having conducted important evidentiary activities capable of determining the identification of the perpetrator and of ascertaining the commission of the reported offence, fails to confer the status of a suspect to the person concerned by the Crime Information Report? In other words, is it mandatory to bring a charge in criminal matters against the person concerned by the Crime Information Report or, on the contrary, is this a procedural act that is exclusively left at the discretion of the criminal prosecution body?

In order to try and answer this question, which is the central focus of this study, we shall proceed by examining the existing legal framework on a person's criminal indictment (considering the two distinct procedures for bringing criminal charges, namely the further prosecution and the criminal indictment respectively). We will also present the findings of a case-law examination focused on the attempt to approximate the average period of time between the time the Crime Information Report is filed and the time the person

[3] The High Court of Cassation and Justice, the Panel in charge for ruling on questions of law in criminal matters, Ruling no. 3 of 28 February 2018, published in the Official Gazette no. 327 of 13 April 2018.

[4] The Constitutional Court of Romania, Decision no. 67 of 26 February 2015, published in the Official Gazette no. 185 of 18 March 2015.

[5] The High Court of Cassation and Justice, the Panel in charge for ruling on questions of law in criminal matters, Ruling no. 4 of 13 February 2020, published in the Official Gazette no. 278 of 2 April 2020.

[6] The High Court of Cassation and Justice, the Panel in charge for ruling on questions of law in criminal matters, Ruling no. 79 of 18 November 2021, published in the Official Gazette no. 96 of 31 January 2022.

concerned by the Crime Information Report is indicted (and, implicitly, the time when the Crime Information Report is materialised into concrete action by the criminal prosecution bodies).

The particular case underpinning this study can be summarised as follows: a) the accused person, who was sent to trial in September 2021 for committing drug trafficking offences, filed a Crime Information Report in November 2022, whereby the criminal prosecution bodies were informed about the commission of drug trafficking offences by certain specified persons; b) in February 2022, as a result the filed Crime Information Report, the criminal prosecution bodies conducted important evidentiary activities (authorised purchases of drugs, through collaborators, from the persons concerned by the Crime Information Report and, respectively physical and chemical findings of a technical and scientific nature); in December 2022, the prosecutor informed the court called to rule on the merits in the case of the accused person who is an informant of the fact that no criminal indictment was ordered in respect of any person in the case file formed as a result of the filed Crime Information Report.

**3. Bringing the charge in criminal matters.**

Pursuant to Article 131 (1) of the Constitution of Romania, "within the judicial activity, the Public Ministry shall represent the general interests of the society and shall defend legal order, as well as the citizens' rights and freedoms". Applied to the criminal indictment of a person in respect of whom there is evidence of having committed criminal offences, the constitutional requirement enshrines the role of the Public Ministry (translator's note: the Public Prosecution Service) as representative of the interests of society and as guardian of the rule of law. Thus, under the assumption that conclusive inculpatory evidence is produced, out of which it follows (in our case) that serious drug offences were committed, the prosecutor's intervention in view of ascertaining the criminal offence and of indicting the perpetrator is a genuine method of guarding the rule of law and of defending citizens' rights and freedoms.

As to the moment, during the criminal prosecution phase, when criminal charges are brought for the first time against a person, Article 305 (3) of the Criminal Procedure Code stipulates: „when there is evidence from which reasonable suspicion arises that a person has committed the offence that warranted the start of criminal prosecution and the case does not fall under any of the situations provided for in Article 16 (1), the criminal prosecution body shall order the further prosecution against the said person who shall acquire the status of a suspect". Consequently, the only requirements that need to be fulfilled in order for the perpetrator to acquire the status of a suspect entail the existence of inculpatory evidence and, respectively, the absence of legal obstacles to the prosecution proceedings. As to whether it is mandatory for the criminal prosecution body to issue an order for further prosecution *in personam*, the legal text under analysis does not clearly specify at what point in time the charge in criminal matters must be brought, while the appropriateness and time of the criminal indictment are determined by the criminal prosecution body.

However, in terms of bringing the charge by means of criminal indictment, Article 7 of the Criminal Procedure Code stipulates: "the prosecutor is required to start and carry-out the indictment ex officio when evidence exists that shows the commission of an offence and there is no legal ground to prevent such prosecution (...)". This legal

text - deemed as having a value of a principle when it comes to enforcing the procedural law in criminal matters - enshrines the mandatory nature of the criminal indictment (and, hence, the mandatory nature of bringing charges in criminal matters against the person in question), while the legislator sets out 2 conditions: a positive condition, requiring the existence of inculpatory evidence; and one negative condition, requiring the absence of legal grounds preventing such prosecution. This ground rule is resumed, somehow differently, in Article 15 of the Criminal Procedure Code ("criminal prosecution shall be started and conducted when evidence exists giving rise to the reasonable assumption that a person committed an offence and there are no situations preventing the start or conduct of such prosecution"), as well as in Article 309 of the Criminal Procedure Code. Given the chronology of the two orders (the further prosecution being at all times prior to indictment), the mandatory act of indicting the perpetrator necessarily determines the mandatory nature of issuing an order for further prosecution.

In our opinion, of relevance for the topic of this study are also the provisions of Article 306 (1) of the Criminal Procedure Code, stating that: "in order to achieve the goal of criminal prosecution, the criminal investigation bodies are required, once notified, to seek and collect data or information concerning the existence of the criminal offences and the identity of perpetrators, to take steps for limiting the consequences thereof (...)". Clearly, these legal provisions apply not only to the criminal investigation body, but also to the prosecutor, requiring a broad interpretation of the legal text (in accordance with the marginal name of the mentioned article, „the obligations of criminal prosecution bodies"). The fact that the obligation to take steps for limiting the consequences of the reported criminal offences is to be borne by the criminal prosecution bodies determines, in our case, the recognition of the need for an active involvement of the criminal prosecution bodies. Thus, once notified of the commission of drug offences and having collected clear inculpatory evidence confirming the content of the Crime Information Report, the judicial bodies are required to intervene by stopping the criminal activity, especially since such criminal offences pose a health treat for the users of the trafficked psychoactive substances.

To be also noted that the specificity of criminal investigations conducted in respect of drug trafficking criminal offences implies, in specific cases, that the time of criminal indictment subsequent to ascertaining the criminal activity be deferred in view of completing the standard of evidence, so as to enable the identification of all persons who, under different forms of criminal participation, contributed to the commission of the criminal offences in question. In this case, it is vital that criminal prosecution (which is not conducted *in personam*) be carried-out in a sustained and credible pace and, in all cases, should not exceed a reasonable period for bringing criminal proceedings against the persons concerned by the Crime Information Report.

**4. Bringing the charge in criminal matters.**

The criminal case files subject to analysis present the following commonalities: a) the subject-matter of the selected criminal cases concerned criminal proceedings brought against persons who committed drug offences; b) the accused persons filed Crime Information Reports against other persons; c) subsequent to the filing of the Crime Information Report, acts of prosecution were carried-out (for the most

part, evidentiary activities consisting of authorised purchases of drugs, via collaborators under true or protected identity, respectively via undercover investigators); d) the inculpatory evidence collected in this manner led to the criminal indictment of the persons concerned by the Crime Information Report (by issuing the orders for further prosecution and, respectively, for criminal indictment) [7].

Judgement no. 827/20 July 2022 rendered by Bucharest Tribunal[8]. The notification by means of a Crime Information Report took place on 16 April 2021. On 5 May 2021, the accused person sold 1.27 grammes of heroin to a protected identity collaborator; on 6 May 2021, the accused person sold 0.73 grammes of heroin to a protected identity collaborator; on 4 August 2021, the accused person smuggled approximately 4 kg of heroin into the country. The accused person was indicted on 12 October 2021 (further prosecution, criminal indictment, detention). *It is noted that approximately 6 months have passed between the notification of the criminal prosecution bodies by means of a Crime Information Report and the time the accused person was indicted.*

Judgement no. 1209/ 7 November 2022 rendered by Bucharest Tribunal[9]. The offence was notified by means of a Crime Information Report on 25 February 2022. Purchases under surveillance were organised between 4 March 2022 and 5 April 2022, with the help of a true identity collaborator (0.85 grammes of heroin, 0.35 grammes of heroin, 0.83 grammes of heroin). The criminal indictment took place on 23 May 2022 (further prosecution, criminal indictment, detention). *It is noted that approximately 3 months have passed between the notification of the criminal prosecution bodies by means of a Crime Information Report and the time the accused person was indicted.*

Judgement no. 1198/4 November 2022 rendered by Bucharest Tribunal[10]. The offence was notified by means of a Crime Information Report on 14 June 2021. 2 purchases under surveillance were organised on 1 July 2021 and on 14 July 2021, with the help of a true identity collaborator (approximately 10 grammes of cocaine). The bill of indictment was issued on 15 October 2021. *It is noted that approximately 4 months have passed between the notification of the criminal prosecution bodies by means of a Crime Information Report and the time the accused person was brought before the court. The analysed judgement does not indicate the time when the accused person was indicted, but it is certain that the indictment occurred prior to commitment for trial.*

Judgement no. 1139/26 October 2022 rendered by Bucharest Tribunal[11]. The offence was notified by means of a Crime Information Report. 3 authorised purchases were organised on 12 November 2021, on 13 November 2021 and, respectively, on 2 December 2021 with the help of a collaborator who filed a Crime Information Report (risk and high-rick drugs). From the content of the judgement under analysis it follows that the accused person was placed under judicial supervision on 22 February 2022. *It is noted that 2 months and 20 days have passed between the date of the last authorised purchase and the time the*

[7] The examined case-law was consulted using the ReJust application, which was accessed between December 2022 and February 2023.

[8] According to https://www.rejust.ro/juris/eeeed5d65.

[9] According to https://www.rejust.ro/juris/4ee78eg38.

[10] According to https://www.rejust.ro/juris/dee8d5975.

[11] According to https://www.rejust.ro/juris/eee637336.

*accused person was indicted; the judgement under analysis does not specify the registration date of the Crime Information Report with the criminal prosecution body.*

Judgement no. 856/27 July 2022 rendered by Bucharest Tribunal[12]. The criminal prosecution bodies were notified by means of a Crime Information Report on 31 January 2022. On 23 February 2021 and on 3 March 2022, the accused person sold 50 grammes of cannabis and, respectively, 30 grammes of cannabis to a true identity collaborator. The criminal indictment took place on 31 May 2022 (further prosecution, criminal indictment). *It is noted that 4 months have passed between the notification of the criminal prosecution bodies by means of a Crime Information Report and the time the accused person was indicted.*

Judgement no. 826/20 July 2022 rendered by Bucharest Tribunal[13]. The criminal prosecution bodies were notified by means of a Crime Information Report on 2 December 2020. Between 22 January 2021 and 13 May 2021, the accused person sold ecstasy to a protected identity collaborator (4 material facts). The criminal indictment took place on 2 June 2021 (further prosecution, criminal indictment), when the commission of the crime was also ascertained further to a deceptive operation designed to catch the person attempting to commit the offence. *It is noted that approximately 6 months have passed between the notification of the criminal prosecution bodies by means of a Crime Information Report and the time the accused person was indicted.*

Judgement no. 805/13 July 2022 rendered by Bucharest Tribunal[14]. The criminal prosecution bodies were notified by means of a Crime Information Report on 6 September 2021. On 2 October 2021, the accused person sold 1.17 grammes of cocaine to a witness collaborating with the prosecution; on 13 October 2021, the accused person sold 2.33 grammes of cocaine to a witness collaborating with the prosecution. The case was sent to court on 18 November 2021 (the judgement under analysis contains no data on when the accused person was indicted). *It is noted that 2 months and 12 days have passed between the notification of the criminal prosecution bodies by means of a Crime Information Report and the time the accused person's case was brought before a court; definitely, the criminal indictment of the accused person took place in a shorter period.*

Judgement no. 826/20 July 2022 rendered by Bucharest Tribunal[15]. The criminal prosecution bodies were notified by means of a Crime Information Report on 24 March 2021. On 28 April 2021, the accused person sold 0.53 grammes of cocaine to a witness collaborating with the prosecution; on 6 May 2021, the accused person sold 0.56 grammes of cocaine to a witness collaborating with the prosecution; on 24 August 2021, the accused held 2.07 grammes of cocaine in his home. The criminal indictment took place on 24 August 2021 (further prosecution, criminal indictment, detention, arrest pending trial). *It is noted that 5 months have passed between the notification of the criminal prosecution bodies by means of a Crime Information Report and the time the accused person was indicted.*

Judgement no. 761/7 July 2022 rendered by Bucharest Tribunal[16]. The criminal prosecution bodies were notified by means of a Crime Information Report on 10

[12] According to https://www.rejust.ro/juris/722293442.
[13] According to https://www.rejust.ro/juris/59992326d.
[14] According to https://www.rejust.ro/juris/2335g92g7.
[15] According to https://www.rejust.ro/juris/59992326d.
[16] According to https://www.rejust.ro/juris/59929949d.

January 2022. On 27 January 2022, the accused person sold 0.44 grammes of heroin to an authorised collaborator; on 31 January 2022, the accused person sold 0.42 grammes of heroin to an authorised collaborator; on 14 February 2022, the accused person sold 0.32 grammes of heroin to an authorised collaborator; on 16 February 2022, the accused person sold 0.35 grammes of heroin to an authorised collaborator; on 14 March 2022, the accused person held 6.42 grammes of heroin and other risk and high-rick drugs with the intent to sell. The criminal indictment took place on 14 March 2022 (further prosecution, criminal indictment, detention, arrest pending trial). *It is noted that approximately 2 months have passed between the notification of the criminal prosecution bodies by means of a Crime Information Report and the time the accused person was indicted.*

Judgement no. 639/15 June 2022 rendered by Bucharest Tribunal[17]. The criminal prosecution bodies were notified by means of a Crime Information Report on 16 September 2021. On 28 September 2021 and, respectively, on 6 October 2021, the accused persona sold 2.33 grammes of cannabis and 46 LSD doses to an authorised collaborator; on 3 November 2021, the accused person was in possession of 15.74 grammes of cannabis and 3.84 grammes of MDMA. The criminal indictment took place on 3 November 2021 (further prosecution, criminal indictment). *It is noted that 1 month and 17 days have passed between the notification of the criminal prosecution bodies by means of a Crime Information Report and the time the accused person was indicted.*

Judgement no. 641/15 June 2022 rendered by Bucharest Tribunal[18]. The criminal prosecution bodies were notified by means of a Crime Information Report on 7 October 2021. On 11 November 2021, the accused person sold 6 MDMA tablets to an authorised collaborator; on 9 December 2021, the accused person sold 4 MDMA tablets to an authorised collaborator. The criminal indictment took place on 3 February 2022 (further prosecution, criminal indictment, detention). *It is noted that approximately 4 months have passed between the notification of the criminal prosecution bodies by means of a Crime Information Report and the time the accused person was indicted.*

Judgement no. 559/26 May 2022 rendered by Bucharest Tribunal[19]. The criminal prosecution bodies were notified by means of a Crime Information Report on 6 July 2021. On 15 July 2021, the accused person sold 5 grammes of cocaine to an authorised collaborator; on 21 July 2021, the accused person sold 5.01 grammes of cocaine to an authorised collaborator; on 25 August 2021, the accused person held 789.23 grammes of cocaine with the intent to sell. The criminal indictment took place on 25 February 2022 (further prosecution, criminal indictment, detention). *It is noted that 7 months and 19 days have passed between the notification of the criminal prosecution bodies by means of a Crime Information Report and the time the accused person was indicted.*

Judgement no. 543/20 May 2022 rendered by Bucharest Tribunal[20]. The criminal prosecution bodies were notified by means of a Crime Information Report on 4 October 2021. On 14 October 2021, the

[17] According to https://www.rejust.ro/juris/722d53439.
[18] According to https://www.rejust.ro/juris/4eeg23875.
[19] According to https://www.rejust.ro/juris/5994e7d7e.
[20] According to https://www.rejust.ro/juris/eee47ge57.

accused person sold 4 MDMA tablets and 3.37 grammes of cannabis to an authorised collaborator; on 25 October 2021, the accused person sold 6.95 grammes of cannabis to an authorised collaborator; on 24 November 2021, the accused person was in possession of 12.42 grammes of cannabis. The criminal indictment took place on 24 November 2021 (further prosecution, criminal indictment, detention). *It is noted that 1 month and 20 days have passed between the notification of the criminal prosecution bodies by means of a Crime Information Report and the time the accused person was indicted.*

Judgement no. 442/2022 of 14 November 2022 rendered by Constanța Tribunal[21]. The ex officio notice concerned with committing the offence of risk drug trafficking on a an ongoing basis took place on 14 January 2022. Between 1 February 2022 and 12 April 2022, the accused person sold different quantities of cannabis (1.53 grammes, 1.52 grammes, 2.47 grammes, 1.64 grammes, etc.) to the authorised protected identity collaborator. The criminal indictment took place on 12 April 2022 (further prosecution, criminal indictment, detention). *It is noted that approximately 3 months have passed between the time the criminal prosecution bodies took note of the offence and the time the accused person was indicted.*

Judgement no. 426/2022 of 25 October 2022 rendered by Constanța Tribunal[22]. The ex officio notice concerned with committing the offence of high-risk drug trafficking took place on 16 November 2021. Between 10 December 2021 and 28 March 2022, the first accused person sold different quantities of risk and high-risk drugs to the relevant authorised collaborator; between 26 November 2021 and 28 March 2022, the first accused person, as well, sold different quantities of risk and high-risk drugs to the protected identity collaborator; between 1 February 2022 and 28 March 2022, the second accused person sold different quantities of risk and high-risk drugs to the relevant authorised collaborator. The criminal indictment took place on 29 March 2022. *It is noted that approximately 4 months have passed between the time the criminal prosecution bodies took note of the offence and the time the accused person was indicted.*

Judgement no. 421/2022 of 20 October 2022 rendered by Constanța Tribunal[23]. The offence of risk and high-risk drug trafficking was notified by means of a Crime Information Report on 7 January 2022. Between 11 February 2022 and 6 May 2022, the accused person repeatedly sold amphetamine, respectively cannabis (2.5 grammes) to the undercover collaborator. The criminal indictment took place on 17 May 2022. *It is noted that approximately 4 months have passed between the time the criminal prosecution bodies took note of the offence and the time the accused person was indicted.*

Judgement no. 228/2022 of 10 June 2022 rendered by Constanța Tribunal[24]. The offence was notified by means of a Crime Information Report on 21 October 2021. On 20 October 2021, the accused person put drugs into circulation, respectively offered 60.15 grammes of cannabis to the witness; on 21 October 2021, the accused person held the quantity of 69.52 grammes of cannabis with the intent to sell and was caught in the act further to a deceptive operation

[21] According to https://www.rejust.ro/juris/dee653549.
[22] According to https://www.rejust.ro/juris/6228ee87e.
[23] According to https://www.rejust.ro/juris/g88234948.
[24] According to https://www.rejust.ro/juris/72e8e8d73.

organised on the same date by the police authorities; on 21 October 2021, the accused person held with the intent to circulate a total quantity of 249.44 grammes of cannabis and 3 cigarette remains on which Tetrahydrocannabinol (THC) was identified, which were discovered while conducting a home search. The criminal indictment took place on 22 October 2021. *It is noted that 1 day has passed between the notification of the criminal prosecution bodies and the time the accused person was indicted.*

Judgement no. 150/2022 of 29 April 2022 rendered by Constanța Tribunal[25]. The offence was notified by means of a Crime Information Report on 16 March 2021. On 22 April 2021, the accused person sold a quantity of 3.4 grammes of MDMA to the undercover investigator. The criminal indictment took place on 5 July 2021. *It is noted that approximately 4 months have passed between the time the criminal prosecution bodies took note of the offence and the time the accused person was indicted.*

Judgement no. 546/2022 of 9 November 2022 rendered by Timiș Tribunal[26]. The offence was notified by means of a Crime Information Report on 27 July 2021. On 25 October 2021, via a WhatsApp videocall, the accused person showed the collaborator that he held at his home 4 jars containing approximately 800 grammes of vegetal mass alleged to be cannabis and a bag containing light-green tablets claimed to be ecstasy tablets (MDMA). The criminal indictment took place on 10 November 2021 when the accused was caught in the act during a home search. *It is noted that approximately 4 months have passed between the notification of the criminal prosecution bodies by means of a Crime Information Report and the time of indictment.*

Judgement no. 679/2021 of 17 November 2021 rendered by Timiș Tribunal[27]. The offence was notified by means of a Crime Information Report on 6 March 2021. On 6 March 2021, the accused person sold 3 aluminium foil packages containing 2.3 grammes of cocaine to the undercover investigator. The criminal indictment took place on 28 September 2021. *It is noted that approximately 6 months have passed between the notification of the criminal prosecution bodies by means of a Crime Information Report and the time of indictment.*

Judgement no. 246/2022 of 20 October 2022 rendered by Cluj Tribunal[28]. The offence was notified by means of a Crime Information Report on 1 February 2022. The criminal indictment took place on 3 February 2022 when the accused was caught in the act intending to sell the quantity of 1,464.6 grammes of cannabis and the quantity of 1.2 grammes of white crystallin substance to the undercover investigator. *It is noted that approximately 2 days have passed between the notification of the criminal prosecution bodies by means of a Crime Information Report and the time of indictment.*

Judgement no. 176/2022 of 1 August 2022 rendered by Cluj Tribunal[29]. The offence was notified by means of a Crime Information Report on 5 March 2021. On 28 April 2021, the accused person sold 1.9 grammes of cannabis and 1.4 grammes of substance containing 3-CMC to the undercover investigator; on 29 September

[25] According to https://www.rejust.ro/juris/235d47d72.
[26] According to https://www.rejust.ro/juris/866gg8d75.
[27] According to https://www.rejust.ro/juris/525d22494.
[28] According to https://www.rejust.ro/juris/eee6dd875.
[29] According to https://www.rejust.ro/juris/23336g8d9.

2021, the accused person sold 9.7 grammes of cannabis to the undercover investigator; on 13 November 2021, the accused person sold 1.5 grammes of substance containing 3-MMC to the undercover investigator. The criminal indictment took place on 15 December 2021. *It is noted that approximately 9 months have passed between the notification of the criminal prosecution bodies by means of a Crime Information Report and the time of indictment.*

Judgement no. 96/2022 of 21 April 2022 rendered by Cluj Tribunal[30]. The offence was notified by means of a Crime Information Report on 29 October 2020. On 28 April 2021, the accused person sold 2 grammes of cannabis to the undercover investigator; on 27 September 2021, the accused person sold 0.8 grammes of substance containing 3-MMC to the undercover investigator. The criminal indictment took place on 22 October 2021. *It is noted that approximately 1 year has passed between the notification of the criminal prosecution bodies by means of a Crime Information Report and the time of indictment.*

The case-law analysis reveals that the longest period of time between the notification by means of a Crime Information Report and the time the person concerned by the Crime Information Report was indicted was of approximately 1 year. Of course, the list referred to above has merely of an illustrative nature and we have no claim as to the certain, universally valid character of our conclusions. In the particular case that constituted the starting point of this study, it is noted that approximately 1 year and 1 month has passed between the notification of the prosecutor by means of a Crime Information Report and the time the court was informed that no criminal charges were brought.

## 4. Conclusions

The practice of criminal case files reveals the fact that the remission by half of the sentence limits prescribed by law, as a result of a Crime Information Report having been filed that led to criminal proceedings brought against the perpetrator constitutes the most important defence, specifically under the assumptions where the commission of the criminal offence is proven beyond any reasonable doubt.

However, the granting of a sentence remission is conditional upon the criminal indictment a person concerned by the Crime Information Report by latest the closing of the criminal proceedings in which the accused - a witness who filed a Crime Information Report - is tried. In such circumstances, one can witness a genuine race against the clock to materialise the Crime Information Report into concrete action, as the bringing of criminal charges, if any, against the person concerned by the Crime Information Report once the decision has become final in the trial of the informant is no longer beneficial to the latter.

Of course, many crime information reports are not materialised by the criminal prosecution bodies, as they are unsuitable for bringing criminal proceedings against the person concerned by the Crime Information Report. Through this study, we sought to analyse the assumption in which, subsequent to the filing of the Crime Information Report, the criminal prosecution bodies carry-out evidentiary activities capable of leading, unquestionably, to ascertaining the commission of the reported offence. For such situations, where there is evidence

[30] According to https://www.rejust.ro/juris/2357g4e73.

showing that the person concerned by the Crime Information Report committed an offence, the criminal indictment (by order for further prosecution) is mandatory.

As to when the criminal prosecution body decides to issue the order for criminal indictment, it must be outlined that at times, for reasons concerned with unveiling the complete truth, the bringing of criminal charges (implicitly meaning the materialisation of the filed Crime Information Report) is deferred until the determination of all circumstances in which the reported offences are committed (participants in the commission of criminal offences, form of guilt, etc.). For such assumptions, in the particular case under analysis which is concerned with the commission of drug offences, the case-law analysis demonstrated that once the clear inculpatory evidence was produced, the indictment took place after a period of maximum 1 year (while a large number of cases was identified in which this period was much shorter).

It therefore follows that the right to defence may be exercised by the accused person by notifying the criminal prosecution bodies by means of a Crime Information Report (a notification method which, at the same time, is an important tool made available to the criminal authorities in their activity concerned with ascertaining the commission of criminal offences and with the criminal proceedings brought against the persons who have committed such offences), while the collection of concrete inculpatory evidence leads to the mandatory issuing of the order for criminal indictment of the person concerned by the Crime Information Report, within a time interval that observes the reasonable period requirement.

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