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ARTIFICIAL INTELLIGENCE IN EUROPEAN LAW

Dan-Alexandru SITARU[*]

Abstract

The emergence of Artificial Intelligence is a topic still fresh and new to law scholars. The aim of the Regulation regarding artificial intelligence (A.I.) is to present a unified and harmonised core legislation, from which the EU Commission and member states to tackle the growing aspects concerning this new sector of economic market, social and administration. As it will be seen in the present article, the EU legislator is still fixed on the existing A.I., known to us until now, governing strict rules as response to some countries in Asia having made use of facial, biometric and location recognition A.I. to control their people and also to award behavioural points and keep score of the "perfect citizen". The draft Regulation is followed by an EU Commissions Directive regarding the liability of all aspects regarding A.I. development, usage and participants. But the core principles, neccesary for such a new matter are laid down in the present Regulation. The document is divided into chapters, addressing mainly the definitions of the main notions used, including one for artificial intelligence system, the types of A.I. that are considered inacceptable and major-risk in respect to fundamental rights and values of the EU, special regulations regarding transparency, registration of A.I. systems and the necessity to have a special European authority, baked by national authorities, in charge of validating the usage of A.I. systems.

Keywords: *Artificial intelligence, European law, proposal, regulation, control, registration.*

1. Introduction

European Parliament and Council have laid down a draft proposition of, to be voted and included in the European Union's (EU) legislation. It resulted in the draft proposition of Regulation of the European Parliament and of the Council harmonised rules on Artificial Intelligence (Artificial Intelligence Act)[1]. The same draft is set to amending certain other EU legislative acts.

In the current political context, the EU Commission is looking to present a unified regulation regarding A.I., having these specific objectives:

1. ensure that AI systems placed on the Union market and used are safe and respect existing law on fundamental rights and Union values;
2. ensure legal certainty to facilitate investment and innovation in AI;
3. enhance governance and effective enforcement of existing law on fundamental rights and safety requirements applicable to AI systems;
4. facilitate the development of a single market for lawful, safe and trustworthy AI applications and prevent market fragmentation.

In light of these objectives, the draft Regulation whites to approach all matters in a balanced manner, but also to tackle some

[*] Lecturer, Ph.D., Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: dan.sitaru@univnt.ro).

[1] For all EU languages see https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021PC0206, consulted on 4.05.2023.

or all the risks that might arise. This must be done as to not hinder any technological development, nor to increase expenditures unreasonably. A juridical and economic framework must be created, adapted to the necessities of modernity, progress and future challenges. This can be achieved by having a strong set of principles, unified in matters of A.I.

The scope of this paper follows the scope of the Regulation, is to present a summary of the provisions introduced by this draft proposal, in order to scrutinise aspects that will definitely have an impact, should it be voted in current form. Aspects like risk management, that does not create unnecessary restrictions for commerce, but also addresses general concerns regarding A.I., those which are justified, are subject to this presentation.

The draft Regulation is not against introducing A.I., but looks to set forth private and safe places for testing, rules for creating and using A.I. and introduction on the market, balanced by a careful risk management. A unified definition is a premiere, and also the forbiddance of certain A.I. practices that are broadly considered dangerous.

In corelation with other EU law, the draft Regulation is drafted in accordance with the EU Charter for Human Rights, bun also consumers, data protection[2], non-discrimination, equality and other core legislation. Romanian legislation is few, but we indicate the forming of the Romanian Committee for Artificial Intelligence[3], by the Ministry of education, under the patronage of the Romanian Government.

At the same time as this draft Regulation, the EU Commission has advanced a draft for a Directive[4], whit purpose to bring under regulation aspects of liability regarding A.I. developing, marketing and use.

2. Presentation of the main provisions of regulations

Regarding the content of the draft Regulation, it's expected to improve and to facilitate good market functioning, by setting forth a unified juridical frame, necessary for creating, developing, marketing and use of A.I. in conformance whit EU policies. It is also worth mentioning that the possibility of a member state to limit these freedoms regarding A.I. shall be limited. A.I. systems are free to be implemented in all sectors of economic, private life and society. Because certain member states have already implemented restrictions, they may remain if their goal is to ensure the safe us of A.I. and general laws and human rights. The free trade principal, at the core of EU law and philosophy, is met by this approach. It also prevents the fragmentation of the single market, by having various legislation for each member state.

[2] Regulation regarding data protection [Regulation (UE) 2016/679] and Directive 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 [Directive (UE) 2016/680].

[3] Order no. 20484/2023 regarding the setting up, organization and function of the Romanian Committee for Artificial Intelligence, issued by the Ministry of Education, Innovation and Digitalisation, published in Official Journal, no. 382 / 4.05.2023, Part I.

[4] See proposal for a Directive of the European Parliament and of the Council on adapting non-contractual civil liability rules to artificial intelligence (AI Liability Directive), https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52022PC0496, consulted on 4.05.2023.

2.1. Scope and definitions (Title I)

The general objectives of the draft Regulation are harmonising the single market with the putting into service and use of A.I., to enjoin certain practices considered dangerous, to assure transparency for A.I. created to interact with people and overall to monitor the market for this new merchandise.

The provisions of the draft Regulation shall apply non discriminatory to all A.I. providers, regardless of them being from EU or tertiary. Given the nature of A.I., all systems that are introduces to EU must obey the principles of the Regulation and EU law. However, military developed special A.I. is excluded from the domain of the draft Regulation, being subject only to foreign policies of the EU and common security[5].

The different terms used by the draft Regulation are given a definition in art. 3. The most important definition is the one given to the notion of "artificial intelligence system" (A.I. system) meaning software that is developed with one or more of the techniques and approaches listed in the Regulation and can, for a given set of human-defined objectives, generate outputs such as content, predictions, recommendations, or decisions influencing the environments they interact with. The approaches referred to are[6]:

(a) Machine learning approaches, including supervised, unsupervised and reinforcement learning, using a wide variety of methods including deep learning;

(b) Logic- and knowledge-based approaches, including knowledge representation, inductive (logic) programming, knowledge bases, inference and deductive engines, (symbolic) reasoning and expert systems;

(c)Statistical approaches, Bayesian estimation, search and optimization methods.

A.I. is basically a software, that should follow the rules of intellectual property. Thus, the draft Regulation gives definitions for "market introduction", meaning the fist release of a system on the UE market, "making available on the market" meaning any supply of an A.I. system for distribution or use on the Union market in the course of a commercial activity, whether in return for payment or free of charge, and "putting into service" means the supply of an A.I. system for first use directly to the user or for own use on the Union market for its intended purpose. Alongside it defines "reasonably foreseeable misuse" meaning the use of an A.I. system in a way that is not in accordance with its intended purpose, but which may result from reasonably foreseeable human behaviour or interaction with other systems.

2.2. Forbidden artificial intelligence practices (Title II)

This title lists practices that are considered dangerous. The draft Regulation ranks them into three categories, based on risk, resulting in inacceptable risks, high risk and low risk A.I. products.

Deriving from this, unacceptable risks are considered forbidden, due tot heir potential harm to EU values. All practices that may, in any way, influence people without them being aware or that exploit vulnerabilities of specific categories of people, in order to materially distort their behaviour in a manner that is likely to cause them or another person psychological or physical harm, are listed in this category. Also, any social behaviour evaluation, made by private or public entities and using

[5] Foreign policy and security are regulated under Title V of the Treaty on the European Union (TEU).
[6] See Annex I of Regulation regarding artificial intelligence (A.I.), as mentioned in footnote 1.

biometric identification in real time and in public places, even for the purpose of law enforcement, are forbidden, with only specific exceptions strictly regulated. The notion of "real-time remote biometric identification system" is defined in the previous title and means a remote biometric identification system whereby the capturing of biometric data, the comparison and the identification all occur without a significant delay.

Not last, A.I. cannot be used to evaluate a person's credibility, over a specific time frame, based on behaviour, personal preferences or known personality statistics, known or suggested, nor to create scores of one's demeanour.

In respect to where an adult person might have a choice, to use or benefit or allow to be used regarding him/her any aspect set forth by A.I., these practices are forbidden only if they fall under the before mentioned examples and are not regulated by other EU law, such as data privacy.

2.3. Major-risk A.I. systems (Title III)

The second category, as mentioned before, of risk evaluated A.I. are major/high risk products/software. They are considered such due to their big potential risk to the safety, health or rights of natural persons. Thus, they are permitted to be used only after careful evaluation of conformity with the laws and values of UE. This evaluation is based not only on the intended scope of the A.I. system, but also on the function and the means by which these are used.

The draft Regulation splits into two categories the major risk A.I.:

- A.I. destined to be used as components of products, subject to conformity verification by third parties;
- other A.I. autonomy programs that may have implications in fundamental rights[7], such as biometric identification, operation of critical infrastructure, education and training, employment, private life, freedom, law enforcement, public administration etc.

In order to implement and manage these risks the draft Regulation sets forth a system for documenting and administer them. This will be a continuous process, at the fist introduction to market and spanned over the entire usage of an A.I. systems, including verification regarding known and possible associated risks derived from miss usage, growing data collections and adaptability of the A.I. High-risk A.I. systems shall be tested for the purposes of identifying the most appropriate risk management measures. Testing shall ensure that major-risk AI systems perform consistently for their intended purpose and they are in compliance with the requirements set out in the Regulation. For this, all major-risk A.I. must have technical documentation, in which to prove that the program abides by the necessary requirements and norms, also facilitating public organism set for verification all aspects needed to evaluate them at all time. These must be placed in records that must pe kept for specific period of time. Not last, all A.I. must be supervised by humas during creation and implementation, including cybernetic security.

These are the fist of many distinct obligations that the draft Regulation ageists to providers. Chapter 3 sets these responsibilities, which expand to importers, distributors and all traders that deal in A.I. One of the main obligations of providers is to ensure that A.I. functions in law abiding, that they provide usage manual to users and that they obtain EU conformity certificates

[7] See Annex III of Regulation regarding artificial intelligence (A.I.), as mentioned in footnote 1.

(CE conformity). Another obligation is to monitor ant take immediate measures, should the A.I. not perform in allowed parameters.

Creators of A.I. system special ensure that their product is ready to be released to market and that it pre-obtained authorisation and necessary conformity certificates. If a provider or creator does not have an official agent in EU or merchandises the product without a designated importer, it must name an authorised agent in EU. Agents or importers will be held liable for obtaining and holding conformity certificates, issuing of technical documentations and usage instructions for consumers. Collaboration with public authorities is mandatory for all.

Users of A.I. also have obligations, to read and abide by the user instruction manual or rules provided by provider, to not bring or render any harm to other users and to not use it abusively or in such manner as to restrict right or liberties. Users of an AI system that generates or manipulates image, audio or video content that appreciably resembles existing persons, objects, places or other entities or events and would falsely appear to a person to be authentic or truthful (‘deep fake’), shall disclose that the content has been artificially generated or manipulated.

The same title, in chapter 4 institutes how and when competent public authorities must be informed in order to evaluate the conformity of A.I. systems. In continuation, in chapter 5 a detailed evaluation procedure can be found, to be followed by all A.I. systems catalogued as high-risk. The approach tens to reduce the work load on both the parties involved and the public authorities. However, for A.I. destined to be used as components of products shall be verified before and after release to ensure their conformity with special laws from their area of implementation and the provisions of the draft Regulation.

After verifications had been concluded and a conformity certificate is to be released, the providers must register their A.I. systems into a common data base, managed by the EU Commission. It’s purpose is to ensure the transparency and to facilitate on-going verifications by authorities. Any modifications, transformations, updates etc. to an A.I. must be reflected in this data-base.

2.4. Transparency and innovation (Titles IV and V)

Transparency is a very important part of the rules that should stop all derail of any A.I. system. As innovation develops, because of the sensitive aspects of the matter, transparency and constant control of the systems must be at the highest priority. Some risks that some A.I. incur may degenerate in manipulation. Transparency obligations shall apply foreground to systems interacting with people, those that are used to detect emotions and/or may render certain associations with social categories or use biometrical data and those that create fake and deepfake information. Regarding the last, as mentioned before, it is considered a violation of rights as may lead to the obligation to disclose that the info was fake.

Transparency means that whenever a user interacts with an A.I. it must be made aware of this situation and, if any aspect their behaviour is recognised, analysed and stored, by automatic means, it must be under the same awareness. All these allow a possible victim of manipulation by an A.I. to take a step back and reassess.

Interesting to see is that the draft Regulation managed to expresses necessary balance needed to exist between innovation and human rights. Innovation is a part of human nature and the scope of the draft Regulation is to provide a safe and legal manner in which to be expressed. So the

draft Regulation is in favour of innovation, adapted to the future needs and resistant to possible deviations. For this purpose, member states are encouraged to develop safe spaces for testing and verifying A.I. Also, because, the present Regulation cannot include all aspects, national competent authorities should set up regulatory sandboxes and sets a basic framework in terms of governance, supervision and liability.

2.5. Governance, implementation and code of conducts (Titles VI, VII, VIII and IX)

In respect to governance of the entire aspects regarding A.I., as regulated by the draft Regulation, proposals are made towards both European and national levels. At EU level, there is the proposition to constitute a European Committee for A.I. governing, having participants from all member states. This committee should facilitate a harmonised introduction and verification of all A.I., contributing to the on-going cooperation between the national A.I. surveillance authorities and the EU Commission. Separately, at national level, the draft Regulation suggests that all member stats create national public authorities, entrusted to authorise, survey and implement the directions set by present Regulation and other special laws in topic.

Having mentioned before that a common data base is required, in order to keep track of major-risk A.I. systems at European level, because of their potential implications regarding fundamental rights, this will be created by the EU Commission and shall be supplied with data from providers of A.I. systems, which are required to register their products before releasing them onto market, or in any way making them usable. This data base will be similar and have the same purpose as, for example, the trade registry of companies.

Creating such a data base is not the only step, its role is to assure transparency and to aid the public authorities in their on-going verification and release of conformity certificates. Providers must feed information regarding all aspects and allow to be examined by public authorities, after the release of a product or system. Investigating potential incidents and dysfunctionalities are o core component. The competent authorities, fist the national ones, must control the market and investigate the obedience of the participants obligations and their conformity with present Regulation and other EU and national laws. This mainly refers to major-risk A.I. systems, but will include the evidence of all systems.

In other words, the draft regulation specifically mentions that public authorities should be granted the funds and the tools necessary for them to be able to intervene in the event that a system generates unforeseen risks and/or damages. A quick and prompt response is highly neccesary.

All this does not affect the existing system and the distribution of powers for the ex post application of fundamental rights obligations in the member states. Where necessary for the performance of their mandate, the existing supervisory and compliance authorities shall also have the power to request and access any documentation kept in accordance with this Regulation and, if necessary, to require market surveillance authorities to organize high-risk AI system testing by technical means.

As it can be observed, the draft Regulation implements different sets of codes of conduct for the three categories of A.I. systems, ranked by risk. If regarding major-risk category the dispositions are mandatory, it is also firmly suggested that even low risk providers to abide by the same

principles. Although it is presumed that their impact is minimal, we are dealing with new and in permanent developing systems, making need for awareness from both sides, the main actors in the market and the public authorities.

4. Conclusions

The importance of the A.I. sector is immense, the importance of having a unified law is greater and the importance of regulating, at least the main aspects that concern the entire EU, is the up most importance. The present paper did not include the sister legal act, the directive regarding liability deriving from A.I. implementation and usage, because of its size and complexity.

De lege ferenda one might suggest that an even more detailed approach should be made, as we are sure that due to the inevitable development of this sector of technology, all regulations shall be extended from the current one.

The impact cannot be denied, any attempt to banning the use of A.I. will be a fail attempt form the very beginning, as showed by the case of Italy regarding the famous Chat GPT. The solution is to acknowledge, monitor, register, control and educate people to this new domain which, even more than the invention of the calculus machine, alone brings a new industrial revolution.

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- Treaty on the European Union (TEU);
- Regulation (UE) 2016/679 regarding data protection;
- Directive (UE) 2016/680 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data.

VOICE OF THE CHILD IN 1980 HAGUE RETURN CASES

Anca Magda VOICULESCU*

Abstract

The voice of the child is a broad and largely discussed concept relevant for family life, and referred to both in different juridical instruments belonging to national and international areas, and also doctrinal opinions. The purpose of the article is to analyse the voice of the child in the particular situation of international child abduction, in the framework of the ever-increasing number of transnational families on the move, within and outside the European Union. As the general principle stipulates that an abducted child shall promptly be returned to the state of habitual residence, children's welfare is to be considered only within the exceptions to the return mechanism. One of these exceptions is represented by the child's objection to being returned, which nevertheless remains highly controversial: if we accept it is generally in children's best interests to be returned, then how can children's rights to express their views be accommodated? Hence, the objectives of the present study are to identify the legal context in which the child's opinion can be expressed and valued in the context of different juridical instruments, with a subsequent focus on the situation of international child abduction (procedural and substantial). Furthermore, the paper will examine the extent to which judicial assessments of child's views in child abduction procedures are conducted in a way that corresponds with a children's rights-based approach, acknowledging their autonomy and right to be heard.

Keywords: *international abduction, prompt return, voice of the child, children's rights, family life*.

1. Introduction

There is a general consensus that children should have a voice in all litigations involving measures concerning them (including international abduction disputes, ever more frequent nowadays).

The issue of children objecting to their return to the state of habitual residence in proceedings under 1980 Hague Convention[1] is nevertheless particularly intense and disputed in the area of family justice.

The subject has great importance, as this is an area where "there are as many practices on how to hear the voice of the child as there are legal cultures and

* Ph.D., Judge at Bucharest Tribunal, seconded at the Ministry of Justice, Directorate of International Law and Judicial Cooperation; trainer in family law at Romanian National Institute of Magistracy; Romanian designated judge in International Network of Hague Judges for 1980 Hague Convention on the Civil Aspects of International Child Abduction; teaching associate in family law at the Faculty of Law within the Academy of Economic Studies (e-mail: ancamagda.voiculescu@gmail.com).

[1] Intergovernmental agreement concluded at The Hague on October 25, 1980, during the 14th Session of the Hague Conference on Private International Law, entered into force on December 1, 1983.

traditions"[2] and where the HCCH[3] has not yet published a Guide to Good Practice.

Moreover, an order of return to the state of habitual residence, although applying the prompt return principle, would directly disregard the child's expressed voice.

There is therefore the question of how the prompt return principle and the exception regarding the child's refusal to return can be accommodated in practice, in the wider context of the importance attached to the child's voice outside the framework of the 1980 Hague Convention.

To reach this aim, the study will concentrate in identifying means in which the child's opinion can be expressed and valued in the context of different juridical instruments.

Having established the general outset, the analysis will further focus on particularities of the child's voice in case of international child abductions, given the tension already pointed-out between the principle of prompt return and the exception related to the child's objection.

Doctrinal opinions and case-law will also be identified and presented, with the necessary note that preponderence goes to studies from abroad, as in Romanian juridical literature the subject has scarcely been approached.

2. Content

2.1. Legal context

Although the subject of the article considers the child's voice in the special situation of international abductions, identifying a wider framework is useful not only for a broader perspective, but also due to the interconnection of different juridical instruments.

These legal instruments may be divided in three main categories, belonging to the area of international private law, EU law, respectively national law (only the most relevant will be mentioned, in a chronological order).

2.1.1. Private international law

The **Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction** (to which Romania is a member state[4]) is one of the most important juridical instruments of private international law, which seeks to protect children from the harmful effects of wrongful removal and/or retention across international boundaries by providing a procedure to bring about their prompt return in the state of origin.

The 1980 Hague Convention indirectly empowers the voice of the child by means of Article 13 (2), consacrating one of the exceptions to the above-mentione principle of prompt return, namely the situation when

[2] Philippe Lortie, Frédéric Breger, *Foreword*, in The Judges' Newsletter on International Child Protection - Vol. XXII / Summer - Fall 2018, available online at the following link: https://assets.hcch.net/docs/a8621431-c92c-4d01-a73cacdb38a7fde5.pdf, last accession on 04.02.2023, 12,04, pp. 3-5, p. 3, last accession on 21.03.2023, 6:25 p.m.

[3] The Hague Conference on Private International Law is an intergovernmental organisation the mandate of which is "the progressive unification of the rules of private international law" (Art. 1 of the Statute). To this end, HCCH elaborated different Guides to Good Practice, Explanatory Reports, Practical Handbooks or Brochures, in order to facilitate the application of different juridical instruments belonging to the area of private international law.

[4] Law no. 100/1992 for Romania's accession to 1980 Hague Convention on the Civil Aspects of International Child Abduction, published in the Official Gazette of Romania no. 243/30.09.1992.

the child objects and has attained the appropriate *age* and *degree of maturity* [5].

Another significant private international law instrument is the **1989 Convention on the Rights of the Child**[6] (Romania is a member state[7]), which directly underlines the importance of the voice of the child, stating the principle that children have the *right* to express their views in procedures affecting them, either directly or through a representative/an appropriate body, and their opinions are to be given due weight in accordance with the age and maturity [8].

Convention of 19 October 1996 on parental responsibility and measures for the protection of children[9], adopted later in the framework of HCCH (and to which Romania is also a member state[10]), aimed to establish common provisions taking into account the previous United Nations Convention on the Rights of the Child.

In particular, this convention values indirectly the voice of the child, providing grounds for non-recognition of judicial or administrative measures taken without the child having been provided the opportunity to be heard.

None of these conventions deals with *substantial and procedural measures related to hearing children*, which were thus left for the contracting states to establish.

2.1.2. EU law

Council Regulation (EC) no. 2201/2003 of 27 November 2003[11]**,** in preamble considerations 19 and 20, respectively Articles 11, 23, 41 and 42 considered the voice of the child by incorporating the principle stipulated in Article 12 of the Convention on the Rights of the Child, with a similar reference regarding the age or degree of maturity [12].

Recognising that hearing of the child plays an important role in the application of the regulation, consideration 19 indicates that this instrument is not intended to modify national procedures applicable to this respect.

[5] According to Article 13 (2): "The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views".

[6] Adopted by United Nations General Assembly, signed in New York on November 20, 1989, entered into force on September 2nd, 1990.

[7] Law no. 18/1990 for the ratification of the Convention on the Rights of the Child was published in the Official Gazette of Romania no. 109/28.09.1990 and republished in the Official Gazette of Romania no. 314/13.06.2001.

[8] According to Article 12: "1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law".

[9] Concluded at The Hague on 19 October 1996 and entered into force on January 1st, 2002.

[10] Law no. 361/2007 for the ratification of the Convention Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, published in the Official Gazette of Romania no. 895/28.12.2007.

[11] Council Regulation (EC) no. 2201/2003 concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, repealing Regulation (EC) no. 1347/2000, published in the Official Journal L 338/1, 23 December 2003.

[12] Article 11(2) applicable in abduction cases: "it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regarded his or her age or degree of maturity".

The present **Council Regulation (EU) 2019/1111**[13] on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction dedicates Article 21 to the right of the child to express his or her views, with the well-known mention by now related to age and degree of maturity[14].

Again, it was left to national law and procedure to determine subsequent aspects related to hearing of the child.

2.1.3. National law

It results that, in the absence of a uniform reglementation in private international law or EU law, domestic legislations play an important role in hearing children, both substantively and procedurally[15].

In Romanian law, references to the voice of the child appear in the general framework provided by **Romanian Civil Code**[16].

Article 264 stipulates: "(1) In administrative or judicial procedures concerning her/him, the *hearing of the child who has reached the age of 10 is mandatory*. However, *the child who has not reached the age of 10 may also be heard, if the competent authority considers that this is necessary* for the resolution of the case. (2) The right to be heard implies the possibility of the child to ask for and receive any information, according to her/his age, to express her/his opinion and to be informed about the consequences that this may have, if respected, such as and on the consequences of any decision that concerns him. (3) *Any child may ask to be heard*, according to provisions of para. (1) and (2). The *rejection of the application by the competent authority must be motivated*. (4) The opinions of the heard child will be taken into account in relation to his *age and degree of maturity*"[17]. (our underline)

Also, the special provisions of Article 10 from **Law no. 369/2004** on the enforcement of the Hague Convention[18] take over the general arrangements for hearing minors for the special situation of international child abductions.

Romanian legislation therefore complies with the general requirements previously established in the sense of granting the possibility for the minor to

[13] Council Regulation (EU) 2019/1111 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), published in the Official Journal L 178/1, 02 July 2019.

[14] Article 21 of Council Regulation (EU) 2019/1111: "1. When exercising their jurisdiction under Section 2 of this Chapter, the courts of the Member States shall, in accordance with national law and procedure, provide the child who is capable of forming his or her own views with a genuine and effective opportunity to express his or her views, either directly, or through a representative or an appropriate body. 2. Where the court, in accordance with national law and procedure, gives a child an opportunity to express his or her views in accordance with this Article, the court shall give due weight to the views of the child in accordance with his or her age and maturity."

[15] For an extensive presentation of national laws in hearing children in EU and states members to 1980 Hague Convention, see The Judges' Newsletter on International Child Protection - Vol. VI / Autumn 2003, available online at the following link: https://assets.hcch.net/docs/8e10ad94-9f28-41e0-9233-5f79cf99af75.pdf, last accession on 26.03.2023, 10:57 a.m.

[16] Law no. 287/2009 concerning Romanian Civil Code, published in the Official Gazette of Romania no. 511/24.07.2009, subsequently modified and republished, in force from 01.10.2011.

[17] Similar provisions are found in the Civil Code of Quebec (opportunity for the child to be heard if age and power of discernment allow it).

[18] Law no. 369/2004 on the application of 1980 Hague Convention on the Civil Aspects of International Child Abduction, published in the Official Gazette of Romania no. 888/29.09.2004 and republished successively, last time in the Official Gazette of Romania no. 144/21.02.2023.

express an opinion, which will be evaluated in relation to the age and degree of maturity.

In addition, the child's age of 10 is indicated as a benchmark for the mandatory hearing, at the same time being left to the judge the possibility to hear children even under this age, if appreciated as necessary.

No other reference is made to practical aspects related to hearing (the place, the time, who takes part, recording, etc.), which gives rise to various practices[19].

2.2. Juridical consequences of the child's view depending on legal context

We will further on briefly examine the concrete ways in which disregard of the child's voice operates in the context of the different above-mentioned international instruments.

All the examples to follow represent but concrete manifestations of the principle that enshrines the child's right to be heard, and the sanctions accompanying its breach fully demonstrates the importance attached.

Under Article 23 (2) (b) of the 1996 Convention, **recognition of measures of protection for children may be refused** "if the measure was taken, except in a case of urgency, in the context of a judicial or administrative proceeding, *without the child having been provided the opportunity to be heard*, in violation of fundamental principles of procedure of the requested State". (our underline)

There are also **non-recognition grounds in parental responsibility** cases, linked to children's hearings in an unappropriated way, as stipulated in Article 39 (2) of Regulation 1111/2019[20]: "The recognition of a decision in matters of parental responsibility may be refused if it was given *without the child who is capable of forming his or her own views having been given an opportunity to express his or her views* in accordance with Article 21". (our underline)

Article 13 (2) of the 1980 Hague Convention states that a court hearing an abduction application may **refuse to order return** when abducted children object to being returned and have attained an age and degree of maturity at which it is appropriate to take their views into account.

There is a divergence in the approach of family law professionals towards the way this article should be interpreted, "raging from a minority who thought the exception was overused and abused, to the majority who felt it was appropriate to listen to the child's views in the context of the exception"[21].

[19] The child is heard either in the courtroom, or in council chambers, or sometimes in specially arranged rooms (if they exist). In addition to the judge, the clerk, the prosecutor, the psychologist may participate in the hearing. Time of hearing may be in court session day or another day (there are different practices, taking into account the timetable of the child and the workload of the court). Related to proceedings stage when the child is heard (at the beginning of the proceedings or after all other evidence has been taken), in practice, hearing is generally at the end, so as to be able to verify the claims of the parties and the information provided by the evidence. Hearing minutes (with or without the hearing recording) are drafted and it is recommended to be attached to the case file only at the end of the proceedings, when the enforceable decision is ruled out (so that the child should be protected from parental pressure during the process).

[20] "The recognition of a decision in matters of parental responsibility may be refused if it was given without the child who is capable of forming his or her own views having been given an opportunity to express his or her views in accordance with Article 21, except where (…)".

[21] Nicola Taylor, Marylin Freeman, *Outcomes for Objecting Children under the 1980 Convention*, in The Judges' Newsletter on International Child Protection - Vol. XXII / Summer - Fall 2018, available online at the following link: https://assets.hcch.net/docs/a8621431-c92c-4d01-a73cacdb38a7fde5.pdf, last accession 21.03.2023, 6:53 p.m., pp. 8-13, p. 11.

In the first orientation, the weight attached to the child's views is balanced against the objectives of the Convention.

Indeed, the objection of the child to being returned to the state of origin is in conflict with the principle of prompt return stipulated by Article 1 of the 1980 Hague Convention, and there is a fear that it might indirectly decide on issues foreign to international abductions (parental rights or domicile of the child).

Followers of this orientation give precedence *a priori* to the prompt return principle, arguing that the "return judge has no reason to hear the child. It is only if the judge decides not to order the return of the child, thus becoming competent on the organization of the life of the child (…) proceed with hearing the child"[22].

In the second orientation, application of the defence provided by Article 13 (2) is viewed from a children's rights perspective. According to this opinon, the principle of prompt return may be countered, under certain conditions, by capitalizing on the child's opinion.

Supporters of the second approach also argue this exception was conceived as "an escape route for mature adolescents", given that there are children below 16 years (age limit for application of the 1980 Hague Convention) who "may attain an age and degree of maturity at which it is appropriate to take account of their opinions"[23].

Statistics show that, in practice, pleading application of the child's defence has not reached high positive scores and also that results present considerable regional variations[24].

The low incidence of Article 13 (2) should nevertheless be analyzed not only in the context of divergent juridical opinions, but also related to practical aspects.

Researchs revealed that approximately 78% of international kidnapping cases involve children under 10 years old[25], whose opinion generally is not taken into account for reasons related to age and degree of maturity (to be discussed later).

2.3. Special focus on the 1980 Hague Convention

We make the prior specification that, in our opinion, children should be given the opportunity to be heard in *any* return proceedings under the 1980 Convention, and not only in proceedings limited to a defence under Article 13 (2).

1980 Hague Convention indeed makes reference to the opinion of the child only when addressing the exception based on the child's objection.

[22] Marie-Caroline Celeyron-Bouillot, *The voice of the child in Hague Proceedings: a French perspective*, in The Judges' Newsletter on International Child Protection - Vol. VI / Autumn 2003, available online at the following link: https://assets.hcch.net/docs/8e10ad94-9f28-41e0-9233-5f79cf99af75.pdf, last accession on 24.03.2023, 5:27 p.m., pp. 18-20, p. 19-20.

[23] Philippe Lortie, Frédéric Breger, *op. cit.*, p. 4.

[24] Nicola Taylor, Marylin Freeman, *op. cit.*, p. 13: "There were some interesting regional differences inasmuch as 31% of all refusals in Latin American and Caribbean States were based upon the child's objections as against 13% in States governed by the revised Brussels II Regulation (...). So far as individual States were concerned, Mexico had the highest proportion (45%, 5 out 11 refusals) of refusals based solely or in part upon the child's objections ground. Germany had the second highest number (4) but this amounted to 19% of all refusals. Many States had no refusals based either solely or in part on this ground."

[25] Bennett A.O., *A better place for the child in return proceedings under the 1980 Convention – A perspective from Australia*, in The Judges' Newsletter on International Child Protection - Vol. XXII / Summer - Fall 2018, available online at the following link: https://assets.hcch.net/docs/a8621431-c92c-4d01-a73c-acdb38a7fde5.pdf, last accession on 25.03.2023, 3:46 p.m., pp. 20-24, p. 20.

Nevertheless, Article 26 of Council Regulation (EU) 2019/1111 stipuates that the child has the right to express her/his opinion in return proceedings according to the already mentioned Article 21, without any limitations related to the child's objection defence[26] (argumentation applicable in case of abductions from one MS to another MS).

As for abductions involving non-EU states, we appreciate that the principle enshrined in Article 12 of the Convention on the Rights of the Child applies also in the framework of 1980 Hague Convention, noting the case-law[27] and the Conclusions and Recommendations of the Hague Conference[28], according to which there is no conflict between these two conventions.

Finally, it would undermine the importance of the voice of the child to restrict the incidence of the child's opinion to particular situations, rather than recognizing a wider right to express his or her views.

2.3.1. Procedural exception or substantive defense

There is no doubt in our appreciation on the substantial nature of the defence related to the child's objection.

If it were to consider the procedural option, it would clearly diminish the importance and even the incidence of this defence, as it would totally depend on procedural national legislations.

2.3.2. Procedural evidence or substantial right of the child

In many countries, there is a discussion related to juridical nature of the voice of the child, starting from the fact that the child in question generally is not made a party to the proceedings[29].

If regarded as procedural evidence, it will be connected to contradictory procedural principles, and this necessarily leads to persons allowed to participate in the hearing[30]. In some states following this orientation, the child is heard as a witness[31].

[26] Article 96 of Council Regulation (EU) 2019/1111 regulates the relation with the 1980 Hague Convention as follows: "the provisions of the 1980 Hague Convention shall continue to apply as complemented by the provisions of Chapters III and VI of this Regulation".

[27] Supreme Court of Canada, case *Balev*, decision from 20.04.2018, case no. 2018 SCC 16, available online at the following link: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/17064/index.do, last accession on 25.04.2023, 1:08 p.m.

[28] See Philippe Lortie, Frédéric Breger, *op. cit.*, p. 4.

[29] In exceptional circumstances, children were granted the permission to join the proceedings as a party and separate legal representation. For a presentation of Englihs case-law in this respect, see Nicholas Wall, *The voice of the child in Hague Proceedings: a English perspective*, in The Judges' Newsletter on International Child Protection - Vol. VI / Autumn 2003, available online at the following link: https://assets.hcch.net/docs/8e10ad94-9f28-41e0-9233-5f79cf99af75.pdf, last accession on 24.03.2023, 5:38 p.m., pp. 20-23.

[30] E.g., in Spain, in children's hearings in the context of international abductions, the Public Prosecutor should always be present (Francisco Javier Forcada Miranda, *The voice of the child from a continental-Spanish perspective*, in The Judges' Newsletter on International Child Protection - Vol. XXIII / Winter 2018 – Spring 2019, available online at the following link: https://assets.hcch.net/docs/dff2cb7c-ed66-4408-a892-2af15c664d58.pdf, pp. 25-28, p. 27, last accession 21.03.2023, 6:53 p.m.).

[31] In Quebec, the child may be heard as a witness, and it is up to the judge to decide the way of hearing (with/without presence of the parents and lawyers, in chambers or in the courtroom) – for a detailed presentation, see Marie-Christine Laberge, *The Child's Voice in Quebec*, in The Judges' Newsletter on International Child Protection - Vol. VI / Autumn 2003, available online at the following link: https://assets.hcch.net/docs/8e10ad94-9f28-41e0-9233-5f79cf99af75.pdf, last accession on 24.03.2023, 6:29 p.m., pp. 27-31, p. 28-29.

If conceived as substantial right of the child, contradictoriality does not apply and judicial proceedings will be aimed at satisfying a child's right.

Along with other opinions expressed in juridical literature, we also appreciate that hearing children is not for gathering evidence in order to reach a decision on the merits, but rather to give effect to their substantial right to be involved in decisions affecting them. Further on, their opinion is to be evaluated in the context of the overall evidence taken in the case.

In this context, we consider important the mention that, even hearings of children are not evidence, matters arising from such hearings cannot simply be banished for procedural reasons, or otherwise there would be no point in hearing children. Therefore, such aspects should subsequently be checked upon in the context of the evidence taken in the case.

2.3.3. Judicial or extrajudicial hearing of the child

Practices of states related to hearing of children vary considerably depending on domestic laws and procedures.

Judicial interviews with children should the first option[32], as face to face interaction is beneficial both for the judge, and also for the children[33].

The judge may personally observe the attitude and body language of the child which, beyond words, may often reveal more about genuine wishes, pessures or influences. Direct hearing also forms an impression of the child and allows the judge to verify whether child's opinion consists (or not) to views advanced by the parents.

Although preferable, judicial hearings are not by far the only option, and there are many jurisdictions where hearing children involves independent experts/intermediaries between the child and the court[34].

In general, this approach is justified arguing that what the child tells the judge in private cannot be tested in court by crossexamination[35] and also that an expert hearing the child has better training and experience and may be called as a witness in court[36].

A common line is clear: whether a judge, independent expert or any other person, the interviewer the child should have appropriate training.

2.3.4. Criteria to be fulfilled

As juridical literature articulated, criteria to be fulfilled for incidence of the

[32] E.g., such is the case of Romania, Italy, Greece, Spain, Germany, United States.

[33] "The children (…) interviewed were pleased to be able to talk to the judge without interruption and to use their own voices rather than having someone relay what they had said" (Nicola Taylor, Marylin Freeman, *Outcomes for Objecting Children under the 1980 Convention, op. cit.*, p. 11).

[34] According to Francisco Javier Forcada Miranda, *op. cit.*, p. 25: "17 different types of specialists were identified". Such is the case in Canada, Japan, United Kingdom.

[35] E.g., in England and Wales, where the child is interviewed by a reporting officer from the Children and Families Court Advisory and Support Service. For more details, see Nicholas Wall, *op.cit.*, p. 20: "After the interview, the CAFCASS officer reports orally to the court on the views of the child, and gives an assessment of the child's degree of maturity. The officer is then crossexamined by the parties' lawyers".

[36] Robin Moglove Diamond, *The voice of the Child in Hague Proceedings: a Canadian Perspective from Manitoba (a common law province) and from Québec (a civil law province). Ascertaining a Child's Voice in Inter-Jurisdictional Cases of Parental Abduction*, in The Judges' Newsletter on International Child Protection - Vol. VI / Autumn 2003, available online at the following link: https://assets.hcch.net/docs/8e10ad94-9f28-41e0-9233-5f79cf99af75.pdf, last accession on 24.03.2023, 6:17 p.m., pp. 23-26, p. 24.

child's objection defence present as a "two-stage test"[37].

First, there is a "gateway stage" (an examination of whether, as a matter of fact, the child objects to being returned).

Secondly, there is a "discretion stage", where the court must consider not only the objection to being returned, but a much wider range of considerations (e.g., whether the objection of the child is authentic - or eventually only the product of influence by the abducting parent; whether the objection coincides with - or is at odds with the child's genuine welfare).

Objection of the child

Whether a child objects is a question of fact, and it is to be verified *in concreto* in each case; however, this aspect raises some practical problems.

Unless the abducting parent invokes Article 13 (2), it is unlikely that the court will find out that the minor actually opposes the return.

The only possible way for the court to be aware of the child's objection in this situation is when the child has reached the age for mandatory hearing (and the court shares the opinion that hearing children is a right of the child in all return cases, and not only when the child's objection defence is raised).

This of course depends on national legislations, and there is still the problem that not all domestic legislations stipulate a minimum age of hearing.[38]

Age and degree of maturity

As already pointed out, Article 13 (2) of the 1980 Convention is rather a general provision, as there is no minimum age, nor any guidelines for assessing the child's maturity indicated.

The Explanatory Report on the 1980 Hague Child Abduction Convention[39] explains in para. 30 that "all efforts to agree on a minimum age at which the views of the child could be taken into account failed, since all the ages suggested seemed artificial, even arbitrary. It seemed best to leave the application of this clause to the discretion of the competent authorities".

The age and degree of maturity leave therefore a great deal of discretion for many children not to be heard, as it depends not only on domestic legislations, but also on how a particular judge perceives age and maturity.

That should however not result in *a priori* decisions not to hear the child, particularly as children often have a point of view which is quite distinct from their parents' opinions. In addition, they are the first who have to accomodate with the decision of the court, whether they like it or not.

In this context, it is beneficial that a number of legislations provide for specific

[37] Justice MacDonald, *What is the Evidential Status on the Child's Voice,* in The Judges' Newsletter on International Child Protection - Vol. XXIII / Winter 2018 – Spring 2019, available online at the following link: https://assets.hcch.net/docs/dff2cb7c-ed66-4408-a892-2af15c664d58.pdf, pp. 14-16, p. 14, last accession on 04.02.2023, 1:41 p.m.

[38] In the EU, the law of 15 jurisdictions does not provide for a minimum age (see Sara Lembrechts, *Hearing abducted children in Court – A comparative point of view from three countries (Belgium, France & the Netherlands),* in The Judges' Newsletter on International Child Protection - Vol. XXII / Summer – Fall 2018, available online at the following link: https://assets.hcch.net/docs/8e10ad94-9f28-41e0-9233-5f79cf99af75.pdf, last accession on 25.03.2023, 6:26 p.m., pp. 28-31, p. 29).

[39] Drafted by Eliza Pérez-Vera, Madrid, April 1981, published in 1982 and available online at the following link: https://www.hcch.net/en/publications-and studies/publications2/explanatory-reports, last accession on 24.03.2023, 3:06 p.m.

minimum ages, when the child is *presumed* to have reached sufficient maturity[40], and from this point further the judge is under the *obligation* to hear the child.

Under these legal limits of age, nevertheless, hearing a child is an option within the *margin of appreciation* of the judge[41].

As most children are abducted when they are quite young (in Romanian experience, the age is no more than 8-9 years), we consider that in abduction cases children should be heard under the age generally accepted in domestic litigations, or the exception articulated by Article 13 (2) is left without any practical function[42].

This obviously does not imply that the opinion of the child is necessarily validated in court, unless maturity is proved into the hearing (the child thus is given the possibility to express and argue an opinion).

In other words, biological age should not be considered as a criterion to decide whether or not the child should be heard. It is more in accordance with the right of the child to be allowed to express an opinion, which will later be evaluated in terms of maturity.

On the other hand, in absence of legal criteria, an inquiry in the case – law concudes that maturity is generally assessed based on ability speakings, behaviour, consistency of arguments, spontaneity, ability to understand the current situation.

In comes therefore as obvious that determining if a child should be heard (generally related to age) and what weight should be given to the child's views (generally related to maturity) is an extremely difficult and challenging task for judges/others interviewing the children, and therefore specialization is necessary.

Margin of appreciation

Although it might appear quite clear, fulfillment of the above-presented criteria does not imply that the child's opinion, once heard, will be validated in court.

This simply creates (again) another stage of discretion for the court determining the matter, related this time to the assessment of the child's objection as well-founded or not.

In other words, even if children are found to object, and also of age and degree of maturity when it is appropriate to take account of their views, they may still be returned to the state of habitual residence against their wishes[43].

In the absence of (even indicative) criteria provided by the 1980 Hague Convention and, in most cases, also by national legislation[44], the key to evaluation of the child's opinion is generally established related to common sense standards, as the ability to understand and evaluate consequences, the ability to express opinions in a reasonable and independent manner,

[40] E.g., 12 years in Spain and Italy, 10 years in Romania, 14 years in the Netherlands.

[41] E.g., in abduction cases children may be heard generally starting from 7 years in Romania or 5 years in Canada ("The question of maturity thus arises when the child is between the ages of 5 and 14", according to Marie-Christine Laberge, *op. cit.*, p. 28). In Netherlands, children from 6 years onwards are given an opportunity to express their views. In Belgium, courts generally allow children 10 years to be heard. In France, children younger than 9 were not heard.

[42] E.g., in the Netherlands, children are in principle heard in legal proceedings from the age of 12, but judges have allowed hearing of children at the age of 6 in abduction cases.

[43] There is a reason for allowing this margin of appreciation, as the judge must strike the right balance between the individual child's rights and the collective interest in preventing/deterring abductions.

[44] In England and Wales, Guidelines for Judges Meeting Children who are subject to Family Proceedings were adopted in 2010.

consequences for reurn/non-return specific for each case.

2.3.5. Value of the voice of the child in practice

When considering the voice of the child in the context of the 1980 Hague Convention and as a matter of accuracy, we consider relevant to make a distinction between Article 13 (2) – objection of the child and Article 13 (1) (b) – grave risk.

In our opinion, less relevance to children's points of view should be granted when discussing grave risk, due to the fact that other evidences are requested in the vast majority of cases and (as already stated) hearing children is not aimed at gathering evidence.

Therefore, the importance children's voice should be evaluated mainly within the framework of Article 13 (2) and the child's objection to being returned.

In practice, nevertheless, the grave risk defence and the child's objection defence often act together, and cases where application of Article 13 alone results in non-return orders are rare.

When evaluating the voice of the child, it needs to be mentioned that there are specific circumstances to be considered for abduction cases.

The court must be aware that manipulation from the abducting parent might appear, as the child is living in unfamiliar surroundings, sometimes does not understand the language, and the only consistent individual in the child's life may be the abducting parent.

Specific safeguards may thus be recommended, such as hearing the child in the presence of an expert, who will then be asked to deliver a report of a possible influence of the abducting parent/specialization of the interviewer in this area.

According to jurisprudence, only firm and consistent objections will be treated as serious grounds for non-return. Children should have a voice in abduction, but this does not mean that they have a choice (to return or not) - their objection has to be seriously motivated, not just simlpy expressed.

Judicial practice revealed concrete situations when the the child's opinion was not taken into account, in cases when, e.g., the child could not give any reasons justifying refusal to return to the state of origin or it was clearly influenced by the kidnapping parent (they were simply too mature for a child, they took over the words and arguments of the abductor, they described the abandoned parent in terms of absolute evil).

Also, a sustainable objection under Article 13 (2) is clearly to be contrasted with a mere preference or wish, based on factual circumstances such as comfortable surroundings, nice school, etc.

Finally, the child's opinion is to be appreciated whithout assessing on parental authority or domicile of the child, as abduction litigations do not deal with such aspects, left in the competence of courts of the habitual residence.

Romanian courts generally rejected requests for return as a result of conjunct application of the child's opposition and the grave risk defences, examining the refusal of the child in the context of all the evidences taken, including psychological reports[45].

[45] Bucharest Tribunal, Fourth Civil Section, decision no. 530/15.04.2021, case no. 3543/3/2021, definitive, not published. The court argued that the psychological report did not reveal any influence on the part of the mother, and also the minor aged 13years did not outline the relationship with his father in the specific terms of an alienated child, but referred, as a positive element, to the way the father cooks.The child's relationship with the father was conflictual, and the rest of the evidence indicated that the conflicting element of the relationship was the father

3. Conclusions

Family law has undergone massive changes related to the importance of the voice of children and there has been a significant movement towards greater recognition of children's right to be involved in decisions affecting their lives.

As juridical literature expressed: "The child, who was previously an object of the law, was becoming a subject of the law"[46] (we should act *with* children, not *upon* them).

For various reasons, the importance of child's voice has nevertheless proved more difficult to be achieved in practice within the framework of the 1980 Hague Convention.

There is in the first place the fear that the child's objection exception would provide an escape mechanism to the obligation to return, and therefore a low incidence of the exception is justified.

Secondly, judges have large discretion to discount children's views, based on very relative standards (minimum age for hearing, where existing, is not uniform and degree of maturity totally depends on the personal appreciation of the judge). Juridical literature opinated that: "Unfortunately, the child objection defence does not appropriately recognise the child's views (…) it gives judges too much discretion to discount children's views"[47].

Thirdly, there are also the practical aspects related to the fact that the overwhelming majority of kidnapped children are under 10 years old, and therefore they are not generally perceived as sufficiently aged and mature so that their opinion may be even asked for.

Still, "Few children are more vulnerable than those caught up in cross-border, often cross-continent, movement and turmoil"[48].

These children, more than their parents, will have to live with what the court decides. And this means that their opinion should be asked for and (if not influenced) should not easily be put aside, under the volatile roof of age-related arguments, as long as the maturity and robustness of their motivation was ascertained.

We consider therefore as beneficial first that all national legislations should introduce a minimum age when hearing children is compulsory, and secondly that this age should be reduced in case of international abductions.

Specialized training of all involved (judges, lawyers, mediators, psychologists, etc.) who activate in the specific area of international abductions is also a useful tool, as specialization elevates professional standards and creates the premises of better understanding.

himself. The child outlined the relationship with his father as being characterized by fear and unconditional compliance with the father's demand, imposed by the latter, if necessary, through verbal violence towards the child.

Similarly, Bucharest Tribunal, Fourth Civil Section, decision no. 1145/13.09.2021, case no. 15924/3/2021, definitive, not published, where the court appreciated that a 13 years old boy was mature enough for his objection to be validated. The child explained that he was obliged by his father to perform daily hard work at the animal farm, he had to wake up at 5.30 a.m. to travel by car to the farm, he would return home at 9.00 p.m., and he was beaten when he failed to work. The child was also evaluated by a psychologist from DGASPC, who concluded that there were no reasons for his statements to be doubted.

[46] Philippe Lortie, Frédéric Breger, *Foreword, op. cit.*, pp. 3-5, p. 3.

[47] Mark Henaghan, *The voice of the child in international child abduction cases – Do judges have a hearing problem?* in The Judges' Newsletter on International Child Protection - Vol. XXII / Summer - Fall 2018, available online at the following link: https://assets.hcch.net/docs/a8621431-c92c-4d01-a73cacdb38a7fde5.pdf, pp. 28-33, p. 29, last accession on 21.03.2023, 8:04 p.m.

[48] Francisco Javier Forcada Miranda, *op. cit.*, p. 25.

"The main objective of the Convention is not to return children at any cost, but to return them in situations where, under the Convention, they ought to be returned"[49].

It results that the prompt return mechanism, although generally appropriate and valuable, is not a solution in itself, not for all cases and not all children[50].

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[49] Michelle Fernando, *Children's Objections in Hague Child Abduction Convention Proceedings in Australia and the "Strength of Feeling" Requirement*, in The International Journal of Children's Rights, vol. 30, 2022, available online at the following link: https://brill.com/view/journals/chil/30/3/article-p729_006.xml, last accession on 25.03.2023, 7:15 p.m.

[50] ECtHR, Decision adopted on 06 July 2010, Application no. 41615/2007, case *Neulinger and Shuruk* v. Switzerland, para 138: "It follows from Article 8 that a child's return cannot be ordered automatically or mechanically when the Hague Convention is applicable. The child's beste interests, from a personal development perspective, will depend on a variety of individual circumstances, in particular his age and level of maturity (…)."

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ENGAGEMENT - "COMMITMENT TO MARRY" OR "MARRIAGE COVENANT"?

Ciprian Raul ROMIŢAN*

Abstract

According to the provisions of the Civil Code in force, engagement is the mutual promise to conclude the marriage. As it will emerge at the end of our study, in order to be in the presence of an engagement, the promise to conclude the marriage must be mutual, i.e. bilateral, concordant of both parties, man and woman. In the course of our study we will also make a brief history of the main legal regulations of this institution and also, given that over the ages various opinions have been expressed, we will analyze and find out what is the legal nature of engagement and its legal characters. At the same time, we will find out how to prove that two people, a man and a woman, are engaged and what are the substantive and formal conditions for the conclusion of the engagement, as well as the impediments to the conclusion of the engagement. Finally, we will analyze the effects of breaking off the engagement, the obligation to return the gifts and who is liable for the wrongful breaking of the engagement.

Keywords: *engagement, family law, promise, marriage, breaking of engagement, restitution of gifts, wrongful breaking of engagement.*

1. A short history of engagement

Engagement, this transition from celibacy to marriage, is thousands of years old and is also mentioned in the Old Testament where it was referred to by the Hebrew term "*aras*" meaning "*marriage commitment*" or "*marriage covenant*"[1].

In our land, in Moldavia, the ruler Scarlat Callimachi (1773-1821) , promulgated, in 1817, a "Civil Code of the Principality of Moldavia", also called the "Calimah Code" or the "Civil Code of Moldavia", in which engagement was considered "a compulsory legal state, prior to marriage", and for engagement to be legal, the man had to be at least 14 years old and the woman 12 years old, a condition that was also valid for marriage at that time[2].

In Walachia, Caragea's Code (Legiuirea Caragea), which came into force on 01.09.1818, regulated the engagement, in Chapter XIV, as a legal state prior to marriage (first marriage agreement) and established the cases in which the engagement could be broken[3].

In our first Civil Code, adopted in 1864, all provisions relating to the institution of engagement were repealed and the Family

* Lecturer, Ph.D., Faculty of Law, "Romanian-American" University; partner lawyer within SCA „Roş şi asociaţii" (e-mail: ciprian.romitan@rvsa.ro).

[1] Lupaşcu Dan, Gâlea Raluca, *Unele consideraţii privind reglementarea logodnei în noul Cod civil român şi în unele legislaţii străine,* in „Lex et Scientia International Journal" no. XVII, vol.1/2010, p. 177.

[2] Andrei Rădulescu (coord.), *Codul lui Calimach,* critical edition, Publishing House of the Academy of the Romanian People's Republic, 1958, Bucharest, p. 5 and 91.

[3] Motica Adina Renate, *Consideraţii privind instituţia logodnei în Codul civil român,* în „Analele Universităţii de Vest – Seria Drept", no.2/2013, p. 120.

Code of 1864 did not have any regulations on this matter.

Currently, the Romanian Civil Code in force regulates engagement in Chapter I, art. 266-270 of Book II (About Family), Title II (Marriage) and is defined as "*the mutual promise to enter into marriage*" [art. 266 para. (1) Civil Code][4].

2. Concept of engagement in the Civil Code in force

In the specialized literature prior to the Civil Code in force, but also after its adoption, engagement was defined as "*a mutual promise of marriage, usually made in a festive setting*"[5], "*a mutual agreement between two persons to marry*"[6], "*a mutual promise given by the future spouses, man and woman, to enter into marriage*'[7], '*an optional legal state, prior to marriage, arising from a mutual promise made by a man and a woman, according to the law, to enter into marriage*'[8] or '*an optional pre-nuptial mutual commitment of the future spouses, agreed upon precisely with a view to entering into marriage*'[9]. In another opinion[10], it was pointed out that "*engagement is nothing more than an empty shell, a legal act without its own content of specific rights and obligations, but which brings together particular rules of civil liability or unjust enrichment, for the hypothesis of unfinished promises of marriage*".

3. Legal nature of the engagement

In order to establish the legal nature of the engagement, we must start from the provisions of Article 266 para. (1) of the Civil Code, which states that "*Engagement is the mutual promise to enter into marriage*". Therefore, the lawmaker provided for that, in order to be in the presence of an engagement, the promise to conclude the marriage must be mutual, i.e. bilateral, concordant of both parties.

Different opinions have been expressed in the literature on the legal nature of engagement. Thus, while some authors[11] qualify engagement as a "*legal act, a*

[4] The Civil Code was adopted by Law no. 287/2009 on the Civil Code, published in the Official Gazette no. 511 of 24 July 2009 and entered into force on 1 October 2011, according to Law no. 71/2011 for the implementation of Law no. 287/2009 on the Civil Code, published in the Official Gazette no. 409 of 10 June 2011, which also introduced a number of amendments. The Civil Code was republished in the Official Gazette no.505 of 15 July 2011.

[5] Marieta Avram, *Drept civil. Familia,* 3rd issue, revised and supplemented, "Hamangiu" Publishing House, Bucharest, 2022, p. 73.

[6] Constantin Hamangiu, I. Rosetti-Bălănescu, Alexandru Băicoianu, *Tratat de drept civil,* vol. I (Restitutio), All Beck Publishing House, Bucharest, 1996, p. 188.

[7] Teodor Bodoașcă, Anett Csakany, *Opinii privind reglementarea logodnei în Codul civil român,* in „Dreptul" nr.5/2015, p. 9.

[8] Dan Lupașcu, Cristiana Mihaela Crăciunescu, *Dreptul familiei,* 4th edition, amended and updated, Universul Juridic Publishing House, Bucharest, 2021, p. 50.

[9] Mihaela Adriana Oprescu, *Logodna în noul Cod civil,* in „Revista română de jurisprudență" no. 4/2012, p. 251.

[10] Marius Floare, *Privire istorică, în spațiul dreptului privat european, asupra rolului logodnei și al formalităților prenupțiale în economia reglementărilor privind căsătoria,* in „Revista română de drept privat" no.3/2018, p. 116.

[11] Emese Florian, *Considerații asupra logodnei reglementată de noul Cod civil,* in „Curierul Judiciar nr.11/2009, p. 632; Codruța Hageanu, *Logodna în noul Cod civil,* in „Curierul Judiciar" no.10/2011, p. 529; Claudia Roșu, Adrian Fanu Moca, *Reglementarea logodnei în noul Cod civil,* in „Dreptul" no.1/2012, p. 81.

bilateral convention", other authors[12] consider engagement as "*a mere legal fact*".

There are also authors[13] who argue that engagement is "*a sui generis bilateral civil legal act*", a view we endorse. The legal act of engagement is characterized as *sui generis* by the authors mentioned, because it does not make the conclusion of the marriage mandatory, the freedom of marriage is not limited at all and can lead to the dissolution of the couple's relationship by breaking it.

It should be stressed that the conclusion of marriage *is not conditional on* the prior conclusion of an engagement, and if an engagement has been concluded beforehand it does not automatically become a marriage. In other words, the *conclusion of the engagement does not create an obligation to conclude the marriage*, which is also clear from the provisions of Article 266(2). (4) of the Civil Code, according to which "*The conclusion of the marriage is not conditional on the conclusion of the engagement*". In a case[14], the court held that "*the conclusion of an engagement does not create a family, but only a possible prerequisite for its birth, but on the basis of a mutual promise made by the parties to conclude the marriage*".

As has been pointed out in the literature[15], engagement does not imply that the two fiancés, man and woman, are obliged to live together in fact, but neither does it exclude it.

Proof of the engagement may be furnished by written documents, witnesses, presumptions, the confession of one of the parties made on his or her own initiative or obtained on cross-examination, or by any other means provided for by law. Specifically, according to the Article 266 paragraph (3) final sentence of the Civil Code, *the engagement can be proved by any means of evidence*, including by mentions made by both fiancés on social networks (Facebook, Twitter, etc.)[16]. It should also be pointed out that according to the provisions of Article 249 of the Civil Procedure Code, *the burden of proof lies with the complainant*[17].

For example, in a dispute[18], the court pointed out that "*the giving of a ring engraved with her name does not prove the fact of engagement, since, on the one hand, it was the defendant's birthday when the ring*

[12] Aurelian Gherghe, *Noul Cod civil. Studii și comentarii*, vol. I, collective coordinated by Marilena Uliescu, Universul Juridic Publishing House, Bucharest, 2012, p. 609; Ioan Albu, *Căsătoria în dreptul român*, Dacia Publishing House, Cluj-Napoca, 1988, pp. 28-32.

[13] Teodor Bodoașcă, *Dreptul familiei*, 5th edition, revised and added, Universul Juridic Publishing House, Bucharest, 2021, pp. 54-56; Dan Lupașcu, Cristiana Mihaela Crăciunescu, Dreptul familiei, 4th edition, amended and updated, Universul Juridic Publishing House, Bucharest, 2021, p. 50; Bogdan Dumitru Moloman, Ciprian Ureche Lazăr, *Codul civil. 2nd book. Despre familie. Art.258-534, Comentarii, explicații și jurisprudență,* 2nd edition, revised and supplemented by Bogdan Dumitru Moloman, Universul Juridic Publishing House, Bucharest, 2022, p. 92.

[14] Bucharest County Court, 5th Civil section, Civil decision no.455A of February 7, 2018, available at www.rolii.ro (accessed on 03.05.2020).

[15] Emese Florian, *Dreptul familiei. Căsătoria. Regimuri matrimoniale. Filatia*, Edition 8, C.H. Beck Publishing House Beck Printing House, Bucharest, 2022, p. 26.

[16] With the ancient Greeks and Romans, the consent for engagement could be given verbally or in writing on tablets on which the dowry was inscribed (Carmen Oana Mihăilă, *Călătorie prin trecut și prezent: căsătoria și regimurile matrimoniale*, in "Studia Universitatis Babeș Bolyai", no.4/2020, p. 578, footnote 35.

[17] According to Article 249 of the Civil Procedure Code, "He who makes a plea in the course of the proceedings must prove it, except in cases specifically provided for by law".

[18] Mehedinți county court, Section I Civil matters, Civil decision no. 25/F of March 12, 2013, available at www.rolii.ro (accessed on 22.09.2019).

was given and, on the other hand, the law does not make the conclusion of the engagement conditional on this fact". In another dispute[19], the court stated that "*as regards the conditions required by law for the valid conclusion of an engagement, it is not necessary and not required that the parties sign a legal document containing a mutual promise, since the mere acceptance of the engagement can be proved by any means of evidence*". In this regard, the court emphasized that "*the conclusion of the engagement may also be proved by photographs or documents taken on the occasion of the marriage feast or by the engagement certificate issued by the priest*".

4. Legal characteristics of engagement

From the interpretation of the legal definition of engagement, governed by Art. 266 para. (1) of the Civil Code, this institution has the following legal characteristics[20]:

- an *engagement is concluded between a man and a woman*, their declared and common purpose being to enter into a marriage in the future, by their mutual promise to each other. Art. 266 para. (5) of the Civil Code expressly and imperatively states that "an engagement may only be concluded between a man and a woman". In other words, *people of the same sex cannot get engaged*;
- the *engagement is freely consented*, that is, in order to be validly entered into, the consent expressed by the promise made must be *freely given* and *non-vitiated*. This expression of will, it was pointed out in a case[21], which concerned the restitution of gifts received during the engagement, "*cannot be vitiated by the existence of divorce proceedings, since both parties knew that it was made under a suspensive condition, pursuant to Art. 1.400 Civil Code.*"[22].
- the *engagement is consensual*. Thus, according to Article 266(3) sentence I of the Civil Code, "the conclusion of the engagement is not subject to any formality", the fiancés being free to choose the manner of expressing their consent, and not being obliged to comply with any formality;
- *the engagement does not have a time limit*, the law in force does not set a deadline for the marriage[23]. As a rule, the engagement lasts until the conclusion of the marriage. We say as a rule because at any time prior to marriage, the engagement can be broken by either of the fiancés;
- *engagement is based on the principle of equality between man and woman, i.e. between fiancés.* The principle of equality between men and women is enshrined in Article 16(1) of the Romanian Constitution, which states that "citizens are equal before the law and public authorities,

Court of district 1 Bucharest, Civil matters, Civil sentence no.17.717 of November 23, 2016, available at www.rolii.ro (accessed on 13.01.2020).

[20] For details, see Alexandru Bacaci, Viorica Claudia Dumitrache, Cristina Codruța Hageanu, *Dreptul familiei*, 7th edition, C.H. Beck Publishing House, Bucharest, 2012, pp. 17-18; Cristina Codruța Hageanu, *Dreptul familiei și actele de stare civilă*, Hamangiu Publishing House, Bucharest, 2012, p. 16; Dan Lupașcu, Cristiana Mihaela Crăciunescu, *op.cit*., (2021), pp. 51-52; Lucia Irinescu, *Instituția logodnei – între tradiție și inovație*, in "Revista de științe juridice" no.2/2014, pp. 47-53.

[21] Reșița county court, Section I Civil matters, Civil decision no. 145/A of March 21, 2019, available at www.rolii.ro (accessed on 22.09.2019).

[22] According to Article 1.400 Civil Code, "The condition is suspensive when its fulfillment depends on the effectiveness of the obligation".

[23] Articles 83 and 85 of the Code of Calimach stipulated that "engagement must be followed by wedding within 2 or 4 years at the most" (Constantin Hamangiu, I. Rosetti-Bălănescu, Alexandru Băicoianu, *op.cit*., p. 188).

without privileges or discriminations"

- the *engagement is concluded for the purpose of concluding the marriage*, in other words, the conclusion of the engagement does not establish a family, but only a possible family can be "born". As a reminder, an engagement is the mutual promise to enter into marriage;

- *engagement is optional*, meaning that engagement is *not compulsory* for the conclusion of a marriage. Art. 266 para. (4) of the Civil Code provides that "*the conclusion of marriage is not conditional on the conclusion of the engagement".*

- *engagement is monogamous*, which means that none of the fiancés can be engaged to more than one person at the same time, since in such cases the engagement would be null and void for violation of the substantive conditions required by law for its valid conclusion, according to Article 266 para. (2) Civil Code[24].

5. Substantive and formal conditions for the conclusion of the engagement

5.1. Substantive conditions for the conclusion of the engagement

The substantive conditions for the conclusion of the engagement are, according to Art. 266 para. (2) of the Civil Code, identical to those for the conclusion of marriage, with the exception of the medical opinion and the authorization of the guardianship court. Therefore, the basic conditions for the conclusion of the engagement are:

- *consent* to the conclusion of the engagement must be: *personal, freely expressed, mutual* and *full*. In other words, consent *cannot be expressed by a attorney*, even if the mandate is in authentic form, cannot be affected by any defect, cannot be affected by any term or condition;

- *age of the future fiancés.* Given the reference that the legislator makes to the provisions of Article 272 of the Civil Code, the age at which an engagement can be concluded is, as a rule, 18 years for both women and men. However, in Art. 272 para. (2)-(5) of the Civil Code also provides for an *exception* to this rule, an exception which is applied according to the Article 266 para. (2) of the Civil Code, i.e. for *good cause*, a minor who has reached the age of 16 may become engaged with the consent of his/her parents or, where applicable, his/her guardian. If there is no unanimity between the parents on whether to agree to the engagement, the disagreement between them will be submitted to the court, which will resolve it in the best interests of the child. If one parent is deceased or unable to express his or her will, the consent of the other parent is sufficient. If there are no parents or guardian who can consent to the engagement, the consent of the person or authority who has been empowered to exercise parental rights is required.

The legislator has not defined the phrase "*for good cause*" so that the analysis of the existence of good cause will be carried out on a case-by-case basis by the parents, the guardian or those entitled to exercise parental rights, and in case of disagreement between parents the existence of good cause will be examined by the guardianship court. Minors who have been granted full capacity by the guardianship court according to the Article 40 of the Civil Code[25]may also

[24] Caransebeș district Court, Civil sentence no. 1435 of November 1, 2012, available at www.rolii.ro (accessed on 22.09.2019).

[25] Article 40 of the Civil Code, with the margin "Anticipated capacity of exercise", provides that "For justified reasons, the guardianship court may recognize the full capacity of exercise to a minor who has reached the age of

validly enter into an engagement. In a case[26], the court held "*that according to Article 266 of the Civil Code in conjunction with Article 272 of the Civil Code, the substantive conditions for the conclusion of an engagement by a minor over 16 years of age refer only to the freely expressed consent of the minor and the consent of his/her parents, given that Article 266 para. (2) of the Civil Code expressly states that the provisions on the conclusion of marriage, with reference to medical opinion and the authorization of the guardianship court, are not applicable. In those circumstances, the court of first instance wrongly held that the defendant was not old enough to enter into an engagement, since the evidence produced in the case shows that her parents agreed to the engagement and even received money for their daughter from the plaintiff by way of a transfer*";

- *sex difference*. Art. 266 para. (5) of the Civil Code states that "*an engagement may only be concluded between a man and a woman*". So, like marriage, engagement is forbidden between people of the same sex. We consider the express regulation in Art. 266 para. (5) of the Civil Code that an engagement can only be concluded between a man and a woman since, in para. (2) of the same article states that the provisions on the substantive conditions for the conclusion of marriage also apply to engagement. However, one of the basic conditions of marriage is the prohibition of same-sex marriage;

- *people who get engaged not to be married or engaged*. A person who is married or already engaged cannot validly enter into an engagement or a new engagement. This condition derives from bigamy, which is a negative substantive condition for marriage. It is true that, in the case of engagement, one cannot speak of bigamy, which is the marriage of a person who is already married. Therefore, if a married person becomes engaged to another person, we are not in the presence of bigamy, but we are in the presence of a failure to fulfill a substantive condition necessary for the valid conclusion of the engagement, the condition represented by the prohibition to become engaged to persons who are married or already engaged;

- *non-existence of natural kinship*. Future fiancés (man and woman) must not be related in the direct or collateral line up to and including the fourth degree. For "*good cause*", collateral relatives of the fourth degree (first cousins) may be engaged to be married to each other [Art. 274 Civil Code in relation to Art. 266 (2) Civil Code];

- *the non-existence of civil kinship (adoption)*. Since adoption creates a filiation link between the adopter and the adopted person, as well as a kinship link between the adopted person and the adopter's relatives, the engagement cannot take place between the adopted person and those who have become relatives through adoption. The prohibitions and exceptions laid down with regard to natural family kinship also apply in the case of adoption;

- *non-existence of guardianship*. This prohibition results from the proper application under Article 266(2) Civil Code, of the provisions of Art. 275 of the Civil Code, according to which the guardian and the person who benefits from his/her protection may not marry.[27];

16. To this end, the minor's parents or guardian will also be heard, and, where appropriate, the opinion of the family council will also be sought."

[26] Botoșani county court, Civil decision no 700 of December 2, 2020, available at www.rolii.ro (accessed on 10.02.2021).

[27] According to Article 275 of the Civil Code, "Marriage is stopped between the guardian and the person benefiting from his/her guardianship".

5.2. Formal conditions for the conclusion of the engagement

In accordance with the provisions of Article 266(3) of the Civil Code, engagement is not subject to any formality and may be proved by any means of evidence. In a case[28], our supreme court held, with regard to the conclusion of an engagement, "*that in accordance with the principle of consensualism, it may be concluded by simple agreement of the parties and may be proved by any means of evidence. Therefore, there is no need for the parties to present a document certified by a state authority to justify the conclusion of the engagement*". In the same dispute, with regard to the proof of engagement, it was held that *"the appellant-plaintiff has proved that there were mutual promises to marry between him and the respondent, in this regard he has submitted messages sent to each other by e-mail, in which both parties addressed each other as "future husband". It also appears from the content of the e-mails sent by the two to each other that they had planned to get married and live together, with the appellant-plaintiff informing the respondent on 28 October 2011 that on 22 December, when he was going to meet her, he was going to put the engagement ring he had bought on her finger*".

But, as has been pointed out in the specialized literature[29], in order to help them in the future in proving their engagement, the fiancés can opt to conclude the engagement in written form or by a notarized deed.

We also consider that, although the law does not require any formalities to be carried out for the conclusion of the engagement, there is nothing to prevent the fiancés from formalizing the conclusion of the engagement by concluding a deed.

6. Effects of engagement

As already mentioned, engagement is *optional* and therefore not a necessary precondition for marriage. In other words, the marriage can be concluded without the prior existence of the engagement, and the existence of the engagement does not oblige to the conclusion of the marriage.

With the conclusion of the engagement, the two parties, the man and the woman, obtain the status of *fiancés*, which in itself constitutes an [30]*effect* of the conclusion of the engagement. The status of fiancés results from the provisions of Article 267 para. (1) and (2) of the Civil Code.[31] and Art. 268 para. (1) and (3) Civil Code[32].

An analysis of the legal provisions governing the institution of engagement shows that fiancés have a number of *rights* and *obligations*, namely:

- the right of the fiancés to break off the engagement [art.267 par.(1) Civil Code];
- the right or, as the case may be, the obligation of the fiancés to return, in the event of the break-up of the engagement, the

[28] High Court of Cassation and Justice, 1st Civil Division, decision no. 3084 of November 11, 2014, available at www.csj.ro (accessed on 21.09.2019).

[29] Lucia Irinescu, *op.cit.*, p. 51.

[30] Teodor Bodoașcă, *op.cit.*, (2015), p. 49.

[31] According to Article 267 paragraphs (1) and (2) of the Civil Code, "(1) A fiancé who breaks the engagement cannot be forced to conclude the marriage. (2) The penal clause stipulated for the breaking of the engagement is considered unwritten".

[32] According to Article 268 paragraphs (1) and (3) of the Civil Code, "(1) In the event of the breakdown of the engagement, the gifts that the fiancés received in consideration of the engagement or, during the engagement, for the purpose of marriage, are subject to restitution, with the exception of ordinary gifts. (...) (3) The obligation of restitution does not exist if the engagement has ceased by the death of one of the fiancés".

gifts they have received in consideration of the engagement, with the exception of ordinary gifts (art. 268 Civil Code);

- the right of fiancés to be compensated (art.269 Civil Code);
- the obligation to compensate for wrongful breaking off the engagement (art.269 Civil Code)[33].

It should be noted that, according to the provisions of Article 270 of the Civil Code, "The right of action based on the provisions of Articles 268 and 269 *shall be subject to statute of limitation one year after the breaking off the engagement*".

As pointed out in the literature[34], the fiancés may also agree, verbally or in writing, on certain rights and obligations that are compatible with the engagement, such as: setting the date and place of the wedding, the place of the wedding, the list of guests, the material contribution of each to support the event, the conditions under which the engagement is broken, the manner in which the gifts will be returned[35] etc.

Children born in a engagement relationship have the status of children out of marriage, following the respective legal regime[36]. In this case, the presumption of filiation with respect to the alleged father, governed by Art. 426 para. (1) of the Civil Code, according to which "Paternity is presumed if it is proved that the alleged father has cohabited with the child's mother during the legal time of conception".

The fiancés can choose the matrimonial property regime, but such an agreement will only take effect from the moment of the marriage[37].

With regard to property acquired by the fiancés during the period of the engagement, we would point out that this is subject to the rules of co-ownership (joint ownership in shares).

6. Conclusions

Now, at the end of our study, we can conclude that engagement, although not a formality prior to marriage, is, along with it and other aspects of people's family life, *a fundamental component of our lives*.

In order to be in the presence of an engagement, as provided by the legislator, *the promise to enter into an engagement must be mutual*, i.e. bilateral, concordant of both parties (man and woman).

The conclusion of a marriage is not conditional on the prior conclusion of an engagement, and if an engagement has been concluded beforehand it does not automatically become a marriage. In other words, the *conclusion of the engagement does not create an obligation to conclude the marriage*. In the same sense, the courts in our country have also ruled that *the conclusion of the engagement does not create a family, but only a possible premise for its birth, but on the basis of the mutual*

[33] According to Article 269 of the Civil Code, "(1) A party who wrongfully breaks off an engagement may be required to pay compensation for expenses incurred or contracted for the purpose of the marriage, insofar as they were appropriate to the circumstances, and for any other damage caused. (2) A party who has culpably caused the other party to break off the engagement may be liable to pay damages under paragraph (1)".

[34] Dan Lupașcu, Cristiana Mihaela Crăciunescu, *op.cit.*, (2021), pp. 60-61.

[35] Article 268 of the Civil Code, with the marginal "*Return of gifts*", regulates the manner in which gifts are returned: "(1) In the event of the breakdown of an engagement, gifts which the fiancés have received in consideration of the engagement or, during the engagement, in view of the marriage, with the exception of customary gifts, shall be subject to restitution. (2) Gifts shall be returned in kind or, if this is no longer possible, to the extent of enrichment. (3) The obligation of restitution does not exist if the engagement has ceased by the death of one of the fiancés."

[36] Bogdan Dumitru Moloman, Ciprian Ureche Lazăr, *op.cit.*, 2022, p. 95.

[37] Nadia Cerasela Aniței, *Convenția matrimonială potrivit noului Cod civil*, Hamangiu Publishing House, Bucharest, 2012, p. 24.

promise that the parties make to each other to conclude the marriage.

Finally, engagement is *a sui generis bilateral civil legal act* because it does not make the conclusion of marriage mandatory, the freedom of marriage is not limited at all and can lead to the dissolution of the couple's relationship by breaking it off.

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THE ROLE OF SOCIAL DIALOGUE IN TIMES OF ENVIROMENTAL CHALLENGES

Nóra JAKAB[*]

„...progress towards a sustainable, fair and inclusive social Europe requires a strong shared commitment to both the promotion of the UN 2030 Agenda and the implementation and realisation of the principles and rights enshrined in the European Pillar of Social Rights; stresses the need to develop an ambitious political agenda with identifiable, achievable, sustainable, clear and binding targets and indicators for social sustainability; Points out that the next EU Social Summit in Porto in May 2021 would be an excellent opportunity for the leaders of the 27 Member States, the European Council, the European Parliament and the European Commission to adopt this agenda at the highest political level; calls for the involvement of the social partners throughout the process…"[1]

Abstract

Stakeholder involvement and dialogue with the social partners are of paramount importance for the implementation of climate-neutral policies and the circular economy. With the European Green Deal, the European Commission is reaffirming its commitment to tackling the climate and environmental challenges that are the defining task of our generation. The atmosphere is warming and climate change is being felt year on year. This transition must be fair, and the fair transition mechanism itself will support regions that are highly dependent on carbon-intensive industries.

Keywords: *climate neutral policy, social dialogue, fair transition, trade union, practice.*

1. Topicality

Stakeholder involvement and dialogue with the social partners are of paramount importance for the implementation of climate-neutral policies and the circular economy. With the European Green Deal, the European Commission is reaffirming its commitment to tackling the climate and environmental challenges that are the defining task of our generation.

The atmosphere is warming and climate change is being felt year by year. One million of the Earth's eight million species are threatened with extinction. Forests and oceans are being destroyed by pollution.[2] The European Green Deal responds to these challenges. As a new strategy for growth, it aims to transform the EU into a just and prosperous society with a modern, resource-efficient and competitive economy, where net greenhouse gas emissions are eliminated by 2050 and where

[*] Professor, Ph.D., Faculty of Law and Political Sciences, University of Miskolc, Institute of Civil Sciences (e-mail jakabn81@gmail.com).

[1] European Parliament resolution of 17 December 2020 on a strong Social Europe for a just transition (2020/2084(INI)) 3.

[2] See about this: Intergovernmental Panel on Climate Change (IPCC): Special Report on the impacts of a 1.5°C increase in global temperatures; ii. Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services: 2019 Global Assessment Report on Biodiversity and Ecosystem Services; iii. International Resource Panel: 2019 Global Resources Review: Natural Resources for our Desired Future; iv. European Environment Agency: Europe's Environment - State of Play and Outlook 2020: Knowledge for a Sustainable Europe.

economic growth is not resource-dependent. [3]

This *transition* must be *fair,* and *the fair transition mechanism* itself will support regions that are highly dependent on carbon-intensive industries. The mechanism will support the most vulnerable citizens in the transition, giving them access to retraining programmes and job opportunities in new economic sectors. [4]

To this end, EU Member States must prepare Territorial Just Transition Plans (also known as Just Transition Territorial Plans) in order to qualify for the €17.5 billion Just Transition Fund. To qualify for the Fund, Member States must submit to the European Commission so-called Territorial Just Transition Plans, which are being prepared for three counties in Hungary - Heves, Borsod-Abaúj-Zemplén and Baranya. Their preparation was coordinated by the Ministry of Innovation and Technology (ITM) with a partner appointed by the Commission, a consortium of KPMG, involving other ministries and relevant local stakeholders

An important segment of the development of a territorially equitable transition plan in our region is the development of sustainable and replicable mobility solutions in the Mátra Power Plant Region.[5] The facilitation of the implementation of the Hungarian National Energy and Climate Plan[6] , with a special focus on the coal drainage of the Mátra Power Plant and ensuring a sustainable and equitable transition of the power plant and its region is a very good example of this. This will include the first full industrial coal decarbonisation best practice in Central and Eastern Europe, innovative prototypes to improve the energy efficiency of lignite-fired households, a complex training programme ("Caring Career Change") for Mátra Power Plant employees, 5 innovative climate-friendly prototypes to replace coal-fired technology, and a reduction of CO2 emissions by 6.5 million tonnes.

The first Hungarian Coal Region Committee (50+ organisation) (high-level consultative forum and working groups) has been set up. A corporate mobilisation programme has been established for around 250 companies (suppliers and subcontractors of the Mátra Power Plant). The first complete industrial lignite export in Central Europe will thus be realised.[7] As can be seen from the above, many of the principles of a fair transition are being met by the process under way.

The main numerical achievements in the area of Just Transition are: setting up the National Coal Region Committee; participating in the development of *Territorial Just Transition Plans* for the counties of Heves and Borsod-Abaúj-

[3] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions - A European Green Deal, Brussels, 11.12.2019 COM(2019) 640 final, 8.

[4](2019) 640 final, 2. *"... At the same time, the transition must be fair and inclusive. It must put people first and pay attention to the regions, industries and workers for whom it will be most challenging. As the changeover will involve major changes, active public participation and trust will be necessary for policy action to be effective and accepted. With the effective involvement of the EU institutions and advisory bodies, we need to bring citizens together in a new alliance with national, regional and local authorities, civil society and industry in all their diversity. ..."*

[5] See https://igazsagosatmenet.eu/fenntarthato-mobilitas/, 13 April 2022.

[6] National Energy and Climate Action Plans of the European Union Member States for the period 2021-2030. The plans outline each country's climate and energy objectives and the steps and policies needed to achieve them and the common EU targets.

[7] See https://igazsagosatmenet.eu/fenntarthato-mobilitas/, downloaded 13 April 2022. Sustainable mobility aims to limit the negative impacts of heavy traffic and reconcile economic, environmental and social criteria.

Zemplén; training and retraining 500 power plant workers; helping 250 companies (suppliers, subcontractors) dependent on the power plant to enter new markets. Carbon dioxide emissions will be reduced by around 14%, which represents almost 50% of the energy sector's emissions.

Aiming at a complete change of approach in sustainable mobility, systematic development practice for young talents; case design with project partners; creation of multidisciplinary talent teams; conducting advanced research analyses, situation assessments; structured programme and workshops for talents and project partners; entrepreneurship support; support and induction for business creation; developing competency-based blended learning courses with universities in the context of sustainable mobility; developing a curriculum of 4 modules (e-mobility, sustainable energy in mobility, sustainable individual mobility, urban challenges and sustainable urban mobility systems; developing and implementing an action plan; information flow between different stakeholder groups.

I have already dealt with the theoretical foundations of the fair transition in my work, and therefore I am concerned with one question in the context of this paper: the role of social dialogue in the process of the fair transition.

Although the role of social dialogue is very important in the transition, it is also changing in the context of changing economic and social conditions: globalisation and innovation are also having an impact on social dialogue.

2. Changes in social dialogue

Social dialogue can be defined as a set of negotiations, consultations, joint actions, discussions and information sharing involving employers and workers. A well-functioning social dialogue is a key instrument for shaping working conditions involving a wide range of actors at different levels. It strikes a balance between the interests of workers and employers and contributes to both economic competitiveness and social cohesion. Recent policy debates at European level have shown that, especially since the 2008 crisis, new debates on social justice, democracy, quality in work and new models of industrial relations have challenged traditional industrial relations and social dialogue systems. Thirty years after the historic launch of the European social dialogue at the Château de Val Duchesse in Brussels, the Commission launched a new start for social dialogue at a high-level conference of the European social partners on 5 March 2015. The European Social Dialogue is an EU social policy instrument that directly contributes to the development of EU labour legislation and policies.[8]

Article 151 TFEU stipulates that fundamental social rights, including those set out in the European Social Charter signed in Turin on 18 October 1961 and the 1989 European Convention on the Fundamental Social Rights of Workers. The Union and the Member States shall have as their objectives the promotion of employment, improved living and working conditions, thereby making it possible to reconcile them while maintaining the process of development, proper social protection, dialogue between management and labour and the development of human resources with a view to lasting high employment and

[8] European Commission event *A new start for social dialogue*, Eurofound blog article: From Val Duchesse to Riga: how to relaunch social dialogue? (Val Duchesse-től Rigáig: hogyan indítsuk újra a szociális párbeszédet?)

combating exclusion; whereas initiatives arising from the European Pillar of Social Rights have a shared responsibility between the EU and the Member States, which have different social systems and traditions; whereas such initiatives should therefore safeguard national collective bargaining systems, ensuring a higher level of protection; whereas fundamental rights, proportionality, legal certainty, equality before the law and subsidiarity are general principles of EU law which must be respected.

Social dialogue and collective bargaining are key tools for employers and trade unions to develop fair wages and working conditions, and robust collective bargaining systems increase the resilience of Member States in times of economic crisis; as societies with strong collective bargaining systems tend to be wealthier and more equal; whereas the right to collective bargaining is an issue that concerns all European workers and can have a decisive impact on democracy and the rule of law, including respect for fundamental social rights; whereas collective bargaining is a fundamental European right, which the European institutions are obliged to respect under Article 28.1 of the Charter of Fundamental Rights whereas collective bargaining is a fundamental right which must be respected by the European institutions under Article 28 of the Charter of Fundamental Rights; whereas, in this context, policy measures which respect, promote and strengthen collective bargaining and the position of workers in wage-setting systems play an important role in achieving high quality working conditions.[9]

Collective bargaining is a key tool for enforcing rights at work; whereas, according to OECD data, both the presence of trade unions and the prevalence of collective bargaining have declined significantly in recent decades; whereas since 2000, collective bargaining has been declining in 22 of the 27 EU Member States; whereas in countries with well-organised social partners and widespread collective bargaining, the quality of work and the working environment is on average higher; whereas collective bargaining, when widely applied and well coordinated, promotes good labour market performance.[10]

Blanpain wrote of globalisation and technological innovation as leading to the fragmentation of companies into interconnected groups where work is organised on a project basis. This changes the role of the employment relationship and the role of the social partners.[11] In effect, the *gig economy* represents a network of individuals connected to each other along separate projects.[12]

When discussing globalisation, many point out that collective bargaining at national level has been unable to regulate the relationship between employers and workers. What do we mean by this? Collective bargaining can secure higher wages if it has a wide coverage and is not only inclusive of all workers in a given

[9] European Parliament resolution of 17 December 2020 on a strong social Europe for a just transition (2020/2084(INI)) J.

[10] European Parliament resolution of 17 December 2020 on a strong social Europe for a just transition (2020/2084(INI)) K.

[11] BLANPLAIN, R (1999) European Social Policies: One Bridge Too Short, *Comparative Labour Law and Policy Journal*, 20. 497.

[12] MANGAN, D. (2018) Labour law: the medium and the message, in Frank Hendrickx - Valerio de Stefano (eds.): Game Changers in Labour Law. *Bulletin of Comparative Labour Relations - 100*, Kluwer Law International BV, Netherlands, 65.

company, but is also strong in a given sector.[13]

In this case, companies have tried to recruit workers from other countries. In the last 20 years we have seen global product chains where a company in a developed economy buys materials and finished products from a developing country under substantially worse working conditions. As rights advocates have stressed that the buyer company can ask the supplier company to respect core international labour standards, even in contractual terms, companies have created their own codes of conduct.[14]

It can be said that companies are seeking to comply with international legal standards through voluntary compliance.[15] Technological developments in

[13] For nearly forty years we have been hearing that multinationals are more powerful than the state, and therefore the response has come from the supranational level.

[14] At the World Economic Forum meeting in January 1999, Kofi Annan announced the UN Global Impact Principles, four of which related to working conditions, https://www.unglobalcompact.org/ (accessed 1 November 2018)

The World Economic Forum has also found that new technologies pave the way for economic growth and the reduction of social inequalities as well as for less noble goals (e.g. civil wars, propaganda). The organisation's research has led to the creation of a new measure, DVS (Digital Value to Society), which analyses the impact of digitalisation on health, safety, employment, the environment and consumers. The resulting DVS indicator expresses how a given instance of digital transformation contributes to value creation in the business sector and society. Unlocking Digital Value To Society: A New Framework For Growth White Paper, World Economic Forum, 2017. http://reports.weforum.org/digital-transformation/wp-content/blogs.dir/94/mp/files/pages/files/dti-unlocking-digital-value-to-society-white-paper.pdf (Accessed 13 October 2018).

It was also in the 1990s that the UN became aware of the growing environmental and social pressures that threaten the planet and humanity. In response to this threat, in 1983 it established the World Commission on Environment and Development, better known as the Bruntland Commission. The Commission worked from 1984 to 1987 to try to find solutions to the world's environmental and social problems. The results of their work were published in a report at the end of their work. The solution to these problems was considered to be sustainable development, defined as development that meets the needs of the present without compromising the ability of future generations to meet their own needs. Report of the World Commission on Environment and Development: Our Common Future: http://www.un-documents.net/our-common-future.pdf (Retrieved 18.10.2018)

[15] In my view, CRS and PSR activities are part of this process. According to one of the most widely accepted definitions of CSR, corporate social responsibility (CSR) comprises four interlocking areas of responsibility, namely economic, legal, ethical and philanthropic expectations, which are addressed to companies from the side of society, where society is understood to mean the broad range of stakeholders of a company. This approach can be traced back to the work of Archie B. Caroll and his CSR pyramid metaphor. SZEGEDI, K.- MÉLYPATAKI, G. (2016).

The European Union has also developed its own definition of CSR as a concept whereby companies voluntarily integrate social and environmental considerations into their business operations and use these principles to shape their relations with their wider stakeholders, i.e. anyone affected by their activities or who has an influence on the company's operations. Green Paper.

GSR stands for Global/Collective Social Responsibility. One of the blessed effects of globalisation and the development of information technology tools is that different organisations and individuals can find each other more and more easily. This, together with the willingness of individuals and organisations to seek each other out, is making social responsibility global and cross-sectoral.

To address society-wide problems and to exploit the various opportunities that arise, corporate social responsibility (CSR), public social responsibility (PSR), civil and personal social responsibility (ISR) are being combined and globalised to form a multi-faceted partnership.

PSR is linked to the specific field of activity of public sector institutions. The control of the functioning of these institutions, of public responsibility, is on the one hand carried out by the public. This responsibility becomes a public *social* responsibility when the organisation, in addition to its statutory tasks, carries out activities within its remit, or sometimes even beyond it, which contribute to meeting important social needs or even to solving problems. *The GVH's Public Social Responsibility (PSR) Strategy*, May 2016 http://www.gvh.hu/data/cms1036194/GVH_PSR_strategia_2017_04_27.pdf (Retrieved 25.10.2018) Public sector social responsibility has received increasing attention in recent years. This is evidenced by a number of research and projects in this field, including the EU-funded project Governmental Social Responsibility Model: An Innovative

telecommunications over the decades and the emergence of English as the general language of business have made it much easier for European and North American companies to do business with each other. A series of bilateral trade agreements between countries around the world, following the *Uruguay Round*[16] , have made it possible for products destined for the European market to be made in Asia, where labour costs are a fraction of those in Europe.

And with the creation of the WTO *(World Trade Organization),* all the obstacles to international trade seemed to have been removed. A key issue in this context has been how individual companies can ensure competitive prices and maximise profits while optimising and reducing labour costs. In this respect, it is possible to apply an appropriate strategy, taking into account the legal framework provided by the Member State concerned.[17] Employers may opt for flexible working arrangements, which will lead to precarious employment.

We have been talking about the information age since the advent of the computer and the invention of the microprocessor in the 1970s. The world of work has moved from the factory to the office, where the number of employees has been significantly reduced. Information technology has completely transformed the way people work. Instead of many people performing the same repetitive work processes, fewer workers are using computers to produce products. No wonder companies have put the emphasis on the *individual in* this change. After all, to thrive in today's open labour market, you need to have: advanced interpersonal skills, the ability to work in a team, the ability to problem-solve and problem-solve, the ability to learn and innovate continuously, the ability to absorb new technologies (*soft skills*)[18].

All the above qualities contribute to this flexibility. The career mindset of workers is even more relevant in the 21st century than before.[19] Work ethics have also changed. Whereas in the past hard work, honesty and integrity were important, today the changes are pushing workers to become less emotionally attached to their jobs and to seek external motivation, for example in leisure activities. In other words, work is no longer necessarily the defining building block of personality.[20] Workers are no longer necessarily substitutes for each other,

Approach of Quality in Governmental Operations and Outcomes, implemented under the South-East European Transnational Cooperation Programme. *Social Value and Responsibility in the Public Sector* - based on presentations at the National University of Public Service Workshop 11.09.2018.

[16] The series of trade negotiations, which lasted seven and a half years and involved a total of 123 countries, is still considered a unique initiative worldwide. See more at https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm (accessed 2 December 2018)

[17] BELLACE, J.R. (2018) 17.

[18] The learning process must be based on a methodology that allows the individual to adapt to the new. This is the basis of learning outcomes-based education today.

[19] MURRAY, B. - HERON, R. (2003): *Placement Of Job-Seekers With Disabilities: Elements of an Effective Service*, International Labour Organisation, 3-4; HOLMES, J. (2007): *Vocational Rehabilitation,* Blackwell Publishing, Oxford. 7-9.

[20] MURRAY, B. - HERON, R. (2003) 4. Here I refer to the important role of reflexive labour law regulation in the development of a social policy in which as many people as possible live in well-being according to their abilities, enjoying social rights to the fullest. Alongside *Freedland* and *Countouris*, *Deakin* and *Rogowski* draw on *Sen* and *Nussbaum's* theory of capability, described earlier, and relate this to the labour market. On this, see DEAKIN, S. - ROGOWSKI, R. (2011) 230-238. *Amaryta K. Sen* and *Martha Nussbaum's* theory of capability takes a holistic view of capability from a human rights perspective. *Amartya K. Sen is credited* with the capability-based approach to disability. *Sen's* theory focuses on the person's ability to *function*, i.e. whether or not someone can do something. This theory does not refer to the existence of a physical or mental ability, but understands it as a practical

and the *intelligence and individual engagement of the worker* is increasingly important. In this respect, the traditional employer-employee relationship is clearly changing.

In North America and Europe, it was mainly *manual workers who were* unionised. They truly represent the traditional employer-employee relationship based on the Fordist model. In their case, there is no strong free will, they were able to achieve results *together*. However, from the 1970s onwards, a completely different generation has grown up, no longer identifiable with the former working class. We call the millennial generation the digital natives, and they are the ones who have lived with technology since birth. These workers feel part of an online community that is a far cry from the working community of fifty years ago.[21]

Globalisation, climate-neutral policies, the changing nature of work and the increased role of the individual can be said to be simultaneously and mutually reinforcing pushing the boundaries of national labour law. In the 19th and 20th centuries, the improvement of working conditions was achieved through collective bargaining. The collective consciousness of workers was strong. But the cross-border activities of multinational companies have weakened workers' organisation.[22] In the digital economy, it is not easy to get workers to take collective action, as the *playing field is* completely different. And the playing field is further shaped by the rules of climate-neutral politics.[23]

The action plan in the climate-neutral policy builds heavily on social dialogue, but this has been weakened by the new forms of employment before and during the Covid-19 epidemic. There is much talk of the dematerialisation of the workplace, leading to a complete weakening of collective labour institutions and thus of industrial relations. That is why I believe it is important to maintain and rethink industrial relations, because a fair transition cannot be achieved without this.

opportunity. Function is the actual performance of the individual, what the individual actually achieves through his or her existence and actions. What is practical opportunity? For *Sen*, it means ability. In the same way, he does not use the traditional notion of action, for him it also means desires other than action, such as eating properly. To illustrate this, he gives the example of two starving people. One does not eat out of religious conviction, the other because he has nothing to eat. This is the difference between action and practical possibility.[20] That is, *Sen* looks at the interests that drive the person rather than the actions. He distinguishes between two ways in which one should interpret one's interests and performance: the way of well-being and the way of advantage. That is, well-being refers to the actions that an individual takes for his or her well-being; advantage refers to the actual opportunities that are available to a person, enabling him or her to exercise the right to choose. The set of a person's capabilities is in fact a set of courses of action on the basis of which the person exercises the freedom of choice. The set of capabilities is influenced by the goods available, the environment around the individual and personal characteristics, all of which lead to actions. *Sen* does not specify a method for measuring the ability set, for the reason that the problem and the circumstances make the individual's attributes, ability and actions constantly changing. MITRA, S. (2006): Capability Approach and Disability, *Journal of Disability Policy Studies, 4,* 236; FREEDLAND, M. - COUNTOURIS, N. (2011b): *The Legal Construction of Personal Work Relations*, Oxford University Press, Oxford, 378-379.

[21] BELLACE, J. R. (2018) 19-20.

[22] In this period in Hungary and in the other former socialist countries, we are faced with an unfavourable situation in which workers with a modest collective consciousness were even more vulnerable after the change of regime. It is noticeable that the disadvantage of nearly forty years after the Second World War is still difficult to compensate for today. Meanwhile, we can see the changes in the Labour Code of 1992 and 2012, and the clear emergence of a more civil rights approach. See later.

[23] As Bellice puts it, "the platform and algorithms work automatically." BELLACE, J. R. (2018) 20-21.

3. Social dialogue in practice

The European Parliament welcomes the launch of the Decent Transition Fund; stresses that broad social acceptance of environmental and climate policy measures is essential for their effective implementation; urges Member States to effectively involve social partners, regional and local authorities and civil society in the development of territorial plans for a fair transition.[24]

The Coal Region Committee was established on 11 March 2021 as the first permanent consultative forum on coal transition in Hungary. Its mission is to support the decarbonisation of the Mátra Power Plant and lignite-based electricity generation and the sustainable and equitable transition of the North Hungary region, involving all relevant organisations.

The Committee is chaired by: the Deputy State Secretary for Energy Policy of the Ministry of Innovation and Technology; the Deputy State Secretary for Climate Policy of the Ministry of Innovation and Technology as the consortium leader of the LIFE-IP North-HU-Trans project; the Deputy State Secretary for Legal Affairs, Coordination and Utilities of the Minister without Portfolio in charge of National Asset Management; the Secretary General of the Heves County Chamber of Commerce and Industry; MVM Mátra Energia Zrt. President of the Central Works Council.[25]

[24] Recalls that climate change and subsequent structural changes are already having a severe impact on many European regions and their populations; stresses that the creation of green and decent jobs is key to creating an inclusive and balanced labour market in a fair and equitable transition to a resource- and energy-efficient, circular and carbon-neutral economy based on renewable energy sources and to ensure that no one is left behind; Insists that the amount proposed in the Commission's amended proposal for the Decent Transition Fund in May 2020 be increased; calls for the Fund to have sufficient financial means to support regions in transition, to ensure that new, quality jobs are created and that social cohesion is the guiding principle for the support provided by the Fund; Emphasises that the revised European Globalisation Adjustment Fund is key to supporting social plans for workers affected by restructuring and calls on the Commission and the Member States to agree on a significant increase in the budget available to the instrument as part of the broader financial support for a fair transition in Europe; Calls for a sustainable and ambitious use of the available resources to support the most vulnerable and lagging regions, with transitional measures where necessary; recalls that eligible projects must be consistent with the 2050 climate neutrality objective, its intermediate steps to be completed by 2030 and the European Pillar of Social Rights. European Parliament resolution of 17 December 2020 on a strong social Europe for a just transition (2020/2084(INI)) 11.

[25] Project partner organisations: the Deputy State Secretaries of the Ministry of Energy and Climate Policy, as founders; the Rector and the project advisor of the EKE, as founders; the Deputy Chief Technical Officer and the Deputy Chief Economic Officer of MVM Energetika Zrt. President of the Hungarian Energy and Public Utility Regulatory Office; President of the Maltese Charity Service; President of the Hungarian Mining and Geological Service; President of the Trade Union of Mine Energy and Industrial Workers; President of the Trade Union of Mine Energy and Industrial Workers of Mátra Power Plant; President of the United Electricity Workers' Trade Union Federation, President of the Electricity Trade Union of the Matra Power Plant, Secretary General of the Heves County Chamber of Commerce and Industry; Secretary General of the Borsod-Abaúj-Zemplén County Chamber of Commerce and Industry; Government Commissioner of the Heves County Government Office; Government Commissioner of the Borsod-Abaúj-Zemplén County Government Office; Mayor of the Municipality of Abasár; Mayor of the Municipality of Markaz; Mayor of the Municipality of Bükkábrány,. Non project partner organisations: President of the General Assembly of the Heves County Municipality of Borsod-Abaúj-Zemplén County; Member of the Parliament of the Constituency No. 2 of Heves County; Member of the Parliament of the Constituency No. 3 of Heves County; Member of the Parliament of the Constituency No. 7 of Borsod-Abaúj-Zemplén County.

Representatives of the local governments within the jurisdiction of the Mátra Power Plant: Visonta, Halmajugra, Detk, Ludas, Karácsond, Vatta, Mezőnyárád, Pálosvörösmart, Csincse, Aldebrő, Managing directors of the local enterprises most affected by the coal transitions: the Mátra Power Plant Central Maintenance Ltd, Managing Directors of some of the companies operating in the Mátra Industrial Park: BAUMIT Kft, ERGO Med

Employees are therefore involved in this dialogue through the Works Council, and employers are represented by the Chamber of Industry and Commerce. The government is strongly represented in this Committee. Although the system of national interest conciliation was completely overhauled in Hungary in 2012, it is clear that this newly established Commission, whose functioning is still poorly understood, is another form of social dialogue in which the stakeholders (project and non-project) are also involved in significant numbers.

The policy of "nothing about us, without us" is therefore applied to these territorial conversion plans. The functioning of this Commission, the change and possible revival of the role of the social project in Hungary can be expected from the Hungarian implementation of the climate neutral policy. However, this will only become clear in the coming years.

The most important aspect of the transition must be the continued guarantee of social security. Security here means a kind of stability, an unshakeable foundation, i.e. the standard that a citizen of a given state can count on from the state in the event of a crisis in his or her life.[26] In Hungary, this fundamental social right is also reflected in the Fundamental Law, in Article XIX, which states that "Hungary shall endeavour to provide social security for all its citizens in certain life situations.".

Supportive strategies are used by trade unions promoting policies to mitigate disadvantages, *fair transition* and a proactive approach to decarbonisation. One concrete example of such an approach is the Just Energy Transition Statement signed in 2017 by the European social dialogue actors in the energy sector: employers, Eurelectric, and EPSU and IndustriAll Europe[27] on behalf of trade unions. While the joint statement calls for public investment in the transition, it does not address the responsibility of employers in financing the transition and does not set out specific activities or measures. Furthermore, as it is not legally binding, there is a possibility that the agreement will not deliver in practice. However, it does set an example of trade union commitment to support decarbonisation of economic activities and proactive engagement, with all its employment implications.

4. Concluding thoughts

The dilemma of work versus environment is therefore a major challenge for trade unions, as decarbonisation policies

Kft, GEOSOL Kft, HŐÉPKER Kft, HŐTECHNIKA ÉSZAK Kft, KOMPLEX Kft, Partner Kft, Prompt 94 Kft, Saint-Gobain Hungary Kft.,

Director of the Bükk National Park Directorate (BNPI); Local green NGOs: Representative of the Életfa Environmental Protection Association; Kaptárkő Association; Green for Green Association; President of the Gyöngyös-Mátra Tourism Association; Chief Medical Director of the Mátra Medical Institute; Rector of the University of Miskolc (ME); Rector of Szent István University (SZIE), Miskolc Regional Committee of the Hungarian Academy of Sciences; National Institute of Environmental Health;

ELTE Sustainable Energy Design Research Group; Director General of the Heves County Vocational Training Centre; Directors General of the Vocational Training Centres of Miskolc, Ózd and Szerencs in Borsod-Abaúj-Zemplén County; President of MANAP Industrial Association; Director of the Directorate of Environmental Sustainability of the Office of the President of the Republic; MAVIR Zrt. Deputy Chief Executive Officer for System Management; Head of Department of the Green Programme of the National Bank of Hungary; Director General of the National Investment Promotion Agency (HIPA)

[26] MÉLYPATAKI, Gábor - The impact of new forms of employment and social innovation on social security, *Hungarian Labour Law E-journal*, 2019/1, p. 1.

[27] Just Energy Transition Statement - EPSU,IndustriAll Europe, Eurelectric (2017) https://www.eurelectric.org/media/2185/statement-energy-just-transition.pdf (last accessed 29.10.2020)

lead to job losses in many sectors. No matter how they react, the unions will face criticism from the workers concerned. If unions and works councils support ambitious climate change mitigation policies, workers may turn away because of the potential loss of jobs. Companies could blame them, as emission reduction policies could lead to reduced profits. Conversely, if trade unions focus on preserving jobs - possibly at the expense of the environment - this could attract criticism from society as a whole.

So the problem is well known: the transition to sustainability is not a matter of choice, it is a matter of urgency, as climate change has become part of our daily lives, a vicious circle that we have not yet managed to break.

The *fundamental value of labour law* is that it *provides* economic *security* and thus *predictability*: both internally, by providing rules to protect workers, and externally, by the state, by providing a social safety net in case workers are unable to work in a situation of disruption. Another very important value is a healthy and safe working environment.

In 1998, the ILO set out the fundamental rights[28] that all states must respect: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced and compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation. *These rights should be fundamental rules of the game, regardless of the playing field*.[29] Security is therefore the preservation of core values within labour law.[30] Workers' organisation, advocacy, information, information and consultation have a major role to play in the transition. A transition to a climate-neutral policy is therefore inconceivable without a stronger partnership.

This is why a fair transition is also likely to involve a stronger representation of labour's interests, as only then can it be successful.

[28] ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, Adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998 (Annex revised 15 June 2010)

"... The International Labour Conference ... (2.) Declares that all Member States, even if they have not ratified the Conventions in question, are bound by their membership of the Organization, in good faith and in conformity with the Constitution, to respect, promote and fulfil the fundamental rights to which these Conventions refer. These principles are: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the abolition of forced and compulsory labour in all its forms; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation. ..."

[29] Mangan also refers to what Bellice pointed out in the case of algorithms. Namely, that algorithms can lead to inequalities, i.e. discrimination. MANGAN, D. (2018) 72.

[30] *I do not analyse Freedland* and *Countouris's theory of personal work relations in this research, as I do not consider the concept feasible. However, there are several elements in the concept that deserve to be highlighted. One of these is about values in work. It is* pointed out that, rightly, the normative basis of labour law is the balancing of the positions of parties in unequal situations. Human dignity is a first-generation right with which we are all familiar and which is enshrined in many international documents. *Freedland* and *Countouris* complement this thinking on dignity with the concept of autonomy and equality. Autonomy means that a person makes decisions about his or her own life (work life) autonomously, without any constraints. This is complemented by equality, which, like human dignity, is also one of the oldest first-generation human rights. However, equality is thought of in terms of *Amaryta Sen's* concept of equality, which is equality based on ability, which is considered the most appropriate for labour and social law. Dignity IS closely linked to the person of the worker, based on personal work. FREEDLAND, M. - COUNTOURIS, N. (2011b) 372-376.

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PARAFISCAL CHARGES AND THEIR LEGAL REGIME

Viorel ROȘ[*]
Andreea LIVĂDARIU[**]

Abstract

There are several hundred parafiscal charges in Romania, which collectively constitute the parafiscal system. These taxes are not officially designated as such, and they exist in the gray or black areas of the country's financial economy. This form of taxation is not a part of the official tax system and lacks consistent and clear guidelines that would apply to all of its components. It is essentially a hidden tax, masquerading under a new name in the legal jargon, which adds to its enigmatic nature. The realm of parafiscal charges is highly unpredictable, volatile, and precarious. With their sheer number and potential hazards, it wouldn't be far-fetched to liken it to quicksand using a metaphorical lens. The parafiscal charges, despite sharing some similarities with compulsory tax levies, exhibit several differences owing to the various names they go by. Parafiscal charges are akin to taxes and other fiscal duties in that they are imposed by an authoritative body and carry legal obligations. However, they are closer in nature to taxes than they are to fiscal duties in that, often, their payment does not entail direct and immediate consideration. In conceptual terms, parafiscal charges differ from fiscal levies mainly because their objective is not primarily to generate public revenues to cover expenses made for the general welfare - which is the main purpose of taxes and fiscal duties. Rather, parafiscal charges are intended to secure financing and income for specific entities and activities, such as OSIM and the health system or various social and cultural initiatives. They also indirectly provide state aid to private entities or individuals by compelling consumers of products and/or services to make payments for this purpose directly to the beneficiaries, with such payments being concealed in the price of the product/service (e.g. cultural stamp). Parafiscal charges are also distinct from compulsory fiscal levies in that they are not subject to administration and utilization in accordance with fiscal and budgetary laws. To be more precise, parafiscal charges ought not to be managed according to fiscal and budgetary regulations. If they were, they would then be considered taxes or fiscal duties. Moreover, some of these charges are either treated as fiscal claims or are a (incoherent) combination of tax and non-tax aspects.Parafiscal charges have received severe criticism from both the business community and experts. These charges have been described as moldy, abracadabrant, taxation-outclassing, out of control, discretionary, ineffective, and aberrant, among other epithets. However, certain quasi-fiscal charges that have been subject to constitutional scrutiny, such as the clawback tax, cultural stamp, and judicial stamp duties, have been declared constitutional. However, among the numerous parafiscal charges that have not yet undergone constitutional scrutiny, some are unconstitutional or, as the case may be, unlawful (not all of them are established by law, such as the parking fee). It is not, however, possible to make a blanket statement regarding the constitutionality or unconstitutionality of parafiscal charges as a whole. The Romanian authorities have made several attempts to decrease the number of parafiscal charges, some of them successful, although in relation to less important ones that had no major impact on revenues. However, the Romanian legislator does not consider the French model of completely abolishing such charges. The desire to maintain and increase the number of parafiscal charges can be attributed to two factors: firstly, the government's increasing need for revenue and, secondly, the apprehension of the public's response to an increase in the number and amount of taxes

[*] Professor, Ph.D., Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: viorelros@asdpi.ro).

[**] Assistant Lecturer, Ph.D., Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: andreea.livadariu@rvsa.ro).

and fiscal duties. There are other explanations for keeping parafiscal charges alive and for instituting new such charges. As such, a number of these charges are concealed within the prices of products and/or services, either to go unnoticed or to shift dissatisfaction onto the supplier of the product or service provider, who collects the price along with the parafiscal charge. This model is similar to that of indirect taxes like VAT and excise duties. Finally, a crucial reason for the persistence of parafiscal charges is that they are not subjected to the strict fiscal and budgetary rules of administration and control. Typically, parafiscal revenues are collected and used by the beneficiaries themselves, outside of the regular budgetary system. This lack of accountability for both the collection and use of these funds absolves both the beneficiaries and the state of the need to justify their methods. As a result, it is impossible to determine the exact proportion of parafiscal revenues in the overall revenue generated by the state and local communities, as well as in the country's gross domestic product. Additionally, it is unclear how much money is spent for such charges by those who are obliged to pay them.

Parafiscal charges have a wide variety and are identified by different names: contributions, solidarity contributions, tariffs, taxes, payments, royalties, and more. They can cover various fees, from parking fees and cultural stamps to cadastral fees, fees for services provided by public entities, fees for gambling activities, museum visiting taxes, offset, and clawback taxes. The variety and complexity of parafiscal charges, coupled with their inconsistent regulatory framework and diverse beneficiary types, make it difficult to establish a universally accepted definition of such charges. In this context, it is sufficient to state that all payment obligations that are established by an authoritative body and are not of a strictly fiscal nature fall under the category of parafiscal charges.

Keywords: *parafiscality, fiscal taxes, disguised taxation, definition, mandatory payments, legal regime, constitutionality.*

1. Introduction. The concepts of parafiscality and parafiscal charges

The formation of compound words by combining the prefix **"para"** (derived from Greek, meaning **"beyond"**) with a second word that has a separate meaning, which is often merged with the first word to create a new word with a similar or completely different meaning, is not only prevalent in everyday language but also in technical jargon: paranormal, paradox, paraliterature, paraphrase, paramilitary, parapsychology, paramedic, paraclinical, parabiotic, para-intellectual property etc. This process of language enrichment, where the form of a word is altered by association with another word, resulting in a new utterance, is referred to as **paralogy** or **paralogical,** words that also contain the prefix "para". The term **"parafiscal"** is a product of this linguistic process, where two words are combined to create a new word with a distinct meaning. In this case, the words **"para"** and **"fiscal"** are fused together to create an adjective that implies a connection to taxation but with a difference. As with other such compound words, it is challenging to define as it contains an inherent contradiction, defies conventional logic, and does not conform to expectations. The concept of parafiscality is neither entirely true nor entirely false because it should be distinct from taxation (otherwise the very concept of parafiscality would be completely useless), but it is not completely unrelated to taxation either. Parafiscality appears to be a ... paradox[1], meaning it is

[1] The term "paradox" originates from Greek, being formed by combining the words "para", meaning "beyond", and "dokein" meaning "to think." The resulting word denotes something that is contrary to expectations

something that is absurd and contradictory, but despite this, it exists not only in Romania but also in other countries. However, in our case, it is even more paradoxical.

In the absence of a legal definition, the ambiguous nature of the compound word "parafiscal" allows for individual interpretation based on personal will and interests. Even explanatory dictionaries of the Romanian language fail to provide a clear definition for the compound word "parafiscal"; instead, they simply define the two separate words that make up this term along with its derivatives. We also consulted an "artificial intelligence" named Catgut, and it confirmed that while ChatGPT is helpful, it is currently just another machine that collects and processes data, which qualifies it more as an advanced search engine than as a generative artificial intelligence. Therefore, we do not believe that it would pass the Turing test, even if the interlocutor were less knowledgeable about taxation and parafiscal charges.

To establish credibility, this is the definition given by ChatGPT: *"Parafiscality pertains to the entities, charges, and levies established by public authorities or entities under their jurisdiction, but which are not considered traditional taxes or fees. These entities and charges are known as parafiscal because they are established and managed to fund particular activities or services, such as public health, environmental protection, social assistance, or economic development. Unlike taxes and duties, which are established and managed by the government, parafiscal charges are established and managed by designated organizations or authorities that are authorized to provide certain services or activities. Parafiscal charges can be collected either directly from citizens or from other organizations, or they can be incorporated into the prices of the products or services offered. Parafiscal institutions and charges encompass a range of levies, including compulsory social contributions, taxes for environmental protection, vehicle registration fees, and charges aimed at financing the healthcare system".*

From this definition (for which we equally express amazement and even appreciation but also partial disapproval) the following are not accurate: (i) the statement that "taxes and duties are established and managed by the government", because taxes and duties are established by law enacted by the parliament; (ii) the statement that parafiscal charges are established and managed solely by designated organizations and authorities that are authorized to provide certain services or activities, and (iii) the statement considering mandatory social contributions, which in our legal system are regulated not only by special laws but also by the Fiscal Code and the Fiscal Procedure Code, as parafiscal charges, without qualification.

In Romanian, **"Para"** serves as both a standalone word (either a noun or a verb) and as a morpheme that can be used as a prefix or a suffix to form **a wide range of adjectives and nouns**. It serves as a compositional element with various meanings that are relevant to our topic. These meanings include "hard," "very," "strong," "too numerous,"[2] "similar," "near," "next to," and "besides." But also "against", "to defend against", "to protect against..."[3]. We assert that parafiscal charges **share**

- "Paradox" in *Merriam-Webster*, Available at https://www.merriam-webster.com/dictionary/paradox, accessed on 13 November 2022.

[2] Dicționar Explicativ al Limbii Române [Explanatory Dictionary of the Romanian Language], Univers Enciclopedic, 2016, p. 850.

[3] Dicționar Enciclopedic [Explanatory Dictionary], Enciclopedică Publishing House, 2004, vol. V, p. 193.

similarities with taxes and fiscal duties, as they **are compulsory payments established by the authority**. However, they **differ from taxes and duties**, as they are **not administered under budgetary and fiscal laws**, and **are not primarily meant to be used for public expenses**. If parafiscal charges were subject to budgetary and fiscal laws, they would be categorized as mere taxes or fiscal duties.

Upon a thorough examination of the **parafiscal charges existing in our legal system**, it is evident that sometimes they stem from contract rather than law. In such cases, the law merely specifies the amount owed and the method of calculation, as is the case with mining, oil, and agricultural royalties. Additionally, some parafiscal charges, despite being non-fiscal, are treated as fiscal claims (such as the three types of royalties), while others are a peculiar blend of non-fiscal and fiscal components. For instance, the literary stamp generates income for the Writers' Union and writers, while penalties for late payment of the stamp constitute income for the state budget, although categorized as non-fiscal income[4].

Parafiscal charges are certainly mandatory payments established by authoritative means, but they do not fit squarely into either the purely fiscal or non-fiscal categories. Their legal regime is ambiguous and lacks uniformity, leaving precise rules for establishment[5] and administration wanting, with no applicability to all. This category comprises various taxes, contributions, and tariffs that are not explicitly referred to by this name in the Constitution, financial laws, fiscal laws, or budgetary indicator classifications. Indeed, the generic terms "parafiscality"[6] and "parafiscal charges" are not explicitly defined in any law. However, these terms are commonly used in the Romanian legal doctrine[7] and case law[8], including decisions made by the Romanian common law courts and the Constitutional Court, which have held such charges to be constitutional[9]. Additionally, the concept of parafiscal charges is recognized in foreign legal literature[10], in laws (such as in France until 31 December 2003 and in Brazil to this day), and in the European Union's case-law[11].

[4] See Annex 1 to the state budget laws from recent years).

[5] For a critical position on this issue, see Grigore Lăcrița, Taxele nefiscale numite și taxe parafiscale [Non-fiscal taxes also called parafiscal taxes], article from 13 March 2018, available on https://legestart.ro/taxele-nefiscale-numite-si-taxe-parafiscale/.

[6] Michel Bouvier, Marie-Christine Esclassan, Jean-Pierre Lassale, Finances publiques, 8e édition, L.G.D.J., p. 846.

[7] Mircea Ștefan Minea Despre constituționalitatea taxelor parafiscale instituite în România [About the constitutionality of parafiscal taxes established in Romania], article available on https://www.ccr.ro/wp-content/uploads/2021/01/minea.pdf. Accessed on 13 November 2022 and Radu Bufan, Tratat de drept fiscal, Volumul I. Teoria generală a dreptului fiscal [Treaty of fiscal law, Volume I. General theory of fiscal law], Hamangiu Publishing House, 2016, p. 94-95.

[8] CCR, Decision no. 475/2019 which qualified the "clawback tax" as a parafiscal charge and developed the concept.

[9] CCR, Decision no. 310/2021 regarding the plea of unconstitutionality of the provisions of article 21(1)(k) and 21(2) of Government Ordinance no. 51/1998 regarding the improvement of the funding system of programs, projects and cultural actions.

[10] Jacques Grosclaude, Philippe Marchessou, Bruno Trescher, Droit fiscal général, 13e édition, Dalloz, 2020, p. 2.

[11] For example: The Judgment of the EU Court in case T-251/11 on December 11, 2014, and the Judgment of the CJEU in case C-74/18 on January 17, 2019, which ruled that "(...) when an insurance company established in a Member State offers insurance covering the contractual risks associated with the value of the shares and the fairness of the purchase price paid by the buyer in the acquisition of an undertaking, an insurance contract concluded

Based on the premise that any income stipulated by law as fiscal or non-fiscal can only have the nature and regime provided by law, i.e. either fiscal or non-fiscal, but numerous payment obligations have a regime that cannot be classified as purely fiscal or non-fiscal, it follows that, in our opinion, it is not wrong to believe that the terms "parafiscality" and "parafiscal charges" can be considered generic terms that refer to payment obligations imposed on certain entities with a regime that is different from that of traditional fiscal or non-fiscal revenues. We emphasize once again that although these terms are not explicitly stated in our country's laws, it would be incorrect to deny the existence of parafiscality and parafiscal charges based solely on this fact.

2. The French parafiscal model and its abandonment since 2004

Official documents of EU institutions use the terms fiscality and parafiscality[12], while an author from Brazil, a country where parafiscality is part of the national tax system, being regulated under that name[13], claims that the term "parafiscal" was already used in the financial and fiscal language of France in 1946[14], as evidenced by a document prepared by order of Robert Schuman[15], which inventoried the state's budgetary resources and identified certain payment obligations that were sometimes considered taxes, sometimes fees, and sometimes a combination of both[16].

According to a French author who wrote a book on parafiscality in 1977, the term has been used in the legal language of France since 1935. The author defines parafiscality as all taxes and duties that are collected for the benefit of public or private persons, other than the state, local communities, or public institutions. These taxes and duties are known as "assigned taxes" as they were paid directly to their designated beneficiaries at the time of collection[17].

In France, **parafiscality and parafiscal charges are now history** as they were replaced by compulsory levies with tax-like characteristics on 1 January 2004.

While they were in existence, there was a legal basis for establishing parafiscal charges in France (specifically, Article 4 of Ordinance no. 59-2 of 2 January 1959, in conjunction with a decree of 24 August 1961, which was later replaced by another on 30 October 1980). The laws that provided a legal basis for the establishment of parafiscal charges in France were repealed by Organic Law no. 2001-692 of 1 August

in that context is subject exclusively to the indirect taxes and **parafiscal charges** on insurance premiums in the Member State where the policyholder is established."

[12] https://ec.europa.eu/commission/presscorner/detail/ro/IP_86_628, European Commission press release on General guidelines relating to "parafiscal" charges, IP/86/628.

[13] Samora dos Santos Silva, Sistema tributário nacional: fiscalidade, parafiscalidade e extrafiscalidade, article available on Sistema tributário nacional: fiscalidade, parafiscalidade e extrafiscalidade | Jusbrasil. According to the author, the Brazilian tax system has five sources *(pode-se afirmar que são cinco as espécies tributárias que compõem o sistema tributário brasileiro: impostos, taxas, contribuições de melhoria, contribuições especiais e empréstimos compulsórios)*, but our tax system, as currently regulated, consists in taxes, duties and mandatory social contributions).

[14] Marcelo Hugo da Rocha, Contribuições parafiscais, article available on Marcelo Hugo da Rocha - Jus.com.br | Jus Navigandi [952181].

[15] Les problèmes budgétaires (Dépenses publiques. Impôts, Trésor) of 1946 available on Ch. XIV. — Les problèmes budgétaires (Dépenses publiques. Impôts, Trésor) - Persée (persee.fr).

[16] Contribuições parafiscais - Jus.com.br | Jus Navigandi.

[17] Francis Quérol, La parafiscalité, CNRS éditions, Paris, 1997.

2001[18], with effect from 1 January 2004. The parafiscal charges[19], which **do not fall under the category of *"taxes of any nature"*** established only by law enacted by the Parliament, as provided by article 34 of the Constitution of the French Republic, were replaced by levies with tax-like characteristics[20]. Under the previous legal regime in France which was in force until 2003, parafiscal charges were defined as compulsory charges imposed for the economic or social benefit of a private law entity or a public industrial and/or commercial enterprise[21]. In the language of both the law and taxpayers, the term "parafiscal" remains in use and is employed to describe and identify social security contributions, value added tax, and even corporate tax[22]. The doctrine also deems it essential to recall and examine parafiscality and parafiscal charges from both the legal and the historical perspective.[23]

We will examine them in greater detail because the French regulations may serve as a basis for comparison and/or a source of inspiration. Even though they have been repealed, they can still offer valuable insights into their regulation. According to article 4 of the 1959 Ordinance, parafiscal charges were "*collected for the economic or social* ***benefit of a legal entity of public or private law, other than the state, local authorities, and their public administrative institutions"***. These charges were established by a "*decree of the Council of State"*, not by the Parliament. Nonetheless, parafiscal charges could only be collected after January 1 of the year following their establishment and only if they were authorized by the annual budget laws. In simpler terms, a parafiscal charge could be established and collected only if:

- its collection was established for economic or social purposes;
- the recipient (assignee) was a legal entity of public or private law, other than the state, a local authority, or a public administrative institution thereof;
- the establishment of the parafiscal charge was done through a decree of the Council of State, which needed to be renewed every 5 years;
- the charge was authorized for each year by the budget laws.

3. The temptation to define and characterize the concepts of parafiscality and parafiscal charges

Parafiscal charges are challenging to define due to the numerous types that exist in our country, but also elsewhere (several hundred in Romania and over a thousand in other countries[24]). Additionally, they vary

[18] Organic law No. 2001-692 of 1 August 2001 on financial laws - Légifrance (legifrance.gouv.fr).

[19] Jean Lamarque, Olivier Negrin, Ludovic Ayrault, *Droit fiscal general*, LexisNexis, 2e edition, 2011, p. 74-79, 282 și 294-295.

[20] Article 34: *The law establishes the rules regarding (…):* ***the basis, rate and methods of collecting taxes of all types;*** *the regime of issuing money.*

[21] Jean Lamarque, Olivier Negrin, Ludovic Ayrault, op. cit. p. 75.

[22] Tout savoir sur la taxe parafiscale ! - ERP Gestimum. Everything you need to know about the parafiscal tax! - Gestimum ERP.

[23] Lamarque, Jean, Negrin Olivier, Ayrault Ludovic, *Droit fiscal general*, LexisNexis, 2e edition, 2011, p. 75.

[24] In 2008, there were almost 500 such charges in Romania (adding to the 74 taxes and fiscal duties) but the minister of finance at that time declared that he did not know how many there were in reality. Ministers of finance have often announced that their number will be decreased. But even to this date their number exceeds 200. However, there are countries where the parafiscal system is much more extensive than that of Romania. For instance, Montenegro has approximately 1700 parafiscal charges. This information is available on New report on parafiscal

considerably in terms of content and administrative regulation. The revenue generated from these charges has a specific destination, and their recipients (usually, the entities responsible for their collection, but the charges may have other destinations or recipients[25]) are also designated by the act of establishment, which is not always a law. In our legal system, these beneficiaries can be individuals, whether under public or private law, which further adds to the complexity of defining parafiscal taxes.

Each parafiscal charge is named in a way that facilitates its identification, along with the corresponding good or service in whose price the charge is embedded, to a smaller or greater extent, the collecting entity, and its designated purpose. Examples include: literary stamp, parking fee, judicial stamp fee, etc. Some of the parafiscal charges existing in Romania are listed below: fees charged for issuing certificates such as birth, marriage, death, and other documents, criminal or fiscal records, registration and identity documents, stamp duties for literary, artistic, musical, cinematographic, folkloric and judicial works, parking fees, fees for courses organized by public educational and other institutions, fees for the exclusion of *extra-muros* land from agricultural circuits, licensing fees, and fees and tariffs for services offered by various entities such as the State Office for Inventions and Trademarks (Government Ordinance no. 41/1998), the Romanian Copyright Office (Government Decision no. 401/2006 and Government Decision no. 1086/2008) and the National Trade Register Office (Law no. 265/2022 on the Trade Register, Order no. 1082/C/2014, and Government Decision no. 962/2017), etc.

We believe that defining parafiscal taxes in a universally accepted manner is a challenging, if not objectively impossible, due to their vast number, diversity, and the differing purposes for which they are established and administered. The Ministry of Public Finance's unclear stance on the matter contributed to this difficulty, as it defined a parafiscal charge as *"a tax charged by a state institution as its own income and established through a normative act approved by the government"*. In other words, the Ministry of Public Finance excludes taxes established by law or order, as well as those not collected by a state institution, from the definition of parafiscal charges. Therefore, only the benefits established by government decision and whose beneficiaries are state institutions would constitute parafiscal charges.

The Larousse Dictionary defines a parafiscal charge as a compulsory tax paid by taxpayers, which is not intended to cover general interest expenses but rather specific and diverse expenses. This definition has allowed for the inclusion of social contributions, which are equivalent to mandatory social contributions in our tax system, as a type of parafiscal charge in France. To this day, social contributions are not considered taxes or fiscal duties in France. However, such a qualification is not possible in our legal system, as currently regulated, because mandatory social contributions are not only established by special laws, but are also subject to special

charges and burdens: 12 recommendations to Government to improve business environment in Montenegro (ilo.org).

[25] As an example, Article 5 of Government Decision No. 962 of 28 December 2017, which approves the fees for certain operations carried out by the National Trade Register Office and trade register offices attached to the courts, provides that "The National Trade Register Office and trade register offices attached to the courts collect fees for certain activities and/or funds with a specific purpose and transfer them to the account of the legal entities designated as beneficiaries by law."

rules of the Fiscal Code and collected under fiscal law (as outlined in Article 29 and Article 335 of the Fiscal Procedure Code, which defines the authority of fiscal bodies). It is worth noting that, in France, the distinction between social contributions and taxes or fiscal duties has significant legal implications, as **taxes and duties** "*must be established by a law voted by Parliament, while social contributions are established by a simple government decree"*[26].

Professor Mircea Șt. Minea, quoting French authors as well, shows that: *"**parafiscal charges** refer to the monetary sums collected based on legal rules established specifically for this purpose. These charges are collected either by the tax authorities or directly by the entities that benefit from the respective revenues. However, they are paid into the accounts of specific public institutions or other collective entities, whether public or private, other than local public collectives or administrative establishments".*[27]

In another work, professors M. Șt. Minea and Flavius C. Costaș claim that *"taxes are collected with the dual aim of enforcing a specific conduct in the socio-economic sphere and **of financing the common and general needs of society, whereas parafiscal charges are solely collected to provide supplementary revenues to the legal recipients of these funds"*** [28]**.**

The opinion of professor M. Șt. Minea is also found in two decisions of the Constitutional Court of Romania which qualify parafiscal charges as ***"genuine dismemberments of taxes and fiscal duties"***, being similar to the value added tax given their method of collection.[29]

In an attempt to expand on the existing definition, **we define parafiscal charges** as mandatory payments imposed on individuals who purchase specific goods or services that, typically, have a unique destination apart from the state budget. These payments benefit collectors or other authorized entities through the authorization of collections made under this title. Parafiscal charges are not considered fiscal budget revenues and are not managed under fiscal law.

To put it simply, a parafiscal charge is a mandatory payment that is established by a constitutional or (special?) law empowered entity, in exchange for a product, service, or other advantage. This obligation is not administered under pure fiscal law and the collected amount represents income for the collecting entity or another entity established by the act that instituted the contribution. Or even more briefly, any compulsory levy that is not intended towards general interest budgets and is not managed under fiscal law or, as the case may be, is managed as purely non-fiscal income is a parafiscal charge. We do not believe that this category can encompass revenues that are non-fiscal but are treated as fiscal claims in their administration under the law, such as royalties from oil, mining, and agriculture.

[26] Éric Anceau, Jean-Luc Bordron, Histoire mondiale des impôts. De l`Antiquité à nos jours. Passés/Composés, 2023, p. 10.

[27] Mircea Ștefan Minea, Despre constituționalitatea taxelor parafiscale instituite în România [About the constitutionality of parafiscal taxes established in Romania], article available on https://www.ccr.ro/wp-content/uploads/2021/01/minea.pdf.

[28] M. Șt. Minea and C. F. Costaș, Dreptul finanțelor publice [Public finance law], vol. II, p. 368.

[29] CCR Decision no. 310/2021 and CCR Decision no. 495/2017.

4. What are the criteria for differentiating parafiscal charges from taxes and fiscal duties?

The term "parafiscal charges" implies a certain association with taxes and fiscal duties, and their compulsory nature and establishment through authoritative means both provide supporting evidence for such a connection. A connection that is sometimes closer, sometimes more distant. What would be the criteria for differentiating parafiscal charges from taxes and duties of a purely fiscal nature? We will present the parafiscal charges that we have identified, but it should be noted that our parafiscal system does not have universally applicable rules. Thus:

i) If the compulsory payment is collected for the benefit of the state, a territorial administrative unit, or a public institution, and is included in their budget, it is considered a tax or a fiscal duty. We should note that sometimes the parafiscal charges bear more resemblance to taxes than to fiscal duties. This is because, similar to taxes, parafiscal charges do not require a direct and immediate exchange. However, there are instances where the collector may offer a service in exchange for the parafiscal charge, such as: OSIM, ONRC, ORDA. Per a contrario, if the entity that benefits from the income, i.e., the beneficiary, is a person under public or private law, then we can consider it as a parafiscal charge. In our parafiscal system, the rule is not always absolute as some revenues obtained from parafiscal charges may also be included in the state budget or territorial administrative units' revenues, like ORDA's revenues from specific activities such as expert reports and registration fees;

ii) We can identify a tax or fiscal duty when the income collected is intended to cover expenses in the general interest. If the mandatory payment is intended to generate income for specific entities, whether public or private, then it has a parafiscal nature. There are exceptions to this rule as well, as many parafiscal charges are collected and considered as revenues for state or local community budgets (such as licensing fees, court stamp duties, etc.).

iii) If the levy is administered under pure fiscal law, then we are facing a tax or a fiscal duty. On the contrary, if the levy is administered outside the rules of fiscal law and is considered non-fiscal income, the levy has the nature of a parafiscal charge. However, this rule cannot always be considered as absolute.

We would like to recall that some parafiscal charges (not few) **are actually levied on consumers when they purchase products and/or services, and therefore they can be considered as additional taxes on consumption.** A simple example that can be verified is the eight types of stamps established by Law no. 35/1994, which include literary, cinematographic, theatrical, musical, folklore, fine arts, architectural, and entertainment stamps[30]. Here, it is worth

[30] Law no. 35/1994, the 8 categories of stamps that form the object of this law are established as follows:
- the literary stamp, worth **2% of the sale price of a book** and which is added to the book price;
- the cinematographic stamp, worth **2% of the sale price of a ticket** and which is added to the ticket price;
- the theatrical stamp, worth 5% of the sale price of a ticket and which is added to the ticket price;
- the musical stamp, worth 5% of the sale price of a ticket and **2% of the sale price of any record, any printed material, video or audio tape of a musical nature**, other than folklore records, which are added to the respective prices;
- the folklore stamp, worth **5% of the sale price of a ticket and 2% of the sale price of any record,** any printed material, video or audio tape, which are added to the respective prices;
- the fine arts stamp, worth 0**.5% of the sale price of the work of art**, and which is added to the respective work of art price;
- the architecture stamp, worth **0.5‰ of the investment value**, regardless of the beneficiary or its destination;

noting the combination of regulations involved, starting with the law, followed by methodological norms issued by the Ministry of Culture and the Ministry of Public Finance, and the mix of beneficiaries of the parafiscal charges: the stamp is collected by the unions of creators, but the state budget receives **a penalty of 0.2% for any amounts that are not transferred on time.** Collections resulting from literary, cinematographic, theatrical, musical, folklore, fine arts, architectural, and entertainment stamps are not subject to taxation. But according to Article 5(3) of the law, if the amounts collected and due are not paid on time, a penalty of 0.2% is applied for each day of delay, **which is paid to the state budget**. Given the circumstances, determining the legal nature of the stamp regulated by Law no. 35/1994 appears to be an arduous task. Nevertheless, it is worth noting that the Constitutional Court of Romania had to assess the constitutionality of the stamp duty established by this law and found it to be constitutional.

5. What are the advantages and disadvantages of parafiscality and parafiscal charges

As previously stated, the state (at least the Romanian state) is inclined to maintain parafiscal charges. However, we acknowledge that from both the perspective of the state and the parties involved, parafiscal charges have both advantages and disadvantages. Like taxes and fiscal duties, they have their strengths and weaknesses, constituting both a benefit and a detriment at the same time.

(i) Our analysis reveals the following advantages of parafiscality:

- the entertainment stamp, worth **3% of the sale price of a ticket** and which is added to the ticket price.

The literary stamp is applied to each copy of fiction books sold through units of any kind, either published in Romania or not.

The stamps provided for in paragraph (1) letters b) - e) are applied to each ticket sold at cinematographic, theatrical, musical and folklore performances organized in the country and are added to the ticket sales price.

The stamp provided for in paragraph (1) letter g) **is added to the value of the investment and is paid together with the building permit fee**.

The stamp provided for in paragraph (1) letter h) is applied to each ticket sold at artistic and sport performances, other than the ones subject to other stamp duties, as well as at circus performances, organized in the country and are added to the ticket sales price.

Article 2 - (1) The units responsible for collecting the stamp fees are required to transfer the collected amounts, which represent the value of the stamp, on a monthly basis to the accounts of the creators' organizations. The transfer process should follow the methodological norms that have been developed by the Ministry of Culture and Cults, in collaboration with the Ministry of Public Finance. The creators' organizations should also be consulted during the development of these norms.

Article 3 - **The amounts due to the creators' organizations will be used for**:

- supporting cultural projects of national interest;
- participation in interpretation and creation contests in the country and abroad;
- promotion of actions with the participation of Romanians abroad;
- supporting and protecting cinematographic, theatrical and musical art;
- supplementing the funds intended to support the activity of young creators, performers and artists;
- material support for retired creators, performers and artists;
- material support of specialized magazines belonging to creative unions;
- supporting the registration of valuable works of art in the national and international circuit;
- honoring and perpetuating the memory of Romanian cultural personalities and national minorities, both in the country and abroad;
- enhancing the folklore and ethnographic heritage of Romania;
- financial support of shows in which creative works are presented whose authors are Romanians or representatives of national minorities in Romania;
- financial support of awards given to creators and performers.

- it allows for some institutions and activities to be taken off the budget, thereby reducing budgetary pressure (for instance, OSIM is self-financing, the health system benefits from increased funds due to the clawback tax, social and cultural actions, etc.);
- they are easier to establish compared to taxes and fiscal duties since they are not subject to the same constraints and rigorous conditions required for the establishment and modification of taxes and fiscal duties (as stated in Article 4 of the Fiscal Code);
- the collection of parafiscal taxes is usually carried out by the beneficiaries themselves, thereby relieving the fiscal bodies of their administration, and the use of the revenues is more flexible than public funds in the budgetary regime;
- they are often hidden in the price of goods and services, which means that payers are less likely to perceive them as tax burdens, and their complaints are typically directed at the suppliers or service providers who include them in their prices;
- the non-payment of parafiscal charges when due may not result in the same sanctions as those applied to taxes and fiscal duties, making them less burdensome for payers. However, it is important to highlight that in some cases, parafiscal charges are considered similar to taxes and fiscal duties in terms of administration and fiscal claims.

(ii) We have identified the following disadvantages of parafiscality:

- in our fiscal and parafiscal system, the boundary between taxes, fiscal duties, and parafiscal charges is fragile and permeable. Some taxes classified as parafiscal charges are treated as fiscal claims, creating legal uncertainty and insecurity;
- parafiscal charges that are not established by law deprive the legislative power of the ability to regulate their establishment;
- in our opinion, parafiscal charges can only be established exceptionally through legislation; otherwise, they are unconstitutional;
- parafiscal charges that are not established by law (or by local council decisions, where permitted by law) are unlawful;
- since parafiscal charges are not administered and used in a strict fiscal-budgetary regime, the collection and use of these taxes are typically handled by the beneficiaries. This makes it challenging to monitor and control their realization and use, and the lack of transparency can lead to weak or non-existent oversight by both the beneficiaries and the state;
- for the same reason, it is impossible to determine the exact proportion of parafiscal revenues in the overall revenue generated by the state and local communities, as well as in the country's gross domestic product. Additionally, it is unclear how much money is spent for such charges by those who are obliged to pay them;
- they are bureaucratic, burdensome and time-consuming for their payers;
- they are numerous and lack uniform rules.

6. Constitutionality and/or unconstitutionality of parafiscal charges

There are authors who claim, without reservations, that parafiscal taxes are constitutional, and among them is professor Mircea Ștefan Minea, former judge of the Constitutional Court. Arguing his opinion, Professor Mircea Minea shows that **the constitutional basis for the establishment and collection of parafiscal charges is found in Article 139(3) of the Constitution**, the text being introduced on the occasion of the revision of the

Fundamental Law in 2003, providing that ***"The amounts representing contributions to the establishment of funds are used, as provided by law, only according to their destination"***.

In Professor Minea's opinion, this text ***"came to cover and confer constitutional consecration on an economic-financial reality observed during the economic and social evolution of the country on its way to strengthening the rule of law and the market economy"*** *and meant* ***"completion of the initial text with the aim of including in the constitutional parameters other regulations through which financial levies can be instituted and collected for the establishment of funds to finance various actions, services and works, other than those that can be supported from the state budget only"***[31].

If this is the case, this means that until the adoption of Law no. 429/2003 revising the Romanian Constitution, there was no constitutional basis for the establishment and collection of parafiscal charges. But we believe that even after the revision of the Constitution, there are constitutional or, as the case may be, legal problems pertaining to some of the parafiscal charges.

The Constitutional Court had to examine the constitutionality of such a tax and decided, in three decisions (nos. 495/2017, 892/2012 and 1494/2011) that the tax subject to control and which was analyzed (literary stamp) was constitutional. In justifying these decisions, the Court noted that *"cultural stamps regulated by Law no. 35/1994* ***are not taxes, but special duties, which the doctrine calls parafiscal charges*** *and which present themselves in a diversity of forms, a fact that also explains their heterogeneous regulation.* ***Parafiscal charges established based on legal rules adopted for this particular purpose refer to the monetary sums collected either by the tax authorities or directly by the entities that benefit from the respective revenues and paid into the accounts of specific public institutions or other collective entities, whether public or private, other than local public collectivities or administrative establishments*** *(...) The specificity of parafiscal charges is that, like taxes,* ***they are mandatory,*** *being established by law, but, unlike taxes and fiscal duties, they are constituted* ***as extra-budgetary income*** *of certain* ***legal entities under public or private law.*** *They have the same origin as taxes, but although they follow a similar legal regime, their purpose is partly different. (...) the normative act establishing the parafiscal charges is, as a rule, the work of the central public authority (law or government ordinance), but it is possible that such charges are also established by the local public administration authority (by decisions of local councils). Also, the parafiscal charges are monitored and collected either through the tax administrations or directly by the legally designated beneficiaries, in whose accounts they are concentrated. The techniques and procedure by which parafiscal charges are collected and paid are very close to those used in fiscal matters.* ***Due to these particularities, parafiscal charges are considered to be genuine "dismemberments" of taxes and fiscal duties. The difference is that, while taxes are collected with the dual aim of enforcing a specific conduct in the socio-economic sphere and of financing the common and general needs of society, parafiscal charges are solely collected from individuals and/or***

[31] Mircea Ștefan Minea, Despre constituționalitatea taxelor parafiscale instituite în România [About the constitutionality of parafiscal taxes established in Romania], article available on https://www.ccr.ro/wp-content/uploads/2021/01/minea.pdf. Accessed on 13.11.2022.

legal entities specifically targeted by the legal rules establishing such charges, solely to provide supplementary revenues to the legal recipients of these funds"*[32]*.

The Romanian Constitutional Court ruled in an almost identical manner in Decision no. 310/2021 which reviewed (and rejected) the plea of unconstitutionality of the provisions of article 21(1)(k) and 21(2) of Government Ordinance no. 51/1998 regarding the improvement of the funding system of programs, projects and cultural actions by way of a mandatory contribution similar to the literary stamp, showing that:

(a) in spite of differences which cannot be challenged and of their different purpose, parafiscal charges have the same origin as taxes, the normative act establishing the parafiscal charges being, as a rule, the work of the central public authority (law or government ordinance), but it is possible that such charges are also established by the local public administration authority (by decisions of local councils);

(b) the techniques and procedure by which parafiscal charges are collected and paid are very similar to those used in fiscal matters and, from this perspective, parafiscal charges follow a regime similar to value-added tax, as they are collected by the distributors of taxable products from the acquirers/beneficiaries of such products and paid into the accounts of the beneficiary entities provided by law;

(c) due to these particularities, parafiscal charges are genuine "dismemberments" of taxes and fiscal duties. The difference is that, while taxes are collected with the dual aim of enforcing a specific conduct in the socio-economic sphere and of financing the common and general needs of society, parafiscal charges are solely collected from individuals and/or legal entities specifically targeted by the legal rules establishing such charges, solely to provide supplementary revenues to the legal recipients of these funds.

We express reservations regarding the opinion of professor Mircea Ștefan Minea and the Constitutional Court's case law regarding the constitutionality of parafiscal charges as a whole, considering that many of them are unconstitutional, as we will show below.

Before presenting our reservations and arguments, it is important to acknowledge that parafiscal charges are an established part of legal life that cannot be disregarded. There is a large number (hundreds) of parafiscal charges, each with a unique legal regime, making it difficult to categorize them under a single heading. Some parafiscal charges provide significant benefits to their beneficiaries, such as the fees charged by OSIM, representing the single source of funding of this institution, or contributions from consumers to support green energy producers. However, in some cases, the benefits are so minimal that the costs incurred exceed the income generated. While parafiscal charges can help institutions to be funded from sources other than the state budget and state aid to be provided indirectly, thus relieving budget pressure, they are often criticized in the business world for being burdensome for citizens and businesses, consuming time and resources, and lacking proper control. The authorities are aware of both the advantages and disadvantages of these taxes, and are striving to decrease their number. However, the outcomes in our country thus far have not been particularly encouraging[33].

The following are the reasons for our reservations regarding their constitutionality:

[32] Constitutional Court of Romania, Decision no. 495/2017.
[33] Law no. 1/2017 repealed a number of 102 such charges.

(a) in accordance with article 56 of the Romanian Constitution, citizens have the obligation to contribute to public expenses through taxes and duties, any other contributions being prohibited, apart from those established by law, in exceptional circumstances[34].

(b) Articles 137 and 139 of the Romanian Constitution strengthen the principle of legality of taxation (Article 137)[35] and the prohibition to establish taxes, contributions and any other revenues to the state budget other than by law (Article 139)[36]. For this purpose, the doctrine and the Constitutional Court have repeatedly affirmed that in adhering to the principle of legality in fiscal matters and using the term "only" in Article 139 of the Constitution, the legislature aimed to prevent the establishment of taxes, duties, and contributions through instruments inferior to the law, such as governmental decisions, and to assert the budgetary revenues' legal nature[37].

(c) Last but not least, rather the opposite, there is Article 56(3) of the Constitution which prohibits any other contributions, apart from those established by law, in exceptional circumstances. This means that every time mandatory "other contributions" are instituted (whatever they are and whoever their beneficiary is), including parafiscal charges, the exceptional circumstances that require their establishment must exist, be shown and argued/substantiated[38] and we also believe that the "exceptional circumstances" justifying the establishment of "other contributions" can only be limited in time, that is, parafiscal charges can only be temporary.

This means that:

(a) all parafiscal charges that are not established by law are unlawful;

(b) and by law, parafiscal charges can only be established in exceptional circumstances;

(c) the exceptional circumstances that allows the establishment of a contribution of this nature is a matter of appreciation of the legislator, but in order to be able to establish

[34] **Article 56 - Financial contributions.**
(1) Citizens have the obligation to contribute to public expenses, through taxes and duties.
(2) The legal taxation system must ensure the fair settlement of fiscal burdens.

[35] **Article 137 - The financial system.**
The formation, administration, use and control of the financial resources of the state, of administrative-territorial units and of public institutions are regulated by law.
Any other contributions are prohibited, apart from those established by law, in exceptional circumstances.

[36] **Article 139 - Taxes, duties and other contributions.**
Taxes, duties and any other revenues to the state budget and the state social insurance budget are established only by law.
Local taxes and duties are set by local or county councils, within the limits and as provided by law.
The amounts representing contributions to the establishment of funds are used, as provided by law, only according to their destination.

[37] I. Muraru, E.S. Tănăsescu, Constituția României. Comentarii pe articole [Constitution of Romania. Comments per articles], C.H. Beck Publishing House, 2008, p.560-561.

[38] In France, for example, **when establishing a parafiscal charge** by Decree no. 97-1263, the following substantiation was provided: "With effect from 1 January 1998, a parafiscal charge on advertisements broadcast on sound radio and television [('the charge on advertising companies')] shall be introduced **for a period of five years** to **fund an aid scheme for the benefit of those holding a licence to provide sound radio broadcasting services** in respect of which the commercial revenue deriving from broadcasts of brand or sponsorship advertising is less than 20% of the total turnover. The objective of this charge is to promote radio broadcasting." Quoted from the CJEU Judgment of 22 December 2008, rendered in case C-333/07 available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62007CJ0333.

it, the legislator must justify that such a circumstance exists;

(d) parafiscal charges can only be temporary;

(e) the laws by which parafiscal charges were established outside of the exceptional circumstances referred to in Article 56(3) of the Constitution are unconstitutional.

However, these are also reasons why we believe that their regulation by law is necessary.

7. Examples of parafiscal charges, collecting entities, beneficiaries and regimes

We are hesitant to accept that parafiscal charges can be established through means other than the law or other acts having the effect of a law. However, we will provide examples of collecting entities and of parafiscal charges. It is important to note that the names given to these charges are not indicative of their classification as parafiscal charges. We are presenting the following examples to illustrate the diversity and complexity of defining parafiscal charges and for educational purposes. These examples are also significant in terms of the revenue they generate.

As mentioned earlier, one of the advantages of parafiscal charges is their contribution to the relieving the burden of certain public entities or institutions on the state budget. Additionally, it should be noted that some public entities collect parafiscal charges, which ultimately become income for the state budget or other entities. Thus:

(a) The State Office for Inventions and Trademarks which is *"a specialized body of the central public administration, with legal personality under the Ministry of Economy (...) single authority on the territory of Romania in ensuring the protection of industrial property",* and *"the operating expenses of the State Office for Inventions and Trademarks are financed from its own revenues*" (articles 1 and 10 of Government Decision no. 573/1998 on the organization and operation of the State Office for Inventions and Trademarks). Its revenues are represented by the fees it collects and the amount of which is established by a normative act with the effect of law (Government Ordinance no. 41/1998). These represent "additional revenues" that OSIM uses to finance its own activities entirely, and they can also be utilized for funding research and innovation initiatives by universities and/or research institutions (as stipulated in Article 3 of Government Decision no. 573/1998). Thus, it is worth noting that recipients of the parafiscal charges collected by OSIM may include both individuals and legal entities beyond the agency itself. Close to fiscal duties, because they are paid in return for services rendered, they are in reality parafiscal charges.

(b) The Romanian Copyright Office is also a specialized body of the central public administration subordinated to the Government (Government Decision no. 401/2006[39]), is financed from the state budget through the Ministry of Culture, but for the specific activities provided, it collects sums of money (the rates being established by Government Decision no. 1086/2008) which are revenues of the state budget, after collection they are paid by ORDA to the state budget. While parafiscal charges are

[39] Government Decision no. 1086 of 10 September 2008 regarding the establishment of tariffs for the operations carried out by the Romanian Copyright Office for a fee and for the approval of the Methodological Norms regarding the level of establishment, distribution and use conditions of the incentive fund for the staff of the Romanian Copyright Office.

similar to fiscal duties in that they are charged for services provided by a public institution, they are not established by law and are not administered under fiscal law. Therefore, they can only be classified as parafiscal charges. However, not being established by law, their legality is questionable.

(c) The National Office of the Trade Register is also a public institution fully financed from the state budget (Article 19 of Law no. 265/2022 on the trade register). For the services provided, it collects sums of money in the amount established by Order of the Minister of Justice. But according to Article 5 of Government Decision No. 962/2017, which approves the fees for certain operations carried out by the National Trade Register Office, it collects tariffs and fees for certain activities and/or funds with a specific purpose and transfers them to the account of the legal entities designated as beneficiaries by law[40]. Furthermore, the amounts collected appear to be subject to the same regulations as fiscal claims, as stated in Article 4 of Government Decision no. 962/2017[41]. If overpayments were made, they must be refunded to the payers according to the provisions outlined in the Fiscal Procedure Code. They are not established by law, so their legality is questionable.

(d) The National Gambling Office (ONJN) collects fees/tariffs with an even more unclear regime. And we note that here we mainly deal with the contributions they collect for the purpose of financing a social activity of their own (that of preventing gambling addiction). Thus, based on article 10(5) of Government Emergency Ordinance no. 77/2009 regarding the organization and operation of games of chance, amended by Government Emergency Ordinance no. 114/2018 regarding, among other things, fiscal and budgetary measures), in addition to **ONJN ,** ***"an activity was established*** *to* ***promote compliance with the principles and measures regarding socially responsible gambling*** *(...)* ***fully financed from own revenues****, in accordance with the provisions of Law no. 500/2002 on public finance".* This one **activity is fully financed from own resources obtained through the (mandatory) contributions of gambling organizers**. **The nature of these revenues is unclear**, because on the one hand, they **are not taxes, duties or contributions falling under the category referred to in the Fiscal Code**, and on the other hand, by the law that establishes them, **they are fiscal claims,** which means that they cannot be used outside budgetary purposes and according to the destination assigned by law. Moreover, **in the budget laws, they do not appear under this name either in the chapter "fiscal revenues" or in the chapter "non-fiscal revenues".** The "fiscal revenues" chapter of Annex no. 1 to the budget laws only includes *"gambling income taxes"* (budget indicator 030122) and "*gambling taxes* " (budget indicator 160101) and *"taxes and fees for issuing operating licenses and authorizations"* (budget indicator 160103), and if we included them in the category of "social contributions" it would mean adding to the law (which defines them in article 7(10) of the Fiscal Code), which is not possible. **These *"contributions"* are not even listed in Annex no. 1 to the budget laws** and we do not think it is possible to change the name used by the legislator ("contributions") to

[40]Article 5 (1) The National Trade Register Office and trade register offices attached to the courts collect fees for certain activities and/or funds with a specific purpose and transfer them to the account of the legal entities designated as beneficiaries by law.

[41] Article 4 Any overpayments will be returned according to the provisions (...) of the Fiscal Procedure Code (...).

that of duty, nor to qualify or assimilate them with the duty as defined by the legislator, that of payment for the service provided by a public institution and this, because if the "activity" of prevention could be considered a provision of services, **then the payment of the service should be borne by the beneficiaries, i.e. the players,** and not by the game organizers.

The activities "established" and for which the source of income is created by article 10(4) – 10(6^1) of Government Emergency Ordinance no. 77/2009 aims to prevent gambling addiction and include the programs for the protection of young people and players against gambling, the prevention and treatment of gambling addiction, the realization of responsible promotion and advertising, the settlement of disputes between a game organizer and a player, as well as for the provision of personnel expenses related to its own activity in the maximum limit of 30% of the total amounts related to the activity. The own revenues are established on account of the contributions established (imposed) on gambling organizers as follows:

for class I licensed remote gambling organizers, the sum of 5,000 euros annually;

(ii) for legal entities directly involved in the field of traditional and distance games of chance licensed in class II, the sum of 1,000 euros annually;

(iii) for class III state monopoly distance games, the sum of 5,000 euros annually;

(iv) for licensed traditional gambling organizers, the sum of 1,000 euros annually.

The deadline for payment of contributions is for the first year of license, 10 days from the date of approval of the licensing documentation, and for subsequent years, until January 25 of each year. In the event of termination of the validity of the license, for any reason, for the license year in which the factual situation occurs that has the effect of termination of its validity, the annual contribution is due in full. These revenues (which, according to the law, are ONJN's own revenues) **have the nature of budgetary fiscal claims** and **are enforced according to the rules of the Fiscal Procedure Code for fiscal claims based on the ONJN notification which is an enforceable title**.

However, we note that:

(a) according to Article 1(5) of Government Emergency Ordinance no. 20/2013 regarding the establishment, organization and operation of the National Gambling Office, "**The Office has its own budget and is financed from the state budget, through the budget of the Ministry of Public Finance**", the ONJN president being authorized to act as a commitment officer.

(b) Article 10(5) of Government Emergency Ordinance no. 77/2009 regarding the organization and operation of games of chance ordered the "establishment of an activity" for which revenues are created distinct from those of ONJN which is financed from the state budget.

(c) The law establishing the "contribution" fails to show or justify the "exceptional circumstances" that justified its establishment, as provided by Article 56(3) of the Constitution, so that the constitutional requirement for its enactment has not been met. In other words, articles 10(4) – 10(6^1) are, in our opinion, unconstitutional. Until a potential intervention of the Constitutional Court or the legislator is made, the contribution exists, it is mandatory and must be paid by the organizers of games of chance.

A conclusion in relation to such "contributions" is that it is impossible to determine their legal nature.

The evidence presented above shows that tax charges vary greatly, even in cases where they should be similar due to the

collecting entities and the types of activities involved, resulting in different legal regimes. This makes it difficult, or even impossible, to determine their legal nature and raises questions regarding their constitutionality or legality.

In our country, the following are considered to belong to the category of parafiscal charges (among others):

(1) Oil, mining and agricultural royalties (noting that they are assimilated to fiscal claims in terms of their administration (Article 2 of the Fiscal Procedure Code);

(2) Monetary contributions (eg: the contributions of the organizers of the licensed games of chance established for the purpose of financing from their own resources the activity of the National Gambling Office for compliance with the principles and measures regarding games of chance;

(3) Authorization and licensing fees and tariffs (but the budget laws include them in the category of fiscal revenues – see Annex 1;

(4) Judicial fees;

(5) Cadastral taxes and fees;

(6) Fees for the definitive removal of land from the agricultural circuit;

(7) Fees for participation in public procurement through SEAP;

(8) Taxes and tariffs in the field of environment, forests and hunting funds;

(9) Taxes and tariffs in the field of culture (literary stamp, musical stamp);

(10) Tuition and professional qualification fees and charges;

(11) Fees and charges for forensic services (28);

(12) Fees for services in the field of foreign affairs (consular fees);

(13) Competition fees levied by the Competition Council;

(14) Fees for sanitary and veterinary services;

(15) Fees for services of the Ministry of Administration and Interior (registrations, examinations, issuance of driver's licenses);

(16) Tariffs in the field of electronic communications.

The beneficiaries of parafiscal taxes are determined by the acts that establish them and can be collective, public, or private entities. These acts are typically laws, including government ordinances, as well as decisions made by local councils that must "comply with the provisions of the Fundamental Law".

8. Conclusions

Parafiscal charges are challenging to define due to the numerous types that exist in our country, but also elsewhere. Additionally, they vary considerably in terms of content and administrative regulation. The revenue generated from these charges has a specific destination, and their recipients (usually, the entities responsible for their collection, but the charges may have other destinations or recipients) are also designated by the act of establishment, which is not always a law. In our legal system, these beneficiaries can be individuals, whether under public or private law, which further adds to the complexity of defining parafiscal taxes.

In this regard, we express reservations regarding the constitutionality of parafiscal charges, considering that many of them are unconstitutional, as we showed below.

As a general conclusion, the evidence presented in this paper shows that tax charges vary greatly, even in cases where they should be similar due to the collecting entities and the types of activities involved, resulting in different legal regimes. This makes it difficult, or even impossible, to determine their legal nature and raises questions regarding their constitutionality or legality the parafiscal charges present advantages and disadvantages. What it is certain is that one of

the advantages of parafiscal charges is their contribution to the relieving the burden of certain public entities or institutions on the state budget. Additionally, it should be noted that some public entities collect parafiscal charges, which ultimately become income for the state budget or other entities.

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THE ROLE OF THE NICE TREATY IN THE EVOLUTION OF THE EUROPEAN UNION – ANALYSED 20 YEARS AFTER ITS ENTRY INTO FORCE

Augustin FUEREA[*]

Abstract

If we analyse the period between the adoption, signing and entry into force of the main amending treaties (the Single European Act, the Treaty of Maastricht, the Treaty of Amsterdam, the Treaty of Nice and the Treaty of Lisbon), we find that the shortest period was between the Treaty of Amsterdam and the Treaty of Nice. Almost seven years had passed between the Treaty of Nice and the Treaty of Lisbon, if we consider the date of entry into force, and the Treaty of Lisbon has turned out as one of the longest-lasting treaties (over 13 years), until at present. Referring to the dynamics of the domestic, European and international society, in the context of the acceleration generated by digitization (the access to information from the last decade[1]), with the consideration of previous periods, we can appreciate, without worrying of making a mistake, that the merits of the Treaty of Lisbon can be considerably enhanced. For Romania, the Treaty of Nice is particularly important, as it also is for the other 11 states in Central and Eastern Europe, because, with this treaty, for the first time, seats in the European Parliament were allocated to all those states, and also the votes within the Council of the European Union, and not only (if we consider the representation of all these states in all the institutions, bodies, offices and agencies of the European Union).

Keywords: *the Treaty of Nice, the institutional system of the European Union, reform.*

1. General aspects

Looking back, we find that the openness of the European Union (EU), the Council of Europe and the North Atlantic Treaty Organization (NATO) towards Central and Eastern Europe and, implicitly towards Romania, has started in the 90's. Since then, we have been witnessing the weakening, until disappearing, of the economic, political and military bipolarism, in the sense of annihilation, on the one hand, of the Council for Mutual Economic Assistance (CMEA) in the states from Central and Eastern Europe where there were members[1], and on the other hand, of socialism/communism, respectively of the military organization known as the "Warsaw Treaty"[2]. In this context, the concept of

[*] Professor, Ph.D., Faculty of Law, "Nicolae Titulescu" University of Bucharest, (e-mail: augustin.fuerea@univnt.ro).

[1] "The European Commission recognizes that digital technology has an impact on every aspect of EU policy, influencing: the way we produce and consume energy, the way we move from one place to another, the way capital circulates throughout Europe" (**A. M. Conea**, *Politicile Uniunii Europene*, Universul Juridic Publishing House, Bucharest, 2019, p. 190).

[1] The CMEA member states were: Bulgarian People's Republic, Czechoslovak Socialist Republic, German Democratic Republic, Hungarian People's Republic, Polish People's Republic, Romanian People's Republic/Socialist Republic of Romania and Union of Soviet Socialist Republics.

[2] The "Warsaw Treaty" included: the Albanian People's Republic, the Bulgarian People's Republic, the Czechoslovak Socialist Republic, the German Democratic Republic, the Hungarian People's Republic, the Polish

"globalization" has increasingly made its way into the political speech, without being defined, however, from the perspective of political-legal consequences or from the point of view of advantages vs. disadvantages, strengths or weaknesses, if we were to consider a possible SWOT analysis.

It is tempting to carry out multidisciplinary research of the transformations that have taken place in the last more than 30 years since the change of political regimes in many of the European states, research that is certainly being carried out currently, in specialized institutions, at national and international level. I say "currently", relating my statement to one of the most important characteristics of history, namely its *cyclicality* and dynamics. How else can we define cyclicality, other than as a repetition of processes, phenomena (economic, political, social and, why not, military) at a certain time interval. What would that time interval be? It can be shorter or longer, depending on the development of society as a whole. The more society experiences a more pronounced development, the greater the dynamics is, influencing thus, directly the cyclicality, and the history.

We do not propose, through our approach, to go into details regarding the multidisciplinary nature of a possible analysis. Our interest is circumscribed to the option clearly outlined at the level of the Romanian state, since 1990, regarding its accession to the Council of Europe, NATO and the EU. This order is not accidental, and it represents the efforts made by our country, in all the fields, for the accession on January 1st, 2007 to the European Union. Thus, it was necessary for the Romanian state to join the Council of Europe (in 1993) and acquire the statute of state party to the European Convention for the Protection of Human Rights and Fundamental Freedoms (in 1994), in order to prove that the political criterion necessary for EU accession is fulfilled. The accession to NATO (in 2004) was necessary to convince the future partners among the EU member states that Romania was not just a security consumer (beneficiary), but also a security supplier. The revision and republication of the Constitution (in 2003), but also the acquiring, by Romania, in 2004, of the statute of a state with functional market economy, able to face the pressures generated by the existing competition at EU level (demand-supply ratio), represents concretization of the efforts necessary to fulfil the legal and economic criteria necessary for EU accession.

In fact, this is the very main objective of our research: identifying the evolutions in the rather generous approach of the successive statutes attained for EU accession: a) associated state; b) candidate state for accession; c) acceding state; d) member state.

It is important to identify, throughout this process, the place of the Treaty of Nice in the whole framework of amending treaties of the European Union, from the perspective of the multiple reform elements that it grounded, some of which are relevant to the place that our country has currently, within the institutions of the European Union and in the hierarchy of all member states of the European Union. The Treaty of Nice "accomplishes an adaptation of the structure created for an organization that, at the beginning, had only six member states in its composition, to the realities imposed by a

People's Republic, the Romanian People's Republic/Romanian Socialist Republic, the Union of Soviet Socialist Republics.

united Europe"[3], which, at the time, was believed to be counting 30 states.

2. The place of the Treaty of Nice (2001/2003) in the general legal order of the European Union

According to the criterion of the legal force of rules that make up the legal order of the European Union, the Treaty of Nice represents a primary amending source with fundamental legal force from which derogations can be done only by a similar legal instrument.

The amending character places it, in time, after the Treaties of Maastricht (1992/1993) and Amsterdam (1997/1999), both of which were preceded by the Treaty of Brussels (1965/1967) and the Single European Act[4] (1986/ 1987).

For us, taking into account the previously stated context, after 1990, the Treaty of Maastricht and the Treaty of Amsterdam are relevant, both preceding the Treaty of Nice, to which is added the Treaty of Lisbon which succeeds it. All this is of particular importance for the states of Central and Eastern Europe, including for our country.

After the general presentation of the reform elements achieved by the Treaties of Maastricht and Amsterdam, we shall analyse the reform elements envisaged by the Treaty of Nice, with concrete examples for our country.

A. The Treaty of Maastricht (signed on February 7th, 1992 and entered into force after its ratification by the 12[5] EU member states, at that moment, on November 1st, 1993) is the first amending treaty that proposes, among others, the continuation of the process of community building, but in a new context determined by the stable strategy at that time, regarding the continuous expansion of the European Union towards Central and Eastern Europe.

The merit of the Treaty of Maastricht, in its correct and complete name the Treaty on European Union (TEU), is that it has, for the first time, enshrined, by the will of member states, the name "European Union", but not as a subject of international law with legal personality, and for a period of 16 years (1993-2009), just as a *sui generis* entity. The three European Communities[6] have still preserved the legal personality, specific to international organizations. The European Union is equipped with 3 pillars on which, until the Treaty of Lisbon (2007/2009), it had supported its existence and operation, namely: pillar I – the community integration pillar, made up of the three European Communities; pillar II – foreign and common security policy / and the 3rd pillar – justice and internal affairs (pillar of cooperation). In the specialized literature, it is considered "that the Treaty of Maastricht, although (...) representing a single international legal instrument, by its content, has a double value: it is an amending treaty in terms of the changes

[3] **A. Dumitrașcu**, **R.-M. Popescu**, *Dreptul Uniunii Europene. Sinteze și aplicații*, 2nd edition, revised and added, Universul Juridic Publishing House, Bucharest, 2014, p. 29.

[4] The Single European Act "represents a particularly important moment in community building, because at the time of its adoption (1986), the last obstacles to free movement were removed, expanding at the same time the community competences" (**L.-C. Spătaru-Negura**, *Protecția internațională a drepturilor omului. Note de curs*, Hamangiu Publishing House, Bucharest, 2019, p. 73).

[5] Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain and the United Kingdom.

[6] European Coal and Steel Community, European Economic Community/European Community; European Atomic Energy Community (EURATOM).

made to the original treaties and, at the same time, is also an original treaty"[7].

Pursuant to art. A para. (2) TEU, the European Union represents "a new stage in the process that creates a closer union between the peoples of Europe, in which decisions are made as close as possible to the citizens", proposing as its mission, "the organization, in the most coherent and solidary way possible, of the relations between the member states and between their peoples".

The most consistent changes, from the perspective of the name, objectives, community powers and institutions, concern the Treaty establishing the European Economic Community. With the entry into force of the TEU, the name of the European Economic Community and the treaty that established it, changed to "European Community", respectively "Treaty establishing the European Community".

Other new elements, in summary, are the following: the consecration of European Union citizenship, the establishment of the objective of achieving the Economic and Monetary Union (EMU) and the inclusion among the priorities of the European Union, of a political union between the member states, in the sense of a common foreign and security policy, which, on the long term, should also include defence policy, not ignoring the economic dimension of common defence/security.

The Treaty of Maastricht "has improved the functioning of the institutions and strengthened the powers of legislative co-decision and control of the European Parliament"[8].

Pillar II (common foreign and security policy) places particular emphasis on common positions and actions without an express dedication to the field of defence, which, however, we find to be very well outlined within the framework of the 3rd pillar, cooperation in the field of justice and internal affairs.

The treaties establishing the European Coal and Steel Community and the European Atomic Energy Community have undergone changes, exclusively from the institutional point of view, correlated with those of the Treaty establishing the European Economic Community.

B. The Treaty of Amsterdam (1997/1999) "contributed to the transformation (...) of Western and Central Europe into a confederal state, with a single European currency - the euro"[9].

Being included in the category of primary sources of European Union law and with amending character, the reasons for the adoption of that treaty concerned the developments recorded, on the one hand, in the rather large period that passed since the entry into force of the treaties establishing the European Communities and, on the other hand, in the shorter period that passed since the entry into force of the Treaty of Maastricht.

At the centre of attention of the decision-makers at that stage, was the need to update the objectives of the European Union, wishing to create institutions that would transpose the democratic nature of the actions undertaken and in which the citizen could fully express himself.

From institutional perspective, even if through the Treaty of Maastricht, the

[7] **R.-M. Popescu**, *Introducere în dreptul Uniunii Europene*, Universul Juridic Publishing House, Bucharest, 2011, p. 60.

[8] **A. Fuerea**, *Manualul Uniunii Europene*, 6th edition, revised and added, Universul Juridic Publishing House, Bucharest, 2016, p. 70.

[9] **Al. Burian**, *Geopolitica lumii contemporane*, 2nd edition, USM Editorial-Poligraphic Centre Publishing House, Chișinău, 2008, pp. 216-217.

functioning of the institutions registered an important progress, the objective regarding the simplification of the activity, of the functioning of those institutions was far from taking shape (especially in a series of new areas, such as: the single currency and economic cooperation). Those aspects were taken into account by the Treaty of Amsterdam, especially in the part intended for the "simplification of Treaties".

The Treaty of Amsterdam has remained in the history of evolution of the sources of EU primary law, also as the treaty through which the third pillar changed its name from "cooperation in the field of justice and home affairs" to "police and judicial cooperation in criminal matters". The justification for this change is provided by the fact that the treaty enshrines the creation of an "area of freedom, security and justice". The third pillar narrows in terms of the fields that fall under its incidence, in the sense that some of these have been transferred to the first pillar (e.g., migration and asylum).

In addition to the fact that the Treaty of Amsterdam has brought institutional changes, extending the co-decision procedure and the qualified majority to new areas, the powers of the Court of Justice have also been multiplied in direct proportion with the areas that have been transferred from the 3rd pillar to the 1st pillar.

Between 1996 and 1999, Romania had (since 1995) the statute of associated state[10], which is why, of interest to our country, were also those changes regarding the conditions that states had to fulfil in order to adhere. The seat of the matter is represented by art. 49 TUE. Without changing the procedure followed, it is specified that the candidate states must be European states, accept the community acquis and comply with the principles established by art. 6 para. (1) TEU on: freedom, democracy, respect for human rights and fundamental freedoms and the rule of law.

When we refer to the Treaty of Amsterdam, we have in mind that, for almost a year, the negotiations for its finalization did not make much progress, mainly because of the obvious hostilities of Great Britain. In a context in which Euro-optimism was in free fall, giving way to Euro-sceptics, "The European Council in Amsterdam adopts, at 4 o'clock in the morning, on June 18th, 1997, the provisional version of the Draft Treaty of Amsterdam"[11]. "With minor changes, the respective text was definitively adopted on October 2nd, 1997 during the meeting of the Foreign Ministers of the Fifteen[12], organized also in Amsterdam"[13]. The text of the Treaty that entered into force in 1999, was unanimously recognized as an "absolutely disappointing text having as main feature, the postponement of the main decisions for an uncertain future"[14].

C. The Treaty of Nice (2001/2003) has the role of completing, in matters of reform, the institutional reform, the objectives proposed by the Treaty of Amsterdam and remained at the stage of objectives, but also of anticipating the successes of the Treaty of Lisbon.

[10] According to the *Europe Agreement establishing an association between the European Communities and their Member States and Romania*, ratified by Romania through Law no. 20/1993, published in M. Of. of Romania, Part I, no. 73 of April 12, 1993.

[11] ***, *Treaty of Amsterdam*, (Introduction, selection and translation by **T. Tudoroiu**), Lucretius Publishing House, Bucharest, 1999, p. 11.

[12] France was the last country to ratify the Treaty of Amsterdam.

[13] ***, *Treaty of Amsterdam*, *op. cit*., p. 11 (footnote 4).

[14] *Ibidem*, footnote 5.

One of the pending issues was that of the institutional reform, partly achieved by the Treaty of Nice. The partial solution of this problem is related to the largest expansion of the European Union (in 2004[15], 2007[16] and 2013[17]), from 15 states to 25, 27, 28 member states, from the point of view of a possible institutional blockage, taken into consideration by the Treaty of Nice and continued, under the aspect of compromise solutions, by the Treaty of Lisbon. Why? Because, naturally, the institutional system proposed by Jean Monnet was thought to respond to some needs regarding the existence and functioning of the European Communities, as international organizations that were formed of 6 states. Later, they expanded to 9, 10, 12 and 15 member states, which required some adaptations, especially to the decision-making mechanism (the system of unanimous voting, for example, being gradually replaced by that of majority voting, in areas that, also gradually, came under the exclusive competence of the European Union or in which the competence of EU was shared with that of the member states).

An inevitable question is that of the necessity of adopting the Treaty of Nice in 2001 (being signed only two years after the entry into force of the Treaty of Amsterdam), taking into account the fact that, from the entry into force of the Treaty of Nice (in 2003) and until the signing of a new Treaty (of Lisbon, in 2007) no more than 4 years had passed, and from the entry into force of the Treaty of Lisbon (December 1st, 2009) and until now, more than 13 years have passed.

We find the answer, also, in the doctrine of that stage, according to which "after the failure in Amsterdam, a new intergovernmental conference [was to be] launched in (...) March next year"[18] because "proposals abound, already; in the last month alone, no less than four documents on the reform of community institutions[19] were drawn up"[20].

From the perspective of predictions, then, as well as now, more than 20 years after the entry into force of the Treaty of Nice, the questions, doubts and even uncertainties were and some still are more than obvious. Thus, even in 1999, it was appreciated that "it is very difficult to foresee (...) if the future negotiations will not have the fate of those in Amsterdam and if a new delay will not be resorted to, especially since the initial accession of a small number of new members and the extension of the accession procedures can leave a margin of manoeuvre of five, seven or even ten years, by virtue of the eternal principle *il est urgent d'attendre*"[21]. All this happened with the consideration of the political decision coming from the founding states of the European Communities.

Shortly, the Treaty of Nice "did the *homework* established by the Amsterdam points - left-overs- and created *the capacity*

[15] The states that joined in 2004 are the following: Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia.

[16] Romania and Bulgaria joined that year.

[17] Croatia joined that year.

[18] ***, *Treaty of Amsterdam, op. cit.*, p. 11.

[19] For details, see **A. Fuerea**, *The permanence of the process of institutional reform within the European Union*, Romanian Journal of Community Law no. 2/2003, pp. 9-23.

[20] ***, *Treaty of Amsterdam, op. cit.*, p. 16.

[21] *Ibidem*, p. 17.

for enlargement"[22], the expansion of the European Union.

The changes brought by "Nice", and considered to be essential, are multiple, starting from the aspects that were considered real failures of the Treaty of Amsterdam and culminating with those that anticipated the inevitable expansion of the European Union, an expansion that was necessary to be correlated with the qualitative and quantitative developments registered by the dynamics specific to the 3rd millennium (it is the first European Union treaty of this millennium), in general, and by the legislative one (aiming at the adoption of derivative legislation), in particular.

Analysed from a technical point of view, the Treaty of Nice (which has an appropriate structure for such a legal instrument of international law: preamble, substantive amendments, transitional and final provisions, 4 protocols and 24 declarations) aims at revising the Treaty on European Union.

The Treaty of Nice proposed as its main objective, the achievement of the institutional reform from the perspective of successive expansions that the European Union would experience. They mainly refer to: the weighting of votes within the Council of the European Union; the distribution of seats in the European Parliament, respectively in the composition of the EU executive. "These topics may seem dry, but debates on reform were often fierce, precisely because these issues raised broader considerations about the appropriate power of large, medium and small states in the Community and revealed controversial aspects of power relations between the EU[23] institutions", namely: the legislative power (the Council and the European Parliament), the executive power (the European Commission) and the judicial power (the Court of Justice). All these institutions, to which the Court of Accounts is added, represent, guarantee and defend 3 categories of interests, as follows: the interests of citizens of the European Union (see here the citizens of the member states who also hold a complementary citizenship, that of the European Union), the interests of member states of the Union and, inevitably, the interests of the European Union.

Upon a careful analysis of events taking place at the level of the European Union, we notice that the Treaty of Nice overlapped, temporally, with the negotiations carried out for the adoption of the Treaty establishing a Constitution for Europe. From this perspective, the Treaty of Nice has another merit, this time not institutional, but substantive. "The main substantive development concerned the Charter of Fundamental Rights of the EU"[24], its binding nature being postponed until the Treaty of Lisbon. Over time, it has proven its importance, references being made, quite often by practitioners and legal theorists, similarly to the initial period of application of the Universal Declaration of Human Rights, from December 10th, 1948.

The Treaty establishing a Constitution for Europe aimed, among other things, to resolve some of the important issues regarding the future of Europe and, implicitly, the European Union. Realistically speaking, the decision-makers of that stage, given the "competition"

[22] **G. Fábián**, *Drept instituțional comunitar*, 2nd edition, with reference to the Treaty of Romania's Accession to the EU Constitution, the Civil Service Tribunal and Eurojust, Sfera Juridică Publishing House, Cluj-Napoca, 2006, p. 106.

[23] **P. Craig**, **G. de Búrca**, *Dreptul Uniunii Europene. Comentarii, jurisprudență și doctrină*, 6th edition, Hamangiu Publishing House, Bucharest, 2017, p. 18.

[24] **P. Craig**, **G. de Búrca**, *op. cit.*, p. 18.

between the Treaty of Nice and the Constitutional Treaty[25], for the Intergovernmental Conference of 2004, considered important four objectives, namely: "the delimitation of powers between the EU and the states members; the status of the Charter of Fundamental Rights; the simplification of treaties and the role of national parliaments"[26]. Now, 20 years after the entry into force of the Treaty of Nice, we appreciate that all those objectives were, in fact, real failures of the Treaty of Amsterdam, without denying, however also its successes.

3. The impact of provisions of the Treaty of Nice on the institutional system of the European Union

A. The reform of the institutions that make up the bicameral legislature of the European Union

a. The European Parliament. "The Treaty of Nice emphasizes the role of co-legislator of the Parliament"[27].

The number of members of the European Parliament was re-evaluated, taking into account the expansion of EU from 15 member states to 27, including Romania, in the sense that it "cannot exceed 732"[28]. According to the rule proposed in point 3 of art. 4 of the Treaty of Nice, to replace art. 21 point 6 of the Treaty establishing the European Coal and Steel Community, "The European Parliament establishes the statute and general conditions for the exercise of the functions of its members, with the opinion of the Commission and the approval of the Council, deciding by qualified majority". The same qualified majority system is not applied to rules or conditions relating to the tax regime of members or former members, as these must be approved unanimously.

For the first time, through the Treaty of Nice, seats in the European Parliament were allocated to Romania. The 33 seats that Romania received, could not be filled for the entire 2004-2009 legislature, considering the fact that our country joined on January 1st, 2007. For that reason, the 33 seats were redistributed to the member states since that date (25), and the same happened with those of Bulgaria (17)[29]. That redistribution resulted in an increase in the number of seats both for Romania (which received 35, instead of 33) and for Bulgaria (which received 18, instead of 17). Therefore, for the period 2007-2009, the European Parliament counted 785 seats (732 – as stipulated by the Treaty of Nice, to which the 53 seats allocated to Romania and Bulgaria were added).

b. The Council of the Union remains at the forefront of the legislative activity, side by side with the European Parliament, actively involved in the adoption of legal acts of the European Union. The most important changes aim at speeding up the adoption of decisions, in the conditions of the expected expansion to 27 member states, i.e., the transition from unanimous voting to qualified majority voting in a significant number of areas regulated by the Treaty. The

[25] By not entering into force, the treaty has never produced legal effects, its ratification procedure was interrupted by the negative vote given by France and the Netherlands.

[26] Pursuant to Declaration 23 which was annexed to the Treaty of Nice.

[27] **A. Fuerea**, *The permanence of the process of institutional reform ..., op. cit.*, p 18.

[28] In this sense, see point 1 of Declaration 20 regarding the expansion of the European Union, annexed to the Treaty of Nice, as well as point 5 of art. 4 of the Treaty of Nice, pursuant to which "The number of members of the European Parliament cannot exceed seven hundred and thirty-two" (rule proposed to replace art. 20 par. (2) of the Treaty establishing the European Coal and Steel Community).

[29] The "big" states (France, Germany, the United Kingdom of Great Britain, Italy and Spain) were allocated 2 seats each, out of the 50 seats left unoccupied by Romania and Bulgaria, and the "small" states, one seat each.

qualified majority materializes, with the entry into force of the Treaty of Nice, in the fact that an agreement could no longer be concluded without at least 14 member states, out of a total of 27 expressing their favourable vote. At the same time, it is easy to see that the demography of member states, in the sense of population, has a major influence in the adoption of decisions at the level of the European Union Council, because meeting the minimum number of states (14) that vote in favour of the decision is not enough. To this requirement, another one is added, namely: it is necessary for the 14 member states to bring together at least 62% of the total population found in the territories of the 27 member states, with the status of citizens of the European Union.

Equally, the Treaty enshrines, from the perspective of primary legislation, the possibility for the Council institution involved in the legislative process, to initiate the adoption of regulations regarding the funds allocated to political parties.

B. The Executive of the European Union

Regarding the executive of the European Union - the European Commission - as the engine of its operation, it was rightly appreciated, that in its composition, up to the time of Nice (when the member states were not designating the members equally), it had been quite difficult to still function.

In principle, the Treaty of Nice laid the foundations for the subsequent regulations, taken into consideration by the Treaty of Lisbon. More precisely, until the Treaty of Nice, the "big" states, members of the European Union, used to appoint two commissioners each, while the other states appointed one commissioner each.

The Treaty of Nice starts from the premise of enlargement of the European Union, which is carried out taking into account the increase, by default, in the number of members of the Commission, a fact that affects its proper functioning. Therefore, the maximum number of members of the Commission was set at 27, with the possibility, on the part of each state, to designate one member. It is for the first time that the states register, from this perspective as well, full equality, i.e., "one state - one commissioner", in a composition of the European Union with 27 member states. Exceeding the number of 27 member states should have led to the application of the principle of rotation, a principle enshrined, moreover, by the Treaty of Lisbon (2/3 of the member states appointing one commissioner each), but which has not been, however, applied even until now, although during the period 2013-2021, the Union had 28 states in its composition.

The transition from unanimity to qualified majority also materialized, as for the appointment of the president, respectively of all the members of the Commission. The president acquires new powers, having the possibility to establish, for his 5-year mandate, the responsibilities for each individual portfolio, depending on the strategy he has in mind for this period. He also has the competence to appoint, with the approval of the college, the vice-presidents of the Commission or ask for the resignation, respectively the dismissal of a member. These prerogatives are likely to strengthen the power of the Commission president who has an important role in ensuring the independence and impartiality of Commission members, being responsible for their discipline, thus guaranteeing the interests of the European Union.

C. The judicial power of the European Union

At the level of the European Union, at the time of entry into force of the Treaty of Nice, the judicial power was fulfilled, hierarchically, by the Court of Justice (formed of one judge appointed by each

member state and of general attorneys, in a smaller number , designated by the member states), to which is added the Court of First Instance[30] (having a similar membership, at that stage, to that of the Court of Justice, from the point of view of the number of judges, but without general attorneys). The novelty that the Treaty of Nice brings is the possibility of establishing specialized chambers in some fields. Thus, the Civil Service Tribunal could be established in an important field such as that of labour relations which, not infrequently, generate the appearance of disputes between civil servants of the European Union and its institutions, bodies, offices and agencies. As a result of the expansion of the European Union, this fact also determined, correlatively, the multiplication of public functions and the number of public servants, which also determined the establishment of the Civil Service Tribunal[31].

Given the increasing complexity of resolving disputes in the plenary of a Court of 25, 27, 28 judges (keeping the balance given by the possibility of each state to appoint one judge), for speed, an appeal was made, for that stage, to the solution of the establishment of a Grand Chamber made up of 13 judges that would replace the plenary session of the Court. Thus, an emergency procedure was provided for those more sensitive prejudicial appeals. At the same time, in order for the Court of Justice to be relieved of those large, time-consuming actions, technical prejudicial appeals were included among the powers of the Court of First Instance.

The European Public Prosecutor's Office, as body of the European Union, has known a special consecration, contributing to the protection of the Union's financial interests, pursuant to the Treaty of Lisbon.

D. Budgetary, economic and financial-banking activity

a. Court of Accounts. Consecrating its status as a subject of international law, perfected by the Treaty of Lisbon, by acquiring legal personality[32], the European Union pursues objectives, also of economic nature, paying particular attention to the Court of Accounts and its role in its institutional architecture.

In this case as well, the representativeness of all member states is preserved, even if the members of the Court of Accounts are actively involved in guaranteeing the interests of the EU, and not of the member states, during the 6-year mandate that they fulfil.

Decision-making flexibility is also found in the Court of Accounts from the point of view of appointments by the Council, knowing, in this case too, the transition from unanimity to qualified majority.

Even if it is not a jurisdictional court considering the duties it fulfils, the Court of Accounts borrows for good functioning, from the jurisdictional system, the organization within the Chambers aiming at the swiftness of the adoption of reports, respectively opinions.

Similar to the European Commission, in this case too, the president acquires increased prerogatives with the possibility of establishing a committee to ensure communication with similar institutions at national level. In this way, it is appreciated

[30] The current Tribunal, after the Treaty of Lisbon. Currently, the Tribunal, after taking the powers from the Civil Service Tribunal, is composed of 54 judges, two judges appointed by each member state of the Union.

[31] The Civil Service Tribunal ceased its activity in 2016, pursuant to Regulation (EU, Euratom) 2016/1192 of the European Parliament and of the Council of 6 July 2016 on the transfer to the Tribunal, of the competence to rule in first instance on disputes between the European Union and its agents, published in OJ L 200, July 26, 2016.

[32] Art. 47 TEU.

that the economic-financial objectives can be achieved[33].

b. European Central Bank. Pursuant to art. 5 of the Treaty of Nice, the Protocol relating to the Statute of the European System of Central Banks and the Statute of the European Central Bank is amended from the perspective of decisions adopted, respectively recommendations made by the European Central Bank which require a unanimous decision of the Board of Governors.

E. Advisory committees

a. Pursuant to art. 165 of the Treaty on the European Atomic Energy Community, the Economic and Social Committee is formed of "representatives of the various economic and social components of the organized civil society", who carry out a 4-year mandate with the possibility of renewal. The Committee includes representatives, appointed by the Member States, among producers, farmers, transporters, workers, traders and artisans of the liberal professions, consumers and the public interest.

The number of designated representatives is established pursuant to Declaration no. 20 regarding the expansion of the European Union, Romania being allocated 15 seats, in a Union with 27 member states.

By the Treaty of Nice, a total of 344 seats were allocated to the 27 member states, with no possibility of exceeding 350, after some reassessments. Its members cannot be subject to an imperative mandate, pursuing the interests of those who appoint them, and not of those of the European Union.

b. Committee of the Regions. In this case too, the number of members cannot exceed a total of 350, Romania being allocated 15 seats, similarly to the ones allocated within the Economic and Social Committee[34]. Their mandate is also of 4 years, with the possibility of renewal. It is formed of representatives of local and regional communities, holders of an electoral mandate and, by way of consequence, they are politically responsible in front of an elected assembly. An equal number of alternates is added to them, also proposed by the member states, with the possibility of renewing the mandate. The members of the Committee of the Regions must not be bound by any imperative mandate, exercising their job in complete independence, in the general interest of the Union.

4. Conclusions

From the analysis of the treaties successively adopted and applied at the level of the European Union, it follows that the developments registered by the international society, composed of states located on the most different continents, reflect inevitably on the European construction.

The diverse context existing in this first century of the 3rd millennium is different from the one we used to know, more specifically that from the end of the last millennium. Why? Because, we are discussing, currently, of a context essentially marked by the conquests of science and technology (digitalization), to which the pandemic and the armed conflicts, not far from our country, the EU and NATO, are added. Next to these contextual components, we can add, from the perspective of consequences, which are increasingly dramatic, the energy crisis and, above all, the problems of the environment, to which we cannot relate indifferently, but

[33] See Declaration no. 18 regarding the Court of Accounts.
[34] Pursuant to Declaration no. 20 regarding the expansion of the European Union.

responsibly[35]. Compared to all this, the economic-financial crisis remains in the background, without acknowledging that it also determines decisively a series of negative effects closely related to the evolution of mankind.

There are also many other things, added to all these which are likely to trigger some of the most profound reflections of decision-makers at international, universal, regional (European, and not only) level, but also domestically, nationally.

Upon a brief analysis, now that 20 years since the entry into force of the Treaty of Nice have passed, we can conclude that it has essentially achieved the transition from the Treaty of Amsterdam, more precisely from its failure, to the Treaty of Lisbon, which, by its content, constitutes an unequivocal success, especially after the failure of the Treaty establishing a Constitution for Europe. Thus, "over time, European integration has progressed with each new political compromise, materialized in the Single European Act, Maastricht, Nice, Lisbon"[36].

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[35] As one doctrinaire stated, "responsibility is a dimension of the human spirit, in its capacity as axiological entity (valuing and valorizing). Also, responsibility is inherent in the existence of the rule of law and this is necessary both internally and externally" (**E. E. Ștefan**, *Răspunderea juridică. Privire specială asupra răspunderii în Dreptul administrativ*, Pro Universitaria Publishing House, Bucharest, 2013, p. 12).

[36] **M. A. Dumitrașcu**, **O. M. Salomia**, *Dreptul Uniunii Europene II*, Universul Juridic Publishing House, Bucharest, 2020, p. 72.

- Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (1997/1999), OJ C 340, 10.11.1997;
- Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (2000/2002), OJ C 80, 10.3.2001;
- Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (2007/2009), OJ C 306, 17.12.2007;
- Regulation (EU, Euratom) 2016/1192 of the European Parliament and of the Council of 06.07.2016 on the transfer to the Tribunal, of the competence to rule in first instance on disputes between the European Union and its agents, published in OJ L 200, 26.07.2016;
- Declaration no. 18 regarding the Court of Accounts annexed to the Treaty of Nice;
- Declaration no. 23 annexed to the Treaty of Nice;
- Declaration no. 20 regarding the expansion of the European Union annexed to the Treaty of Nice.

THE ELIMINATION OF FORCED OR COMPULSORY LABOUR IN VIETNAM WITHIN THE CONTEXT OF THE EVFTA AND LESSONS FROM EUROPEAN COUNTRIES

Rab HENRIETT[*]
Tien Dung NGUYEN[**]
Huyen NGUYEN[***]

Abstract

Following centuries of attempts to improve labour standards and fight for the elimination of forced or compulsory labour, the problem remains severe on a worldwide scale. No country or continent in the world can abolish this phenomenon in all of its forms, concomitantly, not only does it affect developed and high-income countries, but it also has an enormous impact on developing ones like Vietnam. In order to preserve a level playing field, protect fair competition, avoid divergence on social and environmental standards, and provide each party with the ability to apply its social norms, this issue must be addressed. Eliminating forced or compulsory labour, therefore, is a remarkable goal that the European Union (EU) aims to achieve in its free trade agreements (FTAs), including the EU-Vietnam free trade agreement (EVFTA). Accordingly, the EU also demanded that Vietnam abide by the prohibition on forced or compulsory labour in EVFTA's labour commitments. In light of the need to uphold obligations as a member and the potential market with the EU in the future, the study of eradicating forced or compulsory labour in Vietnam is crucial to both the EU and Vietnam's pursuit of sustainable development. This study focuses on evaluating legislation for eliminating Vietnam's forced or compulsory labour, indicating the compatibility between the EVFTA's labour commitments and the national legal system, and looking at the other EU countries' experiences with this problem; from that, it provides recommendations on completing Vietnamese legislation.

Keywords: *EVFTA, forced labour, EU, Vietnam, free trade agreement.*

Forced or compulsory labour (hereinafter referred to as "forced labour") has been regarded as a crime and a flagrant breach of the most fundamental rights of humanity, an attempt to force individuals into performing labour in undesirable conditions and denying basic human dignity[1]. That not only has been carried out in violation of fundamental rules laid down by the labour law but has also been deemed a severe and inevitable phenomenon globally from the beginning of the International Labour Organisation (ILO) to the XXI century. This issue, however, is enshrined in the "C029-Forced Labour Convention, 1930 (No.29)"[2], and the "C105-

[*] Associate Professor, Ph.D., Faculty of Law and Political Sciences, Department of Agricultural, Environmental and Labour Law, University of Debrecen, (e-mail: rab.henriett@law.unideb.hu).

[**] Ph.D. Candidate, Géza Marton Doctoral School of Legal Studies, University of Debrecen, Hungary (e-mail: nguyentiendung294@gmail.com).

[***] LLM, Hanoi Law University, Vietnam (e-mail: nguyenthanhhuyen0526@gmail.com).

[1] Interparlamentarische Union & Internationale Arbeitsorganisation, *Eliminating forced labour*, Inter-Parliamentary Union, Geneva, 2019, 13.

[2] ILO, *C029 – Forced Labour Convention, 1930 (No.29)*, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C029

Abolition of Forced Labour Convention, 1957 (No.105)"[3], as a core labour standard in the ILO Declaration of 1998, has remained and negatively impacted the economies of many countries in general, as well as their labour forces, therefore, the restriction of all varieties of forced labour is currently regarded as an international law rule from which no exceptions are authorised[4].

With its consistent policy in new-generation FTAs, the EU has indicated its commitment to core labour standards, including the elimination of forced labour. However, as one of the most promising partners of the EU among developing countries, Vietnam, with the ratification of the EVFTA and Convention C105, has strict international obligations to internalise the convention rules into domestic legislation and to implement these regulations in reality effectively. Thus, it is time for Vietnam to revisit the eradication of forced labour within their country by examining the labour law and relevant internal regulations in order to accomplish the legal duties under the FTA with the EU and learning experience from some EU countries, which have a number of similarities, diplomatic and economic cooperation with Vietnam, would help Vietnam keep up with globalisation and trade liberalisation.

Based on the analysis of the relevant literature, this is the first study to investigate Vietnam's eradication of forced labour within the context of the EVFTA. Using synthesis research methodologies, detailed evaluation, and in-depth comparison with ILO and EVFTA papers, this study tries to address three questions: (1) How has Vietnam accomplished the abolition of forced labour in accordance with EVFTA requirements?; (2) How has the situation surrounding the abolition of forced labour been addressed in Vietnam, as well as what are the limitations to this issue?; (3) What are the experiences of EU countries in eliminating forced labour and the lessons for Vietnam?

1. A pocket guide to the determinant of forced labour

1.1. The concept of forced labour

The first international treaty to define what forced labour entails is the Convention (C029) by the International Labour Organisation (ILO) from 1930[5], accordingly, it means "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily"[6]. This concept encompasses three fundamental conditions: "work or service"; "menace of any penalty"; and "voluntary"[7]. To begin, "work or service" includes any kind of work, regardless of the nature or legality of the employment relationship that occurs in any industry, sector, or activity, whether public or private[8]. Secondly, the "menace of any penalty" covers various forms of coercion methods, whether

[3] ILO, *C105 – Abolition Forced Labour Convention, 1957 (No. 105)*, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312250:NO.

[4] United Nations Office on Drugs and Crime, *UNODC and the sustainable development goals*, https://www.unodc.org/documents/SDGs/UNODC-SDG_brochure_LORES.pdf.

[5] Natalia Ollus, "Regulating forced labour and combating human trafficking: The relevance of historical definitions in a contemporary perspective", *Crime, Law and Social Change*, 2015, *63*(5), 222.

[6] Art. 2.1 of C029, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C029.

[7] Ollus, *op.cit.* , 228.

[8] Interparlamentarische Union & Internationale Arbeitsorganisation, *op. cit.*, 19.

financial, physical, psychological, or other, used to restrict individuals from undertaking service or work against their voluntariness which should be understood in various forms of external constraint or indirect coercion[9]. Thirdly, "voluntary" should be analysed regarding the format and scope of consent, the significance of external constraints, and the possibility of freely withdrawing a given consensual agreement[10].

Specifically, the ILO also creates an index list of indicators that depict the most typical signals or "clues" that lead to the possibility of a forced labour situation, which is divided into eleven categories: (1) using physical and sexual violence; (2) taking advantage of people's vulnerability; (3) restricting freedom of movement; (4) threats and intimidation; (5) isolation; (6) disinformation or false promises about the nature of work; (7) withholding identity documents; (8) debt servitude; (9) working excessive hours; (10) abusive working and living circumstances; (11) withholding and non-payment of wages[11].

However, given the constant effects of globalisation, the traditional kinds of forced labour continue to persist alongside the new forms that are emerging in the global economy[12]. The ILO, therefore, has recently defined this phenomenon as: "Traditional practices of forced labour, such as vestiges of slavery or slave-like practices, and various forms of debt bondage, as well as new forms of forced labour that have emerged in recent decades, such as human trafficking"[13].

1.2. Forced labour in the modern world

Forced labour is currently recognised to be the most difficult political and social challenge of the twenty-first century[14]. According to ILO statistics for 2021, there were 27.6 million people in forced labour globally on any given day, which equates to 3.5 individuals per thousand. This figure has steadily climbed in recent years, with the population increasing by 2.7 million between 2016 and 2021[15]. Despite the alarming status of forced labour, the results are only partially reflected in the collected statistical data due to various, including methodologies, to name but one. As a result, the actual scale that the world would face in eradicating forced labour remains unclear and is significantly greater than these estimates[16].

In fact, eliminating forced labour necessitates confronting its root causes. On the one hand, the ILO mentions poverty, informal economic activity, poor governance, a lack of access to social protection, a shortage of understanding of the human as well as labour rights,

[9] *Ibid.*

[10] Kadriye Bakirci, "Human trafficking and forced labour: A criticism of the International Labour Organisation", *Journal of Financial Crime*, 2009, *16*(2), 162.

[11] ILO, *ILO Indicators of Forced Labour*, 2013.

[12] Kanchana N. Ruwanpura & Pallavi Rai, *Forced labour: Definitions, indicators and measurement*, ILO, Geneva, 2004, 4.

[13] ILO, *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization*, Report of the Committee of Experts on the Application of Conventions and Recommendations, 2012, ILC.101/III/1B, 272.

[14] Zbigniew Lasocik, "Is research on forced labour at an 'early stage'? Introduction to the special issue", *Archiwum Kryminologii*, 2021, *43*(1), 8.

[15] ILO & Walk Free & International Organization for Migration, *Global Estimates of Modern Slavery Forced Labour and Forced Marriage*, ILO, Geneva, 2022, 2.

[16] ILO, *Ending forced labour by 2030: A review of policies and programmes*, Geneva, 2018, 31.

humanitarian crises, and discrimination as the primary drivers of this phenomenon[17]. Whilst the high proportion of forced labour happens in the unregulated grey economy[18], the majority of those who are victims of this issue in developing nations are poor[19], as those in poverty or lacking livelihood options are more likely to be at higher risk of being employed in jobs that use forced labour[20]. Similarly, discrimination also contributes to the likelihood of being exploited and allows for continued forced labour today[21]. On the other hand, many facets of state governance can be discussed. First of all, unclear legislation as reflected in forced labour is not defined in any detail, making it hard to identify whether actions come within the prohibition against forced labour and must therefore be punished by the law. Secondly, many countries have failed to prove a specific offence of forced labour in criminal law, even though it is provided in labour law. Thirdly, there is a lack of enforcement measures regulating the abolition of forced labour[22].

All this means that, since its inception under the Paris Peace Treaty in 1919, the ILO has regarded the fight against forced labour as one of its top priorities and, simultaneously, a constant mission from its early days right up to the present[23].

2. Broad context of the EVFTA and the eliminating forced labour in the EVFTA

2.1. Broad context of the EVFTA

Bilateral cooperation between the EU and Vietnam has been fruitful since the signing of the initial Cooperation Agreement[24] in 1995, and the Comprehensive Partnership and Cooperation Agreement[25] in 2012[26]. Nevertheless, it was only in the successful signing of the EVFTA in 2019 that it highlighted a new milestone on the path of almost 30 years of development and cooperation between the EU and Vietnam[27]. Consequencely, the European Commission dubbed EVFTA "the most ambitious and

[17] ILO Global Business Network on Forced Labour, *Viet Nam Policy Brief 1: Addressing forced labour at its root in Viet Nam*, ILO, Geneva, 2020, 3.

[18] *Ibid*.

[19] ILO, *A global alliance against forced labour: Global report under the follow-up to the ILO Declaration on Fundamental Principles and rights at work*, Report of the International Labour Conference 93rd Session 2005, International Labour Office, Geneva, 2005, 18.

[20] ILO Global Business Network on Forced Labour, *op.cit.*, 3.

[21] GTZ, *Forced Labour and Trafficking in Persons*, Programme Promoting Gender Equality and Women's Rights, Germany, 2008, p.1, https://www.oecd.org/dac/gender-development/44896368.pdf.

[22] ILO, *op.cit.*, 2.

[23] Daniel Roger Maul, "The International Labour Organization and the Struggle against Forced Labour from 1919 to the present", *Labour History*, 2007, *48*(4), 477.

[24] Cooperation Agreement between the European Community and the Socialist Republic of Vietnam signed 17 July 1995, https://wtocenter.vn/upload/files/hiep-dinh-khac/323-europe/362-vietnam---eu/2.Cooperation%20Agreement%20between%20the%20European%20Community%20and%20Vietnam.pdf.

[25] Framework Agreement on Comprehensive Partnership and Cooperation between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam, of the other part signed 27 June 2012, https://www.fdfa.eu/sites/default/files/2022-01/1003_Ondertekende%20akte%20in%20het%20Engels.pdf.

[26] Delegation of the European Union to Vietnam, *The European Union and Vietnam*, https://www.eeas.europa.eu/vietnam/european-union-and-vietnam_en?s=184.

[27] Areg Navasartian, "EU-Vietnam Free Trade Agreement: Insights on the Substantial and Procedural Guarantees for Labour Protection in Vietnam", *European Papers-A Journal on Law and Integration*, 2020, *2020*(1), 562.

comprehensive agreement ever concluded with a developing country"[28], and a preliminary step towards the EU's ultimate ambition of negotiating bilateral trade agreements with the individual ASEAN member states[29]. On the other side, the EVFTA, for Vietnam, is the largest new-generation FTA in history in terms of direct benefits[30] and considers Vietnam's development needs[31] entirely. Through the EVFTA's broad range and high level of commitment[32], including trade and even non-commercial commitment, trade activities are boosted, over 99% of customs duties on goods are eliminated, Vietnam's service markets become more open to EU enterprises, and EU investments in the nation are strengthened through more transparent procedures[33]. Furthermore, throughout this agreement, economic benefits are always accompanied by guarantees with regard to the implementation of basic labour standards[34], including eliminating forced labour, through legally binding and enforceable provisions regarding sustainable development. These rules align with what most of the new generation of FTAs, like the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, of which Vietnam is now a part, are doing[35]. Therefore, the role of the EVFTA in reforming the global trade systems should not be underestimated, as it also represents a growing momentum in harmonising trade and sustainable development[36].

2.2. The eliminating forced labour commitment in the EVFTA

In recent years, "social concerns" in international trade agreements have become increasingly important, particularly the consequences of economic integration on labour markets[37]. Besides the positive aspects, globalisation also reveals the negative aspects and international labour standards play a more crucial role than ever in tackling these issues[38]. The question is: what is the best solution to effectively enforce these standards?[39] In response to the above question, Fair trade theory suggests

[28] European Commission, *Guide to the EU-Vietnam Trade and Investment Agreements*, 2016, www.trade.ec.europa.eu, 6.

[29] Delegation of the European Union to Vietnam, *Guide to the EU- Vietnam Trade and Investment agreements*, 2019, https://www.eeas.europa.eu/sites/default/files/eu_fta_guide_final.pdf.

[30] World Bank, *Vietnam: Deepening International Integration and Implementing the EVFTA*, The World Bank, Washington, D.C, 2020, 10.

[31] European Commission, *EU-Vietnam trade agreement enters into force*, 2020, https://ec.europa.eu /commission/presscorner/detail/en/IP_20_1412.

[32] Nguyen et al., "Labour commitments in the EVFTA: Amendments and supplements to Vietnamese Law and Recommendations", *JL Pol'y & Globalization*, 2022, 125, 76.

[33] European Commission, *op.cit.*, https://ec.europa.eu/commission/presscorner/detail/en/IP_20_1412.

[34] *Ibid*.

[35] Munim Kumar Barai et al. , "Vietnam achievements and challenges for emerging as a FTA hub", *Transnational Corporations Review*, 2017, *9(*2), 54.

[36] Tran Thi Thuy Duong, "WTO + and WTO-X provisions in the European Union-Vietnam Free Trade Agreement: A 'fruit salad tree' is yet to grow", *Asia Europe Journal*, 2021, *20*(2), 75.

[37] Inmaculada Martinez-Zarzoso & Hendril W. Kruse, "Are labour provisions in free trade agreements improving labour conditions?", *Open Economies Review*, 2019, *30*(5), 976.

[38] Jan Martin Witte & Deutsche Gesellschaft für Technische Zusammenarbeit, *Realizing Core Labor Standards–The potential and limits of voluntary codes and social clauses–A review of the literature*, GTZ, Eschborn, 2008, 16.

[39] Thomas Payne, "Retooling the ILO: How a new enforcement wing can help the ILO reach its goal through regional free trade agreements", *Indiana Journal of Global Legal Studies*, 2017, *24*(2), 598.

that regional and bilateral trade agreements should be responsible for enhancing labour conditions or, if possible, avoiding a "race to the bottom"[40] by including international labour standards in FTAs and upholding trade sanctions against nations that fail to adhere to the minimum standards[41]. Thus, over the last two decades, the fundamental labour standards of the ILO have been the most prevalent type of labour provisions in FTAs, serving as the legal framework for FTAs to address the issue of global working conditions[42]. Moreover, those clauses are now deemed substantive under the chapter on sustainable development in EU FTAs[43].

According to the labour commitments in the "Trade and Sustainable Development Chapter", Chapter 13 in the EVFTA commits the parties:

"To respect, promote, and effectively implement the fundamental principles and rights at work, in accordance with the duties of ILO member countries and line with the 1998 ILO Declaration of Fundamental Principles and Rights at Work and its Follow-up, namely: (i) the freedom of association and the effective recognition of the right to collective bargaining; (ii) the elimination of all forms of forced or compulsory labour; (iii) the effective abolition of child labour; and (iv) the elimination of discrimination in respect of employment and occupation"[44].

Regarding the commitment to eliminate all forms of forced labour, each treaty party is bound by two aforementioned ILO fundamental conventions[45], as followings:

Convention C029 requires each ratifying country to commit to ending as soon as possible forced labour in any kind (Article 1). Given the definition of forced labour, the Convention allowed exceptions to the notion of "forced labour", which include: prison labour; work exacted under purely military character; work imposed in emergencies; normal civic duties of citizens; and minor communal services[46]. The obligation on ratifying members to guarantee that the unlawful forced labour exactions must be penalised under a criminal offence and the punishment imposed is also truly sufficient and effective as well as expressly forbids using forced labour by private actors without any exception, is also included in this Convention (Article 25).

Convention C105 complements, rather than revises, the earlier Convention[47]. This highlights a variety of targets for which forced labour could never be exacted, particularly at the state level, such as the purpose of economic growth or political education or as a means of retribution for

[40] Zarzoso & Kruse, *op.cit*., 976.

[41] Gijbert Van Liemt, "Minimum labour standards and international trade: Would a social clause work", *Int'l Lab. Rev*., 1989, *128*, 434.

[42] Payne, *op.cit.*, 602.

[43] Hanania Lilian Richieri, "The Social Dimension of Sustainable Development in EU Trade Agreements: Strengthening International Labour Standards", *German YB Int'l L.*, 2016, *59*, 439.

[44] Art. 13.4, paragraph 2 of EVFTA signed 30 June 2019, https://wtocenter.vn/file/17684/full-text-evfta.pdf.

[45] European Commission & Ergon Associates, *Targeted surveys on application of core labour standards: Vietnam*, Publications Office of the European Union, Luxembourg, 2020, 8-9, https://op.europa.eu/en/publication-detail/-/publication/de2b410e-9407-11ea-aac4-01aa75ed71a1/language-en.

[46] Art. 2.2 of C029, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C029.

[47] International Labour Office & Fundamental Principles and Rights at Work Branch (FUNDAMENTALS), *ILO standards on forced labour–The new protocol and recommendation at a glance*, ILO, Geneva, 2016, 4.

participating in strikes, discrimination, or labour discipline[48].

Under the EVFTA, the requirement to abolish forced labour also includes reaffirming fundamental rights by respecting, promoting, and implementing them in law and practice. This implies that these rights must be promulgated in Vietnam's legislation through the Labour Code and effectively enforced in practice[49].

3. The elimination of forced labour in Vietnam under the context of the EVFTA

3.1. Vietnam has promulgated a legal normative document system to eliminate forced labour

The 2013 Constitution, for the first time, stipulates the right to work and to choose a career path, employment, and workplace; the right to be given fair and safe working conditions, the right to be paid a salary; the right to enjoy conditions of rest; and the prohibition of forced labour (Article 35)[50]. This also means that Vietnam, as an EVFTA party as well as a ratifying member of the ILO Conventions, has undertaken efforts to ensure the constant strengthening of the legal instruments for the abolition of every type of forced labour. However, the Vietnamese legislation, still contains explicit limitations despite covering the key features of the ILO Conventions as detailed bellow.

The concept of forced labour

The Vietnam Labour Code defines forced labour as "coercive labour means the use of force or threat to use force or other tricks to force an employee to work against his/her will"[51]. Accordingly, Vietnamese law recognises the term forced labour in the way employers force workers to perform certain work contrary to their will, resulting in a "forced labour" situation[52]. This also details a part of the typical groups of forced labour behaviours in eleven indicators of behaviours[53], which are "use of force", "threat to use of force", and open regulation through the term "other tricks"[54]. By contrast, the lack of detail explained in "other tricks" makes this crime difficult to deter in practice[55].

In sum, compared to the criteria in Article 2 of C029, the scope of the Vietnamese definition of forced labour appears to be narrower and more

[48] Art. 1 of C105, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312250:NO.

[49] European Commission and Government of Vietnam, *EVFTA Report 2018: The EU-Vietnam Free Trade Agreement: Perspectives from Vietnam*, presented to the European Parliament, October 2018, 66.

[50] Nguyen Thi My Linh & Vu Cong Giao, "Thi hành quyết định của Hiến pháp 2013 về xóa bỏ lao động cưỡng bức" [Implementing the 2013 Constitutional Decision on the Abolition of Forced Labour]", *Hội thảo Khoa học Đánh giá 5 năm thi hành Hiến pháp nước Cộng hòa Xã hội Chủ nghĩa Việt Nam năm 2013 [The Scientific Workshop to evaluate 5 years of implementation of the Constitution of the Socialist Republic of Vietnam in 2013]*, Hanoi, 2018, 332.

[51] Art. 3.7 of Labour Code 2019 dated 20 November 2019 issued by the National Assemble, https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/110469/137416/F-1864718830/VNM110469%20Eng.pdf.

[52] Trinh Thi Thu Hien, "Hoàn thiện quy định về 'cưỡng bức lao động' [Completing 'forced labour' regulations]", *Vietnam Lawyer Journal*, 2020, https://lsvn.vn/hoan-thien-quy-dinh-ve-cuong-buc-lao-dong.html.

[53] (1) Abuse of vulnerability; (2) Deception; (3) Restriction of movement; (4) Isolation; (5) Physical and sexual violence; (6) Intimidation and threats; (7) Retention of identity documents; (8) Withholding of wages; (9) Debt bondage; (10) Abusive working and living conditions; (11) Excessive overtime.

[54] Ngo Ngoc Diem & Le Van Nam, "Discussing on forced labour in Viet Nam's criminal law", *Legal Professions Review*, 2016, *6*(2016), 16.

[55] *Ibid*.

ambiguous[56]. In light of the absence of a thorough definition, it is still a profound challenge for Vietnam to implement its commitment within the context of the EVFTA.

Identify the indicators of forced labour

There are only four provisions in the domestic labour law that directly regulate forced labour in the form of acts that are prohibited or entitled behaviours to protest in the case of being forced[57]. In addition, this law also strictly bans a number of behaviours, which include deception in recruitment methods, retention of identity documents, deposit requirements prior to employment, infringement of workers' rights to overtime pay, excessive wage deductions, a specific requirement to meet regional minimum wage requirements, and situations that delay in wage payment[58]. The regulatory framework, however, is still fragmented, with indicators for forced labour separated into several provisions without being gathered into one article. Also, other indicators of the eleven signs indicated by the ILO have yet to be officially recognised, potentially leaving them outside the ambit of forced labour in Vietnam[59].

It so happens that the Labour Code, although it entitles workers to work and freely select a job, a workplace, or an occupation, also gives them the freedom to unilaterally terminate labour contracts without notice[60]. However, for some groups of workers, such as civil servants working in the state sector, domestic law lays down that civil servants are entitled to terminate their labour contracts at their own will, subject to the consent of the competent agencies, organisations, or units[61]. Suppose the competent agencies do not accept the resignation; in that case, they shall state the grounds for refusal, which may include, inter alia, the workers' non-fulfilment of "an obligation to pay money or assets under their personal liability towards their agencies, organisations, or units[62]. By doing so, this provision not only limits the capacity of civil servants to unilaterally terminate their labour contract but is also a sign of debt bondage behaviour that the Labour Code and C029[63] strictly prohibited.

Specification of exceptional cases of forced labour

Regarding cases of emergency, the national labour code provides that the employer has the authority to require employees to work overtime at any time. Employees are not entitled to refuse such work if the work is to implement a

[56] Dao Mong Diep & Mai Dang Luu, "Nội luật hóa quy định của Công ước 29 về lao động cưỡng bức và bắt buộc năm 1930 [Formalization provisions of Forced labour Convetion, 1930 (No. 29)]", *Legal Professions Review*, 2015, *2*(2015), 31.

[57] *Ibid*.

[58] International Labour Organization & Viet Nam Chamber of Commerce and Industry, *Preventing forced labour in the textile and garment supply chains in Viet Nam: guide for trainers*, ILO, Hanoi, 2016, 25.

[59] Nguyen Khanh Phuong, "Kiến nghị hoàn thiện pháp luật về chống lao động cưỡng bức, thực hiện cam kết của Việt Nam trong Hiệp định Đối tác xuyên Thái Bình Dương [Recommendations to improve legislation on anti-forced labour, to implement Vietnam's commitments in the Trans-Pacific Partnership Agreement]", *Legislative Studies*, 2016, 18(322), 54.

[60] Nguyen et al., *op. cit.*, 79.

[61] Art. 3.1 of Decree No. 46/2010/ND-CP providing for job discontinuation and retirement procedures applicable to civil servants dated 27 Apirl 2010 issued by the Government, https://www.ilo.org/dyn /natlex/docs/ELECTRONIC/84250/93524/F1855104368/VNM84250.pdf.

[62] Art. 4.1 of Decree No. 46/2010/ND-CP, https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/84250 /93524/F1855104368/VNM84250.pdf.

[63] CEACR, "Forced Labour Convention (C029)", *Observation - adopted 2020, published 109th ILC session (2021) - Vietnam*, Comments (ilo.org).

conscription request for the reason of: (i) national security or national defence in emergency situations; (ii) preventing and recovering from natural calamities, fires, epidemics, and disasters; (iii) executing duties to protect human life or assets owned by organisations, agencies, or individuals[64]. As reflected in the Observation Report adopted in 2020, the Committee of Experts on the Application of ILO Conventions and Recommendations (CEACR)[65] indicated the scope of labour, in this case, is beyond the one of Article 2.2.d in emergency cases, which only allows forced labour in cases of these situations, especially during special times like wars or natural disasters or the danger of natural disasters, and in situations where the safety of part or all of humanity would be in danger.

Regarding prison labour, those sentenced to detention must be forced to serve their sentences in prison camps that contain structured labour for inmates tailored to their age and health so as to help them become valuable members of society. Following the Execution of Criminal Judgements Law, using prison labour outside the detention camp through collaboration with organisations and individuals is not deemed to violate C029 because of three elements. The first reason is that the prisoner voluntarily participates in labour and study outside the prison camp (by a voluntary application for participation in labour and study). Another reason is that these inmates are compensated for their labour. Finally, the government claims that inmates' labour is placed under the close supervision of prison officers and not the supervision of private enterprises[66].

Regarding the work exacted in drug rehabilitation centres, this means that an administrative treatment mandate is imposed by a decision of the Presidents of the State's administrative agencies, which requires that individuals undergoing drug rehabilitation centres actively engage in labour and manufacturing for treatment, work, education, vocational training, and reintegration into the community. This work, on the one hand, does not constitute forced labour, and it enables drug addicts to recognise the value of their labour and to regain their work capabilities, while no punishment would be imposed on those who are unwilling to work as well. Meanwhile, Article 2.2.c additionally states that labour can only be compelled from a person as a result of a court judgement. With this regard, it emphasises that forced labour imposed by administrative or other authorities or nonjudicial organisations is contrary to the convention. Therefore, the CEACR urged the Vietnam authorities to initiate the necessary actions, both legally and practically, to stop those confined in drug rehabilitation centres without being convicted by a court of law from being required to perform work[67]. A lot of attention is also paid to the fact that persons may be obliged to work in organisations and enterprises that are illegal, as required by Convention C029. That means that the regulation of the obligation to work in drug

[64] Art. 108 of Labour Code 2019, https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/110469/137416/F-1864718830/VNM110469%20Eng.pdf.

[65] CEACR, *op. cit.*, Comments (ilo.org).

[66] The Nation Assembly Office of Vietnam, *Tổ chức lao động, hướng nghiệp, dạy nghề cho phạm nhân ngoài trại giam phù hợp với các điều ước quốc tế Việt Nam là thành viên [Organization of labour, vocational guidance and vocational training for inmates outside prison in accordance with international treaties that Vietnam is a member of]*, 2022, https://quochoi.vn/pages/tim-kiem.aspx?ItemID=65689.

[67] CEACR, Comments (ilo.org).

rehabilitation centres in Vietnam does not align with this convention[68].

Human trafficking regulation

Trafficking in human beings is mentioned in the Law on Prevention and Combat of Human Trafficking 2011, including stipulating the responsibilities of ministries and sectors in preventing and combating human trafficking, the rights and obligations of victims, and principles for handling human trafficking cases[69]. However, criminal sanctions for behaviours related to human trafficking are regulated in the Criminal Code in two articles: the crimes of human trafficking and the trafficking of a person under the age of 16 (Articles 150 and 151, respectively). These provisions make significant changes to human trafficking legislation, such as ensuring a broader definition of human trafficking that includes forced labour as well as sexual exploitation, eliminating forms of coercion or forced labour in cases of child trafficking, and admitting that both men and women can be trafficked[70]. Domestic law, in conjunction with the trafficking of children, is non-compliant with international requirements due to the age of the crime's victims. More explicitly, the Protocol requires state members to criminalise child trafficking under 18 years of age as a mandatory demand[71], whereas national legislation clarifies that children are under the age of 16 and victims of trafficking children crimes are the same age too, which is incompatible with international standards.

Punishment for the criminal offence of forced labour

For the first time, forced labour is criminalised with the highest penalty, up to 12 years in prison[72], in the Crime of Forced Labour (Article 297) of the Criminal Code, signifying a new and targeted approach to regulating forced labour. Notwithstanding, critical obstacles to the application of this provision are: Firstly, the lack of detailed guidance on the behaviour of "using violence" or "threatening violence" in order to force others to work in forced labour helps distinguish it from some acts of other crimes, such as coercive behaviours to force others to perform prostitution activities, illegal arrest, detention, or imprisonment of people, or behaviours of human/child trafficking for sexual abuse or forced labour[73]. Second, the penalty rate for this kind of crime is much lower than for other crimes with the same consequences[74]. For example, when evaluating the consequences of the use of violence that leads to "injury or harm to the health of one person with a rate of bodily injury between 31% and 60%", forced labour crimes are punished with a maximum of three years imprisonment, while

[68] Linh & Giao, *op. cit.*, 338.

[69] International Labour Organization & Viet Nam Chamber of Commerce and Industry, *op. cit.*, 31.

[70] Le Luong & Wyndham Caitlin, "What we know about human traffickers in Vietnam", *Anti-Trafficking Review*, 2022, 18, 34.

[71] Le Thi Van Anh, "Đánh giá tính tương thích của Bộ luật Hình sự năm 2015 về tội mua bán người, tội mua bán người dưới 16 tuổi với quy định của Nghị định thư về phòng ngừa, trấn áp và trừng trị việc buôn bán người, đặc biệt là phụ nữ và trẻ em [Examine the compatibility of the 2015 Penal Code's provisions on the crime of trafficking in persons, including the crime of trafficking in persons under the age of 16, with the Protocol on the prevention, suppression, and punishment of trafficking in persons, particularly women and children]", *Legal Professions Review*, 2021, *3*(2021), 56.

[72] Phuong, *op. cit.*, 55.

[73] Diem & Nam, *op. cit.*, 17.

[74] Van Linh, "Hoàn thiện quy định về tội 'Cưỡng bức lao động' theo Điều 297 BLHS 2015 [Completing regulations on the crime of 'forced labour under Article 297 of the Penal Code 2015']", *Vietnam Lawyer journal*, 2022, https://lsvn.vn/hoan-thien-quy-dinh-ve-toi-cuong-buc-lao-dong-theo-dieu-297-bo-luat-hinh-su-2015165003 6106.html.

intentional injuring provides for a maximum sentence of six years[75].

3.2. Vietnam has taken step-by-step synchronised measures of law implementation to eliminate forced labour

Intending to counter the practice of this phenomenon, Vietnam has ratified ILO C029 and C105 together with reaffirming EVFTA's commitment to putting an end to forced labour through the launch of the National Alliance 8.7 or the Global Alliance to Eradicate Forced Labour, Modern Slavery, Human Trafficking and Child Labour[76]. Moreover, in 2021, the Prime Minister issued Decision No. 2234/QD-TTg approving the Strategy on Execution of the ILO C105, encompassing nine working groups and assigning responsibility for organising the implementation to ministries, sectors, and localities[77]. A vast range of various activities, including as (i) propagating and disseminating contents of C105 and related provisions of Vietnam's regulations; (ii) training and enhancing capacity for employees and employers; (iii) reviewing, amending, supplementing documents or promulgating new ones so as to improve the legal system; (iv) developing a database; (v) formulating documents to guide particular provisions of C105 that must be performed in conformity with Vietnam's conditions; (vi) developing and putting in place a system for inspection, supervision, and managing infractions; (vii) reporting regularly or upon request to the ILO on implementation; (viii) strengthening cooperation with other countries; (ix) comprehensively assessing the implementation, drawing experience and supplement solutions[78]. For new regulatory instruments that could be crafted to maximise their effectiveness, the National Assembly, the Ethnic Council, the National Assembly Committee, deputies' delegations and deputies from the whole country shall, within the scope of their responsibilities and authority, supervise this execution[79].

As of now, neither extensive scrutiny into forced labour practices in Vietnam nor the mechanisms for gathering information on the forms of compulsory labour has been established. This database also contains information still collected through the mass media and a number of documents from non-governmental organisations[80]. Consequently, it is currently impossible to assess the effectiveness of legal instruments comprehensively and accurately, as well as to determine what actions should be taken in the future. Regarding the mechanism for

[75] Hien, *op. cit.*, https://lsvn.vn/hoan-thien-quy-dinh-ve-cuong-buc-lao-dong.html.

[76] European Commission and Government of Vietnam, *op. cit.*, 71.

[77] Ministry of Labour - Invalids and Social Affairs, *Báo cáo quốc gia lần thứ nhất về tình hình thực hiện công ước số 105 của ILO về Xóa bỏ lao động cưỡng bức [First Country Report on the Implementation of ILO Convention 105 on the Elimination of Forced Labour]*.

[78] Quyết định số 2234/QĐ-TTg ngày 30/12/2021 của Thủ tướng Chính phủ về việc phê duyệt Kế hoạch thực hiện Công ước số 105 của Tổ chức Lao động quốc tế (ILO) về Xóa bỏ lao động cưỡng bức [Decision No. 2234/QD-TTg approving the Strategy on Execution of the ILO Convention No. 105 concerning the Abolition of Forced Labour dated 30 December 2021 issued by the Prime Minister], https://datafiles.chinhphu.vn/cpp/files/vbpq/2022/01/2234.signed.pdf.

[79] Art. 4 of Resolution No. 104/2020/QH14 on accession to the International Labor Organization's Convention No. 105 concerning the Abolition of Forced Labor dated 8 June 2020 issued by the National Assembly of Viet Nam, https://english.luatvietnam.vn/resolution-no-104-2020-qh14-dated-june-08-2020-of-the-national-assembly-on-accession-to-the-international-labor-organizations-convention-no-105-co-185795-doc1.html.

[80] Linh & Giao, 339.

inspection, there has yet to be a full-fledged subject-matter inspection of forced labour[81].

In terms of the plan to eradicate human trafficking, the recently adopted National Plan of Action to Combat and Prevent Trafficking in Persons for the period 2021–2025, with a vision to 2030 (NPA), emphasises the fight against all forms of human trafficking, including human trafficking with the intention of exploitation, with the aim of mobilising the participation of all relevant ministries and agencies to prevent and deal with the dangers of human trafficking and tackle the root causes of the latter[82]. However, it appears that Vietnam has not yet addressed all forms of human trafficking[83], and the application of the legislation lags behind since the authors were only able to find very few cases[84]. For example, statistics for 2020 indicate that only 136 individuals were involved in 71 instances of individuals being trafficked for sexual exploitation and ten instances of forced labour[85], of which it is estimated that about 90% of the human-trafficking cases are cross-border and that human trafficking for prostitution or domestic forced labour accounts for 10% of the total cases detected[86]. Furthermore, according to the U.S. Embassy's report on human trafficking in 2022, the Government of Vietnam failed to ultimately achieve the minimum requirements for eradicating trafficking, and its lack of meaningful efforts to do so resulted in Vietnam being degraded to Tier 3[87].

In general, in spite of the fact that the General Labour Federation of Vietnam and the Inspectorate of the Ministry of Labour - Invalids and Social Affairs reported that in Vietnam, no cases of forced labour have been recorded so far[88], that does not mean that Vietnam has fulfilled its obligations under its commitments. It seems necessary for Vietnam to have a lot of time to implement its commitments to the abolishment of forced labour within the EVFTA because this agreement just came into force in 2020. Nevertheless, it is still clear how the highest efforts and goodwill of Vietnam contributed to the common goal of respecting, promoting, and implementing the abolition of forced labour, namely by completely ratifying C029 and C105 and abolishing and amending incompatible legal instruments with a view to improving the domestic legal framework compatible with these Conventions[89], in parallel with the Strategy for Execution of ILO C105 on the

[81] *Ibid*.

[82] Luong & Caitlin, *op. cit.*, 34.

[83] Office to Monitor and Combat Trafficking in Persons, "2022 Trafficking in Persons Report: Vietnam", *U.S. Department of State*, 2022, https://www.state.gov/reports/2022-trafficking-in-persons-report/vietnam/.

[84] Marx Axel & Jan Wouters, "Combating Slavery, Forced Labour and Human Trafficking. Are Current International, European and National Intruments Working?", *Global Policy*, 2017, *8(*4), 496.

[85] Office to Monitor and Combat Trafficking in Persons, *op. cit.*, https://www.state.gov/reports/2022-trafficking-in-persons-report/vietnam/.

[86] Department of Criminal Investigation, *Training Handbook: Capacity building to prevent and combat human trafficking for criminal police forces and grassroots police*, Ministry of Public Security, 2018, 44.

[87] Office to Monitor and Combat Trafficking in Persons, https://www.state.gov/reports/2022-trafficking-in-persons-report/vietnam/.

[88] Ministry of Labour - Invalids and Social Affairs, *op. cit.*

[89] Kien Giang Provincial Department of Labour, Invalids and Social Affairs, *Gia nhập Công ước 105 của ILO: Rất cần thiết và đã đủ 'chín muồi' [Accession to ILO Convention 105: Necessary and "ripe" enough]*, 2020, https://sldtbxh.kiengiang.gov.vn/trang/TinTuc/120/1125/Gia-nhap-Cong-uoc-105-cua-ILO--Rat-can-thiet-va-da-du--chin-muoi-.html.

Abolition of Forced Labour in the period 2021–2025[90].

4. Lessons from European countries in the elimination of forced labour

4.1. European

As one of the most significant economies globally, the EU still has a detrimental impact upon the ability to conceal the threats posed by forced labour in the global supply chain. An estimated 1.3 million persons in EU countries were coerced into modern slavery in 2018[91], as per the Global Slavery Index, and the estimated prevalence of the phenomenon ranged from 02 (in places like Denmark, Austria, Finland, Sweden and Ireland) to nearly 08 victims per 1,000 persons (in Greece)[92]. The EU, thus, formulated a number of legal instruments as some current approaches taken to address forced labour, including the European Convention on Human Rights 1950, which first recognised in Article 4 that slavery/forced labour is prohibited (except for some cases such as prisoners, military duty, and national emergencies), and then the EU Charter of Fundamental Rights 2000 reaffirmed this in Article 5[93]. In addition, a number of EU directives on work and employment, like the ILO Conventions, could protect workers from forced labour, more specifically, the Directives 2003/88/EC and 89/391/EEC, for instance, on the working time, safety and health of workers at work[94]. In regard to human trafficking for the forced labour purpose, the 2005 Council of Europe Convention and Directive 2011/36/EU all include provisions for prosecuting traffickers and protecting their victims[95]. In particular, based on a Delphi expert investigation, the European Commission, in collaboration with the ILO, collectively issued a collection of signs of labour/sexual abuse trafficking in 2009, which published four groups of 67 indicators for victims who are adults and kids trafficked for work and sexual exploitation[96]. Although this collection of metrics is not a rule in and of itself, it has become widely regarded as a standard for national enforcement practice[97].

In a further effort to tackle abuses in supply chains, the EU thus targets companies more directly as key actors in the co-enforcement of enhanced working conditions and combating forced or compulsory labour. The European Commission enacts a specific Directive on Corporate Sustainability Due Diligence, which stipulates that businesses need to prove they have taken all the required steps to prevent, recognise, and address forced labour in every aspect of their business operations and supply chain[98]. These steps

[90] TG, "Thực Hiện công ước của ILO Về Xóa Bỏ Lao động Cưỡng Bức [Implementation of the ILO convention on the Abolition of Forced Labour]", *Communist Party of Vietnam online newspaper*, 2022, https://dangcongsan.vn/xa-hoi/thuc-hien-cong-uoc-cua-ilo-ve-xoa-bo-lao-dong-cuong-buc-601374.html.

[91] Valli Corbanese & Gianni Rosas, *Policies to prevent and tackle labour exploitation and forced labour in Europe*, ILO, Rome, 2021, 1.

[92] *Ibid*., 2.

[93] Nick Clark, *Detecting and tackling forced labour in Europe*, Joseph Rowntree Foundation, York, 2013, p.20.

[94] Corbanese & Rosas, 12.

[95] *Ibid*., 17.

[96] SAP-FL, "Operational Indicators of Trafficking in Human Beings", results from a Delphi Survey Implemented by the ILO and the European Commission, ILO, 2009, https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_105023.pdf.

[97] Clark, *op. cit.*, 21.

[98] Corbanese & Rosas, *op. cit.*, 21-23.

should be integrated into the organisation's ultimate strategies, organisational forms, financial and capital management[99]. In addition, the EU has been working on a bill for a European Parliament and Council Regulation barring the sale of goods created with forced labour in the European trade, strictly prohibiting both imported products and those manufactured in the Union territory to be destined for internal consumption or export, and not focusing on specific types of enterprises[100]. If a corporation performs adequate due diligence on the distribution networks in order to limit, prevent, and eliminate the dangers of forced labour, this will thereby mitigate the risks of placing on the market products obtained by resorting to forced labour[101]. As a result, the two new EU policies together support tackling dangers associated with forced labour throughout the supply chain[102], which is a precious resource for Vietnam seeking to eliminate forced labour.

4.2. Hungary

As a rather modest nation located in the heart of Europe, with a population of approximately 10 million people[103], Hungary is at the intersection of the East-West and South-East Continents. This has made it a source and transit country of legal and illegal migration in which trafficked women and girls are victims of sexual abuse, as well as a country of origin for men and women exploited at work[104] (approximately 63,000 people live in conditions of slavery[105]). Vietnam, with a good and long-standing traditional cooperative relationship with Hungary, and with 1,042 workers working in Hungary in the fields of agriculture, food processing, construction, industrial production, welders, and chefs (in the period 2019-2022), is therefore always concerned with social issues, especially forced labour in Hungary[106]. Forced labour is a hidden situation in Hungary, and because of that, there are only calculated numbers of victims. As we know-according to official crime statistics-a total of 36 registered forced labour crimes were committed in Hungary between 2013 and

[99] Accountancy Europe, *Joint statement on the Corporate Sustainability Due Diligence Directive*, 2022, https://www.accountancyeurope.eu/reporting-transparency/joint-statement-on-the-corporate-sustainability-due-diligence-directive-csddd/.

[100] Anne Altmayer, "Proposal for a ban on goods made using forced labour", *European Parliamentaton Research Servise (EPRS)*, 2023, 3, https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/739356/EPRS_BRI(2023)739356_EN.pdf.

[101] Council of the European Union, *Proposal for a regulation of the European Parliament and of the Council on prohibiting products made with forced labour on the Union market*, Brussels, 2022, https://op.europa.eu/en/publication-detail/-/publication/724c8b9a-3a5a-11ed-9c68-01aa75ed71a1/language-en/format-PDF.

[102] European Commission, *Commission moves to ban products made with forced labour on the EU market*, 2022, https://ec.europa.eu/commission/presscorner/detail/en/IP_22_5415.

[103] Windt Szandra, "The unspoken phenomenon: Forced labour in Hungary", *Archiwum Kryminologii*, 2021, *1*(XLIII), 124.

[104] European Commission, *Migration and Home Affairs - Hungary*, https://home-affairs.ec.europa.eu/policies/internal-security/organised-crime-and-human-trafficking/together-against-trafficking-human-beings/eu-countries/hungary_en.

[105] Walk Free, *Regional analysis: Europe and Central Asia*, Global Slavery Index, 2018, Europe and Central Asia | Walk Free.

[106] Ministry of Labour - Invalids and Social Affairs , *Promoting the cooperation on labour export between Vietnam – Hungary*, 2022, http://www.molisa.gov.vn/Pages/tintuc/chitiet.aspx?tintucID=231273.

2019[107]. The victims typically tend to have alcohol problems, be homeless, unemployed, elderly, in extremely poor health, and be of below-average intelligence, and they usually have problems with money; they are in a debt spiral, which causes their contemporary slavery or forced labour situation. These are the new variations of slavery in Europe and in Hungary too.

Therefore, the legal framework for the abolition of forced labour and human trafficking for exploitation is a set of rights recognised by the Constitution as requiring a high level of protection, the Fundamental Law of Hungary[108], and the Labour Code 2012 (as amended in 2020)[109]. In another attempt, the Hungary government amended and supplemented the Criminal Code at the beginning of 2020 with three major amendments[110]: Firstly, Sections 192 of the definition of human trafficking and 193 of the definition of forced labour were amended in the direction of merging the two concepts into "human trafficking and forced labour". This was an appropriate streamlining of their legislation, while also clearly reflecting the nature of human trafficking and demonstrating the most comprehensive, inclusive, and without exception for victims of trafficking; Secondly, the maximum penalties for the offence described in the standard case are increased from 3 years to 5 years, which reflects how serious the crime is; Thirdly, intentionally making use of services or tasks by victims of human trafficking or forced labour would result in legal repercussions as punishment. At the same time, on February 18, 2020, the Hungarian government approved a plan to combat human trafficking from 2020 to 2023. The strategy is built on the following core elements: prevention, protection, prosecution, and partnership, with measures targeted at the main target groups of children, adolescents, and women (especially those living in extreme poverty)[111]. A comparison with Vietnamese law shows that, via a change in behavioural identification, Hungarian law offers a more comprehensive framework for human trafficking, and regulations that penalise the indirect use of forced labour, in particular, could possibly contribute to strengthening Vietnam's law on this matter.

4.3. Italy

Among the four EU founding member nations, Italy is notable for being a state-centered one in the EU[112]. In Italy, by contrast, forced labour is a severe issue in agriculture, textile production, construction, and domestic work (the second highest in EU countries[113]), which has been known for years to rely on cheap and exploited migrant labour[114]. Due to bilateral cooperation in various fields such as high-tech agriculture, construction and textiles, the experience of Italy on sustainable employment, the management of forced labour, and migration (especially from 2020 to 2022, when the Three-Year Plan was implemented to

[107] Szandra, *op. cit.*, 119.

[108] Art. XII of the Hungary's Constitution of 2011 dated 25 April 2011 by the President, https://www.constituteproject.org/constitution/Hungary_2011.pdf.

[109] 2012 évi I törvény a munka törvénykönyvéről [Act I of 2012 on the Labour Code] dated 1 July 2012 amended in 2023 issued by National Assembly, https://net.jogtar.hu/jogszabaly?docid=a1200001.tv.

[110] Szandra, 126.

[111] European Commission, *op. cit.*, https://home-affairs.ec.europa.eu/policies/internal-security/organised-crime-and-human-trafficking/together-against-trafficking-human-beings/eu-countries/hungary_en.

[112] Clark, 7.

[113] Corbanese & Rosas, 2.

[114] Walk Free, "Country studies: Italy", *Global slavery index*, 2018, Italy | Walk Free.

combat labour exploitation and illegal recruiting in agriculture), these are the problems that Vietnam is interested in[115].

It can be seen that there are a variety of different national approaches to protection for employment, human rights, and equality, especially in the Italian Constitution (Articles 36, 41). Forced labour, on the other hand, is criminalised under Article 603; trafficking in persons and slavery are prohibited in Articles 601, 600, and 602 of the Criminal Code[116]. According to Law No. 1999 on measures to combat undeclared employment, exploitative labour, and wage realignment in agriculture, "caporalato" (exploitation) is defined as if any of the following circumstances are met in a given situation: the pattern of wage payments that are either inconsistent with national collective agreements or grossly out of proportion to the amount and quality of work done; the persistent breaking of safety, sanitation, and working-time regulations; and putting the worker in poor working circumstances or a worsening housing situation. Coupled with a number of aggravating factors of the crime, including: when there are more than three illegally hired employees; when children are illegitimately recruited; and when illegally recruited employees are subjected to any form of hazard[117]. There is no doubt that Italy has broadened the definition's reach while strengthening the protection of forced labourers in identified situations of forced labour. And through the aggravating conditions for illegally recruiting labour, this would convincingly demonstrate comprehensive provisions related to forced labour in this nation.

Additionally, through the Social Labelling Programmes, a label called "Network of High-Quality Agricultural Labour"[118] is used to describe action taken by enterprises to improve working conditions of a product or service[119]. Only companies that comply with core labour standards and have not received convictions for breaches of labour laws in the past three years can use the label as a certificate of business respecting labour laws and social legislation[120]. In a similar vein, Law No. 50 mandates the removal of economic organisations from participating in government procurement practices if the controller has already been found guilty of child labour or human trafficking by a final verdict[121]. Thus, through self-governance and community-based monitoring, businesses will serve as the initial line of defence in recognising and dealing with forced or compulsory labour in their distribution networks[122].

5. Recommendation

Despite deliberate attempts to amend and supplement national legislation on the abolition of forced labour, however, there are still significant limitations that need to be

[115] Ministry of Labour, War invalids and Social Affairs, *Promoting cooperation between Vietnam and Italy in the field of labour*, 2014, http://english.molisa.gov.vn/Pages/News/Detail.aspx?tintucID=217169.

[116] Walk Free, *op. cit.*, Italy | Walk Free.

[117] Ruggero Scaturro, "Modern slavery made in Italy—Causes and Consequences of Labour Exploitation in the Italian Agricultural Sector", *Journal of Illicit Economies and Development*, 2021, *3*(2), 186.

[118] Walk Free, Italy | Walk Free.

[119] Janelle DILLER, "A social conscience in the global marketplace? Labour dimensions of codes of conduct, social labelling and investor initiatives", *International Labour Review*, 1999, *138*(2), 104.

[120] Walk Free, Italy | Walk Free .

[121] *Ibid*.

[122] Schwarz Katarina, et al, *External policy tools to address modern slavery and forced labour*, European Parliament, Brussels, 2022, 109.

taken into account in a further effort to achieve more effective implementation of the EVFTA labour commitments:

Firstly, the Vietnamese legislation should shed light on both the concept and identification of forced labour in line with C029.

In the first place, the Labour Code 2019 continues to define forced labour primarily through the use/threat of force, which is akin to workplace violence, and as a result, the level of danger as well as the variety of forced labour behaviours have not been transmitted. Besides, the "other tricks", which are an open regulation, could be construed in a number of complex ways[123]. Because the definition of forced labour stipulated by C029 might not have been properly incorporated into domestic Vietnamese legislation, it would be necessary for that complete definition of forced labour by defining it as "the situation in which a person is forced by another to impose work under the threat of possible adverse consequences for himself/herself or his/her relatives"[124]. Moreover, to close the gap, a range of indicators should be classified into typical identification signals/cases based on the eleven ILO's indicators for forced labour, including: (i) employers take advantage of their employees' vulnerability; (ii) employers deceive their employees into joining and/or performing contractual relationships with them; (iii) employees are isolated and in a restricted movement; (iv) employees are threatened by their employers; (v) employers put their employees in a position of subordination and make them do required tasks by withholding their ID or wages or using indirect methods; (vi) employees are regularly and constantly forced to work excessive overtime; (vi) employees suffer physical and sexual violence by their employers[125].

Secondly, the Vietnamese law should be amended to narrow down the exceptional cases of forced labour.

As explained above, the scope of emergency in the Vietnamese Labour Code does not meet the characteristic of Article 2.2.d under C029; thus, national legislation should make a more appropriate adjustment to the Convention that permits forced labour to be exacted only in cases of emergency, according to the literal meaning of the phrase, particularly occurrences of war or (threatened) calamity, and also generally, any situations that might jeopardise the survival or the general or specific well-being of the population.

An aspect of addicts work exacted in drug rehabilitation centres, those imposed by an administrative decision, should be subject to the obligation under a court ruling in order to guarantee conformity with the international convention ratified by Vietnam[126]. At the same time, as the use of this workforce by individuals, corporations, or organisations is illegal, it would be necessary to formulate guidelines providing for the cooperation between drug rehabilitation centres and private or individual enterprises, with a particular emphasis on avoiding the transfer of labour or placing it under the right of private property, to comply with the conditions of Article 2 under C029.

[123] Diem & Nam, 16-17.

[124] Nguyen Tien Dung, "Khái niệm về lao động cưỡng bức [Concept of forced labour]", *Hanoi Law Review*, 2016, *12*(2016), 6.

[125] Nguyen Tien Dung & Nguyen Thi Thanh Huyen, "Elinination of forced labour or compulsory worker under Vietnam's law viewpoint from the European Union and some member countries", *Legal professions Review*, 2023, *4*(2023), 80.

[126] CEACR, Comments (ilo.org).

Thirdly, Vietnam should keep adapting to international norms and the experiences of other nations in human trafficking legislation.

As mentioned previously, the lower-level minimum age for trafficking in children is one of the primary obstacles to Vietnam's application of international law. It is, therefore, believed that Vietnam should raise the age for victims of child trafficking to 18 years of age. This amendment would both synchronise with the requirements of international norms as well as the legislation of many countries in the world and be better for decreasing social vulnerability while also protecting those who have not yet acquired physical and mental maturity[127].

Fourth, criminal penalties for forced labour should be revised to improve legal regulation and the penalty level.

Regarding the provision on the crime of forced labour in the Criminal Code, specific guidelines and rules on the use/threat of force to compel others to work alongside distinctive actions of forced labour in other offences should be supplemented[128]. Furthermore, we highly suggest greater penalties for the offence of forced labour, similar to intentional injury or harm to the health of others, and this may refer to aggravating cases involving illegal employment under Italian law to establish the level of danger of the conduct.

Fifth, it is important to promote the execution and allocation of resources for the plan on C105 implementation and the plan for the prevention of human trafficking on a nationwide scale (NPA)[129].

Admittedly, the most urgent issue with Vietnam is the requirement to develop official statistics systems for collecting databases, in addition to carrying out a thorough investigation into forced labour as well as human trafficking in an attempt to closely monitor the situation in the coming years[130]. It is also necessary to establish and carry out an inspection process, monitoring full-fledged subject-matter inspection of forced labour and human trafficking throughout a whole nation. Accordingly, the conduct of inspection and the handling of violations require coordination, a collaboration of several public agencies such as the inspection agency, the organisation of representatives of workers, the judiciary, and the executive agency. Since then, the government has the basis to carry out the prevention, combat, and elimination of forced labour from 2021–2025, as proposed.

Sixthly, it is necessary to enact regulatory measures that not only oblige but also encourage enterprises in Vietnam to take social responsibility, along with the co-enforcement of the elimination of forced labour commitments.

Due to the domestic framework's lack of provisions relating to the responsibility of enterprises or employers to prevent forced labour as mandatory obligations, it is suggested that providing the obligation to "build and take measures in preventing and resolving workplace forced labour" as an enterprise's binding obligation[131]. This regulatory measure also obliges enterprises to disclose the extent to which they take steps to address forced labour in internal labour regulations, as proposed in the

[127] Anh, *op. cit.*, 59.
[128] Diem & Nam, 17.
[129] Office to Monitor and Combat Trafficking in Persons, https://www.state.gov/reports/2022-trafficking-in-persons-report/vietnam/.
[130] Linh & Giao, 341.
[131] Tran Thi Huyen Trang, "The responsibility of businesses for preventing forced labour", *Industry and trade magazine*, 2021, *3*(2021).

directive proposal on corporate sustainability due diligence that has been developed by the EU. Enterprises, besides adhering to obligations under national and international law, also should comply with the Code of Conduct for the strict prevention of forced labour in corporate social responsibility criteria[132]. On the other hand, the government should first actively promote a "Responsible Supply Chain Policy" intended to prevent and mitigate the use of forced labour throughout the global supply chain, in relation to the "social labelling programmes" in Italy, or a legal proposal that empowers the states to exclude from the Vietnamese trade products created with forced labour.

6. Conclusion

This research focuses on the development and implementation of Vietnamese policy on the end of forced labour under the EU's next-generation free trade agreement. The Vietnamese government here has made considerable efforts to both establish appropriate legislative regimes and enforce important tools aimed at eliminating all forms of forced labour together with fighting human trafficking. Despite considering this a high-level priority in the country, in the course of satisfying international obligations, Vietnam still faces a wide range of enforcement challenges.

In fact, active learning from the concrete experience of the EU and EU countries like Hungary and Italy, as well as adapting internal legislation along with exemplary implementation of C105 and C029, would ensure that Vietnam significantly benefits from participating in trade agreements. On the contrary, if Vietnam fails to meet its labour commitments related to the abolition of forced labour, bilateral trade relations between Vietnam and the EU will suffer severely. Therefore, the ongoing review, modification, and supplementation of the internal legal system to ensure compatibility with international legal norms as well as the synchronous implementation of ILO recommendations will additionally prevent and eliminate the practice of using forced labour in Vietnam while still ensuring Vietnam's sustainable development in the world trade market.

Overall, the EVFTA serves as an important declaration of principles, including the eradication of forced labour, which both the EU and Vietnam are willing to uphold on a global scale. Yet it is also a comprehensive trade agreement, with a strategic role for the EU on both sides of the Asian region and in developing countries. So the study on the commitment to eliminate forced labour within the EVFTA would, on the one hand, benefit the EU in reevaluating this commitment as well as commitments in line with the social dimension in EU policy and, on the other, enable other developing nations to reevaluate their own national labour commitments in new-generation FTAs with the EU and other country partners./.

[132] Such as, the UN Global Compact, the International Finance Corporation's (IFC) Performance Standards on Labour and Working Conditions, the Global Reporting Initiative (GRI) Sustainability Reporting Framework, ISO 26000: 2010 - Guidance on social responsibility, the Ethical Trading Initiative (ETI) Base Code, the Fair Labour Association's Workplace Code of Conduct; Social Accountability International - SA8000 Standard, and the Nordic Initiative Clean & Ethical Fashion (NICE).

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SHORT CONSIDERATIONS ON THE RIGHT TO COMPENSATION IN CASE OF MISCARRIAGE OF JUSTICE OR UNLAWFUL IMPRISONMENT – A STEP BEFORE THE ECHR PROCEEDINGS

Mirela GORUNESCU[*]
Laura-Cristiana SPĂTARU-NEGURĂ[**]

Abstract

Pursuant to the provisions of Article 538 et seq. of the Romanian Code of Criminal Procedure, individuals who consider themselves to be victims of manifest miscarriages of justice or in cases of unlawful deprivation of liberty may bring an action against the Romanian State through the Ministry of Public Finance for damages for the unlawful deprivation of liberty they have suffered. This study will attempt to analyse the conditions of admissibility of such claims, arising from unlawful deprivation of liberty, and to present elements of material and non-material damage that could be covered by the court. But even if such actions were to be admitted and the court were to grant the claims referred to by the persons entitled, could the non-material damage be fully compensated, given that several fundamental human rights have clearly been infringed? The issue is also approached from the perspective of the rich case-law of the European Court of Human Rights on this matter, which we consider relevant to the present topic.

Keywords: *action, compensation, damages, reparation, the Romanian State.*

1. Introductory considerations

Fundamental human rights must be respected, and when they are not voluntarily respected, their violation must be redressed. Among the individual human rights recognized to every human being the right to liberty and security of the person, enshrined in **Article 5** of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "***the Convention***") is part of the human rights hard core[1].

The provisions of **Article 5** of the Convention are extremely important for a democratic society, as it regulates the protection of any person against arbitrary or abusive detention or arrest. The term *liberty* does not was chosen by chance, it refers to the very physical freedom of individuals. No person may not be deprived of his/her liberty in an arbitrary manner, but only in well founded cases, provided for and executed according to the law, which are the protection of public order. Even in the case of a permitted deprivation of liberty by law, the person concerned must be assured that

[*] Associate Professor, Ph.D., Faculty of Law, "Nicolae Titulescu" University of Bucharest, attorney-at-law at the Bucharest Bar Association (e-mail: mire_gor@yahoo.com).
[**] Lecturer, Ph.D., Faculty of Law, "Nicolae Titulescu" University of Bucharest, attorney-at-law at the Bucharest Bar Association (e-mail: negura_laura@yahoo.com).

[1] Please see Corneliu Bîrsan, *European Convention on Human Rights: Commentary per Articles*, C.H. Beck Publishing House, Bucharest, 2010, Laura-Cristiana Spătaru-Negură, *International Protection on Human Rights. Course Notes*, Hamangiu Publishing House, Bucharest, 2019, p. 138 and following, Fuerea Augustin, *Introduction to international human rights law: lecture notes*, Era Publishing House, Bucharest, 2000.

certain safeguards are respected. This right is inalienable and no one can waive it.

But what happens when the state violates this fundamental right in judicial proceedings, through manifest miscarriages of justice or unlawful deprivation of liberty?

Under the provisions of **Articles 538 and 539** of Law No 135/2010 (hereinafter "***the Code of Criminal Procedure***"), individuals who consider themselves victims of manifest miscarriages of justice or unlawful deprivation of liberty (hereinafter "***the persons entitled***") may bring an action against the Romanian State, through the Ministry of Public Finance[2], for compensation for damage caused by miscarriages of justice or unlawful deprivation of liberty.

The purpose of this study is to set out certain considerations relevant to actions seeking compensation for damages for unlawful deprivation of liberty suffered.

With regard to territorial, material and general jurisdiction, the court in whose district the person entitled to damages is domiciled, bringing a civil action against the state, which is summoned by the Ministry of Public Finance, has jurisdiction to rule on the action, pursuant to **Article 541 para. (3)** of the Romanian Code of Criminal Procedure.

By the judgment on the merits of the case, the court could be empowered by the persons entitled to order the Romanian State to pay:

i. a sum of money to cover the **material damage** caused by the criminal case, consisting, for example, of lawyer's fees, legal expenses, amount of weekly packages, parental donations for the subsistence of the entitled person's family, and for the lost benefit, as appropriate;

ii. a sum of money to cover the **non-material damage** caused by the unlawful detention of the person entitled and the inhuman and degrading conditions of detention to which he/she was subjected during the period of his/her imprisonment and/or placed under house arrest, under judicial supervision;

iii. **interest** on the amount claimed from the date of the claim until full payment of the amount due;

iv. the person entitled costs incurred in the proceedings in accordance with **Article 453** of the Romanian Code of Civil Procedure.

2. General considerations on the admissibility of such claims

Given that the persons entitled were the victims of an obvious miscarriage of justice in the criminal cases, they are entitled to compensation for damages for the harm suffered, pursuant to **Article 539 et seq.** of the Romanian Code of Criminal Procedure.

Pursuant to the provisions of **Article 539** of the Romanian Code of Criminal Procedure:

"*(1) A person who, in the course of criminal proceedings, has been unlawfully deprived of liberty shall also be entitled to compensation for damages.*

(2) The unlawful deprivation of liberty must be established, as the case may be, by an order of the public prosecutor, by a final decision of the judge of rights and freedoms or of the preliminary chamber judge, and by a final decision or final judgment of the court hearing the case.".

Involvement of these persons entitled in criminal proceedings for alleged

[2] With regard to the passive legal standing of the defendant Romanian State through the Ministry of Public Finance, the provisions of Article 541 para. (3) of the Code of Criminal Procedure recognizes *expressis verbis* the passive legal capacity.

particularly serious offences [i.e. the offence of setting-up an organised criminal group, provided for by **Article 367 para. (1)** of the Romanian Criminal Code, the offence of abuse of office in a continuous form, provided for in **Article 297 para. (1)** of the Romanian Criminal Code], offences which they did not commit, certainly damaged the persons entitled honour, moral credit, social position and professional prestige.

The measures ordered against such persons entitled have harmed the values that define human personality, values that relate to the physical existence of a person, to health and bodily integrity, to honour, dignity, professional prestige and other similar values. The seriousness of the effects produced is accentuated by the age of the persons at the time - for example, young people at the beginning of their careers, with well-defined professional and social prospects.

In case of certain persons entitled, even after their release from pre-trial detention centres, due to the media coverage of the unreal facts, which were presented in the national press, online and on national TV broadcasts, in which the respective persons were **portrayed as criminals**, they may end up being stigmatised in society and feel this trauma, even though it is obvious that miscarriages of justice were committed against them, because in the end **they were acquitted by the courts**.

Thus, the **principle of the financial liability** of the Romanian State for damage caused by errors committed in criminal proceedings is enshrined in **Article 52 para. (3)** of the Romanian Constitution and in accordance with the practice of the Romanian Constitutional Court, as well as with the provisions of **Article 3 of Protocol No. 7** to the Convention.

The **right to compensation** arises when it is premised on a miscarriage of justice, which leads to the conclusion that compensation for damages can be claimed in all cases where the state authorities committed abuses of law or manifested gross negligence. Even if the arrest or detention was qualified as lawful under national law, it could still be contrary to **Article 5** of the Convention.

Individual liberty is a fundamental human right guaranteed by **Article 23** of the Romanian Constitution and by **Article 5** of the Convention.

The European Court of Human Rights has consistently held that in cases of violation of **Article 5 para. 1** of the Convention concerning unlawful deprivation of liberty, apart for the claims for material damage, claims for moral damages for the period of unlawful detention are also justified.

The measure of pre-trial detention of those persons entitled most probably caused them moral suffering, that it materialised in acute states of stress and depression which required a great deal of strength and willpower to overcome.

Thus, in the light of **Article 5** of the Convention, the constitutional principle that **the state is financially liable for damage caused** by miscarriages of justice in criminal proceedings and must allow reparation for the damage caused both by wrongful conviction and as a result of unlawful deprivation of liberty during criminal proceedings, is embodied.

Judicial practice has defined **the conditions which must be met for the award of damages in an action for damages and miscarriages of justice** based on **Article 539** of the Romanian Code of Criminal Procedure, as follows:

A. existence of an unlawful deprivation of liberty;

B. the unlawful deprivation of liberty must be established, as the case may be, by order of the public prosecutor, by a final decision of the judge of rights and freedoms

or of the preliminary chamber judge, and by a final decision or final judgment of the court hearing the case;

C. the existence of damage suffered by the applicant, which is presumed;

D. the lodging of the claim within 6 (six) months from the date of the final judgment of the court.

We will detail further these conditions.

A. Existence of an unlawful deprivation of liberty

In the case of preventive measures in a criminal case, the existence of such preventive measures becomes unjust as a result of the decision to dismiss the criminal charge on the merits - for example, acquittal under **Article 396 paras. (1) and (5)** of the Romanian Code of Criminal Procedure in relation to **Article 16 para. (1) letter (b) first thesis** of the Romanian Code of Criminal Procedure.

As the Constitutional Court pointed out in the Decision No 136/2021 on the objection of unconstitutionality of **Article 539** of the Romanian Code of Criminal Procedure:

"37. Preventive custodial measures taken in the course of ***criminal proceedings represent a severe/major restriction of a person's individual liberty. Even if the constitutional text allows the limitation of individual liberty for the purpose of the proper conduct of the criminal proceedings, it does not mean that, regardless of the outcome of the criminal proceedings, the infringement of this liberty should not be redressed****. In other words, the outcome of the judicial process must be regarded as an* ***essential criterion*** *for compensating for the injustice suffered by the person concerned. (...)* ***Therefore, if it is proved, by a final order of dismissal/judgment, that the criminal charge against the person is unfounded, the severe limitations on his individual liberty must be compensated.*** *(...)*

38. If the State owes compensation for a preventive measure depriving a person of his liberty taken unlawfully, irrespective of the outcome of the criminal proceedings, precisely because it has infringed its own legal system, ***so too does the deprivation of liberty of a person against whom the State, on examining the merits of the charge, fails to rebut the presumption of innocence give rise to a necessary right to compensation. Being deprived of liberty on the basis of the charge brought, a finding that the charge is unfounded/ inconsistent with reality has the effect of establishing that the deprivation of liberty measures taken against the person concerned in the course of the criminal proceedings are unjust****. (...)* ***The failure to comply with legal procedures in the taking of a preventive measure involving deprivation of liberty or the unfoundedness of the criminal charge which led to the taking of the preventive measure involving deprivation of liberty are grounds which equally justify a right to compensation for the impairment of individual liberty, even if the grounds are different*** *[unlawfulness of the measure or unfoundedness of the charge].* ***The fact that the deprivation of liberty is found to be unjust and unfair only at the end of the criminal proceedings does not mean that it was not unjust and unfair at the very time it was ordered and that, therefore, the person subject to the measure was not wronged.***

(...)

44. Therefore, in view of the State's obligation to value justice, the violation of the inviolability of individual liberty in the present case ***constitutes a miscarriage of justice within the meaning of the first sentence of Article 52 para. (3) of the Constitution****, but not from the point of view of the judge's assessment of the case, which*

was based on the evidence in the case, but from the point of view of the outcome of the trial. Thus, ***it is inadmissible for an acquitted person to continue to bear the stigma of the deprivation of liberty to which he has been subjected, without being given the necessary material and moral reparation.*** *(...)*

45. Accordingly, the Court finds that, in the light of Articles 1 para. (3) and 23 para. (1) of the Constitution, ***the deprivation of liberty ordered in the course of criminal proceedings resolved by application of Article 16 para. (1) letters (a)-(d) of the Code of Criminal Procedure causes harm to the person subject to that measure****, which entails the applicability of the first sentence of Article 52 para. (3) of the Constitution. Therefore, the Court holds that there is no congruence between the above-mentioned constitutional texts and the restrictive view of the Code of Criminal Procedure, which links the right to compensation associated with the unlawful deprivation of liberty to the violation of a legal rule in taking/extending/maintaining the preventive measure. Since a legal text cannot restrict the scope of application of constitutional provisions and cannot take precedence over a rule of constitutional rank, an acquittal/termination decision given in a criminal trial for the above reasons must be given* ***the same remedial purpose*** *since it demonstrates a violation of the same constitutional value - the inviolability of the individual's liberty - as in the case of failure to comply with the legal rules concerning the taking/extension/maintenance of the preventive measure depriving the person of liberty.* ***It is true that the situation under consideration is not a case of unlawful deprivation of liberty, but, given that both hypotheses are designed to protect the same constitutional values [justice, individual liberty, legality], it means that the person whose inviolability of individual liberty has been violated must be recognised and enjoy the same protection.*** *The Court therefore finds that the situation under consideration constitutes a case of unjust deprivation of liberty, in which case the individual's right to compensation cannot be extinguished. Therefore,* ***the juxtaposition of the two aforementioned hypotheses in the content of Article 539 of the Code of Criminal Procedure reflects the full and correct dimension of the provisions of Article 52 para. (3), first thesis, of the Constitution, their legal treatment in terms of the type and extent of compensation, as well as the action for compensation for damage, being thus identical****."*[3](our underlining).

The acquittal of such persons on the merits and/or (upholding it) on the effective remedies thus leads us to state that **the custodial measures ordered in these cases appear to be unjust measures by reference to the acquittal** ordered against the persons entitled, respectively to the recitals of the Constitutional Court Decision No 136/2021.

B. The unlawful deprivation of liberty must be established, as the case may be, by order of the public prosecutor, by a final decision of the judge of rights and freedoms or of the preliminary

[3] Decision of the Constitutional Court of Romania No 136 of 3 March 2021, published in the Official Gazette No 494/12.05.2021. By this decision, the Court **admitted the exception of unconstitutionality** raised by Cristian Marius Niță in Case no. 5090/63/2017 of the Dolj Court - Civil Section I **and finds that the legislative solution contained in Article 539 of the Code of Criminal Procedure which excludes the right to compensation for damages in case of deprivation of liberty ordered during the criminal proceedings resolved by closure** (in Romanian "*clasare*")**, according to Article 16 paragraph (1) letter a)-d) of the Code of Criminal Procedure, or acquittal is unconstitutional.**

chamber judge, and by a final decision or final judgment of the court hearing the case

In the case of such persons entitled, the acquittal, pronounced under the provisions of **Article 16 para. (1) para. (1) letters (a)-(d)** of the Romanian Code of Criminal Procedure, is sufficient to establish, in civil proceedings, the **unlawful nature of the measure of deprivation of liberty** ordered during the criminal proceedings, in the light of the considerations of the Constitutional Court Decision No 136/2021.

We consider it useful, relevant and conclusive to point out that the entitled person's right to compensation is not conditional on the basis of acquittal - **Article 16 para. (1) letters a)-d)** of the Code of Criminal Procedure:

a) the fact does not exist;

b) the fact is not provided for by the criminal law or was not committed with the guilt provided for by the law;

c) there is no evidence that a person committed the crime;

d) there is a justifying or non-culpability cause - precisely because, otherwise, the presumption of innocence of the person provided for by **Article 23 para. (11)** of the Constitution.

It is a matter of principle that a final judgment of acquittal has the force of *res judicata* and results in the **preservation of the presumption of innocence**. To distinguish between the grounds for acquittal in order to determine whether or not the person concerned is entitled to compensation would be to maintain a shadow of doubt as to the presumption of innocence. It is unique and has the same effect irrespective of the basis of acquittal. Neither before nor after acquittal can different degrees of comparability of innocence be created.

Following a final acquittal, **it is no longer permissible to express suspicions as to the innocence of the accused person**.

Thus, the European Court of Human Rights considers that once an acquittal has become final - even an acquittal which gives the accused the benefit of the doubt under **Article 6 para. (2)** of the Convention - the expression of any suspicion of guilt, including those expressed in the grounds for acquittal, is incompatible with the presumption of innocence[4].

The operative part of an acquittal decision must be respected by any authority which directly or indirectly concerns the criminal liability of the person concerned. The presumption of innocence means that, where there has been a criminal charge and criminal proceedings have resulted in an acquittal, the person who has been the subject of the criminal proceedings is innocent before the law and must be treated in a manner consistent with that state of innocence. In this respect, therefore, the presumption of innocence will subsist after the conclusion of the criminal proceedings to ensure that, in respect of any charge which has not been proved, the innocence of the person concerned is respected[5].

It follows from an examination of all these legal rules that **the responsibility for damage caused by judicial errors**, in relation to the person entitled, **is always and without exception, directly and without exception, incumbent on the state**, which is obliged to make reparation for any damage suffered by a person who is arrested

[4] Please see, for instance, the Judgment of 21 March 2000, in the case *Asan Rushiti v. Austria*, para. 31; please also see the Judgment of 25 August 1993, rendered in the case *Sekanina v. Austria*, para. 30.

[5] Please see, for instance, the Judgment of 12 July 2013, rendered in the case *Allen v. Unit Kingdom*, para. 103.

or detained in violation of the legal provisions in question.

Thus, if it is established by a final judgment that the criminal charge against the person entitled is unfounded, it follows that the severe restrictions on that person's liberty must be compensated, since it is clear that he/she has suffered damage.

C. The existence of damage suffered by the person entitled, which is presumed

According to Article 539 of the Romanian Code of Criminal Procedure, a person who has been unlawfully deprived of liberty in the course of criminal proceedings is entitled to compensation for the damage suffered.

This text does not establish the categories of damage that can be compensated for unlawful deprivation of liberty, so the **general principle of full compensation for damage**, established by **Article 1349 para. (2)** and **Article 1357 para. (1)** of the Romanian Code of Civil Procedure, includes both material and moral damages.

The honest citizen is not obliged to bear the moral and material consequences of the **malfunctioning of a criminal activity**, i.e. the enforcement and distribution of justice in a democratic society. The state, as a responsible person, is liable for the damaging consequences of the conduct of specific judicial activities, but not for an act committed by another person, but as the guarantor of the legality and independence of the judicial process.

Liability will be incurred independently of any fault, on an objective basis.

The **justification** for this is the objective guarantee against the risk of judgments being handed down or measures being taken which, although not unlawful, do not meet the requirements of **Article 6** of the Convention and are likely to cause harm to individuals.

With regard to the nature and extent of the damage, please take into account the duration of the deprivation of liberty, the consequences for the person or his/her family, and the case-law of the High Court of Cassation and Justice, which in the Civil Decision No 457/27.01. 2012 established that:

"*The moral damage caused by the unlawful arrest (resulting from the acquittal decision) does not have to be proven, since this measure violates one of the most important attributes of human personality, the right to freedom, as an inalienable right of the human being and as a primary value in a democratic society, and the amount awarded by the court by way of compensation for the non-material damage suffered must be compensation for the damage done to his honour, health and reputation by the initiation of the criminal proceedings in which the restrictive measures were ordered and, ultimately, the acquittal of the person.*"[6].

In this case, the arguments considered by the Supreme Court are applicable and the non-material damage caused by the unlawful custodial measures is **indisputable**.

With regard to the amount of compensation, under **Article 540 para. (2)** of the Romanian Code of Criminal Procedure:

"*In determining the amount of compensation, account shall be taken of the duration of the deprivation of liberty or restriction of liberty incurred and the consequences for the person or the family of the person deprived of liberty or of the person in the situation referred to in Article 538.*".

Moreover, according to **Article 540 paras. (3) and (4)** of the Romanian Code of

[6] The text of this decision is available at https://legeaz.net/spete-civil-iccj-2012/decizia-457-2012.

Criminal Procedure, in choosing the type of compensation and its extent, the entitled person's situation in repairing the damage and the nature of the damage caused shall be taken into account, and if the victim was employed before the deprivation of liberty or imprisonment as a result of the execution of a custodial sentence or educational measures, the time during which he/she was deprived of liberty shall also be calculated, in relation to the length of service established by law.

Specifically, in assessing the amount of compensation, account may be taken of the following personal and family circumstances of the persons entitled, which are likely to increase the seriousness of the consequences, as follows:

i. the respectability of the person entitled (e.g. at the time of his/her detention and remand in custody, the person entitled was of a young age and enjoyed a good reputation);

ii. whether the entitled person's health had deteriorated and he/she was left with trauma from the detention centres;

iii. the respectability enjoyed by his/her family (e.g. parents, spouse) and the extent to which his/her health was impaired;

iv. whether, at the time of pre-trial detention, he/she had minor children and whether there were any problems with their care and upbringing;

v. problems relating to promotion at work.

a) Material damage

With regard to the material damage, we specify that this is the harmful consequence that has economic value, being able to be evaluated pecuniary, being primarily the consequence of the violation of the rights and economic interests of the person entitled.

Thus, it is necessary to quantify the amounts paid by the entitled person or his/her family by way of legal fees for the compulsory defence, legal costs, the estimated value of weekly food parcels, fruit and drinks, personal hygiene items received in the detention centres, any donations received by his/her family for subsistence (taking into account the absence of the person's income during the period of pre-trial detention and possibly even the suspension of employment or service), and the benefit not received (e.g. the confidentiality bonus for clearance of national classified information[7], state secrets - "top secret" in the amount of 12% of basic salary).

We consider that all this material damage would be due because, if the Romanian judicial authorities had carried out their duties in a fair and lawful manner, **without abusing the legal provisions[8]**, the persons entitled would not have been put in the position of having to bear these expenses.

b) Moral damage

With regard to moral damage, the settled case-law of the High Court of Cassation and Justice has established that the monetary compensation awarded for reparation of moral damage must reflect a value concordance between the amount or/and the seriousness of the consequences whose reparation it is intended to contribute

[7] On classified information, please see Valentina Bărbățeanu, Andrei Muraru, *Right to a fair trial in the context of classified information. A survey in the light of CCR's case-law*, published in the proceedings of the Challenges of the Knowledge Society (CKS), "Nicolae Titulescu" Publishing House, 2022, pp. 210-219.

[8] Please see Ștefan Elena Emilia, *Legality and morality in the activity of public authorities*, in the Public Law Journal no 4/2017, Universul Juridic Publishing House, Bucharest.

to. In determining the amount of non-material damages, regard must be had to the principle of full reparation of the damage caused by the wrongful act.

The issue of **determining compensation for non-material damage** is not limited to the economic quantification of non-patrimonial rights and values such as dignity, honour or the mental suffering suffered by the person entitled. It involves a complex assessment and evaluation of the aspects in which the harm caused is externalised and can thus be subject to the discretion of the courts.

Therefore, even if **moral values cannot be assessed in money**, the harm caused to them takes concrete forms and the court is thus able to assess their intensity and seriousness and to determine whether a sum of money and in what amount is appropriate to compensate for the non-material damage caused, assessing in fairness, in order to provide the victim with some satisfaction or relief for the suffering suffered.

According to the provisions of **Article 540 para. (2)** of the Code of Criminal Procedure - *Nature and extent of reparation*:

"*(1) In determining the extent of reparation, account shall be taken of the duration of the unlawful deprivation of liberty and the consequences for the person, the family of the person deprived of liberty or the person in the situation referred to in Article 538.*

(2) Reparation shall consist in the payment of a sum of money or the constitution of an annuity or the obligation that, at the expense of the State, the unlawfully detained or arrested person be placed in the care of a social and medical institution.

(3) In choosing the type of compensation and the extent thereof, account shall be taken of the situation of the person entitled to compensation and the nature of the damage caused.".

In such cases, there is no doubt that the arrest of a person for a period of time has caused moral damage both to that person and to his or her family, with the implicit damage to those attributes of the person that influence social relations - honour, reputation - and those that are in the emotional sphere of human life - relations with friends and relatives, damage that finds its most typical expression in the moral pain experienced by the victim.

The consequences of pre-trial detention have had an impact on the professional sphere, as these people are unable to carry out their professional activities due to their **reduced capacity for social relations**.

The whole family also feel the **negative impact of the arrest**, as the violation of the right to liberty made it impossible for them to see the spouse, children and parents, and they were unable to provide them with the necessities of life due to the lack of income.

In addition, in our experience, there are such people who have tried to keep their minors from finding out about the deprivation of liberty situation, not agreeing to come to detention and remand centres throughout the period of remand, with the minors subsequently finding out and **suffering a strong emotional shock**, being haunted by the idea that one of their parents has been arrested for a serious criminal offence.

Thus, clearly, they suffered on a family level, **being torn away from the family**, unable to enjoy their family for a long period of time, and the minor children being deprived of the upbringing and education they could have provided as parents.

Neither the persons entitled nor their families have found it easy to bear the negligence of the Romanian judicial authorities for acts they did not commit, as the unlawful deprivation or restriction of

liberty measures have marked their existence as people in all aspects of their lives, feeling humiliated and unjust, and the inhuman conditions in pre-trial detention **have accentuated the nightmare** they have experienced.

The consequences of unlawful arrest have also most often had **consequences for the health of these people**, which has deteriorated greatly due to the inhuman conditions in detention and remand centres and the emotional stress, including the prospect of repeated postponement of the court's decision.

The moral damage caused to such persons cannot be overlooked in view of the long duration of criminal proceedings.

i. Criteria taken into account in determining the existence of non-material damage

According to its case-law[9], the Romanian High Court of Cassation and Justice has ruled that, in **determining the existence of non-material damage**, the character and importance of the non-patrimonial values to which the damage was caused, the personal situation of the person entitled, taking into account criteria such as his or her social environment, education, level of culture, standard of morality, psychology must be taken into account.

Since the damage is to values which have no economic content and the protection of rights relating to the protection of private life, within the scope of Article 8 of the European Convention on Human Rights, but also values protected by the Constitution and national laws, the existence of the damage is subject to the condition of a reasonable assessment, on a proper and fair basis, of the real and actual damage caused to the victim.

As regards proof of non-material damage, **proof of the unlawful act is sufficient, the damage and the causal link being presumed**, and the courts will infer the existence of non-material damage from the mere existence of the unlawful act capable of causing such damage and the circumstances in which it was committed. The solution will be determined by the subjective, internal nature of the non-material damage, direct proof of which is practically impossible.

ii. The conditions of pre-trial detention under which the suffering of such persons entitled can be assessed

Depending on the place where such entitled persons have been remanded in custody and detained, their **suffering can be very easily presumed**, some such places being known for their miserable conditions (e.g. in Bucharest the Centre for Detention and Remand in Custody of the Central Prison, the Centre for Detention and Preventive Arrest No 5, Rahova Penitentiary).

The conditions in these centres are renown to violate the mandatory minimum standards for accommodation conditions for persons deprived of their liberty, as laid down in the Order of the Minister of Justice No 433/2010. In accordance with **Article 1** of this Order:

"*(1) Premises intended for the accommodation of persons deprived of their liberty must respect human dignity and meet minimum health and hygiene standards, taking into account climatic conditions and, in particular, the living space, air volume, lighting, heating and ventilation sources.*

(2) The accommodation rooms and other rooms for persons deprived of their

[9] Please see, by way of example, Decision No 153 of 27 January 2016 delivered on appeal by the First Civil Section of the High Court of Cassation and Justice on an action for damages.

liberty must have natural lighting, the necessary facilities for artificial lighting and be equipped with sanitary and heating facilities.

(3) Accommodation rooms in existing prisons must provide:

(a) at least 4 square metres (sqm) for each person deprived of liberty in the closed or maximum security regime;

(b) at least 6 cubic metres of air for each person deprived of liberty in the semi-open or open regime.

(4) Minors, juveniles, persons remanded in custody and persons for whom the enforcement regime has not been determined shall be subject to the provisions of paragraph (3) letter (a) shall apply.".

Thus, in these centres, the persons entitled claim to have experienced problems due to **overcrowding** (e.g. although there is a limited number of beds in the cells, at any given time there can be many more people in the room, even posing the problem of receiving other detainees in the bed), the **lack of good sanitary conditions** (unhealthy conditions of the sanitary facilities, including lack of privacy due to the lack of doors to the sanitary facilities in the holding rooms, showers that were not separated from each other, lack of hot water - possibly rationed, unhealthy refrigerators, the presence of mould, prolonged exposure to cigarette smoke due to the fact that the detainees were forced to share a room with smokers) **and heating** (lack of heat in winter), **the presence of pests** (rats, bedbugs, cockroaches), as well as **the lack of daily walks or socio-cultural programmes**, which amount to **degrading and inhuman treatment** *per se*.

As for the so-called "*right to air*", initially considered insignificant, but later becoming the only daily concern during the period of detention, it materialized in the possibility, when weather conditions permitted, of access to a room of maximum 4 square meters, with concrete walls at least 3 meters high and a thick net on top, where prisoners were allowed to walk in the "*air yard*", but not more than one hour a day.

Furthermore, although the applicable legislation provided for the **separation of smoking and non-smoking prisoners in separate rooms**, in fact this did not exist, with non-smokers being placed in a position to breathe in near-permanent foul air tainted with cigarette smoke.

The conditions in these Romanian centres have been intensely debated, notorious and undeniable, as noted by:

i. the representatives of the People's Advocate[10];

ii. the representatives of the Chamber of Deputies[11];

iii. the representatives of APADOR-CH[12] ;

iv. the consistent case-law of the European Court of Human Rights, in particular the judgment delivered in the pilot procedure in the case of ***Rezmiveș and others v. Romania***[13]. Moreover, the European Court of Human Rights has found and analysed the degrading material conditions in the Romanian penitentiaries on

[10] Please see, for instance, https://avp.ro/wp-content/uploads/2021/12/Raport-privind-vizita-desfasurata-la-CRAP-nr.-9-Bucuresti.pdf, https://avp.ro/wp-content/uploads/2021/10/raport-crap-nr-5.pdf, https://avp.ro/wp-content/uploads/2021/02/raport-penitenciar-rahova_2020.pdf .

[11] Please see, for instance, https://www.cdep.ro/presa/Raport.pdf.

[12] Please see, for instance, https://apador.org/raport-asupra-vizitei-in-penitenciarul-jilava/, https://apador.org/en/raport-privind-vizita-in-centrul-de-retinere-si-arestare-preventiva-nr-1-din-bucuresti/.

[13] The full text of the judgment is available at https://hudoc.echr.coe.int/eng?i=001-176305. Please also see Marta-Claudia Cliza, Mirela Gorunescu, Laura-Cristiana Spătaru-Negură, *The Pilot Case of Rezmives and the Most Awaited Reform of the Romanian Penitentiary System*, in Journal of Legal and Administrative Studies, no. 2 (17) of 2017, pp. 27-45, https://www.ceeol.com/search/article-detail?id=610275;

many occasions [e.g. the Rahova Penitentiary in several of its judgments, among which we mention by way of example the judgment in the case of ***Apostu v. Romania***[14] of 3 February 2015 (application no. 22765/12), para. 83; judgment in ***Iacov Stanciu v. Romania***[15] of 24 July 2012 (no. 35972/05), paras. 171-179; judgment in ***Flămînzeanu v. Romania***[16] of 12 April 2011 (no. 56664/08), paras. 89-100; judgment in ***Pavalache v. Romania***[17] of 18 January 2011 (application no. 38746/03), paras. 87-101].

These inhumane conditions clearly have a serious impact on the people's health, as they are detained in unsanitary conditions, on the edge of survival, images that remain deeply imprinted on their retinas and in their souls, often having nightmares and reliving those moments.

iii. Reasonability of moral damages

The Romanian High Court of Cassation and Justice[18] has ruled that moral damages, in order to preserve their character of "just satisfaction", must be awarded in an amount that does not divert them from the aim and purpose laid down by law, so as **not to become an unfair material benefit**, without causal justification in the damage suffered and its consequences.

Thus, in order to ensure fair compensation for the suffering which injured third parties have suffered or may have to suffer, **the compensation awarded must be reasonably proportionate to the damage suffered.**

iv. Establishment of non-material damage

The High Court of Cassation and Justice[19] has ruled that non-material damage represents harmful consequences of a non-economic nature resulting from infringements and violations of non-patrimonial personal rights and is determined by assessment, following **the application of criteria relating to the negative consequences suffered** by those concerned, **in physical, psychological and emotional terms**, the importance of the values damaged, the extent to which they have been damaged, the intensity with which the consequences of the damage were perceived.

In quantifying compensation for non-material damage, fairness is a fundamental criterion established by doctrine and case law.

From this point of view, the determination of such compensation undoubtedly involves a degree of approximation, but the court must strike a certain balance between the non-material damage suffered and the compensation awarded, in such a way as to allow the injured party to enjoy certain advantages which mitigate the non-material suffering, without, however, leading to unjust enrichment.

It has been unanimously held by both national and European courts that **any compensation for non-material damage could only have the role of mitigating psychological damage and not of covering it in its entirety**. However subjective the

[14] The full text of the judgment is available at https://hudoc.echr.coe.int/eng?i=001-150781.
[15] The full text of the judgment is available at https://hudoc.echr.coe.int/eng?i=001-123577.
[16] The full text of the judgment is available at https://hudoc.echr.coe.int/eng?i=001-104498.
[17] The full text of the judgment is available at https://hudoc.echr.coe.int/eng?i=001-123797.
[18] Please see, for instance, Decison no. 320 of 1 February 2018, given by First Section of the Higher Court of Cassation and Justice.
[19] Please see, for instance, the Decision 2 dated 17 January 2017 given in recourse by the Second Civil Section of the Higher Court of Cassation and Justice.

nature of moral damage may be by its very nature, only a **balanced assessment** could compensate for the difficulty of quantifying it, and the practice of the courts in this area offers a more concrete application of the criteria found in **Article 540** of the Romanian Code of Criminal Procedure for determining the type and extent of compensation.

On the other hand, the practice of the European Court of Justice recognises that States (including the national legislator) have a margin of appreciation in relation to certain limitations, without prejudice to the rights of the person claiming a certain conduct on the part of the State.

It follows from the combination of the two aforementioned legal texts that one of the requirements laid down by the law and to be taken into account by the court in order to determine the extent of reparation is proof of the consequences for the person or the family of the person deprived of liberty or whose liberty has been restricted as a result of the deprivation of liberty.

At the same time, it is imperative to take into account **the degree of violation of the right asserted, while respecting both the principle of proportionality[20] and the principle of equity[21].**

For that reason, the court seized of the matter of compensation for non-pecuniary damage must fix an amount necessary not so much to restore the injured person to a situation similar to that which he had previously enjoyed as to provide him with moral satisfaction capable of replacing the value of the damage of which he was deprived.

With regard to the case-law of the European Court of Human Rights, we would point out that the Court has ruled that **excessive formalism with regard to the burden of proving the non-material damage caused by unlawful detention cannot be compatible with the right to compensation covered by Article 5** of the Convention[22].

Assessment of the non-material damage suffered by each person entitled

The attitude of these persons entitled towards family members after release usually changes a lot, as they isolate themselves and refuse to communicate with close people and friends, because they feel ashamed and stigmatised.

The accusations made have a negative effect on the community in which they live, and the community's attitude reflects on them, which is why they feel isolated and blamed within their community.

The public opprobrium to which they have been subjected for years during the criminal trial, the status of "convict" they still feel it even after the whole nightmare ends with the acquittal of the person concerned.

An interesting situation can be found in practice, namely when, in the context of the reintegration of the person entitled into work, the boss of this person is one of the prosecution's witnesses in the case, and it is

[20] Regarding the principle of proportionality, please see Marta-Claudia Cliza, Constantin-Claudiu Ulariu, *Administrative Law. General Part*, C.H. Beck Publishing House, Bucharest, 2023, pp. 115-118.

[21] On matters regarding the general principles of law, the principe of equality and the responsibility principle, 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, Cornelia Beatrice Gabriela Ene-Dinu, *History of the Romanian state and law*, Universul Juridic Publishing House, Bucharest, 2020, p. 288 and following, and Elena Anghel, *The responsibility principle*, published in the proceedings of the Challenges of the Knowledge Society (CKS), "Nicolae Titulescu" Publishing House, 2015, pp. 364-370.

[22] Please see the judgment renderend in the case of *Danev v. Bulgaria*, application no. 9411/05, paras. 34-35 or the short press release available at https://hudoc.echr.coe.int/eng-press?i=003-3237041-3623296.

obvious that this person's attitude towards the former 'convict' is not in line with the court's decision to acquit him, as it is obvious that such a person considers him guilty.

In practice, it has also been noted that even the spouses of such persons, under pressure from their colleagues, are forced to change their jobs, which also involves an emotional effort to adapt, despite being in a family crisis.

For all these reasons, the suffering of such entitled persons is inestimable and fair compensation for this non-material damage must be chosen by the court.

A compensation that is insignificant or disproportionate to the gravity of the violation does not comply with the provisions of **Article 5 para. 5** of the Convention, since **the right guaranteed by this rule would become theoretical and illusory**[23].

Under the provisions of **Article 540 para. (5)** of the Romanian Code of Criminal Procedure, the compensation granted by the court in such cases is borne by the Romanian State, through the Ministry of Public Finance.

D. The lodging of the claim within 6 (six) months from the date of the final judgment of the court

In order for such a claim to be admissible, the action must be brought **within six months of the date on which the judgment** of the court and the order or decision of the judicial authorities finding the miscarriage of justice or the unlawful deprivation of liberty became final.

3. Final considerations

For all the arguments of fact and law set out above, we consider that in such cases, the legal conditions set out in Article 539 of the Code of Criminal Procedure for the State to incur civil liability in tort are met, objective liability, independent of the fault of the judicial bodies involved in taking the preventive measure against the persons entitled.

Thus, *firstly*, such claims are admissible, being circumscribed to the legal hypothesis regulated by the provisions of **Article 539** of the Code of Criminal Procedure, in the light of the considerations of the Decision of the Romanian Constitutional Court no. 136/2021.

Secondly, please find that the only means of redress that the court can order is to grant the material and moral damages requested, since the unlawful nature of the deprivation of liberty measures was such as to restrict mental freedom, to cause real harm to physical existence, bodily integrity, health (due to health problems that have been triggered during this period, as a result of the severe stress to which the person entitled has been subjected), honesty, dignity and honour, but not least, the professional prestige of the person entitled.

In awarding the damages claimed and assessing the amount of damages, account must be taken of the negative consequences suffered by these persons, in family, physical and psychological terms, the age at which they suffered them, the public contempt and the other elements set out in this paper.

The deprivation of liberty measures have caused these persons great damage to their moral values and the harm done to them is immeasurable, and their family,

[23] *Vasilevskiy and Bogdanov v. Russian Federation*, § 22 and 26; *Cumber v. United Kingdom*, decision of the Commission; *Attard v. Malta* (dec.)

professional and social situation has been seriously affected.

The distorted image after many years of criminal proceedings can never be repaired.

Therefore, in order to repair the genuine emotional shock experienced by these persons on a personal, professional and family level, which has had **irreparable consequences on their family members**[24] **life and on their professional life**, starting from the factual situation (i.e. the way in which the criminal case was handled and the final decision handed down by the court), such claims must be admitted and the material and moral damage covered.

Obviously, in judicial proceedings, **evidence** must be given by documents and witnesses, as well as by any other evidence that may be necessary as a result of the debates. **Examples of such documents** include, for example, court judgments handed down in the criminal proceedings, arrest warrants, release papers, employment certificates, documents attesting to the medical condition of the persons entitled before and after conviction, invoices and receipts attesting to expenses incurred and claimed for material damage.

In addition, it is worth pointing out that, according to the provisions of **Article 541 para. (4)** of the Romanian Code of Criminal Procedure, such actions are **exempt from the payment of the judicial stamp duty**.

Moreover, it should be pointed out that, according to the provisions of **Article 541 para. (1)** of the Code of Criminal Procedure, such actions for damages may be brought by the person entitled to damages, and after his death may be continued or brought by the persons who were dependent on him at the time of his death.

It is also important to point out that, according to the provisions of **Article 542** of the Code of Criminal Procedure, in the event that reparation for damage has been granted according to **Article 541** of the Code of Criminal Procedure, as well as in the event that the Romanian State has been convicted by an international court for any of the cases provided for in **Articles 538 and 539** mentioned above, the action for recovery of the amount paid may be directed against the person who, with bad faith or gross negligence, has caused the situation giving rise to damage or against the institution with which he is insured for compensation in case of damage caused in the exercise of the profession.

In such actions for damages, the Romanian State must prove, by means of a prosecutor's order or a final criminal judgment, that a state official has caused the miscarriage of justice or the unlawful deprivation of liberty **causing damage in bad faith or through serious professional negligence**.

We are curious in how many such cases the state will take recourse against the persons responsible with such actions for damages to recover the damage caused.

[24] For information on the concept of 'family members' at the European level, please see Roxana-Mariana Popescu, *Opinion of Advocate General Wathelet and Judgment of the Court of Justice of the European Union in Case C-673/16, concerning the concept of 'spouse' in European Union Law*, published in the proceedings of the Challenges of the Knowledge Society (CKS), "Nicolae Titulescu" Publishing House, 2019, pp. 705-710.

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WHAT HAPPENS WITH GOODS RECEIVED FREE OF CHARGE ON THE OCCASION OF PROTOCOL EVENTS IN THE EXERCISE OF THE MANDATE OF PUBLIC OFFICE?

Elena Emilia ȘTEFAN*

Abstract

One of the concerns of the public authorities governing us should, without doubt, be to make sure that, the trust of the population in the state institutions is increased by means of the activity carried out in respect of the country administration. From this perspective, the article proposes for analysis a current topic on the transparency of the activity of public authorities, viewed from the perspective of the citizen who may wonder if a public official or a civil servant who receives a good during his mandate or position can still be objective? In this respect, we consider that the topic is of interest both to legal specialists and to citizens, future public officials or civil servants, as it provides information on how they should act if they find themselves in such a situation and to avoid conflicts of interests. The study also presents and summarizes information on French legislation regarding the analyzed topic in order to be able to know, from the point of view of comparative law, some aspects related to the approach of this rather sensitive issue of gifts and invitations that can be offered or requested by a public servant and the legal risks that are entailed. Our analysis will emphasize the importance of respecting both the legality of the activity of public authorities and integrity, seen as a fundamental ethical value.

Keywords: *public authorities, conflict of interests, transparency, integrity, protocol.*

1. Introduction

The persons who temporarily hold a position in the state apparatus, public official or civil servant, shall have, in addition to the obligation to comply with the law, the obligation to be honest. In this way, citizens will perceive public administration as a standard of legality and appropriate behavior, in the light of public officials or civil servants. From this point of view, the Administrative Code regulates the general principles[1] of public administration[2] in the first place and the institutions in the second place.

The conflict of interests shall mean: "the situation whereby a person exercising a public office has a personal patrimonial interest, which could influence the objective fulfillment of the duties incumbent on him/her according to the Constitution and

* Associate Professor, Ph.D., Faculty of Law, "Nicolae Titulescu" University of Bucharest, (e-mail: stefanelena@univnt.ro).

[1] In detail, on the principles of the law, in paperwork E. Anghel, *General principles of law*, in LESIJ.JS XXIII nr. 2/2016, Lex ET Scientia International Journal - Juridical Series, pp. 364-370 and E. Anghel, *The lawfulness principle*, published in the proceedings CKS-eBook 2010, vol. I, Pro Universitaria Publishing House, Bucharest, 2010, ISSN 2068-7796, p. 799.

[2] On the case law of the ECJ regarding public administration, see R.M. Popescu, *ECJ case-law on the concept of "public administration" used in article 45 paragraph (4) TFUE*, in proceeding CKS e-book 2017, pp. 528-532.

other normative acts[3]". Furthermore, the Administrative Code regulates the obligation to fulfill the legal regime of the conflict of interests[4] and of incompatibilities for public officials and civil servants, as well as the fulfillment of the rules of conduct. From the analysis of this normative act, emerges, among others, the philosophy of a traditional principle of the administrative law, namely the subordination of citizens to public authorities[5].

According to the doctrine, "the Constitution uses the terms of public positions and offices[6]". The scope of this study is to analyze the legal regime of the goods received free of charge on the occasion of protocol events, in the exercise of the mandate or office, in order to know the risks entailed by such situation. We do not want to develop more in this article on the proposed subject, by analyzing the legislation of the European Union[7] on the legal regime of protocol goods or the case law of the ECHR or the ECJ, this will be done in a future research.

The paperwork has the following structure: on the one hand, analyzes the national legislation and verifies whether public authorities comply with legal obligations and, on the other hand, provides legal information on the analyzed topic.

2. Legal regime of the goods received free of charge on the occasion of protocol events in the exercise of the mandate or office

The legal framework for the measures concerning the goods received free of charge on the occasion of protocol events in the exercise of the mandate or office consists of Law no. 251/2004 on the measures concerning goods received free of charge on the occasion of protocol events in the exercise of the mandate or office[8] and of Government Resolution no. 1126/2004 for the approval of the Regulation for the implementation of Law no. 251/2004[9].

2.1. Who are the persons obliged to declare goods received?

Law no. 251/2004 (...) provides the following *rule*: "the persons holding the capacity of public official and those holding public offices, magistrates and those assimilated to them, persons holding management and control positions, civil servants within public authorities and

[3] Art. 70 of Law no.161/2003 regarding certain measures to ensure transparency in the exercise of public offices and positions and in the business environment, for preventing and sanctioning corruption, published in O.J. no.279 of 21 April 2003.

[4]["The principles underlying the prevention of the conflict of interest (...) are the following: impartiality, integrity, transparency of decision and supremacy of public interest"] - D.Apostol Tofan, *Drept administrativ Part I*, edition 2, C.H.Beck Publishing House, Bucharest, 2008, p.177.

[5] On public authorities, see M.C.Cliza, *Drept administrativ Part I*, Pro Universitaria Publishing House, Bucharest, 2011, pp.12-20.

[6] I. Muraru (coord.), A. Muraru, V. Bărbățeanu, D. Big, *Drept constituțional și instituții politice. Caiet de seminar*, C.H. Beck Publishing House, Bucharest, 2020, p.117.

[7] In what concerns the legal order of the European Union, see A.Fuerea, *Manualul Uniunii Europene*, edition VI, revised and supplemented, Universul Juridic Publishing House, Bucharest, 2016, pp.228-252 or on the policies and competencies of the European Union, see A.-M. Conea, *Politicile Uniunii Europene. Curs universitar*, Universul Juridic Publishing House, Bucharest, 2020, pp.10-20.

[8] Law no. 251/2004 on the measures concerning goods received free of charge on the occasion of protocol events in the exercise of the mandate or office, published in O.J. no.561 of 24 June 2004.

[9] Government Resolution no. 1126/2004 for the approval of the Regulation for the implementation of Law no. 251/2004 (...), published in O.J. no. 680 of 28 July 2004.

institutions or of public interest, as well as the other persons who have the obligation to declare their assets, according to the law". Therefore, the law obliges several categories of persons to declare goods they received, by emphasizing the holding by them of a position or a certain capacity.

2.2. What goods should be declared?

The aforementioned persons shall be bound to declare, within 30 days as of the receipt, the goods received free of charge, within certain protocol events in the exercise of the mandate or office, on the contrary, they shall be held liable for[10].

The law also provides an *exception*: "medals, decorations, badges, orders, scarves, collars and the like received in the exercise of a public office, as well as office objects with a value of up to 50 euros" shall not be declared. By way of interpretation[11], we note that the exception takes into account, on the one hand certain goods in such a category, expressly nominated, as well as other similar ones, and on the other hand, the threshold value of 50 euros for office objects.

2.3. What is the content of the declaration?

The declaration together with the good/goods is submitted to a committee especially appointed for this purpose. The declaration shall contain the following mentions: surname, name, workplace and position held by the person in question; the detailed description of the submitted good; description of the circumstances in which the good was received; date and signature.

2.4. What is the procedure for declaring the respective goods?

The law requires that each authority, institution or legal entity sets up a commission to assess and make an inventory of the goods the persons in question received free of charge, within protocol events in the exercise of the mandate or office. The head of the institution shall appoint the respective commission, consisting of 3 specialized persons, the commission's term of office being of 3 years with a single renewal possibility.

All goods in this category shall be registered and the commission shall propose to the head of the institution to resolve the situation of the respective good by the end of the year. The assessment of the good shall be performed by the commission, by taking into account the market price, but experts in the field can also be consulted, who were selected for this operation, according to the law.

There are two possibilities, depending on the value of the good, the threshold established by the law being of 200 euros:

Possibility 1- if the value of the goods established by the commission is higher than the equivalent in RON of the amount of 200 euros, the persons who has received the goods can request to keep them, by paying the difference. If the value of the goods established by the commission is under the equivalent of 200 euros, they shall be kept by the recipient.

Possibility 2- If the person who has received the goods has not requested to keep

[10] In what concerns the liability of constitutional judges, see Barbu S.-G., A. Muraru A., V. Bărbățeanu V., *Elemente de contencios constituțional*, C.H. Beck Publishing House, Bucharest, 2021, pp.46-49.

[11] In what concerns the interpretation of the legal regulation, see N. Popa (coord.), E. Anghel, C. Ene-Dinu, L.-C. Spătaru-Negură, *Teoria generală a dreptului. Caiet de seminar*, 3rd edition, C.H. Beck Publishing House, Bucharest, 2017, pp. 197-202.

them, upon the commission's proposal, the goods remain in the assets of the institution or can be transferred free of charge to a relevant public institution or sold at auction, according to the law. By capitalizing such goods, the amounts obtained shall represent income to the state budget, local budget or the budgets of authorities, public institutions or legal entities.

In the recitals[12] of the draft law, the threshold value of goods was proposed to be 300 euros and following the legislative process, it remained at 200 euros.

2.5. What are the obligations of public authorities?

The law requires the authorities, institutions and legal entities to publish the list of the submitted goods and their destination, on the website of the respective legal entity or in the Official Journal of Romania, Part III, at the end of the year.

3. Case study

3.1. Case study – national plan

In order to be able to note practical applicability of the law, we have conducted a case study by researching the website of several public authorities to see if they display on the institution's website information on the goods received on the occasion of certain protocol events, in the exercise of the mandate. Representative public authorities were selected at central level: The Chamber of Deputies and the Presidential Administration. The time period that we have documented covers 3 years, respectively 2020-2022.

3.1.1. The Chamber of Deputies

The scientific research performed showed that no declaration was filed in what concerns the receipt of any good by the deputies/employees of the services of the Chamber of Deputies in 2020[13].

In 2021[14], 13 gifts were offered to certain deputies, most of them being returned to the recipient and the rest kept in the assets of the institutions:

- (I) *returned:* tea set with floral design, consisting of 6 cups and 6 saucers and a teapot, made of Bohemian porcelain, amounting to 50 euros; decorative object, logo with the insignia of the Ministry of Defense, amounting to 26 euros; decorative office object, amounting to 30 euros; logo of the Commission I of the Chamber of Representatives of Indonesia, amounting to 24 euros; printed textile material, amounting to 24 euros; traditional decorative bowl, amounting to 56 euros (...).
- (II) *kept*: painting with Theodor Pallady stamps, 150 years since his birth, amounting to 108 euro; plaque with the official insignia of the President of the Republic of Poland, amounting to 56 euros; anniversary plaque of Club Sportiv Dinamo; official plaque with the image of the Indonesian Parliament, amounting to 24 euros (...).

[12] Public information, available online: https://www.cdep.ro/proiecte/2004/100/10/6/em116.pdf, visited on 19.01.2023.

[13] Public information, available online: https://www.cdep.ro/pdfs/cadouri/cadouri2020.pdf, visited on 18.01.2023.

[14] Public information, available online: https://www.cdep.ro/pdfs/cadouri/cadouri2021.pdf, visited on 18.01.2023.

Among the goods received by the deputies as gift in 2022[15], we mention the following: artwork painting in mixed technique, amounting to 50.6 euros (kept in the assets of the institution) and decorative porcelain plate, amounting to 152 euros (kept in the assets of the institution – Parliament Museum).

3.1.2. Presidential Administration

A number of 14 goods were received in 2020[16], free of charge, by the President of Romania, on the occasion of certain protocol events and submitted to the Evaluation Commission within the Presidential Administration, the destination of the goods in the Assets of the Presidential Administration.

The total amount of the goods received free of charge in 2020 is of 1,801 euros and includes, for example: metal and marble statuette, height 26 cm., black color, representing a female character next to a lion, amounting to 150 euro; painting representing the image of ruler Alexandru Ioan Cuza[17], amounting to 105 euro; silver ship, amounting to 300 euros; replica after the sword of Voivode Ștefan cel Mare, amounting to 300 euros; distinctive mark representing the flag of Romania, amounting to 50 euros etc.

In 2021[18], 18 goods were receive, with a total value of 1,883 euros, goods intended for the Assets of the Presidential Administration: gold emblem/statue, amounting to 150 euros; two silver coins, amounting to 85 euros; black and white engraving with wooden frame, amounting to 40 euros; copy after Byzantine icon in 950% silver, lithograph, representing Jesus Christ, amounting to 200 euros etc.

In 2022[19], 26 goods were received, with a total value of 4,753 euros: pen, amounting to 94 euros; writing set, amounting to 30 euros; Republic flag, amounting to 410 euros; mirror, amounting to 70 euros; philatelic painting, amounting to 25 euros; amber painting, amounting to 1,125 euros; traditional design tie, amounting to 60 euros etc.

3.2. Case study France - how are gifts and invitations managed within public authorities?

One of the laws concerning transparency in public life and known as Law Sapin II is one of the most relevant laws of France on our subject matter. French Anti-Corruption Agency– A. F. A.[20] issued practical Guidelines called: *Public officials - the risks of breach of probity in relation to gifts and invitations*[21], document made

[15] Public information, available online: https://www.cdep.ro/pdfs/cadouri/cadouri2022.pdf, visited on 18.01.2023.

[16] Public information, available online: https://www.presidency.ro/files/documente/Lista_bunurilor_primite_cu_titlu_gratuit_cu_prilejul_unor_actiuni_de_protocol_in_anul_2020.pdf, visited on 18.01.2023.

[17] The painting was received on the 200th anniversary of the birth of ruler Alexandru Ioan Cuza. See in this respect, C. Ene-Dinu, *Istoria statului și a dreptului românesc*, edition I, Universul Juridic Publishing House, Bucharest, 2020, p. 223 and the following.

[18] Public information, available online: https://www.presidency.ro/files/documente/Lista_bunurilor_primite_cu_titlu_gratuit_cu_prilejul_unor_actiuni_de_protocol_in_anul_2021.pdf, visited on 18.01.2023.

[19] Public information, available online: https://www.presidency.ro/files/documente/Lista_bunurilor_primite_cu_titlu_gratuit_cu_prilejul_unor_actiuni_de_protocol_in_anul_2022.pdf, visited on 18.01.2023.

[20] Public information, available online: https://www.agence-francaise-anticorruption.gouv.fr/fr, visited on 18.01.2023.

[21] Public information, available online: https://www.fonction-publique.gouv.fr/files/files/publications/hors_collections/GuideCadeauInvitation_AFA.pdf, visited on 18.01.2023.

available in September 2022 and delivered to all public authorities.

According to art. 1 of the law for the promotion of transparency, combating corruption and the modernization of the economy, French Anti-Corruption Agency is: "a national competence service subordinated to the Ministry of Justice and the Ministry in charge with the budget the mission of which is to help competent authorities and the persons dealing with them prevent and detect corruption, influence peddling, misappropriation of public funds and favoritism[22]".

In our analysis, we firstly noted the main obligations of public officials and then developed the actual subject of gifts and/or invitations, in order to understand that the philosophy of the practical Guidelines is precisely based on the care of public authorities that officials do not make mistakes in their actions, being bound by legal obligations. Therefore, we find in the General Civil Service Code the obligations of public agents referred to in art. L 121. French legislator imposes as obligations, for example: "the public agent shall exercise his functions with dignity, impartiality, integrity and probity and shall be bound by the obligation of neutrality" (art. L 121- 1 and L 121-2).

We do not detail the aspects of criminal nature that could intervene in the daily activity of civil servants, the Guide being such a tool that also warns of criminal risks, derived from possible temptations to accept gifts and invitations. Notwithstanding, in addition to the risks of criminal nature, there may also be risks of disciplinary nature or even the risk of contentious administrative litigations associated with gifts and invitations, which may disrupt the activity of the public administration, according to the Guidelines. Examples of such situations are provided: the annulment of a public procurement contract, of a contract or administrative decisions for abuse of power following the acceptance by a public official of a gift, advantage or invitation[23].

The General Civil Service Code[24] defines the conflict of interests in art. L 121-5, as follows: "all situations of interference between a public interest and public or private interests that are likely to influence or appear to influence the independence, impartiality and objectivity of the public official's functions". Another applicable normative act is Law no. 2013 - 907 of 12 October 2013 on transparency in public life. The normative act defines in art. 2[25] thesis 1, the conflict of interest in the same terms as the General Civil Service Code.

The Practical Guidelines are structured in 2 parts and 6 Appendices: Part I - *Understanding the risks related to gifts and invitations* and Part II – *Establishing an appropriate set of rules for gifts and invitations.* According to the Guidelines: "Requesting or accepting gifts or invitations carries the risk of compromising probity. In all cases, in order to avoid criminal risk,

[22] We refer to Loi n˚2016-1691 du 9 decembre 2016, relative a la transparence, a la lutte contre la corruption et a la modernisation de la vie economique, available online at https://www.legifrance.gouv.fr/jorf/id /JORFTEXT000033558528, visited on 18.01.2023.

[23] Public information, available online: https://www.fonction-publique.gouv.fr/files/files/publications/ hors_collections/GuideCadeauInvitation_AFA.pdf, page 23, visited on 18.01.2023.

[24] Public information, available online: https://www.legifrance.gouv.fr/codes/section_lc/ LEGITEXT000044416551/LEGISCTA000044420673/, visited on 18.01.2023.

[25] Art. 2 is part of Chapter I- "*Prevention of conflict of interests"*, Section 1- "*Abstain obligations"* of Loi n˚ 2013-907du 11 octobre 2013 relative a la transparence de la vie publique, available online at https://www.legifrance.gouv.fr/loda/id/JORFTEXT000028056315, visited on 18.01.2023.

disciplinary risk and the risk of affecting the good operation and reputation of the administration, it is advisable to refer, in close and permanent connection with the hierarchical authority, to a series of ethical principles and to take into account the specific circumstances of each gift or invitation: the recipient's functions and missions; the capacity and interest of the giver; characteristics and circumstances in which the gift or invitation was offered."

In France, the law does not set a value threshold for gifts and invitations. In analyzing the condition of accepting a gift or invitation, the Guidelines establish three criteria: the purpose of the gift; frequency and monetary value. French Anti-Corruption Agency provides that no public agent should either request or accept a gift or invitation in the exercise of his/her function and should always inform the direct supervisor[26].

4. Conclusions

In our analysis, we tried, by means of the documentation carried out, to offer more information on the legal regime of the goods received free of charge within protocol events, during mandate or office. On this occasion, we found out that the value threshold regulated by the legislator for the good received is 200 euros, and the applicable normative act is Law no. 251/2004. Furthermore, from the computer research it appears that, during the analyzed period, both the Chamber of Deputies and the Presidential Administration published the list of goods received free of charge on the occasion of some protocol actions and submitted to the Evaluation Commission.

The paperwork also presented the legislation in France in order to be able to know, at a summary level, how gifts or invitations received free of charge by public agents are dealt with in this state. In this way, we noted the important role played by French Anti-Corruption Agency – A. F. A. in the prevention of corruption deeds by issuing practical Guidelines called: *Public officials - the risks of breach of probity in relation to gifts and invitations* and delivered to all public authorities.

The final conclusion of the paperwork is that, regardless of the temporary position held by a citizen, public official or civil servant, in addition to the obligation to comply with the law, he/she shall have the obligation to be honest[27].

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[26] Public Information available online: https://www.fonction-publique.gouv.fr/files/files/publications/hors_collections/GuideCadeauInvitation_AFA.pdf, p.13, visited on 18.01.2023.

[27] From another perspective, see E. Anghel, *The lawfulness principle*, published in proceedings of CKS-eBook 2010, vol. I, Pro Universitaria Publishing House, Bucharest, 2010, ISSN 2068-7796, p. 799 or E.E. Ștefan, *Legalitate și moralitate în activitatea autorităților publice*, in RDP no. 4/2017, pp. 95-105.

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A CENTURY OF CONSTITUTIONALISM

Cornelia Beatrice Gabriela ENE-DINU[*]

Abstract

In the exceptional framework at the end of the First World War, followed by the union with the Old Kingdom of the Romanian provinces of Bessarabia, Bucovina and Transylvania, the question of a new constitution was raised, to reflect the new political, economic-social, ethnic and institutional conditions. The problem of national minorities had also become more complex, confessions had appeared that previously were not very important from a numerical point of view in the Old Kingdom (Greek-Catholic, Protestant, Catholic), and through the peace treaties Romania was obliged to guarantee their rights. After the war, until January 1922, there were no less than six governments, three of which were led by generals (Arthur Văitoianu, Alexandru Averescu, Constatin Coandă), who did not elaborate such a vast and complicated work. The situation changed with the coming to the head of the government, on January 19, 1922, of the well-known politician Ion I.C. Brătianu, who had the ambition to complete what he had started en 1914 without bringing it to fruition. Becoming prime minister, Ion I.C. Brătianu proposes to the king the organization of elections for the National Constituent Assemblies, a name that wanted to highlight both their representative character for the nation and their role in the construction of the state.

Keywords: *Constitution, civil rights, nation, state, democratic parliamentary regime, unitary national state, political parties.*

1. Introduction

In the matter of constitutional law, in the Kingdom of Romania, the Constitution remained in force from 1866 until 1923, when a new Constitution was adopted. It was promulgated on March 28 and published on March 29, 1923[1].

In the process of drafting the new constitution, it started from the texts of the 1866 Constitution, of which approximately 60% were taken over. That is why, in legal doctrine, it was stated that the Constitution of 1923 is only a modification of the one of 1866.[2] Enshrining the creation of the Romanian unitary national state, the Constitution stipulated that "Romania is a national state, unitary and indivisible" and that "the territory Romania is inalienable".

The constitution enshrined the democratic parliamentary regime[3], recognized the rights and freedoms of citizens, and established the principle of

[*] Lecturer, Ph.D., Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: cdinu@univnt.ro).

[1] Published in the Official Journal no 282 of March 29, 1923.

[2] C. Ionescu, *Dezvoltarea constituțională a României. Acte și documente 1741-1991*, C.H. Beck Publishing House, Bucharest, 2016, p. 529.

[3] I. Muraru (coord), A. Muraru, V. Bărbățeanu, D. Big, *Drept constituțional și instituții politice. Caiet de seminar*, C.H. Beck Publishing House, Bucharest, 2020, p. 66.

separation of powers[4] in the state.[5] According to the Constitution, the legislative activity was to be exercised by the king and the national representation (consisting of the Senate and the Chamber of Deputies), the executive by the king and the Government, and the judicial by the courts.

New provisions were introduced that stemmed from the treaties signed by Romania within the League of Nations.

This new fundamental law was imposed by the reality of the creation of the unitary national state, admitted, in principle, by all political parties. However, the parliament formed after the 1922 elections, as a constituent assembly, was harshly attacked by the opposition parties (National Party, Peasant Party, People's Party) who believed that they were unable to effectively participate in the drafting of the new fundamental law.

In art. 19 it was stipulated that the mining deposits, as well as the wealth of any kind in the subsoil, are the property of the state.

The Constitution also defended the interests of the financial banking system, guaranteed the equality of citizens before the law, regardless of class, individual freedom, the inviolability of the domicile, freedom of education, the press, and the writings. Many of these freedoms took on a formal character.

The Constitution also enshrined the principle of the supremacy of the law and the rule of law, establishing the way of organizing the control of the constitutionality of laws.[6]

The fundamental law of 1923 established the democratic parliamentary regime, recognized the rights and freedoms of citizens, representing a positive factor in the development of Romania.[7]

The third title includes the constitutional provisions that enshrined the separation of powers in the state, the legislative activity to be exercised by the king and the National Representation, the executive activity by the king and the Government, and the judicial activity by the courts.

The national representation consisted of the same two assemblies, respectively the Senate and the Assembly of Deputies.

The legislative initiative belonged either to the king or to one of the two assemblies.

The Assembly of Deputies was made up of deputies elected by Romanian citizens, organized by constituencies.

The Senate was composed of de jure senators and elected senators. Senators could be elected by Romanian citizens from the age of 40, with the right to vote, from the electoral constituencies fixed by law, by the members of the county and communal councils, of the chambers of commerce, industry, labor, agriculture, by the professors at every university in the country. De jure senators were part of clergy representatives (metropolitans, bishops), former heads of government, former ministers, former presidents of legislative bodies, former senators, and deputies.

The king had powers to sanction the laws, the right to convene the parliament, to

[4] For more about the separation of power, see E.E. Ștefan, *Drept administrativ Partea I, Curs universitar*, third edition revised, supplemented and updated, Universul Juridic Publishing House, Bucharest, 2019, pp. 27-32.

[5] E. Focşeneanu, *Istoria Constituțională a României 1859-1991*, Humanitas Publishing House, Bucharest, 1998, pg. 57-58.

[6] N. Popa, E. Anghel, C. Ene-Dinu, L.-C. Spătaru-Negură, *Teoria generală a dreptului. Caiet de seminar*, third edition revised and supplemented, C.H. Beck Publishing House, Bucharest, 2017, p. 115.

[7] For more information, see E. Anghel, *Involvement of the Ombudsman Institution in the Mechanism of Constitutional Justice*, in CKS-eBook, 2021, pp. 559-563.

dissolve one of the two chambers, to appoint a new government.[8]

In the exercise of his powers, the king drew up regulations for the application of laws, appointed or confirmed public positions, could create new state positions, exercise command of the army, confirm military ranks, confer Romanian decorations, and had the right to mint coins.[9]

The Constitution provided for the creation of a Legislative Council, which formulated the bills to be debated in the National Representation.

According to the provisions of Chapter III, the executive power was exercised by the Government, in the name of the king. Ministers were appointed and dismissed by the king. The person of the king was inviolable, and the ministers were responsible for their activities.

The Council of Ministers was chaired by a president, appointed by the king and with the formation of the government.

Another innovation of the 1923 Constitution was the introduction of the control of the constitutionality of laws, which was to be exercised by the High Court of Cassation and Justice.

An innovative concept represented a principle of control of the legality of administrative acts.[10] Thus, the courts could censure documents issued by the state administration and oblige the state to pay compensations.[11]

A provision with important consequences was the one in art. 128, according to which "in case of state danger, a state of general or partial siege could be introduced".

The electoral system crystallized between 1917 and 1926, universal suffrage was introduced, and the first parliamentary elections were organized in November 1919.

A new electoral law was adopted in March 1926, which enshrined the right to vote and be elected, the conduct of elections, the structure of the Assembly of Deputies and the Senate.

The new electoral law ensured the interests of the big political parties, consecrating a comfortable majority in the Parliament, and removed the smaller political groups from the stage of political life.

This law replaced the principle of proportional representation with that of the first majority. This system was applied in the elections for the Assembly of Deputies and was based on the following rules: the totalization of votes for each party at the scale of the entire country; the party that obtained 40% of the total votes in the country benefited from a major premium (the first 50% of mandates); the remaining 50% of mandates are distributed proportionally to the number of votes obtained by all parties that received at least 20% of the total votes; the group that did not obtain 20% of the votes did not receive any mandate, unless it obtained an absolute majority in a county; if none of the parties obtained 40% of the votes, the mandates were distributed proportionally to the number of votes obtained.

[8] I. Muraru, S. Tănăsescu, *Drept constituțional și instituții politice*, Vol. I, C.H.Beck Publishing House, Bucharest, 2015, p. 64.

[9] C. Ene-Dinu, *Istoria statului și dreptului românesc*, second edition, Universul Juridic Publishing House, Bucharest, 2023, p. 296.

[10] For more information about the control of the legality of administrative acts, see E.E. Ștefan, *Drept administrativ Partea a II-a, Curs universitar*, fourth edition revised and supplemented, Universul Juridic Publishing House, Bucharest, 2022, pp.110-177.

[11] E. Cernea, E. Molcuț, *Istoria statului și dreptului românesc*, Universul Juridic Publishing House, Bucharest, 2013, p. 316.

In the Senate elections, all mandates in each constituency went to the party that had obtained the most votes (relative majority principle).

In the period 1927-1930, the constitutional provisions related to the institution of the regency functioned, which was determined by the renunciation of the crown by Charles II, the eldest son of King Ferdinand. In January 1926, the legislative bodies ratified the act of renunciation, proclaiming Mihai, son of Carol II, heir.

The regency was constituted of three persons, who were to exercise their prerogatives if Mihai would have become king before reaching the age of majority. The king began to exercise his powers from June 1929, following the death of King Ferdinand, until 1930, when Carol returned to the country and proclaimed himself king.

2. Innovative legal institutions introduced by the 1923 Constitution

2.1. In the field of administrative law

Administrative law[12] has seen the most important changes. They were carried out for the unification of legal regulations and imposed the unification of the state apparatus at the central and local level.

In Transylvania, Bessarabia and Bucovina, certain powers were exercised by the own governing bodies of the provinces that united with the country. In, the public services were managed by the Governing Council, and in Bessarabia and Bucovina, the attributions were exercised by service directorates and secretariats. These powers were established by the Decree Law of December 26, 1918, in Transylvania and by the one of January 1, 1919, for Bucovina and Bessarabia. Foreign affairs, the army, the railways, the post, the telegraph, the financial circulation, the customs, the public loans, the security of the state came under the competence of the central government.

On April 4, 1920, the Governing Council of Transylvania and the directorates and service secretariats of Bessarabia and Bucovina were dissolved, thus putting an end to the regional forms of leadership. During the reference period, new administrative organization laws were adopted both at the central and local levels.

The Law for the Organization of Ministries was adopted on August 2, 1929, which created the general framework for the organization of ministries in a unitary system. According to this law, the king appointed the person who was to form the Government, appointed and dismissed the ministers. The law also provided for the establishment of local ministerial directorates, in number of seven, for each ministry, as local administration and inspection centers.

On June 14, 1925, the Law for administrative unification was adopted, which established a unitary system of territorial organization of the national state and provided for the establishment of eligible local bodies.

According to the law, the territory of Romania was divided, from an administrative point of view, into counties and communes.

Communes were of two types: rural and urban.

- Rural communes could be formed from one or more villages, depending on the number of inhabitants they had;
- Urban communes were population centers recognized as such by law; in their turn, they were divided into county

[12] Regarding the emergence of administrative law in Romania, please see M.-C. Cliza and C.-C. Ulariu, *Drept administrativ. Partea generală*, C.H. Beck Publishing House, Bucharest, 2023, p. 1.

residence communes and non-county residence communes. Internally, urban communes were divided into sectors. Some urban communes, county seats, of greater importance, could be declared municipalities by law.

At the head of the communal administration is the mayor, who executes the decisions of the local Council and the permanent communal Delegation. The mayor was elected by the Communal Council. The counties were divided into squares. The county administration was under the leadership of the prefect, appointed by royal decree, at the proposal of the Ministry of the Interior. The leadership of the palace was exercised by a praetor, appointed by ministerial decision.

At the level of communes and counties, permanent councils and delegations functioned, competent to decide according to the law.

Through the Law for the organization of local administration of August 3, 1929, a series of changes were made to the system of administrative organization. This law stipulated that all communes, urban or rural, could be divided into sectors and that both counties and communes, as well as communal sectors, enjoyed legal personality.

The villages that were part of a rural commune were sectors of it and had their own leadership.

During the reference period, a series of laws were adopted regarding the creation of the Legislative Council; Superior Administrative Council; Pension Houses; Agricultural Chambers; Chambers of Labor; as well as the reorganization of the Chambers of Commerce and Industry. Also, the Statute of civil servants was adopted.

2.2. In terms of civil law

In the field of civil law, the code adopted in 1864 remained in force, but some special laws were also applied, the adoption of which was imposed by economic and social transformations.

The unification of civil legislation was achieved gradually and differentiated from one province to another. Thus, if, at the end of the third decade, the same civil law norms were applied in old Romania and Bessarabia, in Transylvania some specific norms continued to be applied until the Second World War.

In certain areas of civil law, new regulations have intervened, and new principles have been introduced. Thus, in the matter of property, if, according to the classical conception, expressed in art. 480 Civil Code, the property right has an absolute character[13], the 1923 Constitution and the special civil legislation established the concept of property as a social function.[14] In this way, the legal basis was created for expropriation for reasons of national utility. Through the Constitution of 1923, the concept of "public utility" was reformulated, giving it a much wider meaning compared to the one established by the Constitution of 1866. On this basis, a series of measures were adopted to limit the right of absolute ownership. These measures were necessary, since, according to the classical Romanian conception, taken over by the bourgeois civil codes, the owner of a plot of land had full rights both over the

[13] C. Bîrsan, *Drept civil. Drepturile reale principale*, Hamangiu Publishing House, Bucharest, 2008, p. 29.

[14] E.T. Danciu, *Privire istorică asupra evoluţiei proprietăţii în context politic*, Journal of Legal Sciences no. 4/2008, pp. 128-132.

basement and over the air space located on that plot.[15]

However, the 1923 constitution provided that the wealth of the underground becomes the property of the state, which is equivalent to a nationalization of the underground. Also, restrictions were brought regarding the right to airspace, in the interest of air navigation companies. At the same time, the nationalization of some armament enterprises and some metallurgical plants was carried out.

In fact, after nationalization, the wealth of the underground and the enterprises were transferred to the use of private individuals, under the pretext that they can be better valued by private individuals than by the state.

About land ownership, a series of laws were adopted to carry out agrarian reform. These laws were distinct for old Romania and for the old provinces. The agrarian reform, legislated in 1921, involved two distinct operations.

The first operation was that of the transfer of the expropriated lands to the state, with the payment of substantial compensations. The redemption price was equal to the regional lease price multiplied by 40 in the old Romania and by 20 for the rest of the country. This first operation could be carried out in a short period of time, especially since the compensations were to be paid by the state.

The second operation consisted in the sale of land by the state to the peasants. This legal formula by which the appropriation was made was intended to give the impression that the lands did not pass from the property of the landlords to that of the peasants but were sold by the state. The appropriation laws provided that the lands distributed to the peasants could not be sold or mortgaged before the debts to the state were paid off.

The legal regime of ownership over the basement was established by the Mining Law of

July 3, 1924. This law reaffirmed the constitutional principle regarding state ownership of underground wealth, with some exceptions. Thus, the law recognized the acquired rights over the underground wealth, known and exploited at that time, which constituted an important limit of the regulation. This is how the provisions of the law were to be fully applied only for the concession of lands in the state reserve and for the lands of private persons, who could not exploit the basement on their own land.

The legal regime of state property underwent a series of changes through the Mining Law of March 29, 1929, and the Law on the Commercialization and Control of State Economic Enterprises of June 6, 1929. The provisions of these laws were formulated in such a way as to favor private capital, including foreign capital. Thus, for example, the proportion of private capital's participation was not fixed, so that, based on a symbolic participation, it acquired access to the exploitation of state assets.

During the reference period, the provisions of the civil law regarding the legal status of the person were supplemented with new regulations.

We mention in this regard:

- Civil Status Act 1928;
- Employment Contracts Act 1929;
- The law of 1932 on lifting the incapacity of married women.

These laws alleviated the inequality between men and women in the field of civil law. Thus, it was provided that the woman no longer must ask for her husband's consent to conclude an employment agreement and

[15] B. Berceanu, *Istoria constituțională a României, în context internațional*, Rosetti Publishing House, Bucharest, 2003, p. 458.

that the woman has the right to collect her salary and dispose of it, as well as the right to alienate her assets without her husband's authorization.

In the matter of legal entities, there have been changes imposed by the transformations in social and economic life. Thus, the Law of May 26, 1921 authorizes the organization of trade unions, on the condition that they concern themselves only with the problems of a strictly professional, economic, social and cultural nature of their members. Trade unions were prohibited from carrying out any political activity, as well as dependence on any political party.

Through the Law for Legal Entities of February 6, 1924, the old system, according to which legal personality was granted by law, was replaced by the system of granting legal personality based on a special procedure, which took place before the courts.

The new regulations that intervened in the matter of obligations gave the state the opportunity to direct the relations between creditors and debtors, especially during the economic crisis. In this regard, we mention the Law of August 20, 1929, for the free movement of agricultural goods (Mihalache Law), by which the lots resulting from appropriations could be put up for sale by creditors. To solve the agricultural debts of the peasants, which generated deep dissatisfaction, the state intervened with a series of measures aimed at reducing the debts of the peasants, extending the deadlines for the debts that remained to be paid, organizing the agricultural credit, and suspending the foreclosure on the peasants.

Such provisions include the Law for the Settlement of Agricultural Debts from April 19, 1933, the Law for the Regulation of Agricultural and Urban Debts from April 14, 1932, as well as the Law for the Conversion of Agricultural Debts from April 7, 1934. During the reference period, there were also changes in the appearance of the sale purchase contract. According to the Civil Code, the sale-purchase contract is a transfer of ownership, a fact which, under the crisis conditions, generates serious inconveniences for capitalists.

This is because, at the time of bankruptcy, the goods in the merchants' stores were sold at auction, and the resulting sum was divided proportionally among the bankrupt's creditors. In the practice of commercial relations, the goods were procured periodically through the sales purchase contract, and the payment was to be made at the stipulated deadlines: the big traders became the owners of the goods now of their receipt, even if the price was not paid. And if the goods remained unsold, under the conditions generated by the economic crisis, the retailers went bankrupt, and the creditors put their goods up for sale to compensate.

The result was that the industrialists and wholesalers could no longer capitalize on the claim rights born from the contracts concluded with the small merchants, so they also went bankrupt. To avoid such consequences, it was resorted to the sale of the goods without the transfer of the ownership right, if the price was not paid at the time of the return of the goods.

In the field of labor relations, new regulations were adopted during that period, including legislative unification. A series of laws were adopted that included provisions regarding the resolution of collective labor conflicts, the Sunday rest, the length of the working day, the protection of minors and women, labor contracts, and labor jurisdiction.

2.3. Criminal law

In the field of criminal law, the code adopted in 1864 under the rule of Alexandru Ioan Cuza remained in force. In Romanian

law, the legality of criminalization was enshrined in all previous criminal codes, including the Constitution of 1923.[16]

After the creation of the Romanian unitary national state, a new penal code was drawn up, which was adopted, after long delays, on March 18, 1936, and entered into force on January 1, 1937.

The new Criminal Code was systematized in three parts:

- Part I - General provisions.
- Part II - Provisions regarding crimes and misdemeanors.
- Part III - Provisions regarding contraventions.

During the period we are referring to, a series of special criminal laws were also adopted, which referred to the defense of peace and the country's credit (1930), to the repression of unfair competition (1932), to the repression of crimes against public peace (the Mârzescu Law - 1924), to the defense of the monarchical regime in Romania (1927), to the introduction of the state of siege (1933) and to the defense of order (1934).

2.4. Changes to civil and criminal procedures

Due to the differences that existed in the civil procedure in the provinces united to the old Romania, the state intervened with a series of special laws for the use of the Civil Procedure Code in certain areas. In the field of civil procedure, the Code adopted in 1864 continued to apply. The legislative unification in this matter was achieved both by extending some civil procedure provisions from the old Romania to the new provinces, and by adopting new laws. We mention, in this sense, the Law of May 19, 1925, which aimed at the unification of some provisions of civil and commercial procedure, the facilitation and acceleration of judgments, as well as the competence of judges. The law referred to the trial procedure in civil and commercial cases before the tribunals and the courts of appeal. It is an important step in the unification of the procedure, differences remaining as far as the courts are concerned. The advantage of the law is that it also simplified some procedural forms and shortened some deadlines. Thus, the opposition is abolished, that way of appeal by which the missing party at the first term demanded the restart of the process. Also, the appeal period was shortened from 30 days to 15 days.

Important is the new organization given to the summons. It is stipulated that it should include all the plaintiff's claims, with the means of proof that he understood to be used, being made in as many copies as there are parts, plus one copy for the court. Upon receipt of the action, the court communicated to the defendant and the other parties a copy of the action each, and the defendant was obliged to submit to the court, in a short period of time, before the day fixed for the trial, a written response, which would include all his defenses against the claims the plaintiff, as well as the evidence in combating the claims of the plaintiff. In this way, at the first term, the court could proceed to the settlement of the trial, avoiding those countless postponements, for the communication of the action or the approval of the evidence and their administration, etc.

However, the essential features of the civil process were preserved, maintaining the investigation of the merits of the process both in the first instance and in the appeal. Also, the use of appeals was very expensive due to the stamp duty that had to be paid by the person declaring the appeal.

[16] M.A. Hotca, P. Buneci, M. Gorunescu, N. Neagu, R. Slăvoiu, R. Geamănu, D.G. Pop, *Instituții de drept penal*, Universul Juridic Publishing House, Bucharest, 2014, p. 11.

And in the field of criminal procedural law, the old code remained in force. In 1935, on March 19, a new code of criminal procedure was adopted, which entered into force on January 1, 1937. The new Code took over many provisions from the previous one, but also provided for some new regulations. To create a unitary framework for the application of the law, on January 25, 1924, the Law for the unification of the judicial organization was issued.

According to the provisions of this law, the courts were established in a system consisting of:

judges: rural, urban and mixed;

courts - in each county there was a court, composed of one or more sections;

appeal courts, 14 in number, composed of one or more sections;

courts with juries, which tried only criminal cases;

Court of Cassation.

To unify the composition of the body of lawyers, a special law was passed in 1923, amended in 1925.

3. Conclusions

Beyond the complex political process and the resulting normative text, the adoption of the Constitution of 1923 meant both an exercise and an extraordinary intellectual effort, in which the reunited creative legal forces of the reunited country participated, in an unprecedented and unique context in the history of law from Our country. The gathering, dialogue and valorization of the great European constitutional experiences brought to Bucharest by the representatives of the Romanian multicultural legal horizon of the time - Neo-Latin, Austrian, Austro-Hungarian and Russian - entailed a work of synthesis and extraordinary legal-cultural options, intended to ensure continuity, to satisfy diversity and above all to ensure national state specificity in a Europe founded on the values of Law and Justice.

The 1923 Constitution worked until February 1938, when King Charles II initiated a new Constitution, which strengthened royal power and limited democratic freedoms. After the abdication of Charles II, although theoretically his version of the Constitution remained in force, it returned to customs, and after August 23, 1944 the Constitution was partially amended and revised in 1946. Practically, the Constitution of 1923 was once and for all abandoned with the forced abdication of King Mihai I, on December 30, 1947, being replaced without the expression of popular will by one made according to the Soviet model.

It was the moment when the constitutional monarchy, which laid the foundation of modern Romania, was repealed, and the republic was established - an institution brought to Romania by the recently condemned communist regime, an institution without traditions and without popular support. It was the beginning of the darkest period in Romania's history.

It represented, finally, an adaptation of the constitutional data configured in 1866 in terms of a new synthesis to the reintegrated national framework and to the reorganized European one based on the law and values of cooperation and creative mutual dialogue[17]. The juridical-constitutional work of a century ago was one of synthesis, in which the professors of constitutional law from the

[17] For information on this regional context and on the need for international cooperation, please see L.-C. Spătaru-Negură, *Dreptul Uniunii Europene – o nouă tipologie juridică*, Hamangiu Publishing House, Bucharest, 2016, p. 71 and following, as well as L.-C. Spătaru-Negură, *Protecția internațională a Drepturilor Omului – Note de curs*, Hamangiu Publishing House, Bucharest, 2019, pp. 14, 21 and 59.

four law faculties of the country participated, the other renowned specialists in the field, who were joined, from the specific perspectives, by sociologists, historians or economists. All of this has constituted a precious heritage whose cultural-historical essences endure to this day and must be capitalized as such.

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- L.-C. Spătaru-Negură, Protecția internațională a Drepturilor Omului – Note de curs, Hamangiu Publishing House, Bucharest, 2019;
- E.E. Ștefan, Drept administrativ Partea I, Curs universitar, third edition revised, supplemented and updated, Universul Juridic Publishing House, Bucharest, 2019;
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BUSINESS AND HUMAN RIGHTS REGULATION UNDER INTERNATIONAL ORGANIZATION AND NON-GOVERNMENTAL ORGANIZATION

Rehulina REHULINA [*]

Abstract

International organizations and non-governmental organizations have a major role in the business world; thus, this article would like to examine how international organizations and non-governmental organizations deal with the UN Resolution on Business and Human Rights obligation and its guiding principles. The study shows that international organizations such as OECD and ILO and Non-governmental organizations like Global Compact have implemented the UN Resolution on Business and Human right on its regulation. Although the form is a guideline or code of conduct, hence is not binding as a convention, which has authority as a law-making treaty.

Keywords: *Human Rights, Human Rights and Business, corporation and human rights, International Organization, non-international Organization.*

1. Introductions

The importance of international organizations in implementing the UN Protects Respect and Remedy framework (UN Framework) is to oblige companies to comply with the international human rights standard. Moreover, UN Framework aims to protect people's human rights from business actors and help the business actor to implement the UN Framework in its operations. The UN Guiding Principle on Business and Human Rights (UNGPs)[1] outline that companies shall assess and address human rights risks and impacts associated with their business activities, including the operations of subsidiaries and suppliers.[2] The obligation to respect human rights is concentrated not only by the United Nations through UN resolutions on business and human rights as called UN Protect, Respect and Remedy Framework and UNGPs as an international organization but also by other international organizations engaged in trade, such as the OECD[3] and

[*] Ph.D. Candidate, "Géza Marton" Doctoral School of Legal Studies, University of Debrecen; Lecturer, International Law Department, Faculty of Law, University of Lampung (e-mail: rehulinatarigan@gmail.com).

[1] López Latorre, Andrés Felipe. 2020. "In Defence of Direct Obligations for Businesses Under International Human Rights Law." *Business and Human Rights Journal* 5 (1): 56-83. doi:10.1017/bhj.2019.27. https://www.cambridge.org/core/article/in-defence-of-direct-obligations-for-businesses-under-international-human-rights-law/EEB34BECDE016C2E6BC1F18BFE2F10A5.

[2] Gustafsson, Maria-Therese, Almut Schilling-Vacaflor, and Andrea Lenschow. 2022. *"Foreign Corporate Accountability: The Contested Institutionalization of Mandatory Due Diligence in France and Germany.*" Regulation & Governance n/a. doi https://doi.org/10.1111/rego.12498).

[3] Ruggie, John Gerard and Tamaryn Nelson. 2016. "*Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementations Challenges Multinational Corporations.*" *Brown Journal of World Affairs* 22 (1): 99to128. https://heinonline.org/HOL/P?h=hein.journals/brownjwa22&i=103

ILO in regard protecting workers under the ILO Conventions. Interestingly, the non-government organization also contributes to developing respect for human rights by businesspeople, such as those carried out by Global Compact.

This study becomes important because the operation of a business can harm people's human rights. I will assess from two international organizations and one non-governmental organization how these three organizations organize the UN Protect Respect and Remedy within member states or in their organization member (companies). Moreover, there is the relation between this paper and the already existent specialized literature because other written might see how OECD, ILO, or global compact in relation to human rights, but my study purpose is to be finding how these three organizations implant the UN protect on business and human rights on their daily activates as organizations. UN Framework adding on OECD Guidelines for Multinational Enterprises and OECD Due Diligence for Responsible Business Conduct, meanwhile International Labor Organization (ILO) on Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy International Labor Organization (ILO) and Global Compact (GC) on the Ten Principle on Global Compact.[4]

2. The Organization Economic Co-Corporation Development (OECD)

The Organization for Economic Cooperation and Development (OECD) is an international organization that works to build better policies and well-being for life. The organization aims to shape policies that foster prosperity, equality, opportunity, and well-being for all. OECD established sinch 1960 and entered into force in 1961.[5] In the beginning, OECD was encouraged by the Organization for European Economic Cooperation (OEEC), established in 1948 to administer the US-Financed Marshall Plan for the reconstruction of a continent ravaged by war and the focus area to the recovery of Europe after World War II.[6] Afterward, Canada and the US joined OEEC. They signed the OECD convention, expanding their job to the world. Now, OECD has a 38-member country, four accession country candidate, and five countries as key partners, and OECD work in six regional initiatives (Africa, Eurasia, Latin America, Middle East, North Africa, Southeast Asia, and Southeast Europe). In human rights protection in business, OECD has two guidelines for corporations and states. Which are:

a. OECD Guidelines for Multinational Enterprises

This guideline was established in 1976 but has changed several times, and last made changes in 2011 because there is a provision of the UN resolution on Protect, Respect and Remedy Framework in human rights and business. The OECD included a chapter on human rights in this guideline. OECD Guidelines for Multinational Enterprises, especially in human rights responsibility, is written in part 1 (one) chapter IV under

https://heinonline.org/HOL/PrintRequest?handle=hein.journals/brownjwa22&collection=0&div=12&id=103&print=section&sction=12.

[4] Williams, Oliver F. "The UN Global Compact: The Challenge and the Promise." *Business Ethics Quarterly* 14, no. 4 (2004): 755–74. doi:10.5840/beq200414432.

[5] OECD, Key millstone, https://www.oecd.org/60-years/timeline/ last access: 24.12.2022.

[6] The OECD at 60, https://read.oecd-ilibrary.org/view/?ref=1059_1059103-whi5k2wv7w&title=OECD-at-60, last access: 26.12.2022.

Human Rights. There are 6 (six) chapeau that says the state's duty to protect human rights and corporations within international human rights obligations both must.

1) Respecting human rights, which mean that both the state and corporation should refrain from violating the rights of others and should deal with any negative effect on those rights that include the state or corporate. No of their size, sector, operational context, ownership or organizational structure, business should respect human rights wherever they operate. According to the first paragraph of this guidance,[7] state and corporation must address actual and potential adverse human right impacts and entails talking adequate steps for their identifications, prevention, and mitigation of potential impact on human rights, remediations of actual impacts and keeping track of how the impacts are addressed. The term 'infringing' refers to adverse impacts an enterprise may have on the human rights of individuals;

2) In the realm of business operations, it is imperative for both states and businesses to refrain from engaging in or facilitating any actions that may result in negative consequences for human rights. Furthermore, they are obligated to take appropriate measures to rectify any human rights violations that may occur. Paragraph 2 advises firms to refrain from engaging in actions that may result in or contribute to negative human rights consequences as a result of their operations. Furthermore, it emphasizes the importance of promptly addressing any adverse human rights impacts that may arise. The term 'activities' encompasses both deeds and omissions. When a company is responsible for or has the potential to produce a negative impact on human rights, it is imperative for the enterprise to undertake measures to halt or mitigate such damage. If an enterprise is found to be contributing to or has the potential to contribute to such an impact, it is imperative for the enterprise to undertake the appropriate measures to halt or prevent its contribution. Furthermore, the enterprise should utilize its influence to minimize any lingering impact to the maximum extent feasible. The concept of leverage is applicable when one organization possesses the capacity to influence the actions of another institution, resulting in negative consequences for human rights. (42);

3) It is imperative for both states and corporations to actively pursue strategies aimed at preventing or alleviating negative human rights consequences that are directly associated with their business operations, products, or services, even in cases when they are not directly responsible for causing such impacts. Paragraph 3 delves into intricate scenarios wherein an organization has not been involved in the perpetration of a detrimental human rights consequence. Nonetheless, the influence of that impact is intricately connected to the activities, products, or services of the organization, owing to its business affiliation with another firm. Paragraph 3 aims to clarify that it is not the intention to absolve the entity of responsibility for any negative human rights consequences that may arise from its economic relationship with the enterprise. To fulfil the requirements outlined in paragraph 3, an organization would need to utilize its influence, either independently or in collaboration with other organizations as deemed suitable, in order to exert pressure

[7] Kilanowski, Marcin. 2023. "Evaluating the Polish NAPs: Lessons for the Future Implementation of the UN Guiding Principles on Business and Human Rights." *Business and Human Rights Journal*: 1-6. doi:10.1017/bhj.2023.4. https://www.cambridge.org/core/article/evaluating-the-polish-naps-lessons-for-the-future-implementation-of-the-un-guiding-principles-on-business-and-human-rights/DC3EA71AE140727ACDBC70B36343EEC3.

on the entity responsible for the negative human rights consequences. The objective would be to prevent or alleviate the impact on human rights. The term "business relationships" encompasses the connections a company has with its business partners, businesses within its supply chain, and any other non-State or State entity that is directly associated with its business operations, products, or services. Several factors must be considered when deciding the appropriate course of action in such circumstances. These factors include the level of control the enterprise has over the entity in question, the significance of the relationship to the enterprise, the magnitude of the impact, and the potential negative human rights consequences that may arise from terminating the relationship with the entity;

4) Both states and corporations have made a policy commitment to uphold and protect human rights. Paragraph 4 proposes that organizations should demonstrate their dedication to upholding human rights by issuing a policy statement that fulfils the following criteria: (i) it is endorsed by the highest level of authority within the organization; (ii) it is developed with input from relevant internal and/or external experts; (iii) it outlines the organization's expectations regarding human rights for its employees, business partners, and other entities directly associated with its operations, products, or services; (iv) it is publicly available and effectively communicated to all individuals within the organization, as well as external stakeholders; (v) it is integrated into operational policies and procedures to ensure its comprehensive implementation throughout the organization;

5) Conduct a thorough assessment of human rights obligations commensurate with the organization's scale, the characteristics and circumstances of its activities, and the gravity of potential negative human rights consequences. Paragraph 5 suggests that it is advisable for firms to conduct human rights due diligence. The process involves the evaluation of both current and potential human rights effects, the incorporation of these assessments into decision-making processes, the implementation of appropriate actions based on the findings, the monitoring of responses, and the dissemination of information regarding the measures taken to address these impacts. The incorporation of human rights due diligence into comprehensive enterprise risk management systems can be achieved by extending its scope beyond the identification and mitigation of risks that directly affect the enterprise, to encompass issues that impact the rights of individuals. The recognition of human rights hazards is a continuous endeavor, acknowledging that these risks may vary as the enterprise's operations and operational circumstances undergo changes. Additional guidance on doing due diligence, specifically in connection to supply chains, as well as recommended actions to address risks that may arise within supply chains, can be found in paragraphs A.10 to A.12 of the Chapter on General Policies and their Commentaries. Enterprises are advised by the Guidelines to establish mechanisms for Remediation when they become aware, either through their human right's due diligence process or other methods, that they have played a role in causing or contributing to an unfavorable impact. Certain circumstances necessitate collaboration with judicial or non-judicial procedures that are based on the state level. Operational-level grievance mechanisms, when they satisfy the essential criteria of legitimacy, accessibility, predictability, equitability, compatibility with the Guidelines, transparency, and are grounded in dialogue and engagement to pursue mutually agreed solutions, can serve as an effective avenue for addressing the concerns

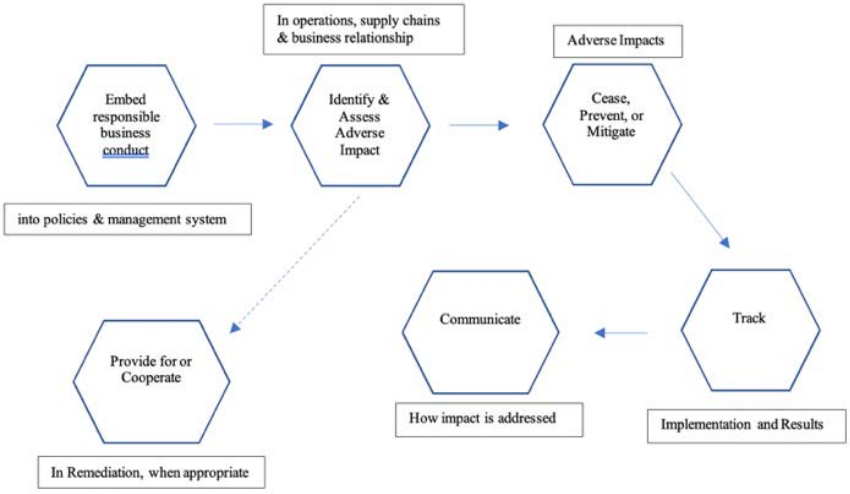
of individuals who may be affected by the activities of enterprises. These methods have the potential to be used by a company independently or in partnership with other stakeholders and can serve as a means of ongoing knowledge acquisition. The utilization of operational-level grievance mechanisms should not be employed in a manner that undermines the significance of trade unions in resolving labor-related conflicts. Additionally, these mechanisms should not impede the ability to access judicial or non-judicial grievance processes, such as the National Contact Points outlined in the Guidelines.

6) State and corporations engage in collaborative efforts within authorized frameworks to address and rectify adverse human rights consequences. This collaboration occurs when both the state and the corporate acknowledge their role in causing or contributing to these impacts.

b. OECD Due Diligence for Responsible Business Conduct

Moreover, on May 2018, OECD launched OECD Due Diligence Guidelines for Responsible Business Conduct. This code of conduct aims to provide practical support to the implementation of OECD Guidelines for Multinational Enterprises, which relate to Chapeau 5 (five) Chapter IV: Human Rights, Chapter V: Employment and Industrial Relations, Chapter VII: Environment, Chapter VII: Combating bribery bribe solicitation and Extortion, Chapter VII: Consumer Interests and Chapter III: Disclosure. Due diligence process and supporting measures futures in the figure below:[8]

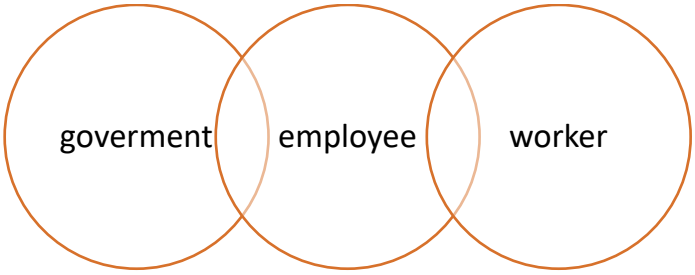
Figure. Due Diligence Process and Supporting Measures[44]



[8] OECD (2018), OECD Due Diligence Guidance for Responsible Business Conduct, https://www.oecd.org/investment/due-diligence-guidance-for-responsible-business-conduct.htm last access: 29.12.2022.

3. Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy International Labor Organization (ILO)

International labor organization (ILO) was established in 1919 after World War I and, in 1946, became UN Special Agency. Today ILO has a 187-member state. ILO is an organization where the stakeholder is the state, employee, and worker. That is why many times it is called a tripartite constituent because ILO has unique tripartite structures, which are[9]:



In human rights and business, ILO have principles called the Tripartite Declaration of Principle concerning Multinational Enterprises and Social Policy (MNE Declaration). This policy was founded in 1997 but had several revisions, and today's Tripartite Declarations are from the 5th amended 2017. The amendment adopted the UN Guiding Principle on Business and Human Rights and the Development of Sustainable Development Goals (SDGs) 2015. The purpose of the Tripartite Declaration purpose is to[10]

"…encourage the positive contributions which multinational enterprises can make to economic and social progress and to minimize and resolve the difficulties their various operations may give rise…"

Moreover, the tripartite declaration offers[11]

a. A global instrument developed, adopted, and supported by governments, employees, and workers' organizations;

b. A substantially on principles contained in triparted-agreed international labor standards (Conventions and Recommendations);

c. Connect regulation with the UN Guiding Principles on Business and Human Rights and the goals and targets of the 2030 Agenda for Sustainable Development.

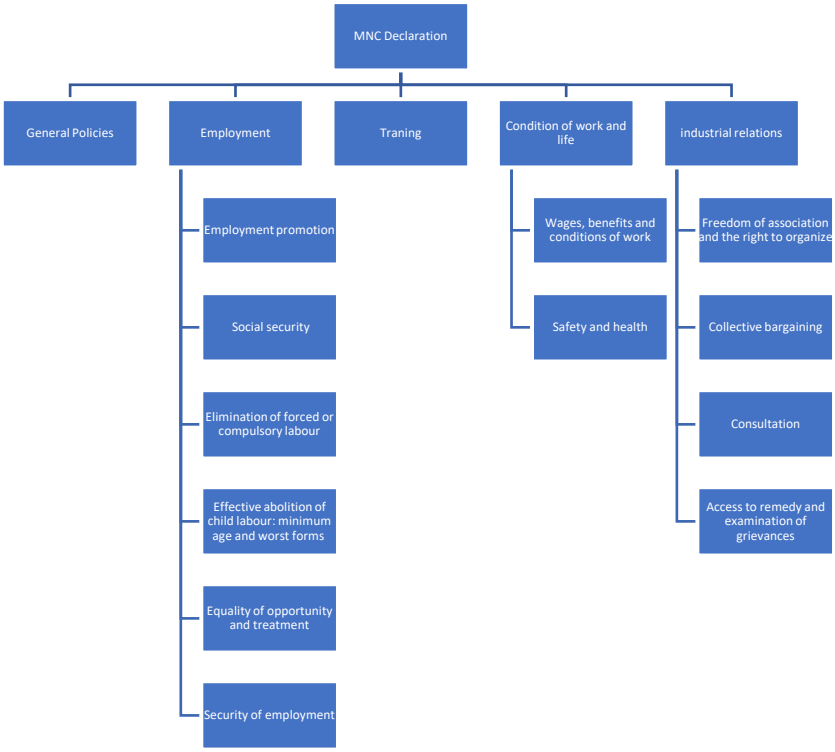
Furthermore, the tripartite declaration is not mandatory, nor is it a code of conduct, but rather "a checklist or reference point for around human rights or corporate social responsibility) The Tripartite contains 68 paragraphs, divided into 5 (fifth) scopes, as shown in the table below.

[9] Biondi, Anna, *New Life for the ILO Tripartite Declaration on Multinational Enterprises and Social Policy*." International Journal of Labour Research 7, no. 1 (2015): 105-116,6. https://www.proquest.com/scholarly-journals/new-life-ilo-tripartite-declaration-on/docview/1774151557/se-2.

[10] OECD, the structure of Tripartite Declaration concerning Multinational Enterprises and Social Policy: An Employers' Guide, https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf last access: 11.12.2023.

[11] OECD, the ILO MNE Declaration: What is in for Workers, https://ilo.primo.exlibrisgroup.com/discovery/fulldisplay/alma995003690902676/41ILO_INST:41ILO_V2, last access: 04.01.2023.

Table. The Structure of Tripartite declaration concerning Multinational Enterprises and Social Policy[12]



Overall, the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy establishes a framework for multinational corporations to promote responsible business conduct and contribute to sustainable development, while also promoting decent work and social justice, human rights respect, and environmental protection.[13]

4. Global Compact on the Ten Principle of Global Compact

The Global Compact is an effort focused on corporate responsibility that operates on a voluntary basis.[14] It establishes the Ten Principles of Global Compact. The Ten Principles of the Global Compact are based on international agreement, including the Universal Declaration on Human Rights, The International Labor Organization

[12] ILO, https://www.ilo.org/empent/areas/mne-declaration/WCMS_570332/lang--en/index.htm, last access: 19.04.2023.

[13] Diller, Janelle M. "ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy." *International Legal Materials* 41, no. 1 2002: 184–201. doi:10.1017/S0020782900009256.

[14] Bremer, J.A., How global is the Global Compact?. Business Ethics: A European Review, 17: 2008, 227-244. https://doi.org/10.1111/j.1467-8608.2008.00533.x.

Declarations on Fundamental Principles and Rights to Work, the Rio Declarations on Environment and Development, and the United Nations Convention Against Corruption. The Global Compact is a United Nations initiative launched in 2000, which aims to promote corporate social responsibility and sustainable development. The initiative is based on ten principles, namely.

Human Rights	Labor	Environment	Anti-corruption
Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights. **Principle 2**: Ensure they are not complicit in human rights abuses.	**Principle 3**: Businesses should uphold the freedom of association and effectively recognize the right to collective bargaining. **Principle 4**: The elimination of all forms of forced and compulsory labor **Principle 5**: The effective abolitions of child labor **Principle 6**: The elimination of discrimination in respect of employment and occupation	**Principle 7**: Businesses should support a precautionary approach to environmental challenges. **Principle 8**: Undertake initiatives to promote greater environmental responsibility. **Principle 9**: Encourage the development and diffusion of environmentally friendly technologies.	**Principle 10**: Businesses should work against corruption, including extortion and bribery.

The Global Compact is voluntary, and companies are encouraged to incorporate the ten principles into their operations and strategies.[15] Companies are also expected to publicly report their progress in implementing the principle. The initiative has more than 12.000 signatories from over 160 countries, including businesses, non-governmental organizations, labor unions, academic institutions, and the government. The Global Compact provides a platform for collaboration and dialogue among different stakeholders,[16] and it promotes partnerships between businesses, government, and civil society to address social and environmental

[15] Volker Türk, The Promise and Potential of the Global Compact on Refugees, *International Journal of Refugee Law*, Volume 30, Issue 4, December 2018, Pages 575–583, https://doi.org/10.1093/ijrl/eey068

[16] Newland, K. (2018). The global compact for safe, orderly and regular migration: An unlikely achievement. *International Journal of Refugee Law*, *30*(4), 657-660.

challenges.[17] Each principle has emphasized which are;

a. Principle 1 emphasizes the imperative for businesses to actively endorse and uphold the safeguarding of human rights as proclaimed on an international scale. The initial principle of the Global Compact emphasises the obligation of businesses to uphold and advance human rights within their activities, as well as to contribute to endeavors aimed at safeguarding human rights on a global, national, and local scale;

b. Principle 2 ensures that individuals or entities do not engage in or support activities that violate human rights. The second principle emphasizes the obligation of corporations to prevent their involvement in human rights violations, whether through direct or indirect means, and to respond appropriately when such violations are detected;

c. Principle 3 emphasizes the importance for businesses to protect the fundamental right to freedom of association and properly acknowledge and respect the right to engage in collective bargaining. The third principle of the Global Compact places significant emphasis on the preservation of the freedom of association and the ability to engage in collective bargaining as essential labour rights. It urges corporations to demonstrate respect for and actively encourage these rights within their operations and supply chains;

d. Principle 4 pertains to the eradication of all types of coerced and obligatory labour. The fourth principle of the Global Compact emphasizes the significance of maintaining the eradication of all types of forced and coercive labor. It urges firms to proactively implement steps to avoid and resolve occurrences of forced labour within their operations and supply chains;

e. Principle 5: The Efficient Eradication of Child Labour The fifth principle of the Global Compact places significant emphasis on the imperative of maintaining the successful eradication of child labour. It urges firms to proactively implement measures to prevent and resolve instances of child labour within their operations and supply chains;

f. Principle 6 pertains to the eradication of job and occupational discrimination.The significance of eradicating employment and occupation discrimination is underscored by the sixth principle of the Global Compact. This concept urges businesses to adopt proactive actions in order to foster equality and non-discrimination throughout their operations and supply chains;

g. Principle 7 posits that enterprises ought to endorse and uphold a precautionary stance when confronted with environmental predicaments. The seventh principle of the Global Compact highlights the significance of endorsing a precautionary stance towards environmental concerns and urges enterprises to proactively mitigate their environmental footprint while promoting sustainable development;

h. Principle 8 emphasizes the importance of implementing measures that aim to foster increased environmental responsibility. This principle underscores the significance of implementing efforts aimed at fostering heightened environmental responsibility and urges businesses to adopt proactive actions in order to mitigate their environmental footprint and contribute to the advancement of sustainable development. This entails the implementation of sustainable business

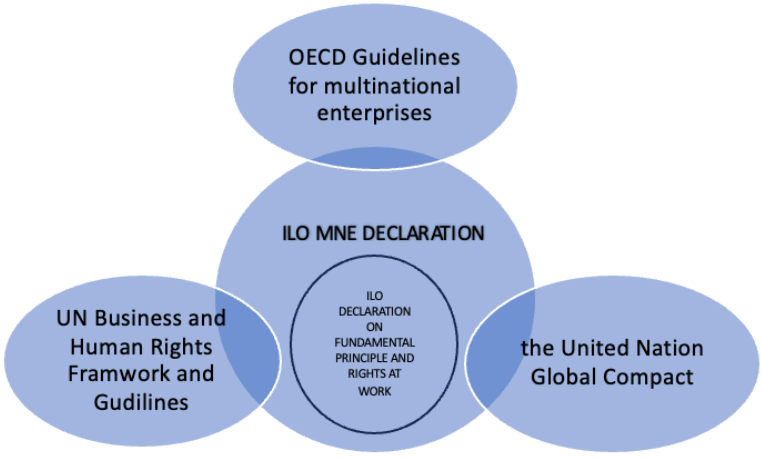
[17] Schembera, S. (2018). Implementing corporate social responsibility: Empirical insights on the impact of the UN Global Compact on its business participants. *Business & Society*, *57*(5), 783-825.

practices, which encompass the utilization of renewable energy sources, the mitigation of greenhouse gas emissions, the preservation of natural resources, and the effective management of waste pollution;

i. Principle 9 emphasizes the promotion and dissemination of ecologically sustainable technologies. This principle underscores the significance of promoting the advancement and dissemination of ecologically sustainable technologies. It urges businesses to allocate resources towards research and development, embrace and advocate for existing environmentally friendly technologies, and engage in collaborative efforts with other stakeholders to expedite the shift towards a sustainable economy;

j. Principle 10 emphasizes the imperative for businesses to actively combat corrupt practices, such as extortion and bribery. The final principle underscores the significance of combating corruption, encompassing acts such as extortion and bribery. It urges businesses to develop and execute robust anti-corruption policies and procedures, foster transparency and accountability, and engage in collaborative efforts with other relevant parties to prevent and address instances of corruption.

The picture below pictures the relation between OECD Guidelines for Multinational Enterprises, ILO MNC Declaration, UN Business and Human Rights Framework and Principles, National Global Compact, and ISO 26000 Social Responsibility[18]



Overall, these frameworks and standards are interconnected and complementary, and businesses can use them in combination to develop comprehensive and effective approaches to responsible and sustainable business practices. By aligning their operations with these frameworks, businesses can contribute to the achievement of global sustainability goals and create value for themselves and society as a whole.

[18] ILO, https://ecampus.itcilo.org/pluginfile.php/104547/mod_scorm/content/23/index_lms_html5.html, Last access: 06.01.2023.

5. Conclusion

The OECD Guidelines for Multinational Enterprises, the ILO MNC Declaration, the UN Business and Human Rights Framework and Principles, and the National Global Compact are all established frameworks or standards that offer businesses direction on the implementation of responsible and sustainable business practises. Although each framework possesses distinct focal points and methodologies, they exhibit shared objectives and concepts, and are interconnected in many manners. The OECD Guidelines and the ILO MNC Declaration offer comprehensive guidelines to multinational firms regarding responsible business practises, encompassing areas such as human rights, labour standards, and environmental sustainability. The UN Business and Human Rights Framework and Principles expand upon existing guidelines and declarations, offering a more comprehensive structure for enterprises to uphold human rights across all aspects of their activities. The National Global Compact initiative is a localised implementation of the United Nations' Global Compact, which offers a framework of principles and rules for enterprises to harmonise their activities with universally recognised sustainability principles and undertake measures that promote social objectives. The framework presented below is founded upon 10 fundamental principles, encompassing the domains of human rights, labour standards, and environmental sustainability. It is crucial to note that this framework holds applicability across many industries and scales of corporate operations.

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LEGAL PERSPECTIVES AND DISTINCTIONS ELECTRONIC AND TRADITIONAL BANKS

Mohammad Elayan AL ANIMAT[*]

Abstract

The article explores the concept of digital banks, which are financial organizations that function only through digital platforms, and highlights their evolutionary trajectory and regulatory considerations. This study examines the historical development of electronic banking, the legal frameworks governing its operations, and the widespread acceptance of electronic payment systems both in Jordan and on a worldwide scale. A comparative analysis of conventional and digital banks reveals that traditional banks provide face-to-face encounters and foster established trust, whereas digital banks promote convenience, cost-effectiveness, and greater interest rates. The selection between the two options is contingent upon individual preferences and specific banking requirements. Both traditional and digital banks are subject to government laws; nevertheless, digital banks may encounter heightened scrutiny as a result of their exclusive online presence. The importance of cyber security and anti-money laundering laws cannot be overstated. So the electronic banking institutions have established a permanent presence in the financial landscape, providing novel and streamlined services. However, they encounter persistent obstacles, such as the need to adhere to regulatory requirements.

Keywords: *Digital Banks, Cyber Security, Laundering, Financial, Electronic Transactions.*

1. Introduction

The banking business has seen a significant transition with the advent of digital banks, resulting in a dynamic and constantly changing marketplace. Digital banks are financial organizations that only conduct their operations using online platforms and mobile applications, without maintaining a physical branch presence, save for necessary administrative necessities, the organization offers a diverse array of financial services and facilitates transactions through remote means, without limitations of time or location.[1]

The advent of contemporary technological solutions has facilitated this innovation, enabling banks to provide services that are fundamentally equivalent to those offered by traditional brick-and-mortar banks. However, these services are conveniently accessible electronically, so obviating the necessity for customers to be physically present.

The evolution of electronic banks has seen substantial changes over the course of time, which may be attributed to the impact of legal advancements and the emergence of information and communication technology, the proliferation of the internet and electronic commerce has contributed to the rapid expansion of digital banks, the advent

[*] Ph.D. Candidate, " Geza-Marton" Doctoral School of Legal Studies, University of Debrecen (e-mail: m1abbadi@yahoo.com).

[1] Elkhaldi, Abderrazek Hassan; Abdullah, Ghaith Arkan. *The Effect Of Cloud Computing's Advantages And Components On Time Savings And Data Privacy For The Quality Of Electronic Banking Services*. International Journal of Professional Business Review (JPBReview). 2022, Vol. 7 Issue 3, p. 15.

of electronic platforms has enabled customers to conveniently engage in a range of banking activities, including check issuance, financial transfers, and account maintenance, all from the convenience of their own homes.[2]

The inception of the digital banking revolution can be traced back to the early 1970s, when advancements in technology led to a shift away from manual labor, this period also witnessed the streamlining of international financial transactions with the establishment of global financial networks such as SWIFT (Society for Worldwide Interbank Financial Telecommunications). In the 1980s were characterized by the emergence of networking, which brought to the introduction of "Home Banking" Subsequently in the 1990, the first internet-based bank was established in 1995, marking the inception of electronic banks.

This study delves into the conceptualization of digital banks, their legal and regulatory structure, their expansion and acceptance across various geographical areas, and a comprehensive analysis of client preferences, costs, convenience, lending possibilities, and technology, drawing a detailed comparison between traditional and digital banks. In addition, we delve into the significance of regulatory supervision, namely in the domains of cyber security, AML/KYC (Anti-Money Laundering/Know Your Customer) obligations, and safeguarding consumer interests, in order to preserve the security and resilience of the financial system.

The proliferation of digital technology and the internet in contemporary society has necessitated the inevitable emergence of digital banks. It is imperative for customers, regulators, the banking sector at large to comprehend the intricacies of these pioneering financial organizations, the current state of electronic banking is positioned for continued expansion, and its influence on conventional banking practices is substantial, rendering it a crucial topic in modern financial discussions.

2. What Are Digital Banks?

Digital banks, as banks that do not have a physical presence (in the form of branches except for some requirements related to general management, and they complete the requirements for establishing a banking relationship, providing services and products, and carrying out banking operations with their customers remotely without time or space restrictions) using internet platforms and mobile applications. And other electronic channels are based on modern technology solutions, where these banks offer the same what banks offer in their traditional form, but rely on electronic means that do not require the actual presence of the customer at any of the bank's branches or any form of his presence[3]. And the banks of the twenty-first century, which provide all their banking services through electronic computers, where provide their services without the need for the presence of several branches, as is the traditional bank, and the concepts of electronic banks have developed through different periods of time, and the legislative developments have their effects On business and banking services, and in light of the growing concept of electronic

[2] Alqudah, O.M.A.; Jarah, B.A.F.; Al-Matarneh, Z.; Al-Khawaja, H.A.; Alshehadeh, A.R.; Soda, M.Z,.*Data Processing Related To The Impact Of Performance Expectation, Effort Expectation, And Perceived Usefulness On The Use Of Electronic Banking Services For Customers Of Jordanian Banks*. International Journal of Data and Network Science, Spring 2023.

[3] Payments System in Jordan, Sixth Annual Report for the year 2021, Department of Supervision and Control of the National Payments System at the Central Bank of Jordan.

commerce, electronic banks have been positively affected by the concepts of this trade, and many banks and financial institutions carry out their banking transactions via the Internet[4] . Can write checks, transfer funds and manage your account while leaving your home, and among the most important electronic transactions that appeared Simultaneously with the information and communication technology revolution is the e-Government, which leads to the use of information and communication technology, such as linking external communication networks and websites to all government agencies.

In light of the existence of the Internet, its popularity, the increase of its users, and the exploitation of this network in electronic activity, banks had an important role, as a revolution took place in the field of banking business, and work was carried out in this sector with the latest mechanisms, so it worked to accelerate the wheel of banking services in it, so it was characterized by flexibility and accuracy in providing services. This is one of the most important factors in the emergence of the idea of electronic banking[5].

Liberation from the means of manual labor began in the banking sector at the beginning of 1971, and the transfer of services between countries became simpler and faster, through financial transfers between countries and worldwide (SWIFT) (Society World Wide Interbank Financial Telecommunications)[6]. The second phase was at the beginning of 1983, which is the period of networking and the era of automated and electronic communications, globally. These technologies were used to reach the customer's home or place of work, which is what is known as (Home Banking).

The period of the nineties is considered the revolution in which the largest processes of technological development took place, cell phones appeared and the spread of the World Wide Web, and the electronic banking system began to work, and the date of 10/18/1995 was the first day in the birth of the first electronic bank, That provides services via the Internet, which is a bank (Net Bank) in USA, and it is a bank that has no offices or headquarters except on the Internet, and it provides all the financial services that are provided through any regular bank[7].

The United States of America is the first country in the world in the field of technological development and the provision of electronic services via the Internet, and its Internet banks are among the most active online banks. In general, there is a delay on the part of Arab banks in providing services via the Internet[8], and this is due to the lack of electronic commerce in the region in a large way, as is the case in Western countries and China, on the other hand electronic services were launched in

[4] Kafi, Mustafa Youssef, *Money and Electronic Banking*, first edition, Dar Raslan for Publishing and Distribution, Damascus, 2012, p. 111.

[5] Ali, Jabir, *Factors Affecting the Adoption of Digital Banking Services in India: Evidence from World Bank's Global Findex Survey*, Journal of Developing Areas. Spring,2023, Vol. 57 Issue 2, p. 347.

[6] In this context, SWIFT refers to the "Society for Worldwide Interbank Financial Telecommunication." Banks and other financial institutions throughout the world utilize this messaging network and service to send and receive transactional messages and data in a safe and efficient manner. While it is true that SWIFT does not physically transfer funds, it does provide a standardized and secure channel for financial institutions to interact with one another in order to effect such transfers.

[7] Abu Jries, George and Khashan Rashwan, *Introduction to Internet Banking*, Union of Arab Banks, Beirut, 2004, p. 15.

[8] According to the analysis of Dr. Abdel Fattah Murad, who is the president of the High Court of Appeal in Alexandria.

Jordan in 1998 through Petra Bank, in a simple way such as a statement of account balances, deposits, loans, electronic credit cards and money transfers, and Jordan began drafting the temporary Electronic Transactions Law No. 85/2001, amended by Law No. (15) of 2015.

In fact, the Central Bank of Jordan has developed a comprehensive definition of the word “company” it is any public or joint-stock company. The companies licensed to practice electronic payment services and manage and operate electronic payment systems.[9] This definition does not legally apply to independent electronic banks, because they deal with these same systems, manage them electronically, and deal with them behind screens, that includes electronic payment operations and all their operations, which are dealt with behind screens. Here, the Jordanian legislator must move forward with issuing a special law for electronic banks, independent of the traditional banking law, which includes electronic payment processes and their challenges.

The term "electronic banking" lacks a clear and consistent meaning under the EU's formal regulatory framework However, you may extrapolate the notion of electronic banking in the EU environment based on broad financial and regulatory concepts.[10] The term "electronic banking," also known as "online banking" or "e-banking," refers to the use of digital and electronic technology to facilitate a variety of banking and financial services, such as account management, fund transfers, bill payment, data e, mobile banking, electronic authentication, and ATM and card services. While there is no universally accepted definition of "electronic banking" in the European Union, financial services and organizations providing "electronic banking" inside the European Union are nonetheless subject to a wide range of EU and state rules covering topics such as banking, payment services, consumer protection, and data privacy. Electronic financial services in the EU cannot function without adhering to these rules[11].

Some researchers have known that electronic banks are "banks that have a full presence on the Internet, and its website contains all the software necessary for banking business [12], where this bank provides services to the customer by conducting all financial transactions related to the bank, which allows him to carry out all his transactions without the need to go to the bank’s management or what is called the bank’s office[13]”.

3. Regulatory And Legal Steps In EU For Digital Banks

Both traditional and digital banks operating in the European Union (EU) are bound by government laws and regulations, the EU has a sophisticated regulatory framework for financial institutions compared to other countries, which includes both traditional banks and digital banks and is the responsibility of the European Central Bank (ECB) and the European Banking

[9] The annual report of the payments system in Jordan issued by the Central Bank of Jordan in 2022.

[10] European Banking Authority. (2018). The text refers to the Regulatory Technical Standards (RTS) that pertain to Strong Customer Authentication (SCA) and Common and Secure Communication (CSC) as mandated by the Second Payment Services Directive (PSD2), https://www.eba.europa.eu/ .Accesses a valuable Oct 17 2023.

[11] Kalinic, Z.; Marinkovic, V.; Molinillo, S.; Liébana-Cabanillas, F.(2019) *A multi-analytical approach to peer-to-peer mobile payment acceptance prediction*. *J. Retail. Consum. Serves.* , p. 13.

[12] Arabs, Younis, *Electronic banks between advantages and disadvantages*, Kenana Information Technology Company, Jordan, www.kenanah.com, accessed 5/27/2022.

[13] Al-Janabihi, Mounir and others, *electronic banks*, first edition, Dar Al-Fikr Al-Jamii, Alexandria, 2005, p. 10.

Authority (EBA), they are the two main regulatory bodies responsible for overseeing the prudential and supervisory components of banking regulation in (EU).

Here are the key factors to consider regarding the regulation, authorization and licensing of traditional and digital banking in the European Union (EU); Both traditional and digital banks must obtain the necessary licenses to operate in the EU and undergo strict regulatory assessments ensuring compliance with prudential and operational standards and minimum capital requirements Regardless of whether they are traditional or digital, banks are obliged to maintain certain levels of capital and Capital to ensure their financial security and ability to withstand financial setbacks, and to protect consumers, EU legislation also imposes consumer protection measures, ensures fair treatment and protects the rights of customers in both the traditional and digital banking sectors, in order to mitigate financial crimes, it is necessary to prioritize data protection, both traditional and digital banks are required to comply with EU data protection legislation, namely the General Data Protection Regulation (GDPR) and the Payment Services Directive (PSD2), in order to protect consumer data and privacy. Payment service providers that operate as digital banks are required to adhere to the Payment Services Directive (PSD2), a regulatory framework that oversees and ensures the security of electronic payment services[14].

On the other hand, cyber security regulations Both types of banks must implement strong cyber security measures to protect against cyber-attacks and regulate financial markets. Both traditional and digital banks that engage in financial market operations and trading are required to comply with additional laws, including the Markets in Instruments Directive. MIFID II,[15] legislators in EU have worked to oblige banks of both types to issue regulatory reports. These are mandatory reports that banks submit to regulatory bodies. These reports aim to ensure transparency and compliance with regulatory regulations.

In fact, digital banks often face complementary regulatory hurdles related to technology, cyber security and online services due to the significant and accelerating development in the field of financial information technology. However, the basic regulatory principles are applicable to both traditional and digital banking activities within the EU the goal is to protect the stability and integrity of the financial system while protecting the interests of consumers and investors.

On the other hand, the European Central Bank (ECB) cooperates with various regulatory bodies and organizations within the European Union (EU). Regarding the legal regulation of electronic banks, the European Banking Authority (EBA) and the European Central Bank maintain close cooperation with the European Banking Authority, an important EU regulatory body that oversees banking regulation and

[14] European Central Bank, "Study on the payment attitudes of consumers in the euro area (SPACE) – 2022".

[15] The second "Markets in Financial Instruments Directive" is abbreviated as "MIFID II." The regulation framework was implemented on January 3, 2018, by the European Union (EU). MIFID II is a major revision of the original MIFID, which came into effect in 2007, and it is designed to improve the openness, effectiveness, and reliability of the European Union's financial markets. The primary goals of the mandate are to strengthen market honesty and safeguard investors. When it comes to the European Union's financial sector, MIFID II is a complicated and far-reaching regulatory framework. Its requirements provide market openness and investor protection, and financial institutions and market players are obligated to adhere with them. It also affects businesses outside the European Union that serve customers in the EU, as they must comply with certain of MiFID II's regulations.

supervision. The EBA formulates technical standards and recommendations that facilitate the uniform implementation of EU banking regulations, including electronic banking provisions as well. In addition, it contributes to the coordination of regulatory strategies between EU Member States and performs a crucial function of regulation and supervision. Cooperative efforts by regulatory bodies The ECB has the capacity to cooperate with other regulatory bodies and agencies to address specific difficulties in the financial industry through cooperative initiatives. These projects may include topics such as cybersecurity, digital innovation, or cross-border payment systems, all of which are relevant to electronic banking[16].

Cooperation between EU agencies, such as the European Central Bank, and national regulators aims to achieve regulatory harmonization between member states. This reduces regulatory fragmentation and promotes fair competition for e-banks operating in several EU countries. The ECB has the ability to contribute to the formulation of EU-level policies and regulations affecting the banking industry, especially electronic banking. It plays a role in developing legal and regulatory frameworks that oversee aspects such as licensing, capital adequacy, risk management and consumer protection.

The cooperative strategy between the ECB and other regulatory entities ensures that electronic banks, as well as traditional banks, operate within a clearly defined regulatory framework that emphasizes financial stability, protection of consumer interests, and compliance with EU legislation and rules; ensuring this coordination is vital to support a unified and effective regulatory structure across the entire financial industry in the EU.

In 1974, the G10 central bank governors formed the Basel group on Banking Supervision (BCBS), a group of banking supervisory agencies. In 2014, the number of members on the Committee grew, there are 45 members in 2019, representing 28 countries and all of the central banks and financial regulatory bodies in those countries. It is a place where officials in charge of banking regulation may talk to one another on a regular basis. Its goal is to strengthen banking supervision across the world by increasing awareness of and expertise in major supervisory issues. International Standards for Capital Adequacy, Basic Principles for Effective Banking Supervision, and the Concordat on Cross-Border Banking Supervision are only a few of the well-known rules and standards established by the Committee. The Committee is based out of the Bank for International Settlements in Basel, Switzerland, which also serves as its secretariat, one of the international organizations working on standard setting and financial stability is the Basel Committee on Banking Supervision, which operates out of and receives assistance from the Bank for International Settlements, in contrast to other committees, the Group of Ten (G10) is governed by the heads of central banks in those nations and has its own reporting lines and agendas International financial regulators meet regularly through the Basel Committee and its sibling organizations, the International Organization of Securities Commissions and the International Association of Insurance Supervisors, it has some autonomy, although it needs to report its doings to the G10 central bankers, without the consensus of these governors, cannot report findings or

[16] European Central Bank, "Study on the payment attitudes of consumers in the euro area (SPACE), 2022.

make suggestions to organizations outside the Bank for International Settlements[17].

The European Court of Justice has indeed confirmed the legality of Standard Contractual Clauses (SCC) as a means of transferring data to nations without a suitable EU decision[18]. SCCs are commonly employed in electronic banking to expedite the movement of data across international borders. The Court emphasized the need of evaluating the sufficiency of data transmission on an individual basis, particularly in circumstances where there is a potential threat to personal data. The ruling has consequences for electronic banking services that operate globally, emphasizing the importance for institutions, including e-banks, to perform thorough data protection impact assessments (DPIAs) and evaluate the risks involved in data transfers, particularly when transferring data to countries with questionable reputations, practices related to safeguarding data[19].

Electronic banking frequently entails the movement of data across borders to facilitate consumer transactions and account administration. The Schrems II ruling highlights the necessity of adhering to EU data protection laws and implementing robust measures to safeguard customer information during data transfers. Consequently, the Schrems II consequences have prompted continuous discussions and negotiations between the EU and the US regarding the development of new data transfer mechanisms. Online banking companies must remain updated on these advancements and guarantee their adherence to developing data protection requirements.

The Schrems II case serves as a poignant reminder of the utmost significance of safeguarding data and ensuring privacy in the realm of online banking and the broader financial services industry. It emphasizes the importance for e-banking providers to prioritize the safeguarding of client data, do thorough risk evaluations, and adhere to developing data protection legislation both within the EU and in cross-border activities.

4. Discussion

The Jordanian legislator has dealt with the issue of electronic transactions in Articles (21 and 22) of the Jordanian Electronic Transactions Law[20] and set conditions for its licensing, practice and operations, which are set by the Central Bank of Jordan. The electronic bank represents all the electronic work carried out by banks or non-banking institutions through the Internet, from the stage of announcing banking services to contracting and running them, and the electronic bank have an independent presence on the Internet, It enables users to benefit from the same financial services provided by traditional banks.

The truth is that the concept of electronic banking should not be limited to the formal framework only, but rather the objective framework should be added to it,

[17] See the "History of the Basel Committee and its Membership" in http://www.bis.org/bc.

[18] SCCs, short for "Standard Contractual Clauses," are also known as "Model Clauses" or "Model Contracts." To make it easier for personal information to be transferred from the European Economic Area (EEA) to countries outside the EEA that do not have a sufficient level of data protection, the European Commission has established standard contractual terms.

[19] Although SCCs are a popular method for transferring data across international borders, their usage has been complicated by the "Schrems II" case (C-311/18). Although the European Court of Justice ruled that SCCs are lawful, it emphasized that organizations should evaluate the degree of protection in the destination country and, if required, take further procedures to guarantee that personal data is adequately protected. This ruling emphasizes the significance of considering the unique aspects of data transfers and, if necessary, taking further precautions.

[20] Jordanian Transactions Law No. 15 of 2015.

that is, just mentioning the services that the bank can provide without the readiness to conduct real transactions[21], the Internet has made business and the emergence of electronic banks a huge progress in the banking business, until there is a complete bank on the Internet, providing financial services and banking consulting that meet the needs of the customer, and here the interaction between the electronic bank and the customer are linked through his own device, but there are certain programs that the bank provides to its customers, through which the customer can deal with them anywhere and at any time[22].

In fact, up to this moment, there is no independent digital bank in Jordan, and there are also no conditions for licensing and no independent regulatory framework for electronic banks, but everything there is relates to electronic companies and not electronic banks in the precise terminology, the Central Bank of Jordan is now polling Jordanian financial institutions to gauge interest in and support for the creation of digital banks in light of the ongoing information technology revolution, according to a circular sent out to local banks by the Central Bank, the founders of an integrated digital bank need to put a lot of thought into a number of different areas. The Central Bank went on to say that digital transformation is an essential issue that cannot be disregarded when it comes to the business models of digital banks since these institutions are not restricted to establishing banking connections and offering services and goods via electronic channels exclusively. The Central Bank of Jordan indicated that digital transformation has many and varied benefits, not only on the level of Customers, but rather financial and banking institutions by reducing costs, effort and time, improving operational efficiency and organization, raising their quality and simplifying procedures when providing customer services, it's a boon for reaching a wider audience and bringing in more of the right kind of business from all around the world.[23] In an effort to close the digital divide between Jordan's outlying areas and the country's major cities and villages, he cited the recent global circumstances brought on by the Corona pandemic as evidence of the need to pursue innovation, continuous development, and join efforts to make economies dependent on the workforce more flexible and rapid. In light of its collaboration in working with the banking industry, will regulate integrated digital banks in Jordan under systematic legislation.

In the same context, the European Union has taken advanced steps in the field of electronic banking services. It has licensed electronic banks, and one of the most important electronic banks currently in the European Union is Revolut Bank. It is a financial technology (fintech) company that provides a wide range of financial services, including banking and payment services. While Revolut offers a variety of banking-like features, it is important to note that it does not operate like a traditional bank in the sense of having a full banking license in all the countries in which it operates. Instead, Revolut typically operates as an electronic money institution or electronic money service provider, which may have certain regulatory differences compared to a full bank. It is important to note that the regulatory status and specific services

[21] Kafi, Mustafa Youssef, *Money and Electronic Banking*, page 111, previous reference.

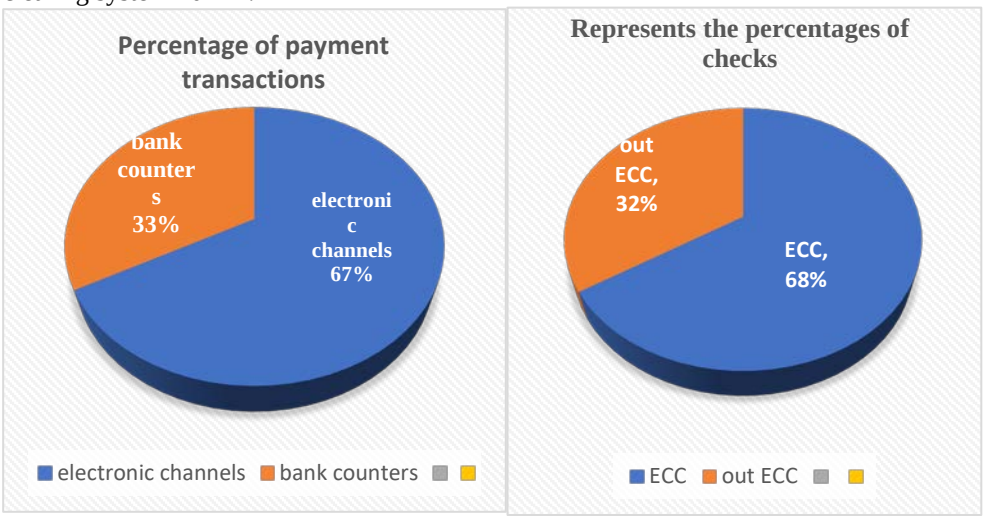
[22] Badawi, Bilal Abdel-Muttalib, *electronic banks*, first edition, Dar Al-Nahda Al-Arabiya, Cairo, 2006 ,page 8.

[23] Central Bank Establishing digital banks in response to the information and communications technology revolution, Jordan news agency journal, available https://cutt.us/HVhk6 access: November 7, 2023.

offered by Revolut can vary by country, and the company may expand its services or Modified over time. Depending on your location and the version of Revolut available to you, it may operate under different regulatory frameworks.

There is a question here; is Revolut a bank or a financial company; Revolut Business is a bank in some of the territories in which we operate, including the European Economic Area (EEA).Revolut Bank UAB holds a full banking license in Lithuania, allowing it to provide cross-border banking services to our business clients in the EEA. But Revolut Business is not a bank everywhere yet, including the UK. Revolut Business continues to work towards obtaining a banking license in the UK and, in the meantime, provides electronic money services to our customers in the UK, and holds our customers' deposits securely in A bank licensed by a third party, and seeks to make changes and future updates in advance[24].

Figure No. (1) Represents the percentages of checks that were executed through the electronic check clearing system against checks that were executed outside the electronic clearing system 2021[25].



Source: Report in Jordan in 2021 issued by the Central Bank of Jordan.

As we note above, the percentage of payment transactions carried out through bank windows and electronic channels to the total electronic and non-electronic transactions in 2021[26].

In fact, Electronic payments have been growing in popularity in recent years due to their convenience and speed. Electronic payment methods include credit/debit cards, online bank transfers, mobile payments, and digital wallets, Non-electronic payment methods include cash, checks, and money orders.

According to a calculation Payments Conformable to 2021, electronic payments accounted for 73% of hither non-alternative

[24] Revolut Bank website https://cutt.us/uxshj, access; November 7, 2023.
[25] The National Payments System Report in Jordan in 2021 issued by the Central Bank of Jordan, p. 9.
[26] *Ibid*, p. 11.

tradesmen globally in 2020, up Stranger 65% in 2015. approximately electronic payments look for to invoice for 78% of all less non-cash trade by 2025.

Jordanian banks are still developing and modernizing electronic Payment channels and their availability to customers are considered the main and best option for customer service by reducing the operational cost incurred by the bank. At the customer level, he can obtain the services he wants at any time or place with ease, which will contribute greatly to enhancing financial commitment in Jordan, which is what the Central Bank of Jordan seeks to achieve.

5. Organizing The Legal Framework For The Digital Euro

The European Union has taken significant and bold legal action in this area to regulate electronic banking and, through the European Central Bank, has just launched a regulatory framework for the issuance of electronic money subject to the EU e-Euro. This will pave the way for the complete release of digital banking regulation and represents the beginning of a true digital transformation, moving from the world of papers to the world of total financial digitization, and represents an important step in the right direction.

In fact, achieving the regulation of digital banks requires establishing a clear and solid roadmap for what is coming, because the shift to digital banks means the shift to a total digital economy, and this matter requires bold steps in the right direction, and the European Union begins this bold risk to prepare an appropriate environment, for the total digital financial transformation through issuing a regulatory framework for issuing a digital euro to facilitate and protect payment services operations, it is a source of great concern in the science of electronic banking and the risks that surround it, banking services have become more important than ever in today's world, human rights are intertwined with the ability to use banking services to obtain a salary, for example, in some countries, a bank account is required.[27] Having a bank account is therefore vital to having the legal right to work and run a business.[28] the majority of mortgage lenders require applicants to have a bank account before approving them for a loan. There is a huge gap between the financial resources of those with bank accounts and those who do not have bank accounts.[29] The Accounts Payable (Bandage) Directive formalizes the requirements for opening a bank account.[30] As a result, it is important to consider how easily anyone can obtain a digital euro. The emergence of the euro in digital form The European Central Bank (ECB) emphasizes that "the digital euro should also be available to people who do not currently have digital payment methods, or have restricted access to digital payment methods," with the aim of expanding access to financial services for all.[31] There are several factors to consider when trying to increase accessibility.

[27] *i.e.* Article 7a of the Dutch Law on Minimum Wages.

[28] Which is protected respectively in articles 15 and 16 of the Charter of Fundamental Rights of the European Union.

[29] Miguel Ampudia, Michael Ehrmann, "Financial inclusion: what's it worth?" European Central Bank Working paper series, No. 1990 (2017), https://www.ecb.europa.eu/pub/pdf/scpwps/ecbwp1990.en.pdf.

[30] Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features Text with EEA relevance, OJ L 257, 28.8.2014, p. 214–246, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0092.

[31] European Central Bank, 'Progress on the investigation phase of a digital euro – second report,' 9.

The first topic of discussion will be the similarities and differences between the PAD and the characteristics of the digital euro. Member States are the primary focus of this guidance. Therefore, the ECB is not affected by the Directive because it does not meet the first condition set out in the OLAF ruling[32]. However, the consequences of this directive for accounts payable when applied to the digital euro are interesting. The first is the fee statement, but this type of statement can also be obtained from commercial banks. Proper transfer between financial institutions is crucial.[33] Freedom to change financial institutions gives customers "vote with their feet". Socially responsible actions taken by banks are usually attributed to the intense competitive environment[34]. Bank accounts are difficult to transfer at the moment. At the very least, ECB consumers should be able to transfer their digital euro balances via brokers and other trading accounts. The secondary law for the digital euro must include this responsibility.

To confirm the viability of a digital euro as a single-digit key account, the ECB should consider employing one to lower barriers to switching between commercial providers. A consumer's digital euro account can be linked to their preferred advertising platform[35]. This can then be linked to the client's trading account, facilitating a smoother transition when changing banks. Ordering the ECB to develop such a system would interfere with the independence of the ECB.

The second part of integration is the hardest part. It has to do with the general population who cannot use financial services. There are several reasons for lack of access to financial services; The main reason is lack of paperwork. There are no online banking options or nearby banks. Within the Eurozone, the problem of unbanked people is declining. About 4% of the adult population in the European Union did not have a bank account in 2022, according to the European Retail Savings and Banking Group[36]. Financial inclusion is a major issue, both in countries where the proportion of unbanked citizens is large and in countries where this proportion is low. Unbanked adults make up less than one percent of the total adult population in the core countries and Slovenia. There are almost no unbanked residents in Denmark.[37] Higher percentages of the adult population in peripheral countries such as Hungary and Bulgaria are not bank customers. Romania stands out because nearly 30% of its adult population is unbanked.95 The majority of this amount is made up of Romania's rural population, they are at risk of poverty because they do not have access to banking services.

[32] Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features Text with EEA relevance, Article 4.

[33] Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features Text with EEA relevance, Articles 9 and 10.

[34] A.W.A. Boot, "Geld en schuld. De publieke rol van banken". Rapport Wetenschappelijke Raad voor het Regeringsbeleid 100(2019), p. 15.

[35] Rob Nicholls, 'Simpler account switching would help keep our banks honest,' The conversation (October 7, 2016).

[36] WSBI. The World Savings And Retail Banking Institute, 'Number Of Unbanked Adult Eu Citizens More Than Halved In The Last Four Years,' (July 14, 2022), https://www.wsbi-esbg.org/number-of-unbanked-adult-eu-citizens-more-than-halved-in-the-last-four-years/.

[37] Ibid, p. 13.

Based on the available evidence, mobile banking is a practical option for those living in remote locations, to facilitate easier use of financial services and mobile access to the digital euro, Hungary, Bulgaria, and Romania are the top three in terms of the percentage of the population without a bank account. There will be no increase in the availability of banking services in these nations as a result of the introduction of the digital euro via mobile networks. The only benefit of a digital euro may be through interoperability. About 3 percent of GDP in nations in the euro area comes from money sent back home by its citizens[38]; for this reason, the European Central Bank's development of a digital Euro convertible into national EU currencies at low cost would be highly desired. This would also aid in preserving the euro's role as a stable currency, migrant workers sending remittances have found the benefits of utilizing crypto currency[39].

When compared to crypto currency, the fees associated with money transfer services are rather expensive.

Therefore, the digital euro will need to be compatible with existing financial services and competitively priced if it is to remain established and compete with crypto currencies, this compatibility may pave the way for the digital euro to be codified in ancillary laws. It will be in line with the goals set forth in Article 3 of the TFEU since it supports free trade and social welfare.

Such services must be provided by intermediaries, who must avoid from offering them directly to their clientele. It would be a breach of free market principles for the ECB to offer such services in direct competition with private banks. The European Central Bank (ECB) is a because it is in a position of strength as a central bank, because of this, it breaks the efficiency criterion for funding the secondary state[40].

But even so, it's fantastic. About seven percent of the adult population in countries like Portugal and Cyprus does not have a bank account. The percentage of the population that does not have access to formal financial services is, however, falling from an average of 6% in 2017 to an average of 2.56% in 2021, but there is a major distinction.

Levels of unbanking vary significantly across core and periphery nations, individuals and the economy as a whole suffer when there are a lot of people who don't have bank accounts, therefore, it's important to work toward greater financial inclusion, yet doing so might potentially leave certain people out, underbanked populations have shrunk as a result of digital change, the growing reliance on technology, however, has negative consequences, particularly for the economically disadvantaged, technology usage or access, from 79% of the Finnish and Dutch populations to 45% in Italy, different percentages of Europeans possess varying levels of fundamental digital abilities[41], the adoption of the digital euro raises the possibility of a new version of the euro Digital division being created[42]. This has

[38] Georgiana Niță, "Remittances from Migrant Workers and their Importance in Economic Growth," 163.

[39] Massimo Flore "*How Blockchain-Based Technology is disrupting Migrants' Remittances: A preliminary assessment*." JRC Science for policy report (2018), pp. 17-25.

[40] Anne Marieke Mooij, "A digital euro for everyone. Can the European System of Central Banks introduce general purpose CBDC as part of its economic mandate?" Journal of Banking Regulation 24 (2023), https://doi.org/10.1057/s41261-021-00186-w.

[41] Eurostat, 'How many citizens had basic digital skills in 2021.

[42] Sofia Ranchordas, "Connected but Still Excluded? Digital Exclusion beyond Internet Access," in The Cambridge Handbook of Life Sciences, Informative Technology and Human Rights, Ienca Publishing House, M., Pollicino, O., Liguori, L.. Stefanini, E. & Andorno, R. (Eds). Cambridge University Press, 2021, Forthcoming.

significant ramifications for the development and rollout of the electronic euro.

There is a correlation between the use of cash and the lack of digital competence,[43] also, although it's still higher than 80%, cash acceptance is on the decline in nearly every country in the Eurozone; as a result, few people are in danger of being totally shut out of the economy, it's concerning that cash is still widely accepted despite the widespread lack of computer literacy, whether or whether people should have the right to use services of public economic interest is called into issue, the Charter guarantees this privilege under Article 36, for this reason the European Central Bank must guarantee adequate use of the electronic euro.

6. Comparison Between Traditional And Digital Banks

Traditional banks and electronic banks sometimes known as online or digital banks, have some characteristics, here are some comparisons of the two kinds of banks; Actual physical presence Traditional banks have a physical presence, which may be comforting to clients who value face-to-face encounters and customized care[44], traditional banks have a lengthy history in the banking industry and have created brand recognition electronic banks, on the other hand, do not have physical branches and are likely to be industry newcomers, customers who prefer in-person encounters with bankers and are unwilling to trust a bank they cannot see may be disadvantaged by this lack of physical presence.[45]

Electronic banks have become increasingly important in banking, particularly in recent years, as they have proliferated globally USA and some great countries. The reason for the rapid proliferation of electronic banks in such a short period of time is what these banks provide their clients in terms of the ability to issue orders and conduct financial operations around the clock and from any location on the planet's surface. Where the bank documents these actions and then transmits them to the competent authorities to begin executing them in electronic methods, electronic banks impose financial charges on the consumer, the customer, or the banks themselves, and the cost of electronic transactions is minimal when compared to traditional bank transactions[46].

It is worth noting that a single website on the Internet replaces many branches that electronic banks may require in each city, which raises the financial costs incurred by traditional banks when compared to what is the case with electronic banks, especially since these branches require building maintenance and periodic repairs, which add to the financial burden, and the biggest credit may be given to the computer, which replaces many personnel[47].

University of Groningen Faculty of Law Research Paper No. 40/2020, p. 3, available at SSRN: https://ssrn.com/abstract=3675360.

[43] Henk Esselink, Lola Hernández, "*The use of cash by households in the euro area*," European Central Bank Occasional Paper Series No. 201 (2017), https://www.ecb.europa.eu/pub/pdf/scpops/ecb.op201.en.pdf.

[44] S. D., Kavitha Vani. *Digital Banking Units: Perception and Receptivity of Customers in Rural India*. , IUP Journal of Bank Management. Nov 2022, Vol. 21 Issue 4, p. 11.

[45] Badawi, Bilal Abdel-Muttalib, *Electronic Banking: What it is, its transactions, and the problems it raises, Electronic Banking between Sharia and Law*, Dubai,p18, 2003.

[46] Cedric J.Magnin ،*The Telebanking contract in Swiss law international and comparative law*, ،& ILSA Journal, 2001,p. 32.

[47] Anjan V. Thakor, Arnoud Boot, *Bank Regulation and Banking Stability*, Article in SSRN Electronic Journal ,2014,p. 7.

On the other hand, Electronic banks are fast gaining popularity due to their innovative product offerings and user-friendly mobile apps, customers that value convenience and do not require in-person encounters with bankers may be drawn to electronic banking, customers may also benefit from cheaper costs and greater interest rates offered by electronic banks.

Overall, the decision between a traditional and electronic bank will be influenced by personal preferences and banking requirements. Traditional banks may be preferred by customers who value a physical presence, personalized service, and established brand familiarity. Customers that value convenience, minimal costs, and creative product offers, on the other hand, may select electronic banks customers should thoroughly research a bank's services, costs, and security measures before opening an account, regardless of the kind of account customers[48], on the other hand all transactions are made online because there are no physical branches for them, as long as a client has access to the internet, electronic banks are recognized for their customers' ability to conduct financial transactions whenever and wherever they choose. As opposed to online banks, traditional banks may only be open during regular business hours and have limited hours of operation, with the ability to view accounts and complete transactions online or through mobile apps, electronic banks provide a high level of convenience to its clients, due to this clients may bank whenever and wherever they choose processing.[49]

In fact, Convenience is a major element that may cause a consumer to pick an electronic bank over a traditional one, customers love being able to bank while on the go and without having to visit physical branches in today's fast-paced environment, electronic banks have benefited from this development by providing easy-to-use mobile applications and websites that enable users to monitor their accounts and complete transactions at anywhere any time[50].

I believe it is important to keep in mind, that certain clients might still enjoy the in-person interaction and personal touch of a local bank branch. Traditional banks could also provide other services that would be challenging to acquire through an electronic bank, such financial advice or notary services.

In general, convenience should be taken into account while deciding between a traditional bank and an electronic one. Customers should consider the advantages of being able to conduct their banking at any time, from any location, against the possible disadvantages of being unable to visit a real bank branch or in-person customer assistance. Conventional banks may demand higher fees for services such as ATM fees, monthly maintenance fees, and overdraft fees. Electronic banks, on the other hand, may not charge as many costs or provide consumers with additional fee-free possibilities, when making the comparison

[48] Source: Bloomberg. (2021). Banks are closing branches at a record pace as digital banking booms accessed; April 10, 2023, https://cutt.us/6YFY5.

[49] According to a 2021 study by J.D. Power, the use of mobile banking apps has increased significantly since the COVID-19 pandemic began. The study found that 38% of retail bank customers used mobile banking apps to manage their accounts, compared to 29% in 2019. The study also found that customers who use mobile banking apps are more satisfied with their bank's services than those who do not. Source: J.D. Power. (2021). 2021 U.S. Retail Banking Satisfaction Study.

[50] A 2020 survey by Bankrate found that 57% of U.S. adults use mobile banking apps to manage their accounts, up from 49% in 2019. The survey found that younger generations are more likely to use mobile banking apps, with 79% of millennials and 70% of Gen Xers using them. Source: Bankrate. (2020). Bankrate survey: COVID-19 drives surge in mobile banking use.

Interest rates to traditional banks, electronic banks may provide greater interest rates on savings and checking accounts, this is because electronic banks do not have as many overhead costs as traditional banks, such as rent and personnel pay.

On the other hand, customer service conventional banks frequently provide in-person customer service, which might benefit consumers who prefer face-to-face encounters, electronic banks typically provide customer care by email, chat, or phone, which is less personal but more efficient, where security precautions are in place at both traditional and electronic banks to secure clients' personal and financial information to combat fraud and identity theft, electronic banks may offer enhanced security measures such as two-factor authentication and biometric login, transaction restrictions, some transactions, such as ATM withdrawals or internet transfers, may have lower transaction limits with traditional banks, electronic banks may impose more limitations or no restrictions at all on some transactions[51].

Traditional banks may provide a greater range of account options, such as savings, checking, and investment accounts. Although there are fewer account possibilities with electronic banks, they may provide unique benefits such as cashback or higher interest rates[52].Traditional banks frequently provide other lending options, such as home loans, vehicle loans, and personal loans. Electronic banks may provide fewer lending options or may partner with other financial institutions to provide loan services[53].

Indeed, electronic banks rely heavily on technology, which might be a double-edged sword, technical improvements enable electronic banks to deliver services that are faster and more efficient, technology can be a source of problems, such as system failures or cybersecurity threats[54]. Traditional banks have been in business for decades, if not centuries, and have earned a reputation and brand recognition. Electronic banks are still in their early stages and may not have the same degree of trust and recognition as traditional banks,[55] have been in business for a long time and have developed a name and brand recognition among their clientele, customers who have a physical location can make personal contact with bankers or tellers, presence in the neighborhood. Traditional banks are frequently insured by the Federal Deposit Insurance Corporation (FDIC) or the National Credit Union Administration (NCUA), providing extra safety and trust to customers.

It is safe to say that digital banks are still in their infancy and may lack the same level of familiarity and trust as traditional banks, customers may be hesitant to trust a bank that they cannot physically visit, and they may be anxious about the security of their online transactions. However, many electronic banks are FDIC-insured, giving customers some piece of mind, to build trust and establish a reputation, many electronic banks offer excellent customer service and user-friendly mobile applications or

[51] Zidan, Muhammad; Hamo, Muhammad. *Economic insights*. 8 June 2015, p. 169.

[52] Alqam, Abdullah Musa. *Money and economics*. A. 63 (June 2010), pp. 47-48, p. 2.

[53] Hijab, Ikram, Al-Saadi, Ayyad and Tayoub, Hussein. 2020. *The challenges of the electronic payment system and the reality of its application in Algerian banks*. Journal of International Economics and Globalization, vol. 3, 2020, p. 135.

[54] Ryan Othman. 2019. *The reality of electronic banking in the Arab world*. International Journal of Economic Performance, vol. 2019, p. 12.

[55] Mufti, Mohamed Salah. 2013. Electronic *Banking. Money and Economics*, vol. 2013. p. 37

websites, they may also provide unique features like as high-interest savings accounts or fee-free checking accounts to entice customers, electronic banks' reputation and awareness are projected to grow as they become more popular and mainstream[56].

The record of accomplishment of traditional and electronic banks in terms of customer care and treatment of client complaints is one element that might influence their reputation. Traditional banks may have a bigger client base and get more complaints but they also may have greater knowledge and resources to successfully manage such issues, in contrast, electronic banks may have smaller customer care staff that struggle to keep up with consumer requests at peak hours. The sorts of services and products supplied by each type of bank can also have an impact on reputation, traditional banks may provide a broader range of services, such as investment services or small business loans, allowing them to position themselves as a one-stop shop for consumers[57]. However, they may be more specialized on certain services, such as online savings accounts or mobile payment solutions, making them more appealing to certain sorts of clients.

Furthermore, electronic banks may experience reputational damage as a result of data breaches or other security issues, customers are increasingly worried about the security of their personal and financial information, and a serious breach may harm a bank's image significantly, because of the nature of their operation, which is primarily reliant on technology and online transactions, electronic banks may face unique risks; according to a Forbes article published in 2021, electronic banks are growing popularity due to their ease and inexpensive costs. According to the study, 46% of consumers would consider transferring to an online-only bank, according to a PWC poll, the report also mentions that e-banks are significantly investing in user-friendly mobile applications and other digital services applications[58], and customer service, product offers, and security breaches can all have an impact on a bank's image, both traditional and electronic, as more clients switch to electronic banking, electronic banks' reputations are expected to improve, but it will also be critical for these banks to maintain great customer service and security measures in order to keep that confidence. Traditional banks have a physical presence and well-established brand awareness, whereas electronic banks are newer and may not have the same degree of trust and familiarity, electronic banks may give greater convenience, reduced costs, and higher interest rates, and they frequently rely on technology to deliver speedier service[59], traditional banks may have an advantage in providing a broader selection of account and loan possibilities, they may also have greater resources to deal with customer service questions and concerns, electronic banks may be more creative in terms of product offers and user experience.

[56] Latrash, Heba and Belhassan, Muhammad. 2021. *Factors Affecting the Adoption of Electronic Banking*: A Quantitative Study of a Sample of Customers of Algerian Banks. Journal of the Institute of Economic Sciences, MG. 2021, p. 169.

[57] Al-Hujaila, Sahar Ayman and Abu Al-Ghanem, Khaled, *The impact of electronic management on the reputation of Jordanian Islamic banks*. Amman Arab University Journal of Research: Administrative Research Series, vol. 7, 2022. pp. 9-33.

[58] Forbes is an American media publishing company, and its most prominent publication is Forbes journal, which is considered a good journal in the world. Financial services to attract customers.

[59] Yuspin, Wardah; Wardiono, Kelik; Nurrahman, Aditya; Budiono, Arief, *Personal Data Protection Law In Digital Banking Governance In Indonesia*, Studia Iuridica Lublinensia , 2023, vol. 32 Issue 1, p. 111, 32p.

Overall, the decision between traditional and electronic banks will be influenced by personal preferences and financial requirements, traditional banks may be preferred by customers who value physical locations, personal relationships with bankers, and a greater choice of account options, whereas electronic banks may be preferred by consumers who value convenience, cheap fees, and high interest rates, security measures, both traditional and electronic banks are subject to government regulatory monitoring, due to the industry's relative youth and the possibility of cyber-attacks[60].

Finally, both traditional banks offer personal contacts and may be more established and trustworthy, but electronic banks provide greater flexibility, convenience, cheaper costs, and lower interest rates and encourage investment in them, as you do not need many branches in all cities and only need a website that is subject to the conditions of the central bank in S Balad to be licensed as an online bank, and the decision between the two is determined according to the customer's preferences and banking requirements; In terms of access, convenience, costs, interest rates, customer service, security, transaction restrictions, account options, loan alternatives, technology, reputation and regulatory oversight, depending on your banking requirements [61].

7. Conclusion

The traditional and electronic banks are both subject to government laws, although electronic banks may face more scrutiny due to the industry's relative youth and the possibility of cyber dangers. The regulatory control of electronic banks is critical to safeguarding the banking industry's safety and soundness. Electronic banks are subject to the same rules as traditional banks, but owing to the inherent dangers connected with their online-only business model, they may face greater scrutiny. Moreover, Cyber-attacks are one of the most serious dangers to electronic banking.

To secure consumer data and prevent illegal access to their systems, electronic banks must have strong cyber security procedures. Regulatory authorities are critical in ensuring that electronic banks meet cyber security criteria and are prepared to deal with any cyber risks that may develop. It is necessary AML/KYC requirements apply to electronic banks as well, to prevent them from being exploited for unlawful purposes such as money laundering and terrorism funding. Banks must have systems and processes in place to identify and verify client identities, monitor customer transactions, and report suspicious conduct to regulatory authorities under these requirements. I believe electronic banks must follow consumer protection laws, capital and liquidity requirements, privacy laws, and international laws. These requirements complicate the regulatory compliance environment for electronic banks, yet they are vital to protect the financial system's integrity and stability system.

The EU has already implemented many regulatory measures to control electronic banking and financial operations within its member states, and this regulation is considered a development and a step in the

[60] Belhassan, Mohammed and Tarsh, Hala.. *Factors affecting the use of electronic banks by Algerian bank customers: an experimental study*. Collections of knowledge, vol. 6, 2020, p. 295.

[61] Belhassan, Mohammed and Tarsh, Hala. *Factors affecting the use of electronic banks by Algerian bank customers: an experimental study*. Collections of knowledge, vol. 6, 2020, p. 298. Previous reference.

right direction in digital banks, the need for which is increasing after and during the Corona pandemic. However, it is important to note that the legal and regulatory landscape can evolve, and there may be additional developments in the near future. In addition, international coordination on regulatory matters is often a complex and ongoing process; Below are some of the key aspects related to EU regulation of electronic banking and finance; the Payment Services Directive 2 (PSD2) is an important EU directive that aims to strengthen consumer protection, encourage competition and encourage innovation in the financial sector. It introduces strong customer authentication (SCA) requirements and opens access to payment services through application programming interfaces (APIs), PSD2 has implications for electronic banking by promoting secure and innovative payment services, and the General Data Protection Regulation (GDPR) has a significant impact on the handling of personal data across all sectors, including financial services, it imposes strict rules on the processing of personal data, and compliance is crucial for online banks that handle customer information, as well as cross-border data transfers. For example it is one of the most important issues in this regard in Europe the Schrems 2 case has implications for the transfer of personal data from the European Union to the United States and other countries it stresses the importance of assessing the level of data protection in the destination country and implementing appropriate safeguards.

As a result of the above, regulatory monitoring is critical to ensuring that electronic banks follow established rules and regulations and retain public trust to secure their clients' financial information, electronic banks must collaborate closely with regulatory authorities to understand and comply with the growing regulatory, as well as invest in sophisticated security measures and compliance systems. Therefore, the researcher believes that among the many advantages of electronic banks is the orientation towards services electronic banking in traditional banks has the greatest impact on the emergence of digital banks, for example, bank savings, profit, and distinguished customer service. Facilitating electronic payment operations by various companies, as transfers from accounts and deposits are made via the Internet, and it must be stated that the situation would have been different and the matter would have become more complicated if these electronic transactions had not occurred and slow. The researcher believes that electronic banks are an unavoidable reality, and that the increase in the number of these banks is due to the large electronic transactions on the Internet, which is considered the backbone of electronic banks, and that electronic banks are not just an advanced form of regular banks, but rather a new combination of developed and systematic banking work that dresses up in speed together with accuracy, governments must enable the essential processes in order to grow the number of electronic banks and electronic transactions over the Internet.

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ASPECTS REGARDING THE USE OF COLLABORATORS IN THE CRIMINAL TRIAL

Mircea-Constantin SINESCU[*]
Alin-Sorin NICOLESCU[**]

Abstract

This work covers the review of the main issues arising in judicial practice with regard to the use of special surveillance or investigation methods, especially the use of undercover investigators and of collaborators, starting from ordering such measures all the way through the limits the intervention of such investigator/collaborator should respect.

Keywords: *evidence taking fairness principle, special surveillance methods, collaborators, judge of rights and freedoms authorization, agent provocateur, evidence exclusion.*

1. Introduction

In matters of evidence taking during criminal prosecution, are extremely important special surveillance or investigation methods, which are, otherwise, the most used by criminal prosecution authorities. Further, more and more often, the practice of criminal prosecution authorities uses undercover investigators and collaborators.

Given that their intervention during investigations requires compliance with the safeguards provided by law, it is essential, firstly, that the mode in which criminal prosecution authorities impart a person the investigator/collaborator status meets the conditions provided by law. Secondly, the investigator/collaborator's intervention should respect both the standards of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the privilege against self-incrimination in light of respecting the defendant's right to choose to collaborate or not with the investigation authorities.

Or, judicial practice set out situations in which criminal prosecution authorities do not respect strictly the regulations in such matters, using artifices in order to obtain evidence in the criminal trial, although, in this manner, the safeguards provided by law are violated.

2. Content

Evidence taking in the criminal trial is governed by the evidence taking fairness principle, which is set out in the provisions under article 101 in the Code of Criminal Procedure.

According to such principle, it is forbidden to use threats, violence or other constraining methods, promises or advice for the purpose of obtaining evidence.

[*] Lecturer, Ph.D., Faculty of Law, "Nicolae Titulescu" University; Managing Partner, SCA SINESCU&NAZAT, Bucharest Bar (e-mail: mircea.sinescu@sinescu-nazat.ro).

[**] Lecturer, Ph.D., Faculty of Law, "Nicolae Titulescu" University; Judge, Criminal Section, High Court of Cassation and Justice (e-mail: nicolescualinsorin@gmail.com).

According to paragraph (2) in the same article, it is forbidden to use listening methods or techniques that would result in prejudicing the status of the person listened to, that is making it impossible for such person to confess deeds voluntarily and consciously, when such deeds are the object of evidence.

Another interdiction criminal process law provides consists in forbidding criminal prosecution authorities to provoke a person to commit or continue to commit a criminal deed, in order to obtain evidence in the criminal trial.

The sanction applicable to evidence obtained by illegal methods consists in evidence exclusion and in the impossibility of using such evidence in the criminal trial.

Thus, pursuant to article 102 in the Code of Criminal Procedure, the evidence obtained by torture or the evidence arising from the evidence obtained by torture may not be used in the criminal trial. Further, the law excludes using in the criminal trial the evidence obtained by illegal methods.

Moreover, if the act whereby evidence taking was either ordered or authorized, or whereby the evidence was taken is illegal, this fact prejudices also the evidence as such, and determines its exclusion from the criminal trial. In this meaning, is relevant the Decision no. 22/2018 of the Constitutional Court of Romania, which established that provisions are constitutional only to the extent the phrase „*evidence exclusion*" would mean also „*the elimination of the evidence from the case file*".

Thus, obtaining evidence in the criminal trial should respect both the standards of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the privilege against self-incrimination, in light of respecting the defendant's right to choose to collaborate or not with the investigation authorities.

It is relevant also in this regard the case law of the European Court of Human Rights[1], which stipulates that „*the Court has no jurisdiction to assess the judiciousness of accepting and taking evidence in a certain case, this being the duty of national courts, but only the task to assess whether the proceeding as a whole, inclusively the mode in which the evidence was obtained, was fair in character*".

Pursuant to the doctrine, the European court underlined that one should not ignore the inherent difficulties of the investigations carried out by the police authorities that have to gather evidence regarding the crimes they investigate; for such, they are forced to appeal, more and more often, especially in the fight against organized crime and corruption, to infiltrated agents, informers and practices called generically „*undercover*".

Such practices are special methods of surveillance or investigation, and are set forth in the provisions under article 138 in the Code of Criminal Procedure, namely: intercepting communications or any type of remote communication; access to a computer system; video, audio or photo surveillance; localization or tracking via technical means; obtaining data about a person's financial transactions; retaining, delivering or searching mail deliveries; using undercover investigators and collaborators; authorized participation in certain activities; delivery under surveillance; obtaining traffic and localization data processed by public electronic communication network providers or by providers of electronic communication services to the public.

The use of special investigation techniques, especially the use of infiltrated

[1] Case Luca vs. Italy, Judgment of 27 February 2001, wwechr.coe.int.

agents, should not prejudice the rights and obligations arising from international multilateral conventions on the protection of human rights.

The Court emphasized that, while the intervention of some „*infiltrated agents*" during preliminary investigations may be accepted, to the extent it is clearly based on and accompanied by adequate safeguards, public interest may not justify the use of evidence gathered as a consequence of a provocation on part of the police authorities; such procedure is prone to deprive *ab initio* and definitively the „*accused*" of a fair trial.

Thirdly, the European court decided that there is provocation on part of the police authorities or of the investigation authorities, in general, when the law enforcement members, or the persons intervening at their request do not limit themselves to examine passively the criminal activity, but exercise over the person carrying out such activity some influence and incite such person to commit a crime that, otherwise, that person would have not committed, for the purpose of making possible to establish that such crime was committed, therefore, in order to evidence it within criminal prosecution. Finally, the Court concluded that, in such a situation, when the information presented by the criminal prosecution authorities do not allow it establishing whether the plaintiff was or was not the victim of some provocation on part of the police authorities, it is essential that the court examines the proceeding within which the judgment was pronounced based on such „*provocation*", in order to check whether, in that case, the right to defend oneself was protected adequately, especially if the audi alteram partem and equality of arms principle was respected.

Based on using such criteria, in the case Romananskas vs. Lithuania, the Court considered that the actions of agent provocateurs, police officers, had as a consequence the instigation of the plaintiff to commit the crime he was convicted for, and no elements in the case file data indicated that, in the absence of their intervention, the defendant would have committed the relevant crime. Considering the incriminated intervention and its use in the criminal trial under discussion, the Court considered that it was not fair, violating the provisions under article 6 in the Convention.

In the same light, we underline also the fact that the right of an accused to keep silent with regard to the deeds imputed to him and the right not to contribute to their own incrimination are essential aspects of a fair proceeding in the criminal trial.

The European Court has decided constantly that, even if article 6 in the Convention fails to mention expressly such rights, they are generally recognized norms, in the center of the notion of a „*fair trial*", consecrated by this text. The reason for their recognition consists, especially, in the need to protect the person accused of committing a crime against the criminal prosecution authorities exercising some pressure, in order to avoid judicial errors and to allow achieving the purposes under article 6. The European court decided that the right not to contribute to one's own incrimination involves that, in a criminal case, the prosecution tries to support their arguments, without using the evidence obtained by constraint or pressure, against the defendant's will. In this regard, such right is closely related to the presumption of innocence, as provided under article 6 paragraph 2 in the Convention.

In our meaning, provoking a person, in view of recognizing or generating some evidence against such person may be assimilated to the conduct forbidden by the legislator, an attitude that is also prohibited by the European Court of Human Rights.

For the same reasons, the legislator, in article 103 paragraph 3 in the Code of

Criminal Procedure, established that „*the decision to convict, waive the punishment or defer the punishment may not be grounded, to a decisive extent, on the statements of the investigator, collaborators or of protected witnesses*".

In this regard, the European Court of Human Rights made a clear distinction between the provoking/setting up the defendant and the mere use of some legal techniques specific to undercover activities. Therefore, according to the European Court, the use of special investigation methods, especially of undercover techniques, may not violate in itself the right to a fair trial. The risk involved by the instigation by the police, via such techniques, involves that the use of the relevant methods is not maintained within well determined limits. The instigation by the police or by persons acting at their order will not be limited to the investigation of criminal activity passively, but will involve exercising some influence on the defendant, so that to incite the latter to commit some crime or to continue to commit some crimes, for the purpose of obtaining evidence.

Further, the distinction between „*police provocation*" and performance of some proactive investigation required the Court from Strasbourg to make a review. In this context, the Court underlined comprehensively the conditions that should be cumulatively fulfilled, so that the state agents' activity may be considered a passive activity that does not involve provocation:

i. The Court established that, *ab initio*, there should be a reasonable suspicion that a person takes part in a crime, or prepares to commit such criminal deed, or has a predisposition to take part in some criminal activities;

ii. It is necessary that the activity of criminal prosecution authorities or their collaborators was previously authorized according to law;

iii. State agents or their collaborators did nothing else than giving the perpetrator an opportunity to commit crimes.

To the same effect, the European Court of Human Rights sanctioned such conduct upon the ruling of the case Allan vs. the United Kingdom. As a matter of fact, after invoking the right to silence, the defendant was placed in a cell together with an informer of the criminal prosecution authority. The evidence, namely the confession obtained by an informer who directed the conversation to the circumstances in which the crime under investigation was committed, was not obtained spontaneously and in the absence of provocation. For this reason, the European Court stipulated that the information obtained through the informer's intervention, was taken against the defendant's will. Moreover, in the Court's meaning, the use of such evidence in the criminal trial amounts to depriving the right to silence of its legal effects, being also violated thus article 6, paragraph 1 in the European Convention on Human Rights.

Otherwise, national courts took over this European reasoning and stipulated that „*recalling the cases Teixeira de Castro versus Portugal of 09.06.1998 and Ramanauskas versus Lithuania of 05.02.2008, showing that agent provocateurs are state infiltrated agents, or any person acting under the management or supervision of some authority (prosecutor), who, during the activity carried out, exceed the limits of duties granted by law to act for the purpose of showing a person's criminal activity, provoking such person to commit*

crimes, in view of evidence taking upon prosecution"[2].

The obligation of fair evidence taking, as well as respecting the right to silence of a person suspected of committing a crime are emphasized especially also by the recent practice of the Constitutional Court of Romania, and also of the High Court of Cassation and Justice with regard to the witness, who is granted the right not to self-incriminate, materialized even by the judge on the merits of the case within the judgment with regard to another co-defendant.

The collaborators of criminal prosecution authorities, whether under their real identity or not, should not exercise a certain influence on the relevant person, so that the latter makes confessions with regard to alleged deeds. Further, it is evident that the purpose of the influence previously mentioned would be to obtain evidence, a conduct that is vehemently prohibited by the European Court of Human Rights, as we showed previously.

Consequently, by acting in such manner, the provisions under article 6 in the European Convention on Human Rights are violated, such action amounting to the one of an agent provocateur.

Moreover, we should emphasize that the use of undercover investigators or real identity investigators and of collaborators, as provided under article 148 in the Code of Criminal Procedure, is distinct from the technical surveillance of some person(s).

Pursuant to the provisions under article 139 in the Code of Criminal Procedure, technical surveillance is ordered by the judge of rights and freedoms, when the following conditions are cumulatively fulfilled:

„a)there is a reasonable suspicion with regard to the preparation of or committing a crime among those provided in paragraph (2);

b) such measure should be proportional to the restriction of fundamental rights and freedoms, given the particularities of the case, the importance of information or of the evidence to be obtained, or the severity of crime;

c) the evidence could not be obtained in another manner, or obtaining it would involve special difficulties that would prejudice the investigation, or there is a danger to safety of persons or of some valuables.

(2) Technical surveillance may be ordered in case of crimes against national security provided in the Criminal Code or special laws, as well as in case of crimes such as drug trafficking, doping substances, illegal operations with precursors or with other products prone to have psychoactive effects, crimes related to not respecting the status of arms, ammunition, nuclear materials, explosives and restricted explosive precursors, trafficking and exploiting vulnerable persons, terrorism, money laundering, counterfeiting coins, stamps or other valuables, forgery of electronic payment instruments, in case of crimes committed via computer systems or electronic communication means, against property, blackmail, rape, deprivation of freedom illegally, tax evasion, in case of corruption crimes and crimes similar to corruption crimes, crimes against the financial interests of the European Union, or in case of other crimes for which the law provides punishment with imprisonment for 5 years or longer."

As such, the difference is emphasized also by the need for fulfilling some different

[2] Judgment no. 199 of 18.08.2011 pronounced by Tulcea Tribunal, maintained also in the decision no. 125/P of 21.10.2011 of Constanța Court of Appeal, sheet 6.

conditions from the ones provided under article 139 in the Code of Criminal Procedure.

Further, under the Decision no. 55/2020 of the Constitutional Court, the objection of unconstitutionality was admitted, and it was established that the provisions under article 139 paragraph 3 final thesis in the Code of Criminal Procedure are constitutional to the extent they do not regard recordings resulted from the performance of activities such as information gathering, which involve restriction of the exercise of some fundamental human rights or freedoms, carried out in compliance with legal provisions, authorized pursuant to the Law no. 51/1991.

Consequently, there is a difference between the recordings mentioned under article 139 paragraph 3 in the Code of Criminal Procedure and the recordings regarding which authorization procedures are regulated.

The decision aforementioned stated that „*therefore, when reviewing the legality of evidence and of the evidence taking the recordings were obtained by, for the system governed by the Code of Criminal Procedure, the Pre-Trial Chamber judge should consider, on the one hand, the conditions imposed by the legal provisions for authorizing such measures, and, on the other hand, the authority with jurisdiction to issue such authorization*."

Pursuant to article 148 paragraph 10 in the Code of Criminal Procedure, *„in exceptional situations, if the conditions provided in par. (1) are fulfilled, and the use of an undercover investigator is not sufficient for obtaining the data or information, or is not possible, the prosecutor that supervises or carried out the criminal prosecution may authorize the use of a collaborator, assigning the latter another identity than the real one. The provisions in par. (2)-(3) and (5)-(9) shall apply accordingly*".

Further, in accordance with article 148 paragraphs 1 and 2 in the Code of Criminal Procedure, *„(1) The prosecutor supervising or carrying out criminal prosecution may order authorization of the use of undercover investigators for a period of maximum 60 days, if:*

a) there is a reasonable suspicion with regard to the preparation of or committing a crime against national security provided by the Criminal Code and by other special laws, as well as in case of crimes such as drug trafficking, illegal operations with precursors or with other products prone to have psychoactive effects, crimes related to not respecting the status of arms, ammunition, nuclear materials, explosives, trafficking and exploiting vulnerable persons, terrorism or similar, terrorism financing, money laundering, counterfeiting coins, stamps or other valuables, forgery of electronic payment instruments, in case of crimes committed via computer systems or electronic communication means, blackmail, deprivation of freedom illegally, tax evasion, in case of corruption crimes and crimes similar to corruption crimes, crimes against the financial interests of the European Union, or in case of other crimes for which the law provides punishment with imprisonment for 7 years or longer, or there is a reasonable suspicion that a person is involved in criminal activities in relation to the crimes listed above;

b) such measure is necessary and proportional to the restriction of fundamental rights and freedoms, given the particularities of the case, the importance of information or of the evidence to be obtained, or the severity of crime;

c) the evidence or localization and identification of the perpetrator, suspect or the defendant could not be obtained in another manner, or obtaining such would

involve special difficulties that would prejudice the investigation, or there is a danger to the safety of persons or of some valuables.

(2) The measure shall be ordered by the prosecutor ex officio or at the request of the criminal prosecution authority, via an ordinance that should contain, besides the mentions provided under art. 286 par. (2):

a) indication of the activities that the undercover investigator is authorized to carry out;

b) the period such measure was authorized for;

c) the identity assigned to the undercover investigator."

It is obvious that the legislator established very strict conditions for the scenario of using a collaborator, exactly because, most times, such evidence taking prejudices the evidence taking fairness principle, as provided under article 101 in the Code of Criminal Procedure.

As regards the condition provided under article 148 paragraph 1 letter b) in the Code of Criminal Procedure, the specialist literature states that „*the legislator regulated the measure subsidiarity principle, underlining its exceptional character, given that it is not adequate that a significant part of the evidence taking in a case consists of acts of undercover investigators, performed in the phase of preliminary acts. Other less intrusive methods should be used for discovering the crime, or for the identification of perpetrators, if liable to lead to the same results and if their use does not raise significant practical obstacles*"[3].

Consequently, the use of a collaborator and, subsequently, of conversations this had with the defendant, in relation to past deeds, is a serious violation of the right to silence and of the privilege against self-incrimination. Otherwise, the case law of the European Court of Human Rights sanctioned repeatedly such type of approaches.

Thus, it stated that „*the right not to contribute to one's own incrimination involves that the accusation should be grounded on evidence that should be taken without appealing to constraint or pressure, or by infringing the defendant's will*"[4].

Article 148 paragraph 3 in the Code of Criminal Procedure states that „*if the prosecutor assesses that it is necessary that the undercover investigator be able to use technical devices in order to obtain photos or audio and video recordings, the first should inform the judge of rights and freedoms in view of issuance of the technical surveillance warrant. The provisions under art. 141 shall apply accordingly.*"

Therefore, when, after assigning the quality of „*collaborator*" to a person, the prosecutor fails to inform the judge of rights and freedoms in view of issuance of the technical surveillance warrant, as imperatively prescribed by the text aforementioned, the use of a collaborator is illegal.

As regards the nature of activities the prosecutor may authorize in the ordinance issued, we should state that the use of some evidence taking procedures, especially of some technical surveillance measures, could not have been included. The only technical surveillance measures that may be used by undercover investigators and by collaborators are the ones provided under article 138 paragraph 1 letter c) in the Code of Criminal Procedure, and only if the judge

[3] Protecția europeană a drepturilor omului și procesul penal român (The European Protection of Human Rights and the Romanian Criminal Trial), M. Udroiu, O. Predescu, C.H. Beck Publishing House, Bucharest, 2008, page 782.

[4] Case Shannon vs Great Britain, judgment of 4.10.2005, par. 32.

of rights and freedoms issues a technical surveillance warrant for such – a warrant that evidently, considering the provisions under article 148 paragraph 3 in the Code of Criminal Procedure, should be issued subsequent to the issuance of the ordinance on the use of collaborators. Consequently, any other technical surveillance measures might not be implemented by the collaborator, and no evidence taking procedures through the collaborator might be performed, any violation of such limitation resulting in the illegality of the evidence taken.

All these because the authorization activity, the judge's exclusive power, has as its purpose to point out the criminal activity, and should be based on the purely passive conduct of the judicial authority, while carrying out some activities without authorization is a violation of the fairness and equity principles.

Ambient recording of a conversation in virtue of the quality of collaborator is different from the scenario provided under article 139 in the Code of Criminal Procedure, such distinction consisting both of the fact that a collaborator receives technical assistance and also of the fact that the conversation is performed deliberately by the person collaborating with the criminal prosecution authorities in a certain direction, its purpose being to obtain certain information that, in other circumstances, could not have been obtained.

All the contentions above are fully confirmed also by judiciary practice, namely by the practice of Bucharest Tribunal that, in the ruling of the Pre-Trial Chamber judge dated 15.12.2016, unpublished[5], states as follows:

„*The defense contented that it is illegal to intercept ambient conversation between A and B. Thus, the ambient conversation was not carried out in view of discovering some crimes, and neither was it performed because of the existence of some reasonable suspicion with regard to the preparation or committing of a corruption crime. This is assessed and ordered only in light of the preparation or committing of a crime, and only if the evidence could not be obtained in another manner, or could be obtained with difficulty.*

The Court considered that interceptions should be used in a fair manner only when, in the intercepted conversations, references to facts that took place several years ago are voluntary, or when there are judicious clues that the persons involved in the relevant conversation try to cover the tracks of such facts, or to hinder the smooth course of criminal prosecution.

Thus, during the conversation, B. mentioned that he no longer remembers the actual circumstances that were the object of the criminal case. In this context, A. led deliberately the conversation towards the remembrance of some facts and circumstances related to the case matters, referring also to the defendant V.L.O. The entire conversation between the two shows clearly that B. was pressed and directed «to remember» certain matters of interest for the prosecution, and that his story, interspersed with several replies such as «I don't know», «I don't remember», was affected by the insistence and perseverance of witness A.

In such circumstances, the Pre-Trial Chamber judge considered that, in order to inspire safety in the use of evidence for finding the truth, the use of special surveillance techniques should not be «doubled» by witnesses eliciting statements from some persons subject to surveillance,

[5] Ion Neagu, Mircea Damaschin, Andrei Viorel Iugan, Codul de procedură penală adnotat (Annotated Code of Criminal Procedure), Universul Juridic Publishing House, 2018, page 215.

about facts or circumstances that occurred years ago and that the person under surveillance does not narrate on their own, consciously, freely and voluntarily."

3. Conclusions

The use of special surveillance or investigation methods, especially of undercover techniques, may not violate by itself the right to a fair trial, while obtaining evidence in the criminal trial should respect both the standards of the European Convention on the Protection of Human Rights and Fundamental Freedoms and the privilege against self-incrimination, in light of respecting the defendant's right to choose to collaborate or not with the investigation authorities.

The collaborators of criminal prosecution authorities, whether they act under their real identity or not, should not exercise a certain influence on the relevant person, so that the latter makes confessions exactly as a consequence of the influence exercised on them.

Moreover, the use of undercover investigators or real identity investigators, provided under article 148 in the Code of Criminal Procedure, is distinct from the technical surveillance of some person(s), being necessary that, after a person is assigned the quality of „*collaborator*", the judge of rights and freedoms is informed, in view of issuance of the technical surveillance warrant, as set forth expressly by legal provisions.

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DOMESTIC VIOLENCE AND FAMILY RELATIONSHIPS. A FEW LEGAL, SOCIAL AND PSYCHOLOGICAL CONSIDERATIONS

Ioana PĂDURARIU[*]
Vasile COMAN[**]

Abstract

Domestic violence is a serious problem (even a criminal offense under Romanian law) that affects a lot of people around the world, has implications in criminal matters, but also in the field of family law, and transcends national law, with implications at the European level as well. We recall here the convictions for the payment of moral damages before ECtHR. In Romania, domestic violence is regulated primarily by Law no. 217/2003 on preventing and combating domestic violence, but there are also some other provisions related to domestic violence in the Civil Code (Law no. 287/2009) and in the Criminal Code (Law no. 286/2009), as well as in other special laws, such as Law no. 272/2004 on protection and promotion of the rights of the child and Law no. 273/2004 regarding the procedure of adoption. At the European level, we can mention Directive 2011/99/EU on the European Protection Order (EPO), a mechanism for the mutual recognition of protection measures of victims of crime, and we will note that, despite the laudable intentions of the EPO Directive, the aim of which is to provide continuous and similar protection of victims when they are moving across Member States, there are many reasons why the EPO remains under-used in practice. Therefore, the chosen topic aims to find an answer to the question of whether the measures to combat domestic violence are sufficient and effective, both those regulated by national legislation and those provided for in international treaties.

Keywords: *domestic violence, family relationships, European Protection Order (EPO), Temporary Protection Order (TPO), national jurisprudence, ECtHR jurisprudence.*

„In civilized life, domestic hatred usually expresses itself by saying things that would appear quite harmless on paper (…) but in such a voice or at such a moment that they are not far short of a blow in the face."[1]

1. An introduction inspired by Francine Hughes and the „burning bed syndrome"

One of the most famous movies that dealt with domestic violence was „The burning bed" (1984)[1]. In fact, it is both a non-fictional book by Faith McNulty and a 1984 TV movie adaptation that follows Francine Hughes trial for the murder of her husband, following her setting fire to the bed he was sleeping in at their home on March 9, 1977, and thirteen years of physical and sexual domestic abuse. This true story has raised awareness about the important issue

[*] Lecturer, Ph.D., Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: ipadurariu@univnt.ro).
[**] Ph.D. Candidate, Faculty of Law, "Titu Maiorescu" University of Bucharest, Judge, Prahova Tribunal, Criminal Section (e-mail: v.comann@yahoo.com).
[1] C.S. Lewis, *The Screwtape letters (The Devil's letters to his nephew)*, 1942, available at *https://judithwolfe.wp.st-andrews.ac.uk/files/2017/08/Screwtape.pdf*, last consulted on 04.05.2023.
[1] For more details, see *https://en.wikipedia.org/wiki/The_Burning_Bed*, last consulted on 03.05.2023.

of domestic violence and the legal system's response to it. In this case, the jury returned from deliberation and found Francine not guilty by reason of *temporary insanity*. Francine Hughes stood outside her Michigan home, watching her abusive husband burn. Earlier that night, he had beaten and raped her for the last time, and then she drove herself to the authorities and turned herself in. Those were the facts. But let's see a little bit more about the story behind this story. As a child, Francine watched her alcoholic father abuse her mother, and, when she dropped out of high school to marry, she quickly became a spousal abuse victim, too[2], with four children and a husband who spent much of their money on alcohol. A nightmarish marriage, marked by physical, verbal and emotional abuse, lead Francine to a divorce, but, even after that, the abuse continued, and, worst of all, even in front of their children.

Francine did not know it, but she was about to become a central voice in the women's movement which worked to draw attention to the cases of women who were brutalized by their husbands but were rarely taken seriously by America's justice system. The movement created a system of life-saving shelters, laying the foundation for a modern awareness of domestic violence. The story of Francine Hughes didn't mean that domestic abuse stopped, though. By 1977, the same year that Francine Hughes killed her husband, the FBI had reported that spousal abuse was the United States' most underreported crime[3]. Cases like Francine Hughes' helped draw awareness to this issue, and inspire changes in U.S. laws and policies on domestic violence for the better protection of the victims. After she was acquitted due to *temporary insanity*, „burning bed syndrome" became something studied by academics and used as a defense in other cases of women killing their abusers. A decade later, the U.S. Congress passed the *Violence Against Women Act*[4], which established a national domestic violence hotline, forced all the states and jurisdictions to recognize and enforce victim protection orders, and provided funding for domestic violence training for law enforcement officers, among other provisions. So, domestic violence had been recognized as a major national problem, but, even in 2019, in the U.S., „20 people per minute are physically abused by an intimate partner, and one in four women and one in nine men will be victims of severe physical abuse by an intimate partner during their lifetime".[5]

However, it is important to note that movies or books can also perpetuate harmful stereotypes and myths about domestic violence, such as the idea that victims are to blame for the abuse or that the abuser is always a man. In recent years, the issue of domestic violence against men has gained increased attention and recognition within the field of jurisprudence and in popular media. In Romania, the legal system recognizes domestic violence against both men and women and provides legal protection for the victims regardless of

[2] Francine confessed: «I was thinking about all the things that had happened to me (…) all the times he had hurt me (…) how he had hurt the kids (...) I stood still for a moment, hesitating, and a voice urged me on. It whispered, „Do it! Do it! Do it!"». For details, see E. Blackmore, *Francine Hughes Killed Her Abusive Husband and Changed U.S. Views on Domestic Violence*, 21.03.2019, available at *https://www.history.com/news/burning-bed-syndrome-francine-hughes-domestic-abuse*, last consulted on 03.05.2023.

[3] *Ibidem*.

[4] The *Violence Against Women Act* of 1994 is a U.S. federal law signed by President Bill Clinton on September 13. See Office on Violence Against Women, Legislation and Regulations, at *https://www.justice.gov/ovw/legislation*, last consulted on 03.05.2023.

[5] See E. Blackmore, *op. cit., loc. cit.*

gender. But, like in many countries, the societal stigma surrounding male victims of domestic violence remains a significant barrier for many men seeking help. This is often due to the prevalent stereotype that men are supposed to be physically strong and emotionally resilient, and therefore less likely to be victims of domestic violence. On the international level, there is growing recognition of the importance of acknowledging and addressing domestic violence against men. For example, the UN[6] has highlighted the issue of male victims of domestic violence in its publications, as have several international organizations, such as the World Health Organization (WHO)[7] and EU[8].

2. Romanian law on domestic violence

2.1. General considerations and definition

The fight against conjugal (domestic) violence has intensified at the national and international level amid the enrichment of the legal framework and the media coverage of this challenge in the context of the expansion of jurisprudence in civil and criminal cases with this object. From the perspective of civil law, there is an attempt to delegalize disputes with this object, a sign that the preventive measures of conjugal violence work in practice with regard to the victims or co-victims of these illicit interferences. Of course, the effectiveness of prevention depends essentially on knowing the causes of the aggression and, at the same time, on the role of the victim's behavior in generating it. On the other hand, from the perspective of criminal law, there is a worrying increase in the continuing causes of violence within the family, and between family members within the meaning of art. 177 CP, including high-violence crimes such as murder and qualified murder.[9]

The basic regulation of domestic violence is found in Law no. 217/2003 on preventing and combating domestic

[6] For example: report from January 21, 2022, *Exploring conflict related sexual violence against men, boys and LGBTI+ people*, available at *https://www.un.org/sexualviolenceinconflict/report/exploring-conflict-related-sexual-violence-against-men-boys-and-lgbti-people/*, last consulted on 03.05.2023; report from December 9, 2019, *Checklist on preventing and addressing conflict-related sexual violence against men and boys*, available at *https://www.un.org/sexualviolenceinconflict/report/checklist-on-preventing-and-addressing-conflict-related-sexual-violence-against-men-and-boys/*, last consulted on 03.05.2023.

[7] WHO stated that most aggressors are men (*a contrario*, men can also be victims). Both women who experience intimate partner violence and children who are affected, either directly or indirectly, are at a higher risk of developing mental health conditions (the same risk also exists for the men who perpetrate intimate partner violence). WHO contributed to the first Psychiatry Commission on intimate partner violence and mental health, which brought together international experts from a variety of backgrounds (academics, clinicians, and those with lived experience), in order to find some key steps against violence and its consequences (and also to prevent future violence) by „understanding the connections between intimate partner violence and mental health and by „training health care providers in how to look for signs and ask the right questions in the right way". See *https://www.who.int/news/item/06-10-2022-preventing-intimate-partner-violence-improves-mental-health*, 6 October 2022, last consulted on 03.05.2023.

[8] See, for example, point (9) from Directive 2011/99/EU of the European Parliament and of the Council, of December 13, 2011, on the European Protection Order (EPO), OJ L 338/2/21.12.2011.

[9] The same crescendo of serious cases regarding domestic violence was observed in other European countries, such as France, where, for example, between 2020 and 2021, cases of homicide between family members increased by 14%. See *Bilan de plusieurs années d'action contre les violences au sein de la famille*, in Revue Actualité Juridique Famille, no. 1/2023 (January), Dalloz Publishing House, p. 15.

violence[10], but also in other special regulations[11] related to the institution.

Preventing and combating domestic violence is part of the integrated family protection and support policy and is an important public health issue, according to Law no. 217/2003 [art. 1 para. (2)]. The same law defines *domestic abuse* as „any intentional inaction or action of physical, sexual, psychological, economic, social, spiritual, or cyber violence that occurs in the family or domestic environment or between spouses or former spouses, as well as between current or former partners, whether the abuser lives or has lived with the victim″ (art. 3).

Important aspects need to be highlighted. *First of all*, the law recognizes that domestic violence may occur in various types of relationships, including marriage, cohabitation, or familial (domestic) relationships. Moreover, the law also refers to former spouses or former partners, as well as situations in which the abuser lives or does not live with the victim. Therefore, the criterion proposed by the legislator is not strictly related to the fact that the victim and her abuser live in the same place[12], nor to a person's marital status deriving from or outside marriage (including relationships after divorce), free unions, or partnerships. The only condition that emerges from the law is that acts of domestic violence committed are based on a family relationship or on an assimilated into the family relationship. *Secondly*, the legislator's reference to „any intentional inaction or action of (…) violence that occurs in the family or domestic environment *or between* spouses or former spouses, as well as between current or former partners (…)″, justifies the conclusion that the law also protects when the victims are family members other than spouses or former spouses, partners or former partners, such as ascendants and descendants, brothers and sisters, their children, as well as the persons who became such relatives by adoption, within the meaning of the concept of *family member*, retained by art. 5 para. (1)[13] from

[10] Republished in the Official Gazette of Romania, Part I, no. 948/15.10.2020.

[11] Violence, in all the mentioned forms (see *infra*, point **2.2. Forms of domestic violence**), is criminalized in various forms in the Romanian Criminal Code, the legislator even allocating special provisions of criminalization such as domestic violence (art. 199) and the killing or injury of the newborn by the mother (art. 200).

[12] See also A.-Gh. Gherasim, *Violența domestică – noțiune și reglementare la nivel internațional și* național, at *https://lex-avocatura.ro/violenta-domestica-notiune-si-reglementare-la-nivel-international-si-national,* last consulted on 15.03.2023. In addition, see CCR dec. no. 264/2017 (Official Gazette of Romania no. 468/22.06.2017) regarding the exception of unconstitutionality of the phrase „in case that they cohabit″ from art. 5 letter c) of the Law no. 217/2003 on preventing and combating domestic violence (the version published in Official Gazette of Romania no. 365/13.05.2012). CCR admitted this exception of unconstitutionality and decided that it violated the Romanian constitutional provisions of art. 1, regarding the rule of law, of art. 22, regarding the right to life and to physical and mental integrity, and of art. 26, regarding intimate and private life. Moreover, CCR retained that the Convention of May 11, 2011, of the Council of Europe on preventing and combating violence against women and domestic violence, ratified by Romania through Law no. 30/2016, represents a genuine treaty on human rights, and art. 3 letter b) of it provides that „domestic violence″ means all acts of physical, sexual, psychological, or economic violence that occur in the family or domestic environment or between former or current spouses or partners, „regardless of whether the aggressor shares or shared the same domicile with the victim″. Therefore, the Court observed that the cohabitation requirement — imposed by the provisions of art. 5 letter c) of the Law no. 217/2003 to people who have established relationships similar to those between spouses or parents and children, in order to be able to issue a PO —, contains an inconsistency, in the meaning of art. 20 para. (2) of the Romanian Constitution, between the internal law and a treaty regarding fundamental human rights. Since the domestic law does not contain more favorable provisions, the provisions of art. 20 para. (2) of the Romanian Constitution enshrine the priority of the international regulation, in this case, the Convention of May 11, above mentioned.

[13] See *infra*, point **2.3. Subjects of domestic violence**.

Law no. 217/2003 and, with almost the same content, by art. 177 CP[14].

Romanian family law also addresses domestic violence, particularly in the context of adoption or divorce proceedings, but also regarding the exercise of parental authority. Thus, according to art. 508 CC[15], the court may decide that the parent may be deprived of parental rights if he or she endangers the life, health, or development of the child through ill-treatment, abuse of alcohol or narcotics, abusive behavior, gross negligence in the exercise of his parental obligations or rights, or by serious harm to the principle of the best interests of the child. In the domain of adoption, the law[16] provides that it cannot adopt a person who has been convicted of an intentional crime against human beings or against the family, as well as a person who has been deprived of parental rights. The impediment also relates to the situation in which a person wishes to adopt himself or herself and his or her spouse is in one of the aforementioned situations. According to art. 37 para. (7) of the Law no. 272/2004 on the protection and promotion of child rights[17], among the serious reasons that can be taken into account by the judge in order to decide the exercise of parental authority only by one of the parents, there can be retained also the violence against the child or against the other parent, the convictions for violent crimes, and any other reason related to the risks for the child that would derive from the exercise by that parent of parental authority. Moreover, art. 21 of the same law provides some criteria that could be taken into account when the judge determines the child's place to live after divorce, based on his or her best interests, and these criteria include the history of parental violence against the child or against other persons.

The family, in the broader meaning of the concept, is protected at the criminal level and by other provisions of the Criminal Code, such as the offenses contained in Chapter II (offenses against the family) of Title VIII (art. 376-380 on bigamy, incest, abandonment of the family, non-compliance with the measures regarding the custody of the minor, preventing access to compulsory general education).

2.2. Forms of domestic violence

The forms of domestic violence are regulated by art. 4 para. (1) of Law no. 217/2003, and these refer to:

- *verbal violence* (brutal language, such as the use of insults, threats, and degrading or humiliating words and expressions);
- *psychological abuse*[18] (imposing the will or personal control, provoking states of tension and mental suffering in any way

[14] See Law no. 286/2009, published in the Official Gazette of Romania, Part I, no. 510/24.07.2009.

[15] This does not exempt the parent from his obligation to provide financial support to the child (art. 510 CC). See Law no. 287/2009, republished in the Official Gazette of Romania, Part I, no. 505/15.07.2011.

[16] See Law no. 273/2004 regarding the procedure of adoption, republished in the Official Gazette of Romania, Part I, no. 739/23.09.2016 [art. 7 para. (1)-(3)].

[17] See Law no. 272/2004, republished in the Official Gazette of Romania, Part I, no. 159/05.03.2014.

[18] In a recent case, it was admitted the notification regarding the issuance of a PO and disposed that, for a period of 3 months, the aggressor keeps a minimum distance of 50 m from the victim, and any contact with the victim was forbidden. In opposition to the opinion of the court of first instance, the tribunal found, on the basis of the same evidence, that the aggressor exercised forms of psychological violence against the victim. The aggressor's temperament and the threatening and offensive language used in the messages sent to the victim were likely to cause real fear, tension, and mental distress. Thus, the placement of the victim in an inferior position by the aggressor, the disclosure in public space of the conflict between the two on a social page, and his attempt to crush his dignity are among the reasons for issuing the PO (Bucharest Trib., 3rd civ. s., crim. dec. no. 446/A/21.02.2022, *www.rejust.ro*).

and/or by any means, by verbal threats, blackmail, demonstrative violence on objects and animals, ostentatious display of weapons, neglect, control of personal life, acts of jealousy, coercion of any kind, unlawful stalking, monitoring of the home, workplace, or other places frequented by the victim, making telephone calls or other types of communications by means of distance transmission, which by frequency, content, or the moment they are made create fear, as well as other actions with similar effects);

- *physical abuse* (personal injury by beating, pushing, knocking down, hair pulling, pricking, cutting, burning, choking, biting, in any form and intensity, including those disguised as the result of accidents, through poisoning, intoxication, and other actions with similar effect, submission to exhausting physical effort or activities with high degree of risk to life or health and physical integrity, other than those established for economic abuse);

- *sexual violence* (sexual aggression, imposing degrading acts, harassment, intimidation, manipulation, brutality in order to have forced sexual relations, rape, including marital rape);

- *economic abuse* (prohibition of professional activity, deprivation of economic means, including deprivation of means of primary existence, such as food, medicines, and first-aid items; intentional theft of the person's goods; prohibition of the right to own, use and dispose of the common goods; inequitable control over the common goods and resources; the refusal to support the family; the imposition of heavy and harmful work to the detriment of health, including to a minor family member; as well as other actions with similar effects);

- *social abuse* (imposing the isolation of the individual from the family, community, and friends; the prohibition of attending the educational institution or the workplace; the prohibition or limitation of professional achievement; the imposition of isolation, including in the common house; the deprivation of access to the living space; the deprivation of identity documents; the intentional deprivation of access to information; as well as other actions with similar effects);

- *spiritual abuse* (underestimating or diminishing the importance of satisfying moral-spiritual needs by banning, limiting, ridiculing, or penalizing the aspirations of family members, the access to cultural, ethnic, linguistic or religious values, prohibiting the right to speak in one's native language and to teach children to speak in their native language, imposing adherence to unacceptable spiritual and religious beliefs and practices, as well as other actions with similar effects or similar repercussions);

- *cyber violence* [online harassment[19], online gender-related hate speech, online stalking, online threats, non-consensual publication of information and intimate graphic content, illegal access (interception) of communications and private data, and any other form of misuse of information technology and communications via computers, smartphones, or other similar devices that use telecommunications or can connect to the Internet and transmit and use social or e-mail platforms for the purpose of

[19] There is an extension of the general incrimination in art. 208 CP on harassment: (1) The act of a person who repeatedly pursues, without right or without legitimate interest, a person or supervises his or her home, job or other places frequented by him, thus causing him a state of fear, shall be punished by imprisonment from 3 to 6 months or by a fine. (2) Making telephone calls or communications by means of remote transmission that, by frequency or content, cause a person fear shall be punished by imprisonment from one month to 3 months or by a fine, if the act does not constitute a more serious crime. (3) The criminal action is set in motion upon the prior complaint of the injured person.".

embarrassing, humiliating, intimidating, threatening, or silencing the victim].

Para. (2) of art. 4 specifies also that under no circumstances may custom, culture, religion, tradition, or honor be considered as justification for any type of violence defined in this law.

2.3. Subjects of domestic violence. Sanction. Prior complaint

As we have mentioned[20], the applicable law regarding domestic violence also provides a definition of the concept of family member. Thus, the response to the question *Who are the subjects of domestic violence?* is given by art. 5 of Law no. 217/2003. According to the law, *family member* means:

a) ascendants and descendants, siblings, their spouses, and children, as well as persons who become relatives by adoption, according to the law;

b) the spouse and/or former spouse; siblings, parents, and children from other relationships of the spouse or former spouse;

c) persons who have established relationships similar to those between spouses or between parents and children, current or former partners, regardless of whether or not they have lived with the abuser, ascendants and descendants of the partner, as well as their siblings;

d) the guardian or another person who exercises in fact or in law rights related to the child;

e) the legal representative or another person who takes care of a person with mental illness, intellectual disability, or physical disability, except for those who fulfill these attributions in the exercise of professional duties.

The law also underlines, in para. (2) of the same art. 5, that *victim* means a natural person who is subjected to one or more of the forms of violence provided in art. 4, including children witnessing such forms of violence.

Art. 199 CP establishes that the criminal offenses of murder, aggravated murder, battery, and other acts of violence or battery leading to death, committed against a family member, are punished more severely, with the maximum limit of these punishments increasing by a quarter.

In the case of family conflicts, the police can act[21] after a written referral is filed at the police station competent over the territorial area of the victim's home (if it is made by the victim it is called a *complaint*, if it is made by a witness, it is called a *denunciation*), following a telephone call to the service officer of the police station or unit in the respective area or a call to the Single Emergency Call Service 112 (which can be made by anyone aware of such events), a verbal referral made by anyone directly to the police officer patrolling, or the police may find out from the media or during an intervention in a different case. An *ex officio* referral is the way in which the police find out about an offense in any other way than through the victim's complaint. Referrals about acts of domestic violence may also be filed by persons with management positions within a public administration authority or within other public authorities, public institutions, or other legal persons under public law, as well as by any person with control powers who, in the exercise of their powers, has become aware of the commission of an offense for which criminal proceedings are instituted *ex officio*. They are obliged to immediately

[20] See *supra*, point **2.1. General considerations and definition**.

[21] See also *https://www.politiaromana.ro/ro/prevenire/violenta-domestica/temporary-protection-order*, last consulted on 04.05.2023.

notify the criminal investigation body and to take measures so that the traces of the offense, the *corpora delicti*, and any other means of evidence do not disappear (art. 291 CPP).

The victims must know that they can refer *a prior complaint* to the criminal investigation body or the prosecutor. This right is personal and belongs to the injured party, but we must retain that the prior complaint may also be lodged by an agent, in which case the power of attorney must be drawn specifically for this purpose and must remain attached to the complaint during the proceedings. The criminal action in cases of offenses punishable upon prior complaint of the injured person, such as battery or other acts of violence (art. 193 CP); threats (art. 206 CP); rape in non-aggravating forms [art. 218 paras. (1) and (2) CP]; sexual assault in non-aggravating forms [art. 219 para. (1) CP]; theft between family members [art. 231 para. (1) CP]; and destruction [art. 253 paras. (1) and (2) CP], is governed by the *principle of availability*: the victim may decide to withdraw the complaint, a situation which extinguishes the criminal action previously initiated. In the case of the offense of battery or other acts of violence committed against a family member, the criminal action may be initiated *ex officio*, and in this case, the victim's will to stop the punishment of the aggressor can no longer be manifested. For the other categories of offenses (for which the law does not require the lodging of a prior criminal complaint), the criminal investigation bodies do not need the express manifestation of will of the injured person to prosecute the perpetrator, regardless of how they found out about it (complaint, *ex officio*).

We must retain, from art. 289, 295 CPP, that *a prior complaint* shall have a certain form[22] and has to be submitted within a certain deadline (within 3 months from the day when the injured person found out about the perpetration of the deed[23]).

2.4. Temporary protection order (TPO)

According to art. 28 of Law no. 217/2003, republished, the *TPO[24] is issued by the police agents* who, in exercising their professional duties, find that there is an imminent risk that the life, physical integrity, or freedom of a person is endangered by an act of domestic violence.

The police agents establish *the existence of an imminent risk* based on their assessment of the factual situation resulting from the evidence held and the risk assessment form. If, further to the assessment of the factual situation, it is found that the requirements for the issuance of a TPO are not fulfilled, the police agents

[22] A prior complaint is addressed to the criminal investigation body or to the prosecutor only by the injured person or by an attorney-in-fact (there should be a limited power of attorney, which shall remain attached to the complaint). If it is made in writing, the complaint has to be signed by the injured person or by the attorney-in-fact. A complaint may also be submitted verbally, and its content shall be recorded in a report written by the person receiving it. A complaint may also be sent electronically, namely by e-mail, but only if it is certified by an electronic signature. Information which shall be included in the complaint: name, first name, personal identification number, quality and domicile of the claimant, description of the fact forming the object of the complaint, indicating the perpetrator, and the means of evidence.

[23] When the injured person is a minor or a major who benefits of judicial counseling or special guardianship, the term of 3 months shall start running from the date when their legal representative found out about the perpetration of the deed. If the perpetrator is the legal representative of the minor or of the incapacitated person, the term of 3 months runs from the date of the appointment of a new legal representative.

[24] See also *https://www.politiaromana.ro/ro/prevenire/violenta-domestica/temporary-protection-order*, last consulted on 04.05.2023.

have the obligation to inform the persons stating that they are victims of domestic violence that they have the possibility to file with the court an application for the issuance of a protection order (PO).

A TPO issued by a police agent shall order, for a period of 5 days, one or several *protection measures* (art. 31[25] of the above-mentioned law):

- temporary eviction of the aggressor from the common dwelling, irrespective of whether such is the holder of the ownership right thereon;
- reintegration of the victim and, as the case may be, of the children, in the common dwelling;
- ordering the aggressor to keep a determined minimum distance from the victim, from the members of the victim's family, or from the residence, workplace or educational unit of the protected person;
- ordering the aggressor to deliver the weapons held to the police.

A TPO shall also include an indication that the breach of any of the ordered measures constitutes an offense and is punished by imprisonment from one month to one year. If the TPO takes the measure of temporary eviction of the aggressor and their accommodation is not ensured from another source, they shall be informed and guided to the residential centers offering accommodation for homeless people, night shelters managed by the local public administration authorities, or any other adequate place. If the aggressor requests accommodation in a residential center such as those mentioned above, they shall be led by the mobile team (mobile team: representatives of the social assistance public service).[26]

The obligations and interdictions ordered against aggressors by the TPOs become mandatory immediately after their issuance, without any summons or lapse of time. The period of 5 days shall be calculated per hours, *i.e.*, 120 hours from the moment when the TPO was issued.[27] The TPO shall be communicated to the aggressor and to the victim[28] and shall be submitted by the police unit to which the police agent who issued it belongs, for confirmation, to the prosecutor's office attached to the competent local court within whose territorial area it was issued, within 24 hours from its issuance date[29]. The prosecutor or the competent prosecutor's office decides the need to maintain the protection measures ordered by the police body within 48 hours from the issuance of the TPO. If it finds that it is no longer necessary to maintain the ordered protection measures, the prosecutor may order the termination of the protection measures, supporting such orders with reasons and indicating the time from which they cease. The prosecutor shall communicate this immediately to the police unit that submitted the TPO, which shall take measures to immediately inform the persons who formed the object of such an order.[30] If the prosecutor confirms that it is necessary to maintain the protection measures ordered by the police body by the TPO, it shall apply an administrative resolution to its original counterpart. The prosecutor shall then submit the TPO with a term of 5 days,

[25] The violation, by the person against whom a TPO has been issued, of any measures provided for in art. 31 para. (1) and ordered by the TPO constitutes an offense and shall be punished by imprisonment from 6 months to 5 years [art. 47 para. (2) from Law no. 217/2003, republished].

[26] See art. 31 paras. (4), (5) of Law no. 217/2003, republished.

[27] See art. 32 paras. (1), (2) of Law no. 217/2003, republished.

[28] See art. 33 para. (1) of Law no. 217/2003, republished.

[29] See art. 34 para. (1) of Law no. 217/2003, republished.

[30] See art. 34 paras. (3), (5) of Law no. 217/2003, republished.

accompanied by the documents underlying the issuance and confirmation thereof, to the competent local court within whose territorial area it was issued, accompanied by an application for the issuance of the protection order with a maximum term of 6 months. The initial term (of 5 days) for which the TPO was issued shall be extended as of right with the time necessary for the fulfillment of the judicial procedure of issuing the protection order, informing the aggressor of this fact.[31] The TPO may be appealed to the competent court of law within 48 hours of its communication.[32]

2.5. Protection order (PO)

According to the provisions of art. 38 of Law no. 217/2003, republished, *a PO is a judgment issued by a court of law* by which it orders, at the request of a person whose life, physical or mental integrity, or freedom is endangered by an act of violence perpetrated by a family member, one or several of the following measures, obligations, or interdictions, having an interim nature:

- temporary eviction of the aggressor from the family home, irrespective of whether such is the holder of the ownership right thereon;
- reintegration of the victim and, as the case may be, of the children, in the family home;
- limitation of the aggressor's right of use only over a part of the common dwelling when such may be partitioned in such a way that the aggressor does not come in contact with the victim;
- accommodation or placement of the victim, with her consent and, as the case may be, of the children, in a support center;
- ordering the aggressor to keep a determined minimum distance from the victim, from the members of the victim's family or from the residence, workplace or educational unit of the protected person;
- interdiction for the aggressor to go to certain localities or determined areas that the protected person attends or visits periodically;
- ordering the aggressor to permanently wear an electronic device of surveillance;
- prohibition of any contact, including by telephone, by correspondence, or in any other manner, with the victim;
- ordering the aggressor to deliver the weapons held to the police;
- entrusting minor children or establishing their residence.

By the same judgment, the court may order that the aggressor bear the rent and/or maintenance costs for the temporary dwelling where the victim, the minor children, or other members of the family live or shall live because of the impossibility to stay in the family home. Besides any of the measures listed above, the court may order that the aggressor undergo psychological counseling, psychotherapy and may recommend voluntary or non-voluntary hospitalization. If the aggressor is a consumer of psychoactive substances, the court may order, with their consent, their integration into a support program for drug consumers.

According to art. 44 of Law no. 217/2003, republished, PO is *enforceable*. It is immediately communicated (the term is of a maximum 5 hours) to the structures of the Romanian Police within whose territorial area the victim's and the aggressor's dwelling is located. The PO that orders any of the measures provided under art. 38 shall enforce them immediately, by the police or,

[31] See art. 34 paras. (4), (6), (7) of Law no. 217/2003, republished.
[32] See art. 35 para. (1) of Law no. 217/2003, republished.

as the case may be, under their supervision. Another legal obligation incumbent upon the police consists of the duty to supervise the manner in which the protection order is complied with and to notify the criminal prosecution body in case of avoidance of its enforcement.[33]

3. EU law[34]

Romania is a member state of the European Union and, as such, is subject to the EU's legal framework on domestic violence. The EU has adopted several directives and regulations that aim to prevent and combat domestic violence effectively, including:

The Victims' Rights Directive (Directive 2012/29/EU of the European Parliament and of the Council of October 25, 2012, establishing minimum standards on the rights, support, and protection of victims of crime and replacing Council Framework Decision 2001/220/JHA[35]) establishes a mechanism for the mutual recognition of protection measures in criminal matters between Member States and sets out minimum standards for victims' rights in all EU member states, including the right to access to justice, protection, and support. Member states are required to ensure that victims of domestic violence receive appropriate protection and support, including access to legal aid, medical care, counseling, and emergency services. According to paras. (11) and (13), the Directive lays down minimum rules (Member States may extend the rights set out in order to provide a higher level of protection) and applies in relation to criminal offenses committed in the Union and to criminal proceedings that take place in the EU. It confers rights on victims of extra-territorial offenses only in relation to criminal proceedings that take place in the EU. A primary consideration in applying this Directive must be the principle of the children's best interests, in accordance with the Charter of Fundamental Rights of the European Union and the United Nations Convention on the Rights of the Child, adopted on 20.11.1989. Child victims should be considered and treated as the full bearers of the rights set out in this Directive and should be entitled to exercise those rights in a manner that takes into account their capacity to form their own views [para. (14)].

The European Protection Order Regulation allows for the recognition and enforcement of protection orders issued in one member state to be recognized and enforced in another member state. This facilitates the protection of victims who move or travel within the EU. To effectively protect victims of violence and harassment, national authorities often grant them specific measures (restraining, barring, or a similar PO) that help prevent further aggression or re-assault by the offender. If someone has been granted a PO in a Member State and he wishes to continue to benefit from this protection when moving or traveling to another Member State, the EU has put in

[33] The violation, by the person against whom has been issued a PO, of any measures provided for in art. 38 paras. (1), (4) and (5) letters a) and b) and ordered by PO constitutes an offense and shall be punished by imprisonment from 6 months to 5 years [art. 47 para. (1) from Law no. 217/2003, republished].

[34] Information taken over from the „*Study on domestic abuse*", conducted in 2016 by the Crime Research and Prevention Institute, cited by *https://www.politiaromana.ro/ro/prevenire/violenta-domestica/causes-of-domestic-abuse*, last consulted on 08.05.2023, and Camelia Deaconescu, *Cercetare practică violența domestică*, from 06.04.2018, on *https://vdocuments.net/cercetare-practica-violenta-domestica.html*, last consulted on 08.05.2023.

[35] OJ L 315/57 from 14.11.2012, at *https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012L0029*, last consulted on 09.05.2023.

place a mechanism for the mutual recognition of protection measures. National protection measures can be of a civil, criminal, or administrative nature, and their duration, scope and procedures of adoption vary among the Member States. POs orders covered by the Directive and the Regulation concern situations where someone is a victim, or a potential victim, of crime and benefits from a prohibition or regulation of entering certain places or being contacted by or approached by a person causing risk. *Directive 2011/99/EU on the European Protection Order (EPO)*[36] sets up a mechanism allowing for the recognition of protection orders issued as a criminal law measure between Member States. If someone benefits from a PO in criminal matters issued in one Member State, he may request an EPO. Protection should be awarded through a new protection measure adopted by the Member State to which he will travel or move, following a simplified and accelerated procedure. However, if someone benefits from a civil law PO issued in the Member State of his residence, he may use *Regulation (EU) no. 606/2013 on mutual recognition of protection measures in civil matters*[37], which sets up a mechanism allowing for the direct recognition of POs issued as a civil law measure between Member States. Therefore, if someone benefits from a civil law PO issued in the Member State of his residence, he may invoke it directly in other Member States by obtaining a certificate[38] and presenting it to the relevant authorities certifying his rights.

4. Domestic violence, a complex phenomenon

4.1. Causes of domestic abuse[39]

- *Cultural Factors:* the attitudes and social stereotypes that legitimate the dominant role of men[40] and the subordinated role of women, which have been perpetuated throughout the history of humankind; the perception of the divorce[41]; society's acceptance of violence within a couple[42]; the fact that violence is seen as a form of resolving tensed or conflictual situations[43].

[36] OJ L 338/2 from 21.12.2011, on *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32011L0099*, last consulted on 02.05.2023.

[37] OJ L 181/4 from 29.06.2013, on *https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R0606*, last consulted on 02.05.2023.

[38] OJ L 263/10 from 03.09.2014, on *https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0939*, last consulted on 02.05.2023.

[39] Information taken over from the *Study on domestic abuse*, conducted in 2016 by the Crime Research and Prevention Institute, cited by *https://www.politiaromana.ro/ro/prevenire/violenta-domestica/causes-of-domestic-abuse*, last consulted on 08.05.2023, and C. Deaconescu, *Cercetare practică violența domestică*, from 06.04.2018, at *https://vdocuments.net/cercetare-practica-violenta-domestica.html*, last consulted on 08.05.2023.

[40] Thus, the main factor responsible for the manifestation of the phenomenon of domestic abuse is represented by the mentality of the men superiority. It should not be forgotten that in Romania, in particular in the rural environment, the family is still under the control of men, being based on the patriarchal pattern of relationships, in which the man decides and the woman listens to, conforms to, and follows.

[41] A perspective according to which a divorce is the recognition of a failure, mostly a woman's failure, who is responsible for the unity of the family, is still passed on by education.

[42] Violent family conflicts, in which the woman is a victim, become to a certain extent known within the entourage and within the community where they live, and the lack of reaction of the people around shows indifference or even tacit approval.

[43] This may be seen not only at the level of the family or couple, but also at the community level. Violence is used in order to impose one's own vision on divergent aspects. That is why the family of origin, the entourage, the group of friends, and the group of colleagues are as many factors determining an individual's behavior as the modalities of action and resolution of conflicts.

- *Mass media* contributes to keeping violence alive and, without any doubt, it has a role in the rise of aggressiveness. Violence is a form of aggressiveness that is learned, and the easiest form of learning is by imitation, which is why the media plays an essential role (news, television programs, cartoons), and violence is abundant.

- *Social and economic factors:* poverty is one of the most frequently incriminated factors in the appearance and proliferation of domestic violence and determines frustration in a person, which generates, in turn, a negative energy that affects family life; financial dependency of a woman, which exists in many of the cases of domestic abuse, favors the victim's lack of reaction and, thus, she chooses to endure; however, a conclusion that domestic abuse is a characteristic of poor families is wrong without affecting the economic middle or upper classes because this type of behavior is manifest in all environments.

- *Legal Factors:* the cumbersome legal procedures applicable in the case of requesting custody of children, the lack of training of some of the experts from the public institutions – social workers, prosecutors, and psychologists; moreover, the crisis of trust in the legal system may be an aggravating factor of this phenomenon.

- *Political Factors:* the lack of political interest in women's problems in general and domestic abuse in particular; the excessive valorization of the family as private space, by limiting the intervention of the State in the life of a couple; the lack of involvement of women in political life.

Besides these causes, there are several circumstances which determine or favour the occurrence of domestic abuse, such as: *excessive alcohol consumption*; *partners' jealousy*; *partners' infidelity*; *sexual problems of the couple*; *arguments regarding children*, existence of unwanted children or divergences regarding the manner of upbringing and educating children; *the woman's desire to become financially independent* - consolidation of woman's status in the family, uncooperating negotiation of her position in the family; *difficulties which make the couple vulnerable* (poverty/depreciation of living standard associated with feelings of failure and frustration; absence of jobs/unemployment associated with feelings of insecurity; stress associated with various unpleasant events, such as loss of job, accident etc.; health condition of one or both partners).

There is a *vicious circle of violence*. Although it all starts with the acceptance of a first act of aggression („*first slap*"), unfortunately, in time, the violent episodes may become more frequent, intense, and more severe. Moreover, the abusive process may start even before the creation of the couple. May be a predisposition, a role learned from childhood, the role of passive victim. Remember the case of Francine Hughes? Persons who unconsciously try to seek in their life partner a model seen in their family of origin, which may be abusive. Other people project an ideal partner in a person they have just met, refusing to see his true personality, living in their own fantasy, and interpreting some of his traits in an idealized manner. Often, the abusing person is forgiven, but, in time, as the frustration rises, the level of tension rises, and the acts of violence become more frequent and severe. The victim's emotional and financial dependency on the aggressor determines, however, that the victim must repress her preservation instincts, find excuses for the aggressor, and remain in this abusive relationship. There are even situations in which the victims may change or adapt her personality in order to no longer incite her life partner to aggressive behaviors and hesitate for a long time before they decide to ask for support or before they effectively

take the decision to exit the dysfunctional relationship. If this happens, it is quite late; there is a tendency to postpone this moment as much as possible. There are also extreme situations, which are less frequent, of *high-risk abusers* who are not characterized by a gradual or phased process of violent behavior within the couple; these cases are very severe from the beginning and often end with hospitalization or even the death of the victim.

4.2. How about a safety plan?

It is not easy to leave a violent relationship. The aggressor[44] either does not admit how severe his behavior is, or promises to change if he is forgiven and supported by the family. Most of the time, he uses emotional blackmail and blames other people for the current situation in the family. Regardless of the control strategy that the abuser applies, the victim[45] should know that she has the right to a dignified life and that there are institutions and NGOs that may help her solve the crisis. There are available resources for abused and beaten women, including shelters, training centers for specialization in a profession, legal services, and child care. By staying and continuing to accept repeated abuses, hoping that he would eventually realize that he was wrong and change, the victim consolidates his conviction that he may do more. The victim's patience contributes, in fact, to the perpetuation of the problem. Even if the abuser attends psychological counseling, there is no guarantee that he will change. After hours of therapy imposed by the victim or by a judge, many abusers continue to be violent. Regardless of whether the victim decides to stay or leave the abusive partner, there are several measures that may confer on her a higher level of personal safety. Here are some *recommendations[46] made by the Romanian Police and the representatives of the „Necuvinte" Association[47]*: be prepared for emergency situations[48], make an escape

[44] Abusers are often described as having low self-esteem, excessive jealousy, aggressive and hostile personalities, low communication skills, low social skills, an intense need for power or feelings of incapacity, anxiety or a strong fear of abandonment, narcissistic personalities, egoism, etc. Most of the time, people who are violent at home seem not to be aware or responsible for their actions or have unbalanced personalities; they cannot manage their anger or nervous breakdowns. However, except for pathological cases, aggressors are normal people from a mental standpoint who are to be found in all social categories without essential distinctions in terms of education or social status. The aggressor's attitude is characterized by: *minimizing responsibility for their own behavior*; *transfer of responsibility for the act of violence to the partner*; *transfer of responsibility to other persons or situations that negatively influenced the cohabitation with the partner*: her parents, her siblings or other relatives, her friends; the poverty, unemployment, etc. See *Study of domestic abuse, op. cit., loc. cit.*

[45] Victims (most of them women) learn that violence is outside their control or that it is normal, and, thus, they become depressed and incapable of helping themselves. Which is specific to a victim of domestic violence is the material or emotional dependency on the aggressor, internalizing traditional mentalities regarding the woman's role within a couple, as well as the presence of personality traits predisposing her to such victimization (mental fragility, self-blaming tendency, docility, obedience, anxiety, conformism, irascibility; they may be persons without initiative or they may lack objective perception of reality). See *Study of domestic abuse, op. cit., loc. cit.*

[46] See *https://www.politiaromana.ro/ro/prevenire/violenta-domestica/temporary-protection-order*, and, for the Romanian version, *https://www.necuvinte.ro/cere-ajutor/planul-de-siguranta/*, last consulted on 08.05.2023.

[47] „Necuvinte" Association is a Romanian non-governmental organization (NGO), created in 2013 in order to combat discrimination, abuse, and gender-based violence. See, for details, *https://www.necuvinte.ro/mission-vision/?lang=en*, last consulted on 08.05.2023.

[48] The victim must be aware of the signs triggering the abuse and use any reason to get away from the abuser and get out of the house. Moreover, the victim must identify the safe areas of the house where she takes refuge (it's better to avoid small spaces, spaces without escape, or rooms with potential weapons – like the kitchen, and, if possible, choose a room with a telephone and an exit room or a window) and set a code (word, phrase, or signal) by which the victim's friends or neighbors know about the danger, so that they call the police for help.

plan[49], get another mobile telephone[50], communicate safely on the internet[51], protect yourself against GPS supervision and recording devices[52], keep your location secret[53], ask for help by calling 112!

4.3. Consequences of domestic abuse in general and their effects on children in particular

Domestic abuse impacts the *physical and mental health conditions* of the victims, their *professional life*, their *economic status*, and their *social relationships*. The victim may suffer injuries that require medical care, as well as temporary or permanent emotional disorders (acute or chronic depression, phobias, post-traumatic stress, panic attacks, anxiety, insomnia), personality disorders, and, sometimes, behavior disorders, food disorders, and even suicide attempts. Regarding the professional and economic status, the aggressor may prohibit the victims from taking a job, or if they already have a job, they may find it difficult to maintain it because of repeated medical leaves after the aggressions suffered. From a social point of view, the victims are radically or gradually isolated from their family, group of friends, colleagues, and social support services. The aggressor prohibits the victim from keeping in touch with the world outside the home, threatens her, has crises of jealousy, and beats the victim if she does not submit to the interdictions invented by the aggressor. The social isolation of the victim is one of the most serious drivers of failure in the woman's attempt to exit such dependency.

Family violence is the main cause of pre-delinquent behaviors in minor children (running away from home, leaving school, vagabondage), which is a first step towards delinquency in the form of theft, robbery, drug consumption and trafficking etc. Most of the children who were sexually abused within their families became abusers, continuing the cycle of violence. Children are always affected by abuse against their mother and may become, in turn, victims of

[49] The victim must be prepared to leave the house in case of need, keep a spare key of the car for herself, a minimum amount of money for emergencies, clothes, important telephone numbers, and her identity documents and the children's identity documents hidden in a safe place (*e.g.*, in a friend's house), and try to memorize a list of emergency contacts and ask several persons that she trust if she may contact them in case of need.

[50] When the victim looks for help against the abuser, it is important that she: covers the traces, especially when using the telephone or the computer; uses a prepaid telephone sim card; verifies the settings of her mobile telephone – there are mobile telephone technologies that the aggressor may use in order to listen to her calls or in order to track where she is, so it's better that the victim close the telephone when she is not using it or no longer take it with her when she is running away from the aggressor.

[51] Many times, the aggressors monitor the activities of their partners, including the use of the computer. While there are means to delete the internet browsing history, it is nearly impossible to delete all evidence from the computer, the history of visited sites, etc., if the victim doesn't know a lot about computers. It is most safe to use a computer outside the house (*e.g.*, at work place, at the house of a friend, or at the library). Also, the victim must consider creating a new e-mail account not known to the aggressor, using new user names and passwords, changing the passwords of the online banking services, and choosing passwords that the aggressor may not guess (not birthdays, nicknames, or other personal information).

[52] The aggressor may use hidden cameras, such as „Nanny Cam", or even a baby monitor in order to monitor the victim. The GPS devices may be hidden in the car, bag or other items that the victim carries. The aggressor may also use the GPS system of the car in order to see where the victim has been.

[53] It is better that the victim not list the telephone number and, for invoices and correspondence, use a post office box rather than her home address. Also, it is safer to cancel the former bank accounts and credit cards, especially if they were joint accounts with the aggressor, and to use another bank for opening new accounts; to change the daily routine, to use another route to get to work, to avoid places where they used to go together with the aggressor and to always keep a charged mobile phone all the time in case of emergencies.

the aggressor, who, in most cases, is their biological father or stepfather. So, there is for sure a link between acts of abuse suffered in childhood and the risk of becoming victims/aggressors when growing up (boys face a higher likelihood of becoming aggressors, and girls face a higher likelihood of becoming victims). It is essential that they benefit from support in order to deal with the experience of violence and to understand that a life of terror and abuse is not normal. *Symptoms of children exposed to violence*: sleep disorders and food disorders; bedwetting; speech disorders; behavioral disorders: aggressive behavior towards colleagues, friends, and teachers or passivity to other people's aggressive behavior; depression, anxiety, introversion, fear of abandonment, fear of injuries, and fear of death; learning and socializing difficulties in school; suicidal thoughts or attempts.[54]

5. Romanian and ECtHR jurisprudence

As we have mentioned above in Sections 2.4. and 2.5., the PO is one of the most commonly used legal measures to protect victims of domestic violence, designed to provide a swift and effective response to incidents of domestic violence by granting immediate protection to the victim. However, it is important to note that POs are not always effective in stopping domestic violence. In some cases, perpetrators may continue to harass or harm their victims even after a PO has been issued. This can occur if the perpetrator ignores the order, if the order is not enforced effectively, or if the victim is not able to report any violation of the order to the authorities. Moreover, POs are not a single solution to domestic violence. Other measures may include counseling and support services for victims, education and training for perpetrators, and more effective prosecution and punishment of domestic violence crimes. It is important that POs are enforced effectively and that victims receive the support and resources they need to stay safe and recover from the trauma of domestic violence.

5.1. Romanian jurisprudence

From the unpublished case-law of the national courts on *high-violence crimes (murder, qualified murder, etc.) against family members* [especially regarding art. 188 para. (1) CP, art. 199 para. (1) CP], we have noted the following relevant decisions:

- constitutes murder the act of the recidivist defendant who, due to jealousy, being in his home, applied to his concubine repeated and high-intensity blows all over his body with fists, legs, and a stick, causing traumatic injuries that led to the slow death of the victim (with whom he also had a minor child, at the time of the act being pregnant, even if the defendant did not know this aspect). It has been shown that living together, assimilated into a marriage, obliges the defendant, at least morally, to care for and show affection for the woman with

[54] Children raised in families where verbal or physical violence is present learn that, by using violence, you may obtain what you want, impose your standpoint, and make the others listen to you. Men who punish women are shown as real men, who know how to be confident, who do not express their feelings, and who are always listened to and respected. In a family affected by aggressive behaviors, children live in an environment in which their needs for safety and emotional security are deeply altered. Instead of parental authority, such a home hosts terror, which does not educate, does not form a balanced adult, and may stop the normal mental and emotional development of the child. See WAVE study, *Away from Violence: Guidelines for Setting up and Running a Refuge* (2004), pp. 10-14, available at *http://fileserver.wave-network.org/trainingmanuals/Away_from_Violence_2004_English*.pdf, last consulted on 31.04.2023.

whom he lived, and in no case should the defendant apply such brutal treatment to the victim, invoking the excuse of jealousy. These circumstances led the first court to focus on the special maximum of the main penalty provided by the law (16 years and 8 months in prison);[55]

- the act of the defendant who, being drunk, applied repeated blows with a hard body to his wife (the leg with heavy boots with a hard bomb, the noise of strong blows applied to the victim being heard to the house of his neighbors), producing traumatic injuries that led to her death, meets the constituent elements of the crime of murder on a family member, for which the defendant was sentenced to 10 years imprisonment as a result of the benefit of the simplified procedure;[56]

- in another case, it was noted that, being under the influence of alcoholic beverages and against the background of violent behavior with his family, the defendant applied several blows to his wife in various areas of the body, including the head, using the tail of a hard object with which he repaired through the yard, causing them multiple traumatic injuries that eventually led to death three days later, despite emergency surgery;[57]

- in the relevant case-law relating to the crime of simple murder of a family member – parent (mother or father), another judgment held that the act of the defendant who exercised acts of physical aggression on his mother, aged 69, as a result of which she died, it constitutes the crime of murder committed on a family member, for which he was sentenced to 25 years in prison; it was established that the defendant was known to be an excess consumer of alcoholic beverages, he usually went to his parents' home to ask them for money to buy alcohol and cigarettes and, if they did not have money, the defendant resorted to acts of violence toward his parents, the father - 73 years old and the mother - 69 years old, who were often in a position to leave home, to take refuge at neighbors or to sleep in the field;[58]

- it meets the constituent elements of the crime of attempted murder on a family member, and not the crime of family abandonment, the act of the defendant who abandoned his newly born daughter (aged 4 days) behind a building in Bucharest, next to some garbage bins, in a plastic bag, with the intention of suppressing her life; in this case, the defendant abandoned her 4-day-old minor daughter near some garbage bins, in a bag that made her little visible, on an isolated alley that was clogging and had no access to the boulevard, in the evening, in adverse weather conditions, aspects that could unquestionably prove that the defendant acted with the indirect intention of suppressing the victim's life; it is not relevant that the victim was found, by chance, shortly after being abandoned by a witness, nor that she was subjected to physical violence, the manner in which the defendant acted being sufficient to lead to the child's death;[59]

- on May 1, 2016, while at his common home, the defendant struck his 82-year-old grandmother repeatedly with his fists and legs („he jumped" on his grandmother's head), which suffered injuries that led to death; following that, the defendant was sentenced to 10 years in prison; the intention to kill cannot be judged in the light of the relationship between the

[55] Bucharest CA, 1st crim. s., dec. no. 576/A/21.04.2015, unpublished.
[56] Bucharest CA, 1st crim. s., dec. no. 1027/A/28.08.2015, unpublished.
[57] Ploiești CA, crim. s. and for cases with minors, dec. no. 550/A/08.05.2017, unpublished.
[58] Bucharest CA, 1st crim. s., dec. no. 988/A/27.07.2015, unpublished.
[59] Bucharest Trib., 1st crim. s., sent. no. 1788/22.07.2016, unpublished.

author and the victim of the feelings nourished by the defendant for the victim, these being subjective and do not remove his willful character and thus do not constitute a component of the offense examined; however, it indicates the seriousness of the act and can be used for the individualization of the punishment.[60]

5.2. ECtHR jurisprudence

ECtHR has been active in addressing domestic violence cases and has issued several landmark decisions that have influenced the legal frameworks of member states, including Romania. During the past thirteen years, the Court has firmly established that domestic violence can constitute a violation of ECHR; however, the way in which this issue has been contextualized by ECtHR has varied and evolved, namely in terms of which articles of the ECHR have been held to have been violated in such cases.

Case *Jurišić v. Croatia*[61] *(no. 2)*, a recent decision that relates to domestic violence, concerned a woman who had been subjected to domestic violence by her husband and who had sought protection from the Croatian authorities. In this case, the applicant had reported several incidents of domestic violence to the police and obtained a PO against her husband. However, the PO was not enforced effectively, and the applicant continued to experience abuse from her husband. She subsequently filed a complaint with the Croatian authorities, alleging that they had failed to protect her from domestic violence. ECtHR found that Croatia had violated the applicant's rights under art. 3 ECHR (prohibition of torture and inhuman or degrading treatment) and art. 14 ECHR (prohibition of discrimination). The Court held that Croatia had failed to provide effective protection to the applicant from domestic violence and that the authorities had not taken the necessary measures to prevent further abuse. The Court also found that the applicant had been subjected to discrimination on the grounds of her gender, as the authorities had failed to take her complaints of domestic violence seriously and had not provided her with effective protection. The Court emphasized that the state has a positive obligation to protect victims of domestic violence, regardless of their gender, and that failure to do so can constitute discrimination. This decision is significant in several ways. It reaffirms the positive obligation of states to protect victims of domestic violence and emphasizes the need for effective measures to prevent and punish domestic violence, including criminal sanctions, POs, and support for victims. It also highlights the importance of a coordinated and effective response to domestic violence, involving different agencies and actors, and the need to address the issue of gender discrimination in the context of domestic violence.

Case *M.S. v. Italy*[62], another recent decision, concerned a woman who had been subjected to domestic violence by her

[60] Prahova Trib., crim. s., dec. no. 174/22.04.2016, unpublished. On the crime of murder (consumed or attempted) on a family member within the meaning of art. 177 CP, see also: Alba Trib., crim. s., dec. no. 52/17.06.2020, unpublished (the victim was a descendant); Bucharest CA, 1st crim. s., dec. no. 955/A/09.07.2015, unpublished (victims were the concubine of the defendant and her father); Brașov CA, crim. s., dec. no. 311/Ap/11.04.2019, unpublished (victims were the wife and two children).

[61] App. no. 8000/21, final judgment from 07.10.2022, available at *https://hudoc.echr.coe.int/eng?i=001-218132*, last consulted on 09.05.2023.

[62] App. no. 32715/19, final judgment from 07.10.2022, available at *https://hudoc.echr.coe.int/eng?i=001-218130*, last consulted on 09.05.2023.

partner and who had sought protection from the Italian authorities. The applicant had reported several incidents of domestic violence to the police and obtained a PO against her partner. However, the PO was not enforced effectively, and the applicant continued to experience abuse from her partner. She subsequently filed a complaint with the Italian authorities, alleging that they had failed to protect her from domestic violence. The ECtHR found that Italy had violated the applicant's rights under art. 3 ECHR (prohibition of torture and inhuman or degrading treatment) and art. 14 ECHR (prohibition of discrimination). The Court held that Italy had failed to provide effective protection to the applicant from domestic violence and that the authorities had not taken the necessary measures to prevent further abuse. The Court also found that the applicant had been subjected to discrimination on the grounds of her gender, as the authorities had failed to take her complaints of domestic violence seriously and had not provided her with effective protection.

Case *Volodina v. Russia*[63], another valuable addition to the ECtHR case law on domestic violence, reinforces the positive obligations placed upon states to protect victims. The applicant argued before ECtHR that the Russian authorities had violated art. 3 ECHR (due to their failure to protect her from repeated acts of domestic violence and to hold the perpetrator accountable) and also had failed to establish a legislative framework to address domestic violence and to investigate and prosecute her ill-treatment under the existing criminal law provisions. In addition, the applicant argued that the failure of the authorities to put in place specific measures to combat gender-based discrimination against women constituted a violation of art. 14 ECHR, in conjunction with art. 3. ECtHR also held that, due to the repeated complaints that the applicant had made to the police, the authorities ought to have been aware of the violence to which the applicant had been subjected and of the real and immediate risk that such violence could recur. ECtHR pointed out that measures such as restraining orders or POs are not available in Russian law. The Court stated that the response of the authorities had been „manifestly inadequate" and that the state had failed in its duty to investigate the ill-treatment that the applicant had suffered; therefore, there had been a violation of art. 3 ECHR. In respect of the alleged violation of art. 14, the Court commented that „substantive gender equality can only be achieved with a gender-sensitive interpretation and application of the Convention provisions that takes into account the factual inequalities between women and men and the way they impact women's lives." ECtHR held that the evidence submitted by the applicant, along with information from international and domestic sources, was sufficient to establish *prima facie* indications that in Russia, domestic violence affects women disproportionately. However, the authorities had not adopted any legislation that was sufficient to provide protection to women who have been disproportionately affected by domestic violence. ECtHR thus held that there had also been a violation of art. 14, in conjunction with art. 3.

[63] App. no. 40419/19, final judgment from 14.12.2021, available at *https://hudoc.echr.coe.int/eng?i=001-211794*, last consulted on 09.05.2023. See also an interesting analysis of this decision by R.J.A. McQuigg, *The European Court of Human Rights and Domestic Violence: Volodina v. Russia*, in International Human Rights Law Review, 07.05.2021, available at *https://brill.com/view/journals/hrlr/10/1/article-p155_155.xml?ebody=full%20html-copy1*, last consulted on 09.05.2023.

In the Case *Buturugă v. Romania*[64], Romania was sentenced by ECtHR to pay moral damages to a woman because the authorities did not respond appropriately to her reports of conjugal violence, a case that highlighted the inefficient management by the Romanian authorities of a domestic violence case in our country. In this case, although the victim of domestic violence has made many efforts to demonstrate the abusive behavior to which she was subjected by her former life partner, her actions have met the indifference of the Romanian authorities. Although the victim asked the Prosecutor's Office attached to the Tulcea Court for an electronic search of the family's computer in order to prove that her partner had abusively consulted her electronic accounts and that he had made copies of his private conversations, the prosecutor's office rejected the victim's request, motivated by the fact that the evidence that could have been thus obtained by search would not be related to the threatening and violent crimes committed by the partner. Thus, ECtHR concluded that the Romanian authorities did not address the criminal investigation into the Commission of a crime of conjugal violence and that, in doing so, no measures were taken appropriate to the seriousness of the facts denounced by the applicant. There has also been no substantive examination of the complaint concerning the violation of electronic mail, which, according to the Court, is closely linked to complaints of striking and other violence. Therefore, there has been an omission in compliance with the positive obligations under art. 3 and 8 ECHR and a violation of these provisions.

Another significant case was *Talpis v. Italy*[65]. E. Talpis suffered years of domestic violence from her alcoholic husband. He attacked her on numerous occasions, causing her injuries, and he also tried to make her have sex with his friends by threatening her with a knife. After E. was hospitalized, she moved into a shelter for three months, but she had to leave due to a lack of space and resources. She tried to tell the authorities about her situation several times, lodged a formal complaint, asking for prompt action to protect her and her children. However, the police did nothing for months and this situation of impunity only caused further acts of violence. One evening in November 2013, E. contacted again the authorities. The police stopped her husband and found that he was in a drunken state, but they allowed him to go home. He went to the house in a rage, attacking E. with a knife. Her 19-year-old son tried to stop him. The husband stabbed the boy, who died of his injuries. E. was also stabbed several times in the chest as she tried to escape, but she survived the attack. ECtHR ruled that the authorities had failed to take steps to protect E. and her son given their knowledge of her husband's violent behavior and the immediate threat he caused. The authorities had also failed to take any steps to investigate her complaints for an excessively long time. By underestimating the seriousness of the domestic violence, the authorities had allowed a situation to develop where it was being carried out with impunity. These failings had been discriminatory, as they were linked to the fact that the violence was being carried out against a woman in the home. Evidence showed that many women in Italy were being murdered by their

[64] App. no. 56567/15, final judgment from 11.06.2020, available at *https://hudoc.echr.coe.int/eng?i=001-201342*, last consulted on 09.05.2023.

[65] App. no. 41237/14, final judgment from 18.09.2017, available at *https://hudoc.echr.coe.int/eng?i=001-171994*, last consulted on 09.05.2023.

partners or former partners and that society at large continued to tolerate acts of domestic violence. The Court reiterates that in domestic violence cases perpetrators' rights cannot supersede victims' human rights, and the State has a positive obligation to take preventive operational measures to protect an individual whose life is at risk.[66]

In *Eremia v. Republic of Moldova*[67], ECtHR found that Moldova had violated the applicant's right to an effective remedy by failing to investigate and prosecute her husband for domestic violence. E's husband, a police officer, had been abusive towards her, often in the presence of their teenage daughters (whose psychological well-being were affected as a result). A PO had been issued against E's husband upon E's first request but was not respected by the husband and was partly revoked on appeal. E filed a criminal complaint and claimed to have been pressured by other police officers to withdraw the complaint. Although a criminal investigation was finally launched and substantive evidence of the husband's guilt was found, the prosecutor suspended the investigation for one year, subject to the condition that the investigation would be reopened if the husband committed another offense during that time on the basis that the husband had committed „a less serious offense" and „did not represent a danger to society." ECtHR found a violation of art. 3 ECHR in respect of E as the suspension of E's husband's criminal investigation in effect shielded him from criminal liability rather than deterring him from committing further violence against E. The Court concluded that the refusal to speed up the urgent examination of their request for a divorce, the failure to enforce the PO, and the insult of E by suggesting reconciliation since she was „not the first nor the last woman to be beaten up by her husband", and by suspending the criminal proceedings amounted to „repeatedly condoning such violence and reflected a discriminatory attitude towards the first applicant as a woman", thus violating art. 14 ECHR. There was also a violation of art. 8 ECHR in respect of E's daughters regarding their right to respect of private life, including a person's physical and psychological integrity. The Court ordered the State to pay the applicants non-pecuniary damages, cost and expenses.

In Case *Opuz v. Turkey*[68], ECtHR held that the failure of Turkish authorities to protect the applicant and her mother from repeated acts of domestic violence by the applicant's husband (H.O.) violated their right to be protected from torture and inhuman or degrading treatment under art. 3 ECHR. The Court emphasized the importance of effective protection measures, including POs, in preventing and addressing

[66] As a result of this decision in Italy, between 2015 and 2018, a series of additional reforms were carried out, including: legal changes to strengthen the rights of victims of domestic violence; life imprisonment for the murder of a spouse or partner; training of police and judges about how to combat domestic and gender-based violence; a wide range of public events and national campaigns to raise awareness of the issue; a 24-hour phone line and specialist support units for victims; and an action plan to combat domestic violence from 2017-2020 with substantial financial resources. Following these reforms, the number of convictions has increased, and the length of criminal proceedings is decreasing. However, the Council of Europe continues to monitor the issue of domestic violence in Italy while further evidence is gathered about the effectiveness of the reforms. See also *https://www.coe.int/en/web/impact-convention-human-rights/-/deadly-attack-on-woman-and-her-son-leads-to-ongoing-reforms-to-combat-domestic-violence*, last consulted on 08.05.2023.

[67] App. no. 3564/11, final judgment from 28.08.2013, available at *https://hudoc.echr.coe.int/eng?i=001-119968*, last consulted on 09.05.2023. See also *https://www.law.cornell.edu/women-and-justice/resource/case_of_eremia_v_the_republic_of_moldova*, last consulted on 08.05.2023.

[68] App. no. 33401/02, final judgment from 09.09.2009, available at *https://hudoc.echr.coe.int/fre?i=001-92945*, last consulted on 09.05.2023.

domestic violence. The victim and her mother were repeatedly abused and threatened by the victim's husband, abuse that was medically documented. The victim's husband and his father were at one point indicted for attempted murder against the two women, but both were acquitted. The abuse continued after the acquittal and eventually resulted in the husband's father killing the victim's mother. The husband's father was tried and convicted for intentional murder, but because he argued provocation and exhibited good behavior during the trial, his sentence was mitigated, and he was released pending an appeal[69]. Taking into consideration regional and international treaties as well as the domestic situation in Turkey, ECtHR held that Turkey violated art. 2 ECHR (the right to life), art. 3 ECHR (the prohibition of torture and inhuman or degrading treatment), and art. 14 ECHR (the prohibition of discrimination), and Turkey was obliged to pay the victim non-pecuniary damages and costs. It held that the Government was liable for not taking action to protect victims of domestic violence. As a result, this was the first time a Court recognized that the failure of states to act against domestic violence was a violation under the Convention. The case concerned alleged incidents of violence, including attempted murder, death threats, harassment, and ongoing physical assault, and occasioning grievous bodily harm towards the applicant and her mother (whom he later shot and killed). This was brought to the attention of the relevant state authorities on numerous occasions; however, prosecutions against H.O. were discontinued because the two women withdrew their complaints. On release, after appealing his conviction, H.O. again harassed the applicant, leading her to the ECtHR, claiming violations under the convention. Such a judgment was considered ground-breaking in regards to international law on violence against women and the state's responsibility. It recognized that States must take a proactive approach in cases where the violence is serious and must bring criminal proceedings against perpetrators of such violence. More significantly, the Court also acknowledged the extent to which violence against women is an issue of inequality and how this impedes the enjoyment of other rights. This was done through non-European sources, such as General Recommendation no. 19 of the CEDAW Committee which highlighted gender-based violence. Thus, it is hoped that the decision could „make a difference for hundreds of thousands of women victims of domestic violence in Europe."[70]

6. NGOs and their roles

There are many *NGOs*, both in Romania and in the world, that are actively involved in addressing the issue of domestic violence. These organizations provide a range of services to victims of domestic violence, including counseling, legal advice, and support groups. These NGOs play a critical role in addressing the issue of domestic violence, and their work is essential in supporting victims, raising public awareness, and advocating for policy changes. Their efforts have helped to raise the profile of this issue and have contributed to the growing recognition of domestic violence as a serious problem that requires a comprehensive and coordinated response.

Here are a few examples:

[69] See *https://www.law.cornell.edu/women-and-justice/resource/opuz_v_turkey*, last consulted on 08.05.2023.

[70] See also the essay *Analysis of the ECtHR judgment in Opuz v. Turkey*, 10.11.2020, on *https://www.lawteacher.net/free-law-essays/human-rights/analysis-of-the-echr-judgment-in-opuz-v-turkey-6831.php#_ftn23*, last consulted on 08.05.2023.

- *„Necuvinte" Association*[71] is a Romanian NGO from 2013, created in order to combat discrimination, abuse, and gender-based violence. It is a member in four specialized national and European networks (Women Against Violence Europe – WAVE, the VOLUM Federation, the Federation of Non-Governmental Organizations for Social Services – FONSS and „We break the silence about sexual violence"). This organization has taken important steps to pave the way for other organizations. From solid partnerships with public institutions with responsibilities in preventing and combating gender-based violence to the first national campaign and caravan „Broken Wings", implemented in partnership with the Romanian Police, to the amendment of Law no. 217/2003 and the proposal to amend the Criminal Code, this association maintains its path to profound change in Romanian society.

- *FILIA Center - Women's Association*[72] was created in 2000 with the aim of developing gender studies at an academic level so that they contribute, through expertise and epistemic authority, to emancipation strategies in Romanian society. This is a feminist NGO that focuses on promoting women's rights and combating violence against women and provides a range of services to victims of domestic violence, including counseling, legal advice, and emergency accommodation.

- *European Women's Lobby*[73] *(EWL)*: The EWL is the largest umbrella organization of women's associations in the European Union. The organization works to promote women's rights and gender equality, including addressing issues related to violence against women.

- *Amnesty International*[74]: is a global human rights organization that works to promote and protect human rights worldwide, including women's rights and addressing violence against women. The organization helps fight abuses of human rights worldwide, bring torturers to justice, change oppressive laws and free people jailed just for voicing their opinion.

- *European Union Agency for Fundamental Rights*[75] *(FRA)*: The FRA is an EU agency that provides support and expertise to the EU and its Member States on issues related to fundamental human rights.

7. Conclusions

In Romania, domestic violence is a widespread problem, with many cases reported each year. According to statistics from the Public Ministry[76], in 2021, 1.561 victims of domestic violence in the country were reported (cases judged by the national courts of Romania), 621 of whom were minor children. However, it is important to note that many cases of domestic violence go unreported (and therefore unjudged), so the true number of incidents is likely much higher. In Europe, domestic violence is also a significant problem, with many high-profile cases reported in recent years. For example, in 2018, the case of a French woman named Jacqueline Sauvage[77] gained international attention after she was sentenced to 10 years in prison for killing her

[71] See *https://www.necuvinte.ro/mission-vision/?lang=en*, last consulted on 20.04.2023.
[72] See *https://centrulfilia.ro/istoric/*, last consulted on 20.04.2023.
[73] See *https://www.womenlobby.org/Mission-vision-values?lang=en*, last consulted on 20.04.2023.
[74] See *https://www.amnesty.org/en/what-we-do/*, last consulted on 20.04.2023.
[75] See *https://fra.europa.eu/en*, last consulted on 20.04.2023.
[76] See *https://www.mpublic.ro/sites/default/files/PDF/vf_2021.pdf*, last consulted on 07.04.2023.
[77] See *https://www.france24.com/en/20200729-french-woman-pardoned-for-killing-her-husband-after-years-of-domestic-abuse-dies-at-72*, last consulted on 07.04.2023.

abusive husband. The case sparked a national debate in France about the treatment of domestic violence victims in the justice system. In the world, domestic violence is a pervasive problem that affects millions of people each year. Recent high-profile cases of domestic violence include the case of Sarah Everard[78], a young woman who was murdered by a police officer in the UK in 2021, and the case of Gabby Petito[79], a young woman who was found dead after going missing while on a road trip with her partner in the US in 2021. These cases highlight the serious and ongoing problem of domestic violence, both in Romania, Europe, and around the world. It is important that individuals, organizations, and governments continue to work together to raise awareness about this issue, provide support to victims, and take action to prevent and address domestic violence in all its forms.

Domestic violence is a serious violation of human rights that affects millions of individuals worldwide, including in Romania. The country has established legal provisions in both criminal and family law to prevent, intervene in, and sanction domestic violence effectively. Additionally, Romania is subject to EU and ECHR regulations that impose obligations to prevent, investigate, and punish domestic violence effectively. The ECtHR has played a significant role in shaping the legal frameworks of member states, including Romania, by emphasizing the positive obligation of states to protect victims of domestic violence and hold perpetrators accountable. However, there are still challenges to effectively addressing domestic violence, including ensuring that victims have access to support services and protection orders, providing adequate training to law enforcement and judicial personnel, and addressing cultural attitudes that normalize domestic violence. It is crucial that these challenges are addressed to ensure that victims of domestic violence receive the protection and support they need and that perpetrators are held accountable for their actions.

Domestic violence against men is a real issue, and it's important to acknowledge and address it as well. While the majority of domestic violence victims are women, men can also experience domestic violence, both in heterosexual and same-sex relationships. In Romania, the legal provisions regarding domestic violence apply to both men and women, and the criminal and family law provisions are gender-neutral. This means that any person who experiences domestic violence, regardless of their gender, can benefit from the legal protection and support services available. However, it's important to note that men who experience domestic violence may face additional challenges in seeking help and support, as there can be cultural and social stigma attached to men admitting that they are victims of abuse. This can make it more challenging for men to come forward and report domestic violence or seek support services. It's also worth noting that the dynamics of domestic violence may be different in cases where the victim is a man. For example, the abuse may be more likely to involve emotional or psychological abuse than physical violence, and the perpetrator may be more likely to use control or intimidation tactics than physical force.

De lege ferenda, we ask ourselves the need to create a jurisdiction that will be strictly specialized in the matter of marital (domestic) violence. In France, in December

[78] See *https://mirror.shorthandstories.com/saraheverard/index.html*, last consulted on 07.04.2023.
[79] See *https://www.cbsnews.com/news/gabby-petito-brian-laundrie-timeline/*, last consulted on 07.04.2023.

2022, a legislative proposal[80] was adopted (at first reading) in order to create a jurisdiction specialized in intra-family violence. It provides for the establishment of a specialized tribunal for family violence in each court of appeal, which will include a judge specialized in this type of litigation, who will be assisted by two assessors. The Tribunal is specialized in criminal and civil disputes; in the latter case, it can issue a protection ordinance (*ordinance de protection*). In Romania, there is no court strictly specialized in this respect, as there is (only formal and conceptual) the Tribunal for Minors and the Family and Criminal Sections for Minors and Family in some of the courts of appeal, which adjudicate cases in the common law procedure. Also, in the case of acts of violence that constitute offenses, there is no special procedure for such disputes in the Criminal Procedure Code, although in the Criminal Code there is a chapter on offenses committed against a family member (Chapter III of Title I – offenses against a person), which criminalizes domestic violence (art. 199), in which an aggravated sanctioning regime is established for classical violent crimes (murder, qualified murder, hitting or other violence, bodily injury, death-giving blows) and the killing or injury of the new-born by the mother (art. 200).

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[80] See *Vers une juridiction spécialisée en matière de violences conjugales*, in Revue Actualité Juridique Famille, no. 1/2023 (January), Dalloz Publishing House, p. 6.

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