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LESIJ - Lex ET Scientia International Journal

CIVIL LIABILITY FOR PUBLIC COMMUNICATION UNDER CURRENT ROMANIAN REGULATIONS

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Abstract

Freedom of the press does not exclude the obligation of journalists to cover the damages created by their materials, especially by exceeding the freedom of speech. Nevertheless, holding someone liable for exercising a fundamental right is not always as simple as mere tort liability. Under Romanian regulations, the journalist will have to cover the damages only if his work can be qualified as an illicit act, or an illegal content. Alongside an introduction, the paper will consist of three parts: 1. general provisions for the liability of the journalist under national provision, 2. special provisions regarding liability according to Romanian law, by reference to International law, namely, the European Convention on Human Rights and 3. Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act). This article aims to identify the particularities of journalist liability or of another person who makes a public communication, in order to remedy the deficiencies of the current regulation.

Keywords: *journalist liability, freedom of speech, public communication, freedom of expression, defamation.*

1. Introduction

Freedom of expression, starting with the first regulations from the time of the French Revolution, until now, has not had the nature of an absolute right, being constantly limited to protect the rights and legitimate interests of other people. For this reason, in most national and international regulations, freedom of expression knows limits both in terms of the message transmitted and in terms of the effects of the communication.

If the limits are exceeded, the material made public may harm other people. Unlike other categories of illegal acts, press crimes produce irreversible effects, which cannot be completely removed from society.

Under these conditions, the injured person cannot benefit from a return to the previous situation, but possibly from a compensation for the damage suffered, under the conditions of tortious civil liability.

The present work will be structured in three substantial parts, of which the first concerns the general conditions for attracting the responsibility of the journalist in the national legislation, and the second will relate to the limits of freedom of expression as derived from the European Convention on Human Rights, and the third will identify the journalist's liability criteria under the terms of Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a single market for digital services and

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amending Directive 2000/31/EC (Regulation on digital services).

The first part involves the analysis of the provisions of art. 30 of the Romanian Constitution, together with the provisions of the Civil Code that regulate both the limits of public communication and the legal regime of civil liability.

The second part will involve the identification of the limits of freedom of expression according to the two normative acts that regulate fundamental rights, the criteria for classifying an act as illegal will be analyzed starting from the content of art. 10 of the EDO Convention. Beyond the analyzed doctrine, decisions will also be used of the Romanian courts and the EDO Court, relevant for this topic.

The third part assumes an increased degree of actuality, as the Regulation on digital services entered into force on 16th of February 2024. In this sense, the general conditions under which media platforms and, implicitly, journalists, are responsible for the content brought to the public's attention will be analyzed.

2. The general conditions for incurring the responsibility of the journalist in the national legislation

In national law, civil liability for criminal acts is regulated by art. 1349, para. 1 and 2 of the Civil Code[1]: "(1) Every person has the duty to comply with the rules of conduct imposed by the law or local custom and not to harm, through his actions or inactions, the rights or legitimate interests of other people. (2) Whoever, having discernment, violates this duty is responsible for all the damages caused, being obliged to repair them in full". The previously rendered provision must be correlated with the provisions of art. 1357, paragraph 1 of the Civil Code: "He who causes damage to another through an illegal act, committed with guilt, is obliged to repair it".

Corroborating these texts, we note that the author of an illegal act, by which damage was caused to another person, is obliged to compensate the person whose legitimate rights or interests were harmed. Since the Romanian legislator established subjective tort liability[2], the illegal act must be committed with guilt, including in the form of the slightest fault.

The classification as illegal of an act committed through public communication implies its reporting to the limits of freedom of expression as regulated in national law, respectively in international law. To the extent that they have been violated, simply bringing the message to the public's attention constitutes an illegal act in the sense contemplated by art. 1357 of the Civil Code.

At the national level, the relevant limits of freedom of expression are found in art. 30, par. 6 and 7 of the Constitution: "(6) Freedom of expression cannot prejudice the dignity, honor, private life of the person, nor the right to one's own image. (7) Defamation of the country and the nation, incitement to war of aggression, national, racial, class or religious hatred, incitement to discrimination, territorial separatism or public violence, as well as obscene manifestations contrary to good morals, are prohibited by law."

The previously rendered provisions are relevant in considering the corroboration with art.75, para. 1 and 2 of the Civil Code, which stipulates: "(1) It does not constitute a violation of the rights provided for in this

[1] Law no. 287/2009, published in the Official Gazette of Romania, Part I, no. 505/15.07.2011.

[2] L. Pop, I. F. Popa, S. I. Vidu, *Tratat elementar de drept civil. Obligațiile*, Universul Juridic Publishing House, Bucharest, 2015, p. 327.

section the infringements that are allowed by law or by international conventions and pacts regarding human rights to which Romania is a party. (2) Exercising constitutional rights and freedoms in good faith and in compliance with international pacts and conventions to which Romania is a party does not constitute a violation of the rights provided for in this section". This last provision constitutes a criterion for analyzing the proportionality of the limitation of the fundamental right[3].

Analyzing the limits provided by art. 30, para. 6 of the Constitution, we note that any public communication is prohibited to the extent that it damages: a) a person's dignity, b) a person's honor, c) their private life and d) the right to their own image. The four limitations strictly target the persons injured by the publicly communicated material and refer to the effects produced on them. Concretely, regardless of the content of the message, the deed will have an illegal nature only in the hypothesis where a concrete injury has occurred to one of the four values protected by the Constitution.[4]

In the specialized literature[5], these were called limitations *in personam*, as they relate to the injured person. Correlatively, the other limitations have an *in rem* nature, that is, they depend only on the content of the transmitted message, their effects not being relevant to the illegal nature of the deed.

Reconciling respect for private life with the right to information is sometimes difficult to achieve, but information becomes legitimate even if it affects private life, if it is useful to the general interest, provided that it does not harm human dignity.[6] It was thus considered that information is always illegal when it is not justified by a general interest.[7]

We note that civil liability acts as a sanction directed against the author of the illegal act[8], being, at the same time, a means of repairing the damage caused to another person.

If the *in rem* or *in personam* limits of freedom of expression are violated, the provisions of art. 30, para. 8 of the Constitution will become applicable, according to which: "Civil liability for the information or for the creation brought to public knowledge rests with the publisher or creator, the author, the organizer of the artistic manifestation, the owner of the means of multiplication, of the radio or television station, under the law. Press offenses are established by law".

In judicial practice, it was appreciated that the statement of a journalist of the type "policeman with the IQ of a boar" has a character of mockery, with the sole purpose of offending, without transmitting any information of interest to the interlocutor, thus exceeding the admissible limits of the exercise of the law to free expression, enshrined in art. 10 of the European Convention. Thus, even within the limits allowed by the literary genre used by the journalist, the use of this appellation

[3] S. Al. Vernea, *Privacy and the press. A practical approach to art.74 of the Romanian Civil Code*, Fiat Iustitia, no.1/2021, p. 188.

[4] T. Toader, M. Safta, *Constituția României. Decizii ale Curții Constituționale, hotărâri C.E.D.O., hotărâri C.J.U.E., legislație conexă,* Hamangiu Publishing House, Bucharest, 2015, p. 148-149.

[5] S. Al. Vernea, *Dreptul comunicării*, Hamangiu Publishing House, Bucharest, 2021, p. 39.

[6] C. Jugastru, *Classic and modern in the field of private life*, in Acta Universitaris Lucian Blaga no. 1-2/2003, pg. 61.

[7] M. Nicolae, V. Bîcu, G. Al. Ilie, R. Rizoiu, *Drept civil. Persoanele*, Universul Juridic Publishing House, 2016, p. 58.

[8] G. Boroi, L. Stănciulescu, *Instituții de drept civil în reglementarea noului Cod civil*, Hamangiu Publishing House, Bucharest, 2012, p. 238.

damages the plaintiff's right to image, representing an interference in the right to private life, incompatible with freedom of expression and journalistic ethics.[9]

When assessing the actual moral damage caused to the plaintiff, the court took into account the negative consequences and implications that the defamatory materials had on the plaintiff's professional and family level, the mental discomfort experienced by the plaintiff, being indisputable even if he was considered psychologically fit for the exercise the position held.

Also, when assessing the proportionality of the pecuniary sanction, account was taken of the position held by the plaintiff, as well as the quality of the defendants as journalists, opinion makers and the means by which the derogatory statements were propagated to the public. It was considered that the illegal act was committed through the written media, in the online environment where information spreads much faster, being easily accessed by the public through search engines.

In another case[10], it was ruled that the simple finding of the illegal nature of the way in which the defendants exercised their right to free expression, to the extent that it only aims to repair the damage caused to the reputation by disseminating defamatory information unsupported by a relevant factual basis, cannot be likely to contribute to preventing the mass media from fulfilling its task of information and control, but possibly only to draw attention to the importance of respecting ethical rules in the exercise of the essential role that the press has in a democratic society.

In judicial practice[11], it was held that, in order to be a passive procedural subject within the legal relationship related to public communication, it is necessary from a legal point of view for the party to have achieved or to have contributed, in any way, to the achievement of the facts of which they are accused by the plaintiffs , respectively the facts consisting in the "making and publishing", on the website, of photos, video recordings and comments in which the plaintiffs are presented in private activities - more precisely the 20 articles incriminated by them.

Also, in order to have passive procedural quality against the second claim of the plaintiffs regarding the obligation to prohibit the publication, "on the website of the magazine or on other partner sites" of any photos or video recordings in which the plaintiffs are presented in the framework of private activities, the defendant should be able to make or determine such publications.

With regard to the claim of the plaintiffs regarding the obligation to prohibit the remittance for broadcasting in some TV shows of these materials, the defendant should also be able to carry out or determine these operations, finding that it cannot be forced to fulfill the claims plaintiffs, because it is not related to the editorial content of the website.

We note that the Romanian legislator, at the constitutional level, stipulated rules regarding liability incurred by public communication carried out outside the limits allowed by law. The order of liability is not accidental[12], since the illegal act is not strictly limited to the drafting of material with an illegal content, but to its

[9] Civil judgment no. 33 of 15.02.2024 of the Arad Court – First Civil Division, unpublished.

[10] Civil judgment no. 6769 of 26.09.2023 of the Court of Sector 5 Bucharest – Second Civil Section, unpublished.

[11] Civil judgment no. 77 of 21.01.2016 of the Bucharest Court – Fourth Civil Section, unpublished.

[12] I. Muraru, E.S. Tănăsescu (coord.), *Constituția României. Comentariu pe articole*, C.H. Beck Publishing House, Bucharest, 2008, p. 293.

dissemination to the receiving public. Thus, in order, the publisher of the publication or the creator of the show or broadcast will be held liable for the first time. In concrete terms, the constitutional legislator considered that the editor and the producer have the vocation to control the content of the material and to disseminate it, respectively bring it to the public's attention only to the extent that it corresponds to the editorial policies of the publication. Under these conditions, once the editorial control has been carried out, and the material has received the necessary approval for publication, the responsibility will fall, first of all, on the publisher, respectively the creator.

In the event that they do not exist, for example in the case of publishing materials on a blog, or on a personal page accessible on social networks, the responsibility can only fall to the author. We appreciate that a possible control of a technical nature, carried out by the administrator of the online platform on the content of the posted material (for example the automatic search for offensive words, or inciting hatred, discrimination, etc.) is not equivalent to an editorial control, but to a measure of filtering of illegal content, which does not imply the existence of an agreement on the part of the online platform to the hosted material.

As a rule, the author is determined or determinable starting from the authentication criteria on the respective platform.

In the situation where the author cannot be identified, since the material was posted by an unauthenticated person or who used an obviously unreal identity, according to the Constitution, the responsibility will fall on the event organizer. In our opinion, the liability has, in this situation, the nature of a guarantee, based on the fault of the organizer who did not allow the traceability of the author of the publicly communicated work. In essence, it is a responsibility for one's own act, since the public communication was made on the occasion of a social event (scientific, cultural, etc.), and the organizer of the event is responsible for his act of bringing the anonymous work to the public's attention.

Finally, for the hypothesis in which there is no organizer of the event, the responsibility will fall, for identity of reason, on the owner of the means of multiplication, of the radio or television station. In our opinion, an interesting problem arises in the case of online publications, since they do not presuppose the existence of a means of multiplication or a radio or television station. For the current understanding of the constitutional regulation, we consider it necessary to report it at the time of drafting. In 1991, when the Romanian Constitution was adopted, the only mass media were represented by the written press, radio and television. Under these conditions, the constituent legislator sought to ensure the existence of an entity that would bear subsidiary responsibility for public communication, in whatever form it was carried out, especially through the mass media. Currently, with the development of online media, we appreciate that the situation of the owner of the means of multiplication is taken over by the online platform that allows the dissemination of the communication made by the author to any interested person.

Based on this finding, we are of the opinion that in the absence of any possibility of identifying the author of a post, the responsibility for its content, in a subsidiary way, belongs to the person who manages the online platform that hosts the post.

3. The journalist's liability under Romanian law by reference to the European Convention on Human Rights

As a preliminary note, we note that freedom of expression enjoys a substantial regulation in art. 10 of the European Convention on Human Rights: "(1) Every person has the right to freedom of expression. This right includes freedom of opinion and the freedom to receive or communicate information or ideas without the interference of public authorities and regardless of borders. This article does not prevent states from subjecting broadcasting, cinematography or television companies to an authorization regime. (2) The exercise of these freedoms, which entail duties and responsibilities, may be subject to formalities, conditions, restrictions or sanctions provided for by law, which constitute necessary measures, in a democratic society, for national security, territorial integrity or public safety, the defense of order and the prevention crimes, the protection of health or morals, the protection of the reputation or the rights of others, to prevent the disclosure of confidential information or to guarantee the authority and impartiality of the judiciary".

Starting from the previously reproduced regulation, we note that the limitations of the fundamental right are allowed only under the conditions of paragraph 2, respectively in the case of their provision in internal normative acts, only to the extent that they are necessary in a democratic society for the expressly listed objectives, and insofar as they are proportionate to the intended purpose. We note that in addition to the national regulation, art. 10 of the ECHR Convention also recognizes a right to receive information, equivalent to art. 31 of the Romanian Constitution[13]. In certain areas of regulation, the right of access to information assumes a distinct regime from freedom of expression[14], having a derogatory regime from the general rules common to these rights. In the present situation, we will limit our analysis strictly to the freedom of expression itself.

The guarantee that art. 10 of the convention offers it specifically to journalists with regard to reporting on issues of general interest, it is subject to the condition that they act in good faith, based on accurate facts, and provide reliable and accurate information, respecting journalistic ethics.[15] Another criterion evaluated in the case consists in the extent of the dissemination of information which can also be important, depending on the type of newspaper in question, with national or local circulation, important or not important.[16]

At the same time, the court will take into account the quality of the person targeted by the incriminated articles, since the status of the person who is the target of the slanderous statements is a criterion of the examination carried out by the Court in cases related to slander. In this sense, the Court considered that the "limits of admissible criticism" are much more extended in the case of persons with public

[13] S.Al.Vernea, *The legal nature of the right to information under Romanian regulations*, in the collective volume Challenges of the Knowledge Society 2021, "Nicolae Titulescu" University Publishing House, Bucharest, 2021, p. 690.

[14] See in this sense S. Al. Vernea, *The Romanian legal regime of access to information in environmental matters*, Fiat Iustitia, no.1/2022, p.116.

[15] Judgment of March 29, 2016 in the case of *Bédat v. Switzerland*, Application no. 56925/08, para. 60.

[16] Judgment of November 16, 2004 in the case of *Karhuvaara et Iltalehti v. Finland*, Application No. 53678/00, para. 47.

status than in the case of simple persons under private law.[17]

The Court ruled that it is necessary to distinguish between persons under private law and persons acting in a public context, as political figures or public figures. Thus, while a person under private law unknown to the public can claim special protection of his right to private life, this is not valid for public persons as well.[18]

The European Court of Human Rights established with principle value that art. 10 para. 2 of the Convention implies duties and responsibilities, applicable equally to journalists, even when it comes to matters of significant general interest. These duties and responsibilities can be of particular importance if there is a risk of harm to a person's reputation.[19]

Moreover, in the case of *Axel Springer AG v. Germany*[20], the ECtHR established to what extent a balance can be maintained between freedom of expression (art. 10 of the Convention), its limits and respect for the right to a good reputation (art. 8 of the Convention), in apparent conflict.

The exercise of freedom of expression includes obligations and responsibilities, the extent of which depends on the situation and the technical procedure used, and that the guarantee offered by Article 10 to journalists is subject to the condition that those concerned act in good faith, so as to provide accurate and worthy information trustworthy with respect for journalistic ethics.

Under these conditions, the role of the press as an opinion maker and the particular impact of the information and opinions published implies the exercise of freedom of expression under certain deontological conditions that guarantee the natural exercise of the role of the press in a democratic society.[21]

If, by virtue of its role, the press has the duty to alert the public when it is informed of alleged embezzlement by local elected officials and public officials, the fact of directly pointing to specific persons, indicating their names and functions, implies for the plaintiffs the obligation to provide a sufficient factual basis.

In its practice, the Court decided that, in the absence of good faith and factual basis, and although the disputed article was part of a wider and very current debate for society - the corruption of officials - the claimants' claims are not the expression of a "dose of exaggeration" or "provocation" which is allowed in the exercise of journalistic freedom.[22]

Specializing, the pamphlet was confirmed as a journalistic style recognized and protected by the freedom of expression included in art. 10 of the ECHR. It is also revealing in this sense that the Council of the European Union, in the meeting of May 12, 2014, adopted, *inter alia*, the following guidelines under the title "EU Human Rights Guidelines on Freedom of Expression Online and Offline": The expression can take any form including the language spoken, written and sign language, as well as

[17] Judgment of September 12, 2011 in the case of *Palomo Sánchez and others v. Spain (GC)*, Applications nos. 28955/06, 28957/06, 28959/06 and 28964/06, para. 71.

[18] Judgement of June 14 2005 in the case of *Minelli v. Switzerland* (dec.), Application no. 14991/02.

[19] Judgment of June 19, 2012 in the case of *Tănăsoaica v. Romania*, Application no. 3490/03, also judgment of February 6, 2001 in the case of *Tammer v. Estonia*, Application no. 41205/98.

[20] Judgment of February 7, 2012, in the case of *Axel Springer AG v. Germany*, Application no. 39954/08.

[21] R. Chiriță, *Convenția europeană a drepturilor omului. Comentarii și explicații*, *2nd edition*, C.H. Beck Publishing, Bucharest, 2008, pg 562.

[22] Judgement of January 31, 2006, in the case of *Stângu and Scutelnicu v. Romania*, Application no. 53899/00.

non-verbal expressions such as images and art objects, all of which are protected. The means of expression may include books, magazines, pamphlets (...)." The Court has emphasized on several occasions that satire is a form of artistic expression and social commentary which, by exaggerating and distorting the reality that characterizes it, aims naturally to provoke and agitate it is for this reason that any interference with the right of an artist or any other person to express himself in this way needs to be scrutinized very carefully.

The European Court of Human Rights showed that art. 10 includes the artistic freedom to participate in the public exchange of cultural, political and social information and ideas of all kinds. Consequently, those who create, interpret, disseminate or exhibit a work of art contribute to the exchange of ideas and opinions indispensable to a democratic society.[23]

In order to establish whether the exercise of the right to free expression of the defendants, journalists, constituted an interference with the right to private life of the plaintiff, respectively whether their sanctioning is necessary in a democratic society and pursues a legitimate purpose, in accordance with the ECHR principles revealed in the case of Lingens v. Austria, it was held that it is necessary to make a careful distinction between facts, on the one hand, and value judgments, on the other. If the material aspect of the former can be proven, those in the second category do not lend themselves to demonstrating their accuracy.[24] The obligation of proof is therefore impossible for value judgments and violates the very freedom of opinion, a fundamental element of the right guaranteed by art. 10.[25]

Although freedom of expression is recognized internationally, both in terms of content and limits, we note that in the ECHR Convention there are no provisions regarding liability for exceeding its limits.

Consequently, we will take into account that any overstepping of the limits of freedom of expression, as recognized by the Convention, is likely to attract the liability of the author of the public communication, however, under the conditions of national law, respectively starting from art. 30, paragraph 8 from the Constitution and from art. 1357, paragraph 1 of the Civil Code.

An interesting problem arises when there is a conflict between national (even constitutional) norms and international norms regarding the same right. In this regard, according to article 20, paragraph 2 of the Constitution, "If there are inconsistencies between the pacts and treaties regarding fundamental human rights, to which Romania is a party, and the internal laws, the international regulations have priority, except in the case in which the Constitution or internal laws contain more favorable provisions". In this hypothesis, the limits of freedom of expression will be determined starting from the most favorable incident treatment for the right holder. Correlatively, his liability will be incurred only if by exercising the freedom of

[23] Judgement of May 24, 1988, in the case of *Müller and Others v. Switzerland*, Application no. 10737/84 para. 27 et seq.; Judgement of October 22, 2007, in the case of *Lindon, Otchakovsky-Laurens and July v. France (GC)*, para. 47.

[24] Judgement of May 7, 2002, in the case of *McVicar v. the United Kingdom*, Application no. 46311/99, para. 83; Judgement of July 8, 1986, in the case of *Lingens v. Austria*, Application no. 9815/82 para. 46.

[25] Judgement of April 23, 2015, in the case of *Morice v. France (GC)*, Application no. 29369/10 para. 126 Judgement of September 9, 1999, in the case of *Dalban v. Romania (GC)*, Application no. 28114/95 para. 49 Judgement of May 23, 1991, in the case of *Oberschlick v. Austria (no. 1)*, Application no. 11662/85 para. 63.

expression both the limits regulated at the internal level and those resulting from the Convention have been violated.

4. The responsibility of the journalist under the terms of Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 (Digital Services Act)

With the entry into force on February 16, 2024 of the DSA Regulation, the liability of online platforms has entered a new regulatory stage.

Beyond the previous regulations in the e-commerce directive, there are currently directly applicable rules in national law regarding the liability of any online platform for the posting of illegal content.

With priority, we note that the regulation does not consider the responsibility of the journalist, but the responsibility of the online platform, as it expressly results from the content of art. 3, letter g of the Regulation, but this appears as relevant in public communication as it represents the equivalent of "multiplication means" referred to in art. 30, paragraph 8 of the Romanian Constitution, previously analyzed.

As a rule, starting from the provisions of art. 6 of the DSA Regulation, we note that the provider of the information service, in this case the person who is responsible for the administration of the platform, is responsible for the posting of "illegal content". The definition of the notion can be found in art. 3, letter h of the Regulation, as "any information which, in itself or by reference to an activity, including the sale of products or the provision of services, does not comply with the law of the Union or the law of any state member that complies with Union law, regardless of the object or exact nature of that right".

We note that illegal content refers to any information that does not comply with the law of the Union or of any member state, regardless of the object or nature of that law. Under these conditions, according to our assessment, both what exceeds the limits provided by art. 30, par. 6 and 7 of the Romanian Constitution and art. 10, paragraph 2 of the European Convention on Human Rights, has the nature of illegal content.

The regulation does not expressly stipulate the obligation of providers to compensate the injured persons, however, it contains in art. 6 a clause of exemption from liability, which leads to the conclusion that every posting of illegal content attracts the responsibility of the provider, with the expressly mentioned exceptions. Art. 6, paragraph 1 of the DSA Regulation stipulates: "If an information society service is provided that consists in storing information provided by a recipient of the service, the service provider is not responsible for the information stored at the request of a recipient of the service , provided that the provider: (a) has no actual knowledge of the illegal activity or illegal content, and with respect to actions for damages, has no knowledge of facts or circumstances from which the illegality of the activity or content results; or (b) upon becoming aware of such matters, act promptly to remove the illegal content or to block access to it."

In such a situation, the obligation to compensate rests with the service provider, less in the situation where he does not know the content of the posted information, and, from the moment he became aware of it, acted promptly to eliminate or restrict access to the material qualified as "content illegal".

At first glance, this provision presents a slight contradiction with the constitutional provisions, but, in reality, we consider that the European legislator has validated our

interpretation in the sense of attracting the subsidiary liability of the administrator of the online platform on which materials with illegal content are posted, as a way of updating of the provisions of art. 30, paragraph 8 of the Constitution.

5. Conclusions

Since freedom of expression has never been an absolute right, it is natural that its limits should be strengthened by establishing sanctions for holders who abuse their right. Even so, the sanctions must present a degree of rigor specific to legal liability, and their effects must be predictable for society.

Essentially, we consider that the current national regulation is mostly reliable, but it has a high number of shortcomings regarding online media, for which there is no clear legal framework.

With the entry into force of the DSA Regulation, a new framework was established for the liability of online service providers, including news platforms or social media platforms, which requires the adjustment of the current tortious civil liability mechanisms so that they can respond to the new challenges arising from online public communication.

In these conditions, given the unprecedented technological evolution and the way it has affected the mass media, we appreciate that the adoption of a law regarding the legal regime of public communications carried out in the online space appears to be necessary, while the DSA Regulation has an extreme object of limited regulation.

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SPECIFICITY AND EFFECTIVENESS OF REPRESENTATION BY LAWYERS OF THIRD PARTIES

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Abstract

This study seeks to deepen the institution of the representation by lawyer of third parties, combining in this sense the provisions of the current Code of Civil Procedure in the matter of representation as well as the provisions of Law 51/1995, the State of the lawyer profession as well as the Code of Ethics regarding the actual activity of the lawyer provided under the legal assistance contract in the case of representing a third party intervening in a legal proceeding. In order to carry out this study, we will analyze the legislation in force, treaties, courses, commentary codes such as monographs published by established authors in the field of civil procedural law, but also decisions pronounced by national and European courts with relevance and impact in the analysis of the institutions addressed.

Keywords: *representation, lawyer, intervening third party, assistance contract, judicial procedure.*

1. Introduction

The study addresses an important and current topic, both under the legislative dimension and from the perspective of the practical situations encountered, essentially aiming at an objective presentation of the issue of conventional representation by a lawyer of third parties involved. In the current civil procedural dimension, third parties are either legal subjects who have nothing to do with the civil process, being strangers to it, or persons who intervene voluntarily or are forcibly introduced into a process that has already started. In order for the third parties who intervene in the process to become parties, certain conditions must be met, namely: the existence of an ongoing process (the third parties intervene or are forcibly introduced through incidental requests made by those who are already parties to the process or are introduced ex officio by court or at its request, in the cases provided for by art. 78 of the Civil Procedure Code), the existence of a connection with the main claim is also necessary, which requires that they be tried together, but last but not least, the existence of an interest in being tried in a process initiated by other people.

2. Third party participation and legal representation

Depending on the method of participation, third parties intervene voluntarily or at the request of the parties in the process or because of the court's order. The forms of intervention are classified into voluntary intervention, which can be main (when the intervener formulates his own claims against the parties in the process) or accessory (when the intervener does not formulate his own claims, but only

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intervenes to support the defense of one of the parties to the process) or forced intervention which, in turn, has several forms: summoning another person to court (art. 68-71 Civil Procedure Code), summoning in guarantee (art. 72-74 Civil Procedure Code), showing the right holder (art. 75-77 Civil Procedure Code) and the ex officio introduction of other persons into the case (78-79 Civil Procedure Code)[1].

The institution of procedural representation can be defined as that form of civil representation that highlights the circumstance in which a person, as a representative, empowered in this sense - conventionally or by law, concludes or completes procedural acts in the name and in the interest part of a process[2].

The procedural acts performed by the representative produce effects vis-à-vis the party they represent, within the limits of the power of attorney granted[3].

The parties may appear in court through an elected representative, in accordance with the law, unless the law requires their personal presence before the court. Thus, by way of example, the law requires that the procedural documents be completed personally by the parties in the divorce procedure, according to art. 921 para. (1) of the Code of Civil Procedure, before the substantive courts, the parties will appear in person, outside only if one of the spouses is serving a custodial sentence, is prevented by a serious illness, benefits from special guardianship[4], resides abroad or is in

[1] I. Deleanu, *Noul Cod de procedură civilă. Comentarii pe articole. Vol. I (art. 1-612)*, Universul Juridic Publishing House, Bucharest, 2013, pp. 120 and following. I. Leș, D. Ghiță (Coord.), *Tratat de drept procesual civil. Vol. I. 2nd edition*, Universul Juridic Publishing House, Bucharest, 2020, pp. 101-103. G. Boroi, M. Stancu, *Drept procesual civil. 6th edition*, Hamangiu Publishing House, Bucharest, 2023, pp. 136-138.; M. Dinu, *Drept procesual civil*, Hamangiu Publishing House, Bucharest, 2020, p. 93.

[2] M. Tăbârcă, *Drept procesual civil. Vol. I – Teoria generală. 2nd edition*, Solomon Publishing House, Bucharest, 2017, p. 457. We recommend consulting the article, V. Stoica, *Despre puterea de reprezentare*, in "Revista de Drept Privat", no. 2/2019; the article can be accessed in its entirety at the address https://sintact.ro/#/publication/151014688?keyword=reprezentarea&cm=SREST

[3] Gh. Durac, *Drept procesual civil, Principii și instituții fundamentale, Procedura necontencioasă*, Hamangiu Publishing House, Bucharest, 2014, p. 158.

[4] Following the deliberations, the Constitutional Court, by Decision no. 601/2020, with unanimity of votes, admitted the exception of unconstitutionality and found that the provisions of art. 164 para. (1) Civil Code are unconstitutional. The Court held the violation of the provisions of art. 1 paragraph (3), art. 16 and art. 50 of the Constitution, as interpreted according to art. 20 of the Basic Law and through the prism of art. 12 of the Convention on the Rights of Persons with Disabilities. In justifying the admission solution pronounced, the Constitutional Court held, in essence, that the protective measure of placing under judicial prohibition provided by art. 164 para. (1) Civil Code is not accompanied by sufficient guarantees to ensure respect for fundamental human rights and freedoms. It does not consider the fact that there may be different degrees of incapacity, nor the diversity of a person's interests, it is not ordered for a fixed period of time and is not subject to periodic review. Therefore, the Court held that any measure of protection must be proportional to the degree of capacity, be adapted to the person's life, apply for the shortest period, be reviewed periodically and take into account the will and preferences of the persons with disabilities. Also, when regulating a protective measure, the legislator must consider the fact that there can be different degrees of incapacity, and mental deficiency can vary over time. The lack of mental capacity or discernment can take different forms, for example, total/partial or reversible/irreversible, a situation that calls for the establishment of protective measures appropriate to reality and which, however, are not found in the regulation of the judicial interdiction measure. Therefore, the different degrees of disability must be assigned corresponding degrees of protection, the legislator in the regulation of legal measures having to identify proportional solutions. An incapacity must not lead to the loss of the exercise of all civil rights but must be analyzed in each individual case. Every person must be free to act in order to develop his personality, the state, by virtue of its social character, having the obligation to regulate a normative framework that ensures the respect of the individual, the full expression of the personality of the citizens, their rights and freedoms, the chances equal, resulting in respect for human dignity. Law no. 140/2022 establishes three forms of protection: assistance for the conclusion of legal acts, judicial

a other such situation, which prevents him from presenting himself. In such cases, the person in question could appear to you through a lawyer, trustee or through a guardian or curator[5].

Legal representation intervenes in the case of natural persons lacking procedural capacity, in the case of legal entities as well as in other cases expressly provided by law. The legal representatives of natural persons can be the parents (one parent being sufficient for a valid representation of the minor party) and the guardian. Although art. 80 para. (2) Code of Civil Procedure refers exclusively to natural persons; legal representation also intervenes in the case of legal persons. Thus, according to art. 209 of the Civil Code, the legal entity exercises its rights and fulfills its obligations through its administrative bodies, from the date of their establishment. As such, the legal representatives of legal entities are their administrators. In the absence of administrative bodies, art. 210 para. (1) of the Civil Code provides that until the date of establishment of the administrative bodies, the exercise of the rights and the fulfillment of the obligations concerning the legal person are done by the founders or by the natural persons or legal persons designated for this purpose[6].

Regarding judicial representation, according to art. 80 para. (4) Code of Civil Procedure, when the circumstances of the case require it to ensure the right to a fair trial, the judge may appoint a representative for any part of the trial under the terms of art. 58 para. (3) Code of Civil Procedure, finally showing the limits and duration of the representation[7]. In contrast of the curators from the field of civil law, special curators provided for by art. 58 Code of Civil

counselling and special guardianship. See C. Roșu, S. Stănilă, P*rocedura punerii sub interdicțiecție judecătorească în "haine" noi*, in "Dreptul", no. 11/2022; the article can be accessed in full format at the address https://sintact.ro/#/publication/151025673?cm=URELATIONS

[5] G. Boroi (coord.), *Noul Cod de procedură civilă. Comentariu pe articole, Vol. I art. 1-455, 2nd edition*, Hamangiu Publishing House, Bucharest, 2016, p. 265.

In the jurisprudence of the Constitutional Court, it was noted that "para. (1) of art. 918 of the Code of Civil Procedure is precisely the expression of the strictly personal character of the action in the dissolution of the marriage, in consideration of the respect of the spouses' right to private life and their personal determination regarding the continuation or termination of the marriage. The explicit provision of para. (1) of art. 918 of the Code of Civil Procedure cannot receive an interpretation - like the one developed by the author of the exception - that would overturn its meaning and be used to divert the norm from its purpose. On the other hand, art. 921 para. (1) of the Code of Civil Procedure establishes some exceptions to the rule of the personal presence of the spouses at the court of first instance, exceptions which are of strict interpretation, and which allow the court to resolve the divorce application in some precisely determined situations in which the personal presence of one of spouses is not possible. This is also an application of the recognized right of any of the spouses to obtain the termination of the marriage, without certain objective circumstances constituting an obstacle to this approach, but also an expression of free access to justice, which must allow any of the spouses, regardless of the procedural capacity in the divorce process, to exercise his procedural rights, by formulating defences, supporting the request, without the impossibility of presentation constituting an absolute obstacle in obtaining the dissolution of the marriage. Nor the provision of art. 922 of the Code of Civil Procedure does not violate, in the opinion of the Government, any constitutional principle, the provision regarding the rejection of the request as unsupported, in case of unjustified absence of the plaintiff, representing a presumption of lack of interest in supporting the request and an application of the principle of availability of the parties". To consult in this sense, Constitutional Court of Romania., decision no. 642/2018 published in Official Gazette, no. 70 of 29.01.2019; the decision can be accessed in its entirety at the address.

https://sintact.ro/#/act/16910520/82?directHit=true&directHitQuery=cod%20procedura%20civila

[6] S. Bodu, *Organul administrativ și reprezentarea legală a societății comerciale*, in "Revista Română de Drept al Afacerilor", no. 6/2017; the article can be accessed in full format at the address

https://sintact.ro/#/publication/151012506?keyword=reprezentarea%20legala&cm=SREST

[7] V.M. Ciobanu, M. Nicolae (coord.), *Noul Cod de procedură civilă. Comentat și adnotat. Vol. I – art. 1-526*, Universul Juridic Publishing House, Bucharest, 2016, pp. 286-287.

Procedure are appointed by the trial court (and not by the guardianship court) and are lawyers specifically appointed for this purpose by the bar for each court (and they cannot be any natural person with full legal capacity and able to fulfill this task). To appoint the special curator and to the extent that the corresponding bar has not previously submitted to the court the list of lawyers appointed to carry out the task of special curator, the court will issue an address to him to appoint a lawyer until the next court term in the sense indicated[8].

About conventional representation, as previously stated, the parties may appear in court through an elected representative, under the law, unless the law requires their personal presence before the court. Conventional representation involves the conclusion between the represented party and the representative of a mandate contract[9] (in the case of the non-lawyer representative-mandatory), of an employment contract or service relationship (in the case of the legal advisor representative) or of a legal assistance contract (in the case of the representative-lawyer), each of which essentially provides the right and, at the same time, the obligation to represent the party[10]. Therefore, in the civil process, the natural person can be represented not only by a lawyer, but also by a person who does not have this capacity. As a rule, legal entities can be conventionally represented before the courts only by a legal advisor or lawyer, under the law. Therefore, unlike natural persons, in the case of legal persons, conventional legal representation by a representative who does not have the capacity of either a lawyer or a legal advisor is excluded. Therefore, the legal persons and entities cannot be conventionally represented by a representative who is not a lawyer or who does not exercise the function of legal advisor. In the same light, it was established that a legal person cannot be judicially represented by another legal person[11].

3. Special provisions regarding the representation of third parties by a lawyer

Regarding the representation by a lawyer of the intervening third parties, it can intervene both in the admissibility procedure in principle and after the admissibility, in the actual judgment of the request for intervention. According to art. 28 para. (1) from Law no. 51/1995 for the organization and exercise of the profession of lawyer,

[8] For further developments, consult, M. Dinu, *Aspecte teoretice și practice cu privire la curatela specială ca formă de reprezentare în cadrul procesului civil*, in "Revista Pandectele Romane", no. 5/2018; the article can be accessed in full format at the adress
https://sintact.ro/#/publication/151012836?keyword=curatela%20speciala&cm=STOP
Ș. Naubauer, *Curatela specială – monopol judiciar al avocaților,* in "Revista Română de Jurisprudență", no, 5/2017; the article can be accessed in full format at the address https://sintact.ro/#/publication/151012080?keyword=curatela%20speciala&cm=SFIRST

[9] See also D.-A. Sitaru, *Considerații privind reprezentare în noul cod civil român*, in "Revista Română de Drept Privat", no. 5/2010; the article can be accessed in full format at
https://sintact.ro/#/publication/151006556?keyword=mandat%20reprezentare&cm=SREST
D. Chirică, *Condițiile de validitate, proba și durata reprezentării convenționale*, in "Revista Română de Drept Privat", no. 2/2019; the article can be accessed in full format at https://sintact.ro/#/publication/151014692?keyword=mandat%20reprezentare&cm=SREST

[10] V. M. Ciobanu, Tr. C. Ciobanu, C. C. Dinu, *Drept procesual civil. Ediție revăzută și adăugită*, Universul Juridic Publishing House, Bucharest, 2023, pp. 128-132.

[11] M. Fodor, *Drept procesual civil. Teoria generala. Judecata în primă instanță. Căile de atac,* Universul Juridic Publishing House, Bucharest, 2014, pp. 200-202.

republished[12], *"the lawyer registered in the bar, has the right to assist and represent any natural or legal person, based on a contract concluded in written form, which acquires a certain date by registration in the register record official"*.

In the content of the specific activity provided by the lawyer, in the case of the representation of third parties, there are activities such as consultations and the formulation of requests of a legal nature (as a rule, even the formulation of intervention requests)[13]. Legal consultations can be granted in writing or verbally in areas of interest for the third party involved and can include: the drafting and/or provision to him, by any means of legal opinions and information on the issue requested to be analysed, drafting legal opinions as well as assisting him in the negotiations related to them or any other consultations in the legal field[14]. The lawyer can draw up and formulate on behalf and/or in the interest of the third party, requests, notifications, memos or petitions to the authorities, institutions and other persons, in order to protect and defend his rights and legitimate interests. Therefore, the lawyer has the right to introduce a request for intervention (depending on the type of intervention that will be made before the court), to assist the intervening third party (when he is present in the courtroom), to represent the third party intervener (when he is not present in the courtroom), to draw up any procedural documents, to make conclusions on any litigious matter, including procedural exceptions or on the merits of the case, etc. Under the same conditions, the lawyer provides legal assistance and representation before the courts, criminal investigation bodies, authorities with jurisdictional powers, public notaries and bailiffs, public administration bodies and other legal entities for the defense and representation with means specific legal rights, freedoms, and legitimate interests of individuals. The assistance and representation of the intervening third party includes all acts, means and operations permitted by law and necessary for the protection and defense of its interests[15].

The power of representation of the intervening third party by the lawyer is based on the legal assistance contract, concluded in written form[16]. Moreover, the lawyer's right to assist, represent or exercise any other activities specific to the profession arises from the legal assistance contract[17]. Consequently, the lawyer can only act within the limits of the contract concluded with his client, except in cases provided by law. The exceptions are of strict interpretation, provided exclusively by law and refer to cases of legal assistance and public judicial aid, respectively the appointment of a special curator lawyer[18], with the legal regime imposed by the normative act where they are provided and

[12] In Official Gazette of Romania, no. 440 of 24.05.2018.

[13] See art. 3 paragraph (1) lit. a) from Law 51/1995 and art. 89 of the Statute of the lawyer profession.

[14] See art. 90 of the Statute of the lawyer profession.

[15] See art. 91 of the Statute of the lawyer profession.

[16] R. Viorescu, *Aspecte practice privind încheierea și comunicarea contractelor de asistență juridică (și, nu numai...) prin mijloace electronice*, in "Revista Română de Drept al Afacerilor", no. 4/2023; the article can be accessed in full format at

https://sintact.ro/#/publication/151029402?keyword=contractul%20de%20asisten%C8%9B%C4%83%20juridic%C4%83&cm=SREST

[17] See art. 108 para. (1) of the Statute of the lawyer profession.

[18] According to the art. 58 Code of Civil Procedure.

regulated[19]. The form, content and effects of the legal assistance contract are established by the Statute of the profession[20]. The relationship between the lawyer and the client-intervening third party is based on honesty, probity, fairness, sincerity, loyalty, and confidentiality[21]. The contact between the lawyer and his client cannot be embarrassed or controlled, directly or indirectly, by any body of the state. If the lawyer and the client agree, a third person may be the beneficiary of the legal services established by the contract, if the third party accepts, even tacitly, the conclusion of the contract under such conditions. As a rule, the lawyer will keep a strict record of the contracts entered into in a special register and will keep in his archive a copy of each contract and a duplicate or copy of any power of attorney received in the execution of the contracts. The legal assistance contract can also be concluded in electronic format, under the condition of obtaining the prior approval of the bar of which the form of practicing the profession is a part[22].

The legal assistance contract expressly provides for the extent of the powers that the client confers on the lawyer. For the activities expressly provided for in the scope of the legal assistance contract, it represents a special mandate, under the power of which the lawyer can conclude, under private signature or in authentic form, acts of preservation, administration, or disposal in the name and on behalf of the client[23]. The client's signature must be inserted on the legal assistance contract, proving the birth of the respective legal relationship. Regarding the power of attorney, it is not necessary to be signed by the client in the situation where the form of exercise of the lawyer profession certifies the identity of the parties, the content and the date of the legal assistance contract based on which the power of attorney was issued, an aspect included in the model of power of attorney established

[19] The existence of exceptions does not remove the general and mandatory nature of the rule of conclusion of the legal assistance contract.

[20] The legal assistance contract is called, expressly regulated by law, which gives rise to rights and obligations specific to the lawyer profession. depending on the concrete object of the legal assistance contract, it may have other named contracts, expressly regulated by the Civil Code (mandate, fiduciary, etc.) as a proximate type. The legal assistance contract is concluded in written form, required ad probationem. It must meet all the conditions required by law for the valid conclusion of an agreement and acquires a certain date by its registration in the official record book of the lawyer, regardless of the way in which it was concluded.

[21] C. C. Dinu, *Fişe de procedură civilă pentru admiterea în magistratură şi avocatură. 6th edition*, Hamangiu Publishing House, Bucharest, 2019, pp. 71-74.

[22] The legal assistance contract can also be concluded by any means of distance communication. In this case, the date of conclusion of the contract is the date on which the agreement of will between the lawyer and the client took place. It is assumed that the lawyer became aware of the conclusion of the contract on one of the following dates:

- the date on which the contract arrived by fax or e-mail (electronic signature) at the professional office of the lawyer.

- if the transmission by fax takes place after 19:00, it is assumed that the lawyer became aware of it on the working day following the day of the transmission.

- the date of receipt of the signed contract by registered letter with confirmation of receipt.

The legal assistance agreement may take the form of a letter of engagement indicating the legal relationship between the lawyer and the recipient of the letter, including legal services and fees, signed by the lawyer, and delivered to the client. If the client signs the letter under any express acceptance of the contents of the letter, it acquires the value of a legal assistance contract.

The legal assistance contract is considered to have been tacitly concluded if the client has paid the fee mentioned therein, the payment of this fee signifying the acceptance of the contract by the client, in which case the date of conclusion of the contract is the date mentioned in the contract.

[23] See art. 126 para. (2) and (3) of the Statute of the lawyer profession.

by the Statute of the lawyer profession[24].

Also based on the legal assistance contract, the lawyer legitimizes himself vis-à-vis third parties through the power of attorney drawn up according to Annex no. II of the Statute, on a typed and serialized form, with the related logos, identical to the legal provisions of the legal assistance contract (typed and serialized forms that will contain the U.N.B.R. logo, that of the issuing bar, the name "National Union of Romanian Bar Associations" and the of the issuing bar)[25]. The activities of the lawyer aimed at the exercise of procedural acts of disposition, assistance and representation must be expressly mentioned in the content of the legal assistance contract and in the power of attorney, the content of the latter having to be in accordance with the rights stipulated in the contract. As such, for the exercise of the acts disposition procedures, it is not necessary for the lawyer to present a special authentic power of attorney, the mention inserted in the content of the legal assistance contract in this sense being sufficient, also taken over in the power of attorney[26].

According to art. 221 para. (1) and (2) of the Statute of the lawyer profession, the contract expressly provides for the object and limits of the mandate received, as well as the established fee, and, in the absence of any contrary provisions, the lawyer can perform any act specific to the profession that he considers necessary to promote the legitimate rights and interests of the client. In this sense, the lawyer must assist and represent the client with professional competence, by using appropriate legal knowledge, specific practical skills and through the reasonable training necessary for the concrete assistance or representation of the client[27].

From the moment of signing the legal assistance contract, the lawyer will act tactfully and patiently to present and explain to the intervening third party all aspects of the case in which he is assisting and/or representing him. In such a situation, the lawyer will seek to use the most appropriate language in relation to the client's condition and experience, so that he has a fair and complete representation of his legal situation. Likewise, the lawyer will consult appropriately with the client to establish the purpose, methods, and finality of the advice, as well as the technical solutions he will follow to achieve, when necessary, the assistance and representation of the client, he will respect the client's options in terms of regards the purpose and finality of the assistance and representation, without abdicating his independence and his professional creed. At the same time, the lawyer is obliged to refrain from engaging whenever he cannot provide competent assistance and representation. Assisting and representing the client requires adequate professional diligence, thorough preparation of cases, files, and projects, promptly, according to the nature of the case, experience, and professional creed[28].

[24] If the existence of the mandate is disputed, the court will ask the lawyer to submit the legal assistance contract to the file, in a certified photocopy for compliance with the original, the confidential sections may be covered.

[25] L. Criștiu-Ninu, *Organizarea profesiei de avocat. Note de curs*, Universul Juridic Publishing House, Bucharest, 2023, pp. 63-65.

[26] Tr. C. Briciu, C. C. Dinu, P. Pop, *Instituții judiciare, 2nd edition*, C.H. Beck Publishing House, Bucharest, 2016, pp. 400 and following.

[27] See also I. Leș, D. Ghiță, *Instituții judiciare contemporane*, *2nd edition*, C.H. Beck Publishing House, Bucharest, 2019, pp. 311-313.

[28] D. Oancea (coord.), *Legea privind organizarea și exercitarea profesiei de avocat. Comentariu pe articole,* C.H. Beck Publishing House, Bucharest, 2015, pp. 130-132.

Moreover, the lawyer must have the appropriate professional competence for the case in which he represents the third party intervener, which implies the careful analysis and research of the factual circumstances, of the legal aspects of the legal issues incident to the factual situation, adequate preparation and permanent adaptation of the strategy, tactics, specific techniques and methods in relation to the evolution of the case, the file or the work in which the lawyer is employed[29].

In the activity performed, the lawyer will limit himself only to what is reasonably necessary according to the circumstances and the legal provisions. In this case, the lawyer will refrain from intentionally ignoring the objectives and goals of the representation established by the intervening third party, so as to fail to achieve them by reasonable means, permitted by the Law and the Statute of the profession and prejudice a client during the professional relations.

Equally, the lawyer will act promptly in the representation of the intervening third party, according to the nature of the case. The lawyer is not bound to act exclusively in obtaining advantages for his client in the confrontation with the adversaries. The strategies and tactics established by the lawyer must lead his activity on the principle of using professional approaches in favour of the third party.

One of the most important obligations of the lawyer is related to the observance of professional secrecy regarding the strategies, tactics and actions expected and carried out for the client[30].

The lawyer who, for various reasons, cannot fulfil his mandate towards the party at a certain moment, has the right and, at the same time, the obligation to ensure his substitution by another lawyer, if this right is expressly provided for in the contract of legal assistance or if the client's consent is obtained after the conclusion of the contract, by reference to art. 226 para. (5) and art. 234 para. (2) of the Statute. Substitution covers only those professional activities that do not suffer delay or those in connection with which delaying the process damages the client's interests. At the respective court term, the substitute lawyer will attach the delegation of substitution to the file, having the right to the fee corresponding to the submitted activity, according to the terms of the agreement between the lawyers. The insurance of substitution will be done only through another lawyer, and not through any other person.

Regarding the obligations of the intervening third party towards the lawyer, he has the obligation to provide the lawyer with accurate and honest information in order for him to carry out the steps necessary for the execution of the entrusted mandate,

[29] As it follows from the legal provisions in the matter, only by way of exception, the possibility to assist and employ the client is recognized even to the extent that at that moment he does not possess a professional competence appropriate to the nature of the case, if due to delay violation of the client's rights and interests (in situations and circumstances that are urgent to safeguard and/or protect the client's rights and interests).

[30] D. Oancea, *Legea privind organizarea si exercitarea profesiei de avocat. Comentariu pe articole, 2nd ed*, C.H. Beck Publishing House, Bucharest, 2019, pp. 188-200.

S. Tiberiu, *Noțiunea și conținutul secretului profesional al avocatului în lumina dreptului comunitar*, in "Revista de Drept European (Comunitar)", no. 6/2007; the article can be accessed in its entirety at the adress

https://sintact.ro/#/publication/151000449?keyword=respectarea%20secretului%20profesional%20avocat&cm=SREST

D. Cherteș, *Infracțiunea de divulgare a secretului profesional de către avocat prevăzută în Legea nr. 51/1995. Scurte considerații*, in Journal "Penalmente Relevant", no. 1/2017; the article can be accessed in its entirety at the adress

https://sintact.ro/#/publication/151022348?keyword=respectarea%20secretului%20profesional%20avocat&cm=SREST

in this case the third party intervening is the only one who bears the responsibility for the accuracy and sincerity the information provided to the lawyer.

Equally, he owes the lawyer the payment of the fee and the coverage of all expenses incurred in his interest[31]. The intervening third party has the right to renounce the legal assistance contract or to modify it in agreement with the lawyer, under the conditions provided by the Law and the Statute. At the same time, the third party has the right to unilaterally renounce the mandate granted to the lawyer, this circumstance not constituting grounds for exoneration for the payment of the due fee for the legal services rendered, as well as for covering the expenses incurred by the lawyer in the procedural interest of the client[32].

Finally, the third party has an obligation not to use the lawyer's opinions and advice for illegal purposes without the knowledge of the lawyer who provided the opinion or advice. Otherwise, the lawyer is not responsible for the illegal action and purposes of the third party.

From the perspective of Law no. 51/1995, the termination of representation relations, as a rule, is carried out with the fulfilment of the obligations assumed by the form of exercise of the profession. The previous termination can be done by unilateral denunciation, by the third party or, as the case may be, by the lawyer, but this fact, as I mentioned before, does not exempt the client from paying the due fee for the services rendered, nor does it exempt him from covering the expenses incurred by the lawyer in his interest[33].

Upon termination of the legal assistance contract, the lawyer of the third party intervening has the obligation to take appropriate measures in a timely and reasonable manner to protect the interests of the client, in the sense of notifying him, giving him sufficient time to hire another lawyer, handing over documents and assets to which the customer is entitled such as notification of judicial bodies. The lawyer has the right of retention on the entrusted assets, except for the original documents that have been made available to him in case the client owes the lawyer arrears from the fees and expenses incurred in his interest.

Finally, the lawyer has the obligation to return to the client the sums advanced by the latter if, until the termination of the contract, the lawyer has not performed the activities for which the fee was paid in advance or has not recorded expenses covered by the sums advanced by the third party in this regard.

4. Conclusion

The participation of third parties intervening in the judgment is a natural thing since in relation to them the litigious legal report deduced from the judgment can produce effects both directly and indirectly, and by way of consequence, both the old

[31] C. C. Dinu, *Considerații asupra caracterului de titlu executoriu al contractului de asistență juridică și formalitățile necesare în vederea punerii în executare silită a acestuia,* in ”Revista Română de Drept Privat”, no. 5/2009; the article can be accessed in its entirety at the adress https://sintact.ro/#/publication/151006697?keyword=contractul%20de%20asisten%C8%9B%C4%83%20juridic%C4%83&cm=SREST

[32] L. Săuleanu, *Limitarea caracterului de titlu executoriu al contractului de asistență juridică la onorariu și la cheltuielile efectuate de avocat în interesul clientului*, in ”Dreptul”, no. 12/2018; the article can be accessed in its entirety at the adress

https://sintact.ro/#/publication/151020869?keyword=contractul%20de%20asisten%C8%9B%C4%83%20juridic%C4%83&cm=SREST

[33] The contract can also be terminated by the agreement of the parties or the loss of the lawyer's capacity.

regulation and especially in the New Code of Procedure civil, gives them increased attention through the possibility of becoming parties to a process.

Regarding procedural representation, this is a frequently used approach, as a rule, the parties resorting to representation by a lawyer, whether they are natural or legal persons.

Probably the main reason why third parties choose to be represented by a lawyer is his legal training, as a specialist in law. In this sense, the lawyer can be employed based on the legal assistance contract and can represent the third party intervener, both in the case of the voluntary formulation of a request for intervention and in the case of being forcibly brought to court. In these two scenarios, the representation consists, as a rule, both in the phase of admissibility in principle (where applicable), and after this moment, when the intervening third party participates as a party in the judgment of the contentious report brought to the judgment.

Analyzing the conventional representation by a lawyer, it is found that the existing provisions in the Civil Procedure Code are usefully combined with the existing regulations in Law 51/1995, the Statute of the lawyer profession as well as in the Code of Ethics of the lawyer profession, creating in this context certain particularities.

A first feature is the legal assistance contract, i.e. the agreement between the intervening third party and the lawyer, based on which the lawyer undertakes to represent the legitimate and legal interests of his client. What differs from a simple representation mandate results from the specialized form of the contract whose clauses are regulated by the legislation specific to the lawyer profession and based on which the party's representation activity is carried out.

A second particularity is given by the legal delegation (power of attorney), the content of which is special compared to a simple power of attorney, having a specialized regime subject to the legal guarantees of the legal profession.

Finally, what differs substantially from common law representation is the extremely broad scope of action of the mandate granted to the lawyer. He has the possibility to carry out a variety of procedural acts in accordance with the legal situation established in relation to the case, to carry out the mandate granted by the client.

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STRATEGIC LAWSUITS AGAINST JOURNALISTS – AN UNCONVENTIONAL WAY TO ENACT CIVIL LIABILITY

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Abstract

In the last decade, a new way of bringing journalists to civil liability has gained momentum, which is also a form of intimidation in carrying out their activity, namely SLAPP (strategic law-suit against public participation) trials. This paper analyzes the essential elements necessary to qualify a trial filed against a journalist as a slap-trial, starting from two relevant European acts: the Proposal for a directive of the European Parliament and of the Council on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings ("strategic lawsuits against public participation") and the Commission Recommendation (EU) 2022/758 on protecting journalists and human rights defenders who engage in public participation from manifestly unfounded or abusive court proceedings ('strategic lawsuits against public participation'). As it has been pointed out, there are at least two essential elements that qualify a law-suit as a Slapp-trial and identifying them is only a prerequisite of the correct qualification, that may also imply subjective elements as bad faith, or abuse of law.

Keywords: *Slapp, intimidation trial, public communication, abuse of law, bad faith, communication law.*

1. Introduction

Today, freedom of the press is one of the most important guarantees of democracy, being a universally recognized value worldwide. Although this is not equivalent to freedom of expression, it is, in our opinion, the most important form of its manifestation.

Although freedom of expression has been recognized internationally since the time of the French Revolution in 1789[1], its regulation has evolved substantially with the emergence of mass media, both in the form of print media and radio and television.

The last decades have surprised by the development of a new form of public communication, namely the online press, which was characterized by a heterogeneous editorial rigor, journalists having both the opportunity to write for formidable publications, with a consistent editorial policy, and the opportunity to publish materials on their own pages, either on social media platforms or on blogs.

Although the regulation dates back to 1950, the European Convention on Human Rights recognized in art. 10, paragraph 1, the importance of freedom of expression[2] in any democratic society based on European

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[1] When was the Declaration of the Rights of Man and Citizen adopted; according to art. 11: "The free communication of ideas and of opinions is one of the most precious rights of man. Any citizen may therefore speak, write and publish freely, except what is tantamount to the abuse of this freedom in the cases determined by Law".

[2] According to art. 10, paragraph 1 of the European Convention on Human Rights: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and

values, always updating its content through the jurisprudence of the European Court of Human Rights. Under these conditions, the press has earned its reputation as the "watchdog" of democracy, a term repeatedly used by the European court. In this sense, in the case of Axel Springer AG v. Germany[3], the Court reiterated the essential role of the press in a democratic society, that of disseminating information and ideas in all areas of public interest, a fact to which the public's right to receive said information corresponds.

In the last decade, the evolution of content-sharing software led to new specialized channels, in various fields of journalism, in which the publication of materials did not know limitations or restrictions, thus, any journalistic investigation, any finding of irregularities in public institutions, could be brought to the attention of society almost effortless.

If society gained by the uncovering of incorrect practices, in administration, justice and even in the private sector, there were still certainly people directly harmed by these disclosures, whose interests required the denial of the facts and the possible discrediting of the journalist.

In specialized literature[4] it was shown that for effective citizen participation in government, anti-Slapp laws should also protect the media.

In this material, we will follow the analysis of particular elements regarding lawsuits brought against journalists by people directly subjected press investigations. These types of lawsuits usually take the form of civil litigation in which defamation of the person by the journalist is invoked, but in certain situations, there may even be criminal lawsuits brought against journalists for how they obtained the information published.

Tortious civil liability is recognized by the unanimity of European legal systems and constitutes the mechanism by which the author of an illegal act is held responsible by the injured person, in order to obtain compensation. This mechanism, originating from Roman law[5], acts, in the field of public communication, as a double-edged sword.

As long as the journalist exceeds the limits of freedom of expression, therefore, when he commits an illegal act, the injured person can obtain compensation for the injuries suffered, but when the injured person acts in bad faith, without the journalist having committed an illegal act, the civil process will produce a different effect: that of harassing the journalist.

2. Slapp-type lawsuits against journalists

Against the background of an increasingly important concern, a series of regulations have been developed at the European Union level regarding strategic processes directed against public participation, in which sense Commission Recommendation (EU) 2022/758 was adopted on the protection journalists and human rights defenders involved in public mobilization actions against patently

ideas without interference by public authority and regardless of borders. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises".

[3] The Grand Chamber decision of 07.02.2012 in case no. 39954/08, paragraph 79 available online athttps://hudoc.echr.coe.int/fre?i=001-109034, consulted on 17.03.2024.

[4] S. Hartzler, *Protecting Informed Public Participation: Anti-Slapp Law and the Media Defendant*, in Valparaiso University Law Journal, vol. 41, no. 3/2007, p. 1283.

[5] The Lex Aquilia, which first regulated tortious civil liability, dates from the 3rd century BC.

unfounded or abusive judicial procedures[6] and a proposal for a directive of the European Parliament and the Council of 27.04.2022 on the protection of persons involved in public mobilization actions against patently unfounded or abusive legal proceedings[7].

The two regulations, although lacking binding legal force, represent the most important legislative steps taken at European level for the protection of journalists against abusive processes, intended to intimidate and harass them, in order to gain their silence. In legal literature[8] it has been shown that the purpose of the anti-Slapp measures is to protect people who became targets of Slapp-type trials or, moreover, those who have ceased their civic or journalistic activity precisely for fear of becoming a target of a judicial process of this kind. Obviously, such trials constitute a violation of the principle of exercising rights in good faith[9] and, at the same time, it represents a hidden form of intimidation by generating responsibilities for the journalist to carry out the process.

A concrete definition of Slapp-trial does not result from the content of the previously mentioned acts, but can be derived from a previous act, namely the Resolution of the European Parliament from November 11, 2021 regarding the consolidation of democracy, media freedom and pluralism in the EU: the unjustified recourse to civil law actions and criminal to silence journalists, NGOs and civil society[10]. Letter "e" in its preamble states: "lawsuits or other legal actions (e.g. injunctions, asset-freezing) brought forward by private individuals and entities, and also by public officials, public bodies and publicly controlled entities, directed at one or more individuals or groups, using a variety of legal bases mostly in civil and criminal law, as well as the threats of such actions, with the purpose of preventing investigation and reporting on breaches of Union and national law, corruption or other abusive practices or of blocking or otherwise undermining public participation".

As shown in the first paragraph of the proposed Directive of 27.04.2022 of the European Parliament and the Council's preamble, in recent years, the phenomenon of Slapp trials has become a common reality, increasingly widespread in the European Union. Against this background, it is necessary to adopt a uniform regulation at the European level, precisely because in the sphere of public communication, the existence of online platforms has determined the effective lack of borders both between states and between civilizations. Thus, on 27.04.2022, the two reference normative acts were adopted, respectively Recommendation (EU) 2022/758 of the Commission and the previously mentioned directive proposal.

For the correct understanding of the specifics of the regulations, we consider it necessary to analyze each one under the aspect of the definition of Slapp trials, of characteristic features and remedies.

[6] Available online at:https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32022H0758, last consulted on 19.03.2024.

[7] Available online at:https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52022PC0177, last consulted on 19.03.2024

[8] C.H. Barylak, *Reducing uncertainty in Anti-Slapp protection*, in Ohio State Law Journal, vol. 71, no. 4/2010, p. 869.

[9] Qualified as a general principle of law, also relevant in the field of public communication. See S. Al. Vernea, *Dreptul comunicării*, Hamangiu Publishing House, Bucharest, 2021, p. 11.

[10] Published in the Official Journal of the European Union C205/2 of 20.05.2022.

3. The proposal for a directive of 27.04.2022 regarding the protection of persons involved in Slapp-type processes

We note that the statement of reasons of the proposed directive begins with a characterization of Slapp-type legal proceedings: "a particularly harmful form of harassment and intimidation used against those involved in protecting the public interest. They are groundless or exaggerated court proceedings typically initiated by powerful individuals, lobby groups, corporations and state organs against parties who express criticism or communicate messages that are uncomfortable to the claimants, on a matter of public interest. Their purpose is to censor, intimidate and silence critics by burdening them with the cost of a legal defence until they abandon their criticism or opposition".

Although the text is meritorious in terms of description, it is also of particular importance in terms of the characteristics of this type of trial. Synthesizing the features, the EU act considers the following to be the defining factors: (i) they are clearly unfounded or exaggerated legal proceedings, (ii) they are initiated by influential persons or their associates against those who criticized the activities of the former by uncovering illegal acts or facts and (iii) the aim is to reduce to silence the critics.

In the content of the directive proposal, in art.3, point 3, the notion of *"abusive court proceedings against public participation, mean court proceedings brought in relation to public participation that are fully or partially unfounded and have as their main purpose to prevent, restrict or penalize public participation. Indications of such a purpose can be: (a) the disproportionate, excessive or unreasonable nature of the claim or part thereof; (b) the existence of multiple proceedings initiated by the claimant or associated parties in relation to similar matters; (c) intimidation, harassment or threats on the part of the claimant or his or her representatives"*.

From the previous text, we note that the legislator did not aim to expose some essential elements of this type of procedure, but made an example of the features, these not being mandatory in all Slapp-type processes.

In our opinion, the technique used by the European legislator is relatively deficient, on the one hand, because it does not allow the correct delimitation of this type of procedure, and on the other hand, because the qualification of the process as Slapp-trial is the only reason to ensure the remedies of preventive nature regulated in Chapter III of the proposed directive, thus it is necessary to establish the determination criteria a priori.

Regarding the remedies available to the journalist for such actions, we note that in the proposed directive there are three different categories of measures: (i) remedies of preventive nature, (ii) remedies of reparatory nature and (iii) remedies of protective nature.

The first category, of preventive remedies, includes the measures stipulated in art. 9-13, which aim to establish an abbreviated judicial procedure[11], with the reversal of the burden of proof, in which strictly the clearly unfounded character of the action will be judged. The judgment of the main dispute will be suspended until the final resolution of this abbreviated procedure.

[11] In specialized literature, it was noted that following the abbreviated procedure produces a "chilling effect", which results in either giving up the procedure or disinterest in it. See S.P. Trende, *Defamation, Anti-SLAPP Legislation, and the Blogosphere: New Solutions for an Old Problem*, in "Duquesne Law Review", vol. 44, no. 4/2006, p. 642.

The second category includes remedies of reparatory nature, regulated by art. 14-16, which include the stipulation of the plaintiff's obligation to pay all the court costs of the defendant, including the costs of legal representation, unless the latter are excessive. Equally, the right of the person injured by being sued in such a process to claim and receive compensation for the damage caused was provided for. Equally, states will have the obligation to impose a series of effective, proportionate and dissuasive sanctions on the person who initiated such a trial procedure, with the aim of discouraging him from resorting to similar actions in the future.

The third category concerns protective measure in favor of a persons convicted in a Slapp trial in another European Union member state. In this sense, art. 17 of the proposed directive provides a reason for refusing to recognize the judgment pronounced in a member state, to the extent that the respective action would have been considered manifestly unfounded or abusive if it had been brought before the courts from the Member State where recognition or enforcement is sought, and the respective courts would have applied their own legislation.

4. Commission Recommendation (EU) 2022/758 on the protection of persons involved in Slapp-type processes

Unlike the proposal for a directive, the Recommendation does not contain a definition of this type of litigation, but it captures their characteristics through point 9, the second thesis, of the Preamble: "These court proceedings are either manifestly unfounded or fully or partially unfounded proceedings which contain elements of abuse justifying the assumption that the main purpose of the court proceedings is to prevent, restrict or penalize public participation".

Then, in sentence II, point 11 of the Preamble, it was shown that such procedures "They often involve imbalance of power between the parties with the claimant having a more powerful position than the defendant for example financially or politically".

Under these conditions, the main characteristics of the Slapp-type processes, as it results from the previously reproduced texts, consist in (i) the clearly unfounded character, in whole or in part, of the action, (ii) the purpose of the procedures is to prevent or limit the mobilization public, and (iii) the litigating parties are placed in a power imbalance.

We note that, despite the different terminology, the three features are conceptually identical to the defining features retained from the analysis of the directive proposal.

Under these conditions, we note that the European legislator was consistent in determining the essential conditions, even if the regulatory manner was exemplary, by listing some conduct specific to plaintiffs in these types of processes.

As for the remedies, we note that the recommendation provides substantially more complex solutions than the directive proposal, starting from the training of legal practitioners and the persons affected by such procedures, up to actions to raise awareness of civil society and the public in the respective field.

Equally, the recommendation established support mechanisms, namely the identification and support by the member states of organizations that provide guidance and support to people sued in such trials. Concretely, all these measures must lead to the provision of effective legal assistance to the persons concerned, regardless of whether they can afford to cover the cost of legal services from their own sources.

In addition, the recommendation proposes the establishment of a data collection, reporting and monitoring mechanism, useful both for the organization of member states' efforts to ensure protection of journalists and public activists against this type of litigation, and for interstate cooperation for the same purpose.

5. Delimitation criteria of Slapp-type processes

From the two European acts, we noticed that there are three defining characteristics of Slapp-type procedures: (i) the clearly unfounded or exaggerated nature of the action, (ii) imbalance of power or status between the parties involved in the litigation and (iii) the purpose of the procedure is to prevent or reduce public mobilization.

Analyzing their content, we appreciate that only two can be considered essential for any Slapp-type process, respectively: (i) the subjective character - the purpose of the procedural approach is to prevent or limit the criticism brought, or public mobilization and (ii) the objective character - the disproportion of economic power or social position between the litigating parties.

As for the manifestly unfounded or exaggerated character of the action, we note that this can constitute a reference element only with regard to civil actions resulting from accusations of defamation. In the hypothesis that the action addressed to the judicial bodies has a criminal or even administrative nature, the analysis of the manifestly unfounded character becomes impossible to achieve in practice, it being necessary to administer evidence and go through some steps inherent in any process.

Moreover, we consider that even the terminology used by the European legislator is inconsistent in this aspect, in the directive proposal the phrase "groundless or exaggerated" was used, while in the recommendation the phrase "manifestly unfounded or fully or partially unfounded" was used. In this situation, we appreciate that a request addressed to the judicial bodies can be considered unfounded, groundless or exaggerated only *a posteriori*, after going through the stages of the process, especially the evidence administration procedure. Equally, the manifestly unfounded character of some claims is contradicted by the possibility that they may be founded only in part.

For these reasons, we appreciate that the inclusion of the clearly unfounded or exaggerated character of the action among the defining elements of this type of process cannot be unanimously accepted. We appreciate, however, that most cases of this nature will have a predominantly unfounded, even abusive character, but this majority feature is not defining.

As for the subjective nature, looking at the purpose of the approach, we appreciate, in accordance with the perspective of the European legislator, that in order to qualify a judicial process as Slapp, it is strictly necessary that the goal pursued by the plaintiff is that of reducing the defendant to silence, through intimidation or exhausting its resources. Equally, the purpose pursued cannot be dissociated from the plaintiff's intention to retaliate[12] for the previous conduct of the defendant, which would have led to the disclosure of illegal acts, of any nature, committed by the plaintiff or his associates.

An interesting problem exists in the matter of proof, since proving the intention with which the plaintiff sued the defendant

[12]A.L. Roth, *Upping the ante: Rethinking anti-SLAPP laws in the age of the internet*. BYU Law Review, 2016, p. 741.

is difficult to achieve, being a subjective component. In our opinion, proving the purpose pursued by the plaintiff can only be done by identifying some related elements (previous correspondence, offer to end the litigation under certain conditions, etc.), which can be explained, mainly, by the truthfulness of his purpose. As long as the motivation for starting the process is in the nature of a legal fact, we appreciate that it can be proven by any means of evidence.

We do not exclude that other elements of subjective nature can be found in the vast majority of Slapp-type processes, such as the bad faith of the plaintiff at the time of the start of the process or the abuse of rights, but these are not defining, essential elements for qualifying the act as such.

Regarding the objective character, namely the disproportion of economic power or social position between the litigating parties, we consider that this inequality between the parties can take multiple forms, being specific both to the relationship between the employee and his current or previous employer, in the conditions where between them there is or there was a dependency relationship during the duration of the employment relationship, or between a student and his teacher, regardless of whether the student took or is going to take an exam with that teacher.

A similar situation also exists in the relationship between a dignitary, or other person representing the public authority, and a person towards whom his authority was, at a given moment, exercised.

Beyond the previously mentioned hypotheses, there are undoubtedly Slapp-type lawsuits initiated by corporations against journalists or legal entities operating in the media field, and between them the imbalance is of purely economic nature, being determined by the budget likely to be allocated by each, for the dispute in question.

In support of the previously mentioned, we note that in November 2023 a study prepared at the initiative of the European Parliament - Committee on Civil Liberties, Justice and Home Affairs was published[13], according to which, 42.6% of the plaintiffs in Slapp-type lawsuits are represented by public figures from among politicians and civil servants, 21.3% by companies, including entities owned by them.

The defendants in such lawsuits are, in 44.7% of the cases, journalists - natural persons and in 28.4% of the cases are legal persons carrying out activity in the field of media.

In these conditions, according to our assessment, the objective criterion referring to the imbalance of an economic nature or social position between the parties constitutes a defining element for Slapp trials.

6. Conclusions

Strategic, fictitious processes designed to intimidate and reduce criticism are unacceptable tools in a democratic society. These can be included in the concept of judicial bullying[14], in a broad sense that includes harassment through the courts, carried out by the parties.

Obviously, taking measures to prevent these practices is increasingly important, with the increase in number of cases of such type throughout the European Union.

[13]J. Borg-Barthet, F. Farrington, *Open Slapp Cases in 2022 and 2023 – The incidence of Strategic Lawsuit Against Public Participation, and Regulatory Responses in the European Union*, p. 30, available online at: https://www.europarl.europa.eu/RegData/etudes/STUD/2023/756468/IPOL_STU(2023)756468_EN.pdf, consulted on 19.03.2024.

[14]M. Kirby, *Judicial stress and judicial bullying*, QUT Law Review Vol. 14, no. 1/2014, p. 10.

Although the beginning of regulation at the level of the Union is commendable, we believe that in the absence of normative acts with binding legal force, the taking of concrete measures is left to the discretion of the member states.

At national level, we consider it necessary to adopt a minimum standard and some internal remedies, starting from the model of the directive proposal, divided into preventive measures, reparatory measures and protective measures.

In the absence of the adoption of a basic normative framework, with binding legal force, processes of this kind will hinder the activity of the judiciary and will endanger freedom of the press and even freedom of speech.

We consider that the application of an elementary filter, composed of the analysis of the two defining features (i) the subjective character – the purpose of the procedural approach is to prevent or limit the criticism brought, or the public mobilization and (ii) the objective character – the disproportion of economic power or social position between the litigating parties, would allow the quick identification of processes in this category and would justify the defendant's appeal to institutions and organizations capable of providing legal and financial assistance in such cases.

Normally, the journalist can be obliged to pay compensation for his work, only to the extent that he has impermissibly violated the limits of freedom of expression. By leaving this type of process unregulated at national level, the journalist is exposed to a new, non-conventional form of civil liability, contrary to any limit provided by the European Convention on Human Rights for freedom of expression – the trial costs.

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EUROPEAN CASE LAW ON THE GDPR VIOLATION BY NATURAL PERSONS

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Abstract

According to the General Data Protection Regulation (GDPR), natural persons can face significant fines if they violate data protection rules while processing personal data outside of purely personal or domestic activities. However, if the data processing is conducted purely for personal or domestic purposes, with no commercial or professional link, GDPR sanctions do not apply. The GDPR allows for hefty fines in cases of non-compliance, with penalties reaching up to 10 million euros or, in severe cases, up to 20 million euros. However, these maximum fines are generally associated with organizations rather than individuals. When determining the amount of a fine, several factors are considered, including: the seriousness of the violation, the degree of fault or negligence, the nature, duration or extent of the breach and the impact on the data subjects affected. Supervisory authorities have discretion when imposing fines and aim to ensure that penalties are proportionate to the specific circumstances of each case. As a result, while the GDPR provides for substantial fines, the actual fines imposed on individuals are generally much lower, and exorbitant fines are unlikely. While the GDPR has stringent provisions for protecting personal data and allows for significant fines in case of violations, the application of these fines to individuals is generally more measured and adjusted according to the specific context of the violation.

Keywords: *natural persons, data processing, violation, consent, case law.*

1. Introduction

Is fining natural persons for GDPR violation, a new reality? When we talk about GDPR we most often think of two things: companies and big fines. Why? Because we are already used to seeing companies all over Europe being fined and we are talking about more than 550 fines totalling more than €260,000,000.[1]

Indeed, natural persons fining for violations of the General Data Protection Regulation (GDPR) is a reality, but it is less common and less publicised than the companies fining. GDPR is about protecting personal data and applies to natural persons as well as companies and organisations. As for natural persons, they can be fined if they violate data subjects' rights[2], such as unauthorised access to personal data, unauthorised disclosure of personal data or other violations of the GDPR. However, fines for natural persons are less common and are more often applied in serious or particularly serious cases. Most of the substantial fines focus on companies and organisations because of the large amount of personal data they process and their impact

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[1] For more informations, see GDPR Enforcement Tracker Report, 4th Edition 2023, available at: https://cms.law/en/media/international/files/publications/publications/gdpr-enforcement-tracker-report-may-2023.

[2] N.-D. Ploesteanu, V. Lăcătușu, D. Farcaș, *Protecția datelor cu caracter personal și viața privată*, Universul Juridic Publishing House, Bucharest, 2018, p. 115.

on natural persons. However, it should not be ignored that natural persons can also be fined under the GDPR, especially if violations are significant or repeated.

In compliance with the provisions of art. 4 point 7 of the GDPR: "'*controller' means the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data; where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law;*"[3].

Under this regulation, a natural person can also be a controller if he/she becomes a data controller under the GDPR and thus the natural person is responsible for complying with the GDPR provisions regarding the personal data processing. This can occur when a natural person determines the purposes and means of processing the personal data, such as filming an event with a phone and further sharing these images on social media. In this situation, the person filming and uploading the material on social media becomes a data controller and must comply with the GDPR. This involves, among other things, informing the data subjects (e.g. the persons in the images) about the processing of their personal data[4], respecting their rights (such as the right to information and the right to data deletion) and taking appropriate security measures to protect the data. It is important that the natural person who becomes a data controller is aware of his/her responsibilities under the GDPR and ensures that the processing of personal data is lawful and observes the rights of the data subjects.

According to the GDPR, not all the activities carried out by natural persons within their personal scope are subject to the GDPR rules. If the data is processed solely for personal purposes and there is no connection with a professional or commercial activity, then the GDPR rules do not apply.

However, when a natural person uses personal data outside the personal scope, for example for socio-cultural or financial purposes, they must comply with the GDPR. Thus, if a natural person collects, stores or uses personal data for such activities, he/she must ensure that he/she respects the rights of the data subjects, and that the data processing complies with the GDPR rules.

Under these circumstances, each of us can ask the following question: can natural persons be fined for GDPR violations?

Indeed, the natural persons can be fined for violating the GDPR and this is confirmed by fines across the European Union. Thus, we have at least 18 fines applied to operators - natural persons, one of which is applied by ANSPDCP - the Romanian Supervisory Authority.

It is important to note that so far, the European case law on fining natural persons for GDPR violations is not as extensive or detailed as for companies or organisations. However, there are certain main directions in which the National Supervisory Authorities at the EU level have focused on serious violations of the GDPR and the enforcement of fines against natural persons. These main directions include:

1. Monitoring of public space and neighbours' property - if a person films or

[3] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC, published in the Official Journal L 119 of May 4, 2016.

[4] R. Ducato, *Data protection, scientific research, and the role of information*, Computer Law & Security Review, volume 37, July 2020, Southampton, United Kingdom, 2020, pp. 1-16.

monitors public space or neighbours' property without their consent or without a proper legal basis, this may be considered a serious violation of the GDPR and may attract sanctions.

2. Surreptitious filming or photography - situations where a natural person surreptitiously films or photographs other natural persons without their consent or without a proper legal basis may be considered serious violations of the GDPR and may be sanctioned accordingly.

3. Disclosure of information on the internet or to third parties - when a natural person discloses personal information of another natural persons on the internet or to third parties without their consent or without a proper legal basis, this can be considered a serious violation of the GDPR and may attract sanctions.

In all of these situations, supervisory authorities have tended to pay close attention to and closely investigate the GDPR violations in the context of public space monitoring, surreptitious filming or photography and unauthorised disclosure of personal information.

2. Criteria for assessing penalties imposed on natural persons at the level of European States - case law

Article 83 para. (2) of the GDPR provides a list of criteria that supervisory authorities should use both in assessing whether a fine should be imposed and in assessing the amount of the fine. This does not imply a new assessment of the same criteria, but an assessment which takes into account all the circumstances of each natural person case in accordance with art. 83.

The supervisory authorities should use these criteria established by the European legislator both in assessing the appropriateness of imposing a fine and in determining its amount. These criteria include, among others:

a. Nature, gravity and duration of the violation: The supervisory authorities should assess the seriousness of the violation and its duration over time.

b. Intention or negligence: It is considered whether the violation was intentional or the result of negligence.

c. Measures taken to remedy the violation: The supervisory authorities may take into account whether the person or entity concerned has taken measures to remedy the violation and to prevent reoccurrence.

d. The degree of responsibility of the concerned natural person or entity: It assesses the level of responsibility of the concerned natural person or entity for the GDPR violation.

e. Any previous history of GDPR compliance: The supervisory authorities may take into account whether the concerned person or entity has had previous violations of the GDPR.

It is important to stress out that the assessment of each natural person case must consider the specific circumstances of the violation and be carried out in accordance with the provisions of the GDPR. Thus, the supervisory authorities must apply the listed criteria appropriately and proportionately to the seriousness and circumstances of each case.

The national procedures and constitutional requirements of some countries may influence how sanctions are assessed and applied under the GDPR. In some countries, the assessment of the existence of a violation may be carried out separately from the assessment of the

sanction to be imposed[5]. This may be determined by the specific legal and constitutional procedures of the concerned country.

For example, in some countries, the process of applying sanctions for GDPR violations may involve several distinct steps, such as identifying and investigating the violation, determining guilt or liability, and then determining and applying the appropriate sanctions. In these circumstances, the content and level of detail of a draft decision issued by the supervisory authority may be influenced by these national procedures and requirements.

It is important that these decisions of the national supervisory authorities observe the principle of proportionality and fairness in the application of sanctions. The supervisory authorities must ensure that their procedures comply with the GDPR requirements and that the taken decisions are justified and in accordance with the law.

To this end, I draw attention to a first case in which the Spanish National Supervisory Authority (AEPD)[6] fined a natural person with EUR 5,300 for illegal camera surveillance. The concerned person had rented two rooms in the operator's apartment. The operator installed a video camera in the apartment and stated that it was installed solely for security purposes and also only monitored the front door area. However, it turned out that such camera was oriented in such a way that it recorded other parts of the apartment, such as the living room. The AEPD states that this constitutes an unwarranted intrusion into the privacy of the data subject without his/her consent.

In reaching this decision, the AEPD considered that, as far as consent is concerned, art. 7 of the GDPR states that "*Where the processing is based on consent, the controller shall be able to demonstrate that the data subject has consented to the processing of his or her personal data.*".

In compliance with the provisions of art. 4 point 11 of the GDPR, "'*consent' of the data subject means any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her*".

The AEPD also took into account the recital 32 of the GDPR, where it is regulated: "*Consent should be given by a clear affirmative act establishing a freely given, specific, informed and unambiguous indication of the data subject's agreement to the processing of personal data (...)*".

Thus, it was assessed in the case that the respondent did not demonstrate in its submissions that the applicant has given its consent to the data processing being carried out in the manner referred to in the GDPR.

In this case, the AEPD proceeded to the individualisation of the facts and considered that the imposed fine must be effective, proportionate and dissuasive in each natural person case, in accordance with the provisions of art. 83 para. 1 of the GDPR. It was therefore considered that the penalty to be imposed should be individualised in accordance with the criteria laid down in art. 83 para. 2 of the GDPR, and with the provisions of art. 76 of the Organic Law 3/2018 on the protection of personal data and the guarantee of digital rights (LOPDGDD), in relation to art. 83 para. 2 letter (k) of the GDPR.

[5] D. F. Barbur, *Protectia datelor cu caracter personal. Ghid practic*, *2nd edition*, C.H. Beck Publishing House, Bucharest, 2022, p. 235.

[6] Resolucion de procedimiento sancionador del procedimiento instruido por la Agencia Española de Protección de Datos y en base a los siguientes Expediente, No : EXP202300216, available: https://www.aepd.es/documento/ps-00117-2023.pdf.

The nature, seriousness and duration of the offences were taken into account as aggravating circumstances for the individualisation of the penalty [art. 83 para. 2 letter (a) of the GDPR], given that the dwelling is inviolable, and the installation of the cameras implies a significant attack on the privacy of the persons living there. To this end, the right to privacy consists in guaranteeing the free development of one's individual private life without any interference from third parties. The presence of interior cameras does not merely imply excessive control of the entry/exit of the resident and/or his/her companions, but rather data processing that is not justified in this case. Moreover, the installation of a video camera entails the unavoidable obligation to warn of its presence by means of an information device, in a sufficiently visible place, announcing the existence of the surveillance device, the identity of the person responsible for processing the data, as well as the possibility of exercising the rights provided for in art. 22 of the GDPR, obligations which the respondent has not complied with.

In the light of these aspects, the AEPD considered that the presented aspects violated the provisions of art. 6 para. 1 and art. 13 of the GDPR, a violation which entails the commission of two offences considered very serious under art. 72 para.1 of the LOPDGDD, which states that: "Based on what is laid down in art. 83 para. 5 of Regulation (EU) 2016/679, acts involving a substantial infringement of the articles mentioned therein shall be considered as very serious (...) and in particular: b) Processing of personal data without any of the conditions for lawful processing laid down in art. 6 of Regulation (EU) 2016/679. (...) h) Omission of the obligation to inform the data subject about the processing of his/her personal data in accordance with the provisions of articles 13 and 14 of Regulation (EU) 2016/679 and 12 of this Organic Law. (...)".

For all these reasons, it is considered that the appropriate sanction is an administrative fine and the obligation to uninstall any type of device inside the dwelling, stressing that the dwelling is a space reserved for the privacy of natural persons, who can carry out their personal activities there, free from any type of surveillance affecting privacy in the broadest sense.

Another case[7] involving a natural person in Austria is based on the following situation: the defendant was the mayor of a town in Austria and a sales representative of a company. In this capacity, the defendant regularly made home visits to customers in connection with the extension of the heating network and to deliver commercial offers. After a meeting on January 13, 2023, the defendant saved on his private mobile phone the name and phone number of a natural person to send him political advertisements on his behalf at a later date for the 2023 Lower Austrian state elections. At the same time, the plaintiff also saved the names and telephone numbers of six other people, whose contact details he provided to the company he worked for as a sales agent. On 25 January 2023 and 26 January 2023, the defendant sent an SMS message to three mobile phone numbers collected in the run-up to the 2023 Lower Austrian state elections. The data subjects did not consent to their personal data being stored by the defendant on his private mobile phone for the purpose of future political advertising.

[7] Data Protection Authority - Austria, File No. 2023-0.404.421, decision of 16 June 2023, available at https://www.ris.bka.gv.at/Dokumente/Dsk/DSBT_20230616_2023_0_404_421_00/DSBT_20230616_2023_0_404_421_00.html.

The defendant subsequently deleted the contact details from his private mobile phone.

The Authority considered that the material scope of the GDPR under art. 2 of the GDPR was undoubtedly fulfilled in this case. The defendant did not object that the GDPR would not apply especially since the processing for private purposes provided for in art. 2 para. 2 letter (c) of the GDPR is not fulfilled because the processing of data by the plaintiff took place in connection with his or her professional activity, according to the recital (18) of the GDPR.

The GDPR defines the term "processing" in art. 4 para 2 by listing a number of possible ways of using personal data: collecting, recording, organizing, arranging, storing, adapting or altering, reading, querying, using, disclosing by transmission, distribution or any other form of provision, deletion or destruction. By saving the contact details of the data entered in his private mobile phone with a view to transmitting them at a later date political advertisements, the defendant processed personal data as a responsible person within the meaning of art. 4 para 2 of the GDPR. Regarding the requirements for lawful data processing, art. 6 of the GDPR states that the processing of personal data is lawful only if at least one of the conditions listed in its content is met. In this regard, it is important that data controllers can demonstrate that the processing complies with at least one of these legal grounds in order to comply with the GDPR and ensure the lawfulness of the personal data processing.

In the present case, it was only the justification under art. 6 para. 1 letter (f) of the GDPR. There was no consent from those affected for the defendant to save the contact details on his private mobile phone. During the trial, the defendant did not invoke any other justification. Accordingly, the Authority has examined the existence of legitimate interests of the defendant or third parties within the meaning of art. 6 para. 1 letter (f) of the GDPR. Therefore, art. 6 para. 1 letter (f) of GDPR allows processing under three cumulative conditions: (i) the pursuit of a legitimate interest; (ii) the necessity of the processing; and (iii) the absence of an infringement of the rights and freedoms of others[8]. It was found that the plaintiff's interest in collecting the contact details of those affected was to "expand his circle of acquaintances" and subsequently generate more preferential votes for the state elections in Lower Austria. If it is assumed that the data processing carried out is necessary to achieve this purpose, the interests of the data subjects are overridden. Because of their relationship with the defendant, they could not reasonably expect him to provide their contact details, which they provided to him only in his capacity as an employee of a company, which he subsequently saved on his private mobile phone, and they could in no way foresee that the contact details they provided would be used by the defendant for a completely different purpose - namely to contact them for political purposes.

After having analysed the interests of the data subjects, the Authority concluded that the notion of privacy and the fundamental rights of the data subjects (the right to observe the private and family life and the right to protection of personal data) override the interests of the defendant. As a result, the legal basis invoked by him as a basis for processing personal data of data subjects is not appropriate for the specific processing. No other legal basis under art. 6 para 1 of the GDPR is possible and has not been invoked by the defendant. According to art. 5 para. 1 letter (b) of the GDPR, personal data must be collected for specified, clear

[8] ECJ Judgment of 11 December 2019, Case C-708/18, para 36 with further references.

and legitimate purposes and may not be further processed in a manner incompatible with those purposes ("purpose limitation"). This is correct, according to art. 6 para. 4 of the GDPR, when processing personal data for a purpose other than that for which they were originally collected, an assessment of the compatibility between the original purpose and the further purpose of the processing is required.

This assessment should include the following aspects: the connection between the initial and further purposes of the processing of personal data; the context in which the personal data were initially collected, including the relationship between the data subjects and the controller; the type of personal data involved in the initial and further processing; the consequences of the intended further processing for the data subjects; whether there are adequate safeguards in both the initial and intended further processing operations. This assessment must be carried out to ensure that the further processing of the data is compatible with the original purposes and that the fundamental rights and freedoms of the data subjects are respected. In the analysis carried out by the Authority, it was ruled that further processing of data is not allowed if there is no compatibility between the original and further purposes or if there is no adequate legal basis for further processing under the GDPR.

Against the background of the described facts, the Authority found that the defendant processed personal data unlawfully and without a legitimate purpose, contrary to art. 5 para. 1 letters (a) and (b) and art. 6 paras. 1 and 4 of the GDPR. This means that the objective side of the offence is fulfilled. From a subjective point of view, it is worth noting in the present case that, because of the deliberate storage of contact data for future contacts for political elections, it can be assumed that the defendant intentionally carried out the processing in question. Therefore, on the subjective side of the offence there is intent within the meaning of art. 83 para. 2 letter (b) of the GDPR.

The sentence assessment within a statutory sentencing framework is a discretionary decision that must be made in accordance with the criteria set out by the legislator. The basis for determining the penalty is the significance of the legal interest protected by the law and the intensity of the damage to this interest by the offence. Possible aggravating and mitigating circumstances must also be weighed against each other. Particular attention should be paid to the extent of the damage. In view of the nature of criminal administrative law, which under Austrian law is the legal branch of the law governing offences that violate the provisions of the GDPR, sections 32 to 35 of the Criminal Code apply *mutatis mutandis*. The defendant's income and financial circumstances and any maintenance obligations should be taken into account when setting fines. If a fine is imposed on an natural person, an alternative custodial sentence must also be imposed if it cannot be collected.

Regarding the facts of the case, the Authority took into account the following mitigating circumstances when setting the penalty: the absence of a criminal record and the active participation of the defendant in the proceedings conducted by the Authority. It was positively assessed that the defendant responded in a timely manner to the Data Protection Authority's requests in the administrative criminal proceedings, admitted to the Data Protection Authority that he sent the messages, cooperated with the Authority and confessed to the alleged offences. Moreover, by his confession, the defendant admitted the unlawful nature of his offence, which contributed to the individualisation of the sentence. Under art.

83 para. 1 of the GDPR, the supervisory authorities must also ensure that fines are effective, proportionate, and dissuasive in each individual case. In the light of the above, the fine imposed by the Authority of EUR 1,000 appears to be proportionate to the seriousness of the offence, having regard also to the limits of the penalty laid down in art. 83 para. 5 of the GDPR, in conjunction with the defendant's income and financial circumstances in accordance with the offence and guilt.

3. Conclusions

The right to privacy is a fundamental concept in the field of human rights and refers to the right of a natural person to protect his/her privacy, identity and personal space from unwanted or intrusive interference by other natural persons, organisations or government authorities. This right is recognised in numerous constitutions and international human rights documents. The data protection scope gives effect to existing national and international data protection regulations.

While the main actors in violations of personal data protection regulations are legal persons or governmental organisations, there is now a growing trend to hold natural persons also accountable for interfering in the private lives of the others. In European countries, there is a growing concern among national data protection authorities to make people more responsible for respecting the privacy and private lives of the others[9].

This trend is accentuated by technological progress, which generates increasingly dangerous social situations for the privacy of the natural person. Technological developments, particularly in communications and the internet, have made it easier for personal information and data to be accessed, stored and distributed. This has led to increased concerns about the privacy and security of the personal data. The widespread use of social media and other online platforms has increased the exposure and vulnerability of natural persons to intrusions into their privacy, such as unauthorised access to personal information or the indiscriminate sharing of images and other private data.

A growing awareness of the importance of protecting privacy and individual rights has increased pressure on institutions and natural persons to be more responsible in managing personal information and observing the privacy of the others[10]. In this context, there is a trend towards stronger regulatory and enforcement mechanisms to counter privacy violations and to establish clear responsibilities and consequences for those who commit them. The effectiveness of these mechanisms is evidenced by a growing body of case law in the area of holding natural persons liable for violations of the social values covered by personal data protection law.

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[9] N.-D. Ploeșteanu *et alii*, *op. cit.*, p. 127.
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LEGAL RESPONSIBILITY OF THE LAWYER. GENERAL ASPECTS REGARDING THE RESPONSIBILITY FOR LEGAL REPRESENTANTION AND ASSISTANCE

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Abstract

In this article, we aim to present essential aspects regarding the legal responsibility of the lawyer, with a particular focus on the activity of legal representation and assistance, without claiming to comprehensively address the chosen topic. In a society based on the values of democracy and the rule of law, the lawyer's role in representing and providing legal assistance to the litigants is to defend their rights and interests before the courts, criminal prosecution bodies, authorities with jurisdictional powers, notaries public and bailiffs, public administration bodies and institutions, etc. Regarding the activity of legal representation and assistance, the lawyer shall not be held criminally liable for oral or written statements made, in proper form, before the courts of law, bodies of criminal investigation, or other administrative bodies of jurisdiction, nor for consultations provided to litigants or for formulating the defense in that case, or for statements made during verbal consultations or written consultations provided to clients, provided that they are made in compliance with the rules of professional ethics. However, during their activity, the lawyer may be held criminally, civilly, disciplinarily, or administratively liable, depending on the nature of the unlawful act committed, which we will assess to what extent by referring to the legal provisions mentioned above. Therefore, through this article, we aim to provide, in a general manner, information regarding the legal responsibility of the lawyer that may arise in the exercise of legal representation and assistance activity.

Keywords: *lawyer, law, legal responsibility of the lawyer, criminal liability, civil liability, disciplinary liability.*

1. Introduction

Article 1 of the Romanian Constitution[1] provides that the Romanian state is a state of law, democratic and social, organized according to the principle of separation and balance of powers – legislative, executive, and judicial – within the framework of constitutional democracy. The judicial power is composed of the High Court of Cassation and Justice and all other courts established by law. In the administration of justice, judges, prosecutors, lawyers, bailiffs, public notaries, experts, witnesses, as well as litigating parties play important roles.

The lawyer is an essential partner of justice in Romania, contributing to ensuring a legal system that is fair, equitable, and transparent, where the fundamental rights and freedoms of citizens are protected and respected. Law no. 51/1995 regarding the

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[1] From a historical standpoint, states have been concerned with incorporating the issue of human action responsibility into both Constitutions and common acts using various terminologies (see E. E. Ștefan, *Răspunderea juridică. Privire specială asupra răspunderii în dreptul administrativ,* Pro Universitaria Publishing House, Bucharest, 2013, p. 12).

organization and exercise of the lawyer profession in Romania regulates the activities of lawyers in Romania, as well as the conditions under which they can carry out their activity.

According to Article 3(1) of Law no. 51/1995 on the organization and exercise of the lawyer profession, the lawyer's activity is carried out through: a) legal consultations and requests; b) legal assistance and representation before the courts of law, the bodies of criminal investigation, authorities with jurisdictional attributions, public notaries, bailiffs, public administration bodies, institutions, as well as other legal entities, in accordance with the law; c) drafting legal documents, certifying the identity of the parties, the content, and the date of the documents submitted for authentication; d) assisting and representing natural or legal persons before other public authorities with the possibility of certifying the identity of the parties, the content, and the date of the concluded acts; e) defending and representing, with specific legal means, the legitimate rights and interests of natural and legal persons in their relations with public authorities, institutions, and any Romanian or foreign person; f) mediation activities; g) fiduciary activities carried out under the conditions of the Civil Code; h) temporary establishment of the registered office for companies at the lawyer's professional office and registering them, on behalf and for the account of the client, the interested parties, the shareholders, or the company shares thus registered; i) fiduciary activities and activities of temporary establishment of the registered office for companies at the lawyer's professional office and registering them, on behalf and for the account of the client, the interested parties, the shareholders, or the company shares thus registered can be carried out under a new legal assistance contract; j) special guardianship activities according to the law and the Statute of the lawyer profession; k) any means and methods for exercising the right of defense, in accordance with the law.

Thus, Law no. 51/1995 establishes the ethical principles and professional rules that lawyers must respect in the exercise of their profession, including admission procedures into the profession, the regime of incompatibilities and prohibitions in the exercise of the lawyer profession, the rights and obligations of lawyers, the organization and functioning of the Bar Associations in Romania, the role and attributions of the National Union of Romanian Bars, the rules regarding advertising in the exercise of the lawyer profession, disciplinary sanctions for violations, and so on.

The principles of the legal profession represent the values upon which the lawyer bases and defends both in the exercise of the profession and in social life, and in relation to which any ethical norm and behavior in or outside of the profession are interpreted.

In doctrine, it has been established that professional ethics entail "standards and rules that guide professional behavior and entail moral rights and obligations of individuals involved in certain professions."[2]

Regarding the legal profession, the principles governing the exercise of the profession are the principle of legality, the principle of freedom, the principle of independence, the principle of autonomy and decentralization, and the principle of professional secrecy. [3]

Additionally, Article 8 (2) of the Romanian Lawyer's Code of Ethics outlines

[2] I. Muraru, E. S. Tănăsescu, *Drept constituțional și instituții politice, 16th edition*, vol. I, C.H. Beck Publishing House, Bucharest, 2023, p. 12.

[3] See Article 1 of the Lawyer Profession Statute.

principles governing the exercise of the profession: the principle of freedom and independence of the lawyer, the principle of legality and respect for the rule of law, the principle of professional secrecy, the principle of avoiding conflicts of interest, the principle of dignity, honor, and probity, the principle of professionalism and loyalty to the client, the principle of professional competence, the principle of respect for colleagues and all individuals with whom the lawyer enters into professional relationships, the principle of autonomy and self-regulation of the legal profession, and the principle of loyalty to the legal profession.

In relation to the topic we aim to address in this article, namely the legal responsibility of the lawyer with particular regard to the activity of legal representation and assistance, we note several principles with a direct influence on what constitutes the activity of legal assistance and representation of natural or legal persons of public or private law before the courts, bodies of criminal investigation, authorities with jurisdictional attributions, public notaries, bailiffs, public administration bodies and institutions, as well as other legal entities, in accordance with the law.

Thus, in the activity of legal assistance and representation, with regard to the analysis of the legal responsibility that could be attributed to the lawyer, the principles that become particularly relevant are: the principle of freedom and independence of the lawyer, the principle of legality and respect for the rule of law, the principle of avoiding conflicts of interest, the principle of dignity, honor, and integrity, the principle of professionalism and loyalty to the client, the principle of professional competence, and the principle of respecting colleagues and all individuals with whom the lawyer enters into professional relationships.

2. Content

Freedom and independence in the legal profession are principles under which the lawyer advocates and defends the rights, freedoms, and legitimate interests of clients in accordance with Law no. 51/1995 regarding the organization and exercise of the lawyer profession and the Statute of the Lawyer Profession. These principles define the professional status of the lawyer and ensure their professional activity.

Moreover, "the freedom and independence of the lawyer allow them to interpret and request the application of the law in a specific case according to their own professional belief, without seeking or fearing to please or displease the judicial, executive, legislative, political, hierarchical, economic, media, or public opinion."[4]

By exercising the rights conferred upon them by Law no. 51/1995 regarding the organization and exercise of the lawyer profession and the Statute of the Lawyer Profession, the lawyer fulfills their duties and obligations towards the client in relation to the authorities and institutions with which they assist or represent the client, towards their profession in general and towards each colleague in particular, as well as towards the public.

The lawyer has a duty to fulfill conscientiously, with honor and professional integrity, their obligations towards the client, in relations with individuals, public or private authorities and institutions, other

[4] Gh. Florea, *Libertatea și independența avocatului în exercitarea profesiei. Între aparență și realitate*, article published on 25.10.2021, link https://www.juridice.ro/essentials/5014/libertatea-si-independenta-avocatului-in-exercitarea-profesiei-intre-aparenta-si-realitate, last time consulted on 25.03.2024.[5] A. Țiclea, *Oratorie și procese celebre, 2nd edition*, Universul Juridic Publishing House, Bucharest, 2023, p. 439.

legal entities, other lawyers, as well as in their relationship with the public.

The lawyer has the right to assist and represent individuals and legal entities before the courts of law and other judicial bodies, law enforcement authorities, public authorities, and institutions, as well as before other individuals or legal entities, who have the obligation to allow and ensure the lawyer's unhindered conduct of their activities, in accordance with the law.

For the purpose of providing legal assistance and representation to the client, under the legal assistance contract concluded, the lawyer may provide legal advice, draft legal documents, represent the client, based on the granted mandate, before judicial or non-judicial bodies, law enforcement agencies, public institutions and authorities, as well as before legal or natural persons, while respecting all participants in a civilized manner.

The lawyer's tools of the trade include not only speaking but also writing. More precisely, they first write, drafting requests, actions, responses, counterclaims, third-party notices, requests for evidence, etc., and only then speak. They must write well so that the judge can easily understand the matter at hand.[5]

Advising and representing a client obliges the lawyer to view the respective case from their own perspective and to provide disinterested advice to the client.

Advising the client involves not only the exposition of legal provisions but also considers the moral, economic, social, and political consequences that may be relevant in the given situation.

Assisting and representing the client encompass all acts, means, and operations permitted by law and necessary for the protection and defense of the client's interests.

In the event they engage to assist and/or represent a client in a legal procedure, the lawyer assumes obligations of diligence. The lawyer must assist and represent the client with professional competence, utilizing appropriate legal knowledge, specific practical skills, and reasonable preparation necessary for the concrete assistance or representation of the client.

Assisting and representing the client require appropriate professional diligence, thorough preparation of cases, files, and projects, with promptness according to the nature of the case, experience, and professional belief.

Thus, "to write well, the lawyer must research, study, and then make connections, establish the factual situation, identify applicable legal provisions, determine what evidence is necessary to support the claim they are making, the arguments that can be invoked, their strength, and the order in which they should be presented. Then they must deal with drafting, the words used, legal terminology, style. Legal writing is ultimately an art. It must be fluent, expressive, and engaging."[6]

Moreover, "the system of selection operations is superior to that of establishing arguments, as the latter has a strong note of spontaneous improvisation, through a supposition characterized by impression, imbued with the subjectivity of basic affective temptation and passionate preferences. Establishing aims to form a primary mass of possible arguments, while selection aims to distinguish and retain only what is the actual argument and, at the same time, admissible from a legal perspective and necessary from a logical-formal point of

[5] A. Țiclea, *Oratorie și procese celebre, 2nd edition*, Universul Juridic Publishing House, Bucharest, 2023, p. 439.

[6] *Ibidem*

view for the alternative chosen by the subject."[7]

Furthermore, we point out that "the lawyer must not forget that he is an auxiliary of justice, and for this purpose, he must make himself clearly understood, express himself in appropriate terms, avoid vague or equivocal formulas, eliminate from the expression the incidents that burden the sentence, rephrase in a different form what he thought was not well understood."[8]

However, the lawyer does not incur criminal liability for the oral or written statements made, properly, before the courts, the prosecutorial bodies, or other administrative jurisdictional bodies, nor if they are related to the consultations provided to litigants or with the formulation of the defense in that case or for the statements made during verbal or written consultations provided to clients, if they are made in compliance with the rules of professional ethics.

The lawyer has the obligation to ensure professional liability, pursuant to Article 42 of Law no. 51/1995 regarding the organization and exercise of the lawyer's profession.

Professional liability covers the actual damages suffered by the client resulting from the exercise of the profession without respecting the provisions of Law no. 51/1995, the Statute of the lawyer's profession, and the deontological rules.

According to Article 38 paragraph (4) of the Statute of the lawyer's profession, the parties may establish the limits of the lawyer's liability by contract. Clauses totally exempting professional liability are considered unwritten.

The lawyer may be civilly liable for the damages caused to his client in the exercise of the lawyer's profession for acts such as negligence or professional error in the exercise of the profession, non-performance or defective performance of contractual obligations assumed towards the client, failure to respect the confidentiality of information received from the client, conflict of interest, etc. The lawyer has the obligation to ensure professional liability.

Professional liability covers the actual damages suffered by the client resulting from the exercise of the profession without respecting the provisions of Law no. 51/1995 regarding the organization and exercise of the lawyer's profession, the Statute of the lawyer's profession, and the deontological rules.

In practice, the civil liability of the lawyer is contractual, occurring in the execution of a legal assistance contract, for acts such as: missing the procedural deadline for filing an action or exercising a remedy, failure to respect the conflict of interest, failure to respect the confidentiality clause, ignorance of the legal provision or insufficient legal research, providing a consultation that contravenes the provisions of the law, etc., without excluding the lawyer's tort civil liability for unlawful acts committed outside the sphere of exercising the profession of lawyer.

As an example, we mention the retention in a lawsuit of the considerations according to which the lawyer showed negligence in the execution of the legal assistance contract, negligence resulting from the erroneous substantiation of the lawsuit on the principle of undue payment

[7] Gh. Mihai, *Elemente constructive de argumentare juridică*, Academy Publishing House of the Socialist Republic of Romania, Bucharest, 1982, p. 116.

[8] Y. Eminescu, *Pledoarii celebre (Antologie de oratorie judiciară),* Academy Publishing House of the Socialist Republic of Romania, Bucharest, 1973, p. 18.

and on tort liability when contractual civil liability was applicable in the case file.[9]

The lawyer may be held disciplinarily liable for acts provided and incriminated as disciplinary offenses or serious disciplinary offenses, according to the applicable normative acts governing the organization and exercise of the legal profession. Thus, the lawyer is disciplinarily liable for failure to comply with the provisions of Law no. 51/1995 regarding the organization and exercise of the legal profession or the Statute of the legal profession, for failure to comply with mandatory decisions adopted by the governing bodies of the bar association or the National Union of Romanian Bars, as well as for any acts committed in connection with the profession or outside it, which are likely to prejudice the honor and prestige of the profession, the body of lawyers, or the institution, according to Article 85 of Law no. 51/1995.

By way of example, we note that the lawyer is obligated to thoroughly study the cases entrusted to them, whether retained or appointed ex officio, to appear at each hearing before the courts of law or the prosecution authorities or other institutions, according to the mandate entrusted to them, to demonstrate conscientiousness and professional integrity, to plead with dignity before the judges and the parties to the proceedings, to submit written conclusions or session notes whenever the nature or difficulty of the case requires it or the court orders it, the attributable failure to perform these professional duties constitutes a disciplinary offense, respectively, the unjustified absence of the lawyer who is a member of the governing bodies of the profession and has the obligation to participate in meetings constitutes a serious disciplinary offense.[10]

Expressions of legal opinions, exercise of rights, fulfillment of obligations provided by law, and the use of legal means for the preparation and effective implementation of the defense of the freedoms, rights, and legitimate interests of their clients do not constitute disciplinary offenses and do not give rise to other forms of legal liability for the lawyer.

The lawyer is not disciplinarily liable for oral or written submissions made before the courts of law, other judicial bodies, prosecution authorities, or other authorities if they are made in accordance with the rules of professional ethics.[11]

Administratively, the lawyer may be held responsible for non-attendance if they have not ensured their substitution by another lawyer, representative, or assisting party, or for failure to comply with the duties established by law or by the court if such conduct causes adjournment of the trial, punishable by judicial fine ranging from 50 lei to 700 lei, according to Article 187 paragraph (1) point 2 letter c) of the Civil Procedure Code.

The lawyer may be criminally liable for committing acts provided and incriminated by criminal law in the exercise of the legal profession, as a qualified active subject of the committed offense.

However, it is noted that the lawyer may commit unlawful acts provided and incriminated by criminal law outside the exercise of the legal profession, in which case they shall be liable for them like any other person.

The criminal liability of the lawyer involves certain particularities that are

[9] See also https://www.legal-land.ro/raspunderea-avocatului-pentru-invocarea-unui-temei-juridic-eronat/, last time consulted on 25.03.2024.

[10] See art. 30, art. 41^1, art. 43, art. 53, art. 54 of the Statute of the Legal Profession.

[11] See Article 7 of the Statute of the Legal Profession.

noticeable from the stage of criminal prosecution, namely, criminal prosecution is carried out, obligatorily, by the prosecutor in the case of offenses for which the jurisdiction in the first instance belongs to the High Court of Cassation and Justice or the court of appeal.[12]

Moreover, offenses committed by lawyers, notaries public, judicial executors, financial controllers of the Court of Auditors, as well as external public authors are settled in the first instance by the court of appeal.[13]

Furthermore, in the exercise of the profession, the lawyer is an indispensable partner of justice, protected by law, without being assimilated to a public official, except in situations where they certify the identity of the parties, the content, or the date of a document.

According to Article 175 paragraph (2) of the Criminal Code, a public official, for the purposes of criminal law, is considered to be a person who performs a public service for which they have been invested by public authorities or who is subject to their control or supervision regarding the performance of that public service.

Therefore, from the combination of the above, it follows that the lawyer is not a public official, but as an exception, they are assimilated to a public official in situations where they certify the identity of the parties, the content, or the date of a document.

In doctrine, it has been established that, "if in the period prior to 1989 the lawyer was assimilated by case law decisions with the category of officials, at present there is no doubt that the lawyer is a freelance professional."[14]

Article 284 of the Penal Code provides that the act of a lawyer or representative of a person who, in fraudulent collusion with a person having conflicting interests in the same case, within a judicial or notarial procedure, harms the interests of the client or the represented person is punished with imprisonment from three months to one year or a fine. Moreover, the same penalty is imposed for the fraudulent agreement between a lawyer or representative of a person and a third party interested in the decision to be rendered in the case, with the aim of harming the interests of the client or the represented person.

3. Conclusions

In a society[15] founded on the values of democracy and the rule of law, the lawyer plays an essential role. The lawyer is indispensable to both justice and the litigants and is tasked with defending their rights and interests. The lawyer is both the advisor and advocate for their client.

In legal doctrine, *the legal profession is considered the archetype of liberal professions*[16], thus, in the activity of legal representation and assistance, the lawyer must benefit from all rights and guarantees recognized by the current normative acts.

[12] See Article 56 of the Code of Criminal Procedure.

[13] See Article 38 of the Code of Criminal Procedure.

[14] L. Dănilă, *Organizarea și exercitarea profesiei de avocat, 2nd edition*, C.H. Beck Publishing House, Bucharest, 2008, p. 13.

[15] Human society is based on a diversity of individuals, grouped according to various criteria into various forms and social structures. Rarely is the social body fully homogeneous; most often it is composite, characterized by pluralism and sometimes even fragmentation. (See I. Muraru, E. S. Tănăsescu, *op. cit*., p. 2).

[16] A. Țiclea, *op. cit.*, p. 430.

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AUTONOMOUS CENTRAL SPECIALIZED AUTHORITIES

Elena Emilia ȘTEFAN [(*)]

Abstract

Within public administration organization system, a special place is given to the autonomous specialized central authorities, regulated by the Constitution. Such a constitutional rank authority is the Economic and Social Council. In view of the fact that, according to the Constitution, the Economic and Social Council is an advisory body of Parliament and the Government, without detailing the areas of expertise in which it is consulted, there is a question in what concerns the way in which it fulfills its role established by the legislator. Therefore, the scope of this study is to know the legal regime of this autonomous central specialized authority, according to the legislation and specialized doctrine. Furthermore, the analysis will place the Economic and Social Council in an international context, in the sense that we will research in comparative law what is provided for in the constitutions of other European countries regarding this authority. From this point of view, we consider the topic to be of interest to legal specialists as it provides information about a public authority of constitutional rank. In this respect, by means of law-specific researched methods, such as documentary method, comparative method and logical-deductive method, we will underline the conclusion of our paperwork, that, among other duties, the Economic and Social Council, being involved in the broad legislative process, according to its organic law, issues opinions and carries out an activity in the public interest.

Keywords: *Administrative Code, Economic and Social Council, autonomous central public authority, Law no. 248/2013 on the organization and functioning of the Economic and Social Council, opinion.*

1. Introduction

Considering the complexity of the daily activity carried out in public administration, combined with the fact that, according to the law, there are certain public advisory authorities, curiosity urged us to document the subject in order to be able to know as much as possible about the activity of the various public authorities, in this respect. According to the doctrine, "*the dynamism of modern life does not in many cases allow the conduct of social life to be shackled to certain fixed patterns, predetermined by law*"[1]. Therefore, we consider that the legislator has regulated the possibility for certain advisory bodies to operate at public administration level. In this respect, one of the public authorities involved in the legislative process is the Economic and Social Council.

Among autonomous administrative authorities of constitutional nature, being provided for first by the Constitution, their organization and functioning being performed by means of organic law, we hereby list the following: "the *Ombudsman, Court of Audit, Supreme Council,*

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[1] T. Drăganu, *Introducere în teoria și practica statului de drept,* Dacia Publishing House, Cluj - Napoca, 1992, p. 184.

Legislative Council, Economic and Social Council, public radio and television services, intelligence services with duties in the field of national security[2]". According to the doctrine, the organization in our country of such authorities, with control or coordination powers, independent of the Government, "*are part of the general trend that characterizes Western legislation in recent years, namely the numerical increase of independent administrative authorities, created at the central level, autonomous towards the Government and sometimes towards the Head of State*[3]".

Therefore, this paper aims to provide as much information as possible on the legal regime of the Economic and Social Council by answering questions such as*: "What are the areas of expertise of the Economic and Social Council?"* or "*What is the role of the Economic and Social Council in the pyramid of public authorities?"*. In this respect, a structure organized on two levels is proposed, the national and the comparative law, and the content of the study will analyze the relevant legislation and doctrine in order to formulate a conclusion.

2. Legal regime of the Economic and Social

2.1. Legal nature and role of the Economic and Social Council

According to art. 141 of the Constitution, "the Economic and Social Council shall be an advisory body of the Parliament and Government, in the areas of expertise stated by the organic law for its establishment, organization, and functioning". The organic law referred to in the Constitution[4] is currently Law no. 248/2013 on the organization and functioning of the Economic and Social Council[5]. Prior to 2013, Law no. 107/1997 on the organization and functioning of the Economic and Social Council was in force[6].

Art.1 of previous Law no. 107/1997 provided the following: "the Economic and Social Council, a tripartite, autonomous body of public interest, shall be set up for the purposes of the social dialogue between the Government, trade unions and employers and a climate of social peace". Currently, according to art. 1 para. (1) of organic law no. 248/2013, the Economic and Social Council, abbreviated as ESC "is a consultative body of the Parliament and of the Government of Romania within the areas of expertise established by means of this law".

Furthermore, the Economic and Social Council is a "public institution of national interest, tripartite, autonomous, set up for the purpose of conducting dialogue between employers' organizations, trade union organizations and representatives of non-governmental civil society associations and foundations" [art. 1 para.(2)]. Moreover, the Economic and Social Council has legal

[2] C. S. Săraru, *Drept administrativ. Probleme fundamentale ale dreptului public*, C. H. Beck Publishing House, Bucharest, 2016, pp.648-649. Also see E. Anghel, *Involvement of the Ombudsman institution of Ombudsman in the mechanism of constitutional justice*, in the proceedings CKS-eBook 2021, pp.559-563.

[3] R. N. Petrescu, *Drept administrativ*, Hamangiu Publishing House, Bucharest, 2019, p.127.

[4] For more about the constitutionalism, see C.G.B. Ene-Dinu, *A century of constitutionalism*, in "LESIJ - Lex ET Scientia International Journal", no. XXX, vol. 2/2023, p. 129-138, online at https://lexetscientia.univnt.ro/download/2023_XXX_2_10_LESIJ.pdf, visited on 07.03.2024.

[5] Published in Official Gazette of Romania, no. 456 of 24 July 2013, as further amended and supplemented.

[6] Published in Official Gazette of Romania, no. 141 of 7 July 1997.

personality and registered office in Bucharest[7].

The administrative law literature discusses the Economic and Social Council in a separate chapter devoted to the autonomous authorities of the specialized central public administration. In this respect, there is an author that states that "being autonomous authorities, but exercising administrative duties, they are not subject to public guardianship regime, such as the autonomous authorities of the local government (county councils, local councils, city halls, etc.)"[8]. In the same context, the doctrine states that the autonomous administrative authorities, "whether or not expressly provided in the Constitution, are organized and function based on certain organic laws[9]". Therefore, "the legal regulation requires acceptance of and compliance with the prescribed conduct [10]".

According to the Administrative Code, art. 2 para.(1) "the central public administration authorities are: the Government, ministries, other specialized bodies subordinated to the Government or ministries, autonomous administrative authorities". The Administrative Code regulates the structure of the specialized central public administration in art.51 para. (1) as consisting of "ministries, other structure in the subordination or coordination of the Government or of the ministries and autonomous administrative authorities". Furthermore, "in accordance with the current body of law, whether constitutional or infra-constitutional, two categories of administrative law relationships can be distinguished: subordination relationships and collaboration relationships."[11]

In what concerns the administrative law relationships arisen between the Government and the autonomous administrative authorities, the Administrative Code establishes them as being collaboration relationships[12] (art.27). Furthermore, the doctrine states that "public administration comprises central public administration bodies and their deconcentrated services, as well as local public administration bodies[13]."

Title III of the Administrative Code regulates the autonomous administrative authorities, in art. 69-74. With regard to the specific names of the authorities, it has been stated that "they differ from one authority to another: council, service, commission, court[14]". The doctrine shows that these autonomous specialized central authorities "are the work of the constituent legislator, which means that they can only be abolished by means of a constitutional law amending the fundamental law by repealing the articles or changing their content[15]".

[7] Public information, available at https://www.ces.ro/consiliul-economic-si-social/ro/1, visited on 10.02.2024.

[8] I. Corbeanu, *Drept administrativ*, Lumina Lex Publishing House, Bucharest, 2010, p. 291.

[9] D. Apostol Tofan, *Drept administrativ, vol. I, 2nd edition*, C.H. Beck Publishing House, Bucharest, 2008, p. 246.

[10] N.E. Hegheș, *The non - retroactivity of' new legal norms-fundamental principle of law. Exceptions*, in "International Journal Of Legal And Social Order (1)", p. 153, online at https://ijlso.ccdsara.ro/index.php/international-journal-of-legal-a/article/view/74/60, visited on 03.03.2024.

[11] M.C. Cliza, C.C. Ulariu, *Drept administrativ, Partea Generală,* C.H. Beck Publishing House, Bucharest, 2023, p. 300.

[12] See also N. Popa (coord.), E. Anghel, C.B.G.. Ene-Dinu, L. Spătaru-Negură, *Teoria generală a dreptului. Caiet de seminar, 4th edition*, C.H. Beck Publishing House, Bucharest, 2023, p. 227.

[13] M.C. Cliza, C.C. Ulariu, *op. cit.*, p. 154.

[14] D. Apostol Tofan, *op. cit.*, p. 246.

[15] V. Vedinaș, *Drept administrativ, 14th edition*, Universul Juridic Publishing House, Bucharest, 2023, p.189.

According to the doctrine, "the difference between autonomous central specialized authorities with constitutional status and those with legal status is not only in terms of the legal act by which they were created, but also in terms of their degree of dependence[16]". Therefore, "the autonomous authorities of constitutional rank are subject to the Government only to the extent that it adopts ordinances or regulatory decisions which are binding on them like any other subject of law"[17]. On the other hand, "for the autonomous authorities created by organic law, the rule established by art. 102 para. (1) according to which the Government exercises the general management of public administration has a higher degree of extension and applicability[18]".

With regard to ESC role, the Court noted the following in its case law: "art. 141 of the Constitution merely enshrines the role of the Economic and Social Council as an advisory body of the Parliament and the Government, and for details of the areas of expertise in which it is consulted, the text refers to its organic law of establishment, organization and functioning[19]".

2.2. Areas of expertise – duties – management

According to its organic law, art. 2 para. (2), the areas of expertise of the Economic and Social Council are: "economic policies; financial and fiscal policies; labor relations, social protection, wage policies and equal opportunities and treatment; agriculture, rural development, environmental protection and sustainable development; consumer protection and fair competition; cooperation, liberal professions and self-employment; citizens' rights and freedoms; health policies; education, youth, research, culture and sport policies".

Furthermore, regarding ESC duties, the law provides the following:

a) "Approves draft normative acts of the areas of expertise referred to in art. 2 para. (2) initiated by the Government, as well as the legislative proposals of the deputies and senators, inviting the initiators to the debate of the normative acts;

b) Draws up at the request of the Government, the Parliament or on its own initiative, analyses and studies on economic and social realities;

c) Notifies the Government or the Parliament of the appearance of economic and social phenomena that require the appearance of new normative acts".

According to art. 6, the types of opinions issued by the Economic and Social Council are: favorable opinions, opinions with observations and proposals, unfavorable opinions. From another perspective, in the administrative law doctrine, the opinions are analyzed as procedural operations prior to the issuance of administrative acts[20]. Returning to the analysis carried out, annual activity reports can be found on the institution's website[21], as well as information on the granted opinions[22].

[16] *Ibidem.*

[17] I. Muraru, E.S. Tănăsescu (coord), *Constituția României.Comentariu pe articole, 3rd edition*, C.H. Beck Publishing House, Bucharest, 2022, p.1013 *apud* V. Vedinaș, *Drept administrativ, op. cit,* p. 189-190.

[18] V. Vedinaș, *Drept administrativ, op. cit.,* p. 190.

[19] Decision no. 391/2021 of the Constitutional Court, published in Official Gazette of Romania no.719 of 22 July 2021.

[20] M. C. Cliza, *Drept administrativ, Part II,* Pro Universitaria Publishing House, Bucharest, 2010, pp.30-32.

[21] Public information, available online at https://www.ces.ro/rapoarte-de-activitate-ale-ces/ro/27, visited on 19.02.2024.

[22] For example: https://www.ces.ro/avize-ces-2024/ro/276, visited on19.02.2024.

Regarding the personnel, the organic law provides information on how this public authority works. According to the doctrine, "like any state body, in general like any social body, public administration bodies consist of individuals who make up the personnel of the respective bodies[23]". The ESC management consists of the president and vice-presidents.

According to art.20 of the law, the plenary ensures the general management of the Economic and Social Council and, among other duties, approves draft normative acts. According to the organic law, ESC plenary consists of 45 members, each member being elected for a 4-year term which cannot be renewed, the law expressly establishing the cases of termination of the term of office.

In interpreting[24] the legal norm regulated by art. 17 para.1) letter e) of the organic law, the High Cort of Cassation and Justice, in its case law, in a case concerning the revocation of members of the Economic and Social Council, has analyzed the legality of administrative acts revoking their membership of the Economic and Social Council.

Therefore, the High Court of Cassation and Justice noted the following:" the issue in the present case is not whether or not the applicants have performed the work for which they were appointed, but the legality of the administrative acts revoking their membership of the Economic and Social Council, and if the decisions to revoke their membership are found to be unlawful, the applicants shall be entitled to receive the allowance even if they were prevented from performing their work (…)"[25].

The Constitutional Court points out the following[26]: "Law no. 248/2013 does not provide for the revocation of members of the Economic and Social Council for failure to perform their duties or for conduct that violates legal or constitutional rules, but establishes the possibility for the Prime Minister to request the revocation, arbitrarily, of the member of the Economic and Social Council whom he has appointed, without specifying the public authority that could approve such revocation (par. 33)"[27]. Furthermore, the Court noted that the "the legislative solution provided for in art. 17 para.1) letter e) which does not specify the cases and grounds for dismissal of members of the Economic and Social Council or the procedure for their dismissal, is unconstitutional. (par.38)[28]".

3. Economic and Social Council – comparative law patterns

The information in this section is based on a selection of European constitutions, by analyzing work Codex constituţional.

[23] D. Brezoianu, M. Oprican, *Administrația publică în România*, C.H. Beck Publishing House, Bucharest, 2008, p. 209.

[24] On the legal interpretation, see M. Bădescu, *Teoria generală a dreptului*, Sitech Publishing House, Craiova, 2018, pp.167-187 or I. Boghirnea, *The interpretation – obligation for the judge imposed by the application of the law*, in "Legal And Administrative Studies", Year XVII, No. 2 (19)/ 2018, pp. 50-57.

[25] High Court of Cassation and Justice – Division of Contentious Administrative and Fiscal, Decision no. 81 of 13 January 2022, consulted online at https://www.universuljuridic.ro/jurisprudenta-prelucrata-consiliul-economic-si-social-revocare-membrii-legalitatea-actelor-administrative-de-revocare-a-acestora-din-calitatea-de-membri-ai-ces-plata-indemnizatiei/, visited on 13.02.2024.

[26] C.B.G. Ene-Dinu, *Constitutionality and referral in the interests of the law*, in "LESIJ - Lex ET Scientia International Journal" nr. XXIX, vol. 1/2022, pp. 66-74, online at https://lexetscientia.univnt.ro/download/2022_XXIX_1_6_LESIJ.pdf, visited on 07.03.2024.

[27] Decision no. 69/2023 of the Constitutional Court, published in Official Journal no. 23 of 11 January 2024.

[28] *Idem*.

Constituţiile statelor membre ale Uniunii Europene (Constitutional Codex. Constitutions of the Member States of the European Union)[29]. According to the administrative law doctrine, "European constitutions are formal laws that include the fundamental rules of the state (...)"[30]. Furthermore, "the Constitution commands the whole of law, by its content and position in the legal system"[31].

By reading the Constitution[32] of the Republic of Austria, it appears that the legislator does not develop information about the Economic and Social Council but merely nominates it in relation to the Government. Therefore, according to art. 23 letter c) "The Austrian participation in the nomination of members of the Commission, the Court of Justice, the Court of First Instance, the Court of Accounts, the Administrative Council or the European Investment Bank, the Economic and Social Committee, as well as the Committee of the Regions within the framework of the European Union is incumbent upon the Federal Government (...)".

In the Constitution of the Hellenic Republic[33] instead, the legislator refers to the law organizing the Economic and Social Council which it regulates under the name of Economic and Social Committee. In this respect, we indicate art.82 para. (3) which provides as follows: "Matters relating to the establishment, functioning and competences of the Economic and Social Committee whose mission is to conduct social dialogue for the overall policy of the Country and, especially, for the orientations of the economic and social policy, as well as to formulate opinions on Bills and law proposals referred to it, shall be specified by law".

In what concerns the Constitution of the French Republic[34], we note a difference from our Constitution, in that the legislator has regulated in Title XI – the Economic, Social and Environmental Council, art. 69-71. Therefore, according to art. 69 para. (1) of the Constitution "The Economic and Social Council, on a referral from the Government, shall give its opinion on such Government Bills, draft Ordinances, draft Decrees, and Private Members' Bills as have been submitted to it". Furthermore, according to art. 71 "The composition of the Economic, Social and Environmental Council, which shall not exceed two hundred and thirty-three members, and its rules of proceeding shall be determined by an Organic Law". We note that although the legislator regulates this public authority, the name is more complex, by also including environmental issues.

Moreover, the Constitution of the Portuguese Republic[35] regulates the Economic and Social Council in art. 92. According to the constituent legislator, the Economic and Social Council is "the body with responsibility for consultation and concertation in the economic and social policy domain, shall take part in drafting the Major Options and the economic and social development plans, and shall exercise any other functions allocated to it by law".

[29] Ş. Deaconu, I. Muraru, E. S. Tănăsescu, S. G. Barbu, *Codex constituțional. Constituţiile statelor membre ale Uniunii Europene*, Official Gazette Publishing House, Bucharest, 2015, pp. 23-748.

[30] D. Apostol Tofan*, Instituții administrative europene,* C.H. Beck Publishing House, Bucharest, 2006, p.12.

[31] I. Muraru (coord.), A. Muraru, V. Bărbățeanu, D. Big, *Drept constitutional și instituții politice. Caiet de Seminar*, C.H. Beck Publishing House, Bucharest, 2020, p. 60.

[32] Public information, https://constitutii.files.wordpress.com/2013/02/austria.pdf, visited on 15.02.2024.

[33] Public information, https://constitutii.files.wordpress.com/2013/01/grecia.pdf, visited on 15.02.2024.

[34]Public information, https://constitutii.files.wordpress.com/2013/02/franta.pdf, visited on 15.02.2024.

[35] Public information, https://constitutii.files.wordpress.com/2013/01/portugalia.pdf, visited on 15.02.2024.

Furthermore, according to the constitutional provisions, "the law shall also define the way in which the Economic and Social Council is organized and its modus operandi, together with the status and role of its members."

In the Constitution of the Republic of Slovenia[36], the Economic and Social Council is known under the name of the National Council. According to art. 96 of the Constitution: "The National Council is the representative body for social, economic, professional, and local interests. The National Council has forty members". Furthermore, the law regulates the organization and functioning of this body.

Romania, like the other countries referred to above, by regulating ESC in the Constitution, has harmonized domestic law with European legislation. As the doctrine has revealed, regarding the application of European Union law in our country, "the provisions of article 148(4), according to which the Parliament, the President of Romania, the Government and the judicial authority guarantee the fulfilment of the obligations arising from the Act of Accession and the provisions of Article 148(4), are relevant[37]". At the same time, Romania has transposed European legislation in various fields of activity, as it is well known that failure to comply with European legislation entails Member State liability.

We note that the European Economic and Social Committee operates at the level of the European Union, a body which "advises the Council and the Commission and is actively involved in the decision-making process[38]". According to art. 300 of the Treaty on the Functioning of the European Union - TFEU there are two consultative bodies of the Union: the Council of the Regions and the Economic and Social Committee - EESC.

According to art. 300 para. (2) TFEU, EESC shall consist of representatives of organizations of employers, of the employed, and of other parties representative of civil society, notably in socio-economic, civic, professional and cultural areas. Furthermore, "EESC is a consultative body of the European Union, based in Brussels and composed of 329 members. Its opinions are required on the basis of a mandatory consultation in the fields established by the Treaties or a voluntary consultation by the Commission, the Council or Parliament, and the EESC may also issue opinions on its own initiative[39]". At the same time, an analysis of the legislation shows that EESC members exercise their functions with complete independence, in the general interest of the Union, by delivering opinions on European Union matters to the European Commission, the Council of the European Union and the European Parliament.[40]

3. Conclusions

The Economic and Social Council - ESC, as a constitutional rank authority, was analyzed in this study in order to find out as much as possible about the applicable legal regime, in which sense the applicable legislation, doctrine and the institution's website were analyzed. The great number of

[36] Public information, https://constitutii.files.wordpress.com/2013/01/slovenia.pdf, visited on 15.02.2024.
[37] R. M. Popescu, *Drept internațional public,* Universul Juridic Publishing House, Bucharest, 2023, p. 34.
[38] A. Fuerea, *Manualul Uniunii Europene*, Universul Juridic Publishing House, Bucharest, 2010, p. 129.
[39] Public information, https://www.europarl.europa.eu/factsheets/ro/sheet/15/comitetul-economic-si-social-european, visited on 19.02.2024.
[40] Decision no. 679/2023 of the Constitutional Court, published in Official Gazette of Romania, no. 23 of 11 January 2024, par. 39.

public information revealed by means of the IT method[41] increasingly underlines that "*mankind is globally connected by high-speed digital data networks*[42]". This has led the doctrine to rightly state that "*the regulation of the digital domain entails the formation of new paradigms in the legal space*[43]".

On this occasion, the analysis showed that the ESC is a consultative body of the Romanian Parliament and Government in the areas of expertise established by the organic law on the establishment, organization and functioning thereof, respectively Law no. 248/2013. At the same time, from the documentation of the legislation, it can be said that the ESC falls under the scope of the autonomous authorities of the specialized central public administration and the activity carried out is a public service[44] in the public interest. With regard to draft normative acts of its areas of expertise, it appears that ESC issues several categories of opinions, as follows: favorable opinions, opinions with comments and proposals, unfavorable opinions.

At the European level, the documentation carried out revealed that this body is established in the Fundamental Law of several European countries, often with different names such as the Constitution of the French Republic (Economic, Social and Environmental Council) or the Constitution of the Republic of Slovenia (National Council). At the same time, our country is also represented at the Economic and Social Committee - EESC, an European advisory body.

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[41] On quantitative research methods, see N. Popa (coord.), E. Anghel, C.B.G. Ene-Dinu and L. Spătaru-Negură, *Teoria generală a dreptului. Caiet de seminar, 3rd edition*, C.H.Beck Publishing House, Bucharest, 2017, p. 29.

[42] G. Manu, O. Predescu, *Dreptul public în fața provocărilor inteligenței artificiale*, in "Universul Juridic Magazine" no. 6/2023, p. 17, online at https://revista.universuljuridic.ro/wp-content/uploads/2023/08/01_Revista_Universul_Juridic_nr_6-2023_PAGINAT_BT_G_Manu.pdf, visited on 19.02.2024.

[43] A. Conea, *Politicile Uniunii Europene*, Universul Juridic Publishing House, Bucharest, 2020, p. 10.

[44] On public services in: V. Negruț, *Drept administrativ. Serviciul Public. Proprietatea publică*, C.H.Beck Publishing House, Bucharest, 2020, p. 1-18.

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- https://constitutii.files.wordpress.com/2013/01/portugalia.pdf, visited on 15.02.2024.
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FICTITIOUS INVOICING IN THE VAT SYSTEM

Zoltán VARGA[(*)]

Abstract

We often hear in news reports that employees of the Hungarian National Tax and Customs Administration seized luxury cars and real estate on suspicion of large-scale VAT fraud and then auctioned them off. These cases are the tip of the iceberg, but according to various European Union surveys, abuses about VAT refunds in the EU cost Member States EUR 140 billion. In the case of Hungary, this results in a loss of nearly HUF 400 billion in the budget. One of these forms of abuse is closely related to the use of fictitious invoices. For decades, the tax authority has been seriously trying to track down businesses that issue and receive fictitious invoices. In my study, I examine the abuse of fictitious invoices, with special regard to tax evasion committed by issuing and receiving fictitious invoices. I will also mention the consciousness of taxpayers in this regard, as this has a significant impact on the determination of sanctions according to the court's case law. Given that transactions cross national borders, I will also refer to the case law of the Court of Justice of the European Union. I also analyze the importance of digitalization by the tax authority, which plays an increasingly important role in detecting transactions.

Keywords: *VAT, fictitious invoice, National Tax and Customs Administration.*

1. Introduction

The legal requirements related to invoicing are laid down in the Act on Accounting, VAT Act, and Tax Administration Identification of Invoices and Receipts, as well as on the Tax Authority Control of Invoices Stored in Electronic Form (VI.30.) NGM Regulation. In EU law, invoicing is dealt with in Chapter Three of the VAT Directive.

As a general rule, the taxable person must issue an invoice for each transaction. Under Article 220 of the Directive, every taxable person is obliged to issue an invoice for the supplies of goods and services carried out by him. The strict invoicing obligation aims to ensure that taxpayers pay VAT on all transactions. The legislation defines the mandatory data content of the invoice. In principle, the mandatory data content of invoices is uniform across the EU, although minor differences between Member States still occur in practice.[1] The invoice must clearly indicate the tax base, i.e. the price of the goods or services excluding VAT, the tax rate applied and any exemptions. For intra-EU transactions, the VAT numbers of both the seller and the buyer must be indicated on the relevant document. Irrespective of the buyer's intention, invoices should be issued for supplies of goods on which the customer is liable to pay tax, such as the sale of new means of transport.

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[1] Erdős Gabriella-Őry Tamás-Váradi Adrienn: Az Európai Unió adójoga, Wolters Kluwer Hungary, Budapest, 2021. 229. o.

In relation to invoices, the authenticity of their origin, the integrity of their data content and their legibility must be ensured. Invoices may only be issued by taxpayers with strict serial numbering. Invoicing programs and invoice forms must ensure that invoices are numbered continuously. During an ex-post audit, the tax authority may examine whether each invoice can be found in the taxpayer's register without omission based on the invoice numbers, and whether the amount of tax payable calculated on the basis of the invoices included in the VAT analysis is equal to the amount of taxes included in the returns.

Since the material condition for the right of deduction is that the invoice is available to the buyer, taxable customers also require sellers to issue an invoice to them. In addition to the mandatory issuance of invoices, the legislation also stipulates the obligation of both the seller and the buyer to keep invoices. At the request of the tax authorities, invoices issued or received during the period under investigation shall be made available to the audit.

Hungarian legislation – Section 119 (1), Section 120 a) of the VAT Act.) Pursuant to Section 127(1), Section 15(3), Section 165(2) and Section 166(2) of the Act on Civil Liberties, the cumulative content conditions for deducting input tax include, inter alia, that the invoice must be issued by a real taxpayer, that it must be a certified document that is correct in form and content, issued on a real economic event and that the tax has also been passed on by the other taxpayer. The right of deduction can only be exercised if the formal and substantive conditions are met. It is not an economic event per se, but an economic event according to a certified invoice that can give rise to the exercise of the right of deduction, the transactions must actually take place in accordance with their agreement, as indicated on the documents issued. An invoice shall be considered authentic if all its details are correct, and the untruthfulness of any of the information provided may overturn the authenticity of the invoice.

However, according to court rulings, an invoice alone does not certify the existence of an economic event, but other evidence supporting the economic event proves the authenticity of the invoice, so that an invoice that is only formally adequate is not sufficient for the lawful exercise of the right of deduction.

2. Disclosure and verification of invoicing from the side of the tax authority

2.1. Audit practices of the tax authority

Act CLI of 2017 on the Tax Administration Code (hereinafter: Air.) defines two types of audit: a tax audit that creates a period closed by an audit[2], and a compliance audit that does not result in a period ending with an audit[3].

One of the peculiarities of compliance audits vis-à-vis tax audits is that they do not create a period closed by an inspection. Within the framework of a compliance investigation, the tax authority may also check before the closing of the tax return period whether the taxpayer has fulfilled certain tax obligations prescribed by law, fulfils them on time and in a manner suitable for establishing, reporting and paying tax (Air. § 91 (1) (a)) and/or collect data in order to establish the veracity of the data, facts and circumstances contained in its records and

[2] Air. Pursuant to Section 89 of the GDPR, the audit department of the tax authority will carry out the audit.
[3] In detail about Air. § 91 defines what compliance checks are.

the taxpayer's records and returns, as well as their authenticity (Air. § 91 (1) (b)) and/or examine the reality of economic events (Air. § 91 (1) (c)) and/or collect data to support its audit activities, in particular for the establishment and maintenance of an estimation database (Air. § 91(1)(d)).

In addition to the main tax obligations - the obligation to declare and pay taxes - taxpayers are also subject to other obligations prescribed by law. Such obligations include, for example, the issuance, storage and bookkeeping of the document. On the one hand, these serve as a basis for taxpayers to be able to fully fulfil their obligations in accordance with legal requirements, and on the other hand, for the tax authority to be able to examine real economic processes and determine the correctness of the fulfilment of obligations or possible defaults during its audit.

One of the special cases of compliance inspections is on-site inspections, in the framework of which, for example, the operational department checks on the spot in the framework of mystery shopping whether the taxpayer fulfils its Western and invoicing obligations, or whether the online cash register operates in accordance with legal requirements, issues legal documents, and whether data communication is ensured between the cash register and the servers of NAV. In addition to imposing a default fine, the results of these audits may also provide grounds for initiating a tax audit.

A tax audit is a complex process that starts with selection and ends with some kind of finding. This finding may be both to the taxpayer's expense and benefit, as the tax authority is obliged to disclose all circumstances during audits. The legislation specifies the procedural steps that an auditor conducting an inspection must follow when conducting an inspection[4].

It is the duty or duty of the tax authority to clarify and prove the facts during the audit, unless the law reverses the burden of proof and makes it the taxpayer's obligation[5]. When disclosing the facts, the tax authority is also obliged to disclose facts benefiting the taxpayer. It is also an important stipulation that unproven facts and circumstances cannot be assessed against the taxpayer, except for the assessment procedure. The tax authority is now free to consider which evidence to take into account in its assessment, but full disclosure of the facts remains an obligation for the audit.

2.2. Evidence revealed during a tax audit

The tax authority must disclose relevant facts and circumstances related to the assessment of the decision. The law does not oblige the authority to obtain all the evidence in the case. The tax procedure itself operates on the principle of free evidence, so the legislator leaves it to the tax authority to choose the means of proof to be used. The legislation lists the most common evidence only by way of example. Evidence under the law includes, for example, statements, documents, witness hearings, inspections, experts, expert opinions and on-the-spot inspections. The provisions of the Air. are not exhaustive, do not prohibit the use of evidence not listed above, nor do they establish a hierarchy of strength of individual evidence, which must be applied by the tax authority. In the course of conducting a tax audit, on the other hand, the

[4] The main rules for conducting the inspection are laid down in Air. however, there are certain detailed rules detailed in Government Decree 465/2017 (XII.28).

[5] Az Air. Paragraph 99 of the Act stipulates that the burden of proof is on the side of the tax authority and is only shifted to the taxpayer on the basis of a special provision of the law, e.g. in connection with a supply exempt from Community tax.

content of documents is of decisive importance[6].

The tax return, the underlying records, accounting documents and other documents are evidence that the revision must be carried out by Air. provides that it must control it during the investigation of the facts. During a tax audit, the tax authority must clarify whether the taxpayer's returns contain correct data and whether they meet the requirement that tax payments be based on true facts.

The taxpayer must have the basic documents of the returns, without which the reality of the tax payment obligation cannot be verified. In some cases, the norm excludes the principle of free evidence. For example, VAT is used to account for input tax (purchased, deductible). tv. provides for bound evidence; The absence of a document certifying the amount of output tax as an objective criterion for deduction cannot be remedied. In the absence of an invoice, the verification of the authenticity of the transaction on which the invoicing is based cannot be considered substantially. Not only the invoice on which the right of deduction is based, but all other documents are relevant; this finding follows from the provisions of Act C of 2000 on Accounting (hereinafter: Accountant).[7]

The most important requirement for evidence is that it credibly verifies its content. Therefore, only data that can be verified by third parties can be considered credible. For example, in the absence of records and accounting, treasury receipts cannot be verified, so the authenticity of the cash movement included in them cannot be established. Art. Pursuant to Art. Section 7, point 24, documents: documents specified by law, registers, books and registers required by legislation on bookkeeping, as well as plans, contracts, correspondence, declarations, minutes, decisions (orders), invoices and other extracts, certificates, certificates, public and private documents, regardless of their form. If the taxpayer fails to comply with its obligation to retain documents and it is not possible to control the data contained in the return in a documentary manner, the law provides an opportunity to conduct the estimation procedure.

The case-by-case decision of the Kúria Kfv.V.35.479/2015 also highlights that if the taxpayer does not have accounts, the tax authority is not in a position to carry out an effective audit and to make a determination at the expense or benefit of the taxpayer at each return period, even if the documents are available to it; In the absence of analytics and ledger files, it is not possible to control which documents have declared their data content.

Pursuant to Section 86 (2) of the Tax Administration Implementing Decree, an estimate may be applied a) if the basis for tax or budget support cannot be established b) if there are data, facts or circumstances available to the tax authority that may be considered significant due to their number or content, it can be reasonably assumed that the taxpayer's documents are not suitable for establishing the basis for real tax or budget support, or (c) where the natural person has made an untrue, incomplete declaration or statement or has failed to make such a declaration. According to paragraph (6) of the legislation, the tax base must be estimated even if it is not possible to determine the tax base because no data, documents or other evidence of income or expenses are available to the tax authority,

[6] Darai Péter: Iratátadás az adóellenőrzés során – egy gyakorlati jogalkalmazó szemszögéből. Miskolci Jogi Szemle 15. évf. 2. sz. (2020).

[7] Kúria Kfv.V.35.479/2015.

and their absence is not due to a reason beyond the taxpayer's control.

The Air. Pursuant to Section 8(1), taxpayers are obliged to exercise their rights in good faith and to facilitate the performance of the tasks of the tax authority. The already called Air. Section 98 (1) also requires active participation and cooperation of taxpayers under tax control. However, during inspections, some taxpayers do not want to hand over the documents or just "drip" them. According to court case-law, obstruction is defined as any conduct that unduly delays or prolongs the conduct of a tax audit.[8]

It cannot be considered a bona fide exercise of rights if the taxpayer refuses to provide data despite repeated requests and later provides the documents in an incomplete, photocopy in administrative proceedings and disputes the legality of the tax authority's decision on these grounds without a specific proposal for evidence.[9]

When revealing evidence, attention should also be paid to the fact that the tax authority does not base its findings only on facts and circumstances that exist on the side of the invoice issuer, because it is not yet possible to determine the taxpayer's consciousness content from this. In connection with this, I present below the decision of the Supreme Court Kfv.I.35.362/2020, in which the tax authority found that the taxpayer was engaged in cereal sales. The tax authority did not allow taxpayers to exercise the right to deduct VAT in relation to five invoice issuers. The origin of the goods could not be established by the invoice issuers and no documents related to them could be provided to the audit. The taxpayer should have exercised due diligence when concluding the contract and should therefore have known that it was accepting documents from companies involved in tax evasion.

The Kúria emphasized that the tax authority must first examine whether the invoice issuers were able to fulfil the economic events covered by the invoices, and the material and personal conditions of the invoice issuers must be examined. If the economic event included in the invoice did not take place, then there is no need to examine the content of consciousness. If the tax authority finds that the economic event did not take place between the parties to the invoice, it is necessary to proceed to the examination of the role of the person who wants to exercise the right of deduction. The tax authority's decision must contain the objective circumstances from which the role of the taxpayer in the analysis of the economic event can be established. The decision of the tax authority did not contain in a systematic, traceable manner the evidence supporting the consciousness of the taxpayer under investigation at any of the invoice issuers.

Where tax fraud has not been committed by the taxable person himself, the right of deduction may be refused to him only where it is established from objective circumstances that that taxable person to whom the goods giving rise to the right of deduction were supplied knew or ought reasonably to have known that, by acquiring those goods, he was taking part in transactions aimed at tax evasion committed by the supplier or by an economic operator earlier or later in the supply chain. The Kúria found that the tax authority did not comply with the analysis of taxpayer consciousness content required by the CJEU but collected the circumstances giving rise to suspicion from the supplier's side and tried to justify

[8] Kfv. I.35.065/2011.
[9] Kfv.I.35.234/2015/6.

and prove the taxpayer's consciousness content with these.

The Kúria obliged the tax authority of first instance to conduct a new procedure and stated that in the course of the new procedure, the tax authority is obliged to indicate and prove, taking into account the decisions of the CJEU, the circumstances on the basis of which the taxpayer knew or could have known that it was participating in a transaction aimed at tax evasion committed by suppliers during the purchase of products.

2.3. Presentation of the related ruling of the European Court of Justice

In the case of Mahagében Kft.[10], the Baranya County Court turned to the European Court of Justice with its questions. On June 1, 2007, the company concluded a supply contract with R. Kft. for the supply of acacia logs in an unprocessed state in an amount of 500 m3. The place of performance of the contract was the premises of the customer. The contract 1.) The parties stated that they are mutually convinced that both the Customer and the Supplier are registered existing companies, have a valid and effective tax number, and that the scope of activity of the Supplier covers the terms of the contract and is able to fulfil the subject matter of the contract. During the delivery period, R. Kft. issued 16 invoices to the applicant for the delivery and sale of various quantities of acacia logs, 6 of which also had delivery note numbers attached to them. He included the invoices in his return and exercised his right of deduction.

The supplier has set up its invoices on its tax return and paid value added tax on its sales. In his statement to the tax authorities, he acknowledged that the sales had taken place. Within the scope of the audit of the right of deduction, the tax authority examined the purchases and sales of R. Kft. and concluded that R. Kft. did not have acacia log stock, and the quantity of acacia logs purchased in 2007 was insufficient to fulfill the sales invoiced on the other invoices issued to Mahagében Kft. apart from one invoice.

Both parties to the transaction stated during the audit that the delivery notes had not been kept, but later the applicant provided the revision with 22 copies of delivery notes as evidence of the economic event. The seller carried out the transport of acacia logs, but he did not have a transport vehicle, nor did his accounting contain an invoice for the rental of a motor vehicle or the consideration for transport.

The Ltd. sold most of the acacia logs to P. Kft. as fuel and resold the high-quality acacia logs for furniture making. It was included in the stock of the quantity purchased from R. Kft. and was resold.

The tax authority audited the tax returns of Mahagében Kft. for the years 2003-2007, as a result of which it imposed a tax deficit on the taxpayer, among others, in connection with the invoices of R. Kft., which resulted in a tax penalty and late payment surcharge for the tax shortfall. In connection with this economic event, it explained that Mahagében Kft. is not entitled to deduct tax in respect of invoices issued by R. Kft., since the invoices cannot be considered authentic because the economic events indicated on the invoices did not or could not take place between the parties indicated on them.

VAT. Act. 44(5) rejected the application of the rule laid down in Section 44(5) of the Act, according to which the tax rights of the taxpayer indicated in the document as a buyer may not be prejudiced if he acted with due care in relation to the

[10] Hajdu Emese: A Mahagében-Dávid ítélet. Számvitel, Adó, Könyvvizsgálat, 2012. vol. 54. no. 7-8.

taxable event, taking into account the circumstances of the supply of goods or services, because, in his view, in the case of such a high-value transaction, in the case of a new business partner or in all cases where the circumstances of the purchase differ from those of the usual commercial From the circumstances of the sale, the buyer can be expected to ascertain the existence, data and tax number of the given company from the company register.

Since the managing director of Mahagében Kft. stated that, due to long-standing acquaintance, he did not check whether R. Kft. is an existing taxpayer or whether G.T. is entitled to act in transactions and issue invoices on behalf of the Ltd., the taxpayer did not act with due diligence when he did not require any written document about the order or other security from another taxpayer to ensure the enforcement of its rights. In its view, the fact that the invoice is on file of both parties and has been entered in the accounts does not establish beyond doubt that the transaction actually took place between the parties indicated on the invoice. He emphasized that he did not dispute that Mahagében Kft. actually, purchased wood in the quantity indicated on the invoices, nor that R. Kft. included the invoices in its return and fulfilled its tax payment obligation. In its view, what is relevant for the assessment of the transaction is that the applicant could not purchase those acacia logs from R. Kft. due to lack of goods.

On the basis of the above facts, the county court asked the following questions:

1. Must Directive 2006/112 be interpreted as meaning that a taxable person for VAT who, in compliance with the provisions of that directive, fulfils the substantive conditions for deduction of VAT may be deprived of his right to deduct by national legislation or practice which prohibits deduction of VAT paid on the purchase of goods where only the invoice as a certified document certifies that the goods have been supplied and does not have a document from the issuer of the invoice who: certifies that he had possession of the product, could deliver it or fulfilled his declaration obligation. Can a Member State require, under Article 273 of the Directive, in order to ensure accurate collection of VAT and to prevent tax evasion, that the recipient be in possession of other documents proving that he has the goods issuing the invoice or that they have been delivered or transported to the recipient?

2. Does the concept of due diligence laid down in Section 44(5) of the National VAT Act contain rules compatible with the principles of neutrality and proportionality in the application of the Directive, which have already been expressed several times by the European Court of Justice, in the application of which the tax authority and established judicial practice require that the recipient of the invoice must satisfy himself whether the person issuing the invoice is a taxable person or has registered his products? whether it has a purchase invoice for these and whether it has fulfilled its declaration and VAT payment obligations.

3. Must Articles 167 and 178(a) of Directive No 112/2006 on the common system of value added tax be interpreted as meaning that that precludes national legislation or practice which, in order to exercise the right of deduction, requires the taxable person receiving the invoice to prove compliance with the law on the part of the company issuing the invoice.

On 21 June 2012, the European Court of Justice delivered *the following judgment in* joined cases C-80/11 and C-142/11 (Mahagében Kft. – Péter Dávid):

Articles 167, 168(a), 178(a), 220(1) and 226 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as *precluding a national practice*

whereby a tax authority refuses to deduct from the value added tax due by a taxable person the amount of input tax on services supplied to him on the ground that: that the issuer of the invoice for those services or one of its subcontractors committed an irregularity, without that tax authority proving, on the basis of objective circumstances, that the taxable person concerned knew, or ought reasonably to have known, that the transaction invoked to establish his right of deduction was involved in tax evasion committed by that invoice issuer or by an economic operator previously involved in the supply chain.

Articles 167, 168(a), 178(a) and 273 of Directive 2006/112 must be interpreted as *precluding a national practice whereby the tax authority refuses the right to deduct on the ground that the taxable person is not satisfied that the issuer of the invoice relating to the goods on the basis of which the right to deduct is exercised is a taxable person, whether he has the goods in question and is able to transport them or whether he is liable to declare and pay value added tax, or on the ground that that taxable person has no document other than that invoice proving that those circumstances exist,* even though all the substantive and formal requirements laid down in Directive 2006/112 for exercising the right to deduct have been fulfilled, and the taxable person was not aware of any circumstance indicating irregularity or fraud in the interests of that invoice issuer.

In the case of Mahagében Kft., the Pécs General Court announced its judgment on 6 December 2012, annulling the decision of the tax authority. In its judgment, it stated that the reasoning of the tax authority's decision was not in line with the reasoning set out in the judgment of the European Court of Justice, basing the taxpayer's denial of the taxpayer's right of deduction solely on the fact that, at the time of issue, the invoice issuer did not have conditions that were necessary for the performance of the economic events included in the invoice, in the view of the tax authority, and was also unable to provide proof of purchase of the goods. The judgment stated that national practice deviates from the interpretation of law consistently pursued by the European Court of Justice, and national practice has established requirements for the exercise of the right of deduction in several cases, which assess deficiencies detected at the invoice issuer to the detriment of the invoice recipient without carrying out any investigation on the part of the recipient, thus rendering the liability of the invoice recipient objective, which is contrary to Directive 2006/112/EC. According to the General Court, the tax authority has not disclosed any circumstance indicating that the taxpayer knew or should have known of any circumstance indicating irregularities or fraud committed in the interests of the invoice issuer. As stated in the judgment, given that the invoice issuer qualifies as a taxable person and has fulfilled its tax declaration and payment obligations, there is no possibility of tax evasion either, since tax fraud requires damage to the budget and the taxpayer's intention to do so, so not only is there not but there can be no circumstance in the litigation case that would justify the untrue economic event, Consequently, further proof is unnecessary.

2.4. Opinion of the Administrative and Labour College of the Kúria[11]

Pursuant to Section 27(1) of Act CLXI of 2011 on the Organisation and Administration of Courts, the Administrative-Labour Division of the

[11] 5/2016. (IX.26.) KMK Opinion.

Kúria issued the following collegial opinion on the interpretation of Section 120(a) of Act CXXVII of 2007 on Value Added Tax in order to promote uniform case-law:

1.) If the economic event included in the invoice did not take place, there is no need to examine whether the recipient of the invoice knew or should have known about tax evasion or tax fraud.

2.) If the economic event took place, but not between the parties included in the invoice, then – depending on the facts – it can be examined whether the recipient of the invoice knew or should have known about tax evasion or tax fraud.

3.) If the economic event took place between the parties included in the invoice, but the invoice issuer (or the issuer of the invoice received by it) has engaged in fraudulent behaviour, it must be examined in the tax administration procedure whether the invoice recipient knew or should have known about tax evasion or tax fraud.

Financial litigation occurs in a significant number in Hungarian administrative courts, and a significant proportion of this is represented by lawsuits related to the deduction/refund of value added tax (hereinafter referred to as VAT or VAT). Community law and the case-law of the Court of Justice of the European Union (hereinafter: CJEU) have a guiding effect on Hungarian legislation and enforcement. In response to Hungarian initiatives, the CJEU has laid down the principles that have brought about changes in the application of Hungarian law in several judgments in preliminary ruling proceedings (e.g. Mahagébenn/Dávid (C-80/11 and 142/11) and Tóth (C-324/11).

Act CXXVII of 2007 on Value Added Tax (hereinafter: VAT Act) Pursuant to Section 120(a): To the extent that the taxpayer – in his capacity – uses or otherwise utilizes the goods or services for the purpose of supplying taxable goods or services, he is entitled to deduct from the tax payable by him the tax that another taxpayer – including Eva, – has paid in connection with the acquisition of goods or services. – transferred to him.

This legislation is identical almost verbatim to Article 168(a) of Directive 2006/112/EC of the Council of the European Union of 28 November 2006 on the common system of value added tax (hereinafter the Directive): A taxable person shall, in so far as the goods and services are used for the purposes of his taxable transactions in the Member State in which his taxable transactions are carried out, be entitled to deduct from the amount of tax for which he is liable: supplied or to be rendered to him by another taxable person VAT due or paid in that Member State on the supply of goods or services. The Kúria has a uniform judgment that a substantially certified invoice is a mandatory condition for exercising the right of deduction. Within the scope of substantive credibility, it must be examined whether the economic event included in the invoice took place, whether it took place between the parties included in the invoice, and whether it can be proved that tax fraud/tax evasion has occurred. Judicial practice conducted before 2012 placed the burden of proof primarily on the taxpayer with regard to these circumstances. The case-law of the CJEU has laid down important principles in this regard which have an impact on the application of the law, including adjudication. The most important, general conclusions are as follows:

- The right of deduction forms an integral part of the VAT mechanism and, in principle, should not be restricted. That right, namely the total amount of input tax

charged on transactions effected, shall apply immediately.[12]

- National authorities and courts should refuse the benefit of the right to deduct where it is established, on the basis of objective circumstances, that that right has been invoked fraudulently or abusively.[13]

- It is for the tax authorities to prove, in the requisite legal manner, the existence of objective circumstances from which it may be concluded that the taxable person knew, or ought reasonably to have known, that the transaction invoked to establish his right of deduction was involved in tax evasion committed by the supplier or economic operator previously involved in the supply chain.[14]

A taxable person who knew, or ought reasonably to have known, that his acquisition involved a transaction constituting evasion of VAT must, for the purposes of the Directive, be regarded as a participant in that evasion, irrespective of whether or not he derives profits from the resale of goods or the use of services in the course of his subsequent taxable transactions.[15](Mahagében/David, paragraph 46).

In light of the above, it can be concluded that, in connection with Section 120(a) of the VAT Act, the burden of proof is on the tax authority, which must prove the existence of objective circumstances that the taxpayer invoked the right to deduct fraudulently or abusively. If the tax authority establishes the inauthenticity of the content of invoices based on evidence, the taxpayer must offer evidence capable of establishing a different fact. The "objective circumstances" related to the occurrence of an economic event are not included exhaustively either in CJEU judgments or in national legislation, and due to its diversity, they cannot be included, the scope of which may be determined by judicial practice. According to current Hungarian court practice, the legality of the defendant's decision may be based if the decision is based not on a single fact or circumstance that qualifies as objective, but on several objective facts and circumstances built on each other, which undoubtedly prove the illegality of the tax deduction.

In connection with the authenticity of the received invoice, the analysis of the taxpayer's consciousness (knew/should have known) may develop in different ways. Three distinct facts can be distinguished in the course of the investigation:

1.) The economic event included in the invoice did not take place.

The supply of goods/services included in the invoice did not take place in reality, the invoice exists only "by itself", without any underlying economic event. Its purpose is to exercise the right to deduct VAT fraudulently or abusively. The parties in the invoice are aware of the absence of an economic event, their subjective consciousness embraces its unreal nature. In view of this, it is unnecessary and incomprehensible to examine whether the invoice recipient knew or should have known about tax evasion and tax fraud. He knew about it because he was involved in tax evasion.

2.) The economic event has taken place, but not between the parties included in the invoice.

The supply of goods or services took place (e.g. the goods became the property of

[12] Mahagében/David, para. 38.
[13] Mahagében/David, para. 42.
[14] Mahagében/David, para. 49
[15] Mahagében/David, para. 46.

the invoice recipient, the house was built), but the tax authority proved that it was not performed by the taxpayer issuing the invoice. A taxpayer exercising his right of deduction often claims that he was deceived and knew that the invoicing taxpayer was performing the contract. In assessing this situation, it cannot be overlooked, on the one hand, that the right to deduct VAT applies in respect of input tax on transactions carried out (Mahagében/David, paragraph 38) and, on the other hand, that tax which has been passed on to him by another taxable person may be deducted (Section 120(a) of the VAT Act, Article 168(a) of the Directive). According to the facts disputed in this paragraph, the transaction was carried out, but the invoice issuer is not the same as the taxable person passing on VAT (the invoice issuer did not actually pass on VAT). The two cumulative conditions are therefore not met, but the dispute is whether they were encompassed by the consciousness of the plaintiff taxpayer. In this context, reference should be made to the case-law of certain courts of EU Member States (see paragraph 8 of the Summary Opinion on the outcome of the examination of "Litigation relating to the deductibility of value added tax" of the Kúria's Case Practice Analysis Group. The practice of the right of deduction of VAT by national courts – 2015.") according to which most Member States only start to examine the question of good faith if the economic event has actually occurred. If the transaction actually took place and tax evasion is associated with it, then the question of good faith may arise.

The case-law of the CJEU makes no distinction between tax evasion by the taxable person himself and where the taxable person knew or ought to have known that he was involved in a transaction aimed at VAT fraud by acquiring the goods. For the purposes of applying this Directive, he shall be regarded as a participant in such tax evasion, irrespective of whether or not he derives profits from the resale of goods or services in the course of taxable transactions subsequently carried out by him.[16]

It is the task of the tax authority to prove this taxpayer's behaviour (consciousness), but the taxpayer is obliged to cooperate, as there are cases when only the taxpayer receiving the invoice has information that can serve as evidence during the procedure. Therefore, in order to assess the legality of a tax authority decision based on the existence of "objective circumstances" compared to the case set out in point 1, it may be necessary, depending on the facts, to examine whether the invoice recipient knew or should have known about tax evasion and tax fraud.

Depending on the facts, a distinction may be made between an active invoice recipient and an invoice recipient engaged in passive tax evasion, in connection with which the behaviour of the recipient of the invoice during the realisation of the economic event must be examined. The accrual is based on whether the recipient of the invoice was a taxable person who played an active or passive role in carrying out the fraudulent conduct. Its conduct is considered active if it has actively acted to obtain an unlawful tax advantage, i.e. it has substantially contributed to the artificial transaction or transactions. In this case, it is not necessary to examine the consciousness of the recipient, but to reveal his actions that prove that he was the primary shaper of the transaction or chain under control. Its conduct is considered passive if it did not examine the conditions and circumstances offered by the other taxpayer during the execution of the transaction. In this case, the consciousness of the invoice recipient must

[16] Case C-18/13 Maks Pen, para. 48.

be revealed, since it must be proved in the administrative procedure that he knew or ought to have known that the transaction or chain thereof was actively created and involved by others in order to obtain an unlawful tax advantage. While in the former case the originator of the transaction(s) is, in the latter case, the recipient is the taxpayer receiving the invoice. In the latter case, however, if he knew, or ought reasonably to have known, that he was involved in tax evasion, he should not exercise the right of deduction. There must be at least one active tax evader in the transaction or chain transaction (carousel), unless it was created and moved from the background by a person who was not itself a counterparty to any transaction. It is therefore necessary for the tax authority to identify the taxpayer(s) benefiting from the unlawful tax advantage, in view of which, in view of the above, the applicant's taxpayer's right of deduction/refund may be denied.

1.) The economic event took place between the parties included in the invoice, but the invoice issuer (or the issuer of the invoice received by it) engaged in fraudulent conduct.

In this case, the cumulative conditions were met: the supply of goods/services took place and was fulfilled by the invoice issuer. However, the tax authority proves that the invoice issuer or, in the case of chain contracts (carousel fraud), a former taxpayer (issuer of the invoice received by him) in the queue engaged in fraudulent conduct. The question arises as to whether the exercise of the applicant's right of deduction may be connected with the conduct of other taxable persons and whether it may lose the exercise of its right, which in principle cannot be restricted. In assessing this issue, it should be borne in mind that combating tax fraud, tax evasion or other abuses is an objective recognised and promoted by the Directive, and individuals cannot rely fraudulently or abusively on norms of EU law.[17] This struggle is an objective that must apply not only between the parties to the bill, but throughout the entire economic chain. However, the applicant taxpayer cannot automatically lose his right of deduction, which, according to the CJEU, forms an integral part of the VAT mechanism because of the abusive conduct of another taxable person.[18] . It is therefore necessary to examine the consciousness of the applicant taxpayer and it is for the tax authority to prove on the basis of objective circumstances that the taxable person knew, or ought reasonably to have known, that the transaction invoked to establish his right of deduction was involved in tax evasion committed by the vendor or supplier or economic operator previously involved in the supply chain.[19]

Judicial practice is never static, it can change and evolve. This is especially true in this area of law, as the CJEU regularly issues new rulings on the legality of VAT deduction, and such cases are pending. Just as the CJEU rulings of 2011/2012 have shaped the practice of national tax authorities and courts, this is also to be expected for the future.[20]

3. Instead of closing remarks – cases that have happened in the recent past

Pharmacies tricked with fictitious bills[21]

[17] Mahagében/David, para. 41 and CJEU judgments cited.
[18] Mahagében/David, para. 38.
[19] Mahagében/David, para. 49.
[20] 5/2016. (IX.26.) KMK Opinion https://kuria-birosag.hu/hu/kollvel/52016-ix26-kmk-velemeny.
[21] https://www.vg.hu/kozelet/2024/05/gyogyszertar-fiktiv-szamla-nav.

Four pharmacies also accepted invoices from companies that were members of an invoicing network already known to the tax authorities. As a result of the official action, pharmacies amended their returns.

When analysing online account data, it was suspected that pharmacies accepted fictitious invoices for almost four times the market price as a substitute for pharmacists. The suspicion was confirmed by the fact that these invoices came from companies that were members of an invoicing network already known to the tax authorities.

In addition to fictitious invoices, there were also replacement invoices actually carried out, with the same amount and period as fictitious invoices.

On detailed examination, it appeared from the documents as if the substitute doctor of pharmacy was present in several places at once. His employer reported him working 20 hours a week, and in addition, according to the documents, 70 hours of substitution per week were accounted for, often overlapping in time and space.

There was a personal connection between the account-receiving pharmacies, the same person as owner, manager or even agent performed the financial management, representation and accounting of the companies. As a result of the authorities' action, pharmacies amended their returns and subsequently declared a total of HUF 6.5 million in taxes, which were paid into the state budget.

After the incident, pharmacies cut off contact with subcontractors and did not accept further invoices from newer companies employing "substitute" pharmacists. Their VAT returns also proved that they chose legal operation after learning from the unsuccessful attempt.

Enforcement proceedings have been initiated at the invoice issuing companies, their tax numbers have been deleted. The Doctor of Pharmacy must also give an account of what happened, and the NAV checks the declaration of his real income and the personal income tax paid.

3.1. Fictitious accounts at all levels[22]

More than two billion forints of damage was caused to the budget by the multi-level chain of companies built up of periodically changing enterprises, the operation of which was recently liquidated by the National Tax and Customs Administration (NAV). In a nationwide operation, 49 locations were searched, 29 suspects were questioned and 5 people were detained by financial investigators.

A man from Fejér County controlled a hierarchically structured criminal organization, whose members operated companies with no real economic activity with a high degree of organization and through secret communication channels.

The perpetrators put straw man persons at the head of the companies; Their sole purpose was to provide beneficial owners with invoices issued without any actual economic activity. Companies unlawfully deducted the VAT content of fictitious invoices, causing a particularly significant financial disadvantage to the budget.

With the support of NAV investigators, IT specialists, inspectors, patrols and the MERKUR Deployment Unit, they searched 49 locations, blocked real estate, bank accounts, seized cars and cash worth more than one and a half billion forints. In cooperation with the International Department of the Asset Recovery Office of the National Bureau of Investigation of the Riot Police, the investigating authority also

[22] Fiktív számlák minden szinten https://nav.gov.hu/sajtoszoba/hirek/Fiktiv_szamlak_minden_szinten.

initiated the seizure of foreign real estate and vehicles linked to the criminal organization.

NAV Central Transdanubian investigators questioned 29 people as suspects in the case. The leader of the criminal organization and four associates were detained. NAV is investigating budget fraud committed by a criminal organisation.

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ARTIFICIAL INTELLIGENCE AND THE JUDICIAL SYSTEM IN NIGERIA: THE NEED FOR TRANSFORMATION.

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Abstract

The world we live in is constantly evolving. Humans tend to seek out simple solutions. Technology has attempted to make the world a better place for people to live by introducing revolutionary technologies intended to reduce human labor and raise the standard of living. As technology advances rapidly, artificial intelligence's function shifts from novelty to necessity, changing established conventions. Artificial intelligence ("AI") is the development of machine technology to mimic human intelligence, resulting in increased efficiency in the performance of jobs previously undertaken by humans. Over time, research into AI has revealed that it is a fascinating contribution to the world of technology as we know it, as well as other fields of human endeavor such as legal practice, justice administration, financial services, insurance, health, and so on. In the field of law, the emergence of artificial intelligence (AI) in developed countries has had an impact on their legal systems. For example, in many jurisdictions' civil and criminal proceedings, electronic evidence is admissible in court because of technology and artificial intelligence. With that said, it is nearly impossible for a legal practitioner to do well without technology due to its efficacy; that is, the introduction of Artificial Intelligence into Law will make the creation of legal databases easier and portable, communication and processing faster and more efficient, and, most importantly, data research easier and more reliable. This article investigates artificial intelligence (AI) and the benefits it could bring to Nigeria's court system if properly implemented. It adopts the doctrinal approach of research and concludes that AI will go a long way in improving the judicial system in Nigeria. It recommends that the Nigerian government and all relevant stakeholders should ensure that AI is introduced to the judicial system in the country.

Keywords: *Artificial Intelligence, Law and technology, Law practice, Legal profession, Nigerian law.*

1. Artificial Intelligence and Its Importance

The term artificial refers to something created or produced by humans rather than happening naturally, particularly as a replica of something natural. At the same time, intelligence refers to the ability to acquire and use information and abilities. Artificial intelligence is the emulation of human intelligence by machines to do activities normally performed by humans. AI has been around since the 1950s, but it has evolved

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over decades of technical developments. AI is used in a variety of ways, including customer support chatbots, speech recognition, self-driving cars, and automation tools such as ChatGPT. (Stamenković et al., 2023)

Hence, artificial intelligence is a computers or a computer-controlled robot's ability to do tasks often associated with intelligent beings. Artificial intelligence can also be described as intelligence demonstrated by machines rather than people or animals. The phrase is commonly used to refer to the endeavor of creating systems that have human-like intellectual processes, such as the ability to reason, discern meaning, generalize, or learn from experience. John McCarthy, regarded as the first person to use the term artificial intelligence, defines it as "the science and engineering of making intelligent machines". In a nutshell, artificial intelligence is the act of allowing computers to do what humans are intended to do, with the involvement of the term "intelligence" (Merzbacher, Matthew, 2021).

Today, we have an artificial intelligence lawyer named ROSS who helps lawyers go through thousands of cases and returns a list of the most relevant laws in seconds. It also assists lawyers in analyzing legal difficulties and making connections that would otherwise be undetectable. The machine can also write legal memos in the same way that humans and lawyers do.

From a legal standpoint, artificial intelligence is the use of man-made knowledge in conjunction with technology to assist in the legal profession and judicial administration. Modern law firms provide a wide range of services and themes, including commercial law, banking, corporate, employment, real estate, litigation, maritime, and foreign investment, which are specialized to certain economic sectors (Pavan Duggal,2017).

Artificial intelligence increases law firms' overall efficiency. For example, in business transactions, associates and attorneys spend hours exploring online data rooms, analyzing company documents, contracts, and other critical information as part of due diligence. Furthermore, speed-reading and error vetting, as well as issue detection based on specific terms and phrases in contract agreements, demonstrate speed, efficiency, and human error reduction. It can never get weary of reviewing commercial contracts, unlike humans who have limited energy[1].

Furthermore, it can greatly benefit the court and judiciary in areas where advanced or sophisticated Artificial Intelligence can assist attorneys and judges in extrapolating a wealth of resources and locating precedents much more quickly and efficiently than human attorneys and traditional research (Reiling, 2020). Online courts are highly recommended for lesser matters in Nigeria since they save clients' money and time, ensure efficiency, and reduce congestion in court lists and cases submitted.

One of the best qualities of Artificial Intelligence technology that has radically changed the practice of law and lawyers' work are areas that involve and encompass searching of documents or other databases, legal authorities, judicial precedents, legal expert opinion, comparative laws information and coding of cases, legal issues, learning about new laws, can now be easily accessed by modern lawyers via adopting or use of its tools by the press of a button or finge (Reiling,2020).

One of the most significant inventions of the twenty-first century is the emergence

[1] Artificial Intelligence And Lawyers In Nigeria – bamandgadsolicitors.com.ng. (n.d.). Retrieved from https://www.bamandgadsolicitors.com.ng/artificial-intelligence-and-lawyers-in-nigeria

of search engines such as Google, Bing, Yahoo search, AOL, DuckDuckgo, Yandex, Baidu, and so many others that can search and process billions of data and provide accurate results on queries[2].

These are all good examples of Artificial Intelligence and can be used by lawyers in Nigeria through the legal tools' software.

2. The Judicial System in Nigeria

The judiciary is an arm of government having the authority to interpret laws enacted by the legislature. The judiciary is a system of courts that interprets and administers state laws. They oversee establishing a system for resolving disputes. The Nigerian Constitution[3] classifies courts as either federal or state courts. The fundamental distinction between the two is that the President appoints justices/judges to federal courts, while State Governors appoint judges to state courts. The National Judicial Council's recommendations guide all appointments, whether federal or state. The federal courts include the Supreme Court, the Court of Appeals, the Federal High Court, and the State High Courts.[4]

State courts consist of the High Court of a State, the Customary Court of Appeal of a State, and the Sharia Court of Appeal of a State. Each state is constitutionally entitled to have all these courts. However, Sharia courts are more common in Muslim-majority northern regions than Customary courts. The primarily Christian southern states tend to have customary courts rather than Sharia courts.

Because the Nigerian capital (known as The Federal Capital Territory, FCT) is not a state and has no Governor, its courts that are equal to state courts have Judges selected by the President and are thus federal courts[5]. The FCT courts are the High Court of the FCT, the Customary Court of Appeal of the FCT and the Sharia Court of Appeal of the FCT.

The COVID-19 pandemic had a significant impact on Nigeria's legal system, altering how courts functioned. However, the outbreak provided opportunities for the use of cutting-edge procedures and technologies, which could eventually improve the effectiveness and accessibility of the legal system. One notable impact is the delay in dispute resolution induced by court closures to combat the spread of COVID-19. It was claimed that there was an increase in some cases, such as contract and domestic violence (Fawole Oluwafunmilayo et al., 2021; Zachariah Wada et al., 2022). This resulted in a rise in the backlog of cases and inconvenience for those with urgent matters.

Despite efforts to conduct court proceedings online, cross-examining witnesses and determining the integrity of evidence posed challenges. The present level of technology and necessary software to expedite this development has not yet been embraced, affecting the effective use of technology in the judicial process.[6] The level of connectivity in the country also had an impact on access to justice; many Nigerians were unable to obtain justice owing to a lack of technology or internet connectivity.

[2] *Ibidem*
[3] 1999 Constitution of the federal republic of Nigeria (as amended) Cap C23 LFN 2004
[4] S242 *Ibidem*
[5] S299 *Ibidem*
[6] *Ibidem*

3. Challenges Faced by The Judiciary in Nigeria

In Nigeria, the justice sector remains an intrinsic part of one of the government's arms. The justice system, like any other sector in Nigeria, has obstacles; the judiciary, the major arm of government in charge of this sector, continues to battle with these concerns and challenges daily (Obutte, Peter, 2016). In Nigeria, the judicial system faces various obstacles that impede justice delivery.[7]. Corruption, inefficiency, and delays are some of the major problems. These identified challenges will be examined one after the other.

(i) **Corruption**: The Nigerian judicial system has considerable issues, including corruption. This weakens the system's credibility and impartiality. Corruption is one of several difficulties to Nigeria's justice system. It is claimed that those who reside in Nigeria are more likely to become corrupt since corruption is almost unavoidable. Corruption is unavoidable since morals is relaxed in Nigerian society and many people struggle to survive without government support.[8] Unfortunately, this same government is meant to be accountable for providing a solid foundation for its citizens' existence (Obutte, Peter, 2016). Looking at the Judiciary in a microcosm, court officers are not immune to this pernicious corruption. This sort of corruption in the courts, which undermines the proper administration of justice, can be divided into two categories. The first is administrative corruption, which occurs when court administrative workers break official administrative procedures for personal gain (Ayodeji Gafar and Samuel Odukoya 2014). This type of corruption manifests itself when, for example, a member of the judiciary's administrative staff accepts a bribe to steal or remove a document from a file that is critical to the success of a party's case, or to steal or destroy the file of a specific case. Practitioners are not surprised to hear stories about files going missing in court (Ayodeji Gafar and Samuel Odukoya, 2014). The second part is operational corruption, which occurs in large corruption schemes where political and significant economic interests are at stake.[9] When that becomes the case, cherished legal norms are swept under the carpet just for economic gains. This type of corruption cripples the administration of justice, leading to unnecessary delays and adjournment; it also has far-reaching effects on the larger society. In this wise, the words of Uwais CJN (as he then was) are apt when he stated thus:

(i) "A corrupt judge is more harmful to society than a man who runs amok with a dagger in a crowded street. The latter can be restrained physically, but a corrupt judge deliberately destroys the moral foundation of society and causes incalculable distress to individuals by abusing his office while still being referred to as honourable."

To summarize, court authorities are frequently bribed in Nigeria to distort justice (Lugard, Sunday, 2017). Corruption is deeply rooted in Nigeria's judicial system (Obutte, 2016). Bribes affect court rulings, which undermines Nigeria's transparent legal system. Some Nigerians do not receive justice because of corruption when they approach a court of law with their issues. This has soiled the image of Nigeria's justice system. All Nigerian judges are not corrupt, but the corrupt ones undermine the

[7] Examining the Structure of the Legal System in Nigeria (professions. ng) accessed 11th March 2024.

[8] VE Dike, 'Managing the Challenges of Corruption in Nigeria' (June, 2003) Available at <http://web.archive.org/web/20180412082414id_/http://www.bribenigeria.com/wpcontent/uploads/2011/07/managing-corruption-in-Nigeria.pdf> Accessed on 6th March 2024.

[9] *Ibidem*

judiciary's image (Lugard, Sunday, 2017). The issue of corruption in the Nigerian judicial system has been of great concern and challenge to the system (Obutte,2016). According to the United Nations Office on Drugs and Crime (UNODC), corruption is pervasive in Nigeria's judiciary. Melissa Omene, a UNODC official, stated this on Friday August 18 at an event on judicial accountability in Abuja. Ms Omene spoke about a 2019 survey performed by the UNODC and the National Bureau of Statistics (NBS), which "found that 20% of those who had contact with the Nigerian judiciary were confronted with a request for the payment of a bribe." She further said and I quote “Indeed, corruption in the Nigeria judiciary is extensive and both male and female judges are party to it”[10]

In another development, Flora Azinge, who happened to be the chairman of the State and House of Representatives Election Petition Tribunal sitting in Kano raised an alarm and expressed a great concern and worry when she said corruption allegations, like a malignant genie, cling tenaciously to the judiciary. She said that a senior lawyer is seeking to pay her to influence the court. This has highlighted the importance of weeding out corruption and rebuilding public trust in the judiciary. Though Azinge would not reveal the identity of the lawyer allegedly attempting to bribe the panel, she asserted that several top lawyers defending petitions before the tribunal were engaging in unethical behaviour to corrupt the system. Visibly enraged, she revealed in court that a senior lawyer offered a member of her staff N10 million to bribe the panel members. This was the judge's second time making such serious allegations. She has previously accused an anonymous Senior Advocate of Nigeria of requesting a bank account to send her "Sallah gifts." [11]

According to the Independent Corrupt Practices and Other Related Offences Commission, the judiciary sector is now at the top of the Nigeria Corruption Index for 2018–2020. The anti-corruption commission stated that lawyers offered and paid bribes totalling N9,457,650,000.[12]

The latest ICPC report, titled 'Nigeria Corruption Index: Report of a Pilot Survey', which was conducted by the Anti-Corruption Academy of Nigeria, the ICPC's research and training arm, found that bribe for judgement is one of the most egregious forms of grand corruption as it operates to undermine the very essence of judicial dispute resolution. According to the poll, 78 respondents, or 8.7% of all justice sector respondents, admitted offering or paying bribes to influence the judicial process. Among the 78 justice sector respondents who reported amounts of money offered or paid, 63 were lawyers." This percentage represents 9.9% of all lawyers polled in the judicial sector. According to the survey, the majority of the 63 lawyers who reported payments were male (69.8%), with female colleagues accounting for 30.2%.

The total amount disclosed by lawyers was N5,733,986,000. Female lawyers reported an amount of N918,045,000, while male lawyers submitted N4,815,941,000

[10] Ameh, E. (2024, March 1). Corruption in Nigerian judiciary is extensive – UNODC. *Premium Times.* https://www.premiumtimesng.com/news/top-news/673568-corruption-in-nigerian-judiciary-is-extensive-unodc.html?tztc=1.

[11] Punch Newspaper. (2023, August 24). *Uprooting corrosive corruption in the judiciary*. Punch Newspapers. https://punchng.com/uprooting-corrosive-corruption-in-the-judiciary/.

[12] *Judiciary tops corruption index in Nigeria with N9.4billlion bribe – ICPC | Sahara Reporters*. (2020, December 2). https://saharareporters.com/2020/12/02/judiciary-tops-corruption-index-nigeria-n94billlion-bribe-%E2%80%93-icpc.

(N4.8 billion).[13] It was recently reported that five judges who were fired for receiving bribes to influence the judgements of a Nigerian election tribunal will soon appear in court on corruption charges, according to the chairman of Nigeria's anti-graft commission. Justice Mustapha Akanbi, chairman of the Independent Corrupt Practices Commission (ICPC), stated on Wednesday in Abuja that the judges will be charged in court after the body's investigations were completed. They were recently arrested but then released on police bail. Effiong Udo, the former chief judge of Akwa Ibom state in southeast Nigeria, is accused of passing an undefined amount of money in bribes to four other judges on an election tribunal.[14]

It has been reported that the National Judicial Council (NJC) has approved the investigation of seven judges who are accused of participating in a variety of corrupt activities. This decision was made by the council, which is statutorily designated to discipline errant judicial officers in the country, following its two-day meeting on June 14th and 15th 2023.[15]

(ii) Inefficiency: The judicial system's inefficiency has been a serious issue for the judiciary. Citizens frequently do not receive justice on time, increasing frustration with the legal system (Das Vasudev, 2018).

(iii) Executive Suppression and Intimidation of the Judiciary: This impedes the administration of justice in Nigeria. When the government suppresses and intimidates the judiciary, it impacts the way and way the judiciary administers justice. Justice could hardly be administered without fear or favour. Suppression and intimidation can be blatant or covert. It is direct when the government blatantly attacks the Judiciary, and it is evident to all and everyone that this is a frontal attack by the executive, as we have seen in the recent goings-on in the judiciary, where law enforcement personnel raid the residences of judges (Das Vasudev, 2018).

Executive suppression and intimidation of the judiciary become nuanced when the executive use devious and indirect techniques to force the court to dance to its tune. This impairs the judiciary's independence and determination to execute justice without fear. This form of subtle administrative intimidation of the judiciary prompted Hon. Justice Benson C Anya of the Abia State High Court to issue a restraining order suo motu against the Department of State Security Services.[16] This bravery is commendable.

(iv) Delayed Justice delivery: Delays in justice delivery are a widespread issue in Nigeria. Citizens' trust in the legal system suffers as a result.

(v) Case backlog: There were concerns about an inefficient number of judges in the country. Cases take longer to

[13] *Why Nigerian judiciary is rated as corrupt - Daily Trust.* (2020, December 22). Daily Trust. https://dailytrust.com/why-nigerian-judiciary-is-rated-as-corrupt/.

[14] Five sacked judges face corruption charges. (2024, April 22). *The New Humanitarian.* https://www.thenewhumanitarian.org/report/49613/nigeria-five-sacked-judges-face-corruption-charges.

[15] Ekele, E. (2023, June 16). NJC Probes Seven Judges, Dismisses Petitions Against Odili, 25 Others. *Channelstv*. https://www.channelstv.com/2023/06/16/njc-probes-seven-judges-dismisses-petitions-against-odili-25-others/.

[16] *Mazi Nnamdi Kanu v Federal republic of Nigeria and 7Ors* HC Abia State, Benson C Anya, HIN/FR/14/2021 (19 November 2021). Following the barricade and blockage to the access road of the Abia State High Court occasioned by the act of the officers of the Department of State Security Service surrounding the entire Court premises, Hon. Justice Benson C Anya, who perhaps may have been disturbed by the presence of the Officers and had refused to be intimidated by their presence, gave an Order, *suo motu*, restraining them from, among other things, further barricading the Court premises and from arresting anyone within the court premises.

resolve, including verdicts. To reduce each judge's burden, many judges must be engaged. However, because few of these judges are active in Nigeria, the proceedings take longer, resulting in adjournments. Unethical procedures, such as delays between defense counsel and prosecutors, elongate criminal proceedings. Chieftaincy and title cases might take a long time to resolve.

(vi) Lack of judicial independence: The Nigerian judicial system lacks independence due to interference from the upper class. One of the judicial system's goals is to regulate the operations of the legislature and the executive. This is to ensure that they adhere to the Federal Republic of Nigeria's constitution. Because the judiciary system is not autonomous, political figures and Nigerian elites have influence over it and can overthrow justice. The judiciary in Nigeria is occasionally influenced by the Executive and Legislature, which is unlawful, null and void, and violates the rule of law. (Ezinwa, 2019).

(vii) Low application of ICT: Information and Communication Technology (ICT) enables courts to record and exchange data more quickly. E-justice allows for the automated payment of costs through certain websites.

(viii) Influence from politicians: Politicians continue to influence law enforcement agents, resulting in apathy towards judicial rulings. This resulted in a breach of the Nigerian constitution. Public officials disregard court decisions, and courts are frequently closed due to political strife. The Executive in Nigeria frequently disregards court verdicts because these judicial officers are appointed by the Executives. This causes them to have no regard for the judiciary (Chukwuma, 2023).

(ix) Credibility: The credibility of a judiciary is essential to its effectiveness. Unfortunately, the highest court's inconsistent and occasionally ridiculous verdicts call into question its competence and honesty. Addressing this issue involves user-generated initiatives to demand corrective action.[17]

4. The Need for AI in Transformation of The Judiciary in Nigeria

Nigeria is an emerging nation with a long way to go in every respect. Artificial intelligence is gaining traction in the legal industries and justice administration in the twenty-first century (Eze,2024b). Despite the legal industry's long-standing reluctance to embrace new technologies, AI is making an impact on law firms. AI in law firms can bring considerable efficiency and cost-saving benefits for your business by helping automate typical processes such as legal research and analysis, document management, and billing.[18]

Most lawyers are moving away from traditional forms of advocacy, including the courtroom. Although lawyers are afraid that this new idea might take up their role in the legal profession, as artificial intelligence may reduce the need for lawyers in the legal industry, but not completely because this artificial intelligence aims to perform certain activities to reduce labor in practice and enhance the works of lawyers, thereby

[17] Challenges judiciary must tackle in 2022 — lawyers. (2019, August 5). https://www.vanguardngr.com/2021/12/challenges-judiciary-must-tackle-in-2022-lawyers/

[18] *What is AI and how can law firms use it?*. Clio. (2024, April 17). https://www.clio.com/resources/ai-for-lawyers/lawyer-ai/#:~:text=In%20the%20legal%20industry%2C%20today%E2%80%99s%20AI%20can%20help,to%20dedicate%20more%20time%20to%20focusing%20on%20clients.

making their works easier, faster, more efficient, effective, and thorough.[19]

Artificial intelligence will enhance lawyers' skills and judgment. The task that would take a long time for a lawyer can now be done by artificial intelligence within a certain period and even be more accurate than human beings, thereby saving the time of lawyers and making legal service easier and faster in all segments.[20] Because the legal profession is constantly evolving and developing, artificial intelligence will undoubtedly become a tool for the advancement of the legal sector.

Man has had the inclination to develop better ways of completing activities from the time immemorial.[21] It is not an exaggeration to claim that society has fostered invention. Advancement has always been recognized as an important instrument for improving efficiency in professional duties, and law practice is no different. Prior to the COVID-19 epidemic, Nigeria's legal systems were plagued by issues like as sluggish judgment delivery, limited access to justice, and inadequate legal representation.

Artificial intelligence will benefit judicial decisions in a variety of ways. The judicial system requires a great deal of effort and the application of legal principles in real-world scenarios. With the help of artificial intelligence, the door to using multiple sophisticated artificial intelligence systems in decision-making and sentencing will open in the future, as several online dispute resolution tools have or are being developed to completely circumvent the judicial process. Nigeria's government can do something decent with artificial intelligence by creating machine learning legal portals that provide free legal assistance on civil law issues to persons who cannot afford to pay lawyers. Artificial intelligence will aid in the advancement of legal practice and research. Without a doubt, the method legal research is carried out today differs significantly from yesterday because, thanks to technology, research can be done at any time and from any location without worry. The future of the legal system is fairly apparent with artificial intelligence; things will undoubtedly improve in terms of legal research and so on. Law Pavilion, NWLR Online, and other resources have significantly improved the quality of legal research.

Following COVID-19, videoconferencing technology became increasingly popular among many organizations. It was used by judges in numerous nations, including the United Kingdom, the United States, India, and China, to handle hearings and trials remotely (Hashim, 2019). It reduces the need for in-person appearances by linking courts with parties, witnesses, and legal professionals. Nigeria should use this technology as soon as possible because it will help to solve the judiciary's noted problems. Webex and Microsoft Teams are popular video conferencing programs in some countries, including Nigeria (Olugasa & Davies, 2022), but there is a need for standard organizational-based software, which the Nigerian government will develop

[19] Report looks at pros and cons of AI in law firms. (2023, November 20). Retrieved from https://www.sra.org.uk/sra/news/press/2023-press-releases/risk-outlook-ai/#:~:text='Yet%20there%20are%20risks.,high%20standards%20their%20clients%20expect.

[20] Chioma, U. (2021, January 20). *Artificial Intelligence and the legal practice in Nigeria.* TheNigeriaLawyer. https://thenigerialawyer.com/artificial-intelligence-and-the-legal-practice-in-nigeria/

[21] Abiola, H. (2020, November 27). *Artificial Intelligence and the legal profession by Halima Ummi Ismail*. The Loyal Nigerian Lawyer. https://loyalnigerianlawyer.com/artificial-intelligence-and-the-legal-profession-by-halima-ummi-ismail

and continue to upgrade to meet the needs of its judiciary.

Nigeria's judiciary does not appear to have the technology to handle digital evidence currently; nonetheless, as technology advances, digital evidence is becoming increasingly crucial in the judicial system (Littman and Kessler, 2011). Effective administration and storage are essential as they progress through the court system. By providing tools for storing, indexing, and searching electronic documents and other sorts of digital evidence, AI can help courts manage electronic evidence more effectively. Some jurisdictions already use systems like Trial Director and Sanction, Presentation Assistant, and Prezi for this purpose (Jiya, Samaila, & Surajo, 2023).

Digital transcription tools are used to transform audio recordings of court proceedings into formats suitable for archiving and analysis. This software allows the legal team to focus on other important activities and assists in remote proceedings. One critical component of the need in Nigeria is to develop digital transcription tools for local languages; these tools would be required to transcribe witnesses' testimony in local languages. The primary use of AI in courts is to aid judges in decision-making and to reduce the number of cases that come before the court. Several AI applications in court processes have achieved exceptional success in legal practice (Jiya, Samaila, & Surajo, 2023).

If AI makes its way into the judiciary system, it will alter the justice system by acting as an "assistant" judge, supplementing judges' efforts to increase judgment accuracy. Some may believe that algorithms lack the ability to provide fairness, proper interpretation of law, or explanations of decisions made; however, AI can be viewed as an implementation of a codified justice system that can bring about fairness and reduce arbitrariness in the justice system. It has the potential to alter the judicial system by predicting the outcomes of court decisions based on previous cases. Artificial intelligence has the potential to improve judicial efficiency by increasing predictability and accuracy of case outcomes.

It will also improve decision-making quality and reduce the time required for trials and proceedings. There are simple and difficult scenarios in which AI can help judges on various fronts. For example, (Jiya, Samaila, and Surajo,2023) examine evidence during proceedings and create basic adjudication instruments quickly. Based on prior evidence, AI can help lawyers forecast the outcome of court cases. This allows them to make more informed decisions about whether to settle a lawsuit or proceed to trial. The prediction capability of AI applications has been prevalent in many fields of research before now and has been of considerable strength for helping in strategic decision-making; nonetheless, it is starting to be utilized in areas that do not seem

Preparing court sentences can be difficult and time-consuming due to the enormous number of documents to examine; nevertheless, AI can help speed up the process. A notable example is VICTOR, an AI software employed by the Brazilian Supreme Court that scans all appeal cases filed and determines which ones are associated with specific consequences. (Jiya, Samaila, and Surajo, 2023) argued that the software accelerated the judges' job. It is also proposed as a support system for lower court judges to limit the number of cases that reach the appellate court. With this machine learning application, the number of possible instances will be reduced as appeals are processed more efficiently. AI can also be used to analyze legal documents to find key legal principles, arguments, or an

individual's opinions. This can aid in determining motive or purpose in a case. Such analysis will also help courts make better choices. The software's success rate is close to 80%. With such extraordinary success, it has the potential to serve as an effective support system for judges addressing human right matters.

5. Other Key benefits of Artificial intelligence in Judicial system

In addition to what has been mentioned in the previous paragraphs, this section will examine in specific ways, how our courts in Nigeria can be assisted using artificial intelligence in ensuring smooth running of the court system.

Organisation of information: In the context of categorising large quantities of cases or in complex cases that contain a significant amount of information, it can be advantageous to identify patterns in text documents and files. One instance from the United States of America is "eDiscovery," an automated process. Before the commencement of a court proceeding, electronic information is investigated for the purpose of discovery. The most effective algorithm for extracting pertinent information from a vast quantity of information is determined through training in machine learning AI, which is employed in eDiscovery. Parties agree regarding the search terms and coding they employ. Assessment and confirmation of the agreement are conducted by the magistrate (Reiling, 2020)

Guidance: An AI that can provide guidance can be beneficial to individuals and prospective parties to a court case who are seeking a solution to their issue but are uncertain about their options. However, legal professionals may also benefit from advisory AI. AI not only searches for pertinent information also offers a response to a query. The user subsequently determines whether to implement the advice. By providing individuals with the ability to independently resolve a greater number of their issues, this advisory function can help prevent disputes or court cases. Support in identifying a solution is also feasible if the advice is inadequate. By providing assistance in the development of a solution that necessitates judicial review, such as a request or summons, the judge's evaluation can be made more routine (Reiling,2020)

Forecasts: There is a significant amount of interest in artificial intelligence that purports to have the ability to forecast court rulings. The often-used term in English/American legal discourse for this concept is "predictive justice". This word has sparked debate since the results produced by the prediction algorithms do not align with either fairness or predictability. The term "forecast" is a more precise designation that accurately represents ongoing discussions. The result appears akin to a meteorological prediction rather than a well-established truth. Like atmospheric conditions, legal proceedings carry the potential for an uncertain result. As the case grows more intricate with additional information and other difficulties, the likelihood of that risk intensifies. One of the reasons why there is much interest in AI is its purported ability to mitigate risk. Commercially, a variety of prediction tools are available in the United States (Reiling,2020)

6. How can lawyers use AI in law firms

The legal business is currently utilizing AI in a variety of areas. AI in law companies may not be immediately obvious, but it does assist lawyers and paralegals execute their jobs more effectively. In particular, AI in law firms enables legal

practitioners to alter their practice by putting clients first in an unprecedented way.

Lawyers can leverage AI in their firms in the following ways:

6.1. E-Discovery

E-discovery is the simplest and most popular application of artificial intelligence in law. E-discovery is the process of scanning electronic information to obtain non-privileged information related to a lawsuit or claim.[22] E-discovery software enables lawyers to scan documents based on search phrases or particular parameters, such as dates or geographical location. As a result, lawyers will receive near-instant responses, which is substantially faster than scanning physical documents. This additional time enables lawyers to gather more pertinent material.

6.2. Legal Research

Lawyers can use legal research software to obtain data and better comprehend precedent. AI-powered legal research software quickly scans and searches massive databases, including regulations and statutes, Practice areas, Jurisdictions, Case laws etc. It allows lawyers to perform more detailed research at a faster pace and saves lawyers' time, which eventually saves clients' money. Tools that interface with practice management software, such as Casetext and Fastcase, allow users to perform and attach research directly to pertinent case facts, increasing productivity even more.

6.3. Document Management and Automation

While law firms continue to transition away from paper documents, electronic document storage faces comparable issues as hard copy document storage. Electronic records require less physical space, but sorting and finding documents remains difficult. AI-powered document management software, on the other hand, stores and organizes legal papers such as contracts, case files, notes, and emails by leveraging tagging and profiling features. This way of storing and organizing digital information, together with full-text search, will make papers much easier to locate. Document management solutions can provide document identification and check-in/check-out privileges to ensure version control and security. Document management software can also connect to other systems, such as Microsoft Office, allowing users to effortlessly exchange files with others.

Document automation will enable law firms to prepare documents using intelligent templates; legal experts will be able to automatically populate form fields straight from case records, saving time and effort. Legal document automation is a centralized and efficient way to create letters, agreements, motions, pleadings, bills, invoices, and other legal documents.

6.4. Due Diligence

Due diligence frequently needs legal specialists to evaluate a huge number of documents, such as contracts. As with other document-related difficulties, AI can assist legal professionals in reviewing documents more efficiently (Eze,2024).

[22] *Ibidem*

An AI-based due diligence solution may retrieve specific documents needed for due diligence, such as those containing a specific clause. AI due diligence software can also identify differences or modifications in documents. The best thing is that AI can process papers in seconds. While we still propose a human evaluation of the data, lawyers can profit from significantly lowering the manual work of document inspection (Eze,2024).

6.5. Litigation Analysis

Determining the viability of litigation or measuring the worth of a lawsuit necessitates a thorough examination of precedent-setting decisions. Lawyer AI can swiftly examine those precedents and assist lawyers to produce more accurate and acceptable papers based on that data.

7. How AI can tackle corruption in the judicial system

This section talks about how artificial intelligence can tackle corruption in the Nigerian judicial sector. The points will be addressed on after the other.

i. Automation of the court system: The utilisation of AI in CCTV cameras within and around court premises will significantly reduce corruption in the judiciary, as most corruption-related arrangements are made in the vicinity of the court. Furthermore, the utilisation of CCTV reduces the interaction between judicial officers and the public, as many of them function as conduits for the aforementioned malfeasance within the judicial system.[23]

ii. AI streamlines process and expedites case resolutions. When there is a delay in the administration of justice, parties often engage in lobbying efforts to expedite the resolution of their cases. Considering this, they may go to great lengths to achieve this goal. When court officials request any form of benefit to expedite the resolution of a case, individuals will acquiesce, thus fostering corruption inside the judicial system[24].

iii. Predictive Analytics: Artificial intelligence has the capability to examine patterns and detect possible instances of corruption in judicial decisions and processes[25].

iv. AI-driven case management systems have the capability to track and monitor cases, hence minimising the possibility of manipulation or delay (Fontes et al., 2022).

v. Document Analysis: Artificial intelligence has the capability to examine legal papers and detect inconsistencies or fraudulent alterations. (Kabir & Alam, 2023)

vi. Attitude Analysis: Artificial intelligence can assess public reaction and attitude regarding judicial decisions, aiding in the detection of possible instances of corruption. (Zhu & Zheng, 2021)

vii. AI can offer judges automated decision support by providing them with impartial and data-based suggestions to enhance the fairness of their decision-making process[26].

viii. AI can facilitate the monitoring and evaluation of judicial performance,

[23] An oral interview conducted with Prof Yusuf Olaolu Ali SAN in his office Ghalib Chambers, Ilorin, Kwara State Nigeria on July 30, 2024.

[24] *Ibidem*

[25] Gabinete. (2023, November 21). *Artificial Intelligence and the fight against corruption*. Antifraucv. https://www.antifraucv.es/en/artificial-intelligence-and-the-fight-against-corruption/

[26] Woxsen University. (n.d.). *White papers*. https://woxsen.edu.in/research/white-papers/exploring-the-use-of-ai-in-legal-decision-making-benefits-and-ethical-implications/

enabling the identification of specific areas that require improvement[27].

ix. AI-powered chatbots offer a secure and anonymous method for reporting misconduct[28].

x. AI can provide legal research assistance by helping judges and legal researchers locate pertinent precedents and laws (Takyar & Takyar, 2023)

xi. AI can assist in the examination of digital evidence in corruption trials, a field known as digital forensics (Angadi, 2023)

7.1. Precautionary measures to be taken while using AI

As much as the use of AI has been encouraged to facilitate the judicial process in Nigeria, certain precautions must be taken while using AI. Firstly, the fundamental human rights of Nigerians should be considered and well respected during the deployment of AI. Right to privacy, fair hearing etc. as enshrined in the Constitution should be respected. Secondly, the issue of confidentiality is of importance. Data processing procedures should be taken into consideration to ensure that information about the matter is not divulged in a manner that is unprofessional. In addition, Discreteness. The methods of data processing should be rendered transparent and comprehensible, and external audits should be permitted (Popotas, 2021)

7.2. Challenges That May Face Introduction of AI In Nigeria Judicial System

Illiteracy

The level of illiteracy in Nigeria is very high. In this regard, those who will make use of AI must be those whose level of literacy is high. Therefore, to succeed in this regard, there is a need to trainer the users on how to make use of the facility so as not amount to a waste of resources when such is put together for use in the judicial system.

Corruption: as earlier mentioned the cases of corruption in the judicial system calls for concern in Nigeria. The introduction of AI will reduce the level of corruption. The question then is, will these corrupt officials allow AI to work? (Obutte,2016)

High cost of installing the machines across the courts may also be a setback. Lack of maintenance culture in Nigeria can also be a barrier to the actualization of AI in the judicial system. Lack of commitment on the part of the officials can also limit the use of AI in the judicial system, most of the officials are not dedicated to duty, the commitment is not there on their part.

8. Conclusion and Recommendations

The Nigerian judiciary has failed to recognize its significance to the country and Nigerians. Most Nigerians have lost faith in the country's legal system. 61 years after independence, our legal proceedings remain retrogressive and rudimentary. Judges, including the Supreme Court Justices, continue to write in longhand. The appointment process for the bench is still quite troubling. The best hands struggle to get to the bench unless they can enlist the assistance of another. Merit does not appear to play a significant role any longer. Addressing these difficulties is critical to Nigeria's justice system remaining healthy and functional.

Human population growth leads to an increase in crises and litigation. This has

[27] *Ibidem*
[28] *Ibidem*

resulted in an ever-increasing number of instances brought before judicial personnel for adjudication. However, the judiciary in Nigeria and around the world is always burdened with a significant number of cases that exceed the available staff, resulting in many cases going unresolved for years. However, coordinated study among scientists from many fields is required to develop efficient legal service systems. The current overreliance on manual systems and physical procedures is also a significant barrier. Implementing intelligent software and using proper technology can increase access to justice, speed up work, and minimize the workload on court staff. It'll improve the quality of judgements and lower the risk of arbitrariness on the part of judges. It is therefore recommended that the Nigerian government and all relevant stakeholders should ensure that AI is introduced to the judicial system in the country.

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THE POWER TO DEFINE. OBSTETRIC VIOLENCE: BETWEEN TENSIONS, DEBATES AND THE ROMANIAN CASE STUDY

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Abstract

In April 2024, at the request of the FEMM Committee, the European Parliament announced the launch of the study "Obstetric and Gynaecological Violence in the EU - Prevalence, Legal Frameworks, and Educational Guidelines for Prevention and Elimination." In May 2024, the European Commission also announced the launch of a commissioned study on obstetric violence, "Obstetric Violence in the European Union: Situational Analysis and Policy Recommendations." In September 2024, the Association of Independent Midwives announced the release of the first research report on obstetric violence in Romania. We are talking about a growing interest in bringing to the public and formal agenda issues related to the quality of care that women receive in interactions with the medical system, especially in relation to the topic of reproductive health. In this paper, I aim first to discuss the controversial aspects of defining and classifying inappropriate, abusive, or violent interactions, particularly in relation to obstetric health. I will attempt to answer the question, "What is obstetric violence, and who has the authority to define this term?" The answer to this question is crucial, as it will impact how obstetric violence can be integrated into a solidified legal framework. Secondly, I will analyze the Romanian case, briefly reviewing the quantitative research results conducted in collaboration with the Association of Independent Midwives, as well as examining how the debates, controversies, and potential pathways toward a legal framework are developing about the complex issues encapsulated by the concept of obstetric violence.

Keywords: *obstetric violence, definitions, controversies, Romania.*

1. Introduction

In September 2024, after approximately nine months of work alongside a research team consisting of two sociologists with solid experience and myself (with a background in political science and expertise in gender equality and gender-based violence), we presented the findings of the first descriptive cross-sectional study about obstetric violence done in Romania. The primary objective of this research was to identify Romanian women's perceptions of their experiences with care during pregnancy, childbirth, and the postpartum period in clinics and hospitals over the past five years (2018–2023). I accepted this challenge solely because it aimed to capture women's perceptions regarding childbirth experiences and because I would be working with a research team well-versed in quantitative methods and gender studies. Moreover, since a significant part of my research interest has always focused on domestic and gender-based violence, I thought my expertise would be beneficial in carrying out this study.

The entire research team understood from the beginning the complexity and interdisciplinary nature of the subject being

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investigated. Throughout the research, data collection, and analysis phases, we made continuous efforts to seek feedback, comments, and revisions from medical professionals and other practitioners in the field of obstetric medicine. We were committed to a transparent and ethical approach to data collection and presentation, clearly acknowledging the study's limitations. At the same time, we adopted a clear theoretical perspective aligned with our expertise in gender studies, which influenced our choice of the definition of obstetric violence used in the study, as well as the analysis and interpretation of the collected data. This perspective was especially influential when it came to designing potential solutions or interventions to reduce the phenomenon investigated.

These considerations were crucial for several reasons. Upon reviewing the relevant literature, we realized, on the one hand, that there is still no universally accepted definition of obstetric violence—one that could provide us with a clearly defined concept that is easier to investigate, integrate into comparative analyses, and transfer into a coherent legal framework. On the other hand, we recognized that the concept is fraught with controversies and tensions, as well as dynamics that deserve in-depth investigation. These dynamics involve the power to define a concept, particularly one whose definition necessarily carries legal implications and legitimizes demands for policies that states must adopt and implement.

Building on this experience, my aim in this paper is to anchor the research findings regarding Romanian women's perceptions of their experiences with pregnancy, childbirth, and postpartum care in Romanian clinics and hospitals within a deeper analysis of the debates and controversies surrounding the definition of a form of violence that women experience[1]. As we saw, this form of violence is gaining increasing attention not only from citizens and non-governmental organizations but also from states and the EU.

2. Defining Obstetric Violence – Tensions and Controversies.

At the outset, it's important to note that there is no widely accepted definition of obstetric violence, primarily due to controversies surrounding the conceptualization of the term. As we will see from the examples below, while the conceptualizations in most definitions are closely aligned, there are certain hesitations in labeling problematic aspects as violence. From my perspective, analyzing the arguments for and against using the term "violence" is closely tied to, on one hand, the responsibilities and legal implications associated with different definitions, and on the other, to the degree of understanding and awareness regarding the link between obstetric violence and gender-based violence. This includes viewing obstetric violence as a form of violence situated at the intersection of the healthcare system (in terms of access to health services), a set of sociocultural norms and often patriarchal rules (such as stereotypes, biases, and traditional gender roles), and the dominant or counter-dominant discourses on the place of the state and the market in providing healthcare services, reproductive health, as

[1] The violence, abuse, or inadequate treatment that women experience during pregnancy, childbirth, and postpartum are not new phenomena; they have always existed. However, they have only recently begun to enter the formal agenda in the EU, becoming a topic of public attention, research, and debate, particularly at the level of Latin America.

well as in naturalizing, pathologizing, and medicalizing women's bodies, especially concerning reproductive aspects[2].

Perhaps the best way to illustrate the hesitations in naming certain forms of abuse as violence is in how the World Health Organization (WHO) refers to the issue. In a report commissioned by the European Parliament, it's noted that WHO "conceptualizes" obstetric violence in terms of "any abuse, disrespect, and mistreatment in childbirth caused by healthcare professionals that results in violations of women's dignity (this can consist of outright physical abuse, humiliation caused by verbal abuse, lack of confidentiality, and neglect that results in unnecessary pain and avoidable complications)"[3], but without explicitly mentioning the term "obstetric violence."[4]

The study also presents two other definitions of obstetric violence. The one used by France's High Council for Equality between Women and Men (HCE), an independent governmental body, refers to the concept as the "most serious sexist acts that can occur in the context of gynecology and obstetrics follow-ups." This definition includes "sexist acts during gynecological and obstetrical follow-up—gestures, comments, practices, and behaviors performed or omitted by one or more healthcare staff members during gynecological and obstetrical follow-up, which are part of a history of gynecological and obstetric medicine driven by a desire to control women's bodies (sexuality and reproductive capacity). These acts can take various forms, from seemingly innocuous to the most serious, by caregivers—of all specialties, both women and men—who may not necessarily intend to be abusive."[5]

Another definition mentioned is the one used in Portugal, following a 2021 parliamentary resolution, which defines "obstetric violence" as any conduct directed at women, during labor, childbirth, or the postpartum period, carried out without their consent, which constitutes an act of physical or psychological violence that causes pain, harm, unnecessary suffering, or restricts their ability to choose and make decisions.[6]

Even though in Europe, no Member State has passed a national law directly addressing and defining obstetric violence, the European Commission report references several definitions operationalized in other legal contexts, including Italy, Germany, Spain, and France. For instance, Catalonia's Law No. 17/2020 explicitly addresses obstetric violence and the violation of sexual and reproductive rights as forms of gender-based violence, introducing the following definition in Article 4.d: "Obstetric violence and violation of sexual and reproductive rights consist of preventing or hindering access to truthful information necessary for autonomous and informed decision-making.

[2] Nisha Z. 2021, *The Medicalisation of the Female Body and Motherhood: Some Biological and Existential Reflections*, in "Asian bioethics review", no.14(1), p. 25–40 (https://doi.org/10.1007/s41649-021-00185); Vieira, E. M. 2003, *A medicalização do corpo feminino*, Rio de Janeiro: Fiocruz; Costa T., Navarro Stotz E., Grynszpan D. et al. 2007, *Naturalization and medicalization of the female body: social control through reproduction*, Interface (Botucatu), Vol. 3(se):0-0. DOI: 10.1590/S141432832007000100006.

[3] World Health Organisation. Statement on the Prevention and Elimination of Disrespect and Abuse during Facility-Based Childbirth, World Health Organization; Geneva, Switzerland: 2015.

[4] Silvia Brunello, Magali Gay-Berthomieu, Beth Smiles, Eneidia Bardho, Clémence Schantz et alii, *Obstetric and gynaecological violence in the EU - Prevalence, legal frameworks and educational guidelines for prevention and elimination* [Research Report] European Parliamentary Research Service. 2024. ⟨hal-04574789⟩, p. 14.

[5] Silvia Brunello, Magali Gay-Berthomieu, Beth Smiles, Eneidia Bardho, Clémence Schantz, *et alii*, *op. cit*., p. 14.

[6] *Ibidem*

This can affect different areas of physical and mental health, including sexual and reproductive health, and may hinder women's decisions regarding their sexual practices, reproductive choices, and conditions of childbirth as per specific legislation. It includes forced sterilization, forced pregnancy, impeded access to legal abortion, restricted access to contraceptives, STI and HIV prevention methods, assisted reproduction, as well as gynecological and obstetric practices that do not respect a woman's choices, body, health, and emotional processes of the woman."[7]. Similar definitions are present in the case of Italy and Germany[8]

The literature on the legal framework for obstetric violence cites **Venezuela** as the "pioneer country in constructing the term and its legal definition in 2007." This definition considers obstetric violence to be "any behavior, action, or omission triggered by a team of healthcare professionals, directly or indirectly, in a public or private setting, characterized by the domination of a woman's body and her reproductive processes, manifesting as dehumanized care, medicalization abuse, and pathologizing reproductive physiological processes, resulting in the loss of a woman's autonomy and capacity for free decision-making, negatively impacting her quality of life and well-being."[9]

Without aiming to provide an exhaustive overview of the various definitions of obstetric violence, I believe that, after reviewing these definitions, it becomes apparent that they have a high capacity to capture and describe the phenomenon. They are carefully formulated and, despite being produced in different contexts, by different organizations, at different times, they contain many of the same elements, clearly synthesized in the European Parliament's report published in April, which, in its attempt to outline a definition of the term, enumerates the core elements compiled from previous studies. Thus, in this report, obstetric violence is identified as:

- "Psychological, physical, and sexual abuse during obstetric and gynecological consultations—this includes humiliating behaviors such as denying privacy; physical abuse; coercion, such as restricting movement or denying choice of birth position; non-consensual vaginal or rectal penetration for medical examinations; discrimination/neglect/failure to be treated with dignity during pregnancy and gynecological consultations, infantilization, verbal abuse through inappropriate comments, ridicule, or raised voices.
- Forced medical procedures or procedures performed without consent—including forced contraception, forced sterilization, forced abortion, any medical act/examination performed without explicit consent.
- Non-medically necessary (harmful) procedures—such as routine labor induction, routine cesarean sections, routine episiotomies, non-evidence-based medical practices like Hamilton's maneuver and

[7] Silvia Brunello, Magali Gay-Berthomieu, Beth Smiles, Eneidia Bardho, Clémence Schantz, et al.. Obstetric and gynaecological violence in the EU, *op. cit*, p. 15.

[8] Patrizia Quattrocchi, 2024, *Obstetric violence in the European Union: Situational analysis and policy recommendations*, Directorate-General for Justice and Consumers Directorate D — Equality and Non-Discrimination Unit D.3 Gender Equality, pp. 27-28.

[9] Ferrão A.C., Sim-Sim M., Almeida V.S., Zangão M.O., *Analysis of the Concept of Obstetric Violence: Scoping Review Protocol*, *J. Pers. Med.* 2022, *12*, 1090. https://doi.org/10.3390/jpm12071090, p. 3 *apud* Pérez D'Gregorio R., *Obstetric violence: A new legal term introduced in Venezuela*, in Int. J. Gynaecol. Obstet. 2010, 111, 201–202.

fundal pressure.

- Refusal or delay of care—including delay or refusal of pain management during procedures, delay or refusal of abortion care, withholding of information, denial of contact, and refusal to allow a birth companion."[10]

In this context, a natural question arises: what are the controversies and tensions that make it difficult to adopt a unified definition and consequently direct efforts toward building an adequate legal framework? Various studies highlight, first and foremost, the reluctance of healthcare professionals to use the term "violence," with many preferring terms like "abuse," "disrespect," and "mistreatment in childbirth."[11] In a 2023 study on the perceptions of obstetrics physicians regarding "obstetric violence," of the 506 participants, 374 (73.9%) considered the term obstetric violence harmful to professional practice[12]. Another critique from healthcare professionals is that the term "violence" itself can be seen as an unfair accusation against medical staff.[13] Leila Katz dismantles this controversy, calling it "unreasonable," as the adjective "obstetric" is not exclusively associated with the medical doctor.[14]

Another element brought up is the correlation of the term violence with a certain intentionality in harmful acts, which can have serious implications for professionals since intentionality in cases of violence is automatically linked to criminal law. Additionally, there is the argument that the use of the term violence refers strictly to individual malpractice, suggesting that these forms of violence are not actually systemic[15] and should be investigated on a case-by-case basis, without assigning such a broad scope to the phenomenon. We now have a clearer picture of the tensions surrounding the definition of obstetric violence and the alternative terminology used. Associating violence with intentionality and thus with responsibility and possible punishments helps us understand, from a new perspective, the lack of consensus on this issue. The distinction between individual intentionality in obstetric violence and "mistreatment that occurs as a form of structural violence, explained by the precarious conditions of health systems and the working conditions of professionals, with the potential to reduce

[10] Silvia Brunello, Magali Gay-Berthomieu, Beth Smiles, Eneidia Bardho, Clémence Schantz *et alii*., *op. cit*., pp. 13-14.

[11] Ferrão, A.C.; Sim-Sim, M.; Almeida, V.S.; Zangão, M.O., *op. cit*., p. 3, *apud* Sen, G.; Reddy, B.; Iyer, A. *Beyond measurement: The drivers of disrespect and abuse in obstetric care*, in Reprod. Health Matters 2018, 26, 6–18. [CrossRef].

[12] Terribile DC, Sartorao Filho CI, *Perceptions of the Brazilian obstetrics physicians about the term obstetric violence: a cross-sectional study*, Rev Assoc Med Bras (1992). 2023 Mar 3;69(2):252-256. doi: 10.1590/1806-9282.20220945. PMID: 36888765; PMCID: PMC9983464.

[13] Zanardo GLP, Uribe MC, Nadal AHRD, Habigzang LF, *Violência Obstétrica no Brasil: uma revisão narrativa*, Psicol Soc. 2017; 29: e155043.

[14] Katz, Leila et alii, *Who is afraid of obstetric violence?*, in Revista Brasileira de Saúde Materno Infantil 20 (2020): 623-626. 10.1590/1806-93042020000200017, pag 625.

[15] Silvia Brunello, Magali Gay-Berthomieu, Beth Smiles, Eneidia Bardho, Clémence Schantz *et alii*, *op. cit*., p. 81, *apud* Ayres-de-Campos D., Louwen F., Vivilaki V.,Benedetto C., Modi N., Wielgos M., Tudose M. P., Timonen S., Reyns M., Yli B., Stenback P., Nunes I., Yurtsal B., Vayssière C., Roth G. E., Jonsson M., Bakker P., Lopriore E., Verlohren S. Jacobsson B., European Association of Perinatal Medicine (EAPM), European Board and College of Obstetricians and Gynaecologists.

their ability to ensure the best possible care for women"[16] becomes important.

However, while terms like "disrespect and mistreatment"[17] reflect relevant differences from "violence," when it comes to the distinction between "abuse" and "violence," the differences are often imperceptible, and the two terms are frequently used interchangeably. Preference for such terminology is partly supported by the idea that "violence" is too harsh a term, which may antagonize professionals who play a fundamental role in addressing the phenomenon, as seen in WHO's strategy[18]. However, if we analyze how these alternative terms are defined, we realize that the scope is essentially the same, and there are reasons to believe that there is a deliberate softening of language, intended to avoid offending those that are harming. But in a world where women are the basic victims of different forms of domination and abuse, it is also worth questioning the legitimacy of calls for softer terminology, particularly when these calls primarily come from those accused of engaging in harmful behaviors. While substantial debates on how we define obstetric violence are necessary and should involve all relevant stakeholders, this question remains valid.

Leila Katz also brings up an element that seems to have been overlooked by obstetric professionals, but which is largely part of the solution to the tensions outlined above: understanding obstetric violence as gender-based violence and, therefore, directly linked to structural and systemic factors. Katz also notes that "violence can result from systemic failures at various levels of care in health systems, so the term should not be understood as synonymous with 'violence committed by the obstetrician."[19]. Recognizing, therefore, obstetric violence as a reality does not mean blaming any specific professional category. This violence is not only direct but also structural, reflecting the patriarchal norms prevailing in society and healthcare practices. Thus, even professionals who intend to care are situated in a care context that not only normalizes but constructs discursive rhetoric lacking a scientific basis to refuse recognition of practices that are actually violent.[20]

The connection between obstetricians' reluctance to use the term "violence" and a limited understanding[21] of the structural/systemic nature of this type of violence is clearly highlighted in a study aimed at evaluating health sciences students' perceptions of obstetric violence and identifying possible changes after an educational intervention. Before presenting the study's results, the authors note that training on obstetric violence had a much higher participation rate than initially expected, and that the sample consisted primarily of women (89.7%). The

[16] Ferrão, A.C.; Sim-Sim, M.; Almeida, V.S.; Zangão, M.O., *op. cit.*, p. 4, *apud* Bohren, M.A.; Vogel, J.P.; Hunter, E.C.; Lutsiv, O.; Makh, S.K.; Souza, J.P.; Aguiar, C.; Saraiva Coneglian, F.; Diniz, A.L.; Tunçalp, Ö. et alii *The Mistreatment of Women during Childbirth in Health Facilities Globally: A Mixed-Methods Systematic Review*, PLoS Med. 2015, 12, e1001847. [CrossRef].

[17] "the concept of mistreatment is broader by allowing us to separate the issue of individual intentionality in violence and link it within the scope of quality in health", Ferrão, A.C.; Sim-Sim, M.; Almeida, V.S.; Zangão, M.O. *op. cit.*, p. 11 *apud* Sen, G.; Reddy, B.; Iyer, A. *Beyond measurement: The drivers of disrespect and abuse in obstetric care*, Reprod. Health Matters.

[18] Ferrão, A.C.; Sim-Sim, M.; Almeida, V.S.; Zangão, M.O., *op. cit.*, p. 4.

[19] *Idem* p. 625.

[20] *Idem* p. 625.

[21] Which is completely understandable in patriarchal societies, in fact being the basis on which obstetrical and gynecological violence is perpetuated.

intervention consisted of an 8-hour seminar (including a theatrical performance on obstetric violence in the delivery room, a master class on legal aspects presented by a health law specialist, a roundtable with professionals from different fields sharing their experiences, and another roundtable where four volunteer mothers narrated their birth experiences). The study concluded that a formative activity aimed at raising awareness and reflecting on obstetric violence helps students recognize this type of violence and identify it; women in the study perceived all points raised on the OV scale as having higher OV; a normalization of this type of violence was observed according to the students' year of study (with a lower perception of OV among more advanced students); and a normalization of these obstetric practices based on personal experience with pregnancies and births (with a decreased perception of OV after having been pregnant or given birth)[22].

Similarly, the European Parliament report emphasizes that obstetric and gynecological violence should not be equated with medical malpractice or negligence due to its structural nature, which must be addressed comprehensively, showing how it impacts women's human rights, equality, health, and reproductive autonomy[23].

Finally, these debates could be solved by considering the importance of the perspective of women and all those affected by this form of violence. Increasingly, research highlights the traumatic experiences of women related to sexual and reproductive health, including various forms of obstetric violence to which they are subjected[24]. Ethical considerations are also critical when discussing obstetric violence. Based on these premises, a study using qualitative methodology, in which 24 midwives participated in three focus groups, revealed that obstetric violence infringes on the basic principles of bioethics (American principles of non-maleficence, beneficence, autonomy, and justice, as well as European principles of vulnerability, integrity, and dignity), as it involves four major categories of ethical issues: the maleficence of forgetting my vulnerability, beneficence requires respect for my integrity and dignity, my autonomy is being removed from me, and a problem of social justice towards us, women. The study also emphasizes that it is not as important to focus on whether it is called violence or not; the critical issue is that women have such negative experiences during childbirth, and measures must be taken to improve the quality of obstetric care[25].

3. Obstetric Violence in Romania – A Case Study

a) The Experience of Giving Birth in Romanian Hospitals.

As noted at the beginning of this article, in September 2024, together with Laura Grunberg and Crina Radu, and with the support of the Association of Independent Midwives, we published the

[22] Mena-Tudela D, González-Chordá VM, Soriano-Vidal FJ et alii, *Changes in health sciences students' perception of obstetric violence after an educational intervention*, Nurse Education Today. 2020 Feb;88:104364. DOI: 10.1016/j.nedt.2020.104364. PMID: 32120084.

[23] Silvia Brunello, Magali Gay-Berthomieu, Beth Smiles, Eneidia Bardho, Clémence Schantz *et alii, op. cit.*, pp. 81.

[24] *Ibidem*, pp. 21.

[25] Martín-Badia J, Obregón-Gutiérrez N, Goberna-Tricas J. *Obstetric Violence as an Infringement on Basic Bioethical Principles. Reflections Inspired by Focus Groups with Midwives*, Int J Environ Res Public Health. 2021 Nov 29;18(23):12553. doi: 10.3390/ijerph182312553. PMID: 34886279; PMCID: PMC8656655.

first quantitative study in Romania aimed at identifying Romanian women's perceptions of the care they received during pregnancy, childbirth, and the postnatal period in Romanian clinics and hospitals over the past five years (2018-2023). The approach explicitly chosen and adopted in the report was to refer to this phenomenon as obstetric violence, and we received no fewer than 5,623 valid responses to the survey we conducted. Here, I will present only a small part of the research findings, to place them within a broader presentation of the current situation regarding obstetric violence in Romania[26].

Hyper-medicalization as Obstetric Violence? Caesarean sections outnumber natural births in both public and especially private hospitals, significantly exceeding any reasonable recommendations in the field. Just over one-third of women reported giving birth naturally. For pre-scheduled caesarean sections, 33.7% of women in the sample reported this mode of birth. Adding another 12.5% who underwent a caesarean section without entering labor, the number of caesareans open to critical analysis increases. In total, 70.4% of births in private hospitals were caesarean sections, while in public hospitals, caesarean sections accounted for 60.1% of all births. The WHO is currently reserved about setting an ideal caesarean rate but still refers to the 1985 WHO recommendation that the ideal caesarean section rate should be between 10-15%[27]. In 2014, following a second expert meeting organized by the WHO, the main conclusions were that "every effort should be made to provide caesarean sections to women in need, rather than striving to achieve a specific rate," and that "at the population level, caesarean section rates higher than 10% are not associated with reductions in maternal and newborn mortality rates."[28] In 2024, a joint statement by the European Association of Perinatal Medicine and the European Midwives Association recommended a caesarean delivery rate at the country level of 15-20%[29].

Although I am not qualified to validate or invalidate the data presented above, I want to draw attention to the significant differences in recommendations regarding the utility of caesarean sections compared to the much higher rates reported in our research, which points to a hypothesis of birth hyper-medicalization. It's also worth noting that out of the 1,894 women who had a scheduled caesarean section over the past five years, nearly 3/4 stated that they chose caesarean section based on their obstetrician's recommendation, and about 1/4 said the choice was theirs[30].

The most frequently used recommendation by gynecologists for

[26] For more details, the full report is accessible at: https://moasele.ro/wp-content/uploads/2024/09/Raport-privind-violenta-obstetrica_AMI_septembrie_2024.pdf.

[27] WHO Statement on Caesarean Section Rates, accessible at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://iris.who.int/bitstream/handle/10665/161442/WHO_RHR_15.02_eng.pdf?sequence=1.

[27] WHO statement on caesarean section rates. 14 April 2015. https://www.who.int/publications/i/item/WHO-RHR-15.02.

[28] *Idem*.

[29] EUROPEAN ASSOCIATION OF PERINATAL MEDICINE (EAPM) EUROPEAN MIDWIVES ASSOCIATION (EMA) Joint position statement: Caesarean delivery rates at a country level should be in the 15-20 % range Ayres-de-Campos, Diogo et al. European Journal of Obstetrics and Gynecology and Reproductive Biology, Volume 294, 76 – 78.

[30] D. Neaga, L. Grunberg, C. Radu, *Experiența nașterii în spitalele din România. Raport de cercetare privind violența obstetrică*, Asociația Moașelor Independente, 2024, p. 13.

caesarean birth (Q15) is based on a history of prior caesareans (32% said this was the reason their doctor recommended it). Other common reasons include cephalopelvic disproportion (large baby/small pelvis): 17.7%; nuchal cord (cord around the neck): 18.8%, and abnormal presentation (other than anterior occiput): 11.5%; maternal myopia: 11.6%. Other less frequent reasons include thrombophilia, the mother's age, and overdue pregnancy. For women, the main reason cited by nearly 2/3 (60%) for choosing cesarean birth was fear of pain. Other reasons included hearing traumatic stories about natural birth (around 50%), or the belief that cesarean birth is safer for themselves (30%) or for the baby (22%)[31].

The report also highlights a greater probability of experiencing forms of obstetric violence during vaginal births. According to the data, women who gave birth vaginally reported encountering obstetric violence risks more frequently. On average, they identified approximately one-third of the 25 forms of violence identified in the study as applicable to this type of birth (29.6%)[32]. Vaginal birth is considered by women to involve the most exposure to forms of obstetric violence, which may explain the high number of caesarean sections, particularly scheduled caesareans. More specifically, the choice by the 525 women who opted for a scheduled caesarean was motivated primarily by fear of pain (59% of these) and traumatic stories about vaginal births (48.8%)[33].

Separation from the baby at birth remains one of the most traumatic experiences for laboring women, but in vaginal births, it ranks third, after being forced into a specific position (lithotomy position), a practice commonly encountered in both private and public hospitals. More than half of women who gave birth in private hospitals reported experiencing this. The Kristeller maneuver (applying pressure to the uterine fundus/pressing down on the abdomen), a procedure not recommended both in Romania and internationally, was identified as frequently practiced in both state hospitals (45.3%) and private ones (32.4%). Other frequently encountered experiences in public hospitals (over 30%) include non-consensual procedures, movement restrictions during labor, lack of information, inappropriate staff conversations, insufficient time for consultations, and food/water restrictions during labor, which also occurred in private hospitals[34].

b) The Obstetricians' Response. The data published in this research report sparked critical reactions from the Obstetrics and Gynecology Commission and the Board of the Romanian Society of Obstetrics and Gynecology (SOGR), which sent a letter to the Association of Independent Midwives. The issues raised in the letter highlight that the debates and tensions mentioned earlier in this article are also very much current in Romania. The main criticisms of the report focused on: a) the epistemic authority of the researchers and, consequently, the study's validity, specifically pointing out that the authors do not come from the medical field, alongside critiques regarding methodological transparency; b) the contestation of the term "violence," citing a lack of consensus on terminology and an overly broad interpretation of obstetric violence; c) the argument that such studies might harm the doctor-patient relationship

[31] *Idem*, p. 14.
[32] *Idem*, p. 25.
[33] *Ibid*em
[34] *Idem*, p. 31.

and create unrealistic expectations and tension; d) the contestation of the relevance of the ideal caesarean rate of 10-15%, citing that it does not account for the increased age of first-time mothers, higher rates of chronic conditions, and infertility issues; e) the argument that current population, medical, and economic realities should be more considered in such studies, emphasizing that an entire medical body, which genuinely works in the interest of women, should not be blamed; f) the argument that pregnancy and childbirth are times of intense emotions that should be supported positively to provide women with confidence, support, and medical safety.

4. Conclusions/Discussion

Romania mirrors debates that have already emerged in other regions, indicating that the issue of obstetric violence is reaching both the public agenda and potentially the formal agenda as well. Bringing this form of gender-based violence to light will consequently require a unified definition, as well as the establishment of a legal framework to prevent and address this phenomenon. Naturally, I anticipate a challenging phase ahead, marked by intensified dialogue among various professionals. This phase should be accompanied by increased research on the topic, ultimately leading to a legal and policy framework aimed at minimizing obstetric and gynecological violence.

The success of this stage will certainly depend on how each relevant actor involved in the process recognizes that obstetric violence is a form of gender-based violence, thus having a structural/systemic nature. For this to happen, it is important to be aware of the need for an interdisciplinary approach to this issue. Obstetric and gynecological violence is a topic at the intersection of fields like anthropology, ethics & bioethics, sociology, political science & administration, law, medicine, and gender studies. Professionals from all these domains must be involved to define the problem comprehensively and to propose a coherent legal and policy framework as part of the solution.

Secondly, it is essential to gain a better understanding of how obstetric violence is configured in Romania, its causes and implications, and how various medical professionals and decision-makers perceive and respond to this issue. Equally important is to give a voice to the women affected by this type of violence—not only to bring their experiences to light but also to identify their needs and expectations about the healthcare system. Without questioning the epistemic authority of doctors, it must be emphasized, whenever necessary, that medical practice should never undermine patients' autonomy and dignity. In this regard, the voices and experiences of women cannot be ignored. Finally, we have reasons to believe that educational interventions integrating the topic of obstetric and gender-based violence into the curricula of medical professionals are essential in reducing tensions between professionals.

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ON THE NECESSITY OF INITIATING CRIMINAL PROCEEDINGS. EXTRA-PROCEDURAL EFFECTS

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Abstract

This article analyzes the specific procedural moments at which the prosecutor orders the initiation of criminal proceedings, taking into account the practice of criminal prosecution, and taking into account the definition of the legal action as an indispensable condition for the court to exercise its jurisdiction. The timing of the initiation of criminal proceedings can be understood by recognizing the procedural necessity of the indictment, a requirement which completes the set of conditions laid down in the law of criminal procedure for the initiation of criminal proceedings. It should also be noted that the effects of initiating criminal proceedings in certain circumstances go beyond the criminal proceedings, as the indictment is the basis for other provisions, with important temporary consequences in certain professions, such as temporary relocation, suspension of the decision on the application for a service pension or payment of a service pension, suspension from office.

Keywords: *criminal proceedings, prosecutor, prosecution, legal action, indictment, temporary removal, suspension.*

1. Specifically, when and why is criminal action initiated?

Regarding the initiation of criminal action, the current Code of Criminal Procedure (hereinafter, C. pr. pen.) does not provide detailed regulations. We mention the provisions of art. 14 para. (2) C. pr. pen., according to which *criminal action is initiated by the indictment act provided by law*[1]. Furthermore, according to art. 15 C. pr. pen., *criminal action is initiated (…) when there is evidence that reasonably suggests that a person has committed a crime and there are no cases that prevent the initiation…*

With the same intention of ensuring the normative framework for the provision of initiating criminal action, the legislator provided, in art. 7 para. (1) C. pr. pen., that criminal action is initiated obligatorily, ex officio, by the prosecutor *when there is evidence that suggests the commission of a crime and there is no legal cause to prevent it*, respectively in art. 309 para. (1) C. pr. pen., according to which criminal action is initiated *by the prosecutor, by prosecutorial order, during the criminal investigation, when it is found that there is evidence that a person has committed a crime and there is none of the impediments provided in art. 16 para. (1).*

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[1] The discussed norm reproduces the content of art. 9 para. (2) of the previous Code of Criminal Procedure, which came into force on January 1, 1969.

After the entry into force of the current Code of Criminal Procedure, we highlighted the non-uniform regulation of the initiation of criminal action[2]. Thus, with reference to the relevance of the evidence administered in the file, each legal text proposes different premises. From the content of art. 15 C. pr. pen. it results that the evidence must be able to lead to the formulation of a *reasonable assumption* that a person has committed the crime, while in art. 309 para. (1) C. pr. pen. it is specified that the evidence administered must show that a person has committed the crime, the legislator abandoning the expression "reasonable assumption." This formulation is also present in the content of art. 7 para. (1) C. pr. pen.

Regarding the *in personam* character, among the 3 norms under analysis, art. 7 para. (1) C. pr. pen. differs by omitting references to the commission of the crime by a known, determined person. Of course, in the vast majority of cases, when there is evidence that suggests the commission of a crime, it is assumed that the act was committed by a person, even if that person has not been identified. For example, the discovery of a corpse with stab wounds allows the hypothesis of a human action, the crime being obviously committed by a certain person. However, the differentiation noted is that in art. 15 C. pr. pen., respectively art. 309 para. (1) C. pr. pen., the reference is made to the commission of the crime by a determined person, whose identity is known to the criminal investigation bodies.

Beyond these discrepancies, the above-mentioned procedural criminal provisions allow us to formulate, in agreement with opinions expressed in the specialized literature[3], the following conclusions: the provision for initiating criminal action is carried out by the prosecutor, during the criminal investigation, through an indictment act (prosecutorial order), when it is assessed that there is evidence in the criminal investigation file that a determined person has committed a crime and if there is none of the impediments provided in art. 16 para. (1) C. pr. pen.

As an exceptional situation, by adopting a procedure established in Romanian legislation since the first modern Code of Criminal Procedure[4], criminal action can also be initiated during the trial phase, exclusively by the prosecutor. Thus, according to art. 360 C. pr. pen., if a criminal act is committed during the hearing, if the

[2] I. Neagu, M. Damaschin, *Tratat de procedură penală. Partea generală*, Universul Juridic Publishing House, Bucharest, 2014, pp. 260-261.

[3] See, in this regard, Gr. Gr. Theodoru, *Tratat de drept procesual penal, 3rd edition*, Hamangiu Publishing House, Bucharest, 2013, p. 171; Gh. Mateuț, *Procedură penală. Partea generală*, Universul Juridic Publishing House, Bucharest, 2019, p. 129; A. Crișu, *Drept procesual penal, 2nd edition*, Hamangiu Publishing House, Bucharest, 2011, pp. 137-138; A.-V. Iugan, *Procedură penală. Partea generală*, C.H. Beck Publishing House, Bucharest, 2023, pp. 143-144. Similarly, in a different formulation, V. Dongoroz, in V. Dongoroz, S. Kahane, G. Antoniu, C. Bulai, N. Iliescu, R. Stănoiu, *Explicații teoretice ale Codului de procedură penală român. Partea generală, vol. V, 2nd edition*, Romanian Academy Publishing House, All Beck Publishing House, Bucharest, 2003, pp. 63-64.

[4] According to art. 177 of the Code of Criminal Procedure from December 2, 1864 (respectively art. 517-519), "If a correctional offense is committed in the place and during the hearing, the president will make a report about the incident, will listen to the accused and the witnesses, and the court will apply, without leaving the place, the penalties prescribed by law. This provision will apply to correctional offenses committed in the place and time of the hearings of the courts of appeal, and even the hearings of the courts when judging civil cases, the convicted person having the right to appeal against that sentence." The procedure for finding audience offenses was also regulated in the Code of Criminal Procedure of 1936 (art. 628-629), respectively the Code of Criminal Procedure of 1968 (art. 299).

prosecutor participates in the trial, they can declare that they are starting the criminal investigation and initiating criminal action[5]. In the doctrine, for this hypothesis, it is mentioned that the initiation of criminal action is done by the prosecutor's verbal declaration, a manifestation of will recorded in the hearing minutes.

Under these conditions, during teaching activities, I have noted the difficulties in understanding "criminal action," an eminently abstract concept derived from "legal action," which in turn generates difficulties in assimilation. However, during the criminal investigation, when exactly is criminal action initiated? And why? For which, adopting a pragmatic definition of legal action, namely "the necessary condition for a court to exercise its jurisdictional duties[6]," I considered a supplementary requirement pertinent, namely *the necessity of initiating criminal action*[7]. Thus, the prosecutor's provision for initiating criminal action must be based on evidence that shows that a determined person has committed a crime and there is no impediment to the indictment act and, equally important, it must be necessary for the exercise of jurisdictional duties by a court.

Next, we will try to illustrate with concrete practical hypotheses the cumulative fulfilment of these requirements of the indictment act.

In a first hypothetical case, not very common in criminal investigation practice but relevant for the purpose of this study, let's assume that the criminal investigation is conducted against a suspect without criminal action being initiated. Without representing an expressly regulated hypothesis by law, compared to the previous Code of Criminal Procedure[8], conducting the criminal investigation without criminal action being initiated is perfectly possible. The issuance by the prosecutor of the provision to continue the criminal investigation signifies the existence in the case file of evidence for the accusation showing the commission of the crime by the suspect and the absence of any of the impediments provided in art. 16 C. pr. pen. However, criminal action is not initiated for various reasons (for example, the prosecutor considers that no preventive measure against the perpetrator is necessary). At the end of the criminal investigation, if it is found that the perpetrator should be sent to trial, we will be in the presence of the fourth condition, *the necessity of initiating criminal action*, determined by the indictment. We consider that the person sent to trial must obligatorily have the procedural status of the accused. In other words, the necessity of the indictment act derives from the above definition of criminal action, the court being unable to exercise its jurisdictional duties, consisting mainly of resolving the criminal action, in the absence of the indictment

[5] The procedure is exceptional, having a low incidence of application in the practice of the criminal process. Much more frequent is the application by the prosecutor of the provisions of art. 292 C. pr. pen. Thus, for example, in the case of finding the commission of an audience offense consisting of false testimony, the prosecutor will declare that they are acting ex officio, requesting the court to forward the hearing minutes and the witness's statement to the competent prosecutor's office.

[6] R. Merle, A. Vitu, *Traité de droit criminel*, Cujas Publishing House, Paris, p. 651 *apud* I. Neagu, *Tratat de procedură penală*, Pro Publishing House, Bucharest, 1997, p. 159.

[7] M. Damaschin, *Drept procesual penal. Partea generală*, Universul Juridic Publishing House, Bucharest, 2013, pp. 143-148.

[8] We mention §1 "Investigation without initiating criminal action" (art. 255-257) from Section VII, "Termination of the criminal investigation," Chapter IV, "Conducting the criminal investigation," Title I, "Criminal investigation" from the Special Part of the Code of Criminal Procedure 1968.

provision. Therefore, the anticipation of the moment of indictment and, implicitly, the beginning of the trial function, determines the cumulative fulfillment of the 4 indispensable conditions for initiating criminal action at the end of the criminal investigation phase.

In a second hypothesis, we will assume that the criminal investigation bodies have been notified of the commission of a serious crime (for example, murder), without information about the perpetrator's identity (the so-called AN files, "with an unknown author"). Immediately after the notification, respectively the provision to start the criminal investigation, significant evidence for the accusation will be administered, from which a very probable commission of the murder will result. At the same procedural moment, it can be reasonably assumed that there are no impediments regarding the initiation or exercise of criminal action. At the same time, given the seriousness of the crime, the discovery of the perpetrator's identity would be followed by the initiation of the preventive deprivation of liberty procedure, in which the judge of rights and freedoms would be called to exercise their jurisdictional duties to take a preventive measure. Therefore, even at the beginning of the criminal investigation, the administered evidence has the ability to lead to the finding of the existence of three requirements for initiating criminal action, namely the commission of a crime, the absence of impediments provided in art. 16 C. pr. pen., and the necessity of initiating criminal action. However, the condition regarding the establishment of the perpetrator's identity is missing, which prevents the issuance of the prosecutorial order for initiating criminal action. In these circumstances, criminal action can be initiated later, during the criminal investigation, at the moment of discovering the perpetrator's identity.

In a third hypothetical situation, we will assume that following the flagrant commission of a serious crime, the criminal investigation bodies manage to gather evidence showing the commission of the crime by a certain person, without being able to retain the existence of any of the cases provided in art. 16 C. pr. pen. In this scenario (which can be placed even at the beginning of the criminal investigation or at a considerable distance in time, in which case the criminal investigation will have been conducted in rem, only regarding a certain reported act), it will be found that the condition of the necessity of initiating criminal action is met, as the practice of the criminal investigation bodies in these cases is characterized by the need to take preventive measures against the accused. And, for the judge of rights and freedoms to exercise the attributes subsumed under the function *jurisdictio*, analysing the opportunity of preventive arrest or house arrest (or judicial control), a prior initiation of criminal action by the prosecutor is necessary.

Of course, there are procedural criminal regulations, which we consider derogatory from those presented above, which, during the criminal investigation, allow the judge to exercise jurisdictional duties in the absence of criminal action. As in other certain cases, the indictment represents a prerequisite for the prosecutor to issue certain procedural acts. Thus, in exemplifying the first situation, the judge of rights and freedoms is not conditioned by the initiation of criminal action to order technical surveillance or to authorize the conduct of home, computer searches, etc. Practically, in these cases, the Romanian legislator offers the judge, in exercising the function of disposition over rights and freedoms, the possibility to decide on the restriction of certain fundamental rights and freedoms without a criminal accusation

being formulated against the presumed perpetrator of the crime[9]. Of course, these regulations are justified by the imperative of finding the truth in the criminal process, this objective having precedence over fundamental procedural rights, such as the right to defence or even the presumption of innocence. Also, in exemplifying contrary hypotheses, sometimes criminal action is a necessary prerequisite for the prosecutor to order judicial control or judicial control on bail. Thus, if the administered evidence leads to the conclusion of placing the perpetrator under judicial control, the fourth condition presented in this study, *the necessity of initiating criminal action so that the court (in a broad sense) can exercise its jurisdiction, becomes the necessity of initiating criminal action so that the prosecutor can decide on certain fundamental rights and freedoms of the person.*

For these reasons, we consider that a pragmatic understanding of the provision for initiating criminal action during the criminal investigation involves considering the necessary character of the indictment act, either for the continuation of the criminal process with the trial phase or for the judge to exercise the function of disposition over the fundamental rights and freedoms of the person during the criminal investigation phase.

2. Extra-procedural consequences of initiating criminal action

2.1. Preliminary remarks

In the criminal procedural plan, the initiation of criminal action by the prosecutor allows for the criminal liability of the accused and represents, at the same time, an official notification of the accused regarding the criminal charge brought against them. As we have seen above, the initiation of criminal action creates the necessary procedural framework for the preliminary chamber judge/court to exercise the three specific judicial functions, namely, the function of disposition over the fundamental rights and freedoms of the person during the criminal investigation phase, the function of verifying the legality of sending or not sending to trial, and the function of judgment.

However, there are also extra-procedural effects of initiating criminal action. Without analysing the provisions of Law no. 290/2004 regarding the criminal record[10] (a normative act that regulates the provisional notation in the criminal record organized at police structures of the provision for initiating criminal action against individuals or legal entities in all criminal cases), we will present the consequences of the indictment act in specific situations of committing crimes by persons with certain qualities, as follows: public officials, police officers, prison police officers, and magistrates (judges and prosecutors).

[9] Both the provision to continue the criminal investigation against the suspect and the provision to initiate criminal action can be considered practical ways in which the criminal investigation bodies formulate the criminal accusation against the perpetrator.

[10] Republished in the Official Gazette of Romania no. 777 of November 13, 2009.

2.2. Status of public officials

In the first version of the Public Officials Statute, adopted in 1999[11], according to art. 79, suspension from office could be ordered in the event of initiating criminal proceedings against the public official for crimes committed during service or in connection with the duties of the public office they hold or for other crimes that make them incompatible with the public office they hold. We can observe that suspension from office operated for the simple provision of initiating criminal proceedings, a procedural act inferior to the indictment act in terms of the standard of proof.

Subsequently, in 2003, following the amendment of the Public Officials Statute by Law no. 161[12], suspension from office of the public official operated in the case of initiating criminal action for committing one of the crimes provided by law (crimes against humanity, against the state or authority, service-related crimes, crimes that obstruct justice, forgery, or corruption offenses), according to art. 74 para. (2). At this point in the regulation, the indictment act of the public official directly affected their career. Upon republication in 2004[13], a new amendment to the regime of automatic suspension of the public official's service relationships occurred, applicable, among other things, in the event of preventive arrest, abandoning the effect of automatic suspension for the hypothesis of initiating criminal action. In 2013[14], two new hypotheses of suspension of service relationships were introduced, namely placing the public official under house arrest and sending to trial for committing a crime against humanity, against the state or authority, service-related crimes, crimes that obstruct justice, forgery, or corruption offenses, etc. Additionally, the public official's statute was supplemented with a new regulation, consisting of the mandatory temporary transfer of the public official in the event of initiating criminal action against them, provided that it is found that the accused could influence the criminal investigation.

In the current form of the Public Officials Statute[15], the institution of the temporary transfer of the public official has been maintained, under the conditions of art. 501 para. (3): "from the moment of initiating criminal action, if the public official can influence the investigation, the person with the authority to appoint to the public office is obliged to order the temporary transfer of the public official within the authority or public institution or within another non-legal entity structure of the authority or public institution. The measure is ordered for the entire duration during which the public official can influence the investigation." If, after the initiation of criminal action, the public official is preventively arrested, placed under house arrest, or under judicial control (if obligations have been imposed that prevent them from performing their

[11] Adopted by Law no. 188 of December 8, 1999, regarding the Statute of Public Officials, published in the Official Gazette of Romania no. 600 of December 8, 1999.

[12] Law no. 161 of April 19, 2003, regarding some measures to ensure transparency in the exercise of public dignities, public functions, and in the business environment, preventing and sanctioning corruption, published in the Official Gazette of Romania no. 279 of April 21, 2003.

[13] Official Gazette of Romania no. 251 of March 22, 2004.

[14] See Law no. 255/2013 for the implementation of Law no. 135/2010 regarding the Code of Criminal Procedure and for the amendment and completion of some normative acts containing criminal procedural provisions, published in the Official Gazette of Romania no. 515 of August 14, 2013.

[15] Adopted by Government Emergency Ordinance no. 57 of July 3, 2019, regarding the Administrative Code, published in the Official Gazette of Romania no. 555 of July 5, 2019.

duties), the service relationships are automatically suspended, according to art. 513 para. (1) letter e) of the Public Officials Statute. The same scenario is regulated for the hypothesis of sending the public official to trial, but only for certain crimes[16].

2.3. Status of the Police Officer

In the initial version of the Police Officer Statute, adopted in 2002[17], a specific institution was regulated, *the availability*, characterized by the partial suspension of service duties, which became applicable in the case of the provisions of art. 65 para. (2), "during the criminal investigation and trial" of the police officer. *Suspension from office*, a distinct institution, became applicable exclusively in the hypothesis of ordering preventive arrest (a provision that presupposed the prior initiation of criminal action).

In 2003, following the amendments made by Government Emergency Ordinance no. 89[18], the provision for initiating criminal action against a police officer for committing a crime against peace and humanity, against the state or authority, service-related crimes, crimes that obstruct justice, forgery, or corruption offenses or any other intentional crime that made them incompatible with the exercise of the police officer's function determined their suspension from office. Thus, the indictment of a police officer under these conditions generated significant extra-procedural effects, during the suspension, the police officer could no longer benefit from any of the rights provided in the Statute, being obliged to hand over their weapon, badge, and insignia.

In 2013, a new legislative amendment intervened, the indictment of the police officer generating their availability. Thus, as a consequence of the amendments made by Law no. 255, art. 65 para. (2) of the Police Officer Statute acquired the following content: "The police officer against whom criminal action has been initiated is made available, except in cases where criminal action has been initiated for a culpable offense and it is considered that this does not affect the prestige of the profession"[19].

Currently, following Government Emergency Ordinance no. 21/2016[20], the initiation of criminal action against a police officer, except in cases where criminal action has been initiated for a culpable offense not committed in connection with the service, generates the effect of making the police officer available, according to art. 27[21] para. (2) of the Police Officer Statute. During the availability period, the police officer performs tasks and duties established in writing by the unit head, which do not impede the proper conduct of the criminal

[16] Crimes against humanity, against the state or authority, corruption or service-related crimes, crimes that obstruct justice, forgery offenses, or intentional crimes that would make the public official incompatible with the exercise of the public function, except in cases of rehabilitation, post-conviction amnesty, or decriminalization of the act.

[17] Law no. 360 of June 6, 2002, published in the Official Gazette of Romania no. 440 of June 24, 2002.

[18] Published in the Official Gazette of Romania no. 440 of June 24, 2002.

[19] Regarding the phrase "crimes that harm the prestige of the profession," we mention the jurisprudence of the Constitutional Court, which found this provision unconstitutional, leading to its removal from legislation (see C.C.R., dec. no. 225/2017, published in the Official Gazette of Romania no. 468 of June 22, 2017).

[20] Published in the Official Gazette of Romania no. 459 of June 21, 2016.

[21] Adopted by Law no. 146 of July 22, 2019, regarding the status of border police officers, published in the Official Gazette of Romania no. 631 of July 30, 2019.

process, according to art. 27[22] para. (2) and (2) of the Police Officer Statute. Regarding the suspension of the police officer, this measure is ordered, among other things, in the case of preventive arrest, house arrest, or judicial control or judicial control on bail, if the prohibition of exercising the profession has been ordered, procedural hypotheses that involve the prior indictment of the police officer (art. 27[23] of the Police Officer Statute). In conclusion, the initiation of criminal action against a police officer determines their availability under the law, while the initiation of criminal action, followed by the taking of preventive measures, leads to the automatic suspension of the police officer.

2.4. Status of the Prison Police Officer

Similarly to the Police Officer Statute, the initiation of criminal action against a prison police officer determines their availability, in which case they perform only those tasks and duties established in writing by the unit head and benefit from the monetary rights corresponding to their professional rank, at the base level, and other rights provided by law [art. 128 para. (2) of the Prison Police Officer Statute[24]]. If the indictment provision is followed by preventive arrest, house arrest, or judicial control (if the accused has been imposed the obligation not to exercise the profession or other measures that prevent the exercise of professional duties), the prison police officer is suspended from office.

2.5. Status of Judges and Prosecutors

The legal framework dedicated to the career of magistrates has been noted from the beginning (after 1989) for establishing strict rules applicable in the hypothesis of indicting judges and prosecutors. In this regard, according to art. 76 para. (2) of Law no. 92/1992 for judicial organization[25], "when criminal action is initiated against a magistrate, they will be suspended from office until the final decision." The legal provision, in force until 2004, accompanied the indictment act with particularly harmful professional consequences for the magistrate in question (cessation of salary rights, loss of seniority in the judiciary), suspension from office could be maintained for a significant period.

Through the Statute of Judges and Prosecutors adopted in 2004[26], the hypothesis of suspension from office in the case of initiating criminal action was maintained, without distinctions between the different crimes that could be imputed to the judge or prosecutor magistrate or the form of guilt with which these acts would have been committed, until 2013. Thus, following the amendments made by Law no. 255, the effect of suspension from office following the initiation of criminal action was abandoned, other legal hypotheses being

[22] See Law no. 303/2004 regarding the status of magistrates (name changed in 2005 to "status of judges and prosecutors"), published in the Official Gazette of Romania no. 576 of June 29, 2004.

[23] The regulation was also included in the Statute of Clerks and other categories of personnel holding specialized positions within the courts, the prosecutor's offices attached to them, and the National Institute of Forensic Expertise (Law no. 11/2024, published in the Official Gazette of Romania no. 26 of January 12, 2024).

[24] Adopted by Law no. 146 of July 22, 2019, regarding the status of border police officers, published in the Official Gazette of Romania no. 631 of July 30, 2019.

[25] Law no. 92/1992 for judicial organization was published in Official Gazette of Romania no. 197 of August 4, 1992.

[26] See Law no. 303/2004 regarding the status of magistrates (name changed in 2005 to "status of judges and prosecutors"), published in the Official Gazette of Romania no. 576 of June 29, 2004.

regulated (sending to criminal trial or ordering a preventive deprivation of liberty measure or placing under judicial control accompanied by the obligation not to exercise the profession in which the act was committed).

This professional regime is maintained through the current statute of judges and prosecutors, adopted in 2022[27], the initiation of criminal action no longer having direct and immediate consequences on the magistrate's career. However, it should be noted that the indictment act of a magistrate still generates extra-procedural effects. Thus, according to art. 214 para. (2) related to para. (1) of the Statute of Judges and Prosecutors, the initiation of criminal action for a corruption offense, an offense assimilated to corruption offenses, a service-related offense, or an offense related to these or an offense against the administration of justice automatically attracts either the suspension of the resolution of the service pension request or the suspension of the payment of the service pension[28].

At the end of this study, we also mention the possible effects of initiating criminal action against defendants who hold the status of members of the Competition Council. In this regard, according to art. 15 para. (10) of Law no. 21/1996[29], from the date of initiating criminal action, the members of the Competition Council can be suspended from office by Parliament.

5. Summary Conclusions

The idea of this study arose from the pedagogical difficulties of explaining criminal action (an abstract concept, difficult to understand, susceptible to existing in a virtual manner without the need for a criminal file, but also effectively during the criminal process). By reviewing the concrete procedural moments in which the prosecutor orders the initiation of criminal action, considering the practice of criminal investigation and, essentially (in the authors' opinion), taking into account the definition of legal action as an indispensable condition for the court to exercise its jurisdiction, we consider that the moment of initiating criminal action can be understood by recognizing the procedural necessity of the indictment act, a requirement that completes the set of conditions provided in the criminal procedural law for initiating criminal action. Additionally, we have found that the effects of initiating criminal action exceed, in certain circumstances, the framework of the criminal process, the indictment provision representing the basis for other provisions, having significant temporary consequences within certain professions: the temporary transfer of the public official, the availability of the police officer, respectively the prison police officer, the suspension of the resolution of the service pension request, or the suspension of the payment of the service pension for judges, prosecutors, clerks, or other categories of personnel holding specialized positions within the courts, the prosecutor's offices attached to them, and the National Institute of Forensic Expertise, respectively the possibility of suspending the members of the Competition Council from office.

[27] See Law no. 303/2022 regarding the status of judges and prosecutors, published in the Official Gazette of Romania no. 1102 of November 16, 2022.

[28] The regulation was also included in the Statute of Clerks and other categories of personnel holding specialized positions within the courts, the prosecutor's offices attached to them, and the National Institute of Forensic Expertise (Law no. 11/2024, published in the Official Gazette of Romania no. 26 of January 12, 2024).

[29] Law no. 21/1996 of competition was republished in the Official Gazette of Romania no. 153 of February 29, 2016.

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TO THE CLASSIFICATION OF THE POWERS OF THE APPELLATE COURT ACCORDING TO THE BULGARIAN CRIMINAL PROCEDURE CODE

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Abstract

The paper examines the essence of the appellate court as a controlling judicial instance and clarifies the basic principle according to which the appellate court works and issues judicial acts. Based on this, a check was made to match the nature of the appellate court proceedings with the nature of the classification of his powers as proposed in Article 334 of the Criminal Procedure Code. At the end of the paper, a new classification of his powers, compatible with the nature of appellate judicial review, was developed.

Keywords: *court, review, trial, sentence, accused party, prosecutor, judicial powers.*

1. Introduction

This report is related to the clarification of the meaning and application of significant norms of the Criminal Procedure Code of Republic of Bulgaria. The word is about important texts that outline the type and arrangement of the powers of the appellate court, as well as the cases in which they should be exercised. The aim is to ensure without problem understanding and application of Art. 334, Art. 335, Art. 336 and Art. 337 of the Criminal Procedure Code. This is of essential importance both for the rights of citizens and for the full adaptation of the intended legal norms to the spirit of the control judicial proceedings themselves. Here, normative resolutions of problems are proposed in accordance with the philosophy of second-instance judicial proceedings and with the need to preserve "by all means" the role of the appellate court as a full-fledged guarantee against procedural error in criminal proceedings. It necessarily follows that the report recommends and insists on the principled compatibility of the appellate proceedings, both with Chapter Two of the Code and with the tasks of criminal proceedings. Only with such compatibility a fair trial can be ensured and citizens' confidence can be strengthened in the judiciary in the Republic of Bulgaria.

2. Contents

Before considering the powers of the appellate court, it is appropriate to point out that the appellate proceedings are an important guarantee of both the public and the private interest in the criminal process, since both interests require the correct decision of the criminal case. The appellate proceedings provide precisely this opportunity, as it is controlling in its legal nature and is aimed at eliminating vicious judicial acts from the legal world. The verification of the correctness of an act issued by the first judicial instance before a higher instance, and more precisely before

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the next judicial instance, is also denoted by the word combination - appellate review.

Before the court of second instance are attacked, i.e. appeal and protest not entered into force judicial acts of the court of first instance. More specifically, the appellate court verifies the correctness of the judgments issued by the court of first instance in criminal cases of a general and private nature - Art. 313 of the CPC[1]. Validation is performed in three directions.

Firstly, the contested judgment is examined for legality. The appellate court verifies whether the sentence rendered complies with the material and procedural law applicable to the case, and also whether the criminal proceedings themselves were conducted in accordance with the requirements of the law.

Secondly, the assailed judgment is examined for reasonableness. This means that the appellate court checks whether the facts accepted as established by the verdict correspond to the evidence and means of proof in the case. The appellate court answers the question of whether there is an overlap between the factual conclusions of the judge and the evidentiary material from which they are drawn.

Thirdly, it is checked whether the sentence passed is fair. The appellate court reviews the penalty imposed by the verdict. The review concerns the individualization of punishment, i.e. the control includes the manner in which the court of first instance has determined the type and amount of punishment according to the degree of public danger of the act and of the perpetrator in the specific criminal proceedings.

It is important to note that, according to the Bulgarian law, the appellate court makes a comprehensive review of the contested sentence, regardless of the grounds on which it was appealed. What's more, the intermediate appellate review instance shall also revoke or modify the sentence in the section that has not been appealed, as well as with respect to the persons who have not filed an appeal, if there are grounds therefore. Proceedings before the intermediate appellate review instance shall be instituted by protest of the prosecutor or by appeal of the parties (the accused party, the victim and their defenders). Appeals and protests shall be filed within 15 days after the announcement of the sentence. Appeals and protests shall be filed through the court which has pronounced the sentence – Art. 319 CPC.

The control proceedings commented here are most significant for the rights of citizens in view of the so-called the revision for correct on the non-enforced first-instance verdicts according to the operation of the appellate principle. According to this principle, the verdicts are checked for the presence of defects, the removal of which is imperative to reach a lawful and fair administration of justice in the country. Georgi Mitov successfully notes that the Bulgarian: "appellate review of the sentence has a complex nature. It combines within itself judicial control over the activity of the court of first instance and the rendered judicial act with a specific form of examination and decision of the case on its merits. In other words, the appeal is a manifestation of judicial control over the sentence and the administration of justice"[2] In this sense, our appellate proceedings constitute a "second - first instance"[3] on the merits of the criminal case. The appellate court can therefore rule anew and in a

[1] Abbreviation of Criminal Procedure Code.
[2] G. Mitov, *Vazivno proizvodstvo po nakazatelni dela*, Sibi, Sofia, 2016, p. 41.
[3] *Ibidem*, p. 42.

different sense on the questions of guilt and criminal responsibility of the defendant. He can re-decide the case by convicting an acquitted or acquitting a convicted.

Another distinctive feature of the Bulgarian appellate proceedings, as it became clear above, is the effect of the prohibition on worsening the situation of the accused party (reformatio inpejus). This prohibition, as generally noted in the theory, provides the defendant with peace of mind on appeal and prohibits the court from aggravating his situation unless there is an accompanying protest by the prosecutor or an accompanying complaint by the private complainant or private prosecutor.[4] When aggravation of the defendant's position is sought by the appellate court, the protest and appeal must be relevant, i.e. to contain an express request for that - Art. 335, paragraph 4 and Art. 336, Art. 337, paragraph 2 of the Criminal Procedure Code.

In case of need, the appellate court can make a factual determination in the case (Art. 332 in conjunction with Art. 315 of the Criminal Procedure Code), this follows from the principle that it can decide the criminal case on its merits. For this purpose, the appellate court is unrestricted in its review, it fully checks the correctness of the verdict, regardless of the reasons given by the parties. The main view that I seek to share with the report is precisely that the powers of the appellate court and their arrangement in law should be marked by the operation of the appellate principle. In other words, from the position of the appellate court of “second-first instance.” Has this been achieved at the normative level?

When analyzing the provisions of chapter Twenty-one of the code, it is inevitable not to undergo a teleological and systematic interpretation of Art. 334 of the CPC. The purpose of the law is an attribute of the law itself.[5] Law as an organized system has a certain direction conditioned by the achievement of significant social results. It can even be assumed that "law is a means of achieving certain social goals by legal means"[6] As for the ratio legis inserted in the appellate proceedings, it should be specified that it must be discovered and deduced through interpretation by the interpreter, because it is nowhere specifically indicated by the legislator. In this sense, jointly interpreting the provisions of section one of chapter Twenty-one of the CPC, the purpose of the appellate procedure is to serve as a tool to ensure that in the social community, criminal law cases will be resolved, solely and only with the help of effective correct criminal convictions. Therefore, the legislator proceeds from the understanding that the work of the first instance court includes the possibility of making a procedural error and, in view of this, it is necessary to provide control judicial proceedings for its possible establishment and elimination. The results of social practice show, not only that a mistake can be made in the decision of the case by the first court instance, but that a mistake is too often made. This is what G. Mitov also observed: "the appeal aims at legal peace so that an incorrect and illegal judicial act does not remain. We cannot accept that the purpose of the appeal is to set aside or modify the first instance judgment. Unfortunately, in practice, this is often the case - in a significant number of appealed cases, the result is exactly this - the attacked act is amended or canceled"[7]. The appellate court

[4] *Ibidem*, p. 46.
[5] R. Tashev, *Teoriya na talkuvaneto*, Sibi, Sofia, 2000, p. 234.
[6] *Ibidem*, p. 235.
[7] G. Mitov, *Vazivno proizvodstvo po nakazatelni dela*, Sibi, Sofia, 2016, p. 182.

is the "guardian" of the correct decision of the case. It is designed as a "second-first" instance in essence and last instance on the facts of the case, namely, in order to be able to really and effectively reach the undesirable but often admitted procedural error by the court of first instance. It is not argued here that mistakes are made in all first-instance cases in the country, or that the error of the first instance must necessarily be expected by litigants and citizens, but that such mistakes are often made, and that the powers of the appellate court must be adapted to this circumstance. Is it so de lege lata?

This question should be answered in negative. The arrangement of the powers of the appellate court is not in line with either the purpose of the appellate proceedings or the results of social practice.

According to Art. 334 of the CPC: "the intermediate appellate review court may:

1. revoke the sentence and return the case for another examination by the first-instance court;

2. revoke the first-instance court sentence and issue a new sentence;

3. modify the first-instance sentence;

4. rescind the sentence and terminate criminal proceedings in cases under Article 24, Paragraph (1), Items 2 to 8a and 10 and Paragraph (5);

5. suspend criminal proceedings in cases under Article 25;

6. confirm the first-instance sentence. "

From the gradation of the powers of the appellate court two things immediately make an impression:

firstly, the legislator places as the most important (begins with) a power that is not distinctive for appellate proceedings. Revoke of the sentence and return of the case for a new trial is a typical control-revocation power and is characteristic of the cassation proceedings. It is reasonable from the point of view of the purpose of the law to impose as leading the powers to set aside the first-instance judgment and decide the case on the merits, as well as that of amending the first-instance judgment;

secondly, the legislator unjustifiably puts the suspension and termination of the criminal proceedings before the confirmation of the first-instance sentence, as if they were more frequently advocated hypotheses in social practice. Thus, it is hardly indicated to the law enforcers that the confirmation of the first-instance judgment is the most distant, the rarest, the most unacceptable and the most extreme procedural possibility. The appellate court affirms only if there is nothing else to do in the case - it is baseless!

According to the above arguments, it is imperative that the powers of the appellate court should be preserved, but rearranged in order of importance. Their rearrangement should also be guided by the results of the systematic interpretation of all provisions of the appellate procedure. This means that the new enumeration of the appellate court's powers should be guided by the fact that the appellate court is an instance that can conduct fact-finding and decide the case on its merits.

I propose the following de lege ferenda amendment to Art. 334 of the Criminal Procedure Code. The intermediate appellate review court may:

1. revoke the first-instance court sentence and issue a new sentence;

2. modify the first-instance sentence;

3. confirm the first-instance sentence;

4. revoke the sentence and return the case for another examination by the first-instance court;

5. rescind the sentence and terminate criminal proceedings in cases under Article 24, Paragraph (1), Items 2 to 8a and 10 and Paragraph (5) of the CPC;

6. suspend criminal proceedings in cases under Article 25 of the CPC.

The proposed new arrangement of the powers of the appellate court is already in line with the purpose of the proceedings itself and ultimately with the spirit of Art. 338 of the CPC, according to which the appellate court confirms the sentence only when it finds that there are no grounds for its cancellation or amendment.

A proposal to amend the law must also be made in accordance with Art. 335 of the CPC. As a starting point for this undertaking Art. 335, paragraph 3 of the Code will be used.

According to Art. 335, paragraph 3 of the Criminal Procedure Code: "in cases under Article 348, paragraph 3 the appellate court shall revoke the sentence and remit the case to the first instance, unless it can itself eliminate the violations allowed or these might not be avoided in a new examination of the case". This refers to the cases where an appellate review is reached a second time in the same case. Then, in order to achieve procedural economy and speed, the legislator prescribes an obligation for the appellate court to decide the case on its merits, i.e. the appellate court decides the case instead of returning it a second time to the trial court for decision. In Art. 335, paragraph 3 CPC, an internal reference is made to paragraph 2, and no such reference is made to paragraph 1 of the same article. Should such a reference be made?

From the strict interpretation of paragraph 3 of Art. 335 of the Code comes to the conclusion that the cases referred to in paragraph 1 of Article 335 of the Criminal Procedure Code do not fall within its scope. Therefore, when the conditions of paragraph 1 are present again, the appellate court can return the case instead of deciding it on its merits. In Art. 335, paragraph 1 of the CPC indicates a case where the appellate court revoke the sentence and sends the case to the prosecutor. From Art. 335, paragraph 3 of the Criminal Procedure Code, the appellate court has no obligation to decide the case on its merits if it comes to the conclusion a second time that the case should be returned to the prosecutor. Such an obligation exists only if the case has to be returned a second time to the court of first instance. The problem is not in the dual application of the authority to cancel and return the case for a new trial, but in the fact that Art. 335, paragraph 2 of the Criminal Procedure Code demanded the cancellation of the sentence and the return of the case for a new trial to the court of first instance due to significant violations of the procedural rules. The revoke of the sentence and the return of the case in the sense of Art. 335, paragraph 1 of the Criminal Procedure Code is because of the finding of the appellate court that the crime for which the proceedings were initiated on the complaint of the private complainant is of a public nature. The return of the case to the prosecutor is due to mistakes made in the qualification of the crime, and not due to significant violations of the procedural rules. Probably for this reason, paragraph 1 of Art. 335 of the CPC is excluded from the scope of Art. 335, paragraph 3 of the Code. Whether this is an accidental act of the legislator or his well-thought-out action remains a mystery, because he has nowhere indicated that the ground for cancellation of the sentence is the violation of the substantive law contained in it (wrong legal qualification of the act), as well as themselves the duties of the prosecutor after receiving the returned case. Any mandatory instruction of the court to the prosecutor regarding the legal qualification applicable to the case is a form of interference in the prosecutorial function. Thus, from the analysis of Art. 335, paragraph 3 of the Code, it is concluded that it is correct, paragraph 1 of Art. 335 of the CPC to be dropped, instead of being

included in the content of Art. 335, paragraph 3 of the CPC. Georgi Mitov is of a similar opinion: "... there are no grounds for the appellate court to cancel the contested judicial act and return the case for a new examination. Establishing a different nature of the crime is related to the application and interpretation of the substantive law. In the specific case, the finding by the appellate court of the fact that the crime, subject of consideration in the proceedings, which is based on the victim's complaint, is of a general nature, goes beyond the application and interpretation of the substantive law and has significant procedural consequences with a change in the nature of the order of examination of the criminal case... the possibility of the court to return the case to the prosecutor upon establishing a change in the nature of the crime subject of the proceedings, de lege ferenda should be an independent power, which is specified in a separate text".[8]

In view of the frequency of application in practice and discussion in theory of Art. 336, paragraph 1, item 1 of the CPC, and for its qualitative distinction from Art. 337, paragraph 1, item 2 of the CPC, it is important to provide for an explicit legislative distinction between these two cases of deterioration of the situation of the defendant by the appellate court. This can happen satisfactorily with the development of a definite legal norm in which to define the concept of "the law for a more heavily punishable crime" and to list, for example, its most typical manifestations. This will bring clarity to the exercise of individual powers by the appellate court, as well as the possibility of relating by analogy other similar factual cases under the hypothesis of Art. 336, paragraph 1, item 1 of the Criminal Procedure Code, which will significantly ease the work of the parties in the case! The general beneficial result would be to limit the possibility of making a procedural error in the case! Nowadays it is minimized through theory. It is there that the concept of " more heavily punishable crime " is associated with a mistake made in the qualification of the crime, while "increasing the amount of punishment" is associated with a mistake made in the individualization of criminal responsibility. In the first case, the appellate court corrects the error by applying a law with a more severe legal qualification, if there was an accusation of this in the first court instance. In the second case, the appellate court corrects the error by maintaining the qualification given in the case and increasing the criminal liability of the defendant.

Moreover, the adoption of a definitive legal norm to describe and distinguish the content of the concepts: "a law providing for equally or for same crime" will also have a positive impact on legal practice - Art. 337, para. 1, item 2 of the Criminal Procedure Code. Currently, the distinction between the cited terms in practice is achieved by using the most general standards developed for this purpose in theory. For example, the "same punishable crime" is present when, in the case, the appellate court has to classify the crime under another component of the same crime or under the same component of the crime, but with an insignificant change of the facts of the accusation. The term "equally punishable crime law" refers to the cases when the appellate court misrepresents the facts relevant to the case under a new crime category (qualification), different from the previous one, as the punishment for both categories is the same.[9]

[8] *Ibidem*, p. 246-247.
[9] *Ibidem*, p. 203.

3. Conclusions

In conclusion, with the problems outlined above in the formulation and application of Art. 334, Art. 336 and Art. 337, paragraph 1, item 2 of the Criminal Procedure Code sought to confirm the view that the appellate court should function as a "second-first" court with clear and logically distributed procedural authority. With the permissions and recommendations proposed in the report, the provisions of the appellate proceedings become more precise and more applicable, both for the competent state authorities and for the citizens of the Republic of Bulgaria.

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THE PROCEDURE OF VERIFYING PRECAUTIONARY MEASURES IN CRIMINAL PROCEEDINGS

Ştefan Alberto LUPU[(*)]

Abstract

This paper aims at providing an overview of the institution of precautionary measures also called preliminary injunction measures in the criminal trial, namely of the procedure instituted by the legislator in art. 250 [2] of the Criminal Procedure Code and on the terms in which the judicial bodies are obliged to verify whether or not the grounds for maintaining precautionary measures still exist. It is a matter of principle that protective measures, like precautionary measures, are measures that have the effect of limiting the fundamental rights of the person against whom they are ordered, and the manner in which they are ordered and maintained must observe the limits and guarantees of the right to a fair trial. The present study will mainly focus on the aspects related to the way in which this procedure is carried out by the judicial bodies, as well as the contradictions encountered in the legal practice on the legal termination of protective measures, on the nature of the terms regulated by art. 250 [2] of the Criminal Procedure Code and on the conditions that must be analysed in this verification procedure.

Keywords: *verification, termination of right, terms, obligation, equitable, measure.*

1. Introduction

The precautionary or injunction measures have generated many a debate over time, both at the doctrinal and jurisprudential level, discussions that looked at both the way of regulating these procedural measures in the Criminal Procedure Code and their practical applicability. These procedural measures are of particular importance in the conduct of the criminal proceedings and they can give rise to various particular situations with relevance for criminal practitioners. Precautionary measures are provisional procedural measures, with a right-restricting real nature, which aim at guaranteeing the repair of the damage caused by the crime, the execution of the fine, the injunction of the special seizure or the extended confiscation, as well as the guarantee of the payment of legal expenses generated by the conduct of a criminal judicial proceedings.

The need to analyse the institution of precautionary measures verification as regulated in art. 250 [2] of the Criminal Procedure Code law comes on the one hand from the laconic way of drafting the text which creates application difficulties for the judicial bodies and on the other hand from the non-unitary present jurisprudence on this institution.

This paper will mainly address certain general issues about precautionary measures in the criminal trial, namely the conditions under which these preventive measures can be taken and the procedure provided by law, and then the current opinion of the courts on the nature of the terms in which they should carry out the procedure for verifying the

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precautionary measures by the judicial bodies, and whether or not a sanction is required in case of non-compliance with these terms as well as criticisms related to the practical way in which the juridical bodies understand the existence of the grounds requiring the maintenance of these measures during the course of the criminal trial.

Also, through this paper, we set out to highlight the ambiguities in the drafting of art. 250 ^{2} of the Criminal Procedure Code, which in its current form, creates practical problems, questioning the legislator's omission regarding certain important procedural aspects. Among these aspects, we are going to review the omission of the legislator to establish the maximum term until which the insurance measure must be verified in the preliminary chamber procedure and to propose by *lege ferenda* the necessity of the legislator's intervention on the text provided by art. 250 ^{2} of the Criminal Procedure Code in the sense of establishing the term in which the verification of precautionary measures must be carried out during the preliminary chamber procedure, it being well known that there are cases in which the preliminary chamber proceedings extend over a longer period of time.

Also, after analysing the verification procedure as it is regulated by the provisions of art. 250 ^{2} of the Criminal Procedure Code case, we are going to discuss the need for the intervention of the legislator to clarify the norm in terms of establishing the consequences that may occur in the event of non-compliance with the deadline for the verification of precautionary measures. Although we are of the opinion that at this moment, there is a regulation in the Criminal Procedure Code of the consequence in case of non-compliance with the verification deadlines, it being expressly regulated by the provisions of art. 268 para. (2) of the Criminal Procedure Code, nevertheless, considering the non-unitary practice in the matter, it is necessary that the legislator intervene in order to correct the provisions of art. 250 ^{2} of the Criminal Procedure Code, i.e. by the express addition of the legal termination solution of the injunction measures.

The issue of the terms established by the legislator in the provisions of art. 250 ^{2} of the Criminal Procedure Code, for verifying the precautionary measures, is important from viewpoint of art. 6 ECHR on the observance of the right to a fair trial and questions the existence of a legislative vacuum consisting in the absence of a rule expressly regulating the consequences that may arise if the precautionary measure established on a person's assets is not subject to verification by to the judicial bodies within the term established by the legislator, depending on the procedural phase of the case. Therefore, the simple regulation of a rule that only establishes the conduct of the judicial bodies to verify the precautionary measures within certain terms without expressly indicating what sanction are ordered in case of non-compliance with the terms of 6 months or one year provided by the law, renders the rule set by art. 250 ^{2} of the Criminal Procedure Code law incomplete and give rise to the legislator's obligation to intervene and complete this norm.

We appreciate that in the matter of precautionary measures, a review of the legal provisions is necessary, especially with regard to art. 250 ^{2} of the Criminal Procedure Code, so that this institution is adapted to the new aspects of judicial practice. The revision of the procedure for verifying the precautionary measures is necessary, given that they are measures triggering the restriction of certain fundamental rights, and thus, in order to guarantee compliance with all procedural guarantees, the law must be clear, predictable and provide the necessary

levers so that the limitation brought by these measures does not become excessive, abusive and disproportionate.

The introduction of the provisions of art. 250 [2] in the Criminal Procedure Code and the establishment of the mechanism for verifying precautionary measures was necessary. However, it seems that the application of these provisions in the criminal trial is more of a formality. This emerges from the current judicial practice. The mere fact of forwarding for debate of the parties the "maintenance" of the injunction measures without an effective analysis on the existence of the need to maintain them, makes this procedure ineffective for the purpose for which it was enacted. The verification involves a concrete, thorough and mandatory analysis for the judicial bodies. Any deviation from the legal method of carrying out this procedure results in violating certain rights of the persons against whom these measures were instituted, or this is not the purpose of the verification procedure introduced by the legislator.

2. The actual content of the paper

2.1. Precautionary measures: conditions and procedure

Precautionary measures are regulated in the provisions of art. 249 et seq. of the Criminal Procedure Code and represents the mechanism by which the prosecutor, the preliminary chamber judge or the court, ex officio or upon request, may order the non-disposal of the assets of the suspect, the defendant or the civilly responsible party in order to avoid concealment, destruction, alienation or evasion from prosecution of goods that may be subject to special seizure or extended confiscation or that may serve to guarantee the execution of the fine or legal expenses or the repair of the damage caused by the crime.

By their effect, the precautionary measures guarantee the execution of the patrimonial obligations arising from the resolution of the criminal action and the civil action within the criminal trial. [1]They do not imply the loss by the owner of the asset's property, but of the right of material and legal disposal over it.

The Criminal Procedure Code regulates three distinct categories of precautionary measures: the sequestration itself, the mortgage notation and the seizure measure. The last two are considered special forms of seizure. The purpose of the precautionary measures is the unavailability both of movable assets and of immovable assets.

The functionality of these measures is only precautionary and not reparative. The application of the measure does not automatically represent the coverage of the damage, the court must oblige by its order the coverage of the damage caused by the crime. For instance, the seizure report may not constitute a title by which the defendant could be prosecuted for the payment of civil damages [2].

From the analysis of the provisions of art. 249 of the Criminal Procedure Code, a series of conditions regarding the taking of injunctive measures emerge: precautionary measures to guarantee the execution of the fine may only be taken on the assets of the suspect or the defendant, and in this case applies the principle according to which criminal liability is personal, or, in order to ensure the execution punishment, only the property of the person to be held criminally

[1] I. Neagu, M. Damaschin, *Tratat de procedură penală. Partea generală, 3rd edition*, Universul Juridic Publishing House, Bucharest, 2020, p. 721.

[2] *Ibidem*, p. 722.

liable may be confiscated; the injunction measures ordered for special seizure or extended confiscation may be taken on the assets of the suspect, the defendant or the persons in whose ownership or possession the assets to be confiscated are located and the insurance measures instituted in order to guarantee the repair of the damage caused by the commission of the crime or to guarantee execution of judicial expenses may be ordered on the assets of the suspect, the defendant or the civilly responsible party only up to the concurrence of the probable value of the damage incurred and the expenses caused by the criminal trial.

As a rule, the precautionary measures are optional, the legislator establishing in art. 249 para. (1) of the Criminal Procedure Code the possibility for the courts to assess in relation to all the data of the case if the establishment of these precautionary measures is justified and necessary. However, the provisions of art. 249 para. (7) of the Criminal Procedure Code provide that the precautionary measures are mandatory if the injured party is a person without exercise capacity or with restricted exercise capacity. Also, certain normative acts regulate the obligation to take these precautionary measures. See in this regard Law no. 241/2005 on preventing and combating tax dodging[3] or Law no. 78/2000 for the prevention, discovery and sanctioning of acts of corruption [4] which provide for the mandatory establishment of precautionary measures in the event of the commission of one of the deeds criminalized by these laws.

Taking precautionary measures is ordered during the criminal investigation, by the prosecutor, by justified ordinance, at the request or ex officio, in the preliminary chamber procedure by the preliminary chamber judge by conclusion and may be ordered ex officio, at the request of the prosecutor or the civil party cases as well as in the trial phase, by the court by conclusion, judgement or decision, ex officio, at the request of the prosecutor or the civil party.

The suspect, the defendant, the civilly responsible party and any other interested person may file an appeal against the decision to institute precautionary measures as well as against the way of carrying out these measures. The appeal against the prosecutor's ordinance may be introduced within 3 days from the date of notifying the order to take the measure or from the date of its implementation, to the judge of rights and freedoms from the court that would have the competence to judge the case for merits. The appeal is not suspensive of execution. The resolution of the appeal is done in the council chamber, with the summons of the person who formulated the appeal and the interested persons and with the mandatory participation of the prosecutor.

As for the conclusion by which a precautionary measure was ordered by the preliminary chamber judge, the trial court or the appellate court, the defendant, the prosecutor or any other interested person can file an appeal within 48 hours of the ruling or, as the case may be, from communication. The appeal is suspensive of execution, it is submitted to the first court or appellate court that issued the contested decision and is forwarded, together with the case file to the hierarchically superior court. The appeal is settled in a public hearing, with the participation of the prosecutor and with the summons of the defendant and the interested party who formulated it.

[3] Published in Official Gazette of Romania no. 672 of 27.07.2005.
[4] Published in Official Gazette of Romania no. 219 of 18.05.2000.

2.2. The procedure for verifying the precautionary measures

According to art. 250 [2] of the Criminal Procedure Code "Throughout the criminal trial, the prosecutor, the preliminary chamber judge or, as the case may be, the first court periodically checks, but no later than 6 months during the criminal investigation, or one year during the trial, if the grounds that determined taking or maintaining the precautionary measures, ordering, as the case may be, the maintenance, restriction or extension of the ordered measure, or the lifting of the ordered measures, the provisions of art. 250 and 250 [1] applying accordingly.".

This legal text was introduced into the Criminal Procedure Code by Law no. 6/2021 on the establishment of measures for the implementation of Council Regulation (EU) 2017/1.939 of 12 October 2017 implementing a form of consolidated cooperation regarding the establishment of the European Public Prosecutor's Office (EPPO) [5]. Considering that the precautionary measures are not available for a certain period of time, as is the case with the precautionary measures, the legislator understood to establish also at the level of the precautionary measures the obligation of their periodic verification, in order to analyse by the judicial bodies whether the precautionary measures continue to be proportionate and they are still justified to be maintained as interferences in the fundamental rights of the person against whom they were instituted.

Therefore, from the provisions of art. 250 [2] of the Criminal Procedure Code, it appears that the prosecutor, the preliminary chamber judge as well as the court must carry out a check on the injunctive measures instituted on the assets of the suspect or the defendant, no later than 6 months during the criminal investigation, or one year during the trial in the sense of to analyse whether the reasons that determined the taking or maintaining of the precautionary measures still exist.

In this procedure, the existence of the grounds that led to the taking of these measures will be analysed by referring to new elements involved in the case and the proportionality of the measure will be examined considering the speed of the procedure, the length of time during which the goods were unavailable, maintaining the proportional nature of the interference in the exercise of the right of ownership.[6]

In this procedure, it is not possible to verify, in principle, whether the conditions stipulated by the law were met at the time of taking the protective measures, the judicial bodies will not analyse whether there were grounds that led to the taking of the precautionary measures, but only if they exist. This verification procedure cannot be interpreted as an appeal against the act by which these precautionary measures were established. By way of exception, certain illegalities existing at the time of the measures taking may be analysed, but only in the context where they have a flagrant character [7], for example the nature of the goods subject to precautionary measures can be questioned, i.e. if an asset that cannot be the object of the precautionary measures or the quality of the person with respect to whom these measures were taken, for example, a injunctive measure may not be ordered to guarantee the punishment of the fine on the assets of persons who are not related to the criminal case, since the imposition of these measures has

[5] Published in Official Gazette of Romania no. 167 of February 18th, 2021.
[6] A.V. Iugan, *Măsurile procesuale*, C.H. Beck Publishing House, Bucharest, 2023, p. 322.
[7] *Ibidem*

consideration of the principle of the personality of criminal liability, thus only the assets of persons likely to be criminally sanctioned with a criminal fine may be made unavailable.[8]

During the criminal investigation, the procedure for verifying the protective measures is non-contradictory, the prosecutor not having the obligation to summon the defendants or to hear them. An appeal against the prosecutor's order can be made by the defendant or by any interested party, within 3 days from the date of communication of the order maintaining the measure. The appeal is settled by the judge of rights and liberties from the court that would have jurisdiction to judge the case on merits. The appeal will be resolved according to the provisions of art. 250 of the Criminal Procedure Code. In the event that the prosecutor ordered the prosecution of the defendant before the resolution of the appeal against the order to maintain the protective measures, the provisions of art. 250 para. (5 [1]) of the Criminal Procedure Code, otherwise the appeal will be resolved by the preliminary chamber judge.[9]

During the preliminary chamber procedure and in the trial phase, however, the procedure is adversarial, so the verification of precautionary measures will be discussed with the prosecutor, the civil party, other interested persons and the defendant. The court session will be held in the council chamber, if the case is in the preliminary chamber procedure, or in public session if the case is in the trial phase. On the verification of the precautionary measures, the court will issue a decision that may be challenged within 48 hours from the decision or, as the case may be, from communication. The appeal will be resolved within 5 days of registration.

As regards the procedure for verifying the precautionary measures and the competent body to carry it out in the hypothesis that the case is the appeal of the contestation against the conclusion of the preliminary chamber judge ordering the start of the trial or the return of the case to the prosecutor's office, there is no express regulation. However, in the literature[10] it has been appreciated that even in this situation incidents mutatis mutandis become considerations of Decision no. 5/2014 ruled by the High Court of Cassation and Justice in the resolution of an appeal in the interest of the law by which it was established that the preliminary chamber judge from the court seised by indictment, whose conclusion ordering the start of the trial was appealed, has the competence to rule on precautionary measures, according to the legal provisions that regulate precautionary measures in the preliminary chamber procedure, until the resolution of the appeal provided for by art. 347 of the Criminal Procedure Code. Practically, applying mutatis mutandis this decision also in the matter of precautionary measures means that if the case is in the phase of appeal against the conclusion of the preliminary chamber judge and the verification of the precautionary measures is required, the verification procedure will have to be done by the judge from the court notified with the indictment, namely from the court on merits.

[8] M. Udroiu, *Sinteze de procedură penală. Partea generală*, C.H. Beck Publishing House, Bucharest, 2020, p. 1046-1047.

[9] A.-V. Iugan, *op. cit* , p. 318.

[10] *Ibidem*

2.3. The deadlines for carrying out the procedure for verifying the precautionary measures

An important practical problem is the analysis of the nature of the terms provided by the provisions of art. 250 [2] of the Criminal Procedure Code, namely the terms of 6 months and one year in which the judicial bodies must order the verification of the precautionary measures and the sanction that is applied in case of exceeding these terms. As shown in the previous sections, when it comes to the deadlines for verifying the precautionary measures and the sanction that occurs if these deadlines are exceeded, the judicial practice is non-uniform, the courts ruling on this aspect in different ways.

According to art. 250 [2] of the Criminal Procedure Code case, the verification of precautionary measures is done periodically, but no later than in 6 months in the criminal investigation, and one year during the trial. From the analysis and interpretation of this legal text, it follows that the prosecutor is obliged to carry out the procedure for verifying the precautionary measures no later than 6 months from the date on which they were instituted and the court will set a deadline for verifying the precautionary measures not later than a year. As for the preliminary chamber, the provisions of art. 250 [2] of the Criminal Procedure Code do not regulate what the verification term would be. We appreciate that in this procedure as well a deadline for verifying the precautionary measures should be established, especially given that the preliminary chamber procedure extends over a long period of time and in the context in which there are doctrinal opinions that qualify the preliminary chamber as a phase distinct part of the criminal trial and not a stage specific to the trial phase, to which the same verification period, i.e. one year, should be applied.

But what happens when the precautionary measures are not verified by the judicial bodies within these terms? The provisions of art. 250 [2] of the Criminal Procedure Code does not regulate either the sanction that would occur in case of exceeding the deadlines in which the verification of the security measures must be carried out.

In the absence of an express regulation in the matter of precautionary measures regarding the incidental sanction in case of non-compliance with the verification deadlines, we appreciate that the provisions in this matter must be compulsorily corroborated with the provisions of art. 268 of the Criminal Procedure Code and if the judicial bodies would exceed the deadlines provided by the legislator for the verification of precautionary measures, their omission would have the effect of the direct application of the provisions of art. 268 para. (2) of the Criminal Procedure Code, namely to state that the precautionary measure has ceased by law.

The direct application of the provisions of art. 268 para. (2) of the Criminal Procedure Code was also the solution ruled by certain courts. Thus, in judicial practice[11] it was noted that *"The provisions of art. 268 para. (2) of the Criminal Procedure Code shows that when a procedural measure may only be taken for a certain period of time, the expiration of this term automatically causes the measure to cease to be effective. Even if in the regulation art. 249 et seq. of the Criminal Procedure Code there is no explicit mention of the type "the precautionary measure is taken for a duration of", from the very obligation of its verification "no later than"*

[11] High Court of Cassation and Justice, Criminal Chamber, decision no. 547 of 20.09.2022, available at the internet address *www.scj.ro*, last time consulted on 16.03.2024.

the clear intention of the legislator that the preventive measure is taken or maintained only for a certain limited period emerges".

Also in judicial practice, one raised the issue of the need to qualify the nature of the terms provided for by art. 250 [2] of the Criminal Procedure Code, namely if they are substantive terms or procedural terms. In this sense, it was appreciated that the substantive terms are those that protect rights, prerogatives and extra-procedural interests, pre-existing to the criminal trial and independent of it, limiting the duration of certain measures or conditioning the performance of acts or the promotion of actions that would annihilate a right or an extra-procedural interest. Unlike the substantive deadlines, procedural deadlines are the deadlines that protect the procedural rights and interests of the participants in the criminal trial and contribute to the discipline and systematization of the procedural activity in order to ensure the timely and just achievement of the purpose of the criminal trial. Or, considering that in the matter of precautionary measures, it is about the protection of pre-existing extra-procedural rights, it was assessed that the maximum terms of 6 months and 1 year, within which the precautionary measure must be checked, are substantial terms, and the expiry of the substantial terms attracts a specific sanction, i.e. legal termination [12].

In judicial practice as well, there were also courts which appreciated that the terms provided by the provisions of art. 250 [2] of the Criminal Procedure Code are recommendation terms and would not attract the sanction of legal termination of injunction measures.

In support of this opinion, one started from the fact that the legislator did not foresee a procedural sanction in the case of the judicial body remaining inactive or exceeding the deadline. The explanation lies in the fact that it is a term of procedure, of recommendation, which may be used by procedural subjects and judicial bodies according to the legitimate individual or general interest or of the criminal trial, but the possible sanctions are extra-procedural. At the same time, it was also appreciated that unlike the regulation in the matter of preventive measures, evoked in support of the legal termination solution, in the case of which art. 241 of the Criminal Procedure Code expressly establishes the situations of termination by law, such a regulation is not found regarding precautionary measures. In the court's opinion, the legal solution of applying this text by analogy in the case of precautionary measures cannot be accepted, since the legal terms have distinct legal natures (procedural terms in the case of precautionary measures and substantive terms in the case of preventive measures).[13]

Furthermore, in the opinion of those who qualify the terms provided by art. 250 [2] of the Criminal Procedure Code as recommendation terms, it is also taken into account the fact that art. 241 of the Criminal Procedure Code does not contain a rule of principle, a norm of a general nature that could become applicable to the analysed hypothesis, but represents a special norm, whose sphere of incidence is clearly defined in its very content, being thus of strict interpretation and application – specialia generalibus derogant. An interpretation by analogy implies the extension of the solution in similar matters that do not benefit from

[12] Bucharest Court of Appeal, decision no. 440 of 19.09.2023 and conclusion no. 271 of 16.05.2023 available at the internet address *www.rejust.ro* last time consulted on 16.03.2024.

[13] High Court of Cassation and Justice, Criminal Chamber, decision no. 209 of 30.03.2022 available at the internet address *www.scj.ro* last time consulted on 16.03.2024.

express regulation, where the law is silent, and not in hypotheses for which the legislators themselves evaluated the solutions, within distinct regulations. In the case of precautionary measures, the law wording expressly provides the solutions, art. 250 ^{2} of the Criminal Procedure Code law listing only the maintenance, restriction, extension or lifting of the preventive measure, not the legal termination.

As regards the nature of the terms established by the provisions of art. 250 ^{2} of the Criminal Procedure Code, important are also the issues discussed during the meeting of the chief prosecutors of the criminal and judicial investigation section of the Prosecutor's Office within the High Court of Cassation and Justice, DNA, DIICOT and the prosecutor's offices within to the appellate courts [14] where it was concluded that *"it is difficult to accepted that, by legally establishing this maximum term, the legislator would have aimed for it to be only a recommendation and that exceeding it would remain without any consequences regarding the precautionary measure; it is not a simple term to speed up the procedures, but one that protects substantive rights among the fundamental ones, so that the protection must be concretized by considering that upon the expiration of this maximum legal duration, in the absence of a provision to maintain the measure, it ceases by law. However, the legal text is obviously unconstitutional due to the lack of any provision regarding the consequence of exceeding the maximum duration. Therefore, the appropriateness of raising an exception of unconstitutionality must be analysed."*

As far as we are concerned, we appreciate that the terms provided by art. 250 ^{2} of the Criminal Procedure Code are not recommended terms, they are substantive terms and exceeding these terms cannot be without sanction. The fact that the legislator did not provide in the newly introduced legal text a sanction for non-compliance with these deadlines does not grant them the nature of recommendation deadlines. The fact that they cannot be qualified as recommendation deadlines results from the wording of the text, from which it follows that *" one **checks** periodically **but no later** than 6 months during the criminal investigation, and one year during the trial"*. So the terms used "checks" and "no later than" establish an obligation and not a possibility/ a faculty /a recommendation. The legislator established an imperative deadline, the non-verification of precautionary measures within this deadline having as *ope legis* effect the termination of these measures.

Moreover, we appreciate that in the matter of precautionary measures also we should take into account the considerations of the RIL Decision no. 7/2006 of the ÎCCJ pronounced in the matter of preventive measures [15] according to which *"In the light of the constitutional provisions and the international regulations to which reference was made, these mandatory provisions of the Criminal Procedure Code require strict compliance with the deadlines for verifying the legality and validity of the preventive incarceration measures during the trial, because otherwise there would be no guarantee that deprivation of liberty may only take place under the conditions determined by law"* . Or, on the same reasoning as that considered by the supreme court in the matter of preventive measures, we appreciate that the norm established by

[14] Minutes of the non-unitary practice meeting at the national level - prosecutors, Bucharest, May 27-28, 2021, p. 61-62, available at the internet address *www.inm-lex.ro* last time consulted on 16.03.2024.

[15] Published, in Official Gazette of Romania, no. 475 of 01.06.2006.

the provisions of art. 250 [2] of the Criminal Procedure Code is an imperative norm, as it results from its wording and from the terms used by the legislator, and the non-verification within the established terms of the precautionary measures would disregard man's fundamental guarantees, such as the observance of the right to property which may be limited only in the conditions determined by law.

The legal nature of these terms is given by the purpose of the regulation, art. 250 [2] of the Criminal Procedure Code being introduced for disciplining and systematizing the procedural activity regarding precautionary measures. The legislator reflected on these terms considering the need to respect the proportional character of the measure in relation to the duration and evolution of the procedure. The rationale for establishing the obligation through the phrase "no later than" was precisely that of eliminating arbitrariness as regards the indefinite maintenance of a right-restricting measure. Therefore, these terms cannot be qualified as mere recommendations and cannot go beyond the purpose intended by the legislator, namely preventing the accused from using their assets, in order to avoid the imposition of an excessive individual burden.

We agree that the current regulation of art. 250 [2] of the Criminal Procedure Code is unclear and one should intervened precisely because there is a non-uniform practice in terms of how this text is applied by the judicial bodies; however, we appreciate that the legislator has directly outlined certain aspects that, when combined, can give a solution to this non-unitary practice, as follows:

First of all, from the text of art. 250 [2] of the Criminal Procedure Code law the obligation results to verify the precautionary measures within the terms established by the legislator, this obligation being highlighted by the phrase "no later than".

Secondly, given the obligation established by the legislator and the nature of the precautionary measures as measures restricting rights, we believe that the mere corroboration of the provisions of art. 250^2 of the Criminal Procedure Code with the provisions of art. 268 para. (2) of the Criminal Procedure Code, provisions regarding deadlines, can clarify the situation of the sanction and the solution that would be imposed in the event that the injunction measures were not verified within the deadlines provided by the legislator.

Last but not lease, we consider that the very fact that the legislator wanted to regulate at the level of precautionary measures also, similar to the matter of preventive measures, the institution of verification, proves the fact that the legislator was primarily concerned with respecting the proportionality of the duration of the precautionary measure with the restriction of the right to property and put at the disposal of the persons against whom these measures were instituted the necessary levers for the defence of their property right, so that one can discuss, within the established terms, whether or not such interference with these rights is still justified. Therefore, the assessment that the verification terms would be mere recommendation terms only would disregard the legislator's intention.

On the same note, by Decision no. 24 of January 26, 2016 [16] the Constitutional Court retained that in the absence of ensuring effective judicial control over the measure of making assets unavailable during a criminal trial, the state does not fulfil its

[16] Published in Official Gazette of Romania, no. 276 of April 12th, 2016.

constitutional obligation to guarantee the private property of the natural/legal person.

2.4. The condition of proportionality of precautionary measures

According to the provisions of art. 250 [2] of the Criminal Procedure Code, the court charged with verifying the precautionary measures will check whether the reasons that determined the taking or maintaining of the precautionary measures still exist and will examine the proportional character of the interference in the exercise of the right to property.

By Decision no. 19/2017 [17]pronounced by the ÎCCJ in an appeal in the interest of the law, the supreme court showed that *"the institution of a precautionary measure obliges the judicial body to establish a reasonable ratio of proportionality between the purpose for which the measure was ordered (for example, in order to seize assets), as a way of ensuring the general interest, and the protection of the accused persons' right to use their assets, in order to avoid imposing an excessive individual burden"* . With regard to the proportionality between the purpose pursued when establishing the measure and the restriction of the accused person's rights, it was assessed that this *"must be ensured regardless of how the legislator assessed the necessity of ordering the seizure, as arising from the law or as being left to the discretion of the judge. The condition follows both from art. 1 of the First Additional Protocol to the European Convention on Human Rights and Fundamental Freedoms, as well as from art. 53 para. (2) of the Constitution of Romania, republished (the measure must be proportional to the situation that determined it, to be applied in a non-discriminatory manner and without prejudice to the existence of the right or freedom)* .

Therefore, one of the important aspects that must be taken into account by the court in the procedure in which the precautionary measures are verified is to analyse whether the maintenance of the precautionary measures still meets the proportionality conditions at the time when the judicial body performs the verification. The judicial bodies must take into account and respect the proportionality test so that the measure, by its duration and purpose, does not turn with the passage of time into an excessive burden for the person whose assets were made unavailable [18].

In the procedure of precautionary measures verification, the solution of lifting precautionary measures must be possible and considered by the court when **the effective duration of this measure is excessively long, in relation to the duration and evolution of the procedure and the consequences it triggers exceed the normal effects of such a measure.**

In judicial practice, the analysis of the existence of the measure proportionality and the existence of the grounds that lay at the basis at the establishment of these measures has become more of a formality, especially in cases where deeds provided for in special laws that require the mandatory taking of precautionary measures are investigated.

In a case pending before the Bucharest Appellate Court [19], the court admitted the appeal filed by the defendants against the conclusion by which the precautionary measure was maintained in the procedure

[17] Available at the internet address *www.scj.ro*, last time consulted on 11.03.2024.

[18] ECHR, the Case Forminster Entreprises Limited vs. the Czech Republic, Judgment of 09.01.2008 available at the internet address, *www.hudoc.echr.coe.int.ro* last time consulted on 16.03.2024.

[19] Bucharest Court of Appeal, decision no. 26/CO of 18.01.2023, unpublished.

provided by art. 250 [2] of the Criminal Procedure Code, annulled the contested conclusion and ordered the case to be re-tried because the court on merits did not proceed with an effective verification of the precautionary measures instituted on the defendants' assets, it did not effectively analyse whether the grounds that determined the adoption or maintenance of the precautionary measure still exist. In this regard, the judicial review court held that *"the assertion of the trial court regarding the proportionality of the measure with respect to the intended purpose (...) presents a degree of generality that does not allow the judicial review court to discern what the actual arguments were in relation to which the court made this statement* " and that *"the examination of proportionality presupposes, first of all, that the court must make sure that the value of the seized goods does not significantly exceed the value of the damage attributed to the person concerned"* .

Analysing the manner in which the first court on merits applied the provisions of art. 250 [2] of the Criminal Procedure Code, the Court found that *"the first court on merits did not carry out any concrete analysis on the approximate value of the assets subject to the precautionary measure in order to assess whether the restriction of the value up to the level for which the precautionary measure was taken on all the assets initially subject to the sequestration, especially in the circumstances in which the goods are immovable located in the Municipality of Bucharest and in the Ilfov County, and may have significant values that, added up, substantially exceed the alleged damage in the case"* , and continued *"the same assets were subject to precautionary measures both for a prejudice of 3,895,590 lei and for a prejudice of 2,324,377 lei"* .

In the same case, in a second procedural cycle, in the retrial of the case after the annulment, the court [20] , analysing the appeal against the conclusion by which the precautionary measures were maintained by the Bucharest Tribunal in the retrial, found again that the court checked only formally whether the grounds still exist that led to the taking of precautionary measures, considering that *"although in the disputed conclusion the Tribunal analysed aspects regarding the fulfilment of the legal conditions to order the maintenance of precautionary measures, it analysed only formally the proportionality of the measure with respect to the intended purpose"* and that *"the valuation of the assets imposes with regard to the proportionality of the measure, since in the case, given the fact that at the time of taking the injunction measure the damage was estimated at the amount of 3,895,590 lei, later being reduced to the amount of 2,324,377 lei, it could be an excessive discrepancy between the value of the presumptive damage and the value of the assets made unavailable"* .

Concluding on the aspects identified in the judicial practice, we find that at the level of the courts, the procedure for verifying the precautionary measures does not achieve the purpose for which it was introduced in the provisions of the Criminal Procedure Code. In the exposed case, there was no effective verification of the precautionary measures imposed on the defendants, the solution to maintain the injunction measures being ordered based on a general conclusion such as *"the court considers that the precautionary measures ordered in the case would be proportionate to the purpose pursued by their establishment"* without mentioning the criteria and the reasons on the basis of which this reasoning was built, should also be pointed out in the content of

[20] Bucharest Court of Appeal, decision no. 492/CO of 17.10.2023, unpublished.

the decision. The need to understand the purpose for which this verification procedure was introduced is important and must be kept in mind by judicial bodies. The legislator sought to regulate a procedure intended to reanalyse aspects that have the effect of restricting/limiting certain fundamental rights, as through the establishment of precautionary measures the right to property is restricted.

Or, in the *supra* case, it was proven that this purpose was not taken into account by the court, given that: a) the precautionary measures were instituted on the defendants as early as 2017, an aspect that required the analysis of proportionality in relation to the period in which the assets were unavailable; b) the assets that are subject to the precautionary measures are immovable property, which at the time of the verification exceeded by far the value of the estimated damage in question, which required at least a solution to restrict the protective measures, and c) the value of the imputed prejudice gave rise to real debates, since one started from the premise that the damage would be 3,895,590 lei, but after returning the case to the prosecutor's office motivated by the lack of clarity of the accusations in terms of the damage, it was valued at 2,324,377 lei.

Another important aspect encountered in the judicial practice is constituted by the solutions ruled by the courts in the procedure of verifying the precautionary measures in the cases in which the deeds provided for in the special laws that impose the obligation to take the precautionary measures, for example Law no. 241/2005 on preventing and combating tax dodging[21] or Law no. 78/2000 for the prevention, detection and sanctioning of corruption deeds [22].

In these cases, often the solutions provided are to maintain the precautionary measures, the motivation being given by the fact that they are mandatory according to the law. We consider that such a motivation disregards the rationale of the legislator considered at the time of the introduction of art. 250 [2] in the Criminal Procedure Code. In this case, if we had as premise exclusively the fact that the precautionary measures are mandatory because they are provided by law, we would leave without effect a legal provision, namely art. 250 [2] of the Criminal Procedure Code and we would create a difference of treatment among those who have instituted precautionary measures, which contravenes the right to a fair trial. In addition, it should be borne in mind that the provisions of art. 250 [2] of the Criminal Procedure Code were introduced in the said Code l by Law no. 6/2021, so after Law no. 78/2000 or Law no. 241/2005, the latter were not adapted to the changes brought to the Criminal Procedure Code, as the provisions of these laws have not been reanalysed also through the prism of introducing a procedure for their verification in the matter of precautionary measures.

In this situation, we reckon that the proportionality of the measure must be analysed regardless of whether the measure is mandatory or not. Any other interpretation would invalidate a legal norm, and this may only be done under the conditions expressly provided by law. This being the case, we appreciate that it is necessary for the legislator to intervene in order to clarify the rules in the matter of precautionary measures.

[21] Published in Official Gazette of Romania, no. 672 of 27.07.2005.
[22] Published in Official Gazette of Romania, no. 219 of 18.05.2000.

3. Conclusions

The procedure of verifying precautionary measures raises extensive and important debates. The manner in which this procedure is regulated triggers discussions in judicial practice, the non-unitary jurisprudence being obvious on certain issues with an essential aspect in carrying out the verification procedure by the judicial bodies. As we have shown, the provisions of art. 250 ^{2} of the Criminal Procedure Code lack accessibility and predictability. Although the purpose of establishing this procedure for verifying precautionary measures, similar to preventive measures, is clear, the legislator's intention to protect fundamental human rights being obvious, the nevertheless the frame drawn by the legislator, the conditions for effective verification and the method of applying this procedure are not clear, such a lack of clarity having the effect of diametrically opposed solutions or procedures.

We consider that the intervention of the legislator is necessary to clarify the way of applying this procedure, and the important aspects that should be addressed have been pointed out in this article. The importance of establishing certain essential conditions in this procedure would clarify the contradictory aspects faced by the practitioners in the field of criminal law but also the persons directly involved, namely those against whom these right-restrictive measures are instituted.

We still maintain the importance of this procedure's existence in the current regulation. But a simple regulation in the Criminal Procedure Code is not enough, it is necessary for this regulation to be clear, to establish a complete procedure, with all the conditions that should be taken into account by the judicial bodies. A norm that establishes a certain conduct/rule, especially in the matter of measures restricting rights, must not have gaps, any gap in the application of a legal provision affects the rights of the person against whom it should be applied.

At this moment, the provisions of art. 250 ^{2} of the Criminal Procedure Code do not have the capacity to confer security to the legal relationship they regulate. The reality of this fact is proved by the judicial practice, which is non-unitary, contradictory and creates an imbalance in the matter of the solutions that may be ordered in the procedure of verifying the precautionary measures.

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NEW FORMS AND PERSPECTIVES ON *RES JUDICATA* IN CRIMINAL MATTERS

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Abstract

The fundamental principles of the due process in criminal matters compel the prosecution to ensure that an effective official investigation is carried out, which can identify criminal offences, ensuring that the perpetrators are held accountable. At the same time, the impartial administration of criminal justice requires the existence of a single trial, with due respect for the rights of the defender, in which the substantive truth is definitively established. It must be possible to review a court's decision exclusively by means of appeals, regulated by clear and precise rules, so as to establish a specific point in time when the final judgment that settles a criminal trial becomes final, after which the judge's ruling cannot be overturned. Res judicata is the power or force given by law to a final judgment to be enforced and to prevent a new prosecution for the same offence. This doctrine is based on two fundamental rules: a person can only be tried once for a criminal offence; the basis for the judgment is presumed to express the truth and must not be contradicted by another judgment. What legitimates res judicata is not so much the finality of the judgment as the truth which must underlie it, the truth which constitutes the basis, the rationale and the social and moral foundation of this effect of the judgment. This study is an analysis of res judicata, in terms of the content of the doctrine, its legal dimension, as well as the way in which it ensures the guarantee of a fair trial in order to establish the judicial truth. The article also examines the relationship between res judicata, res judicata and the non bis in idem principle. The way in which these three principles operate in the course of criminal proceedings helps to ascertain the particular effects of decisions not to refer to trial, decisions of the committing judge of the pre-trial chamber. At the same time, the study also takes into account the effects of the Constitutional Court Decision no. 102/2021 on the res judicata authority of judgments rendered by civil courts in preliminary points of law, as provided under Article 52 of the Code of Criminal Procedure.

Keywords: *finality of judgments, res judicata, claim preclusion, non bis in idem, preliminary points of law.*

1. Introductory considerations

"It is necessary for the social order, for the freedom and security of citizens that the judgment should come to an end, become unappealable, final; (....) a justice whose judgments could be questioned at any time would lack prestige, public confidence and social utility; the idea of justice would be jeopardized; final judgments must be presumed to express the real truth or 'social and legal truth', because they are the result of research carried out with all the guarantees and impartiality necessary to establish this truth." [1]

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[1] Tr. Pop, *Drept procesual penal. Partea specială, vol. 4*, National Printing House, Cluj, 1948, p. 558-559.

Professor Traian Pop's references include a summary presentation of the specific defining characteristics of res judicata. Although summarily treated in the Romanian criminal procedure doctrine, the authority of res judicata is not limited to the regulation of a mere effect of the court rulings, but represents one of the main ways of pursuing criminal justice.

The principles of legality and right to truth, which heavily shape the Romanian criminal procedure, compel the prosecution to carry out an effective official investigation in order to identify the criminal offences and to take the necessary measures to criminally prosecute the perpetrators of the offences. In order to ensure the effective application of these principles and with a view to preventing bias, the State must guarantee that the defendants in criminal proceedings are subject to a single trial that respects the legal procedural guarantees, in particular the right to a defense so that the judicial truth is impartially established.

Thus, the legislator established that the judgment of a court of law can only be reviewed by means of appeals, under by clear and precise rules, so as to establish a specific point in time when the final judgment that settles a criminal trial becomes final, after which the judge's ruling cannot be overturned.

Once the judgment has become final, the trial can be reopened under national and European law only by means of an extraordinary appeal in accordance with the law, in two cases, namely the existence of a serious procedural error, and the occurrence of a new fact or circumstance, unknown at the time of the initial judgment, which makes it necessary to re-establish the facts[2]. Thus, the prospect of a retrial, in the absence of the above-mentioned situations and only by means of an extraordinary appeal, has been rejected by all modern legislation, being considered that "it is quite inhuman to keep the defendant under perpetual threat of a new prosecution."[3]

In order to settle this principle into law, modern legislation has established res judicata as one of the effects of final judgments.

2. Concept. Character.

Res judicata is a specific effect of judicial decisions. In the doctrine[4] , it has been held that the concept of *"res judicata"* is the resolution by a final judgment of criminal case brought before the courts. The judgment settles the merits of the case or an actionable matter and settles the case on the merits or the actionable matter to the extent that a judgment is pronounced. Thus, what the court has definitively decided in a criminal case is *'res judicata'* and such a judgment has *'res judicata authority'*.

Also, **res judicata** is the power or force granted by law to a final judgment to be enforced and to preclude a new prosecution for the same offence[5]. Res judicata - the most important effect of judgments - is based on two fundamental rules: a person can only be tried once for a

[2] Under Article 4 of Protocol 7 to the European Convention on Human Rights:

"1.No one shall be liable to be prosecuted or punished as a criminal offender in the same State for the commission of an offense for which he has already been finally acquitted or convicted by a final judgment in accordance with the criminal law and procedure of that State.

2.The provisions of the preceding paragraph shall not preclude the reopening of the trial, in accordance with the law and criminal procedure of the State concerned, if new or newly discovered facts or a fundamental flaw in the previous proceedings are such as to affect the judgment (...)".

[3] Tr. Pop, *op. cit.*, p. 558.

[4] Tr. Pop, *op. cit.*, vol IV, p. 557.

[5] *Ibidem*

criminal offence; the basis for the judgment is presumed to express the truth and must not be contradicted by another judgment[6]. What legitimizes res judicata is not so much the finality of the judgment as the truth which must underlie it, the truth which constitutes the basis, the rationale and the social and moral foundation of this effect of the judgment.

The characteristics of res judicata[7] are: exclusivity, unappealability, enforceability and binding force.

a. ***The exclusive nature*** prevents the opening of a new trial with the same subject matter as the one settled by a final judgment. According to Article 371 of the Code of Criminal Procedure, the new criminal trial may not concern the same facts and the same persons in respect of whom the legal conflict has been extinguished by a final judgment. In the event of the commencement of a new criminal investigation of the same offences and the same persons, a criminal case may not be opened, in accordance with Article 16(1)(i) of the Code of Criminal Procedure, and if all means of appeal have been exhausted, the judgment rendered may only be set aside by way of an appeal for annulment (Art. 426(i) and Art. 432 (2) of the Code of Criminal Procedure), regardless of the outcome of the proceedings (except in case where the outcome was the termination of the criminal trial, pursuant to Art. 16 (1)(i) of the Code of Criminal Procedure].

The exclusive nature of the final judgment clarifies the duality of the principle of res judicata.

From an extrinsic point of view, res judicata precludes an ordinary procedure aimed at retrial and quashing of a final judgment. Thus, the exclusive nature of res judicata will also be undisputed, since the procedural law exhaustively regulates the extraordinary procedures allowing the court to reopen proceedings in whole or in part.

From an *intrinsic point of view*, res judicata ensures the overlapping of judicial and material truth. Although it is intellectually impossible to superimpose the two forms of truth, in order to ensure the certainty of legal relationships arising from final judgments, the law confers on judicial truth the value of absolute truth. It can no longer be called in question by means of an extraordinary appeal in the absence of proof of a substantial change in the facts on the basis of which that truth was established in the first place, or in the absence of a fundamental procedural error, since that would entail a breach of the fundamental principle of fair justice in a State governed by the rule of law.

These elements form the basis of the presumption expressed as *" judged matter"*, namely *res judecata pro veritate habetur* - the judicial truth that shapes, on the basis of the law, into an absolute truth that ensures the stability of the legal relations created, transformed or changed by a final judgment, regardless of the premise on which they were based.

b. ***The incontestable nature of*** res judicata follows from the exclusive nature of res judicata and ensures that it is impossible for the parties or the prosecutor to question the judicial truth established by the final judgment in an ordinary procedure.

The case law of the European Court of Justice held that the right to a fair trial before a court of law, guaranteed under Art. 6(1), is to be interpreted in accordance with the preamble to the Convention, which states the supremacy of law as an element of the common legacy of the Contracting States.

[6] V. M. Ciobanu, *Tratat teoretic și practic de procedură civilă, vol. II*, National Publishing House, Bucharest, 1997, p. 270 - 271.

[7] *idem*, p. 272.

One of the fundamental elements of the supremacy of law is the principle of certainty of legal relations, which implies, inter alia, that the final decision given by the courts in any dispute may not be called into question[8] .

The certainty of legal relations implies that final judgments are res judicata. On the basis of this principle, no party to the proceedings may apply for a review of a final judgment in order to have a retrial of the facts or points of law and, ultimately, a back-door settlement of the case. The powers of the reviewing courts in the area of extraordinary review should be exercised to remedy certain miscarriages of justice, not to re-examine the merits. Thus, an extraordinary appeal against a final judgment must not become an appeal in disguise, as the mere existence of different views on the same legal issue is not a sufficient ground for a retrial. Derogations from this principle are justified only when they are necessary *on the basis of substantial and compelling circumstances*. The powers of higher courts to set aside or vary final and enforceable judgments should be exercised *in order to remedy fundamental shortcomings* - the existence of serious procedural errors or the establishment of new facts or circumstances which make it necessary to reconsider the case. These powers must be exercised in such a way as to so as to strike, as far as possible, a fair balance between the interests of the individual and the need to ensure the effectiveness of the system of criminal justice [9] .

On the basis of these guiding principles, the European Court of Human Rights has established that the appeal for annulment, an extraordinary remedy regulated in the Criminal Procedure Code of 1968, repealed by Law no. 281/2003, whereby the Supreme Court of Justice had the jurisdiction to settle on serious errors of fact or the conformity of a final judgment with the substantive and procedural rules of law applicable to the case, was an appeal in disguise, contrary to the provisions of Article 6(1) of the Convention[10] .

Thus, the indisputable nature of res judicata requires certain parameters to be set within the limits within which the legislator may regulate extraordinary legal remedies that ensure the stability of the solution contained in a final judgment. Under the minimum standard laid down by the Convention, an extraordinary appeal must:

- have the functional capacity to lead to the modification of a final judgment only on the basis of substantial and compelling circumstances;
- to seek to remedy fundamental deficiencies - the existence of serious procedural flaws or the proving of new facts or circumstances which make it necessary to review the facts;
- to ensure, as far as possible, a fair balance between the interest of an individual and the need to ensure the effectiveness of the justice system.

The current criminal procedure legislation sets out four extraordinary remedies: appeal for annulment, appeal in cassation, review, and reopening of the criminal proceedings in the case of a person convicted in absentia. In order to ensure that these remedies comply with the conventional standard, the legislator inserted certain safeguards to prevent these

[8] Case Brumărescu v. Romania, Grand Chamber judgment of 30.09.1999, application no.28342/95, para. 61.
[9] Case of Elisei-Uzun and Andonie v. Romania, judgment of 23.04.2019, application no. 42447/10, paras. 42 - 43.
[10] Brumărescu v. Romania, cited above.

procedures from becoming an appeal in disguise.

First of all, the retrial of the merits and the modification of the final judgment must be preceded by a "screening" of admissibility in principle, in which the applicant must prove the existence of a legal reason which makes it necessary to remedy a fundamental flaw in the judgment.

Secondly, the grounds on which a court's final decision may be called into question are expressly and restrictively provided under the law and cannot be aimed at the correct ascertainment of the facts, i.e. the concurrence of the judicial truth with the material truth barring any new facts or circumstances which were not known by the court that rendered the final judgment, and which have a decisive influence on the situation of the parties to a trial, ensuring the effectiveness of the justice system (for example, the perpetration of offences in establishing the judicial truth - false testimony, forgery of documents, or corruption or abuse of office committed by judicial bodies).

Lastly, the misapplication of the law is limited to cases in which the procedure in which the judicial truth was established was carried out in breach of the fundamental guarantees laid down in the Constitution or in the Convention for the Protection of Human Rights and Fundamental Freedoms, which are usually subject to absolute nullity (for example, trial by a court which lacked jurisdiction or failed to guarantee independence and impartiality, failure of the prosecutor to participate in the trial or breach of the obligation to hear the defendant during the appeal). Likewise, the wrongful infringement of the substantive rules is limited to cases where a serious miscarriage of justice has occurred which justifies quashing the judgment under appeal (e.g. the conviction was for an act which is not a crime; a course of action which prevented prosecution was wrongly relied on; a sentence was executed that was subject to the statute of limitation).

In the light of the above, it should be noted that the indisputability of res judicata requires both the impossibility of reforming or amending a final judgment by an ordinary appeal and the quality standards of those extraordinary proceedings, in order to avoid the formulation of *" appeals in disguise"*.

e. *The binding nature of* res judicata requires that the prosecutor, the parties to the trial and the other parties to the proceedings must be subject to the effect of res judicata, without being able to set it aside. This res judicata effect is, in criminal matters, a consequence of the principle of formality and is automatic. Thus, no further formality is necessary for res judicata to operate, as this legal attribute of final criminal judgments cannot be postponed or refused by judicial process and operates without any limitation in time, until the possible admission of an extraordinary appeal.

In order to guarantee the absolute nature of res judicata, the legislator has provided, under Article 428 (2) of the Code of Criminal Procedure, the possibility of enforcing at any time an appeal for annulment where two final judgments have been handed down against a person for the same offence.

d. *Enforceability* follows from the mandatory nature of the judgment and makes it possible to enforce criminal court judgments as soon as they become final. It has been pointed out in the doctrine[11] that res judicata has two effects:

- *the negative effect*, consisting in preventing a new criminal trial on the same

[11] Gh. Mateuț, *Procedură penală. Partea generală*, Universul Juridic Publishing House, Bucharest, 2019, p. 76.

subject-matter, an effect owing to the exclusive nature of res judicata;

- *the positive effect*, whereby the court may order immediate enforcement of the final judgment.

According to Article 555 et seq. of the Code of Criminal Procedure, judgments are enforced ex officio by the enforcing judge delegated by the competent court on the day the judgments become final. If the judgment became final through the settlement of an appeal, the court of appeal or a higher court shall send an extract from that judgment to the enforcing court, with the necessary data for enforcement, on the day of the judgment.

We thus note that the enforceable effect of final criminal judgments is also produced by operation of law, without any other formalities (e.g. statement of enforceability; writ of execution). The procedural acts carried out by the enforcing judge are intended to involve in the enforcement process certain extra-judicial bodies that are entrusted with specific tasks to ensure compliance with the court's judgment.

3. Regulatory dimension of the doctrine

Res judicata is only regulated in civil procedural law. Pursuant to Article 430 of the Code of Civil Procedure: (1) A court judgment which resolves, in whole or in part, the merits of the case or rules on a procedural objection or any other issue shall, from the time of its pronouncement, be res judicata in respect of the matter decided.

(2) The res judicata shall relate to the operative part of the judgment and the grounds on which it is based, including those on which a matter has been settled.

(3) A court judgment taking a provisional measure shall not have res judicata effect on the merits.

(4) Where the judgment is subject to appeal or other remedies, res judicata shall be provisional.

(5) The judgment appealed against by an application for annulment or revision shall remain res judicata until it is replaced by another judgment.

Although the criminal procedural legislation has not expressly regulated the authority of res judicata, the provisions of Article 430 of the Code of Civil Procedure must be applied in accordance with those of Article 2 (2) of the same law, according to which the provisions of the Code of Civil Procedure also apply in other matters, to the extent that the laws governing them do not state otherwise[12] .

The fundamental principles found in the broad regulation of res judicata provided by the civil procedural rule must also be taken into account by the interpreter of the criminal procedure rule for the following reasons.

In criminal procedural law, the effects of the judgment **are not separately regulated in relation to specific procedures** that would bar the application of the civil procedural law rule in this aspect. However, the Code of Criminal Procedure recognizes three **particular applications of** res judicata, namely: the existence of the cause for dismissal of criminal proceedings under Article 16(1)(i) of the Code of Criminal Procedure, the application for annulment under Article 426(i) of the Code of Criminal Procedure and the non bis in idem principle. Given the close connection of the doctrine with the latter principle, as well as its wider scope of application, we consider that, in order to avoid possible

[12] High Court of Cassation and Justice, decision no. XXXIV pronounced on 06.11.2006, published in Official Gazette of Romania, no. 368 of 30.05.2007.

over-regulation, the legislator has provided rules exclusively on the particular application of res judicata, namely the non bis in idem principle.

However, it has been pointed out in the doctrine that, although non bis in idem derives from the principle of res judicata, the guarantee of procedural impartiality implies the extension of the scope of theft no bis in idem principle beyond the authority of res judicata. In this regard, when analyzing the relationship between the res judicata of criminal judgments and the non bis in idem principle, it has been held that[13] the latter has a much broader scope than res judicata. Although the non bis in idem principle precludes a new prosecution or trial for the facts and persons subject to res judicata, it extends the concept of "final judgment" to all procedural acts that ultimately settle the criminal proceedings and definitively extinguish the criminal prosecution. Thus, in accordance with the non bis in idem principle, even certain orders of the public prosecutor have, under domestic and European laws, the ability to complete and definitively terminate criminal proceedings. In other words, it is possible that an act issued by judicial bodies does not have the force of res judicata, but prevents the duplication of proceedings, based on the non bis in idem principle.

However, the inextricable link between the non bis in idem principle and res judicata cannot be denied, as both principles will always refer to the subject matter of the judgment as provided under Article 371 of the Code of Criminal Procedure, namely to the individual notions of "same facts", "same persons" and "same trial".

While for the non bis in idem principle, the provisions of the Code of Criminal Procedure are supplemented by the case law of the European Court of Human Rights[14] and the Court of Justice of the European Union[15] , the interpretation and application of the principle of res judicata must be referred to the provisions of Article 430 of the Code of Civil Procedure. This approach is not essentially theoretical in nature, since the limits within which res judicata is defined in the Code of Civil Procedure make it possible to settle an old doctrinal dispute as to which part or parts of the judgment are subject to res judicata.

As we have shown, **under the rule of civil procedural law**, res judicata relates to the operative part of the judgment by which the conflict of law has been settled, but **is not limited to it, extending also to the considerations which settle any contentious matter being judged**. **In criminal procedural law**, the existence of a final judgment precludes criminal proceedings in respect of the same offence and the same person and entitles the person concerned to have the judgment set aside by extraordinary appeal if the prohibition has been disregarded. While the provisions of Art. 426(i) provide that the criminal judgment is subject to annulment if it has been handed down against of an offence or a person in respect of whom a trial had previously been finally settled, Art. 16 (1) (i) provides that criminal proceedings may not be brought where there is res judicata. In both cases, the rule seems to refer to the operative part of the final judgment, since it contains the court's decision settling the conflict of criminal law arising in connection

[13] A. Zarafiu, *Procedură penală. Partea generală. Partea specială, 2nd edition*, C.H. Beck Publishing House, Bucharest, 2015, p. 23.

[14] In application of Article 4 of Protocol No. 7 to the Convention.

[15] In application of Article 54 of the Convention implementing the Schengen Agreement.

with the offence and the persons who were the subject of the proceedings.

We thus note that none of the applications of the principle of res judicata establishes to what extent **a litigation**, which preceded the resolution on the merits of the case exclusively considered in the recitals of the final judgment, benefits from res judicata in the same way as the operative part of the judgment. For example, does a judgment in criminal proceedings, by which the good faith or bad faith of a company manager has been established in the course of the trial for embezzlement or an offence under Law No 31/1990 on trading companies, confer a res judicata effect to that litigation, so that another civil or criminal court would no longer be able to reopen that particular case?

We consider that the answer must be yes, otherwise a **discriminatory situation** would arise between the persons in respect of whom this contentious matter has been decided by the civil court, whose judgment is deemed as res judicata by the criminal court, on the basis of Article 52 (3) of the Code of Criminal Procedure, read in conjunction with Article 430 of the Code of Civil Procedure, and those in respect of which the matter has been decided in the recitals of a judgment delivered by the criminal court, where res judicata would relate exclusively to the operative part of the judgment, which would imply that all the disputed matters decided in the recitals or in the preliminary rulings would not be res judicata.

In a broader sense, **the resolution of this problem must start from a particularly important effect of res judicata on the impartiality of the proceedings, namely the separate notion of "legal certainty"**. In this regard, the European Court of Human Rights has recalled in several cases, including Brumărescu v. Romania and Androne v. Romania, that the right to a fair trial before a court (civil or criminal), guaranteed by Art. 6 (1), is to be interpreted in accordance with the preamble to the Convention, which states the supremacy of law as an element of the common legacy of the Contracting States. One fundamental element of the supremacy of law is the **principle of the legal certainty, which implies, inter alia, that the final decision given by the courts in any dispute must not be questioned in a future case.**

When drawing a parallel between the analyzed issue and the guarantee of legal certainty, we believe that it is not fair to make a distinction between the matters that were the main subject of the trial, as provided by Article 371 of the Criminal Procedure Code, and the related matters that have been finally settled by the operative part of the judgment rendered by a civil or criminal court. This was the basic premise on which Article 430 of the Code of Civil Procedure was built, which expressly provides that res judicata must also extend to the considerations of the final judgment settling any matters constituting the main or secondary subject-matter of the trial.

From this perspective, it cannot be held that the specific rules of criminal procedural law prevent the application in this matter of Article 430 of the Code of Civil Procedure in all aspects related to the effects of res judicata.

4. Conditions of *res judicata*

The content of the concept of *"res judicata"* must be related to the case law of the ECHR and the CJEU in applying the *non bis in idem* principle. Thus, in order for res judicata to apply, the following conditions must be met: the two criminal proceedings must concern **the same facts and the same persons**; **the** first criminal proceedings **must have been finally concluded** by a judgment. However, as stated above, the

scope of the *non bis in idem* principle also extends to other acts of the judicial authorities that are capable of definitively closing the case following an effective investigation. From this perspective, the latter condition will be subject to a different interpretation when considering the *non bis in idem* principle, namely res judicata.

While the identity of persons would not raise any particular problems, further clarification was needed in European doctrine on the **separate notion of *"same facts".***

In *Sergey Zolotukhin v. Russian Federation*[16] , the European Court of Human Rights held that the existence of a variety of approaches to establishing whether the crime for which a person has been prosecuted is indeed the same as the one for which he has already been convicted or acquitted by a final judgment creates legal uncertainty incompatible with a fundamental right, namely the right not to be tried twice for the same offence. When asked to give a harmonized interpretation of the concept of *"same offence"*, the Court pointed out that Article 4 of Protocol No 7 must be understood as prohibiting the prosecution or trial of a second *"offence"* in so far as ***it arises from identical facts or facts which are substantially the same***.[17]

Further, the Court held that the guarantee enshrined in Article 4 of Protocol No 7 becomes relevant when a new prosecution is initiated, if a previous acquittal or conviction has already acquired the status of *res judicata*. At that point, the materials available will necessarily include the decision by which the first "criminal proceedings" were terminated and the list of charges brought against the applicant in the new proceedings. Normally, these documents would contain a description of the facts regarding both the offence for which the applicant has already been tried and the offence with they are charged. In the Court's view, such descriptions of the facts are, in fact, an appropriate starting point for determining whether the facts in both proceedings were identical or substantially the same. The Court emphasizes that it is irrelevant which parts of the new charges are ultimately admitted or dismissed in the subsequent proceedings, since ***Article 4 of Protocol No. 7 contains a safeguard against retrial or the risk of retrial in fresh proceedings rather than a prohibition of a second conviction or acquittal***.

In establishing the *"idem"* element, the investigation should focus on those facts which constitute a set of concrete circumstances actually involving the same defendant and which are inextricably linked in time and space, the existence of which must be proved in order to secure a conviction or to initiate criminal proceedings[18] .

In the *Van Esbroeck* case[19] , the Court found that the only relevant criterion for the application of Article 54 of the CISA is that of the identity of the material acts, understood as the existence of a set of facts indissolubly linked together, and that this criterion applies irrespective of the legal classification of those acts or the legal interest protected. Although this view was criticized by the governments of the Member States, which argued that the application of the criterion based on the identity of the material acts must enable the competent national courts to take the protected legal interest into account in the same way when

[16] Judgment of the Grand Chamber of February 10, 2009, Application No 14939/03.

[17] In the same sense, see A. Crișu, *Drept procesual penal. Partea generală, 5th edition*, Hamangiu Publishing House, Bucharest, 2021, p. 83-84.

[18] Paragraphs 78 - 84.

[19] Judgment of March 9, 2006, (C-436/04, ECR, p. I-2333), paras. 36 and 42.

assessing a set of specific circumstances, in *Kretzinger*[20] , the Court pointed out that, because of the lack of harmonization of national criminal law, assessments based on the protected legal interest would be likely to create as many obstacles to freedom of movement within the Schengen area as there are criminal systems in the Contracting States. Therefore, it must be confirmed that the competent national courts, when called upon to determine whether there is identity of material acts, must confine themselves to examining whether they constitute a set of facts inextricably linked in time, space and subject-matter, without considering as relevant any assessment based on the protected legal interest.

In conclusion, **the separate notion of *"same facts"*** concerns both **the material identity** between the two activities that are the subject of the subsequent criminal proceedings and the assumption of **a set of facts inextricably linked in time and space**, the existence of which must be proven in order to secure a conviction or to initiate criminal proceedings.

Since the authority of res judicata arises from the need to establish a connection between the judicial truth resulting from examining the evidence and the real truth, as an objective reflection of reality in the real world, the legislator also provided for a **regulation on res judicata** that would allow the removal of two different, irreconcilable realities, established by final court judgments, which although do not concern the same facts and the same persons, coexist in time and space.

In these circumstances, subsequent to a judgment establishing the truth of a case becoming final, the intervention of another judgment that differs from the original judgment constitutes a **new circumstance within the meaning of Article 4 Protocol 7 of the ECHR**. In such a situation, **the courts must intervene to establish a single judicial truth** by reference to both sets of facts, since impartiality is incompatible with the existence of two final judgments stating two distinct versions of the same judicial truth.

In this situation, the extraordinary remedy of revision of judgments applies, which allows irreconcilable judgments to be set aside, cases to be joined and a new judgment to be handed down, which would also give a consistent solution to inextricably linked conflicts of criminal law.

5. Scope

5.1. Res judicata applies to all judgments in criminal matters, in respect of the points of law ruled on, including where the law regulates procedures whereby the points of law established by a final judgment are reviewed by another judge, in order to pursue the purpose of the criminal trial.

On this last point, we note that the issue of res judicata must be considered differently in the scope of the new Criminal Procedure Code, as opposed to the previous one. Under the 1968 rules, the judge's intervention was mainly at the trial stage, whereas the new legislation divided the jurisdiction into three areas of functional competence, in accordance with the principle of the separation of judicial functions:

- the provision on the fundamental rights and freedoms of the person during criminal proceedings, within the functional competence of the committing judge;
- verification of the legality of the referral or non-referral for trial, as well as

[20] Judgment of July 18, 2007, (C- 288/05, ECR, p. I- 6470), paras. 33 - 34.

taking of specific measures in case of non-referral (special confiscation, destruction of documents, verification of security measures, confirmation of the order to reopen criminal proceedings, etc.), within the functional competence of the pre-trial judge;

- judgment on the merits of the case, within the jurisdiction of the court.

While it is much clearer to establish the res judicata effect of judgments given by the trial court, certain problems arise in relation to the authority of judgments given by the committing judge and the pre-trial judge.

From a theoretical point of view, the main attributes of jurisdiction - *cognitio* and *imperium* - should be borne in mind - in relation to which the characteristics and effects of res judicata have been established. In the absence of provisions expressly governing the enforceability of judgments (*imperium*) or the possibility of reviewing a final decision at subsequent stages of the proceedings (*cognitio*), the scope of these attributes should not be limited to the plenary powers exercised by the courts.

In its case law, the Constitutional Court has consistently held that the substance of the safeguards laid down in Article 6(1) ECHR is given by the *"right to appear in court"*, as a right of access to justice or to a judge. As the European Court of Human Rights has concluded, a *'court'* is characterized, in a substantive sense, by its jurisdictional role, which is to adjudicate, on the basis of the applicable rules of law and in accordance with an organized procedure, any dispute brought before it. This safeguard can only be applied by establishing a procedure that is consistent with the requirements of impartiality under Article 21 (3) of the Constitution and Article 6(1) of the ECHR, barring which any ruling given by a judge within the limits of his or her powers is devoid of substance[21]. As pointed out before, constitutional and conventional safeguards deem res judicata to be a means of ensuring legal certainty.

In this regard, in civil matters, the doctrine[22] and judicial practice make a distinction between the *"res judicata"* and the *"res judicata authority"* of the decisions. By judgment no. 177/25.06.2015, the High Court of Cassation and Justice - Second Civil Section[23] , held that res judicata has two procedural dimensions: that of procedural exception and that of presumption, a means of evidence capable of demonstrating a certain fact in relation to the legal relationship between the parties.

While, in its manifestation as a procedural exception (which corresponds to a negative, extinctive effect capable of precluding a new judgment), res judicata implies the triple identity of the elements – subject matter, parties, cause – unlike in the assumption in which this vital effect of the judgment is positive, integrating the manner in which certain contentious matters were previously settled between the parties, without the possibility of ruling otherwise. In other words, the positive effect of the res judicata is established in a second judgment which relates to the issue previously settled, without the possibility of being reversed.

There is a clear distinction between res judicata and res judicata authority as regards the condition of application. In this respect, res judicata authority implies the identity of the actions (parties, subject-matter and legal cause) which precludes a new trial, whereas

[21] Decision No 599/21.10.2014, published in Official Gazette of Romania, no. 886/05.12.2014, par. 19 and 30.

[22] V. M. Ciobanu, *op. cit.*, p. 269-271.

[23] www.scj.ro

res judicata evokes the presumption of judged matter, in the interest of consistent judgments, so that what has been found and ruled in one judgment must not be overturned by another judgment.

In such circumstances, an appellate court could not dismiss the action on the basis of res judicata, as it had an obligation to rule on the merits, but the solution had to take into account the ruling already given on the question of law before the court, giving effect to the presumption of res judicata, since the matter in dispute had already been settled once before by a previous judgment, which had become final.

The rationale for the decision given by the higher court lies in the *cognitio* - the power to decide and rule on the matter referred for settlement - which belongs to any jurisdiction, regardless of whether the judgment was given following the resolution of a judicial action or of a litigation under the law.

In criminal procedural matters, ever since the inter-war period, the doctrine[24] took on and analyzed such reasonings, finding that the law gives all judgments (regardless of whether they are pronounced by the trial court or by the investigating judge or the indictment chamber of the court) legal force and enforceability, ensuring legal effectiveness and, where necessary, enforceability of the jurisdictional act, preventing the duplication of proceedings, in the absence of new facts or evidence.

We consider that two forms of res judicata are found in the current legislative context, namely:

- *complete or total authority* - the judgment on the merits (criminal and civil action), which will definitively extinguish the litigation, precluding a new criminal trial against the same person for the same offence;
- *limited or relative authority* - a decision by which the judicial bodies with jurisdictional powers (the court, the committing judge or pre-trial judge) resolve a litigation, the solution of which cannot be overturned by another decision, except in cases where new facts or evidence arise and the law allows the review of the final judgment previously pronounced by the judge.

Limited res judicata authority derives precisely from the res judicata power of rulings pronounced by judges or courts by means of final judgments that precede the judgment on the merits. These judgments involve the analysis of contentious issues, aspects or incidental issues, whose resolution is directly based on the ***facts alleged against the accused, factual and legal circumstances*** are assessed, ***substantive issues*** are resolved, *and* ***evidence adduced by the prosecution*** is examined.

Moreover, some judgments handed down by the pre-trial judge definitively settle contentious issues specific to extra-criminal matters, with direct consequences on the civil rights of certain persons (for example, the procedure for the exclusion of a false document or special confiscation, as provided under Article 549[1] of the Code of Criminal Procedure).

Since the decisions given by the committing judges or the pre-trial judge are final from a legal point of view, the contentious issues decided by them must be res judicata. They may not be overturned by a subsequent judgment, unless new facts or circumstances become available which are liable to alter the original assumptions

[24] I. Ionescu-Dolj, *Curs de procedură penală*, Socec SA Publishing House, Bucharest, 1940, p. 508; Tr. Pop, *op. cit.*, 570 - 571.

underlying the separate manner of resolution of the same issue under litigation.

In this respect, as far as *preventive measures* are concerned, we have in mind the regular review of the grounds considered by the adjudicating judge or court in order to ensure the protection of fundamental rights. This procedure does not deprive the final and enforceable judgment of the authority of res judicata, but is intended to ensure the effective and constitutional operation of the measures taken during the criminal trial and the potential regular review of the grounds for the restriction of fundamental rights, in the light of the evolving nature of evidence adduced at the various stages of the trial.

According to Article 242 (1) of the Code of Criminal Procedure, the preventive measure shall be revoked, ex officio or upon request, if new evidence becomes available which show that it is unlawful. Thus, the judge called upon to review the preventive measure ordered in the criminal proceedings will not be able to reconsider the grounds on which the measure was granted in the absence of new evidence, since they were established by previous judgments which are res judicata, based on evidence adduced at the relevant trial stage.

Moreover, if when rejecting the prosecutor's motion for a preventive measure, the committing judge finds that there is a potential obstruction to the criminal proceedings, among those listed under Article 16 (1) of the Code of Criminal Procedure, their decision cannot be ignored by the criminal investigation bodies or by the court that was subsequently seized. These judicial bodies remain bound by the final decision handed down by the committing judge and are required to issue a procedural act stating that a legal impediment has occurred, if such impediment cannot be removed (for example, the intervention of a special statute of limitations or amnesty) or to update the criminal case, being able to rule in a manner contrary to the previous resolution of the contentious matter if new facts or evidence show that the impediment which was found by the judge to prevent the prosecution did not exist (for example, the evidence which the arrest referral was based on failed to show that a person had committed the crime).

The possibility of reviewing contentious issues decided by the pre-trial judge does not remove the authority of res judicata, even in matters of the legality of the evidence adduced during the criminal prosecution or the regularity of court referral. By Decision No 802/2017, the Constitutional Court ruled that *"29. [...] a review of the reliability/legality of the administration of evidence, from this perspective, is also admissible in the course of the trial, thus applying the general rule that absolute nullity may be raised throughout the criminal proceedings"*. Since the judgment of the court does not make any distinction, the legality or impartiality of the evidence may be re-examined in the course of the trial both where the pre-trial judge has ordered the commencement of the trial under Article 346 (1) of the Code of Criminal Procedure, as well as when they rejected court the claims and objections raised ex officio or raised ex officio with regard to the legality or impartiality of the evidence, ordering the commencement of the trial under Article 346 (2) of the Code of Criminal Procedure.

In the latter situation, the decision of the pre-trial judge, which rejected the claims and exceptions in relation to the legality or impartiality of specific pieces of evidence, will be final before the court, which, after reviewing the merits of the application for absolute nullity, will be bound by the previous decision, a fact which cannot be challenged in the absence of new facts or evidence that are liable to substantially alter

the premises of the previously adopted decision.

In the matter of *complaints against the decisions to dismiss the case and the decisions rejecting the reopening of criminal proceedings*, the final judgment of the pre-trial judge creates its own impediment to reopening criminal proceedings or to the commencement of new criminal proceedings for the same offence against the same person, if the procedure under Article 335 (2) and (4) of the Code of Criminal Procedure.

In the inter-war doctrine[25], it was held that final orders not to prosecute or not to refer to trial were res judicata in two respects. Firstly, those judgments were absolutely binding on the trial courts, in the sense that they could no longer be seized in another case with the trial for a case in respect of which a refusal to prosecute or not to prosecute had been ordered, even if the facts were substantiated, since the repressive justice system could only be seized by reopening the case. Even if the Public Prosecutor's Office or the injured party had relied on new evidence, the trial courts could not hear the case, since the new evidence gave rise only to the right to request the reopening of the investigation. Secondly, decisions not to refer the case to prosecution or to trial were binding on the investigating courts, which could no longer be seized with a new case, even if new evidence were adduced. In this case, too, the only possibility of using the new evidence was to apply for a reopening of the case.

Thus, according to the views with regard to the Code of Criminal Procedure of 1936, which had an organization of judicial functions similar to the one under Law No 135/2010, the decisions of investigating judges to order the non-prosecution or the non-referral to trial were res judicata and precluded the opening of a new criminal trial, even if the law in principle allowed the reopening of the case. This solution is in line with the principles governing criminal proceedings, since the possibility of reopening the criminal proceedings must be subject to the law, must be foreseeable for the participants in the proceedings and must guarantee the res judicata effect of the decision not to prosecute or not to refer the case for trial.

The above reasoning is also fully applicable in the current system of criminal procedural law, in which the order of the investigating judge or the decision of the indictment division is replaced by the decision of the pre-trial judge to reject the complaint against the decisions not to refer the case to the pre-trial chamber or the proposal to confirm the reopening of the criminal proceedings. The reasons in fact or in law which the decision not to dismiss the case is based on are relevant solely based on the possibility of reopening the criminal proceedings, but the res judicata effect of the decision of the pre-trial chamber precludes the commencement of new criminal proceedings outside the framework of Article 335 of the Code of Criminal Procedure.

Moreover, the decision of the pre-trial judge to reject the complaint against the decisions to discontinue the proceedings or the proposals to confirm the reopening of the criminal proceedings may constitute *"final decisions closing the proceedings"* within the meaning of Article 4 of Protocol No 7 to the ECHR[26] or Article 54 of the Convention

[25] I. Tanoviceanu, V. Dongoroz, *Tratat de drept și procedură penală, 2nd edition*, vol. V, Socec&Co. Publishing House, p. 714; *Tr. Pop, op. cit.*, 571.

[26] In the *case of Zigarella v. Italy* (Decision of Section I of the European Court of Human Rights, in application no. 48154/99, delivered on 03.10.2002) it was held that Article 4 of Protocol No. 7 Additional to the ECHR *"covers not only the situation of double jeopardy but also that of double prosecution, applying even where a*

implementing the Schengen Agreement, giving rise to the *non bis in idem* principle and constituting an impediment to the commencement of a new criminal trial for the same facts and the same persons.

In the *procedure for confiscation or rejection of a document in the event of dismissal or termination of criminal proceedings*, as provided under Art. 549[1] of the Code of Criminal Procedure, the ***res judicata authority of the decisions of the pre-trial judge shall be with full effect,*** the rights of the parties or third parties arising in connection with the confiscated property or the rejected documents being amended, transmitted or transformed with full effect, without the civil or criminal procedural rules providing for a new form of access to justice for the reopening of the issues settled by the decision of the pre-trial judge.

Therefore, the authority of res judicata must also apply to the judgments of the committing judge or of the pre-trial judge, the contentious issues decided by them being open to review only in the event of new facts or evidence which warrant a review of the rulings given in fact and in law.

5.2. In the case of civil judgments, res judicata is regulated differently, depending on the subject-matter of the dispute that has been finally settled by the court. If the civil action concerned tortious civil liability for unlawful acts constituting offenses, the provisions of Art. 28 (2) of the Code of Criminal Procedure shall apply, according to which the final judgment of the civil court settling the civil action shall not be res judicata before the criminal judicial authorities as to whether a criminal offence exists, the person who committed it and their guilt.

Although seemingly contrary to the previous analysis of the principle of legal certainty, this choice of the legislator can be explained from the perspective of the **particular legal regime of the two procedures, particularly in the area of the right of disposition and evidence.** Thus, the civil procedure is not governed by the rules requiring an effective investigation of all the factual circumstances relating to the wrongful act causing the damage. The procedural framework is set by the plaintiff, who may limit the subject-matter of the proceedings to the matters which they have an interest into.

Moreover, **in terms of evidence**, the civil procedural law is much stricter, and such evidence must only be adduced to the extent that it is required under the conditions and within the time limits required by law, thus allowing the possibility that the evidence before the civil court does not cover all the relevant circumstances in relation to the wrongful act causing damage.

Last but not least, in civil matters, the **principle of availability** gives the parties much wider discretion to negotiate on the subject matter of the dispute. In view of these aspects, the civil procedure does not always enable the judicial bodies to gain a full picture of the facts and circumstances giving rise to civil liability in tort, in which case the ***parties' availability in civil proceedings could turn into a risk of impunity in criminal proceedings.***

On the other hand, the judgment of the civil court is not entirely devoid of res judicata, since the judgment of the criminal court is limited to those facts and circumstances strictly necessary to establish that the elements of a crime are present and

person has been the subject of a simple criminal prosecution which has not led to a conviction. In principle, the Court has held that the principle of non bis in idem is applicable whether or not a person has been convicted".

to hold the guilty party criminally liable. The judgment of the civil court thus retains the authority of res judicata in respect of matters in dispute which go beyond the existence of the offence the person who committed it and the guilt of that person.

With regard to this last aspect, the criminal procedure law has characterized the issues that go beyond the existence of the act, the person who committed it and their guilt as ***"preliminary matters"*** subject to a special legal regime under Article 52 of the Code of Criminal Procedure. Based on the above-mentioned article, the criminal court has jurisdiction to hear any matter prior to the resolution of the case, even if by its nature that matter falls within the jurisdiction of another court, except in situations in which the jurisdiction to resolve it does not belong to the judicial bodies.

Although the legislator does not define *in terminis the* notion of preliminary issues, we consider that they must concern the rulings of the criminal court on issues separate from those listed in the final part of Article 28 (2) of the Criminal Procedure Code. According to Article 15 of the Criminal Code, the offense is the sole basis of criminal liability, being defined as a human activity - the "deed" under criminal law (both objectively and subjectively), unwarranted and imputable. Thus, the proper elements of a criminal judgment are the proof of the existence of a human activity that had an unlawful consequence under the criminal law, the performance of that activity by the person to be held criminally liable and the culpability with which the activity was carried out.

The provision of the offence in the criminal law, together with its unjustifiability and imputability, are ***issues that must necessarily be resolved by the criminal court, but are not always appropriate for a criminal rial***.

The varied elements of the offenses depend on the specificity of the economic and social areas covered by the criminal law. For this reason, it is possible that, in relation to these areas, the civil court may have previously been called upon to settle certain contentious issues (determination of the owner of the property right, validity of consent to the conclusion of a civil legal act, etc.).

If these questions constitute **legal circumstances** in connection with the commission of an unlawful act, they will always become preliminary questions if the civil court's decision depends on the establishment of one of the components of the crime (the actual nature of a civil contract and the existence of a specific purpose for which the property was delivered for the establishment of the components of the crime of breach of trust; the existence of a family relationship between the defendant charged with the crime of aiding and abetting and the participant in the commission of the predicate offense)[27] .

On the other hand, as far as **factual circumstances** are concerned, their classification as preliminary issues depend on their connection with the human activity which is part of the act which is the subject-matter of the proceedings. If a similarity or inextricable connection in time and space exists, those factual circumstances could never constitute prior matters, except the unlawful act itself, as provided under Article 371 of the Code of Criminal Procedure, which is subject to trial. Consequently, the provisions of Art. 28 (2) of the Code of Criminal Procedure shall apply, which do not confer res judicata authority on the

[27] A. Zarafiu, *op. cit.*, p. 146.

judgment of the civil court on these factual circumstances.

On the contrary, when the factual circumstances necessary to establish the typical, unjustified or imputable nature of the act are distinct from the act that is the subject of the trial and are not inextricably linked in time and space with it, they will become preliminary matters, according to the legal regime under Article 52 of the Criminal Procedure Code (the factual circumstance of the surrender of movable property in the case of breach of trust, separate from the refusal to return or wrongfully dispose of it, which is subject to criminal law).

With regard to preliminary issues, the High Court of Cassation and Justice, by Judgment no. 52/2021 rendered in a Panel for the resolution of certain matters of law, held that "*doctrine and case law are consistent in interpreting the concept of 'preliminary issue', the opinions expressed being that, in the course of criminal proceedings, certain acts must necessarily be performed before others, certain situations must necessarily be investigated first, and the resolution of certain issues must necessarily be preceded by the resolution of others, etc.*" [para 108]

Thus, the High Court holds that, "*In order for a matter to be considered preliminary, its subject-matter must be of a factual or legal character that is required for the resolution of the case that is the subject of the criminal proceedings. The preliminary issue has this character when it concerns the existence of an essential requirement in the structure of the offence (the prerequisite situation or the essential elements that make up the components of the offence), the quality or status of the offender, and may concern any area of law: civil law, administrative law, labor law, international law, etc.* [para. 109] *Under the Code of Criminal Procedure, any preliminary issue of any kind is decided by the criminal court that has jurisdiction to hear the case whose outcome depends on its resolution, which also entails an increase in the subject-matter jurisdiction of the criminal court concerned."* [para 110]

Once a factual circumstance has been qualified as a preliminary issue, the code of criminal procedure regulates **two effects which will apply differently depending on whether the issue has been finally settled by another court**. If the matter has not been finally settled, the criminal court **will extend** its **jurisdiction** and will have to settle the contentious issue on which the components of the crime it is trying are based. Otherwise, if the contentious issue has been settled by a judgment of a court with jurisdiction to hear the matter, the provisions of Article 52 (3) of the Code of Criminal Procedure shall apply, which establish **the res judicata authority of the final judgment of the civil court** before the criminal court, the latter not having the functional competence to reopen the matter in question.

In this respect, the Criminal Procedure Code contained a constitutional flaw in relation to the res judicata authority of the judgment settling the preliminary issue, which was addressed by Decision no. 102/2021 of the Constitutional Court.

In its reasoning, the Court essentially held that the provisions of Article 52 (3) of the Code of Criminal Procedure, which allowed for a criminal court to extend its jurisdiction in order to resolve any preliminary issue on which an offence is predicated, entails the infringement by the criminal courts of the res judicata authority of final judgments handed down by civil courts, with the ensuing violation of the principle of legal certainty.

In this regard, in view of the requirements arising from the decisions in principle handed down by the European Court of Human Rights and the

Constitutional Court, the provisions of Article 52 (3) of the Code of Criminal Procedure enable a criminal court to review aspects of the criminal case that have been finally settled by other courts and thus to become a court of review of final judgments of other courts on aspects relating to the existence of an offence. Thus, the criminal court may pronounce solutions that are contrary to those which have become final, seriously undermining the principle of res judicata, which is a safeguard of the right to a fair trial as laid down in Article 6 of the Convention.

In such a situation, by the standard of the European Convention on Human Rights, there is no objective and reasonable argument justifying the review by the criminal court of aspects of the case which constitute preliminary issues and which have been finally settled, by a court having jurisdiction to hear another matter, even if those issues concern the very existence of the offence.

Once the constitutionality flaw in the wording of Article 52 (3) of the Code of Criminal Procedure was addressed by Decision No. 102/2021, the judgments rendered by other courts on preliminary issues will always be res judicata before the criminal court, which can no longer reopen the issue in question. As stated above, the same reasons must also justify the res judicata effect of judgments by which the criminal court has ruled on a contentious issue in the preamble to the final judgment or in a judgment prior to the decision on the merits, since it is unfair and objectively unjustified for only contentious issues decided by the civil courts to be res judicata before a criminal court, whereas the same issues finally settled by a judgment of a criminal court may be the subject of a new judgment before another criminal court.

As a result of Decision no. 102/2021 of the Constitutional Court, the Romanian legislator removed this constitutionality flaw in the criminal procedure rule, by means of Law no. 201/2023, article 52 (3), by removing the text *"except for the circumstances relating to the existence of the offence"* from the wording of the law that was ruled to be unconstitutional.

Currently, following the amendment of this text, Art. 52 (3) provides that "*Final decisions of courts other than the criminal courts on a preliminary issue in criminal proceedings have the authority of res judicata before the criminal court.*"

As regards the scope of application of Art. 52 (3) of the Criminal Procedure Code, it can be concluded that those circumstances on which the court has ruled on an incidental basis or in the recitals of the final judgment shall also constitute preliminary issues that have been settled by a previous final judgment of the civil court.

In this respect, we refer to the institution of the appeal against enforcement, by which the civil court settles certain incidents arising in the course of enforcement. Two issues are of interest in this matter:

First, Article 712 (2) of the Code of Civil Procedure provides that, in the event of enforcement on the basis of a writ of execution other than a court judgment, the appeal against enforcement may also raise pleas in fact or in law relating to the substantive right contained in the writ of execution, only if the law fails to provide for a specific procedural remedy for the annulment of that writ of execution. In such a situation, the appeal will no longer have the character of a procedure in which incidents arising in the course of enforcement are settled, but will constitute a genuine action to endorse an existing agreement, which will be fully res judicata, similar to an action for nullity or rescission.

Secondly, the specificity of the offences in the course of enforcement action

may allow the solution pronounced in an appeal against enforcement to have the same legal status as a preliminary issue under Article 52 (3) of the Criminal Procedure Code. For example, in case of an offence of non-compliance with court decisions under Article 287(b) – (g) of the Criminal Code, it is possible that, prior to the completion of the criminal proceedings, the prerequisites for establishing one of the offences may have been analyzed in the framework of an appeal against enforcement. In such a case, we consider that the provisions of art. 52 (3) of the Criminal Procedure Code Hall apply, the judgment of the civil court having the authority of res judicata on the preliminary issues that have been analyzed, even if the judgment was intended to settle incidents arising during the enforcement procedure.

6. Conclusions

In the above context, we believe that the res judicata is a complex doctrine, liable to generate different interpretations on the issues analyzed, while the legislator might find it useful to draw inspiration from the civil procedural law and the decisions of the Constitutional Court in order to establish a clear, precise legal regime that ensures the most effective protection of legal certainty, but also of the rights of the parties to a trial.

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CONJUGAL VISIT – RIGHT OR BENEFIT?

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Abstract

During the execution of custodial sentences, the conjugal visit enjoys a dual regulation: both as a right and as a reward. Between the two institutions, there are several differences that lead to the non-uniform application of legal provisions. The method of establishing the criteria for applying the reward is the subject of the present analysis and gives rise to a legitimate question: is the conjugal visit a right or a benefit?

Keywords: *execution of the sentence, conjugal visit, right, concubine, reward.*

1. Introduction

The legal situation of incarcerated individuals involves strict regulation by the legislator, both in terms of establishing coercive rules to ensure the effect of custodial sentences and in terms of setting legal provisions to guarantee their corresponding rights and freedoms.

From the analysis of the provisions of Law no. 254/2013, we will observe that the conjugal visit benefits from dual regulation: one primary, within the provisions establishing the rights of convicted persons, namely within Article 69, and one secondary, when the legislator refers to the aforementioned provisions regarding the rewards that convicted persons may benefit from, according to the provisions of Article 98(1) letter d) of the same legislative act.

The manner in which the legal provisions regarding the right to conjugal visit are applied, as well as the conditions that the convicted person must meet, are aspects that we will consider in the following analysis and which will outline the necessity of legislative changes in this regard.

2. Conjugal Visit - an Applicable Right (to Some) of Incarcerated Individuals

Depending on the severity of the offense committed and the social danger it poses, the perpetrator of the offense may spend a considerable period being deprived of liberty, which leads to the need to ensure a procedure whereby their rights are respected, and they can effectively benefit from them.

It is no coincidence that we referred to the "*perpetrator of the offense*" without granting them a specific procedural status because the legislator establishes distinct regulations when the person holds the status of a suspect, then that of an accused, and finally that of a convicted person.

The first procedural status that the active subject of the offense acquires is that of a suspect, in which case deprivation of liberty may occur exclusively for a period of 24 hours, in accordance with the regulations

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regarding the preventive measure of detention, specifically the provisions of Article 209(3) of the Criminal Procedure Code[1]. In such a situation, it is not necessary to analyze the incidence of the right to conjugal visit, as long as the period for which they are deprived of liberty does not affect in any way family relationships or the proper development of the individual.

The second procedural status is that of the accused, in which case we must consider the provisions regarding the most severe of preventive measures, namely pre-trial detention, as regulated by Articles 223-240 of the Criminal Procedure Code. If the initial duration for which it may be ordered is 30 days, according to the provisions of Article 233 (1) of the Criminal Procedure Code[2], this period may be extended for successive periods of 30 days up to the maximum duration set by the legislator for each procedural phase.

In the case of criminal investigation, the measure of pre-trial detention may be extended for a maximum of 180 days, according to Article 236(4) of the Criminal Procedure Code[3], which implies that with the completion of the criminal investigation phase, another term is regulated for the other phases of the criminal proceedings. Expressly, criminal procedural legislation benefits from such regulation, establishing that during the trial, the duration of pre-trial detention cannot exceed 5 years at any time.

If in the case of the preventive measure of detention, a violation of the right to conjugal visit could not be retained, given the short duration for which it can be ordered, in the case of pre-trial detention, we can no longer support the same assertion. The period of 30 days, which can be repeatedly extended due to the complexity of the criminal investigations, requires a distinct regulation of the right to conjugal visit.

From the analysis of the legal provisions, it appears that the legislator intended to grant this right to a restricted category of individuals deprived of liberty before the pronouncement of a final conviction. According to Article 69(1) letter a) of Law no. 254/2013, the holder of the right to conjugal visit is the person under preventive arrest, who is already in the trial phase. It is true that the legal text does not distinguish between the two procedural moments that fall within the trial phase, namely the trial before the first instance and the trial before the appellate court. However, we start from the presumption that the provision is equally applicable to both procedural stages within the trial.

Nevertheless, we notice that the legal provisions regarding the execution of custodial sentences do not regulate in any way the possibility for the individual deprived of liberty to benefit from the right to conjugal visit during the pre-trial phase.

The rationale behind the legislator's decision to establish a differentiated regime regarding the exercise of the right to conjugal visit is based on logistical considerations, not on aspects concerning the respect of the rights and freedoms of the individual deprived of liberty. The manner in which a preventive measure depriving of liberty is executed during the pre-trial phase

[1] Detention may be ordered for a maximum of 24 hours. The time strictly necessary for transporting the suspect or accused to the premises of the judicial authority, according to the law, is not included in the duration of the detention.

[2] During the criminal investigation, the duration of pre-trial detention of the accused cannot exceed 30 days, except when extended under the conditions of the law.

[3] The total duration of pre-trial detention of the accused during the criminal investigation cannot exceed a reasonable term and cannot be longer than 180 days.

creates significant organizational difficulties.

While the execution of pre-trial detention during the trial phase, after the court has been seized with one of the two referral acts, is carried out in a penitentiary, during the pre-trial phase, this preventive measure is executed in detention centers organized at the level of each administrative-territorial unit. The lack of sufficient space, accommodation conditions, as well as the related procedures that should be carried out by the administration of detention facilities, were sufficient elements for the legislator to exclude the exercise of a right recognized by law in this procedural phase.

In addition to the aforementioned, it is necessary to analyze the other conditions provided by the provisions of Article 69 of Law no. 254/2013, conditions that must be cumulatively fulfilled for the proper exercise of the right to conjugal visit.

The relationship between the individual deprived of liberty and the one with whom they are to participate in the conjugal visit must be one of marriage or cohabitation, the legislator thus setting the limits for exercising the right to conjugal visit when the individual deprived of liberty is married. Therefore, there is no alternative possibility to exercise this right if the person with whom they are married refuses to participate in such a procedure.

The proof of the relationship between the two is established distinctly, depending on its nature: if the individuals are married, the proof before the administration of the place of detention is made based on a legalized copy of the marriage certificate, unlike the situation where the relationship is based on an legally unregulated partnership. In the latter case, a sworn statement authenticated by a notary is required, stating that the two had a similar relationship before the deprivation of liberty.

The next condition provided by law exclusively targets those who are serving a custodial sentence, meaning a final court decision has been issued. Thus, the right to conjugal visit may be granted to the convict who has not benefited from permission to leave the place of detention in the last 3 months. Such an exceptional situation is justified by the fact that the convicted person could have had the appropriate meetings with their partner during the permission to leave the place of detention.

The last condition concerns the conduct of the person deprived of liberty, with the legislator aiming for them not to have been subject to disciplinary sanctions or for a reason for lifting the sanction to have occurred. In this case as well, a distinction is made between the two forms of deprivation of liberty: in the case of convicted persons, the absence of sanctions must be for at least 6 months before the moment they request the right to conjugal visit, unlike the situation of persons in pretrial detention, where the term is reduced to 30 days before the moment of the request.

We also note the moment to which the legislator refers, namely the date of the request for the right to conjugal visit, without there being an additional provision regulating the situation in which the disciplinary sanction occurs after the request has been made, but before the person deprived of liberty actually benefits from their right. In such a situation, the only way to restrict the exercise of the right to conjugal visit is through the application of a disciplinary sanction that meets legal requirements and leads to the prohibition of the right to conjugal visit. In the absence of such a situation, the law does not expressly establish the conditions under which the person deprived of liberty could still exercise their right.

Beyond the legal limits of exercising the right to conjugal visit, it is important to

also consider the social purpose of such regulation. Family life, interpersonal relationships, and the constant interaction between the two partners who form a couple are essential aspects in the process of social reintegration and resonate in interaction with other members of society.

Specialized literature[4] has highlighted the role of the family and, implicitly, of the relationships developed even during the period when one of the partners is serving a custodial sentence.

The last condition provided by the provisions of Article 69 (1) letter e) of Law no. 254/2013 is also not devoid of importance, according to which the person deprived of liberty engages in educational or work activities, on the occasion of which the administration of the place of detention may observe a constant tendency towards rehabilitation.

In addition to the legal provisions mentioned earlier, it is important to highlight the condition provided in Article 147 (2) of the Implementing Regulation of Law no. 254/2013, which requires that individuals participating in conjugal visits, both the person deprived of liberty and their partner, must submit to the administration of the place of detention a declaration stating that they do not suffer from any sexually transmitted disease or AIDS.

A special situation is encountered, both in specialized literature and in judicial practice, when exercising this right involves two individuals deprived of liberty. Thus, the legislator has established a series of provisions applicable to cases where the partners are subject to pre-trial detention - either during the trial phase or already convicted to a custodial sentence.

In this regard, judicial practice[5] has established that if both partners are deprived of liberty, it is not sufficient for the request to exercise the right to conjugal visit to be made by only one partner; both partners must make the request jointly. This dual condition seems to exist only when both partners are deprived of liberty. The judge delegated with overseeing the execution of the sentence and, subsequently, the trial court, have noted that the mere expression of will by one of the partners is not sufficient.

Analyzing the legal provisions, this simultaneous expression of will condition is not evident. It is necessary for the convicted person to file the request and for their partner to submit the necessary documents.

The interpretation of the court in the decision rendered following the appeal against the decision of the judge delegated with overseeing the execution of the sentence leads to the conclusion that the reasons for rejection took into account a strict analysis of the legal provisions regarding the exercise of the right to conjugal visit. We believe that in such a situation, it was not necessary to verify the condition regarding the filing of the request by the other partner, as long as both were in the same place of detention, and the agreement regarding the conjugal visit was expressed.

3. Conjugal Visit - a Reward

As mentioned at the beginning of this analysis, the conjugal visit represents a form of expression of the detained person, materialized in a right expressly regulated within the law on the execution of custodial sentences. However, the right to conjugal visit can be supplemented, as well as

[4] I. Chiș, A.B. Chiș, *Executarea sancțiunilor penale, 2nd edition*, Universul Juridic Publishing House, Bucharest, p. 468-469.

[5] A.V. Iugan, *Drepturile persoanelor deținute*, Universul Juridic Publishing House, Bucharest, 2018, p. 92.

restricted, which is why it is necessary to focus our attention on the supplementary regulations within Chapter IX of Law no. 254/2013 - a chapter entitled "*Rewards, Infractions, and Disciplinary Sanctions*".

The conduct of the detained person, constant involvement in activities organized at the detention facility, and diligence in work are some of the elements that the administration of the detention facility considers when rewards are granted. The conjugal visit is included in the category of these rewards, in the form of supplementing the right, when the convicted person meets the conditions provided by law.

However, some mentions are necessary regarding the specific way in which this reward is granted, as the provisions within Article 212 of the Implementing Regulation of Law no. 243/2013 establish a mechanism whereby the convicted person effectively benefits from the reward.

So, the legal text makes a distinction between two moments: the first moment is when the administration of the detention facility concludes that the detained person should receive the reward regarding the supplementation of the right to conjugal visit, and the second moment is when the detained person benefits from the reward.

Between the two moments mentioned above, there is a maximum term of 3 months, a time interval during which there is a risk that the right may no longer be exercised, either for reasons attributable to the detained person - against whom disciplinary sanctions are applied, or for reasons not attributable to them - generated by the couple relationship they have or the inability of the partner to participate in such a meeting.

This gap that the legislator had in mind for organizational reasons raises questions about the real nature of the conjugal visit: is it a right or a benefit? If in the first part of the analysis we observed the necessary conditions for exercising the right to conjugal visit, and the regulation provides sufficient guarantees from which the certainty of exercising it results, in the case of rewards, the certainty of the supplementary exercise of this right does not present a certainty, which is why we believe that we are dealing with a benefit.

From a linguistic point of view, the notion of "*benefit*" also means "*advantage gained from a situation or activity*," which seems to lead to the hypothesis I mentioned earlier: the premise is the existence of a deprivation of liberty, and participation in socio-educational programs is the precursor and foundation of the supplementation of the right to conjugal visit.

4. Conclusion

The legal situation of a person deprived of liberty should not be an impediment to exercising the rights recognized by the fundamental law and even less by the special law regarding the execution of custodial sentences.

Interpersonal relationships, including those akin to romantic partnerships, are an essential part of each individual's development process. The period during which one is deprived of liberty, as a consequence of inappropriate and illicit behavior, can be navigated more easily when the person deprived of liberty is in a position to effectively exercise their rights, including the right to conjugal visits.

The legislative restrictions that impose that intimate relationships with persons deprived of liberty occur only in two situations (in the case of marriage or in the case of a pre-existing cohabitation relationship before the moment of deprivation of liberty) represent an indirect limitation of the right to conjugal visits,

without any explanation provided in this regard.

The role of the legislator is not to unjustifiably limit the exercise of rights that it has regulated but to ensure a uniform and efficient application of legal rules- aiming to maintain the natural relationships that the individual has developed before the moment of deprivation of liberty or will be able to develop both during and after their release.

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SOME ASPECTS OF COMPARATIVE LAW REGARDING CHILD PSEUDOPORNOGRAPHY AND VIRTUAL CHILD PORNOGRAPHY

Bogdan NICULESCU(*)

Abstract

The present study aims to bring to the fore domestic law provisions and their interpretation in national judicial practice in four (4) countries with a long democratic tradition, namely the United States of America, France, the Netherlands and Belgium, with regard to pseudo-child pornography and virtual child pornography, in order to find answers to questions such as: Are pseudo-child pornography and virtual child pornography criminalised in the laws of these countries? What were the reasons considered for their criminalisation or non-criminalisation? What is the link between A.I. and these subspecies of child pornography and how can this technology be integrated into the fight against the phenomenon? How is pseudo-child pornography reconciled with the principle of legality of criminalisation? And more. The proposed objective is to update the local doctrinal studies in the field of pseudo-child pornography and virtual child pornography from the perspective of comparative law, in order to provide arguments for and against the criminalisation of these types of child pornography, including how to reconcile the competing social values at stake. New socio-technological realities also require addressing and understanding how I.A. technologies have influenced the proliferation of child sexual abuse material online, the extent of this phenomenon, and identifying effective solutions to prevent and combat the scourge.

Keywords: *virtual child pornography; pseudo child pornography; comparative law; principle of legality of criminalisation; artificial intelligence technology.*

1. Introduction

The crime of child pornography, together with the sexual exploitation of children, is classified as a serious form of violation of fundamental human rights, in particular the freedom and integrity of the sexual personality and human dignity[1] .

With the development of information and communication technology, crime has taken on a predominantly digital character, and recent innovations in the field of artificial intelligence are on the verge of generating a new, alarming phenomenon of unimaginable proportions and incalculable consequences for society in general and minors in particular, in terms of child pornography.

Recently, several articles[2] from reputable online publications have raised an

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[1] In the same sense, A. Mărgineanu, *Combaterea exploatării sexuale a copiilor și a pornografiei infantile*, in Caiete de drept penal no. 3/2013, p. 63-89.

[2] See article entitled "*US receives thousands of reports of AI-generated child abuse content in growing risk"*, published on 31.01.2024 on the Reuters website, available at https://www.reuters.com/world/us/us-receives-thousands-reports-ai-generated-child-abuse-content-growing-risk-2024-01-31/, accessed on 10.04.2024; also the article "*Society needs to be alert': Most people are unaware AI is being used to create child abuse content"*, published on 19.02.2024 on the Euronews website, available at https://www.euronews.com/next/2024/02/19/society-needs-to-be-alert-most-people-are-unaware-ai-is-being-used-

alarming phenomenon, on an upward trend, regarding the generation of illegal content online using A.I., specifically the generation of pornographic material with real or non-existent minors.

A coordinated, effective, cohesive and timely response, adapted to common social values shared by democratic states, is urgently needed to counter this scourge.

The present study aims to highlight provisions of national law and their interpretation in the national judicial practice of four (4) countries with a long democratic tradition, namely the United States of America, France, the Netherlands and Belgium, with regard to child pornography and virtual child pornography, in order to find answers to questions such as: Are child pornography and virtual child pornography criminalised in the legislation of these countries? What were the reasons considered for their criminalisation or non-criminalisation? What is the link between A.I. and these subspecies of child pornography and how can this technology be integrated into the fight against the phenomenon? How is pseudo-child pornography reconciled with the principle of legality of criminalisation? And more.

At the same time, it aims to update the local doctrinal studies[3] in the field of child pseudopornography and virtual child pornography from a comparative law perspective.

These sub-classes of child pornography bear particular attention in the current global socio-technological context, in which A.I. technology has taken hold and is making its presence felt in many areas of modern life at a pace seemingly hard for states to match in terms of its regulation; its innovative nature and varied capabilities have been exploited, surprisingly or not, including by criminals for illegal purposes such as social engineering via deepfake[4] .

2. Brief considerations on the legal foundations and significance of the subject matter

All these realities were anticipated, to some extent and with some precision, by the original architects of the criminalisation of this scourge at international level; thus, on 20 November 1989, the United Nations General Assembly adopted the Convention on the Rights of the Child, which laid down in Article 34 the obligation of States Parties to protect children against all forms of sexual exploitation and sexual violence.

To this end, States shall, in particular, take all appropriate national, bilateral and multilateral measures to prevent: a) the inducement or coercion of children to engage in unlawful sexual activities; b) the exploitation of children in prostitution or other unlawful sexual practices; c) the exploitation of children in pornographic performances or materials.

Subsequently, complementary to the Convention, on 18 January 2002, the Optional Protocol on the sale of children, child prostitution and child pornography entered into force, including a legal

to-create-child-abuse-caccessed 09.05.2024; also, article entitled "A.*I.-Generated Child Sexual Abuse Material May Overwhelm Tip Line"*, published on The New York Times website on 22.04.2024, available at https://www.nytimes.com/2024/04/22/technology/ai-csam-cybertipline.htmlaccessed on 10.05.2024.

[3] See M.A.B. Pasamar, "*Child pornography on the Internet: the basis and limits of criminal law intervention*", in Caiete de drept penal no. 2/2008, pg. 1-43; S. Corlățeanu, A. Cîrciumaru, S. Corlățeanu, " *Elemente de drept comparat referitoare la combaterea pornografiei infantile prin mijloace de drept penal"*, in Revista Dreptul no. 11/2007, pg. 213-229.

[4] Deepfake is a fake, digitally manipulated video or audio file produced by using deep learning, an advanced type of machine learning, and typically featuring a person's likeness and voice in a situation that did not actually occur, in accordance to definition provided by https://www.dictionary.com/accessed on 10.05.2024.

definition of child pornography in Article 2 lit. (c), according to which *child pornography* means any depiction, by whatever means, of children engaged in real or simulated explicit sexual activity or any other exposure of the sexual organs of children, primarily for sexual purposes.

At the same time, the Protocol established a series of commitments of the signatory states for the implementation of its directives, in the field of substantive and procedural law, among which we note those contained in Art. 3, point 1 lit. c), 2) and 3), under which it became imperative to criminalise in national law at least the following activities, whether committed domestically or internationally, individually or in an organised manner: the production, distribution, dissemination, import, export, offer, sale or possession of pornography, as defined in Article 2, for the purposes mentioned.

With regard to child pornography in electronic format, the first international legal instrument to address, among other things, this phenomenon was the Convention on Cybercrime[5] , adopted on 23 November 2001 in Budapest under the auspices of the Council of Europe.

To this end, the signatory parties undertook to adopt the necessary legislative or other measures to criminalise the following conduct, when committed intentionally and unlawfully, under their domestic law: (a) the production of child pornography for the purpose of distribution by means of a computer system; (b) the offering or making available of child pornography by means of a computer system; (c) the distribution or transmission of child pornography by means of a computer system; (d) the act of procuring for oneself or for another person child pornography by means of a computer system; (e) the possession of child pornography in a computer system or a computer storage medium.

The term "child pornography" was defined as any pornographic material that visually depicts: a) a minor engaging in sexually explicit conduct; b) a person of full age, depicted as a minor, engaging in sexually explicit conduct; c) realistic images depicting a minor engaging in sexually explicit conduct.

The latter two subcategories are defined in the literature[6] as *pseudo-child pornography*(b) and *virtual child pornography*(c).

It should be noted that all 4 States concerned by this study are signatories[7] to the Budapest Convention, some of which have made reservations[8] under Article 9(2) of the Convention. 4 of the international normative act, concerning these sub-classes of child pornography.

3. Regulation in the United States of America

In U.S. law, the subject of criminalizing child pornography has been debated in relation to the right to free speech, guaranteed by the First Amendment[9] to the

[5] Known as the "Budapest Convention", available at CETS 185 - Convention on Cybercrime (coe.int)accessed on 03.05.2024.

[6] See M.A.B. Pasamar, *op. cit.*

[7] See the list of signatory states to the Budapest Convention, available at Parties/Observers to the Budapest Convention and Observer Organisations to the T-CY - Cybercrime (coe.int)accessed on 10.05.2024.

[8] See the list of States that have entered reservations to various provisions of the Convention, available at https://www.coe.int/en/web/conventions/full-list?module=declarations-by-treaty&numSte=185&codeNature=0accessed on 10.05.2024.

[9] Adopted on December 15, 1971, it was the first of ten amendments to the U.S. Constitution, forming the so-called "Bill of Rights"; it was intended to limit the power of Congress to make laws for the establishment of any

U.S. Constitution, being essentially a human form of expression; the debate has taken place at the highest level of the U.S. judiciary, the Supreme Court, which has set certain benchmarks in the process of criminalizing and interpreting the law in relation to child pornography.

One of the representative cases in this regard was *Miller v. California*[10] , in which the Supreme Court set the standard for assessing the obscenity of speech/form of expression at three points[11] , namely: (a) whether based on contemporary community standards, an ordinary person would consider the work, viewed in its entirety, to evince an obscene interest; (b) whether the work depicts or illustrates, in a patently offensive manner, sexual conduct or excretory functions as defined by state law; (c) whether the work as a whole is devoid of serious literary, artistic, political, or scientific merit.

Subsequently, in *Ferber v. New York*[12] , the Supreme Court clearly delineated child pornography from First Amendment protection, even though the Miller test for the type of content under consideration is not met; thus, it reasoned that the protection of children from sexual abuse is paramount, and material depicting sexual activity involving children is closely related to such abuse and has no artistic value; thus, the production, distribution or promotion of such material is exempt from First Amendment protection.

In *Osborne v. Ohio*[13] , the Supreme Court extended its interpretation in the above case to the mere viewing or possession of child pornography, based on the same arguments, plus the thesis that acting to decrease the demand for child pornography implicitly decreases the production of such content(supply), and that the material can be used to lure and sexualize children for the purpose of their subsequent abuse.

Some two decades after the Ferber v. New York decision, the Court was again called upon to rule on the constitutionality of child pornography rules, but this time contained in a federal law, the Child Pornography Prevention Act of 1996[14] ; the case was called *Ashcroft v. Free Speech Coalition*[15] , in which the Court declared two provisions of that law unconstitutional because their language was too broad with respect to material that was neither obscene under the Miller test nor produced through the exploitation of real children, as in the Ferber case, thus violating First Amendment protections.

Only one of the two provisions is of interest for the present analysis, namely the one that covered "any visual depiction, including any photograph, film, video, image or computer-generated image" that "is

religion or prohibition of the free exercise thereof, or to abridge freedom of speech, freedom of the press, or the right of the people peaceably to assemble and to petition the government for the redress of grievances; https://ro.wikipedia.org/wiki/Primul_amendament_la_Constitu%C8%9Bia_Statelor_Unite_ale_Americii, accessed 06.04.2024.

[10] Settled by judgment of the Court of 21 June 1973; available at https://supreme.justia.com/cases/federal/us/413/15/ , accessed 06.04.2024.

[11] The criteria are cumulative, conventionally referred to as the "Miller Test".

[12] In which the Court delivered its judgment of 2 July 1982; available at https://supreme.justia.com/cases/federal/us/458/747/, accessed 06.04.2024.

[13] Settled by judgment of the Court of 18 April 1990, available at https://supreme.justia.com/cases/federal/us/495/103/, accessed 06.04.2024.

[14] Available at https://www.congress.gov/bill/104th-congress/house-bill/4123/text, accessed 06.04.2024; the act aimed to criminalise child pornography online, including virtual child pornography.

[15] Settled by judgment of the Court of 16 April 2002, available at https://supreme.justia.com/cases/federal/us/535/234/, accessed 06.04.2024.

or appears to be of a minor engaging in sexually explicit conduct"[16] ; the provision aimed at criminalising different types of conduct, such as production, procurement, distribution, involving so-called pseudo-child pornography and virtual child pornography, where the resulting content did not involve real children in sexually explicit conduct, but either adults appearing to be minors or computer-generated images of non-existent children.

In contrast, the Court upheld the validity of the arguments in *Ferber v New York in* relation to another type[17] of virtual child pornography, which renders the image of a real child, but altered by means of a computer system so as to create the impression of the child's involvement in sexual activities[18] (for example, by superimposing the image of a child's face over the face of an adult engaged in sexual activities).

Responding to society's need to balance competing general interests (the right to free speech and the protection of children from sexual abuse and exploitation), a year later, in *2003,* the U.S. Congress passed the *Procedural Remedies and Other Tools to End Child Exploitation Today Act*[19] ; among other things, the Act brought its provisions in line with the principled rulings of the Supreme Court in the Miller, Ferber and Ashcroft cases on virtual child pornography.

The Act changed the previous wording "appears to be a minor" to "indistinguishable from that (n.n. image) of a minor", thereby narrowing the scope of the rule to limit interference with freedom of expression to what is necessary to achieve the stated objective; thus, it was an offence to possess or distribute any visual depiction of sexually explicit conduct involving "a computer image, computer-generated image or digital image that represents or is virtually indistinguishable from that of an actual minor" to an ordinary observer (not an expert).

In addition, it introduced a case[20] which would remove criminal liability for the offence if the subject of the visual depiction was a real adult (over 18) at the time of production or was merely a virtual creation and not a real minor, but the burden of proving these elements was on the defendant; thus, to the extent that the case did not involve a real minor, the requirement in Ferber v. New York excluding First Amendment protection only for child pornography involving real children was also respected; the rationale for reversing the burden of proof from the prosecutor to the defendant as to the non-existence of a real child in the pornographic visual depiction, despite appearances, was that the person creating or receiving child pornography was certainly in a better position than the prosecutor in this regard, especially since no effective tools were available to identify the source of the materials.

However, this legal defence was explicitly excluded for the other form of virtual child pornography, which involved

[16] Article 2256 para. 8 lit. A of the U.S. Code, as amended by the 1996 Act.

[17] In the literature it is referred to as pseudo-pornography, as distinct from virtual child pornography proper, which involves the generation of entirely computer-generated pornographic images of unreal children; see, Marie Eneman, Alisdair A. Gillespie and Bernd Carsten Stahl, "*CRIMINALISING FANTASIES: THE REGULATION OF VIRTUAL CHILD PORNOGRAPHY*", available at *https://gup.ub.gu.se/file/207727,* accessed 10.04.2024.

[18] The provision was found in Art. 2256 para. 8 lit. C of the U.S. Code.

[19] The acronym in English being the "PROTECT Act of 2003", also known as the "Amber Alert Law", available at https://www.congress.gov/congressional-report/108th-congress/senate-report/2/1?q=%7B%22search%22%3A%22%5C%22protect+act+of+2003%5C%22%22%7D&s=5&r=29

[20] In American criminal law, this type of legal defence is known as the affirmative defence.

transforming[21] images of real children in such a way that they appeared to be engaged in sexual activity; the justification was that the rule was intended to prevent the creation of a sexually explicit image using an innocent image of a child, the possible distribution of which clearly created a real danger to the image, dignity and privacy of the child in question, despite the fact that they had not been directly involved in the sexual activity depicted.

These virtual child pornography and pseudo child pornography provisions introduced by the PROTECT Act of 2003 have stood the test of time to date, as they are also found in the current *U.S. Code* in Title 18- Crimes and Criminal Procedures, Part I- Crimes, Chapter 110- Sexual Exploitation and Other Abuse of Children, *Section 2256*[22] .

Note the topography of the criminalisation of child pornography in the US Criminal Code, i.e. within the spectrum of social relations concerning sexual exploitation and other abuse of children, and not within the social relations concerning public morality[23] ; therefore, the legal object protected by the criminal norm is mainly concerned with the individual rights of children - their freedom and integrity of sexual personality, freedom of will, dignity and privacy.

4. Regulation in the Kingdom of the Netherlands

In the Kingdom of the Netherlands, the criminalisation of child pornography is found in the *Dutch Criminal Code, under* Title XIV - Offences against morality, in *Article 240b*, and covers both child pornography as such and virtual child pornography and pseudo-child pornography.

The offences include the production, possession and distribution of, inter alia, an image or data medium containing an image of a sexual act involving or appearing to involve a person who is visibly under the age of 18[24].

The last two subcategories of child pornography in the above list became criminal offences with the entry into force of the Act of 13 July 2002 amending the Dutch Criminal Code and Code of Criminal Procedure[25], which raised the age threshold for the person covered by the protection of criminal law from 16 to 18 and introduced the phrase "apparently involved".

Thus, the new legislative formula covered the following three assumptions[26] : (1) representation of a real child; (2)

[21] The Act concerned digital transformation, known in American legal parlance as "morphed child pornography images".

[22] Article defining the terms used in the criminalisation of child pornography conduct, including 'minor', 'sexually explicit conduct', 'production', 'visual depiction', 'computer', 'child pornography', 'identifiable minor', 'indistinguishable from'.

[23] This legal object is protected by other offences found in Chapter 71 of the US Criminal Code, entitled "Obscenity".

[24] See Dutch Criminal Code, form in force at the date of access - 29.04.2024, available in the official language of the Kingdom of the Netherlands at the following address wetten.nl - Regeling - Wetboek van Strafrecht - BWBR0001854 (overheid.nl)as well as in the Romanian version, in the form in force on 01.10.2012, available at Codex Penal - Criminal Code of the Kingdom of the Netherlands (just.ro), accessed on 28.04.2024.

[25] Available at Staatsblad 2002, 388 | Overheid.nl > Officiële bekendmakingen (officielebekendmakingen.nl)accessed on 01.05.2024.

[26] See in this respect, Memorandum of the Minister of Justice of the Kingdom of the Netherlands No. 27745-299b on the legal issues raised in the parliamentary debates on the 2002 draft law, ante-referred, published in the Dutch Official Gazette on 20.06.2002, available at kst-20012002-27745-299b.pdf (officielebekendmakingen.nl)accessed on 02.05.2024.

representation of a real adult person who looks like a child; (3) realistic representation of a non-existent child engaged in sexual conduct.

It should be noted that these three situations are based on the hypotheses referred to in Article 9(9). 2 of the Budapest Convention on Cybercrime concerning the definition of child pornography, an international legal instrument which inspired the Dutch legislator, among others[27].

What made the image pornographic in the first place was the depiction of sexually explicit behaviour of a person apparently under the age of 18, including the exposure of genitals or pubic area in an ostentatious manner[28] ; on the other hand, the way in which the image was created was equally eloquent in this respect, if it served to sexually stimulate the viewer (e.g. by adding text/voice, overlaying some elements or removing others, resulting in a sexual character, focusing on certain anatomical parts of the person's body, especially those sexual or considered erogenous)[29] .

At the same time, the arguments that underpinned the criminalisation of virtual child pornography and pseudo-pornography focused on the need to prevent behaviour that would have encouraged or attracted children to adopt inappropriate sexual behaviour or that would have generated a subculture of promoting sexual abuse of children; at the same time, the aim was to ease the burden of proof on the investigating authorities in the sense that it was no longer necessary to prove the use of real children for the production of pornographic material, which was impossible to prove solely on the basis of available visual evidence[30] .

The phrase "is apparently involved" in Article 240b of the Dutch Criminal Code signifies the indistinguishable character of an image of a real child engaged in sexually explicit conduct, and the standard for assessing this factual aspect relates to an ordinary observer without relevant expertise in the field, as follows from the case law[31] of the Supreme Court of the Netherlands.

At the same time, regardless of whether the person depicted in the image is an adult, but, on the basis of his or her physical appearance, looks like a minor, under the age of 18, criminal liability is incurred for committing the offence of child pornography, with its subspecies, pseudo-child pornography; this assessment of the age of the person depicted remains a question of fact, left to the discretion of the judge, who has not raised questions of constitutionality of the incriminating text from a lex certa perspective to date.

Therefore, in contrast to the case law of the Supreme Court of the United States of America, as set out above, the Dutch legislature has held that the criminalisation of virtual child pornography does not infringe the freedom of expression and the right to privacy of its nationals; the general interest of preventing and combating child pornography as a whole, encompassing both real and virtual child pornography, which

[27] See Explanatory Memorandum to the Act of 13 July 2002 amending the Criminal Code and the Code of Criminal Procedure of the Kingdom of the Netherlands, available at Parliamentary document 27745, no. 3 | Overheid.nl > Official announcements (officielebekendmakingen.nl).

[28] See Judgment of the Supreme Court of the Kingdom of the Netherlands of 07.12.2010 in case No 08/00787 B, available at https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2010:BO6446accessed on 20.03.2024.

[29] See Instructions of the College of Prosecutors General, published in the Official Gazette no. 19415 of 2016, available at https://zoek.officielebekendmakingen.nl/stcrt-2016-19415.html, accessed on 04.05.2024.

[30] See Judgment of the Supreme Court of the Kingdom of the Netherlands of 12.03.2013 in case No 11/04168, available at https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2013:BY9719accessed on 20.03.2024.

[31] *Idem.*

are essentially inseparable, prevails over the competing private interests at stake.

5. Regulation in the Kingdom of Belgium

In the law of the Kingdom of Belgium, child pornography is found in the *Belgian Criminal Code*, Title VIII - Crimes and Offences against the Person, Chapter I - Offences against Sexual Integrity, the Right to Sexual Self-Determination and Public Decency, Section 2 - Sexual Exploitation of Minors, Subsection 3 - Images of Sexual Abuse of Minors, *Articles 417/43 to 417/47*[32] and punishes both child pornography as such and virtual child pornography and pseudo-child pornography.

It criminalises conduct such as producing, disseminating, possessing or accessing images of sexual abuse of minors, among others.

As regards the phrase 'images of sexual abuse of minors', Article 417/43 defines such images in accordance with the authentic interpretation of the term 'child pornography' found in Article 2 lit. c) of Directive 2011/93/EU[33] of the European Parliament and of the Council on combating the sexual abuse, sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, a legal instrument which, together with the Lanzarote Convention and the Budapest Convention, among others, has been a source of inspiration for the Belgian legislator in this area[34] .

Thus, the term encompassed the following three assumptions: (1) depiction of a real child; (2) depiction of a real adult person who looked like a child; (3) realistic depiction of a non-existent or apparent child engaged in real or simulated sexual conduct or exposing genitals, primarily for sexual purposes.

The Belgian legislator's vision of placing child pornography offences within the spectrum of offences protecting social relations relating mainly to the integrity of the sexual personality, human dignity and the private life of the person dates back to 2022, initially the offence was placed under the auspices of Title VII - Offences against the family and public order, Chapter VII - Offences against morality, Article 383 bis[35].

With regard to the criminalisation of virtual child pornography and pseudo child pornography, defined in hypotheses 2 and 3 above, the ratio legis was aimed at complying with international obligations in this area, ensuring a high degree of predictability of the criminal law and protecting the image of the minor per se, even in the case of pseudo child pornography.

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[32] See Belgian Penal Code, in its current form, available at https://www.ejustice.just.fgov.be/cgi_loi/loi_a1.pl?imgcn.x=57&imgcn.y=15&DETAIL=1867060801%2FF&caller=list&row_id=1&numero=3&rech=4&cn=1867060801&table_name=LOI&nm=1867060850&la=F&chercher=t&dt=CODE+PENAL&language=fr&fr=f&choix1=ET&choix2=ET&fromtab=loi_all&cc=DROIT+PENAL&sql=dt+contains++%27CODE%27%2526+%27PENAL%27+and+cc+contains+%27DROIT+PENAL%27and+actif+%3D+%27Y%27&tri=dd+AS+RANK+&trier=promulgation#LNK0120, accessed 15.04.2024.

[33] Published in the Official Journal of the European Union on 17.12.2011.

[34] See Explanatory Memorandum to the Act of 31.05.2016 on the amendment of the Belgian Penal Code to implement European obligations in the field of sexual exploitation of children, child pornography and trafficking in human beings, among others, published in the Official Gazette on 08.06.2016, available at https://www.lachambre.be/doc/flwb/pdf/54/1701/54k1701001.pdf#search=%221701%20%2054k%20%3Cin%3E%20keywords%22, accessed on 03.05.2024; this legislative act amended Article 383bis of the Belgian Penal Code, the seat of the child pornography offence until 30.03.2022, when the article was repealed.

[35] See Belgian Criminal Code, as in force from 01.08.2016, available at https://codexpenal.just.ro/laws/Cod-Penal-Belgia-RO.html, accessed on 20.04.2024.

With regard to the latter, a case decision[36] considered the request of the defendant, convicted at first instance of possessing and accessing images of apparently underage persons engaged in sexually explicit conduct, to refer the matter to the Constitutional Court of the Kingdom of Belgium for a review of the constitutionality of the incriminating provision - at that time Art. 383bis of the Belgian Penal Code with the principle of legality in criminal matters; the defendant argued that the law refers to "a person who appears to be a minor engaging in sexually explicit conduct", which is a purely subjective concept leaving room for too wide a margin of appreciation on the part of the judge.

The court rejected the defendant's request, arguing that, by criminalising pseudo-child pornography and virtual pornography, the Belgian legislature had sought to prevent and combat all forms of child pornography, in accordance with the consensus view of the States parties to the Budapest Convention, to which Belgium had acceded, without making any reservations in that regard; at the same time, because of the general nature of the laws, their interpretation and application leave the courts with a certain margin of discretion, but the result of the interpretation must be reasonably foreseeable and consistent with the substance of the offence.

The foreseeability of the law does not preclude the person concerned from seeking expert advice in order to assess, to a reasonable extent in the circumstances of the case, the consequences which might flow from a particular act[37] .

The Court concluded that the criminal law does not place the judge in the position of deciding, on the basis of a purely subjective assessment, whether or not the person depicted in the pornographic material is legally a minor, but only to decide whether the material produced endangers the image of a minor by the explicit sexual conduct it depicts.

6. Regulation in the French Republic

In France, child pornography is regulated in the *French Penal Code*, Book II Crimes and Offences against Persons, Title II - Offences against the Individual, Chapter VII - Offences against Minors and the Family, Section 5 - Peril to Minors, Subsection 2 - Sexual Offences against Minors, *Article 227-23*[38] and covers in principle only child pornography as such and virtual child pornography.

Conduct such as fixing or recording, disseminating or possessing pornographic images or representations of a minor is criminalised,

From the perspective of virtual child pornography, it is worth mentioning the amendments made by Law No 98-468 of 1998 on the prevention of sexual offences

[36] See judgment of 19.01.2023 of the Court of Appeal of Liège, available at https://juportal.be/content/ECLI:BE:CALIE:2023:ARR.20230119.1?HiLi=eNp1kUFuwjAQRe/iRddxAiRMVlGJwFJErIgewAKLjhQRK4QVYkNXvUa76jkK92qcTkBEZvvf+HvmfwV8CkcEL94Dj4DJ359NZap6V21rZd5RxyxG4JZ6wEyNuzUaPJRW9a0aACv1VpXYXD6u34gWBBaErVk6y2VeLPN5kciFSDuv0e2nTwcdt9QftfQlVetDo2PHzOS+q4OGNwf91CEiB+O8dkoOpndwJeLRjUa7KB8u4RryKVVZiOWrkOIt6+Sglx/C5l1uHFiWzpNMrJKVEJ0+phZIv5yvX0QmA9L2QyQkL2pONf+98ah/8djo6Q+lza3s, accessed on 15.04.2024.

[37] Judgment of 15.11.1996 in Cantoni v. France, paragraph 35, available at https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-62627%22]}.

[38] See the French Penal Code, in its current form, available at https://www.legifrance.gouv.fr/codes/id/LEGIARTI000043409170/2021-04-23/accessed on 02.05.2024.

and the protection of minors[39] to Art. 227-23 of the French Penal Code, according to which the phrase "representation of a minor" was inserted in the precept of the incrimination, as an alternative to the phrase "image of a minor" of a pornographic nature, and a relative legal presumption of the existence of the state of minority was inserted for the person appearing in the pornographic image, when his/her appearance looks like that of a minor, and the burden of proof to the contrary is on the accused.

The representation of minors in pornographic poses covers the virtual domain, which does not exist, as it emerges from the parliamentary debates held during the formulation of amendments to the bill under discussion[40] .

This thesis was also confirmed by the French Court of Cassation in its case law[41] when it ruled on an appeal brought by the defendants accused of importing and distributing to the public a film in which the protagonist, an animated character, "undoubtedly presents the characteristics of a small child, in particular in view of his small size in relation to the adult characters around him, the absence of morphological signs suggesting that he might be an adult and his facial features which make him appear as a very small child", a character who was having sexual relations with adult women; the court dismissed the defendants' appeal, holding that the legislature's intention was to punish the dissemination of pornographic depictions of minors and that the scope of the offence was broadened by including in the subject-matter of the offence, previously limited to the image of a minor, any visual, photographic or cinematographic depiction of a child, any depiction of a minor; the offence therefore also covered unreal images of an imaginary minor or even images resulting from the transformation of a real image.

The French legislator's intention not to criminalise child pornography is clear from the last sentence of Article 227-23 of the French Penal Code, which states that the provisions of the offence also apply to images of a person whose physical appearance is that of a minor, unless it is proved that the person was at least 18 years old at the time the image was taken or recorded.

However, by reversing the burden of proof from the prosecution to the accused regarding the adult status of the person whose physical appearance is similar to that of a minor, even actual cases of pseudo-child pornography can be sanctioned, to the extent that the accused fails to prove the contrary.

7. A look at the extent of virtual child pornography and pseudo-child pornography and the challenges posed by A.I.

At the beginning of the paper I mentioned the huge amount of material on sexual abuse of minors[42] , which is spread in the virtual environment, but which is recently amplified by the use of A.I. technology to generate such content.

[39] Published in the French Official Journal on 18 June 1998, available at https://www.legifrance.gouv.fr/loda/id/LEGIARTI000006492895/1998-06-18/accessed on 04.05.2024.

[40] Available at https://www.senat.fr/rap/l97-265/l97-265.htmlaccessed on 08.05.2024.

[41] See French Court of Cassation, Criminal Division, Judgment of 12 September 2007, available at https://www.legifrance.gouv.fr/juri/id/JURITEXT000007640077?fonds=JURI&page=1&pageSize=10&query=%22l%27aspect+physique+est+d%27un+mineur%22&searchField=ALL&searchType=ALL&tab_selection=all&typePagination=DEFAULTaccessed on 07.05.2024.

[42] In English, "Child sexual abuse material".

Among law enforcement in the United States, a country in whose jurisdiction social networks or electronic communications service providers[43] with a significant percentage of global users operate, the sense of helplessness in the face of the explosive number of such materials flooding the online environment has increased with Meta's announcement[44] of the integration of end-to-end encryption into electronic messaging services earlier this year[45] ; added to this is the growing number of computer-generated materials from A.I. of such sexual abuse of real or non-existent children, which further increases the logistical and human effort to investigate the circumstances in which these materials were produced; once it is established that these are virtual child pornography materials, the investigation is not as definitive as it should be, since, under US law, this type of virtual child pornography of fictitious children is not criminalised in this situation[46] ; these situations significantly reduce the chances for prompt intervention in cases of sexual abuse of real children, whose victimisation is disseminated online.

In addition, it is also worth noting the ease[47] with which criminals can use A.I. to modify the source code of real child sexual abuse material so that the result does not change the nature of the content, but only its logical (digital) fingerprint[48] , so that the material cannot be recognised by the filters used to detect and remove illegal content.

However, the same A.I. is able to offer solutions to overcome these obstacles in an effective way; for example, a joint project of the Centre for Artificial Intelligence and Robotics of the United Nations Interregional Crime and Justice Research Institute (U.N.I.C.R.I.) and the Ministry of Interior of the United Arab Emirates, called "*AI for Safer Kids"*, was launched in 2020 and aims to effectively combat online child abuse, including sexual abuse, by providing information, best practices and tools for using AI, and facilitating the exchange of experience between law enforcement agencies from 72 countries[49] .

It should be noted that at this point in time, AI technology is not so reliable that the results of its processing are not duplicated by human examination, and this is even more so for child sexual abuse material; however, it does take many of the time-consuming tasks off the shoulders of those involved in preventing and combating this scourge online and offline, such as identifying duplicates of such material in an automated way, as well as facilitating the identification of new victims.

Against the current backdrop of the extent of online dissemination of child sexual abuse material, the technology industry has come up with its own solutions to the use of A.I. technology. in identifying, removing and reporting this type of illegal content in their own online platforms that they manage or for which they provide

[43] Like Meta, Twitter, Snap Inc., TikTok, Google etc.

[44] The company was listed as the most prolific partner for law enforcement agencies in identifying and reporting the circulation of child sexual abuse material on social networks it managed, according to

[45] See article "*Law Enforcement Braces for Flood of A.I.-Generated Child Sex Abuse Images*", published on 30.01.2024 on The New York Times website, available at https://www.nytimes.com/2024/01/30/us/politics/ai-child-sex-abuse.html?searchResultPosition=1, accessed 15.04.2024.

[46] The so-called "*affirmative defense"* set in favor of the defendant, mentioned above.

[47] In the same vein, the article "*Law Enforcement Braces for Flood of A.I.-Generated Child Sex Abuse Images"* , cited.

[48] Known as a "hash".

[49] Project available on the platform at https://unicri.it/topic/AI-for-Safer-Children-Global-Hubaccessed on 10.05.2024.

electronic communication services; some companies use these machine learning processes in ways that are compatible[50] with respect for the human right to privacy in its substance, and others in ways that have sparked controversy and legal disputes[51] , such as the generation of a facial recognition fingerprint[52] used to identify victims and offenders, based on a huge database containing billions of photos taken from the internet and social media.

Thus, there is an acute need to regulate the use of this A.I. technology, with potentially diametrically opposed capabilities, depending on the purpose of its use.

In Europe, more specifically within the political edifice called the European Union, a draft law on A.I. is currently being debated in the legislative forums of the European Parliament and the Council of the European Union, and has recently been provisionally agreed[53] ; the future legislation aims to maximise the benefits of this new technology in order to strengthen democracy, respect for human rights and the environment, as well as to minimise its potential risks and impact; it could also be used to combat the proliferation of child pornography, including virtual and simulated child pornography, online.

Also in the United States, with a more specific objective, a bill[54] called the Commission of Experts on Child Exploitation and Artificial Intelligence Act has recently been introduced in the US Congress, aiming to establish a commission to devise a legal framework useful in the prevention, detection and prosecution of AI crimes against children.

8. Conclusions

We found that the field of virtual child pornography and pseudo-child pornography involves relatively different legislative solutions in the positive law of the United States, the Netherlands, Belgium and France.

Similar to the US Criminal Code, French law does not incriminate pseudo-child pornography, but places the question of whether or not this type of child pornography is punishable in practice on the evidentiary level; the option thus reconciles the competing interests at stake, on the one hand, the individual's particular interest in privacy and freedom of expression, and, on the other hand, society's overriding interest in preventing and combating the use of minors for sexual abuse or exploitation, and in protecting their dignity and privacy.

It is noted that this option of criminalisation is also consistent with the view of the legislator in the United States of America and France on placing the offence

[50] For example, the Safety API tool offered by Google to combat child sexual abuse online by detecting, removing and reporting new potentially harmful or illegal content; more information is available at https://protectingchildren.google/#alliances-and-programs, accessed on 10.05.2024.

[51] See Report provided by the Research Service of the European Parliament, November 2020, available at https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/659360/EPRS_BRI(2020)659360_EN.pdf, accessed 10.05.2024.

[52] For example the Clearview AI tool, offered by a US start-up of the same name, further information is available at https://www.clearview.ai/contactaccessed on 10.05.2024.

[53] See press release posted on 09.12.2023 on the European Parliament's website, available at https://www.europarl.europa.eu/news/ro/press-room/20231206IPR15699/artificial-intelligence-act-deal-on-comprehensive-rules-for-trustworthy-aiaccessed on 10.05.2024.

[54] See press release issued on 16.04.2024 by Congressman Nick Langworthy, available at https://langworthy.house.gov/media/press-releases/congressman-langworthy-introduces-legislation-combat-use-artificialaccessed on 10.05.2024.

of child pornography mainly in the spectrum of social relations relating to birth and protecting minors from prohibited conduct.

In contrast, the legislation of the Kingdom of the Netherlands mainly protects social relations relating to birth and the development of collective morality in the sense of the repugnance of the conduct contained in child pornography, while the legislation of the Kingdom of Belgium had the same vision until the legislative amendment in 2022, but subsequently kept the offence in the sphere of these social relations only in a subsidiary manner.

Thus, we note that the criminalisation of virtual child pornography and pseudo-child pornography is closely related to these states' view of the social relations affected mainly by the specific conduct of child pornography.

We have also found that some regulations on virtual child pornography, as well as their interpretation and application in practice, such as the legislation of the United States of America and the Kingdom of the Netherlands, offer a high standard of predictability of the rule, such as to significantly limit the power of interpretation and discretionary application of the judiciary, in accordance with the principle of legality of incrimination *nullum crimen sine lege* and its component *lex certa*.

As Article 2256 of the U.S. Criminal Code is worded, and as Article 240b of the Dutch Criminal Code is interpreted in case law, with regard to virtual child pornography, the standard "indistinguishable from the image of a minor" could also be used to reformulate the precept of criminalisation of pseudo-child pornography.

We state this because the standard "adult person appearing to be a minor" used for child pornography has different perspectives of interpretation[55] ; one in which criteria extrinsic to the physiognomy, somatic features and secondary sexual characteristics[56] of the person depicted are used, the other in which the assessment is based strictly on the latter criteria (physiognomy, somatic features, secondary sexual characteristics).

Thus, according to the first variant, accessories or style of dress or hairstyle suggesting the idea of a minor, such as a school uniform, braided pigtails, a Barbie doll/schoolbook in hand, a backpack on the back, etc., could be traced, perhaps complementing a shy or playful attitude, independently of the visibly mature physical appearance of the person depicted, in order to characterise the material as child pornography.

In contrast, the other option only includes in the classification of this type of child pornography elements related to physical appearance, such as an adolescent face, the presence of facial acne, visibly immature somatic features, lack of facial or pubic hair or the onset of such hair.

It should be pointed out that even in the latter variant, subjectivity is not excluded in assessing the appearance of minority, especially in situations where we are talking about young adults whose physical appearance is close to that of a 16-17 year

[55] The conclusion is all the more obvious in wording such as that used in Art. 374 para. 4 of the Romanian Penal Code for child pseudo-pornography, according to which *pornographic material* means any material that *presents* a person of legal age as a minor engaging in sexually explicit conduct; the term "presents" prima facie leads us to think of a context detached from the mere physiognomy of the person represented in that material.

[56] In the literature, secondary sexual characteristics are understood to mean in girls - the appearance of pubic hair and mammary development, respectively the appearance and dimensions of the testicles, penis and pubic hair in boys; for details, see D. Navolan, D. Stoian, M. Craina, *Sexologia de la A la Z, 2nd edition*, Publishing House Victor Babes, Timisoara, 2020, p. 21.

old minor, bearing in mind that the transition to adulthood is natural, gradual and relatively imperceptible.

This degree of subjectivity can make the difference between a conviction and an acquittal, with all the legal consequences that entails.

Therefore, we believe that the competing interests at stake can and must be reconciled in a fair manner, the desiderata being greater predictability of the law, respect for the principle of *ultima ratio* and proportionality between the means and the end, and the degree of adequacy of the means to the objective pursued.

In our view, this reconciliation can be achieved by reformulating the provisions criminalising child pseudo-pornography by reference to the following *standard*: the image of a real adult, whether or not digitally distorted, so that it is indistinguishable by itself from that of a prepubescent or pubescent minor engaged in sexually explicit conduct by an ordinary observer without close scrutiny.

The reference to a prepubertal or pubertal minor leads to an exclusive analysis of the physiognomy, somatic features and secondary sexual characteristics of the person represented, and the degree of differentiation from a minor at the age of majority is higher, thus reducing the judge's margin of discretion.

Thus, we would remove the ambiguity as to whether or not the criterion of physiognomic image is exclusive in determining whether the minor is a minor, the subjectivity of distinguishing a minor teenager from a young adult, and we would protect the image and prevent frivolous sexualisation and the generation of a subculture of promoting sexual abuse or sexual exploitation of the most vulnerable minors, while respecting freedom of expression and the privacy of the individual; we would have a necessary compromise for the simultaneous protection of competing interests.

Logic and consistency in regulation would oblige us to limit virtual child pornography - realistic images of a non-existent minor - to the same category of minors, prepubertal or pubertal.

Of course, a note of subjectivity would still persist when the judge has to analyse and respond to a defence by the defendant that, in his opinion, the real adult or fictitious minor depicted in the picture does not appear as a pubertal minor, but as a minor on the verge of majority, say 17, thus invoking a factual error.

However, as has been crystallised in the case-law of the European Court of Human Rights[57] , because of the general nature of laws, their wording cannot be absolutely precise, and more or less imprecise formulas are necessary in order to avoid excessive rigidity; equally, the foreseeability of the law does not preclude the person concerned from seeking the advice of experts in order to assess, to a reasonable extent in the circumstances of the case, the consequences which might result from a given act.

Of course, in the context of this proposal, the adulthood or imaginary character of the person represented would fall to the defendant, as provided for in U.S. law, since he is certainly in a better position than the prosecutor in this respect.

A final point should be made here, namely the need for multidisciplinary studies to prove or disprove the existence of a serious link between the creation and possession of virtual child pornography or pseudo-pornography and the sexual abuse of

[57] Judgment in Cantoni v. France, paras 31, 35, cited above; Judgment of 25.05.1993 in Kokkinakis v. Greece, para 40, available at https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-62384%22]}accessed 09.05.2024.

children, as there are relevant voices[58] arguing that criminalising such conduct would actually reduce the consumption of actual child pornography with real minors; the answer to such a question needs to be provided, as important competing interests are at stake, such as freedom of expression and individual privacy, and on the other side a concept, also important for the development of a modern and robust society, but volatile over time - collective sexual morality.

On the other hand, we have noted the extent of child pornography in the electronic environment, especially virtual child pornography, and the challenges posed by the use of artificial intelligence in the creation of such content.

In this respect, the direction of action is to integrate as a way of working in this kind of cases A.I. tools, capable of analysing, classifying and reporting, in a much shorter time and with greater accuracy, a volume of data incomparably superior to human capabilities; it would also be necessary to involve the providers of online platforms and services, which can host and propagate such illegal content, for proactive detection using artificial intelligence technology.

The sheer volume of material circulating around the world makes a reactive approach to the phenomenon, by investigating after the fact cases of child pornography in digital format, ineffective and implausible; the thesis is all the more eloquent because, at present, a major shortcoming is the lack of a standardised classification[59] of the content of child sexual abuse material between the various parties involved in the process of preventing and combating child pornography - law enforcement agencies, non-governmental organisations, companies in the I industry.Such a shortcoming also affects the effective cooperation between public and private partners in several countries.

Thus, a unified approach to the problem is needed from both a legislative and administrative point of view from developed countries in order to reduce as much as possible the causes of the proliferation of this scourge.

Finally, we stress the importance of following the future legal instruments at international level, especially at the level of the European Union and the United States of America, for regulating the use of A.I., mentioned above, in order to analyze and assess, to a reasonable extent, the impact and effectiveness of these regulations in combating child pornography online, but the subject will probably be reserved for a future study.

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[58] See F. Morales Prats, *Los ilicitos en la red(II): pornografia infantil y ciberterrorismo*, in ”El cibercrimen: nuevos retos juridico-penales, nuevas respuestas politico-criminales”, Comares, Granada, 2006, p. 294, *apud* M.A.B. Pasamar, *op. cit*.; K.S. Williams, *Child Pornography Law: Does it Protect Children?*, in ”Journal of Social Welfare and Family Law”, 2004, pg. 245-261 *apud* M. Eneman, A. A. Gillespie and B. C. Stahl, *op. cit*.

[59] See Report provided by the European Parliament Research Service, November 2020, cited above.

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