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PARENTAL ALIENATION (~Estrangement) BETWEEN SCYLLA AND CHARYBDIS OR HOW MY CHILD IS TAUGHT TO HATE ME

Ioana PĂDURARIU (*)
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Abstract

There are many custody (exercise of parental authority) contexts in which alienation issues arise and need to be investigated and properly understood in order to propose some appropriate legal and psychological remedies for the whole family. What is and what is not parental alienation/~estrangement? In fact, what did the Romanian legislator want to protect – or to punish maybe? – by adopting the Law No. 123/2024? The present study aims to indicate some issues regarding: descriptors; effects; emotional child abuse; civil, criminal, custody/parental authority and therapeutic/emotional responses to parental estrangement, in order to delimit her from parental alienation also. Between myth and reality, between a kind of Scylla and another kind of Charybdis, the child is often faced with a difficult choice: mother or father. The emotional pressure to which he is subjected, sometimes accompanied by violence (verbal or physical), is used as a shield; a defence of the rights that some believe they have, regardless of whether, to obtain them, they are willing (and do so!) to step over everything... over the souls and the bodies of their own children. So, are we face to face with some myths or fears related to parental alienation/~estrangement? If that is so, in order to understand them, can we confirm or dispel them?

Keywords: *parental estrangement (PE), parental alienation (PA), parental alienation syndrome (PAS), best interest of the child, alienated child, naïve alienation, active alienation, alienating/abusive parent (AP), victim/abused parent (VP), emotional child abuse, Law No. 272/2004 on the protection and promotion of the rights of the child (LPC).*

'Mother is the child's heaven […]. Dad is his earthly God […].'[1]

1. Introduction

No one is allowed nor comfortable living and settling in a despotic state (and equally in any hostile space, wherever it may be). The intrinsic nature of the republic requires that those who 'share justice' do so by keeping it close to the letter of the law[2] (that there is no law for one, and another law for the other) and that both, judges, and the legislator, are obliged to honour 'the social' contract and 'the spirit of the laws' (those concepts spoken of and believed by the leading representatives of the Enlightenment period – Jean-Jacques Rousseau and Charles-Louis de Secondat, Baron de Montesquieu), remaining separate powers but worthy of marking society as a whole[3].

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[1] Savatie Baștovoi, *Antiparenting. Sensul pierdut al paternității*, Cathisma Publishing House, Bucharest, 2017, p. 120, 128.

[2] Let us not forget, for example, Paul Johann Anselm Feuerbach, a German criminal specialist (1775-1833), who basically laid this principle at the basis of both legislative and jurisdictional activity. Let us also remember that the principle of the legality of incrimination was enshrined at international and European level in Article 11 para. (2) of the Universal Declaration of Human Rights (1948), as well as in Article 7 ECHR (1950) and, at national level, was included in explicit provisions in the fundamental laws of 1866, 1923, 1938, 1991 and the revised Constitution of 2003, but also in the Criminal Codes of 1865, 1936 and 1969.

[3] See Cesare Beccaria, *Despre infracțiuni și pedepse*, Scientific Publishing House, Bucharest, 1965, p. 13, *apud* Constantin Sima, *Principiul legalității – fundamentul dreptului penal modern*, in "Pro Lege", No. 1/2016, p. 14 *et seq.*

The obviously sensitive area of family relations and relations between parents and children is also part of what needs to be protected or defended, especially if we take a look at the alarmingly large, growing casuistry in which parents, obviously, to the detriment of the interests/interest of children: either dispute the exercise of parental authority; or either establish at will the way to preserve the personal relations between the child and the parent to whom he does not live constantly; or even fail to bring to a common denominator the contribution of each to the expenses of raising and educating the child. A 'mathematics' that is still owed to rise from minus somewhere, without answers, as an equation with several unknowns, mainly due to a legislative vacuum, but also, in the secondary, to a social, economic imbalance and, why not, a weak investment, personally or at macro level, in the education of couples (from marriage or from outside marriage) who have children. These milestones have consistently weakened, on the one hand, the legal and social significance of marriage, perceived today as an increasingly thin, more dilute, more groundless construction, and, on the other hand, the role that parents have in the process of raising the child. Perhaps we should remember that we owe it to constantly and honestly, without detours, to the following: *What does our child want, not what we, the parents, want or what is more at hand to us? What would be more helpful to our child? What is the best interest of the child? How do we apply that principle and how do we protect our child? How do we keep our child safe from abuse, neglect, violence and we truly let his voice be heard? How far do we go with what we want?*

The legal void we mentioned above refers to the phenomenon of parental estrangement (PE) – confused in the psychological name of parental alienation (PA) – a possible, veritable 'double-edged weapon' for the child-parent/s relationship, child who can be easily 'thrown' into a false smiling tandem with the face of mother and father, between two dangers, Scylla and Charybdis, both harmful, as seen in the following. It seems that this loophole of Romanian legislation was filled by the recent amendments brought to the Law No. 272/2004[4] *(hereinafter, LPC)* by Law No. 123/2024[5], inadmissible late, after 20 years. In this study we aim to highlight some aspects, mainly related to: • *PA or child between Scylla and Charybdis – concept or syndrome?* • *Legislative and jurisprudential guidelines prior to the adoption of Law No. 123/2024 – anticipation of the need for regulation, intuition or legal common sense?* • *PROs and CONs about PE. Law No. 123/2024 – evolution or regress?* • *PE/PA and emotional/psychological implications – teaching our child how to hate the other parent (or both!) and treat him, according to our will, as we once did with Jesus, by sending him from Annas to Caiaphas?*

2. PA or child between Scylla and Charybdis[6] – concept or syndrome?

The PA phenomenon, which falls exclusively within the psychology's domain

[4] Law on the protection and promotion of the rights of the child, republished in the Official Gazette of Romania, No. 159/05.03.2014, with subsequent amendments and completions.

[5] Published in the Official Gazette of Romania, No. 414/07.05.2024.

[6] Mentioned by Homer in the Odyssey, Scylla and Charybdis were, according to Greek mythology, sea monsters located on opposite sides of the Strait of Messina, between Sicily and the Italian mainland, so close to each other that no ship could avoid passing by one without encountering the other and thus being destroyed. As a result, these two monsters represented an inevitable threat for sailors trying to pass through (Homer says in the Odyssey, Book XII, that Ulysses would have confronted them as well). This is how these stories gave navigating between two dangers a proverbial sense, an

of interest, is not a new one; specialized literature recorded it in 1985[7] under the form of Parental Alienation Syndrome (PAS), from which later formulations such as pathological alienation[8], parental alienation[9], unjustified rejection[10], or parental denigration[11] emerged.

Who hasn't heard, at least once in their life, if not in their own life, then in that of the others (relatives, friends, or acquaintances), expressions like: '*She/he never wanted you!*', 'I'm sure *he/she will be late as usual*!', 'I was/am your *real* parent!' and so on. There are just a few examples of what an angry parent repeatedly expresses to the children and their effect is to break the child's confidence in and love for the other parent and to create an intolerable confusion and, worse, an emotional abuse of the child.

It is true that there has never been and there is no consensus on the concept of PA. The terms PA and PAS are most often used interchangeably, possibly due to the word syndrome, which leads to a set of behaviours or beliefs attributed to the alienating/abusive parent (AP), such as, among others: • opposing the enforcement of court decisions regarding the establishment of visitation and the time the child spends with VP (victim/abused parent); • denigrating the VP in front of the child (reproaches, accusations - both verbal and non-verbal language - whether founded or not, which make VP a significant negative character (his personality and parenting flaws are exaggerated also in the child's presence); • the assurance (expressed unequivocally or suggested) that everything would be much better if the other parent disappeared; • his/her uncontrolled rage reflected (and) onto the child; • the scheduling of activities to be carried out together with the child, all in clear competition with those desired or even already established by the other parent; • the scheduling of a very large number of activities for the child precisely with the idea

expression that means 'to be in a predicament, in a danger from which there is no way out' or 'to choose between two evils' or, why not, the equivalent of the proverb 'to jump from the frying pan into the fire'. Even Victor Hugo used the equivalent French expression ('tomber de Charybde en Scylla') in 1862, this time in a political context, as a metaphor for the organization of two rebel barricades during the peak of the Paris uprising, around which the final events of the novel "Les Misérables" culminate. No further than 1983, however, the expression is used again, but in the musical domain, in the lyrics of the song (single) by The Police, "Wrapped Around Your Finger", the second verse using it as a metaphor for entering a dangerous relationship ('caught between the Scylla and Charybdis' – which would not be far from the meaning of the child's 'entrapment' in a dangerous relationship with the alienating parent - AP), reinforced by a later mention of the similar expression 'the devil and the deep blue sea'.

[7] Apparently, PA was first described in 1976 as a 'pathological alignment'. See James N. Bow, Jonathan W. Gould, James R. Flens, *Examining Parental Alienation in Child Custody Cases: A Survey of Mental Health and Legal Professionals*, in "American Journal of Family Therapy", 37(2), 2009, p. 127-145, at *http://www.drjamesrflens.com/_Bow_et_al.__2009___Examing_parental_alienation_in_child_custody_case.pdf*, last consulted on 27.11.2024. See, also, Richard A. Gardner, *Recent trends in divorce and custody litigation*, in "Academy Forum", No. 2/1985, vol. 29, p. 3-7, *apud* Andrei Ionel Mocanu, *Duo conjugal versus duo parental*, in the volume coordinated by Marieta Avram, *Autoritatea părintească. Între măreție și decădere*, Solomon Publishing House, 2018, p. 302.

[8] Richard A. Warshak, *Bringing Sense to Parental Alienation: A Look at the Disputes and the Evidence*, in "Family Law Quarterly", 37, 2003, p. 273-301, *apud* Andrei Ionel Mocanu, *op. cit., loc. cit*, p. 303.

[9] Douglas C. Darnall, *Beyond Divorce Casualties: Reunifying the Alienated Family*, Rowman & Littlefield Publishing Group, Lanham, Maryland, 2001, *apud* A.I. Mocanu, *op. cit., loc. cit.*, p. 303.

[10] Barbara J. Fidler, Nick Bala, Michael A. Saini, *Children who resist post separation parental contact. A differential approach for legal and mental health professionals*, Oxford University Press, New York, 2013, *apud* A.I. Mocanu, *op. cit., loc. cit.*, p. 303.

[11] Jenna Rowen, Robert Emery, *Examining parental denigration behaviors of co-parents as reported by young adults and their association with parent-child closeness*, in "Couple and Family Psychology: Research and Practice", 3(3), 2014, p. 165-177, *apud* A.I. Mocanu, *op. cit., loc. cit*, p. 303.

that these would interfere with the other parent's activity plan; • phone calls, messages, and/or letters often not passed on to the child; • all references to the VP are removed from the house, including pictures which might be torn apart even in front of the child) in order to exclude the VP; • keeping secrets or organizing secret meetings with the child, to the detriment of the VP; • 'poisoning' the child with unfounded, unjustified reasons to fear the VP; sometimes, earlier disciplinary interactions involving angry or confrontative (but not abusive, non-violent) behaviours by the VP are repackaged and used as a weapon to confirm the VP's violence toward the child; • the refusal of access for the VP to the medical file or to the conduct of surgeries, medical tests, as well as to the school evaluations or the educational progress of the child; • the withdrawal from the circle of VP's acquaintances, cumulatively or not with the removal of any person who might have a different opinion about VP than that of AP.

The examples could go on and are practically infinite. What do all these lead to? To the emergence of the *alienated child*[12]. Maybe, in other words, it is about the same phenomena that the recent doctrine stated about[13]: 'Even greater attention must be given when the child comes into contact with the authorities during a complicated moment in their life, namely in the context of their parents' divorce (or the separation of unmarried parents, *s.n.*). *For the child, both their inner world and outer world are often encompassed between the two poles described by their parents. Everything and everyone relates to this world, from emotions and feelings to life rules and the space of life. When, however, the relationship of his parents shifts from the eternal project into the dissolutive concrete, his world is shaken to its core.*' Thus, the *parents 'often crush what they have built most precious: their own child*'. What should be noted as common to all these true manipulation techniques (or even violent manifestations) is the AP's intention (conscious or not) to strengthen the relationship with the child at any cost, to the detriment of the VP.

On the other hand, we must underline also some VP's behaviours, which contribute to a child alienation: • his/her passivity and withdrawal in situations of high conflict (VP cease attempts to call or communicate with the child, give up attempts to reconcile with the child in therapy, his/her lack of financial resources and/or feelings of helplessness about what to

[12] See Joan B. Kelly, Janet R. Johnston, *The Alienated Child. A Reformulation of Parental Alienation Syndrome*, in "Family Court Review", No. 3/2001, vol. 39, p. 251-254, at *https://jkseminars.com/pdf/AlienatedChildArticlepdf*, last consulted on 27.11.2024. The aforementioned authors proposed a scale (from positive to negative) as follows: *(a) the healthiest end/point of the relationship* – the child establishing *positive relationships with both parents*; *(b) the child's affinity with one parent*, a situation that does not prevent the child from expressing interest in maintaining a connection with the other parent; *(c) the allied child* – caught in the conflict between parents prior to their divorce or separation, manifesting between disdain and/or indignation and recognition of love for the parent who caused the divorce or the separation; *(d) the estranged child* – exposed to violence or even a victim of abuse or neglect by one of the parents, both before and after the divorce or the separation; often, they can only feel safe enough to reject the violent or abusive parent after the separation/divorce; *(e) the alienated child* – situated at the negative extreme of the scale [opposite the positive extreme of a)], this is the child who clearly refuses to maintain any contact with one of the parents, manifesting anger, hatred, rejection, and/or fear towards that parent, feelings significantly disproportionate to the current (real) experience with that parent.

[13] See Ioan Ilieș Neamț, *I see you. Sau despre ascultarea copilului în procedurile administrative și judiciare care-l privesc, cu un accent pe procedura divorțului*, in "Revista de Dreptul Familiei", No. 1/2024, Universul Juridic Publishing House, Bucharest, p. 200-201.

do to restore the parent-child relationship); • counter-rejection of the alienated child (VP feels that he/she is being abusively treated by an alienated child who is also refusing all efforts to reconnect and VP can become increasingly offended by the absence of respect and gratitude he/she receives from the alienated child); • a harsh and rigid VP (also *prior* the separation/divorce); • a self-centered and immature VP – he/she puts his/her needs ahead of the child's during the marriage (*e.g.*: going fishing/shopping with friends rather than attending the child's soccer game/ballet performance); • a critical and demanding VP during the marriage – always asking for perfection in studying/in athletic, musical performance; unwise and angry criticism of their children's appearance and/or their friends; • a VP with a diminished empathy for the child – VP believes that the child does not really feel this way at all and is only the mouthpiece for the angry accusations and denigration of the AP, but, in his/her anger toward AP for creating the child's alienation, VP has no empathic connection with the child and cannot be emotionally available to his/her child even when he/she raises legitimate complaints.

Moreover, there are other reasons related to both parents (VP and AP) or factors/situations external to their marriage/family or unrelated to the VP or to the AP, which might lead to a PA situation, such as: • the nature of the separation/divorce process which encourages hostile, polarized, black-and-white manner of thinking; • prior to separation/divorce, both parents use their children in the marital conflict and this hostile dynamic involving the child may continue into the divorce process and after that; • both parents experienced separation/divorce as a deeply humiliating, as a complete abandonment which might result in vengeful behaviours, vindictiveness, and a complete blurring of boundaries between parent and child ('he/she doesn't love *us*, otherwise he/she wouldn't have left *us!'* seems familiar? – in that case, it is a great probability that a VP convert to an AP and *vice versa*[14]); • the existence of new partners for both, AP, and VP, particularly those perceived to be 'responsible' for the breakup/the dissolution of the marriage – this situation can make children feel betrayed by the parent; • religious beliefs and practices in order to condemn one of the parents (usually the VP) who is seeking divorce for his/her 'immoral behaviour and ungodly choices' (the leading role in this situation is played by the other parent, by someone from the extended family, or even by an entire religious community); • the role of the professionals (family law attorneys, minor's counsels, custody evaluators, individual therapists for parents and children) who tend to become polarized themselves and take absolute, rigid points of view in supporting their 'clients'.

However, it is imperative to make a distinction between an *alienated child, who persistently refuses and rejects visitation due to unreasonable negative feelings and views*, and *other children who also resist contact with a parent after separation for a variety of normal, realistic, and*

[14] It may occur a combination or interference of VP's features and AP's features, potentially resulting in a 'disturbing' identity, as illustrated below: one possibility is that an AP may act in a manner similar to a VP, but also in a manner similar to himself (an AP); similarly, a VP may act in a manner similar to an AP, but also in a manner similar to himself (a VP); this could occur sequentially, at a precise time, or concurrently, resulting in the interchangeability of the roles and the gradual merging of one role into another; this scenario is likely to render considerably more complex the process of ascertaining the primary contributor to a PA situation.

developmentally expected reasons[15]. Nevertheless, there is a tendency for all young people resisting visits with a parent to be incorrectly labelled as 'alienated'. Conversely, parents who express reservations about the value of visitation in these situations are often labelled 'alienating parents', despite the absence of any concrete evidence or research to support such a claim.

In the specialized literature[16], another distinction has been made between: • naïve PA (considered to have the lowest risk for the child; AP recognizes the value of the relationship between VP and the child, both before and after separation or divorce; he sincerely tries to maintain this strong relationship, but from time to time, he does or says something that suggests VP's 'fault' – in expressions like: 'you have exactly your father's/mother's temperament'; 'your mother is not helpless, she can find out about your school situation herself'; 'we won't be able to afford to eat out until I receive the child support; if I don't receive it on time, we have no choice but to eat at home' and so on; it seems that, in this category, AP is the least 'harmful' because he/she learn from his/her mistakes and does his/her best to correct them); • active PA (this kind of AP struggles with unresolved issues that give rise to various, intense, emotional reactions; he is the one who 'lives' and 'feeds himself' with the memories of the 'WHYs' of their separation/divorce, but even so, he is classified in a moderate risk category); • pathological PA (the most severe and serious form of PA, in which the PA behaviour is absurd, irrational, arbitrary, discretionary, and out of control – especially regarding the emotional aspect –, sometimes even leading to violent situations, aggressive manifestations – verbal and/or physical).

The concepts of PA/PAS, proposed by Gardner, have not gone without echo and have not been sheltered from **criticism**, subsequent studies[17] noting that: • PA is seen as a non-existent phenomenon, without adequate confirmation in clinical and judicial reality, or, in a more moderate version, PA/PAS actually exists but represents a rare and marginal phenomenon in *custody* disputes (the equivalent of the institution of *parental authority* exercise in the Romanian law); • Gardner views PA/PAS as having an attitude that minimizes child abuse, especially paedophilic abuse; • PA/PAS particularly opposes feminist movements, considering them detrimental to the abilities of divorced/separated mothers to care for the child; that is because, in

[15] *E.g.*: normal separation anxieties in the very young child, fear of leaving the custodial parent alone, behaviours of the parent or stepparent that affect willingness to visit, fear or inability to manage the high-conflict transition (as a result of a high-conflict marriage and divorce/separation).

[16] See D.C. Darnall, *op. cit., apud* A.I. Mocanu, *op. cit., loc. cit.*, p. 303.

[17] See, among others: Cheri L. Wood, *The parental alienation syndrome: a dangerous aura of reliability*, in "Loyola of Los Angeles Law Review", 29, 1994, p. 1367-1415; Kathleen Coulborn Faller, *The parental alienation syndrome: What is it and what data support it?*, in "Child Maltreatment", 3(2), 1998, p. 100-115; Carol S. Bruch, *Parental Alienation Syndrome and Parental Alienation: Getting It Wrong in Child Custody Cases*, in "Family Law Quarterly", 35(3), 2001, p. 527-552; Robert E. Emery, *Parental Alienation Syndrome: Proponents bear the burden of proof*, in "Family Court Review", 43(1), 2005, p. 8-13; Jennifer A. Hoult, *The Evidentiary Admissibility of Parental Alienation Syndrome: Science, Law and Policy*, in "Children's Legal Rights Journal", 26(1), 2006, p. 1-61; Sonia Vaccaro, Consuelo Barea Payueta, *El pretendido Síndrome de Alienación Parental. Un instrumento que perpetúa el maltrato y la violencia*, Bilbao, Desclée de Brouwer, 2009; Joan S. Meier, *A Historical Perspective on Parental Alienation Syndrome and Parental Alienation*, in "Journal of Child Custody", 6, 2009, p. 232-257. Conversely, for supporters of Gardner's ideas, see William Bernet, Wilfrid von Boch-Galhau, Amy Baker, Stephen L. Morrison, *Parental Alienation, DSM-V, and ICD-11*, in "American Journal of Family Therapy", 38(2), 2010, p. 76-187 (information available at *https://it.cathopedia.org/wiki/Alienazione_parentale*, last consulted on 27.11.2024).

Gardner's early works, AP, the 'guilty' party in the smear campaign against the other parent (VP), was mainly identified with the mother, a clear consequence since, for many decades, the 'rule' was that, after separation/divorce, the child (especially the very young one) was most often entrusted to the mother or had their residence established with her, with occasional visits to the father or such visits made by the father at the mother's residence, sometimes even only under her supervision; • another danger, recognized as such even by the supporters of PA/PAS, is that the abuse of this diagnosis could turn (prove) into a real weapon for AP to defend against abuse allegations and could lead to AP obtaining *custody/exclusive exercise of parental authority* of the abused child.

However, the indiscriminate employment of PAS terminology has engendered a general confusion and misinterpretation within judicial, legal, and psychological areas. In USA, some jurisdictions have begun to reject expert witness testimony on PAS, citing the higher standards for admissibility of evidence set out in *Daubert v. Merrell Dow Pharmaceuticals* (1993)[18]. In the broader community, the notion of PAS has given rise to its own set of gender politics: father's rights groups and women's rights advocates, for instance, have either embraced, utilised, or vehemently rejected Gardner's formulation. The media has entered the debate, conducting extensive stories and investigations, some of which adopt a balanced, journalistic approach, while others are sensationalised and one-sided. Given the absence of empirical support for PAS as a diagnostic unit, the exclusion of evidence about PAS in some courtrooms, the oversimplified concentration on the brainwashing parent as the primary aetiological agent, and the frequent improper application of Gardner's PAS theory to many different phenomena in child custody litigations, there is an urgent need to reshape a more useful terminology than PAS. Certainly, there are many custody contexts in which alienation issues arise and need to be investigated and properly understood in order to propose appropriate legal and psychological remedies for the family.

3. A few legislative and jurisprudential guidelines prior to the adoption of Law No. 123/2024 – anticipation of the need for regulation, intuition or legal common sense?

In this fruitful context of interpretations and meanings regarding PA (as originally defined and/or maintained as a concept), in the national law, until the adoption of Law No. 123/2024, the phenomenon of PA was recognised and defined[19], in the medical domain, as 'a form of serious psychological (emotional) abuse of the child, consisting in the activity of systematic denigration of one parent by the other parent, with the intention of alienating the child towards the other parent'. We note that, at that time (2016), it was considered that only the parent could have the 'honour'

[18] See Joan B. Kelly, Janet R. Johnston, *op. cit.*, p. 250 and also *https://supreme.justia.com/cases/federal/us/509/579/*, last consulted on 31.03.2025.

[19] See Article 1 para. (1) of the Disposition No. 2/2016 on the recognition of the phenomenon of parental alienation and the provisions of the Protocol on the recognition of parental alienation, issued by the College of Psychologists of Romania, published in the Official Gazette of Romania, No. 144/25.02.2016. The aforementioned regulation was subsequently abrogated by another act of the same organism (Disposition No. 31/2021), published in the Official Gazette of Romania, No. 1030/28.10.2021, the latter act leaving nothing in place to somehow replace or at least outline some new guidelines concerning PA.

to fall into the category of the abuser, not other people.

After the repeal, in 2021, of the disposition containing the above definition and until the adoption of Law No. 123/2024, there was an unjustified silence[20] in the Romanian law, a legal vacuum that the courts have tried to fill, as far as possible, by applying the provisions of the Civil Code related to: • the determination of the child's place of residence to one of the parents [when it appears, obviously, the separation between the child and the parent with whom the child does not actually live – although there is (or should be) no such thing as a 'primary, important, superior, privileged' parent (the one the child lives with) and a 'secondary, less important, inferior' parent]; • the exercise of parental authority (usually jointly[21], by both parents[22]); • how to maintain the personal ties between the parent who is separated from his or her child (with whom he or she does not live); • how to determine the contribution of both parents to the expenses of the child's raising, education, teaching and professional training.

In applying the principle of 'rendering to Caesar what is Caesar's', it has been noted[23] that, when discussing matters related to psychology, it would be ideal to refer to the term PA and, when moving to the field of law (family law), it would be preferable to keep the expression currently provided for in Law No. 123/2024, namely PE. Between us, however, the terminological battle between PA and PE does not make life easier for the alienated child, and in fact, in our opinion, represents a false problem that could go unnoticed.

We note that national or European jurisprudence, prior to the adoption of Law No. 123/2024, played an important role in recognising the PA phenomenon. Regarding the Romanian courts' jurisprudence, although this 'syndrome' was and is less known than at the European/international level, there were still some court decisions in which PA was mentioned. Thus, it has been stated[24] that the mother's constant opposition to the existence of personal relations between the father and the minor is a typical PAS behaviour. However, as this characterization is a specialized one, the Court could not judge it without a psychological evaluation; all it could do was to note that, based on the evidence presented, it was found that the defendant (the mother) manifested such behaviour. In another national decision[25], the Court ruled that the 7 and 9 year old minors should be returned to their father, based on the evidence that the decision of the first instance was not based on an objective basis, as it was decided solely on the assumption that 'the girls needed the care that only a

[20] Besides the 'fragile' provision from Article 4 para. (1) letter (f) of the Law No. 217/2003 to prevent and combat domestic violence (republished in the Official Gazette of Romania, No. 948/15.10.2020), which effectively recognizes the PA phenomenon by including, in the definition of *social violence*, of the so-called 'imposed isolation of the person (the child also, *s.n.*) from her family […]'.

[21] The importance of the joint exercise of parental authority has been noted in recent judicial Romanian jurisprudence (see, *inter alia*, the Bucharest Courts of First Instance, District 1, Civil Chamber, Sentence No. 5220/2016, Case No. 102468/299/2015, unpublished).

[22] The exercise of parental authority by only one parent is and must remain an exceptional situation for which there must be well-founded reasons based primarily on the application of the principle of the best interests of the child, *e.g.*: an alcoholic parent or one suffering from a serious mental illness, an abusive or violent parent.

[23] See Diana Iulia Olac, *Alienare parentală vs. Înstrăinare părinteasc*ă, 23.01.2024, at *https://www.juridice.ro/722012/alienare-parentala-vs-instrainare-parinteasca.html*, last consulted on 18.03.2025.

[24] Brașov Tribunal, Civil Chamber, Sentence No. 2969/21.03.2008, Case No. 9267/197/2006, unpublished.

[25] Bucharest Tribunal, Civil 4th Chambers, Decision No. 1181/A/08.11.2010, Case No. 6698/94/2009, unpublished.

mother can give to children', and on the observation that 'the way in which the mother has managed the situation is fundamentally contrary to the best interests of the child and has contributed to aggravating the separation of the two girls from their father, with the risk of making this separation irreversible'. In other words, the Court identified the PA phenomenon caused by the mother's actions and manipulations towards the girls.

At the European level, we highlight two important Resolutions of the Parliamentary Assembly of the Council of Europe, which: on the one hand[26], required the authorities of the Member States to respect *the right of fathers to exercise (joint) custody*[27], ensuring that family law provides the possibility of joint custody of children in the event of separation or divorce, in their best interests, based on mutual agreement and not imposed; on the other hand[28], proposed measures to promote *equality between men and women in the exercise of joint custody*, including in cases of separation and/or divorce.

ECtHR has also pronounced about PA/PAS in several cases, *e.g.*: • Case *R.I. and children v. Romania* (app. no. 57077/16)[29] – ECtHR recognise the PA concept ('the first applicant contacted the Bucharest child protection authority again and explained that the behaviour exhibited by the children during their recent encounter made her fear that they were suffering from *parental alienation syndrome* because of their father's influence over them'); • Case *Bianchi v. Switzerland* (app. no. 7548/04)[30] – the 'passive attitude had caused the complete break-off in contact between father and son, which had lasted almost two years and which, given the very young age of the child, was liable to result in *growing alienation* between them which could not be said to be in the child's best interests. Accordingly, the Court could not consider that the applicant's right to respect for his family life had been protected in an effective manner as required by the Convention. There had therefore been a violation of Article 8'; • Case *Döring v. Germany* (app. no. 40014/05)[31] – Recalling that, under Article 1684 § 1 of the (German, *s.n.*) Civil Code, each parent had the right and the duty to have access to his or her child, the applicant emphasised that the purpose of access rights was to enable the parent not vested with parental authority to follow the development of his or her child, to maintain an emotional bond with him or her and thus to prevent *alienation* between the child and the parent concerned. It added that a child needs contact with both parents for healthy personality development. The Court also recalled that the decisive criterion for any decision was the child's well-being, as set out in Article 1697a of the (German, *s.n.*) Civil Code.

[26] Resolution 1921 (2013) on Gender equality, reconciliation of private and working life and co-responsibility, at https://pace.coe.int/en/files/19478/html, last consulted on 27.11.2024.

[27] Romanian national law does not use/does not recognize the term 'custody', but rather 'parental authority', and, in reality, the two terms do not benefit from a strict identity, and the confusion between the two notions is 'due' to the manner in which this institution was transposed from the Civil Code of Québec. For developments in this area, see Adina Renate Motica, Alienarea parentală sau cum să crești un copil nefericit, in M. Avram (coord.), op. cit., p. 356.

[28] Resolution 2079 (2015) on Equality and shared parental responsibility: the role of fathers, at https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=22220, last consulted on 27.11.2024.

[29] https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-187931%22]}, last consulted on 10.03.2025.

[30] https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-1714296-1797156%22]}, last consulted on 10.03.2025.

[31] https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-99804%22]}, last consulted on 10.03.2025.

4. PROs and CONs about PE. Law No. 123/2024 – evolution or regress?

From the analysis of the explanatory reasons[32] of the legislative proposal to amend and supplement LPC, it can be seen that the initiators of this normative project sought to eliminate (from a legal as well from a moral point of view) the effects of the PE, considered as a violation of the child's recognised rights, resulting in severe trauma and the impossibility of normal development into adulthood. We are about to highlight in the following a few PROs and CONs regarding PE, with references to LPC *(amended by the Law No. 123/2024)*.

PROs:

the legal definition of PE [Article 4 letter h) LPC] *as a form of psychological violence by which one of the parents or persons referred to in letter c) and d) (from the extended family or from the substitutive family), intentionally, pursued or assumed and appropriated, generates, accepts or uses a situation in which the child becomes apprehensive or hostile, unjustified or disproportionate to any of the parents*; we note that the Law No. 123/2024 delimit somehow PE from the domain of social violence, as it was once stated in Article 4 para. (1) letter f)[33] from Law No. 217/2003 on domestic violence;

the manner in which PE occurs (*intention* - with a specific qualification to mean both the pursued and generated purpose, as well as the assumed and appropriated, and then used purpose) – Article 4 letter h) LPC;

the determination of the methods by which PE can be established [exclusively by the court at the request of one of the parents, the prosecutor, the General Direction of Social Assistance and Child Protection (DGASPC), in the main proceedings or in any pending litigation where measures concerning the child are to be ordered, other than those provided for in Article 133 LPC] – Article 140^1 para. (1) LPC;

the legal consequences of establishing a case of PE, with implications for: the analysis of the principle of the best interests of the child; the establishment of the exclusive exercise of parental authority; the child's residence; the child's personal relations with the parent with whom it does not live;

the creation of a rebuttable presumption that it is in the best interests of the child for parental authority to be exercised exclusively by VP, as a result of the psychological violence to which the child has hypothetically been subjected by AP) [Article 140^1 para. (2) LPC];

the presence of a psychologist in all cases where the judge 'interrogates' the child (in reality, it cannot be a hearing/an interrogation, but at most a listening to the minor), his opinion having the probative value of a rebuttable presumption);

the step-by-step implications of PE in the deprivation of parental rights, following the next path: a) identifying signs of PE; b) the mandatory and urgent notification of DGASPC by the public social assistance service within 24 hours of identifying the signs; c) the mandatory notification, this time without a specified deadline established by the legislator, but we believe that the condition of urgency should be maintained or, at least, related to the requirement provided in Article 263 para. (4) CC ('procedures concerning children must be conducted within a reasonable time, so that the best interest of the child and family relationships are not affected'), by DGASPC if it considers that the conditions for

[32] See *https://cdep.ro/proiecte/2022/600/90/8/em843.pdf*, last consulted on 27.11.2024.

[33] See supra, footnote 20.

deprivation are met; d) the pronouncement of a solution by the court.

the regulation of a psychological counselling, both for the child and their parents, at the level of DGASPC, is welcome, with the aim of restoring and maintaining the child's personal relationships, as well as the stage of monitoring these personal relationships – Article 18 para. (3^1) and the following LPC;

the PE's recognition as a legitimate justification in order that the court decide that a single parent exercise parental authority – Article 37 para. (7) LPC;

the widening of the environment in which PE can be shaped, from family, educational institutions, medical facilities, sports environments, crime research environments, rehabilitation/detention environments, the internet, the media [Article 89 para. (1) LPC - to which we could add, why not, religious or spiritual communities], to any public or private institution whose employees, by the nature of their profession, come into contact with a child under suspicion of PE [Article 89 para. (3) LPC].

CONs:

the child's listening represents a court session? *No, we believe,* especially since, in our opinion, a child already traumatized by their parents' divorce/separation is subjected to additional possible traumas, *e.g.*: the mere presence of the child in front of a judge, in a space considered unsafe; the court holds listening for children in the council chamber, as is stated in Article 226 CPC;

the psychologist's participation is mandatory, we already saw that and it is a good thing, but what would be the consequences of their non-participation in the court session, given that, in relation to the number of disputes with possible PE implications, the number of psychologists strictly belonging to the DGASPC is much reduced; returning to the answer, *the psychologist's non-participation constituting a case of non-compliance with a procedural form, can only attract the sanction of relative nullity*;

it is not clear to us who appoints the psychologist (the court, the DGASPC director?), since it is not clear whether there is mandatory for it to belong to DGASPC; thus:

pursuant to Article 140^1 para. (3) letter b) LPC, 'If the child's dwelling is established at the home of the alienating parent, the court shall order: (.) b) psychological counselling of the child and both parents *by DGASPC.'*;

according to Article 101 para. (1) LPC: 'In the process referred to in Article 100 para. (3) and (4) LPC (requesting the issuance of a *presidential ordinance for the emergency placement* of the child with a person, a family, a foster caregiver, or in a residential service, licensed in accordance with the law, s.n.) the written statement of the child regarding abuse, neglect, parental alienation, exploitation, and any form of violence to which he has been subjected can be administered as evidence *ex officio*. The child's statement can be recorded, according to the law, using audio-video technical means. The recordings are *mandatory to be made with the assistance of a psychologist.'*;

according to Article 140^3 para. (1) LPC: 'In cases where measures regarding the minor child are to be taken, other than those provided for in Article 133 LPC, the court proceeds to listening the minor *only with the participation of a psychologist from DGASPC.'*;

suitable to 140^3 para. (3) LPC: 'If the minor's listening was carried out with the participation of a psychologist from DGASPC, they will draft a report of findings, which must be submitted to the case file.' - *Well, aren't you, the legislator, the one imposing this condition on me in Article 140^3 para. (1) LPC?* ('*only* with ...

doesn't mean that *only a psychologist from DGASPC* can do it?') However, a *per a contrario* interpretation of Article 140^3 para. (3) LPC 'if the… listening ... was carried out with the participation of a psychologist from DGASPC' can lead to the conclusion that, in the legislator's generosity, it is possible to have, in this case, since it is an imperative condition a psychologist to participate, the presence of a psychologist who is not affiliated to DGASPC;

we reiterate the idea that the child is not interrogated in any way by the judge, as he hold not the status of a witness, status that could obviously generate an obligation for the latter to provide information; therefore, *the applicable institution will be that the child will be listening by the judge*, and the mandatory participation of the psychologist serves precisely to reinforce this solution, fully justifying the functions of the hearing as an evidentiary procedure*; moreover, the child is not obliged to declare anything, the focus being on the child, not the act of the listening itself*; It is sad and unacceptable that, in the same article, a few words apart, the legislator is inconsistent ['Article 140^3 LPC: (1) In cases where measures regarding the (…) child are to be taken (…) the court proceeds to *listen to* the minor. (2) The provisions of Article 231 CPC (…) apply accordingly to the *hearing* of the child. (3) If the minor's *listening* was carried out with the participation of a psychologist from DGASPC (…). (…) (5) *Listening* to minors in the judicial procedure will be mandatory after the administration of the evidence in the file (…).'], not taking into account the provisions of Article 264 CC that speaks, in all 5 paragraphs, about *listening to the child*, nor those of Article 226 CPC which also refers to the *listening of minors*;

the report of findings, done by a psychologist from DGASPC, must strictly contain the psychological findings resulting from what the child has declared in the council chamber; additionally, the provisions of Article 332 para. (1) and (3) CPC regarding recusal apply to this report (or we are actually talking about the recusal of the psychologist) and we do not believe that the para. (2) of Article 332 CPC would be applicable regarding the 5-day term in which the recusal must be requested because the psychologist is not appointed by the court, but designated by DGASPC;

how do we apply to the psychologist the provisions of Article 334 CPC regarding the listening of the expert? *We believe that the psychologist can express their opinion in court verbally as well*;

does the *psychologist's report constitute a genuine expert report?* we believe that the report done by a psychologist from DGASPC is a *sui generis* report, with a questionable evidentiary value;

the inconsistency of LPC in the alternative use of the following terms: *minor/s* [Article 140^3 para. (1), (3), (5), Article 5 para. (1) LPC], *child/children* [Article 140^3 para. (2), (3), Article 140^1 para. (2), (3), Article 5 para. (1) LPC], *minor child* [Article 140^3 para. (1), Article 140^1 para. (1), Article 140^4 para. (1) LPC]; *a greater care for legal accuracy being necessary, taking into consideration also the child definition from both, Article 263 para. (5) CC and Article 4 letter a) LPC*;

the provision of Article 18 para. (3^1) point b) LPC (the court *orders* that…) should be attenuated (the court *may order*), correlated with Article 396 CC (the court will decide taking into account: the best interests of the child, the psycho-social report and, if relevant, the agreement of the parents whom it listens to) and with Article 264 CC on listening to the child; Article 396 CC, even if it regulates the effects of divorce on relations between parents and children, being applicable, by analogy, also in the case of separation of unmarried parents;

since non-compliance with these provisions results in the possibility of applying precautionary measures or daily penalties for delay, Article 20 para. (1) LPC ('as well as compliance with the provisions regarding the establishment of the child's residence…') does not specify which provisions are being referred to; additionally, the norm must establish which act is used to determine non-compliance with the provisions in question, an act that constitutes the basis for applying delay penalties; furthermore, the penalties provided in Article 20 para. (2) letter a) LPC must be correlated with Article 906 para. (2) and Article 910 para. (3) CPC;

Article 140^1 para. (2) and (3) LPC create a differentiated regime between, on the one hand, the hypothesis in which the court has established through a judicial decision both the manner of exercising parental authority and the child's residence, and, on the other hand, the hypothesis in which such a decision has not yet been made, a differentiation that is not justified from the perspective of the child's best interest [Article 263 para. (1) CC];

Article 140^3 para. (1) LPC must be correlated with Article 264 para. (1) CC regarding the listening of a child who has reached the age of 10, in the sense of the obligation to listen them; remaining that, for a child who has not reached the age of 10, the listening shall remain at the discretion of the court only if it considers it is necessary for resolving the case;

a situation may arise where a violent/abusive parent towards the child, following the invocation of PE, as a VP (at least presumed), could receive as a 'gift' from the court the exclusive exercise of parental authority; which would result in the powerlessness and, in our view, injustice for an alleged AP; the judge will be obliged to order the relocation/transfer of the child's residence to this abusive parent (so called VP), depriving the so-called AP of her rights, who is in fact a VP.

5. PA/PE and emotional/psychological implications – teaching our child how to hate the other parent (or both!) and treat him, according to our will, as we once did with Jesus, by sending him from Annas to Caiaphas?

Once upon a time, Jesus, bound as a common criminal, was led first to Annas, the influential former high priest, then to his son-in-law Caiaphas. Afterwards, the Sanhedrin proclaimed: 'He is liable to death!'. And this abusive, illegal behaviour occurs during a nighttime trial, a formal judgement based on the fear that the Old way comes to a New way of thinking and living. For a child, PE represents both, the Jesus trial, and the Jesus Golgotha, an imposed will of the others in order to a so-called defend of the best interest of the child. In fact, whether we talk about PE or PA, those have various implications, mostly emotional, by teaching a child to hate one parent, by throwing the love apart from his soul and by leaving him with huge, devastating traumas (*e.g.*: an impaired ability to establish and maintain future relationships; a lowering of the child's self-image; a loss of self-respect; the evolution of guilt, anxiety, and depression over their role in destroying their relationship with a previously loved parent; lack of impulse control – aggression can turn into delinquent behaviour, educational problems, disruptions in school.

Whether we talked about 'mental harm', 'mental injury', 'emotional instability', 'emotional endangerment', 'emotional damage', it is clear that emotional child abuse is a statutory crime. When one parent intentionally encourages the child to turn against the other parent, he

or she is employing PA as a strategy. When this strategy is used by one parent in hopes of alienating the child against the other parent, it is tantamount to teaching the child how to hate, and according to a Canadian judge (John H. Gomery) all can be resumed as follows: *'Hatred is not an emotion that comes naturally to a child. It has to be taught…. Defendant has deliberately poisoned the minds of his children against the mother that they formerly loved and needed'*[34]. Family law's innovations and reforms have become the showcase for therapeutic jurisprudence. PA cases provide an opportunity to demonstrate how the strategy of replacing the 'punishment' role of the courts with the therapeutic 'fix-the-problem' approach can advantage children. Evaluation and therapy are earmarks of the therapeutic response to PA.

6. Instead of Conclusions… Some tips…

- there is no PA/PE when there is reasonable justification for the child to express negativity against one parent;
- PA/PE can be a strategy used by the custodial parent, the noncustodial parent, or by both parents;
- PA/PE is nearly impossible when the child is an infant; the beginning stage of PA/PE is difficult to begin in the child's late teen years;
- PA/PE can be operative on one sibling, while not operative on the other siblings;
- if PA/PE is suspected or alleged, it should be assessed by an evaluator experienced in the matter;
- extreme PA/PE should be considered emotional child abuse and referred criminally;
- often PA/PE can be reduced or eradicated by ordering more time between the child and the targeted parent; when a child spends frequent positive time (primary experience) with one parent, it is less likely that the other parent's PA/PE strategy will be successful;
- PA/PE case law is growing; family court judges should become familiar with cases in their jurisdictions;
- the urgent need arises to identify mental health professionals in family court jurisdictions who have PA/PE expertise.

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THE SUCCESSORY UNWORTHINESS RELATED TO THE CRIME OF MURDERING THE DECEDENT

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Abstract

The 2009 Civil Code reconfigured the institution of inheritance indignity, taking into account existing doctrinal critiques as well as the inconsistent judicial solutions. Thus, certain imperfections, such as those related to criminal conviction, have been addressed. The absence of a criminal conviction ruling for the author who committed one of the acts provided under Article 958 (a) and (b) of the Civil Code, due to the statute of limitations, amnesty, or the author's death, does not lead to the removal of inheritance indignity. The current regulation allows the application of indignity based on a final civil court decision, which is tasked with establishing the act when a criminal conviction cannot be rendered. The law punishes with disinheritance only the heir who intentionally sought to kill the person whose inheritance is in question or to remove another heir who is called before them to inherit de cujus. The 2009 Civil Code, being responsive to the critiques in the legal literature regarding this essential negative condition necessary to inherit from the deceased, as well as to the jurisprudential solutions that were not always consistent, regulated inheritance indignity under Articles 958-961 of Chapter II, Title I of Book IV. Although the 2009 legislator did not provide a definition of inheritance indignity, from the provisions regulating this civil sanction, we can infer that inheritance indignity refers to the disqualification of a legal or testamentary heir, both from the right to inherit the share of the deceased's estate that is due to them and from the right to inherit the reserved portion they would have been entitled to under the law, had they not been guilty of any of the acts expressly and exhaustively provided in Articles 958-959 of the Civil Code.

Keywords: *indignity, criminal conviction, disinheritance, final civil decision*

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 Article 78 of the Civil Procedure Code), the existence of a

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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.

1. 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 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 (Article 68-71 Civil Procedure Code), summoning in guarantee (Article 72-74 Civil Procedure Code), showing the right holder (Article 75-77 Civil Procedure Code) and the *ex officio* introduction of other persons into the case (Article 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 Article 921 para. (1) of the Civil Procedure Code, 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 a other

[1] I. Deleanu, *Noul Cod de procedură civilă. Comentarii pe articole. Vol. I (Article 1-612)*, Universul Juridic Publishing House, Bucharest, 2013, p. 120 and following. I. Leș, D. Ghiță (Coord.), *Tratat de drept procesual civil. Vol. I. 2nd ed.*, Universul Juridic Publishing House, Bucharest, 2020, p. 101-103. G. Boroi, M. Stancu, *Drept procesual civil. 6th ed.*, Hamangiu Publishing House, Bucharest, 2023, p. 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 ed*, 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 Article 164 para. (1) Civil Code are unconstitutional. The Court held the violation of the provisions of Article 1 paragraph (3), Article 16 and Article 50 of the Constitution, as interpreted according to Article 20 of the Constitution and through the prism of Article 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 Article 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

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 Article 80 para. (2) of the Civil Procedure Code refers exclusively to natural persons; legal representation also intervenes in the case of legal persons. Thus, according to Article 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, Article 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

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 counselling and special guardianship. See C. Roşu, S. Stănilă, *Procedura punerii sub interdicţie judecătorească în 'haine' noi,* in "Dreptul", No. 11/2022; the article can be accessed in full format at https://sintact.ro/#/publication/151025673?cm=URELATIONS.

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

In the jurisprudence of the Constitutional Court, it was noted that 'para. (1) of Article 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 Article 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, Article 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 Article 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 of Romania, No. 70/29.01.2019; the decision can be accessed in its entirety at https://sintact.ro/#/act/16910520/82?directHit=true&directHitQuery=cod%20procedura%20civila.

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 Article 80 para. (4) Civil Procedure Code, 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 Article 58 para. (3) Civil Procedure Code, 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 Article 58 Civil Procedure Code 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

[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 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 – Article 1-526*, Universul Juridic Publishing House, Bucharest, 2016, p. 286-287.

[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 din 2018; the article can be accessed in full format at 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 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, p. 128-132.

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].

2. 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 Article 28 para. (1) from Law No. 51/1995 for the organization and exercise of the profession of lawyer, 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

[11] M. Fodor, *Drept procesual civil. Teoria generala. Judecata in prima instanța. Căile de atac,* Universul Juridic Publishing House, Bucharest, 2014, p. 200-202.

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

[13] See Article 3 paragraph (1) lit. a) from Law No. 51/1995 and Article 89 of the Statute of the lawyer profession.

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

[15] See Article 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

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 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

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 Article 108 para. (1) of the Statute of the lawyer profession.

[18] According to the Article 58 Civil Procedure Code.

[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, *Fișe de procedură civilă pentru admiterea în magistratură și avocatură. 6th* ed., Hamangiu Publishing House, Bucharest, 2019, p. 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.

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 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 Article 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

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

[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. Crișțiu-Ninu, *Organizarea profesiei de avocat. Note de curs*, Universul Juridic Publishing House, Bucharest, 2023, p. 63-65.

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

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

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]. 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 Article 226 para. (5) and Article 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

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

[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, p. 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 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 ”Penalmente Relevant”, No. 1/2017; the article can be accessed in its entirety at https://sintact.ro/#/publication/151022348?keyword=respectarea%20secretului%20profesional%20avocat&cm=SREST.

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, 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

[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 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 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.

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.

3. 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 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 No. 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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DETERMINATION OF THE LEGAL INTEREST APPLICABLE TO THE AMOUNTS CHARGED UNDE ABUSIVE CLAUSES INCLUDED IN CREDIT CONTRACTS CONCLUDED IN ROMANIA, IN FOREIGN CURRENVY

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Abstract

Romanian legislation allows the granting of loans in foreign currency, even if both the credit institution and the borrower have Romanian nationality. To the extent that these contracts contain abusive clauses allowing the charging of certain commissions or the modification of the interest rate, they may lead to the collection by the credit institution of sums subsequently subject to restitution as a result of the annulment of those clauses by the courts. In such situations, the principle of full reparation of the damage suffered by the borrower imposes the obligation of the credit institution not only to return the amount of money unduly charged, but also to moratorium damages from the time of collection of said sums until the time of their effective return. The legal regulation, respectively Government Ordinance No. 13/2011, establishes two mechanisms to determine the moratorium damages (or, in other words, the applicable punitive legal interest): a mechanism based on the reference interest rate of the National Bank of Romania and another that involves the application of a fixed legal interest of 6% per year. The latter is applicable in legal relations with a foreign element, if Romanian law is applicable and the payment was established in foreign currency (Article 4 of Government Ordinance No. 13/2011).

Keywords: *credit contracts, foreign element, foreign currency, moratorium damages, legal interest*

1. Introduction

This study analyses the method of determining the legal penalty interest applicable to amounts charged in foreign currency by credit institutions, based on contractual clauses whose abusive nature is established by the courts. The premise of the incidence of legal interest in the analysed situation is that of the conclusion of a credit contract in foreign currency (usually EUR or CHF) between a credit institution in Romania and a Romanian consumer. Typically, these contracts include clauses regarding the possibility of the creditor to adjust the interest rate, as well as clauses that establish various commissions that remunerate the bank for administrative services provided for the benefit of the consumer. In the situation where the credit is granted in foreign currency, the interest and the contractually stipulated commissions are also charged in foreign currency. Not infrequently, due to the ambiguity of their formulation or the unclear mechanism of their activation, the aforementioned clauses have been qualified as abusive by the courts, and their annulment has been ordered[1]. In these situations, consumers obtained the obligation of the co-contracting credit institutions to refund the amounts collected

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[1] For a summary of the judicial practice on the matter, see: L. Mihali-Viorel, *Clauzele abuzive în contractele de credit*, 2nd edition, Hamangiu Publishing House, Bucharest, 2018, C. D. Enache, *Clauze abuzive in contractele incheiate intre profesionisti si consumatori*, Hamangiu Publishing House, Bucharest, 2012.

under the aforementioned clauses, as well as to pay legal penalty interest, for full compensation for the damage suffered.

The usefulness of this scientific approach is determined by the heterogeneous judicial practice in the matter of the method of determining the legal interest owed by credit institutions in the hypothesis presented above.

Thus, in a first jurisprudential orientation, it was assessed that, since it is a dispute without an element of foreignness (the granting of the loan in foreign currency having no vocation to modify this qualification), the provisions of Article 3 para. (2) of Government Ordinance No. 13/2011[2], according to which 'The legal penalty interest rate is set at the level of the reference interest rate plus 4 percentage points'[3], and 'The amounts as penalty interest were calculated in RON because the reference level of the National Bank according to which the legal interest is set refers to the national currency - RON. The calculation of the penalty interest in another currency, namely CHF in this case, should be calculated according to Article 4 of Government Ordinance No. 13/2011 - which refers to legal relationships with an element of foreignness. Foreign currency credit contracts cannot be classified as legal relationships with a foreignness character, which is why Article 3 applies, making it necessary to convert the amounts paid in excess as interest into lei'[4]. At the level of the courts that embrace the cited solution, there is, however, no uniform practice on the moment at which the conversion into lei of amounts unduly paid in foreign currency must be carried out, in order to determine the legal interest. Thus, in a first opinion, it was held that '(…) the accounting expert (…) erroneously established the legal interest by reference to the CHF currency. In order to establish the amount of the legal interest, it was necessary to convert it into the equivalent in lei from the date of each payment made (…) and apply the legal penalty interest'[5]. In contrast, in a second opinion, it was stated that '(…) the obligation to pay the legal interest refers to the CHF value in lei on the date of the enforcement expert report, respectively at the exchange rate on the date of the report'[6] (i.e. not from the date on which the amounts on which the legal interest is calculated were paid by consumers without due consideration).

In another jurisprudential orientation, it was held that '(…) the provisions of Article 3 of Government Ordinance No. 13/2011 establish the value of the legal interest and do not contain rules regarding the currency in which it is calculated (…). In such a situation, it cannot be argued that

[2] Official Gazette of Romania No. 13/2011 regarding the legal interest rate and penalty for monetary obligations, as well as for the regulation of certain financial and fiscal measures in the banking sector was published in the Official Gazette no. 607/29 August 2011.

[3] According to Article 3 para. (1) of Government Ordinance No. 13/2011, 'The legal remunerative interest rate is set at the level of the reference interest rate of the National Bank of Romania, which is the monetary policy interest rate established by decision of the Board of Directors of the National Bank of Romania'.

[4] Civil Sentence No. 9403 of December 4, 2020 pronounced by the 1st District Court, final by rejecting the appeal by Civil Decision No. 3234 of June 15, 2022 pronounced by the Bucharest Court, 6th Civil Section (unpublished).

[5] Civil Sentence No. 11139 of November 14, 2018 pronounced by the 2nd District Court, final by rejecting the appeal by Civil Decision No. 2559 of September 9, 2019 pronounced by the Bucharest Court, Fifth Civil Section (unpublished).

[6] Civil Sentence No. 6411 of July 7, 2021 pronounced by the 1st District Court, final by rejecting the appeal by Civil Decision No. 2486 A of July 9, 2024 pronounced by the Bucharest Court, Third Civil Section, final (unpublished).

there is a prohibition on calculating the legal interest in CHF'[7].

Starting from the aspects reported by judicial practice, the study aims to establish successively: a) the nature of the legal relationship deriving from the foreign currency credit contract (i.e. legal relationship with or without an element of foreignness), b) the method of determining the legal penalty interest rate and c) possible obstacles regarding the payment of the legal penalty interest in foreign currency determined by the status of the parties to the legal relationship.

The interest of this scientific approach is justified on the one hand by the jurisprudential divergences evoked above, and, on the other hand, by the lack of doctrinal references on this issue. Thus, although the legal regime of moratorium damages is analysed in the specialized literature both in the field of domestic commercial law (from the perspective of Article 3 of Government Ordinance No. 13/2011) [8] and in the field of international trade law (from the perspective of Article 4 of Government Ordinance No. 13/2011)[9], the situation of the legal penalty interest owed by the credit institution of Romanian nationality for the amounts unduly charged under a loan granted in foreign currency to a Romanian consumer is not taken into account.

2. Legal nature of the relationship deriving from the foreign currency credit agreement

The need to determine the legal nature of the legal relationship arising from the foreign currency credit contract is determined by the distinction made by Government Ordinance No. 13/2011 between legal relationships with a foreign element and those that do not contain such an element.

Thus, according to Article 4, 'In legal relationships with a foreign element, when Romanian law is applicable and when payment in foreign currency has been stipulated, the legal interest rate is 6% per year'. *Per a contrario*, the legal penal interest rate will be related to the reference interest rate of the National Bank of Romania, as provided for in Article 3 para. (2) of Government Ordinance No. 13/2011, in the case of legal relationships without a foreign element.

In the hypothesis that is the subject of this research, the difficulty of qualification is determined by the fact that, on the one hand, the credit agreement is concluded between persons of Romanian nationality, and, on the other hand, the currency of the credit is a foreign one. In order to establish the relevance of each of these two elements (the nationality of the parties and, respectively, the currency in which the credit was granted), it is necessary to clarify the notion of 'element of foreignness'.

In a working definition, the 'element of foreignness' represents a feature

[7] Civil decision no. 3226 of December 2, 2021 pronounced by the Bucharest Court, Fifth Civil Section, final (unpublished).

[8] St. D. Cărpenaru, *Tratat de drept comercial român*, 6th edition, Universul Juridic Publishing House, Bucharest, 2019, p. 431-433, Gh. Piperea, *Contracte si obligații comerciale*, C. H. Beck Publishing House, Bucharest, 2022, p. 256-292, V. Nemeș, *Drept comercial*, 2nd edition, Hamangiu Publishing House, Bucharest, 2018, p. 289-293, A. T. Stănescu, *Drept comercial. Contracte profesionale*, 5th edition, Hamangiu Publishing House, Bucharest, 2022, p. 14-23.

[9] D. Al. Sitaru, *Dreptul comerțului internațional. Tratat. Partea generală*, 2nd edition, Universul Juridic Publishing House, Bucharest, 2017, p. 592-595.

(particularity) of the legal relationship consisting in the fact that one or some of its component elements have links with a country other than that of the forum. It follows that the element of foreignness can characterize, as the case may be, the subjects, the object or the content of the legal relationship. Thus, in the case of the *subjects* of the legal relationship, their citizenship, domicile, residence or headquarters, etc. may be related to a foreign country. Also, as regards the derived *object* of the legal relationship, this may be an asset located in another state. Finally, the rights and obligations that make up the *content* of the legal relationship could be exercised or executed, as the case may be, in a foreign country[10].

It follows, therefore, that the currency in which the credit was granted cannot by itself constitute an element of foreignness of the legal relationship, as long as the parties have Romanian nationality and the contractual obligations are performed in Romania.

Consequently, the legal relationship analysed is one without an element of foreignness.

3. Method of determining the legal penalty interest rate

The qualification of the legal relationship between the credit institution and the consumer as lacking an element of foreignness attracts the incidence of Article 3 para. (2) of Government Ordinance No. 13/2011, and not of Article 4 of the same normative act, which determines that the applicable interest rate is not a fixed one (at a percentage rate of 6% per year), but a variable one depending on the reference interest rate of the National Bank of Romania.

An obstacle to the application of Article 3 para. (2) of Government Ordinance No. 13/2011 seems to be, however, as follows from the aforementioned case law, the fact that the amounts unduly collected by the credit institution are expressed in foreign currency, and not in national currency.

Under these conditions, on the one hand, the principle of full compensation for the damage caused imposes the obligation of the debtor (respectively of the credit institution that collected the respective amounts) to refund both the amounts unduly collected and the default damages according to Article 1535 para. (1) of the Civil Code[11]. The refund obligation therefore covers both the amounts in foreign currency unduly collected and the legal interest (default damages) on these amounts, from the date of collection until the date of effective refund.

On the other hand, the question arises whether Article 3 para. (2) of Government Ordinance No. 13/2011, applicable in the present situation as we have already shown, allows the calculation of legal interest, according to the mechanism it establishes, also in the case where the currency in which the amount of money owed is expressed is other than the national one (the leu).

At a superficial approach, from the corroboration of Article 3 and 4 of Government Ordinance No., the conclusion that seems to emerge is that of the application of the interest rate provided for by the last legal provision mentioned in the case of amounts expressed in foreign

[10] See, for developments, D. Al. Sitaru, *Drept internațional privat. Partea generală. Partea specială – Normele conflictuale în diferite și instituții ale dreptului privat*, C. H. Beck Publishing House, Bucharest, 2013, p. 1-2.

[11] According to Article 1535 para. (1) of the Civil Code, 'If a sum of money is not paid when due, the creditor is entitled to damages for late payment, from the due date until the moment of payment, in the amount agreed upon by the parties or, failing that, in the amount provided by law, without having to prove any prejudice.'

currency and, *per a contrario*, of the first legal provision in the case of amounts expressed in lei. The conclusion seems reinforced by the mechanism for determining the interest rate established by Article 3 of Government Ordinance No. 13/2011, namely by reference to the reference interest rate of the National Bank of Romania which can be assumed to be established for amounts expressed in national currency.

In reality, however, Article 3 and 4 should not be read in this interpretation key, but in a different one. Thus, Article 3 of Government Ordinance No. 13/2011 represents the common law on legal interest (remunerative or penal as the case may be) and establishes as a reporting criterion the reference interest rate of the National Bank of Romania. It follows that the mechanism established by this legal provision is applicable whenever a special provision does not provide otherwise. Article 4 constitutes exactly this special provision, and its incidence presupposes the cumulative meeting of the following conditions: a) the legal relationship must present an element of foreignness, b) Romanian law must be applicable to it and c) the payment must have been stipulated in foreign currency. Failure to meet any of the listed conditions will obviously determine the non-application of the exceptional provision and a return to the rule situation – the application of Article 3 of Government Ordinance No. 13/2011.

Since we have already shown that the analysed legal relationship does not present an element of foreignness, the conditions for the application of Article 4 of Government Ordinance No. 13/2011 are not met, so the provisions of Article 3 of this normative act become incidental, which leads to the determination of the legal interest rate in relation to the reference interest rate of the National Bank of Romania.

4. Possible obstacles regarding the payment of legal penalty interest in foreign currency determined by the status of the parties to the legal relationship

According to Article 3 par. (1) of the Regulation of the National Bank of Romania no. 4/2005 on the foreign exchange regime[12], 'Payments, receipts, transfers and any other such operations arising from sales of goods and provision of services between residents, regardless of the legal relationship that regulates them, shall be carried out only in the national currency (leu) (…)'.

In the situation analysed, both the credit institution and the consumer (borrower) are residents from a currency point of view, falling under the incidence of Article 4 point 4.2 of annex no. 1 of the aforementioned regulation, as a legal entity having its headquarters in Romania and, respectively, as a natural person having his domicile in Romania. Consequently, as a matter of principle, all payments made between them should be made on the territory of Romania in national currency.

An exception to the stated principle is regulated, however, in Article 3 para. (2) of Regulation no. 4/2005, according to which 'All other operations between residents (…) may be carried out freely, either in the national currency (leu) or in foreign currency. These operations include, without being limited to, operations representing financial flows generated by the granting of loans, the establishment of deposits, transactions with securities and the distribution of dividends'. The legislator's option for a formulation with a wide scope, namely 'financial flows generated by the granting of credits', instead of the restrictive

[12] Published in Official Gazette of Romania, No. 616/2007, as subsequently amended and supplemented.

one of 'payments made under the credit agreement', denotes its intention to exempt from the rule of making payments between residents exclusively in the national currency not only the provision of the borrowed amount to the consumer and the payment by him of the credit installments, interest and commissions due, but also any other payments generated by the granting of credit ('financial flows'), i.e. including the refund by the credit institution of amounts unduly charged under the credit agreement and the penalty interest determined by such charging.

Consequently, the prohibition, in principle, of making payments in foreign currency between residents, established by Regulation No. 4/2005 does not in reality constitute an obstacle to the payment in foreign currency by the credit institution of the legal penalty interest due for collecting from the borrower amounts that were not owed to him according to the credit agreement.

If the contrary opinion were accepted (which in our opinion violates the provisions of Article 3 para. (2) of Regulation no. 4/2005) and it were concluded that the obligation of the credit institution to pay legal penalty interest can only be enforced in national currency, this could not lead in any case, however, to the conclusion of determining the interest by reporting the equivalent in lei calculated on the date of collection of the amounts not owed, but from the date of enforcement of the obligation to refund these amounts. Any other interpretation would lead to preventing the consumer from fully recovering the damage suffered, namely an amount that, in national currency, corresponds, on the date of refund, to the amount in foreign currency paid unduly (*damnum emergens*), as well as the legal penalty interest for the lack of use of this amount until the date of effective refund (*lucrum cessans*).

5. Conclusions

As results from the analysis carried out, the legal relationship between a credit institution of Romanian nationality and a Romanian consumer does not acquire an element of foreignness from the simple contractual stipulation according to which the granting of the loan and its repayment are made in foreign currency.

Consequently, the legal penalty interest due by the credit institution in the event of abusive collection of amounts from a consumer will not be determined according to the provisions of Article 4 of Government Ordinance No. 13/2011 (which regulates a fixed interest rate of 6% per annum), but according to the provisions of Article 3 of the same normative act (which establishes as a criterion the reference interest rate of the National Bank of Romania). In the absence of limitations established by the latter legal text, there is no reason to consider that it would not allow the determination of the legal interest related to a monetary debt in foreign currency. Likewise, the status of the parties to the legal relationship as residents from a currency point of view does not restrict their possibility of making mutual payments in foreign currency, as long as they constitute 'financial flows generated by the granting of loans', such as the payment of the legal penal interest by the credit institution, as a result of the abusive collection from the consumer of amounts allegedly owed under the credit agreement.

Through these conclusions, the present study can contribute to stabilizing judicial practice on an issue where solutions are currently divergent, as highlighted above. At the same time, it can constitute the starting point of future research devoted to the legal relationship between the Romanian branch of a foreign credit institution and a Romanian consumer.

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ACQUIRING OWNERSHIP BY USUCAPTION – A PARALLEL BETWEEN THE FORMER PROCEDURE AND THE NEW PROCEDURE

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Abstract

On October 1, 2011 the New Civil Code entered into effect and on February 15, 2013 the New Civil Procedure Code entered into force, both codes containing both substantive and procedural provisions regarding the acquisition of property rights by means of usucaption. Both in doctrine and in judicial practice there has been much controversy as to how the new rules should be applied in relation to usucaptions commenced during the period of the former codes. The purpose of this paper is to present the hypotheses of application over time of the old and the new procedure, the problems encountered in practice and our opinion on the applicability of the new procedure.

Keywords: *usucaption, former procedure, new procedure, ownership*

Introduction

On February 15, 2013, the current Civil Procedure Code entered into force, containing the procedural rules governing the civil process. Together with the rules of substantive law, it created the current legislative framework. Although they have been fewer in number, there have also been difficulties with the applicability of the procedural rules over time. One such example is the procedure relating to the acquisition of property by usucaption. The current Civil Procedure Code has introduced a number of novelties with regard to this mode of acquisition of ownership, thus creating a special, separately regulated procedure. Usucaption is a means of acquiring ownership of property and is characterized by a long, bona fide possession of a movable or immovable property.

Types of usucaption under the old and New Civil Code

Within real estate usucaption, there were significant differences in the two sets of rules.

The old Civil Code of 1864 contained provisions regulating two types of real estate usucaption: long usucaption - of thirty years and short usucaption - from ten to twenty years. Subsequently, Law 7/1996 was enacted, but it was only applied in the regions of the country where the real estate publicity system based on the registers of transcriptions and inscriptions was in operation.

The current Civil Code contains provisions regulating two types of usucaption: tabular usucaption and extra-tabular usucaption. In addition, the new Civil Procedure Code creates a distinct framework for the procedure, with many

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elements which are new compared to the old procedure.

The long usucaption of thirty years is the most common type of usucaption invoked before the courts in order to acquire ownership of immovable property by virtue of usucaption. This is the case where the possessor does not hold a title deed and wishes to be recognized as the true owner through this type of action. The possessor has acquired the property on the basis of hand receipts, either from the true owner or from another possessor who did not have just title. In this situation, the current possessor must bring the action against the true owner, i.e. the person who is the rightful owner.

With regard to short-term usucaption, in addition to the requirement of useful possession exercised within the minimum period of ten years, there are certain additional conditions relating to the existence of a title and the good faith of the possessor. Unlike long-term usucaption, where possession could also be in bad faith, in the case of short-term usucaption, possession must be based on the good faith of the possessor, i.e. the possessor must be convinced that he is the owner of the property, based on a just title.

There has been much discussion, both in judicial practice and in doctrine, as to what constitutes a real estate title on the basis of which the possessor bases his possession in good faith. The real title is any legal act transferring ownership but originating from a non-owner.

The doctrine has established that a title which is absolutely null and void cannot constitute a real title for the purposes of abridged usucaption; on the other hand, the possessor may rely on a title which is relatively null and void, unless it is opposed to the person entitled to invoke the relative nullity, the latter exception only operating as long as the extinctive prescription of the action for declaration of relative nullity has not expired.[1]

The doctrine has also established that a real estate title cannot exist subject to a suspensive condition, as it must exist for certain, it must be real. Likewise, a putative title (its existence being present only in the possessor's imagination) cannot be included in the concept of just title.[2] Thus, the old Civil Code laid down two types of usucaptions of immovable property, each of which required special conditions.

With regard to the court procedure, in the case of usucaptions based on the old rules, the ordinary court procedure applied, as there was no special procedure. By contrast, as regards usucaptions based on the provisions of the current Civil Code, there is a special, non-contentious procedure.

Thus, a first distinction between the old and the current rules is the existence of procedural rules governing the application of the rules and the procedure before the court.

In terms of substantive rules, the current rules refer to two types of usucaption which are distinct from the old rules: extra-tabular usucaption and tabular usucaption. These types of usucaption refer to the way in which the immovable property has or has not been entered in the land register. Whereas in the case of usucaption under the old rules, the focus was on the duration of possession and whether or not the possessor had just title, under the new rules, the focus is on whether or not the property was entered in the land register. However, the duration of

[*].[1] Gabriel Boroi, Mona Maria Pivniceru, Tudor Vlad Rădulescu, Carla Alexandra Anghelescu, *Drept civil. Drepturi reale principale*, Hamangiu Publishing House, Bucharest, 2010, p. 162.

[2] Ibidem.

possession is not omitted either, the term being reduced to ten years.

With regard to usucaption based on the provisions of the current Civil Code, the focus is on the way in which the property is entered in the land register. Extra-tabular usucaption applies to possessions exercised for a period of at least 10 years in three hypotheses. The first is where the owner entered in the land register has died or ceased to exist. The second situation is where a declaration of renunciation of ownership has been entered in the land register. The third hypothesis applies if the immovable was not entered in any land register.

Thus, in the case of extra-tabular usucaption of immovable property, the focus is on the way in which the former owner has lost his ownership of the property, in the light of the entries in the land register. However, the last hypothesis, where the immovable had no open land register, covers situations often encountered in practice as there is not yet a complete land register system in the country.

In practice, extra-tabular usucaption under the current Civil Code is similar to the usucaption procedure under the old Civil Code. It is similar to the old procedure, especially in the absence of an entry in the land register.

Next, concerning extratabular usucaption, para. 2 of Article 930 of the Civil Code states that the new owner may acquire his right by virtue of usucaption only if another person has not registered his own application for registration of the right in his own name. If another person were to register the ownership right in the land register, this would constitute an interruption of possession, and the action based on usucaption would be dismissed.

The hypothesis of the application of extra-tabular usucaption provided for in lit. a) of para. (1) of Article 930 of the Civil Code adds, in addition to the previous regulation, the specification that extra-tabular usucaption is also possible against legal persons who have ceased to exist, in a similar way to natural persons who have died or have renounced their right. The aforementioned situation applies if, prior to the registration of the application for registration in the land register of the usucapient's right, another interested person has not, for a legitimate reason, registered the same right in the land register for his own benefit.[3]

The new Civil Code introduces a novelty regarding tabular usucaption. According to Article 931 of the Civil Code, if a person has entered his right in the land register, without legitimate cause but in good faith, and has possessed the real estate for five years, he will be able to acquire the right of ownership of the real estate by virtue of usucaption. It can be seen that the time limit for the exercise of possession has been reduced quite significantly, both in comparison with the old rules and with the new rules relating to extra-tabular usucaption. The reason for this short period is that the possessor has exercised possession in good faith and in public, his alleged right of ownership having been established by means of the land register.

A similar provision was contained in Article 27 of Decree-Law 115/1938, which stated that in the case of the registration of rights in rem acquired by usucaption, they will remain validly acquired if the holder of the right has possessed them in good faith, in accordance with the law, for ten years. In the past, therefore, there was a similar way of acquiring property rights to the tabular usucaption of the present day, the difference

[3] Rodica Peptan, *Uzucapiunea în noul Cod Civil*, in "Dreptul", No. 8/2010, p. 15.

being made mainly by the length of the period of time during which possession must be exercised, i.e. ten years under Decree-Law 115/1938 and five years under the current Civil Code.

Also, the institution for the joining of possessions is included in the current regulation. Article 933 paras. 1 and 2 of the Civil Code specify that, although each possessor starts a new possession in his own weight, in order to invoke usucaption, the current possessor may join his own possession with the possession exercised by his author, in order to fulfill the condition regarding the duration of the period of exercise of possession.

In both laws 'it would seem that a necessary and sufficient condition for the present possessor to acquire the status of author is that the person in question must be someone other than the true owner of the right in rem'. Doctrine, however, has made it clear that it is also necessary to fulfill a subsequent condition, that of not being a mere precarious possessor. Otherwise, since precarious possession cannot be taken into account in calculating the period of usucaption, the acquirer will only be able to intervert possession and start a new useful possession in his person.[4]

Goods subject to usucaption in the old and new civil law

According to Article 929 of the Civil Code, inalienable property cannot be usucapted. The legal provision refers to both public domain goods and goods forming the subject matter of private property rights insofar as they have been declared inalienable by law.[5] Therefore, only individually determined immovable property which is in the civil circuit may be usurped.

As far as the Civil Code of 1864 is concerned, short usucaption applies only to individually-determined immovable property, thus excluding movable property and universalities, even if they include immovable property.

These requirements as to the scope of the short usucaption apply not only where the aim is to acquire ownership, but also where the aim is to acquire a dismemberment of ownership.

By contrast, the right of mortgage cannot be acquired by short usucaption, so that if the mortgage is constituted by a third party on the immovable property of another, the creditor cannot oppose the mortgage to the true owner.[6]

The procedure for registering rights acquired by virtue of usucaption in the old and new Civil Code

As mentioned above, the Civil Procedure Code now contains a special procedure regulating the conduct of civil proceedings in actions based on usucaption.

The court of the place where the immovable property is situated has exclusive jurisdiction. An action based on usucaption shall contain the particulars of the person claiming ownership of the property by virtue of the usucaption, the type of usucaption invoked (tabular or extra-

[4] Eugen Roșioru, *Comentarii, doctrină și jurisprudență, Noul Cod Civil*, Hamangiu Publishing House, Bucharest, 2012, p. 1337.

[5] Valeriu Stoica, *Drept civil. Drepturile reale principale, ed. 3 revizuită și adăugită*, C.H. Beck Publishing House, Bucharest, 2017, p. 388.

[6] Valeriu Stoica, *op. cit.*, p. 371, apud https://mitran.ro/procedura-recunoasterii-uzucapiunii-in-vechile-si-noile-dispozitii-civile/.

tabular) and the name of the former owner if known.

At the same time, the plaintiff will have to attach to the statement of claim the documents indicated in Article 1051 para. 3 Civil Procedure Code. In our opinion, if the plaintiff fails to submit the indicated documents, he may be asked to fill in the missing documents during the regularization procedure, without, however, being subject to the sanction of annulment of the summons if he fails to submit them. We consider that Article 200 of the Civil Procedure Code is of strict interpretation and cannot be applied in extenso. If the plaintiff is not asked to make up these deficiencies before the first term of judgment, we consider that the court will be able to order the plaintiff to complete the application at any time during the judicial investigation.

The procedure provided by Article 1050-1053 of the Civil Procedure Code seems to create a complete framework for the conduct of proceedings in actions based on the right of usucaption. However, the provisions do not also refer to the need to draw up an expert's report identifying the immovable property. In our opinion, a technical expert's report is necessary in view of the fact that the immovable property must be clearly individualized. In the absence of an expert's report, the size and boundaries of the property will be unclear and out of date.

Therefore, we consider that, in addition to the documentation submitted and the evidence indicated to be administered as required by the provisions of Article 1051 of the Civil Procedure Code, it is also necessary to administer topographical expert evidence in order to establish the boundaries of the property and to clearly identify the property.

Another very important aspect is related to the passive procedural standing in actions based on the new procedure of usucaption. Whereas under the usucaption procedure based on the old Civil Code, the passive legal standing was vested in the owner of the property (or his successors) or the administrative territorial unit within the area of which the property is located, under the new procedure, the passive legal standing is not determined. Therefore, the new procedure can be considered as a non-contentious procedure.

Article 1052 of the Civil Code refers to certain objections that interested persons may make to the plaintiff's action. The manner in which interested persons may become aware of the action before the court is not the subject of this paper, which is why we will only emphasize that by virtue of usucaption the plaintiff acquires a property right over a real estate, so that the legislative requirements should be at a high level.

At the same time, it was noted that this new regulation was determined by the change in the approach regarding the effects of the registration of the property right in the land register: in the old regulation, the registration in the land register ensured the opposability against third parties, while in the system of the current Civil Code, the registration produces constitutive effects, according to the regulation Article 557 para. (4) of the New Civil Code and Article 885 of the New Civil Code.

Under the Civil Code of 1864, the system of registers of transcriptions and entries was a system of personal publicity, consisting in the registration and transcription of legal acts relating to property in registers kept by the courts, operations carried out in the names of individuals or legal entities, and not in the names of real estate as in the land register system.[7]

[7] Mugurel Mitran, *Procedura recunoașterii uzucapiunii în vechile și noile dispoziții civile*- https://mitran.ro/procedura-recunoasterii-uzucapiunii-in-vechile-si-noile-dispozitii-civile/

The system of the register of transcriptions and inscriptions, according to the Civil Code of 1864, was a system of personal publicity, and consisted in the registration and transcription of legal acts relating to property in registers kept by the courts, operations carried out in the names of individuals or legal entities, and not on real estate as in the system based on land registers.[8]

Conclusions

In conclusion, actions based on the acquisition of property rights by virtue of usucaption are actions which require greater rigor on the part of the courts. Whether the usucaption is based on the current Civil Code or on the provisions of the old Civil Code, it is necessary to carry out increased checks in relation to the conditions. The provisions of the new procedure lead to a simplification of the process, particularly in view of the fact that the procedure is currently apparently non-contentious. Despite the simplification of the procedure, the legislator has conferred constitutive effects, in contrast to the old rules, which ensured enforceability against third parties.

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[8] Ibidem.

THE IMPACT OF ARTIFICIAL INTELLIGENCE ON FUNDAMENTAL HUMAN RIGHTS IN EU COUNTRIES. EXAMINATION OF ACADEMIC STUDIES AND THE POSITIONS OF NON-GOVERNMENTAL ORGANIZATIONS REGARDING THE ETHICAL AND LEGAL RISKS OF AI

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Abstract

Artificial intelligence (AI) is rapidly changing life in Europe and profoundly transforming contemporary society, influencing multiple aspects of economic, social, and legal life. In the European Union, the development and use of AI pose significant challenges regarding the protection of fundamental human rights, such as the right to privacy, equality, and access to justice. Authorities are implementing strict regulations to ensure that innovation does not compromise essential democratic values, aiming to find a balance where new technologies and the protection of human rights merge in the best interest of humanity. My research aims to analyze the impact of artificial intelligence (AI) technologies on fundamental rights in the European Union, identify the risks to these rights, and assess legislative and ethical measures for their protection.The research methodology is based on documentary analysis, meaning the study of European laws and international documents related to AI and human rights. Another method used is comparative evaluation, identifying points of convergence and divergence between the national regulations of member states in implementing EU standards on AI. The research follows a deductive approach, starting with the existing legal framework, such as the Charter of Fundamental Rights of the EU and the General Data Protection Regulation (GDPR), while also considering new initiatives like the Artificial Intelligence Act (AI Act). Additionally, the study examines specialized literature and reports from international institutions, such as the Council of Europe and the European Union Agency for Fundamental Rights. This paper provides a comprehensive analysis of EU regulations on AI and proposes practical solutions to align technology with human rights.

Keywords: *EU, Artificial intelligence, fundamental human rights, legislative and ethical legislative and ethical measures, EU regulations on AI.*

Introduction

Fundamental human rights are those essential prerogatives recognized to every human being by virtue of their inherent dignity. They form the foundation of any democratic rule of law state and are the expression of supreme values: dignity, freedom, equality, solidarity, citizenship, and justice.

The concept of fundamental rights gradually crystallized in the evolution of political and legal thought, beginning in the 17th century, with the emergence of Enlightenment ideas about natural rights. The Declaration of the Rights of Man and of

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the Citizen of 1789, adopted during the French Revolution, is considered a turning point in the recognition of human rights as universal and inalienable rights.[1]

After the horrors of the Second World War, the necessity for firm legal protection of these rights led to their international and European enshrinement. In 1948, the UN General Assembly adopted the Universal Declaration of Human Rights, and in 1950, the Council of Europe signed the European Convention on Human Rights (ECHR), essential instruments in strengthening the standards for their protection.

In the European Union, fundamental rights have been gradually integrated into the normative architecture of the Union, culminating in the adoption of the Charter of Fundamental Rights of the European Union in 2000, which became legally binding with the entry into force of the Treaty of Lisbon in 2009.[2]

One of the most groundbreaking innovations that emerged in the 21st century is artificial intelligence (AI), which has a major impact on the social, legal, and economic life of contemporary society. According to the European Union (EU), both innovations that can be made with the help of artificial intelligence and the risks that primarily affect the fundamental human rights recognized by the Charter of Fundamental Rights of the European Union are of utmost importance. Human dignity, freedom, equality, the rule of law, and, overall, the fundamental values of democracy are in crisis in the context of accelerated digitalization, as well as the increasing use of automation in administrative, judicial, security, and economic decisions. Many of these technologies may pose the risk of social discrimination, mass surveillance, social exclusion, or euthanasia without competitive legislation[3].

This is why my paper addresses algorithms using AI and studies fundamental rights at the European level, aiming to establish the significant risks and existing legal protections or those under development.

2. Content

In the context of accelerated digitalization and the increasing use of automated systems in administrative, judicial, economic, or security decisions, a critical analysis of how these technologies can affect the fundamental values of democracy is essential: human dignity, freedom, equality, and the rule of law. AI-based technologies can bring significant advantages in streamlining public services, but in the absence of solid legal guarantees, they can become tools of discrimination, mass surveillance, or social exclusion.

It is well known that the European Union plays an important role in promoting and protecting fundamental rights, building its own specific legal system in parallel and in interaction with the mechanisms of the Council of Europe. Fundamental rights represent a constitutive element of the EU's legal order and an essential condition for the legal functioning of its institutions, as well as for the legitimacy of European policies and legislative acts. For this reason, the European Union has adopted relevant documents in the field of human rights,

[1] Ion Neagu, *Drepturile omului – Evoluție, concept, protecție juridică,* C.H. Beck Publishing House, Bucharest, 2019, p. 15.

[2] Corneliu Bîrsan, *Convenția europeană a drepturilor omului. Comentariu pe articole,* vol. I, All Beck Publishing House, Bucharest, 2005, p. 23.

[3] Corneliu Bîrsan, *op. cit.*, p. 23.

which have often had a significant impact on the protection of fundamental human values.

The Charter of Fundamental Rights of the European Union, adopted in 2000 and gaining binding legal force through the Treaty of Lisbon in 2009, summarizes in one document the civil, political, economic, and social rights recognized within the Union. The Charter is structured in six titles: Dignity, Freedoms, Equality, Solidarity, Citizens' Rights, and Justice, being inspired both by the constitutional traditions common to the Member States and by the European Convention on Human Rights (ECHR) and other international treaties. The Charter applies to EU institutions but also to Member States when implementing EU law, providing a robust framework for examining the compatibility of legal acts or administrative decisions with fundamental rights.

Although part of the Council of Europe system, the European Convention on Human Rights (ECHR) has a significant impact on EU law. The Court of Justice of the European Union (CJEU) recognizes the case law of the European Court of Human Rights as a source of inspiration in the interpretation of fundamental rights, and the Treaty of Lisbon foresees the EU's accession to the ECHR – although this process has currently been blocked by the CJEU through Opinion 2/13 of 2014. The ECHR offers reference guarantees for rights such as the right to a fair trial, freedom of expression, or the right to privacy – all of which are relevant in the context of artificial intelligence use.[4]

The Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), Article 2 TEU explicitly provides that the Union is founded on respect for human dignity, freedom, democracy, equality, the rule of law, and human rights, including the rights of persons belonging to minorities. Article 6 TEU reaffirms the binding nature of the Charter and the relevance of the ECHR. Furthermore, the TFEU enshrines the principles of non-discrimination (Article 10), data protection (Article 16), the right to access to justice (Article 47 Charter), and other provisions that are directly affected by the implementation of AI.

Equally, the role of the case law of the Court of Justice of the European Union (CJEU) cannot be minimized, as it plays an essential role in the interpretation and application of fundamental rights in the context of EU legislation. Its decisions have strengthened the right to privacy (e.g., the Digital Rights Ireland case, 2014), personal data protection (e.g., Schrems I and II), and transparency in automated decision-making – aspects that are highly relevant in the context of artificial intelligence.[5]

Artificial intelligence (AI) has become a strategic priority for the European Union, which seeks to harness the potential of this technology in a responsible, ethical manner, and in accordance with the fundamental values of the Union. Unlike other global powers, the EU adopts a human-centric approach, where technological innovation must be compatible with the protection of fundamental rights and the state of law.[6]

The European Union recognized early the transformative potential of artificial intelligence, but also the risks it poses to democracy, security, and human rights. In

[4] Emil Bălan, *Drepturile fundamentale în Uniunea Europeană*, C.H. Beck Publishing House, Bucharest, 2015, p. 45.

[5] Koen Lenaerts, *The European Court of Justice and the Protection of Fundamental Rights in the European Union*, "Columbia Journal of European Law", vol. 20, 2014, New York, p. 185.

[6] Luciano Floridi *et alii*, *AI4People – An Ethical Framework for a Good AI Society*, Mind & Society, Springer, Vol. 28, No. 1, 2019, Milano, p. 15.

2018, the European Commission launched the 'European Strategy on AI', proposing strategic investments in research and innovation, alongside the development of a solid ethical and legal framework. This strategy was followed by the 'Coordinated Plan on AI' (revised in 2021), which foresees close cooperation between Member States to strengthen Europe's technological autonomy.[7] A key moment was the publication in 2020 of the White Paper on Artificial Intelligence, which proposes an approach based on 'excellence and trust'. This document created a regulatory model based on risk assessment, where AI systems are classified as follows: anacceptable risk – prohibited (e.g., social scoring like in China), high risk – allowed but subject to strict obligations (e.g., AI used in justice or recruitment), limited risk – subject to transparency requirements (e.g., chatbots must disclose themselves),minimal risk – no additional regulation (e.g., spam filters).[8]

As a continuation of this model, in 2021, through the proposal of the Artificial Intelligence Act (AI Act), the first comprehensive legal framework for AI was created at the global level, which regulates strict requirements for high-risk systems, such as: the use of clean and representative training datasets; ensuring human oversight; algorithmic explainability; cybersecurity measures and auditability.[9]

The EU was forced to allocate large funds for the development of AI through the Horizon Europe, Digital Europe, and NextGenerationEU programs, encouraging the formation of centers of excellence, AI Test Beds, and regulatory sandboxes, where companies can test AI technologies under regulated conditions.[10]

The European Union has expanded the use of Artificial Intelligence and implemented it in the most important fields, with significant impact on citizens and public institutions. AI applications can enhance efficiency, predictability, and responsiveness, but they can also lead to algorithmic discrimination, lack of transparency, and violation of privacy.

In healthcare, AI is used for computer-assisted medical diagnosis, radiological image analysis, personalized treatment planning, and monitoring chronic patients. In the context of the COVID-19 pandemic, AI was used for epidemiological forecasts and identifying high-risk patients. However, the lack of transparency in predictive models and the risk of errors can seriously affect the right to health and life.[11]

In justice and law enforcement, some Member States such as France, the Netherlands, and Poland have tested predictive justice systems, recidivism risk assessments, or facial recognition in public spaces.[12] Although increased efficiency has been observed, there have also been significant risks of discrimination, ethnic profiling due to the lack of real human oversight, affecting rights such as the presumption of innocence or the right to defense.

In public administration, AI is used for automating the processing of social benefits

[7] European Commission, Coordinated Plan on Artificial Intelligence 2021 Review, COM(2021) 205 final, Brussels, p. 5.

[8] European Commission, *White Paper on Artificial Intelligence*, COM(2020) 65 final, p. 9

[9] Martin Ebers (ed.), *Artificial Intelligence and Human Rights*, Springer, 2022, p. 110.

[10] Michael Veale, Frederik Zuiderveen Borgesius, *Demystifying the EU Artificial Intelligence Act*, "Computer Law Review International", 2021, p. 98.

[11] Topol, Eric, *Deep Medicine: How Artificial Intelligence Can Make Healthcare Human Again*, Basic Books, 2019, New York, p. 27.

[12] Henrik Skaug Sætra, *AI in the Courtroom: A Critical Analysis*, AI & Society, Vol. 36, 2021, London, p. 535.

applications, resource allocation, or analyzing administrative files. Problematic examples include the systems used in Austria and the Netherlands for detecting social fraud, criticized for lack of transparency and discrimination[13].

AI also plays an essential role in the development of autonomous vehicles, route optimization, traffic management, or forecasting urban congestion. In Germany and Spain, AI systems are already integrated into public transport to anticipate urban mobility needs. Additionally, intelligent educational platforms use AI to personalize the learning process, automated assessment, or vocational counseling. However, excessive data collection about students and the risk of stereotyping raise concerns about data protection and equity of access to education.[14]

The European Union has created relevant bodies for AI management, and the most important ones are:

- The European Artificial Intelligence Board (EAIB), which was proposed through the AI Act, coordinates the implementation of AI legislation at the EU level. Composed of representatives from national authorities, the EAIB has a consultative role and responsibilities for harmonizing practices, publishing technical guidelines, and monitoring cross-border risks. By analogy with the EDPB (European Data Protection Board), the EAIB is expected to become an essential center for AI oversight.[15]

- European Data Protection Board (EDPB) is an independent body that ensures the consistent application of the General Data Protection Regulation (GDPR). The EDPB frequently publishes guidelines regarding automated data processing, algorithmic decisions, and profiling. In the use of AI, the role of the EDPB is crucial for guaranteeing the right to privacy and the protection of personal data.[16]

- European Centre for Algorithmic Transparency (ECAT) was created by the European Commission in 2023. ECAT is a technical-legal body tasked with auditing the algorithms used by very large online platforms (such as Google, Meta, TikTok) under the Digital Services Act. It was created to analyze the impact of these algorithms on freedom of expression, informational pluralism, and online manipulation risks.[17]

- AI HLEG (High-Level Expert Group on AI) is a high-level group of AI experts, created by the European Commission to advise on AI policies. Its key report, 'Ethics Guidelines for Trustworthy AI', outlined the seven pillars of trustworthy AI: human agency, technical robustness, transparency, fairness, non-discrimination, accountability, and sustainability.[18] Although the AI HLEG is no longer active today, its principles form the basis of current legislation.

In some EU Member States that have implemented the use of AI, both benefits and violations of fundamental rights have been observed.

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[13] Alessandro Mantelero, *AI and Social Scoring: Lessons from the Netherlands and Austria*, "European Journal of Risk Regulation", Vol. 12, 2021, Cambridge, p. 230.

[14] Wayne Holmes, "Artificial Intelligence in Education: Promise and Implications for Teaching and Learning", UNESCO, 2019, Paris, p. 15

[15] European Commission, *Proposal for an AI Act*, COM(2021) 206 final, p. 45.

[16] European Data Protection Board, Guidelines on Automated Individual Decision-Making and Profiling under GDPR, 2021, Brussels, p. 7.

[17] European Commission, ECAT: Ensuring Transparency and Accountability in Algorithmic Systems, Brussels, 2023.

[18] AI HLEG, Ethics Guidelines for Trustworthy AI, 2019, Brussels, p. 14.

In the Netherlands, the Dutch Government developed SyRI (System Risk Indication), an automated system designed to detect fraud in the granting of social benefits, which combined data from multiple sources (income, rent, education, criminal records) to assess the risk of fraud. However, in 2020, a court in The Hague declared the system illegal, as it violated the right to privacy and did not provide transparency regarding the algorithm, potentially leading to discrimination based on location or ethnicity.[19]

In France, the Ministry of Justice experimented with automated analysis systems to assist judges in predicting judicial outcomes. At the same time, the police tested algorithms to identify areas with a high risk of crime ('predictive policing').[20] However, it was found that the danger of 'automated judicialization' created the risk of AI influencing the independence of judicial decisions. Algorithms could reinforce existing biases in the database.

In Austria, an automated model was created for the allocation of unemployed individuals, used by the Public Employment Service (AMS) to classify job seekers based on their chances of employment. People with low scores had limited access to professional training or financial support[21]. Although it increased the efficiency of the service, it was criticized by civil society for indirectly favoring discrimination against women, older individuals, or those with immigrant backgrounds. The system was temporarily suspended.

In Spain, biometric surveillance has been implemented in public spaces, in cities such as Madrid and Barcelona, which tested facial recognition systems in public transport areas or crowded markets, under the pretext of public safety. [22]Although the use is limited, the lack of clear regulations and the failure to inform the public have drawn criticism, particularly due to the violation of the right to anonymity in public spaces and the right to privacy.[23] Therefore, the need for a clear legal basis is essential for the use of AI.

Estonia is a European leader in e-government. AI is used for analyzing administrative documents, automatically issuing decisions regarding permits or subsidies, and predicting social needs, leading to efficiency, transparency, and reduced bureaucracy. It has been a major challenge for the government to maintain human control and ensure that AI decisions are explainable and fair.

Artificial intelligence is becoming an essential technology in the transformation of European administration, justice, healthcare, and economy. The European Union has chosen a distinct model compared to other global powers – one focused on respecting fundamental rights, transparency, and algorithmic accountability.

Documents such as the AI Act, Digital Services Act, and the GDPR framework reflect the Union's desire to set a global standard for 'trustworthy' AI. However, concrete cases in the Netherlands, France, Austria, and Spain show that risks related to

[19] Evelien Brouwer, *Digital Borders and Real Rights: Effective Remedies for Third-Country Nationals in the Schengen Information System*, Martinus Nijhoff Publishers, 2008, Haga, p. 235.

[20] Ronald Leenes et alii, *Data Protection and Privacy: The Age of Intelligent Machines*, Hart Publishing, 2017, Oxford, p. 185.

[21] AlgorithmWatch, Automated Decision-Making Systems in the EU: Case Studies, 2020, Berlin, p. 14.

[22] Javier Sánchez, *Facial Recognition in Public Spaces in Spain: A Legal Perspective*, "Revista de Derecho Digital", No. 7, 2021, Madrid, p. 72.

[23] Tarmo Kalvet, *Digital Governance in Estonia: Foundations and Future Directions*, eGA Report, 2021, Tallinn, p. 11.

discrimination, lack of transparency, and invasion of privacy are real and current.

European bodies (such as the EDPB, ECAT, or the future EAIB) play a crucial role in the uniform implementation of these standards, but the technical capacity and political will at the level of each Member State remain decisive.

In conclusion, the development of AI in the EU is a process that must be carefully guided to avoid transforming a promising technology into an opaque surveillance tool or a means of social exclusion.

Major risks and challenges for fundamental rights have been observed in the application of AI in the context of artificial intelligence.

The most affected right is the right to privacy and the protection of personal data. The use of AI often involves accessing vast personal data sets, often without the individuals concerned being fully aware. Technologies such as facial recognition, social media behavior monitoring, or advanced biometric analysis involve intrusive processing, which can lead to continuous surveillance and a sense of digital insecurity. According to Article 8 of the Charter of Fundamental Rights of the EU, everyone has the right to the protection of their personal data. Therefore, according to the General Data Protection Regulation (GDPR), any collection and processing must be: legal, fair, and transparent; based on freely given consent; proportional to the declared purpose; subject to technical and organizational safeguards.

Without these conditions, AI technology can generate invasive profiling, with severe consequences for personal autonomy and individual freedom.

In Italy, the Garante per la Protezione dei Dati Personali temporarily banned ChatGPT in 2023 due to the lack of transparency regarding processed data and the inability to verify the age of minor users.

In France, the use of facial recognition in high schools was banned by CNIL (the data protection authority), citing disproportionality and the lack of a clear legal basis.

In France, the use of facial recognition in high schools was banned by CNIL (the data protection authority), citing disproportionality and the lack of a clear legal basis.[24]

The principle of non-discrimination and algorithmic fairness is also affected by the use of AI. Algorithmic discrimination is not just a technical possibility but a reality already documented. It occurs when AI is trained on historical data marked by inequalities or when the design of the algorithm contains unintended cultural and social biases. Clear examples include credit systems, which are granted more frequently to men, or recruitment systems that rank CVs containing ethnic names poorly; predictive policing software that more frequently targets poor neighborhoods. These practices violate Article 21 of the Charter of Fundamental Rights of the EU, which prohibits any form of discrimination. Algorithms that classify people based on 'probabilities' of behavior can lead to social profiling, affecting access to jobs, services, or social benefits.

In Austria, the AMS system, which estimated the chances of employment, was suspended after it was found to favor young men born in Austria, to the detriment of other vulnerable groups.[25]

[24] Paul De Hert, Vagelis Papakonstantinou, *The New General Data Protection Regulation: Still a Sound System for the Protection of Individuals?*, in "Computer Law & Security Review", 2016, Amsterdam, p. 185.

[25] Sandra Wachter, *Normative Challenges of Identification in the Age of AI*, in "Nature Machine Intelligence", Vol. 1, 2019, p. 173.

In Sweden, the automated system used by the Immigration Agency was criticized for rejecting asylum applications based on a statistical score without human intervention, which led to the exclusion of vulnerable cases without a real justification.

These practices violate the principles of equality of treatment, transparency, and the right to appeal, as outlined in the Charter of Fundamental Rights of the EU and anti-discrimination legislation.

The use of AI can also affect the right to a fair trial and control of automated decisions. AI is already used in justice for predictive analysis, determining sentences, or assessing the risk of reoffending. This endangers: the right to defense; the presumption of innocence; access to a reasoned and transparent decision; judicial file allocation; analysis of the likelihood of recidivism; and evaluation of financial risks in commercial disputes. In this way, Article 47 of the Charter, which guarantees the right to a fair trial, including in relation to administrative or automated decisions, is seriously violated, as well as the provisions of Article 22 of the GDPR, which stipulate that individuals have the right not to be subject to a solely automated decision with legal effects. The problem arises when the final decision is made without real human intervention or when the explanations for the automated decision are opaque or nonexistent. This affects: the right to a reasoned decision; the right to defense; and the right to effective appeal.

In Estonia, the government implemented a 'digital judge' for resolving minor commercial disputes, sparking debates about the legitimacy of automated decisions without the involvement of a human judge,[26] or in Poland, the use of AI in the random allocation of cases to judges was criticized for being susceptible to political manipulation due to a lack of transparency, undermining trust in the impartiality of the justice system.

Freedom of expression and information pluralism is another fundamental right that can be violated by AI. Algorithms that manage information flows on platforms (e.g., YouTube, Facebook, TikTok) can create informational sources, influencing: the diversity of opinions; access to relevant information; and the formation of public opinion. Social media platform algorithms decide which content is 'visible' to the user, based on: interaction history; behavioral patterns; and the platform's commercial interests. Filtering and prioritizing content based on commercial logic can affect Article 11 of the Charter, which guarantees the freedom of expression and information.

The analyses carried out by ECAT on TikTok's algorithms showed that young people were disproportionately exposed to extreme content, promoting stereotypes and risky behaviors.[27]

AI creates excessive 'personalization', which can lead to: informational bubbles and polarization; self-censorship (chilling effect), and even the exclusion of minority or non-conformist voices.

In Romania, Germany, Hungary, and other EU countries, Facebook and TikTok algorithms have been accused of amplifying extremist content during elections, affecting access to balanced information and freedom of opinion.

The automation of processes through AI risks leading to job losses in sectors such as transportation, administration, and retail. At the same time, AI creates new types of jobs – but these require higher digital skills. This rapid transition may affect the right to

[26] Martin Ebers, *op. cit.*, p. 133.

[27] European Commission, Report on Algorithmic Transparency – ECAT, Brussels, 2023.

work (Article 15) and vocational training (Article 14 of the Charter), especially among people with low digital education or from rural areas.

Robotization and AI affect the labor market by eliminating some repetitive or routine jobs; increasing demand for digital skills, and leading to the emergence of algorithmic control forms (e.g., platforms that monitor employee productivity in real-time).

Risks that have emerged and created dangerous precedents include: digital exclusion of elderly or poorly skilled people; lack of transparency in decision-making regarding work evaluations, and increased precariousness in the 'gig' economy.

In Germany, trade unions have called for the inclusion of the principle 'algorithms do not fire people' in collective agreements, demanding transparency and participation in automated decisions concerning employees[28]. In Spain, Glovo delivery drivers protested against the automated rating system that affected their income and even access to work, without the right to appeal.

Other fundamental rights are also affected: human dignity, freedom of thought and choice, children's rights.

Whenever people are reduced to 'results' or 'behavioral patterns', there is a risk that the individual will be perceived as a statistical object, not as a human being with rights and freedoms, experiences, and aspirations. AI must be designed in a way that respects the intrinsic value of each individual.

AI systems can easily be used for behavioral manipulation (e.g., hyper-personalized ads, digital nudging) and can influence decisions without the individual being aware of the influence – affecting the autonomy of thought. Children are exposed to AI without the ability to understand or challenge it. Games, social media, and digital assistants can collect data, manipulate attention, and influence emotional development. When used without parental control, this has even led to suicide. Protection of minors is essential in an automated digital environment, and legislation must create clear norms for defense and protection.

In the Netherlands, an educational chatbot for students automatically collected data about their emotions without clear parental notification, which triggered an investigation by the child protection authority.

There is a risk that AI may deepen digital inequalities – between states, regions, or social groups. Unequal access to infrastructure, digital education, or algorithmic opportunities may create a new form of exclusion.

AI is a transformative but also profoundly disruptive technology. Its impact on fundamental rights is complex, variable, and often unpredictable. From privacy and data protection to equality, justice, and dignity, AI technologies raise real risks of abuse, especially in the absence of effective control and a solid ethical framework.

Although the European Union has a strategic advantage by placing human rights at the center of its digital policy, the application of this principle requires: rigorous impact assessments on fundamental rights; transparency and explainability in AI design; digital education and active social inclusion; meaningful human oversight mechanisms and effective remedies.

In the European Union, the protection of fundamental rights is a central principle of all policies and legislation. This principle is

[28] Valerio De Stefano, Antonio Aloisi, *Your Boss Is an Algorithm: Artificial Intelligence and Platform Work*, Hart Publishing, 2022, Oxford, p. 49.

also reflected in regulations concerning emerging technologies, such as artificial intelligence (AI). However, the challenges related to AI require an adaptable and comprehensive legislative framework that addresses issues beyond traditional regulations.

The European Union was forced to create a solid normative framework regarding fundamental rights, which gradually adapts to the challenges of digital technology. [29]The main pillars are:

- The Charter of Fundamental Rights of the European Union (2000) – which enshrines rights such as privacy (Art. 7), data protection (Art. 8), non-discrimination (Art. 21), human dignity (Art. 1), and access to justice (Art. 47);
- The European Convention on Human Rights (ECHR) – interpreted by the European Court of Human Rights in cases related to digital surveillance and online freedom of expression;
- The General Data Protection Regulation (GDPR) (2016/679) – an essential act in regulating AI, especially regarding automated decisions (Art. 22) and the right to explanation.
- The Charter of Fundamental Rights is an essential document that protects the fundamental rights of all individuals within the European Union. It includes basic rights such as: Right to privacy (Art. 7); protection of personal data (Art. 8); right to non-discrimination (Art. 21); access to justice (Art. 47).

In the context of AI, the protection of privacy and personal data becomes crucial, as many AI technologies are built on the massive processing of personal data. Additionally, the right to non-discrimination is essential in preventing algorithmic discrimination that can affect vulnerable groups.

The GDPR is one of the most important instruments for protecting fundamental rights in the digital context. It regulates how personal data can be collected, processed, and stored, imposing strict restrictions on automated decisions that may affect people's lives. Article 22 of the GDPR prohibits making automated decisions, including profiling, that could have significant legal effects on individuals involved, without their explicit consent. The GDPR stipulates that data protection impact assessments (DPIAs) are mandatory when AI is used to process sensitive data, providing a framework to prevent risks to individuals' fundamental rights.

These assessments must consider: the impact on privacy, freedom of expression, dignity; the risk of indirect discrimination; remedies and meaningful human oversight. However, these assessments are not mandatory for all actors and are not standardized, which may lead to inconsistent implementation.[30]

The ECHR remains a fundamental legal framework for the protection of human rights across Europe, including in the digital age. The European Court of Human Rights has issued a series of rulings regarding fundamental rights in the context of digital technologies, including electronic surveillance and the right to privacy.

The Regulation on Artificial Intelligence, known as the AI Act, is a major legislative initiative by the European Union aimed at regulating the development, implementation, and use of artificial intelligence systems in the European space. It is the first legislative act of its kind globally, proposed by the European

[29] Hielke Hijmans, *The European Union as Guardian of Internet Privacy*, Springer, 2016, Luxemburg, p. 211.

[30] Nathalie A. Smuha, *How the EU Can Protect Fundamental Rights in the Age of AI*, in ”European Journal of Risk Regulation”, 2021, Bruxelles, p. 153.

Commission in April 2021 and adopted in its final form in March 2024, with phased implementation starting in 2025.

The AI Act marks a historic moment, being the first global legislative initiative to attempt to regulate AI comprehensively. One of its central objectives is the protection of fundamental rights, reflecting the EU's commitment to democratic values.

The Regulation seeks to avoid excessive regulation, focusing on applications with the highest potential to violate rights, and has identified a series of risks, such as: the use of AI in justice, biometric surveillance, and automated decision-making in sensitive areas. The AI Act places particular emphasis on the transparency of automated decisions. According to the regulation, individuals affected by an automated decision must be clearly informed that a decision has been made by an AI system and about the logic behind this decision. This is an important step for protecting fundamental rights, especially regarding privacy protection and the right to understand and contest such decisions.

Moreover, the AI Act requires that all high-risk AI systems be periodically audited and verified to ensure compliance with ethical standards and fundamental rights protection.

The European Union has demonstrated, through the adoption of the Artificial Intelligence Regulation (AI Act), a clear commitment to its fundamental values, seeking to balance the promotion of technological innovation with the protection of the fundamental rights of citizens. However, despite the innovative nature of the regulation, legitimate questions arise regarding the sufficiency and effectiveness of this regulatory framework in the face of the challenges posed by the rapid developments in artificial intelligence.

The AI Act is part of a broader legal ecosystem, alongside acts such as the General Data Protection Regulation (GDPR), the Digital Services Act, the Digital Markets Act, as well as the fundamental instruments enshrined in the Charter of Fundamental Rights of the European Union. Together, these regulations shape a robust, yet complex and potentially fragmented framework, which may lead to uncertainties in implementation and difficulties in delineating institutional competences.[31]

Moreover, the AI Act adopts a predominantly static approach, focusing on ex-ante risk assessment and imposing compliance requirements based on the classification of AI systems. This approach is legally justified, but it is not adapted to the accelerated dynamics of technological innovation, especially in the context of the emergence of generative artificial intelligence systems, self-learning neural networks, and autonomous applications.[32] Thus, the need arises for flexible and adaptable legal mechanisms, capable of responding promptly to technological transformations and emerging risks.

Another problematic aspect concerns the lack of solid procedural safeguards for individuals affected by decisions made by AI systems. Currently, the AI Act does not explicitly enshrine the right to information, the right to intelligible explanations, or the effective right to contest automated decisions. In the absence of these safeguards, essential rights such as human

[31] Michael Veale, Frederick Zuiderveen Borgesius, *Demystifying the Draft EU Artificial Intelligence Act*, in "Computer Law Review International", no. 22(4), 2021, p. 97–112.

[32] Nathalie A. Smuha, *From a 'Race to AI' to a 'Race to AI Regulation': Regulatory Competition for Artificial Intelligence*, in "Law, Innovation and Technology", no. 13(1), 2021, p. 57–84.

dignity, equality before the law, and access to fair justice are exposed to systemic risks[33].

Furthermore, the effective implementation of European regulations will depend crucially on the ability of member states to implement adequate institutional mechanisms. The establishment of national authorities specialized in AI oversight, equipped with sufficient resources and technical expertise, as well as the development of collaborative frameworks between public institutions, the private sector, and civil society, is necessary.[34]

Although the AI Act represents a major step toward the ethical regulation of artificial intelligence, in its current form, it is not sufficient to guarantee the full and effective protection of fundamental rights. The future of this legislative framework will depend on its ability to evolve, to be complemented by additional mechanisms for procedural protection, and to respond flexibly to the challenges posed by ongoing technological developments.

The AI Act has a number of gaps and ambiguities that may limit the effectiveness of the regulation. First, impact assessments on fundamental rights are not subject to systematic external oversight, which may reduce transparency and accountability of the actors involved. Second, the definition of risks is sometimes vague and susceptible to divergent interpretations, which could allow the misclassification of potentially dangerous AI systems into low-risk categories.

What is concerning is that the provisions regarding biometric surveillance in public spaces raise questions. Although, in principle, it is prohibited, numerous exceptions related to national security and the prevention of serious crimes are allowed. These exceptions, formulated in general terms, risk leading to wide derogations and abusive applications. The regulation does not explicitly enshrine a right to an explanation in the face of automated decisions, nor an effective mechanism for challenging them. In the absence of these procedural safeguards, the effective protection of fundamental rights is called into question[35].

The regulatory framework established by the European Union in the field of artificial intelligence reflects a real effort to align technological innovation with the ethical and legal requirements of fundamental rights protection. However, the static nature of the current regulations and the accelerated pace of technological progress raise an essential question: are the current legislative tools sufficient to ensure effective protection of fundamental rights in the long term?

Although the AI Act provides a coherent general framework adapted to a variety of AI use scenarios, the legislation as a whole is fragmented. Currently, the protection of fundamental rights depends on the conjunction of the AI Act, GDPR, the Charter of Fundamental Rights, and other sectoral instruments. This normative plurality can create confusion, overlap, and implementation difficulties.[36]

[33] AlgorithmWatch (2021). Automated Decision-Making Systems in the EU: Fundamental Rights Implications.

[34] European Union Agency for Fundamental Rights (FRA) (2020). *Getting the future right – Artificial Intelligence and fundamental rights.* Publications Office of the European Union.

[35] Martin Ebers et alii, *The European Commission's Proposal for an Artificial Intelligence Act—A Critical Assessment by Members of the Robotics and AI Law Society (RAILS).* JIPITEC, no. 12(3), 2021, p. 283–324.

[36] Giovanni Sartor, Francesca Lagioia, *The Impact of the General Data Protection Regulation (GDPR) on Artificial Intelligence*. European Parliamentary Research Service (EPRS), 2020.

Furthermore, new forms of artificial intelligence, especially generative AI and self-learning systems, surpass the classical model of identifiable risks in advance. The AI Act relies on an ex-ante risk assessment, which makes it vulnerable to emerging applications that cannot be anticipated at the time of authorization or registration.[37]

Major problems are also created by the absence of clear procedural protection mechanisms. The right to information, to explanation, and to contest automated decisions is not directly and firmly regulated. In the absence of these safeguards, citizens risk being subjected to opaque, inequitable, or arbitrary decisions, without the possibility of understanding or challenging them.

Moreover, the effectiveness of the regulations depends crucially on the institutional capacity of member states to implement and monitor their application. Specialized authorities with strong technical expertise and operational independence, as well as coordination mechanisms between the European and national levels, are needed.

Therefore, in its current form, the European legislative framework provides a solid foundation but is insufficient to adequately respond to the complexity and dynamics of the AI phenomenon. An evolutionary approach is needed, based on periodic updates, strengthening procedural safeguards, and better integrating human rights principles into the logic of technological governance.

The specialized literature and reports developed by non-governmental organizations (NGOs) have provided significant contributions to understanding the impact of artificial intelligence on fundamental rights. These external sources play an essential role in complementing the institutional and legislative vision, bringing critical, empirical, and interdisciplinary perspectives to the forefront concerning the ethical and legal risks of AI use.

An important part of the academic literature focuses on the normative and philosophical implications of AI. The work of Luciano Floridi and other researchers in the field of digital ethics explores how algorithms can affect human autonomy and the principles of social justice[38]. In the same vein, research by Sandra Wachter and Brent Mittelstadt has highlighted the lack of a coherent framework to guarantee transparency and explainability of algorithmic decisions in relation to the rights conferred by the GDPR.[39]

Another important trend in the specialized literature is comparative analysis. For example, researchers at the AI Now Institute (New York University) have pointed out significant differences between the regulations proposed in the US and those in Europe, criticizing the trends of corporate self-regulation and the lack of common standards for legal accountability.[40]

NGOs active in the field of digital rights, such as Access Now, AlgorithmWatch, or European Digital Rights (EDRi), have raised awareness about the negative effects of AI on vulnerable

[37] Sandra Wachter, Brent Mittelstadt, Chris Russell, *Counterfactual Explanations without Opening the Black Box: Automated Decisions and the GDPR*, in "Harvard Journal of Law & Technology", no. 31(2), 2017, p. 841–887.

[38] Luciano Floridi et alii, *AI4People—An Ethical Framework for a Good AI Society: Opportunities, Risks, Principles, and Recommendations*, in "Minds and Machines", no. 28(4), 2018, p. 689–707.

[39] Sandra Wachter, Brent Mittelstadt, *A Right to Reasonable Inferences: Re-Thinking Data Protection Law in the Age of Big Data and AI*, in "Columbia Business Law Review", 2019(2), pp. 494–620.

[40] Kate Crawford, Meredith Whittaker et alii, *AI Now Report 2019*, AI Now Institute, New York University, 2019. Available at: https://ainowinstitute.org/reports.html.

groups and the systemic risks of discrimination, exclusion, and mass surveillance.

European non-governmental organizations have advocated for the inclusion of firmer provisions in the AI Act regarding explicit prohibitions, the right to human intervention, and the independence of supervisory authorities. These positions have directly influenced European parliamentary debates, demonstrating the capacity of civil society to intervene in the legislative process with well-documented and solid arguments.

Although academic studies and NGOs operate from different epistemological frameworks, there is an increasing convergence regarding the need for ethical governance of AI. Both sides promote the idea that AI should not be seen as a mere neutral technology but as a socio-technical construct with profound implications for legal norms and democratic values.

However, tensions arise regarding the approach: academic literature tends to be more nuanced and analytical, while NGOs often adopt a more normative and advocacy-oriented discourse. This difference is not a weakness but reflects the complementarity between research and civic action, contributing to a broader and more democratic understanding of the challenges posed by artificial intelligence.[41]

Conclusions

The transformations generated by the development of artificial intelligence (AI) bring unprecedented challenges for legal systems and, in particular, for the protection of fundamental rights in the European space. This work has shown that AI is not just a matter of technological progress but primarily an issue of ethical and legal governance, where the rule of law, human dignity, and individual freedoms must remain central benchmarks.

The analysis of the risks and intrinsic potential of AI to affect rights such as privacy, freedom of expression, non-discrimination, and access to justice revealed an imbalance between the accelerated pace of innovation and the ability of the law to react in a timely and adequate manner.[42] Automated decision-making systems, generative language models, and digital surveillance tools are just a few examples where technology can undermine individuals' rights if not properly regulated.

The European Union has reacted by developing major legal instruments, headed by the Artificial Intelligence Regulation (AI Act). This offers a unified and preventive legal framework, based on risk classification and the imposition of proportional technical and ethical obligations. The AI Act represents a pioneering legislative initiative at the global level but suffers in terms of its capacity to integrate the technological dynamic in a flexible and anticipatory manner.[43]

The conclusions of this work lead to the identification of three essential directions of action for strengthening the protection of fundamental rights in the AI era:

- Rethinking regulatory principles in an adaptive key , ashift is needed from a rigid normative approach to an evolutionary

[41] European Digital Rights (EDRi). (2022). *AI and Fundamental Rights: Civil Society Recommendations for the AI Act*. Available at: https://edri.org.

[42] Sandra Wachter, Brent Mittelstadt, Luciano Floridi, *Why a Right to Explanation of Automated Decision-Making Does Not Exist in the General Data Protection Regulation*, in "International Data Privacy Law", 7(2), 2017, pp. 76–99.

[43] Michael Veale, Frederick Zuiderveen Borgesius, *op. cit.*, p. 97–112.

one, which includes mechanisms for the continuous update of legal obligations based on technological developments and empirical data from the application of AI in practice.[44]

- Institutionalizing effective procedural safeguards .Fundamental rights cannot be defended solely by general norms; they require concrete mechanisms such as the right to be informed, the right to intelligible explanations, access to an effective remedy, and real human oversight over automated decisions.

- Strengthening institutional capacity at the European and national levels. The protection of rights in the context of AI requires the existence of independent authorities, well-funded and with technological expertise, capable of monitoring, sanctioning, and advising actors involved in the development and use of AI.

The European Union is in a unique position of normative leadership, with the potential to set a global standard for ethical, safe, and human-centered artificial intelligence. However, for this vision to become a reality, it requires consistent political and institutional commitment, an open interdisciplinary dialogue, and a continuous reassessment of the relationship between technology and fundamental rights.

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[44] idem

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DOES E-GOVERNMENT REVIVE PUBLIC TRUST AND LEGAL CERTAINTY

Ardianto Budi RAHMAWAN (*)

Abstract

This study investigates Hungary's electronic government (e-gov) initiatives, focusing specifically on the education sector and assessing their compliance with European Union (EU) information and communications regulations. Key research questions address how Hungary's e-gov initiatives, mainly through the Neptune platform and EnterHungary website, impact legal certainty and public trust. The study argues that while Hungary's e-gov framework has streamlined public administration and contributed to the country's favorable standing in human development indices, new EU regulatory requirements have introduced challenges that slow public service efficiency. This normative research combines public surveys with legal analysis to evaluate Hungary's adherence to information technology laws and explore citizens' perceptions of trust and reliability in e-gov services. Findings reveal significant barriers, including regulatory compliance issues and a need for improved transparency, which impact both legal certainty and public trust. The study suggests strategic recommendations for aligning Hungary's e-gov services with EU standards to enhance service quality and trustworthiness, ultimately supporting the sustainable implementation of e-government across sectors.

Keywords: *e-Government, Technology, Hungary, Legal Certainty, Public Trust*

Introduction

The rapid advancement of technology is undeniably transformative by its nature whereas today as societal changes unfold daily alongside technology, our lives will always be in constant flux. For instance, in the 21st century, our communication methods have evolved dramatically transitioning from handwritten letters to instantaneous electronic communication via mail. In addition to this, we can now order food without visiting a restaurant, utilize parking machines seamlessly, transfer money through our smartphones, and manage administrative tasks without stepping into governmental offices. This technological progress has minimized the need for face-to-face interactions, as a growing array of services are now available in the digital world. However, such a transformative shift is not without challenges. Legal uncertainty and pervasive distrust from both public society and government agencies often continue to hinder the full potential of these advancements.

"EnterHungary" is an official government portal designed to simplify the immigration process for foreign nationals entering Hungary. This digital platform allows users to efficiently manage visa applications, resident permit requests, and other immigration-related tasks. Similarly, "Neptune" serves as the administrative system utilized by Hungarian universities to

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oversee academic records, course registrations, and student information. Both these platforms are integral components of the wider Hungry e-Gov initiatives, which aim at enhancing efficacy and alleviating the bureaucratic burden on citizens and residents. By digitizing processes that traditionally required some form of in-person interactions, these systems strive to provide greater transparency, accessibility, and expedited services for all its users.

Administrative issues, legal certainty, and public trust are critical considerations in the context of both entrepreneurship and student administration, particularly in platforms such as EnterHungary. While this official government portal enhances convenience for foreign nationals navigating immigration processes, it is not without its challenges. Users may encounter administrative hurdles and technical glitches that can often undermine both legal certainty and public trust. For example, ambiguous instructions, delays in application processing, and inconsistent communication from immigration authorities can create uncertainty regarding the legal status of applications, leading to confusion and potential disruptions for applicants. Furthermore, when users feel that their rights and obligations are not articulated or perceive the platform as unreliable, their trust in the system erodes, possibly violating these administrative principles. To maintain public confidence in EnterHungary and, by extension, in Hungary's broader e-Gov initiatives, it is essential to uphold the principles of legal certainty—ensuring that procedures are transparent, predictable, and consistently applied. As previously discussed, while technology facilitates many aspects of public service, it is crucial to remember that the foundation of effective public services lies in legal certainty, which ultimately fosters trust in these critical matters.

What is Legal Certainty and Public Trust?

Legal certainty has been a cornerstone of Western legal theory for centuries. As law and certainty are regarded as the 'heart' of regulation, a thorough understanding of regulation is essential, as it forms the foundation of legal principles. Essentially, legal principles represent the standard norms of ethical values that underpin the regulatory process. Consequently, these principles, which encompass ethical norms, ensure that parties affected by legal circumstances are safeguarded from arbitrary or capricious treatment by government agencies.[1] This assertion is further supported by Van Apeldoorn, who highlights two key aspects of legal certainty:[2] first is the importance of understanding the current implications of one's circumstances, and second, the awareness of potential actions that individuals can take when engaging in activities with legal consequences. By ensuring clarity and predictability, legal certainty fosters a fair and just legal environment for all parties involved.

Furthermore, legal certainty stands at the heart of law as a social science, reflecting its fundamental role in shaping human behavior and ensuring the smooth functioning of society. It is a key concept that underpins the rule of law, providing individuals and institutions with clarity, predictability, and stability in legal matters.

[1] Kordela, M. (2008). The Principle of Legal Certainty As A Fundamental Element of The Formal Concept of The Rule of Law. *Revue du notariat, 110(2)*, 587-605. Http://doi.org/10.7202/104553ar.

[2] van Apeldoorn, L. (2021). Hobbes on Property: Between Legal Certainty and Sovereign Discretion. *Hobbes Studies, 34(1)*, 58-79. https://doi.org/10.1163/18750257-bja10024.

The principle of legal certainty ensures that laws are not only accessible and understandable but also applied consistently over time. This consistency is vital for fostering public trust in legal institutions, as it enables individuals to anticipate the consequences of their actions within a legal framework. Without legal certainty, the social order would be jeopardized, as citizens would face arbitrary or unpredictable enforcement of laws, leading to confusion, instability, and erosion of trust in governance. As theorists like Max Weber have argued, modern legal systems are characterized by formal rationality, where the law is constructed as a logical, coherent system that provides clear guidance to individuals on acceptable conduct (Weber, 1978).[3] Legal certainty supports this rationalization by ensuring that laws are explicit and enforceable, allowing individuals to make informed decisions based on an understanding of legal consequences. In this way, law not only regulates social interactions but also reflects and reinforces societal norms and values, contributing to the cohesion of society as a whole.

Therefore, from the explanation above it is clear that legal certainty is closely linked to the idea of fairness in law, as it prevents the arbitrary exercise of power by authorities. As the European Court of Human Rights has noted, the principle of legal certainty is essential for safeguarding individuals against unjust treatment by public authorities (European Court of Human Rights, 2021).[4] By ensuring that laws are applied uniformly and predictably, legal certainty helps protect fundamental rights and freedoms, providing citizens with a secure environment in which they can act without fear of unexpected legal repercussions. Thus, legal certainty forms the backbone of both the legitimacy and efficacy of legal systems in modern societies.

In the realm of administrative law, legal certainty assumes even greater importance, as it profoundly influences the relationship between government bodies and the public. Administrative law regulates the actions of public officials and institutions, ensuring that their decisions align with established legal standards. In this context, legal certainty necessitates that administrative decisions are made transparently, grounded in clear legal provisions and that citizens have access to effective remedies when adversely affected by government actions. Legal scholars emphasize that administrative decision-making must be anchored in the principles of consistency and fairness, both of which are fundamentally supported by legal certainty.[5] When legal certainty is absent in administrative processes, citizens may encounter unpredictable outcomes, which can lead to a significant decline in trust in public institutions. Thus, maintaining legal certainty is essential for fostering a reliable and accountable administrative framework that upholds the rights and expectations of the public.

The growing reliance on information technology (‘IT’) in public administration and governance—often termed e-government (‘e-gov’)—introduces significant complexities to the notion of legal certainty. As governments worldwide adopt digital platforms to deliver public services and manage administrative processes, the need for clear, reliable legal frameworks becomes even more pressing in

[3] Weber, M. (1978). Economy and Society: An Outline of Interpretive Sociology. *University of California Press*.
[4] European Convention on Human Rights, 213 U.N.T.S. 222 (1950), Article 6.
[5] Craig, P. (2021). Administrative Law. *Sweet & Maxwell*.

the digital age, legal certainty encompasses the imperative that technological applications in governance align with established legal principles, particularly concerning data protection, cybersecurity, and the legitimacy of electronic transactions. E-gov systems facilitate interactions between citizens and government authorities through digital interfaces, enabling activities such as submitting applications, accessing public records, and even casting votes online. It is essential that these processes are underpinned by transparent legal standards that safeguard the security, privacy, and integrity of digital engagements.

This role of legal certainty in information technology is highlighted by the challenges posed by rapidly evolving technologies such as artificial intelligence ('AI'), blockchain, and cloud computing. As new technologies are integrated into administrative processes, existing legal frameworks often struggle to keep pace, leading to gaps in regulation and legal uncertainty. For instance, the application of blockchain technology in public registries and smart contracts raises critical questions regarding the legal status of digital records and the enforceability of automated agreements (Tapscott & Tapscott, 2016).[6] In this context, legal certainty is crucial for ensuring that the rights of citizens and businesses are protected when interacting with these new technologies.

In Europe, the General Data Protection Regulation ('GDPR') serves as an example of an effort to establish legal certainty in the digital realm. The GDPR provides clear rules on how personal data must be handled by both public and private entities, ensuring that citizens' privacy is protected in the digital age. This regulation addresses the need for legal certainty by offering clear guidelines on data collection, storage, and processing, as well as the legal obligations of organizations that handle personal data. By providing a uniform legal framework across the European Union, the GDPR enhances legal certainty for both individuals and businesses, fostering trust in digital services (Voigt & Von dem Bussche, 2017).[7]

In the context of e-govs, legal certainty such as those brought by the GDPR ensures that digital platforms are accessible and secure, promoting greater public trust in digital governance. When citizens are confident that their digital interactions with government agencies are secure and legally valid, they are more likely to engage with these platforms, leading to greater adoption of e-government services. Conversely, legal uncertainty in the digital space—such as unclear regulations regarding electronic signatures or digital identities—can undermine public trust and reduce the effectiveness of e-government initiatives (Pérez-Morote et al., 2020).[8]

Therefore, legal certainty is a core element of law as a social science, providing the stability and predictability necessary for the effective functioning of society. Its importance is magnified in the context of administrative law and information technology, where legal frameworks must adapt to the complexities of digital governance while maintaining transparency, fairness, and protection of citizens' rights.

[6] Tapscott, D., & Tapscott, A. (2016). Blockchain Revolution: How the Technology Behind Bitcoin is Changing Money, Business, and the World. *Penguin*.

[7] Voigt, P., & Von dem Bussche, A. (2017). The EU General Data Protection Regulation (GDPR): A Practical Guide. *Springer International Publishing*.

[8] Pérez-Morote, R., Pontones-Rosa, C., & Núñez-Chicharro, M. (2020). The Effects of E-Government Evaluation, Trust and the Digital Divide in the Adoption of E-Government Services in Europe. *Technological Forecasting and Social Change, 154*.

Ensuring legal certainty in these areas is essential for fostering public trust in both traditional and digital governance systems, making it a critical consideration for modern legal and administrative practices.

Public trust on the other hand can be conceptualized as the confidence that society places in the government regarding information and administrative matters. This trust is evaluated through the effectiveness of government programs, innovations, and services. Rooted in the Public Trust Doctrine ('PTD'), this principle has its origin in Roman law and is prevalent in countries with public agreements that govern the management of natural resources. Over time, the PTD doctrine has significantly evolved, particularly in the context of environmental and natural resource disputes in the United States, marking a substantial advancement in environmental law.[9] As Richard Frank asserts the PTD is a foundational doctrine for environmental law and natural resource management.[10]

As was the case since Roman antiquity, the PTD has aimed to protect public spaces that are open and accessible to all citizens, grounded in the trust placed in state institutions. The PTD is employed in various countries where this inherent trust diminishes the need for formal written agreements between the state and society.[11] Private law can be compared to the relationship between property managers and tenants in a rental agreement. In this scenario, the tenant is responsible for maintaining the cleanliness of their unit, while the manager is obligated to ensure the overall upkeep of the property and repair any damaged communal facilities. This relationship exemplifies the trust that exists between both parties, as they are each responsible for preserving the shared environment for future tenants. In public law, the concept of public trust is deeply rooted in the principles of democratic governance, emphasizing that the true power and future of society lie within its citizens. Therefore, the trust that citizens place in their officials must be respected and upheld. In the United States, PTD regulations are enshrined in state constitutions to protect and conserve the environment.[12] At least five states incorporate the PTD into their governmental frameworks, although the principle is not explicitly mentioned in most state constitutions or the United States Constitution. This highlights the ongoing importance of the Public Trust Doctrine in ensuring that public resources are managed responsibly and in the public interest.

Research Methodology

The research follows a review process of the method suggested by Webster and Watson,[13] focusing on the literature surrounding the value of e-gov. A literature review on specific topics becomes particularly relevant when an event prompts

[9] Solomon, C. (2016, May 27). The Newest Legal Tool to Fight Climate Change is as Old Ancient Rome. *Outside.* https://www.outsideonline.com/2083441/newest-legal-tool-fight-climate-change-old-ancient-rome.

[10] M. Frank, R. (2012). The Public Trust Doctrine: Assessing Its Recent Past & Charting Its Future. *University of California, Davis, 45(665).* https://www.law.gwu.edu/sites/g/files/zaxdzs5421/files/downloads/FrankThePublicTrustDoctrine.pdf.

[11] C. Wood, Mary. (2009). Advancing The Sovereign Trust of Government to Safeguard The Environment for Present and Future Generations (Part II): Instilling A Fiduciary Obligation in Governance. *Lewis & Clark Law School ENVTL L. 39(91).*

[12] Sun, H. (2011). Toward A New Social-Political Theory of The Public Trust Doctrine. *Vermont Law Review 565.*

[13] Webster, J., & Watson, R. T. (2002). Analyzing the Past to Prepare for the Future: Writing a Literature Review. *MIS Quarterly, 26(2),* R13.

a new research inquiry. In this literature review process, the focus will be on the concept of legal certainty, which is a fundamental characteristic of law, as well as the principle of public trust, which stems from elements of common law. By examining these critical concepts, the research aims to provide a comprehensive understanding of their significance in the context of e-gov. In the quest to answer the two research questions, the authors intend to break down the elements of legal certainty and define the trust between citizens and the government by using a holistic approach. This approach involves a combination of the following steps:

1. Identify the elements of legal certainty in administrative and information technology; and
2. Assessing PTD elements through e-gov processes in Hungary.

This research will also examine the digital interfaces of EnterHungary and Neptune, specifically designed for international students, to highlight the critical importance of legal certainty and information rights. The author will analyze these platforms to assess the significance of the translated information provided and the duration of the bureaucratic processes that international students face in Hungary. Additionally, the author will compare these interfaces with those of websites in other countries to evaluate the adoption of administrative and electronic information systems. This comparative analysis will enhance our understanding of how different countries facilitate access to essential information for international students.

Results and Discussion

Defining Legal Certainty as a Legal Principle

Grasping the fundamental concept of law, particularly legal certainty, is essential, as the law relies on the predictability of outcomes. Law is a systematic framework of rules created by humans to establish order within a society, and therefore, it must be adhered to. In the context of legal principles within a country, which encompasses both government officials and citizens, laws should be formulated in advance, made widely known, and presented in an easily understandable manner. This approach ensures that all parties can navigate the legal landscape with clarity and confidence.[14] In a formal definition, theoretical perspectives on legal certainty emphasize that it encompasses not only substantive and material aspects but also procedural dimensions. Understanding these procedural aspects is crucial, as they highlight the significance of timely responses within the legal decision-making process. Legal certainty, therefore, is defined by its ability to ensure that procedures are transparent and predictable, facilitating fair and informed outcomes.[15] Moreover, when interpreting legal certainty, there is often a reliance on personal judgment, as human decisions can be influenced by the risks of discrimination and unfair treatment. However, in the context of e-govs and administrative processes, interpretations of legal certainty frequently overlook the formal and procedural dimensions, primarily because human involvement remains integral to the system. For instance, tasks such as

[14] Tamanaha, BZ. (2012). The History and Elements of the Rule of Law. *Singapore Journal of Legal Studies 12*, 232–247; Raz, J. (1979). The Authority of Law: Essays on Law and Morality. *Oxford: Clarendon Press*.

[15] Taekema, S. (2013). The Procedural Rule of Law: Examining Waldron's Argument on Dignity and Agency. *Annual Review of Law and Ethics 21*, 133–146.; Bertea, S. (2008). Towards a New Paradigm of Legal Certainty. *Legisprudence 2(1)*, 25–45.

interpreting documents, verifying data validity, and cross-referencing information with other agencies can complicate the definition of legal certainty. These additional factors can hinder the realization of true legal certainty, as they introduce variability and potential bias into the decision-making process.

Hence when assessing legal certainty, it is important to consider the element of foreseeability. Foreseeability here is defined as the ability to predict the legal consequences that may arise from fulfilling or failing to fulfill certain conditions and plays a crucial role in assessing legal certainty. For instance, if government agencies do not provide timely decisions on specific requests from citizens, those citizens may face penalties or repercussions for being unable to meet certain prerequisites. When examining e-gov services in Hungary, it becomes evident that Hungarian agencies often fail to specify the duration required to process public requests. This lack of clarity undermines foreseeability, leaving citizens uncertain about the timeline and potential outcomes of their interactions with the government. Such ambiguity can significantly impact their ability to navigate legal obligations effectively.

Issues in Legal Certainty During the Hungarian Law-Making Process

Legal certainty is vital in ensuring that laws are clear and consistently applied, which fosters trust in governance. In Hungary, however, the e-gov framework lacks this crucial element. The legal system has struggled to keep pace with rapid technological advancements, leading to uncertainty in key areas like data protection, cybersecurity, and digital signatures. This has confused both citizens and businesses, as inconsistent or outdated regulations undermine confidence in digital platforms. Additionally, sudden regulatory changes without adequate public consultation further exacerbate this issue.[16]

Adding fuel to the fire, the Hungarian government has also introduced sudden regulatory changes in its e-gov systems without proper public consultation. Such changes exacerbate the issue of legal uncertainty, as citizens and businesses need more guidance to adapt to new rules. This lack of transparency in the legislative process deepens mistrust in e-gov platforms, as users feel unprotected and uncertain about their rights and obligations under the law. Without public input, laws governing e-government systems often fail to meet users' needs, diminishing their effectiveness. In addition, Hungary's e-gov system is compounded by the government's fragmented approach to legal reform. Legal gaps and ambiguities make it easier for certain actors to exploit loopholes, particularly in public procurement, where e-government systems are used for awarding contracts. This raises concerns about fairness and accountability and erodes public confidence in the legal and governance systems that underpin digital services. Addressing these legal shortcomings through more transparent, more consistent legislation and a more inclusive regulatory process is crucial for restoring public trust and enhancing the effectiveness of Hungary's e-government initiatives.

[16] Group of States Against Corruption (GRECO). (2023). Fifth Round Evaluation on Hungary. *Council of Europe.* https://rm.coe.int/fifth-evaluation-round-preventing-corruption-and-promoting-integrity-i/1680ab87f5.

The Importance of Ensuring Legal Certainty in E-Government

Legal certainty is a fundamental principle in any governance framework, ensuring that laws are clear, precise, and predictable. In the realm of e-gov, this principle takes on heightened importance, as it directly affects how citizens engage with digital services and the level of trust they place in governmental processes. E-gov systems depend heavily on digital platforms for delivering public services, necessitating a robust legal framework that guarantees the legality and reliability of online transactions. Establishing legal certainty provides citizens and administrators with clear guidelines and expectations regarding digital processes, their rights in these interactions, and the legal implications of utilizing these services.[17]

To ensure this legal certainty in e-gov, the legal framework needs to be continuously updated to address evolving digital technologies and the various risks associated with digital processes. This includes developing new laws and regulations specifically tailored for digital interactions, such as data protection laws, electronic signatures, and cybersecurity regulations. These legal measures help reduce ambiguities by setting clear standards for the authentication of users, the integrity of data, and the validation of digital documents. A transparent legal environment fosters confidence in e-government platforms, leading to higher adoption rates by the public and reducing resistance to innovative technologies.

Another essential aspect of legal certainty in e-gov is its role in mitigating risks of fraud and misuse. With clear legal rules in place, governments can hold individuals and organizations accountable if they misuse e-gov platforms, thereby protecting the integrity of the system. For example, digital contracts signed via e-government platforms need to be legally binding, and any disputes over such contracts must have clear legal remedies. Without legal certainty, citizens may hesitate to use these platforms, fearing that their rights might not be adequately protected or that the government might not be held accountable for its digital services.

On the other hand, a situation of legal uncertainty presents significant challenges to the successful implementation of e-gov systems. Legal uncertainty occurs when laws are ambiguous, outdated, or not adequately adapted to address recent technologies. In this context, this can manifest in several ways, such as unclear regulations regarding the use of digital signatures, insufficient guidelines on how personal data is processed, or gaps in the law when it comes to the legal status of digital documents. Legal uncertainty can undermine public trust in e-government systems, reducing their effectiveness and discouraging citizens from engaging with online services. One primary cause of legal uncertainty in e-gov is the rapid pace of technological advancement, which often outstrips the legislative process. Laws, particularly in the realm of digital governance, can struggle to keep up with recent technologies such as artificial intelligence, blockchain, or cloud computing. For instance, the legal framework may not yet fully address the implications of blockchain technology for recording public transactions, leading to

[17] Maxeiner, James R. (2008). Some Realism About Legal Certainty in the Globalization of the Rule of Law. *Houston Journal of International Law, 31(1),* 27-46. https://ssrn.com/abstract=1471563; Delimatsis, P. (2007). International Trade in Services and Domestic Regulations - Necessity, Transparency, and Regulatory Diversity. *Oxford University Press*. https://ssrn.com/abstract=1471563.

uncertainty about its admissibility in court or its alignment with data protection regulations. As innovative technologies emerge, governments must respond quickly by updating their legal systems, or they risk creating an environment where e-government initiatives are implemented without sufficient legal support. Moreover, legal uncertainty in e-gov can create an uneven playing field where some entities or individuals may exploit ambiguities in the law to their advantage. This is particularly concerning in areas like public procurement, where e-government systems are used to facilitate the awarding of contracts. If the legal rules governing these processes are unclear, it may lead to inconsistencies in how contracts are awarded, with some players benefiting from loopholes or vague interpretations. This not only threatens the fairness of the system but can also lead to legal disputes, which, in turn, further erode public trust in e-government.

Another dimension of legal uncertainty arises from the cross-jurisdictional nature of many e-gov services, especially in countries with decentralized or federal systems of governance. Different regions or states may have varying legal interpretations of e-government processes, leading to confusion about which laws apply to specific transactions. For example, a digital service provided at the federal level may be subject to different data protection standards in individual states, creating uncertainty for both service providers and users. Harmonizing legal standards across jurisdictions is crucial for reducing this uncertainty and ensuring a consistent user experience.

Balancing Legal Certainty and Flexibility

While legal certainty is essential for the smooth functioning of e-gov systems, it is also important to balance it with a degree of flexibility. Over-regulation or rigid legal frameworks can stifle innovation and make it difficult for governments to adapt to new technologies or societal needs. For instance, if laws governing e-government processes are too prescriptive, they may limit the ability of government agencies to experiment with new digital services or to implement more efficient technological solutions. Therefore, while legal certainty provides the stability necessary for e-government processes to function, it must be accompanied by flexible regulatory mechanisms that can accommodate future developments.

One way to achieve this balance is through adaptive legal frameworks that can evolve alongside technological advancements. These frameworks could include provisions for regular reviews of e-gov laws or mechanisms that allow governments to issue temporary regulations that can be tested and adjusted as needed. By incorporating flexibility into the legal system, governments can ensure that e-gov platforms remain both legally sound and adaptable to new technologies. Additionally, governments could establish legal 'sandboxes' where innovative digital services can be tested under relaxed regulations before they are fully implemented, providing a controlled environment for legal experimentation without sacrificing certainty.

Trust in Public Administration

Trust in public administration is a multifaceted concept that has garnered significant attention in marketing

literature.[18] It is essential for sustaining long-term relationships.[19] Consequently, trust building is regarded as a primary objective by numerous organizations due to its correlation with various advantageous outcomes (including commitment, loyalty, and positive word-of-mouth).[20] Trust is commonly defined as the readiness of one party to be vulnerable to the actions of another, predicated on the expectation that the latter will undertake a specific action, regardless of the trustor's capacity to oversee or regulate.[21]

Like corporations, governments in public management seek to enhance citizens' trust in public administration, dedicating time and resources to accomplish this objective and sustain satisfactory long-term relationships with citizens. Research in public administration has observed a significant decrease in citizen trust in governments globally,[22] particularly in Europe.[23] Nonetheless, no consensus exists regarding the essential factors that enhance or diminish trust.[24] Diverse factors, including political scandals, economic instability, mass media information, government popularity, and governmental performance, have been identified as potential determinants of governmental trustworthiness.[25] E-gov research has highlighted trust as a vital component that demands careful scrutiny.[26] Nevertheless, the majority of e-gov studies primarily regard trust as a precursor to the adoption of e-services or concentrate solely on trust within a particular public e-service.[27] Conversely, limited research has concentrated on trust in public administration as a comprehensive entity, treating it as an independent variable.[28] Establishing trust in the government is regarded as a factor influencing e-gov

[18] Morgan, R., & Hunt, S. (1994). The Commitment-Trust Theory of Relationship Marketing. *Journal of Marketing, 58 (3),* 20-38; Doney, P., & Cannon, J. (1997). An Examination of the Nature of Trust in Buyer-Seller Relationships. *Journal of Marketing, 61(2),* 35-51.

[19] Anderson, J., & Narus, J.A. (1990). A Model of Distribution Firm and Manufacturer Firm Working Partnerships. *Journal of Marketing, 54 (1),* 42-58.

[20] *Ibid*.

[21] Mayer, R., Davis, J., & Schoorman, F. (1995). An Integrative Model of Organizational Trust. *Academy of Management Review, 20(3),* 709-734.

[22] Al-Adawi, Z., Yousafzai, S., & Pallister, J. (2005). Conceptual Model of Citizen Adoption of E-Government. *The Second International Conference on Innovations in Information Technology (IIT).*

[23] Bannister, F., & Connolly, R. (2011). Trust and Transformational Government: A Proposed Framework for Research. G*overnment Information Quarterly, 28(2),* 137-147; Corporate Excellence. (2012). Cae la confianza en empresas e instituciones y sube en expertos e iguales. *Documentos de Estrategia, I16/2012*.

[24] Solomon, C. (2016, May 27). The Newest Legal Tool to Fight Climate Change is as Old Ancient Rome. *Outside*. https://www.outsideonline.com/2083441/newest-legal-tool-fight-climate-change-old-ancient-rome.

[25] C. Wood, Mary. (2009). Advancing The Sovereign Trust of Government to Safeguard The Environment for Present and Future Generations (Part II): Instilling A Fiduciary Obligation in Governance. *Lewis & Clark Law School ENVTL L. 39(91).*

[26] Beldad, A., Van Der Geest, T., de Jong, M., & Steehouder, M. (2012). A Cue or Two and I'll Trust You: Determinants of Trust in Government Organizations in Terms of their Processing and Usage of Citizens' Personal Information Disclosed Online. *Government Information Quarterly, 29 (1),* 41-49.

[27] Bélanger, F., & Carter, L. (2008). Trust and Risk in E-Government Adoption. *Journal of Strategic Information Systems, 17 (2),* 165-176; Belanche, D., Casaló, L. V., & Guinalíu, M. (2012). How to Make Online Public Services Trustworthy. *Electronic Government: An International Journal, 9(3),* 291-308.

[28] Bélanger, F., & Carter, L. (2008). Trust and Risk in E-Government Adoption. *Journal of Strategic Information Systems, 17 (2),* 165-176; Belanche, D., Casaló, L. V., & Guinalíu, M. (2012). How to Make Online Public Services Trustworthy. *Electronic Government: An International Journal, 9(3),* 291-308.

adoption rather than a standalone public policy objective.[29]

Public trust in government is essential for fostering the principles of good governance. The PTD doctrine, although rooted in environmental law, is closely linked to contemporary notions of good governance.[30] This framework encompasses key elements such as transparency and accountability, which redefine the role of governments in delivering public services. By enhancing these aspects, governments can significantly strengthen public trust and confidence in their actions.[31]

EnterHungary, a key public service platform in Hungary, lacks the transparency necessary to instill confidence among citizens. Despite a significant increase in internet users in the country,[32] there is no clear evidence of public satisfaction with the Hungarian government's website. A 2017 survey even indicated that the government is moving in the wrong direction, suggesting that the quality of e-services provided by Hungarian agencies fails to support democratic principles.[33] The interactions between citizens and the government through these e-services can be viewed as contractual relationships, where rights and obligations are established. Furthermore, the perceived absence of adequate accountability mechanisms only exacerbates public mistrust and undermines the government's credibility. Thus, to improve e-service quality, effective management is crucial, especially given the diverse population in Hungary.

Inadequate Accountability mechanism

In Hungary, the mechanisms for administrative accountability within e-gov are inadequate. The absence of a robust accountability framework can significantly undermine public trust in government institutions. Accountability in digital governance is crucial, as it empowers citizens to hold authorities responsible for arbitrary actions, particularly when discretion is involved.[34] Unfortunately, the Hungarian government has demonstrated a consistent decline in accountability, with many agencies operating without sufficient oversight.[35] This lack of oversight is

[29] Arduini, D., & Zanfei, A. (2014). An Overview of Scholarly Research on Public E-Services? A Meta-analysis of the Literature. *Telecommunications Policy, 38(5),* 476-495.

[30] Kaufmann, D., Kraay, A., & Mastruzzi, M. (2009, June 29). Governance Matters 2009: Learning From Over a Decade of the Worldwide Governance Indicators. *Brookings*. https://www.brookings.edu/articles/governance-matters-2009-learning-from-over-a-decade-of-the-worldwide-governance-indicators/.

[31] Pillay, P. (2017). Public Trust and Good Governance A Comparative Study of Brazil and South Africa. *African Journal of Public Affairs, 9(8),* 31–47. Affairs, 9(8), 31–47.

[32] Kemp, S. (2024, Feburary, 24). Digital 2024: Hungary. *DataReportal*. https://datareportal.com/reports/digital-2024-hungary.

[33] Ipsos Hungary Zrt. (2017, November 30 – December 20). *Public Opinion in Hungary*. Center for Insights in Survey Research 2017, Hungary. https://www.iri.org/wp-content/uploads/2018/04/hungary_poll_presentation.pdf.

[34] 5 U.S. Code §706 (1966). https://www.law.cornell.edu/uscode/text/5/70; Nicolaides, P., & Preziosi, N. (2014). Discretion and Accountability: An Economic Analysis of the ESMA Judgment and the Meroni Doctrine. *Intereconomic 49*, 279-287. DOI: 10.1007/s10272-014-0510-2.

[35] Civic Space Watch. (2023, December 14). HUNGARY: Parliament passes the "Defence of Sovereignty" bill despite concerns from CSOs and journalists. *European Civic Forum*. https://civicspacewatch.eu/hungary-draft-defence-of-sovereignty-bill-concerning-for-csos-and-journalists/; Wahl, T. (2024, February 22). Hungary: Rule-of-Law Developments May 2023 - Mid-January 2024. *Eucrim*. https://eucrim.eu/news/hungary-rule-of-law-

reflected in the persistent levels of corruption and inefficiencies within legal and institutional frameworks, which have remained unchanged since 2022, placing Hungary among the lowest in the EU in this regard.[36] The high levels of corruption across the EU further exacerbate the situation, as the failure to ensure accountability and transparency deepens public distrust in government agencies, particularly concerning the digital initiatives undertaken by the Hungarian government.[37] Furthermore, Hungary's failure to implement effective accountability mechanisms reveals that government agencies generally lack sufficient oversight. This deficiency not only fosters public distrust but also jeopardizes the government's ability to fulfill its obligations to its citizens.

Major Barriers to Legal Certainty and Public Trust in Hungary's E-Government Services

Despite the benefits of e-gov, several factors can undermine public trust in these systems. One of the major sources of frustration for users of e-gov services is technical failures. If a government website frequently crashes, experiences downtime, or suffers from poor performance, citizens may lose confidence in the system. For example, the Healthcare.gov rollout in the United States faced widespread criticism due to its technical issues, which severely undermined public trust in the platform and the broader healthcare reform efforts.[38] Technical failures and system downtimes can compromise both legal certainty and public trust, creating significant barriers.[39] When systems that support digital legal processes or public services malfunction, they can introduce ambiguity regarding the status of legal procedures,[40] further eroding public confidence. For example, when online systems or e-governance platforms crash, or when they fail to provide timely updates on requests for government documents, individuals and businesses may experience delays or interruptions in their legal processes. This can lead to uncertainties about deadlines, rights, and obligations. Therefore, maintaining legal certainty and public trust is essential for the

developments-may-2023-mid-january-2024/; R. Apaza, Carmen. (2008). The Importance of Bureaucratic Oversight Mechanisms: The Case of the Inspector General. *Journal of the Washington Institute of China Studies, 3(3)*, 23-41.

[36] Transparency International. (2023, November). Corruption Perceptions Index: Hungary. *Transparency International*. https://www.transparency.org/en/countries/hungary; M. Jávor, Dénes., Ligeti, M., P. Martin, J., & Zeisler, J. (2023). Hungary is the most corrupt Member State of the European Union. *Transparency International*. https://transparency.hu/wp-content/uploads/2023/02/TI_Hu_CPI_2022_report_-en.pdf.

[37] Council of Europe. (2024, June 9). Hungary - Publication of 5th Round Evaluation Report and 4th Interim Compliance Report of 4th Round. *Council of Europe.* https://www.coe.int/en/web/greco/-/hungary-publication-of-5th-round-evaluation-report-and-4th-interim-compliance-report-of-4th-round.

[38] Jones, L. R., & Kettl, D. F. (2014). Assessing Public Management Reform in an International Context. *International Public Management Review, 4(1),* 1–19. https://ipmr.net/index.php/ipmr/article/view/206.

[39] Cornett, L., & A. Knowlton, N. (2020, June). Public Perspectives On Trust & Confidence In the Courts. *IAALS—Institute for the Advancement of the American Legal System.* https://iaals.du.edu/sites /default/files/documents/publications/public_perspectives_on_trust_and_confidence_in_the_courts.pdf; Federal Judicial Center. (2019). Maintaining the Public Trust Ethics for Federal Judicial Law Clerks. *Federal Judicial Center*. https://www.fjc.gov/sites/default/files/materials/24/Maintaining_the_Public_Trust_Revised_4th_Edition _2019.pdf.

[40] Telang, A. (2023, March 14). The Promise and Peril of AI Legal Services to Equalize Justice. *Jolt Digest*. https://jolt.law.harvard.edu/digest/the-promise-and-peril-of-ai-legal-services-to-equalize-justice.

effective operation of legal and governmental systems.[41]

Another major barrier to legal certainty is due to technical failures is the inconsistency that arises when digital systems do not function as expected. For example, if an electronic system is attacked by a virus or a hacker experiences downtime,[42] the public might miss critical deadlines, resulting in the dismissal of certain events or legal penalties. These system failures can create confusion about legal rights and obligations, in particular no legal certainty provided by the government, especially when there is no clear contingency plan.[43] Even when backup procedures are available, the transition from digital to manual processes can cause inconsistencies in the treatment of cases, undermining the principle of legal certainty. Studies have shown that frequent technical issues in e-gov systems can lead to a decrease in user confidence, as people may not be certain that the system will function reliably when needed.[44] In addition to this, any disruption of the legal processes and technical failures also hinder the transparency that is crucial for building and maintaining public trust. E-gov systems are increasingly used to provide public access to laws, regulations, and public services. When these platforms go offline or experience technical glitches, it can create the perception that the government is not competent or transparent in its operations. This lack of trust can be exacerbated if users suspect that technical failures are being used to obscure information or delay justice. Research on the impact of technological downtime in public institutions suggests that the more frequent and prolonged these outages, the greater the erosion of public trust, as citizens begin to feel that their legal rights and access to services are not being adequately protected.[45].

To address these barriers, robust technical infrastructure and reliable contingency plans are essential. Systems must be designed with redundancy and failover capabilities to ensure continuous operation, even in the face of technical difficulties. Furthermore, clear communication with the public is necessary during times of technical failure, providing transparency about the cause of the issues and the expected time for resolution. Legal frameworks should also account for such eventualities, allowing for extensions of deadlines or other accommodations when technical failures occur. According to legal scholars and the academic discourse, building public trust in digital systems requires not only technical robustness but also procedural safeguards that protect users

[41] B. Gracia, D., C. Ariño, L.V. (2015). Rebuilding Public Trust in Government Administrations Through E-government Actions. *Revista Española de Investigación de Marketing ESIC, 19(1),* 1-11. https://doi.org/10.1016/j.reimke.2014.07.001.

[42] Antoniuk, D. (2024, July 11). Macau Government Websites Hit with Cyberattack by Suspected Foreign Hackers. *The Record*. https://therecord.media/macau-government-websites-hit-with-cyberattack.

[43] Nadarajah, H., Iskandar, A., & T. San, S. (2024, June 15). Indonesian Government Under Fire Following String of Cyber Breaches. *Asia Foundation of Canada*. https://www.asiapacific.ca/publication/indonesian-government-under-fire-after-cyber-breaches#:~:text=In%20Brief,immigration%20services%20and%20major%20airports.

[44] Csatlós, E. (2024). Hungarian Administrative Processes in the Digital Age. *European Journal of Society and Politics, 10(1)*. DOI:https://doi.org/10.17356/ieejsp.v10i1.125.

[45] M. Frank, R. (2012). The Public Trust Doctrine: Assessing Its Recent Past & Charting Its Future. *University of California, Davis, 45(665).* https://www.law.gwu.edu/sites/g/files/zaxdzs5421/files/downloads/FrankThePublicTrustDoctrine.pdf.

from the adverse consequences of system failures.[46]

Lack of Standardization and Lack of Inclusion Over Hungary's E-Government Services

Hungary's lack of standardization across e-gov systems poses a significant barrier to the effective delivery and accessibility of digital public services. Standardization entails the uniform application of policies, technologies, and processes, ensuring that users across various regions and services have a consistent and reliable experience with government platforms. However, in Hungary, the absence of a unified e-gov framework has resulted in discrepancies in the implementation and usage of digital services across different governmental agencies and local municipalities. These inconsistencies not only confuse citizens but also hinder the broader adoption of e-gov initiatives. A critical issue stemming from this lack of standardization is the fragmentation of digital platforms among various regions and public institutions. Local governments, ministries, and public service bodies often develop and deploy their own digital systems, which may lack compatibility with one another. This fragmentation further complicates citizens' interactions with government services and diminishes the overall effectiveness of e-gov in Hungary. For example, in 2005 when Acts CSL of 2004 on the General Procedure and Service Regulations of Public Administration Authorities (hereinafter Ket) defined two means to initiate electronic administrative matters.[47] The first method (the direct one) was the usage of high-security digital signatures while the second allowed clients to send their applications through the client access portal of the central electronic service provider system. When Ket. took effect, e-Administration received a separate article within the act with the details expanded in implementing regulations by the legislator. However, it soon became apparent that the regulations within Ket. Were only enough for the computerization of public proceedings; more than the framework would be needed to regulate the numerous services of the central system developed by the government. Therefore, the concept (and its regulations) have been expanded and eventually received separate legal regulations.

Without standardization, Hungary's e-government efforts risk leaving behind those most vulnerable to digital exclusion. Thus, a concerted push towards creating unified easily navigable digital platforms would be a crucial step in ensuring that the benefits of e-gov are felt equally across society, fostering greater inclusion and trust in the digital transformation of public services.[48] Moreover, public trust in e-government is also affected by issues of digital inclusion. Citizens who do not have reliable internet access or who lack the necessary digital literacy skills may feel excluded from government services. This digital divide can lead to a lack of trust in e-gov, as citizens who are unable to access these services

[46] Díaz-Rodríguez, N., Del Ser, J., Coeckelbergh, M., López de Prado, M., Herrera-Viedma, E., & Herrera, F. (2023). Connecting the dots in trustworthy Artificial Intelligence: From AI Principles, Ethics, and Key Requirements to Responsible AI Systems and Regulation. *Information Fusion, 99*. https://doi.org/10.1016/j.inffus.2023.101896.

[47] Act CL of 2016 on the Code of General Administrative Procedure (2016). https://njt.hu/jogszabaly/en/2016-150-00-00.

[48] Veszprémi, B. (2017). The Status of e-Administration in Hungary – Are We on the Right Track?. *Public Governance, Administration and Finances Law Review, 2(2),* 42–59. https://doi.org/10.53116/pgaflr.2017.2.3.

perceive the system as unfair or inaccessible.[49] Inequality in digital access poses a significant challenge to the successful implementation of e-government services in Hungary. While the country has made notable progress in digitizing its public services, a divide persists between those who can easily access and utilize these platforms and those who cannot. This digital divide is influenced by factors such as income, geographic location, and age. According to Eurostat, in 2020, approximately 88% of Hungarian households had internet access,[50] however, this figure conceals substantial inequalities. Rural areas, lower-income groups, and elderly citizens are disproportionately affected by unreliable internet access and limited digital skills, hindering their ability to fully benefit from Hungary's e-gov initiatives.[51]

Geographically, the digital divide in Hungary is stark, with urban areas enjoying significantly better access to e-gov services than rural regions, and that highlights the legal certainty and public trust towards the Hungarian government. In cities such as Budapest, where internet infrastructure is robust and digital literacy programs are more accessible, the uptake of e-government services is relatively high. However, rural areas often need more high-speed broadband, making it easier for residents to connect to government platforms. According to Hungary's National Digitalization Strategy, rural and economically disadvantaged regions face more significant barriers to accessing digital infrastructure, which restricts their ability to participate in e-government services and further deepens the gap in access to public resources.[52] Moreover, digital literacy is a critical issue in Hungary, particularly among older populations. While younger generations are more digitally adept and comfortable using online services, older individuals often need more skills to navigate e-gov platforms.[53] A Hungarian Central Statistical Office report found that only 32% of people over 55 had basic digital skills, compared to 79% of individuals aged 16-24.[54] This gap in digital competence means that many older citizens continue to rely on paper-based government services, limiting the overall effectiveness and reach of Hungary's e-government efforts to restore public trust. To address these disparities, the Hungarian government must improve digital infrastructure in rural areas and promote digital literacy programs across all age

[49] Çelik, N. (2023). The Digital Inequalities in The Digital Society. *Bilgin Kültür Sanat Yayınları*, 75-81. https://www.researchgate.net/publication/376174034_The_Digital_Inequalities_in_The_Digital_Society.

[50] Trading Economics. (2024, November). Hungary - Individuals Using Mobile Devices to Access the Internet on the Move: Individuals, 55 to 74 Years Old. *Trading Economics*. https://tradingeconomics.com/hungary/individuals-using-mobile-devices-to-access-the-internet-on-the-move-individuals-55-to-74-years-old-eurostat-data.html.

[51] Trading Economics. (2024, November). Hungary - Households Without Access to Internet at Home, Because of Privacy or Security Concerns. *Trading Economics*. https://tradingeconomics.com/hungary/households-without-access-to-internet-at-home-because-of-privacy-or-security-concerns-eurostat-data.html.

[52] Cabinet Office of the Prime Minister. (2022). Hungary National Digitalization Strategy 2022 - 2030. *Cabinet Office of the Prime Minister*. https://www.digitaliskeszsegek.hu/wp-content/uploads/2024/08/National-Digitalisation-Strategy.docx.pdf.

[53] Global Digital Impact. (2023). Digital Literacy: The Great Divide. *United Nations*. https://www.un.org/techenvoy/sites/www.un.org.techenvoy/files/GDC-submission_Digital-National-Alliance-Bulgaria_0.pdf.

[54] Krasavina, A. (2024, August 1). Hungary - National Digital Decade Strategic Roadmap. *European Union Digital Skills and Jobs Platform*. https://digital-skills-jobs.europa.eu/en/actions/national-initiatives/national-strategies/hungary-national-digital-decade-strategic-roadmap.

groups to ensure equitable access to e-government services.

Conclusion and Recommendations

Legal certainty is a crucial component for the successful implementation of e-government systems. In Hungary, however, the current legal framework for e-government has struggled to keep pace with technological advancements, leading to confusion among citizens and businesses. Legal uncertainty has arisen due to outdated regulations, inadequate public consultation in regulatory changes, and fragmented approaches to legal reform. This environment fosters mistrust in e-government systems, as citizens feel they need to be more confident about their rights and obligations, particularly in areas like data protection, digital contracts, and public procurement. Moreover, legal gaps and ambiguities make the system susceptible to exploitation, risking fairness and accountability. Hungary's e-government framework must prioritize legal certainty to improve trust and adoption, making laws clear, consistent, and adaptable to technological change.

Trust is essential in public administration, especially in e-government, where relationships are mediated through digital platforms that citizens may already view with some skepticism. In Hungary, public trust in government services, especially digital ones, has declined. Factors like political controversies, economic difficulties, and inconsistent governmental performance have all contributed to this erosion of trust. Additionally, limited transparency and a lack of meaningful public consultation when creating or changing e-government services have further alienated citizens, who feel excluded from decisions that affect their access to essential public services. With's e-government initiatives may only achieve widespread acceptance with concerted efforts to enhance this trust.

Technical failures are a critical issue in e-government, as frequent outages and system downtimes can profoundly impact trust and legal certainty. In Hungary, unreliable digital platforms create uncertainty, especially for users who depend on these services to meet legal deadlines or fulfill civic obligations. When e-government systems fail, citizens may face delays and confusion about the status of their cases or the reliability of their digital submissions. This inconsistency erodes confidence in the digital systems, creating an environment where citizens feel unsure about their rights and obligations, weakening the legal certainty essential for effective governance. Robust technical infrastructure and precise, effective contingency plans are necessary to maintain user trust and ensure consistent service delivery.

Hungary’s e-government initiatives are currently hindered by a lack of standardization, which has led to a disjointed experience across different regions and public agencies. This lack of cohesion creates confusion and hinders accessibility, as citizens face inconsistent processes and requirements depending on which government body they interact with. Without a standardized e-government framework, Hungary risks creating a fragmented system where users struggle to navigate public services. Standardization could provide users with a uniform, seamless experience, fostering stability and predictability in e-government interactions. A unified approach would also increase the operational efficiency of public agencies, facilitating smoother interagency communication and enabling a more integrated digital public service landscape.

The digital divide remains a considerable barrier to the success of Hungary's e-government services, limiting

the accessibility and inclusivity of these platforms. In Hungary, internet access and digital literacy disparities are especially pronounced among rural and elderly populations, who often struggle to engage fully with e-government services. This exclusionary effect undermines the principle of equal access to public services, leaving vulnerable groups alienated and fostering a perception that digital government is inaccessible or unfair. Hungary must prioritize expanding internet infrastructure in underserved areas to address these challenges and invest in digital literacy programs. Bridging this digital divide is essential not only for maximizing the reach and effectiveness of e-government but also for fostering a more inclusive and trustworthy digital government environment that meets the needs of all citizens.

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JURISPRUDENTIAL DEVELOPMENTS ON THE REASONING OF THE ADMINISTRATIVE ACT

Elena Emilia ȘTEFAN (*)

Abstract

The activity of public authorities is subject to the control of legality performed by the administrative courts, according to the law. On the basis of art. 52 of the Constitution, persons aggrieved in their legitimate rights and interests often complain before the courts that the administration fails to give reasoning on the administrative acts. At EU level, the Charter of Fundamental Rights of the European Union stipulates that giving reasons for administrative acts is a component of the right to good administration. In this context, the aim of this paper is to analyze the relevant case law in order to be able to observe the national administrative contentious judge's opinion on the reasoning of administrative acts, in the sense of whether this formality is mandatory or not for the issuing public authority. In terms of the research methodology, the structure of the paper has two main components, a theoretical one, namely it will describe the state of the legislation applicable to the reasoning of administrative acts, then it will focus on the practical component, in order to understand what problems arise in the work of public administration in this aspect. The proposed subject is topical, practical and of general interest. Using specific legal methods, the conclusion of the paper will be emphasized, namely that the reasoning is a condition for the legality of the administrative act, without which the proper functioning of public administration would be questioned.

Keywords: *legality, reasoning, administrative, contentious administrative, case law.*

1. Introduction

The research hypothesis of the paper starts from the idea that the activity of public authorities is carried out under the protection of the principle of legality, fundamental principle[1] underlying the theory of administrative acts. It is not conceivable that decision-makers who take measures for citizens break the law, otherwise the rule of law and European values could be defeated. Yet "the state is the main political institution of society[2]". Exceptionally, when damage occurs, those affected seek justice in the courts, because no one can seek justice alone. From this perspective, we consider that public authorities[3] have a permanent duty to ensure respect for fundamental human rights through fair, transparent and public interest-oriented conduct.

In national law, the principle of legality prevails both as regards the conduct

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[1] For further details on the principles of law, see Elena Anghel, *General principles of law*, in "LESIJ - Lex ET Scientia International Journal", No. XXIII, vol. 2/2016, p. 120 - 130, https://lexetscientia.univnt.ro/download/580_LESIJ_XXIII_2_2016_art.011.pdf, visited on 02.01.2025.

[2] Emilia Lucia Cătană, *Drept administrativ (Administrative Law)*, 2nd edition, C.H. Beck Publishing House, Bucharest, 2021, p. 1.

[3] For further details on public authorities, see Marta Claudia Cliza, *Administrative Law, Part I (Drept administrativ Partea I)*, Pro Universitaria Publishing House, Bucharest, 2011, p. 12-20.

of public administration[4] and in the conduct of the administered persons. According to art. 1 para. (5) of the Constitution: "In Romania, the observance of the Constitution, its supremacy and the laws shall be mandatory". Furthermore, "public authorities and institutions must comply with the principle of the hierarchy of normative acts, observing both the legal force of each normative act and the competence enshrined in the legal rules of each public authority and institution, which also implies not deviating from the procedure established to be followed for the adoption of any such normative act[5]". From this perspective, "the legal norm requires the acceptance and observance of the prescribed conduct[6]".

This study analyzes the situations where, before a specialized judge[7] as that of contentious administrative[8], a conflict may at some point arise, where an aggrieved person complains that an administrative act has not been given reasons for[9] by an authority or because of unclear legislation. Yet, the legislation is not always clear, it "gives rise to interpretations with consequences that affect (...) the way in which disputes are settled [10]".

2. The reasoning of administrative acts - theoretical and practical guidelines

2.1. The legal framework on the reasoning of the administrative acts

Art. 41 of the Charter of the European Union - "right to good administration" provides "the obligation of the administration to give reasons for its decisions" [para. 2, letter c)]. Therefore, at Union level[11], the obligation of public

[4] From a conceptual prospective, see Roxana Maria Popescu, *ECJ case-law on the concept of "public administration" used in article 45 paragraph (4) TFEU,* in "CKS eBook 2017", p. 528-532, https://cks.univnt.ro/cks_2017/CKS_2017_Articles.html , visited on 07.01.2025.

[5] Silviu Gabriel Barbu, Alexandru Domșa, Oana Șaramet, *Organization of government administrative control in Romania, the European Union and the United States of America (Organizarea controlului administrativ guvernamental în România, Uniunea Europeană și Statele Unite ale Americii),* C. H. Beck Publishing House, Bucharest, 2024, p. 14.

[6] Nicoleta Elena Hegheș, *The non - retroactivity of' new legal norms-fundamental principle of law. Exceptions,* in "International Journal of Legal and Social Order", No. 1/2022, p. 153, https://ijlso.ccdsara.ro/index.php/international-journal-of-legal-a/article/view/74/60, visited on 06.01.2025.

[7] On the role of the judge in restraining the excess of power of public administration, see Dana Apostol Tofan, *Discretionary power and excess of power of public authorities (Puterea discreționară și excesul de putere al autorităților publice),* All Beck Publishing House, Bucharest, 1999, p. 359-368.

[8] The paper does not explore the constitutionality control of laws, although the case law of the Constitutional Court is invoked in the context of the reasoning of administrative acts. Interesting developments in the first constitutional review of laws in Romania, in Cornelia Ene-Dinu, *History of Romanian State and Law (Istoria statului și dreptului românesc),* Universul Juridic Publishing House, Bucharest, 2020, p. 265-266.

[9] The present research focuses only on analyzing the reasoning of administrative acts and does not develop the procedural operations of issuing administrative acts. In this respect, see an interesting study, Vasilica Negruț, Ionela Alina Zorzoană, *Theory of endorsements: legislative and jurisprudential development in Romania and the European Union,* Laws, 2023, 12 (5) 83, https://doi.org/10.3390/laws12050083, visited on 07.01.2025.

[10] Virginia Vedinaș, *Administrative Law,* 15th edition, revised and supplemented (*Drept administrativ*, ediția a XV-a, revăzută și adăugită), Universul Juridic Publishing House, Bucharest, 2024, p. 10.

[11] This study does not detail the legal order of the European Union or the policies of the European Union. See in this respect, Augustin Fuerea, *European Union Handbook,* 6th edition, revised and supplemented *(Manualul Uniunii Europene*, ediția a 6-a revăzută și adăugită*),* Universul Juridic Publishing House, Bucharest, 2016, p. 228-252 or Alina-Mihaela Conea, *Policies of the European Union. University course (Politicile Uniunii Europene. Curs universitar),* Universul Juridic Publishing House, Bucharest, 2020, p. 10-20.

authorities to give reasons for administrative acts is expressly enshrined. Therefore, state administration cannot take discretionary, illegal decisions without giving reasons in fact and in law, because no one is above the law, as this is clear from art. 16 para. (2) of the Constitution. Yet, "the Constitution commands the whole of law by its content and its position in the legal system"[12]. In this respect, the case law provided: "the absence of actual reasoning in fact and in law for the administrative act represents a violation of the principle of the rule of law and is in itself harmful"[13].

The motivation is enshrined in the Constitution and is provided for in the case of emergency ordinances. According to art. 115 para. (4) of the Constitution: "The Government can only adopt emergency ordinances in exceptional cases, the regulation of which cannot be postponed, and has the obligation to give the reasons for the emergency status within their contents". The Constitutional Court, in its case law, has held that the expression extraordinary situations refers to "the necessity and urgency of regulating a situation which, due to its exceptional circumstances, requires the adoption of a serious interference with the public interest[14]".

The Administrative Code also refers to motivation, such as cases of termination of the mandate of a local or county councilor. Therefore, art. 304 para. (2) provides the following: "the office of local councilor or county councilor shall terminate automatically, before expiry of the normal term of office, in the following cases: absence without good reason from more than 3 consecutive ordinary and/or extraordinary meetings of the Council during a period of three calendar months (letter d.); absence without justification from 3 meetings of the Council convened within 3 calendar months, which makes it impossible to hold ordinary and/or extraordinary meetings in accordance with the law" (letter e).

Another example concerns a civil servant who is temporarily transferred to another vacant or temporarily vacant public office. In this case, art. 508 para. (8) provides that this measure shall be ordered, in the interests of the public authority or institution, by the head of the public authority or institution in a public office at the same level, with due regard for the category, grade and professional grade of the civil servant, for a maximum period of 6 months in any calendar year, stating the reasons on which it is based. The case regulated by 152 para. (5) of the Administrative Code is also interesting in terms of reasoning, as it concerns the dismissal of the deputy mayor. This may be done by the local council by a decision adopted by secret ballot by a two-thirds majority of the councilors in office, on a duly reasoned proposal by the mayor or by one-third of the local councilors in office.

We find in the Administrative Code the lack of motivation allowed by the legislator in certain substantiated cases: the appointment of a member of the Government by the President of Romania, in case of government reshaping or vacancy of office. Therefore, according to art. 47 para. (4) The President of Romania may refuse, by giving reasons, any proposal delivered by

[12] Ioan Muraru (coord.), Andrei Muraru, Valentina Bărbăţeanu, Dumitru Big, *Constitutional law and political institutions. Seminar Booklet (Drept constitutional şi instituţii politice. Caiet de Seminar)*, C.H. Beck Publishing House, Bucharest, 2020, p. 60.

[13] The Court of Appeal Timişoara, Administrative and Tax Litigation Chamber, Decision No. 424/2021, https://www.iccj.ro/wp-content/uploads/2021/07/C-Ap-Timisoara-Trim-I-2021.pdf, visited on 02.01.2025.

[14] The Constitutional Court of Romania, Decision No. 65/1995, published in Official Gazette of Romania, No. 129/28 June 1995.

the Prime Minister to appoint a member of the Government, only once, if he/she considers that "the person proposed is not suitable for the office in question or, in respect of that person, the cases of termination of the office of member of the Government, loss of electoral rights following a final judgment, death and criminal conviction by a final judgment, have occurred. In this case, the Prime Minister shall submit to the President a new proposal for the appointment of a member of the Government within 5 days as of the date on which the President has informed him/her of the rejection of the previous proposal[15]".

2.2. Reasoning of administrative acts - examination of judicial practice

Doctrine has held that "the reasoning of the administrative act, the justification of the reasons in fact and in law on which it was based, is a guarantee of respect for the law and the protection of individual rights, a form of protection of the citizen against arbitrary public power (...)"[16]. At national level, disputes concerning the failure to give reasons for administrative acts are contentious administrative litigations. French doctrine outlines that "disputes most often place the administered persons against their administration" (...)[17].

In the case law of the High Court of Cassation and Justice, we find actual situations analyzed by the division of contentious administrative and fiscal, which are based on a lack of reasoning, such as, for example, a case concerning an inspection protocol drawn up in relation to a building, which ordered the owner to take corrective measures due to the degradation of the building, a commercial company - a third party to the administrative act[18].

The Constitutional Court, in its case law[19], noted that the "the adoption by the Government of Emergency Ordinance No 136/2008 was not motivated by the need for regulation in an area in which the primary legislator did not intervene but, on the contrary, by the need to counter a legislative policy measure adopted by Parliament in the area of the salaries of education staff". On another occasion, the Court noted that "What produces legal effects is not the reason for the refusal or the justified nature of the reason for the refusal, but the refusal to countersign the decree. The Constitution does not provide, either expressly or implicitly, for the possibility for the President of Romania to oblige the Prime Minister to countersign a decree conferring

[15] Elena Emilia. Ștefan, *Administrative Law, Part I, University course*, 4th edition, revised and supplemented *(Drept administrativ, Partea I, Curs universitar*, ediția a 4-a, revăzută și adăugită*)*, Universul Juridic Publishing House, Bucharest, 2023, p. 164.

[16] Ovidiu Podaru, *Administrative Law, vol. I, Administrative Act (I), Guidelines for a different theory (Drept administrativ, vol. I, Actul administrativ, Repere pentru o teorie altfel)*, Hamangiu Publishing House, Bucharest, 2010, p. 147.

[17] Clémence Barray, Pierre-Xavier Boyer, *Droit du contentieux administratif*, Gualino Publishing House, Lextenso, 2024, Paris, p.15.

[18] High Court of Cassation and Justice, Administrative and Tax Litigation Chamber, Decision No. 3116/28 September 2006, in *High Court of Cassation and Justice, Case law of the Administrative and Tax Litigation Chamber for 2006, semester II Jurisprudența Secției de contencios administrativ și fiscal pe anul 2006 (*, Hamangiu Publishing House, Bucharest, 2007, pp. 20-24 apud Rodica Narcisa Petrescu, *Drept administrative (Administrative Law)*, Hamangiu Publishing House, Bucharest, 2009, p. 429-430.

[19] The Constitutional Court of Romania, Decision No. 1221/2008, published in Official Gazette of Romania, No. 804/2 December 2008.

a decoration in the event of an initial refusal by the Prime Minister[20]".

With regard to the conditions for giving reasons for an administrative act, the High Court of Cassation and Justice ruled in a case that: "the extent and detail of the reasoning depend on the nature of the act adopted, and the requirements which the reasoning must meet depend on the circumstances of each case. Therefore, giving reasons is a general obligation applicable to any administrative act (…)[21]".

Furthermore, the Court of Appeal of Suceava noted that: "Without denying the need to give reasons for any administrative act issued by a public authority, as set out extensively by the appellants, it is found that the challenged tax decisions in the present case were reasoned in a manner sufficient to enable their legality to be reviewed, with a brief statement of the facts and legal bases[22]". In another case, the Court of Appeal of Suceava noted: "The statements of reasons in fact and in law for the tax administrative act are mandatory statements, the mandatory nature of which derives, on the one hand, from the imperative tone of the regulation and, on the other hand, from the principle that the statement of reasons is a condition of the external legality of the act, which is subject to an assessment in concreto, according to its nature and the context of its adoption.[23]".

As to whether or not the public authorities are bound to give reasons for their decisions, Timisoara Court of Appeal rules as follows: "the obligation of the issuing authority to give reasons for the administrative act represents a guarantee against the arbitrary action performed by the public administration and is particularly necessary in the case of acts modifying or abolishing individual and subjective rights or legal situations"[24]. The supreme court considered that "The reasoning of an administrative act serves a dual purpose, namely it fulfills a function of transparency for the advantage of the beneficiaries of the act, who will thus be able to verify whether or not the act is justified and it allows the court to carry out its jurisdictional review, thus ultimately allowing the reconstruction of the reasoning carried out by the author of the act in order to reach its adoption. It must be included in the content of the act and must be performed by its author[25]".

3. Conclusions

This paper analyzes the issue of reasoning of administrative acts. On this occasion, the documentation of the topic covered: doctrine, legislation and case law.

[20] The Constitutional Court of Romania, Decision No. 285/2014, published in Official Gazette of Romania, No. 478/28 June 2014.

[21] The High Court of Cassation and Justice, Administrative and Tax Litigation Chamber, Decision No. 1442/2020, http://www.scj.ro, visited on 28.12.2021 *apud* Elena Emilia Ștefan, *Drept administrativ Partea a II-a, Curs universitar (Administrative Law Part II, University course)*, 4th edition, revised and supplemented, Universul Juridic Publishing House, Bucharest, 2022, p. 51.

[22] The Court of Appeal Suceava, Administrative and Tax Litigation Chamber, Decision No. 621/2022, in *Jurisprudence 2022 (Buletinul jurisprudenței 2022*), p. 165, https://www.iccj.ro/wp-content/uploads/2023/03/CA-Suceava-Buletinul-jurisprudentei-SCAF-2022.pdf, visited on 15.07.2024.

[23] The Court of Appeal of Suceava, Administrative and Tax Litigation Chamber, Decision No. 349/2022, *op.cit.*, p. 70.

[24] The Court of Appeal of Timisoara, Administrative and Tax Litigation Chamber, Decision No. 424/2021, p. 89, https://www.iccj.ro/wp-content/uploads/2021/07/C-Ap-Timisoara-Trim-I-2021.pdf, visited on 02.01.2025.

[25] The High Court of Cassation and Justice, Administrative and Tax Litigation Chamber, Decision No. 6152/2023, https://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=212035#highlight=##%20motivare%20act%20administrativ, visited on 12.09.2024.

For the cases, data were collected using the computerized method, by studying the websites of the Romanian courts, Constitutional Court and High Court of Cassation and Justice.

From the selected case law, settled by the supreme court or other national courts, the divisions of contentious administrative and fiscal, we note that, in interpreting[26] the law, the contentious administrative judge considers that it is mandatory to give reasons for administrative acts.

Furthermore, the reasoning shall include both a detailed statement of the factual reasons which gave rise to the administrative act and a statement of the legal grounds on which it is based, indicating the applicable legal basis. Persons aggrieved by an unjustified administrative act shall be entitled to ask the administrative judge to review the legality of the respective act. In this respect, French doctrine noted that: "when the conduct of public authorities becomes unlawful or harmful, it must be followed as soon as possible by appropriate measures of annulment or remediation under penalty of its legitimacy, being open to doubt and challenge[27]". Doctrine unanimously considers that the reasoning is a substantive condition of the administrative act and the lack of it leads to the annulment of the act and in the case of emergency ordinances of the Government, the Romanian Constitution expressly requires that the reasons be stated.

The final conclusion of the present scientific research is that, in accordance with the provisions of the Charter of Fundamental Rights of the European Union, the reasoning of administrative acts is a component of the right to good administration, which is also reflected in national legislation.

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[26] On methods of interpreting the law, see Nicolae Popa (coord.), Elena Anghel, Cornelia Ene-Dinu, Laura-Cristiana Spătaru-Negură, *General Theory of Law. Seminar booklet (Teoria generală a dreptului. Caiet de seminar)*, 3rd edition, C.H. Beck Publishing House, Bucharest, 2017, p. 197-202; Mihai Bădescu, *General theory of law (Teoria generală a dreptului)*, Sitech Publishing House, Craiova, 2018, p.167-187; Iulia Boghirnea, *The interpretation – obligation for the judge imposed by the application of the law*, in "Legal and Administrative Studies", No. 2 (19)/2018, p. 50-57, https://www.upit.ro/_document/31012/jlas_2_2018_r.pdf, visited on 15.01.2025.

[27] René Chapus, *Droit du contentieux administratif*, 13th edition, Montchrestien Publishing House, Paris, 2008, p. 769.

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THE LIMITS TO THE WORK OF UNDERCOVER INVESTIGATORS, AS SET OUT IN THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

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Abstract

According to Article (4) and (5) of the Romanian Criminal Procedure Code, undercover investigators are operational workers of the criminal investigation police, whose role is to collect data and information and make it available in full to the prosecutor conducting or supervising the criminal prosecution, by drawing up a report. The work of the undercover investigator must be carried out under the observance of the fair trial guarantees. However, as this study will demonstrate, the judgments of the European Court of Human Rights reveal a practice that is at least surprising: not infrequently, criminal activity has been provoked by prosecuting authorities in order to gather the evidence necessary to bring a case to trial. Article 148 para. (7) of the Criminal Procedure Code provides that judicial bodies may use or make available to the undercover investigator any documentary evidence or objects necessary for the conduct of the authorized activity. The activity of the person making available or using the documentary evidence or objects does not constitute an offense. Notwithstanding, in practice, the judicial bodies have assigned to the wording of Article 148 para. (7) of the Criminal Procedure Code the interpretation according to which, in the exercise of their legal powers, they may draw up/enact/issue any documentary evidence or objects necessary for the performance of the authorized activity, giving them an appearance of legality, with the purpose of provoking the commission of a crime. In this background, by examining the case law of the European Court of Human Rights on the use of special investigative techniques, we note that the Court of Strasbourg has repeatedly held that the Romanian State violated the general principles of fair trial guarantees, on the grounds that the criminal activity was provoked by the criminal prosecution authorities.

Keywords: *undercover investigators, fair trial guarantees, evidence, causing a crime to be committed, limits, case law of the European Court of Human Rights*

1. Introduction

According to Article 148 para. (1) of the Criminal Procedure Code, authorization to use undercover investigators may be ordered by the prosecutor supervising or conducting the criminal prosecution, for a maximum period of 60 days, if certain cumulative conditions are met.

Therefore, there must be reasonable suspicion regarding the preparation or commission of a crime against national security under the Criminal Code and other special laws, as well as in case of crimes provided by Article 148: drug trafficking offenses, offenses related to doping substances, unlawful operations with precursors or other products likely to have psychoactive effects, offenses related to non-compliance with the regime of restricted arms, ammunition, nuclear materials, explosives and explosives precursors, trafficking and exploitation of

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vulnerable persons, acts of terrorism or acts assimilated to terrorism, terrorist financing, money laundering, counterfeiting of coins, stamps or other valuables, counterfeiting of electronic payment instruments, in the case of offences committed by means of computer systems or electronic means of communication, extortion, unlawful deprivation of liberty, tax evasion, in the case of corruption offences, offences treated as corruption offences, offences against the financial interests of the European Union or other offences for which the law provides for imprisonment of 7 years or more or where there is a reasonable suspicion that a person is involved in criminal activities related to the offences listed above.

A second condition is that the measure must be necessary and proportionate to the restriction of fundamental rights and freedoms, given the particularities of the case, the importance of the information or evidence to be obtained or the seriousness of the crime.

Furthermore, criminal law establishes that the evidence or the location and identification of the offender, suspect or defendant could not be obtained in any other way or obtaining it would involve particular difficulties which would prejudice the investigation or there is a danger to the safety of persons or valuable property.

Article 148 para. (7) of the Criminal Procedure Code provides that 'judicial bodies may use or make available to the undercover investigator any documentary evidence or objects necessary for the conduct of the authorized activity. The activity of the person making available or using the documentary evidence or objects does not constitute an offense'.

2. Content

By examining the case-law of the European Court of Human Rights[1] on the use of special investigation techniques (Judgment of 1 June 2010, final on 1 September 2010, in Case Bulfinsky v. Romania; Judgment of 23 June 2015, final on 23.09.2015, in Case Opriș v. Romania; Judgment of 29 September 2009, final on 29 December 2009, in Cause Constantin and Stoian v. Romania; Judgment of 14 February 2017, final on 14 May 2017, in Cause Pătrașcu v. Romania; Judgment of 16 July 2015, final on 14 December 2015 in Case Ciprian Vlăduț and Ioan Florin Pop v. Romania), we can note that, *the Court of Strasbourg has repeatedly held that the Romanian State infringed the general principles relating to fair trial guarantees on the ground that the criminal activity was instigated by the criminal prosecution authorities.*

These general principles on fair trial guarantees in the context of the use of special investigative techniques to combat drug trafficking or corruption are detailed in Case Bannikova v. Russia (4 November 2010). The European Court of Human Rights has emphasized that it is aware of the difficulties involved in combating serious crime and of the need for the authorities to sometimes resort to more elaborate methods of investigation. In principle, its case-law does not preclude, at the investigation stage and in cases where the nature of the crime justifies it, the production in the case-file of evidence obtained by means of an undercover police operation (Ludi v. Switzerland, 15 June 1992, series A, no. 238). Notwithstanding, the intervention of undercover agents must be restricted:

[1] Regarding the role of ECHR case law, see also Cornelia Ene-Dinu, *National and European case law – a remark for the High Court of Cassation and Justice in preliminary judgements*, published in "Journal Legal and Administrative Studies Supplement", 2024, p. 440 – 453; Laura-Cristiana Spătaru-Negură, *Protecția internațională a drepturilor omului. Note de curs*, ed. a 2-a, revizuită și adăugită, Hamangiu Publishing House, Bucharest, 2024, p. 95.

although the police can act secretly, they cannot provoke a crime (Teixeira de Castro v. Portugal, 9 June 1998; Vaniane v. Russia, 15 December 2005).

Furthermore, there is incitement on the part of the police when the officers involved - members of law enforcement agencies or persons intervening at their request - do not limit themselves to examining criminal activity in a purely passive manner, but exert on the person under surveillance[2] an influence such as to incite him or her to commit an offense which he or she would not otherwise have committed, in order to make it possible to establish the crime, i.e. to provide evidence of it and to bring about the prosecution of the person concerned (case Teixeira de Castro, previously mentioned).

A comparative law study carried out by the Court on the legislation of 22 Member States of the Council of Europe (Austria, Belgium, Bulgaria, Czech Republic, Croatia, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Liechtenstein, Lithuania, "the former Yugoslav Republic of Macedonia", Poland, Portugal, Romania, Slovenia, Spain, Turkey and United Kingdom) on the use of undercover investigators in test purchases and similar undercover operations is summarized in case Veselov and others v. Russia (no. 23200/10, 24009/07 and 556/10, items 50-63, 2 October 2012). In this case, it was held that it is essential to establish whether the criminal act was already in progress at the time when the source began to cooperate with the police[3].

Case Pătrașcu v. Romania has pointed out that, in order to distinguish entrapment from permissible conduct, the European Court of Human Rights has developed the following criteria: *(i)* Substantive test of incitement; *(ii)* Procedure deciding on the plea of incitement.

Therefore, when the Court is referred to on the ground of instigation, the Court will first try to establish whether the crime would have been committed without the intervention of the authorities. The definition of incitement given by the Court in case Ramanauskas v. Lithuania is as follows: 'There is incitement on the part of the police when the officers involved - members of law enforcement agencies or persons intervening at their request - do not limit themselves to examining criminal activity in a purely passive manner, but exert on the person under surveillance an influence such as to incite him or her to commit an offense which he or she would not otherwise have committed, in order to make it possible to establish the crime, i.e. to provide evidence of it and to bring about the prosecution of the person concerned [...]'.

In deciding whether the investigation was 'mainly passive', the Court will examine the grounds underlying the undercover operation and the conduct of the authorities who carried it out. It will also be based on whether there were objective suspicions that the applicant had been involved in the criminal activity or was likely to commit a crime (see Bannikova v. Russia, no. 18757/06, item 38, 4 November 2010). Therefore, the Court has formulated the requirement that any preliminary information as to the pre-existence of criminal intent must be verifiable, as follows from cases Vanyan v. Russia (no. 53203/99, item 49, 15 December 2005) and Khudobin

[2] Regarding supervision methods, see Cornelia Ene-Dinu, *The video surveillance matter in the case-law of the European Court of Justice*, in "LESIJ - Lex ET Scientia International Journal", no. XXVII, vol. 2/2020, p. 32-40.

[3] See also Elena Emilia Ștefan, *Delimitarea dintre infracțiune și contravenție în lumina noilor modificări legislative [The demarcation between crime and contravention in light of the new legislative changes]*, in "Dreptul", no. 6/2015, p. 143-159.

v. Russia (no. 59696/00, item 134, ECHR 2006-XII)[4].

In what concerns the second criteria - Procedure deciding on the plea of incitement – the Court essentially held that the prosecution must show that there was no instigation, provided that the respondent's allegations are not entirely unproven. In the absence of any such evidence, it is for the judicial authorities to examine the facts of the case and to take the necessary steps to uncover the truth by establishing whether there was instigation. If they find that it existed, they must draw conclusions in accordance with the Convention (see Ramanauskas, cited above, item 70).

In case Opris v. Romania, the European Court of Human Rights ruled that, where the information disclosed by the prosecuting authorities does not enable the Court to determine whether or not the applicant was the victim of police incitement, it is essential to examine the procedure in the course of which the accusation of police incitement was decided, in order to ascertain, in the case in point, whether the rights of the defense and, in particular, the principles of adversarial proceedings and equality of arms were adequately protected (Edwards and Lewis v. United Kingdom (MC), Constantin and Stoian v. Romania). It was pointed out that the national courts must examine, in particular, the reasons why the special investigative operation was organized, the extent of police involvement in the commission of the crime and the nature of the incitement or pressure brought to bear on the applicant (Ramanauskas, cited above, item 71).

In such cases, the Court of Strasbourg has carried out a two-stage examination. The first step was to establish whether the state agents involved in the investigation activities adopted *a purely passive attitude or, on the contrary, whether they overstepped the boundaries, acting as "agents provocateurs"* (the Court's examination depends to a large extent on the availability of information relating to investigative activities prior to the sting operation and, in particular, the nature of the contacts which the State agents had with the applicant prior to the sting operation procedure). In the absence of this information, the Court proceeded to the second stage of its analysis and examined the procedure in which the national courts addressed the arguments based on police incitement.

In case Ciprian Vlăduț v. Romania, the European Court held that police insistence[5], coupled with the lack of prior information on the alleged implication in drug trafficking of the first applicant are sufficient to conclude that there was entrapment in the case. On the other hand, the Court notes that besides arguing that the undercover police had played a too significant role in the drug deal, the applicants also asked expressly for the undercover agent to be heard by the court. The courts, however, either gave no answers to their pleas or dismissed them without

[4] Given the exclusion of the Russian Federation from the Council of Europe, see Corneliu Bîrsan, Laura-Cristiana Spătaru-Negură, *Russia's Exclusion From The Regional Human Rights Mechanism Or How Human Rights Are Endangered In A Sensitive International Context?!*, in "CKS - Challenges of the Knowledge Society", "Nicolae Titulescu" University Publishing House, Bucharest, 2023, p. 224-230.

[5] The Court cannot but note the significant role played by the undercover agent in arranging the next transaction, which runs counter to the requirement of passivity on the State agent's part. The undercover agent was the main buyer of the first batch of drugs and, although the crime had already been committed, he insisted that the first applicant bring in more drugs to sell exclusively to him. He renewed his offer, was insistent, and threatened the first applicant that he would take his business elsewhere if drugs were not produced rapidly.

further consideration (see paragraphs 29 and 32 above).

In case Bulfinski v. Romania, to ascertain whether or not the undercover police confined themselves to 'investigating criminal activity in an essentially passive manner in the present case', the Court has regard to a number of considerations. There are no indications that the applicant or the co-defendants have been previously involved in drug-related crimes and the authorities did not give details or refer to any objective evidence concerning unlawful behavior by the suspects prior to the incidents. In the light of these divergent interpretations, it is essential that the Court examine the procedure whereby the plea of incitement was determined in order to ensure that the rights of the defense were adequately protected, in particular the right to adversarial proceedings and to equality of arms [see Ramanauskas, §§ 60-61, and Malininas, § 34, and Khudobin v. Russia, no. 59.696/00, § 133, ECHR 2006-XII (extracts)]. The Court found a violation of the right to a fair trial under Article 6 para. (1) of the Convention, on grounds that in convicting the applicant and his co-defendants, the courts relied exclusively on the evidence obtained during the investigations, namely written reports by the undercover agents and the statements made by the suspects, as well as the defendants' testimonies before the first-instance court. Furthermore, the courts did not hear the undercover agents. Therefore, the defense had no opportunity to cross-examine witnesses. The courts also decided to give precedence to the statements obtained by the investigators and considered that those given before the first-instance court had been false.

By analyzing the case-law of the European Court of Human Rights, it is easy to see that such violations of Article 6 of the Convention have been the basis for the judgments finding that the investigating bodies were not merely passive but, on the contrary, overstepped the limits, acting as 'agents provocateurs'.

Guide on Article 6 of the Convention, Right to a fair trial (criminal limb), published in 2014[6], provides the following: the Court's judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules established by the Convention, thereby *contributing to the observance by the States of the engagements undertaken by them as Contracting Parties* (Irland v. United Kingdom, item 154). Although the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights case law throughout the community of the Convention States [Konstantin Markin v. Russia (MC), item 89].

In the section devoted to the use of evidence obtained unlawfully or in violation of Convention rights, the above cited Guide states that in cases where a challenge is at issue, Article 6 of the Convention is not observed if, during the trial, the plaintiff could successfully invoke the existence of the challenge, by way of an exception or otherwise. It is therefore not sufficient for these purposes, contrary to what the Government maintained, that general safeguards should have been observed, such as equality of arms or the rights of defense

[6] The translation is published with the agreement of the Council of Europe and the European Court of Human Rights and is the sole responsibility of the European Institute of Romania. The guide can be downloaded at: www.echr.coe.int (Jurisprudence – Analyse jurisprudentielle – Guides sur la jurisprudence).

[Ramanauskas v. Lithuania (MC), item 69]. In this case, the Court held that the burden of proving lack of provocation is on the prosecution, to the extent that the defendant's allegations are not devoid of any credibility.

The Court has also held that where an accused asserts that he was incited to commit an offence, the criminal courts must carry out a careful examination of the material in the file, since for the trial to be fair within the meaning of Article 6 § 1 of the Convention, all evidence obtained as a result of police incitement must be excluded. This is especially true where the police operation took place without a sufficient legal framework or adequate safeguards [Ramanauskas v. Lithuania (MC), item 60].

Paradoxically, despite the existing case law and the repeated condemnation of the Romanian state, the provocation of criminal activity by criminal prosecution bodies, in the context of the use of special investigative techniques, does not seem to stop. This practice is allowed by the interpretation that judicial bodies have assigned to Article 148 para. (7) of the Criminal Procedure Code, according to which, in the exercise of their legal powers, they may draw up/enact/issue any documents or objects necessary for the performance of the authorized activity, giving them an appearance of legality, with the purpose of provoking the commission of a crime. In this way, by distorting the content of a legal norm, the prosecution authorities have drawn up (and not 'used' or 'made available' to the undercover investigator) a false document in order to incite a person to commit a crime and to gather evidence against him, in violation of the spirit of the criminal law.

Conclusions

In order to conclude, we recall the considerations of Decision no. 489/2016, in which the Constitutional Court emphasized that the law, as a work of the legislator, cannot be exhaustive, and if it is incomplete, unclear, the legal system recognizes the judge's competence to decide what has escaped the attention of the legislator, through a judicial, causal interpretation of the rule. The meaning of the law is not given forever at the moment of its creation, but it must be accepted that the content of the law is adapted by way of interpretation - as a stage in the application of the legal norm to the concrete case - in criminal matters, in compliance with the principle that criminal law is of strict interpretation. The Court thus holds that an authentic, legal interpretation may constitute a prerequisite for the proper application of the legal rule, in that it gives a correct explanation of its meaning, purpose and finality, but the legislator cannot and must not prescribe everything. In concrete terms, any legal rule to be applied to resolve a specific case is to be interpreted by the courts (judicial interpretation, case-by-case interpretation) in order to issue a legal enforcement act.

On the other hand, in accordance with the settled case law of the Constitutional Court[7], we hold that 'the diversion of statutory provisions from their legitimate purpose, through systematic misinterpretation and misapplication by the courts or other persons called upon to apply the provisions of law, may render that provision unconstitutional'. In this case, the Constitutional Court has the power to eliminate the unconstitutionality flaw thus created, essential in such situations being to ensure respect for the rights and freedoms of

[7] Decision no. 607/2020, Decision no. 250/2019, Decision no. 448/2013 and Decision no. 224/2012.

individuals and the supremacy of the Constitution.

Under Article 20 of the Constitution, the European Court is more than a mere dialog partner, its case law constituting a binding frame of reference for the Constitutional Court of Romania. Therefore, the Romanian constitutional judge has assumed the role and the authority to ensure the transposition of the Convention and the practice of the European Court, with effects both in terms of the regulation of the issue of fundamental rights and freedoms and the application of these regulations by national courts[8].

Essentially, it is the dialogue of the constitutional judge with the European judge that makes possible the drawing up of common standards for the protection of fundamental rights and the improvement of the existing ones. Notwithstanding, it is not enough that they exist, they must be observed and embraced in national lawmaking and law enforcement by all addressees of legal rules. Or, as our doctrine states, 'the need for normative regulation of behavior is undoubtedly a social imperative and is not the prerogative of the times we are going through now, but has existed since the dawn of time, regardless of the form of state organization.'[9] The efficiency and fairness of justice depend on the loyal conduct of public authorities and call for a joint effort by all those involved in defending these values.

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[8] Tudorel Toader, Marieta Safta, *Dialogul judecătorilor constituționali (The dialogue of constitutional judges*), Universul Juridic Publishing House, Bucharest, 2015, p. 69.

[9] Elena Emilia Ștefan, *Comparative law aspects regarding the oath of the head of state*, in "Revista de Drept Public", no. 3-4/2020, Universul Juridic Publishing House, Bucharest, p. 91.

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THE COMPENSATION FOR LOSS AND THE RECOVERY OF THE GOODS OBTAINED BY COMMITTING CRIMINAL OFFENCES - THE NEW CRIMINAL POLICY OF THE ROMANIAN STATE

Mihai Adrian HOTCA (*)

Abstract

The academic literature of the last decades and the ECHR acknowledge the proportionality of criminal protection as an essential rule of Criminal Law, which means that the measures chosen by the legislator for fighting criminality have to be appropriate, necessary and equivalent to the gravity of the penalised conduct [nulla poena (sanctio) sine crimine et necessitate]. As regards the criminal offences aimed at obtaining illegal gains, as a special application of the principle of proportionality of criminal protection, in the last years, the state's criminal policy has started to change, whereas its main goal is the compensation for the loss caused, the recovery of illicit goods or the confiscation thereof, in order to introduce them or their value equivalent in the public budget. The criminal policy of the last decades has undergone visible changes in respect of the criminal offences through which the offenders aim to obtain goods. Starting from the objective according to which the criminal offences do not create goods, the laws adopted in the last years are mainly aimed at compensation the damages and at recovering the goods obtained by committing criminal offences. In this article, we want to signal this change of paradigm and to present some institutions that breathe the new conception.

Keywords: *criminal offence, damage, illicit goods, criminal policy, recovery of goods, illicit products*

1. Introduction

Throughout its evolution the content of Criminal law has been often influenced or determined by the people exercising power during the different historical times. In other words, in specific ways, each civilisation or culture has left strong or superficial marks on Law, in general, and on Criminal Law, in particular.

The classical (theory) school of Criminal law has put an emphasis on the free will of the offender, and the positivist school on the thesis of the influence of different factors on the criminal conduct. The classical doctrine of Criminal Law has gravitated around the idea that man is naturally equipped with free will. Having the ability to make a distinction between what is forbidden and what is allowed, man has to be accountable for his acts that violate the legal rules. It was deemed that the finality of Criminal Law was not to prevent the commission of offences, but only the imposition of penalties proportional to the degree of harm of the acts of those with antisocial conducts (the repressive reaction). What can be reproached to the classical school is that it did -not focus on the active subject of the criminal offence, that is the person that violates the Criminal Law (the offender).

Indeed-, according to the classical doctrine, the punishment was conceived as a

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retribution aimed at compensating the harm caused by the criminal offence. It was deemed that, once the enforcement of the sentence ended, the offender was rehabilitated. The effect of such conception was a negative one, the crime has increased, and Criminal Law proved to- be unable to contribute to the reduction of crime.

Another aspect that can be reproached to the classical school of Criminal Law is that, by focusing the attention on the criminal offence and the punishment, it has ignored the causes of criminal offences and the means required for preventing them.

On the contrary, the positivist doctrine (school) has placed the criminal offender in the centre of Criminal Law, by insisting on the factors that may determine or influence him in the criminal activity. The safeguards, the analysis of the causes of crime and the move of the *spotlights* on the criminal offender are, maybe, the most important merits of the positivist school.

By believing that the man, far from benefitting from an absolute free will, is determined in his acts, the basis for the imposition of criminal penalties is social defence, and not the moral responsibility of the offender. According to the positivist view, the punishment is the last solution (*ultima ratio*) and, in any case, it has to be adapted (individualised, customised) by taking into consideration the degree of social harm of the perpetrator.

The positivist school has undeniable merits, such as the orientation of scientific research to the causes of crimes, the putting of the person of the offender, who is not absolutely free, under the *radar* of the judge, and the promotion, for the first time, of the thesis of the need to take safeguards, together with the penalties or separately.

In time, the classical doctrine and the positivist one have brought their concepts closer. Being receptive to the critiques made and realising the importance of certain principles of the classical doctrine, the followers of the positivist doctrine have restated a part of the arguments of this doctrine, aligning significantly the positivist doctrine to the classical one, more precisely to the neoclassical doctrine[1]. Indeed, taking into consideration the relevant critiques given to the classical school, the classical doctrinaires have tried to correct the flaws identified and to update the classical conception by reference to the social realities, thus determining the emergence of the neoclassical doctrine. The supporters of the classical ideas have started to pay attention to the person of the perpetrator, have accepted the need to research the causes of crimes and to individualise the criminal penalties[2].

Regardless of the critiques given, the positivist doctrine, in its *updated* form, constitute, together with the *neoclassical* doctrine, the foundation (the pedestal) for the current criminal laws. The criminal laws of all democratic legal systems include principles of the classical and positivist doctrine.

In retrospective, we can say that the French Revolution has infused Criminal Law with humanism, the modernism has imposed then idea of proportionality of criminal protection, and the postmodernism proposes and provides alternatives to the

[1] Some of the contemporary criminologists are positivists, and others are supporters of different doctrines (classical, eclectical etc.).

[2] One of the most important neoclassics was R. Saleilles, who wrote the outstanding work The *individualisation of penalties*, Paris, 1898. Other neoclassics are: Ludwig von Fuerbach and Francesco Carrara (from the foreign ones) or Vasilake Petroni and Constantin Eraclide (from the Romanian ones) – see Constantin Duvac, Norel Neagu, Niculae Gamenţ, Vasile Băiculescu, *Criminal Law. General Part (Drept penal. Partea generală)*, Universul Juridic Publishing House, 2019, p. 42-43.

classical penalties, claiming the need for changing some paradigms of classical Criminal Law.

We live the most accelerated period in history, the moving speed of which increases progressively, as if we are in the antechamber of a disruptive imminent change, whereas humankind has reached the stage in which information doubles in 24 hours.

Together with the undeniable facilities provided, the explosion of widely accessible data generates, as a secondary effect, the multiplication of possibilities to harm the social values and the increased complexity of serious antisocial conducts. The criminal offences committed via the IT systems, the criminal offences concerning personal data protection, the criminal offences concerning organ trafficking, the transplant and the xenotransplant, money laundering and so on have appeared and have become more numerous, varied and sophisticated.

Volens nolens, the postmodern Criminal Law - in action - is obviously determined, not only influenced, by the paradigmatic changes in the society, and tries to keep up with them in order to fulfil its *ultima ratio* mission (the last redoubt) of the society in the defence against the persons who commit the most serious antisocial acts (the criminal offences).

If we examine the current state of Criminal Law, we see that criminal laws have a hard time keeping up with the realities that change continuously and in an increasingly accelerated manner, and they are inappropriate in many fields, such as the IT or the virtual coins, or are totally absent in fields like the artificial intelligence, the biomedicine or the bioethics.

Not long ago, we could talk about the arbitrary of the lawmaker in respect of the *opportunity of the scope of Criminal Law*, in the sense that its absolute constitutional freedom to assess whether to forbid or not certain antisocial conducts and, also the faculty of sanctioning, in the case where it chooses to criminalise them, were acknowledged, in the new circumstances - the increase of the ways of injury and of their degree of complexity - the observance of the principle of proportionality of criminal protection, from the standpoint of the *ultima ratio*[3] requirement, appears to be necessary.

According to this orientation, the definition of a criminal liability for minor antisocial acts is not necessary, but, at the same time, the criminal liability is imperative in all cases in which the existent extra criminal measures or means are not effective in fighting the serious antisocial acts. For example, usually, the imposition of criminal liability is not necessary in the case of conduct crimes, that is against certain ways of life, because such conducts are related to the inner feelings of the individual and do not harm the general interest, as long as they do not harm the general interests of the society. Therefore, any human conduct reflecting aspects of the individual morals must not be forbid by criminal laws[4].

The relatively recent academic literature, the Constitutional Court and the ECHR acknowledge the proportionality of criminal protection as an essential rule of Criminal Law, which means that the measures chosen by the legislator for fighting criminality have to be appropriate, necessary and equivalent to the gravity of the penalised conduct [*nulla poena (sanctio) sine crimine et necessitate*].

[3] Mihai Adrian Hotca, *Reflection of Criminal Law principles in the Criminal Code in force (Reflectarea principiilor dreptului penal în Codul penal în vigoare)*, in "Dreptul", No. 12/2021, p. 176.

[4] Idem, p. 179.

Moreover, as regards the criminal offences aimed at obtaining illegal gains, as a special application of the principle of proportionality of criminal protection, in the last years, the state's criminal policy has started to change, whereas its main goal is the compensation for the loss, the recovery of illicit goods or the confiscation thereof, in order to introduce them or their value equivalent in the public budget.

2. Criminal provisions that confirm the reorientation of criminal policy

2.1. Preliminary considerations

The criminal laws in force are more and more infused with rules that breathe the thesis of *reconfiguration* of the goals of criminal policy in the field of *crimes against property* (able to provide the offenders with goods).

The first clear signal has been given in the years 2000, via the laws on fighting tax evasion, frauds involving European funds and money laundering, the content of which included provisions reflecting the change of the general policy in the field of crimes against property or of those generating economic gains.

2.2. Romanian Criminal Code provisions

But, the strongest message, by which the change of criminal policy in the field of *criminal offences generating economic gains* has been confirmed, has been given by the Romanian Criminal Code in force, adopted by the Law No. 286/2009, with the subsequent amendments and supplements. Thus, *the extended confiscation safeguard* has been regulated by the Law No. 63/2012, being introduced in both criminal codes - the previous Romanian Criminal Code and the Romanian Criminal Code in force. By this regulation, the legislator has pursued a goal already visible in the criminal legislation in force *ilo tempore*, that is to connect the latter to the theories of the postmodern Criminal Law doctrine.

The compensation for the loss and the recovery of the goods obtained by committing the criminal offences are reflected in several provisions of the 2014 Romanian Criminal Code. The most relevant ones are presented below.

The criminal fine, in conjunction with the imprisonment for the commission of a criminal offence

According to Article 62 para. (1) Romanian Criminal Code, if the committed offense was intended to provide a material gain, the penalty of imprisonment may be accompanied by a fine penalty. It can be noticed that, in this case, the fine is optional[5]. In order to apply the provisions of Article 62 para. (1) Romanian Criminal Code, it is not necessary that the offender had actually acquired the economic gain, but it is enough to find that the offender had pursued it for his benefit or for the benefit of a third party. Indeed, whereas the law does not make a distinction, we believe that the provisions of Article 62 para. (1) Romanian Criminal Code apply both in the case where the convicted person has pursued the economic gain for himself, and in the case where he intended that the gain is obtained by another person.

[5] For a case in which the Bucharest Court of Appeal has applied the fine in conjunction with the penalty of imprisonment, see Norel Neagu, *Criminal Law. General Part (Drept penal. Partea generală)*, Universul Juridic Publishing House, Bucharest, p. 347.

On another note, we support the opinion according to which it is possible to cumulate the fine with the imprisonment regardless of whether the imprisonment is provided for as a sole penalty or as an alternative penalty to the fine. But, in this last case, the cumulation of the two penalties is admissible only if the court does not choose to impose the fine. Moreover, the addition discussed here is also possible in the case where the imprisonment is regulated alternatively with the life imprisonment. Of course, the cumulation of the two main penalties shall be performed provided that the court considers that a prison sentence is required.

According to the provisions of Article 91 para. (2) Romanian Criminal Code, the fine may also accompany the prison sentence in the case where the suspension of the enforcement of the penalty under supervision has been ordered, but the fine penalty has to be enforced, whereas the suspensive nature only concerns the prison sentence. This interpretation has also been confirmed by the Decision (Appeal in the Interest of the Law) No. 4/2020. In this Decision, the High Court of Cassation and Justice has stated: 'Article 62 of the Romanian Criminal Code aims to stimulate the voluntary compensation for the loss, throughout the proceedings, and mainly represents an aggravating factor for the punitive treatment, to be exploited in the context of the judicial individualisation. This regulatory way and the different and cumulated purpose of the distinct main penalties, the imprisonment and the fine, justify the solution provided for in Article 91 para. (2) of the Romanian Criminal Code, namely the suspension of the prison sentence, provided that the fine penalty has been enforced'.

By developing the recitals, the Supreme Court shows: 'The substantiation note of the draft of the New Romanian Criminal Code specifies that the enforcement of the fine penalty, imposed either as a sole main penalty, or as a main penalty together with the imprisonment, in the case where the criminal offence committed was intended for obtaining an economic gain and the court opts for a cumulative penalty, may not be suspended[8]. The exclusion of the suspension of the enforcement of the fine penalty is clearly reflected in the criminal rule in respect of the sole main penalty, the resultant penalty and in the case of the fine penalty accompanying the prison sentence and a solution resulting from the interpretation of Article 91 of the Romanian Criminal Code, in the case of the resultant penalty in which the fine is added to the prison sentence.

The resultant penalty legally cumulates the individual penalties so that, in the case where the fine is enforced in the case of the sole penalty, all the more the enforcement regime shall remain the same in the case of the resultant involving a criminal plurality, therefore an aggravating state, which excludes the case of indulgence, the suspension of the enforcement of the penalty.

The same is true of the resultant penalty that includes/adds the fine and the imprisonment, according to Article 39 of the Romanian Criminal Code. In the case of concurrence or of merger of the main penalties, the fine and the imprisonment, the fine shall be added to the prison sentence, and the criminal fine may not be suspended in the framework of the resultant penalty.

The reason that has determined the legislator to adopt this solution in the case of the sole fine penalty, of the fine penalty accompanying the prison sentence, in the case where the criminal offence committed was intended for obtaining an economic gain, or of the resultant fine is even clearer in the case of the resultant that includes/adds the main fine penalty to the prison sentence.

The loss of autonomy in the case of merger may not change the enforcement method, in the sense of excluding the express interdiction of the suspension, whereas this way of interpretation would be equivalent to an addition to the law, to an actual law-making.

This solution of fully suspending the resultant penalty, including the fine, brings harm to the res judicata (in the case of merger of final sentences, if, initially, the criminal fine was enforced either as a sole main penalty or as a penalty accompanying the prison sentence, following the merger, the enforcement of the criminal fine would be suspended).

The grammatical, systematic and teleological interpretation of the provisions of Article 91 para. (1) letter (a) of the Romanian Criminal Code, which concerns the suspension of the prison sentence (of not more than 3 years) in the case of concurrence of criminal offences, therefore of the resultant prison sentence, and of Article 62 para. (2) and (3) of the same regulatory act, which excludes the suspension of the fine penalty, either as a sole main penalty, or as a penalty accompanying the prison sentence, proves the will of the legislator in relation to the enforcement of the criminal fine and the exclusion of the suspension institution in all cases in which it is imposed, as a sole main penalty, as a penalty accompanying the prison sentence in the case of criminal offences intended for obtaining an economic gain and in the case of loss of autonomy in favour of the resultant penalty'.

In the application of the provisions of Article 62 of the Romanian Criminal Code, if it is found that the acquisition of an economic gain represents an aggravating circumstantial factor in the qualified or aggravated content of a criminal offence, we consider that the cumulation of the fine and the imprisonment is not possible. For example, in the case of the qualified murder committed because of an economic interest [Article 189 para. (1) letter b) Romanian Criminal Code]. If the cumulation was also allowed in these cases, the same circumstances would be used for a double tightening of the punitive treatment. Furthermore, according to the substantiation note accompanying the new Romanian Criminal Code, the possibility of cumulation has been justified by the idea of finding effective means of criminal constraint, which do not involve the increase of the length of the prison sentence[6]. Or, in the case where the legislator has wished to aggravate the liability by creating aggravated or qualified criminal variants, in the case where the perpetrator has intended to obtain an economic gain, the cumulation of the imprisonment with the fine is not justified.

In the case of addition of the penalty fine to the prison sentence, the special thresholds of the days-fine are those provided for in Article 61 para. (4) letter b) and c) and shall be determined by reference to the length of the prison sentence set by the court and may not be reduced or increased as an effect of the grounds for mitigating or aggravating the sentence [Article 62 para. (2)].

The value of the economic gain obtained or pursued shall be taken into account in order to establish the amount corresponding to a day-fine [Article 62 para. (3)].

In the context of this analysis, the following question seems legitimate: The court shall take into consideration only the value of the economic gain or shall also take into account the criteria provided for in Article 61 para. (3) second sentence of the Romanian Criminal Code, namely the economic situation of the convicted person

[6] Available on *www.just.ro*.

and the legal obligations to his/her dependants? We believe that the provisions of Article 61 para. (3) second sentence have a general nature, which means that they apply in all cases in which the court imposes the fine penalty, including the hypothesis provided for in Article 62 of the Romanian Criminal Code, but in addition to the special criteria.

The reconciliation, a ground for removing criminal liability in the case of property offences, other than those in the case of which the criminal proceedings are instituted on the basis of the prior complaint of the injured party

In the case of property offences, the previous Romanian Criminal Code provided for the reconciliation in all cases in which the prior complaint of the injured party was regulated as a requirement for instituting the criminal proceedings, and, in respect of the other criminal offences, the reconciliation was provided for in only one case, the seduction offence. On the contrary, the Romanian Criminal Code in force regulates the reconciliation in the case of the mere theft, the theft with the intention of usage, the appropriation of the good found or arrived by mistake to the perpetrator, the deception or the insurance fraud.

By introducing the possibility of reconciliation in the case of property offences, such as the theft or the deception, the legislator has wanted to provide support to the injured parties in respect of the compensation for the loss suffered by them. The jurisprudence has endorsed the view of the legislator, as there are cases in which the parties to the proceedings have reconciled.

The extended confiscation

The extended confiscation[7] was introduced by Article 112^1 of the Romanian Criminal Code, by the Law No. 63/2012 on the amendment and the supplementation of the Romanian Criminal Code and of the Law no. 286/2009 on the current Romanian Criminal Code.

The final part of the Law No. 63/2012 specifies that this 'transposes into the domestic legislation Article 3 of the Framework-Decision 2005/212/JHA of the Council of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property, published in the Official Journal of the European Union series L, No. 68/15 March 2005'.

Article 2 of the Framework-Decision 2005/212/JHA specifies: '(1) Each Member State shall take the necessary measures to enable it to confiscate, either wholly or in part, instrumentalities and proceeds from criminal offences punishable by deprivation of liberty for more than one year, or property the value of which corresponds to such proceeds.

(2) In relation to tax offences, Member States may use procedures other than criminal procedures to deprive the perpetrator of the proceeds of the offence'.

According to Article 3 para. (1) of the Framework-Decision 2005/212/JHA, each Member State shall as a minimum adopt the necessary measures to enable it, under the circumstances referred to in paragraph 2, to confiscate, either wholly or in part, property

[7] In order to review the provisions on extended confiscation, introduced in the Romanian legislation by the Law No. 63/2012, see: Mirela Gorunescu, Costin Toader, *The extended confiscation – from constitutional disputes to tax and administrative disputes towards tax disputes (Confiscarea extinsă – din contencios constituţional, în contencios administrativ şi fiscal spre contencios penal)*, in "Dreptul", No. 9/2012; Florin Streteanu, *Considerations concerning the extended confiscation*, in "Caiete de drept penal", No. 2/2012, p. 11.

belonging to a person convicted of an offence indicated in this Article.

According to Article 3 para. (2) of the Framework-Decision 2005/212/JHA, each Member State shall take the necessary measures to enable confiscation at least: a) where a national court, based on specific facts, is fully convinced that the property in question has been derived from criminal activities of the convicted person during a period prior to conviction for the offence referred to in paragraph 1 which is deemed reasonable by the court in the circumstances of the particular case, or, alternatively; b) where a national court, based on specific facts, is fully convinced that the property in question has been derived from similar criminal activities of the convicted person during a period prior to conviction for the offence referred to in paragraph 1 which is deemed reasonable by the court in the circumstances of the particular case, or, alternatively; c) where it is established that the value of the property is disproportionate to the lawful income of the convicted person and a national court, based on specific facts, is fully convinced that the property in question has been derived from the criminal activity of that convicted person.

And according to Article 3 para. (3) of the Framework-Decision 2005/212/JHA, each Member State may also consider adopting the necessary measures to enable it to confiscate, either wholly or in part, property acquired by the closest relations of the person concerned and property transferred to a legal person in respect of which the person concerned — acting either alone or in conjunction with his closest relations — has a controlling influence. These provisions are also valid in the case where the person concerned receives a significant part of the legal person's income.

The substantiation note that has accompanied the draft of the Law No. 63/2012 shows that, although Romania currently has a coherent and comprehensive legislative framework, developed in accordance with the international standards in the field of confiscation of proceeds of crimes, this framework has certain flaws, by reference to the relevant European requirements.

More precisely, the above-mentioned Framework-Decision is not fully transposed into the domestic legislation, as the transposition of Article 3 of the Community act, on the extended confiscation, is missing. The extended confiscation measure must be at least one of the three variants provided for in Article 3 para. (2) letter a), b) and c), respectively. In all cases, this allows the confiscation of the goods originating from criminal activities that are not directly related to the criminal offence for which the person is convicted; more precisely, the direct link between the criminal offences leading to the conviction and the confiscated goods is not proven. This is a principle of the extended confiscation of the goods of the convicted person. Letter a) concerns those goods in the case where they originate from activities carried out in a period preceding the conviction, while the letter b) concerns the goods originating from 'similar' activities. As regards the letter c), this concerns the disproportion between the value of the goods and the level of the lawful income of the convicted person.

Moreover, it is specified that, in the case where the extended confiscation operates exclusively in criminal proceedings, concerns a list of very serious criminal offences and applies exclusively to a person already convicted - the introduction of the extended confiscation is not incompatible with the presumption of the lawful nature of the wealth, included in Article 44 para. (8) of the Constitution of Romania, republished. This presumption is a relative one, so this will be rebutted, from case to case, by submitting evidence that will

convince the court that the goods possessed by the convicted person are obtained from criminal offences.

In this context, the conditions provided for in the draft and which have to be proved in advance are enough for rebutting the presumption without violating though the constitutional principle mentioned.

Otherwise, the prosecutor would only have to prove that a certain person, in a period of time, was involved in the commission of certain criminal offences; for example, organised crime. From that moment on, the judge may presume that the goods acquired are the result of the criminal activities carried out by the convicted person throughout a period preceding the conviction, which is deemed reasonable by the court. In this case, the burden of proof concerning with the lawful nature of the wealth acquired would lie with the convicted person. If the judge reaches the conclusion that the value of the goods held is disproportionate by reference to the legal income, he may order that they are confiscated from the convicted person.

Furthermore, it is specified that the finding of the Constitutional Court may also be brought in support of the arguments made in the substantiation note. In the Decision No. 799/17 June 2011, on the unconstitutionality of the removal of the presumption of the lawful acquisition of the wealth, the Constitutional Court has shown that the regulation of this presumption does not impede the primary or the delegated legislator, in application of the provisions of Article 148 of the Constitution – 'Integration in the European Union'- to adopt regulations allowing the full compliance with the Union laws in the field of crime fighting.

At the end of the substantiation note, it is shown that the proposed regulatory act aims to transpose Article 3 of the Framework-Decision 2005/212/JHA of the Council of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property, with full observance of the constitutional principles concerning the ownership.

The Constitutional Court has assessed several initiatives concerning the revision of Article 48 para. (8) of the Fundamental Law.

Thus, by the Decision No. 85/1996[8], the Court has delivered its opinion on an initiative concerning the revision of the Constitution, proposing the replacement of the text regulating this presumption with another, with the following content: 'The wealth the lawful acquisition of which cannot be proven shall be confiscated". On this occasion, the Court has held that the presumption of the lawful acquisition of the wealth is one of the constitutional guarantees of the right to property, in accordance with the provisions of para. (1) of Article 41 of the Constitution [currently Article 44 para. (1)], according to which the right to property is guaranteed. This presumption is also based on the general principle according to which any legal act or fact is lawful unless there is evidence to the contrary, and requires to prove, in respect of the wealth of a person, the unlawful acquisition thereof. By finding that the revision proposal aims at rebutting the burden of proof concerning the lawful nature of the wealth, in the sense that the wealth of a person is presumed to be unlawfully acquired unless its holder submits evidence to the contrary, and that the legal security of the right to property over the goods composing the wealth of a person is indissolubly related to the presumption of lawful acquisition of the wealth, and the removal of this presumption means that a constitutional guarantee of the right to property is abolished, the Court has found that this proposal is not constitutional.

[8] Published in the Official Gazette of Romania No. 211/6 September 1996.

Moreover, by the Decision No. 148/2003[9], the Constitutional Court has given its opinion on the constitutionality of the legislative proposal for the amendment of the same text, amendment concerning the circumstantiation of the presumption of lawful acquisition of the wealth. The proposed text established that the presumption does not apply" in the case of goods acquired following the exploitation of the income obtained from criminal offences'.

By the Decision No. 799/2011, the Constitutional Court has found that 'it has already given its opinion on certain initiatives for the revision of the same constitutional text, initiatives that have concerned, essentially, the same finality: the removal of the presumption of lawful acquisition of the wealth from the Constitution'[10].

Then, in respect of the matter concerned, the Constitutional Court has stated: 'In application of the provisions of Article 152 para. (2) of the Constitution, according to which no revision may be made if it has as effect the abolition of the fundamental rights of the citizens or of their guarantees, the Court finds that the deletion of the second sentence of Article 44 para. (8) of the Constitution, according to which the" lawful nature of the acquisition is presumed", is unconstitutional, whereas it has as effect the abolition of a guarantee of the right to property, thus violating the limits of the revision, provided for in Article 152 para. (2) of the Constitution.

In this context, the Court emphasizes its views found in its jurisprudence, for example, in the Decision No. 85/3 September 1996, mentioned, or in the Decision No. 453/16 April 2008[11], in the sense that the regulation of this presumption does not impede the examination of the unlawful nature of the acquisition of the wealth, but the burden of proof lies with the person claiming this nature. To the extent to which the party concerned proves the unlawful acquisition of some goods, of a part or of the whole wealth of a person, the confiscation may be ordered in respect of those goods or the wealth unlawfully acquired, according to the law'.

After examining the arguments of the Constitutional Court, we notice that the Court rightly considers that the presumption of lawful acquisition of the wealth of a person is essential (fundamental).

Getting back to the regulation of extended confiscation, we specify that the *sedes materiae* is Article 112^1 of the Romanian Criminal Code. This has the following content: '(1) Goods other than those referred to in Article 112 are also subject to confiscation in the case where a person is convicted for an act likely to procure him/her a material benefit and the penalty provided by law is a term of

[9] Published in the Official Gazette of Romania No. 317/13 May 2003.

[10] It concerns the Decision No. 86/1996 and the Decision No. 148/2003. Thus, for example, by the Decision No. 148 of 2003, the Constitutional Court alleges that 'this way of drafting is criticable and can lead to confusions', showing that it follows from the way of drafting para. (7^1), the introduction of which is proposed, that the rebuttal of the burden of proof of the lawful nature of the wealth is intended, by the provision of the unlawful nature of the wealth acquired by the exploitation of the income resulting from the criminal offences. Therefore, by making reference to its Decision No. 85/1996. The Court has held that this case also concerns the abolition of a constitutional guarantee of the right to property, which is contrary to the provisions of Article 148 para. (2) of the Constitution [the current Article 152 para. (2) – *author's note*]. On the same occasion, the Court, by referring to the way the rule examined is drafted, has held that if the text aims at allowing the confiscation of the wealth acquired in a lawful manner, but which was built on an amount of money originating from criminal offences, the drafting thereof is inappropriate.

[11] Published in the Official Gazette of Romania No. 374/16 May 2008.

imprisonment of 4 years or more, the court is convinced that such goods originate from criminal activities. The conviction of the court may also be based on the disproportion between the lawful revenues and the person's wealth. (2) The goods acquired by the convicted person within a period of 5 years before and, if appropriate, after the time of perpetrating the offence, until the issuance of the document initiating the proceedings, may be subject to the extended confiscation. The extended confiscation may also be ordered in respect of the goods transferred to third parties, if they knew or should have known that the purpose of the transfer was to avoid the confiscation. (3) In order to apply the provisions of para. (2), the value of the goods transferred by the convicted person or by a third party to a family member or to a legal entity controlled by the convicted person shall be taken into account. (4) According to this Article, the goods shall also include the amounts of money. (5) In determining the difference between the lawful income and the value of the assets acquired, the value of the goods upon their acquisition and the expenses incurred by the convicted person and his/her family members shall be considered. (6) If the goods subjected to confiscation are not found, money and assets shall be confiscated up to the value thereof. (7) The goods and the money obtained from exploiting or using the goods subject to confiscation as well as the assets produced by such shall be also confiscated. (8) The confiscation may not exceed the value of the goods acquired during the period provided for in para. (2), which exceeds the level of the lawful revenues of the convicted person'.

After analysing the provisions of Article 112^1 of the Romanian Criminal Code and those of Article 107 of the Romanian Criminal Code, we consider that the reviewed safeguard may be ordered only if the following conditions are cumulatively met:

- the offender status of the perpetrator;
- the conviction of the offender;
- the conviction for an act able to provide the offender with an economic gain and for which the legal penalty is imprisonment to 4 years or more. The extended confiscation may also be ordered in respect of the goods transferred to third parties, if they knew or should have known that the purpose of the transfer was to avoid the confiscation;
- the belief of the court that those goods originate from criminal activities. The conviction of the court may also be based on the disproportion between the lawful revenues and the person's wealth;
- the safeguard ordered eliminates a state of danger and prevents the commission of new acts provided for by criminal law.

The principle of the personality of the extended confiscation safeguard follows from the content of the provisions of Article 112^1 and of Article 107 of the Romanian Criminal Code, which means that the penalty may not be imposed on persons who have committed mere unlawful acts, not provided for by the criminal law. Moreover, by derogation from the general rule, existing in the field of safeguards, according to which they may also be imposed on persons who commit acts provided for by the criminal law (regardless of whether they are criminal offences or not), in respect of the extended confiscation, in order to be ordered, the act has to be a criminal offence and the person on which the safeguard is imposed has to be convicted.

Moreover, the extended confiscation may not be imposed on other persons than the convicted one, who have not committed criminal offences, regardless of the relationship between them and the offender, whereas the criminal law penalties apply

only to the persons who have infringed the criminalisation rules and are also served by these persons.

Besides the legal considerations, the principle of personality of criminal law penalties is very important for any legal system, whereas it is not usual and educational that a criminal law penalty is imposed on a person who was not involved at all in the commission of a criminal offence.

We specify that, by the amendment made to Article 112^1 by the Law No. 228/2020, the legislator provides that the extended confiscation may also be ordered in respect of the goods transferred to third parties, if they knew or should have known that the purpose of the transfer was to avoid the confiscation.

The compensation for the loss created by criminal offences by the convicted persons

Currently, the conditional release is granted if, in addition to the other conditions, the convicted person fully pays the civil obligations set by the sentence.

Thus, according to Article 100 para. (1) of the Romanian Criminal Code 'Conditional release in case of imprisonment may be ordered if: a) a convict served at least two thirds of the penalty, in case of a term of imprisonment no longer than 10 years, or at least three quarters of the penalty, but no more than 20 years in prison, in case of a term of imprisonment exceeding 10 years; b) a convict is serving a sentence in an open or semi-open regime; c) a convict fulfilled completely all civil obligations established by the judgment of conviction, unless he/she proves to have been unable to do so (our emphasis added); d) the court is convinced that the convicted person has reformed and is able to reintegrate into society'.

3. The reflection of the new orientation of the criminal policy in special laws

According to Article 20 of the Law No. 78/2000, in the case of criminal offences against the financial interests of the European Union, the adoption of safeguards is compulsory. Moreover, the adoption of safeguards is mandatory according to the provisions of Article 50 of the Law No. 129/2019 and of Article 11 of the Law No. 241/2005.

The Law No. 126/2024, recently entered into force[12], has partially *reconfigured* the legal framework applicable to the field of preventing and fighting tax evasion," the primary aim" of the law, according to the substantiation note, being the" compensation for the loss to the budget" and" rendering liable the guilty persons".

The new regulation arrived in the legal landscape, aimed at fighting the tax evasion phenomenon (introduced by the Law No. 126/2024), confirms *the mutations* occurred at the level of criminal policy in terms of approaching the criminality impacting the public budget. According to this approach, which *redefines* the main goal of the regulation, the main goal of the state's criminal policy is the compensation for the loss and the recovery of the goods resulting the criminal offences.

Indeed, the penalty has to be only a mean of achieving a higher social goal and not an aim in itself. The purpose of the penalty is the prevention of new criminal offences and the reinstatement of the rule of

[12] On 16 May 2024 (it was published in the Official Gazette of Romania No. 437/13 May 2024).

law[13]. The aim of the penalty is subordinated to the goal of Criminal Law, that is the protection of the State, the individual and of his/her rights or freedoms against the criminal offences.

Following the entry into force of the Law No. 126/2024, Article 10 of the Law No. 241/2005 has the following content: '(1) In the case where a criminal offence provided for in Article 6^1, 8 or 9 is committed, if, until the expiry of a period of not more than 30 days from the completion of the inspection carried out by the relevant bodies, following on which a damage to the general consolidated budget of not more than Euro 1,000,000 is identified, the damage, increased by 15% of its value, to which the interest and the penalties are added, is fully covered, by actual payment, the act shall not be punishable. In this case, the relevant bodies shall not make a referral to the criminal prosecution bodies. (2) In the case where a criminal offence provided for in Article 6^1, 8 or 9 is committed, if, until the first court hearing, the damage caused is fully covered, by an actual payment, the thresholds for the penalty provided for by the law for the act committed shall be reduced by half. If the damage caused and recovered in these conditions does not exceed Euro 1,000,000, in the domestic currency equivalent, a fine may be imposed. In the case where a criminal offence provided for in Article 6^1, 8 or 9 is committed, if, until the first court hearing and until the final settlement of the case, the damage caused is fully covered, by an actual payment, the thresholds for the penalty provided for by the law for the act committed shall be reduced by a third. The damage shall be determined on the basis of an expert report. The suspect or the defendant shall be entitled to take part in the conduct of the expert examination. The provisions of Article 172-180 of the Criminal Procedure Code shall apply accordingly. The suspect or the defendant, natural person or legal entity, by representative, as appropriate, shall be notified that an expert witness has been appointed, and shall be given the time required to fully exercise his/her procedural rights. (3) In the case where a criminal offence provided for in Article 6^1, 8 or 9 is committed, by which a damage not exceeding Euro 1,000,000, in the domestic currency equivalent, is caused, if, throughout the criminal investigation, the damage cause, increased by 25% of its value, to which the interest and the penalties are added, is fully covered, by an actual payment, the act shall not be punishable, and the provisions of Article 16 para. (1) letter h) of the Criminal Procedure Code shall apply. If, throughout the preliminary chamber procedure or the court proceedings, until a first instance judgment is delivered, the same damage, increased by 50% of its value, to which the interest and the penalties are added, is fully covered, by an actual payment, the act shall not be punishable, and the provisions of Article 16 para. (1) letter h) of the Criminal Procedure Code shall apply. If, throughout the appeal proceedings, until a final court judgment is delivered, the same damage, increased by 100% of its value, to which the interest and the penalties are added, is fully covered, by an actual payment, the act shall not be punishable, and the provisions of Article 16 para. (1) letter h)

[13] Prof. Vintilă Dongoroz considered that the punishment acts in three directions: towards the individuals with latent criminality; towards the victim of the criminal offence; towards the whole society (Vintilă Dongoroz (coord.) at alii, *Theoretical explanations of the Romanian Criminal Code. General Part*, Vol. II, Romanian Academy Publishing House, Bucharest, 1970, p. 583]. It-was also said that, whereas the punishment is an evil, its effect is also an evil (Cathrein). This idea may not be accepted, whereas we would-be unable to impose the penalty, because, as Giuseppe Bettiol said, the end does not justify the means (*Diritto penale*, Cedem Publishing House, Padova, p. 666).

of the Criminal Procedure Code shall apply. (4) The provisions of this Article shall apply to all defendants even though they have not contributed to the compensation for the damage provided for in para. (1) and (2). (5) In the case where the person who has committed one of the criminal offences provided for in Article 6^1, 8 or 9 reports the criminal offence committed to the criminal investigation bodies or to the tax bodies, while the criminal offence is still ongoing or within not more than one year from the end of the criminal activity and before the criminal offence is referred to the criminal investigation bodies and, later, facilitates the discovery of truth and the imputation of the criminal liability to one or more participants to the criminal offence, the special thresholds shall be decreased by half. (6) The provisions of para. (1) and (2) shall not apply if the perpetrator has committed a criminal offence provided for in this law within 5 years from the commission of the act in relation to which it has benefitted from the provisions of para. (1) or (2)'.

Moreover, the Constitutional Court has reiterated this state objective in the Decision No. 146/2024, specifying that the Law No. 126/2024 'constitutes an important step in the transition that the states have to make from the traditionalist retributive theories of Criminal Law, according to which the imposition of custodial sentences in the case of criminal offences represent a sine qua non condition for the reinstatement of the rule of law, to the modern theories specific to the branch of law, according to which, in the case of criminal offences aimed at obtaining illegal gains, the main goal of the state criminal policy must concern the identification and the confiscation of those goods (in a broad sense), in order to introduce them or their countervalue in the public budget (our emphasis). Therefore, the legal provisions (...) represent a form of transposition of the above-mentioned objective into the State's criminal policy in the field of tax evasion'[14].

Conclusions

The Romanian criminal policy of the last decades has undergone visible changes in respect of the criminal offences through which the offenders aim to obtain goods. Starting from the objective according to which the criminal offences do not create goods, the laws adopted in the last years are mainly aimed at compensation the damages and at recovering the goods obtained by committing criminal offences.

Article 10 of the Law No. 241/2005 constitutes most important step in the transition that the states have to make from the traditionalist retributive theories of Criminal Law, according to which the imposition of custodial sentences in the case of criminal offences represent a sine qua non condition for the reinstatement of the rule of law, to the modern theories specific to the branch of law, according to which, in the case of criminal offences aimed at obtaining illegal gains, the main goal of the state criminal policy must concern the identification and the confiscation of those goods.

Another step was Article 62 para. (1) Romanian Criminal Code, if the committed offense was intended to provide a material gain, the penalty of imprisonment may be accompanied by a fine penalty and introduced by Article 112^1 of the Romanian Criminal Code, by the Law No. 63/2012 regarding extended confiscation.

[14] See the Decision of the Constitutional Court of Romania No. 146/2024, published in the Official Gazette of Romania No. 496/29 May 2024.

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THE JUDICIAL DECISION IN CRIMINAL PROCEEDINGS – COMPLEX PROCEDURAL AND PROCESSUAL ACT AND GUARANTEE OF A FAIR TRIAL

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Abstract

The judgement is the most complex substantive and procedural act in Romanian criminal proceedings; it is regulated by the Criminal Procedure Code and also by the secondary legislation. Moreover, the judgement is an act of legal culture that illustrates, on the one hand, how the criminal proceedings have been carried out during the criminal investigation, the preliminary chamber, in the first instance and the appeal. On the other hand, the arguments presented, the ability of the drafters to review and summarise, the legal language, and the references to national and European case law are able to highlight, both to the parties and to society, the interpretation and the application of the law, specifically of those relevant provisions, by reference to the evidence presented, thus enabling awareness of violations, the rehabilitation of perpetrators, and ensuring the protection of society.

Keywords: *judgement, substantive act, procedural act, types of judgements, act of legal culture*

1. Introduction

Romanian criminal proceedings in the trial stage, both in the first instance and in the ordinary and extraordinary appeals are a set of judicial activities that is completed by an act with a fundamental legal value – the judicial decision, which represents a processual and procedural act, reflecting, in a unitary manner, the judgement as a whole.

At the same time, the judicial decision is a guarantee of a fair trial, the criteria defining it by reference to the legal content in the domestic law are also codified by Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, namely the right to a fair trial and the case law of the European Court of Human Rights.

Types of judicial decisions in the framework of criminal proceedings are regulated by the Criminal Procedure Code, and reflect, depending on their specificity, the deliberation and the delivery thereof.

The Conventionality Block and Opinion No. 11 of the Consultative Council of the European Judges specifically highlight peculiarities that complement the domestic legal framework, in a standard, concerning verification of the reasoning of the decisions delivered by the domestic courts, and formal aspects thereof, as guarantees of a fair trial.

Moreover, the judgement is an act of legal culture that highlights the ability of the drafting judge or of all members of the formation to review and to summarise the evidence, to reply in a critical manner to the defences presented and to the applications put forward, with the arguments being drafted in proper legal language, which leads to a full understanding of how the law is interpreted and applied in the case brought before the court.

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It is also important to emphasize that the judgement, besides playing an important role in the resolution of the criminal law relationship and raising awareness among the parties of breaches of the law, also plays an important role in the protection of the society. This is because it is intended to draw attention to when the criminal offences that are committed are serious, and to the response by judicial authorities, which, in compliance with all procedural safeguards provided for by law, have resolved the criminal law dispute by means of a solution that instils confidence that justice is independent, impartial, professional, and respects the general interest of the community or of society.

Depending on its nature, the subject-matter of the case and the level of jurisdiction, but also when it has to ensure an unitary case-law, the criminal law judgement represents the highest form of manifestation of the principle of legality, being the expression of certain constants of legal institutions, on the one hand, while on the other, providing the legislative authority with interpretation arguments, in order to amend the regulatory acts by reference to the reality of the situations.

It must be also emphasized that the criminal law judgements are intended to contribute to a judicial dialogue, through the component of European and international judicial cooperation when they provide the arguments for specifically regulated applications, such as, inter alia, European arrest warrants, extradition requests, the recognition of judgements, the transfer of convicted individuals, reflecting how the principle of mutual trust and European case law have been regulated and accepted.

The role and the importance of the consequences of the judgement, as substantive and procedural act of Romanian criminal proceedings, clearly follows from the paragraphs above.

In this study, we aim to examine the judicial decision in Romanian criminal proceedings, as a processual and procedural act, which plays a fundamental role in ensuring the observance of the rights and the obligations of the parties, with significant assumption of the judge's responsibility effectively giving content to thephrase 'Nulla Justitia Sine Lege'.

2. The notion of 'judicial decision'

In the legal doctrine, the judicial decision has been examined both as a processual act and a procedural act.[1]

Regardless of the composition of judicial panels (judge of rights and freedoms, preliminary chamber judge, judge of first instance or judge in extraordinary appeals), at the end of the trial stage, the factual and legal issues are settled by a reasoned act from a lawfulness perspective and/or from a lawfulness and a well-foundedness perspective.

In a broad sense, the judicial decision is a processual act, by which the court will decide on both the criminal case,[2] and on all

[1] Ion Neagu, Mircea Damaschin, *Criminal Procedure Treatise, Special Part*, 3rd edition, revised and supplemented (*Tratat de procedură penală. Partea specială*, ediția a 3-a, revăzută și adăugită), Universul Juridic Publishing House, Bucharest, 2021, p. 215-216; Nicolae Volonciu (coord.), *The Criminal Procedure Code commented*, 3rd anniversary edition, revised and supplemented (Codul de procedură penală comentat, ediția a 3-a aniversară), Hamangiu Publishing House, 2017, p. 1071-1073.

[2] Ion Neagu, Mircea Damaschin, the Treatise quotes Vintilă Dongoroz (coord.) et alii, *Theoretical explanations of the Romanian Criminal Procedure Code. Special Part (Explicații teoretice ale Codului de procedură penală român. Partea specială),* Romanian Academy Publishing House, Bucharest, 1976, p. 150; I.

the other matters arisen during the trial stage and in other stages of the criminal proceedings.

In a narrow sense, the judicial decision represents the final act of the court, by which it ends the trial stage.[3]

The legislator has regulated the types of rulings in Article 370 of the Romanian Criminal Procedure Code.[4]

Thus, the legal framework concerning the type of judicial decisions represents a national standard, foreseeable and predictable, an essential requirement for a fair trial. This is because there is a legal provision regulating the decisions delivered by the courts of the Romanian judicial systems and, consequently, they may be checked by reference to the conventionality block by the European contentious court.

Moreover, as a processual act, the judicial decision reflects the deliberation process of the judicial panel. Therefore the provisions of Article 370 of the Criminal Procedure Code have to be examined in relation to the provisions of Article 391-407 of the same Code[5].

The complex legal framework that the legislator wanted to regulate in respect of the judicial decision reveals not only its purpose of having ample and detailed legal provisions regarding several stages, namely at deliberation, at pronouncement and the

Neagu, *Romanian Criminal Procedural Law*, vol. II (*Drept procesual penal român*, vol. II), University of Bucharest Publishing House, 1979, p. 104.

[3] The cited work quotes Vintilă Dongoroz, *Criminal Procedure Course (Curs de procedură penală)*, 1942, p. 298; Traian Pop, *Criminal Procedural Law (Drept procesual penal)*, vol. IV, National Publishing House, Cluj, 1948, p. 247; Nicolae Volonciu, *Criminal Procedural Law (Drept procesual penal)*, Didactic and Pedagogical Publishing House, Bucharest, 1972, p. 331; Ilie Stoenescu, Savelly Zilberstein, *Civil Procedure Law, General Theory* (Drept procesual civil. Teoria generală), Didactic and Pedagogical Publishing House, Bucharest, 1977; Mircea N. Costin, Ioan Leș, Mircea Șt. Minea, Dumitru Radu, *Civil Procedural Law Dictionary* (*Dicționar de drept procesual civil*), Scientific and Encyclopaedic Publishing House, Bucharest, 1983, p. 242-243.

[4] Article 370 of the Romanian Criminal Procedure Code in force (the Law No. 255/2013 implementing the Law No. 135/2010 on the Criminal Procedure Code and amending and supplementing certain regulatory acts containing criminal procedure provisions in the Official Gazette of Romania, No. 515/14 August 2023, with the subsequent amendments and supplements) (1) The ruling wherein the case is settled by the court of first instance or wherein the court of first instance dismisses the case without solving it shall be called a sentence. The court shall issue a sentence in other situations as well, as provided by the law. (2) The ruling wherein the court makes a decision regarding the appeal, the appeal for review and the appeal in the interest of the law shall be called decision. The court shall rule in a decision in other cases as well, as provided by the law. (3) All the other rulings reached by courts throughout the proceedings shall be called court resolutions. (4) The development of the trial in the court room shall be recorded in a court resolution that shall comprise: a) the day, the month, the year and the name of the court; b) the mention whether the court session was public or not; c) the surnames and first names of the judges, prosecutor and clerk; d) the surnames and first names of the parties, the counsels and the other persons who take part in the proceedings and who were present in the trial, as well as the missing persons, emphasizing their legal standing in trial and the mention concerning fulfilment of the procedure; e) the offense for which the defendant was sent to trial and the legal texts that regulate it; f) the evidence that had been the object of adversarial debates; g) the motions of any other nature, developed by the prosecutor, the victim, the parties and the other participants in the court proceedings; h) the prosecutor's, the victim's and the parties' conclusions; i) the measures taken during the session. (5) The court resolution shall be developed by the clerk no later than 72 hours since the completion of the court hearing and shall be signed by the judicial panel president and the clerk. (6) When the ruling is issued on the day when the court hearing took place, no court resolution thereof shall be developed.

[5] Section 2 Court deliberation and judgment: Article 391 Adjudication of the case, Article 392 Deliberation; Article 393 Object of the deliberation; Article 394 Reaching the decision; Article 395 Resuming the court investigation or the debates; Article 396 Settling the criminal proceedings; Article 397 Settling the civil action; Article 398 Judicial expenses; Article 399 Provisions concerning the preventive measures; Article 400 Minutes; Article 401 Content of the court ruling; Article 402 Contents of the introductory part, Article 403 Content of the narrative description; Article 404 Contents of the operational part; Article 405 Pronouncing the ruling, Article 406 Writing and signing the ruling; Article 407 Notifying the ruling.

content of the judicial decision in the first instance, thus conferring to the final act its due consideration as a procedural act as well, with a significant implications for the parties to the proceedings, but also for society.

In other words, the judicial decision delivered at the end of the trial in the first instance, is its corollary, reflecting its reasoning or considerations, in clear and concise legal language, but understandable to those to whom it is addressed, the resolution of the case. This includes reference to the evidence examined, so that the arguments presented show how the facts or the factual bases and the legal framework in which it fits is evident. Specificallythis involves analysing the conditions of objective and subjective typicality of the offences committed in the forms of participation provided by law. When the judge is convinced, beyond any reasonable doubt, he will justify the conviction decision and operation to individualise penalties, referring to the specific situation of the main, complementary, and accessory penalties, the manner of executing the punishment, then addressing the civil action in the event of an offence resulting in damage, other measures, and judicial expenses.

By its structure, the judicial decision must also highlight the stages of the proceedings and how the measures concerning the hearing of the parties, of the injured party, of the witnesses as well as technical evidence. It should also address the resoluti9on of other requests made during the trial, such as: the request for a reference to the Constitutional Court concerning the unconstitutionality of a criminal or of a criminal procedure rule or to the Court of Justice of the European Union concerning the interpretation of national provisions by reference to Community decisions or to the High Court of Cassation and Justice for a preliminary ruling to resolve legal issues.

In the cases where either the Court of Justice of the European Union or the High Court of Cassation and Justice have been consulted, the decisions rendered by these courts, which have clarified issues related to the interpretation of Community norms or of legal terms or provisions, whether general or specific, related to the substance of the matter, shall be applicable throughout the examination of the substance of those cases. Consequently, the final judgement will reflect a judicial dialogue among multiple courts, whether exclusively national, or European and national, thereby imparting a complex character nature to the rendered judicial ruling.

According to the jurisprudence of the European Court of Human Rights concerning the reasoning of judicial decisions, the latter must to reflect adherence to the principle of proper administration of justice, in the sense that they must sufficiently indicate the reasons on which they are based. For instance, in the case of *Papon versus France*, the Court emphasised the necessity of judgements to provide adequate reasoning to uphold the fairness of proceedings.

In Opinion No. 11 (2008), issued by the Consultative Council of the European Judges within the Council of Europe[6] regarding the quality of judicial decisions, several quality factors, among which the internal ones concern the professionalism of the judge, the procedure, the case management, the hearings, and elements related to the decision itself.

Paragraph 21 of the aforementioned opinion states that a judge's professionalism is the primary guarantee of a high quality judicial decision. This encompasses advanced legal training in line with the

[6] https://rm.coe.int/1680747bb2

principles outlined by the CCJE in its Opinions No. 4 (2003) and No. 9 (2006), as well as the development of a culture of independence, ethics, and deontology, as detailed in Opinions No. 1 (2001) and No. 3 (2002).

In Opinion No. 11 (2008) of the Consultative Council of European Judges (CCJE), paragraphs 25 and 26 highlight that the mere existence of procedural laws meeting necessary requirements is insufficient. The CCJE asserts that judges should have the ability to organise and direct proceedings actively and promptly. Delivering a judgment within a reasonable time frame, [7]as stipulated in Article 6 of the European Convention on Human Rights, is considered a significant aspect of quality. However, there can be a tension between the speed of proceedings and other quality factors, such as the right to a fair trial, also guaranteed by Article 6. Ensuring social harmony and legal certainty inherently involves, but is not limited to, the element of time

Furthermore, in the same Opinion No. 11, the Consultative Council of the European Judges recommends criteria for states concerning the elements inherent to the decision, the clarity and the reasoning. Below we highlight the most relevant examples.

Thus, point 31 specifies that, in order to be of high quality, 'a judicial decision must be perceived by the parties and by society in general as being the result of a correct application of legal rules, of a fair proceeding and a proper factual evaluation, as well as being effectively enforceable. Only then will the parties be convinced that their case has been properly considered and dealt with and will society perceive the decision as a factor for restoring social harmony'; point 32. 'All judicial decisions must be intelligible, drafted in clear and simple language - a prerequisite to their being understood by the parties and the general public. This requires them to be coherently organised with reasoning in a clear style accessible to everyone. point 33 Each judge may opt for a personal style and structure or make use of standardised models if they exist. The CCJE recommends that judicial authorities compile a compendium of good practices in order to facilitate the drafting of decisions'.

Regarding the reasoning of judicial decisions, the Consultative Council of European Judges has highlighted in point 34 of the Opinion No. 11 that 'Judicial decisions must in principle be reasoned. The quality of a judicial decision depends principally on the quality of its reasoning. Proper reasoning is an imperative necessity which should not be neglected in the interests of speed...'; point 36 'The reasons must be consistent, clear, unambiguous and not contradictory. They must allow the reader to follow the chain of reasoning which led the judge to the decision'; point 40 'The statement of reasons should not necessarily be long, as a proper balance must be found between the conciseness and the proper understanding of the decision'. point 41 'The obligation on courts to give reasons for their decisions does not mean replying to every argument raised by the defence in support of every ground of defence. The scope of this duty can vary according to the nature of the decision. In accordance with the case-law of the European Court of Human Rights, the extent of the reasons to be expected depends on the various arguments open to each party, as well as on the different legal provisions, customs and doctrinal principles as well as the different

[7] Guide on Article 6 of the European Convention of Human Rights, right to a fair trial (criminal branch), http://ier.gov.ro 2018/11

practices regarding presentation and drafting of judgments and decisions in different states ...' point 42 'In terms of content, the judicial decision includes an examination of the factual and legal issues lying at the heart of the dispute'.

In national jurisprudence -, judicial decisions, depending on their type, must show in a clear, concise and legal way, how the judge has taken into account the nature of the case, resulting in varying levels of reasoning.

For example, regarding the prosecutor's request for the preventive detention of the defendant, a reasoned court resolution is pronounced in respect of this request, based on the criminal investigation file, but also on the reasoned proposal in terms of grounds for the preventive detention, the necessity, the proportionality thereof.

As a rule, the reasoning in such a ruling, issued by the judge for rights and freedoms is relatively brief , if the proposal for the preventive detention concerns only a defendant, but if the latter concerns several defendants, investigated for the commission of several criminal offences, the examination of the grounds for preventive detention is more complex, whereas it also involves the examination of the evidence taken in relation to the reasonable suspicion concerning the commission of the alleged criminal offences and the personal circumstances, and the necessity and the proportionality of the measure, therefore the reasoning is lengthy.

When a request is made for a home or computer search, or for a special surveillance method, such as the interception of communications or of any type of remote communication, the resolution of the judge of rights and freedoms shall be reasoned by reference to the request, the legal requirements for such measures, the evidence taken but also the necessity and the purpose thereof for the smooth running of the criminal proceedings during the criminal investigation stage. This includes referencing relevant jurisprudence from either the Constitutional Court of Romania or the European Court of Human Rights concerning the degree of intrusion into the private life of the defendants in respect of which those measure are requested, shall be indicated. Moreover, the length of the reasoning of such resolutions is different, whereas it requires a factual and probative analysis, individualised in the context of the case, by reference to the nature of the criminal offences, the procedural steps taken and the purpose thereof.

Additionally, the decisions rendered in the ordinary appeal process as well as in extraordinary appeals such as an annulment or revision contain, besides their constant component parts, the introductory part ('practicaua'), the narrative description (the reasoning) and the operative part of the decision, but also specific aspects, depending on the special legal provisions provided for, such as issues related to the court investigation in appeal and the new evidence taken, which shall be examined as a whole with the decision appealed, by reference to the grounds for appeal raised, or by reference to the criteria for admissibility in principle, in the case of extraordinary appeals. The length of decisions also varies depending on the legal requirements examined and the actual grounds raised, the language being clear, coherent, concise and legal, in order to be accessible to all parties.

Therefore, the judgements rendered by the courts of the Romanian judicial system comply with both the domestic and the European standard, from the standpoint of the conditions and criteria presented, which facilitates the verification and the finding of their lawfulness and well-foundedness, either the compliance with the European conventionality block, or the procedural

irregularities which are sanctioned according to the law.

The judicial decision also represents an act of culture (legal and general), as it encompasses a factual, legal and jurisprudential analysis. This analysis includes elements of comparative law, whether legal or jurisprudential, and may also reference other fields. For example, in the case of copyright offences, references are made to the intellectual property right or to the cultural heritage, to archaeology or treasure notions, according to UNESCO.

Furthermore, judicial decisions play a crucial role in ensuring consistent judicial practice, as regulated in the Criminal Procedure Code, in relation to the appeal in the interest of the law (Article 474 of the Criminal Procedure Code concerning the content of the ruling and the effects thereof) and to the reference made to the High Court of Cassation and Justice in order to given a preliminary ruling on the settlement of legal issues (Article 477 of the same Code, concerning the content and the effects thereof), represents a live instrument, which provides a general interpretation for the courts of the Romanian judicial system, thus ensuring uniformity in legal interpretation and eliminating divergent practices to guarantee consistency in the interpretation and the implementation of the law.

Additionally, the judicial decisions delivered in the framework of the international cooperation in criminal matters, in the cases concerning, for example, the European arrest or extradition warrant according to the Law No. 302/2004 on the international cooperation in criminal matters, with the subsequent amendments and supplements, play an important role, whereas, by the length of the reasoning, the use of the legal language within the limits of the requirements imposed in such proceedings, they ensure the unified application of international instruments, facilitating the cooperation between the Member States of the European Union or on the basis of bilateral international instruments for legal cooperation. They also guarantee the security and the recognition of such rulings, whether in the European legal space or internationally, based on applicable international instruments.

3. Conclusions

This study on judicial decisions in criminal proceedings has shown aspects concerning their legal nature, as well as national and European conditions and criteria, aiming to highlight national regulator and enforcement standards are harmonised with the European framework.

A judicial decision in criminal matters represents a structured synthesis either rulings on the measures taken during criminal investigation stages, the ruling at first instance or in extraordinary appeals, presenting the legal grounds, by reference to the measures or the substance of the cases, representing an analysis in a clear, concise and coherent language, which confers quality to the proceedings completed.

In Romanian criminal proceedings, a judicial decision is a complex procedural and processual act that also serves as a guarantee of a fair trial, ensuring the interpretation and application of criminal law in a manner that contributes to the development of a legal culture

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CONTROVERSIES ON REMEDIES AGAINST COURT REFERRAL IN PRE-TRIAL PROCEEDINGS

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Abstract

Considering the particular importance of the pre-trial chamber procedure in criminal proceedings, in relation to the legal consequences deriving from the fulfilment of the judicial function specific to this procedural stage prior to trial, this article aims to answer the legal issues giving rise to controversies both at doctrinal and jurisprudential level regarding remedies against the court referral. The jurisprudential upheaval caused particularly by the intervention of the Constitutional Court has led to a reconfiguration of the relevant legal framework. As a result of the failure of the lawmaker to align the wording of the law that was declared unconstitutional with the Constitution, the legal instruments remaining at the disposal of the judge hearing the case before the pre-trial chamber were no longer functionally capable of specifically meeting the requirements imposed by the Constitutional Court. Against this background, starting from the need to achieve a clear outline of the functional competences of each judicial body actively participating in the pre-trial chamber procedure, this paper aims at a broad analysis of the logical and legal mechanisms that allow the identification of the appropriate procedural remedies for the new judicial realities, able of representing an effective remedy of any irregularities in the court referral.

Keywords: *remedy of court referral, functional jurisdiction, referral of the case back to the prosecution, implied irregularity, mandatory procedural time limit, penalty*

1. Introduction

In the dynamics of judicial activities specific to the pre-trial chamber procedure, the remedy against the court referral is the procedural instrument that remove any legal flaws which affect its very functional attribute. The essential role of this remedial mechanism is to ensure that the court is provided with an indictment able of establishing, in a concrete and unequivocal manner, the procedural framework, the subject-matter and the limits within which the trial is to be conducted.

However, due to some legislative gaps caused by the substantial amendments made to the Criminal Procedure Code adopted by Law No. 135/2010, i.e. abandoning the traditional tripartite structure of the criminal trial and implementation of a novel preliminary chamber procedure, certain doctrinal and jurisprudential controversies have arisen regarding how to remedy court referrals.

In this respect, the paper aims to clarify the controversial issues related to the limits of judicial functions in this matter, the legal nature of the act by which the irregularities in the court referral are remedied, as well as

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the time limit under Article 345 para. (3) of the Criminal Procedure Code for the performance of this legal operation, as well as the penalty applicable in case of failure to comply with the legal deadline.

At the same time, the reconfiguration of the normative framework regarding the pre-trial chamber procedure, as a reflection of the jurisprudential upheaval at the hands of the Constitutional Court, coupled with the lack of active intervention by the lawmaker to align the declared unconstitutional text of the law with the Constitution, gave rise to procedural difficulties in the application and realisation of the judicial function specific to this procedure.

The existing normative shortcomings in this area that persist even today, despite calls from both national and conventional courts (with reference to the case law of the Court of Justice of the European Union), continue to be based in the lack of legal instruments functionally capable of meeting the requirements enshrined into law.

In this context, the study also aims to provide adequate solutions to the essential problem of the ineffectiveness of the current legal instruments that are regulated by criminal procedural law.

2. Preliminary aspects regarding the regulatory framework and the role of preliminary chamber procedure

In view of its functional role as a procedural act that invests the court with the aim of achieving the purpose of the criminal proceedings, the indictment must fulfil the role of legality review, which aims at an evaluation from the perspective of its legality (but not its validity), the review being exclusively related to the compliance with the formal (extrinsic) and substantive conditions intrinsic to the indictment.

However, the procedural act that includes the prosecutor's order to send the case to trial, as a consequence of the materialisation of the entire activity specific to the criminal prosecution stage, will be able to inform the court in order to resolve the legal conflict and, implicitly, to concretely outline the procedural framework in which the trial is to take place, by clearly establishing the subject matter and limits of the trial, according to Article 371 of the Criminal Code.

In order to ensure the full functionality of the court referral in accordance with Articles 328 and 329 of the Criminal Procedure Code, the legislator has regulated a novel preliminary procedure as part of the current system of criminal procedural law, to take place prior to the commencement of the trial, which allows a judicial review of the legality of the indictment, falling within the exclusive remit of a specialised official subject, namely the pre-trial chamber judge.

The normative framework in which this pre-trial stage operates and which regulates the set of rules prescribed for the participants in this procedure is represented by the provisions of Articles 342-348 of the Code of Criminal Procedure.

Considering the limits of the review under Article 342 of the Criminal Procedure Code, the object of the verifications carried out by the pre-trial chamber judge concerns four essential aspects for the subsequent conduct of the trial: the competence of the court, the legality of the court referral, the legality of the adducing of evidence by the prosecution and the legality of the criminal investigation acts.

These aspects exhaustively listed by the lawmaker in the aforementioned wording of the law jointly constitute the subject-matter of the main task of the judicial function of the pre-trial chamber judge.

Essentially, the procedural aspect of the effective realisation of the preliminary chamber judge's review is to be found in the

wording of Article 345 of the Criminal Procedure Code, which regulate the actual pre-trial procedure.

This procedural framework becomes active only in the hypothesis in which requests and exceptions have been formulated or they have been raised ex officio, despite the fact that, as correctly held in the doctrine[1], in the preliminary chamber procedure there may be two *distinct procedural conjunctures* depending on the nature of the participants involved - whether or not requests and exceptions have been formulated or they have been raised ex officio by the judge within the time limits under Article 344 para. (2) or (3) of the Criminal Procedure Code.

Otherwise, in the absence of any criticisms regarding the legality of the court referral, the adducing of evidence or the performance of the acts of criminal prosecution, the judge will order, in consideration of Article 346 para. (1) of the Criminal Procedure Code, the opening of the trial.

Therefore, according to Article 345 para. (3) of the Criminal Procedure Code, if the pre-trial chamber judge finds irregularities in the indictment or if they sanction, under Articles 280-282, the acts of criminal prosecution carried out in violation of the law or if they exclude one or more pieces of evidence, within 5 days from the communication of the decision, the prosecutor shall remedy the irregularities in the indictment and shall inform the pre-trial chamber judge whether they maintain the decision to send the case for trial or requests the return of the case.

This intermediate stage regulated by the aforementioned legal text is an incidental procedure, a remedial procedure by which the pre-trial chamber judge gives the prosecutor the opportunity to express their judicial views, even after the completion of the criminal prosecution stage, in order to remedy the irregularities in the indictment and to state their procedural position on whether or not to maintain the indictment.

However, it should be noted in advance that the remedy is of a limited nature, as it cannot apply to all aspects of illegality found by the pre-trial chamber judge, but only to those which have been shown to be genuine irregularities in the court referral[2].

Although this procedural mechanism regulated by Article 345 para. (3) of the Criminal Procedure Code, the legislator has established a positive procedural obligation for the prosecutor to remedy the indictment within the limits set by the pre-trial chamber judge, allowing them to request clarification of the issues related to the concrete determination of the subject matter and limits of the trial, this does not represent a transfer of judicial powers to the prosecution.

By the conclusion pronounced on the requests and exceptions, in the context of sanctioning the legality flaws of the indictment, in this incidental procedure, the pre-trial chamber judge does not disqualify themselves and thus does not create the premises for reactivating the judicial function of criminal prosecution, implicitly vesting the prosecutor to perform specific acts of the first procedural phase, but only performs a form of interaction between these judicial bodies, limited to the procedural form provided by law.

[1] Ion Neagu, Mircea Damaschin, *Criminal Procedure Treatise. Special Part (Tratat de procedură penală. Partea specială)*, Universul Juridic Publishing House, Bucharest, 2015, p. 214.

[2] Andrei Zarafiu, *Criminal Procedure. General part. Special part*, 2nd edition (*Procedură penală. Partea generală. Partea specială*, ediția a 2-a), C.H. Beck Publishing House, Bucharest, 2015, p. 385.

This form of interaction takes place exclusively with the public prosecutor, not with the public prosecutor's office, which is not a case of resumption of criminal prosecution covered by Article 334 of the Criminal Procedure Code, which implies an act of reactivation of the judicial function specific to the criminal prosecution stage. The case is only returned to the prosecution when the pre-trial chamber judge, following the incidental procedure under Article 345 para. (3) of the Criminal Procedure Code, orders one of the remedies set out in Article 346 para. (3) of the Criminal Procedure Code.

The law does not allow for a temporary transfer of judicial powers, as long as the judge was not disqualified, so that, from a functional standpoint, the prosecutor can only resume acting once their natural function, previously lost by the issuance of the indictment, is reactivated following the pronouncement of one of the decisions to return the case to the prosecutor's office under Article 346 para. (3) of the Criminal Procedure Code.

In our judicial system, the functional competence can be established, according to the main regulations imposed both at constitutional level - art. 131para. (2) and (3) of the Constitution - and in principle - Article 3 of Law No. 304/2004 - only by law, as the establishment or extension of powers by judicial means is prohibited.

Therefore, from the point of view of the prosecutor's authorisation to act judicially in the pre-trial chamber procedure, we emphasise that **only the pre-trial chamber judge has an active function during this procedure.**

3. Considerations on the legal nature of the remedial act

The essential premise that determined the need for a broad debate on the concrete establishment of the functional limits within which the powers conferred by law on each judicial body must be exercised, in order to comply with the principle of separation of judicial functions provided under Article 3 of the Criminal Procedure Code, has taken into account, both at the doctrinal and especially at the jurisprudential level, the emergence, since the emergence of the Criminal Procedure Code in the active legislative background, of controversies regarding the legal instrument that allows the removal of these legality flaws that are subject to the preliminary chamber procedure.

Thus, one first aspect that required essential clarification concerned the legal nature of the act by which the prosecutor can remedy the indictment. In the absence of an express legal text laying down the procedural act to perform a remedy, the solutions approached in courts were varied.

Initially, it was considered that the prosecutor's obligation to remedy must take the same form and fulfil the same conditions as those required for the issuance of the indictment. On a practical level, this guideline took the form of issuing of a new referral document in which the initial irregularities were removed.

Since such a solution was clearly contrary to the mandatory provision of Article 328 para. (3) of the Criminal Procedure Code, which requires the prosecutor to issue a single indictment regardless of whether the criminal prosecution proceedings concerned several offences or several suspects and defendants or even if different outcomes were to be envisaged, this solution was subsequently nuanced.

Thus, at an early stage, a part of the doctrine initially considered that 'If the irregularity concerns the content of the indictment forming the subject matter of the trial (...) we consider that the prosecutor

must communicate a new original copy (with the required dissemination copies) of the original indictment, but which contains the elements found to be missing. In the latter case, there must be one and the same original indictment - with the additions required by law - and not another indictment'[3].

Although the time factor has played a significant role in the evolution of this institution of criminal procedural law in enshrining a unanimously accepted judicial practice, which excludes the indictment from the acts that can fulfil the procedural function of remedy in the incidental procedure under Article 345 para. (3) of the Criminal Procedure Code, this opinion now seems to have been only partially abandoned at the doctrinal level, with echoes of the previously expressed opinion continuing to be heard.

Thus, some specialised works[4] continue to state that the act drawn up by the public prosecutor in order to remedy the specific irregularities found by the judge, appearing as an addition to the initial notification and generating, in the opinion of the authors, the same legal effects, cannot have a different form from that of the initial referral. Since the indictment of the defendant is not made by order, but by issuing the indictment, the indictment can only be maintained - as the authors of the scientific paper argue - only by means of an act with the same legal value.

In our opinion, even this solution is not free from legality criticism. First of all, the indictment is the specific procedural act exclusively specific to the criminal prosecution phase, which includes one of the solutions restrictively provided under Article 327 of the Criminal Procedure Code, which the prosecutor may order at the end of this procedural phase as conclusion of the entire investigative activity. It is a legal act with an autonomous character, regulated by Article 328 of the Criminal Procedure Code, which we find in Title I – 'Criminal Prosecution' - of the special part of the Criminal Procedure Code, being part of the set of legal norms that regulate the conduct of judicial activities in this procedural phase.

Second, the indictment simultaneously fulfils the legal effects of two different judicial functions: on the one hand, it leads to disinvestment of the prosecution, representing the final act of the first stage of the proceedings, and on the other, it leads to sending of the case to the pre-trial chamber. As a consequence, the representative of the prosecution, having no functional competence at this pre-trial procedural stage, can no longer issue a new procedural act incorporating the reference order, and cannot temporarily extend its own competences on its own.

Moreover, the re-establishment of any procedural act implies that it was previously declared void. However, in the incidental procedure under Article 345 para. (3) of the Criminal Procedure Code, the judge of the pre-trial chamber does not nullify the court referral, but merely finds that there are irregularities. It is not by chance that in these provisions, the lawmaker uses the concept of 'remedy' and not 'restoration', the latte naturally implying the return of the case to the prosecution in order to reactivate the appropriate judicial context in which the prosecution function can be resumed, which would allow the prosecutor to resume their judicial role.

[3] Nicolae Volonciu, *Code of Criminal Procedure with comments. Anniversary edition (Codul de procedură penală cu comentarii),* Hamangiu Publishing House, Bucharest, 2017, p. 1027.

[4] Cătălin Marin, *Preliminary Chamber Procedure (Procedura camerei preliminare),* Universul Juridic Publishing House, Bucharest, 2024, p. 338-340.

On the other hand, the issuing of a new indictment could require the entire pre-trial chamber procedure to be restarted, from the randomisation of the case, the creation of a separate file and the start of a new pre-trial chamber procedure[5], which the lawmaker clearly did not take into account, and which is also contrary to the reason why it was deemed necessary to create this pre-trial procedural stage.

The majority opinion of the doctrine[6], which confirmed the arguments above, was also steered in the same direction.

In fact, the basis of the above-mentioned arguments is established as Supreme Court case law, as the High Court of Cassation and Justice, through its binding case law, definitively settled this controversial legal issue.

Thus, by Decision No. 23/4 May 2022[7], the High Court, in a panel of criminal-court judges, stated inter alia that, unlike the act of referral to the court, the act of remedying irregularities in the indictment has a different role and purpose. 'It does not contain a solution given to the criminal case and does not aim at a new referral to the court, but only clarifies the scope and particulars of the provisions contained in the indictment, thus aiming to preserve the effects already produced by the original referral and to avoid returning the case to the prosecutor in other situations than those restrictively provided by law'.

Thus, the solution that seems to meet the requirements of legality as correctly as possible, in the absence of an express provision by the lawmaker, involves issuing a separate act from the indictment (either a separate order, notes, clarifications, report, etc.), but which is a common document.

As far as we are concerned, we are reluctant to consider the order as valid in the incidental procedure under Article 345 para. (3) of the Criminal Procedure Code - as a procedural act through which irregularities are remedied - even if, according to Article 286 of the Criminal Procedure Code, it is the main procedural act through which the prosecutor can exercise their role.

The rationale is precisely that the prosecutor's order is the reflection of an active judicial function of criminal prosecution, which cannot operate while the pre-trial chamber judge still has an active role. In the procedure governed by Article 345 para. (3) of the Criminal Procedure Code, the judge does not ask the representative of the prosecution to issue a new indictment, but only to specify their procedural position on whether or not to maintain the order already issued in the course of the criminal proceedings by means of the indictment.

The omission of the lawmaker to regulate the legal nature of the procedural act by which the prosecutor will remedy the irregularities in the court referral, as well as the substantive and formal conditions that it must fulfil, has also generated serious controversy regarding the mandatory nature of its legality and validity review by the hierarchically superior prosecutor, as an essential requirement of validity.

Until recently, it has been considered that the prosecutor's act remedying the irregularities in the indictment must be subject to a legality and validity review by the hierarchically superior prosecutor,

[5] Grigore Gr. Theodoru, Ioan Paul Chiș, *Criminal Procedure Law Treatise*, 4th edition (*Tratat de drept procesual penal,* ediția a 4-a), Hamangiu Publishing House, Bucharest, 2020, p. 736.

[6] Bogdan Micu, Radu Slăvoiu, *Criminal Procedure (Procedură penală),* Hamangiu Publishing House, Bucharest, 2019, p. 397. Mihail Udroiu, *Criminal Procedure Summaries. Special Part (Fișe de procedură penală. Partea specială),* C.H. Beck Publishing House, Bucharest, 2020, p. 277; A. Zarafiu, *op. cit.*, p. 386.

[7] Published in the Official Gazette of Romania, No. 665/4 July 2022.

following the procedure for verification of the indictment under Article 328 para. (1) sentence II of the Criminal Procedure Code [8], on the grounds that 'the particulars contained in the document in which the prosecutor states that they remedied the irregularities found by the judge, being a common document with the indictment and having the same legal value as the latter, must fulfil all the formal requirements of the indictment'[9].

As it was not a requirement that had a legal basis, but rather was adopted judicially on the basis of doctrinal interpretations up to that time, this circumstance generated an inconsistent judicial practice that required, in the end, the intervention of the Supreme Court to clarify this matter of law.

Therefore, by the same Decision No. 23/4 May 2022 referred to above, in addition to clarifying and underlining the major difference between court referral and the procedural act of remedy, from the perspective of the legal nature and the effects that the two acts produce, the High Court of Cassation and Justice has also definitively settled the issue of the need for a legality and validity review by the hierarchically superior prosecutor. In this regard, the court ruled that 'The act by which the prosecutor remedies the irregularities in the indictment, in accordance with Article 345 para. (3) of the Criminal Procedure Code, is not subject to a legality and validity review by the hierarchically superior prosecutor'.

In order to give such a solution, the High Court started from the clarification of the nature and limits of the competences of each judicial body in the preliminary chamber procedure, emphasising the arguments set out in the introductory part of this article.

Thus, the Supreme Court stated that 'Although carried out by the prosecutor - as the holder of the prosecution function and of the power to prosecute - the remedying of irregularities in the indictment does not, however, represent an effective procedural initiative of this judicial body. Such procedural activity takes place exclusively at the request of the preliminary chamber judge, is carried out within the strict limits laid down by the interim judgment settling the applications and objections, and is ultimately subject to the same judge's legality review'.

Moreover, 'given that the lawmaker intended to confer on the judicial body under Article 54 of the Code of Criminal Procedure the exclusive competence to review the legality of the court referral and to request, when it finds irregularities in this document, that the prosecutor remedy them, it follows that the pre-trial chamber judge is the only one entitled, by law, to rule on the legality of the remedial act and its ability to effectively remove the aspects of initial irregularity of the court referral.'

This conclusion is legally supported not only by the explicit content of the provisions relating to the competence of the pre-trial chamber judge, but also by the solutions that they may order in the light of Article 346 para. (3) and (4) of the Criminal Procedure Code. Thus, the High Court states that 'the latter provisions reaffirm the lawmaker's intention to confer on the pre-trial chamber judge the exclusive power to assess the remedial act, in order to determine whether it regularises the indictment and, if the answer is no, to decide to what extent the persistent irregularity entails or not the impossibility of establishing the subject matter or the limits of the trial, with the

[8] Grigore Gr. Theodoru, Ioan Paul Chiș, *op. cit.*, p. 735.
[9] Mihail Udroiu, *op. cit.*, p. 276.

consequence of whether returning the case to the prosecutor or to start the trial'.

'With the court referral, the legislative basis of the right of the head of the prosecutor's office to examine the legality and validity of the acts drawn up by the subordinated prosecutors no longer exists. The resolution of the case by the drafting of the indictment marks the final moment of the criminal prosecution, after which the prosecutor no longer has the possibility to order a possible new solution, which, by virtue of the principle of hierarchical subordination, is subject to a review by the head of the prosecution service'.

Therefore, following a systematic interpretation of the procedural rules governing the preliminary chamber procedure, the Supreme Court emphasised that 'the institution of regularisation of the indictment lies in a procedural phase which is no longer under the control of the head of the prosecution service, but of the preliminary chamber judge, the latter having the exclusive competence to decide on the legality and soundness of the acts drawn up at their behest".

The same opinion has been expressed in the legal literature[10], where it is argued that 'the remedial act does not need to meet the formal requirements of an indictment, even though it must be drafted by the same prosecutor who conducted or supervised the criminal investigation. For instance, it is not subject to review in terms of legality and soundness by the head of the prosecutor's office to which the issuing prosecutor belongs, or by the hierarchically superior prosecutor, as is the case with the indictment'.

Accordingly, the procedural act by which the prosecutor remedies the irregularities in the indictment found by the pre-trial chamber judge is not subject to review by the hierarchically superior prosecutor.

4. The legal nature of the deadline regulated by Art. 345(1) of the Code of Criminal Procedure.

In relation to Article 345(3) of the Code of Criminal Procedure, we note that the procedural obligation of the prosecutor to remedy the court referral is time-bound, with a deadline within 5 days from the ruling the pre-trial chamber judge to remove any legality flaws and communicate whether they maintain the indictment or requests the return of the case.

The 5-day deadline is a procedural time limit which, in relation to the provisions of Article 269 para. (2) of the Criminal Procedure Code is calculated on free days, not including the day from which it starts to run or the day on which it ends.

With regard to the acts deemed to be carried out within the time limit by the prosecutor, the provisions of Article 270 para. (3) of the Criminal Procedure Code regulates a special situation in that, with the exception of appeals, the point of reference is not the filing or transmission of the acts, but the moment when they are entered in the outgoing register of the prosecution.

With regard to the legal nature of this term, some authors of the doctrine[11] have considered that we are in a scenario of a term of recommendation. In support of this assertion, it was held that 'based of art. 268 para. (1) of the Criminal Procedure Code regarding the consequences of failure to comply with the time limit, one notes these legal provisions refer to the exercise of a

[10] Gheorghiță Mateuț, *Criminal Procedure. Special Part (Procedură penală. Partea specială),* Universul Juridic Publishing House, Bucharest, 2024, p. 260.

[11] Nicolae Volonciu, *op. cit.*, p. 1026.

right. However, the court does not exercise rights, but fulfils legal obligations. Therefore, the disqualification does not apply to acts carried out by the criminal prosecution authorities after the mandatory or recommended deadlines have elapsed'.

Against these arguments, our opinion is in favour of affirming the mandatory nature of the procedural time limit under Article 345 para. (3) Criminal Procedure Code, by reference to the procedural sanction applicable in the event of non-compliance, namely the disqualification of the prosecutor from the right to proceed to remedy the irregularities in the court referral.

The prevailing opinion in legal doctrine[12] also supports this interpretation, endorsing the view that 'the deadline within which the prosecutor is required to remedy procedural irregularities and to inform the preliminary chamber judge of their decision regarding the indictment is a mandatory procedural time limit, the breach of which results in forfeiture'.

However, with regard to the disqualification, we believe that a nuanced analysis is required in relation to the specific particularities of the pre-trial chamber procedure.

Thus, according to Article 268 para. (1) Criminal Procedure Code - general provisions on procedural time limits - the failure to comply with the legal time limit for the exercise of a procedural right entails forfeiture of that right and invalidity of the act submitted after the time limit has elapsed.

However, Article 346 para. (3)(c) sentence II of the Criminal Procedure Code regulates an express sanction in the event of failure by the prosecutor to comply with the 5-day procedural time limit, which only applies at this procedural stage prior to the trial, namely *the return of the case to the prosecution service when the prosecutor fails to respond within the time limit under Article 345 para. (3) of the Criminal Procedure Code.*

Therefore, the imperative nature of the 5-day procedural deadline under Article 345 para. (3) Criminal Procedure Code follows precisely from the express sanction regulated by Article 346 para. (3) Criminal Procedure Code.

Therefore, even if the special rule does not expressly include the notion of '*disqualification*', it follows from the aforementioned provisions that the generic sanction of disqualification which applies in the event of failure to comply with a mandatory time-limit continues to exist, except that it is utilised judicially not by rejecting as untimely the procedural act performed after the time-limit, but by a sanction adapted to the procedure of the pre-trial chamber, namely the return of the case to the prosecution. The prosecutor is thus deprived of the right to exercise their power.

It should be noted that, in our opinion, in order for the sanction of returning the case to prosecution under Article 346 para. (3)(c) of the Criminal Procedure Code, it is not necessary to fulfil the additional condition under Article 346 para. (3)(a) of the Criminal Procedure Code, namely that the irregularity which remained unaddressed makes it impossible to establish the subject-matter and limits of the trial.

This additional condition concerns only the case where the prosecutor replies within the 5-day procedural time limit but fails to or only partially remedies the irregularities. It is only in these circumstances that the return of the case to the prosecution is conditional on the fulfilment of this additional requirement that the irregularities continue to prevent the

[12] Gheorghiță Mateuț, *op. cit.*, p. 259.

determination of the subject-matter and limits of the trial.

However, in the absence of a response within the mandatory procedural deadline under Article 345 para. (3) of the Criminal Procedure Code, this condition is no longer applicable, since the return of the case to the prosecution derives from the forfeiture of the prosecutor's right to remedy the irregularities found, in the sense that the consequence of the return is the result of the passivity of the prosecution or its failure to respond within the time limit, not as a result of the impossibility of establishing the procedural framework.

5. Exclusion of illegally administrated evidence. Sanction and appropriate procedural remedies.

As regards the power of the pre-trial chamber judge to carry out a legality review in the light of the limits under Article 342 of the Criminal Procedure Code, we note that the scope of the checks is not limited only to the legality of the court referral, but also concerns the legality of the adducing of evidence and the performance of the criminal investigation. These latter checks follow a legal regime separate from that relating to the verification of the legality of the indictment, which boil down to the mechanism of nullity.

Thus, when dealing with the requests and objections raised in the pre-trial chamber procedure or with the objections raised ex officio, the judge may find, on the basis of the criminal file and the evidence adduced in this incidental procedure governed by Article 345 para. (1) of the Criminal Procedure Code, the applicability of the procedural sanction of absolute or relative nullity of all the evidence obtained in the course of the criminal prosecution or the procedural or procedural acts carried out by the prosecution, or only some of them.

Once some evidence was found null and void per art. 102 para. (2) and (3) of the Criminal Procedure Code, they can no longer be used in the criminal proceedings, therefore will be excluded.

However, this sanction, derived from the procedural sanction of nullity, must not only take the form of a legal exclusion, but it must be effectively realised through the physical removal of evidence obtained in violation of the law.[13]

In this regard, the Constitutional Court has clarified this issue, calling in the recitals of Decision No. 22/ 2018[14] of the need to physically remove them both from the body of evidence and from the indictment or from other procedural acts on which the charges were based.

In the reasoning of the decision, the Court, admitting the exception of unconstitutionality against Article 102 para. (3) of the Criminal Procedure Code, held that although 'the legal exclusion of evidence obtained unlawfully from the criminal trial appears to be a sufficient guarantee of the aforementioned fundamental rights, this guarantee is purely theoretical in the absence of the actual removal from the case file of the evidence obtained unlawfully' [para 23], thus being 'insufficient for an effective guarantee of the presumption of innocence of the accused and their right to a fair trial' [para 24].

The Constitutional Court states that 'the physical removal of evidence from criminal files, once with the exclusion of the evidence in question, by declaring it null and void, in accordance with article 102(3) of the

[13] See also Gheorghiță Mateuț, *Criminal Procedure. General Part (Procedură penală. Partea generală),* Universul Juridic Publishing House, Bucharest, 2019, p. 1017-1018.

[14] Published in Official Gazette of Romania, No. 177/26 February 2018.

Code of Criminal Procedure, an exclusion which entails a two-fold dimension to the meaning of the concept of 'exclusion of evidence' - namely the legal dimension and that of physical elimination - is such as to effectively guarantee the fundamental rights referred to above, while at the same time ensuring that the text criticised is clearer, more precise and more predictable. Therefore, the Court holds that it is only in those circumstances that the exclusion of evidence can fulfil its purpose, which is to protect both the judge and the parties from issuing legal judgments and reaching solutions directly or indirectly influenced by potential information or conclusions arising from the judge's empirical examination or re-examination of the evidence declared invalid' [para. 27].

In the light of these rulings of the Constitutional Court, it follows that it is not sufficient merely to physically exclude the unlawful evidence from the body of evidence, but that it is also necessary to physically remove any references to it, both from the of the court referral and from other procedural documents on which the charges were based.

Otherwise, to order the commence the proceedings in a case in which the procedural documents on which the order for reference for a preliminary ruling is based on excluded evidence is to disregard Decision No. 22/2018 of the Constitutional Court, the recitals of which are generally binding *erga omnes.*

We note therefore that, by the aforementioned decision, the Constitutional Court has reconfigured the playing field within which the exclusion of illegally obtained evidence must be approached.

As mentioned above, even if, in principle, the sanction of nullity and, implicitly the exclusion of evidence obtained in violation of the law is, in fact, enforced by the pre-trial chamber judge after a legality review of the evidence, and not a matter of irregularity of the indictment, in reality, however, the maintenance in the indictment, but also in other procedural documents (indictments, acts of continuation of the criminal prosecution, etc.) of any text taken from or references to such evidence excluded in the light of Article 102 para. (2) and (3) of the Criminal Procedure Code, as well as Decision No. 22/2018 of the Constitutional Court, specifically determines *an implicit irregularity of the court referral.*

Therefore, the mere physical exclusion of evidence from the criminal proceedings is not sufficient to satisfy the requirements imposed by the Constitutional Court, since the procedural documents by which the prosecutor has established the criminal charges against the defendant still contain factual circumstances resulting from the evidence unlawfully or unfairly adduced. In such a hypothesis, we consider that the *cognitive effect* referred to by the Constitutional Court in Decision No. 22/2018 has not been removed, as the effective guarantee of the presumption of innocence of the defendant and their right to a fair trial is only ensured in deceptive manner, which, in our opinion, becomes a flaw of the complaint as a whole.

This aspect is evoked in different forms by the judicial practice of the High Court of Cassation and Justice, stating, in essence, that 'the elimination of those mentions from the procedural documents is also required for the same reasons considered in Decision No. 22/2018, because, otherwise, the very effect of the physical exclusion of the means of evidence would be nullified, given that the existence and even the content of the evidence is expressly detailed in the indictment and the order of regularisation of the court referral. In other words, contrary to the reasons for the removal of evidence whose invalidity

was established, the facts and circumstances revealed by the excluded evidence would still be known and evidenced by acts essential for the outcome of the case. However, in the present case, in addition to simply indicating those modes of proof and the manner in which the authorisation of the technical surveillance measures was ordered, the indictment contains a detailed analysis of those modes of proof and a broad description of the content of the evidence obtained via the technical surveillance measures. (...) Considering the reasoning behind the Constitutional Court's Decision No. 22/2018, keeping these entries in the two procedural documents would cancel the consequences of the exclusion of unlawful evidence and would have the opposite effect to that sought by the Constitutional Court in the aforementioned decision, leading implicitly to damaging of the presumption of innocence and the defendant's right to a fair trial'.[15]

In agreement with our arguments is also the position in the literature, considering that 'if the excluded evidence finds its way in the indictment, in view of Decision No. 22/2018, the entire indictment will also be found as irregular'.[16]

The fact that the binding rulings delivered by the Constitutional Court in Decision No. 22/2018 have not yet been transposed into law has led to a legislative gap in the procedural mechanism by which this irregularity can be remedied in the pre-trial chamber procedure.

The existing mechanism under Article 345 para. (3) of the Criminal Procedure Code is not sufficient in the current legislative framework, since this form of irregularity does not stand on its own, but as an effect of the finding and application of the penalty of exclusion.

On the other hand, referring to the solutions exhaustively described in Article 346 para. (3) of the Criminal Procedure Code, we note that the only legal instrument granted by the lawmaker to the pre-trial chamber judge for the removal of evidence and references to it from the procedural documents is the return of the case to the prosecution pursuant to Article 346 para. (3)(b) of the Criminal Procedure Code, but only if the exclusion concerns all the evidence adduced during the criminal investigation.

If the sanction of nullity and, implicitly, the exclusion as a derivative sanction, is partially enforced, only with regard to certain pieces of evidence, and the prosecutor's procedural position communicated in consideration of Article 345 para. (3) of the Criminal Procedure Code is in favour of maintaining the indictment, the pre-trial chamber judge will have to order the trial to commence on the basis of an indictment and of procedural acts in which passages and/or reproductions of the excluded evidence are still to be found in the indictment. Moreover, the irregularity of the indictment also derives from the fact that their physical exclusion may cause serious flaws in the factual basis of the allegations, in the sense of the failure to fulfil the rules of the entire the evidence on which the decision to refer for trial is based.

In the absence of express provisions laying down the procedural manner of remedying these irregularities, the provisional solution adopted only judicially, without a normative basis, was that of a *direct intervention of* the prosecutor on the procedural acts in order to fulfil the order of

[15] Judgment No. 31/C of 27.09.2018 delivered by the High Court of Cassation and Justice - Panel of 2 pre-trial chamber judges.

[16] Mihail Udroiu, *op. cit.*, p. 275.

the pre-trial chamber judge to physically exclude any unlawful or unfair evidence, which, in reality, conflicts with other procedural mechanisms. Such a solution is not, by itself, functionally capable of meeting the requirements imposed by the Constitutional Court.

Thus, to be effective, direct intervention requires two cumulative conditions. On one hand, the activation of the appropriate procedural context allowing the exercise, by a judicial body which has already lost its competence following the committal for trial, of judicial powers and, on the other hand, the objective suitability of this remedy to achieve the objective of physically or materially removing the excluded evidence.

As shown above, from the point of view of the prosecutor's authorisation to act judicially in the pre-trial chamber procedure, one must note that only the pre-trial chamber judge has an active function during this procedure. The law *does not allow for a temporary transfer of judicial powers* as long as the pre-trial chamber judge has not lost competence, so that, functionally, the representative of the prosecution can only manifest themselves once their natural function, previously lost, is reactivated.

However, the only procedural means of reactivating the function which would allow the prosecutor to issue or intervene in the acts which have given rise to the criminal charge which is the subject of the indictment is the resumption of the criminal prosecution, which is determined by the return of the case to the prosecutor.

At the same time, even from the point of view of its substantive purpose, direct intervention does not actually remove the information rendered ineffective by exclusion, since the indictment and the other indictments remain unchanged.

Whether it takes the form of a report to rectify a clerical error or a report with a note to exclude certain data, this intervention remains ineffective because it operates exclusively at judicial level.

However, the essential premise of Constitutional Court Decision No. 22/2018 regards the need for the actual, physical removal of any media containing unlawful or unfair evidence. It is only by removing material evidence that the risk of insidious, cognitive utilisation of judicially unactionable evidence is completely eliminated.

From this perspective, the inclusion in the pleadings of text from the excluded evidence can only be remedied by issuing new documents.

However, such operations can only be carried out by the prosecution, as they are the exclusive prerogative of the public prosecutor, and at this procedural stage, the latter no longer has the functional competence to carry out such steps.

In this context, in order to give effect to the rulings of the Constitutional Court in Decision No. 22/2018, but also to prevent the commencement of the trial based on a flawed indictment based on evidence that was already ruled out, in our opinion, the only appropriate procedural remedy that had the ability to remove any irregularity is only the one that requires the case to be returned to the prosecution and, therefore, the reactivation of the judicial function of criminal prosecution, so that the representative of the prosecution, if they wish to maintain the court referral, can review the procedural documents and issue a new indictment, in which they can remove any text from the indictment or references to evidence given in breach of the law.

This solution that we propose is the only one that effectively fulfils the requirements imposed by the Constitutional Court in Decision No. 22/2018.

The preference for the use of this procedural remedy of returning the case to

the prosecution, which would trigger the reinvestigation of the case by the prosecution, appears to be the optimal solution that has the real ability to prevent the commencement of the trial and the submission to the court of an indictment whose legality flaws cannot be removed only through the *direct intervention of* the prosecutor, which would significantly hinder the court's ability to dispense justice.

As such hypotheses have often been encountered in judicial practice, it should be noted that even the Court of Justice of the European Union dealt with this issue in case of ZX and Spetsializirana prokuratura (Specialized Public Prosecutor's Office, Bulgaria), application no. C-282/20, ruling that Art. 6(3) of Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings and Article 47 of the Charter of Fundamental Rights of the European Union must be interpreted as precluding national legislation which does not regulate a procedural route capable of enabling, after the hearing of the pre-trial chamber in a criminal case, the correction of the ambiguities and omissions in the contents of the indictment, which affect the right of the defendant to be provided with detailed information concerning the charge.

The CJEU's judgement complements the case law on the right to information of defendants as set out in Directive 2012/13. In the Grand Chamber Judgment of 05.06.2018 in Case C-612/15 Nikolai Kolev, Milko Hristog and Stefan Kostadinov v Nikolai Kolev (hereinafter Kolev Judgment), it was held that art. 6(3) of Directive 2012/13 requires that defendants receive detailed information on the charge even after the indictment has been lodged as a court referral, but before the examination of the merits of the case has begun and the opening of the hearing or even after the opening of the hearing but before the deliberation stage, where the information thus communicated is subject to subsequent amendments, provided that the court takes all necessary measures to ensure that the rights of the defense are respected and that the fairness of the proceedings is guaranteed.

When comparing these requirements in the established case law of the Court of Justice of the European Union to the current system of Romanian criminal procedural law, we note that all the rules governing the criminal procedures at the trial stage do not provide an adequate remedy to ensure respect for the rights arising from the aforementioned conventional rules.

In the absence of express legal provisions, the maintenance of the court referral, together with the order to start to trial, and the issuing of an indictment whose legality flaws, by their very nature, cannot be removed by *direct intervention* by the prosecution (with reference to all the arguments set out above), create the premises for a legal conflict between national and conventional rules.

In the same way, such a situation is an obstacle for the courts to proceed to an objective and impartial reassessment of the charges contained in the court referral, based exclusively on the evidence adduced in compliance with all procedural guarantees of legality and loyalty, with the removal of all evidence and references to it from the procedural documents, which are sanctioned by the judge hearing the case with absolute nullity.

The case law of the Court of Justice of the European Union is still not reflected in criminal procedural law, even despite a recent intervention of the lawmaker in this area.

Thus, with the entry into force of Law No. 201/2023 amending and supplementing Law No. 135/2010 on the Criminal Procedure Code, and amending other normative acts, as it results in paragraph 47

of the law, a new article is added after Article 386 of the Criminal Procedure Code, namely Article 386[1], which reads: 'If, during the course of the trial, the absolute nullity of the preliminary chamber proceedings is established, the court shall rule to quash the act by which the commencement of the trial was ordered and shall establish the limits within which the proceedings shall be resumed, the decision being subject to appeal under Article 425[1]'.

Although this new regulation, given the marginal denomination of the legal text under which it finds its functionality - "*Resumption of the preliminary chamber proceedings*" - could create the appearance of a procedural remedy intended to remove the legality flaws that escaped the preliminary chamber proceedings and which affect the very legality of the court's competence, in reality it limits the exercise of this procedural function only to the cases of absolute nullity exhaustively regulated by Article 281 para (1) of the Criminal Procedure Code, that arise in the course of the preliminary chamber proceedings.

For example, the resumption of the preliminary chamber procedure is ordered, per Article 386[1] of the Criminal Procedure Code, in the event of a breach of the rules on the composition of the court panels, when the preliminary chamber procedure was not conducted before a specialised judge, although the court referral concerned corruption offences which fall within the exclusive purview of specialised panels according to Article 29 para. (1) of Law No. 78/2000.

Therefore, this procedural flaw does not operate as a compensatory mechanism to remedy any irregularities in the court referral that are found after the pre-trial chamber procedure.

Conclusions

The reconfiguration of the normative framework regarding the pre-trial chamber as a reflection of the jurisprudential upheaval at the hands of the Constitutional Court, coupled with the lack of active intervention by the lawmaker to align the declared unconstitutional text of the law with the Constitution, gave rise to procedural difficulties in the application and realisation of the judicial function specific to this procedure.

In view of the arguments expressed in this scientific paper, we consider that a firm intervention of the lawmaker in this matter is called for by the need to implement compensation procedural mechanisms that meet the requirements imposed by both the Constitutional Court and the Court of Justice of the European Union, and which make it possible to remove all irregularities in the court referral, including those which were missed by the preliminary chamber procedure and were found by the court, so that the subject-matter and limits of the trial can be clearly established.

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