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OCCUPATIONAL SKILLS AS BASIC ELEMENTS OF TALENT DEVELOPMENT IN THE COMPETENCIES LEGAL FRAMEWORKS

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ABSTRACT

The relation between performance and professional competence has often been considered as equal. A term frequently used by both practitioners and researchers to describe professional performance is that of competence, in the sense of developing that level of competence that ensures performance. Competency models were used to describe performance, to identify the main areas to be identified, to be evaluated in the selection processes, to identify training needs or to plan managerial succession. At this moment, the importance of judicious design of jobs and the creation of the most accurate portrait of the ideal employee for his employment is obvious.

KEY WORDS: *competencies, talent, competence legal framework*

INTRODUCTION

Competencies are the object of work for talent management. If the description of the roles in the organization, as well as the description of the capacity and potential of an employee are made in terms of skills, the rest of the typical activities for talent management become relatively simple.

The scientific use of the term competence was implemented by McClelland (1973), in the well-known article „Testing for competence rather than for intelligence". Over the past 50 years, this term has gained popularity among practitioners and researchers alike. In its sense, competence is considered an individual characteristic that contributes to achieving performance or achieving success in a specific task. Currently, the term competence is used in the sense of „observable attribute that contributes to the successful completion of activities" (Cook, 2009).

The two definitions presented above indicate that a multitude of behaviours or variables can be included in the scope of this concept. The existence of this flexibility in defining the concept has led to the emergence of models or taxonomies of competencies that often have different contents. Moreover, not only are there competency models that have different contents, but the number of variables or the internal structure of these models varies from one approach to another.

APPROACHES TO COMPETENCIES IN DIFFERENT EDUCATIONAL FRAMEWORKS

Three main approaches to competencies can be delimited: the educational approach, the behavioural approach and the organizational approach, a company-specific approach. From an educational perspective, a competency is a behaviour or series of behaviours that achieve specific goals, or in other words a minimum standard (Markus, Cooper-Thomas, & Allpress, 2005).

From the perspective of applied psychology, the acceptance of the term of competence that has obtained the consensus of the scientific community is that formulated by Bartram and Kurz (2002): „sets of behaviours that are instrumental in achieving the expected results." The perspective frequently used in organizations is to define competencies as elements of collective learning within organizations (Markus, Cooper-Thomas, & Allpress, 2005).

Among the multitude of contents or variables that have been included in the competence models are:

- specific knowledge or skills that are applied in the activities set out in the job descriptions. An example would be the preparation of a subject sheet for a subject taught, or basic activity for a teacher;

- general skills and knowledge that can be applied or used in several roles or areas. An example would be teamwork or the efficiency with which a person collaborates with others to achieve a goal;

- skills that facilitate or even condition the successful completion of certain professional activities or tasks, such as general learning ability;

- personal characteristics and dispositions, such as sociability or altruism (Cook, 2009).

Guy le Boterf describes the defining features of competence:

• competence is produced by an individual or a group, in a given situation (being able to act in a field of conditions and resources);

• it is named and socially recognized (validated directly through the social environment);

• it corresponds to the mobilization in action of a certain number of personal resources: knowledge, practices, skills, combined in a specific way and complemented by the mobilization of social resources;

• the goal is to generate a predefined performance.

The competencies necessary for school management, in the context of the orientation towards the professionalization of management, guidance and control functions in the educational field, can be presented by categories of competencies, specific competencies, fields of application and ways of accomplishment.

The emphasis of managerial activity is on leading and coordinating people, on directing their potential. The efficient relationship of the school manager in the educational environment or outside it is guaranteed by the development and ability to use, in solving problems, the following categories of skills:

1. communication and relationship skills;
2. psycho-social skills;
3. skills in the use of information technologies;
4. leadership / coordination and organization skills;
5. assessment skills;
6. resource management and administration skills;
7. skills for institutional development;
8. self-management skills.

Competence categories specific to the educational field

Competence categories	**Specific competences**	**Areas of application**
Communication and relationship skills	Selection of appropriate means of communication in	Work environment Consulting and audiences

	order to streamline organizational management Adapting to various, new situations, their operative solving and educational problems Resolving conflict situations	Relationships with parents, teachers and partner institutions Communication with students
Psycho-social skills	Valuing group and individual particularities Stimulating a climate of trust and collaboration	Professional ethics
Competences in using information technology	Synthesizing information Capitalizing on information Decision-making process in accordance with specific realities Using technology to streamline its activity and quality	Computerized information system

Competency models refer to creating transparent standards of the skills needed in an organization to be successful. There are a variety of ways to develop and use these models in organizations, but first it is useful to understand their development over time. By the early 1970s, most organizations saw the characteristics necessary for the organization's success, either based on technical skills or the belief that intelligence mattered most. The way intelligence is understood, as one of the important attributes of human resources, has undergone fluctuations over time. Forms of intelligence have developed, giving great attention to the emotional and social.

Goleman, in his research on emotional intelligence, links McClelland's research to theories of brain function, and proposes that emotional intelligence be In this study Goleman proposes that emotional intelligence be divided into four areas: self-awareness, social awareness, self-management, and relationship management.

CONCLUSIONS

Competence means „knowing how to do something”, so it must have a context and determine results. Competence is seen today as a response to regulating market requirements, focused on better use of resources and the involvement of social actors in finding solutions.

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A NEW PARADIGM OF TALENT FROM AN ORGANIZATIONAL PERSPECTIVE

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ABSTRACT

Talent can be understood as a combination of potential and performance. The potential reflects the possibility of professional growth and development, and performance refers to the success of professional services. Performance in turn depends on skills, quality and creativity, along with experience. However, performance differs depending on the contexts and objectives of the organization. Hence the need to address talent as a factor / resource that develops according to the characteristics of the organization, which the manager who wants a performance-based process to use to achieve goals.

KEY WORDS: *talent, management, educational system*

INTRODUCTION

Research conducted in 2007 by the ICPD reveals how the word "talent" has a different meaning for three reasons:

- is specific to each organization and influenced by the type of sector or the nature of the work;

- has group level implications;

- focuses on the concept of the individual and is dynamic, so it can vary over time.

We can use different levels of explanation of the term depending on how the talent is inserted in the context:

1. talent at organizational level - Talent is defined contextually (depending on the nature and characteristics of the organization), its nature being given by the compatibility with the coordinates of the organization. Important differences are identified when it comes to talent in a small company, a public institution or a multinational. The organizational dimension therefore does not allow a common, unique definition. Similarly, each position within the organization will have its own concept of talent depending on the skills and responsibilities required by the different roles, positions;

2. Talent at group level - we can consider here two aspects: a positive one, related to the recognition of the value of the person and a negative one related to the possible marginalization of some employees with consequences on the total performance. Within the group we can talk about leadership talent, key talents, peripheral talents, etc.

3. Talent at the individual level - usually recognized as unique and special, a talented individual is a person with innate abilities, which does not require effort to use them. He excels easily, he has special qualities that others want. (Thorne and Pellant, 2007).

WINNING THE „WAR OF TALENT”

What was identified in the McKinsey & Company study in the 1990s was that organizations that successfully applied human resource management processes - attracting,

developing, retaining - had a competitive advantage over others. This has changed the way corporations view talent, and today this concept is considered to be the latest trend in human resource management. The Economist confirmed in 2007 the existence of a new important factor in the talent war - the so-called "battle for brainpower" - namely: demographic aging (Gabrielli, 2010), a factor that may not be so important in other areas, but at the school level it it is strongly felt, both due to the demographic factor itself and to the drastic decrease in young people's interest in the educational professions.

The talent war has two implications:

- The power passes from the company to the individual, in the sense that in negotiation the talents have the necessary power to follow their career aspirations;
- Talent management has become the primary source of competitive advantage: only companies capable of attracting and retaining talent will reach this precious resource.

To win this battle it is not enough to grab the biggest shoulder of talent, it is essential to know how to implement the best strategies for their management, so as to meet their expectations. Thus, it will be necessary to sometimes resort to "employer branding", ie for potential employees, building a work environment attentive to the needs of employees, investing in professional skills and clearly communicating expectations about organizational value (Ricceri, 2007).

The valorization of talents results thus, not only in identifying the people who have the right talent for the respective position, but also in creating opportunities for their development.

Although the term "talent management" is used very often today, it is not easy to identify a definition. Some economists consider it a static practice, others a dynamic one. Some believe that it should be integrated into the organizational system of performance appraisal, others that it should remain separate. Some consider that it applies only to a small number of people, others on the contrary that it applies to all.

Talent management must therefore be understood as an activity that must be coordinated autonomously and specifically in each organization. However, in order to be understood as a process, the common features of the different definitions must be highlighted (Blass e April, 2008).

We can define talent management as a process by which a system identifies, manages and develops employees, being oriented towards:

- developing a strategy to determine what the organization needs to meet current and future needs;
- defining the processes for measuring the necessary and available competencies
- creating a range of tools and processes to determine approaches based on the individual needs of employees;
- identifying ways to obtain and retain those who are fundamental to success;
- defining appropriate interventions for those who do not adapt to organizational needs;
- measuring the impact of these strategies so that personnel policy can be further developed and refined for high performance.

We consider talent management as the totality of the processes of identification, recruitment, selection, integration, development of employees that the organization considers to have potential for high performance. Talent management is an employee management

model that focuses on skills and capabilities, potential and possible contribution to the organization, so it is a process related to specific contexts of the organization.

Lewis and Heckman (2006) consider that definitions of talent management can be organized into three categories. The first is a substitute for human resource management, with a combination of standard practices from selection to career development. The second focuses on creating a large pool of talent, ensuring the quantitative and qualitative flow of employees in the organization. The third considers talent a resource in relation to the level of performance. The latter approach has an important impact, but some authors (Collings e Mellahi, 2009; Huselid et al., 2005) are skeptical, considering that if talent management is applied to all employees, it will be difficult to distinguish it from human resource management.

The fourth approach considers talent management as a process and activities that start with identifying those key positions that explicitly contribute to the success of the organization; they go through the development of a pool of high potential and performers to cover those roles, and end up creating a different architecture from human resource management to facilitate the process and ensure that valuable resources remain in the organization.

Iles, Preece e Chuai (2010) proposed, in this approach, three perspectives for analyzing talent management to understand how it differs from human resource management:

1. Talent management is not overly different from human resource management. Both lead to the integration of the right people at the right time and in the right position and manage the flow and development of employees. Talent management could be seen as a rebranding exercise to increase the credibility of the human resources function;

2. The second vision is that talent management is integrated into human resource management but has a more selective focus. It may adopt the same tools, but focuses on a small segment of the internal and external workforce, defined as talent, by virtue of their current or future performance;

3. Talent management includes the development of organizational skills through the management and development of talents, but the central point does not refer only to the resource pool, but to their continuity within the organization. The concept should not be confused with other processes such as recruitment or succession.

A STRATEGY FOR ALIGNING TALENT TO ORGANIZATION

Thus, organizations in defining the concept of talent management have at their disposal two strategic approaches: aligning people to roles or aligning roles to people.

The first identifies activities to link performance success, which are selection and recruitment to identify the right people, develop them to respond to opportunities, succession planning, but with a focus on the person and career choices, not roles.

The second perspective considers it necessary to identify roles according to the requirements of employees, in order to satisfy their career opportunities.

Broadly defined, talent management includes the instrumentation of unification strategies or processes to improve a person's performance in the workplace by implementing systems and processes to attract, develop, retain and use the necessary skills and abilities, as well as the aptitude appropriate to current needs and future of the business. Talent management usually involves identifying, developing, evaluating, deploying, and maintaining high-performing and high-potential employees (Collings and Scullion 2007). What we could

observe in our research was that the directors of the institutions studied are increasingly involved in the talent management process, so that over 20% of their time is spent on issues involving talent issues.

Although talent management is one of the biggest organizational challenges (Boudreau and Ramstad 2007), it remains an underdeveloped and under-researched topic (Lewis and Heckman 2006). Talent has become the key aspect that makes the difference in human capital management and that determines the competitive advantage.

Talent management is considered today a key factor in the development of successful corporations and also schools (Davis 2010, p.418). the term in this sense refers to attention to talent from the earliest stages of employment to their integration into the organizational culture (Barron 2008). But talent management differs from personnel management, because it involves methods that determine the attraction, motivation, training and involvement of talented employees in the organization (Abravanel, 2001).

Talent management is a concept that intersects three key elements: people, tools and organizational environment (Ciannamea, 2008). Talents are individuals who have optimal probabilities of development, but are not considered a distinct group, an elite; they are the engine of organizations' innovation and are at their service, so the organizational environment in which they operate is also important (Gabrielli, 2010).

Other authors (Fegley, 2007; Hatum, 2016; Cross, 2016) consider that talent management is the very management of human capital, representing the process of recruiting, managing, evaluating, developing and maintaining the most important resource of the organization - the human (Fegley, 2007; Hatum, 2016; Cross, 2016). Thus we can say that it represents the strategic management of the flow of talents in the organization.

This management of the flow of talents is achieved through the processes of human resources management in the organization. However, there are few situations in which there is a talent management strategy that goes through all these human resources activities.

In today's society, where knowledge has a special place, the value in organizations is given mainly by people. Thus, the advantages of companies are the ideas, creativity, knowledge, skills, performance of members of organizations. Talent management defines which group of individuals are key to the future of the organization, so that talent development processes, programs and tools represent how the competitive advantage can be maintained in the organization.

Talent management describes the process by which employers of all types - firms, institutions, non-profit organizations - anticipate the need for human capital and act to identify, shape, improve, maintain and develop them (Elegbe, 2016).

Scweyer believes that talent management must be approached strategically to optimize and align human capital with the company's strategy (Scweyer, 2010). And Caplan defines talent management as the process that includes the following stages:

- a recruitment brand to attract qualified candidates;
- a selection process based on competencies to ensure that the candidate is suitable;
- the integrity of those who carry out the selection process (Caplan, 2010).

In this process, recruitment and selection must be linked to the company's long-term strategy.

Some authors consider talent management to be a “set of integrated procedures and processes, used by the organization to attract, retain and develop talent, to achieve strategic objectives” (Avedon, Scholes, 2005; Silzer, Dowel, 2009).

Others, such as Graddick Weir, refer to "the ability to attract, develop and retain different talents to meet the current and future needs of the organization." Along the same lines, Gerrone defines talent management as “attracting, retaining, developing the right people with the right skills in the right positions” (Scullion, Collins, 2011).

Cappelli defines talent management as the process by which employers anticipate and manage their own need for human capital (Capelli, 2010). Likewise, Lawles emphasizes the importance of attracting the right talents and training them to understand what the organization's expectations are (Ravinder, 2009). They must be continuously developed to build capacity and skills to determine the right talent.

Morton explains how individuals who have the ability to make a significant difference in the company's current and future performance are considered talented (Morton, 2010). Talent management is defined by the following functions:

- analysis of organizational needs in terms of talents;
- identifying and discovering the right talents;
- attracting and recruiting talents in the organization;
- identifying the optimal remuneration for them;
- training and development of experts in the field of talent management;
- evaluation of talent performance;
- building their career plan;
- applying a talent retention strategy in the organization.

Thus, it is a complex process, and each stage of it is very important. For the success of the process it is necessary to observe some basic principles:

- hiring the right people: not only the expert must adhere to the company's culture, but also the company must be the ideal environment for his personal development;
- keeping promises: it is vital for building a lasting professional relationship;
- recognition of merits: appreciation, motivation and rewards at the right time encourage performance;
- a positive work environment: Talents need the ideal conditions for the maximum development of their own potential;
- opportunities for growth: there will always be competition for talented employees, who choose to stay only where they can express themselves and where they can experiment;
- recreational activities: several responsibilities must be accompanied by complementary fun activities (team building, days off, ensuring a recreational space in the organization).

Thus, from the study of the literature in the field, it results that the observance of these principles determines the elaboration of the efficient talent management strategy.

The definition of Silzer and Dowell seems to us the most complete, specifying how talent management is an integrated set of processes, programs and cultural norms in an organization in order to achieve strategic objectives and meet organizational needs (Silzer, Dowell , 2009).

CONCLUSION

Studying the literature, we see that talent management in organizations has a number of benefits, such as:

a) competitiveness: because talents are looking for environments conducive to continuous development and with specific strategies for talent development;

b) loyalty of talents: the constant investment in their development determines their maintenance in the organization;

c) contingency: rapid coverage of key positions through the use of internal talent.

We can therefore say that talent management involves an effective combination of performance measurement processes and the strategy used by the organization to retain key people: measuring talent, managing them, and long-term strategies. It is fundamental to combine talent management processes with valid decision support systems (pre-employment evaluation solutions, evaluations for promotion, performance evaluation) and one that correlates all these processes with the company's objectives.

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THE RECONFIGURATIONS OF THE ADMINISTRATIVE-TERRITORIAL ORGANIZATION OF ROMANIA AND THEIR IMPACT ON THE EVOLUTION OF REGIONAL DEVELOPMENT POLICY AFTER 1989

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ABSTRACT

The main objective of this study is to analyze the evolution of Romania's administrative-territorial organization and study the impact of each stage on the regional development process after 1989 in order to identify national features that could contribute to the improvement of Romania's current regionalization process.

Starting from the premise that any proposal for Romanian regionalization must be based on a rigorous research of the historical context in which the territorial administrative reconfigurations took place, the present study aims to present a synthetic analysis of different territorial configurations proposed by various regimes as well as the political and social circumstances in which they were implemented.

KEY WORDS: *Regional development, Regionalization, Administrative-territorial organization, Decentralization, Regional disparities.*

INTRODUCTION

Regardless of all its economic, political, and social metamorphoses as well as its many administrative-territorial organization reforms over the last 100 years, Romania's regional design did not suffer major transformations. Even to this day, Romania's regionalization plan remains an open and rather sensitive subject of debate.

Considering Romania's sinuous path towards territorial-administrative reorganization and the high degree of centralization and forced urbanization specific to the communist period, the current study wishes to investigate whether Romania has internalized and accepted regions as territorial-administrative units and not just as economic functional units. Additionally, it seeks to analyze whether the current development regions represent viable structures for conducting a successful regional development policy or they should be modified to insure more even development levels.

The main motivation underlying this study is the relative absence of complex analysis in the academic literature on the historical impact of different models of administrative-territorial organization on modernization and regional development in Romania. The evolutionary analysis of regional development is a topic that has been relatively avoided in academic circles. Instead, it appears to be found more often in political discourses and parliamentary debates. As Marchis argued, ''the political debates on Romanian regionalization were mainly focused on political interests, without taking into account an

important series of factors that can spur growth and socio-economic development across our regions.''[1]

Another observation that contributed to the substantiation of this study is that the debate on regionalization came rather as a response to the necessity of meeting all the requirements of the European Union, being largely related to excessive centralization and its effects on the degree of structural funds absorption and less to the actual need to implement the regionalization process with all the elements it comprises. Moreover, following the debates on regionalization, we find that at the governmental level, Romania does not intend to initiate a process to reduce the development gaps of its regions until very late, and despite all the efforts that have been made recently toward achieving a convergence to the EU average, the disparities between Romania's regions are still significant.[2] *If during the communist period Romania has attempted to diminish these regional differences by increasing their industrial development, once Romania transitioned to a market economy, the regional disparities issue reappeared.*

Thus, any discussion on the process of regionalization, decentralization and reduction of development gaps between Romania's regions has to be based on an in-depth understanding of the development dynamics specific to each historical period, paying particular attention to the influences brought by each territorial-administrative organization model that has been implemented to this date.

ROMANIA'S ADMINISTRATIVE-TERRITORIAL ORGANIZATION DURING THE (1918-1968)

Between 1918-1981 Romania has passed through eight major administrative-territorial reconfigurations having a highly unstable territorial policy that fluctuated from short attempts of centralization followed by experiments meant to introduce the principles of decentralization and local autonomy (administrative regionalism) to a gradual reinsertion of centralism. The interwar legislation that refers to the 1925 administrative unification law and the 1923 Constitution represented a corollary that contributed to the adoption of a very centralized administrative system and in the same time to the consolidation of the unitary national character of the Romanian state. At this stage, Romania's territory was divided, into counties, urban and rural communes that have associative rights. The 1925 administrative law remains a reference law in Romanian public administration being considered the first law that brought real transformations in the administrative field and a proof of the democratic evolution of the Romanian society at that time. [3]

However, the 1929 administrative reform is believed to be the first law that aimed to achieve real administrative decentralization through the creation of seven superior regional structures that had legal personality and were coordinated by seven local ministerial

[1] Gabriela Marchis, ''The Potential Sources of Change in Romania Regional Policy'', *European Integration - Realities and Perspectives. Proceedings*, 2015, p. 657

[2] Country Report on Romania, COM, 2019, available at: https://ec.europa.eu/info/sites/info/files/file_import/2019-european-semester-country-report-romania_en.pdf, accessed on 02. 09.2020.

[3] Gheorghe Calcan, ''The Administrative Unification of the Completed Romania. The Stages of the Administrative Integration Of Transylvania 1918-1925'', *Transylvanian Review of Administrative Sciences*, No. 30E/2010 p. 26

directorates. Moreover, the local councils were now directly elected.[4] Thus, in 1930, Romania's territory was divided into seventy-one counties, 322 'plăși', 172 towns and 15, 201 villages.[5] However, this decentralization tendency was halted by a new administrative law created in 1936 that considerably increased Prefect's prerogatives while decreasing the importance of local self-governing bodies.[6] The last Romanian administrative reform of the interwar period took place in 1938 and was implemented under the government of King Carol II. This new administrative law created a new type of macro territorial structure, a 'proto-region' called 'ținut' (province) and abolished the legal personality of the counties. The 10 provinces were geographical and economic defined units larger than the old limits of the historical provinces.[7] According to old statistics, the provinces were including 71 counties, 429 plăși, 179 towns and 15891 villages. [8] According to Dobre, the current regional division of Romania is to some extent inspired by the 1938 reform in the sense that the territorial divisions designed then and the idea of creating regions through associating the counties were preserved but the post-communist regimes rejected the principle of political regionalization.[9] However, this model of administrative-territorial organization had a very short life. During the summer of 1940, the Romanian government accepts the Soviet ultimatum (26th of June 1940) and the USSR invades Bessarabia, Northern Bukovina and Herța region. On the 30th of August 1940, Romania loses a great part of Transylvania according to the second Vienna arbitration and on the 7th of September 1940 surrenders the entire Cadrilater to Bulgaria. Thus, in only 74 days, Romanian lose approximately 33,8% of its territory and 33,3% of its population. The newly installed Antonescu government adopted a law that eliminated''ținutul'' as the main territorial-administrative unit offering legal personality to counties but without maintaining the County Councils. [10] The military dictatorship of Antonescu's government left very little space for the survival of any form of decentralization or legal autonomy.

The first Romanian communist and pro-soviet government was installed on the 6th of March 1945. Although by then ''the bureaucracy became rigidly centralized and operated under a strict hierarchical model, both vertically and horizontally''[11], the 1948 Constitution did not bring major changes regarding the model of territorial-administrative organization. This Stalinist type of constitution changed the name of the sate into Romanian People's Republic and preserved the classification of the territorial-administrative structures into counties, communes and plași.

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[4] Antonescu Daniela, *Studiu retrospectiv privind organizarea administrativ-teritorială a României, în ultimii 100 de ani*, Munich personal RePEc Archive Paper, 2018, pp. 30-31.
[5] Ibid, p. 22
[6] UNDP, The 2003-2005 National Human Development Report (NHDR) for Roamania, available at http://hdr.undp.org/sites/default/files/romania.pdf, accessed on 02. 09. 2020
[7] Armand Călinescu, ''Spiritul noului regim administrativ'', *Enciclopedia României*, II, 1938, p. 4.
[8] Vasile M. Zaberca, Istoria adminis-trației publice în România, Editura „Eftimie Murgu", Reșița, 1997, apud., Sorin Bocancea (coord.), Constituția României. Opinii esențiale pentru legea fundamentală, p. 102.
[9] Ana Maria Dobre, ''Romania: From Historical Regions to Local Decentralization via the Unitary State'' in Frank Hendriks, Anders Lidström, and John Loughlin (eds.) T*he Oxford Handbook of Local and Regional Democracy in Europe*, 2010, p. 688
[10] Viorel Stănică, *Politici Administrativ-teritoriale în România Modernă și Contemporană*, Accent, 2010, p. 86
[11] UNDP, The 2003-2005 National Human Development Report (NHDR) for Roamania, available at http://hdr.undp.org/sites/default/files/romania.pdf, accessed on 02. 09. 2020

It is only in 1950 that this type of territorial-administrative organization model is being drastically changed with a new Soviet type of organization that was artificially imposed without considering any geographical or historical criteria not to mention, the Romanian realities of that time. Thus, the new administrative reform dissolved the counties and created 28 regions that were directly subordinated to the central structures, 177 rayons (districts) 148 towns and 4052 communes. The Soviet influence was reflected even in the toponymy of these units. Old Romanian traditional names disappeared or were replaced with imported names such as the name of Brașov region which was replaced with the name Stalin. The creation of two new administrative units (rayons and regions) emulated the already existing model of administration on the USSR territories. The political rationale for introducing this model was the willing to replace the old administration, gain control and prevent any type of political resistance, while the economic one referred to the need of new territorial divisions that served the purposes of collectivization and planning policies. [12]

However, due to the high number of regions and rayons the new system proved to be economically inefficient and relatively difficult to handle from a political point of view. Consequently, a new debate regarding the reduction of their number emerged and only two years later, the 1952 Constitution together with the 331 Decree eliminated 10 out of the 28 regions through agglutination. Four years later (1956) another two regions (Arad and Bârlad) will disappear from Romania's territorial-administrative map. The same Decree created the Autonomous Magyar Region (a replica of the Soviet *oblast*) which was based on ethnic criteria and enjoyed a certain degree of autonomy.

Taking advantage of the favorable momentum created after Stalin's death in 1955, the Romanian Worker's Party leaders decide to work on their long-term plans of de-Sovietization. According to Băncilă, the 1956 territorial-administrative reform represented Romania's first step towards detaching itself from the Soviet sphere of influence.[13] Furthermore, as a result of the Soviet troops withdrawal from Romania in 1958, Dej's policy became more oriented towards Romanian traditional values and Romanian communism moved away from the Soviet-type of communism to a more nationalist type.[14]

The second step towards this direction was the 1960 territorial reform that maintains the same number of regions (16) but changes once again their structures and delineation as well as their names back to their traditional versions. The Autonomous Magyar Region becomes the Mureș Autonomous Magyar Region and Stalin region regains its older name. [15]

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[12] Florin S. Soare, *45 de ani de la ultima reorganizare administrativ-teritorială a României*, IICCMER, 2013, available at: https://www.iiccmer.ro/45-de-ani-de-la-ultima-reorganizarea-administrativ-teritoriala-a-romaniei/, accessed on 10. 09. 2020.

[13] Băncilă, Andi Mihail, ''Reforma Administrativ-Teritorială Din Anul 1956, Primul Pas Spre Emancipare De Sub Tutela U.R.S.S.'', Impactul transformărilor socio-economice și tehnologice la nivel national, european si mondial; Nr.6/2015, Vol.6, 2015, pp.160-161, available at: https://ssrn.com/abstract=2670451, accessed on 10.09. 2020.

[14] Radu Săgeată,''A Proposal For Romania's Administrative Organization Based On Functional Relations In The Territory'', *Transylvanian Review of Administrative Sciences*, No. 46 E/2015, p. 184.

[15] Legea nr. 3/1960 pentru îmbunătățirea împărțirii administrative a teritoriului Republicii Populare Romîne, publicat în Buletinul Oficial nr. 27 din 27 decembrie 1960.

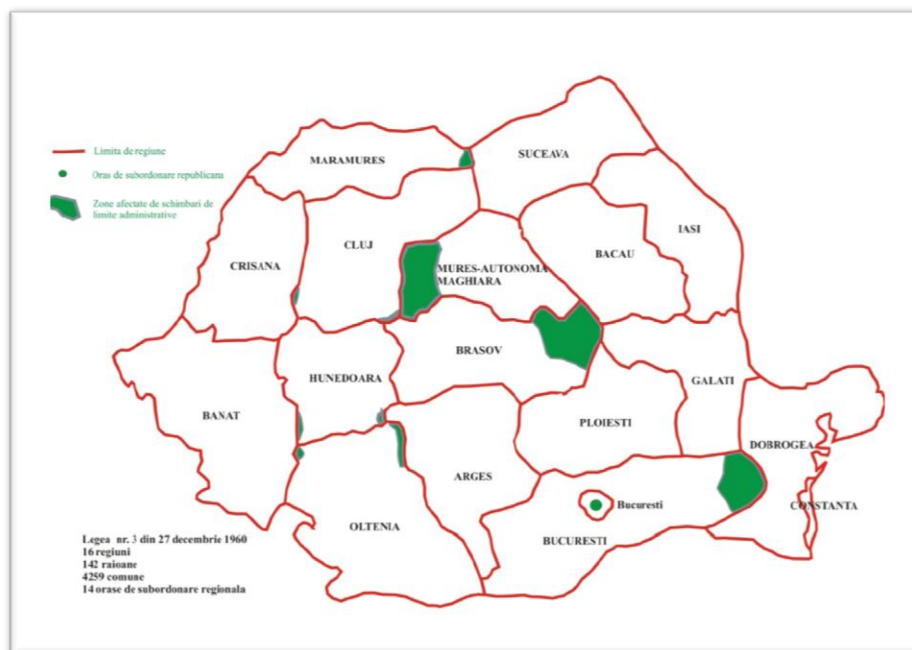

Fig. 1-The territorial administrative organization of Romania (1960-1968)
Source: Radu Săgeată, ''Reformele Administrative Din România – Între Raţiunile Politice Şi Realităţile Geografice'', *Geograful*, anul III, nr. 2, p.8

As stated by the 1965 Constitution, the official name of the state becomes the Socialist Republic of Romania and its territorial-administrative organization is changed once again. According to the new constitution, the territorial division included counties, towns, and communes.

ROMANIA'S ADMINISTRATIVE-TERRITORIAL ORGANIZATION DURING THE (1968-1989)

The establishment of the Socialist Republic of Romania coincided with an increased level of centralization and major transformations in the territorial-administrative organization of the state. According to Chen,''the degree of centralization under the Ceaușescu regime exceeded even that of the Gheorghiu-Dej regime. By the time Nicolae Ceaușescu became first secretary of the party in 1965, the party already firmly established its domination over the administrative structure.''[16]

In a report on the measures to improve the management and planning of the national economy and the administrative-territorial organization of Romania presented at the P.C.R. National Conference on the 6th of December 1967, Ceaușescu argued that the qualitative development of the society together with the changes that have occurred in the population's structure and within the profile, dimensions and the living conditions of towns, communes and villages, represent the main arguments or reterritorialization. He criticized the two middle structures introduced in 1950 (regions and rayons) for complicating the relations between the central structures and the basic units, delaying the implementation of the central directives,

[16] Chen Cheng, ''The roots of illiberal nationalism in Romania: a historical institutionalist analysis of the Leninist legacy'', *East European Politics and Societies*, 17(2), 2003, p. 187

creating a great dispersion of forces and for generating a large volume of civil servants that determined inflation of the administrative apparatus. For all these reasons, he supported the re-establishment of the counties as the main territorial units. [17]

One year later a document entitled *The basic principles for improving the Romanian territorial-administrative organization and the systematization of rural areas* was discussed and adopted at the Plenary session of the Central Committee of the Romanian Communist Party on January 14. Based on this document, law no. 2 (2nd of February 1968) regarding the territorial-administrative organization of the Socialist Republic of Romania reintroduced the inter-war administrative system of organization and divided the territory into 39 counties, 236 towns (45 out of them were municipalities) and 2706 communes (see fig. 2). However, this system of territorial-administrative organization did not copy entirely the administrative configuration that was in place prior to 1950. 19 counties from the prior configuration were no longer present and others had their names partially or completely changed.[18] Unlike previous territorial-administrative configurations, the 1968 configuration was able to withstand for a longer period without major changes.

A new organization of the state's territory comes in 1974 with the promulgation of law no. 58 on the territorial systematization of urban and rural areas. This law aimed to create a balanced distribution of the productive forces according to the centrally planned economy idea determining a forced industrialization and a pseudo- suburbanization that lead to the destruction of millions of households, most of them in rural areas.[19]

Fig. 1-The territorial administrative organization of Romania (1968-present)

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[17] Nicolae Ceauşescu (Secretar general al C.C. al P.C.R.), *Raportul cu pivire la măsurile de perfecţionare a conducerii şi planificării economiei naţionale şi la îmbunătăţirea organizării administrative-teritoriale a României. Prezentat la Conferinţa Naţională a P.C.R., 6 decembrie 1967*, Editura Politică, Bucureşti 1967.

[18] Antonescu Daniela, ''Evoluţia reformelor administrativ-teritoriale din România în ultimul secol'', Academia Română, Institutul Naţional de Cercetări Economice, 2013, p. 9, available at: http://www.studii-economice.ro/2018/seince181218.pdf, accessed on 02.09. 2020.

[19] Antonescu Daniela, *Studiu retrospectiv privind organizarea administrativ-teritorială a României, în ultimii 100 de ani*, Munich personal RePEc Archive Paper, 2018, p. 29.

Radu Săgeată, *Organizarea sdministrativ teritorială a României, Eevoluţie. Propuneri de optimizare*, Academia Română, Institutul de Geografie, 2013, p. 16.

The beginning of Ceaușescu's regime was characterized by high levels of centralization and during the first decade of his rule, '' national bodies such as the Grand National Assembly and local organs like the People's Councils became almost symbolic institutions, with little political responsibility or authority.''[20] In addition to the high degree of centralization that was inherited from his rule, the regional specialization policy imposed by Ceaușescu determined also high inter and intra-regional imbalances that left their mark on Romania's post-communist regional development.

The last territorial-administrative organization reform of the communist period took place in 1981 when by Decree no. 15 the reorganization of Calărași, Giurgiu and Ilfov counties was established. The Ilfov Agricultural Sector was created around Bucharest. Starting with this year, Romania's territorial-administrative map entered a period of relative stability that lasted even in the post-communist period and it is still in place at present. On December 22, 1989, the new state leadership structure was created, called the National Salvation Front. As a result, new county, municipal, town and communal councils subordinated to the Front are organized throughout the country.

The new leadership structure promises to eliminate all forms of centralism and exaggerated bureaucracy promoted by the communist rule. According to Rus, the Decree no. 2/1989 can be considered as a provisional mini constitution that destroyed all power structures established by the 1965 constitution and replaced them with new ones that were meant to form a committee responsible for drafting the project of the new constitution.[21]

THE EVOLUTION OF REGIONAL DEVELOPMENT POLICY AFTER 1989

After the collapse of communism, Romania has made efforts to implement a post-socialist democracy system which among others, meant also a step towards decentralization. However, the newly created Romanian Constitution (1991) stipulated the reestablishment of the counties (41counties along with the municipality of Bucharest) as the main territorial unit marking thus a return to the old, centralized territorial-administrative paradigm. According to Dragoman, despite the fact that ''Romania was born by binding together different provinces, such historical entities as provinces remained only as cultural denominations.''[22]

Consequently, the current composition as well as the names of Romania's administrative-territorial units are established by the 1986 no. 2 Law which after 1989 suffered around 200 modifications. As stated by Soare, Romania remains the only state of the former Soviet bloc that, after the collapse of the communist regime, did not experience a

[20] Chen Cheng, ''The roots of illiberal nationalism in Romania: a historical institutionalist analysis of the Leninist legacy'', *East European Politics and Societies*, 17(2), 2003, p. 187

[21] Angela Rus, ''Consideraţii Privind Adoptarea Primelor Reglementări Cu Caracter Electoral Din România Postcomunistă. 1990-1996'', *Anuarul Institutului de Istorie «George Bariţiu» din Cluj-Napoca*, tom LIII, 2014, p. 46.

[22] Dragoş Dragoman, ''Regional Inequalities, Decentralisation and the Performance of Local Governments in Post-Communist Romania'', p. 649.

drastic administrative reform to correct a series of malfunctions and update to its current realities. [23]

In the context of Romania's candidacy for accession to the European Union in 1995, a new direction regarding territorial-administrative organization emerged. As a consequence of starting the negotiations on the adoption of the *acquis communautaire*, the regional development policy became an important component on Romanian Government's agenda. Consequently, the 151/1998 law adopted the creation of 8 development regions (see Fig. 3) designed according to European NUTS II level, which were reconfirmed by law no. 315 in 2004. Neither of these regions are territorial administrative units, nor do they have legal personality, but the entire regional framework was configured around them so that Romania was able to attract European financial assistance. [24] According to Dobre, these regions are voluntary associations of four to six counties that serve solely statistical and regional development purposes legitimizing the current distribution of competences between central and local levels of government. As such, they do not possess any political, fiscal or policy-making powers. [25] Moreover, these regions were not founded on any historical, cultural, or geographical grounds and cannot claim having any cultural identity that is usually a prerequisite for the creation of a region. [26]

Fig. 3- Romania's current development regions

[23] Florin S. Soare, *45 de ani de la ultima reorganizare administrativ-teritorială a României*, IICCMER, 2013, available at: https://www.iiccmer.ro/45-de-ani-de-la-ultima-reorganizarea-administrativ-teritoriala-a-romaniei/, accessed on 10. 09. 2020.

[24] Gabriela Marchis, ''The Potential Sources of Change in Romania Regional Policy'', *EIRP Proceedings*, Vol 10, 2015, p. 536.

[25] Ana Maria Dobre, ''Romania: From Historical Regions to Local Decentralization via the Unitary State'' in Frank Hendriks, Anders Lidström, and John Loughlin (eds.) T*he Oxford Handbook of Local and Regional Democracy in Europe*, 2010, p. 701

[26] Jose Ruano**,** Marius Profiroiu, (Eds.), *The Palgrave Handbook of Decentralisation in Europe*, Palgrave Macmillan, 2017. P. 366.

Source: http://www.artlitera.ro/wp-content/uploads/2010/05/

If in 1950 Romania was importing a Soviet model that was forcefully fit to its territorial-administrative structure, the 1998 configuration of the new regions can be regarded as another attempt to artificially impose a model where the region is constructed solely to serve the purpose of implementing EU's regional development policies.

According to Art. 2 of Law 151/1998 (which became Law 315 in 2004), the main objective of regional development in Romania refers to the ''reduction of existing regional imbalances by stimulating balanced development, by accelerating the recovery of delays in the development of disadvantaged areas as a result of historical, geographical, economic, social, political conditions, and the prevention of new imbalances."[27] However, regional development in Romania is very uneven. Not only that the gap between the capital city region and the other regions is extremely wide but at the same time, there is growing disparity between regions that are located in the western half of the country and those located in the middle east. [28]

These inequalities have only increased during the last decade. Thus, the wealthier regions became even more developed while the underdeveloped ones lagged further behind. The favoring factors that lead to the perpetuation of this regional development heterogeneity vary from historical legacies, excessive centralism, corruption, political capitalism, to lack of financial and administrative capacity that translated into low absorption of funds.

According to Dragoman, the historical legacies that influenced such an uneven regional development refer to the fact that ''modern Romania has integrated provinces previously run by multinational empires. Provinces like Transylvania and Bukovina, part of the Austro-Hungarian Empire, were wealthier and more urbanized and industrialized, than the Kingdom of Romania, which was dominated for centuries by the Ottoman Empire.'' [29] Historically one of the wealthiest regions of Romania, Transylvania came up with a proposal for a regional restructuring in 2000 but since the proposal was based more on cultural and political arguments and less on economic ones, it triggered a strong oppositions from the Romanian nationalists. Benefiting from this competitive advantage and willing to increase their absorption rate, 4 Municipalities (Cluj, Timişoara, Arad and Oradea) have forged in 2018 the Western Alliance. A similar alliance was created shortly after including 3 Municipalities (Bucharest, Braşov and Constanţa). Both alliances aim to decrease the level of centralization and improve the local administrative capacity in order to attract more funds.

There is also a direct correlation between the low absorption rates and the lack of administrative capacity that mainly refers to inefficient public administration. The administrative apparatus often includes underpaid or underqualified personnel and politicians that are putting the interest of their party above the public interest. Improving institutions and the performance of their employees would increase the absorption rate which for 2019 was of

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[27] Law 151/1998, available at: http://legislatie.just.ro/Public/DetaliiDocument/15220, accessed on 20.09.2020.

[28] Simona Biriescu, Antoaneta Butuza, '' Regional Development - Past, Present and Future in Romania'', *Annals of the University of Petroşani, Economics*, 11(1), 2011, p. 19.

[29] Dragoş Dragoman, ''Regional Inequalities, Decentralisation and the Performance of Local Governments in Post-Communist Romania'', p. 657.

just 26%, below the European average.[30] In addition to this, probably one of the most underrated factors that hinder Romania's regional development, is the political capitalism that appeared during the post-communist period. Unfortunately, Romanian government structures at all levels continue to be negatively affected by excessive bureaucratization, lack of transparency, endemic corruption, nepotism, and bribery.[31]

Between 2013-2014 there were many political debates regarding the necessity of modifying the existing regional design but they were mainly focusing on institutional reform and on nomination procedures of representatives rather than seeking to improve Romania's institutional capacity to contribute to a harmonious economic and social development of the regions. [32] Although in 2019 the Romanian president, Klaus Iohannis has stated that he intends to relaunch the public debate regarding Romania's regionalization, this discussion seems to be abandoned at the moment. If we are to consider the ongoing global pandemic that sifted government's priorities worldwide and the fact that 2020 represents an electoral year with great stakes for the Romanian political parties, it is safe to infer that the public debate regarding Romania's regionalization process will be again postponed.

CONCLUSIONS

Currently, Romania has a territorial division system that is regulated by a law dating back to 1968 (with its subsequent modifications). From a legal point of view, more than fifty years have passed since the last territorial-administrative reorganization and meanwhile, the Romanian society has passed through numerous social, economic and political metamorphosis that all ask for an updated territorial-administrative organization law adjusted to the realities of the new socio-economic context. Laws, like societies are not meant to be static and the fact that now Romania is still relaying on a model adopted in the communist period, reveals a lack of political commitment for the actual development of the state.

The current study has shown that the historical context of each territorial-administrative reform has left a mark on the current configurations of Romania's regional development. What we now call setbacks of what could have been a harmonious regional development process, are in fact measures that became well entrenched in the Romanian administrative system because they have been present for a very long time. For example, as Papadimitriou and Phinnemore argued in their work *Romania and the European Union, From marginalisation to membership*, Romania`s centralism must be regarded as a cultural-historical phenomenon that can be traced back to the early life of the Romanian state in 1860.[33] Moreover, centralism was reinforced by more than forty years of communist rule and this can partially explain why it was perpetuated by the post-communist governments and is still present in our society after more than three decades of transition.[34]

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[30] Lucian Paul, ''The Role of Cohesion Policy in the Development of Romania'', Studies in Business and Economics no. 14(3), 2019, p. 107.

[31] Laurențiu Petrilă, *Administrație publică în România. De la discursul politic la acțiune socială,* Editura Presa Universitară Clujeană, 2020, p. 10.

[32] Marchis, Gabriela, ''The Potential Sources of Change in Romania Regional Policy'', *European Integration - Realities and Perspectives. Proceedings*, 2015, p. 551.

[33] Dimitris Papadimitriou and David Phinnemore, *Romania and the European Union, From marginalisation tomembership*, Abingdon: Routledge 2008, p. 120

[34] Ana Maria Dobre, ''Romania: From Historical Regions to Local Decentralization via the Unitary State'' in Frank Hendriks, Anders Lidström, and John Loughlin (eds.) T*he Oxford Handbook of Local and Regional Democracy in Europe*, 2010, P.689.

Similarly, the uneven regional development tendency can be traced back to the age of empires and to the political decision of borrowing the Soviet model of administration in 1950. The process of adjusting to the market economy system that followed immediately after the collapse of the socialist regime, has only deepened the already existing inter-reginal development gaps. The configuration of the new development regions in 1998 was justified solely by the need to adjust to the EU norms in order to attract EU financial assistance which plays a crucial role for Romania's future development. Although today we are witnessing an accelerated economic development of large cities that are turning into growth poles (Bucharest, Cluj-Napoca, Timisoara) and despite their attempts to informally relaunch the regionalization process, Romania's absorption rate is still very low, the inter-regional disparities are growing and the decentralization process proves to be extremely challenging.

Any future territorial-administrative reconfiguration must be based first and foremost on a close historical analysis that allows us to understand state traditions and to identify patterns of development for individual administrative units. Secondary, this process should focus on those economic aspects that could significantly contribute to the closing of the inter-regional development gaps and we believe that improving basic infrastructure by attracting EU funds would represent one of the most important steps towards achieving this goal. Of course, increasing the EU funds absorption rate cannot be done without improving local, regional, and central institutions and their management performance. Last but not least, this entire process has to be equally based on cultural, geographical and political grounds. As president Iohannis argued, the real issue at hand now is to decide whether we need to create new regions as administrative units (regrouping the counties) and a secondary intermediary unit or to maintain the current territorial division and start a serious process of decentralization.[35]

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[35] Klaus Iohannis,''Autonomie locală sau centralism?'', *Revista de drept public*, nr. 4/2003, p. 89.

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THE LEGAL PROTECTION OF THE NATURAL PERSON

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ABSTRACT

The ensemble of legal means used for human protection forms the system of means of protecting the natural person. This system has been characterized in the legal literature as a "unity in diversity".

- unity, because its purpose is the protection of man;

- diversity, because it is made up of legal means of branch protection ", that is to say civil law, commercial law, family law, labor law, constitutional law, financial law, criminal law etc. In the last period the scope of human legal protection was completed by the adoption of normative acts aimed at protecting the natural person. Civil law, like other branches of law, includes numerous institutions and norms that ensure the defense and protection of the subjective rights of natural persons. The norms of the civil law ensure protection by special means to the following categories of persons:

- to minors, through parental protection, guardianship and trusteeship;

- to the alienated and the mentally instable, by putting under interdiction and establishing the guardianship and the trusteeship;

- persons in special situations (old age, illness, physical disability), by establishing the trusteeship.

KEY WORDS: *guardianship, trusteeship, forbidden judiciary, physical disability etc.*

INTRODUCTION

The protection of the natural person means the assembly of the means of civil law through which the recognition and protection of the subjective civil rights and of their justice interests, as well as the means of protection of the natural person as a participant in the civil circuit are ensured. The group of legal means used for the protection of the human being make up the legal means for the protection of the natural person. This system has been characterized in the legal literature as a "unity in diversity".

- unity, because its purpose is the protection of man;

- diversity, because it is made up of legal means of branch protection ", ie civil law, commercial law, family law, labor law, constitutional law, financial law, criminal law etc.

In the last period the sphere of the legal protection of the human being has been completed by the adoption of normative acts that have as purpose the protection of the natural person.

Civil law, like other branches of law, includes numerous institutions and norms that ensure the defense and protection of the subjective rights of natural persons1. In principle,

[1] See Tărchilă P.*Drept civil ,Partea generală şi Persoanele,* Ed.Gutenberg, 2016, Arad, p.311.

civil law is a right of protection "of human rights and especially of certain categories of persons. There is almost no institution or norm of civil law that does not reflect and protect the interests of the natural person: relative nullity is a "protection" nullity of a particular interest; the suspension and reinstatement within the limitation period are provided by law in the purpose of protecting the subjective rights of persons in special situations; the anticipated use capacity is a measure of protection of the child conceived but not yet born; capacity constraints are essentially protection measures.

1. CATEGORIES OF NATURAL PERSONS PROTECTED BY MEANS OF THE CIVIL LAW

The norms of civil law ensure the protection of the following categories of persons by special means:

- minors, through parental protection, guardianship and trusteeship;
- to the alienated and the mentally instable, by putting under interdiction and establishing the guardianship and the trusteeship;
- persons in special situations (old age, illness, physical disability), by establishing the trusteeship.

These categories of persons protected by means of civil law also enjoy the attention of legal norms belonging to other branches of law (means of branch protection), criminal law, financial law, constitutional law, administrative law, commercial law, family law, etc.

1.1. Protecting the child through guardianship

Guardianship is a free and compulsory task, by virtue of which a certain person named guardian is called upon to exercise parental rights and duties towards a minor child whose parents are deceased or permanently unable to exercise their atributions.

The guardianship is regulated in Title III, chap. 1, section II of the family C., entitled "Guardianship of the minor" (art. 113-114).

a) Legal characters

The guardianship has a complex legal nature, for the minor without parental protection, it is a means of protection, and for the guardian it appears as a free and obligatory task.

Being first and foremost a reliable, social task (the guardian has a duty to contribute effectively to the child's upbringing), the guardianship has the following characteristics:

The legality of the guardianship. The establishment of the guardianship, the cases in which the guardianship is opened, the procedure for appointing the guardian, the obligation for certain persons to fulfill the task of guardian, as well as the termination of the guardianship are provided by law by mandatory rules.

Obligation of guardianship. Being a mandatory task, the so-called guardian can only refuse in special situations, biologically, socially and morally motivated. These situations are expressly provided in art. 118, paragraph 2, Family Code. Thus he can refuse the guardianship task:

- the person who turned 60 years old;
- the pregnant woman or the mother of a child younger than 8 years old;
- the person who raises or educates two or more children;
- the person exercising another guardianship or trusteeship;

- the person who, because of the disease, of the infirmity of the kind of work, of the departure of the domicile from the place where the goods of the minor are, or for other good reasons, could not fulfill the task of the guardianship.

Free tutoring. According to article 121, paragraph 1, Family Code, "Guardianship is a free task." The gratuity is of the nature of the guardianship and not of its essence, so that "the guardianship authority, taking into account the work done in the administration of the assets and the material state of the minor and the guardian, will be able to grant the latter a remuneration, which shall not exceed 10% from the income of the minor's goods. The supervisory authority, according to the circumstances, will be able to modify or suppress this remuneration "(art. 121, para. 2).

The personality of the guardianship. The tutorship is strictly personal, being instituted intuituu personae, considering the person of the tutor. Therefore, it must be exercised personally by the tutor, who cannot substitute for another person to fulfill his duties. Generality of the guardianship. Guardianship is instituted whenever a minor is deprived of parental protection. Art. 115, of the Family Code establishes the obligation to notify the guardianship authority in all cases when guardianship must be opened for a minor without parental protection.

Opening the guardianship

Guardianship opens in all cases when both parents of the minor find themselves permanently unable to exercise parental protection. In case only one of the parents is unable, the guardianship will not open, the protection of the minor being ensured by the other parent.

The cases in which the minor will be placed under guardianship are listed by art.113 Family Code as follows:

a) when both parents are dead or declared as dead;

b) when both parents are deprived of parental rights;

c) when both parents are unknown;

d) when both parents are placed under judicial interdiction;

e) when both parents are missing;

f) when, after the adoption, the underage child, the court, decides to establish the guardianship.

Content of guardianship protection

As with parental protection, guardianship protection comprises two sides: personal and patrimonial. As far as the personal side is concerned, the guardian has the same rights and obligations towards the minor under his tutelage as a natural parent. Thus, he has an obligation to raise him/her, "taking care of his physical health and development, his education, teaching and professional training according to his qualities."[2]

The patrimonial side of the protection of the minor through guardianship includes:

1.) In the case of the minor under 14 years, the right to administer his assets and to represent him in the civil legal acts.

The legal documents that the tutor concludes in the representation function of the minor can be grouped as follows:

a.) - acts that the tutor can conclude alone, without the approval of the tutelary authority: acts of conservation and acts of administration of the patrimony;

[2] Turianu C.,2008, *Drept civil,Partea generală şi Persoanele*, Ed Universitară, Bucharest, p.388.

b.) - acts that the tutor can only validly conclude with the prior consent of the guardianship authority: legal documents available, including taking from the CEC (The Romanian Savings Bank) the amounts of money that exceed the maintenance needs of the minor. According to art. 128, Family Code: "It is stopped to conclude legal acts between the guardian, the husband, a relative in a straight line, or the brothers and sisters of the guardian, on the one hand, and the minor on the other." Also, art. 129, para. 1 states: "The guardian cannot, in the name of the minor, make donations or guarantee the obligation of another."[3]

2.) For the minor over 14 years, the role of the tutor is to approve the acts that he personally concludes. Thus, according to art. 133, Family Code, "The minor who has turned 14 years concludes legal documents with the prior approval of the tutor."

Termination of guardianship

The guardianship of the minor ceases either due to causes that concern the person of the guardian (the termination of the guardian's function is considered), or as a result of some causes that concern the person of the minor (termination of the guardianship). The following are considered to be causes for tewrmination of a tutor's function:

- death of the tutor;
- removal from the guardianship, if one of the circumstances that makes the person incapable of being a guardian occurs (art. 117, Family Code), or if he "commits an abuse, a gross negligence or facts that make him unworthy to be a guardian, as well as if he does not fulfill his task satisfactorily " (art. 138, paragraph 2, Family Code);

Responsibility of the tutor

The tutor's responsibility is committed for the non-fulfillment or inadequate fulfillment of the obligations stipulated by the law, both regarding the person of the minor and in relation to the administration of his or her heritage.

The criminal liability is committed if the act of the guardian meets the constituent elements of an offense, for example, ill treatment applied to the minor (art. 306, Criminal Code), fraudulent management (art. 214, Criminal Code).

The adminsitrative liability intervenes if the guardian does not fulfill his obligations sanctioned by the law, in case of non-observance, with a contravention fine.

Whenever the guardian, by not exercising or improper performance of the obligations has caused the minor a prejudice, the civil liability will be committed.

The civil liability may be:

- non-patrimonial, having as a consequence the removal from the guardianship. In this sense, art. 138, paragraph 2 of the Family Code, states: "The tutor will be removed if he commits an abuse, a serious negligence or an act that makes him unworthy to be a guardian, as well as if he does not fulfill his task satisfactorily;"
- patrimonial, which takes the form of criminal liability for own deed (art. 998-999, Criminal Code).

Protecting the child through custody

The custody of the minor is the legal, temporary and subsidiary means, established by the law, through which the protection of the minor is ensured. Along with the parental and guardianship care, the custody is included among the means of protecting the minor. As a legal nature, the custody is an ad-hoc guardianship, being applicable to it, by analogy, the rules of guardianship of the minor.

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[3] See Tărchilă P.*Drept civil ,Partea generală şi Persoanele,* Ed.Gutenberg,2016,Arad, p.311

Establishment of the custody

The custody of the minor is instituted by the guardianship authority from the minor's domicile. The establishment of the custody takes place ex officio or at the request of one of the persons provided for in art. 115, Family Code.

The juvenile custody can be ordered for one of the following 4 cases:

1.) when there are contradictions of interests between the minor and his legal guardian (parent or guardian). Art. 132, Family Code states: "Whenever there is a conflict between guardian and minor’s interests that are among those that must lead to the replacement of the guardian, the guardianship authority will appoint a curator."

2.) When the replacement of one minor's tutor with another is not done concomitantly. Art. 139, Family Code stipulates: "until the new tutor comes into office, the tutelary authority will appoint a curator".

1.) When there is a process regarding the interdiction of the minor. Art. 146, Family Code specifies: "In case of need and until the request for interdiction is resolved, the tutelary authority will be able to appoint a guardian for the care of the person and the representation of the one whose intention was requested, as well as for the administration of the goods".

2.) When the legal guardian of the minor is temporarily prevented from exercising his rights and duties towards the person and his goods. Article 152, letter c, Family Code stipulates that the guardianship authority will be able to institute a court order "if due to illness or other reasons the parent or guardian is prevented from performing a certain act on behalf of the person whom he/she represents or whose acts it approves".

Content of protection by custody

The custody covers two categories of curator attributions:

1.) - protecting the person of the minor (the personal side of the content);

2.) - the management of the patrimony of the minor (the patrimonial side of the content);

Termination of custody

The custody ceases if the causes that led to its establishment disappeared, based on the decision of the guardianship authority.

1.3. Protecting the mentally ill through the institution of judicial interdiction

The judicial prohibition is a protection measure that is provided under the conditions expressly provided by law for the person without capacity of decision due to alienation or mental weakness and consists in his/her lack of exercise capacity and the establishment of the guardianship.

The prohibition is a measure of judicial protection, which can be ordered only by the court. Therefore, the prohibition is different from the guardianship and custody (also protection measures) that is instituted by the guardianship authority.

This legal institution is regulated in the Family Code, art. 142-151, Decree no. 31/1954, art. 11, Decree no. 32/1954, art. 30-35.

The competent court of law

The jurisdiction to settle the application for interdiction belongs to the court whose territorial area is the domicile of the person for whom the interdiction is requested.

The placing under judicial interdiction can be requested by the tutelary authority as well as by all those provided in art. 115 (art. 143, Family Code). In the legal literature it is appreciated that the person concerned would also be entitled to apply for interdiction.

The effects of banning

The prohibition has the effect of depriving the person of exercise capacity and thus creating the premise for establishing the guardianship.

a.)- lack of interest in exercising one's capacity

As long as an elderly, alienated, or mentally disabled person has not been placed under a ban, she/he is considered to have full exercise capacity. The legal acts he/she concludes are, in principle, valid[4]. They could only be annulled if the alienated or mentally disabled could prove that he or she had completed the legal act at a time when he or she had no discerning in his / her actions. The fact that it would prove that his usual state of alienation or mental disability is not enough to create incapacity, until the court decision to place the interdiction intervenes, because the alienated or the mentally disabled also has moments of lucidity. In order to reach the annulment of the act, proof of the lack of discernment must be provided at the time of the conclusion of the act, otherwise the act is perfectly valid.

Following the interdiction, the alienated or the mentally disabled is completely deprived of the capacity to exercise, and for the annulment of the concluded act the evidence that it is forbidden to judge will be sufficient. In this situation, the legal act will be annulled, even if it were claimed that the forbidden one concluded the act in a moment of lucidity. In the case of ban, the incapacity is permanent, covering the possible moments of lucidity.

Being totally devoid of exercise capacity, the one placed under the interdiction will be able to validly conclude legal documents, only through the tutor who is his legal representative.

The declaration of the incapacity of the forbidden by the judicial decision to place the interdiction is followed by the opening of the guardianship.

According to art. 145 Family Code, the decision to place under irrevocable interdiction is communicated by the court to the tutelary authority, which will appoint a guardian, as well as to the county sanitary direction.

Cessation of judicial prohibition

The judicial ban ends with:

- the death of the forbidden, either physically ascertained or declared by court. In the latter case the prohibition ceases on the date established in the declaration of death as the date of death. - lifting the prohibition by judicial decision, if the conditions that determined it ceased5.

The lifting of the prohibition is pronounced by the court with the respect of the same procedure as when establishing it, and with the compulsory obedience of the prosecutor's conclusions. The lifting of the ban will take effect from the date on which the decision became final.

The decision will be communicated by the court that pronounced it, to the court of the place where the decision to place the interdiction was transcribed, to be transcribed in the register and to be mentioned about lifting the ban, according to the decision that pronounced the ban.

1.4. Protecting the adult natural person through custody

The custody is the legal, permanent or temporary and subsidiary means of protecting the adult natural person. Two categories of custody can be distinguished:

1.) the actual custody, for the protection of a capable person, who is unable to manage his/her own estate, due to special situations (illness, old age, physical infirmity, etc.)

[4] Dogaru I., 2010*, Drept civil român,Persoanele* ,Ed.Europa,Craiova, p.421.

[5] See L.Pop,op.cit. p. 345.

2.) the custody of the incapable, for the temporary protection of a person without exercise capacity or with limited exercise capacity

The distinction between the actual custody and the custody of the incapable has the following aspects:

a.) the premises of the two institutions: the actual court is established for the protection of a person with full exercise capacity, but unable to exercise his/her rights due to special situations; the custody of the incapable considers the protection of a person lacking exercise capacity, or with limited exercise capacity;

b.) different legal regime: the rules of the mandate are applied to the actual custody, and the rules of the guardianship apply to the custody of the incapable.

Cases for establishing the custody

The establishment of the custody of the capable person is regulated in art. 152, Family Code, as well as in other normative acts thus according to art. 152, Family Code, the custody is established in the following situations:

a.) - if due to old age, illness or physical infirmity, a person, although capable, cannot personally manage his assets or defend his interests in satisfactory conditions and, for good reason, cannot name himself a representative (custody of persons with physical disabilities);

b.) - if, due to the disease or for other reasons, a person, although capable, can neither personally nor through a representative take the necessary measures in cases whose resolution does not suffer delay (the custody of the person in case of emergency);

c.) - if, due to the illness or for other reasons, the parent or guardian is prevented from performing a certain act on behalf of the person representing it or of whose acts he/she agrees with (the custody of the parent or guardian);

d.) - if a person misses a long time from home and did not leave a general guardian (the custody of the person missing for a long time from home);

e.) - if a person disappeared without news about him and did not leave a general guardian (the custody of the missing person).

f.) - the notarial succession court is established only if there is no guardian of the succession, the guardian being appointed by the notary (art. 72 of the Law no.36 / 1995 of the public notaries and of the notarial activity and art. 15 para. 1 of Decree no.31 / 1954);

g.) - the custody of the inheritance accepted as inventory benefit by the sole successor. In this case, the sole heir exercises a legal action against the inheritance (art.672 of the Civil Procedure Code);

h.) - the custody of the deaf-and-dumb. According to art.816 of the Civil Code: "the deaf-and-dumb who does not know how to write can accept a donation only with the assistance of a special curator appointed ... according to the rules established for minors."

Procedure for establishing the custody

The custody is instituted upon request or ex officio (art. 154, para. 1, Family Code).

According to art. 154, para. 2 Family Code: "The custody can be instituted only with the consent of the represented one, except in cases where the consent cannot be given (the case of missing person from home)[6]. The jurisdiction of the appointment of the trustee belongs (except in the case of the trustee of a succession) to the tutelary authority; the territorial competence of the tutelary authority differs depending on the case in which the curator is established.

[6] Dogaru I., 2010, *Drept civil român,Persoanele*, Ed.Europa, Craiova, p.433.

Content of protection

The content of the custody of the capable person is governed by the following rules:

- the content of the curate of the capable person coincides with that of the representation. Thus, art. 155., paragraph 1, Family Code. specifies: "In cases where the custody is established, the rules of the mandate apply." Therefore, representation by the curator is made only under the conditions imposed by the represented one and only within the limits of the powers conferred by the curator. Exceptionally, if the represented person is not able to give instructions to the curator, the tutelary authority is authorized to give instructions to the curator (art. 155, para. 2, Family Code);

- the represented one can revoke the curator or he can also personally terminate the civil legal act. In this sense art. 153, Family Code stipulates: "In the cases provided in art. 152, the establishment of the custody is without prejudice to the capacity of the one the curator represents. ";

- while performaning her/his task, the curator must consider the cause, or the reason for the establishment of the custody[7].

2. Essential points in the logic of the theme

- the totality of the legal means used by the state for the purpose of protecting the individual, designates the system of legal means of protection of the natural person.

- the legal rules of the civil right, in accordance with the provisions of the new civil code, adopted on 01.10.2011, ensures the special means of the following categories of persons:

- to the minors, by protecting these through trusteeship and guardiansheep;

- to the alienated and mentally disabled by putting them under court prohibition and establishment of the trusteeship and guardianship;

- to natural persons found in special situations due to old age, diseases, physical disabilities and lack of people who can support them, by positioning them under the institution of the custody.

CONCLUSIONS

Civil law, like other branches of law, includes many institutions and norms that ensure the defense and protection of the subjective rights of natural persons. The norms of civil law ensure the protection of the following categories of persons by special means:

- to minors, through parental protection, guardianship and trusteeship;

- to the alienated and the mentally unstable, by putting under interdiction and establishing the guardianship and the custody;

- persons in special situations (old age, illness, physical disability), by establishing the custody.

The cases in which the minor will be placed under guardianship are listed by art.113 Family Code as follows:

a) when both parents are dead or declared as dead;
b) when both parents are deprived of parental rights;
c) when both parents are unknown;
d) when both parents are placed under Court interdiction;
e) when both parents are missing;

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[7] Gh. Beleiu, op.cit., p.337

f) when, after the adoption, the underage child, the court, decides to establish the guardianship.

The child's custody is the legal, temporary and subsidiary means established by the law, which ensures the protection of the child. Along with the parental and guardianship care, the custody is included among the means of protecting the child. As a legal nature, the custody is an ad-hoc guardianship, being applicable, by analogy, the rules of the guardianship of the minor. The custody of the minor is instituted by the guardianship authority from the minor's domicile. The establishment of the custody takes place ex officio or at the request of one of the persons stipulated in art. 115, Family Code. The juvenile court can be ordered for one of the following cases:

- when there are contradictions of interests between the minor and his legal guardian (parent or guardian). Art. 132, Family Code states: "Whenever there is a conflict between guardians and minor's interests that are among those that must lead to the replacement of the guardian, the guardianship authority will appoint a curator."

- when replacing one juvenile's tutor with another, it is not done concomitantly. Art. 139, Family Code stipulates: "until the new tutor comes into office, the tutelary authority will appoint a curator".

- when there is a process regarding the interdiction of the minor. Art. 146, Family Code specifies: "In case of need and until the request for interdiction is resolved, the tutelary authority will be able to appoint a guardian for the care of the person and the representation of the one whose intention was requested, as well as for the administration of the goods" .

- When the legal guardian of the minor is temporarily prevented from exercising his rights and duties towards the person and his/her goods. Article 152, letter c, Family Code stipulates that the guardianship authority will be able to institute a court order "if due to illness or other reasons the parent or guardian is prevented from performing a certain act on behalf of the person who represents it or whose acts it approves".

The judicial prohibition is a protection measure that is provided under the conditions expressly stipulated by law for the person without capacity of decision due to alienation or mental disability and consists in his lack of exercise capacity and the establishment of the guardianship.

The prohibition is a measure of judicial protection, which can be ordered only by the court. Therefore, the prohibition is different from the custody and guardianship (also protection measures) that are instituted by the guardianship authority.

This legal institution is regulated in the Family Code, art. 142-151, Decree no. 31/1954, art. 11, Decree no. 32/1954, art. 30-35. The competence to solve the application for interdiction belongs to the court whose territorial area is the domicile of the person for whom the interdiction is requested. The placing under judicial interdiction can be certified by the tutelary authority as well as by all those provided in art. 115 (art. 143, Family Code). In the legal literature it is observed that the person concerned would also be entitled to apply for interdiction. The interdiction has the effect of depriving the person of exercise capacity and thus creating the premise for establishing the guardianship.

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THE FIRST ROMANIAN REGULATION ON MORAL HARASSMENT

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ABSTRACT

On August 10 th 2020 entered into force the first Romanian normative act expressly regulating the moral harassment, Law no. 167/August 7th 2020 amending Government Ordinance no. 137/2000 on the prevention and sanctioning of all forms of discriminations, and Law no. 202/2002 on equal opportunities and treatment for women and men. In July 2020, about one month before the coming into effect of the regulation on moral harassment, the Law 53/2003 -the Labour Code- was amended through Law no. 151/2020 which supplements the provisions safeguarding the principle of equality of treatment and the principle of human dignity. The paper is an analysis of the legal measures having as purpose to improve the protection of these principles, of the rights and obligations provided for by the recently adopted legal framework, identifying the legal aspects of an absolutely new character, highlighting the benefits of the new regulations for vulnerable holders of such rights, as well as some of Romanian legislator's reasons. Even if moral harassment is not a new phenomenon at all, the abuse behaviour and its numerous faces, its consequences on physical, mental and emotional health, the existence of equality and dignity rights and the possibility to defend them are less known in Romania, and therefore less respected. The new regulations above safeguarding against visible and invisible abuse, particularly the Law no. 167/August 7th 2020 modifying the Government Ordinance no. 137/2000, should be considered a great first step toward a new age of fundamental rights protection in the Romanian society.

KEYWORDS: *moral harassment, principle of human dignity, principle of equality of treatment, physical, mental and emotional health, stress and physical exhaustion, high liability standards.*

1. INTRODUCTION.

Violence is affecting people all around the world and can take multiple forms, making it difficult to distinguish between various types of abuse.

When there's talk about violence, the first thing that comes to mind is domestic violence, especially the physical violence.[1]The physical is the most frequently met type of interpersonal violence, but there are multitudes of ways in which domestic violence can take place: verbal violence, psychological violence, economic violence, sexual violence, social violence, spiritual violence, cyber violence.

Somewhat comparable, these forms of violence, especially the psychological[2] one may

[1] The domestic violence it is regulated in the Romanian law by the Law no. 217/2003 on the Preventing and Fighting against Family Violence republished in the Official Gazette no. 948/2020. ”

[2] The psychological domestic violence, according to the Article 4 paragraph 1 letter b is „ the imposition of the will or of personal control, causing state of tension and distress in any way and by any means, violence and animal demonstration objects, through verbal threats, ostentatious display of weapons, neglect, personal life control, jealousy, the constraints of any kind, as well as other actions having a similar effect control, jealousy, the constraints of any kind, as well as other actions having a similar effect.” As examples of comparable meanings, it is considered that one typical reason for harassment is professional jealousy which to a certain extent is similar to the one in private life, or the harassment at work may take the form of physical aggression,

be encountered in political life, in public spaces, including „*virtual*" public spaces, and particularly at work place.

Domestic violence, the most known form of violence, and violence at work, which is less familiar but also common, must not be confused. The fundamental difference between them regards the area of social relations in which each of them can arise, family relationships or similar to for the domestic abuse or employment relationships for the workplace one. On the other hand, violence at work concept which can be found in some pieces of European legislation does not overlap with harassment at work concept; even the harassment is considered a form of violence at work.[3]

Moreover, the limit between violence and discrimination, including harassment as a form of discrimination, is a very sensitive one. Their common key element is the abuse of power and dominance. The aggressive behaviour is motivated by the intention of hurting the attacked person. The visibility could be the main difference between, but the consequences that are seen to arise from the practice are the same, irrespective such behaviour is visible or invisible. It certainly doesn't make a mistake considering the discrimination through harassment as psychological violence.

Thus, there are different terms that cover the phenomenon of violence at home, at work, in the society as a whole. What is important to stress is the link between them: domestic violence has a negative impact on efficiency at work, the violence at work has consequences on personal life, both of them affecting all the individual life's aspects and needing legal protection.

If for the domestic violence, there has always been a legal basis for defending its victims, with a certain evolution, for the abuse at work the establishment of a relevant protection went differently.

Before the entering into force of the Law no. 167/2020[4], people who experienced abuses at their workplace[5] on different bases were protected through the provisions of the Article 2 paragraph 5 of the Government Ordinance, which defines the harassment as "any behaviour that creates an intimidating, hostile, degrading or offensive environment on the basis of race, nationality, ethnicity, language, religion, social category, beliefs, gender, sexual orientation, belonging to a disadvantaged category, age, handicap, refugee or asylum status or any other criterion creating an intimidating effect" and through the provisions of the Article 4 letter d^1 of the Law no. 202/2002 on equal opportunities and treatment for women[6], governing the psychological harassment, defined as „any inappropriate behaviour that occurs over a period of time, is repetitive or systematic and involves physical behaviour, oral or written language, gestures, or other intentional actions that could affect a person's personality, dignity or physical or psychological integrity " corroborated with correlative legal rules stipulated in the Labour Code regarding the principle of equal treatment.

Recent legislation, Law no. 151/2020[7] modifying the Labour Code and Law no.

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form of abuse which is common into family relationships. Also, it was observed that verbal aggression it's just as often encountered in private relationships and at the workplace.

[3]As it is stipulated in the European Parliament resolution of 11 September 2018, the violence at work should include „ co-existence of bullying, sexual harassment and harassment on grounds of pregnancy and motherhood with various forms of unpaid work in the formal and informal economies (such as subsistence agriculture, food preparation, care for children and the elderly) and a range of work experience schemes (such as apprenticeships, internships and voluntary work)", https://www.europarl.europa.eu/doceo/document/TA-8-2018-0331_EN.html, accessed December 2020.

[4] The first European Union Member State that adopted a special normative act against moral harassment is Sweden- Ordinance on Victimization at Work, 1993.

[5] It is to note that The Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work has to be improved, new legal rules aiming to grant a solid legal framework regarding the psychological safety and health at work.

[6] Republished in The Official Gazette no. 326/ 5 of June 2013. Article 4 letter d^1 was introduced through Law no. 229/2015, published in the Official Gazette no. 749/7 of October 2015.

[7] Published in the Official Gazette no. 658/24 of July 2020.

167/2020[8] modifying the non-discrimination Government Ordinance, changes that are the subject of our study, impose higher protection against abuses at workplace. Following a general approach, the analysis starts from the new legal framework on the equality and dignity principles[9] provided for by the Labour Code and continues with the main legal aspects of the moral harassment, emphasising the concept of moral harassment, the employers' obligations, the sanctions for violation of the rights set out by the Government Ordinance no.137/2000, as amended.

2. LAW no. 151/2020 AMENDING LAW no. 53/2003 - The LABOUR CODE - A NEXT LEVEL OF EQUALITY AND DIGNITY PRINCIPLES LEGAL PROTECTION.

The majority of the legal relationships concluded by the subjects to law, natural persons and legal persons, are based on the principle of equality between the parties from the conclusion moment until the end of the agreement.

In case of the work field, the employer and the employee are equal at the labour contract negotiation's stage regarding its clauses. Prior to concluding the contract, the parties agree on the content of the essential provisions, as well as on that of the special clauses regarding their correlative rights and obligations. After the moment of employment contract conclusion, the same fundamental principles have to be respected, without discrimination. This rule is expressly regulated by the Labour Code, in the Article 5, paragraph 1: „ Within the work relationships, the principle of the equal treatment for all employees and employers shall apply." In addition, the paragraph 2 of the Article 5 regulates very clear the prohibition of any employee discrimination by the employer and the Article 6 paragraph 1 of the Labour Code consecrated the dignity right of the employee as follows: „ Any employee who performs work shall benefit from adequate work conditions for the activity carried out, social protection, labour safety and health, as well as the observance of his dignity and conscience, with no discrimination. " [10]

The Labour Code has been recently modified in this respect [11], supplementing the provisions which prohibit and sanction the discrimination in the field of employment.

Thus, paragraph 2 of the Article 5 modified by the Law no. 151/2020 for the amendment and completion of the Law no. 53/2003-The Labour Code- provides the following:„ any direct or indirect discrimination towards an employee, discrimination by association, harassment and victimization, based on race, national origin, ethnic origin, colour of the skin, language, religion, social origin, genetic characteristics, sex, sexual orientation, age[12], political options, disability, non contagious chronic disease, HIV infection, political options, family conditions or responsibilities, union membership or activity, belonging to a disfavoured category criteria shall be prohibited. " Furthermore, the paragraph 5 of the Article 5 qualifies, in general terms, as being discrimination „any type of behaviour

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[8] Published in the Official Gazette no. 713/7 of August 2020.

[9] According to the Article 1 of the Universal Declaration of Human Rights „ All human beings are born free and equal in dignity and rights ". In the Romanian Constitution provisions, the natural human rights of citizens are stated and guaranteed, as well. The Civil Code gives a more clear regulation of human rights. Under the title „The Right to Dignity", the Article 72 paragraph 1 stipulates that „every person has the rights to respect for the dignity" and paragraph 2 stipulates that „ any harm brought about a person's honour or reputation is forbidden, given they haven't consented to the respective actions or by trespassing the limits and regulations imposed in article 75".

[10] Article 10 of the Labour Code.

[11] In the previous form, the paragraph 2 of the Article 5 of the Labour Code had the following content:„ Any direct or indirect discrimination towards an employee, based on criteria such as sex, sexual orientation, genetic characteristics, age, national origin, race, colour of the skin, ethnic origin, religion, political options, social origin, disability, family conditions or responsibilities, union membership or activity, shall be prohibited. "

[12] See F. Bejan, *Equal Treament of Young People and Seniours : "Pleading" for a Special Law on Age Discrimination*, Challenges of the Knowledge Society, CKS-eBook, Nicolae Titulescu University Editorial House, Bucharest, 2018, p. 197 and the following.

based on one of the criteria stipulated in the paragraph 2, aiming to or resulting in the violation of dignity, creating an intimidating, hostile, degrading, humiliating or offensive environment". The general formulation allows for a general application and leads to a significant protection of the employee from this perspective, all the more so according to the paragraph 9 „any adverse treatment as a reaction to a petition or a case law regarding the infringement of non-discrimination and equal treatment principles", known as victimization[13], is prohibited through a special disposition.

Of an absolutely novelty character is the regulation of the discrimination by association which, according to paragraph 6 of the Article 5, consists in „discrimination against a person who does not belong to a category of persons identified according to the criteria expressly provided by paragraph 2, but nonetheless is associated or presumed to be associated with one or more persons belonging to such a category."[14]

Finally, it is important to underline that the non-observance of the provisions of paragraph 2 together with those of paragraphs 3 to 9 of the Article 5 of the Labour Code, as were amended, is sanctioned very severely by the law, with a fine between 1.000 lei and 20.000 lei.

As a first remark, taking into consideration the regulations in the work domain, especially the new ones, even though on the base of the employment contract the employee carries out the activity for and under the authority of an employer,[15] the equal treatment and the dignity right have to be the fundamental principles governing their relationship and have to be strictly respected within the employment relationship.

It is worth noting that there are some differences between the discrimination criteria expressly enumerated in the Ordinance no 137/200 and in the Law no 202/2002 and those of the Labour Code, as was amended. In this regard, the criteria enumeration provided by the Labour Code is a limitative one.

Unlike the Labour Code, the Article 2 of paragraph 1 of the Ordinance no 137/2000 establishes the discrimination criteria in a very permissive way, as follows „discrimination is understood as any distinction, exclusion, restriction or preference based on race, nationality, ethnicity, language, religion, social status, belief, sex, sexual orientation, age, disability, non-contagious chronic disease, HIV infection, membership of a disadvantaged group and any other criteria which has the purpose or the effect of restriction, elimination of recognition, use or exercise of fundamental human rights and freedoms or of rights recognized by the law in the political, economic, social or cultural field or in any other field of public life."

The conjunction *„and "* at the end of the definition followed by the wording *„any other criteria*" corroborated with the formula *„ or in any other field of public life"* have the meaning that not so much the criterion is important, but the act of discrimination, that the criteria cannot be limited and each human being has the right to consider any other reason as a criterion of discrimination, without limitation. To illustrate, the physical appearance in not stipulated by the Romanian law as discrimination criteria, but for sure in practice, including in the labour field, many cases of discrimination are based on the physical aspect. Therefore, even though interpretation, new criteria may be invoked as being base of discrimination at work, for a better correlation and application of the overlapping rules, we are of the opinion that the wording of the Ordinance no. 137/2000 has to be inserted in all the existing

[13] The sense of legal term „victimization" used in the regulation on discrimination has to be understood with the strictly meaning provided by the law, without adding through interpretations meanings outside the legislator's intention.

[14] For a decision regarding discrimination by association, see the Judgment of the Court (Grand Chamber) of 17 July 2008, Case C-303/06, Coleman v Attridge Law and Steve Law-, http://curia.europa.eu/juris/liste.jsf?language=en&num=C-303/06.

[15] The running of management positions should not be done with the infringing of dignity right and conscience rights, according to Denisa Patrascu, Expert Opinion on Fundamental Principals/Labour Code, Indaco Law 5, available at https://lege5.ro/Gratuit/gi2tknjxgq/art-6-principii-fundamentale-codul-muncii?dp=gu3dmmjxhezto, accessed on December 2020.

regulations in the field, including in paragraph 2 of the Article 5 of the Law no. 53/2003 - The Labour Code.

3. LAW no. 167/2020 AMENDING GOVERNMENT ORDINANCE no. 137/2000 - THE FIRST ROMANIAN NORMATIVE ACT EXPRESSLY REGULATING THE MORAL HARASSMENT.

3.1. General Considerations.

In August 2020, new legal rules were adopted by the Romanian legislative having as goal to safeguard the dignity right at work, with no discrimination.

Government Ordinance no. 137/2000 on the prevention and sanctioning of all forms of discriminations, and Law no. 202/2002 on equal opportunities and treatment for women and men were amended through Law no. 167/2020, entered into force on 10 August 2020.

The Romanian legislative framework has a greatly anticipated regulation on moral harassment.

In the current medical crisis, having serious social and economic consequences, when many people may experience harassment at their workplace on different grounds, this new regulation could contribute for greater protection of employees against abuses.

The poor education and the conservative culture represent a real problem of our society[16], and result in discrimination of all types in various fields, especially in the area of work.

Fixing them through legal norms, including them in the Romanian legal order, is the most appropriate solution for a better work environment and for a higher standard of living. It's a fact that people spend at least eight hour per day at work, no matter the modality of how work is organized, and this means a very important part of their lives.

Law no. 167/2020 amended the Government Ordinance no. 137/2000 on the prevention and sanctioning of all forms of discriminations[17], completing the Article 2 of Chapter I „Principles and definitions” with seven new paragraphs and Article 26 of Chapter III „Procedural Provisions and Sanctions” with five new paragraphs. Within these provisions, the legislator has regulated moral harassment: it defines the concept, prohibits it and sanctions the infringement of legal rules that protect employees against behaviour that, in general word, embarrasses, demeans, humiliates them.

[16] The moral harassment is not a Romanian phenomenon, but a problem of all Member States of European Union . The moral harassment and other forms of violence at the workplace are an important issue on the agenda of all Member States of European Union. Committee on Women's Rights and Gender Equality has submitted to the European Parliament a Report on measures to prevent and combat mobbing and sexual harassment at workplace, in public spaces, and political life in the EU, on the base of which the European Parliament adopted resolution of 11 September 2018. One of the subtitles of the resolution is *Violence in the workplace*. The European Parliament recommends the Member States to implement active and effective policies to prevent and combat all forms of violence against women, including sexual harassment and acts of sexism and mobbing to which the majority of women are subjected in the workplace (point 24)and emphasises the urgent need for standards on violence and harassment at work, which should provide a legislative framework for governments, employers, companies and trade union action at all levels(point 25)- European Parliament resolution of 11 September 2018 on measures to prevent and combat mobbing and sexual harassment at workplace, in public spaces, and political life in the EU available at https://www.europarl.europa.eu/doceo/document/TA-8-2018-0331_EN.html , accessed on December 2020.

[17] The Government Ordinance no. 137/2000 was published on the 1st of November 2000 with the applicable form from 8th of February 2007 until 6th of March 2014, being republishing in the Official Journal on 7th of March 2014.The law is divided in four chapters: „Principles and definitions”; „Special Provision” which is split in six sections; „Procedural Provisions and Sanctions” and the last one „Final Provision”. Also the six sections of the second chapter are: „Equality in economic activity and in employment matters and professions”; „The access at public administrative juridical, health and other services, goods and facilities”; „Access to education”; „Freedom of transport, of self chosen home and access to public spaces”; „The right to personal dignity”; „The National Council for Discrimination Combat”. The Government Ordinance no. 137/2000 transposed the provisions of the Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and the provision of the Directive 2000/43/EC establishing a general framework for equal treatment in employment and occupation.

3.2. The Concept of Moral Harassment.

The Romanian legislator has decided to choose „moral harassment" as legal term for defining and establishing the legal regime of abusive behaviour at work. The legislative systems around the world use various terms for workplace harassment: mobbing[18], workplace bullying, victimization, psychological harassment. Irrespective of these terminology differences between national laws, their common denominator is prohibition and sanctioning of any types of conduct having humiliating effects, infringing the dignity, the physical or psychological integrity of the harassed person at workplace, degrading the climate of the workplace, but not limited to these.

Under the Romanian law, according to the Article 2 (5^1), (5^2), the following are considered forms of moral harassment and will be consequently sanctioned:

a) Any kind of behaviour exercised towards an employee by another employee who is her/his hierarchical superior, by a subordinate and/or by an employee who is comparable from a hierarchical standpoint, in connection with working relations, with the purpose or effect a deterioration of the work conditions through the violation of rights or dignity of the employee, through harming her/his physical or mental health, or through compromising her/his professional future, such behaviour being is manifested in any of the following forms :

- hostile or undesired behaviour;
- verbal comments;
- actions or gestures;

b) Any kind of conduct which, through its systematic nature, may prejudice an employee's or a group of employees dignity, physical or mental integrity, jeopardizing their work or degrading the working environment

c) Stress and physical exhaustion.

In our opinion, apart from these three forms of moral harassment, very clear expressed, the law establishes another two:

a) The sanctioning, dismissal or discrimination, directly or indirectly, including actions regarding salary, professional development, promotion or the extension of labour relations, on the ground that she/he has undergone or refused to undergo moral harassment at the workplace shall be prohibited (Article 2 (5^5)) and

b) Any kind of behaviour exercised by the employer which consists of the establishment „ in any form, internal rules or measures that oblige, determine or urge employees to commit acts or deeds of moral harassment at work."[19], or in general terms the employer's behaviour which determines the employees to have any kind of moral harassment conduct at work against other employees. (Article 2 (5^5))

Our conclusion is based on the following reasons:

- in the first case, stipulated by Article 2 (5^5)), we consider that the will of the legislator was to regulate a form of moral harassment similar to victimization prohibited in general law on discrimination (G.O. no. 137/2000) having as purpose to protect the employee in case she/he has been subjected or refused to be subjected to moral harassment, particularized to labour field. In the Article 2 paragraph(3) of the Government Ordinance no. 137/ 2000 „any adverse treatment as a reaction to a petition or a case law regarding the infringement of non-discrimination and equal treatment principle constitutes harassment and it's contraventionally sanctioned. " Or, all the measures prohibited by the Article 2 (5^5)), affecting remuneration, promotion , training, contract extension, dismissal, and any other sanctions represent „adverse treatment" and may be applied or used by the employer;
- in the second case we consider that the will of the legislator was to regulate a form of moral harassment not just similar, but better characterized than the instruction to

[18] Professor Heinz Leymann, the psychologist who discovered and developed the mobbing concept , referred to this abusive behaviour as being one that terrors the harassed person, an idea that in our opinion may be used more in defining and defending the individuals rights that are subjected to this.

[19] Article 2 (5^6) of the Law no. 167/2020.

discriminate prohibited in general law on discrimination as follows ”The instruction to discriminate a person on any ground provided by paragraph is considered to be discrimination in accordance with the ordinance herein. ”[20] . Thus, we are of the opinion that the intention of the legislator expressed in the Article 2 (5^5)) was to regulate and to sanction the incitement to moral harassment together with the instruction to moral harassment.

3.3.The Employers Obligations.

The law gives the employers more responsibility in order to stop the behaviour and deal with the moral harassment. Many of the employees have been reported to have been part or to have taken part as witnesses in some acts or deeds of moral harassment at work.

It is therefore very important that the Romanian legal framework on moral harassment aims to ensure the right of every employee to a workplace devoid of acts of moral harassment (Article 2 (5^1)(5^5) (5^6) of the G.O. no.137/ 2000), correlated with the general obligation of the employer to guarantee to the employees adequate work conditions for the activity carried on, social protection, labour safety and health, as well as the observance of his dignity and conscience with no discrimination (Article 6(1) of the Labour Code).

As this law has been recently adopted and the infringement of its provisions may have even severe consequences, the employers have to be aware on the following obligations :

a) The employer has the obligation to take any necessary measures in order to prevent and combat acts of moral harassment at the workplace, including by providing in the internal regulation disciplinary sanctions for employees committing moral harassment at the workplace, as it is stipulated in the Article 2 (5^5) ;

b) The employer has the obligation to not establish, in any form, internal rules or measures that oblige, determine or encourage employees to commit moral harassment at the workplace. In order to regulate any possible face of moral harassment behaviour of the employer, the law imposed that *„ any kind”* of such conduct is forbidden: verbal, non-verbal, spoken or written language, suggestion, recommendation, gestures or other acts.

3.4.The Sanctioning of Moral Harassment.

The liability standards for moral harassment at workplace are higher than those for other forms of discrimination, both for the employees and for the employers.

The employees who commit acts or deeds of moral harassment at the workplace are liable to disciplinary sanctions, as well as to administrative sanctions (fines) [21] or penal sanctions[22], as it is stipulated under Article 2 (5^1).

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[20] Article 2 paragraph 2 of the Government Ordinance no. 137/ 2000.

[21] In case of non-respecting of the legal provisions regarding the moral harassment at workplace, the National Council of Discrimination Combat (NCDC) has the competence to investigate, to ascertain and to sanction the discrimination acts. The National Council of Discrimination Combat (NCDC) is the public authority institution which has to guarantee that the anti-discrimination principles are respected and applied according to the national and European legislation, according to the international treaties to which Romania is a party. The National Council of Discrimination Combat have competences in the following domains: prevention of discrimination cases by doing information campaigns on what discrimination means and which are the effects of the discrimination, mediation of discrimination acts between involved parties, investigation, ascertaining and sanction of discrimination acts, monitoring of the discriminatory cases and observation of the implicated parts, providing specialized assistance to the discrimination victims.

[22] The Penal Code criminalizes Harassment and Sexual harassment. Harassment is defined and sanctioned by the Article 208 of the Penal Code as follows: „ (1) The act of a person who repeatedly pursues, without right or without a legitimate interest, a person or supervises his home, work or other places frequented by him, thus causing him a state of fear, is punishable by imprisonment from 3 to 6 months or with a fine. ” „ (2) Making telephone calls or communications by means of remote transmission, which, by frequency or content, causes fear to a person, shall be punished by imprisonment from one month to 3 months or by a fine, if the act does not constitute a more serious crime. ” „ (3)The criminal action is initiated upon the prior complaint of the injured person. ” Sexual Harassment is defined and sanctioned by the Article 223 of the Penal Code as follows: „The repeated request of sexual favours in an employment or similar relationship, if the victim has been intimidated or put in a humiliating situation, shall be punished by imprisonment from 3 months to one year or by a fine. The criminal action is initiated upon the prior complaint of the injured person. ”

The contraventional fine at the workplace which may be applied as a sanction to an employee for the infringement of rights and dignity of another employee through moral harassment is minimum of 10.000 lei and maximum of 15.000 lei.

The administrative sanction is more substantial for the employers who violate the legal rules imposed by the law in the Article 2 paragraph (5^5) and paragraph (5^6).

Thus, the non-fulfilment by the employer of the obligation to take any necessary measures in order to prevent and combat moral harassment at the workplace, to establish disciplinary sanctions in the internal regulation for employees committing moral harassment is sanctioned with a fine from 30.000 lei up to 50.000.[23]

It is much more serious in the opinion of the legislator the violation by the employer of the obligation to not engage the employees in direct or indirect harassment against other employees, fixing a more severe sanction with a fine from 50.000 lei up to 200.000.[24]

Moreover, the employer may be sued by the employee and according to the Article 26 paragraph (2^1) the court of law that will find that an act or deed of moral harassment at work occurred will be able:

a) to order the employer to be obliged to take all the necessary measures to stop any acts of moral harassment at work at the workplace regarding the employee;
b) to order the reintegration of the employee in question at the workplace;
c) to order the employer to be obliged to pay the employee compensation in an amount equal to the salary rights he/she was deprived of;
d) to order the employer to be obliged to pay to the employee compensatory and moral damages ;
e) to order the employer to be obliged to pay to the employee the amount necessary for the psychological counselling that the employee needs, for a reasonable period established by the occupational medicine doctor;
f) to order the employer to be obliged to amend the employee's disciplinary records.

The person subjected to moral harassment at work may file a claim with a Romanian court of law or may file a petition with the National Council of Discrimination Combat for the administrative offence. The National Council of Discrimination Combat has the competence to investigate and sanction through fines the moral harassment acts and deeds, including to decide on two of the measures above as well, stipulated by the letter a) and by the letter e) of the Article 26 paragraph (2^1). Moreover, it is considered a contravention the failure of the employee to carry out the measures ordered by the National Council of Discrimination Combat and is sanctioned with fine between 100 000 lei and 200.000 lei.[25]

Employees and employers have to be aware of the behaviour the law imposed on them and of the consequences they are exposed to in case of failure to comply with the obligations provided by the law, taking into account aspects that need to be highlighted:

- the quantum of administrative fines is higher than those established for sanctioning of the other types of discrimination and they can be up to15.000 lei for employees and up to 200.000 lei for employers;

- the sanctions fixed for employers that violate the legal norms on moral harassment are much more severe that those that may be applied to the employees that commit acts and deeds prohibited by the law, and even the latter are substantial if we take into consideration the level of wages at the national level;

- the administrative fine is not the only one sanction the employee and the employer are exposed to;

- the employer is considered by the legislator one of the key factor in informing, educating and respecting the dignity principle and the equality principle at workplace and this explain why the improper attitude and bad decisions of the employer are sanctioned if this is

[23] Article 26 paragraph (1^1) letter a).
[24] Article 26 paragraph (1^1) letter b).
[25] Article 26 paragraph (2^3)

the case; however, the Romanian employer need to start thinking harder before initiating harassment actions, before infringing or just ignoring the way it behaves or the obligation to elaborate internal regulations on psychological violence at work.

4. CONCLUSIONS.

Dignity is an inherent value of humans and can only be protected by respecting it. The concept of dignity has evolved over the years, and the relevance of legislation as well. [26]

This pandemic period brought in our national legal framework with legislation focused on safeguarding it.

The regulating of moral harassment through special legal rules is one of extreme importance, since humiliation, undermining, malicious gossip, stonewalling, personal information revealing, slandering, isolation, intimidation, exclusion, criticism, contempt, other forms of emotional abuse, verbal and physical aggression affect so many people in Romania every day.

Law no. 151/2020 modifying the Labour Code and, particularly, Law no. 167/August 7th 2020 amending Government Ordinance no. 137/2000 on the prevention and sanctioning of all forms of discriminations, the first Romanian regulation on moral harassment, on discriminatory and abusive conduct at work, violating the dignity, the equality right, the physical or psychological integrity, but not limited to, can play a defining role in the way this multifaceted, complex and devastating phenomenon is perceived and respected within our society.

The existence of a legal framework, the punitive, protective and preventive measures of legislation are to be coordinated with raising awareness of the seriousness of the moral harassment, and not just to combat it, but more to understand how abusive behaviour manifests itself, and to educate people to protect their own rights and respect the rights of others.

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[26] Since 2000, the Article 15 within Section V- *The right to personal dignity*- of Government Ordinance no. 137/2000, expressly prohibits the infringement of „any public behaviour with a nationalistic- chauvinist character, any incitement to racial or national hatred, or any behaviour aiming to prejudice a person's dignity or to create a hostile, degrading, humiliating or offending atmosphere, perpetrated against a person, a group of persons or a community on the base of race, nationality, ethnic group, religion, social category or belonging to a disfavoured category, on account of beliefs, sex or sexual orientation shall constitute contravention, unless the deed falls under the incidence of criminal law. "

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COMPENSATIONS IN THE MATTER OF THE ADMINISTRATIVE LITIGATION, IN THE LIGHT OF ARTICLE 19 OF LAW NO. 554/2004

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ABSTRACT

The appearance in 2004 of Law no. 554 on administrative litigation brought a new perspective on this institution, with all the necessary implications. Many of the concepts specific to administrative litigation have been rethought, including the issue of damages, a matter of the utmost importance, given that, we are on the ground of a struggle between the state, on the one hand, and the individual, on the other. In most cases, the annulment of an administrative act cannot but entail a compensation to which the person who obtained the annulment of the act is fully entitled. The same reasoning is similar if the authority refuses to respond within the legal deadlines. In addition to the pecuniary damage, it is obvious that the moral damage will also be discussed, because, in addition to the actual damage suffered, the claimant can prove that he also suffered moral damage. Therefore, the authority can be held responsible for illegal conduct (by annulling the act or recognizing the right) and can also be held responsible for paying amounts of money that, not infrequently, can reach quite significant values for the public budget. Precisely for this reason, I considered useful a review of what involves the issue of damages in administrative litigation, related to those recently ruled by the High Court of Cassation and Justice, in an appeal in the interest of the law.

KEYWORDS: *administrative litigation, compensations, limitation period, High Court of Cassation and Justice, injured person, administrative act, Law on administrative litigation.*

1. THE PROBLEM OF COMPENSATIONS IN THE PHILOSOPHY OF LAW NO. 554/2004 ON ADMINISTRATIVE LITIGATION

With the change in the philosophy of administrative litigation (and we can mark this moment since the entry into force of Law no. 29/1990 - the first law of administrative litigation after the revolution in 1989), the issue of public authorities' liability for illegal administrative acts or for non-recognition of a legitimate right or interest was discussed. As a collateral and as a natural consequence of the idea of damage, the problem of how to repair them arose.

Art. 52 of the Constitution refers to the fact that the person injured in a right or legitimate interest, by a public authority, by an administrative act or by not resolving a petition within the legal term, is entitled, in addition to the recognition of the claimed right or the legitimate interest and the annulment of the act, to obtain the damage repair. The notion of damage reparation has in view both the granting of material and moral damages by the court, but also the finality of the act of justice - the execution of the judgment - without which the reparation of the damage would be illusory.[1]

The basis for granting material or moral damages is also the art. 1349 of the Civil Code, text which provides that: Paragraph 1 "*Every person has the duty to observe the rules of*

[1] Cătălin – Silviu Săraru, Contenciosul administrativ român (Romanian administrative litigation), C.H. Beck Publishing, Bucharest, 2019, p. 320

conduct that the law or the custom of the place imposes and not to infringe, through his actions or inactions, the rights or legitimate interests of other persons.

Paragraph 2 *He who, having discernment, violates this duty is liable for all damages caused, being obliged to repair them in full."*

Starting from this general principle of law, we find in Law no. 554/2004 on administrative litigation, texts that directly address the issue of damages.

Thus, art. 8 which regulates the object of the legal action shows that the entitled person can also request, in addition to the annulment of the act the "*reparation of the damage caused and, possibly, reparations for moral damages"*.

Art. 18 detailing the solutions pronounced by the administrative litigation court shows that the court may order the obligation: "*to pay compensation for pecuniary and moral damages, if the claimant has requested this*."

Art. 19 regulates the limitation period for compensations, when they are not requested by the main action, and shows: Paragraph 1 "*When the injured person has requested the annulment of the administrative act, without requesting compensation at the same time, the limitation period for the compensation claim runs from the date on which he knew or should have known the extent of the damage*.

Paragraph 2 "*The petitions are addressed ... within one year provided in art. 11 para. 2."*

We will see below that this very term has given rise to various interpretations in the practice of the courts, an aspect that led to the an appeal in the interest of the law by the High Court of Cassation and Justice. It is about Decision no. 22 / 24.06.2019, ruled on appeal in the interest of the law and published in the Official Journal of Romania, Part I, no. 853 of October 22, 2019, which we will comment on during this study.

From the analysis of the texts listed above, it is undeniable that in administrative disputes, the claimant can ask both material and moral damage, provided that we are in a subjective dispute, as we will analyse in detail.

The court will award such damages only to the extent that they have been claimed by the claimant, and will not be able to establish ex officio any damage (material and / or moral) to cover. In conclusion, the court cannot rule ex officio on the removal of the unfavourable consequences of the unilateral administrative act (typical or assimilated) considered illegal. This conclusion is necessary, as the court must rule only on the concrete claims made by the claimant, who is also the one who sets the procedural framework by indicating a specific object for the summons, the principle of availability being applicable. [2]

Regarding the damage to property and the criteria for granting them, the High Court of Cassation and Justice ruled that the court may require the defendant to pay them, to the extent that proof of actual and certain damage is provided. Material damages are not granted automatically, as an effect of admitting the action in annulment of the act, but certain objective criteria must be taken into account resulting from the degree of damage to the protected social values, aspects based on which the intensity and severity of the damage must be considered.[3]

If in the matter of material damage, the evidence is somewhat obvious, in the sense that this damage must be proved with all the evidence available to the claimant and the court will grant it only to the extent that it is proven, things are much more sensitive in the matter of moral damages.

Under the rule of the current Law on administrative litigation no. 554/2004, there was a change of courts' perspective, which, following the principle of law *restitutio in integrum*, material and moral damage is granted, noting that the full reparation of the damage involves

[2] Iuliana Rîciu, *Procedura contenciosului administrativ (Administrative litigation procedure),* Hamangiu Publishing, 2012, p. 368

[3] Iuliana Rîciu, op. cit., p. 370

the removal of all harmful consequences of an unlawful and culpable act, be they patrimonial or non-patrimonial, in order to restore the injured person to the previous situation.[4]

The problem that has arisen is that of the evidence in case of requesting and granting these damages, a matter much more difficult to prove compared to the material damages, where we talk about a concrete quantification of the requested amounts in relation to the benefit that the legal administrative act would have produced or to the damage caused by the illegal administrative act.

In the literature, moral damages are considered to be an injury to the existence of the individual, bodily integrity and health, honour, dignity and honour, professional prestige.[5]

According to the provisions of art. 1169 of the Civil Code, the burden of proof in the claim for moral damage falls on the claimant, according to the principle *actori incumbit onus probandi*. Based on the rules of common law, the claimant must prove the existence of the attempted moral damage, the unlawful nature of the act committed by the defendant with guilt and the causal relationship between that damage and the defendant's act.[6]

The courts considered that evidence must also be administered to prove the occurrence of moral suffering because the mere fact of the annulment of an administrative act is not likely to lead to the conclusion of psychological harm, and if they occurred, they differ depending on the elements related to the personal and moral status of each person injured in rights.[7]

With regard to the determination of the amount of moral damage, the court will consider that they are compensatory in nature, and cannot constitute excessive amnesia for the perpetrators of damages or unjustified income for the victims.[8]

In conclusion, it can be argued that the claim for damages is ancillary to the main proceedings. Mainly, this petition is introduced in the main proceedings of administrative litigation. Exceptionally, if the claimant does not know the extent of the damage at the date of the trial of the main action, the action for damages may be filed later, according to art. 19 of Law no. 554/2004 on administrative litigation.[9]

Under no circumstances may an action for damages be brought before the main action in administrative proceedings. In that regard, in Case C-25/62 Plaumann v. Commission of the EEC, ruled by judgment of 15 July 1963, the Court held that the action for damages sought to remove the legal effects that the contested decision had on the claimant, but an administrative act which has not been annulled is not liable to cause damage to the persons to whom it is addressed, and the latter cannot claim appropriate damages.[10]

2. COMPENSATIONS - SPECIAL LOOK AT ART. 19 OF LAW NO. 554/2004 ON ADMINISTRATIVE LITIGATION

As shown by a reputable judge from the administrative contentious section of the High Court of Cassation and Justice and an exceptional doctrinaire, art. 19 entitled “Limitation period for compensation” does not excel in rigor, neither in terms of normative technique, nor in terms of the legal qualification of the term it provides.[11]

Another drafting imperfection would be the location of art. 19 regarding the compensations in a separate way (in its essence) before art. 20 which has as object the appeal in administrative litigation. We appreciate that it would have been necessary to place such a

[4] Iuliana Rîciu, op. cit., p. 369
[5] Gabriela Bogasiu, Legea contenciosului administrativ comentată și adnotată (Administrative Litigation Law discussed and annotated), Editura Universul Juridic, 2018, p. 509
[6] Gabriela Bogasiu, op. cit., p. 509
[7] Iuliana Rîciu, op. cit., p. 369
[8] Gabriela Bogasiu, op. cit., p. 509
[9] Anton Trailescu, Drept administrativ. Partea special (Administrative law. The special part), Editura C.H.Beck, București, 2020, p.222
[10] Gabriela Bogasiu, op. cit., p. 534
[11] Gabriela Bogasiu, op. cit. P. 534

text after the one that regulates the appeal, since the idea of the action promoted by art. 19 is distinct from the completion of the procedure before the administrative contentious court (merits and appeal). Basically, in the application of art. 19 we have in mind a separate action having as object the damages in a separate way, conditioned by the annulment of the act and not exceeding the term of one year from the moment the damage becomes known.

The premise of formulating a petition based on the provisions of art. 19 of Law no. 554/2004 is represented by the formulation of an action for annulment having as object a harmful administrative act. Subsequent to the annulment of that administrative act, the injured person (*id est* is the one who filed the action for annulment) may formulate the action for damages provided by the art. 19 para. (1) of Law no. 554/2004 since at the date of bringing the action for annulment he was not aware of the extent of the damage.

Article 19 in its current wording raises several discussions, which we will detail below.

The first would be related to the admissibility / inadmissibility of the action for damages compared to an objective / subjective litigation.

The second discussion would have in view the prescription of the material right to action, the term of one year, which in the wording of the law runs ”from the date on which the claimant knew or should have known the extent of the damage. "

A third discussion is related to the person who has an active procedural capacity to bring the action, related to the fact that an action for damages based on art. 19 is conditioned by a previous court decision annulling an illegal administrative act.

These issues were resolved by the High Court of Cassation and Justice by Decision no. 22 / 24.06.2019, pronounced on appeal in the interest of the law and published in the Official Journal of Romania, Part I, no. 853 of October 22, 2019.

The issue of inadmissibility appeared in the discussion by referring to the two types of litigation regulated by Law no. 554/2004.

Thus, administrative litigation is objective when the dispute is based on a legitimate public interest which concerns the rule of law and constitutional democracy, the guarantee of the fundamental rights, freedoms and duties of citizens, the satisfaction of Community needs, the exercise of public authority. The contentious objective concerns a litigation against the administrative act strictly related to the violation of some normative acts that govern its issuance or adoption.[12] Examples of such actions would be those promoted by the People's Advocate (Ombudsperson), the Public Ministry, the National Agency of Civil Servants, obviously by virtue of the active procedural quality conferred by Law no. 554/2004.

Administrative litigation is subjective when the dispute is based on a subjective right or a legitimate private interest that is alleged to be harmed by an administrative act. Subjective litigation concerns a litigation that focuses on or concerns the violation of subjective rights or legitimate interests of individuals, without concern for the objective legality of the administrative act.[13]

Therefore, in relation to the two types of litigation, has the legitimate issue been discussed, regarding the time when damages can be claimed separately?

The issue of inadmissibility was decided by the High Court of Cassation and Justice in the sense that: *From the systematic interpretation of the provisions of art. 18 para. (3) of Law no. 554/2004, in correlation with the norms contained in art.8 of the law, which regulates the object of the judicial action, it results that the court can grant compensations for the moral or material damage* ***only in the case of actions in subjective litigation****, because the actions based on violation of a legitimate public interest may have as object only the annulment of the act or the obligation of the defendant authority to issue an act or another document, respectively to carry out an administrative operation.*

In order to engage the administrative-patrimonial responsibility of the defendant public authority, it is necessary the cumulative fulfilment of the following conditions, deduced

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[12] Cătălin – Silviu Sararu, op. cit., p. 42

[13] Cătălin – Silviu Săraru, op. cit., p. 43

from the interpretation of the provisions of art. 1,349 and art. 1,357 et seq. of the Civil Code, in correlation with the rules that configure the legal regime of administrative litigation: the existence of an illegal act consisting in an illegal administrative act annulled by the court or an unjustified refusal or failure to resolve a request, found as such by the court; causing damage; proof of the causal link between the unlawful administrative act and the damage suffered by the claimant . "

The solution is perfectly in line with the entire philosophy of the Law on Administrative Litigation, which also created the two types of litigation. It is obvious that in an objective litigation, in which the defence of some public / general interests is wanted, the admission of the action cannot imply the reparation of some damages as these damages cannot be estimated, not being a report to a concrete case, in which the damage can be estimated.

The interpretation given by the High Court of Cassation and Justice is not likely to violate the right of access to justice, as the European Convention on Human Rights regulates it in art. 6. The provisions of art. 6 of the ECHR recognize access to justice for the protection of civil rights or obligations of a natural or legal person.

The prescription of the material right to action was another much debated issue. In the literature, the question has arisen whether the prescription in administrative litigation is an institution identical to that currently regulated by the new Civil Code or, in reality, it is a completely different notion, the term “prescription” being misused.[14]

In the analysis of the issue of prescription, we should start from the provisions of art. 2523 of the Civil Code, which provide "*The prescription begins to run from the date when the holder of the right to action knew or, depending on the circumstances, should have known its occurrence*."

These provisions must be corroborated with art. 2528 of the same code: "*The prescription of the right to action in reparation of a damage that was caused by an illicit deed begins to run from the date when the injured party knew or should have known both the damage and the person responsible for it."*

The above provisions are interpreted in the matter of compensations requested pursuant to art. 19 of Law no. 554/2004 by reference to the text of this article, which provides, as we have already shown, that special term of one year.

The prescription of the material right to action was settled by the High Court of Cassation and Justice as follows: - „*79. The limitation period is one year and runs from the date on which the* ***claimant knew or should have known the extent of the damage*** *[...], the time at which the* ***injured person knew or should have known the extent of the damage is a matter of fact*** *which is determined according to the circumstances of the case, taking into account the* ***nature***, ***content*** *and* ***effects*** *of the illegal administrative conduct* ”.

In the light of the foregoing, it is common ground that the date of final decision notification has no relevance in determining when the limitation period begins to run, determining, *inter alia*, the nature, content and effects of the unlawful administrative act.

On the provisions of art. 19 para. 2 of Law no. 554/2004 on administrative litigation, the Constitutional Court also ruled by Decision no. 568 of June 7, 2007, published in the Official Journal no. 544 of August 9, 2007 showing that the term provided in art. 19 para. 2 considers precisely those situations in which, at the moment of introducing the petition for the annulment of the individual administrative act, the injured person cannot objectively know the existence and extent of the damage, so he cannot simultaneously formulate an action for compensation. After resolving the action for annulment, he may estimate and claim the damage caused by the annulled administrative act, having at his disposal a period of one year for the formulation of such an action. "

[14] Ovidiu Podaru, Dreptul administrativ. O concepție. O viziune (Administrative law. A conception. A vision), Hamangiu Publishing, BUcharest, 2017, p. 156

The active procedural quality was also settled by the High Court of Cassation and Justice which ruled that: *In the situation where the* ***injured person****, due to the fact that he did not know the amount of damage or for other reasons, did not file the petition for the annulment of the act, has the possibility to act under the conditions of art. 19 of Law no. 554/2004* ".

The claim for compensation formulated separately, based on the provisions of art. 19 of Law no. 554/2004, ***is conditioned by the existence of a court decision by which the action directed against the illegal, typical or assimilated administrative act was admitted, because the reparation of the injured person's damage is an intrinsic side of the administrative dispute****. Otherwise, the* ***claimant*** *can only resort to the common law for the incumbent liability of the public authority, under the conditions provided by the Civil Code.*

From the systematic interpretation of the provisions [...], ***the rule of the action in subjective litigation of full jurisdiction*** *is outlined, containing also the petition regarding the* ***payment of compensations*** *for reparation and removal of the harmful consequences of the administrative act - typical or assimilated - illegal. Therefore, the procedural way regulated by art. 19 is an exceptional one, which should be used only when the case provides evidence that would lead to the conclusion that the* ***claimant was not reasonably able to know the extent of the damage from the date of the action for annulment*** *within the terms provided in art. 11 of Law no. 554/2004. "*

From the considerations set out above, it results unequivocally that only the claimant in the action for annulment of the administrative act can have an active procedural capacity to introduce an action based on the provisions of art. 19 of Law no. 554/2004.

Moreover, this conclusion is also supported by the practice of the High Court of Cassation and Justice, of which we quote an extremely telling example: "*The provisions of art. 19 of Law no. 554/2004 concern the claims submitted after the annulment of the administrative act, under the conditions, the court procedure and the competence provided by Law no. 554/2004.*

Such a claim remains unresolved, only because the injured person did not request, together with the annulment of the administrative act and compensations [art. 19 para. (1)], the party may address separately a petition to the same court competent to resolve the main dispute [art. 19 para. (2)]. This legal provision is a procedural application of the rule of accessories, the court competent in resolving the main claim (seeking annulment of the act) remaining competent to adjudicate the accessory claim consisting in damages, even when it was not brought to trial at the same time as the main one.

On the other hand, as long as the contravention report was not subject to control and annulled under the conditions provided by Law no. 554/2004, but pursuant to G.O. no. 2/2001, normative act that represents the basis in contravention matter, the determination of the competence to solve the action for repairing the damage produced by the wrong finding of the contravention, will not be made under the conditions of art. 19 of Law no. 554/2004, but in relation to the common law norms of the civil procedure, to which the provisions of art. 47 of O.G. no. 2/2001 refer. Thus, the administrative nature of the annulled act - identified as the cause of the damage - is not relevant, as long as the dispute is evaded from the contentious-administrative jurisdiction regulated by Law no. 554/2004 and subject to the rules of common law as a court procedure and rules of jurisdiction.

The essential difference between administrative disputes given in the jurisdiction of certain courts by special rules and those given only in the jurisdiction of ordinary administrative courts is that the former will not be judged according to the procedure provided by the law of administrative litigation, based on the common law procedure of civil procedural law." (High Court of Cassation and Justice, Decision no. 286/2017 - Minutes of finding and sanctioning the contravention. Damage created as a result of illegal confiscation of property and application of the fine. Annulment of the act under Government Ordinance no. 2/2001. Action for damages based on the provisions of common law (substantive procedural jurisdiction to settle the dispute, published in the Bulletin of Cassation No. 12 of

December 30, 2017).

3. CONCLUSIONS

In the current system imagined by Law no. 554/2004 of the administrative litigation, the liability of the public authorities for the acts they issue has become a guarantee and a protection. We can say that it is a dimension of the rule of law, because without these guarantees, we would face forms without merits.

The law therefore regulates this pecuniary liability in several texts, providing for the possibility of claiming damages from the moment the object of the action is regulated in administrative litigation, subsequently providing for the possibility for the court to grant them (see the solutions that the court may rule), in order to subsequently dedicate a separate text to the situation in which the injured party did not know at the time of the action the extent of the damage, subsequently formulating a petition in this regard.

Therefore, we face a protection offered by law so that the citizen not only benefits from the annulment of the act / recognition of the right but also from the coverage of any damages he would have suffered, a natural solution meant to put the authorities in a position to think thoroughly when deciding on the issuance of an act.

The damages suffered by the individual can be significant, especially when we consider the individual administrative acts, which can infringe extremely concrete legitimate rights and interests, related to the situation of the beneficiary. Only if we consider the effects and impact of a cancelled or suspended building permit, the picture of damage becomes quite clear.

However, as we have shown, the texts of Law no. 554/2004 with incidence in the matter were criticized, being gaps in wording and expression. It is from here that the need to clarify the interpretation arose, an aspect widely debated as a result of the admission of appeal in the interest of the law analysed in this study.

Under the impact of those presented, in view of the criticisms and comments taken into account, we do not exclude the possibility of amending the incident legislation, in the sense of establishing clearer criteria for the administrative court to take into account in awarding material and especially moral damages. We insist on this point, since, as we have shown, moral damages remain in the current form of the law in the realm of a probation that is quite difficult to perform, both the claimant and the judge being subject to arbitrariness. In the matter of moral damages, the claimant will always plead the case with a dose of subjectivism, and, in the absence of award criteria (quite difficult to imagine), the judge will resort to free will in granting / diminishing / rejecting them.

However, the overall picture provided by the Law on Administrative Litigation remains one of citizen's protection against the abuses of public authorities, which, as I said, encourages the struggle of individuals with the state. The appeal of the litigant before the judge for a full understanding of the case remains the last redoubt he must conquer and a desideratum of the hope reported to the principle "*Fiat justitia, perat mundi.*"

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SOME THOUGHTS ON PERFORMING A LAW ENFORCEMENT PUBLIC TASK AS A PUBLIC SERVICE

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ABSTRACT: *The present study aims to show how law enforcement activity emerges as a public service in European countries. The study does not cover a more profound presentation of each idea's practical implementation, as this requires a more comprehensive review. We can see, different countries organize law enforcement in their country from various professional and organizational aspects. It is also necessary to explain that the concept of policing, as a starting point, is interpreted differently, which determines the direction of their perception. The study presents some examples: we can also see examples of UK and continental European solutions.*

KEY WORDS: *law enforcement, public task, public service, police*

INTRODUCTION

The concept of security is gaining a more and more comprehensive interpretation. In a changing security environment, challenges, risks and threats now emerge at multiple levels - at the level of individuals, communities, states and regions, and the global level - and individuals, governmental and non-governmental organizations, and affect a wide range of transnational actors. Today, the joint management of the political, military, economic and financial, social, including human and minority rights, and environmental dimensions of security has become essential. However, XXI. century, the military segment of security chooses with new emphases. Security policy challenges, which require comprehensive and coordinated political, economic and, where necessary, military action, are becoming increasingly important. Globalization and unequal development are causing profound changes in Hungary's security environment. The process of globalization and international integration not only strengthens openness and better access to the achievements of action but also makes them more vulnerable to the effects of threats and dangers. New centres of power have emerged or are rising, and we must reasonably reckon with weak and dysfunctional states. For each actor, scientific and technological advances do not represent targeted uses in the context of strategic threats. The emergence and strengthening of non-state actors threatening security continues. All this rearranges and makes the security situation in each region and the international balance of power more unpredictable.

CONCEPTUAL BASIS

Perhaps there are few disciplines in the world today that would struggle with such terminological chaos as law enforcement. For example, the definition of law enforcement in Hungarian literature, like law enforcement, is quite controversial. In some cases, policing is applied to the mere performance of the police organization; in other cases, the authors use an extremely comprehensive concept of policing. According to the latter, the policing is the segment of public administration that provides general security to society and that eliminates disturbances resulting from unlawful human behaviour in possession of a monopoly of

legitimate physical violence.[1] At the same time, law enforcement activities are carried out by other law enforcement and administrative bodies, and even by private economic organizations. In this sense, a law enforcement-type task may sometimes be performed by a professional member of a law enforcement organization, a non-law enforcement officer of the Immigration and Citizenship Office, or a member of the Nature Conservation Service, and we could list. In a broad sense, security can also be assessed as a law enforcement activity: the activity of a field guard employed by the local government or even a plant police officer employed by an economic organization, as well as the area covered by private security market participants (money carriers, bank guards, security guards).

Conceptual, definitional problems come under even more severe judgment if we realize that there are indeed contradictory, opaque, overlapping directions in terms of basic concepts as well. It is enough to think of the concept of law enforcement (or law enforcement science). The term is specifically a Hungarian entity, although of course its equivalent is used abroad; however, the term is known in German (Polizei and its various forms), and Anglo-Saxon fields (Policy and its various forms) return the definition immanent in any way essence rather than formally.[2] Regarding the concept of policing, we can distinguish (among many other demarcations) the concepts of material, institutional (or organizational), and formal policing.[3] The essence of the material concept is that he perceives the police as the embodiment of legitimate violence and legal coercion, the aim of which is to protect individuals and society from conduct that threatens public order and public security. The term institutional (or organizational) refers to a specific group of bodies and institutions that have law enforcement powers. In a formal sense, we mean the functions that the state exercises by its law enforcement agencies.[4]

In the present work, we use law enforcement in a narrow sense, i.e. as a concept identical to or close to "classical" law enforcement, i.e. as a collective category of conduct aimed at preventing or eliminating violations or threats to public order and ensuring public order.[5] To further nuance the picture, we must also refer to the fact that today (and even before today) there have been trends that have brought with them new concepts. This circumstance further complicated the already problem-free conception or use. For example, municipal police and community police have emerged as new concepts, but we could go on and on.

In terms of its tasks and powers, the municipal police is similar to the state (centralized) police, however, it is subordinated to the given local government, so from the point of view of leadership the local government is a relevant police body operating as an integral part of it. Thus, the municipal police is an alternative to the state-run police - although perhaps it is better to look at it as an adjunct - already if we consider the place held in the organizational system of the public administration.[6] Examining the issue only from the side of public service - and not from the side of police, law enforcement - the primary difference between the two organizational structures is which public entity provides the public service and which is

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[1] See, for example, the standpoint of Géza Finszter. Finszter Géza: A rendészeti rendszer alkotmányos és közjogi alapjai [The constitutional and public law foundations of the law enforcement system], Budapest, 2008, 18-19.

[2] Katona Géza: A kriminálpolitikai és a rendészettudományi fogalomrendszer analízise, az egységes fogalomhasználat biztosítása [Analysis of the concept system of criminal policy and law enforcement, ensuring uniform use of concepts], Budapest, 2008, 11.; Szamel Lajos: A rendészet és a rendőrség jogi szabályozásának elméleti alapjai [Theoretical bases of the legal regulation of the law enforcement and the police]. Budapest, 1990, 27.

[3] Katona Géza: Adalékok a rendészet fogalmának meghatározásához [Additives to define law enforcement]. Rendészeti Szemle, 1993/6.

[4] Hans-Gerd Pieper: Polizei- und Ordnungsrecht NRW [Police and police security law], ALPMANN und SCHMIDT, Münster, 2011, 1.

[5] To put it simply, we mean policing in the ordinary sense, and we do not cover areas such as immigration, border policing, fire policing, disaster relief, environmental policing..

[6] For an overview of Hungarian concepts, see Kökényesi József: Az önkormányzati rendészet néhány kérdése [Some questions of local government policing], Budapest, 2008.

responsible for it. It is clear that, even if a clean model could be implemented, but there is very little chance of this in the current situation in Europe, the state or the municipality would be solely responsible for providing this public service. However, it is not difficult to see that public service is also unequal in the case of the state police model, as in some areas serve more police officers, with more professional commitment, etc., in others, there is less, which in itself is disproportionate. If only the local government model were to be implemented, these inequalities would probably - and certainly - intensify. Why? Because the municipality is responsible for the provision of the public service, including its financing. Just looking around, either in Hungary or in Europe, near or far, it can be seen that a municipality with stronger economic potential can objectively provide more resources for police tasks than a poorer settlement with only modest economic potential (county, region, etc.).

Moreover, a larger resource can mean more professionals, more modern technology, and possibly better working conditions, which can mean a higher level of public service, ergo better public safety. Of course, we must also draw attention to the fact that in the case of such a model, a more favourable resource background is not enough in itself, as it is only an objective option, but by no means a guarantee of better public service, as it requires from their political will, resources can be allocated to the provision of certain public services, without which economic opportunities will only be realized as untapped opportunities. On the other hand, it is also true that a municipality that can present more modest resources can spend more on its police if decision-makers so decide. However, given that as a result of the global crisis that began in 2008, the possibilities of accessing resources have not been reduced, it is also conceivable that more resources would be available only at the expense of other public services.

About municipal police, there has been a recent structural change in the several Member States of the European Union. In Belgium, police reform took place in 2000 and 2002.[7] The former federal gendarmerie, the federal criminal police, and the community police were integrated into a police organization (Integrated Police). The integrated police were organized at two levels of competence: the Federal Police, which employs 13,000 staff, and the Local Police, which is zoned and has 27,000 staff. Based on these, we could ask how the population judges the reorganization of the police, its efficiency. Studies conducted in 2008-2009 show that 80% of the population is satisfied with the reorganization of the police.

In Austria, the 37 Community security guards have nearly the same rights as the federal police, so it is immediately apparent that there is a level of community policing below, or rather in addition to, the federal level. Accordingly, Austrian law precisely defines the competences and powers of each body.

In Italy, by contrast, the picture is rather inhomogeneous for local police. Every Italian municipality has one or more local police officers on duty. However, the local police co-operate with the national police in very different ways, and these standards of cooperation are extremely difficult to compare between municipal police. It is also difficult to see that there are several police units at the national level, or at least law enforcement: the Police of the State (Polizia di Stato), the Gendarmerie (Carabinieri), the Financial Guard (Guardia di Finanza) and the Penitentiary Police (Polizia Penitenziaria).

In England and Wales, the Police Reform Act came into force in May 2012. One of the important elements of the reform was the involvement of the population, the civil sphere, and the strengthening of cooperation - as we have already indicated as a trend. As part of the reform, residents will elect the Police and Crime Commissioner (PCC) for each police station. This process is not exactly like the practice in Anglo-Saxon, USA, where the sheriff is also elected there. The legislator hopes that this measure will strengthen the local responsibility and role in maintaining local security and will replace the work of the existing Police

[7] Gregor Wenda: Kommunale Polizei in Europa, Öffentliche Sicherheit [Local Police in Europe, Public Security], 2012/1-2., 54-55.

Authorities. Of course, we must not forget that this actor enjoys the political support of public life; he/she has achieved his election because candidates supported by political parties are running for office.

The community police is an immanent feature of social cooperation.[8] In the concept, community refers to the community of people, and this can be interpreted at different levels of society.[9] The starting point of the community police and the key to its effectiveness and efficiency is paying attention to social problems, understanding them and the intention to solve them.[10] Thus, community-type policing does not act in a society based on the authority of state authority but is nurtured by the trust of law-abiding members of social groups. In the absence of this trust, the efficiency of the police is greatly reduced, as exemplified by the example of centralized, state-owned police (most recently, for example, the idea of a community police force in Central and Eastern Europe). It does not only apply to state law enforcement activities, and especially not only to Hungary, but we must refer to the fact that the pre-existing trust of society and individuals in the state institutional system has faltered. However, this too means that, as the police have to build on the trust and involvement of citizens and members of society, the efficiency of the police is reduced, as the information needed to operate does not or does not reach it as quickly as it does necessary for efficient and effective operation. As a result of this loss of confidence, the image of the community police is logically strengthened, which may be of great help in restoring social trust.[11] At this point, however, we must definitely refer to a significant circumstance: the community police are not exclusively the same as the municipal police. After all, if a person who is not sensitive to the problems of the given community, and in some cases not from that community (i.e. from another settlement, for example) performs law enforcement activities, we can talk about municipal police, but not about the community.[12]

CONCLUSIONS

As can be seen above, law enforcement is organized differently in European countries. This difference is mainly because different countries have different historical and social traditions. Whichever solution we examine, despite the differences, each aims to preserve public order and public order. The countries' goal is always to develop an efficient, economic and professional law enforcement activity as a public service. How effective this is always determined by social context.

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[8] Finszter Géza: A rendészeti rendszer alkotmányos és közjogi alapjai [The constitutional and public law foundations of the law enforcement system], Budapest, 2008, 143.

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[10] Jelentőségéhez lásd Mátyás Szabolcs: A településszerkezet és a bűnözés összefüggései a magyar főváros példáján [The connections between the settlement structure and crime on the example of the Hungarian capital], Belügyi Szemle, 2018/5, 105-115.

[11] Education also has a role to play in this. See Elena-Ana Iancu: Quality education by implementing standards in the law field. In: Elena-Ana Iancu (Nechita) [ed.]: Siguranţa persoanei şi construirea capitalului social - The person's safety and building social capital, Universul Juridic, Bucharest, 2019, 563-565.

[12] Christián László: A rendészet alapvonalai, önkormányzati rendőrség [Basic lines of policing, municipal police], Universitas-Győr Nonprofit Kft, Győr, 2011, 185.

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OBSERVANCE OF HUMAN DIGNITY; EXCLUDING THE EVIDENCE OBTAINED IN VIOLATION OF THIS RIGHT DURING THE PRELIMINARY CHAMBER PHASE

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ABSTRACT

Production of evidence, as a procedural activity carried out by the criminal judicial bodies, must be made in strict accordance with the legal provisions, so as not to harm the rights and legitimate interests of any person; at the same time, the existence of a deontology regarding the methodology of production of evidence is fundamental in the probation process.

If the criminal investigation bodies proceed to the production of evidence with non-respect regarding the right to human dignity, the preliminary chamber judge will be able, in accordance with the law, to apply the sanction of exclusion of the evidence.

KEYWORDS: *observance of human dignity, evidence, exclusion of evidence, preliminary chamber, personal safety.*

INTRODUCTION

Preliminary, we emphasize that the issue of evidence is one of the essential issues regarding the criminal process. In this regard, pursuant to the provisions in art. 5 of the Criminal Procedure Code, the judicial bodies are under an obligation to ensure the finding of the truth about the facts and circumstances of the case, based on evidence, and about the person of the suspect or defendant; it is necessary that the evidence to be administered objectively, in full compliance with the requirement of fairness.

The administration of evidence is therefore a complex procedural activity through which the criminal judicial bodies, *ex officio* or at the request of the parties and the main procedural subjects, proceed to gather the factual elements necessary for the fair settlement of the case.

In this regard, pursuant to the provisions in art. 100 (1) of the Criminal Procedure Code, during the criminal investigation, criminal investigation bodies gather and produce evidence both in favor and against a suspect or a defendant, *ex officio* or upon request. Also, during the trial, the court produces evidence upon request by the prosecutor, the victim or the parties and, subsidiarily, *ex officio*, when it deems it necessary for the creation of its own conviction. As an expression of an important guarantee of the fairness of the criminal process, pursuant to the provisions in art. 100 (3) of the Criminal Procedure Code, an application regarding the production of evidence filed during the criminal investigation or the trial is sustained or denied, on a justified basis, by the judicial bodies.

We also emphasize that the activity of evidence administration is directed by both the general and the special requirements inscribed in the Criminal Procedure Code and involves recourse to the evidentiary procedures and means of proof provided by law. During this important procedural activity, the criminal judicial bodies are forbidden to infringe, in any way, the rights and interests of the parties and the main procedural subjects.

From this perspective, we note that article 101 of the Criminal Procedure Code took over some provisions of the Criminal Procedure Code of 1968 and established the principle of loyalty regarding the administration of evidence, principle which includes, as we shall see,

several aspects. In connection with this principle, the romanian legislator (which has been inspired by the *common law* tradition) regulated the sanction of excluding evidence obtained illegally, as a result of non-compliance with the prohibition to administer evidence in such a manner.

Consequently, we consider that the present study finds its relevance in the context of the section of the conference called "The person's safety from the perspective of respecting the fundamental rights during judicial proceedings". In this regard, we note that, within the judicial procedures, the safety of the person is also guaranteed by strictly respecting the right to dignity, as a basic rule of the Romanian criminal process.

HUMAN DIGNITY - FUNDAMENTAL PRINCIPLE OF THE ROMANIAN CRIMINAL TRIAL

In accordance with art. 11, para. (1) of the Criminal Procedure Code, ,,Any person under criminal investigation or on trial shall be treated in compliance with their human dignity". As it can be observed, the legislator preserved the right to human dignity in the provisions currently in force, as a core rule of the Romanian criminal proceedings. Likewise, pursuant to art. 22 para. (2) of the Constitution, ,,No one may be subjected to torture or to any kind of inhuman or degrading punishment or treatment".

Thus, the core rule under review, a genuine guiding and fundamental notion[1], establishes the legal framework regarding the applicable treatment to the suspect or defendant during the criminal trial, the prerequisite for ensuring human dignity, during all stages of the criminal proceedings[2], not just during prosecution and trial.

Furthermore, it is to be noted that this principle is enshrined by art. 3 of the European Convention on Human Rights (body of law which regulates an absolute right, which speaks of five elements, namely: torture, inhuman punishment, degrading punishment, inhuman treatment and degrading treatment), as well as in art. 1 of the Charter of Fundamental Rights of the European Union, in relation to which ,,Human dignity is inviolable. It must be respected and protected". Moreover, according to art. 4 of the same provision, ,,No one shall be subjected to torture or to inhuman or degrading treatment or punishment".

As indicated, the requirement of human dignity observance implies, in addition to other elements, the prohibition of torture, inhuman and degrading treatment, and is closely linked to loyalty and the legality of obtaining evidence during the legal process[3]. As to assessing the severity of treatments to which a person is subject to during the criminal trial, we emphasize that this is done depending on various factors (for example, the nature and duration of treatments, the method of execution, age or health status of the victim)[4].

It should also be emphasized that, along with the express provisions found in art. 11 para. (1) of the Criminal Procedure Code, the criminal law and criminal procedure provisions in force also contain other regulations which convey the impression of genuine guarantees in terms of applying the rule of human dignity observance[5]. For instance, in light of art. 101 para. (1) of the Criminal Procedure Code, in order to obtain evidence, the legislator enshrined the principle of loyalty in the process of gathering evidence, prohibiting the use of violence, threats or other means of coercion, as well as promises or exhortations.

Likewise, according to art. 101 para. (2) of the Criminal Procedure Code, ,,Hearing methods or techniques capable of affecting the capacity of persons to remember and tell

[1] Nicolae Volonciu, *Drept procesual penal*, "Editura Didactică şi Pedagogică'' Publishing House, Bucharest, 1972, p. 44.

[2] Gheorghiţă Mateuţ, *Procedură penală. Partea generală*, "Universul Juridic" Publishing House, Bucharest, 2019, p. 97; Ion Neagu, Mircea Damaschin, *Tratat de procedură penală. Partea generală*, "Universul Juridic" Publishing House, Bucharest, 2014, p. 106.

[3] Gheorghiţă Mateuţ, *op. cit.,* p. 97.

[4] ECHR, *Kostadinov vs. Bulgaria*, 7th of July 2003, available at *www.echr.coe.int.*

[5] Anca-Lelia Lorincz, *Drept procesual penal*, vol. I, "Universul Juridic'' Publishing House, Bucharest, 2015, p. 49.

conscientiously and voluntarily facts representing the object of evidence gathering may not be used. Such prohibition applies even if a person subject to such hearing gives their consent in relation to the use of such hearing methods and techniques". Consolidating the fundamental principle inscribed in art. 11 para. (1) of the Criminal Procedure Code, the legislator established, according to art. 102 para. (1) of the Criminal Procedure Code, the sanction of excluding evidence obtained through torture and evidence derived from such means.

Another category of provisions, by means of which the principle of observing human dignity is ensured indirectly[6], encompasses, for example, the following: (i) the special rules of hearing, set out in art. 106 para. (1) of the of the Criminal Procedure Code, according to which „If, during the hearing of a person, such person shows visible signs of excessive fatigue or symptoms of a disease that affect their physical or psychological capacity to participate in the hearing, judicial bodies shall order cessation of the hearing and, if the case, shall procure that the person is examined by a physician"; art. 110 para. (1) of the Criminal Procedure Code, in relation to which the time when the hearing started and when the hearing ended shall be mentioned every time in the content of the statement, thus preventing a lengthy and excessive procedure.

Lastly, we emphasize that the substantive criminal law provisions in force provide several crimes in obstruction of justice, the legislator taking into account, in this regard, the criminal prosecution of those official procedural subjects which, during the criminal proceedings, disregard the right to human dignity. Whit regard to this, we shall consider the crimes of abusive prosecution (art. 280 of the Criminal Code), submission to ill treatment (art. 281 of the Criminal Code) and torture (art. 282 of the Criminal Code).

BRIEF REVIEW REGARDING THE OBJECT OF THE PROCEDURAL PHASE OF THE PRELIMINARY CHAMBER

As it can be observed by reading the statement of reasons of the new Criminal Procedure Code[7], regulating the preliminary chamber's jurisdiction within the architecture of the criminal process in our country began from the realities of the contemporary legal life, characterized by "the lack of celerity of criminal proceedings, in general". In this context, the legislator's intention was that the institution of preliminary chamber should have a significant role, with reference to the removal of the excessive duration of the criminal trial, by enshrining a simplified mechanism aimed at verifying the legality of the criminal investigation phase[8].

Consequently, in the current configuration, the Romanian criminal proceedings consist of four procedural phases, as follows: the criminal prosecution, the preliminary chamber, the judgement and the enforcement of the criminal court decisions. Thus, the procedure set out by art. 342-348 of the Criminal Procedure Code appears as an autonomous procedural phase, and not as a procedural stage integrated in the trial phase, as it has rightly been retained both in the legal literature[9] and in the constant jurisprudence of the Constitutional Court[10].

The newly regulated jurisdiction (which has been given the name of preliminary chamber judge), carries out an *a posteriori* legality check regarding the documents drawn up during the criminal prosecution[11]. Therefore, in light of art. 342 of the Criminal Procedure Code, the purpose of the preliminary chamber procedure is to verify, after the indictment, the

[6] Ion Neagu, Mircea Damaschin, *op. cit.,* p. 107.

[7] The substantiation note to the New Criminal Procedure Code, according to the Ministry of Justice webpage http://www.just.ro, visited on 12.10.2020.

[8] Nicolae Volonciu, Alexandru Vasiliu, Radu Gheorghe, *Noul Cod de procedură penală adnotat. Partea specială*, ''Universul Juridic'' Publishing House, Bucharest, 2016, p. 123.

[9] Anca-Lelia Lorincz, *Drept procesual penal*, vol.II, ''Universul Juridic'' Publishing House, Bucharest, 2016, p. 53; Gh. Mateuţ, *op. cit.,* p. 27.

[10] Constitutional Court, Decision no. 641 of 11 November 2014, published with the Official Gazette of Romania no. 887 of 5 December 2014.

[11] Gheorghiţă Mateuţ, *op. cit.,* p. 66.

competence and lawfulness of seizing the court, as well as to check the lawfulness of the administration of evidence gathered and the procedural acts undertaken by the criminal prosecution bodies. Thus, the legal mechanism of the preliminary chamber procedure was conceived by the legislator in the sense of corresponding to the accomplishment of the judicial function of verifying the lawfulness of the sending to trial, in order to create the premises for the rapid settlement of the merits of the case[12].

Under these circumstances, during the jurisdiction of the preliminary chamber, the validity of the evidence gathered or the indictment can't be reviewed, the competent judge not being able to deliver a ruling regarding the judicial actions in the criminal proceedings.

Furthermore, *de lege lata*, the preliminary chamber judge is unable to perform a thorough examination of the evidence gathered, his activity being confined to the sphere of lawfulness. Thus, according to article 3, para (3) of the Criminal Procedure Code, the lawfulness of the indictment and evidence it relies upon (as well as the lawfulness of decisions to drop charges) shall be subject to approval by the preliminary chamber judge, as under the law. Undoubtedly, the review of the lawfulness of the administration of evidence gathered represents a distinct objective of the preliminary chamber procedure, the legislator conceiving it separately from the review of the regularity of the indictment.

As it can be noted, the preliminary chamber judge is assigned with the important task of carrying out an objective precisely determined by the legal framework, thus preparing the upcoming procedural phase (that of the trial). Despite the fact that the duties of the preliminary chamber judge do not concern the merits of the case, we consider that the role of this jurisdiction is one of crucial importance within the criminal proceedings. As such, legal literature[13] has found, in a substantiated manner, that the decisions which can be ordered during the preliminary chamber proceedings, regarding the lawfulness of the pre-jurisdictional phase of prosecution can significantly influence the settlement of the criminal proceedings.

From this perspective, the ruling which can be issued by a grounded conclusion by the preliminary chamber judge[14], following an analysis on lawfulness, aims at either the commencement of the trial or the return of the case to the prosecutor's office.

CONSIDERATIONS REGARDING THE EXCLUSION OF EVIDENCE OBTAINED IN VIOLATION OF THE RIGHT TO DIGNITY

As a preliminary point, we emphasize that the current Criminal Procedure Code has enshrined, as an innovation, a sanction which applies exclusively in cases of evidence administered in breach of the principle of legality, an institution referred to as the exclusion of evidence obtained illegally. As literature has rightly expressed[15], the purpose of this sanction includes both evidence administered in violation of legal provisions and evidence obtained by failing to comply with the principle of loyalty in producing evidence.

This procedural sanction, which occurs even in cases of disregard for the fundamental rights and freedoms enshrined by the European Convention (such as the use of torture or inhuman or degrading treatment during hearings) is encountered in the adversarial procedural system, being closely linked to the notion of the rule of law[16]. In the legal system of the United States, where the sanction of exclusion of evidence produced in violation of law has

[12] Anastasiu Crişu, *Drept procesual penal. Partea specială*, ''Hamangiu'' Publishing House, Bucharest, 2019, p. 118.

[13] Mihail Udroiu, *Procedură penală. Partea specială*, 3rd edition, ''C.H. Beck'' Publishing House, Bucharest, 2016, p. 149.

[14] Anca-Lelia Lorincz, *op. cit*., 2016, p. 56.

[15] Gheorghiţă Mateuţ, *op. cit.,* pp. 485-486; Mihail Udroiu (coordinator), *Codul de procedură penală. Comentariu pe articole*, 2nd edition, ''C.H. Beck'' Publishing House, Bucharest, 2017, pp. 417-422.

[16] Mihail Udroiu, *Procedură penală. Partea generală*, ''C.H. Beck'' Publishing House, Bucharest, 2014, p. 655.

made the highest progress, the influence of constitutional provisions has given the notion of exclusion of evidence a content of its own[17].

Regarding the sanction of exclusion, the doctrine has fundamentally stated that it is necessary for it to intervene as a last resort[18]; thus, the exclusion, jeopardizing, at times, the administration of criminal justice, must be applied with great caution.

The exclusion of evidence produced unlawfully, refers to evidence obtained during the first phase of the criminal trial, this procedural sanction being applicable, we believe, only when the preliminary chamber phase is taking place. Thus, by considering the provisions of art. 346 para. (3) section b) and art. 346 para. (5) of the Criminal Procedure Code, the application of the sanction of exclusion implies the restitution of the case to the prosecutor's office (in cases where one or more pieces of evidence have been excluded).

In light of art. 102 para (1) of the Criminal Procedure Code, „Evidence obtained through torture, as well as evidence deriving from such may not be used in criminal proceedings". Although this provision refers only to evidence gathered through torture, we consider that the rule must be interpreted in a broad manner, evidence obtained through the use of inhuman or degrading treatment, which have the same regime, being included as well[19]; in this regard, a similar reasoning has been identified in the jurisprudence of the European Court of Human Rights[20].

Respecting the absolute right inscribed in art. 3 of the European Convention, the Romanian legislator regulated in the aforementioned law text a case of automatic exclusion, independent of any procedural damage[21]. From this perspective, we emphasize that even in extreme situations (for example, the fight against organized crime or terrorism), the European Convention strictly prohibits torture and inhuman or degrading treatment, no derogations being allowed.

Furthermore, concerning art. 102 para (1) of the Criminal Procedure Code, it can be noted that not only evidence obtained directly by means of torture, but also evidence derived from such acts cannot be used. In other words, the sanction of exclusion is also applied in regard to evidence arising from evidence gathered in breach of art. 3 of the European Convention, in accordance with the doctrine of "fruit of the poisonous tree", found in the *common law*.

Therefore, while administering evidence, criminal judicial bodies may not prejudice the rights and interests of the parties and of the main procedural subjects. For example, during the hearing, the use of threats, violence or promises for the purpose of obtaining evidence is strictly prohibited, given that it is likely to be in violation of the right to dignity and, at the same time, to harm the prestige of criminal justice[22]. At the same time, in the category of prohibited procedures we include the provisions of art. 101 para. (2) of the Criminal Procedure Code, according to which, during the trial, certain special hearing methods (for example, hypnotism or narcosis) are not allowed, as they may defeat the conscious resistance of the person heard[23].

Thus, it can be stated that the criminal procedural regulation in force tends to satisfy the requirement of human dignity observance, as enshrined by art. 3 of the European Convention (body of law with direct applicability in national law). From this perspective, during the process of evidence, the judicial bodies cannot make use of physical or moral

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[17] J.B. Haddad, L.R. Meyer, J.B. Zagel, G.L. Starkman, W.J. Bauer, *Exclusionary Principles and Alternative Remedies for Unlawful Investigative Practice*, in „Criminal Procedure. Cases and Comments'', 7th ed., Thomson West, New York, 2003, p. 730.

[18] Gheorghiţă Mateuţ, *op. cit.*, p. 486.

[19] *Idem*, p. 487.

[20] ECHR, *Gäfgen vs. Germany*, 1st of June 2010, available at *www.echr.coe.int.*

[21] Mihail Udroiu, *op. cit*., 2014, p. 655.

[22] According to the European Convention's jurisprudence, the use of evidence obtained through torture is a denial of justice (ECHR, *Othman vs. United Kingdom*, 17th of January 2012, available at *www.echr.coe.int.*).

[23] Gheorghiţă Mateuţ, *op. cit.,* p. 477.

violence (for example, as it can happen in the case of abnormal prolongation of the interrogation, without breaks), otherwise the sanction of exclusion of evidence shall intervene.

Moreover, it should be emphasized that in the case law formed after the entry into force of the current Criminal Procedure Code, there have been identified numerous cases in which the coercion consisting of degrading and inhuman treatment committed by criminal prosecutors has been invoked before the preliminary chamber judge. For example, according to the report of a flagrant crime, the defendant inserted a piece of paper in the oral cavity, trying to destroy it by chewing it; however, this did not occur, as the criminal investigation body intervened and determined the defendant to remove the piece of paper by locking the jaw. During the preliminary chamber phase, it was considered that the defendant was not subjected to any degrading treatment, the judge stating that the intervention of the criminal investigation body did not aim to humiliate the defendant, but the preservation of a criminal body, considering that the purpose of the defendant's actions was to destroy it, at the time being, a less intrusive method not being identified at that time.

In addition, the entire action lasted for approximately 5 seconds and consisted only of preventing the defendant from chewing the piece of paper. Thus, the preliminary chamber judge considered that, *in concreto*, the defendant faced no suffering or humiliation of such intensity which could be classified as degrading treatment[24].

In other cases, our country has been convicted by the European Court of Human Rights on acts of violence perpetrated by the judiciary on individuals. For example, in the case of *Iambor v. Romania*[25], the Court found that the Romanian judicial authorities concealed physical aggression against persons in detention, thus violating the provisions of art. 3 of the European Convention.

CONCLUSIONS

Pursuant to the provisions in art. 11 (1) of the Criminal Procedure Code, „Any person under criminal investigation or on trial shall be treated in compliance with their human dignity''. Although this legal text refers to only two procedural phases, we consider that the legal provisions must be extended regarding the preliminary chamber procedure, respectively the enforcement of final decisions.

We also emphasize that at the basis of the principle of loyalty of the production of evidence (rule regulated in article 101 of the Criminal Procedure Code) is the requirement to prohibit any maneuvers which aims at the administration in bad faith of the means of proof or which results in the provocation of a criminal offence, in the context in which these procedures infringe on the dignity of the person, his right to a fair trial or the right to privacy.

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[24] Bucharest Tribunal, the decision of November 7, 2016, remained final through decision no. 72/24.02.2017, in Cristina Moisă, *Probele în procesul penal. Practică judiciară adnotată*, ''Hamangiu'' Publishing House, Bucharest, 2017, p. 69.

[25] ECHR, *Iambor vs. Romania*, 24th of June 2008, available at *www.echr.coe.int.*

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ROBERT MUGABE'S SIEGE ON JUSTICE: THE DEMISE OF THE SADC TRIBUNAL AND SOUTH AFRICA'S JUDICIAL REPARATIONS FOR ZIMBABWEANS

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ABSTRACT:
This research piece investigates how Zimbabwe's government was successful in rendering a regional court obsolete, with the implicit approval of South Africa. It also tackles how South Africa's judiciary stepped in to fill the resulting jurisdictional void by enforcing a distinctively detrimental decision on Robert Mugabe's regime on a particularly controversial subject for both countries: namely, land restitution. In achieving the above, South Africa's judicial branch managed to repair some of its executive's missteps in handling Zimbabwe's descent to authoritarianism – one brimming with human rights infringements and attacks on the rule of law. The article lies at the intersection of two humanities: political science and law, drawing themes and research methods from each. Still, it is not limited to practitioners from the said fields, being specifically constructed to be accessible to any interested reader.

KEYWORDS: *democracy; the rule of law; authoritarianism; national jurisdiction; sovereignty, land restitution, dispossession*

ZIMBABWE'S DEMOCRACY BESIEGED

During the Lancaster House Conference of 1979, Zimbabwe's regime conceded defeat, and the country once again became a colony of Britain, thereby receiving a new constitution. Ian Smith's defeat also put an end to the internal war between Zimbabwe's liberation movements[1] and the minority government. Shortly thereafter, the British ended a period of 14 years of sanctions, and most of Zimbabwe's neighbours followed suit, alongside the UN. Zimbabwe emerged as an independent state on 18 April 1980, with Robert Mugabe as its Prime Minister and head of government and Canaan Banana as its ceremonial President, after ZANU's landslide victory in elections. In the decades to follow, Mugabe established himself as the *de facto* ruler of Zimbabwe by gradually seizing the country's power structures. Dissent was silenced through either coercion or co-optation for almost three decades. ZANU-PF's elites eventually ousted Robert Mugabe from power in 2017, after an intraparty fight for power.

In the late 1990s, Zimbabwe's political system was marked by a classical form of authoritarianism. Political power was centralised around the figure of President Mugabe and his clientele – mainly composed of ruling party members and supporters. This client-patron relationship is what enabled ruptures in the democratic process. The holders of political power relied on nationalism when promoting a culture of intolerance towards the other part of society, which encapsulated political parties, civil society organisations, labour unions, and professionals from all spheres of work, including the judiciary. On the other hand, the divergent part of the population articulated narratives of 'transition', amid hopes that ZANU-PF would cede power and that a new regime would strive for further democratisation. The establishment grew tired of this latter category not falling in line with its *modus operandi*;

[1] The Zimbabwe African National Union (ZANU) and Zimbabwe African People's Union (ZAPU)

thus, it started considering them enemies of the state – as the former took upon themselves to be the only legitimate representatives of the state.

Briefly, the independent judiciary was bullied into submission; the remaining cluster of the free press was manipulated into demonising the political opposition, and civil society was either drawn in by threats or incentivised to give up their advocacy role.

Due to government overspending, generalised corruption, and gross mismanagement, Zimbabwe faced one of the most catastrophic financial crises of modernity, which gave birth to popular dissatisfaction. As a result, Mugabe's government pushed back – in an attempt to cling to power and shrug off disapproval. Still, Mugabe was left unconstrained from other state powers.

Zimbabwe's (mostly) liberal Constitution was applied discretionarily, and one could not speak of a truly independent judiciary. This fertile ground allowed authoritarianism to foster and enabled President Mugabe to act as the supreme authority in law – sometimes the only such authority. Capitalising on his position, he often ignored court rulings, which the executive chose not to enforce[2] because, as Mugabe phrased it, Zimbabwe's administration "*respect[ed] judgments where the judgments [were] true judgments"*[3]. One can argue that the government sometimes acted as a control power - a sort of supra-judiciary, if you may: court decisions were measured, weighed, and those found wanting were dismissed. In numerous instances, dissenting judges were forced to resign,[4] while other judges retired in good health, without any declared reasons, only to have their posts filled by Mugabe loyalists.[5] White judges gradually left the judiciary amid pressures, as they were "*maligned because of their race and alleged links to the colonial era*". [6] One of the most pertinent examples of exclusion based on race is former Chief Justice Anthony Gubbay, who was forced to resign in 2001 after months of vilification. In theory, Zimbabwe's legislation provides checks and balances in the way the executive and legislative exercise their respective powers. However, in the period perused by our research, this system's effectiveness fell tributary to numerous controversies.

DE JURE AND DE FACTO – ON FORMS WITHOUT SUBSTANCE

In 2013, Zimbabwe introduced a new Constitution, after several counter-democratic amendments had made their way in the body of text in previous years. Relating to the independence of the judiciary, Section 164 of the said Constitution states that courts are independent and are subject only to the Constitution and the law, which they must apply impartially, and that no actor, regardless if they are a part of the state apparatus or an individual, may interfere to breach independence, which is crucial to the rule of law and, subsequently, to democratic governance.[7] The state is required to both assist and provide protection to the courts, not only through legislative means, which would "*ensure their independence, impartiality, dignity, accessibility and effectiveness*".[8] Nevertheless, courts'

[2] For a list of court decisions which had been ignored by 2003 see the footnote section of Arnold Tsunga, "The Legal Profession and the Judiciary as Human Rights Defenders in Zimbabwe in 2003. Separation or Consolidation of Powers on the part of the State?", Zimbabwe Lawyers for Human Rights (ZLHR), p. 2, Available at: http://archive.kubatana.net/docs/hr/zlhr_legal_judic_hrdef_031224.pdf.

[3] Robert Mugabe quoted in Tsunga, *ibid*.

[4] James R. Arnold and Roberta Weiner, *Robert Mugabe's Zimbabwe (Revised Edition)*, Minneapolis: Lerner Publishing, 2008, p. 84.

[5] Peta Thornycroft, "Zimbabwe High Court judge quits", *The Telegraph*, 04 January 2002, Available at: www.telegraph.co.uk/news/worldnews/africaandindianocean/zimbabwe/1380399/Zimbabwe-High-Court-judge-quits.html.

[6] *Ibid*.

[7] *Constitution of Zimbabwe 2013,* 22 May 2013, Section 164, Available at: www.refworld.org/docid/51ed090f4.html.

[8] *Ibid.*, Section 165.3.

impartiality and independence had been stipulated, albeit in simplified terms, in Zimbabwe's 1980 constitution and reinforced by a series of amendments, including one in 1990.[9]

Furthermore, Zimbabwe's new Constitution stipulates that the courts' decisions are binding on everyone, including the institutions and agencies of the state.[10] All the provisions above draw their inspiration from the 1996 Constitution of South Africa[11] and seek to cover the double-sided essence of judicial independence: institutional independence and the independence of decision-making. Even by afar, the text of the two constitutions, especially regarding judicial independence, is similar to such a degree that Zimbabwe's legislative power seems to have only rephrased what had been laid down by its South African counterpart. Taking the principles that function in South Africa and including them in the Zimbabwe's Constitution demonstrates an act of goodwill while also revealing a tangible way in which South Africa has impacted the legislative process of its neighbour. Nonetheless, we argue that similar to the case of the Lancaster Constitution, drawing inspiration from the form of a decree does not suffice, for certain values have to be embedded inside the branches of power, thereby providing a guarantee that the essence behind drafted legislation is known and understood, and can be applied. As for the presence of these 'guardian values', Mugabe's government's actions since the 1990s prompt one to show restraint and scepticism - to put it mildly.

If we were to extend the comparison between the constitutions of South Africa and Zimbabwe, we must note that the distinct ways in which the political settlements came to fruition. In South Africa, transition materialised organically - it was negotiated between stakeholders; whereas, in Zimbabwe's case, the transition was super-imposed by external entities, such as the UN or UK. Van Zyl Slabbert warned in 1992 that the constitutional order in Zimbabwe had been imposed by external actors, leading to a perilous construction from the get-go.[12] With no organic, internally negotiated settlement – such as in South Africa - the super-imposed Constitution, while not lacking in democratic principles, suffered from the absence of a sound source for those principles. Zimbabwe's independence came in the circumstances of a forceful marriage between a profoundly racist authoritarian regime and a Marxist liberation movement, namely ZANU. A long-lasting democratic order could hardly emerge from such a combination because the essential foundations needed were missing. Furthermore, ZANU was contested by its rival, ZAPU, and needed to identify ways to assert its supremacy within national politics: thereby, the construction of a healthy democratic order was not necessarily the main priority for the latter.

There are numerous historical ties between South Africa and Zimbabwe, as their colonial past made the two states fall victim to many of the same plagues. As such, the two countries sometimes have similar objectives. Restituting land to those dispossessed by the former regimes is *par excellence*, one of them. While in the past, the methods used by the two for pursuing said objectives demonstrated striking differences, the distinctions seem to have all but faded as of recent. South Africa's constant tacit approval of Mugabe's human rights infringements related to land restitution has attracted the government in Pretoria a sum of critiques from the West. Western leaders envisaged the regional hegemon as its own foothold in Africa. While that still rings true on many issues, when it comes to the historical retribution for the past minority governments' sins, one can understand South Africa's tendency to side with those with shared similar experiences.

ON LAND RESTITUTION AND FARM SEIZURES

[9] *Constitution of Zimbabwe 1980*, 18 April 1980, Ch. 8, Section. 79b, Available at: https://www.refworld.org/docid/3ae6b5720.html

[10] *Constitution of Zimbabwe 2013*, *op. cit.*, Section 164.

[11] *Constitution of the Republic of South Africa*, 10 December 1996, Section 165, Available at: www.refworld.org/docid/3ae6b5de4.html.

[12] See Frederik Van Zyl Slabbert, *The Quest for Democracy: South Africa in Transition*, London: Penguin, 1992.

The land seizures that took place under the colonial regimes of the past represent one of Zimbabwe's major unhealed wounds. Through a series of racist laws, land was confiscated from the majority population, who were sometimes resettled, and awarded to large scale white farmers. As such, historical retribution remains latched in Zimbabwe to the question of land. However, while returning land to the dispossessed black citizens of Zimbabwe has always been a prerogative, Zimbabwe's 1980 constitution has a generous part dedicated to the protection of property[13], in which forceful seizure was restricted but not forbidden. Amendments to the Constitution – most notably Act 30 of 1990,[14] further detailed the circumstances in which land could be acquired by mandatory compensation – and the jurisdiction to decide on possible litigations. In 1992, the Land Acquisition Act was passed, thereby extending the government's capacity to acquire land through compulsory action. Even with the said legislation in place, the land reform went slowly, and no decisive government action was taken in this regard until the end of the 1990s.[15] In 2000, the majority of Zimbabweans, rallied by the opposing party, Movement for Democratic Change (MDC), voted against the new Constitution proposed by Mugabe's regime. This fact sparked a violent outbreak orchestrated by ZANU-PF, which led to a series of occupations of white-owned farms. The administration called the seizures led by so-called war veterans' spontaneous' and did not admit to any involvement. Nevertheless, it soon became clear that the government was behind the entire affair, in a desperate attempt to flex their muscles so that they might deter the opposition from consolidating their standing within national politics. As the overwhelming part of literature in the field uses the syntagm 'war veterans' when referring to the squatters taking over farms, we have also adopted it. Still, some critics argue that only a small percentage of the squatters were veterans, the rest being too young to have fought in the independence war 20 years earlier.[16] In truth, up to 85% of the said veterans were unemployed youths paid by the ruling party.

THE SADC TRIBUNAL'S DEMISE

While the South African Development Community (SADC) was either limited or outright powerless in enforcing decisions about Zimbabwe, there had been binding treaties that made several institutions of the SADC, such as the SADC Tribunal, capable of resolving disputes and tackling the issues in the said state. The SADC Tribunal had been created back in 1992, but due to a series of delays and incidents,[17] it only appointed judges in 2005 and started hearing cases two years later.

A decision was reached in one of the Tribunal's first human rights cases, in November 2008. In *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe*, the plaintiffs argued that the land redistribution put in practice by the government against whites was illegal.[18] In 2007, the Tribunal had issued an interim ruling affirming its jurisdiction, granted that the Supreme Court of Zimbabwe had previously denied the plaintiffs the right to object to their land's seizure. Thus, the plaintiffs had been left without any potential domestic legal remedy. The SADC Tribunal ruled in favour of the plaintiffs, thereby reinforcing these specific farmers' right to lock the government's acquisition of their farms. The Tribunal also argued that farm evictions under Amendment 17 of Zimbabwe's Constitution[19] represented a *de facto*

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[13] *Constitution of Zimbabwe 1980*, *op. cit.*, Ch. 3, Para. Section 16.
[14] Also *Constitution of Zimbabwe Amendment (No. 14) Act*, 1996
[15] Beverly L. Peters and Naudé Malan, "Caveats for land reform in South Africa: Lessons from Zimbabwe", in South *African Journal of International Affairs*, 7 (2), 2000, p. 154.
[16] Linda van Buren, "Economy", in Katherine Murison (ed.), *Africa South of the Sahara*, London: Europa Publications 2004, p. 1232.
[17] On 18 January 2007, the Turnhalle building in Windhoek, which accommodated the court room burned down and was completely destroyed, with reconstruction starting in the fall, the same year.
[18] See "Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe (2/2007) [2008]", *SADC Tribunal 2*, 28 November 2008.
[19] Amendment 17 removes Zimbabwean courts' jurisdiction to hear an any plea that contests expropriations conducted by government.

discrimination of the country's white population,[20] and violated the SADC Treaty principles on non-discrimination and the rule of law[21].

Mugabe's government, however, refused to recognise the Tribunal's decision and vehemently opposed enforcing it. Zimbabwe pulled out of the SADC Tribunal in protest, as it had previously done from the Commonwealth of Nations.[22] These unilateral actions show a recurrent *modus operandi* of Mugabe, which, similarly to a child who clashes with others on the playground and can't bully the latter, picks up his toys and leaves whenever deemed suitable. Whereas in the Commonwealth, Harare's actions left Western powers unimpressed, inside the SADC, Mugabe's peers did their best to avoid taking action against Zimbabwe and accommodate at least part of its wishes. Arguably, inside African fora, Mugabe reputation and his statute of elder, made him untouchable. The denigration campaign against the Tribunal launched bu Zimbabwe furthered "*a stance amounting to non-compliance (with) enforceable rulings on human rights violations*",[23] bringing about a "*rule of power*"[24] that replaced the rule of law. During a 2010 Summit in Windhoek, the SADC ordered a review of the Tribunal's functions, role, and terms of reference.[25] South Africa stood silent on the issue, despite being legitimately expected to oppose such a move and pull the Tribunal forward, rather than accept pushing it back in time and rendering it invalid. Given its progressive Constitution and the constant trumpeted devotion to both human rights and the rule of law, this move can only be understood by analysing the regional political environment of that time through the lens of Pretoria's aspirations. We will not go in detail but contend with saying that South Africa's Nkosazana Dlamini-Zuma[26] needed Mugabe's support to win AU Chairmanship – after she had failed to secure a first-ballot win.[27] Thus, upsetting Zimbabwe's President could have entailed sacrificing more significant foreign policy objectives for South Africa.

Coming back from our excursus, we note that in the lack of other options, the farmers addressed their case to the South African court system. South Africa's courts ruled that the defunct Tribunal's verdict could be applied locally, granted that their country was a member of SADC and that regulations permitted such a move. The separation of powers in South Africa was still standing, despite its executive's past predilections to side with Mugabe. As such, Zimbabwean farmers had every reason to believe that South African judges would remain impartial when hearing their case. There was also a belief that Jacob Zuma, South Africa's new President, would be different from his predecessor and have a tougher stance on Zimbabwe.

Zimbabwe took the case through the Supreme Court, to the Constitutional Court of South Africa. In a landmark judgement from 2013, the Constitutional Court ruled that dispossessed farmers could sue in South African courts for compensation and attack Zimbabwe's assets in South Africa for compensation. The above constitutes the first ruling in international legal history, whereby a country's assets could be sold within another country, in

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[20] Mike Campbell vs Republic of Zimbabwe, *op. cit*.

[21] *Ibid.*

[22] See Dan Petrica, "South Africa's involvement in the issue of Zimbabwe's suspension from the Commonwealth of Nations", in *Comentario Internacional. Journal of the Andean Andean Center of International Studies*, 20, 2020.

[23] Andre Dumon, "The SADC Tribunal: The rule of power versus the rule of law - The Tribunal Tragedy ", *Helen Suzman Foundation*, 14 March 2013, Available at: hsf.org.za/resource-centre/hsf-briefs/the-sadc-tribunal-the-rule-of-power-versus-the-rule-of-law-the-tribunal-tragedy.

[24] *Ibid.*

[25] "Communique of the 30th Jubilee Summit of the SADC Heads of State and Government", *SADC*, Republic of Namibia, 17 August 2010.

[26] Nkosazana Dlamini-Zuma, the former wife of South African President Jacob Zuma, was amongst the leaders of the country's ruling party, the African National Congress (ANC). She served at the time as South Africa's Minister of Home Affairs.

[27] "AU chooses Nkosazana Dlamini-Zuma as leader", *BBC News*, 15 July 2012, Available at: www.bbc.com/news/world-africa-18846210.

settlement for human rights violations.[28] The Constitutional Court held that South Africa had obligations under a treaty, as a SADC member, to enforce the SADC Tribunal's decision against Zimbabwe in South African domestic courts.[29] This interpretation arose by developing the common-law doctrine of enforcement of foreign judgments to cover those pronounced by the SADC Tribunal. Despite contestation, the Court also held that no immunity could be granted to Zimbabwe in this specific case.[30]

The government in Harare felt the shockwave emanating from this ruling. But the decision also had entailed salient political implications for South Africa, where the land reform was not going as fast as planned, and voices calling for a Zimbabwe-like model began to multiply. We cannot stress the importance of this landmark case. It shows that the South African judiciary can resist the pressures that have made the SADC Tribunal crumble and capable of objectively judging human rights cases, which Zimbabwean Courts had refused to touch due to their sensitive nature. The situation presented above provides us with one instance in which South Africa's judicial branch demonstrates that it is free of the political constraints that keep the executive's hands tied. It does not hear nor decide cases based on foreign policy goals.

The decision reached by South Africa's court system signified that that rule of law could no longer be taken arbitrarily by Mugabe's government and that human rights, including that of property, must be sheltered. While Thabo Mbeki and, to some degree, Jacob Zuma needed to take into account several factors when dealing with Mugabe, such as the sometimes-unclear limits of (breaching) sovereignty, South Africa's independent judiciary gave a lesson to both the executive of Zimbabwe and to its judiciary, which was more or less attached to ZANU-PF. The principle of separation of power inherent in South Africa demonstrates that while the executive dictates foreign policy and how international relations are created and kept, the judiciary can also set the parameters when called upon to solve exceptional situations.

CONCLUSIVE REMARKS

The SADC Tribunal took the issue of land distribution into its hands, and in a landmark decision of late-2008, decreed that the farm invasions occurring in Zimbabwe had been illegal. Mugabe's regime met the decision with anger and refused to enforce it, only to pull Zimbabwe out from the Tribunal and successfully denigrate the institution. As a result, the Tribunal went under review and was later disbanded. South Africa's implicitly approved both decisions, for it had foreign policy goals that needed Mugabe's support. Furthermore, Pretoria pursued Zimbabwe's objective to further land restitution on its own territory, albeit by different means. Finding themselves in the impossibility of obtaining domestic remedies, the said landmark case's plaintiffs sought to transfer the judgement to South Africa's courts, hoping for impartiality. The case reached the Constitutional Court of South Africa, which, decided that the plaintiffs could sue in South Africa and held that South Africa had obligations arousing from treaties to enforce the SADC Tribunal's ruling against Zimbabwe. In South Africa, the judiciary was prompt to move from official governmental policy relating to its neighbour and prioritise human rights concerns and the sanctity of property rights. Thus, while not directly being a force of democratisation, South Africa's judiciary punished anti-democratic practices by compensating their victims through the sale of Zimbabwean assets.

The issue presented in this article is very relevant today, especially since in December 2018, South Africa's Constitutional Court ruled that President Zuma's participation in

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[28] See "Government of the Republic of Zimbabwe v Fick and Others (CCT 101/12) [2013] ZACC 22; 2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC) ", Constitutional Court of South Africa, 27 June 2013.

[29] *Ibid*.

[30] Immunity from civil jurisdiction and enforcement is usually accorded to foreign states by both international and South African domestic law.

abolishing the SADC Tribunal was unconstitutional. As such, South Africa withdrew its signature from the decision to disband the institution.

The SADC Tribunal is still suspended; nevertheless, prompted by its Constitutional Court, South Africa seems to have found a new impetus to revive the body, or, at the minimum, resuscitate the stalemated talks surrounding it.

This article's key takeaway is that even in the absence of political will to tackle the various problems threatening democracy in a neighbouring one country, the judicial branch of power can repair some of the harm inflicted by the executive's inaction or its counterproductive actions.

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CONSIDERATIONS ON THE IMPORTANCE OF THE EUROPEAN CRIMINAL LEGAL REGULATIONS CONTAINED IN THE TREATY OF LISBON

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ABSTRACT:*The establishment of a common European space of the Member States from an economic and judicial point of view has been the desideratum of the European states. The openness created by the European space, namely the free movement of people, generates an enormous advantage for Europe's population, but can also lead to Member States being exposed to various forms of cross-border crime that go beyond their borders.*

Free movement within the U.E. it must be accompanied by the strengthening of Member States' cooperation in the field of criminal justice and policing in order to ensure a framework of security and safety for European citizens.

European citizens have the right to move and live freely without fear of being exposed to various forms of crime. However, international crime in various forms: drug trafficking, trafficking in human beings, prostitution, pimping, theft, robbery, murder, terrorism is a worrying phenomenon for European citizens. The number of organized crime cases has increased, capital market offenses, illegal e-commerce activities as well as those related to the safety and physical and moral integrity of the person have increased significantly.

The issue of ensuring European criminal justice has thus been raised over time. Adoption of unitary criminal measures in the legislation of European states, but also at EU level. it is considered an effective means of preventing international crime and punishing those guilty of committing it.

We find in European documents criminal regulations at European level that define the common effort to reduce and limit international crime. In this article, I have focused on the latest fundamental European treaty: the Treaty of Lisbon, in which criminal law falling within the exclusive sphere of the Member States acquires European competences.

KEY WORDS: *Lisbon Treaty, Criminal Code, criminal law, European Union*

INTRODUCTION

Ensuring a climate of peace at European level in the wake of the atrocities and aftermath of World War II, which broke out just 20 years after the end of World War I, was the goal of the great politicians of the time.

Thus, starting with 1950, European countries begin to unite, economically and politically.

On May 9, 1950, the French Minister of Foreign Affairs, Robert Schuman[1] proposed that coal and steel production be jointly managed by European countries. In this way, no country could secretly arm itself against the others, coal being the most important source of energy available at that time.

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[1] He is considered one of the founding fathers of the European Union, and also served as President of the European Parliament from 1958 to 1960

1. THE EVOLUTION OF CRIMINAL REGULATIONS IN THE EUROPEAN TREATIES[2]

On 18 April 1951 the first European Treaty was signed, the Treaty establishing the European Coal and Steel Community, which entered into force on 23 July 1952 and established the European Coal and Steel Community.

This is the origin of the current European Union.

The European Coal and Steel Community was founded by six neighboring countries: Belgium, France, Germany, Italy, Luxembourg and the Netherlands.

The decision to set up the CECO led to the elimination of mistrust between states and the tensions that had accumulated during the Second World War.

In the first stage, this grandiose project of mutual support of the European states emphasized the strengthening of the economic cooperation, being involved in trade, the European states become interdependent from the economic point of view.

The importance of economic cooperation between states proved its effectiveness, which led to its extension to other economic sectors, with the signing of the Treaties of Rome[3] – The CEE and EURATOM treaties on 25 March 1957 and entered into force on 1 January 1958.

The European Economic Community, set up by the Treaty of Rome, has made great strides economically and contributed to the intensification of economic cooperation between the six signatory states.

The Merger Treaty - the Brussels Treaty, signed on 8 April 1965 and entered into force: 1 July 1967 saw some key changes in the existence of the new European bodies, with the aim of simplifying the European institutional framework by creating a single Commission and a single Council for all three European Communities (CEE, Euratom, CECO).

The Single European Act entered into force: 1 July 1987 and the Maastricht Treaty[4] by which the European Union was formally established.

The Maastricht Treaty was signed on 7 February 1992 and entered into force on 1 November 1993. This Treaty divided the spheres of competence of the European states into three pillars.

The third pillar, Cooperation in the field of justice and foreign affairs, sought to develop joint action through intergovernmental methods, in order to provide citizens with a high level of protection, in an area of freedom, security and justice.

What began as a strictly economic union has gradually become an entity with activities in countless fields, the third pillar referring to, among other things, the fight against terrorism, serious crime, drug trafficking and international fraud, judicial cooperation. in criminal and civil matters and the creation of a European Police Office (Europol) equipped with an information exchange system between national police.

The Treaty of Amsterdam[5] entered into force on 1 May 1999 and prepared the European Union for further enlargements. It has led to obviously more important consequences in the field of criminal law.

The European Council presented true principles underlying the collaboration between the various national authorities (judges, prosecutors, police) of the Member States, between them and the European criminal institutions, and between the latter: the principle of mutual recognition of judgments[6], sharing or availability of information, direct communication

[2] The European Union was created and is based on the rule of law. Any action taken by the U.E. derived from treaties. These treaties have been approved voluntarily and democratically by all Member States

[3] The Treaty of Rome gave birth to European civil society, which needed a legal basis, as legislative harmonization was needed, which would lead to the supremacy of Community law over national law

[4] The Maastricht Treaty decided to improve legal cooperation

[5] He established the Area of Freedom, Security and Justice

[6] It is considered to be the structural principle of the whole of Community law, or the cornerstone of judicial cooperation

between judicial and police authorities, the principle of coordination of police and judicial investigations, the principle of indirect enforcement and the principle of horizontal sui generis cooperation. These principles were intended to lay the foundations for the construction of a European criminal law.

The Treaty of Nice entered into force on 1 February 2003.

The last treaty of the European Union is the Treaty of Lisbon which entered into force on 1 December 2009 and aims at ”to make the EU a more democratic, efficient and capable entity in tackling global issues in unison”.

All the Member States' actions were taken on the basis of those Treaties.

All Member States must agree on the Treaties, by mutual agreement, in a voluntary and democratic manner. In this way, the treaties become binding on all Member States. According to these treaties, European Union law is above national policy and interests.

European Union law may affect certain aspects of the sovereignty of the Member States.

However, Member States have voluntarily transferred parts of their sovereignty to the European institutions in order to build a stronger and more efficient Europe.

2. THE IMPORTANCE OF CRIMINAL REGULATIONS AT EUROPEAN LEVEL IN THE LISBON TREATY

The Treaty of Lisbon provides in art. 2 para. 2 that „The Union provides its citizens with an area of freedom, security and justice, without internal borders, within which the free movement of persons is ensured, in conjunction with appropriate measures on external border control, asylum, immigration, crime prevention and control this phenomenon”.

”The states of the European Union have recognized that it is better for them to work together than as independent states and outside the Union”.

The European Union is currently an extremely complex organization, made up of 27 European states following England's exit from the union.

Border controls between EU Member States have disappeared, citizens can move freely on almost the entire continent, which requires increased cooperation between states to protect against cross-border crime.

These are both cross-border, international crime, organized in organized groups, and individual crime to limit the possibility of criminals to take refuge in the territory of other states.

Cross-border crime has evolved a lot, transcended national borders, and the fight at national level has often proved ineffective, with cooperation between states becoming an essential element.

Forms of organized crime have proliferated in several states: international drug trafficking, trafficking in live meat, counterfeiting, theft and robbery facilitated by the development of international tourism. A dangerous alarm signal is caused by terrorist phenomena.

Measures must be taken against crime at European level.

The Treaty on the Functioning of the European Union devotes an entire chapter to laying the foundations of European criminal law.

Thus, Chapter 4 of the Treaty of Lisbon is reserved for judicial cooperation in criminal matters within the European Union: ”Judicial cooperation in criminal matters within the Union shall be based on the principle of mutual recognition of judgments and judgments and shall include the approximation of the laws, regulations and administrative rules of the Member States in the areas referred to in paragraph 2 and Article 69B”[7].

The Union is working to ensure a high level of security through crime prevention measures.

[7] Article 69 A, para. (1), Treaty of Lisbon, Chapter IV Judicial cooperation in criminal matters

In this regard, it is provided that " The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures on:

- the establishment of rules and procedures to ensure the recognition, throughout the Union, of all categories of judgments and judicial decisions;
- the prevention and settlement of conflicts of jurisdiction between Member States;
- supporting the professional training of magistrates and judicial staff;
- facilitating cooperation between the judicial or equivalent authorities of the Member States in criminal prosecution and enforcement"[8].

Also "may lay down minimum rules to take account of differences between the legal systems of the Member States as regards:

- mutual admissibility of evidence between Member States;
- the rights of persons in criminal proceedings;
- the rights of victims of crime;
- other special elements of criminal procedure which the Council has previously identified by a decision".

The Treaty provides that the European Parliament and the Council, " may lay down minimum rules on the definition of offenses and sanctions in areas of particularly serious crime such as terrorism, trafficking in human beings and the sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering , corruption, counterfeiting of means of payment, cybercrime and organized crime"[9].

Another important provision refers to the fact that the European Parliament and the Council can support Member States in the field of crime prevention.

The Treaty strengthens its position Eurojust.

Eurojust is a central cooperation body set up in The Hague in 2003.

Its objective provided for in the Treaty is "

strengthen coordination and cooperation between national investigative and prosecuting authorities in relation to serious forms of crime affecting two or more Member States", his duties may include:

- " the initiation of criminal investigations and the proposal to initiate criminal proceedings by the competent national authorities, in particular those relating to offenses affecting the financial interests of the Union
- coordination of investigations and prosecutions
- strengthening judicial cooperation".

Official acts of judicial procedure are carried out by the competent national authorities.

The Treaty regulates the possibility conferred by unanimous vote of the Council to establish by regulation a European Public Prosecutor's Office with the consent of the European Parliament.

It would have the power to investigate, prosecute and prosecute, where appropriate in collaboration with Europol, the perpetrators and co-perpetrators of offenses affecting the financial interests of the Union, and may extend its powers to include the fight against serious criminal offenses. cross-border dimension as regards perpetrators and co-perpetrators of serious crime affecting several Member States.

Cooperation in criminal matters is essential between states. In this sense, the means of criminal law used at European level are:

- The application of the principle of universality of the criminal law, according to which the Romanian criminal law can be applied also to the crimes committed by foreigners outside the Romanian territory with the observance of the application conditions provided in art. 11 Romanian Criminal Code:

[8] Article 69 A, para. (1), Treaty of Lisbon, Chapter IV Judicial cooperation in criminal matters
[9] Article 69 B, para. (1), Treaty of Lisbon, Chapter IV Judicial cooperation in criminal matters

- the deed to be committed outside the territory of our country
- the deed committed to be another crime than those provided in art. 10 Penal Code

an act committed by a foreign national or a stateless person not domiciled in the country (stateless person)

- the offender is voluntarily in Romania

- Extradition, ie the bilateral act of international legal assistance in criminal matters, by which a state hands over to another state upon request the offender who is on its territory in order to judge or execute punishments or measures ordered by their judicial authorities.

This legal institution finds its legal regulatory framework in art. 19, Romanian Constitution, art. 14, Romanian Criminal Code and in Title II of Law no. 302/2004 with subsequent amendments and completions.

- The European Arrest Warrant, a legal instrument that has been in use since 2004 and is used to replace lengthy extradition procedures.

It includes a request from the authorities of a State to detain and hand over a particular person for the purpose of prosecuting or serving a custodial sentence or the application of a measure of pre-trial detention addressed to another State.

This legal institution finds its regulatory framework in Title III of Law no. 302/2004 with subsequent amendments and completions.

- The transfer of proceedings in criminal matters aimed at the conduct of criminal proceedings or the continuation of proceedings instituted by the authorities of a State by another State to which that person is bound by origin, nationality or residence.

This legal institution finds its regulatory framework in Title IV of Law no. 302/2004 with subsequent amendments and completions.

- Recognition and enforcement of judgments, criminal orders and judicial acts in relation to third countries

This legal institution finds its regulatory framework in Title V of Law no. 302/2004 with subsequent amendments and completions.

- Transfer of convicted persons, a legal institution that aims to facilitate the social rehabilitation and reintegration of convicted persons, goals that are easier to achieve when the sentence is executed in the state where the convicted person is to be released. Sometimes it can become necessary due to personal reasons or health problems.

This legal institution finds its regulatory framework in Title V, chap. II and Title VI of Law no. 302/2004 with subsequent amendments and completions.

- International legal assistance in legal criminal matters which finds its regulatory framework in Title VIII of Law no. 302/2004 with subsequent amendments and completions and includes the following activities:

” a) international letters rogatory
b) videoconferencing hearings
c) the appearance in the requesting State of witnesses, experts and persons pursued
d) the notification of the procedural documents that are drawn up or submitted in a criminal trial
e) criminal record
f) other forms of legal aid”.

CONCLUSIONS

The opening of the European Union's borders to the free movement of persons has also led to exposure of Member States to various forms of cross-border crime. A convergent fight must be waged against it by both national and European criminal law. Slowly but surely there is talk of a European criminal law. This requires the development of a criminal justice system for the European Union.

Criminal regulations at European level have not been a priority area of the European Community.

Gradually, rules and principles applicable to criminal law emerged.

The moment that marked the beginning of the transition to a European criminal law was the Maastricht Treaty.

The Treaty of Lisbon has given priority to criminal law.

The great innovation brought by the Treaty in the field of criminal law is that the European Parliament and the Council now have the possibility to establish minimum rules on crimes and sanctions in areas of particularly serious crime that affect several Member States with the possibility for the Council to adopt unanimously, regulations and other areas of criminal law.

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He is considered one of the founding fathers of the European Union, and also served as President of the European Parliament from 1958 to 1960
The European Union was created and is based on the rule of law. Any action taken by the U.E. derived from treaties. These treaties have been approved voluntarily and democratically by all Member States
The Treaty of Rome gave birth to European civil society, which needed a legal basis, as legislative harmonization was needed, which would lead to the supremacy of Community law over national law
The Maastricht Treaty decided to improve legal cooperation
He established the Area of Freedom, Security and Justice
It is considered to be the structural principle of the whole of Community law, or the cornerstone of judicial cooperation
Treaty of Lisbon, Chapter IV Judicial cooperation in criminal matters

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THE PRINCIPLE NON BIS IN IDEM APPLICATION FOR CRIMINAL PROCEEDINGS TRANSFER

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ABSTRACT*: Applying the non bis in idem principle in criminal proceedings transfer requires three criteria: identity regarding the sanctioned person, double sanctioning procedure and identity of the facts related to the case.*

For this purpose we have done an analysis of international and national legislation and of european jurisprudence, applying the issues found in a concrete situation encountered in national judicial practice.

KEYSWORDS: *criminal proceedings transfer, non bis in idem principle, crime, misdemeanor*

INTRODUCTION

The *non bis in idem* principle implies that a person cannot be punished twice for committing an illegal act and applying this principle to the transfer of proceedings in criminal matters has as a result the refuse of the transfer requests if the requested state authorities will find that there has been a criminal trial for the same offense and the same person and by a final judgment have been found not guilty or guilty and a sanction applied.

For which we will analyze the application of this principle in the transfer of criminal proceedings highlighting theoretical aspects in concrete situations encountered in judicial practice.

Applying this principle in criminal proceedings transfer involves avoiding the risk of double sanction for the same criminal behavior, as well as ensuring the person safety by respecting all procedural guarantees of the accused person.

In this sense, the conditions under which a criminal proceedings initiated in one member state may be transferred to another member state are strictly and exhaustively provided by law with the aim of increasing the efficiency of criminal investigations and prosecutions, but also preventing the violation of the *non bis in idem* principle.

Applying the *non bis in idem* principle in the criminal proceedings transfer implies the guarantee of the investigated person fundamental rights during judicial proceedings, firstly, because this principle is stated as a fundamental right of the person and secondly because giving up the repressive proceedings initiated under the jurisdiction of one state and transmission to another state in connection only after a legal proceedings before a court.

Thus, by examining in the course of a judicial procedure a criminal charge, which aims to establish the existence of a final criminal decision by which a person has already been prosecuted for an illegal act, then the right to a fair trial was respected.

Any judicial procedure offers in itself guarantees for a person and hes fundamental rights, thanks to his procedure and organization rules, fact for which we conclude that the respect for all other fundamental rights, depends, in the end, on the good administration of justice.

INTERNATIONAL AND NATIONAL LEGISLATION

To understand the *non bis in idem* principle in the criminal proceedings transfer is necessary to analyze international and national developments on its contents.

The first which must be analysed is the one provided in art. 4 of Protocol[1] no. 7 at the European Convention on Human Rights which states that no one shall be tried or punished again in criminal proceedings under the jurisdiction of the same state for an illegal act for which has already been acquitted or convicted by a final judgment under the law and criminal procedure.

Comparing to other rights from the convention, the right provided in art. 4 of Protocol no. 7 was not unanimously accepted by the signatory states, including some member states of the European Union. Thus, Protocol no. 7 was not signed by very important western countries such as Germany, Belgium, Netherlands and United Kingdom and among the states that ratified it, France made a reservation to art. 4 of the protocol, limiting its application only to the crimes qualified as such by the criminal law.[2]

To remove the difference between the member states on the *non bis in idem* principle, it was stated in art. 50 of the Charter of Fundamental Rights of the European Union, entitled the right not to be tried or punished twice for the same illegal act, which states that no one shall be tried or punished again for an offense for which, by final court decision, in accordance with the law, he has already been finally acquitted or convicted within the Union. As the Charter of Fundamental Rights of the European Union is now part of the primary law of the Union, after the Treaty of Lisbon become applicable on 1 December 2009, the *non bis in idem* principle can be invoked directly by European Union citizens before national courts. [3]

The analysis of these legal provisions concludes that art. 50 of the Charter of Fundamental Human Rights shall apply in relations between the member states, while the provisions of art. 4 point 1 of the Protocol no. 7 at European Convention on Human Rights only concerns national law.

The content of the *non bis in idem* principle was influenced by the constant jurisprudence of the European Court of Human Rights (ECHR) which gave an autonomous meaning to the concept of final criminal judgment, assimilating to it a series of acts that are not issued by criminal courts, but by other authorities, even by administrative authorities or by the police. Court has interpreted the concept of criminal proceedings by serving the so-called Engel criteria in order to extend guarantees to art. 7 of the sanctions of public power law qualified as administrative authorities. Thus, since the judgment in Engel, ECHR uses three criteria to assess whether a penalty is criminal under Article. 7 of the Convention: qualifying illegal act under national law, illegal act nature and the severity of the penalty for the person who committed the act. The Court's reasoning was that if member states could freely transform an offense or misconduct or may choose according to procedures to judge such a case or criminal proceedings, disciplinary, then applying article 7 would be only their choice.[4]

In conclusion, these criteria were used for inclusion within the definition of criminal sanction sanctions, fiscal, disciplinary or administrative. Thus, it is applied whether she would make a court or an executive power part, should be made in compliance with all procedural safeguards provided to the person in a criminal investigation. The act by which any of such sanctions was applied represents a final criminal judgment, which makes it impossible to judge for the same act.

Regarding the romanian legislation, this principle was inserted in art. 6 of the current Criminal Procedure Code as a criminal proceedings fundamental principle according to which no person may be prosecuted or tried for committing an illegal act when it was previously given a final criminal judgment on the same act even under a different legal classification.

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[1] Protocolul nr. 7 la Convenţia pentru apărarea drepturilor omului şi a libertăţilor fundamentale încheiat la Strasbourg la 22 noiembrie 1984;

[2]Cristinel Ghigheci – Principiile procesului penal în noul Cod de procedură penală, Editura Universul Juridic, București 2014, p.100;

[3] Ibidem

[4] Cristinel Ghigheci,op.cit., p. 103

Although before the new Criminal Procedure Code [5] it was not expressly provided as a fundamental principle of the romanian criminal process, it was recognized in the legal literature [6] as the principle of res judicata of final criminal judgments.

In conclusion, the rule that a person can not be punished twice for the same act is general and is found in all democratic states laws, regardless under which title has been applied.

THE PRINCIPLE *NON BIS IN IDEM* APPLICATION FOR CRIMINAL PROCEEDINGS TRANSFER

The European Convention on the Transfer of Proceedings in Criminal Matters adopted in Strasbourg on 15 May 1972 states the transfer of proceedings in criminal matters in european legislation and in romanian legislation the Law no. 302/2004 on international judicial cooperation in criminal matters which has transposed the convention provisions into national law.

Among others, in romanian legislation this form of judicial cooperation procedure has two components. First one, the active component that includes all the specific facts and acts that precede and accompany the request of proceedings transfer which takes place in the requesting romanian state. The procedure in this case is a judicial nature because this request has to be solved by the court which is competent to judge the case at first instance if the proceedings relate to the work of the prosecution or the court before which the case is pending if the procedure refers to the judicial activity.[7]

Second one, passive component which highlights the formal rules that are in the state requested that the request for criminal proceedings transfer received from the state in connection. In this case, the procedure has a judicial character, the role of the central authorities [8] being reduced to the receipt and transmission of the application to the competent judicial authority, without a filter of international regularity.[9]

Regarding the connection between *non bis in idem* principle and the criminal proceedings transfer is necessary to mention first of all the provisions from the European Convention on the Transfer of Proceedings in Criminal Matters which states that a person who has been the subject of a final and enforceable criminal judgment may not, for the same act, be prosecuted, convicted or subjected to a sanction execution in another contracting state:

a) when she was found not guilty;

b) if the sanction imposed has been fully executed or is being executed, it was pardon or an amnesty fully or in part and it can not be executed because of the prescription;

c) if the court found the person guilty, without imposing the sanction.

However, a contracting state shall shall not be obliged, unless it has itself requested the proceedings, to recognize the effect of *ne bis in idem* principle if the act which the judgment has been committed against a person, institution or thing having public status in that state, or if he person had herself a public status in that state.

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[5] Legea nr.135/2010 privind Codul de procedură penală, publicată în M onitorul Oficial al României nr.486/15 iulie 2010, cu modificările şi completările ulterioare;

[6] Rodica Mihaela Stănoiu, în Vintilă Dongoroz și colectiv (Siegfried Kahane, George Antoniu, Constantin Bulai, Nicoleta Iliescu și Rodica Mihaela Stănoiu) Explicațiile teoretice ale Codului de procedură penală român, partea specială, volumul VI, Editura All Beck, București, 2003, p. 311

[7] Codul de procedură penală. Comentariu pe articole, ediția a 2 a, editura C.H.Beck, 2017 de Mihail Udroiu, Amalia Andone-Bontaş, Georgina Bodoroncea, Sergiu Bogdan, Marius Bogdan Bulancea, Dan Sebastian Chertes, Ioan-Paul Chiş, Victor Horia Dimitrie Constantinescu, Daniel Grădinaru, Claudia Jderu, Irina Kuglay, Constantin-Cristinel Meceanu, Iulia Nedelcu, Lucreția Albertina Postelnicu, Sebastian Rădulețu, Alexandra Mihaela Șinc, Radu Slăvoiu, Isabelle Tocan, Andra-Roxana Trandafir (Ilie), Mihaela Vasiescu, George Zlati, p.326;

[8] Parchetul de pe lângă Înalta Curte de Casație și Justitție și Ministerul Justiției;

[9] Codul de procedură penală.op.cit, p.326

In addition, a contracting state in which the act was committed or is deemed to have been committed under the law of that state shall not be required to recognize the effect *non bis in idem* principle unless the state itself has requested the prosecution.

If a new prosecution is instituted against a person tried for the same act in another contracting state, then any period of deprivation of liberty carried out in the execution of that judgment shall be deducted from the sentence which may be imposed. [10]

The Law. 302/2004 on international judicial cooperation in criminal matters had taken the *non bis in idem* principle legal content.

Thus, art. 8 of the law states in general the incidence of this principle [11] and in order to apply the Convention implementing the Schengen Agreement (CAAS), in art. 135 of the Law. 302/2004 this principle was reiterated, after the legislation in the Schengen Agreement, which provides that a person against whom a final judgment has been given in a trial on a contracting part may not be prosecuted by another part for the same acts, in the event that a sentence has been imposed, it has been executed, is being executed or may no longer be executed under the laws of the contracting part which has given the sentence.[12]

Regarding to the application of art. 54 from the Convention implementing the Schengen Agreement, the Court of Justice of the European Union was notified by the Fifth Criminal Chamber of the Bundesgerichtshof (Federal Court of Justice - Germany) with a request to resolve the question if the prosecution concerns the same facts within the meaning of art. 54 of the CAAS when a defendant has been convicted by an italian court for importing and possessing foreign smuggling tobacco in Italy and subsequently convicted by a german court for the acquisition of the same goods, previously from Greece, because he did not paid the custom duties to the first country he crossed so far as the defendant intended from the outset, after acquiring the goods in Greece, to transport them from Italy to the United Kingdom.[13]

The Court of Justice of the European Union has established as a relevant criterion for the application of this article the identity of material acts, understood as the existence of a set of facts linked, regardless of the legal classification of these facts or legal interest. The facts consisting in the acquisition of smuggled foreign tobacco in a contracting state and in the importation and possession of the same tobacco in another contracting state, characterized by the fact that the defendant, who was prosecuted in the two contracting states, had the intention to transport tobacco, after the first entry into possession, to a final destination, crossing several contracting states, represent the behavior which may be the "same facts" in the meaning of art. 54. In this case the courts from competent state have the final assessment. [14]

So, the Court of Justice of the European Union left to the discretion of each national authority that given the specific circumstances in which they were committed illegal acts to establish if the *non bis in idem* principle is incident or not.

In light of the above, in a situation where the illegal act committed is under romanian law is a misdemeanor (for which romanian judicial authorities have ordered the application of sanctions) and under the laws of the requesting member state is a crime (which is why the

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[10] art. 35 din Convenţia europeană privind transferul de proceduri în materie penală, adoptată la Strasbourg la 15 mai 1972, ratificată prin Ordonanţa nr. 77/1999 publicată în Monitorul Oficial al României nr. 420 din 31 august 1999;

[11] Art. 8 din Legea nr.302/2004 privind cooperarea judiciară internaţională în materie penală, republicată în Monitorul Oficial al României, Partea I nr. 441/27 mai 2019;

[12] Art. 54 din Convenția de punere în aplicare a Acordului Schengen din 14 iunie 1985 între guvernele statelor din Uniunea Economică Benelux, Republicii Federale Germania și Republicii Franceze privind eliminarea treptată a controalelor la frontierele comune, semnată la Schengen la 19 iunie 1990 și intrată în vigoare la 26 martie 1995;

[13] Cauza C-288/05 -procedură penală împotriva lui Jürgen Kretzinger, Repertoriu I – 6470, punctul 31; (www.curia.europa.eu,consultat la datade 25.03.2020)

[14] Cauza C-288/05 -procedură penală împotriva lui Jürgen Kretzinger, Repertoriu I – 6470, concluzii; (www.curia.europa.eu,consultat la datade 25.03.2020)

judicial authorities opened a criminal investigation and asked the romanian judicial authorities to hand over the goods that were the object of the smuggling crime in order to continue the criminal proceedings), the romanian court held the incidence of the *non bis in idem* principle and refused the procedures transfer request.

Specifically, the Bucharest Court of Appeal rejected the request for legal assistance regarding the goods transfer that had been smuggled in order to continue the criminal proceedings on the member state territory, formulated by the prosecutor from Republic of Bulgaria, retaining the *non bis in idem* principle.

Starting from the fact that in the *non bis in idem* principle application must be identity regarding the sanctioned person, a double sanctioning procedure and identity of the facts judjed by the court, I applied these criteria and found that the romanian court stated that a bulgarian citizen was investigated in Romania for the act of introduction, on the romanian territory goods without paying the customs duties, deed for which he received a misdemeanor (sanction that the person executed voluntarily).

At the date of the request, the bulgarian citizen was being investigated by the prosecutor's office of the Republic of Bulgaria for the crime of smuggling, the criminal investigation being initiated by the bulgarian authorities based on the notification of the initiation of criminal proceedings received from the romanian judicial authorities, given the fact that it was established that the goods detained by the romanian authorities were illegally removed from Bulgaria.

Therefore, the court stated that, in its materiality, in essence, the deed for which the bulgarian citizen was prosecuted and subsequently sanctioned for contravention by the romanian authorities is the same as the one for which the person is prosecuted by the bulgarian authorities.

Considering the above, the court held, correctly, the *non bis in idem* principle incidence principle which prevents any action, including international judicial cooperation, from revealing the acceptance to continue the proceedings by the authority finding the incidence of this principle.[15]

Romanian legislation provides also situations in which the provisions of the *non bis in idem* principle do not apply, respectively if:

a) the deeds covered by the foreign judgment were committed in whole or in part on Romania's territory. In this case, the exception shall not apply if the acts were committed in part in the territory of the member state where the judgment was given;

b) the facts covered by the foreign judgment are a crime against the security of the state or against other Romania's essential interests;

c) the deeds covered by the foreign judgment were committed by a Romanian official in breach of his duties.

However, the exceptions shall not apply where, for the same facts, the member state concerned has requested that criminal proceedings be instituted or the extradition granted..[16]

Regarding the effects of the principle *non bis in idem* on the passive competence of the criminal proceedings transfer, according to the provisions of Law no. 302/2004 the request of the foreign state to take over or initiate criminal proceedings is rejected if the criminal prosecution's exercise is contrary to the *non bis in idem* principle. [17]

In the same note, the request's acceptance to take over or initiate criminal proceedings is revoked when the continuation of criminal proceedings in Romania is contrary to the principle. [18]

[15] Hotărâre nr. 64/2017 din 31/03/2017 Curtea de Apel București - Secția a II-a penală; www.lege5.ro, consultat la data de 14.08.2020;

[16] Art. 135 din Legea nr.302/2004 privind cooperarea judiciară internaţională în materie penală;

[17] Art. 128 ^{2} din Legea nr. 302/2004 privind cooperarea judiciară internaţională în materie penală;

[18] Art. 128 ^{3} din Legea nr. 302/2004 privind cooperarea judiciară internaţională în materie penală;

In conclusion, from the analysis made, it results that the *non bis in idem* principle's incidence in criminal proceedings transfer has as a consequence the rejection by the romanian authorities of the execution of the request to take over and to continue the criminal proceedings if they found that the person of which the transfer is requested has already been punished for the act committed.

CONCLUSIONS

The *non bis in idem* principle is a consequence to a the final nature of a criminal sanction resulting in two guarantees, which also apply to the transfer of criminal proceedings in criminal matters, namely the guarantee that a solution given to a criminal charge, and which has acquired the authority and power of res judicata can no longer be rediscussed, as well as a guarantee of the right of defense of the investigated person who assumes that his previously sanctioned act and behavior cannot be analyzed again.

The content of this principle was influenced by the jurisprudence of the European Court of Human Rights and the Court of Justice of the European Union in that it led to the inclusion in the notion of criminal sanction to contraventional, fiscal, disciplinary or administrative sanctions; these sanctions, regardless of whether they are applied by a court or not, should be made in compliance with all procedural guarantees granted to the person investigated. The act by which any of such sanctions was applied represents a final decision, which makes it impossible to prosecute or to judge for the same act.

Therefore, in criminal proceedings transfer the application of the *non bis in idem* principle prevents any action that could reveal the authority's acceptance to continue the proceedings when it finds the incidence of this principle.

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THE PRINCIPAL'S RELATIONS WITH THIRD PARTY CONTRACTORS

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ABSTRACT

This paper aims to bring attention to a typology of contract that is as old as it is current. Today, more than ever, the mandate contract proves its usefulness, not only as a traditional means of concluding free acts, selfless and friendly service, but especially as a legal mechanism that allows the deployment of numerous professional activities. As trade has gained huge territorial expansion and diversification, business intermediaries have become increasingly important, even vital, and the mandate, in its various manifestations, provides a highly flexible legal framework for achieving business.

In this article, we focus on the principal's relations with third party contractors, especially on the exceptional situations in which the agent's excessive acts are opposable to the principal, namely the ratification and the apparent mandate, making a brief review of the doctrine and jurisprudence on the matter and expressing our own opinions regarding the liability of the principal towards third party contractors in such situations.

KEYWORDS: *mandate, representation, principal, agent, third party contractor, ratification*

1. THE ACTS CARRIED OUT BY THE AGENT WITHIN THE LIMITS OF THE MANDATE

According to art. 1296 of the Civil Code, *"the contract concluded by the representative, within the limits of the power of attorney, in the name of the represented, produces direct effects between the represented and the other party."*

Therefore, the principal will have to execute the obligations derived from the acts concluded by the agent on his behalf, as long as they are within the limits of the mandate conferred and the agent worked in the name of the principal, showing the third party his status of representative, or the latter at least should have known that the agent was acting as a representative (art. 1297 par. 1 of the Civil Code).

The operations concluded by the agent with third party contractors in these conditions give rise to direct legal relations of contractual nature between the principal and the third parties involved. As legal doctrine[1] has stated, *"in fact, the third party deals with the agent, but in law, they contract with the principal."* Therefore, all active or passive effects of the acts concluded by the agent with the third party contractor will occur directly upon the person and patrimony of the principal, who thus becomes the creditor, respectively debtor of the third party contractor.

[1] Fr. Deak, *Civil Law Treaty. Special Contracts*, 2nd ed., Ed. Actami, Bucharest, 1999, p. 354

As regards the agent, he does not, in principle, establish direct legal relations with the contracting third party, since he remains a third party in regard to the act that he concludes on behalf of the principal and which shall not produce efects upon the trustee, in accordance with the principle of the relativity of the effects of contracts (*"res inter alios acta, neque nocere neque prodesse potest"*). This means that the trustee will not, in principle, be held liable towards the principal, for the performance of the obligations assumed towards the principal by third party contractors. Thus, art. 2021 of the Civil Code provides: *"Unless otherwise agreed, the agent who has fulfilled his mandate shall not be liable to the principal for the performance of the obligations assumed by the persons with whom he contracted, unless their insolvency was or should have been known to him at the time of the conclusion of the contract with those persons."* However, the parties may stipulate in their contract express clauses by which they increase the trustee's responsibility for the performance of the obligations assumed by third party contractors.

Jurisprudence has also shown that *"by virtue of the effect of representation in legal acts, the contract concluded by the agent, within the limits of his legal or conventional powers, obliges the principal for the entire duration of the contract concluded by the agent, and not only for the trustee's term of office, this for the safety of the third party, who is dealing with a representative."*[2]

It should also be noted that the effects of the act concluded by the agent in the name of the principal and within the limits of his mandate will have direct effects on the principal whether it is a contract or an unilateral act (eg an act interrupting the limitation period carried out by the trustee on behalf of the principal, or the acceptance of a succession) and regardless of the nature of these effects, namely that they are personal or real (for example, the purchase of a good by trustee transfers ownership directly to the patrimony of the principal), or that they are constituent, translational or extinctive of rights (eg the payment received by the agent extinguishes the claim of the principal).[3]

2. THE ACTS CARRIED OUT BY THE AGENT OUTSIDE THE LIMITS OF THE MANDATE

In principle, the acts performed by the agent outside the limits of the mandate do not produce any effects between the principal and third party contractors. However, it is not excluded that these acts may be opposed to the principal on the basis of the existence of an apparent mandate, or that the principal himself voluntarily assumes the consequences of the agent's excessive acts, by ratification.

2.1 *The principle of non-applicability to the principal of the excessive acts of the agent*

"The agent may not exceed the limits established by the mandate", the legislator states in art. 2017 par. (1) of the Civil Code.

As stated in French doctrine, *"when we say that the principal gives the power of attorney to the trustee, we mean that he gives an order. This is not an advice, nor a recommendation, but an order."*[4] Therefore, regardless of whether the mandate conferred is a general or a special one, it has an imperative character and implicitly a limiting one: the agent only has those powers that were given to him by the principal. The consequence of non-compliance with this imperative comes natural: any act concluded by the trustee outside the limits of the powers conferred by the principal does not oblige the agent; it does not create any direct legal relationship of contractual nature between the contracting third party and the

[2] Bucharest Court of Appeal, s. IV, dec. no. 100/1924, cited in C. Hamangiu, N. Georgean, *The Civil Code Annotated*, vol. IV, "Universala" Alcalay&Co. Bookstore Publishing House, Bucharest, 1926, p. 31

[3] In this regard, see also Ph. Pétel, *Le contrat de mandat*, Dalloz, Paris, 1994, p. 79

[4] F. C. Dutilleul, Ph. Delebecque, *Contrats civils et commerciaux*, 4e éd., Dalloz, Paris, 1998, p. 480

principal, as the latter's consent for the conclusion of the act is lacking; the so called *"principal"*, in this case, has not expressed his willingness to contract with the third party either directly or by representation, as the power to represent does not exist outside its limits; the *"principal"* will have practically the quality of a third party towards the excessive act.

However, par. (2) of art. 2017 of the Civil Code brings to the limits of the mandate a corrective imposed by the practical realities of mandate relations development. Thus, the Civil Code stipulates the possibility for the agent to deviate from the instructions drawn up by the principal for the fulfillment of the mandate. This possibility is granted to the trustee only when the circumstances justifying such conduct would have led to its approval by the principal and, in addition, the trustee must have been unable to notify the principal in advance in order to obtain his consent. In addition, as soon as it becomees possible, the agent is obliged to notify the principal of any changes to the performance of the contract.

In this context of legal regulation, one might ask the question whether the trustee can deviate from the instructions received only as regards the manner of execution of the acts with which he was empowered or also with regard to the acts that he can perform themselves? We believe that the legislator's intention, that can also be seen from the way in which the mentioned legal text was formulated (it explicitly refers only to the *"changes brought to the execution of the mandate"*), was to give the agent a more permissive legal framework of exercising the attributions conferred by the principal, but without being able to substitute his will regarding the acts that would be concluded on his behalf. Thus, even in these circumstances, the principal remains protected against the agent's excessive acts, the consequences of which he will not have to assume in any case.

The inapplicability to the principal of the act performed by the agent may derive either from the fact that the trustee acted without power of attorney, which did not exist in the first place or it was withdrawn, or from exceeding the limits within which the agent is authorized to act for the principal.

Nevertheless, there is nothing to prevent the principal from voluntarily assuming the effects of the agent's excessive act, by ratifying it. At the same time, the act may also be opposed against his will, should there be an apparent mandate.

2.2 *Exceptional situations in which the agent's excessive acts are opposable to the principal*

2.2.1 Ratification

In case the trustee is acting outside the limits of his power of attorney, the contract thus concluded will not produce effects between the principal and the third party contractor.[5]

From the interpretation of the provisions in art. 1311 par. (1) and art. 1312 of the Civil Code, it results that the principal will be able to ratify the act that was concluded by the agent exceeding the limits of his power of attorney, the effects of ratification occuring retroactively, without affecting the rights acquired by third parties in the meantime. Practically, as stated, *"ratification has the value of a valid mandate."*

Thus, for example, in one case, the agent did not conclude the mortgage contract with bank Y, as authorized by the principals, but with bank X, thus exceeding the limits of the mandate by contracting with a third party other than the one indicated in the power of attorney. However, given that the principals tacitly ratified the acts concluded beyond the

[5] Art. 1309 par. (1) of the Civil Code: *"The contract concluded by the person who acts as a representative, without having power of attorney or exceeding the powers conferred, shall not produce effects between the represented person and the third party contractor."*

limits of the mandate, the court decided that the ratification standed for a valid mandate, so the principals were bound to the third party contractor within the limits of the ratified mandate. Their lack of consent cannot be retained, as such consent was subsequently given by ratification, tacitly, but unequivocally.[6]

In another case-law ruling revealing the retroactive effects of ratification, the court held that, although at the time the claim was brought (which stands for an act of disposition), the plaintiffs' agent had only a general power of attorney for the administration of the property, the action in court would not be rejected as being done outside the mandate, but it would be granted if, in the meantime, the principals confirmed the act of disposition (the action in claim).[7]

The third party contractor may grant, by notification, a *"reasonable time"* for ratification, after the fulfillment of which the contract can no longer be ratified (art. 1311 par. 2 of the Civil Code); this notification is in fact a contract offer from the third party contractor, which, once accepted, produces the retroactive effect of the conclusion of the contract directly in the person of the third party contractor and of the *"represented"* person. If the third party contractor wishes to establish contractual relationship with the one with whom he believed he was contracting, then ratification may occur and have retroactive effects, the rights and obligations arising from the business thus concluded being considered acquired in the person and property of the so-called *"represented"*, from the very moment the operation was concluded between the third party contractor and the alleged representative (art. 1312 of the Civil Code). The latter, as we see, cannot oppose ratification, except in agreement with the third contracting party, by abolishing the business concluded before ratification and only in the absence of a term conferred by the third party to the *"represented"* person, for the purpose of ratification. Thus, even if the *"representative"*, wishes to assume in his own name the effects of the act concluded on the basis of his alleged capacity as representative, he will not be able to do so against the will of the third party (who could invoke the annulment of the act, for fraud) or of the *"represented"* person, who, in turn, although has the quality of a third party of that act, can justify a legitimate interest in requesting the absolute nullity of the act concluded by the *"representative",* with fraudulent cause.

Regarding the formal conditions of ratification, art. 1311 par. (1) of the Civil Code shows that it can be made by the one in whose name the excessive act was concluded in compliance with the forms required by law for its valid conclusion. It is a reiteration of the principle of symmetry of forms, which we also find in the special matter of the mandate contract, in art. 2013 par. (2) of the Civil Code. Therefore, the ratification will have to take the same form as the act that is its object, but only if it is the subject by law to a requirement of an *ad validitatem* form.

In conclusion, ratification can be carried out under the same conditions as the mandate; that means that, in principle, it is a consensual act, the requirement of symmetry of forms operating only if the act performed by the agent is a solemn one, *ad validitatem*.

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[6] Bucharest Court of Appeal, civil section IV, dec. no. 1890/2003. cited in *Bucharest Court of Appeal, Collection of Civil Judicial Practice 2003-2004*, no. 46, p. 155 and by L. C. Stoica, *The Mandate. Judicial Representation. Case Law*, 2nd ed., Ed. Hamangiu, Bucharest, 2010, no. 8, p. 38-39

[7] High Court of Cassation and Justice, civil and intellectual property section, dec. no. 2330/2005, in *Dreptul* no. 8/2006, p. 214 and in V. Terzea, *The New Civil Code Annotated with Doctrine and Case Law*, 2nd vol (art. 1164-2664), Ed. Universul Juridic, Bucharest, 2011, p. 923

This nature, consensual as a principle, of ratification, was moreover confirmed by a rich jurisprudence, as well as by doctrine.

Thus, Bacău Court, in decision no. 246/1915[8] decides that the ratification by the principal of the acts concluded by the agent beyond the limits of the mandate is valid, even if it didn't meet the conditions requested by art. 1190[9] of the Civil Code of 1864, being sufficient to have been made in awareness of the situation. In the same sense, Ilfov Court made the decision no. 696/1914[10]: the ratification provided by art. 1546 of the 1864 Civil Code may result from any facts or circumstances that clearly show the will of the principal to approve the acts concluded by the trustee beyond the limits of the mandate.

Tacit ratification results from the intention of the contracting party deduced from the circumstances of the case assessed by the court and especially from the voluntary execution in whole or in part of the obligation, knowingly made by the person against whom the contract is invoked.[11]

Currently, the regime of confirmation of annulable legal acts is more permissive itself, the new Civil Code stating that this confirmation may also result from the tacit will to waive the right to invoke the nullity of the person entitled in this regard, provided that the will to waive is certain.[12] Moreover, in the absence of express confirmation, tacit confirmation may also result from the voluntary execution of the obligation at the time when it could be validly confirmed by the interested party.[13] Thus, we believe that the principal's will to assume the legal consequences of an act concluded with exceeding the limits of the empowerment conferred to the agent may result not only from an explicit act formulated in this respect, but also from material deeds of execution of the obligations derived from the excessive act. Moreover, art. 2013 par. (1)[14] of the Civil Code explicitly regulates the possibility of tacit acceptance of the mandate by the agent, by its voluntary execution; we believe that similarly, the principal who executes an act concluded by the agent on behalf of the principal, but without his authorization or by exceeding the limits of the empowerment received, achieves a tacit acceptance of both the mandate within its new limits, and the act derived from it. Of course, the freedom to choose the form of the act of ratification is restricted, as we have shown, by the need to comply with the form required by law for the valid conclusion of the ratified act, where such legal requirements exist.

2.2.2 The apparent mandate

As we have already shown, if the *"representative"* concludes a legal act without power of attorney (for example, in the event that the proxy has been revoked and the empowered person knew or could have known the withdrawl of his power of representation) or if they exceed its limits, the contract thus concluded will not produce effects between the

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[8] Cited in *Curier Judiciar* 16/1916 and by C. Hamangiu, N. Georgean, *cit. op*., no. 23, p. 30

[9] Art. 1190 of the Romanian Civil Code from 1864 stated that: *"The act of confirmation or ratification of an obligation, against which the law admits the action for annulment, is valid only when it includes the object, cause and nature of the obligation, and when it mentions the reason for the action for annulment, as well as the intion to repair the defect on which that action was based."*

[10] Cited in *Curier Judiciar* 5/1915, p. 42 and by C. Hamangiu, N. Georgean, *cit. op*., no. 23., p. 30

[11] Bucharest Court of Appeal, 1st section, dec. no. 1201/1920, cited by C. Hamangiu, N. Georgean, *cit. op*., no. 28, p. 30

[12] Art. 1262 of the Civil Code

[13] Art. 1263 par. (5) of the Civil Code

[14] Art. 2013 par. (1) of the Civil Code: *"The mandate contract may be concluded in written form, authentic or under private signature, or verbally. Acceptance of the mandate may also result from its execution by the agent."*

so-called *"represented"* person and the third party contractor[15], since the *"representative"* (*falsus procurator*) is not the exponent of the will of the one for whom he claims to contract. The person *"represented"* will have the quality of a third party reported to the respective act, which will therefore not be able to benefit or oblige him, according to the principle of the relativity of the effects of the contract (art. 1280 of the Civil Code).

However, the legislator states that the contracting third party will be able to act against the *"represented"* one, by invoking the contract against them, if they can prove the existence of a lawful appearance (apparent or deceptive representation), more precisely if "*by his conduct, the represented has caused the third party contractor to reasonably believe that the representative has the power to represent him and to act within the limits of the powers conferred"* (art. 1309 par. 2 of the Civil Code).

In such cases, the contract will be enforceable against the *"represented"*, who is guilty of misleading the third party, most often by omission, for example, by the fact that the *"represented"* did not take any necessary measures to ensure that third parties will be able to acknowledge the revision of the power of attorney (in the sense of restricting its limits), its revocation[16] or the occurrence of a cause of cessation of the power to represent.[17]

Thus, the third party who concludes the contract with the legitimate belief that the apparent representative has the power of representation, precisely because of the conduct of the alleged *"represented"*, may hold the latter to perform the obligations arising from this act, based on the principle of the appearance that creates law (*error communis facit jus*).

The represented may modify the power of attorney conferred, extending or restricting the limits within which the representative may contract on his account and he also has the right to revoke it, just as the reepresentative may waive the power of attorney received (art. 1305 of the Civil Code).

Art. 1302 of the Civil Code provides that the third party contractor always has the right to require the person claiming to act on behalf of another one to prove the powers entrusted to him by the represented person and, if the power of attorney was conferred by a written document, to give him a copy of that act, signed for compliance. In this way, the representative will prove both the existence of his power of representation, and the limits within which it allows him to act on behalf of the represented.

Normally, the power of attorney is conferred before the representative concludes with the third party the act envisaged by the represented one, precisely in order to carry out the respective business. However, the power of attorney can be granted *post factum*, in the form of the ratification by the *"represented"* one of the acts concluded on his behalf by the person who did not have the power to represent him (according to art. 1311 par. 1 of the Civil Code). In this way, the effect of non-enforceability against the *"represented"* of the acts concluded

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[15]Art. 1309 par. (1) of the Civil Code: *"The contract concluded by the person acting as a representative, but without having power of attorney or exceeding the powers conferred, shall not produce effects between the represented one and the third party."*

[16]On this matter, art. 1306 of the Civil Code states that *"modification and revocation of the power of attorney must be notified to third parties by appropriate means. Otherwise, they are not enforceable against third parties unless it is proved that they knew or could have known them at the time of the conclusion of the contract."*

[17]Art. 1307 of the Civil Code provides that: *"(1) The power to represent ceases by the death or incapacity of the representative or of the represented, if from the contract or the nature of the business does not result otherwise. (...) (3) In case of starting the insolvency procedure of the representative or the represented, the power to represent ceases under the conditions provided by law. (4) The termination of the power to represent shall not affect third parties who, at the time of the conclusion of the contract, were not and should not have been aware of this circumstance."*

on his behalf by the alleged *"representative"* is removed, as ratification has the value of a valid mandate.

In a case settled in 2009, the court pointed out that if a third party, based on erroneous beliefs, concludes an act with a person who did not have the power to perform it, the appearance thus created allows the recognition of the validity and enforceability of that act. If the conclusion of that contract exceeds the limits of the mandate granted to the agent, the contracts concluded with third parties acting in good faith are valid and therefore opposable to the principal, based on his fault in choosing a representative who abused the powers conferred on him.[18]

Therefore, the court supports the validity and opposability to the principal of the excessive acts of the agent, concluded by him with third parties acting in good faith, stating that the principal's liability is based on the presumption of fault *in eligendo*.

Such a position blatantly contradicts the provisions of art. 1309 par. (1) and art. 2017 par. (1) of the Civil Code. The principal's liability for the acts concluded on his behalf without the agent having power of attorney may be established, as shown in par. (2) of art. 1309 of the Civil Code, only on the existence of a lawful appearance, which presupposes a proven fault of the *"represented"*. The fault of the *"represented"* cannot be presumed from the simple fact of ignorance by the third party of the fact that the trustee is working outside the limits of his mandate. The liability of the *"represented"* could not in any case derive from the presumption of his guilt based simply on the fact that the agent proves to be a persson of bad faith, who abuses the trust conferred by the principal.

Indeed, art. 1309 par. (2) of the Civil Code enshrines the responsibility of the represented person regarding the acts concluded by the representative with exceedind the limits of the conferred powers, but the fault of the represented one is in no case a presumed one, the legislator explicitly stating that *"the represented may not rely on the lack of power to represent in relation to the third party contractor"*, except for those situations in which he himself, *"by his conduct, has caused the third party to reasonably believe that the representative has the power to represent him and that he is acting within the limits of the powers conferred."* Therefore, the civil responsibility of the represented can be related to his fault of misleading the third party acting in good faith, by creating a false appearance of the existence of a power of representation, a fault that is not only attributable to the false representative, but also to the so-called *"represented"*. Therefore, the guilt of the *"represented"* will have to be proven by the third party who wishes to enforce the excessive act on him, as it cannot be presumed. In fact, in general, the fault is not presumed, except for the cases where the law expressly establishes such a presumption.

In the same sense, an author stated: *"In the absence of a valid power of attorney or if the limits of the power granted are exceeded, the representation cannot have the effect of transmitting the power of representation, validly, to the intermediary, or producing the effects of the legal acts that he has concluded with third parties upon the patrimony of the allegedly represented person. Therefore, in the circumstances shown, the person in whose interest the legal opeerations are concluded will have the quality of a third party to those legal acts,*

[18] The High Court of Cassation and Justice, Commercial section, dec. no. 1754/2009, cited in V. Terzea, *cit. op.*, p. 924

according to the principle of relativity of the effects of legal acts. Therefore, the acts in question will neither benefit, nor harm third parties."[19]

Therefore, in the absence of his proven guilt, the so-called *"represented"* cannot be held liable for those acts, in relation with which he has the position of a third party, and of course that he can neither claim any right derived from them. This is the interpretation of the principle provided by art. 1309 par. (1) of the Civil Code[20], from which par. (2) establishes a derogation, on the grounds of guilt from participating in the creation of a false but *"reasonably"* believable appearance, which gives rise to liability for the *"represented"* person.

In fact, case-law has repeatedly ruled in this regard. Thus, it has stated[21] that if the trustee has not made known to the third party the extent of his power of attorney and the third party, acting in good faith, has been misled as to the quality which the agent has acquired by exceeding his mandate, the legal consequences arising from the act thus concluded cannot be enforced on the so-calleed *"principal"*, who in this given situation has the position of a third party in relation to that legal operation.

The criticized judgement is by no means singular.

Thus, in an earlier judgement of the Court of Cassation, it was considered that the principal would have to assume the effects of the acts concluded with third party contractors acting in good faith by the so-called *"agent"*, even if the latter was acting in the name of the principal knowing that he no longer had the power to represent him. The Court stated that the liability of the *"principal"* was justified by his fault in the election of the agent: *"(...) from combining art. 1558 and art. 1554 of the Civil Code (from 1864), it results that the contracts concluded with third parties of good faith are valid and therefore opposable to the principal, even if the agent would have known the cause of the mandate termination, because only the principal is gulity to have entrusted his powers to a person who abused them, whereas the third party contractors, not being aware of the cause of mandate termination, have no fault and therefore their interests cannot be damaged for other persons' fault."*[22]

A similar view, in the sense that the principal assumes the effects of the act concluded with third party contractors acting in good faith by the deceivable agent, was also supported by legal doctrine[23], the author stating that the principal's liability is based upon the same guilt regarding the entrusting of the power of representation to a person who abuses it. On the other hand, the doctrine cited argues that the opposability to the principal of the act thus concluded derives from the existence of an apparent mandate, namely from the fact that, *"(...) although the will of the principal to be represented is lacking (...), third parties are contracting with the excusable and legitimate belief (so without any fault, but not necessarily common error) that the apparent trustee has powers of representation; as it was stated, <<legitimate belief has the value of a legal act>>. This happens, for example, in the case of the mandate revocation, which was not brought to the atttention of third parties (art. 1554 of the 1864 Civil Code), regardless of the fact that the principal was guilty or not (but not completely*

[19] D. A. Sitaru, Considerations regarding representation in the new Romanian Civil Code, in *Revista Română de Drept Privat* no. 5/2010, p. 137-170

[20] Art. 1309 par. (1) of the Civil Code provides that *"the contract concluded by the person acting as a representative, but without having power of attorney or exceeding the powers conferred, shall not produce effects between the represented and the third party."*

[21] Cas. I, dec. no. 212/1881, cited by C. Hamangiu, N. Georgean, *cit. op.*, no. 1, p. 25

[22] Cas. II, dec. no. 544/1924, cited by C. Hamangiu, N. Georgean, *cit. op.*, no. 2, p. 42

[23] Fr. Deak, *cit. op.*, p. 361, 341

foreign to the appearance created either). The good faith of the third party is presumed, according to general rules." Therefore, in the opinion of the quoted author, the principal was sanctioned both for the mistake of choosing an agent not worthy of trust, and for failing to take the necessary steps to ensure that third parties were aware of the cause of mandate termination (for example, by notifying them, when required by law, as was the case of notifying the third party regarding the revocation of the mandate – art. 1554 of the Civil Code of 1864).

However, in the regulation of the new Civil Code, the legislator does not require the principal to communicate the termination of the mandate to third parties, it being opposable to third parties who knew or should have known this circumstance (art. 1307 par. 4 of the Civil Code), regardless of the means by which they may become aware of it. Therefore, the principal's responsibility towards third parties is reduced to making it possible for them to know about the termination of the mandate, by *"appropriate means"* (art. 1306 of the Civil Code).

As a consequence, the principal will not be bound by the act concluded by the trustee who, in bad faith, continues to act on behalf of the principal after the termination of his mandate, contracting with good-faith third parties, unless he failed to provide to third parties the possibility of acknowledging the cause of the mandate termination, or if by his behavior, he determined the third party contractor to reasonably believe that the agent had the power to represent the principal and that he was acting under and within the limits of this power of attorney (art. 1309 par. 2 of the Civil Code); therefore, under the rule of the current regulation, the apparent mandate will exist only if the third party who invokes it can prove the gulity and deceptive conduct of the principal, as it does not exist in the absence of the fault of the *"represented"* person.

CONCLUSIONS

In conclusion, we believe that ratification of the agent's excessive acts can be made in the same form as the proxy itself, that is, in principle, a consensual act, since the requirement of symmetry of forms is operating only when the act concluded by the trustee is *ad validitatem* a solemn one. Tacit ratification may result from the intent of the party, inferred from the facts taken into consideration by the court and especially from voluntary execution of the obligation, either complete or partial, that has been done deliberately by the party on whom the contract is being enforced.

Regarding the apparent mandate, doctrine and jurisprudence sometimes stated that the principal's liability towards third parties acting in good faith for the acts concluded by the agent outside the limits of his powers was based on the presumption of an *in eligendo* fault. We cannot share this view. For purpose of enforcing the excessive acts of the trustee on the principal, the third party will have to prove the principal's fault, which may not be presumed. Thus, an apparent mandate will only exist if the third party claiming it can prove culpable and misleading conduct of the principal, since it cannot exist in the absence of the fault of the *"represented"* person.

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THE LOCAL POLICE

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ABSTRACT

The Local Police is an "organ" in the "service" of society and not a "force" used in society. Its actions and approaches are carried out under the strict monitoring of the community. By what it does, it must be very transparent and predictable. The defining constant of the qualitative evolution of work is the training in progress. The basic quality of a local police officer is communication.

KEYWORDS: *Local, Police, service, society.*

INTRODUCTION

The consequences of European integration on the Romanian legal system are as strong as in other areas and in what the Local Police means, seen through organization, legal basis, action, personal recruitment, personal training, transparency and predictability in terms of what executes and undertakes, internal cooperation.

Starting from the idea that the aim of the Council of Europe is to achieve a closer union between its members and aware that one of the objectives of the Council of Europe is both to promote the rule of law, which is the basis of a true democracy, considers that the justice system plays a decisive role in protecting the rule of law and that the Local Police has an essential role in this system, we can show, without fear of error, that an important pillar that made possible access to and maintenance in the European Union is also defined by rethinking and functioning of the Local Public Administration and within it the Local Police service versus what it means to increase local autonomy.

The trust of the population (community) in the Local Police is rigorously linked to the attitude and behavior of the police towards the community and in particular to the rule of law, respect for human dignity, freedoms and fundamental rights of the person, which are enshrined in the Convention.European Convention on Human Rights. [1]

1. DEFINING KEY TERMS

SERVICE, services, s. N. 1. The action, the act of serving; form of work performed for the benefit or interest of someone. Expr. To be (or put oneself) in the service of someone. (or something) = to serve a person or a purpose, an idea, etc. (In construction with the verbs "to do", "to bring") Deed, action that serves, benefits someone, duty, obligation.[2]

ORGAN, organ, s.n. 1. Group of people who perform a political, social, administrative, etc. function; political, social, administrative institution, etc. represented by these persons.[3]

FORCE s. F. 1. Power, strength, vigor[4]

SOCIETY, societies, s. F. 1. The totality of people who live together, being connected to each other by certain economic relations. Unitary ensemble, organized system of historically determined relations between people, based on economic and exchange relations[5]

[1] Comitetul Miniștrilor Consiliului European, Codul european de etică al poliției, Recomandarea (2001) 10, p. 3
[2] Dicționar explicativ online, https://dexonline.ro/
[3] *Ibidem.*
[4] *Ibidem.*

2. THE LOCAL POLICE AN "ORGAN" IN THE "SERVICE" OF SOCIETY

"The police in the service of community" is an idea that originated in the United Kingdom, where it was about involving the whole community, in particular, to prevent crime, but also to detect it. This model has been adopted by many European countries and has gained the widest possible values and benefits for citizens. [5]

The "assistance" (support) of the population (community) is the main mission of the Local Police. The inclusion of the function of "service" among the objectives of the local police is slightly different from what we knew until now, in the sense that it changes the role of the police, which, ceasing to be a "force" used in society, then becomes a "body" in the service. the latter.[6]

In recent years, there has been a clear trend in Europe to integrate the police into civil society and bring it closer to the population.

This goal is achieved through the development of the Local Police in several Member States. One of the main means used is to confer the status of a "body" of "public service" and not a mere "body" in charge of law enforcement. If this transformation is not to be purely linguistic, it is necessary to introduce categories of "services" into the actions of the local police, among the objectives of a moderate democratic police. The assistance provided by the local police generally concerns concrete situations in which they intervene. [7]

To help people who are in danger, through direct action or combined with other structures with responsibilities in the field.

We list below some of the concrete situations in which the citizen can directly request the support of the Local Police personnel, as follows:

– Detection of discovered canal mouths and covering them with the help of those from Regie Apa, Canal;

– Elimination of outbreaks of infections, epidemics, episodes, zoonoses, etc .;

– Ensuring disinsectization and rodent control of buildings with the support of institutions authorized to carry out these operations.

– Lifting community dogs from the public domain, so as not to be bitten or attacked by citizens, or forcing dog owners to walk them with a leash or muzzle;

– Field inspection, inventory and isolation of the area where there are walls, roofs and disused buildings that can collapse over passers-by;

– Checking the sanitation of watercourses and preventing their pollution.

– Proper disposal of cigarette butts;

– Following the way in which the grooming and cutting of trees is performed on the public domain;

– Ensuring the sanitation of streets, access roads, green areas, gutters, snow and ice removal from access roads;

– Participation together with the road administrator to remove the effects of natural phenomena, such as: heavy snow, blizzard, strong wind, torrential rain, hail, ice and other such phenomena, on public roads.

– Providing assistance in case of massive water leaks, floods or fires in homes, inhabited areas, etc. until the arrival of special intervention crews;

– Isolation of the area where high voltage wires dropped on the ground are detected and call on the spot of a qualified personnel to remedy the problem;

– Tracking the repair of potholes in the roadway

– Evacuation of people in case of natural disasters

– Prohibition of walking dogs in parks and playgrounds specially designed for children;

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[5] Comitetul Miniștrilor Consiliului European, *Op. cit.,* p. 31

[6] Comitetul Miniștrilor Consiliului European, *Op. cit.,* p. 24.

[7] *Ibidem.*

– Checking the means of road signs and correcting irregularities regarding the operation of traffic lights, the status of signs and road markings.

Basically, the Local Police solves the daily problems of the citizens, the daily ones, which affect them directly or indirectly.

Relationship of persons with other authorities, institutions, through:

– Guiding people and providing assistance

– Leading the persons to the component institutions in solving the claimed problems;

– Informing citizens

– Relationship through the Local Police with other structures (Technical Directorate within the mayor's office, Institution of the Chief Architect, etc.)

– Relationship with the authorized provider from the Local Public Administration, for street and household sanitation.

– Information on legislative developments, using several levers (notifications, press releases, interviews, leaflets, etc.)

– Arbitration service

– Providing a close link with educational institutions

– Collaboration with market administrators in order to ensure public order and safety in their premises and perimeter;

– Removal of persons who resort to public mercy and their management to the areas where they have their domicile together with ASCO;

– Lifting homeless people from the public domain and accompanying them to the night shelter;

– Guarding the accident sites until the arrival of the intervention teams (Traffic Police, Firefighters, etc.);

– Maintaining the emergency environment, land and green spaces;

The Local Police is constituted in a lever to extend the “eye” of the mayor's office in the field and through a lever through which the citizen can relate directly to the mayor.

3. LEGAL BASES OF THE LOCAL POLICE

The Local Police is a public body. Local Police operations must always be carried out in accordance with domestic law and international norms accepted by countries.

The legislation for organizing the Local Police must be accessible to citizens and sufficiently clear and precise; in the case of a contract, it must be supplemented by regulations also accessible to citizens.

The staff of the Local Police is subject to the same legislation as ordinary citizens, the only exceptions to this principle can only be justified, in order to ensure the proper conduct of police duties in a democratic society.[8]

4. Organization chart of the Local Police

The organization of the Local Police is made in such a way as to respond to its mission: defending the fundamental rights and freedoms of the person, private and public property, prevention and detection of contraventions in the following areas: public order and peace, and security of goods, traffic on public roads, discipline in constructions and street display, environmental protection, commercial activity, personal records, other areas established by law.[9]

[8] Comitetul Miniștrilor Consiliului European, *Op. cit.*, p. 5.
[9] Extras din Legea Poliției Locale 155/2010, art. 1, 2. http://legislatie.just.ro/Public/DetaliiDocument/120615

The Local Police operates on the principles of legality, trust, predictability, proximity and proportionality, openness and transparency, efficiency and effectiveness, accountability and responsibility, impartiality and non-discrimination.[10]

The number of local police officers in a structure takes into account the European Standard which provides for one police officer per 1000 inhabitants.

The lucrative entities are constituted according to the priorities of the city, which they serve and to its particular and specific elements.

The organization chart is not immutable, it can be reconfigured whenever needed according to the requirements of the operational situation in the field.

The following will be taken into account in the organization of the Local Police structures:

– Its members enjoy the respect of the population, both as law enforcement professionals and as service providers;[11]

– To have a comprehensive mutual understanding between the population and the police;

– Success is validated by the population;

– Community police services must be adapted to the requirements of the community;

– To provide citizens with objective information about their activity;

– Transparency in what it undertakes.

5. STAFF RECRUITMENT

Staff recruitment should be based on personal competence and experience, mainly from young people who have graduated from a higher education university, who refer to communication, sociological, linguistic, psychological and relationship knowledge. outside the character, medical, legal aspects and the family and professional background.

6. STAFF TRAINING

The general training of local police personnel should be as open as possible to society. This must be done according to the objectives of the police and as much as possible based on the concrete reality or who will act. It must fully integrate the need to combat racism and xenophobia.[12]

Continuous active and practically applied training, at regular intervals, is another urgent need for the staff of the Local Police structures.[13]

7. LOCAL POLICE ACTION

The Local Police in all its actions must respect the right to life of any person.

It must not apply inhuman or degrading treatment.

It can only use force if absolutely necessary.

It must systematically verify the legality of the operations it undertakes and must be impartial and non-discriminatory.

It must guard the spirit of the fundamental rights of everyone, as well as the freedom of thought, conscience, religion, expression, pacifist assembly, movement and the right to one's property. [14]

8. Responsibility and control of the Local Police

The Local Police must be accountable to the State, its citizens and their representatives. It must be subject to external and effective control.[15]

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[10] *Ibidem.*

[11] *Ibidem.,* p. 29.

[12] *Ibidem.*, p. 8.

[13] *Ibidem*, p. 36.

[14] *Ibidem.*, p. 43.

[15] *Ibidem.*, p. 50

In an open democratic society, the control exercised by the state over the local police must be complemented by the responsibility of the police for its actions in front of the population, ie in front of the citizens and their representatives.[16]

The responsibility of the local police towards the public is of paramount importance for the relationship between the police and the population.

In a general way, the openness and transparency of the police are indispensable conditions for the efficiency of any accountability / control system.

In order for the local police to carry out control as effectively as possible, it must be accountable to the various independent powers in the democratic state, ie the legislative, executive and judicial powers.[17]

The public authorities must apply effective and impartial appeal procedures against the police[18]. Police complaints must be the subject of an impartial investigation.

"Police investigating the police" is an operation that generally casts doubt on its impartiality. The state must apply systems that are not only impartial, but also visible, able to gain the trust of the population.[19]

The creation of mechanisms to determine the responsibility of the local police and based on mutual communication and understanding between the population and the police should be encouraged.[20]

Transparency and public control in these situations, such as public access to police stations, is an example of beneficial measures, both for the population and for the police, in that it allows the population to exercise some supervision and to help combat the charges. unfounded brought to the police.[21]

9. INTERNATIONAL COOPERATION

International cooperation between European police must be encouraged, both at the level of states and international organizations.[22]

Thanks to its expertise and experience in democratic values, ethics, human rights and the rule of law, the Council of Europe can facilitate such cooperation.[23]

CONCLUSIONS

The "service" should not be confused with certain administrative tasks entrusted to the local police (eg issuing identity cards). In general, the function of the local police as a public service body is related to its role of rescuing, supporting, helping the population and the determination of the police is one of the fundamental and important aspects in this regard. The "service" function of the local police is much more related to the state of mind of the latter, in relation to the population, than to the fact that it is entrusted with duties, in addition to the usual tasks. It is clear that the local police cannot assume too difficult responsibilities in terms of services provided to the population.[24]

Most European police services, in addition to enforcing the law, play a social role and provide a number of services in society. The activities of the Local Police are undertaken mainly in close relationship with the population (community), and their effectiveness depends on the support of the latter.

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[16] *Ibidem.*
[17] *Ibidem.,* p. 50.
[18] *Ibidem.,* p. 51.
[19] *Ibidem.*
[20] *Ibidem.*
[21] *Ibidem.,* p. 52.
[22] *Ibidem.*
[23] *Ibidem.,* p. 53.
[24] *Ibidem.*

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`TRIBAL TONGUES` PHENOMENON – INTELLIGENCE AND POLICY RELATIONS

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ABSTRACT:

The article discusses an important topic on the agenda of the intelligence studies, namely the consumer–producer relations as regards the intelligence cycle. Far from being an easy to grasp subject, the debate is significant at least for the persistent fears expressed by the public opinion about intelligence being politicized. We highlight the idea that by definition the intelligence activity may be considered politicized and the challenge would be to better clarify the term `politicized`. The tribal tongues phenomenon characterize the intelligence–policy relation as the two tribes have divergent perspectives and missions. While the intelligence is invested with attributes like objectivity and expertize, the policy realm speaks the language of subjectivity and preferences.

Therefore, understanding and discussing the consumer–producer relations (a syntagm used in intelligence studies) is of highest importance, given that intelligence can be after all easily politicized as long as it is defined as an adjunct to policy.

KEYWORDS: *intelligence, policy, politicized, role, defining*

INTRODUCTION

The expression `tribal tongues` was first formulated by Mark Lowenthal (1992) in order to describe the relation between intelligence and policy. The theme of intelligence–policy relation in a democratic society is a matter of vital importance as intelligence agencies exist in order to support political decisions and are specifically designed to collect and interpret information about the international security environment. As the role of intelligence in national security is uncertain the issue represents a basic problem (Rovner 2011). The question is a major theme of reflection for thinkers and specialists in the field of Intelligence Studies, an academic discipline that has a relatively short history. Intelligently, Warner (2014, 25) emphasizes the relevance of having such an academic field of study by pointing the same idea: even if espionage has a long history and got along just fine for thousands of years without much scholarly reflection, longevity does not automatically mean understanding, thus confirming the need for an academic approach of intelligence. The first book considered representative for this field of study was written by Sherman Kent in 1949.

Being a major theme in intelligence studies, defining the relation between policy and intelligence involves defining the role of intelligence. Usually, the role of intelligence is expressed in terms like to support policy makers, yet the support might presume myriad ways to perform the task. Traditionally, intelligence agencies exist for four reasons: to avoid strategic surprise, to provide long-term expertise, to support policy process and to maintain the secrecy (Lowenthal 2015, 2). Without a constant resort to political decisions, the intelligence process has no reason. To ignore the knowledge interests of the political factors would mean to abandon the basic mission of the intelligence organizations. The intelligence services are designed to offer expertise and knowledge related to subjects which have a profound socio-political implications. Shulsky and Schmitt (2002, xii) express the same idea, intelligence should have become, less of a "cloak and dagger" affair and more like a branch of the social sciences, seeking to analyze and ultimately predict political, economic, social, and military matters.

`Intelligence estimates play an important role in strategic judgment, adding unique kinds of information and insight to help leaders cope with the inherent uncertainty and complexity of international politics.` (Rovner 2011, vii)

The difficulty of the relation is of highest importance, given that intelligence can be after all easily politicized as long as it is defined as an adjunct to policy. The tribal tongues phenomenon suggests that the intelligence – policy relation are inherently difficult as the two tribes have somehow divergent perspectives and missions. While the intelligence is invested with attributes like objectivity and expertize, the policy realm speaks the language of subjectivity and preferences.

Therefore, understanding and discussing the consumer – producer relations involves the theme of politicization of intelligence, usually perceived in pejorative terms, as a negative aspect. The syntagm is not well clarified and understood, being an ambiguous concept.

POLITICIZATION OF INTELLIGENCE MAY COME IN MANY FLAVORS

The relationship intelligence–policy is a complicated one. Most specialists think that the ideal relation between intelligence and policymakers should be defined by two terms: objectivity and relevance. If the intelligence analysts would be totally independent, then their products would probably not address the political dilemmas. The other way round, if the relation would be too close between the two tribes that would affect the objectivity of the analysis. Rovner (2011) notices that `the existing literature on intelligence-policy relations relies on ambiguous concepts that are alternately confusing, all encompassing, or contradictory. *Politicization* in particular seems to have as many definitions as there are authors using the term.`

The politicization of intelligence can be perceived as well as inevitable and a must. The policy makers play a central role for every step composing the intelligence cycle and it would be a big mistake to be excluded. The policymakers must be understood as being less than the beneficiaries of the intelligence products, in fact they are the key players in designing the intelligence cycle. The relationship between the intelligence producers and intelligence consumers has important consequences for intelligence process. Even if there is a negative perception, that intelligence politicization is a bad thing, it is important to understand that defining politicization is even more important. Why? The intelligence agencies do not have political interests *per se*, yet the intelligence analysis must have relevance for political decisions, in order to improve the capacity to rationalize ends and strategies, to reduce the inherent uncertainty when taking decisions and acting on international scene.

From a theoretical point of view, the intelligence services must be free in their endeavor to objectively analyze information, even if the data analyzed have political relevance and the analysis might formulate points of view that may sustain or invalidate some political options. Therefore, it is important not to ignore the political needs as the intelligence organizations must serve the society by providing expertize on different political, social, economic subjects. If the intelligence services provide information without being asked for, those intelligence products have little chances not to be taken into account.

The role of intelligence services is very important within the socio–political system, therefore it is important to be clarified. The modality the government relates to intelligence represents the key in configuring the role of intelligence services for the society. Translating into practice is the hardest thing. Understanding the intelligence services as being `specifically designed to collect and interpret information about the international security environment` is a very flawed definition. It is not relevant to affirm that the core task of intelligence agencies is that of collecting information. By comparison, defining science as being nothing more than a process of `collecting data and interpreting information` would imply saying nothing relevant about its core mission. Likewise, defining intelligence agencies as collectors and analyzers of information says nothing important about their missions: as instruments used by policymakers in governance. A syntagm like `the parallel state` would better describe a pathological relation between intelligence and policy, an undesirable social

condition, and at the other extreme would be the excessive harmony, another pathological relation. Within the literature of intelligence studies there have been identified and discussed many aspects that characterize pathological politicization, named as following: embedded assumptions, intelligence parochialism, bureaucratic parochialism, partisan intelligence, intelligence as scapegoat etc. As the intelligence tribe and the policy tribe speak different languages, the interaction is difficult. It is not something new that intelligence-policy relations do not always go well. The relations are occasionally poisonous (Rovner 2011).

A certain degree of politicization of the intelligence is unavoidable, as the relation between the tribes is configured, as we have explained in an article entitled *Intelligence and IR Constructivism* (Leucea 2020), by a strategic culture and by paradigms adopted in interpreting the international security environment.

ASSESSING THE INTERNATIONAL SECURITY ENVIRONMENT AND THE INTELLIGENCE CYCLE

We may assume that the `politicization` of intelligence starts from the very beginning of the intelligence cycle. Most specialists in intelligence studies do not consider the policy maker a part of the intelligence cycle, although there are authors (Lowenthal 2014, Schreier 2010) who think that the policy maker should be included within the intelligence process and that it would be a mistake to be excluded. The political leaders are not just the beneficiaries of the intelligence products but they are the ones who configure the entire intelligence process by establishing the intelligence requirements. Without a constant connection to policy makers` requirements, the intelligence process has no ends and no meaning.

*`The intelligence and facts were being fixed around the policy.` (*Rovner 2011,)

A key component in linking the intelligence and policy tribes are the estimates of the international security environment, estimates which fundament the national security strategy, for instance. The assessment of the international security environment is an extremely complicated task. As we stated in a previous article (Leucea 2017), the difficulty of assessing the international security environment is similar to the academic endeavor to conceptualize the international systems in world history, theoretical instruments being necessary to be developed. Theoreticians of the world systems apprehend that the systemic perspective is created by the analyst. The same, the assessment of the international security environment depends on implicit or explicit assumed theoretical lenses. The policymakers and intelligence officers most often than not have divergent perspectives on national security policy and strategy, but in the process of conceiving the national security strategy both tribes are very much involved.

The intelligence requirements are not abstract concepts, but compose a security agenda. As theoreticians of the international systems notice, the systemic perspective of the international security environment is firstly and inevitably a theoretical artefact. In conceiving the national security strategy both tribes contribute. We may affirm that the intelligence gaps may be generated as well by the articulation between intelligence and policy in assessing the international security environment: prioritized topics by defining them as having national security relevance constructs as well the doctrine of intelligence collection. Intelligence agencies plan intelligence collection in accordance with national security estimates assumed and presented in strategic documents like the national security strategy. Formulations as `the international environment is constantly changing`, `the security environment is characterized mainly by the following major tendencies` or `the main risks and threats that can put in danger the national security of Romania are…` leave the impression of objective descriptions of the security environment but are imbued with subjectivism and are dependent on a particular security agenda.

Therefore, the political leaders are, in fact, the first organizers of the intelligence process, and here is the very moment the `politicization` starts. That is the reason some experts advocate the intelligence cycle must incorporate the decision maker. The national security strategy is created by a political process in relation with the intelligence process. For

instance, Peter Jackson (2005, 15-18) highlights that the identification and interpretation of risks is a political activity, the possibility that the intelligence products to be influenced/biased by the policymakers' perception being present during the entire intelligence cycle. From scratch, the political assumptions determines the risks prioritization and interpretation, a key aspect that influences the security agenda, the data collection as it prefigures which information is relevant for national security.

Therefore, the politicization of intelligence may come in different flavors but the first step would be the national security strategy, respectively the assessment of the international security environment. The systemic ideological biases are functioning as cultural/perceptive lenses and are used in interpreting the world, playing an important role in selecting and identifying the security risks. From the very beginning of the intelligence process, assessing the international security environment is inherently influenced by cultural/theoretical filters used by intelligence analysts and policy makers in their construction the map of the international system, decisively influencing the manner in which the environment is perceived. The IR specialists emphasize the idea of a mediated perception of the international security environment:

`It is equally important to analyze the manner in which the world politics is studied, the process of theorizing becoming a subject itself.` (Burchill & Linklater 2005)

The assessment of the international security environment is not explicit in stating and assuming the impossibility in maintaining the distance between the knowledgeable subject and the object of study. The assessment is inherently subjective and can be considered an artefact being dependent on particular paradigmatic stances. The question of the role of theories for science is a fundamental one for any academic subject, yet the assessment of the international security environment leaves the impression of objectivity but it can as well be a source of misperception in international politics. Probably that is the reason the most common type of intelligence politicization is the tendency to configure the intelligence analysis in a manner which confirms and fills the policies underway (Jackson 2005, 15-18). That type of politicization determines the intelligence producers to confirm the expectances of the policymakers in order to avoid being marginalized, ignored or excluded.

A very dangerous situation, favored by the relativity determined by the perceptive lenses, would be that of using intelligence services as instruments in implementing politics. At the same time, specialists highlight (Schreier 2010, 145) the need to expand the policymakers` role in strategic warning in order to overcome producer–consumer disconnects.

`Strategic warning should be reconfigured as a governmental responsibility rather than an intelligence responsibility. Policymakers will have to make the challenging decisions about resource commitments for defense against future threats should have a direct role at every phase of the strategic warning process.` (Schreier 2010, 145)

Another remarkable specialist in intelligence studies, Gregory Treverton (2004), invokes a 'real intelligence cycle' composed of five phases. The author formulates that in reality the intelligence community 'infers' the needs of policy-makers. David Omand (2014, 66) as well mentions that in reality policy-makers are too busy – and often not sufficiently expert – to articulate their requirements. Instead the requirements are inferred by members of the intelligence community.

CONCLUSIONS

The tribal tongues phenomenon challenges much more the task to frame intelligence not as a specific activity or separate entity but rather in a broad context of knowledge production (Agrell & Treverton 2015, 3). To better frame intelligence and convey its meaning around the concept of science would mean facilitating finding answers to questions like those formulated by Mark Lowenthall (2009): what happens if the policy makers do not decide, find that they cannot decide, or fail to convey their priorities to the intelligence community? Who sets intelligence priorities then?

The intelligence – policy relation is a multifaceted phenomenon and has an evolving character. We may assume that the dynamics of the international security environment compel the relation between the two tribes to be as flexible and adaptable as the winds of change propel.

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RECENT LEGISLATIVE CHANGES IN THE FIELD OF COUNTY ROAD PASSENGER TRANSPORT

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ABSTRACT: *This article aims to capture the recent legislative evolution in the field of county road passenger transport and the impact of the new regulations on the material competence of the county councils in this matter. It highlights the succession of normative acts adopted in the field of county road passenger transport over the last two years, reviewing the legal regime changes generated by them, as well as the consequences of legislative instability on all actors involved in providing this service and, of course, on its beneficiaries.*

KEYWORDS: *county road passenger transport, public service, commercial regime, management delegation contract, county councils, passenger carriers, compensations.*

INTRODUCTION

Until December 31st 2018, the county road passenger transport had the characteristics of a commercial transport. The adoption of Law no. 328/2018 generated important changes in the Law on local public transport services no. 92/2007, and, under art. VI of the same amending text, the Order of the Minister of Interior and Administrative Reform no. 353/2007 for the approval of the Norms for the application of Law no. 92/2007 was repealed.

LEGISLATIVE CHANGES IN THE FIELD OF COUNTY ROAD PASSENGER TRANSPORT AFTER DECEMBER 2018

The main changes determined in the field of road passenger transport by Law no. 328/2018 for the amendment and completion of Law no. 92/2007 aim to the following aspects:

- Changing the name of Law no. 92/2007 into the *Law on public passenger transport services in administrative-territorial units*;
- Removing special regular services from the text of Law no. 92/2007;
- Replacing the phrase "local public transport" with "local and county public transport";
- Extending the route license validity over a period that could ensure amortization of the means of transport in the local and county public transport;
- The procedure of issuing route licenses for the local and county public transport and their corresponding bid of specifications has been changed since the attributions of the Romanian Road Transport Authority were taken over by the County Councils;
- The abrogation of Order no.353/2007 on the approval of the application norms for the Law no. 92/2007 on local public transport services, with the subsequent amendments and completions, brought about changes in the competitive procedure for allocating the routes and the conditions for scoring the evaluation factors, the competent authority being the County Council;
- The validity of existing transport programs, route licenses and management delegation contracts has been extended by law until 2nd of December, 2019.

Basically, by adopting Law no.328/2018, the county road passenger transport was regulated as a **public transport service**, as referred to by Regulation (EC) no.1370/2007 of the European Parliament and of the Council of 23 October, 2007 on public passenger transport services by rail and by road and repealing Regulations (EEC) No 1191/69 and no. no.1107/70 of the Council, with the subsequent amendments and completions.

In terms of definition, art.2 paragraph (e) of Regulation (EC) No.1370/2007 clearly explains "public service obligation" as ”*requirement defined or determined by a competent authority in order to ensure public passenger transport services in the general interest that an operator, if it were considering its own commercial interests, would not assume or would not assume to the same extent or under the same conditions without reward”*.

According to the new provisions, the allocation of routes (new or no longer accepted by a transport operator) is made directly by the county councils based on Law no. 99/2016 on sectoral procurement via the SICAP system. Consequently, in compliance with art.231 paragraph (6) of Law no. 92/2007, with the subsequent amendments and completions, the county council has the obligation to establish the scoring grid based on the allocation criteria stipulated by paragraph (5) of the same article.

According to art.17 paragraph (1) letter (c) of the Law no.92/2007 on public passenger transport services in the administrative-territorial units, recently amended and completed by Law no.328/2018, one of the attributions of the county councils is "a periodic update of routes and transport programs based on the needs of the population and in correlation with the existing inter-county, international, railway, air or naval passenger transport, as well as the correlation of the various modes of local passenger transport services by buses, trolleybuses, trams, metro and taxi, as the case may be".

At the same time, according to art.18 paragraph (1) letter d) of Law no. 92/2007 with the subsequent amendments and completions, the local public administration authorities are expressly conferred, in their relations with the road transport operators or the authorized transporters providing local and county public transport services, the right to *"update the public passenger transport programs by regular rides in accordance with transport requirements"*.

Of the same importance is also the fact that, pursuant to art.20 paragraph (6) of the above-mentioned normative act, the county public administration authorities, "based on the mandate received, are **local regulatory authorities** in the field of local and county public transport service". Therefore, they have a regulatory competence in the field that allows them to harmonize with national legislation.

By the subsequent adoption of the G.E.O. no.51/2019, published in the Official Gazette no.535/28.06.2019, the Law no. 92/2007 on public passenger transport services in the administrative-territorial units has undergone important amendments concerning the attributions of the county councils in this field. The purpose of G.E.O. no.51/2019 was among others, to replace the paid road passenger transport by public regular services, provided at county level, as stipulated by Regulation (EC) no. 1370/2007. Shall the county administration authorities not comply with this Regulation, Romania will be liable for non-compliance, as shown in the preamble of the G.E.O. no.51/2019.

The text of the ordinance aims to ensure the distinction between the legal regime of local public transport services and that of county-level transport. Upon its entry into force, the county-level regular road passenger transport becomes commercial activity, falling under the provisions of G.O. no.27/2011 on road transport, with subsequent amendments and completions.

Regarding the socio-economic impact of the new regulation, as suggested by its preamble, the provisions of the G.E.O. no.51/2019 are meant to prevent the negative consequences of the previous regulation of the public road passenger transport at county level, as follows:

- the clear intention of the transport operators, publicly expressed by the representative of the employers' federations, to boycott, at the end of June 2019, the extension of route licenses, which would have impeded the passengers` travelling throughout the counties, thus blocking the road passenger transport;

- substantial distortion of the competition in the field, in the sense of virtually disrupting the transport activity at national level, with consequences on the development of economic activities under market conditions;

- the negative impact on the county budgets due to an additional budgetary burden, which was quite significant;

- the current risk that at Community level, Romania might be liable for non-compliance with Regulation (EC) no.1.370/2007 by the county councils, as mentioned before.

The methodological norms for the application of the provisions regarding the organization and implementation of paid road passenger transport through regular services at county level, approved by Order no.1158 of 12 August 2019 of the Minister of Transport and of the Minister of Regional Development and Public Administration, establish the framework for the application of the provisions of art.V of G.E.O. no.51/2019 for the amendment and completion of some normative acts in the field of passenger transport.

Pursuant to art.2 paragraph (2) of G.O. no. 27/2011, as amended by G.E.O. no. 51/2019, *"the paid road passenger transport by regular services at county level is regulated by the county council, which represents the competent authority at county level, within the limits of the attributions conferred by this emergency ordinance"*. Thus, county councils maintain their quality of regulatory authorities in the field of paid road passenger transport at county level. However, the exercise of their regulatory power through the county transport authorities must comply with the national legislation in force based on the principle of the pyramid of sources of law, which requires rapid adaptation to the fluctuations of the legal regime in the matter.

The new art. 8[1] paragraph (2) of G.O. no.27/2011 points out the attributions of the county councils in the matter of road passenger transport. Given the new legislative context created by the G.E.O. no.51/2019, it is necessary to elaborate and approve a new Regulation on the organization and implementation of paid road passenger transport through regular services at county level, considering that under art. X of the G.E.O. no.51/2019, *"the validity of the current county transport programs and, as the case may be, of the route licenses for road passenger transport through regular services at county level shall be extended until June 30, 2023"*.

Also, by art.VI of G.E.O. no.51/2019, art.57 paragraph (1) of G.D. no.69/2012 is completed with a new letter - letter c), according to which the persons delegated by the presidents of the county councils for county transport acquire certain control attributions in contravention matters. However, it does not rule out the application, where appropriate, of art. 2 paragraph (2) of G.O. no.2/2001 on the legal regime of contraventions, with subsequent amendments and completions, which stipulates that: *"Decisions of public local or county administration authorities set up and sanction contraventions in all areas of activity that the law has established attributions for, insofar as no contraventions have been established in the respective fields by laws, ordinances or Government decisions"*.

The following year, Law no.34/2020, published in the Official Gazette no.271 of 01.04.2020, ruled out G.E.O. no.51/2019 for the amendment and completion of some normative acts in the field of passenger transport. As a result, in the county passenger transport, the applicable legislation becomes Law no.92/2007, as amended by Law no.

1 The level of the travel fare is calculated according to the formula from art. 272 para. (1) lit. a) of Order no.134/2019, taking into account an average occupancy rate of 70% by bus, which may not be achieved in practice, which does not remove the operator's right to compensation and, implicitly, the obligation of the authority to payment.

328/2018. Under the new conditions, the legal regime of the county road passenger transport ceases to be commercial and becomes **public service** again.

Consequently, the operator will provide county public passenger transport service by regular rides in compliance with the public service job responsibilities established by the management delegation contract. Of the same importance is also the fact that upon entry into force of Law no.34/2020, the legislation applicable to the procedure for the award of contracts for public passenger transport services at county level is the legislation in the field of sectoral procurement, that is, Law no.99/2016 and the Methodological Norms for its application. The transport fare remains one of the most important factors in evaluating the submitted bids.

The argumentation of fares[1] is made in accordance with the provisions of the Order no.272/2007 of A.N.R.S.C. for the approval of the Framework Norms regarding the establishment, adjustment and modification of fares for public local passenger transport services, as amended by Order no.134/2019.

By adopting Law no.34/2020, the route licenses for paid road passenger transport services at county level whose validity has been extended until June 30, 2023, under art.X of G.E.O. no.51/2019, are no longer valid as a result of the ordinance rejection, although the transport operators have already paid the fees for the extension.

Once with the application of the public service regime, the financial impact on the county budget involves the granting of monthly compensations to the transport operators, calculated according to the national regulations implemented at county level. More specifically, the estimate is based on the provisions of the Joint Order no.131/1401/2019 of the A.N.R.S.C. and A.N.A.P. on the standard documents and the framework contract to be used within the procedures of delegating the management of the public passenger transport service in the administrative-territorial units.

Public service compensations are defined by art.2 lit. g) of Regulation (EC) no. 1370/2007 as any benefits, in particular financial, granted directly or indirectly by a competent authority, from public funds, during the fulfilment of a public service obligation or in connection with that period. The compensation amounts are included in the county budget and are estimated annually by the contracting entity based on a formula provided by Order no. 131/2019.

The implementation of the current compensation regime, as per Order no.131/2019, following the rejection of G.E.O no.51/2019, raises a number of important issues related to a possible unwise structuring of county routes, risk of overcompensation, quality of real-time passenger traffic monitoring, late or incomplete submission of documentation by operators in order to receive compensation, etc.

At the same year with the return to a public service regime, by art. 66-70 of the **G.E.O. no.70/2020**, new regulations have also been introduced regarding the county road passenger transport and student transport, in compliance with the global epidemiological context. More exactly, the provisions of art. 68-80 of the above mentioned normative act have amended art. 84 of the National Education Law no.1/2011 by providing free transport to pre-university students. Subsequently, this article has been amended again by **Law no.226/2020**, as currently the subsidies to county road transport services for students are impossible in the absence of implementation rules. In practice, this has led to uncertain situations, like providing free transport services, some operators` intention to give up providing the service or even charging the very beneficiaries of the recently granted "exemption".

CONCLUSIONS

To summarize, the succession of these normative acts in less than two years and the changes in the legal regime of the county road passenger transport have created a climate of legislative instability and unpredictability meant to equally affect all parties involved: transport operators, passengers, county councils. Their consequences simultaneously affect functionality on several levels: economic-financial, social, educational, administrative, institutional and even personal.

Ensuring continuity in providing public road passenger transport at county level, especially for vulnerable communities, under the unusual conditions of route license expiration, establishment of new routes, or abandonment of certain routes by transporters has proved to be a real challenge.

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COVID-19 – ANOTHER REASON FOR PUBLIC ADMINISTRATION REFORM?

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ABSTRACT

The present paper tries to shed light on the effect that a pandemic and a state of emergency can have on the public administration. There is no doubt of the quick adaptation of public administration representatives to the new situation caused by Covid-19 but during this period of time there were a series of criticism regarding the violation of civil rights. In relation to this, the present article emphasize on the adaptation and amendment of the legislation and as well on inclusion of a new category of reasons for which is important to reopen the discussion on the need for reform of public administration.

KEY WORDS: *public administration, Covid-19, public administration reform*

I. GENERAL CONSIDERATIONS

The public administration is meant to serve the public interest, to be a public service available to the whole society, to all citizens.

In this regard, the activity of the Romanian administration has become a subject of criticism and dissatisfaction both for the citizens and for the international partners. In the last ten years there have been many changes and improvements of the Romanian public administration. However, reforms have been established and implemented for specific situations, without a general strategy and conception of a reform. (Profiroiu, 2012, p. 13)

According to some theorists, the notion of administration has two meanings. In a first sense, the term designates a certain activity, and in the second sense, it is designated the subject who performs this activity.

Al. Negoiță in "Elements of administrative law" frequently uses the two meanings and thus explains the connection between the notion of public service and that of public administration as a service, but also as an organization that performs that service.

Public administration is a public activity, put in the benefit and general interest of society, which is achieved both by the activity of state bodies and by the activity of local public administration entities, autonomous utilities, companies, other institutions.

The public administration, as a system of organization, is made up of several elements, well structured, with different attributions, which work together.

Since 1990 and until today, the public administration system in Romania is in a continuous process of reform. However, the resources needed to create the necessary legislative and institutional framework for the central and local public administration and, in particular, for the efficient implementation of the reform measures could not be mobilized. There are several causes that make it impossible to implement a real reform in the administration, such as: severe financial constraints, lack of political determination, low experience with alternative administrative structures, lack of training of civil servants to meet the requirements of the arising from rapid environmental change, lack of clear regulations on staff and administrative structures.

Although it has been a separate chapter in all government programs so far, administrative reform has not been a priority; on the contrary, the centralist methods were perpetuated and the expected changes were much too slow and fragmentary.

II. UNREGULATED CRISIS SITUATIONS. ADAPTATION AND MODIFICATIONS.

The trend of globalization, accompanied by the dynamic development of social systems, puts the national states in a whole new position, in which institutions and administrative systems must be adapted. Any intervention in the field of public administration reform involves changes of the major components, including central government, local government and public services. On the other hand, the development of democracy requires the establishment of a new relationship between citizens and the administration, the growth and strengthening of the role of local authorities and the reconsideration of the partnership with civil society.

There are many reasons for the structural and functional modernization of the Romanian public administration. The need for reform was imposed by four main categories of reasons, among which we mention:

- **Economic reasons:** low economic growth and diminishing budgetary resources allocated to public administration, the need of the private sector to have a modern, flexible administration and open to public-private partnership;
- **Technological reasons**: introduction of information and communication technology in public administration;
- **Sociological reasons**: citizens, as beneficiaries of public services;
- **Institutional reasons:** highly hierarchical structure gives way to new organizational types based on decentralized structures. (Government Strategy on Accelerating Public Administration Reform, 2001)

To these is added the fifth category, based on the concrete situation caused by the COVID-19 pandemic, namely **extreme reasons.**

This category may include natural cataclysms, wars, terrorist attacks that have been provided in legal norms identified and motivated according to European requirements (Law 381/2002, OG 47/1994, Order 1863/2016 respectively Criminal Code, Labor Code, Law 129 / 2019, Law 35/2004, Law 58/2019.)

Regarding pandemics, the legislation specific to the administrative system (contained in Article 93 of the Romanian Constitution), the right and especially the obligation of the President to declare a state of siege or a state of emergency throughout the country or in some territorial administrative units and the obligation to request Parliament to approve the measure adopted within 5 days of its adoption, and if Parliament is not in session, it shall be convened by law no later than 48 hours after the establishment of the state of siege or emergency and operates throughout its duration.

Starting from this provision corroborated with the provisions of OU 21/2004 based on the motivation of the moment, namely "the current geostrategic context and the multiplication, on the one hand, and the increase of gravity, on the other hand, of non-military risks to national security, against the background of accelerating globalization trends, radical climate change, of the development of scientific experiments with unpredictable effects, the diversification of legal economic activities - and not only - that use, produce and market dangerous substances", the **National Committee for Special Emergency Situations** was established respectively the **National Emergency Management System** (art. 72 of Law 55/2020, OUG 21/2004 approved and supplemented by Law 15/2005) which was empowered to manage, resolve and reduce the often unknown effects of defined emergencies.

The definitions, attributions, measures, the management of concrete situations were subsequently regulated by amending the nominated act according to OU 1/2014, Law 15/2005, OUG 68/2020, Law 55/2020.

There is a rapid adaptation of public administration representatives at the highest level, to the situations that generated a series of criticisms regarding the lack of

constitutionality control, lack of classical procedures but especially criticisms regarding the violation of civil rights in relation to art.53 of the Romanian Constitution.

We consider that, regardless of the criticisms, these normative acts are authentic and have legal validity as long as they are in force if they have not been attacked and **until their declaration as unconstitutional.**

It should be noted that by the Decision of the Constitutional Court no. 157 of May 13, 2020, published in the Official Gazette no. 397 of May 15, 2020, the exception of unconstitutionality regarding art. 4 of the Government Emergency Ordinance no. 21/2004 on the National Emergency Management System, noting that the provisions of this article are constitutional insofar as the actions and measures ordered during the alert state do not aim to restrict the exercise of fundamental rights or freedoms.

According to art. 147 para. (1) of the Romanian Constitution, republished in the Official Gazette no. 767 of 31 October 2003, the provisions of the laws and ordinances in force, as well as those of the regulations, found to be unconstitutional, shall cease to have legal effect 45 days after the publication of the decision of the Constitutional Court if, during this period, the Parliament or the Government as appropriate, do not agree the unconstitutional provisions with the provisions of the Constitution. During this period, provisions found to be unconstitutional shall be suspended by law. Therefore, starting with May 15, 2020, the provisions of art. 4 of the Government Emergency Ordinance no. 21/2004 on the National Emergency Management System, insofar as the actions and measures ordered during the alert state, aim at restricting the exercise of certain rights or fundamental freedoms, shall be suspended by law, and shall cease to have effect starting with June 29, 2020, if the legislator does not intervene to amend the contested provisions.

III. CONCLUSION

In order to succeed in the reform process in the Romanian public administration, it is necessary to:

- Formulate concrete and quantifiable objectives
- Increase the strategic capacity of the public administration to opt for different projects and to define its own priorities
- Articulate changes in public administration in the medium and long term
- Have better representation of citizens' interests in decision-making processes
- Ensure management through objectives
- Increase the consulting and monitoring function in the administration.
- Adapt and amendment the legislation, by including crisis situations.

The need for reform is determined by both internal factors (management, social and economic issues) and external factors (internationalization and rapid development of information technology). (Government Strategy on Accelerating Public Administration Reform, 2001)

Maintaining the constitutionality control through the intervention of the Constitutional Court at the notification of the interested persons as well as the judicial control through the possibility of attacking the administrative acts stated in the administrative disputes guarantees the possibility of reforming the public administration and also under the aspect of extreme reasons (for example Covid-19).

Public administration reform is a dynamic process and, like any other process of structural reform, it can never be completed and accomplished.

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THE ROLE OF THE POLICE IN THE CRIMINAL PROSECUTION PHASE

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ABSTRACT: *The general framework of criminal prosecution is regulated in the new criminal procedure in art. 285-341 Cod Proc. Pen. of course, with the mention that many procedural institutions used in this phase of the criminal process are provided in other chapters of the criminal procedure. The task of the judicial police bodies is to gather and administer evidence and means of evidence that outline the constituent elements in order to establish the existence of criminal acts, to determine the identity of the perpetrators and to hold them accountable. The administration of evidence is the basis for the decision to sue or not the perpetrator, but it is very important that these activities are carried out in compliance with the fundamental rights and freedoms of the parties to the criminal proceedings.*

KEYWORDS: *police, criminal, prosecution, phase.*

INTRODUCTION

The investigative bodies of the judicial police have general material competence. Even if the criminal procedure provides for criminal acts that are obligatorily within the competence of prosecuting the prosecutor, almost exclusively the criminal investigation is carried out by the police. At the Balance Sheet of the Romanian Police for 2012, the General Prosecutor of Romania estimated that over 95% of the criminal investigation activity is carried out by the police. The art. 57 Cod Proc. Pen. the provision is inserted that "the criminal investigation bodies of the judicial police carry out the criminal investigation for any crime that is not given, by law, in the competence of the special criminal investigation bodies or the prosecutor, as well as other cases provided by law".

It should be mentioned that during the criminal investigation, in order to achieve the main purpose of the criminal investigation to find out the truth, the criminal investigation bodies of the judicial police carry out criminal investigation acts but also acts that do not fall into the category of criminal investigation acts. We are talking here about investigations, informative activity, the perception of certain facts or facts on the spot, the execution of photographs or video recordings, the verification of some claims of the parties, controls or inventories, etc. An important role in carrying out such activities can also be played by the local police workers in carrying out the joint activity that they carry out together with the police officers from the national police. Regarding the activities that fall into the category of criminal prosecution acts performed by police officers and that become evidence in the criminal process, can be highlighted as follows: on-site investigation, collection of objects or documents, technical-scientific or forensic findings, hearing the perpetrator or the injured person, reconstitutions, group reconnaissance or body searches. An exception that gives the possibility to the investigative bodies of the judicial police to carry out acts in cases that are within the competence of the prosecutor are provided in art. 60 Cod proc. pen. "The prosecutor or the criminal investigation body, as the case may be, is obliged to carry out the criminal investigation acts that do not suffer postponement, even if they concern a case that is not within its competence. The work performed in such cases shall be sent immediately to the competent prosecutor. "

THE ROLE OF THE POLICE IN THE CRIMINAL INVESTIGATION ACTIVITIES

The criminal investigation activities are carried out only by police officers designated under the conditions provided by Law no. 364/2004. As an appreciation of this law, I must mention that it is a superficial law that is outdated by the reality of the criminal investigation, by the conditions of organizing the police, by the dynamics and the modes of operation regarding the commission of crimes. It is a law that includes the spectrum of prosecutor's domination through surveillance, the allegation of an opinion of the prosecutor general for entry into the judiciary or promotion and the presumption of indiscipline in the judicial police doubled by sanctions from the prosecutor or police chiefs. Not a word about the rights of the criminal investigation body of the judicial police, nor about the obligations of the prosecutor.

Depending on certain criteria, the Code of Criminal Procedure or special laws have delimited certain rights and obligations of criminal prosecution bodies, thus establishing their criminal jurisdiction. The criteria underlying the establishment of criminal jurisdiction are crucial in allowing certain institutions to carry out certain legal, criminal and criminal procedure activities, while respecting the fundamental rights and freedoms of the parties. Relating to the place of the crime, to the quality of the person who committed the crime or on whom it was committed, to the nature of the crimes or depending on the specialization of the judicial bodies, we find the following forms of competence.

1. The material competence defines the vertical competences and establishes which of the judicial bodies are entitled to carry out the criminal investigation legally and thoroughly or to solve the criminal case depending on the complexity of the criminal facts, the nature and gravity of the criminal offense.

2. Territorial jurisdiction is related to the place where the results of the criminal activity took place in whole or in part or the place where the criminal activity took place. According to art. 41 paragraph 1 "The jurisdiction by territory is determined, in order, by:

a) the place of the crime

b) the place where the suspect or defendant was caught

c) the residence of the suspect or defendant natural person or the headquarters of the defendant legal person, at the moment when he committed the deed

d) the dwelling or, as the case may be, the headquarters of the injured person".

3. Personal jurisdiction is mainly related to the quality of the perpetrator or, in some cases, the injured person at the time of the criminal act. The fulfilment of the criminal investigation acts with the non-observance of the norms of personal competence entails the sanction of absolute nullity. Thus, all procedural acts performed by a criminal investigation body of the judicial police that are not materially competent or of the quality of the perpetrator or defendant will be struck by absolute nullity and will be subject to annulment.

The involvement of judicial police investigation workers in the administration of evidence in the criminal prosecution phase is an active one, adapted to the realities of today and which goes far beyond the covers in which the evidence and means of evidence underlying the sending or non-sending of a package are "packaged". defendant before the judge. I will refer to some of the evidence obtained by the criminal investigation bodies of the judicial police in the criminal investigation:

Listening to the suspect or defendant. The suspect or defendant does not need to prove his innocence and as such he is not obliged to give a statement before the criminal investigation bodies of the judicial police during the criminal investigation. This does not have any repercussions on the accused or defendant, but if he chooses to testify, it can be used even in his accusation. The recognition of the facts of the suspect or defendant must be doubled by an active attitude of the police officer in the sense that he must administer evidence leading to the confirmation of the statement of the suspect or defendant.

Listening to witnesses is the most commonly used means of proof in criminal proceedings but also one of the most important evidence administered in criminal proceedings. The practice of criminal prosecution bodies of the judicial police has established,

however, that in some cases the statements of witnesses do not reflect reality, influenced by multiple and complex conditions related to the personality of the witness but also by the conditions under which certain crimes were committed. Throughout the forensic examination, it has been shown that the mechanism of perception, memorization or rendering of certain facts differs from person to person, to which can be added the bad faith of the witness or the subjectivism of those who listen to the witness, manifested mainly in how to interpret his words. Therefore, it is extremely important the experience, behavior but also the wisdom or exigency of the police officer, knowledge of verbal or nonverbal language, the worker's attention in taking and recording the witness statement, the success or failure of listening to the witness being largely achieved only if the investigating body of the judicial police knows and manages to apply in practical activity these theoretical qualities. At the same time, the stage of preparing for the hearing of the witness is extremely important, which is done by knowing the witness heard in advance, knowing in detail the case file, setting questions to support the hearing of the witness or ensuring the conditions under which the witness is heard. Adherence to these parameters to the highest possible standards will bring objective results from the hearing of the witness and will effectively contribute to finding out the truth in the criminal investigation.

Listening to the injured party. When finding out the truth, it is important to achieve a concordance between the committed deeds, as they happened in their materiality and the perception, which is realized by the criminal investigation body of the judicial police, through the evidence it administers in the criminal case. An important evidence can be the statement of the injured party but in the conditions in which the judicial police officer manages to eliminate his emotional and volitional factors considering the fact that the injured person may have a subjective reaction to the facts produced and assessments that bring him certain favors. from this activity or even a personal revenge on the suspect or defendant. Beyond the experience of the police officer manifested during the hearing of the injured person, it is extremely important that this statement is part of the circumstances of the other evidence in the sense that it must be corroborated with the other evidence administered in the criminal case.

Confrontation. For objective or subjective reasons, inconsistencies or contradictions may arise between the statements of the parties to the criminal investigation. Finding out the truth in such cases is flawed, therefore, by virtue of the active role, the judicial police officer must remove these inaccuracies between the evidence in the case by confronting the parties. In order to carry out this means of proof in good conditions, it is important that the police officer knows well the criminal investigation file, the nature of the contradictions and, if possible, their cause, must prepare well the confrontation of the parties, establish the workers participating in these hearings. establish a hearing plan in this procedure.

Picking-up objects or documents. This procedure is often used during criminal proceedings, can be carried out voluntarily or by force and is intended to provide goods or documents that constitute evidence and means of proof in criminal proceedings to prove the commission of criminal acts but also on guilt and prosecution. criminal offenses. For the seizure of these goods, the proof of seizure is drawn up in which the data provided in the criminal procedure are mentioned and a detailed description of the seized objects or documents is made. When the situation requires it, these lifting of objects or documents can be done in secret with the prior authorization of the judge of rights and freedoms, the activity being recorded in a report that is a means of proof in the criminal case.

The search. This procedural activity is used in criminal cases, in the criminal investigation phase and is intended for the search and identification of objects, goods, documents or values held by the parties but whose possession is denied by them or the criminal investigation bodies consider that it requires this activity. procedural in order to discover evidence or means of proof. This criminal procedure is carried out only with the

prior authorization of the judge of rights and freedoms and is recorded in a report that will be constituted as evidence in the case under investigation.

Technical-scientific finding and expertise. Starting from a principle, so well known in the daily life of our lives, namely that there is no perfect crime, forensic research is carried out starting from the idea that every deed is committed in time and space and leaves traces. These procedural activities are aimed at identifying and removing the traces from the place of committing the crimes, processing these traces but also the expertise of the evidence and means of proof. These procedural activities are carried out on the basis of the ordinance by which the criminal investigation body of the judicial police orders the performance but also the objectives that it pursues by performing this finding or expertise. The development of forensic technology and the diligent training of police officers or experts in the structure of forensic police, known as the forensic police, have in recent years brought better and better results in identifying perpetrators, proving criminal activity and prosecuting them with the help of evidence or means of proof required could not be denied in the trial phase of the criminal trial.

Reconstitution. The new criminal legislation was also regulated in order to broaden the horizon of procedural activities leading to the finding out of the truth by the criminal investigation bodies of the judicial police. This procedure aims at artificially reproducing the conditions and circumstances in which the criminal act took place in order to verify, first of all, whether the act could have been committed under the given conditions, to verify the evidence or means administered in question were developed during the investigation of the criminal case and even for the identification of new evidence. Reconstitution, as a procedural activity, is recorded in a report that is a means of proof in the criminal proceedings.

Special surveillance or research techniques. The art. 138 paragraph 1 of C. Proc. Pen are provided "Special surveillance or research techniques:

a) interception of conversations and communications
b) Access to a computer system
c) Audio, video or photography surveillance
d) Location or tracking by technical means
e) Obtaining the list of telephone calls
f) Detention, delivery or search of postal items
g) Requesting and obtaining, according to the law, the data related to financial transactions, as well as the financial data of a person.
h) Use of undercover investigators
i) The finding of a crime of corruption or the conclusion of a convention
j) Supervised delivery
k) Identification of the subscriber, owner or user of a telecommunications system or of a computer access point ".

According to the special procedure, these special means are used only when there is certainty of committing a deed of a criminal nature, but there is no other means or means of proof for proving the deed and the perpetrator. These techniques are used only with the permission of the judge of rights and freedoms for a period of 30 days which can be extended for limited periods in criminal proceedings. For the special activities and techniques carried out, the judicial police officer draws up minutes that are confirmed for legality by the prosecutor supervising the case and who will represent means of proof in the criminal case.

CONCLUSIONS

Without claiming to be a comprehensive analysis of the activity of the criminal investigation bodies of the judicial police, it is obvious the extremely active presence of the police in the criminal investigation phase of the criminal process, based primarily on professionalism and versatile training, on permanent adaptation to world reality. in which we also live on everything that means state-of-the-art technology in proving criminal acts and

holding accountable those who commit them all, while respecting fundamental rights and freedoms and human dignity.

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THE PROCESS OF REGIONALIZATION OF ROMANIA IN THE INTERWAR PERIOD - THE FIRST LEGISLATIVE STEPS

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ABSTRACT: *The interwar period defined the reform of the Romanian regionalization on the background of the Great Union. This materialized in the form of a process of integration, of uniformity of the structures of the Old Kingdom, taking into account the specifics of each province. At the same time, the process was one of recovering the advance of the West, of integrating in a new stage of the Romanian state. Even if the projects created at that time aimed to form a construct of efficient territorial organization and applicable to the current reality of the interwar period, in the end it proved to be deeply influenced and organized against the problem of territorial unity.*

KEYWORDS: *regions, regionalization, interwar period, Romania, constitution*

INTRODUCTION

The year 1918 reveals a post-war Romania with a doubled territory and number of inhabitants, along with a status of regional power. At that time, the administrative organization of the state did not derive from a single legal source, but from several. At that time, it could be said that we have as many systems of administrative organization as there are large regions that make up the country. The old kingdom has its administrative structure, which was given to it in 1864 and which was strengthened, two years later, by the Constitution. We must not forget, however, that the idea of this structure is purely Latin, as one that proceeds from the ideas of the Great French Revolution, which ended the eighteenth century.[1]

This made it necessary to formulate a new constitution, the 1923 Constitution, along with a unification of administrative legislation. Administrative decentralization was announced by granting counties and communes the right to satisfy their own interests through elected councils.[2]

The term region is not yet established at this period as a unit of administrative-territorial decentralization.[3] The provisions of the constitution of 1923 did not allow the establishment of such units superior to the counties. All that could be achieved were the so-called ministerial directorates with administrative deconcentration units at the level of which the counties were to necessarily form associations endowed with legal personality[4].

The same problems can be signaled in the case of the reforms following the union with Bessarabia, together with the excessive centralism through innumerable attributions offered to the Country Council. The process of reorganizing the province was achieved by adopting the administrative institutions of the Old Kingdom, but without resorting to a sudden elimination of the old Russian institutions.[5] For Bucovina, the process of applying the

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[1] Anibal Teodorescu, *Viitoarea organizare administrativă a României,* în *Constituția din 1923 în dezbaterea contemporanilor,* București, Editura Humanitas, 1990, p. 407.
[2] Manuel Guțan, *Istoria administrației publice românești,* Ediția a 2-a, București, Editura Hamangiu, 2006, p.260.
[3] Monitorul Oficial, *Legea nr. 95/1925 pentru Unificarea Administrativă*.
[4] Manuel Guțan, *Istoria administrației publice românești,* Ediția a 2-a, București, Editura Hamangiu, 2006, p. 263.
[5] A se vedea Monitorul Oficial, *Legea nr. 95/1925 pentru Unificarea Administrativă*.

Romanian administration was much more complicated and involved a much longer period of time, because the approval of the Romanian government's delegate minister in Chernivtsi was needed.

MEASURES TAKEN FOR ADMINISTRATIVE-TERRITORIAL REORGANIZATION

In this context, the idea of regionalism was resumed in 1921 by Constantin Argetoianu, in whose project of organizing the local administration it was proposed to group the 76 counties of Greater Romania and to establish nine regions.

The regionalist problem was brought up again on the occasion of the Draft Law for the Organization of Local Administration in 1921, submitted by Constantin Argetoianu, the Minister of Interior at that time.[6] This project tells us about the creation of a new administrative constituency, of the region, consisting of several counties, as a consequence of the increase of the territory and of the number of inhabitants of the country. The project talks about the formation of a regional council that will lead the interests of the new constituency and will be composed of delegated members of the county councils and municipal councils in the region, but also of law members. The executing body will be appointed the president of the region. However, the commune, the net and the county remain equally subordinate to the higher administrative bodies of the region.[7]

The aim of the region, according to this project, is to deconcentrate some attributions exercised by the central power and to facilitate the application of laws, having as object the administrative services and the services of hygiene, assistance and social provision, as well as to give a greater impulse and development. local economic and cultural interests, interests that go beyond the territorial limits of the counties[8].

The process of creating a single legislative and institutional framework for the entire country lasted several years, being legislated by the Law of Administrative Unification of June 14, 1925.[9] The law supported the idea of association of counties, which specifies the formation of a deliberate body - the Regional Assembly, consisting of members of each county. Each such region will have a center that will be represented by the prefect of the county and that will have the role of government commissioner in the region and will supervise the execution of laws and regulations of public administration.

According to the constitution, Romania's territory was divided administratively into counties and counties into communes. Statistical Yearbook of 1923[10], it recognized a number of 76 counties and 7241 communes, of which 144 were urban communes. From a judicial point of view, the territory has judicial districts, and each county has a court. Another division of the country's space is the constituencies, sanitary, school, labor or forestry and mining.[11]

According to Art. 4 Title 1 of the Constitution of 1923: The territory of Romania from an administrative point of view is divided into counties, counties into communes. Their number, extent and territorial subdivisions shall be determined in accordance with the forms provided for in the laws on administrative organization.[12]

This article exposes to us clearly and concisely the fact that the territory of Romania is administratively organized from counties, which have as subdivision, communes. Nothing is reported about an administrative-territorial organization in the form of regions or in the form

[6] Adrian Onofreiu, *Un proiect de regionalizare a României din anul 1921. Cazul județului Bistrița-Năsăud*, Revista Bistriței XXVIII/2014, pp. 299-331.
[7] *Ibidem*.
[8] Paul Negulescu, *Tratat de drept administrativ,* volumul I, Bucureşti, Tipografiile Române Unite, 1925, p. 562.
[9] Monitorul oficial, *Legea de unificare administrativă de la 14 iunie 1925.*
[10] Ministerul Industriei și Comerțului, *Anuarul statistic al României din 1923*, București, Tipografia Curții Regale, 1924.
[11] Paul Negulescu, *Tratat de drept administrativ român,* vol. I, ediţiunea a III-a, Bucureşti, Editura Tipografiile Române Unite, 1925, p. 52.
[12] Monitorul Oficial, *Constituţia României din 1923*, Titlul I, Articolul 4.

of other methods of territorial grouping more comprehensive than counties. This fact can be seen as a deficient aspect in the wording of the articles of the Constitution, taking into account that it is the first fundamental law elaborated after the achievement of the Great Union. It was important and relevant to produce an article that had an organization more specific to the current needs of the newly formed state, not a simplistic and very clear one as the existing one.

At the same time, Title 1. About the territory of Romania, has in its composition only four articles and only one refers to the administrative organization of the territory of Romania, although there have been several projects and proposals for such an organization. Among them, we mention that of Anibal Teodorescu, who proposed the formation of the region in order to simplify the state administration by deconcentrating what would bring the existence of this region in the attributions of the center, being at the same time a good method to supervise administration of the counties from which it would be composed.[13] He believed that there should be financial autonomy of the counties, and the region could be a means to achieve the goal of better decentralization.

This idea of the association of counties is taken up by the Law of 1925.[14] Thus, the region will have a deliberative body, the regional assembly consisting of full members along with members elected by the county councils in each county, but also an executory body that will be represented by a standing committee that will work during the sessions of the assembly and will be composed of three delegates for each county, elected from the regional assembly. Each region will benefit from the existence of a center that will be represented by the prefect of the county who will have the role of government commissioner in the region and will supervise the execution of laws and regulations of public administration. At the same time, it will represent the legal personality of the State in court.

A few years later, close to the outbreak of World War II, we encounter a new attempt to achieve a process of regionalization, proposed by the political class of the time, through ministerial directorates. The ministerial directorates within which the counties were obliged to form associations with legal personality could be considered the parents of the notion of region that we use today, this being the most concrete example of the regionalization process in the interwar period.

Between 1925 and 1929, between the Law for Administrative Union, respectively the Law for the organization of local administration, three more decisions of the Council of Ministers were issued:

- Decision of the Council of Ministers no. 577 of 1926 - grouping the 71 counties in nine administrative districts with executive role, without legal personality;
- Decision of the Council of Ministers no. 25 134 of 1927 - the establishment, under the same conditions, of ten administrative districts;
- Decision of the Council of Ministers no. 4,640 from 1928 - grouped the counties into nine other administrative districts.[15]

The government formed by the National Peasant Party, led by Iuliu Maniu, installed on November 10, 1928, undertook rapid measures of administrative reorganization, especially aiming at a better integration of the united provinces. Thus, by the Law for the organization of local administration, of August 3, 1929, seven centers of local administration and inspection were created, called local ministerial directorates, as institutions of deconcentration and administrative integration.[16]

The fall of the national-peasant government and the takeover of power by the government led by Nicolae Iorga, attracted a series of changes. Thus, the question of the

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[13] Anibal Teodorescu, *Viitoarea organizare administrativă a României, în Constituţia din 1923 în dezbaterea contemporanilor*, Humanitas, Bucureşti, 1990, p. 417.

[14] Monitorul Oficial, *Legea nr. 95/1925 pentru Unificarea Administrativă.*

[15] Radu Săgeată, *Acte normative care au vizat organizarea administrativ-teritorială a României*, 2012.

[16] Ioan Silviu Nistor, *Comuna și județul. Evoluție istorică,* Cluj-Napoca, Editura Dacia, 2000, p. 123.

viable functioning of the ministerial directorates is called into question, the decision to abolish them being taken on 15 July 1931.

The administrative law of 1936 does not bring essential changes to the county organization, maintaining the principles and spirit of the law of 1925. A greater impact had the administrative law of August 14, 1938, by grouping the counties into ten lands that were large territorial divisions of regional character, endowed with personality legal, the counties remaining simple administrative constituencies of control.[17]

As a characteristic term of the Romanian legislation, the idea of regionalization appeared with 1938, being a regulation that aimed at the administrative organization of the territory. The law for administrative reform of August 14, 1938 stipulated that the territorial constituencies through which the local administration is exercised are: commune, net, county and county. The commune and the county were legal persons representing local interests and exercising at the same time the attributions of general administration, conferred by law, while the network and the county were defined as constituencies of control and deconcentration of the general administration.[18] The most important changes that took place at this time were the transformation of the village or commune into the only local administrative formations, but also the establishment of bodies larger than the counties - the lands. The lands appeared in the context of the dictatorship of King Charles II, following the administrative model of fascist Italy and Yugoslavia during the dictatorship of King Alexander I.

The notion of land from 1938 defines the formation of administrative bodies larger than counties. As a result of these changes, the counties become control and deconcentration districts of the general administration, and the communes and the lands are units of administrative decentralization.

The law for administrative reform established the land as a mixed administrative region: it functioned both as a unit of administrative devolution, meant to satisfy the general interests of the state in close connection with those of the local community, and as an administrative-territorial unit of administrative decentralization[19]. From a decision-making point of view, the mayor or the royal resident became the main decision-making body at communal / county level. The communal / territorial council was still a deliberative body, but it took second place in terms of responsibilities and importance. But these forms of organization, the lands, were designated by the Decree-Law for the abolition of the Royal Residences and the organization of the county prefectures promulgated under no. 3219 of September 21, 1940[20], as a result of the territorial losses that Romania suffered in August 1940. Thus, the counties regained legal personality, establishing an administration based on the principle of deconcentration. However, the counties became only administrative districts, without deliberative bodies (county councils) characteristic of decentralization.[21]

The year 1938 represents for Romania the moment that defines the beginning of a dictatorial and totalitarian regime in a country that barely managed to define the idea of parliamentary democracy. A new Constitution is elected, which maintains the monarchy as a form of government, but establishes a king with broad powers of government and administration, hence the wording of the king and the ruler and the government, who is the head of the central public administration.

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[17] *Ibidem,* p. 125.

[18] Cristian Petrişor Onete, *Consideraţii privind necesitatea deconcentrării administrativ-teritoriale, descentralizării şi regionalizării României,* în *Descentralizarea. Prezent şi perspective în contextul transformărilor din administraţia publică românească,* Sibiu, Institutul de Ştiinţe Administrative Paul Negulescu în colaborarea cu Universitatea Româno-Germană din Sibiu, 2009, p. 515.

[19] Manuel Guţan, *Istoria administraţiei publice româneşti,* Bucureşti, Editura Hamangiu, 2006, p. 270.

[20] Monitorul Oficial, p. I, nr. 221, 22 septembrie 1940.

[21] Viorel Stănică, *Administrarea teritoriului României în timpul celui de-al doilea război mondial*, Transylvanian Review of Administrative Sciences, 19/2007, p. 109.

Under the new constitution, there was no longer any reference to administrative-territorial units, and the principle of administrative decentralization and the eligibility of local deliberative bodies were no longer constitutional. Thus, it was up to the Parliament to decide the principles that would underlie the organization of the local public administration.[22] These decisions of the central administration were nothing more than having full control over the local authorities.

The year 1938 represents the rapid orientation of Romania towards totalitarianism. A first moment in this sense is represented by the abolition of political parties and the establishment of the National Renaissance Front. This fact attracted the transformation of political life into one monopolized by this single party, but also the condition of appointment to certain positions of membership in this political group. All these actions attract excessive political control, which leads us to conclude briefly that decentralization is only history: the country's territory is divided into provinces and communes, the county and the network becoming constituencies of control[23].

CONCLUSIONS

To conclude, we can say that Romania presented itself as a state formed by inhomogeneous structures from a legal and demographic point of view, the basic principles of the Old Kingdom coexisting with the particular ones of each province. The desire to abandon the centralization characteristic of the period before the First World War by adopting decentralized administrative policies, which would benefit from a guarantee of preserving the regional identity, is visible.

Even though a new constitution was drafted towards the end of the interwar period, its articles did not provide for references or allow the formation of administrative units in the form of what we now call regions. However, we meet a form of regionalization with the help of units appointed at that time ministerial directorates in which the counties were obliged to form associations with legal personality. The experiments carried out until 1936 highlighted the fact that neither the obsession of ensuring the politico-territorial unity of the state, nor the obsession of achieving a decentralization according to scientific laboratory formulas did not benefit the reform of the local public administration.[24]

The issue of regionalization of the territory was an important aspect for the studies and research of the interwar period, but this was not a priority on the agenda of politicians, because more importance was given to projects of state unity, and the concept of regionalization was presented. in the form of project ideas that more closely resembled administrative or political regionalization.

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[22] Manuel Guțan, *Istoria administrației publice românești,* Ediția a 2-a, București, Editura Hamangiu, 2006, p. 269.
[23] Ion Iordan, *Regionalizare – Cum?Când? Structuri administrativ-teritoriale în România, București, Editura CD Press, 2003,* p. 18.
[24] Manuel Guțan, *Istoria administrației publice românești,* București, Editura Hamangiu, 2006, p. 261.

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