AGORA International Journal of Juridical Sciences

http://univagora.ro/jour/index.php/aijjs

Year 2021

No. 2

Publisher: **Agora University Press**

This journal is indexed in:
International Database
International Catalog

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AGORA International Journal of Juridical Sciences, http://univagora.ro/jour/index.php/aijjs
ISSN 1843-570X, E-ISSN 2067-7677
No. 2 (2021), pp. 1-10

MENTAL ILLNESS TREATMENT IN LAW: ORIGIN AND EVOLUTION OF GLOBAL MENTAL HEALTH

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ABSTRACT

This analysis seeks to demonstrate the recognition of the right to mental health corresponding to an obligation on the part of the State to create the conditions for the pursuit of the right to protection of those who show conditions of "vulnerability".The study gives us the opportunity to highlight some interesting ideas. The work starts from the consideration of the role of the madman in legal and social history with an inevitable reference to some leading figures of nineteenth-century phrenology (Franz Joseph Gall, Ferraresi Miraglia, Dorothea Dix) who have also provided a substantial contribution to the legal treatment of the protection of mentally ill people. The birth of psychology and the affirmation of human rights in the twentieth century are other elements that lead to the United Nations Convention on the Rights of Persons with Disabilities of 2006 and subsequent acts, all reported by the WHO in the MiNDbank, including MI5 Principles and programs such as the 2013-2020 Mental Health Action Plan. Finally, the international process defining systems for the prevention, treatment and assistance of people with mental illnesses for the 21st century, called Global Mental Health (GMH) – promoted and supported by the World Health Organization (WHO) – ensures some internationally agreed minimum standards on health care worldwide, which was part of the Millennium Goals of the United Nations and the current Sustainable Development Goals.

KEYWORDS: mental, illlness, treatment, law.

HISTORICAL EVOLUTION OF MENTAL ILLNESS TREATMENT

From stigma to care

The consideration of madness and society's relations with madmen is represented by the isolation and social distancing of those whose behavior was considered to be out of "normality". One of the most accredited historical reconstructions of madness and its relationship with society can be found in the *History of madness in the classical age* by Michel Foucault, who, using the painting *The Ship of Fools* (a novel by Sebastian Brant, 1494) by Hyeronimus Bosch (1450 -1516) as an excuse, gives a description of madness and then goes on speculating that isolation turns into internment, hence imprisonment for the mentally ill. Once socially isolated, the madman's deprivation of liberty can also work as a way of protecting and preventing the society made up of "normal" people. Foucault also narrates the existence of internment places for the treatment of mentally ill people, mainly connected to the Middle Eastern world, prior to the Middle Ages, dedicated to treatment rather than isolation. At the same time, it shows how the establishment of internment places for the insane also becomes a tool for the internment of subjects who, despite not being insane, were unwelcome to society, or rather to political leaders.

The repressive use of internment, which today is defined as psychiatric, immediately leads to a distortion of law and intervention for health purposes from an instrument of regulation and preservation of society to an instrument of power and conservation of the established regime. Such a distortion has accompanied the treatment of mentally ill people as well as those assimilated to them up to the present day, with a view to subordinating the

individual to society and power, but above all in order to eliminate anything that in some way represented sin, guilt, even from a moral and religious point of view. According to Foucault, in the classical age all forms of extravagance, dissolute conduct, magic, alchemy, as well as all forms of sexuality deemed deviant, are neutralized through an identification with the incapacity to reason, according to the model of unreasonable madness theorized by Erasmus of Rotterdam (2016). The punishment also justifies the often inhumane conditions in which the insane were kept (or detained). The same conditions were also represented and denounced by Goya in his work of art *Casa de locos* (1819), when the Enlightenment attacked the existing mental institutions. In this context, the place of internment is also a place for the social isolation of troublesome subjects, so that the available legal frameworks (concerning weak people) were often used in the event of even small pathologies.

The era of phrenology

It is only at the beginning of the nineteenth century that the madman begins to be separated from others for therapeutic purposes, and no longer for isolation and punishment, in a process stimulated by the evolution of the sciences, in particular the affirmation of Gall's phrenology and the phrenological schools emerging all over Europe which finally get to distinguish mental illness from all other forms of strangeness. Focusing only on the study of the mind, albeit according to principles that have proved not scientifically based, phrenology creates a watershed with respect to the previous model and the previous motivations for internment, gives authority and greater power to the medical science within the institutions and begins groping for therapeutic processes for mental illness. In this scenario, the misuse or even the abuse of internment becomes more complex since it requires the collaboration of like-minded doctors previously unnecessary, now jointly responsible.

In Italy one of the major phrenological schools is that of the Kingdom of Naples, whose epitomes were Luigi Ferrarese and Biagio Gioacchino Miraglia, which exerted a great influence throughout Europe, with its mental asylum approach (Baral, 2016). Ferrarese and Miraglia invented some innovative therapeutic processes, but they are also authors of some emblematic writings on the relationship between law and the treatment of madness, among which one must remember *Delle procedure a uso dei tribunali, Della frenologia e della applicazione all'educazione, alla morale e alla giurisprudenza criminale* (1855) and *La follia ragionante* (1873).

In the same years in the USA, Dorothea Dix, who was not a psychiatrist, but had the task of promoting the development of the status of mentally ill individuals in order to improve their care and living conditions, also became very influential both in her own country and abroad as an advocate of an innovative treatment for the care of mentally ill people. She suffered from a mental disorder and when she began to pay visit the centers for the housing and treatment of mentally ill people she was shocked by the conditions she saw. Her observations about these treatment centers led to changes in the custody, accommodation and treatment of mentally ill people. She visited England where she met many people interested in reforming treatment and improving the well-being of people with mental illness, and she conducted investigations into mental asylums in Scotland and other European countries (Okpaku et al.). Neither academic nor scientific, her essentially humanitarian contribution has been a break point between the activities of the two sides of the Atlantic.

The great contribution of 19th-century phrenology was to consider the subject separately from the disease, in order to identify the symptoms of psychic pathologies, to verify their subsistence patient by patient. It was a very important step towards the consideration of the individual as such and not in relation to the disease, and at the same time it brought to light the limits of the regulatory system which in fact deprived mentally ill people – as well as anyone who had the misfortune to enter, even erroneously, in a nursing home for the insane – of protection.

Towards the globalization of therapeutic models

Between the nineteenth and twentieth centuries, international collaborations and comparisons in health matters intensified, a series of international health conferences were convened in order to unify action against the growing spread of diseases related to international trade. The first meeting in Paris in 1851 is generally regarded as the opening of a new era of international action in public health. Following the 11th International Health Conference held in Paris in 1903, an international public health office was created in 1907, the *Bureau International d'Hygiène Publique*, whose functions were to disseminate general information on public health among its members, in particular with regard to the most common communicable diseases.

After the Great War, the of *Universal Declaration of Human Rights* has provided that everyone has the right to live under sufficient conditions to be guaranteed the health and well-being standard (with particular regard to food, clothing, housing and medical care). Furthermore, on the basis of Article 25, letter f of the League of Nations Covenant, the Health Organization was set up in 1920 (Burci, 2016). The second phase in the process of acquiring knowledge and awareness of the need for a global plan for mental illness has been dominated by leading scientists and social psychiatrists, and by the activities of three large organizations: *World Federation for Mental Health* (WFMH), *World Health Organization* (WHO), *World Psychiatric Association* (WPA).

The Constitution of the WHO (1948), especially its Preamble, lists a set of groundbreaking principles that define health as both an international interest and a fundamental human right. The definition of health provided by the preamble – which states a "*complete physical, mental and social well-being and not simply the absence of disease or infirmity*" and that "*the enjoyment of the highest attainable level of health is one of the rights fundamental principles of every human being without distinction of race, religion, political creed, economic or social condition*" – have been incorporated in other subsequent international instruments.

The paradigm of health is now overturned compared to the past approach, moving from the treatment of the disease to the protection of health. In the same period the main international instruments for the protection of human rights are signed. These treaties had and continue to have a great influence on devising the concept of *Global Mental Health* as well as on its achievement.

The contemporary era, from the late seventies, saw the affirmation of the idea of mental health protection, up to the affirmation, in 2000, of the *Movement for Global Mental Health* and the *Grand Challenges in Global Mental Health*. This latter process arises from the confluence of three different phenomena. In the first place, the experience of the Second World War, which took barbarism to the extreme, and gave rise to the need to introduce international instruments to limit the powers of states; secondly, the "vision", the "imagination" and the search for a humanitarian response to the perversions inherent in the protection system for mentally ill people; finally, a rebirth of "humanitarianism", a sense of equity reinforced by the *Millennium Fund*.

HUMAN RIGHTS AND MENTAL HEALTH

The common framework of human rights

The relationship between mental health and human rights has been rarely highlighted (Roth et al., 2009:148-156). The right to mental health begins to take shape with the San Francisco Charter (Roth et al., 2009). The Charter of the United Nations affirms principles of dignity and the enjoyment of fundamental freedoms for all. The *Universal Declaration of Human Rights* and the subsequent *Covenants on Civil and Political Rights* (ICCPR) and on

Economic, Social and Cultural Rights (ICESCR), both of 1966, outline the general principles for the protection and promotion of those categories which the following *Barcelona Declaration* of 1998 will define as "vulnerable groups" (Rossi, 2015:12,18).

More specifically, the 1966 Pacts take two divergent paths. The ICCPR Pact protects the individual from government initiatives that violate the freedom, privacy and freedom of expression, even of people with mental disorders; while the ICESCR Pact outlines, through the rights, the duties of the State. In concrete terms, on the one hand, cruel, inhumane, degrading treatment of people in mental suffering is prohibited, and even any measure restricting personal freedom must follow procedures appropriate to the case; on the other hand, the Pact defines the structures and the economic and social services aimed at protecting the individual and the family, as well as "*the right of each individual to enjoy the best conditions of physical and mental health that he is able to achieve*" at the expense of the State (ex art.12), also allowing access to health services and education and training programs for people with mental illness (A.V.V., 2002:59-73).

The legal focus on people with mental suffering deepens with the signing of four other international conventions:

- the *United Nations Convention on the rights of women*, which provides the right to the protection of health and safety of working conditions, as well as the elimination of discrimination against women in the field of health care in order to ensure, on an equal footing with men, the means to access health services;
- the *Convention on the Rights of the Child*, which contributes to focusing on the rights of people with mental disabilities, when it is established, in art. 23, that "*a child with a mental or physical disability must lead a full and decent life in conditions that guarantee their dignity* [...]"(Rossi, 2015:63);
- the *International Convention for the Elimination of All Forms of Racial Discrimination* (Meron, 1985:283-318);
- the *Convention prohibiting torture and inhuman or degrading treatment*. The latter directly protects people with mental disorders who could often be subjected to cruel treatment in their family or in institutions.

Soft Law Acts

By the end of the seventies, the General Assembly of the United Nations, had acquired as pillars the principles of the Treaties, Pacts and Conventions. It had also adopted *the Principles for the protection of the rights of people with mental illness* (Rossi, 2015:14), first of all stating some freedoms and fundamental rights aimed to offer the best medical and psychiatric treatments available, the respect for dignity, the protection from abuse, and even the duty to treat patients in a less restrictive environment (Rosenthal et al., 1993:257-300). Precisely on this last aspect, the Principles define standards and procedures, including judicial procedures, for forced hospitalization, setting specific parameters (*The United Nations principles for the protection of people with mental illness: Applications and limitations*, in Psychiatry, Psycology and Law, 1996).

The Principles constitute one of the most direct expressions of the culture of human rights in relation to mental illness so far adopted by the United Nations. The drafting of the principles was then followed by the drafting of a series of manuals on the guidelines proposed by the WHO and the United Nations for the implementation of the principles on mental illness, manuals still being updated and written (UN General Assembly, Res. 46/119: *Guidelines for the application of the principles for the protection of persons with Mental Illness and for the Improvement of Mental Health Care*). Among these, the guidelines on the promotion of human rights for people with mental disorders deserve to be recalled and analyzed. In addition to the Principles, the United Nations has issued numerous other sources of *Soft Law* affecting the condition of mentally ill people, including:

- the *Declaration on the Rights of Mentally Retarded Persons*;
- the *Declaration on the Rights of Persons with Disabilities* (1975) which expressly refers also to persons with mental disabilities and provides for a broad catalog of civil, political, economic, social and cultural rights, also in order to endorse integration efforts in the community;
- *Standard Rules on the Equalization of Opportunities for Persons with Disabilities* (1993).

Despite being all *Soft Law* acts, they indicated a collective will to recognize the rights of disabled people, and were the fertile ground that then generated the *Convention on the Rights of the Disabled of 2006* (A/RES/61/106 December 13th 2006).
In the UN Resolution of 29 June 2016, *Mental health and Human Rights*, concerns are expressed that people with mental health problems or psychosocial disabilities, in particular people who use mental health services, may be subject to "*discrimination, stigma, prejudice, violence, social exclusion and segregation, illegitimate and arbitrary institutionalization, hyper-medicalization and treatments that do not respect human dignity*".
Moreover, an interesting tool is the European *Barcelona Declaration on Policy Proposals to the European Commission on Basic Ethical Principles in Bioethics and Biolaw,* which, rather than being a legal instrument, provides for some guidelines compiled by the scientific community on the subject of mental disability, and which is of particular importance for the definition of four guiding principles: *autonomy, dignity, integrity and vulnerability*. Autonomy ought to be interpreted as the ability to give meaning and an end to one's life, to have "self-regulation" and one's own intimacy, to act and reflect without coercion, the capacity to have personal responsibility and to be politically involved, the ability to give informed consent; integrity as an untouchable nucleus, the basic condition for a life that is dignified, both physically and mentally, and that should not be subject to any external intervention; dignity, or the quality by virtue of which living beings possess an ethical status. Finally, vulnerability, which is a concept introduced by the Declaration, refers to a situation of particular weakness and fragility, that of individuals who, due to age, condition, etc., require a special protection. In a broad and general sense, the concept of vulnerability deals with the very precarious condition of all living beings, human and non-human, who are exposed, throughout their existence, to the risk of being injured, and are therefore eminently "vulnerable". Especially in this second meaning, with its strong ethical and anthropological value, vulnerability has some important implications in terms of care (*Final Report to the Commission on Project Basic Ethical Principles in Bioethics and Biolaw*, 1995-1998, part B).

2.3 *The Convention on the Rights of Persons with Disabilities*

The process towards the recognition of the rights of persons with mental disabilities finds in the *2006 Convention on the Rights of Persons with Disabilities* the most recent and most effective international instrument (Hoffman et al., 2016:28). People with mental illness are considered to be people with disabilities according to art. 1, co. 2 of the aforementioned Convention, underlining that disability, in whatever form, is due to a specific interaction between the impairment and the barriers to full social participation on an equal basis. However, it is controversial which mental pathologies can truly be considered disabling (Szmukler et al., 2014:245-252). The fundamental principles of equality, independence and non-discrimination define the legal framework one should refer to.
The Convention implements a Copernican revolution in the interpretation of disability: people with disabilities from objects to be treated, therefore protected, become persons, holders of rights like everyone else, including those to live in their own community and to have a public life, also by supporting their efforts to lead an independent life on an egalitarian and non-discriminatory basis (Kayess, 2008:29). As a consequence, states have in fact specific obligations, including not pursuing policies or actions that lead to a condition of

discrimination. As provided for by art. 4, par. 1, the Convention binds all States Parties to *"promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability*".

The same article goes on listing a series of detailed obligations that States assume through the ratification of the Convention, ranging from the abrogation of all discriminatory norms, to the development and use of technologies that help people with disabilities, and even the guarantee of access to information. Furthermore, these goals must be achieved through reasonable means. Hence the need for a law that does not establish immutable rules, since it must arrange a process of continuous adaptation which includes various issues so as to allow the weak and disadvantaged to develop their own identity and point of view. *The Convention on the Rights of Persons with Disabilities* marks a certain change in the concept of dignity. In fact, it does not repeat the usual sentence whereby human rights are "derived" from an inherent dignity of the human person but it constantly refers to the respect for the "rights and dignity" of people with disabilities, implicitly suggesting that these are separate issues and human dignity, in particular, is a prerequisite for guaranteeing any human right (Carozza, 2013:1-16).

Another fundamental point of the Convention, particularly relevant for mental disability and compulsory treatment, is Article 12, concerning the legal capacity of people with disability interpreted as a "capacity to act", with its central role for the recognition of other fundamental rights, such as the right to personal freedom, the right not to be subjected to any coercive treatment contrary to human dignity, as well as the right to family and social life. In fact, the Convention implements "the revolution" requiring that people with disabilities must be recognized everywhere as persons before the law. Consequently, all States Parties must act to give any support that people with disabilities might need in the exercise of their capacity, as well as to ensure that all measures provide for appropriate and effective safeguards to prevent abuses.

3. Global Mental Health

3.1 *Definitions and contents*

An area for study, research, and practice that places a priority on improving health and achieving equity in health for all people worldwide. Global health emphasizes transnational health issues, determinants, and solutions; it involves many disciplines within and beyond the health sciences and promotes interdisciplinary collaboration; and it is a synthesis of population-based prevention with individual-level clinical care (Koplan et al., 2009:1993-1995).

Global Mental Health, according to a widespread academic interpretation, is an extension of the above-mentioned definition to the field of mental health (Patel et al., 2010:1976-1977). It is an international movement that takes as its guiding principle an improvement in the conditions to achieve a good mental health. Other authors (such as O. Okpaku and S. Biswas in *History of Global Mental Health*) provide another definition of Global Mental Health, explaining that 5 criteria are required to detect the phenomenon:

1) a universal or transnational approach; they give some examples concerning the role of poverty in mental illness and its stigmatization around the world;

2) the problem should have a common basis within the population, for example, violence;

3) an international arrangement between the interested parties should be put in place, through bilateral or multilateral agreements; it might also involve educational or scientific institutions, government bodies, NGOs or individuals;

4) the problem should fall within the competence of the recipient organization, institution or country in question;

5) the groups committed to the project should have a multidisciplinary nature as well as different origins.

The concerns of the scientific community are largely focused on the issue of health within the most-needy groups of communities in low and middle-income countries; although they are aware that poverty does not affect only the developing countries. In fact, homeless people are also present within the richest communities and the protection of the human rights of individuals suffering from mental illness is a universal issue. While no utopian answer can be sought, the United Nations and the World Health Organization, the World Bank and the IMF are reported to play a significant role in contributing to the success of the commitments enshrined in the Millennium Development Treaties and Rio de Janeiro. The treaties impose a commitment by UN member states to eradicate health inequalities and provide decent living conditions for all individuals regardless of race, gender, age or socioeconomic class.

3.2 *The contribution of the World Health Organization: results*

The disparity between rich and poor countries concerning both the respect of human rights and the treatment of people with mental disorders is one of the most evident inequalities. Low and middle-income countries are home to over 80% of the world's population, but they control less than 20% of the share of mental health resources. The resulting “therapeutic gap” is itself a violation of basic human rights. For example, over 75% of those identified with severe mental disorders (related to anxiety, mood, impulse control, or the use of psychotropic substance) in surveys carried out in low and middle-income countries received no treatment, despite showing substantial disability. The report *Global Burden of Disease* surprised the global health community with its discovery that five of the top ten elements leading to a life with disabilities, globally are mental disorders (Murray et al., 1996).

In 2020 and 2021 Mental health is one of the most neglected areas of health globally. This was true before COVID-19 (coronavirus), but the pandemic has further worsened the status of mental health (https:// unitedgmh.org/sites/default/files/2020-09/The%2BImpact%2BOf%2BCovid19%2BOn%2BGlobal%2BMental%2BHealth%2BReport.pdf). There are several reasons why mental health has been ignored. The first one is an associated stigma. The second is a perception of mental health disorders as a “luxury good”, as opposed to actual illnesses. The additional top reasons include a fragmented and outdated service model. Some of these include the provision of mental health services mainly in psychiatric hospitals, severe lack of preventative mental health service; lagging policy changes and also a shortage of human resources. The social and economic impact of mental disability is varied and far-reaching. People with mental health problems often see their human rights violated and are rarely aware of it. In addition to restrictions on the right to work and education, they can also be subject to unsanitary and inhumane living conditions, physical and sexual abuse, neglect and harmful and degrading treatment practices in health facilities.

Failure to provide basic necessities, such as adequate nourishment, clothing, shelter, comfort and privacy, as well as unauthorized and uncontrolled detention, or chaining and immobilization are all well-documented abuses which are still to be dealt with since they are considered as 21st-century health challenges. Today, nearly 1 billion people live with a mental disorder and in low-income countries, more than 75% of people with the disorder do not receive treatment. Every 40 seconds, a person dies by suicide (https://www.who.int/en/news-room/fact-sheets/ detail/suicide).

According to the World Health Organization (WHO), the COVID-19 pandemic has disrupted or, in some cases, halted critical mental health services in 93% of countries worldwide, while the demand for mental health is increasing. Given the chronic nature of the disease, this translates into a significant economic impact worldwide. Countries spend less than 2% of their health budgets on mental health. It is expected that in the next ten years,

depression will put more burden on nations than any other disease (https://www.who.int/news/item/05-10-2020-covid-19-disrupting-mental-health-services-in-most-countries-who-survey). Data highlight that effective pharmacological and psychological treatments exist for a range of mental disorders and that unskilled health care professionals can offer psychological treatments or care interventions at increasing levels for mental disorders, with large treatment effects that are sustained over a long period of time.

During the World Health Assembly in May 2021, governments from around the world recognized the need to scale up quality mental health services at all levels and endorsed WHO's Comprehensive Mental Health Action Plan 2013-2030, including the Plan's updated implementation options and indicators for measuring progress.

In 2007-2008, the WHO launched the *Mental Health Action Plan*, and two specific programs for mental health: the *WHO MiND (Mental Improvement for Nations Development*) (https://www.who.int/ mental_health/policy/country/en/) and the *MhGAP* (*Global Action Program for Mental Health*); in addition to a series of proposals. The *WHO MiND* is a database of all documentary tools useful to deal with *Global Mental Health*; and the MhGAP program provides tools for adapting therapeutic processes and protocols around the world.

The WHO has also aimed at promoting certain aspects considered essential in order to pursue the objectives of the *Mental Health Plan*. For example, the integration of mental health care into programs already in place for other health conditions, which represents a pragmatic and efficient approach that may only marginally require additional resources. The most vulnerable people with mental disorders are those living in severe, long-lasting and disabling conditions: intellectual disabilities, schizophrenia and dementia are distinctive examples of these conditions.

For these people, there is an urgent need for de-institutionalization and the provision of acute and continuing care services closer to the communities where those affected live. For the WHO, respect for human rights is not just a package of rules to be recognized for the individual, even if suffering from mental illnesses, but it represents an ethical guide for both health and legal professionals involved and it is a tool for strengthening the so-called *Recovery* whose goal is to grant any individual the best possible health and integration, without being discriminated.

This pragmatic approach is connected to the fundamental principles of the WHO itself, affirmed and shared, at least theoretically, by all the states adhering to the Organization, and in particular to the principle that the best possible state of health constitutes a fundamental right of every being human. It should be noted that it was a precise choice to go beyond a simple cooperation scheme on health matters to conceive a wider and more comprehensive system of interventions. Consequently, the goal of the organization becomes the best possible level of health for all peoples. Furthermore, WHO can, in collaboration with UNESCO, undertake the activities it deems advisable in the field of mental health, and presumably invoke the encouragement of psychiatric methods worldwide. Among the fundamental principles on which an effective international health program should be based, the healthy development of the child, so that they can live harmoniously in changing the total environment, plays an important role according to the WHO charter. The introduction of psychiatric techniques in public education systems is clearly a consequence of this statement. The preamble of the WHO Constitution also recognizes that the achievement of high levels of health throughout the world can play a vital role in the pursuit of peace and security and, to this end, the extension to all peoples of medical, psychological benefits and their related knowledge will be sought in every possible way.

CONCLUSIONS

The evolutionary process of the treatment of mental illness has meant that the normal treatments are now considered, in most cases, real abuses, through various stages of transformation. Having identified mental illness as an affliction to be isolated and combated, even when not curable, the need arises to adapt the places of internment, transforming them into places of care, and therefore improve the conditions themselves, typically horrible and monstrous, in acceptable conditions of care. The transition towards a system of recognition of some fundamental individual rights for the sick subject, and even of social rights, still in progress, was not faster, having to bring together a plurality of interests to get to create structures that would allow their recognition; the process also involved an important change in the social perception of the mentally ill. While in the past any change in the consideration of madness inevitably led to the removal of the subject from the society of "normal", the recognition of new rights, and in particular the human rights applied to a mentally ill individual, require the inclusion of the subjects in their social and family context, and, as far as possible, their right to self-determination. Considering some examples, in particular, from countries such as the United States, where homeless people are a scourge, or the United Kingdom, where the health service is in great difficulty, the next challenge will be the elaboration of strategies compatible with local development conditions.

The future of *Global Health* and *Mental Health* is likely to be influenced by a variety of key factors. One of these is activism. This implies a greater role for civil society, acting as advocates for patients and health service users, their families and the whole community. Various WHO agreements, national and international mental health policies as well as many health agencies support this position. A related driving force is the reduction of stigma and the inclusion of the most vulnerable individuals. The study of mental illnesses together with the rehabilitation and job placement of users represent a good practice. Another great driving force is the changing perception of the definitions of *health* and *mental health*, which requires that a greater importance should be given to the social determinants of health, especially mental health, such as poverty, immigration, human trafficking and modern slavery. Other well-known factors include mass crimes, national and international conflicts and wars, which have highlighted the role of violence as a risk factor for mental illness. Climate change, lack of water resources and poverty are all factors related to mental distress which significant consequences on health. With regard to all these aspects the implementation of national or regional programs is still completely inadequate, that is why a global approach and international cooperation efforts are necessary.

BIBLIOGRAPHY

1. WHO, *MiND Policy and Services*: https://www.who.int/mental_health/policy/country/en/
2. WHO, https://www.who.int/news/item/05-10-2020-covid-19-disrupting-mental-health-services-in-most-countries-who-survey.
3. WHO, https://www.who.int/news/item/27-08-2020-world-mental-health-day-an-opportunity-to-kick-start-a-massive-scale-up-in-investment-in-mental-health#textMental%20health%20is%20one%20of,every%2040%20seconds%20by%20 suicide
4. WHO, https://www.who.int/en/news-room/fact-sheets/ detail/suicide.
5. Erasmo da Rotterdam, *Elogio della follia*, Italian version, *Suisse Book Edizioni*, Milano 2016.
6. S. Baral, *Il frenologo in tribunale. Nota per una ricerca sul caso italiano*, Criminocorpus, Folie et justice de l'Antiquité à l'époque contemporaine, June 2016, http://journals.opene dition.org/criminocorpus/3283.
7. O. Okpaku - S. Biswas, History of Global Mental Health.

8. L. Burci - A. Cassels, *Part IV Activities of Organizations*, Ch.21 Health, in *The Oxford Handbook of International Organizations*, Oxford University Press, Oxford 2016. https://doi.org/10.1093/law/9780199672202.003.0021.
9. L. O. Gostin, *Human Right in Mentan Health*, in M. Roth - R. Bluglass, *Psychiatry, Human Rights and the Law*, Cambridge University Press, Cambridge 2009.
10. S. Rossi, *La salute mentale attraverso lo spettro dei diritti umani*, in «Forum di Quaderni Costituzionali/Rassegna», 2015, 3.
11. T. Meron, *The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination*, in *The American Journal of International Law*, 1985, 79, 2.
12. *Principles for the Protection of Person with Mental Illness* Res. 46/119 of December 17th 1991. S. Rossi, *La salute mentale attraverso lo spettro dei diritti umani*.
13. E. Rosenthal - L. S. Rubenstein, *International human rights advocacy under the "principles for the protection of persons with mental illness"*, in *International Journal of Law and Psychiatry*, 1993, 16, 3-4, pp. 257- 300; S. Rossi, *La salute mentale attraverso lo spettro dei diritti umani*, cit.
14. *The United Nations principles for the protection of people with mental illness: Applications and limitations*, in Psychiatry, Psycology and Law, 1996, 1, 3.
15. UN General Assembly, Res. 46/119: *Guidelines for the application of the principles for the protection of persons with Mental Illness and for the Improvement of Mental Health Care.*
16. *Final Report to the Commission on the Project Basic Ethical Principles in Bioethics and Biolaw, 1995-1998, part B, Peter Kemp, Center for Etik og Ret i Natur og Samfund.*
17. *S. Hoffman - L. Sritharan - A. Teipar, Is the UN Convention on the Rights of Person with Disabilities Impacting Mental Health Laws and Policies in High-Income Countries? in Canada BCM International Health and Human Rights, 2016, 16, p. 28.*
18. *G. Szmukler - R. Daw - F. Callard, Mental health law and the UN Convention on the rights of persons with disabilities, in International Journal of Law and Psychiatry, vol. 37, issue 3, May-June 2014, pp. 245-252, https://www.sciencedirect. com/science/article/pii/S0160252 71300126X#.*
19. *R. Kayess - P. French, Out of darkness into light? Introducing the Convention on the rights of persons with disabilities, in Human Rights Law Review, 2008, pp. 29 ss.*
20. P. G. Carozza, *Part III Structural Principles, Ch.14 Human Dignity*, in D. Shelton, *The Oxford Handbook of International Human Rights Law*, Oxford 2013.
21. P. Koplan - T. C. Bond - M. H. Merson MH et al., *Towards a common definition of global health*, in *Lancet*, 373, 2009.
22. V. Patel - M. Prince M, *Global mental health: a new global health field comes of age*, in J*ama*, 303, 2010, pp. 1976-1977. doi:10.1001/jama. 2010.616.
23. C. Murray - A. Lopez, *The Global Burden of Disease, Harvard School of Public Health*, WHO and World Bank, Boston 1996.
24. THE IMPACT OF COVID-19 ON GLOBAL MENTAL HEALTH A BRIEF 2020, *UN Policy Brief: COVID-19 and the Need for Action on Mental Health*, May 2020 https:// unitedgmh.org/sites/default/files/2020-09/The%2BImpact%2BOf%2BCovid19%2BOn%2BGlobal%2BMental%2BHealth%2BReport.pdf

AGORA International Journal of Juridical Sciences, http://univagora.ro/jour/index.php/aijjs
ISSN 1843-570X, E-ISSN 2067-7677
No. 2 (2021), pp. 11-16

NEGOTIATED, MIXED AND STANDARD FORM CONTRACTS. A PROPOSAL FOR A NEW CLASSIFICATION OF CONTRACTS

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ABSTRACT

If negotiation is considered the current manner in which contracts are concluded thereby making negotiated contracts the norm, non-negotiated terms included in contracts are an unavoidable part of everyday legal operations. Although the importance of this phenomenon in the private-law landscape has been recognized by the Romanian Civil Code through several provisions, those provisions do not address non-negotiated contracts as a whole but specific issues of non-negotiated contractual terms included in any type of contract. Firstly, with the support of the legal doctrine this article intends to examine those specific provisions of the Romanian Civil Code addressing both negotiation as a pre-contractual phase and non-negotiated contractual terms along with the particular provisions provided in the secondary legislation such as Law No. 193 of 6th of November 2000 regarding abusive terms in contracts concluded between professionals and consumers. Secondly, through this overview, the article proposes to identify the outlines of different types of contracts determined by the various degrees of non-negotiated terms in their design.

KEYWORDS: adhesion contract, standard form contract, standard terms, unusual terms, abusive terms, negotiation, mixed contract.

INTRODUCTION

With regard to the formation of contracts, the New Romanian Civil Code introduces specific provisions regarding negotiations. However, there is no doubt that negotiation was an inherent practice of concluding contracts with a broad application even during the 1864 Civil Code, even though this Code, heavily influenced by the French 1804 Code Napoleon, did not explicitly contain any particular provisions regarding this manner of contract formation (Dogaru, Drăghici, 2014, pp. 158-165). Therefore, by introducing specific dispositions regarding negotiation of contracts, the New Romanian Civil Code allows for two logical conclusions to be drawn: firstly, through those provisions it is offered a formal recognition to the importance of this manner of concluding contracts by assigning a specific legal status to contractual negotiations which are broadly used with or without an existing legal framework addressing it; secondly, it also creates a legal space for a counter-part, which would consist of contracts concluded in a non-negotiating manner. The New Romanian Civil Code does not address in detail the legal status of such contracts, merely defining standard form contracts in article 1175 in a section of the Code dedicated to different types of contracts, and focuses instead on non-negotiated terms which are addressed through specific provisions regarding standard and unusual terms. Building on the provisions of the New Romanian Civil Code, the legal doctrine addresses also, symmetrically, separate aspects – it refers to negotiation as a pre-contractual phase and as a means of contract formation to which there is provided a specific legal status, and the counter-part of negotiation is addressed on the somewhat different level of the non-negotiated contractual terms (Pop, Popa, Vidu, 2020, pp. 56-109). This article makes the case that combining both levels in which the problem of negotiation is reflected in the legal provisions of the New Romanian Civil Code – as a means of contract formation and as reflected on the level of contractual terms – there is sufficient legal ground to speak of different types of contracts determined by the various degrees of non-negotiated terms they contain.

NEGOTIATION AS A MEANS OF CONTRACT FORMATION

Negotiation as a pre-contractual phase is addressed through a series of provisions such as 1182, 1183, 1184 of the New Romanian Civil Code where it is mentioned that contracts can be concluded either through negotiation or an unconditioned acceptance of a contractual offer (Baias, Chelaru, Constantinovici, Macovei, 2021, pp. 1407-1413). Observing the practice of contractual negotiations, the legal doctrine mentioned that the negotiation phase starts when the eventual contractual parties announce to each other their intention to come to an agreement on the elements of the contract (Ciochină-Barbu, Jora, 2020, pp. 39-41). Negotiations end whenever any of these three possible outcomes is reached – the formation of the negotiated contract, the refusal to conclude the contract, or the conclusion of what the legal doctrine has called `preparatory contracts` (Veress, 2019, p. 33). These last contracts are concluded at the end of negotiations, when the parties have agreed on the essential elements of the future contract, but through which they agree to schedule or condition in various ways the conclusion of the negotiated contract.

As a consequence of the freedom of will principle applied in contractual law, this pre-contractual phase is governed by the principle of freedom of negotiations, which implies, as stated in article 1183 (1) of the New Romanian Civil Code, that anyone is free to choose with whom they enter a negotiation, free to start, to conduct or to break negotiations, and in this particular case, cannot be held liable for the failure of negotiations (Oglindă, 2017, pp. 51-52). As a broad definition, the negotiation is the attempt of the parties to agree on the elements of the contract. Article 1182 (2) of the New Romanian Civil Code states that it is sufficient for the parties to agree on the essential elements of the contract for the contract to be concluded, even if they postpone the agreement on secondary elements or entrust a third party to determine them. The essential elements of the contract are considered those which determine the will of the parties and in the absence of which the contract cannot be concluded, such as the object of the contract and of the obligations or any other aspects on which the parties insist in order to conclude the contract (Romoșan, 2018, p. 41). Therefore, there is no fixed, strict limit between essential and secondary elements. Besides those aspects of the contract in the absence of which there is no contract whatsoever, the only criteria for determining essential from secondary elements of the contract is the will of the party – whenever one of the parties insists on a certain aspect in concluding the contract, it is considered to be an essential element (Almășan, 2018, pp. 16-18). Thus, the New Romanian Civil Code recognizes the sufficient agreement theory, which considers the contract to be concluded whenever the parties have reached an agreement on the essential elements of the contract. The effect is that whenever the parties do not reach an agreement on secondary elements of the contract or the designated third party does not determine those secondary elements, any of the parties can request from a judge to complete the contract, who will proceed in doing so by taking into account the will of the parties and the nature of the contract, as stated in article 1182 (3) of the New Romanian Civil Code.

Also deriving from the negotiation practice, the legal doctrine mentioned that the participants in a negotiation are allowed to customize the manner in which the negotiations are to be conducted through contracts governing this pre-contractual phase (Pop, Popa, Vidu, 2020, pp. 64-72). However, in the absence of such contracts which would configure according to the will of the partners the manner in which negotiations are to be conducted, there is a set of legal obligations the negotiating participants are bound to – the good faith obligation, the confidentiality obligation and an implied legal obligation to inform (Codrea, 2018, 357-370). The breach of any of these legal obligations generates a form of liability governed by tort law, just as the breach of any obligation stipulated in a contract through which participants understand to conduct negotiations would generate a contractual liability.

Non-negotiated terms: standard terms, unusual terms, abusive terms

The New Romanian Civil Code contains several provisions regarding non-negotiated terms. There is a general disposition regarding standard terms in article 1202 (2), applying to any kind of non-negotiated terms, and also article 1203 that addresses unusual terms, which are a particular type of standard terms. Also, article 1177, referring to contracts concluded with consumers, relates the general provisions of the Code to the special legislation which governs such contracts without specifically identifying it (which is Law No. 193 of 6th of November 2000 Regarding Abusive Terms in Contracts Concluded Between Professionals and Consumers). Therefore, under the broad category of non-negotiated terms we can speak of standard terms, unusual terms and abusive terms. Related to non-negotiated contracts there is a definition to standard form or adhesion contracts provided in article 1175, as contracts containing essential terms imposed or drafted by one of the parties, for itself or according to its instructions, which the other party can only accept as such. We can so far conclude that according to the explicit provisions of the New Romanian Civil Code there are two types of contracts – negotiated contracts and non-negotiated contracts, such as standard form or adhesion contracts, as explicitly mentioned in article 1175.

Standard terms are those prepared in advance by one of the parties in order to be used in a general and repeated manner, without being negotiated with the other party. The legal doctrine has mentioned that the use of standard terms is due to the superior economic position of the party who uses standard terms or due to the frequent nature of its activity (Pop, Popa, Vidu, 2020, pp. 99-102). However, not all non-negotiated terms are standard terms. In order to be a standard term, the contractual provision, besides being non-negotiated, it also has to have a repeated character which derives from the intention of the proposing party (Vasilescu, 2017, pp. 292-295). As a particular kind of standard terms, article 1203 refers to unusual terms, as those terms which stipulate in the benefit of the one who proposes them the limitation of liability, the right to unilaterally revoke the contract, the right to suspend the performance of the obligations, forfeiture of the rights or the benefit of the term of the other party, the limitation of the other party's right to use exceptions, the limitation of the right of the other party to contract with others, the implied renewal of the contract, the applicable law, compromissory clause or the change of the jurisdiction from the common courts. These specific cases are explicitly and limitedly provided by the article 1203, which also states that unusual terms are valid and have full effect only with the explicit, written acceptance of the other party, which can be accomplished in several ways as the legal doctrine pointed out: by signing in the contract next to the term, by adding an appendix to the contract containing those specific terms or by any written document through which the other party acknowledges the fact that it has been informed about the terms (Almășan, 2018, pp. 92-93). The consequence of not respecting the written conditions imposed by the law for unusual terms is that those terms can be declared invalid.

With regard to abusive terms, the New Romanian Civil Code refers to the special legislation governing contracts concluded with consumers in article 1177. Law No. 193 of 6th of November 2000 Regarding Abusive Terms in Contracts Concluded Between Professionals and Consumers defines consumer contracts as those contracts concluded between a professional (individual or legal person for whom the contract is concluded as part of its business activity) and a consumer (individual for whom the contract is concluded for reasons outside of its business activity). Article 4 of the Law defines the abusive term as a term which was not directly negotiated with the consumer and which by itself or in relation to other terms of the contract generates in the detriment of the consumer and in breach of good faith a significant imbalance between the rights and obligations of the parties. The Law also specifies that abusive terms in consumer contracts are considered completely void which implies that the absolute nullity can be established by the court itself, it can be raised any time, cannot be confirmed by the consumer and, in addition, if after the exclusion of the abusive term the contract cannot produce its effects anymore, the consumer can claim the rescission of the

contract with damages. Abusive terms, however, can be included not only in consumer contracts, but in general contracts as well, in which case they do not fall within the scope of Law No. 193 of 6th of November 2000 Regarding Abusive Terms in Contracts Concluded Between Professionals and Consumers. In these cases, following the same definition as stated in the Law, abusive terms are subjected to the same rules as standard terms, and as such, their effects can be counteracted on several grounds, such as undue influence, unjust or lack of cause, abuse of rights or through interpretation of the contract.

Negotiated contracts, standard form contracts, mixed contracts

If we can conclude that there are negotiated contracts on the basis of the provisions regarding negotiation as a pre-contractual phase and as a mode of contract formation, and non-negotiated contracts such as standard form or adhesion contracts as it is explicitly stated in article 1175 of the New Romanian Civil Code, there is sufficient ground to speak of a third type of contract which is not addressed as such, but to which several provisions of the New Romanian Civil Code relate. I would call this third type of contract mixed contract, insofar as it does not consist solely of negotiated terms or standard terms. Before clarifying the legal status of mixed contracts as it derives from the New Romanian Civil Code provisions, I will address the issues of negotiated contracts and standard form or adhesion contracts.

The New Romanian Civil Code contains specific provisions which were already addressed regarding negotiation as a means of contract formation. However, what does a negotiated contract contain when it comes to contractual terms? It would ideally consist of only negotiated terms. However, this is rarely the case, since the parties rarely if ever negotiate every single aspect of the contract. There are several provisions related to the composition of negotiated contracts. Firstly, there is article 1168 referring to the rules applicable to unnamed contracts which states that all contracts which are not specifically regulated in the New Romanian Civil Code are subjected to the general rules and, if this does not suffice, they are subjected to the special rules applicable to the contract to which they mostly resemble. Secondly, article 1272 (2) states that the concluded contract binds the parties not only to that which is explicitly stated in the contract, but also to all those consequences which the usual practices of the parties, the custom, the law or equity derive from the nature of the contract. Therefore, we can speak of negotiated contracts and still have contractual terms which the parties may have not explicitly negotiated or agreed upon, and as such, negotiated contracts do not contain exclusively negotiated terms. On a separate note, reversely, not all terms which are considered part of the contract are explicitly reflected in the composition of the contract, as article 1201 points out referring to external terms to which the parties relate to in the contract, external terms that can be negotiated or standard. Therefore, although a negotiated contract has all these legal constrains which reflect in its composition, it can be defined as containing not only negotiated terms on which the parties have explicitly agreed upon, but also the terms which the parties have had the effective possibility of subjecting to their negotiation.

On the counter-part of negotiated contracts where both parties have a saying in the contractual terms, there are standard form or adhesion contracts. As stated before, this type of contract is merely mentioned in the New Romanian Civil Code in article 1175 as a contract which would consist solely of standard terms, established exclusively by one of the parties. In contrast to negotiated contracts, standard form or adhesion contracts leave the other party with only two options – either agree to the terms presented and conclude the contract or refuse to do so. The New Romanian Civil Code does not provide for a detailed legal status to standard form or adhesion contracts, the only disposition to be found is the one referring to matters of contract interpretation – article 1269 (2) states that stipulations included in standard form or adhesion contracts are to be interpreted against the party who proposed them. Apparently paradoxically, just as it was the case with negotiated contracts, standard-form contracts do not

consist always entirely of standard terms, since this type of contracts is also subjected to article 1168 and article 1272 (2). Thus, a better description of standard form or adhesion contracts would refer to them as containing standard terms, unilateral reflections of the will of the proposing party, but also terms which were not explicitly addressed by those standard terms, in both cases, the other party not having the effective possibility to subject them to negotiation.

If negotiated contracts consist of negotiated terms and of all those terms which could have been effectively subjected to the negotiation of the parties, and standard form or adhesion contracts consist of standard terms and terms which without being subjected to any negotiation are not covered by standard terms, mixed contracts consist of both negotiated and standard terms and, in addition, of all those terms which were not explicitly addressed by any of the parties, deriving from the application of article 1168 and article 1272 (2) discussed above (Almășan, 2018, p. 85). Regarding this type of contracts and without specifically naming them as such, there is article 1202, containing provisions on standard terms, stating in the second paragraph that negotiated terms prevail over standard terms whenever the latter conflicts with the former. In the third paragraph it also refers to a situation involving mixed contracts, whenever such contracts are concluded through the use of standard terms by both parties. In this situation, the contract is considered to be concluded on the basis of negotiated terms or on any other standard terms common in their substance. Therefore, the formation of such mixed contracts implies a gradual process in which, firstly, divergent standard terms are excluded from the contract following an application of the general norms instead, and secondly, the remaining terms are subjected to an evaluation through the requirements of the sufficient agreement theory – if, on the basis of the remaining negotiated terms and those standard terms divergent only in form but common in substance, there is an agreement on the essential elements of the contract, the contract is concluded. When the contract is concluded in this circumstance the article 1202 recognizes the possibility of any of the parties to notify the other, either before or immediately after concluding the contract, that it has no intention of being part of such contract.

CONCLUSIONS

After analysing the legal framework of negotiation as it is explicitly provided in the dispositions of the New Romanian Civil Code, along with those provisions regarding the definition of standard form or adhesion contracts, the status of standard terms, unusual terms and abusive terms, the latter being addressed in Law No. 193 of 6th of November 2000 Regarding Abusive Terms in Contracts Concluded Between Professionals and Consumers, the analysis continued with addressing the issue of the types of contract. I proposed a new classification of contracts on the analysed legal basis, referring to negotiated contracts, standard form or adhesion contracts and a new category, mixed contracts. However, this leaves unaddressed the manner of formation of the contracts belonging to this category. On the level of the contractual terms, negotiated contracts consist of negotiated terms and of all those terms which could have been effectively subjected to the negotiation of the parties, standard form or adhesion contracts consist entirely of standard terms and terms which, although were not subjected to any negotiation, are not covered by the standard terms, mixed contracts consist of both negotiated and standard terms and also of all those terms which were not explicitly addressed by any of the parties, deriving from the application of article 1168 and article 1272 (2). On the level of contract formation, however, if negotiated contracts are concluded through negotiation as article 1182 (1) states, and standard form or adhesion contracts are concluded without any negotiation by the mere acceptance of the other party as stated in article 1175, the mixed contracts presuppose in their formation also a pre-contractual phase of negotiation, as it derives from article 1202 (1) – even though it is limited in scope by

the standard terms used by any or both of the parties, the rules governing negotiations apply to this category as well.

BIBLIOGRAPHY

1. Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, Codul civil. Comentariu pe articole. Ed. 3, C. H. Beck, București, 2021.
2. L. Pop, I.-F. Popa, S. I. Vidu, Drept civil. Obligațiile. Ed. 2, Universul Juridic, București, 2020.
3. I. Ciochină-Barbu, C. Jora, Drept civil. Obligațiile. Ed 2, Editura Universitară, București, 2020.
4. E. Veress, Drept civil. Teoria generală a obligațiilor. Ed 4, C. H. Beck, București, 2019.
5. A. Almășan, Drept civil. Dinamica obligațiilor, Hamangiu, București, 2018.
6. I. D. Romoșan, Drept civil. Obligații, Hamangiu, București, 2018.
7. C. Codrea, Nemo potest venire contra factum proprium. The coherence principle in European contract law, CES Working Papers, Vol. 10, No. 3, pp. 357-370, 2018.
8. P. Vasilescu, Drept civil. Obligații. Ed. 2, Hamangiu, București, 2017.
9. B. Oglindă, Drept civil. Teoria generală a obligațiilor, Universul Juridic, București, 2017.
10. I. Dogaru, P. Drăghici, Drept civil. Teoria generală a obligațiilor. Ed. 2, C. H. Beck, București, 2014.

AGORA International Journal of Juridical Sciences, http://univagora.ro/jour/index.php/aijjs
ISSN 1843-570X, E-ISSN 2067-7677
No. 2 (2021), pp. 17-28

DEFENDING FAMILY LAW VALUES VIA CRIMINAL LAW NORMS

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ABSTRACT

The economic and social challenges of the modern society necessarily imply the existence of a well-trained human resource, able to efficiently manage the various tasks related to the workplace, but also to efficiently cope with the evolution (revolution) of the informatics.
In this respect, at present, each European state seeks, through various specific policies, to develop a high social capital capable of successfully fulfilling these goals.
Thus, the protection of the family, as a matrix of the primary development of everyone, but also of the values related to it, has a primordial role in this context. The protection mechanisms are diverse, being regulated by both the rules of public and private law.
In the following we have proposed to review the criminal law norms that protect certain values of family law, such as the crime of abandoning the family (art. 378 Criminal Law), and the offense of preventing access to mandatory general education (art. 380 Criminal Law).

KEYWORDS: family, legal norms, education, crime.

INTRODUCTION

The feeling of tranquillity and trust conferred by the state institutions of the population regarding the application of measures to maintain public order and security, the safety of communities and goods as part of the concept of "public safety" must be reflected both at the macrosocial and microsocial level, i.e., at the level of the family.

Family protection is the subject of the concerns of all modern societies, which invest in human capital their entire arsenal of values.

In a plastic expression, I would say that the family is the cradle of human civilization. It constitutes the matrix in which every person is born, receives education and love, which is why its protection, including that of its members: spouses, children, and the values adjacent thereto: marriage, family life, its patrimony, children's education is important, and it must be ensured and guaranteed both by private law norms, such as those of family law, as well as by rules of public law, such as those of criminal law.

Lately, there has been an expansion of organized crime, illicit trafficking in drugs and human beings, including domestic violence, all of which have a major negative impact both on the person, viewed *ut singuli*, and on the microclimate which that person is a part of, in particular on the family.

In another context, it is noticed that the existence of a high social capital, able to generate added value in the society, implies children's and young people's better training with the State creating the necessary socio-economic conditions for the access to the mandatory general education, and later to the high school and higher education.

In relation to these premises, it is noted that in the Special Part of the current Criminal Law, in Chapter III of Title I, called Crimes against the person, the crimes committed against a family member are incriminated: domestic violence (art. 199 Criminal Law) and the killing or injury of the new-born committed by the mother (art. 200 Criminal Law). Also, separately from them, but related to them, the current Criminal Law incriminates in Title VIII called

Offences affecting relations regarding social cohabitation, under the name Offences against the family (Chapter II): bigamy (art. 376 Criminal Law), incest (art. 377 Criminal Law), family abandonment (art. 378 Criminal Law), non-observance of measures regarding the custody of the minor (art. 379 Criminal Law) and preventing access to mandatory general education (Art. 380 Criminal Law).

DELINEATION OF SOME CONCEPTS

The family is one of the most important values of a society. For this reason, his protection, and the values adjacent to it were in the attention of the legislator both under the family code, currently repealed, and of the Civil Code that entered into force in 2011, but also of the Criminal Law that entered into force in 2009.

The family is a basic social form, achieved through marriage, which unites the spouses (parents) and their descendants (unmarried children) (DEX, 2009). Etymologically, the term family comes from the Latin familia (-ae), which means the totality of members of a house or clan (Bodoaşcă, 2018, p.1).

The concept of the family is currently undergoing a real regress, due to some phenomena that have gained momentum recently: the multiplication of divorces, the abandonment of the perspective of marriage, the degradation of the condition of children and teenagers, etc.. This has attracted the attention of traditional churches. Thus, having as a premise the debate on how to use the term family in the Civil Code, the Orthodox Patriarchate Romanian declared the year 2014 "The Year of the Family" (Bob-Bocșan, 2020). Pope Francis also decided to proclaim a special pastoral year "Familia Amoris Laetitia " held from March 19, 2021, to June 26, 2022, the year in which the Catholic Church aims to promote spiritual, pastoral, and cultural initiatives to support families facing the current challenges (vaticannews.va).

First of all, the family, consists of the two spouses, that is, a man and a woman who have concluded the legal act of marriage under the conditions provided by law. The idea of union between a man and a woman for the purpose of procreation also constitutes the traditional significance of the institution of marriage. Thus, in the doctrine based on the Family Code, the concept of family was defined in various ways: the family is the main form of organization of the common life of people linked by marriage or kinship (Popescu, 1965, p. 17); the family designates the group of persons between whom there are rights and obligations arising from marriage, kinship, as well as from other relations assimilated to family relations (Ionaşcu, Costin, Ursa, 1975, p. 5; Filipescu, 2000, p. 2).

The meaning of the term family, as a union between two persons of different sex, is confirmed by the current legislation on family law in Romania, by the interpretation of constitutional norms in the field, but also by various other international documents. In this respect, the provisions of Article 259 para. (1)-(2) of the current Civil Code which establishes: "Marriage is the freely consented union between a man and a woman, concluded under the law.

Man and woman have the right to marry to establish a family."

In this context it should be noted that, although Art. 48 of the Constitution provides in par. (1) that: “The family is founded on the freely consented marriage between the spouses, on their equality and on the right and duty of the parents to ensure the upbringing, education and training of the children”, without therefore explicitly referring to marriage between a man and a woman, by corroborating this text with the other constitutional provisions, it follows that any marriage involves partners of the opposite sex. The Constitutional Court, invested to rule on the constitutionality of these norms, provided that: "The constitutional protection of the family against any attempts to erode marriage, as a freely consented union between man and woman, for the purpose of establishing a family and procreating, is thus imposed as an

essential measure for the protection of the Romanian people, their identity and unity in the great European family" (Decision of the Constitutional Court no. 580 of July 20 2016).

The requirement for the two spouses to be of different sexes is also provided for by certain international regulations such as: Article 16(1) of the Universal Declaration of Human Rights or Article 23(2) of the International Covenant on Civil and Political Rights, Article 12 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which expressly stipulates the right of men and women to marry and thus to establish a family.

Secondly, by the family is understood the two spouses, that is, a man and a woman, as well as their children. With this significance we find the notion of family also in certain laws incident in the field, such as Law no. 273/2004 on the procedure of adoption and Law no. 277/2010 on family support allowance. Thus, art. 2 lett. j) of Law no. 273/2004 on the adoption procedure states that the family means parents and their dependent children; and art.2 of Law No 277/2010 on family support allowance provides that the family consists of husband, wife, and their dependent children who live together (par. (1)]; and the single parent family is the family formed by the single person and the children in that person's care and who live with the respective person (par. (2)]. Also, according to par. (3) of Article 2, the family shall be considered within the meaning of the rules of par. (1) also the relation the unmarried man and woman, with their children and those of each of them, who live and share the household, if this is recorded in the social survey.

In defining the family, however, one cannot ignore the realities existing in the present society in which many couples choose to live together in cohabitation or to procreate without having the status of married persons.

It is also noted that in recent years, several European states, such as Belgium, Denmark, Finland, France, Germany, Ireland, Malta, the United Kingdom (except for Northern Ireland), Spain, and the Netherlands, have proceeded to legalise same-sex marriages (L. Irinescu, 2020).

However, the considerations mentioned above cannot interfere with the idea that, as a rule, marriage is the foundation of a family.

The importance of the family as a social value is also highlighted by the significant protection granted to family life through various domestic and international regulations. Thus, at national level, the constitutional provisions that provide in par. (1)-(2) of article 26 called "Intimate, family and private life" that: "Public authorities respect and protect intimate, family and private life.

The natural person has the right to dispose of himself or herself, if he/ she does not violate the rights and freedoms of others, public order or morals. "

We appreciate in this context that the text of par. (1) of Article 26 may be amended to emphasize more strongly the involvement of the State in the protection of intimate, family, and private life, as we propose that it provides that the public authorities guarantee respect for and protection of those values.

At international level, in the Charter of Fundamental Rights of the European Union (2000), article 7 provides that: "Everyone has the right to respect for private and family life,...", a provision which is also found in article 12 of the Universal Declaration of Human Rights (1948), art. 8 par. (1) The Convention for the Protection of Human Rights and Fundamental Freedoms (1950) and in the International Covenant on Civil and Political Rights (1966) (Article 23 par. (1)] .

Relative to children, ECHR case-law about the family life enshrines interdependent rights, such as the child's right to family life and the child's right that his or her best interests take precedence over. It is noted, however, that the child's right to respect for family life may be limited in order to guarantee his or her best interests (European Union and Council of Europe Agency for Fundamental Rights, 2015, p.76).

Therefore, family life can be considered a complex phrase that includes the totality of the relationships that arise between the members of a family, but also the set of rights arising

from these relationships, such as: the right to support, education, vocational training, physical health, etc.

According to the EU legislation, as well as the legislation of the Council of Europe, the right to respect for family life is not absolute but is subject to limitations. In this respect, in accordance with Article 8 par. (2) of the Convention for the Protection of Human Rights and Fundamental Freedoms, the interference of a public authority in the exercise of this right is permitted only if such interference is provided for by law and constitutes a measure which is required for national security, public safety, economic well-being of the country, the protection of order and prevention of criminal acts, the protection of health or morals, or the protection of the rights and freedoms of others in a democratic society.

Thus, the growth of high social capital involves the education of any person, through education aiming at the free, integral, and harmonious development of human individuality, in shaping the autonomous personality and undertaking of a system of values that are required for personal fulfilment and development, for the development of the entrepreneurial spirit, for the active citizen's participation in society, for social inclusion and for employment on the labour market.

The right to education is consecrated both through international regulations and through internal normative acts.

At national level, this right is regulated by the norms of constitutional law, but also by those of the Law on National Education No. 1 of 2011.

Art. 48 of the Romanian Constitution confers on parents the right, but also the duty to ensure the upbringing, education and training of children, the family environment being the most conducive to the child to learn the first rules of conduct and learning.

In the fundamental law the right to education is enshrined in art. 32: "The right to education is ensured through mandatory general education, high-school and vocational education, higher education, as well as other forms of training and improvement (Moroşteş, 2020, p. 56). Education of all grades is carried out in Romanian. According to the law, education can also be carried out in an international language." [par. (1) -(2)]. It is noted that people belonging to national minorities are guaranteed the right to learn in their mother tongue, but also the right to be able to be trained in this language [par. (3) .

To ensure the access of the entire population of school age to education, it is ordered that the state education is free of charge, according to the law; also, for children and young people coming from disadvantaged families and institutionalized, the state grants social scholarships, according to the law [art. 48 par. (4) of the Constitution].

The legal basis for exercising the right to education is created at national level by the Law on National Education no. 1 of 2011, which provides the framework for the exercise under the authority of the Romanian state of the fundamental right to lifelong learning, and, at the same time, it regulates the structure, functions, organization and functioning of the national education system (art.1).

The main purpose of the education and professional training of children, young people and adults is to form the necessary skills, according to art. 2 of the reviewed law, in order to achieve certain desiderata, such as: personal fulfilment and development, by achieving their own objectives in life, according to the interests and aspirations of each and the desire to learn throughout life; social integration and active citizen participation in society; employment and participation in the functioning and development of a sustainable economy and education in the spirit of dignity, tolerance and respect for human rights and fundamental freedoms;

At international level, the child's right to education is foreseen since 1959, the year in which, on November 20, the U.N. General Assembly passes the Declaration of the Rights of the Child, which establishes the right of the child to free and mandatory education at an elementary level, conferring this responsibility primarily on parents.

Convention on the Rights of the Child, passed by the U.N. General Assembly, on November 20, 1989, ratified by Romania in 1990, stipulates in Articles 28 and 29, the

child's right to education. Thus, art.28 recognises the right of the child to education and, inter alia, to make primary education public and free of charge for all; to establish free education and the granting of financial assistance in case of need, etc.

In European Union law, Article 14 of the EU Charter of Fundamental Rights guarantees the right of any person to education, but also to access to vocational training and continuing education. The right to education includes "the possibility to attend mandatory education free of charge". The third line of the same legal text enshrines the right of parents to ensure the education and training of their children, according to their own religious, philosophical, and pedagogical beliefs.

In the law of the Council of Europe, Article 2 of Protocol No 2. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms guarantees the right to education. The ECHR states that it does not oblige the State to make education services available but guarantees "the right of access to educational institutions existing at a given time" (European Union Agency for Fundamental Rights and the Council of Europe, 2015, p. 145). However, this right is not absolute, but its limitations, e.g., suspension or expelling from an educational institution must be carried out under the conditions and with the procedure provided by the legal provisions.

In this respect, in the ECHR case-law it was decided that the forced closure of schools taught in the Moldovan language (which use the Latin alphabet), and the subsequent harassment of children on the way to these schools constituted an unjustified interference with the children's right to education, thus causing a violation of Article 2d of Protocol No. 1 to the Convention for the protection of human rights and fundamental freedoms (ECHR, Catan and others/Moldova and Russia [GC], 2012).

1. THE OFFENCE OF FAMILY ABANDONMENT

As mentioned above, the current Criminal Law dedicates to crimes against the family the Chapter II of Title VIII of the Special Part.

The special legal object of the crimes against the family is represented by the social relations whose existence is determined by the defence of the family, as an institution, but also as a social value, which also determined their inclusion in Title VIII called Crimes that affect some relations regarding the social cohabitation.

Given the special impact that the acts incriminated by this crime produce on the family, we have chosen to analyse the crime of family abandonment, regulated by art. 378 of the Criminal Law.

In the regulation of the current Criminal Law, the offence of family abandonment takes the form of a standard version and of an assimilated variant. The standard version can be committed by the person who has the legal obligation to support, in relation to the one entitled to receive support, in several ways:

- leaving, banishing, or leaving without help, exposing him to physical or moral suffering;
- failure to comply, in bad faith, with the support obligation provided by law;
- non-payment, in bad faith, for 3 months, of the alimony established by the court.

The assimilated version is committed by the non-execution, in bad faith, by the convicted person of the regular benefits established by a court decision, in favour of the persons who are entitled to receive support from the victim of the crime (art. 378 par. (2) Criminal Law].

The special legal object of this crime is the social relations that concern the legal support obligation under which the family members owe support to them, but also moral and material support (Ristea, vol. II, 2020, p. 427).

The obligation for support is materialized through mutual aid activities between the members of a family and relies on the feelings of human solidarity and affection, which develop in a family.

The performance of this obligation involves a concrete support, consisting in providing the living means to one of the members of the family who is in need (Popescu, 1965, p. 197; Boroi, 2014, p. 701)..

The provisions of the current Civil Code stipulate the rule that the person who is in need enjoys the right to support, due to the fact that he cannot support himself from his work or from his assets (art. 524). However, the provisions of art. 527 par. (2) of the same normative act which establishes that only the person who has the means to pay for it or has the possibility to acquire those means may be obliged to it.

As such, in a particular situation, the existence and extent of the support obligation (Berlingher, vol. I, 2014, pp. 199-201) implies, as sine qua non requirements, the state of need of the creditor, respectively the means necessary for the granting of support by the debtor (Florian, 2011, p. 258). .

It is noted, however, that the effects of the support obligation are established by kinship, marriage, or by those assimilated to family relationships. In this respect, the law-maker specifies in art. 516 et seq. of the Civil Code who are the persons between whom the support is due, respectively: between husband and wife, relatives in a straight line, between brothers and sisters, but also between the other persons specifically provided by law, as well as between the former spouses, if the legal requirements are met. Subjects of the support obligation are also the spouse that has contributed to the upbringing of the other spouse's child, who is obliged to support the child, for as long as the child is underaged, in the conditions in which the child's natural parents have died, are missing or are in need. Correlatively, the child may also be obliged to perform the support obligation towards the person who upbrought it in this way for a period of 10 years.

The material object is those goods which the person entitled to receive support was deprived of, such as: shelter, food, clothing, etc.

As for the *subjects of the crime*, it is noticed that the qualified active subject of the crime of family abandonment is the person who has the legal obligation to support it.

In the situation referred to in par. (1) letter c) of Article 378 Criminal Law, the deed is committed only by the person who, incumbent on him/ her with such an obligation, must pay support to another person, following the ruling of a court decision.

It is noted, however, that in the assimilated version, the active subject is that person sentenced by a court decision to pay periodic benefits to the persons who are entitled to receive support from the victim of the crime. The legal text thus refers to the perpetrator of a crime directed against the person (e.g., murder, manslaughter, but also outrage, etc.).

Within the analysed crime, criminal participation is also possible, in the form of instigation and complicity (Ristea, vol. II, 2020, p. 428).

The passive subject of the crime is the person who is entitled to receive support from the active subject, as provided law.

Constituent content

The material element of the objective side consists of certain actions or inactions, such as: leaving, banishing, or leaving without help the person entitled to support (Art. 378 par. (1) letter a) Criminal Law].

Leaving is that action that refers to the departure of the perpetrator from the place where the person entitled to support is found without providing him/ her with the necessary living means, exposing that person to hunger, cold, etc.

Banishment implies the action of removal by the perpetrator of the person entitled to support from his home or from the place where they are temporarily set and where the support obligation is exercised (Ionaş, Măgureanu, Dinu, 2015, p. 618).

Leaving without help designates a statement on the part of the perpetrator, for example leaving the person entitled to support without treatment.

The existence of the material element of the objective side in the cases referred to in letter a) of par. (1) Art. 378 Criminal Law involves exposing the entitled person to physical or moral suffering.

Another incriminated inaction is the non-performance in bad faith of the support obligation provided for by law (art. 378 para. (1) letter b) Criminal Law].

In the specialized literature it was stated that only the person in need was entitled to support, as a result of the impossibility of a gain from work due to the inability to work or who does not have other income (Boroi, 2014, p. 703).

According to para. (1) letter c), another way of achieving the material element of the analysed crime envisages the non-payment, in bad faith, for 3 months of the alimony established by the court.

As regards the date from which the 3-month period runs, we note that H.C.C.J. was seized with a preliminary ruling for the untying of the question of law regarding the clarification of the meaning of the expression "committing the act", stipulated by the provisions of art. 296 of the Code of Criminal Procedure Law (relevant for the calculation of the deadline for submitting the preliminary complaint), in the sense of establishing whether this means the date of cessation of the inaction (the date of exhaustion of the offence of family abandonment) or the date of consumption of the crime (expiry of the 3-month period during which the perpetrator remained in passivity). In this regard, the supreme court ruled that: "In the case of the offence of abandonment of the family provided for in article 378 para. (1) letter c) of the Criminal Law, the term of submission of the prior complaint provided for in the content of Art. 296 par. (1) and (2) of the Code of Criminal Procedure Law - 3 months from the day when the harmed person or that person's legal representative learned about the act doing - shall run from the date on which the harmed person or that person's legal representative knew about the deed doing." (High Court of Cassation and Justice - The panel for resolving legal issues in criminal matters, Decision no. 2 of January 20, 2020)

In the assimilated version, the material element takes the form of non-execution, in bad faith, by the person sentenced to the payment of periodic benefits ordered by court decision, in favour of persons entitled to support on behalf of the victim of the crime. Thus, in this variant, it is about committing a crime against a person who has the obligation to support, and as a consequence of this crime, that person can no longer fulfil his/ her duties (for example, in the event of loss of the capacity to work).

We agree to the opinion expressed in the doctrine (Ionaş, Măgureanu, Dinu, 2015, p. 619) that the obligation deriving from a support contract does not refer to the support obligation provided by the text of art. 378 Criminal Law.

The actions or inactions by which the offence of family abandonment is committed have as an *immediate consequence* the creation of a state of danger with regard to family relations, in the sense that the lack of support to which the person whom the obligation to support is entitled to may affect that person's physical, mental development or survival.

In this context, it is noticed that the existence of the analysed crime necessarily implies a *causal link* between the incriminated action or inaction and the result produced.

Regarding the subjective side, the family abandonment is committed with direct or indirect intention in the case of the modalities regulated by Article 378 par. (1) letter a) Criminal Law, respectively by an omission in bad faith, in the case of the modalities established by art. 378 par. (1) letters b) and c) Criminal Law (Boroi, 2014, p. 704).

It was stated in the doctrine that there is no bad faith in the situation in which the person obliged to pay the support pension, although not paying, lived during that period with the mother of the child and with him/ her and took care of the minor, assuring him/ her the necessary means for living (Dobrinoiu, Conea, 2000, p. 466).

Regarding *the sanctioning* of this crime, it is noted that it is punished by imprisonment from 6 months to 3 years or by a fine in the ways provided by the standard version and in the assimilated variant.

With regard to the offence of family abandonment committed by the defendant's failure to pay, in bad faith, the support pension to the injured person (in this case his minor son), it was decided in the judicial practice that, starting from the premise that the defendant was previously sentenced to a prison sentence of 1 year, in respect of which the conditional suspension of execution for a period of 3 years was ordered, what was a trial term, the penalty of the fine is not sufficient to achieve the preventive, educational and sanctioning purpose of the punishment, which is why it sentences the defendant to the punishment of 1 year and 6 months imprisonment, also revokes the benefit of the conditional suspension of the execution of the sentence of 1 an prison, and orders the full execution of this sentence along with the punishment applied by this sentence, the defendant having to execute the sentence of 2 years and 6 months imprisonment (Săveni Court, Criminal Sentence no. 47/03.02.2020).

Criminal proceedings are set in motion to the prior dismissal of the injured person.

We note that the attempt is not punished, although it is possible in case of leaving, banishing, or leaving without help.

Also, the capacity is not sanctioned if the defendant fulfils his obligations before the end of the criminal investigation ((Tulcea Court, Criminal Sentence 930/15.06.2017).

At the same time, if, until the final decision of conviction, the defendant fulfils his obligations, the court may order, as the case may be, either the postponement of the application of the sentence or the suspension of the execution of the sentence under supervision, even when the conditions established by law for it are not met (art. 378 par. (5) Criminal Law].

2. THE OFFENCE OF PREVENTING ACCESS TO MANDATORY GENERAL EDUCATION

Another crime that produces serious consequences on the future of the minor is the offense of preventing access to mandatory general education, regulated by art. 380 of the current Criminal Law.

This offence is established by the provisions of the Criminal Law that entered into force in 2009, as it had no counterpart in the previous legislation. The criminalization of this act is due to the alarming increase in the school dropout rate by students of increasingly younger age, as stated in the explanatory memorandum of the new Criminal Law.

The incriminating text does not refer to situations in which this abandonment is caused by a precarious material situation, a hypothesis in which the state has the obligation to intervene through other legal levers, but those situations in which the parent abusively proceeds to withdraw the minor from studies or prevents him from following them, although he would have had all the conditions for this (I. Ristea, 2020, p. 437).

The child's right to education is regulated, as we indicated above, both by the provisions of the Constitution (art. 32, art. 48), the Law on National Education 1/2011, but also by the norms of Law no. 272/2004 on the protection and promotion of the rights of the child, which in art. 47 par. (2) has the obligation of parents to provide children with the necessary conditions for growth, education, education, and vocational training.

The reviewed crime looks like a type of variant.

In this regard, the crime is committed by the parent or the person to whom a minor has been entrusted with, according to the legal norms, and who, unjustifiably, proceeds to withdraw or prevents him by any means from attending the courses of mandatory general education.

The special legal object in the case of the crime of preventing access to mandatory general education is the social relations that consider the protection of the upbringing and education of minors and their access to mandatory general education.

Under the Law on National Education no. 1/2011, art. 24 par. (1), as amended by Law no. 56/2019, general education includes: primary education, secondary education and the first two years of higher secondary education.

It is noticed that this crime is devoid of *material object*.

Regarding the *subjects of the crime*, it is inferred from the legal norms that the active subject is qualified, being the parent or that person to whom the minor was entrusted for upbringing and education.

The criminal participation may be encountered in the form of instigation or complicity (Dobrinoiu, Neagu, 2014, p. 721).

The main passive subject is the state, as the holder of the social values protected by the Criminal Law, and the secondary passive subject is the minor who is violated the right enshrined in the constitutional provisions to the mandatory general education.

Constituent content

The material element of the objective side consists in the action of withdrawal or the action/inaction to prevent the minor, committed by the parent, by any means, to follow the mandatory general education.

The removal of the minor means the removal, abandonment, quitting to attend the courses of the mandatory general education, as a consequence of the decision adopted in this regard by his/her parent or the person whom the minor was entrusted to, according to the law.

Preventing the minor from attending the courses of mandatory general education means his/her interdiction to attend the courses, by means such as: not enrolling him/her at a school or sending him/her to a locality where there is no education institution (Dobrinoiu, Neagu, 2014, p. 722).

The immediate consequence is to create a state of danger for the development and education of the minor.

The causal relationship requires the existence of a causal link between the incriminated action and the result produced.

The subjective side can manifest itself in the form of direct or indirect intention, the fault being excluded.

As forms, it is noticed that the acts of preparation and the attempt are not sanctioned, and the offense is consumed by withdrawing or preventing the minor from attending the mandatory general education (Ristea, 2020, p. 440).

The offence of preventing access to mandatory general education *is punishable* by the rules of the Criminal Law with imprisonment from 3 months to a year or by a fine.

Regarding the initiation of criminal proceedings in the case of this crime, distinct opinions have been expressed in the doctrine. Thus, certain authors consider that criminal proceedings are set in motion *ex officio* (Dobrinoiu, Neagu, 2014, p. 723; Ionaş, Măgureanu, Dinu, 2015, p. 626), and others consider that it is set in motion only at the preliminary complaint (Ristea, 2020, p. 440). Considering that art. 380 of the current Criminal Law does not regulate the preliminary complaint and also the importance of the value protected by the incrimination norm, namely the minors right to education and their access to mandatory general education, we agree to the opinion that criminal proceedings are set in motion *ex officio*.

The jurisdiction to judge this offence at first instance belongs to the court of law [art. 35 par. (1) Criminal Procedure Law].

The criminal norms provide for a special cause of non-punishment of the deed, respectively if, before the end of the criminal investigation, the defendant ensures the resumption of attendance of courses by the minor (art. 380 par. (2) Criminal Law]].

In addition, as a special cause of individualization of the punishment, par. (3) of Article 380 Criminal Law states that the court rules, as the case may be, to postpone the application of the sentence or to suspend the execution of the sentence under supervision, even if the conditions established by the legal provisions for it are not met, in the event that, until the final decision of conviction, the defendant ensures the resumption of attendance of courses by the minor.

CONCLUSIONS

Paraphrasing the memorable speech of the illustrious Romanian diplomat and jurist Nicolae Titulescu held in 1937 in Bratislava on the occasion of receiving the title of Doctor *Honoris Causa*, we appreciate that, at almost 100 years after its utterance, it keeps its actuality, because indeed, only then when the law shines, just as the sun illuminates the soul of men, as a guiding spirit, as a self-imposed obligation, as a self-censorship that identifies with organized freedom, only then will mankind be safe, because the human being will be able to fulfil its destiny in the peace established by the legal order.

In the current context, dominated by economic and social insecurity as a result of the Covid19 pandemic, it is needed to provide the state institutions with a special protection of the family.

The protection of the family and of the values adjacent to it is a desideratum that is part of the sphere of interest of both private and public law. The state, through its mechanisms, must create a proper legal framework that ensures the harmonious development of the family life of the natural person, regardless of the way in which he wants to configure it.

On the other hand, in the current situation, characterised by the tendency to reconfigure family relations as a result of the choice of many couples to live in cohabitation, of the registered partnerships recognised by many European states, of the legalisation in many European countries of same-sex marriages, it remains to be seen to what extent the current framework of the traditional family can be preserved.

BIBLIOGRAPHY

1. dexonline.ro, accessed on 17.11.2021.
2. Bodoaşcă T., Contribuții la definirea juridică a familiei și la stabilirea conținutului acesteia (Contributions to the legal definition of the family and to the establishment of its content), 2018, p.1, https://www.universuljuridic.ro/contributii-la-definirea-juridica-a-familiei-si-la-stabilirea-continutului-acesteia/, accessed on 17.11.2021.
3. Bob-Bocșan M.-D., Despre devenirea familiei în dreptul român şi perspectivele legislative ale parteneriatului civil (On the becoming of the family in Romanian law and the legislative perspectives of civil partnership), 2020, https://www.universuljuridic.ro/despre-devenirea-familiei-in-dreptul-roman-si-perspectivele-legislative-ale-parteneriatului-civil/6/, accessed on 17.11.2021.
4. vaticannews.va
5. Popescu T. R., Dreptul familiei. Tratat (Family law. Treaty.), vol. I, Publishing House Didactică și Pedagogică, Bucharest, 1965, p. 17.
6. Ionașcu A., Costin M., Ursa V., Familia și rolul ei în societatea socialistă (Family and Its Role in Socialist Society), Publishing House Dacia, Cluj-Napoca, 1975, p. 5; Filipescu I. P., Tratat de dreptul familiei (Treaty of Family Law), 5th edition, Publishing House All Beck, Bucharest, 2000, p. 2.
7. Decision of the Constitutional Court no. 580 of 20 July 2016 on the legislative initiative of the citizens entitled "Law revising the Constitution of Romania", published in the Official Gazette No. 857 of 27 October 2016.

8. Law nr. 273/2004 on the adoption procedure, republished in the Official Gazette No. 739 of 23 September 2016.
9. Law nr. 277/2010 on family support allowance, republished in the Official Gazette No. 785 of 22 November 2012.
10. Irinescu L., Principiile dreptului familiei versus parteneriatul civil. De la tradiţie la modernism?(Principles of family law versus civil partnership. From tradition to modernism?), 2020, https://lege5.ro/gratuit/gmztcmrygu3a/principiile-dreptului-familiei-versus-parteneriatul-civil-de-la-traditie-la-modernism-les-principes-du-droit-de-la-famille-contre-le-partenariat-civil-192-partir-de-la-tradition-au-modernisme-princip, accessed on 19.11.2021.
11. European Union Agency for Fundamental Rights and Council of Europe, Handbook of European Law on the Rights of the Child, 2015, Publications Office of the European Union, Luxembourg, 2016, p. 76 https://www.juridice.ro/wp-content/uploads/2019/06/Handbook_rights_child.pdf, accessed on 19.11.2021.
12. Law on National Education No. 1 of 2011, published in the Official Gazette No 18 of January 10, 2011.
13. Moroşteş A. F., Protecţia naţională şi internaţională a drepturilor omului (National and International Protection of Human Rights), Publishing House Casa Cărţii de Ştiinţă, 2020, p. 56.
14. Declaration of the Rights of the Child, https://www.salvaticopiii.ro/sci-ro/files/32/327ef3da-c4d0-4fff-9f76-8cbcd20fa8c1.pdf
15. Convention on the Rights of the Child, https://www.salvaticopiii.ro/ce-facem/drepturile-copilului/conventia-onu-cu-privire-la-drepturile-copilului
16. EU Charter of Fundamental Rights, https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:12012P/TXT&from=DE
17. Convention for the Protection of Human Rights and Fundamental Freedoms, http://ier.gov.ro/wp-content/uploads/2018/11/Conven%C5%A3ia-pentru-ap%C4%83rarea-drepturilor-omului-%C5%9Fi-a-libert%C4%83%C5%A3ilor-fundamentale.pdf
18. ECHR, Catan et all/Moldova vs. Russia [GC], no. 43370/04, no. 8252/05 and no. 18454/06, October 19, 2012 apud Agency for Fundamental Rights of the European Union and the Council of Europe, Handbook of European Law on the Rights of the Child, 2015, Publications Office of the European Union, Luxembourg, 2016, p. 146, https://www.juridice.ro/wp-content/uploads/2019/06/Handbook_rights_child.pdf, accessed on 20.11.2021.
19. Ristea I., Drept penal. Partea specială (Criminal Law. The Special Part), vol. II, Publishing House Universul Juridic, Bucharest, 2020, p. 427.
20. Popescu T., Dreptul Familiei. Tratat (Family law. Treaty), vol. II, Publishing House Didactică şi Pedagogică, Bucharest, 1965, p. 197; Boroi Al., Drept penal. Parte specială (Criminal Law. Special Part), Publishing House C. H. Beck, Bucharest, 2014, p. 701.
21. For support obligation in private international law, see Berlingher D., Instituţii de drept internaţional privat (Institutions of Private International Law), vol. I, Publishing House Limes, 2014, pp. 199-201.
22. Florian E., Dreptul familiei (Family Law), 4th edition, Publishing House C. H. Beck, 2011, p. 258.
23. Ionaş Al., F. Măgureanu, C. Dinu, Drept penal. Partea specială – conform noului Cod penal- (Criminal Law. The special part – according to the new Criminal Law), Publishing House Universul Juridic, Bucharest, 2015, p. 618.
24. H.C.C.J. - The panel for resolving legal issues in criminal matters, Decision no. 2/ 20.01.2020, published in the Official Gazette. no. 135 of February 20, 2020.

25. Dobrinoiu V., Conea N., Drept penal. Parte specială, Vol. II, Teorie şi practică judiciară (Criminal Law. Special Part, Vol. II, Judicial Theory and Practice), Publishing House Lumina Lex, 2000, p. 466.
26. Săveni Court, Criminal Sentence nr. 47/03.02.2020, https://www.jurisprudenta.com/jurisprudenta/speta-167a7sci/, accessed on 06.12.2021.
27. Tulcea Court, Criminal Sentence 930/15.06.2017, https://www.jurisprudenta.com/jurisprudenta/speta-140pg9h6/,accessed on 06.12.2021.
28. Law no. 272/2004 on the protection and promotion of the rights of the child, republished in Official Gazette no. 159 of March 5, 2014.
29. Dobrinoiu V., Neagu N., Drept penal. Parte specială (Criminal Law. Special Part), Publishing House Universul Juridic, Bucharest, 2014, p. 721.

AGORA International Journal of Juridical Sciences, http://univagora.ro/jour/index.php/aijjs
ISSN 1843-570X, E-ISSN 2067-7677
No. 2 (2021), pp. 29-36

TOWARDS FEDERALIZATION OF NIGERIAN UNITARIZED JUDICIARY

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ABSTRACT

This paper examines federalism as a concept, its adoption to governance in Nigeria through the constitution. The constitution is examined with a view of showing elements of unitarism instead of the federalism the constitution proclaims for Nigeria. In this regard, we examined the creation of federation account, statutory allocation of revenue to states and local government and what it portends for a federation. Conduct of general Election on a date for the central government and all the states of the federation is observed as an aberration in a federal state, so also is the creation of a National electoral commission for both the central and state governments. Creation of central judiciary for both the National and state government with institutions like Economic and Financial Crimes Commission (EFCC) and Independent Corrupt Practices Commission (ICPC) is also an aberration in a federation. The paper is concluded by contrasting Nigerian federation with American federation with a recommendation for true federation modeled along American system so as to ensure peace, order, good governance and security of the nation. This will be a form of devolution of power which can ensure Nigeria's unity and erase agitation for balkanisation of Nigeria.

KEYWORDS: Federalization, Nigeria, Judiciary, Constitution, Government.

INTRODUCTION

Federalism is a system of government by which the same territory is controlled by two levels of government (Garner, 2009). Both the national government and smaller political sub-divisions have the power to make laws and both have a certain level of autonomy from each other (https://www.britannica.com). It is also seen as a system of government where there is one strong central controlling authority and other smaller units still retaining power of governance in their respective units (https://www.merrian-webster.com). It is also described as a system of government that believes each state under central government can have its own laws and customs while still sharing unified laws, customs and currency e.g. U.S.A (https://www.law.cornell.edu).

Federalism is also described as a mode of political organization that unites separate states or other polity within a political system in a way that allows each to maintain its own integrity (https://www.dictionary.com). Federal systems do this by requiring that basic policies be made and implemented through negotiation in some form, so that all the members can share in making and executing decision. The political principle that animate federal system emphasize the primacy of bargaining and negotiated coordination among several power centres; they stress the virtues of dispersed power centres as a safeguarding individual and local liberties. The various political system that call themselves federal differ in many ways, certain, characteristics and principles, however, are common to all truly federal systems (https://www.britannica.com). Example of federal states are:- Argentina, Australia, Belgium, Bosnia, Brazil, Canada, Germany, India, Malaysia, Mexico, Nigeria, Pakistan, Russia, Switzerland and United States of America.

METHODOLOGY

The article relies on the doctrinal research methodology. Doctrinal research is concerned with legal propositions, the sources of data are legal and appellate courts decisions. It is library research; it includes primary and secondary sources. The primary sources are Statutes, Constitution, Acts and Laws while secondary sources are books, articles etc.

Some of the primary sources explored here are: The 1999 Constitution of the Federal Republic of Nigeria (as amended), Economic and Financial Crime Act, Federal Road Safety Commission Act among others. The secondary sources include books, articles and journals related to the subject matter of this research. The internet has turned the whole world not only into a global village but also a global room. It helps a lot in various researches of various natures. There is no information needed that cannot be obtained from the internet. Thus, the internet is of tremendous help in putting this article together.

COMMON FEATURES OF A FEDERAL SYSTEM

Written Constitution

All federal relationship must be established or confirmed through a perpetual covenant of union usually embodied in a Constitution which is clearly written down. The Constitution outlines the terms by which power is divided or shared between the central and the component states or units. The constituent states, often retains constitution making power right of their own (https://www.britannica.com).

Non-concentration of power

The political system itself must reflect the Constitution by diffusing power among a number of substantially self sustaining centres. Such diffusion of power may be referred to as non centralization of power. This is a way of ensuring in practice that the authority to participate in exercising political power cannot be taken away from the general or the state government without common consent (https://www.britannica.com).

Area division of power

This has two faces-the use of area divisions to ensure neutrality and equality in the representation of the various groups and interests in the polity and the use of such division to secure local autonomy and representation for diverse groups within the same civil society. This encourages national integration (https://www.britannica.com). The principle of representation serves to maintain the union i.e. Having a National Assembly that represents the divergent people on the basis of equality and proportionality. House of reps, represents on proportionality while the senate represents on the basis of equality.

Nigeria as a Federation

Nigeria, as a country is regarded as a federation because the 1999 Constitution of the Federal Republic of Nigeria (as amended) (The 1999 Constitution of the Federal Republic of Nigeria, Cap C23, LFN 2004) said so, not because Nigeria exhibits the characteristics of a federation. It is true that the constitution proclaimed in the preamble that we the people of the federal Republic of Nigeria, having firmly and solemnly resolved to make and give this constitution to ourselves (Babalola, 2018). The same Constitution says the Federal Republic of Nigeria shall not be governed nor shall any person or group of persons take control of the government of Nigeria or any part of it except in accordance with the provisions of this constitution (Preamble to the 1999 Constitution of the Federal Republic of Nigeria, Cap C23, LFN 2004). More specifically, the Constitution went further to say that Nigeria shall be a federation consisting of states and Federal Capital Territory (Section 2(2) of the 1999 Constitution of the Federal Republic of Nigeria, Cap C23, LFN 2004). The Constitution also

stated the Legislative, Executive and the judicial powers of the federation and prescribed the appropriate persons and institutions vested with the authority to exercise those powers.

The same Constitution not only prescribed that Nigeria shall be a federation but also provided that the federal republic of Nigeria shall be a state based on the principle of democracy and social justice and that sovereignty belonged to the people through whom the government derives all its powers and authority. The security and welfare of the people is vested in the government as the primary purpose of government and the same Constitution made it mandatory for the people's participation in government and governance. It went further to state clearly the political, economic, social, educational and cultural objectives of the government.

Political Participation

According to Patrick J. Conge (Conge, 1988), political participation is any number of voluntary activities interactions by the public to influence public policy either directly or by affecting the selection of persons who make those policies through, typically associated with voting in elections, political participation includes activities such as working on political campaigns, donating money to candidates causes, contacting public officials, petitioning, protesting and working with other people on issues.

To ensure clarity in division of power between the national government and state governments two legislative lists were created by the Constitution while the third legislative list is always conventionally inferred. Globally the Exclusive Legislative list contains those legislative powers reserved for the central or national government while the Concurrent legislative list is reserved for both the central or national government and the state governments. The third list known as the residual legislative list is always reserved for the states. Residual legislative list consists of items, issues or matters not mentioned in either the exclusive or concurrent legislative lists (Posey, 1988).

However, it must be stressed here that some federations only insert Exclusive Legislative list in the Constitution while any other item not on that list is consigned to the residual list. An example of this type of federation is the United States of American while another state like India specifically stated the three legislative lists in its Constitution so the Constitution of India contains the exclusive, concurrent and residual legislative lists for avoidance of doubt.

Unitary Concept of Governance

Unitary government is a kind of government system in which a single power which is known as the central government controls the whole government. In fact, all powers and administrative divisions' authorities lie at the central place (Conge, 1988). According to Robert Longley, a unitary state or Unitary government is a governing system in which a single central government has total power over all of its other political sub divisions.

A unitary system is the opposite of a federation where governmental powers and responsibilities are divided. In a unitary state, political subdivision must carry out the directives of the central government but have no power to act on their own. In a unitary state, the central or national government may grant some powers to its local governments through a legislative process called "devolution". However, the central government reserves the supreme power and can revoke the powers it devolves to the local government or invalidate their actions. Of the 193 member countries of the United Nations Organization 165 are Unitary States. The United Kingdom and France are the well recognized examples of the lots.

The United Kingdom comprises of England, Scotland, Wales and Northern Ireland; while technically a constitutional monarchy, the United Kingdom functions as a unitary state with total political power held by the parliament. The Parliament is the national legislature located in London, England. While the other countries within the United Kingdom each have

their own government, they can neither enact a law that affects any other part of United Kingdom nor can they refuse to enforce a law enacted by parliament.

In the Republic of France, the central government exercises total control over the country's nearly 1,000 local political subdivisions which are called departments. Each department is headed by an Administrative Prefect appointed the French Central or National Government while they are technically government, France's Regional departments exist only to implement directives issued by the central government. Some other notable unitary states include Japan, Italy, the Peoples Republic of China and The Philippines. The Notable advantages of a unitary state are that it can be less costly, can be smaller using minimal land span, does not need a massive workload, but it can also lack infrastructure, can ignore local needs and can encourage corruption and abuse of power (https://www.bscholarly.com)

To the discerning, it can be seen that the 1999 Constitution of the Federal Republic of Nigeria deliberated opted for Federalism because of the diverse people that constitute Nigeria. However, in spite of the fact that federalism is the system best suited for the diversified tribes, culture and religions of Nigerians, yet the same Constitution fused Unitary System with federal principles in so many sections, parts and chapters. These sections, part and chapters we shall now examine briefly

Features of Unitarism in Nigeria Federation

The Nigerian Federation which is a creation of the constitution has been unitarised by the inherent contradictions in the same constitution. The Nigerian constitution contradicts the universal principles of federalism as earlier stated in this paper. We shall now proceed to itemize these inherent contradictions as follows: -

The 1999 Constitution of the Federal Republic of Nigerian even though established Nigeria as a federation went ahead to unitarise some powers, functions and institutions in Nigeria. The vesting of a large chunk of power to generate revenue in the central government is the starting point of unitarisation of the Nigerian Federation (Section 162 &163 of the 1999 Constitution of the Federal Republic of Nigeria, Cap C23, LFN 2004). Instead of each level of government i.e. central or national and states to generate its own revenue, the mineral resources and other natural resources are vested in the federal government instead of vesting it in the owner of the land where it is found as in American (Section 1 of Nigerian National Petroleum Corporation Act 1969).

The 1999 Constitution of the Federal Republic of Nigerian also created a federation account for the federation, state and local governments (Section 162(4) of the 1999 Constitution of the Federal Republic of Nigeria, Cap C23, LFN 2004). The money paid into this account is to be shared using certain unfair parameters (Section 162 (2) ibid). This sharing is done on a monthly basis among federal, states and local governments this and made them to be dependent on the federal government. The federal government instead being equal partners to the component states is now the master of the component states.

In the Nigerian federation, state cannot organize its own election, election into the offices of state governors and their deputies and States Houses Assemblies are equally organized and conducted by a federally controlled institution (Item 63 of the Exclusive Legislative Act to the of the 1999 Constitution of the Federal Republic of Nigeria, Cap C23, LFN 2004). The National assembly is the only institution that can legislate on these elections except election to local government offices which the states are empowered to conduct by the Constitution. Even after the general election to the offices of state governors and their deputies and the Houses of Assembly. It is the Federal Government that has the power to set up election tribunals and to appoint the judges of the tribunals.

It is the federal Constitution that contains a uniform code of conduct applicable to all public officers whether of state or federal public service. There is also a federally controlled Code of Conduct Tribunal, Economic and Financial Crime Commission (Economic and Financial Crime Act 2004), Independent Corrupt Practices Commission etc (Independent

Corrupt Practices Act 2000 Act No 5 Laws of the Federation of Nigeria). The Nigeria federation also has a Federal Policing System, with all security agencies being Federal Agencies and Institutions (Nigeria Securities Agencies Act) except the "Amotekun" security Agency that has just been inaugurated or established in the South Western part of Nigeria. No state or local government police or security outfit in Nigeria. This has made it difficult for states to secure their territories. There is also a central prison system or correctional services system, Federal Road Safety System (Federal Road Safety Commission Act Cap 141 LFN 1990) and Federal Driving licensing authority contrary to the provision of the Constitution (Item 63 of the Exclusive Legislature List to the 1999 Constitution of the Federal Republic of Nigeria, Cap C23, LFN 2004). The Constitution specifically assigned the power to make law on traffic on federal trunk roads on the federal government while state is to make law on traffic on the state roads. The Constitution also reserved some powers in the Federal Government to establish certain executive bodies that will exercise power on issues that concerns salaries and wages of the state public Office holders or Public servants like Nigeria Revenue Mobilization Allocation and fiscal commission (Section 153 ibid), the same Constitution created and fund Local Governments, (Section 7(2) ibid) the same Constitution created an impediment that took away their power from the states by inserting a schedule in the Constitution that listed all the Local Governments in Nigeria (Section 3 (2) ibid). The implication of the listing on the Schedule has been interpreted to mean that the local government in Nigeria are inelastic except the National Assembly amends the schedule to include newly created Local Governments by the states (Attorney General of Lagos State V Attorney General of Federation, 2003: 12 NWLR Pt.833) and this the National Assembly has been reluctant to do.

Looking at all the aforementioned contradictions, it is clear that the Nigeria Federation is a hybrid type not a federation at all. This account for the frequent agitation for true federalism, resource control, restructuring and devolution of power. Failure of each state of the federation to have its own Constitution is another aberration in a federation. In the first republic, every region has its own Constitution. Although the Constitution of the federation did not prohibit state Constitution, but states refused to make their Constitution.

The Unitarisation of the Judiciary in the Nigerian Federation

The Nigeria Judiciary is also a creation of the Constitution which established the Supreme Court, Court of Appeal, Federal High Court, High Court of Federal Capital Territory Abuja, High Court of a State, Sharia Court of Appeal of Federal Capital Territory Abuja, Sharia Court of Appeal of a state, National Industrial Court of Nigeria and such other courts as may be authorized by law (Section 6 (1) of the Federal Republic of Nigeria, Cap C23, LFN 2004). Looking at this court structure, it looks like a Federation at the level of High Courts, i.e. The Constitution established State High Courts and Federal High Courts, Sharia Court of Appeal at Federal Capital Territory and States, Customary courts of appeal at Federal Capital Territory and states (Section 270 – 284 ibid) but the appellate level of the courts are Unitarised. The Constitution did not establish State Courts of Appeal or States Supreme Courts.

Appeal lies from State High Courts, State Sharia courts of Appeal and Customary Courts of Appeal to the Court of Appeal and the Supreme Court established by the federation for the federation. (Section 241 ibid) Each state in Nigeria ought to have its own Court of Appeal and Supreme Court. |This had happened in the first republic especially in the Western part of Nigeria. The present position of the appellate system in Nigeria had given room for federal government's interference in the judicial system in Nigeria.

Another very disturbing aspect of the Unitarisation term of the judiciary in Nigeria is the procedure of appointment of judicial officers to the courts. The appointment procedure is a fusion of the powers of state and federal government especially in the appointment of state judicial officers. While the Federal Government appoints its Judges or Judicial Officers at all

levels from Federal High Courts to the Supreme Court, without the input of states, the federal government interferes in the appointment of judicial officers (judges) to the State High Courts, Sharia Courts of Appeal and Customary Courts of Appeal through the National Judicial Council (Sections 271, 276 & 281 ibid). The State Chief Executive (Governor) should be able to approve the appointment of states judges without interference of the National Judicial Council. The procedure under the 1979 Constitution which was not abused by any state should still have been the position (Sections 271, 276 & 281 ibid).

The procedure then was that the state Judicial Service Committee will recommend to the Governor who will then forward the name to the House of Assembly for confirmation. This position is recommended for future appointment of State Judicial Officers. The National Assembly should take cognizance of this obvious fact in their Constitution alteration or amendment. The power to discipline the State Judicial Officers is also vested in the National Judicial Council.

Judicial System in American Federation (Art. III, Constitution of U.S.A.)

The Judicial system in the American Federation has two separate branches. The federal, national or central judiciary and state judiciary. They are distinct and run paripasu. The federal judiciary has three layers of courts namely District Courts, Court of Appeal and the Supreme Court. Each state in America has its own three layers or court system namely District Court, Court of Appeal and Supreme court.

The Federal Court Structure in America (Art. III, Section I, Constitution of U.S.A.): The Judicial power of the United States shall be vested in one Supreme Court and in such inferior court as the congress may establish from time to time. In exercise of this power, the Congress established the following:

The District Courts: The District Courts are the trial courts of the Federal System. There is at least one district court in each state and the large states have more e.g. Texas has four District Courts and eight other state have three., there are eighty-nine Federal district courts in U.S. and there are 382 District Court judges in the US federal judiciary. The District Courts exercise original jurisdiction and appeal goes from there to the Federal Court of Appeals.

Court of Appeals: The eighty-nine district courts are grouped into ten circuits in each of which these is a United States Court of Appeal. Each circuit court comprises from three to nine judges. Each case is heard by no fewer than three judges and a decision is by majority. The jurisdiction of Circuit Court of Appeal is appellate in nature. Appeals from the decisions of the District Courts go to the appropriate Circuit Court whose decision ordinarily is final. Appeals are also taken to the circuit courts from decisions of quasi –adjuratory boards and commissions such as the interstate commerce commission.

The Supreme Court of the United States (Art. III, Section I, Constitution of U.S.A.): The Pinnacle of the Federal Judicial System is occupied by the Supreme Court, consisting of a Chief Justice and Eight Associate Justice. The size of the court is set by the Congress. The Constitution confers Original Jurisdiction upon the Supreme Court in cases involving ambassadors, ministers, consuls, or a state government. Otherwise the Jurisdiction of the court is appellate and as a matter of policy on the part of the court, is largely confined to cases containing some constitutional questions. Appeal cases come from the Court of Appeal, the District Courts or the state Supreme Court. In some cases coming from state Supreme Courts, an appeal to the Supreme Court is a matter of right. The Supreme Court by and large determines what cases it will adjudicate and what cases it will not.

All of its cases are heard by at least Six Justices, decisions are by majority opinion, if the court splits evenly upon a case, it is later re heard. The Chief Justice assigns one of the majority to write the majority opinion. A Justice who disagrees with the verdict of the majority may write a dissenting opinion if he wishes. If a Justice agrees with the majority but on the basis of different law of reasoning, he may write a concurring opinion.

The State Court System in America

Each State has its own system of courts. The state judiciary constitutes a larger element in American jurisprudence for state courts are more numerous than the federal courts, they are staffed by a larger number of judges and they adjudicate a much larger number of cases. The state courts are also classified into three layers of Circuit Courts, Court of Appeal and the Supreme Court.

Circuit Court/District Court

The typical name for the general trial courts both civil and criminal of a state is Circuit Court although they may also be referred to as District Court or Superior Court or County Court or court of common pleas. The judges are elected to serve for four or six years. Circuit courts are the general trial courts of record, a court of first instance. They have original jurisdiction, no appellate jurisdiction. One judge hears each case with or without a jury. All proceedings are taken down verbatim by court reporters. Some states provide for specialized courts having jurisdiction over estates and inheritances, legal declaration of mental infirmity and for supervision of the property of minors and insane persons.

State Court of Appeals

Twenty three states have one or more Court of Appeals to relieve the State Supreme Court of burden of Appeal in cases of minor importance. A typical appeal court consists of three judges either elected to the court or selected to the court by the Supreme Court from among the personnel of lower state courts. Appeals has to this court from the district, courts or inferior court of record.

Supreme Court of States

At the apex of the Judicial pyramid is the state supreme court. It usually consists of five or seven judges elected for a term of six years, although the term varies considerably among states. The court sets exclusively as an appellate court hearing appeals from decisions of the lower state courts. The judges sit en banc and render decisions by majority concurrence. Sometimes the court is divided into two or three sectors each section hearing cases separately.

Appointment and removal of judges in America

The judges of state courts in twenty-seven states are elected by the people. Party nominations and partisan elections ballots are used in thirteen states while non partisan nomination and election prevail in fourteen states. In fourteen states, a portion of the judiciary is popularly elected. This method is adopted to guarantee independence of the judiciary.

CONCLUSION AND RECOMMENDATION

From the analysis above, the judiciary in Nigeria is Unitarised by fusing the federal judiciary with state at the Court of Appeal and Supreme Court level. The appointment and removal of judges is done by a federal agency called National Judicial Council. Whereas, in America where we copied our democracy, the state and federal judiciary are kept separate in operation, appointment and removal of judges.

We recommend that the American Judicial System be adopted for states in the ongoing constitutional amendment. The procedure before now in Nigeria was that the state Judicial Service Committee will recommend to the Governor who will then forward the name to the House of Assembly for confirmation. This position is recommended for future appointment of State Judicial Officers. The National Assembly should take cognizance of this obvious fact in their Constitution alteration or amendment. The power to discipline the State Judicial Officers is also vested in the National Judicial Council which should be changed in line with the arguments canvassed in this article.

BIBLIOGRAPHY

1. Garner B.A. (2009) Black's Law Dictionary (9th ed) West Publishers USA.

2. Posey R.B. (1988) American Government (Littlefield, Adams quality paperback) Rowman and Littlefield Publishers NJ
3. Babalola D, Nigeria: A Federation in Search of 'True Federalism. Retrieved from https://www.researchgate.net.
4. Conge P.J The Concept of Political Participation: Toward a Definition-jstor. Retrieved from https://www.jstor.org.
5. Federalism, Definition, History, Characteristics & Facts. Retrieved from https://www.britannica.com.
6. Merits and Demerits of Unitary System of Government. Retrieved from https://www.bscholarly.com.
7. https://www.britannica.com.
8. https://www.merrian-webster.com.
9. https://www.law.cornell.edu.
10. https://www.dictionary.com.
11. The 1999 Constitution of the Federal Republic of Nigeria, Cap C23, LFN 2004
12. The Constitution of the United States of America
13. Code of Conduct Tribunal Act Cap 58 LFN 58 LFN 1990
14. Economic and Financial Crime Act 2004
15. Federal Road Safety Commission Act Cap 141 LFN 1990
16. Independent Corrupt Practices Act 2000 Act No 5 Laws of the Federation of Nigeria
17. Nigeria Securities Agencies Act
18. Attorney General of Lagos State V Attorney General of Federation (2003) 12 NWLR (Pt.833)

AGORA International Journal of Juridical Sciences, http://univagora.ro/jour/index.php/aijjs
ISSN 1843-570X, E-ISSN 2067-7677
No. 2 (2021), pp. 37-45

THE POLYGRAPH EXAMINATION FROM THE LEGAL PERSPECTIVE

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ABSTRACT
The aim of this article is to emphasize the main features of the polygraph examination within the Romanian Criminal process, by evaluating the legislation which makes possible to use it, the ground for doing it and the potential results which might be expected by the investigators in their aim of looking for the truth.

KEYWORDS: *Polygraph examination, evidence, psycho-detection, simulated behaviour, bio-gram, psycho-physiological mechanisms, insincerity*

INTRODUCTION

One of the issues that has arisen with the entry into force of the new Romanian Criminal Procedure Code is whether it legitimizes the use of the polygraph as evidence in the criminal process. Although the technique was also used during the period when the provisions of the previews Criminal Procedure Code were in force, the polygraph was not expressly mentioned among the evidences, as these were listed strictly and exhaustively. It should be noted, however, that the polygraph tests materialized in technical-scientific report which allowed them to be assimilated as evidence under the conditions of art. 64 paragraph (1) of the previews Code of Criminal Procedure. For this reason, uncertainties have been raised about the probative value of the polygraph test, which remained even with the entry into force of the new Code of Criminal Procedure, since polygraph testing was not expressly provided for by the new code as evidence.

However, with the entry into force of the new code, it can be seen that the formal types of evidence are no longer strictly listed, the judicial bodies being able to gather as evidence within the criminal file, any other means of proving the facts that are not prohibited by law (art. 97, para. 2, letter f) of the new Code of Criminal Procedure). Thus, it can be seen that the legislator did not clarify the problem caused by the polygraph test, but, by listing the evidence by way of example it created a more favourable framework for the use of this technique. The legislator, at the time of drafting the new Code of Criminal Procedure, took into account that the means of proof which can be evidence should not be explicitly listed. So, any expert reports that could help police to find out the truth in a specific criminal case, being admitted. We consider that the position of the legislator was objective because it took into account the development of science and technology, and it cannot restrict the area of evidence, it did not nominate only the evidence known at that time. It allowed the new technologies of the future to be assimilated as evidence without the need of modifying the law. In the Article 97, paragraph (1) of the new Code of Criminal Procedure, the legislator explicitly defines what is meant by evidence, while showing that there is no hierarchy of evidence in relation to a predetermined value, as follows: to ascertain the existence or non-existence of a crime, to identify the person who committed it and to know the circumstances necessary for the just settlement of the case and who contribute to finding out the truth in the criminal proceedings.

THE POLYGRAPH AS EVIDENCE

Starting from the provisions of the Article 97, paragraph 1, of the Criminal Procedure Code and taking in account that in this way, following the polygraph test, it is possible to identify the person who committed a crime, or, in other circumstances, at list to found there is or there is not a certain crime, it can be obviously assessed as valuable evidence in the settlement of the case.

How to use the polygraph?

The polygraph, also known as the "lie detector" is one of the most powerful devices used to detect simulated behaviour of the people. The polygraph is nothing more than a mechanical and electronic recorder, which pneumatically takes over the changes of the blood pressure, pulse, respiration, supplemented by a system for recording electro-dermal resistance (Buș, 2005: 155) and the micro muscle movements.

The polygraph does not detect in any way the "lie", as such, as it is wrongly considered by someone, but highlights the physiological changes caused by the emotions that accompany the simulated behaviour. The whole technique is scientifically based on the following aspects: when perpetrating a criminal act, the subject participates with his entire personality, mobilizing for his/her criminal success the entire cognitive, motivational and affective potential. It means that the criminal act does not remain on a random peripheral acquisition of consciousness, but integrates into it, in the form of a stable criminal structure with specific content and emotional load, with a well differentiated motivational role. Regarding the explanation of the phenomenon underlying the psycho-physiological reactions, three basic motivational-emotional theories have been formulated in the doctrine (Mitrofan et al., 1992: 260-261), namely:

- *The theory of conditioned response* - argues that the physiological response is nothing but the consequences of an emotional activation caused by a conditioned stimulus. When a given stimulus is associated with a strong emotion, a broad response will be expected. However, the theory does not explain why the detection of simulated behaviour takes place in conditions with low motivation and less threatening;
- *Conflict theory* - according to which, both the motivation to lie and the desire to tell the truth is found in the physiological area. The more intense the conflict, the broader the response.
- *The theory of punishment* – according to which, the physiological area during the simulation is activated by the fear of consequences if it were detected.

Meantime, other opinions have emerged regarding the explanation of the origins of the psycho-physiological reactions involved in the simulated behaviour. It's about:

- *The theory of presumption of guilt* - argues that the psychophysiological reaction will be highlighted in the relevant question, due to the fact the subject is aware of his guilt;
- *The focus of attention theory* - it has been found that the psycho-physiological response to a stimulus reflects the degree to which the stimulus is expected.
- *The theory of dichotomization* - according to it, we can distinguish between two distinct categories of stimulus, namely the relevant and the irrelevant. Subjects who have information about the criminal act for which they are being investigated will focus on only one aspect of the stimulus presented, while ignoring the other aspects of the stimulus which informs the investigator about the degree of simulation of the subjects.

To any of these theories we refer, there is a level at which, they converge, namely the fact that psycho-physiological reactions certainly occur when a person hides the truth, so it is insincere. So, it turns out that we cannot talk about determining the guilt or innocence of the person through the polygraph technique, so we cannot use the results thus obtained as a proof of the person's guilt. Practically, the technique detects the emotion, indirectly, by capturing

the general activating reactions and involving central and peripheral psycho-physiological mechanisms, which, captured by the detector, will be the object of bio-information conversion.

The scientific basis

Because the human health and survival depend on maintaining a balance of the concentrations of chemicals within the body fluids (this balance is called homeostasis), in the nervous system of human body there is an autonomous component of treating risk situations and maintaining normal physiological rhythms. This formation is called *hypothalamus* and is also called the "endocrine brain".

The sleep, oxygenation of the blood, body temperature, levels of potassium, calcium and magnesium salts in the blood, as well as the concentrations of all the chemicals that maintain cellular activity, are controlled by this formation. The vegetative nervous system is centred in the hypothalamus which is being responsible for all the so-called involuntary reflexes (for example: maintaining heart rate, constant blood pressure, muscle tone of blood vessels).

When the sense organs detect a threat, a nerve signal is sent to the autonomic nervous system and thus, the body is activated and the physiological rhythms is accelerated. With the disappearance of the stimulus and the situation perceived as threatening, the autonomic nervous system reduces physiological rhythms and restores homeostatic balance. This game between economic and high consumption is ensured by the two levers of the vegetative nervous system: sympathetic and parasympathetic. These two levers each act through chemicals called neuro-transmitters. Neuro-transmitters are secreted into body fluids and thus reach specific receptors in various organs, thus influencing their activity (inhibition / excitation) (Reid et al., 1996: 17).

In the polygraph test, the subject's ear is the receiver through which potentially threatening information reaches the subject. Through the auditory nerve, the stimulus reaches the temporal lobes of the brain, where the center of hearing is. Here, through the operations of thinking, the dangerous potential of the stimulus is established. When a question is perceived as threatening, impulses are sent from the frontal lobes of the brain to the hypothalamus, thus triggering a physiological alert reaction. In this way, a whole train of nerve impulses will be emitted, their role being to accelerate the heart rate, to change the distribution of blood volume in the body, to change the respiratory rate, etc. In a word, the stimulus perceived as threatening triggers the so-called physiological reaction "fight or flight", a reaction whose role is to energize the whole body to overcome the danger.

In the techniques of experimental investigation, the following psycho-physiological parameters are taken into account (together with the associated recording and measurement techniques) (*Methodology of polygraph activity in the Romanian police,* Bucharest, 2005: 13):

-electrical impulses in the brain: electro-encephalography
-muscular electro-genesis: electromyography
-variations in respiration: pneumography
-muscular strength: dynamography
-current and excitation time: chronaximetry
-the difference in electrical potential involved in eye movement: electroculogram
-variations in the volume of blood vessels: plethysmography
-electrodermal reaction: electrodermogram
-temperature variations:
-blood pressure:
-electrical rhythms generated by the heartbeat: electrocardiogram.

In the field of polygraph tests, the theoretical paradigms and working methodologies of experimental psychology were taken over. In this sense, the monitoring of the activity of the vegetative nervous system is performed by means of the following sensors:

-two sensors for thoracic and abdominal neuromuscular activity (penumographs)
-a sensor for skin potential difference or galvanic skin reaction (GSR electrodes)
-a blood pressure sensor (blood pressure sleeve)
-a heart rate sensor (optical plethysmograph)

All these sensors obtain physiological recordings of the activity of the vegetative nervous system throughout the polygraph test, in response to the test questionnaire.

The object of judicial bio-detection

The above mentioned object is represented by the simulated behaviour, which is an entity between the apparent and the unapparent aspect of the behaviour, expression of the psychological doubling in relation to oneself (unapparent aspect, strictly secreted) and in relation with the society (apparent-notorious aspect, displayed or naive, but insistent, with persuasive efforts). Simulated behaviour is defined as an attempt to hide or falsify the meaning of a psychosomatic (Bogdan, 1979: 187) background reality.

The bio-detection considers both terms of the simulation binomial and elaborates the methodology of operant conditioning of reactions in order to obtain the necessary information.

The concerns of judicial bio-detection include:

- the intentionally simulated behaviour, with aspects of appearance and non-appearance;
- the simulated behaviour binomial
- the credibility
- the existence of an error, as an aetiology of behaviours that are apparently simulated
- the existence or non-existence of the discernment of criminal acts
- searching for material evidence for conversion
- intentionality

The purpose of judicial bio-detection

The data obtained from the polygraph examinations allow:

- excluding the suspects not involved in the investigated cases, preventing judicial errors, wasting time through unnecessary checks and avoiding the involvement of specialists in inefficient activities;
- identifying the perpetrators of crimes regardless of their gender;
- verifying the veracity of the statements of the persons involved in the process;
- establishing the sincerity of the defences formulated by the persons who perpetrated the crimes (cases that remove the criminal character of the deed, self-defence, state of necessity, factual error, physical or moral coercion);
- establishing the circumstances that qualify or aggravate some criminal acts;
- detecting the slanderous character of some criminal complaints;
- resolving the contradictions that appear between the statements of the parties when the classic procedure of confrontations did not reach to a result.

Other aspects of establishing the truth may arise in judicial practice, so that the polygraph technique can be used and adapted to any situation.

Method

The polygraph technique is based on monitoring the activity of the vegetative nervous system (with its sympathetic and parasympathetic components), activity reflected in the psycho-physiological changes that occur in the human body. As a result of the thinking operations induced by the auditory stimuli associated with the polygraph test, representations are formed and updates of the memory of the examined subject take place. These psychological phenomena are governed by the free will, the subject being free to carry out any cognitive operations with test-induced information. The reverse of this freedom is the

inability to control the physiological alert reactions that occur when hearing potentially dangerous information (for example, information related to the involvement of the test subject in a criminal act). It is these psycho-physiological changes following a well-individualized stimulus (question from the polygraph questionnaire) that indicate the involvement / non-involvement of the subject in a certain activity with criminal relevance.

The method is non-intrusive, the five sensors used by the polygraph are just recording the psycho-physiological parameters in the immediate vicinity of the body of the examined subject and therefore is no need to insert any sensor into the skin or swallow activating substances.

Steps to do for the polygraph examination

The specialist in task with doing a polygraph examination, have to go through some specific phases, like:

- the study of the file;
- the before-test discussion;
- the examination itself;
- the post-test discussion;

a) The study of the file is very important because the specialist must know every detail of the fact under investigation, the stage of it, what else evidence is gathered to the file, what kind of person is that who has to face the examination and, what are the questions, he/she must focus when do the examination.

b) The before-test discussion – is the phase in which the device is presented to the subject and the device is calibrated for each case, through specific tests, to identify the individual psycho-physiological parameters of the subject as a term to compare with subsequent simulations, as a result of dishonest answers. He/She shall be provided with some information from the file and, at the end of this conversation, the subject have to sign the statement of consent for being examined.

c) The examination itself – which is done following the specific rules and which can be interrupted at any time at the request of the subject. If he/she does not agree to go further, the examination will be ended.

d) Post-test discussion - during these mandatory steps, the subject may present a pre-test recognition, when he/she realizes that he/she cannot cheat the device or a post-test recognition, after being informed that he/she has had simulated behaviour, insincere to relevant critical questions or may further deny the offense.

If the subject accepts the examination and no pre- or post-test confession is made, then the examiner will draw up the technical-scientific finding report with his/her conclusions on the sincere or insincere behaviour of the subject, or, if the case, by eliminating or including the person examined in the circle of suspects. The circumstances in which the polygraph specialist will discuss the test results with the examined subject depend on the overall architecture of the file, the personality of the examined subject and the operational opportunities in this case. It must be kept in mind that the use of persuasion techniques is a methodology whose limits are represented by the interaction personality of the examiner and the subject examined (Butoi et al., 2006: 278).

In order to carry out the examinations with a high degree of accuracy and objectivity, the following rules (Cucoș, 1997: 125) will be observed:

- The complying with the specifications of the paragraphs on polygraph requirements, laboratories and polygraph equipment.
- The polygraph examination can be requested at any time of the investigations, but not before a minimum of activities specific to the police work have been carried out, which should concretely establish the issue and the objectives of the investigation.

- The specialist must be provided with the necessary file and information, so that the detailed knowledge of the events allows to establish the most pertinent questions in relation to the issues requested for investigation.
- Within the laboratory, during the examination, access of persons, other than the examiner and the subject, is not allowed, except for translators in those cases in which some foreign nationals are involved.

In what regarding the persons to be subjects of examination:

a) previously have to be assured conditions of rest and normal nutrition;

b) they have to be in a normal psycho-medical condition;

c) they do not have to be subjected to prolonged investigations and, in the case such situations occurred, the investigations will be interrupted at least 3 days before the test;

d) they do not have to be threatened with the polygraph examination, because it determines the appearance of parasitic reactions that prevent the formulation of certain indices;

e) persons who are under the influence of alcoholic beverages or drugs that influence the functions of the central nervous system, will not be tested;

f) against the persons brought to the test, no threats, constraints, promises or exhortations will be made, factors that can vitiate the test result;

The following categories of persons will not be tested (Butoi, 1997: 152):

- pregnant women, those who are breastfeeding in the period preceding the test or the moment of requesting the polygraph examination;
- minors under 18 years of age;
- chronic alcoholics;
- people with mental illness regardless of the diagnosis made in medical documents;
- persons under medical treatment who cannot be interrupted;
- any other persons about whom the expert deems motivated that they are not fit to face the examination.

Interpretation of the results obtained at the polygraph

Interpreting the results obtained from the polygraph test or interpreting the diagrams is perhaps the most difficult and at the same time the most important part of the whole polygraph testing operation. The process of interpretation is an unfolding of reasoning in which the intuitive intertwines with the scientific and which is based on knowledge of experimental psychology, psycho-physiology and a rich experience in the field. In detail, the correlations being made on the one hand between the qualitative characteristics of the routes of the answers of distinct questions and on the other hand between the quantitative parameters (amplitude, frequency, duration, etc.) of the same route characteristics, thus based on reasoning of inductive, educational and analogical type on the structure of the relevant syndrome (Butoi, 1997: 59-60).

In one opinion the interpretation of the diagrams (Mitrofan et al., 1992: 219) has several distinct phases, namely:

1. *The primary phase* comprising:

- establishing the route segments that highlight the sincere answers, that is, those without emotion and that correspond to neutral questions, without confusion;
- finding the particularities of the route segments that highlight the insincere answers (that is, where the voltage peaks are signalled on the diagram), respectively to the questions with incriminating load, directly accusatory;
- following the selective detection of the characteristics of the route segments to the related investigative questions and the detection of those that highlight the state of emotional tension.

- finally, the specific features of the route segments are identified, which highlight the insincere answers (in which the emotional tension is present) to the control questions with the general load, namely those that present "normal reactivity under test conditions".

2. Secondary phase

After establishing in the first phase the existence of positive bio-information, the relevant segments are compared with the neutral ones and the detailed ones with the neuter ones, thus concluding, based on the graphic analysis between these segments or the non-existence of the simulated behaviour. At the same time, the segments corresponding to the control questions are compared with the neutral ones and the differences are established and to what extent they are corroborated with the relevant segments.

In this phase, a meticulous process of detecting the most sensitive changes in the routes of the tested functions takes place, drawing the first qualitative conclusions. It also proceeds to the effective processing of data with the notification of all significant variations that occur in their constituent parameters such as: amplitude, latency, duration, frequency, etc., thus resulting in quantitative conclusions this time.

The parameters followed by the examiner-psychologist in order to correctly interpret the polygraph diagram are, in an opinion, the following:

- Latency of response - involves the existence of the time between the utterance of the word stimulus and the actual response of the subject over 4 seconds;
- The absence of response involves delaying the subject's response to the word stimulus by more than 30 seconds;
- The absurd reaction is a change of direction, voluntarily introduced by the person examined during the associations;
- An abnormal superficial association when the subject gives a superficial, banal association, in the middle of correctly established intrinsic associations;
- Repeating the word stimulus is a method of gaining extra time to prepare an answer considered by the subject difficult;
- The repetition of the answer words means a specific connotation of the repeated word for the subject;
- So is perseverance.

3. *Tertiary phase*

In this final stage of the interpretation, a diagnosis is established for the diagram which can be one of the following:

- positive bio-diagram - suitable for conversion into evidence of guilt;
- negative bio-diagram - unfit for this conversion, but suitable for evidence of innocence;
- uncertain bio diagram - does not offer possibilities for conversion into evidence.

Following the end of the stage of interpreting the results, the post-test discussion takes place, separately from it. As said before, it is a stage in which the tested subject interacts with the examiner, but the relationships are reversed. The subject will express his/her opinion on the test and the results of the bio-gram, which is presented on this occasion. It is also an opportunity for the subject to testify, which is often the case, especially if he/she is shown his own positive bio-gram. In case of counting, in order for the positive results to be used in the judicial investigation, so if there is a contradiction between the positive bio-diagram and the negative post-test discussion, the conversion of information from the bio-informational complex will be used as simulated behaviour.

Other authors (Buș, 2005: 155) appreciated that in order to process and interpret the values of the physiological parameters recorded on the polygraph diagram, the "Numerical evaluation system" can be used. The aim of this method is to highlight the differences in amplitude and length (of the order of millimetres) of the physiological changes, obtained in the answers given by the subject to the relevant and control questions. For this, the authors, psychologists and specialists in the field of detection of simulated behaviour took into account

four psycho-physiological parameters, namely: thoracic and abdominal breathing, electro-dermal reaction and pulse-joint tension.

CONCLUSIONS

The investigation of crimes is a very complex activity, and the discovery of the perpetrators of the criminal acts depends on the way in which it is carried out. The criminal investigation bodies, on the one hand, are directly interested in finding the shortest way to find the perpetrators of the crimes, because their stay at large means a social danger. In the other hand, they are interested in using legal tools, efficient, and, at the same time, rigorous scientific as much as possible (Dumbrava, 1999: 221). At the same time, it should be emphasized that the criminal investigation bodies, in their complex activity, need to clarify as soon as possible, the hypothetical versions of the criminal acts and the suspected authors.

Moreover, the parties involved in the judicial process are people with different interests whose structure includes the two classic types of behaviour - the apparent and the unapparent. However, the real concern of those called to do justice is to find out the truth contained in the unapparent (hidden) behaviour.

The criminal activity is marked by a mental strain, characterized by an exacerbation of the senses and attention which makes the course of events during the act, to be irrevocably and independently of the will of the perpetrators, at the level of memory in the form of information. All this data (sensory perceived information) defines the criminal matrix and is found in the mode of operation, representing a special class of "traces" that are much more stable over time than the categories of classical traces, but which require specific methods of "sampling” and interpretation. All this problem was successfully answered by the bio-detection of the simulated behaviour, using the polygraph technique.

BIBLIOGRAPHY

1. I. Buş, *Psychodetection of simulated behavior*, Publishing House Ingram, Cluj-Napoca, 2005, p. 155.
2. N Mitrofan, V Zdrenghea, T Butoi, *Legal psychology*, Publishing House" Șansa", Bucureşti, 1992, p. 260-261.
3. John E. Reid, Fred E. Inbau, *Truth and Deception the polygraph tehniqe*, SUA, 1966, p. 17.
4. *Methodology of polygraph activity in the Romanian police,* Bucharest, 2005, p.13
5. T.Bogdan *Problems of forensic psychology*, The Publishing House of Science , Bucharest, 1979 , p.187
6. T. Butoi, I. Teodora Butoi *Legal psychology*, Publishing House Romania de Maine, Bucharest, 2006, p. 278.
7. C. Cucoş, *Lying, counterfeiting, simulation*. Publishing House Polirom, Iaşi, 1997,p.125
8. T. Butoi, *Crime Under the Lie Detector: Investigating Simulated Behaviors*, Press Mihaela, Bucharest, 1997, p. 152.
9. I. Bus, *Psychological intervention in judicial practice*, Publishing House Universitara Clujeana, Cluj-Napoca, 1999, p. 125-130;
10. D. P. Dumbrava Forensic in judicial practice, Publishing House Argonaut, Cluj-Napoca, 1999, p.221.

AGORA International Journal of Juridical Sciences, http://univagora.ro/jour/index.php/aijjs
ISSN 1843-570X, E-ISSN 2067-7677
No. 2 (2021), pp. 45-50

HOW WILL THE UNIVERSITY CHANGE WITH THE COVID-19 PANDEMIC? AN ITALIAN PERSPECTIVE

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ABSTRACT

The shock of the closure to contain the Covid-19 pandemic has forced universities all over the world to make rapid changes to their teaching and research; but also changed the social and economic role in the area where the university is located. In fact, after an initial period of disorientation and more than a year of distance learning, the students and teachers began to appreciate the "new university" made up of different times and places; a more inclusive university. It is therefore necessary to emphasise the need to focus all attention on managing this change and designing the future of the university worldwide; a reflection that is part of a broader context of studies, research and reflections undertaken at academic and institutional level to identify the new possible university scenarios in which to invest in order not to find oneself disoriented in a new world made up of different teaching methods, new ways of providing services to students, new relationships between research and teaching and also new administrative processes. These aspects will be the most important part of the orientation of young people and adults in choosing the university where to study.

KEYWORDS: Covid-19; university, quality assurance; post-pandemic, lifelong learning.

INTRODUCTION

The shock that the whole of society is still experiencing as a result of the restrictions on the containment of the Covid-19 pandemic has changed everyone's life forever, including the university system, which has found itself obliged to use telematics approach; a management system that it has always wanted to avoid because it did not consider it to be of high quality. It has had to adapt the way in which it trains students in all aspects: online lectures, the services integrated with them, the way in which research is carried out and the dissemination of its results (web-conferencing), but also the ways of maintaining relations with the territory and contributing to its development. Each teacher was obliged to carry out his or her lessons from home, while all the students, who were also at home, were at the other end of the computer; often all the students were connected, even those who previously would not have attended the courses, since they were shut away at home.

Students, especially those who regularly attended classes, without the university found themselves without their daily living environment, their social relationships and their autonomy from their families. Finally, the geographical area around the university lost its social role and paid for the halt in all forms of economic development. It is precisely the university area that has still not been able to resume its activities on a regular basis, since even if the bookshops, stationery shops, copy shops, canteens, bars, restaurants, pubs, B&Bs, room rentals, etc., have reopened, they are still not working. Without students and teachers do not work.

Everyone's attention must now be focused on identifying the best way of restoring the university's role: as a formal education for the university course; as a non-formal place because it is a source of learning for young students and of comparison between teachers; as an informal place because the university allows students from different places and cultures to meet; as a common good because it enables economic development.

Even after the end of the emergency, the university will no longer be the same in terms of both teaching and research; the system devised for the emergency is appreciated by students and their families, and not only by those with special educational needs (workers, adults, the off-site, the disabled, etc.); also by teachers, especially those who live far from the seat. The first reflections and research point to an appreciation by all of the lessons held at home (the number of students attending courses has increased), of the exams taken at a distance (grades have increased and improved), of the student reception, as well as of the administrative procedures, from matriculation to graduation, etc., all of which have been appreciated by students.

Faced with the restart of activities in attendance, each university, particularly the smaller ones, is faced with the need to define new strategic guidelines to try to resume its activities without suffering those of other universities, particularly the more famous ones. It is necessary to make choices that will outline the future development of the university and its reference territory; choices that will identify the ability to transform what has been done in an emergency into an opportunity for consolidation, development or even just defence, in order to avoid being crushed because decisions have not been taken.

TOWARDS A NEW EDUCATION FOR UNIVERSITY STUDENTS

Compared to the common appreciation of distance learning on the part of the students and a little bit also of the teachers, what emerged as a limitation was precisely the way in which the lessons were carried out; in fact it was defined as a lesson given in the classroom and not different; still too much based on traditional teaching models, considered inadequate to the current needs of learning no longer only of knowledge but on the ability to do, ability to use knowledge and skills; what was said was that the teacher was unfamiliar with the platforms and above all not very capable of using them both in live activities and in those to be carried out independently.

Distance learning has also been available in Italy for many years. As early as 1990, the reform of university provided for financial support for state universities wishing to set up distance learning activities; immediately afterwards, in 1991, with the law on the right to university studies made it possible to promote courses for student workers and distance learning. This possibility continued until 2003, when a ministerial decree defined the criteria and accreditation of distance learning courses at state and non-state universities. The intention of the government was to allow all universities to provide access to university for everyone: adults, workers, the sick, the weak, the disabled, etc. A possibility of life-long learning exploited mainly by telematic universities, which have thus identified their target users.

Despite the fact that it has been possible to give university lectures at a distance for over thirty years in Italy, the pandemic has highlighted the delay in Italian university lecturers' ability to give lectures at a distance; what has, in fact, happened is the frontal lecture through a computer and an internet network that is not always adequate; all introduced by "Good morning, can you hear me? I'm sorry, but today the Internet is worse than usual...".

However, it must be acknowledged that a new 'revolution' has begun in the Italian university; however, this will only bring about real change if there is real investment in teachers, who must be kept up to date on teaching, assessment and quality assurance. Without training there will be another untapped opportunity to bring the university closer to those who cannot attend today. For the university, this would be a way of resuming its role as a driving force for territorial development, a role that has always characterised it and which in the past has led to the establishment of many universities or the opening of local branches to promote the socio-economic development of a given area.

FOR A NEW UNIVERSITY COMMUNITY

As in other social contexts, the sudden obligation to suspend the university activities in presence caused a general disorientation, more in the scholars than in the administrative staff, especially because many had never had any experience of distance learning; probably also for this reason the method adopted to carry out the lesson was that of replicating what was usually done in the classroom: a live lesson; this however could not be integrated by body language and interaction with the class group, transforming it in fact into a transmission of knowledge by voice and with correlated images, almost like a recorded lesson.

Today, after several months of experience acquired in the field, of informal (by asking the other colleges) and non-formal (with moments of exchange of practices organised by the universities themselves) training, activities that can be called blendend learning are starting to take place: live lessons integrated with asynchronous activities on the "platforms" that already exist but are only used to give the materials to the students and with exams organised in a different way from the traditional computer-based interview.

Some lecturers, on the other hand, were able to combine lectures to students with their own research activities, turning the research webinars into a valuable resource for students; previously, students did not participate in in-depth disciplinary initiatives by lecturers and experts from other universities. The work pathway experiences are also becoming an opportunity for students that they did not have before; "smart-working" placements have actually increased the opportunities to choose even abroad, especially for students with special needs including work.

Student services have changed rapidly because the pandemic has made it possible to speed up the change to digitalisation, which was not done for cultural reasons or economic strategy; in fact, enrolment, relations with the teaching and student secretariat, delivery of forms, etc. now take place online and assistance is provided by telephone. This is changing relations between students and the university, but the educational value of these moments is being lost: aggregation, mutual aid, personal growth, learning the rules, problem solving, etc.

On the other hand, the university lecturer was used to working away from the university and this was nothing new; in fact, preparing lessons, correcting exams, responding to students' requests, studying, carrying out one's own research are activities that have always been carried out away from university. The problem arises with the relationships between the schoolars; in fact every informal relationship is being cancelled and every moment of contact with the administrative staff and the students is being lost; this is distancing them from feeling part of a university community.

It is clear from initial research that it is the student who has suffered the greatest shock from the suspension of university life; in fact, in the belief that university students, as adults, had a greater capacity for adaptation than those at other levels of education, priority was given to restoring and/or maintaining the 'quality' of the university, neglecting its educational role and that of social and economic development.

A number international research (UNESCO 2020) highlight the fact that distance learning, while on the one hand it has brought university students (out-of-towners, workers, the disabled, etc.) closer to a world that for various reasons they could not attend, on the other hand for regular students it has confirmed the loss of the added value of life in classrooms, common spaces and non-university spaces.

Of great importance is what the students think: there are very few in favour of an exclusively online teaching method and a higher percentage of them attending the lessons, precisely because of the removal of time and geographical barriers; the others are divided between a return to a completely face-to-face mode and a "mixed teaching". It seems that this will be the mode used in the future.

Here too, however, a plan for the development of digital and technological infrastructures can never be complete without a parallel plan to train and update teachers in 'blended teaching': an alternation of self-study on recommended texts, teaching materials

specially designed for the acquisition of the basic knowledge needed for in-depth studies, discussions, and exercises necessary for the acquisition of the skills to be carried out in the university classroom.

A learning model that, moreover, would make it impossible to come close to those used by telematic universities, which, on the other hand, prefer teaching methods that do not involve synchronous activities. Beyond institutional choices, therefore, the transformation of the efforts made so far to manage the emergency into an opportunity for the university's development is in the hands of university lecturers; only through innovative and inclusive teaching can the university return to being the centre of development in the area, relying, for example, on an increase in the attendance of all students at the university at different times and in different ways than before.

CONCLUSIONS

While everyone is convinced that the Covid-19 pandemic is also transforming the university, the discussion by both the academy and the institutions on how it is transforming itself is still in its infancy. Indeed, it is uncertain what post-pandemic model will be adopted for the design of teaching and student services but also for the research of each faculty member and department. It is still uncertain what new role the university will play in the training of students as workers but also as citizens and above all in the development of the reference territory; students, lecturers and all the university staff have changed their habits and lifestyles towards distance activities.

Some new scenarios can be seen in the new university: administrative services for students (enrolment, communication with secretariats or teaching committees, library services, etc.) and teaching services (student reception, tutoring, thesis assistance, placement, etc.) will also remain online; infrastructures (covid-free equipped classrooms, common areas, enhanced internet) and teaching services (virtual environments for both synchronous and especially asynchronous lessons, etc.) have been transformed, thanks also to some ministerial funding. What we still do not see, at least in Italy, is a different didactic organisation of lessons, and this is mainly due to the resistance of many teachers who find it hard to accept that lessons are conducted differently from the way they have always been done.

On the whole, however, the university’s solid organisational response and the formation of a “telematics” culture among professors and administrative staff has confirmed that the removal of time barriers (the time it takes to get to the university, the times of student receptions or of the opening of administrative offices, etc.) and space barriers (travel to the university, home and work, etc.), while on the one hand improving the university's ability to be inclusive, is on the other hand undermining the ability of those who were unable to experience the university.) and spatial barriers (travel to the university, home and work, etc.) have on the one hand improved the inclusive capacity of those who could not experience the university, but on the other they are jeopardising the roles of university campuses: informal educational agency for students and promoter of socio-economic development for the non-university territory.

In any case, the only direction that the universities seem to be maintaining is that of on-line teaching, albeit with different configurations, from the “dual” one, which would allow those who cannot be present to attend lectures at the university to do so (aware of the difficulty of teaching two classes at the same time), to the “mixed” and unique one for everyone (blended learning); this provides for the training process to be carried out partly on-line (but not in live) and partly in presence (with in live classes).

This new way of teaching would in any case be an inclusive university policy because it would enable everyone (adults, workers, the disabled, etc.) to attend university, thereby also increasing the number of students graduating, which is a major problem in Italy. If this leads the Italian university towards the prospect of lifelong learning and an increase in the

population continuing its studies, it will on the other hand bring about a change in the way of choosing the university and the city in which to continue their studies; the choice of university is in fact also forced by the ability of a family to invest in human capital and not only for the tuition fee; in fact, with mixed teaching the way of studying will change (off-site or as a commuter); in fact, it will not be compulsory to attend lessons every day on the university campus.

There is no doubt that this will cause the university to lose its role as social capital for training in aspects of daily life, in autonomy of choice, in the management of relations between peers and with adults; there is a risk that it will no longer be able to promote the socio-economic development of an area. The risk is great.

The hope is that the post-pandemic reorganisation of universities will reduce the enrolment gap between them and thus be able to rebalance their distribution among several universities so that they can maintain their role as a common good for the territory they serve.

This work is supported by Agora University from project POSDRU/161/2.1/G/137526.

BIBLIOGRAPHY

1. Baggiani S., Mochi A. (2020). I sistemi scolastici europei al traguardo del 2020. I Quaderni Eurydice Italia. Ediguida S.r.l.
2. Carretero Gomez, S., Napierala, J., Bessios, A., Mägi, E., Pugacewicz, A., Ranieri, M., Triquet, K., Lombaerts, K., Robledo Bottcher, N., Montanari, M. and Gonzalez Vazquez, I., What did we learn from schooling practices during the COVID-19 lockdown, EUR 30559 EN, Publications Office of the European Union, Luxembourg, 2021, ISBN 978-92-76-28418-5, doi:10.2760/135208, JRC123654
3. Decreto Legge del 17 aprile del 2003 "Criteri e procedure di accreditamento dei corsi di studio a distanza delle università statali e non statali e delle istituzioni universitarie abilitate a rilasciare titoli accademici di cui all'art. 3 del decreto 3 novembre 1999, n. 509"
4. European Commission (2017a). DigComp 2.1. The Digital Competence Framework for Citizens. With eight proficiency levels and examples of use. https://ec.europa.eu.
5. European Commission (2020) DigiEduHack 2020: Together we redefine learning! https://ec.europa.eu/education/news/digieduhack-2020_it
6. Gallagher S., Palmer J (2020), The Pandemic Pushed Universities Online. The Change Was Long Overdue, Harvard Business Review
7. Legge n. 341/1990 n. 341, Riforma degli ordinamenti didattici.
8. Legge n. 390/1991, Norme sul diritto agli studi universitari.
9. Monteduro G. (a cura di) (2020), Sotto esame. La vita degli studenti universitari al tempo del Covid-19, Treno, Erickson.
10. Palmieri G. (a cura di), 2020, Oltre la pandemia. Società, salute, economia e regole nell'era post Covid-19, Editoriale Scientifica, Napoli.
11. United Nations (2020). Shared responsibility, global solidarity: Responding to the socioeconomic impacts of COVID-19.
12. UNESCO (2020a). COVID-19 education response. URL: https://en.unesco.org/covid19/educationresponse/ globalcoalition
13. UNESCO (2020b). COVID-19 Educational disruption and response. URL: https://en.unesco.org/covid19/ educationresponse
14. UNICEF (2020). UNICEF and Microsoft launch global learning platform to help address COVID-19 education crisis. URL:https://www.unicef.org/press-releases/unicef-and-microsoftlaunch-global-learning-platform-help-address-covid-19-education

15. Williamson, B., Eynon, R., & Potter, J. (2020). Pandemic politics, pedagogies and practices: digital technologies and distance education during the coronavirus emergency. Learning, Media and Technology, 45(2), 107-114.

AGORA International Journal of Juridical Sciences, http://univagora.ro/jour/index.php/aijjs
ISSN 1843-570X, E-ISSN 2067-7677
No. 2 (2021), pp. 51-54

CHARACTERISTIC FEATURES IN PERSONS INVOLVED IN RELATION TO CHILDREN AND YOUNG PEOPLE WITH DISABILITIES

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ABSTRACT

Personality traits define those characteristics that we demonstrate in most contexts and are relatively stable over time. A certain personality tells us almost nothing about our abilities, but it can tell us a lot about the environment in which we feel best. And because there are certain contexts in which we are at ease, it is very likely that our performance will be a good one there.

KEYWORDS: character, personality, youth, children, disabilities.

CONCEPTUAL FRAMEWORK

Brânzei (1979, p.135) defines personality as the determinant of the freely conscious attitude towards the world and towards one's own person.

Enăchescu (2003, p.41) states that personality is the synthesis of all the elements that contribute to the mental configuration of a subject, in order to give it its own physiognomy. This aspect results from the psycho-physiological constitution, the instinctive-affective elements, the character, the temperament, the type of reaction, the behavior, the level of expectations.

One of the major component of personality is character, that Cosmovici and Iacob (2005, p. 61-62) define as a structure that expresses the hierarchy of a person's essential motives, as well as the possibility to translate into in fact the decisions taken in accordance with them.

Other authors, such as Enache and Giurgiu (2017, p.176), offer us an etymology of the term character. This is a term that comes from the Greek language and means pattern, seals that are imprinted on the most probable, frequent and somewhat predictable behaviors of an individual, which reflects a set of his own traits and also his lifestyle.

Self-esteem is the evaluative component of the self, which refers to the emotional experience, the emotions that a person experiences when he refers to his own person (Constantin, 2004).

Personal autonomy expresses a degree of freedom and capacity for deliberation, uninfluential and easy, as a psychic feature of self-awareness and personality (Șchiopu, 1997).

Self-acceptance refers to the way we perceive our own physical, emotional, cognitive, social and cultural qualities (CF. https://www.cdt-babes.ro accessed on 26.04.2020)

When it comes to accepting others we can use the synonym of tolerance. According to DEX https://dexonline.ro/definitie/toleranta (accessed on 04.05.2020) the term tolerance means a forgiving, indulgent attitude.

Perseverance is the characteristic trait that denotes confidence and patience. A person who is persevering knows very well his qualities but also his defects and knows how to deal with a situation, even if it does not go according to the pre-established plan or as the person had proposed.

APPLIED RESEARCH

Objectives

The main objectives of the research are:

- Objective 1. Identify significant differences between specialists, parents and volunteers, in terms of self-esteem, personal autonomy, perseverance, self-acceptance and acceptance of others.
- Objective 2. Identify the correlations between self-esteem, personal autonomy, perseverance, self-acceptance and acceptance of others.

Hypotheses

The main assumptions of the study are:

• It is assumed that there are significant differences between parents, specialists and volunteers in terms of self-esteem, personal autonomy, perseverance, self-acceptance, acceptance of others.

• It is assumed that there is a relationship between self-esteem and variables like personal autonomy, perseverance, self-acceptance and acceptance of others.

Sample

In the case of samples, the most appropriate sampling unit will be started. As well as from the available sampling frames. In the case of the sample, the problem of both the sample size and the probability of error must be studied.

In our research, we aim to investigate 30 people who are in a relationship with young people and children with disabilities. The 30 people will be divided into three groups: specialists, parents and volunteers. 7 people - specialists, 8 people - parents, and the remaining 15 people representing volunteers.

Research instruments

The following instruments were used:

1.Personal autonomy assessment questionnaire (Cognitrom Assessment System)
2. The self-esteem interpretation questionnaire
3. Self-acceptance questionnaire - Emanuel M. Berger
4. The scale of acceptance of others (Cognitrom Assessment System)

The results of the study

We applied the comparison coefficient for three independent groups - Kruskal Wallis.

Of the five variables studied, we obtained statistically significant differences in: self-esteem (Chi-Square = 15,370 significant at the threshold of .000), personal autonomy (Chi-Square = 15,487 significant at the threshold of .000), perseverance (Chi-Square = Square = 10,901 significant at the .004 threshold) and self-acceptance (Chi-Square = 7,597 significant at the .022 threshold).

Therefore, the data obtained confirmed the first five hypotheses from which we started the study.

The following hypotheses assume the relationships that exist between: self-esteem, personal autonomy, perseverance, acceptance of others and self-acceptance

Due to the asymmetric distributions of scores, we used the Spearman's correlation coefficient

- We obtained a significantly positive correlation at a threshold of .000, so the hypothesis is confirmed. Due to the fact that we have a positive correlation, this means that with the increase of self-esteem, the level of personal autonomy of the individual also increases.
- We obtained a significantly positive correlation at a threshold of .022, so the hypothesis is confirmed. Due to the fact that we have a positive correlation, this means that with increasing self-esteem, the level of perseverance of the individual increases.
- We obtained a significantly positive correlation at a threshold of .000, so the hypothesis is confirmed. Due to the fact that we have a positive correlation, this means that with the increase of self-esteem, the level of self-acceptance of the individual increases.
- We obtained a significantly positive correlation at a threshold of .013, so the hypothesis is confirmed. Due to the fact that we have a positive correlation, this means that with the increase of self-esteem, the level of acceptance of others by the individual also increases.

Specialists are people who conduct research on the mental and social processes of people with disabilities, study their individual and collective behaviors, and apply the knowledge gained to promote the adaptation of people with various disabilities socially, professionally, educationally. Carries out teaching-learning activities in accordance with the curriculum and special school curriculum, also cares for and protects people with special needs, designs, organizes, conducts, monitors and evaluates stimulation and recovery activities, stimulates and forms personal autonomy skills and social.

A parent is and must be a fantastic balance between emotional involvement and control, between ensuring independence and ensuring security, both physical and mental for a child.
Parents are responsible for raising and educating a new generation.
Being the parent of a child with disabilities is a great challenge, it is one of the most overwhelming experiences.

In order to cope with such a situation, the parent is informed. Look for the best solutions, look for the best therapists, the best therapy practices, listen and look for the opinions and experiences of other parents in order to be able to cope better with the situation, to be able to offer their children the best possible education. , the best treatment. The parent does everything in his power for his child to be integrated as well as possible in society, to live a decent life and to have a high degree of personal autonomy in the future.
All these situations that the parent of a child or young person with disabilities goes through, make him build over time a set of character traits much better outlined than that of a typical parent of a child.

Volunteering is a great opportunity for a teenager to find out if a particular activity they enjoy or not, if it arouses their interest and if the field can be the job they want in the future.
Within volunteering, there are effects on the volunteer, the host organization, the beneficiaries of the organization but also on the community.
Among the direct effects that volunteering has on the volunteer we can list: increasing the level of self-confidence, developing the capacity for empathy, developing the capacity for interpersonal communication, self-knowledge, development of professional skills, increasing employment opportunities, route optimization professional.

Limits of research

The limits of this research are represented by the use of convenience sampling and insufficient number of participants, which may prevent expansion and generalization in the general population.

CONCLUSIONS

Our study considered the discovery of significant differences between people in relationships with young people and children with disabilities, respectively between specialists, parents and volunteers, in terms of the following variables: self-esteem, perseverance, personal autonomy, self-acceptance . and acceptance of others.

Through the results of the study we could see that from the point of view of self-esteem, perseverance, personal autonomy, self-acceptance and acceptance of others, the specialists ranked first, followed by parents and the last in terms of results they were volunteers.

This ranking was due to the age of the participants (specialists and parents were enrolled in youth and adulthood, as opposed to volunteers who were in adolescence and post-adolescence).

Another criterion that contributed to this classification was work experience and studies.

Another aim of our study was to identify the correlations between the variables listed above.

With the help of the results from our study but also with the help of other specialized studies, we were able to observe and demonstrate that self-esteem correlates significantly and positively with all other variables.

All the objectives and hypotheses of our research have been met and demonstrated.

BIBLIOGRAPHY

1. Brânzei, P. (1979). *Intinerar psihiatric*. Iași: Ed. Junimea.
2. Constantin, T. (2004). *Memoria autobiografică; definirea sau redefinirea propriei vieţi*. Iaşi: Ed. Institutului European .
3. Cosmovici, A., Iacob, L. (2005). *Psihologie școlară*. Iași: Ed. Polirom.
4. Enache, R.G., Giurgiu, L.R (2017). *Psihologia generală cu aplicații în practica asistenței sociale-ediția a doua, revizuită și adăugită*. București: Ed. Universitară.
5. Enăchescu, C. (2003). *Tratat de psihanaliză și psihoterapie*. București: Ed. Polirom.
6. https://dexonline.ro/definitie/perseverenta
7. https://dexonline.ro/definitie/toleranta
8. https://www.cdt-babes.ro/articole/imaginea-de-sine-stima-de-sine-si-increderea-in-sine.php
9. Șchiopu, U., coord. (1997). *Dicționar de psihologie*. București: Ed. Babel

AGORA International Journal of Juridical Sciences, http://univagora.ro/jour/index.php/aijjs
ISSN 1843-570X, E-ISSN 2067-7677
No. 2 (2021), pp. 55-62

CRIMINAL MEANS TO COMBAT DOMESTIC VIOLENCE – GUARANTOR OF THE PERSON'S SAFETY. STATE OF THE ART AND PERSPECTIVES

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ABSTRACT

The present work is part of the research steps dedicated to the writing of my PhD thesis on the topic of combating domestic violence by criminal means, dealing mainly with the effect of criminal instruments on the safety of victims. The latter is an important social problem, especially in the current context of spending longer periods of time at home, which, together with a relatively more difficult access to justice, has led all over the world to an escalation of domestic violence.

Specifically, I will briefly deal with the presentation of the current legislative framework, insisting on the elements of criminal legislation and I will highlight the weaknesses in relation to guaranteeing the safety of the person, respectively, I will advance proposals for harmonization and improvement of the legislative framework.

The conclusions of the study present the neuralgic elements of the criminal legislation, regarding the protection of the life and integrity of the victims of domestic violence, as well as the changes that I consider appropriate for improving the legal intervention in the field.

KEYWORDS: domestic violence, Romanian criminal legislation, person safety and family protection

INTRODUCTION

Guaranteeing the safety of the person is a desideratum of modern societies. However, especially in the current pandemic context, we are witnessing, all over the world, an exponential increase in the number of cases of domestic violence. In Romania, at the level of the first quarter of 2020, 6,731 victims of domestic violence were reported, of which 5,343 are minor victims and 1,388 are adult victims. Of these, 94.74% were women. For comparison, at the level of the entire year 2018, there were 2,321 adult victims of domestic violence, which means that over the course of a single year, the number of viticles increased almost 2.5 times (ANES statistics, 2021).

Regarding the frequency of aggressions, it is found that most of them take place daily (38.94%), which means that we are not talking about accidental events, but practically about a lifestyle in which a large part of the Romanian population is found, independent of the social status.

In terms of legal steps taken in cases of domestic violence, in the same period (Q1 of 2020), 279 forensic certificates were issued, of which 27 were subsequently withdrawn, 1,136 criminal complaints were filed, of which 126 were withdrawn, respectively 371 applications were registered for the issuance of protection orders, of which 23 were withdrawn. In the applications for the issuance of the protection order, in 182 cases, the evacuation of the aggressor was also requested, 16 of these requests being subsequently withdrawn.

On a simple calculation, we note that out of 1,388 cases with adult victims, only 1,010 complaints were filed and maintained, which means that in over a quarter of the cases no mechanism of legal protection was set in motion. From the complaints filed, we find that only about a third is resolved with the issuance of a protection order and only in less than half of the cases for which protection orders have been issued, it goes as far as the evacuation of the

aggressor from the family home, this being, in my opinion, an adequate measure of protection of the victims.

Summing up, in relation to the number of cases of domestic violence, only in one situation out of nine, we can say that an attempt is being made to guarantee the safety of the victim by legal means. Here, then, is the legal and social relevance of a discussion about the effectiveness of criminal means in protecting victims of domestic violence.

REFLECTION OF THE THEME IN THE SPECIALIZED LITERATURE

Romania had experienced domestic violence on a large scale, as a social phenomenon, long before there was a legal framework for identifying and combating it (Wimmer & Harrington, 2008, p. 624, quoted in Tunduc, 2020). The spread of the phenomenon is due to a cumulation of factors such as:

- traditional, including religious - education - which cultivates a supremacy of the man in the family (the head of the family and for a long time its only financial supporter); (Irimescu, 2006; Koya and Cook, 2010; Philip, 2019; Vrabiescu, 2019)
- the more precarious financial and occupational situation of the woman in relation to the life tainer; (Broza-Grabowska, 2011; Slabbert, 2017)
- social pressure (the feeling of fault or personal failure in case of a possible divorce, the guilt that is attributed almost exclusively to her in the family and in society); (Sweeney, 2016; Haselschwerdt & Hardesty, 2017 - addresses the issue of social pressure in wealthy and socially well-positioned families, where violence is denied for the preservation of appearances)
- lack of legal means to resort to in case of violence exercised against her (Dumitrescu, 2014)

The widespread social acceptance of these domestic abuses and the tendency not to complain about them were not such as to put pressure on the legislator to create and strengthen the legislative framework, which would allow their identification and solution. External events, such as the accession to the EU in 2007 as well as the natural need for alignment and harmonization of laws and procedures, have most likely led to the awareness of the need to create a legislative framework in the field of domestic violence.

LEGISLATIVE CONTEXT

According to the Romanian legislation, the adjudication of domestic violence cases involves both civil and criminal legal texts, which requires the effort of harmonizing the two corpora of law, to allow a unitary and covering approach, regarding the protection of victims.

From the point of view of the stages through which a case of domestic violence passes, I propose the following systematization of the categories of norms incident in the field: norms regarding the prevention of the phenomenon of domestic violence, the norms applicable in the criminal investigation phase and in the trial phase, respectively the norms intended to prevent relapses. Also, to these are added the measures of protection of victims and of control of collateral effects, such as those on children, who, even if they are not directly involved, assist in committing acts of violence, which can be classified as psychological violence. In the following, I briefly describe each one.

1.1. Rules on prevention

The institutional responsibilities regarding the prevention of domestic violence are divided between several bodies, each of which is subject to specific norms, as follows:

- MMJS Order no. 2525/2018, puts in charge of the local authorities the intervention, upon the victim's notification, through multi-fulfillment teams, to advise her from the point of view of exercising her legal rights, to provide her with medical, psychological, spiritual assistance. Also, these teams can guide the victim to state social shelters or inform them about alternative services offered by NGOs or other private entities. At national level there are 42 such teams, at the level of each county and of Bucharest, which can be contacted through a national call center – 0800500333, launched in 2015.
- The Ministry of National Education organizes educational events for parents and children, on topics related to domestic violence, to prevent it. Since 2005, by GD nr. 686 / 12.07.2005 which approves the National Strategy in the field of preventing and combating the phenomenon of domestic violence, is given to the Ministry of Education the responsibility to introduce in the school curriculum, activities dedicated to the prevention of domestic violence, respectively to organize manifestations to educate young people in the spirit of respecting family values. At present, there is not yet a very clear framework for evaluating the implementation of these measures and their impact, as they are still left to the discretion of teachers.
- The Public Service of Social Assistance (SPAS) has attributions at local level, in the sense of early detection of situations of family risk and intervention to prevent violence against children, respectively the separation of children from parents, if the stage of prevention was ineffective and the violence is reached in the continued form. If SPAS do not have the capacity to provide social services in an emergency regime, it is necessary to collaborate with the DGASPC's that take over the management of the case.

To these local and central state structures are added the accredited social service providers from the private environment, namely NGOs, foundations, churches, private medical networks, through which the material and logistical base of the state institutions can be extended.

1.2. Norms regarding the criminal prosecution and the trial phase

The finding and solving of domestic violence cases is also a matter for the police and the courts, which in some cases may be complete by the criminal and in other situations, specialized panels of minors and family.

The investigation of cases of domestic violence is set in motion, in most situations, upon the notification of the victim, who requests the support of the police. In a small number of cases, the police are notified by third parties (relatives, neighbors, people nearby, etc.) or even act.

After registering a complaint regarding an act of domestic violence, the police authorities ascertain the existence of the deed and based on the investigations, assess the degree of risk for the life and integrity of the victim. If an imminent risk to the life, physical integrity or freedom of a person is found, to eliminate or reduce this risk, the police officer issues a temporary protection order for a period of 5 days, calculated per hour, respectively 120 hours from the moment of issuance.

The police officers find the existence of an imminent risk, analyzing the factual situation, by:

a) the evidence obtained because of the verification of the complaints regarding the domestic violence when the acts of domestic violence are not the object of the investigation under the aspect of committing other crimes.

b) the evidence gathered according to the provisions of Law no. 135/2010 on the Code of Criminal Procedure,with subsequent amendments, when acts of domestic violence are the object of investigation under the aspect of committing acts that fall under the provisions of art. 199 of Law no. 286/2009 on the Criminal Code, with subsequent amendments.

Also, the policemen assess the factual situation based on the risk assessment form, according to the methodology of its use, according to the provisions of art. 22^{10} of the Law 217/2003.

The provisional protection order issued by the policeman shall order, for a period of 5 days, one or more measures to protect the victim:

- temporary eviction of the aggressor from the common dwelling, even if he is the holder of the property right.
- reintegration of the victim and, where appropriate, of the children into the common dwelling.
- obliging the aggressor to keep a minimum distance determined from the victim, from his family members, or from the residence, place of work or educational establishment of the protected person.
-obliging the aggressor to hand over the weapons held to the police. (https://www.politiaromana.ro/ro/prevenire/violenta-domestica/ordinul-de-protectie-provizoriu, accessed 28.10.2021)

These obligations enter into force immediately, without any further prior notice.

After the provisional protection order has been issued, it shall be submitted by the territorially responsible police unit, within 24 hours, to the Prosecutor's Office attached to the Court in which the jurisdiction was issued. At the level of the Prosecutor's Office, a case prosecutor decides on the need to maintain the measures established by the police. Within 48 hours from the issuance of the protection order, the prosecutor decides either that the measures must be maintained, through an administrative resolution applied on the provisional protection order, or that they are not justified and must be revoked, in which case they motivate and communicate this fact to the police unit. This, in turn, informs the parties involved.

The provisional protection order maintained by the prosecutor is submitted by him, with all the supporting documents, to the territorially competent court, with a request for issuing the protection order, for a maximum period of 6 months. In this situation, the 5-day validity of the OPP is extended accordingly, until the completion of the judicial procedures regarding the issuance of the PO, with the information of the aggressor.

The Provisional Protection Order (OPP) may be challenged in the competent court within 48 hours of communication.

If it is found that the conditions for issuing the provisional protection order are not met in the present case, the policemen are obliged to guide the persons who claim to be victims of domestic violence to formulate, if they wish, a request in court for the issuance of a protection order.

In the practice of the courts, the legislative base consists of both the Criminal Code and a corpus of special laws, represented mainly by law 217/2003, which has undergone numerous successive additions and modifications, some of them wearing, in their turn, the form of law.

In the Criminal Code, the headquarters of the matter is represented by art. 199, which defines domestic violence, and art. 177, which delimits the notion of family member. The wording of art. 199 of the Pen Code does not reveal the crime of domestic violence as a crime in its own right but considers it as an aggravating circumstance in the case of the deeds stipulated in art. 188 and art. 189 pen Code as well as art. 193-196 pen Code. Therefore, the crime of domestic violence is not sanctioned separately but only comes to increase the special maximum of the punishment applied for committing one of the previously listed offenses.

This understanding of the crime of domestic violence is congruent with the practice of the criminal investigation phase, when in parallel with the issuance of an OPP, the case

prosecutor finds, on the background of the situation of domestic violence, the perpetration of some offenses provided by the above-mentioned articles and orders the formation of a criminal file in terms of committing those offenses, continuing the criminal prosecution that can end with the sanctioning of the aggressor.

1.3. Rules on the prevention of relapses

Under Law nr. 252/2013 on the organization and functioning of the probation system and gd no. 1079/2013, which approves the Regulation for the application of the law, at the level of the Ministry of Justice carries out its activity in the direct coordination of the minister, the National Probation Directorate. This direction aims at the social rehabilitation of offenders, maintaining safety in the community by decreasing the risk of relapse. Also, the probation system reduces the social costs of executing sanctions, offenders being reintegrated into the community and into labor relations.

At the level of each county there is a local probation service, composed of probation counselors, who:

- carries out the evaluation of the defendants ex officio or at the request of the judicial bodies.
- supports the court in individualizing the punishments and educational measures.
- supervises the observance of the measures and the execution of the obligations established by the court in the charge of the persons it supervises(http://www.just.ro/directia-nationala-de-probatiune,accessed on 02.11.2021).

The violation of the protection order by the aggressor is a crime, which is punished, according to law 183/2020, by imprisonment from 6 months to 5 years, whether it is a temporary protection order, or the protection order issued by the court.

A series of studies at national level, published by NGOs fighting for women's rights, between 2012 and 2018, show that, on the one hand, the average duration of obtaining a protection order has decreased from 33 days in 2013 to about 7 days in 2017, which considerably decreases the risk of violence in the form continued in the period between the moment of the referral and the issuance of the protection order. With the introduction of the provisional protection order (OPP) in 2018, this risk is at least theoretically canceled. Things are not as good regarding the violation of the protection order, at the level of 2018 being registered 1424 such offenses, which means that approximately 1/3 of the issued POs were violated (http://www.fundatiasensiblu.ro/wp-content/uploads/2015/02/Studiu-la-nivel-national-ordine-de-protectie-decembrie-2013.pdf, accessed on 02.10.2021; https://transcena.ro/wp-content/uploads/Retea-VIF-studiu-2017.pdf, accessed on 02.10.2021).

From the IGPR data, in the first half of 2019, 16585 criminal acts of domestic violence were notified, 3016 protection orders were issued and 3034 OPP. There were 766 offenses of non-compliance with the PO and 236 offenses of non-compliance with the OPP, which indicates, proportionally, a slight decrease compared to the previous year.

There are no impact studies yet on the effects of Law no. 183/2020 that tightens the sanctions for violating the protection orders. However, I can say that the simple legislative amendment, in the absence of adequate surveillance and intervention measures, will not have a significant impact.

In this respect, it is necessary to implement the electronic surveillance bracelets provided by Law no. 97/2020 currently in the stage of parliamentary debate. These bracelets are already a good practice in other European countries, such as Austria, Sweden and Norway. By way of example, in a 2016 article Henneguelle et al. studies the effect of electronic bracelets on recidivism in France, showing that their implementation decreases the likelihood

of relapse by 9 to 11%, which has important economic effects. There are also studies for the UK (Hucklesby & Holdsworth, 2016).

LEGISLATIVE EVOLUTION

Regarding the provisions of the civil legislation, I summarize below the main amendments to Law 217/2003, on three main levels:

A. Completing and nuanced the notion of domestic violence:

- **Law nr. 25/2012**, which substantially completes art. 2 of the initial law, in the sense that it expands the spectrum of domestic violence (initially understood only as physical, verbal, and sexual violence), by including psychological, economic, social, and spiritual violence.
- **Law nr. 106/2020,** which defines more broadly the notion of domestic violence and introduces a new notion, that of cyber violence as well as a series of duties of some state institutions regarding the combating of the phenomenon of domestic violence.

These two amendments led to an extension of the notion of domestic violence that currently includes all the situations encountered in current practice, being also aligned with the definition of this notion at European level.

B. The broader and more precise definition of the notion of family member:

- **Law nr. 25/2012,** which completes art. 3 of the initial law, which defined the notion of family member in a very narrow sense, significantly broadening the definition, as follows:
    - a) ascendants and descendants, brothers and sisters, their children, as well as persons who have become such relatives by adoption by adoption, according to the law.
    - b) the spouse and/or former spouse.
    - c) persons who have established relations like those between spouses or between parents and children if they are living together.
    - d) the guardian or other person exercising in fact or in law the rights towards the person of the child.
    - e) the legal representative or other person caring for the person with mental illness, intellectual disability, or physical disability, except for those who perform these duties in the performance of professional duties.

However, the law maintains the condition of cohabitation of family members, which will be eliminated by CCR Decision no. 264/2017, whichdismissed the exception of unconstitutionality and finds that the phrase "if*they live together" from*the content ofart. 5 lit.c) of Law no. 217/2003 for preventing and combating domestic violence is unconstitutional.

C. Streamlining the measures for the protection of victims and tightening the sanctions for violating the protection order

- **Law nr. 187/2012** for the implementation of Law no. 286/2009 on the Criminal Code, amends art. 32 of Law no. 217/2003 as follows:

'Infringement*of any of the measures referred to in Article 23 (2) (a) shall be replaced by the following: (1) and ordered by the protection order shall constitute the offence of non-compliance with the court decision and shall be punished by imprisonment from one month to one year. Reconciliation removes criminal liability."*

Subsequently, by **Law no. 183/2020,** these sanctions were much tightened, as follows:

1. Infringement by the person against whom an order for the protection of any of the measures referred to in Article 23 (1) has been issued. (1), (3) and (4) lit. a) and b) and

ordered by the protection order constitutes a criminal offence and is punishable by imprisonment from 6 months to 5 years.

2. Infringement by the person against whom an order for the provisional protection of any of the measures referred to in Article 22$^{4\ (2)}$ has been *issued. (1) and ordered by the provisional protection order constitutes an offence and is punishable by imprisonment from 6 months to* 5years."

- **Law 174/2018**, which introduces the provisional protection order, which can be issued directly by the police, when the criteria of severity and speed provided by law are met.

We note from the enumeration of these changes that progress has been made both in the sense of more precise circumscribing of the phenomenon and in that of streamlining the protection of victims, respectively of sanctioning the aggressors.

In its current form, the special law is, therefore, mainly oriented towards providing prompt protection to the victims, so it has a broader meaning and insists more on identifying the sources of violence, both in terms of its types and in terms of categories of perpetrators, while the criminal code envisages the qualification of the deed as a crime and less some detailed classifications.

In criminal matters, the offenses of domestic violence are found in Title I, chapter. III – Crimes committed against a family member, which includes only two articles, art. 199 – *Domestic violence* and art. 200 – Murder or injury of the newborn committed by the *mother.*

Apart from the articles to which art. 199 of the Pen Code refers and about which I mentioned before, there are also to be considered a series of articles of the Criminal Code that are circumscribed, in my opinion, in the sphere of the crime of domestic violence, as follows:

- ***Art. 197 – The ill-treatment of the minor***, a crime that in the Criminal Code of 1969 was part of the chapter of offenses against the family and by extending its scope in the new Criminal Code, was included in the chapter dedicated to the offenses against the person, which a person can commit, regardless of the nature of the relationship with the assaulted minor. I believe that for this offense, the circumstance of its commission by a family member of the minor should be provided separately, in which case the provisions of art. 199 of the Pen Code should be applied.
- ***Art. 211 – Trafficking in minors***, a crime for which the aggravated form is not provided in the case of its perpetration by a family member of the minor, although I consider that these situations are encountered in practice and their sanctioning accordingly should be found in the text of the article.
- ***Art. 220 – Sexual intercourse with a minor*** and ***art. 221 – Sexual corruption of minors,*** which although they explicitly provide for the aggravated circumstance of their commission by a relative in direct line, brother or sister of the minor and the increase of the punishment limits, are not mentioned in the enumeration in art. 199 as crimes of domestic violence.

In conclusion, I think it is useful to extend the enumeration from art. 199 Criminal Code, with the inclusion in the sphere of domestic violence offenses and those provided for in the above-mentioned articles.

FINAL CONSIDERATIONS

From the examination, briefly, of the socio-cultural context, as well as of the legislative corpus relevant for domestic violence, both in civil matters (Law 217/2003, with subsequent additions and modifications), as well as in criminal matters, the following conclusions are drawn:

- Undoubtedly, significant progress has been made in the legislative plan, in the sense of unifying the legislation and harmonizing it with the European trends. Specifically, in relation to the aspect that interested me, in the present work, that of protecting the victims, I highlighted the introduction of new elements (such as the provisional

protection order) intended for immediate protection, when the situation requires it, respectively the increase of punishments, to discourage, as much as possible, such attitudes on the part of the aggressors.

- However, there are, in my opinion, necessary improvements. As we note, the protection of victims is ensured especially by the civil legislation, respectively the special law. A better protection, in criminal matters, can be ensured by broadening the spectrum of the crime of domestic violence, as we have shown, respectively by nuancing the conditions in which the penalties for other offenses are increased, for which the aggressor's family membership is an aggravating circumstance.

I also come back to the need for terminological unification – domestic *violence* in the special law, in the sense of alignment with the term used in European legislations, but domestic *violence* in the Criminal Code, which leads to non-unitary approaches in the practice of the courts and to the restriction of the spectrum of sanctionable deeds, under the aspect of committing the crime of domestic violence.

BIBLIOGRAPHY

1. Filip, O.L., Popp, E.L., Andrioni, F. (2019) Domestic violence: a determining factor in the socio-emotional development of children, University Journal of Sociology. Year XV, no. 2/2019, pp. 161-167
2. Irimescu, G. (2006) Social protection of the abused child, Editura Universităţii "Alexandru Ioan Cuza", Iaşi,Romania
3. Kaya, Y., Cook, K.J. (2010) A cross-national analysis of physical intimate partner violence against women. International Journal of Comparative Sociology 51(6), pp. 423-444
4. Mossige, S., Dyb, G. (2009) Voldsutsatte barn og anoint i Oslo. Forekomst og innsatsområder for forebygging, Oslo,Norsk institutt for forskning om oppvekst, velferd og aldring og Nasjonalt kunnskapssenter om vold og traumatisk stress
5. Tunduc, A. (2020) When intimate partner violence becomes femicide: A socio-legal analysis of the Romanian legal framework in light of the Istanbul Convention, Master Thesis, Umeå University, Faculty of Social Sciences, Department of Law, urn: nbn:se: umu: diva-173855
6. Vrabiescu, I. (2019) Creating solidarity: Intimate partner violence (IPV) and politics of emotions in a multi-ethnic neighbourhood in Romania, European Journal of Women's Studies, Volume 26 issue 2, pp. 150-164
7. Wimmer, J. S., Harrington, P. A. (2008). Domestic violence services in Romania: A longitudinal case study, International Social Work, 51(5), pp. 623–63

AGORA International Journal of Juridical Sciences, http://univagora.ro/jour/index.php/aijjs
ISSN 1843-570X, E-ISSN 2067-7677
No. 2 (2021), pp. 63-75

HUMAN RIGHTS AND ETHICS IN THE COVID-19 PANDEMIC. THE PHENOMENON OF "VACCINATION AT THE SINK" IN ROMANIA

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ABSTRACT

The increase in the number of confirmed coronavirus cases (Covid-19) at various stages of the pandemic, as well as the success of several waves, have highlighted the need to take action to ensure the safety of human health and to adapt the strategies so that the measures taken are as effective as possible. This paper aims to address key issues regarding the ethical challenges generated by the distribution and administration of the anti-Covid vaccine and from the perspective of fundamental human rights, considering the right to health. The work ends with a case study from the Romanian space regarding the violation of ethical and legal norms in the administration of the vaccine by "vaccination at the sink".

KEYWORDS: human rights, ethics, vaccine, responsibilities.

INTRODUCTION

The COVID-19 pandemic is probably one of the most serious challenges for humanity after the Second World War, both from the perspective of radical changes for our lives and of generated effects, terrible and particular fast. In this sense, we mention the significant loss of life at worldwide level and the pressure exerted on the governments and health systems of most states. So far, 02.12.2021, according to the data provided by the National Institute of Public Health in Romania through the National Centre for Surveillance and Control of Transmittable Diseases (CNSBT,2021), globally there are 263,720,306 confirmed cases of coronavirus infection and 5,241,839 deaths. The severity of this new situation imposed measures whose objective was to slow down the spread of the pandemic and lead to the development of new treatments and biomedical technologies to save the patients' lives. In order to limit the spread of the coronavirus infection, measures such as confinement, isolation at home, hospital admission have been taken, and even the radical measure of lockdown was applied. These measures were further supplemented by the administration of several anti-Covid vaccines. International solidarity present at the level of responsible bodies and states in an attempt to combat the spread of the pandemic by creating networks of action was an important contribution to ensuring human safety and, as far as possible, public health.

The measures taken by the authorities during the Covid-19 pandemic have seen major critical approaches both from some specialists and from citizens in general. These criticisms targeted the compromise often resorted to between individual and collective rights on public health and compliance with ethical norms in the pandemic. In this study we aim to address the very measures to ensure the safety of human health by administering anti-Covid vaccines from the perspective of fundamental human rights, considering the right to health and the underlying ethical principles this approach. The paper ends with a case study from the Romanian area regarding the violation of ethical and legal norms in the administration of the vaccine by the so-called "vaccination at the sink".

FUNDAMENTAL RIGHTS AND CIVIL LIBERTIES

The launch of the vaccination campaign against Covid-19 has brought to the attention, sometimes through over-bidding, the fundamental human rights, provided for in international and national documents. For instance, States have an obligation to protect the right to (individual and public) life and health, but this obligation should be balanced with other rights, such as the right to free movement, privacy, freedom of expression, freedom of religion. But how are fundamental human rights defined? And what is their ground? How does it differentiate itself from other types of rights? The citizens' fundamental rights, also called "human rights", are explicitly stated in international documents, unlike other rights, relevant in this respect being the Universal Declaration of Human Rights (1948). In addition to this document, mention can be made of the two Pacts adopted by the UN General Assembly in 1966 and for Europe, the Convention for the Protection of Human Rights and Fundamental Freedoms (Morosteş, 2020, p. 23).

A. John Simmons, in his work "Human Rights and World Citizenship: The Universality of Human Rights", states that human rights are "rights possessed by all human beings (at all times and in all places), simply in virtue of their humanity" (Simmons, 2001, p. 185). Therefore, belonging to humanity, to the human species, makes a human being an owner of these rights. Martha Nussbaum promotes a concept by which it binds human rights and lays as its basis the capabilities of the person to act and make choices. The author identifies ten central capacities that are "entailed by the idea of a life worthy of human dignity": life, bodily health, bodily integrity, senses (imagination and thought), emotions, practical reason, affiliation, other species, play, and control over one's environment (Nussbaum, 2011, pp. 33-34). In the author's view, to end poverty, injustice and inequity, any policy should meet these requirements because all human beings have the right to these capacities as a matter of human rights (Nussbaum, 2011, p. 62). Therefore, fundamental human rights „designate the category of citizenship rights, essential for the physical existence and mental integrity of individuals, for their material and intellectual development"(Morosteş, 2020, p. 22).

The right to health as a fundamental right of the person and collective responsibilities during the Covid-19 pandemic

Legal regulations on the right to healthcare

It can be found from the above lines that among the fundamental human rights is explicitly mentioned the right to health protection and from this point of view the state has a duty towards its citizens. The right to healthcare, as a fundamental right, is mentioned in several international documents: the Preamble Constitution of the World Health Organization (1946), the Universal Declaration of Human Rights (1948), the European Social Charter (revised in 1996), the International Covenant on Economic, Social and Cultural Rights (ratified by Romania in 1974) and the Book of Human Rights (revised 1996), the International Covenant on Economic, Social and Cultural Rights (ratified by Romania in 1974) and the Book of fundamental Human Rights of the European Union. The Universal Declaration of Human Rights expressly states that: "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control".

In Romania, the right to healthcare is guaranteed by the state through the Constitution, being provided for in Article 34 (paragraph 1), so that "the state has to take measures to ensure hygiene and public health". Providing for and implementing this fundamental right of

the person is in connection with other fundamental rights specified in the Romanian Constitution, which it must be correlated with, such as the right to life and physical and mental integrity (art. 22), the right to information (art.31), the right to work and to the social protection of work (art. 41). D. Creţ refers to the documents that provide for the observance and guarantee of the rights of the child, so as not to endanger his life, bodily integrity, physical and mental health (2011, pp.208-209). The international documents mentioned in the above section, ratified at various times by Romania, as well as the constitutional provisions, represent the grounds on which a rich legislation in the field of health has been developed at national level, at the centre of which is situated Law no. 95/ 2006 with some revisions. We also mention the Patient's Rights Law no. 46 of 2003, updated on 10.01.2019.

Individual right to healthcare and collective responsibilities

The right to health is closely linked to individual physical and mental existence but is not limited to adequate and timely medical care. The UN Committee on Economic, Social and Cultural Rights points out that this right also includes other determinants of health, "such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health. A further important aspect is the participation of the population in all health-related decision-making at the community, national and international levels". For the clarity of the approach, we consider it important to approach the way in which the concept of health is defined. According to the Explanatory Dictionary of the Romanian Language (DEX 2009) health is a "good state of an organism in which the functioning of all organs is carried out normally and regularly". In the Preamble *Constitution of the World Health Organization,* health is defined as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity". From a medical perspective, health is the state of normality of the physiological, mental and emotional functions of the body (Popescu, 2007, p. 27).

A different approach we find at M. Liao, who in his work "Health (Care) and Human Rights: A Fundamental Conditions Approach", defines health from the perspective of a distinction he introduces between what he means by "basic health" and "non-basic health":

"Basic health is the adequate functioning of the various parts of our organism that are needed for the development and exercise of the fundamental capacities.

Non-basic health pertains to any biological functioning that does not affect the various parts of our organism that are needed for the development and exercise of the fundamental capacities" (Liao, 2016, p. 263).

From how the definition is proposed by Liao we note that the basic health is aimed at the proper functioning of those parts of our organism that are necessary for "the development and exercise of fundamental capabilities". The diseases and inadequate functioning of vital parts and organs of the human body generated by the Covid-19 infection are framed in that “basic health” side which the state is responsible for in terms of guaranteeing it in relation to the citizens. Covid-19 outbreaks and the pandemic, as a whole, pose a serious threat to the right to protection and the health of the population also at worldwide level. A solution to reduce the spread of the Covid-19 virus infection, along with other applied measures aiming to protect the public health, is vaccination – a tool of public health through which both the individual and the members of the community are protected. Specialists claim that the achieving high vaccination rates at the level of the population influences the success of public health policies and is also the expression of compliance by states of the fundamental right to protect the health of their citizens. Vaccination policies, considered to be in the interest of the citizen and the community, were viewed differently, so some people agreed to this practice and were vaccinated, while another party obstinately refused vaccination. In Romania, for example, according to official data, until November 6, 2021, only 45% of the adult population

received a little a dose of anti-Covid 19 vaccine. In other countries in Europe, the vaccination rate is much higher, even over 90% in Portugal (Gheorghiţă, 2021). Although the state is fulfilling its obligation to ensure the right to health in the pandemic through the vaccines made available free of charge, part of the citizens choose not to exercise this right, for various reasons, given that vaccination is not mandatory. On the other hand, citizens who refuse vaccination actually choose not to exercise a right that the state guarantees and ensures towards them.

The hottest debates are being held in this context, where an individual citizen's right intersects, for example to choose to get vaccinated or not, with collective rights on public health. One of the arguments of those who refuse vaccination is that possessing a right does not mean that it constitutes an obligation if this fact is provided for as norm required by law. They also argue, the individual's right to protect health by using the anti-Covid vaccine cannot be converted into an individual obligation to protect community members' health. More specifically, an individual right does not become a community obligation in the sense of vaccinating a person in order to protect those around him from infection with the Covid-19 virus. On the other hand, vaccinated "point the finger" at the unvaccinated, whom they consider partially responsible for the spread of the virus and the large number of people admitted to hospitals, some in terminal stages of the disease. However, it is quite clear that both have at the heart of their reasonings the concept of health: the unvaccinated – that this is how they keep their health (the vaccine would be risky and could have adverse effects on their health), and the vaccinated – that only by administering the vaccine they can preserve the state of health, that basic health about which S.M. Liao talks in his study. Beyond these disputes, one thing is clear, namely that the protection of the collective right to health in the Covid-19 pandemic, can be achieved through a balanced approach of individual rights with collective responsibilities.

The effectiveness of the measures taken by governments and authorities relies also on the level of trust of the population in these measures and on the responsibility with which they undertake compliance with the measures. Perhaps before imposing restrictions and exclusive policies, the authorities should pay attention to communicating with people in order to inspiring them confidence in the results of the taken measures and to make them aware of their responsibilities to communities in such special times like those of the pandemic. Raising people's awareness in the pandemic on basic health, either by appealing to vaccination or by strictly following the imposed rules, such as wearing a mask, washing, and disinfecting hands, keeping physical distance, limiting the freedom to move, etc. could be an effective way of acting against Covid-19. Even observing all of the above, it is clear that the pandemic could not be avoided, but surely the size of the disaster would be smaller. It is therefore necessary to strike a balance and accept a compromise between individual rights and collective rights to health, based on responsibility all stakeholders socially involved. Moreover, the Universal Declaration of Human Rights refers to the limitation of some rights "for the respect of the rights and freedoms of others" (Art. 29, par. 2). In the same document, Art. 29, paragraph 1, it is stated that "every person has duties towards the community, because only within the free and full development of the individual's personality is possible". Duty towards the community can be interpreted in a key of responsibility for protecting the health of community members by protecting their own health, but only when it is accompanied with other rules and without being effectively converted into an obligation, except in the case of this precise situation where, for example, vaccination becomes legally mandatory for the population. Otherwise, these duties towards the community we believe should bear the load of responsibility to the community and public health. The issue of responsibility in the application of human rights is also dealt with by K. Sikkink who points out: "We who believe in human rights need to begin talking and thinking explicitly about the politics and ethics of responsibility" (2020, p.1). The protection of the collective right to health can be correlated, for example, with the responsibility to move only under legally established terms. The

individual decision on vaccination on one's own initiative may be correlated with the responsibility of being a correctly informed person. The right to correct information about the administration, effects, and risks of anti-Covid vaccines is also stipulated in various documents.

In the Universal Declaration of Human Rights, reference is made in Art. 19 to the right and freedom "to receive and spread information and ideas by any means and independently of state borders". In the Romanian legislation, this right to correct information is provided in the Patient's Rights Law no. 46 of January 2003, Art. 4: "The patient has the right to be informed about the available medical care, as well as about how to use it". From the above lines it is seen how important there are for citizens both the right to access correct information about the pandemic, vaccines, and responsibilities to oneself and to the community, as well as the correct use and interpretation of this information. Accessing truncated information from unofficial sources and misinterpretations regarding the pandemic and vaccination, in the sense of disinformation of the population, have led to true currents antivaccine trends promoted either in demonstrations of supporters or through social media channels. Often framed in so-called "conspiracy theories" antivaccine movements influenced the decisions of some members of the community in not to get vaccinated. In our opinion, to this situation has also contributed the ineffective communication from the government in what the vaccination campaign means. We therefore believe that disputes relating to the crossing the individual right to health with collective rights to health, from the perspective of anti-Covid vaccination, can be mitigated by balancing these rights and emphasising the responsibility of all those involved at the social level.

ETHICS, MANAGEMENT AND DISTRIBUTION OF ANTI-COVID VACCINE

The anti-covid vaccine, as a public health tool, contributes to the protection of both the individual and the community by reducing the spread of the virus and the disease. Achieving of a high vaccination rate among the population is particularly important for a successful intervention in the protection of public health. Along with other measures to protect public health, vaccination of citizens in a high percentage is regarded as part of the solution for getting over with the pandemic. The administration of anti- Covid vaccines is marked by ethical principles inserted in guidelines that are addressed to health professionals and aspire to guide the work of those whom they are addressed to. These documents provide ethical benchmarks, by articulating ethical attitudes and behaviours, as well as values that should be undertaken by the experts. Understanding the need for an ethical framework, the World Health Organization has set up an international working group for Ethics and Covid-19, with the aim of providing guidance and answer to key ethical questions formulated by different states. R. Huxtable points out, however, that there is a potential for confusion, which could be aggravated, since the identification of "ethical" guidance by experts would not always be simple (2020, p. 2). With regard to anti-Covid vaccination, ethical considerations generally concern two dimensions: (1) the management and distribution of resources/ anti-Covid vaccine and (2) ethical principles in the administration of anti-Covid vaccine.

Ethical considerations on vaccine management and distribution

Managing the vaccine at worldwide level and distributing it is a new challenge in the Covid-19 pandemic, especially since the rate of vaccine development and production is a particularly a fast one. However, statistical statements show that although more than 5.6 billion doses of the vaccine have been administered globally by September 2021, their dissemination has been uneven. Thus, if some states managed to reach a vaccination rate that allowed citizens to return to a life relatively close to normality in 2021, with a certain safety

in health protection, other states, more precisely 24 in number, had not vaccinated even 1% of the population, according to the data provided by Rebekah Farrell. We see a lack of fairness in the distribution of resources, that is, vaccines, between states. On the other hand, the Universal Declaration of Human Rights and other international documents refer to equality between people, non-discrimination, and the right to health protection.

The unequal distribution of vaccines among citizens leads to violation of the principle of fairness and the human common right to health protection. On the other hand, communities are not equipped logistically in the same way to cope with the pandemic either, or there are many discrepancies in this regard. Access to resources does not only mean access to vaccines, but also people's access to the technology related to their use, such as Wi-Fi and/ or smartphones. But what happens if a person gets vaccinated but does not have a smartphone or Wi-Fi access? There should be alternative vaccination solutions that can be accessed on several variants: SMS, telephone, etc. However, populations with a higher degree of vulnerability are more affected by Covid-19 and face barriers in trying to improve health. We find a violation of the principle of fairness in the fact that vaccines are not available to everyone and at the same time. We must also mention the particular situations of those who have access to vaccination but cannot apply the procedure for health reasons.

Another important ethical component in the management of vaccination is the provision of data privacy by users of the software in the healthcare system in the process of collecting / using personal data. For users, it must be very clear how data is collected and used, what is their right to use it, as well as the allowed limits. The use of data for purposes unrelated to the Covid-19 pandemic would be a violation of privacy and human rights. An important aspect is the duration of keeping personal data, which must be limited and known by users in the system. Sure, we may wonder if users could share citizens' personal data with third parties? The consent of the concerned person seems to me to be absolutely required in this case. However, there may be particular situations, such as the one in which the request is made within a legal framework.

The allocation of vaccines and the monitoring of results, in order to generate confidence among the population, involves the use of clear, transparent procedures, as well as access to correct and relevant information. Transparency in this approach is essential for the confidence of the population in the act of vaccination and also regards undertaking responsibility by all stakeholders involved in the development of the vaccination program.

In the Multivalue ethical framework for fair global allocation of a COVID-19 vaccine, Yangzi Liu et al. propose an ethical framework for the fair distribution of vaccines starting from the analysis of four allocation paradigms, so that this framework is appropriate to the COVID-19 pandemic. The first principle that authors consider is "the ability to develop or buy". The ethical problem captured in the analysis starts from the fact that there are globally five multinational companies that produce the majority of vaccines in the world and negotiate with both the public and private sectors the procurement process. There are states, such as the USA, that have tried to obtain exclusivity for access to a vaccine, which would lead to an unfair allocation based on citizenship and the country's ability to pay. At the same time, other states protect their domestic production by banning producers from exporting the vaccine (Yangzi et al., 2020, p. 499.). Another principle proposed to support the ethical framework is "reciprocity", with reference to the global inequity by which developing countries, while helping to produce vaccines, do not benefit from them. The example given is of Indonesia. These situations call for "the need for a reciprocity system that improves the fair distribution of vaccines to countries involved in vaccine development" (Yangzi et al., 2020, p. 499). "Implementation capacity" is not an ethical principle, having to do with the resources and infrastructure of a vaccine administration state. For this reason, low-income countries should pay attention to improving the area of resources for the implementation of vaccination programmes. Another principle introduced into this ethical framework is "distributive justice

for developing countries", as a fundamental element for the fair distribution of vaccines (Yangzi et al., 2020, p. 500).

An ethical framework for the administration of the anti-Covid vaccine

In order to avoid slippages and prevent abuses in the administration of anti-Covid vaccines, it is necessary to guide the correct actions through ethical principles articulated in a normative framework that is known to all practitioners and subjects who get vaccinated. Since the beginning of the Covid-19 pandemic, different principles have been specified to contribute to the development of an anti-Covid approach organized on ethical bases. Ethical principles are widely used to guide healthcare conduct and are relevant to the issue of mandatory vaccination against COVID-19 of medical staff (Bowen, 2020, p. 421).

In this paper, we propose an ethical framework starting from the path of principles (principlism) promoted by Tom L. Beauchamp and James F. Childress in the book *Principles of Biomedical Ethics*, published in 1979. The peculiarity of principlism is that it is based on four principles derived from common morals, which comprises norms and rules accepted by most people, beyond cultural differences. Thus, independence from traditional ethical theories was expressed. The four principles are respect for autonomy, beneficence, non-maleficence, justice. The principles are not hierarchical, none of them have an absolute value and behave as prima facie debts. The principlism pathway addressed by excellence the needs of bioethics (medical ethics) as a framework for moral evaluation and decision (Sinaci, 2014, 137-138). These principles are interpreted in this paper in the particular context of anti-Covid vaccination and they are articulated with other ethical principles that we believe play a key role in this endeavour, without being put in a hierarchical manner.

Respect for autonomy. Autonomy relies on the fact that all persons have an intrinsic value, and no one can limit or deny the individual’s free choices regarding his life and body, even if it would put his life in danger and the choice would seem inappropriate. Interpreted and applied, this principle in the particular context of anti-Covid vaccination will consider the fact that people have the right to make decisions on vaccination autonomously, to accept or reject it, based on one’s own desires and beliefs, in an informed manner. In an analysis of the autonomous action, from the perspective of the one who chooses to get vaccinated, it will be considered: intentionality, knowledge of vaccination data – including the possible undertaken risks and placing the action outside of any influences that might determine its course. For the context of the anti-Covid vaccination, we mention two rules aimed at the autonomy principle: (a) the informed consent of the subject; (b) the subject's power to take a decision. Mandatory vaccination policies, in particular those of staff in categories considered essential, should be accompanied by a strong reasoning based on evidence and correlated with fundamental rights aimed at collective health.

The principle of non-maleficence. This principle has an obligation not to do harm intentionally, either by commission or omission, and to prevent any potential harm. Applied to the anti-Covid vaccination, the non-maleficence principle aims on one hand to protect the subject from potential harm through infection with the Covid-19 virus, and on the other hand, vaccination can help to avoid harming by getting infected those around you. People who are not vaccinated can cause harm by omission to those around them, that is by non-vaccination, which would increase the risk of infection for the other members of the community. The problem arises even more acutely in the medical staff who work even with sick people. There may be situations in which the principle of non-maleficence is applied, and vaccination not recommended – not even having in mind the protection of those around us, when administering the vaccine would be done to a person who poses a risk of significant adverse effects, going as far as death. Regardless of the risks, the medical staff will inform the candidate for vaccination as objectively as possible, without oversizing or diminishing the risks, thus that the choice for vaccination takes place autonomously, in full knowledge.

The principle of beneficence. It is defined as the moral obligation to do good for all, to actively help them to promote their legitimate rights and interests (Sinaci, 2014, p. 141). The principle of beneficence requires us that by doing good to others, the burden be diminished in relation to the benefit that is generated by that action. The benefits of vaccination, except for particular situations in which it is not recommended, are related to the well-being and health of the vaccinated person, even if he were going through the disease (studies have shown that vaccinations make it a mild form), and by decreasing the risks of transmitting infection to others. It is important that in the case of subjects who pose risks, the cost/ benefit ratio is considered, so that the costs are minimal or even zero.

The application of the principle of beneficence is sometimes done in a paternalistic way, when governments or medical authorities impose their will on obtaining the best result, as a benevolence that surpasses autonomy and violates the patient's will not to be vaccinated. In such situations we witness a normative conflict between beneficence and autonomy, which is referred to especially in the case of compulsory vaccination. The imposition of compulsory vaccination would mean that the violation of the patient's autonomy can be considered acceptable, and the erosion of the principle could lead over time to abuses.

The principle of justice. Justice refers to honesty, rightfulness, and fairness in the distribution of resources, benefits, opportunities, risks, and costs. The principle of justice has a significant role to play in guaranteeing the right to fair treatment and care for all people, reducing inequalities. As such, vaccination against Covid-19 should be widely accessible, so that everyone receives it depending on his health, needs, without discrimination due to characteristics of age, gender, religion, or socio-economic status. Unlike the principle of beneficence, which can slip into paternalism, the principle of justice would support a person's right to refuse vaccination.

Improving the population's health. During the pandemic, the application of this principle could help reduce mortality and illnesses among the population so that they are as low as possible. Its application should be guided by specialists in epidemiology and provided as a priority in vaccination policies.

People's trust. Policymakers and health authorities should cultivate people's trust in the institutions involved in the vaccination process, in the scientific community and in general in everything related to the vaccination process. Policies, that do not focus on these aspects of vaccination, risk eroding people's trust in this whole process — an attitude that can affect the use of the vaccine and influence other people to choose the same positions. Shetty P. points out that the coercive power that governments or institutions display in a programme that undermines voluntariness could have unintended negative consequences for vulnerable or marginalized populations (2020, pp. 970-971). We believe that greater attention should be paid to increasing the confidence of people from historically disadvantaged backgrounds and minority groups because vaccine reluctance it can be stronger in their case. On one hand there may be a distrust in the authorities, with roots in the history of local healthcare policies built on an unethical basis, and on the other hand it can be a concentrated perception on some inequities, or on a certain type of inherited traditions in relation to the medical act.

"VACCINATION AT THE SINK" IN ROMANIA – THE THIRD WAY BETWEEN PRO-VACCINE AND NON-VACCINE SUPPORTERS

In Romania the vaccination was declared by the authorities as a matter of national security, an aspect reiterated several times by V. Gheorghiță, president of the National Committee for coordination of activities on vaccination against SARS-CoV-2 (CNCAV). This position of the authorities was not understood by some citizens even when Romania was in the middle of 4th wave of the pandemic. From the desire to obtain the so- wanted green certificate, some Romanians resorted to dangerous attitudes for themselves and the community, totally unethical and in violation of the legislation. Both medical professionals

and citizens were involved in this process. The ways they acted to enter "anyway" in possession of the green certificate were:(1) fraudulently obtaining false vaccination certificates and (2) "vaccination at the sink".

"Vaccination at the sink" is described as a complicity between a person in the vaccination system and the person who, without getting vaccinated, wants a valid green certificate. The vial is taken, it is emptied at the sink, the vaccination is mimed, and the "vaccinated person" receives the certificate in exchange for an amount, preferably in euros.

The Romanian press reported in June 2021 the existence of several networks that sold fake vaccination certificates by modifying personal data with the help of Photoshop, or about the sink vaccination. At that time the authorities referred to "370 possibly fake certificates, so 370 people who sent possibly fake papers, with their personal data modified in Photoshop". The forged certificates were sold "in plain sight", on social media. We exemplify this situation with an announcement posted in early July on the Facebook network: "Does anyone need a certificate attesting that he has been vaccinated?".

In the midst of the fourth wave of the Covid-19 pandemic, several doctors in Romania have noticed that approximately 10% of the deaths recorded weekly from the cause of the Covid infection are from deaths of people registered as being vaccinated with the full scheme. This has drawn the doctors' attention of and comparing the average percentages of vaccinated people who die in Romania with those in the USA, that is, an average of 10% in our country with one of 7.4% in America, there is a mortality difference of 2.6 percentage points. This higher mortality in the case of the vaccinated people who are found in Romania compared to the other Western countries also includes the "vaccinated at the sink" persons who become infected, have complications, and can lose their lives. The conclusion reached by the doctors was that these patients had fraudulently obtained vaccination certificates. For it is not possible, after you have been immunized, to get so seriously ill. As a result, these people may have lied and fraudulently procured the certificates that now allow them to travel abroad without restrictions. Some of these patients, arriving at the hospital with serious forms of the disease, admitted that although they had a green certificate, they were not vaccinated. At European level, there have also been clear signals from the authorities in Italy and Greece due to fake green certificates.

In this context, in October this year, the police started numerous investigations, with more than 360 criminal cases nationwide alone, which led to the discovery of networks that delivered fake Covid certificates. In these cases, doctors, nurses, and medical registrars from all over the country were involved. For example, at Customs Point Petea, where the largest network for issuing fake vaccination certificates was identified, five people were arrested for issuing about 3800 vaccination certificates and fake European digital certificates, through the "vaccination at the sink" method, for sums between 250 and 300 euros. DNA prosecutors state that there were two ways of action:

- The concerned person would have actually presented himself at the vaccination centre, but the dose of the vaccine was not administered to him– being practiced vaccination at the sink.
- The concerned person did not even show up at the vaccination centre, receiving only the vaccination certificate in exchange for the requested amount of money. This was the most used procedure.

Another vaccination centre, in Bucharest this time, the Neghinita Centre, "stood out" also through frauds of this type, which led to an extreme measure, namely temporary closure of the centre.

As a result of the investigations carried out, two conclusions were outlined: the legion of the vaccinated persons "at the sink" would include thousands of Romanians; the "resourceful" Romanian has become a danger for Europe, as the problem of fake vaccination certificates has spread to the EU.

At a brief analysis of the phenomenon "vaccination to the sink", recognised by the Romanian authorities, we find that the involvement belongs both to the one who performs vaccination of the person– medical professional, and of the one who receives it – the citizen willing to hold the green certificate without introducing the vaccine in his body. Between the two parties there is a complicity and, also, a reward offered by the applicant to the medical staff for "vaccination at the sink".

This phenomenon present in Romania raises several issues to which we refer in the following lines. On one hand, it is about the violation of the legal rules on vaccination, followed by the application of sanctions, both for the medical staff and for the applicants. The visa charges were made of bribery, intellectual forgery, and computer forgery. In the same register of the discussion, we refer to the violation of the right to health by those mentioned above, in relation to other members of the community, through the places occupied in hospitals in case of aggressive forms of infection with Covid-19. A perverse effect is that this kind of people who fall ill being fictitiously vaccinated leads to an increase in the percentage of those who make serious forms of the disease, as vaccinated people. And then it can be concluded that vaccination is in vain, thus decreasing the confidence of citizens in the medical act and in the effects of the vaccine. These people mislead the medical act itself, stating that they are vaccinated.

Regarding the deed of the medical staff, they violate not only the legal norms, but also the norms of professional deontology and all the ethical principles that represent an ethical basis for the vaccination process, mentioned in the documents that guide this process. It is quite clear that the phenomenon of fake certificates and "vaccination at the sink" discredits Romania worldwide and in Europe, discredits the medical body and all the effort made in the Covid-19 pandemic.

We can ask ourselves what are the causes of this phenomenon that has turned Romania into a country with a European risk in the anti-Covid vaccination and what consequences it could have. We mention below, without a specific hierarchy, some factors that contributed to the choice of some Romanians to "vaccinate themselves at the sink" and the possibility of performing it:

- Poor, unconvincing communication on the vaccination from the authorities;
- mistrust in the authorities;
- lack of confidence in the results of science;
- a lower level of education for some citizens;
- pressure and manipulation by members of anti-vaccine groups;
- the existence of cracks in the vaccination system that made it possible to obtain fake vaccination statements / certificates;
- existing corruption in the healthcare system;
- fear of postvaccination complications;
- the willingness of the medical staff to fraud the vaccination for some amounts of money;
- the personal beliefs of some citizens regarding the act of vaccination.

Regarding the consequences of the phenomenon of fake vaccination, it is obvious that they are numerous, and we are trying to bring out at least some of them:

- endangering one's own state of health through voluntary exposure to infection and the possibility of developing serious forms of the disease or even death;
- discredit of the medical act and the vaccination itself;
- discredit of the medical body through corruption acts;
- obtaining fake results when assessing the disease of the "vaccinated" compared to the unvaccinated;
- the decline in the population's confidence in protection by vaccination, as there is also talk of vaccinated persons getting the infection, most of whom are falsely vaccinated.

CONCLUSIONS

Fundamental human rights also include the right to healthcare, and from this perspective the state has a duty to its citizens. The period of the Covid-19 pandemic has further highlighted the need to involve the state through coherent and effective health policies. In this paper I have motivated that dispute over the crossing paths between the individual and health rights with collective rights from the perspective of anti-Covid vaccination can be mitigated by balancing them with the emphasizing responsibility of those involved. The administration of the anti-Covid vaccine must be carried out on an ethical basis. I proposed an ethical framework in this regard, starting from principlism. At the end of the work, I presented and analysed the phenomenon of "sink vaccination" present in Romania, as the third way between vaccination and non-vaccination.

BIBLIOGRAPHY

1. The situation of coronavirus infections globally, updated daily - National Centre for Surveillance and Control of Transmittable Diseases https://www.cnscbt.ro/index.php/situatia-la-nivel-global-actualizata-zilnic/2842-situatie-infectii-coronavirus-covid-19-2-12-2021/file (accessed on 02.12.2021)
2. A. F. Morosteș, Protecția internațională și națională a drepturilor omului (International and National Protection of Human Rights), Publishing House Casa Cărții de Știință, Cluj-Napoca, 2020.
3. A. J. Simmons, Human Rights and World Citizenship: The Universality of Human Rights, in Justification and Legitimacy: Essays on Rights and Obligations, Cambridge University Press, Cambridge, 2001.
4. M. Nussbaum, Creating Capabilities: The Human Development Approach, Belknap Press of Harvard University Press, Cambridge, 2011.
5. Constitution of the World Health Organization (1946), https://www.who.int/governance/eb/who_constitution_en.pdf (accessed on 01.11.2021).
6. Universal Declaration of Human Rights (1948), Adopted and opened for signature, ratification, and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976, in accordance with article 27. https://www.un.org/en/about-us/universal-declaration-of-human-rights (accessed on 01.11.2021).
7. D. Creț, Protecția copilului împotriva exploatării economice (Child protection against economic exploitation), Studia Universitatis „Vasile Goldiș" Arad, Series Economic Sciences, Year 21, pp. 208-220, 2011.
8. The European Social Charter, https://www.coe.int/en/web/european-social-charter. (Accessed on 01.11.2021).
9. International Covenant on Economic, Social and Cultural Rights (1966), https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx (accessed on 01.11.2021).
10. EU Charter of Fundamental Rights, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT. (Accessed on 20.10.2021).
11. Law nr. 95 / 2006 on the health reform was published in the Official Gazette of Romania, Part I, no. 372 of 28 April 2006. http://www.cdep.ro/pls/legis/legis_pck.htp_act_text?idt=72105 (accessed on 21.10.2021).

12. Law nr. 46 / 2003 on patient's rights was published in the Official Gazette of Romania, Part I, no. 51 of 29 January 2003. http://legislatie.just.ro/Public/DetaliiDocument/41483 (accessed on 21.10.2021).
13. UN Committee on Economic, Social and Cultural Rights, General Comment No. 14, The Right to the Highest Attainable Standard of Health, August 2000. https://www.refworld.org/docid/4538838d0.html. (Accessed on 21.10.2021).
14. Dicționarul explicativ al limbii române (Explanatory Dictionary of Romanian Language), 2009, https://dexonline.ro/definitie/s%C4%83n%C4%83tate (Accessed on 21.10.2021).
15. Constitution of the World Health Organization (1946), https://www.who.int/governance/eb/who_constitution_en.pdf (accessed on 01.11.2021).
16. O. Popescu, Dreptul la sănătate și sănătatea acestui drept (The Right to Health and the Health of This Right), Romanian Institute for Human Rights, Bucharest, 2007.
17. S.M. Liao, Health (Care) and Human Rights: A Fundamental Conditions Approach, Theoretical Medicine and Bioethics, Vol 37, No. 4, pp. 259-274, 2016.
18. Valeriu Gheorghiţă: 45% of the adult population of Romania received at least one dose of anti-Covid-19 vaccine, https://www.hotnews.ro/stiri-coronavirus-25162161-valeriu-gheorghita-45-din-populatia-adulta-romaniei-primit-cel-putin-doza-vaccin-anti-covid-19.htm (accessed on 06.11.2021).
19. K. Sikkink, The Hidden Face of Rights: Toward a Politics of Responsibilities (Castle Lecture Series), Yale University Press, New Haven and London, 2020.
20. Ethics and Covid-19, https://www.who.int/teams/health-ethics-governance/diseases/covid-19 (accessed on 19.11.2021).
21. R. Huxtable, Bin it or pin it? Which professional ethical guidance on managing COVID-19 should I follow? BMC Medical Ethics 21, nr. 60, pp. 1-10, 2020. https://doi.org/10.1186/s12910-020-00491-5
22. Rebekah Farrell, the ethics, equity, and human rights of Covid-19 Vaccines - why it's the business of business, https://www.rmit.edu.au/news/acumen/covid_vaccine_human_rights (accessed on 01.11.2021).
23. Yangzi Liu, Sanjana Salwi, Brian Drolet, Multivalue ethical framework for fair global allocation of a COVID-19 vaccine, Journal of Medical Ethics 46, pp. 499-501, 2020.
24. T.L. Beauchamp, J.F. Childress, Principles of Biomedical Ethics, Oxford University Press, New York, 1979.
25. M. Sinaci, Normativitate și bioetică. Aspecte filosofice contemporane (Normativity and Bioethics. Contemporary Philosophical Aspects), Publishing House Presa Universitară Clujeană, Cluj-Napoca, 2014.
26. Bowen RAR, Ethical and organizational considerations for mandatory COVID-19 vaccination of health care workers: A clinical laboratorian's perspective. Clin Chim Acta. 510, pp. 421-422, 2020. doi:10.1016/j.cca.2020.08.003
27. P. Shetty, Experts concerned about vaccination backlash, Lancet 375, pp. 970–971, 2020.
28. V. Gheorghiță, https://www.antena3.ro/actualitate/sanatate/valeriu-gheorghita-vaccinarea-chiuveta-absolut-rusinos-620064.html (accessed on 02.11.2021).
29. https://romania.europalibera.org/a/vaccinarea-la-chiuvet%C4%83-suspiciuni-de-comer%C8%9B-ilegal-cu-certificate-de-vaccinare-/31429982.html (accessed on 01.11.2021).
30. https://www.hotnews.ro/stiri-esential-25013466-ministerul-interne-400-persoane-cercetate-pentru-eliberarea-certificate-false-vaccinare-anti-covid.htm (accessed on 02.11.2021).

31. Vaccination certificate, put up for sale on Facebook, https://ms-my.facebook.com/europafmromania/posts/10165482580900581/(accessed on 01.11.2021).
32. https://spotmedia.ro/stiri/opinii-si-analize/vaccinarea-la-chiuveta-cum-o-problema-nationala-a-devenit-europeana (accessed on 02.11.2021).
33. https://www.hotnews.ro/stiri-esential-25186887-cazul-celei-mai-mari-retele-eliberare-certificate-vaccinare-false-mandate-arestare-pentru-cinci-persoene-inclusiv-pentru-asistentele-medicale.htm (accessed on 01.11.2021).

AGORA International Journal of Juridical Sciences, http://univagora.ro/jour/index.php/aijjs
ISSN 1843-570X, E-ISSN 2067-7677
No. 2 (2021), pp. 76-82

MIGRANTS SMUGGLING EUROPEAN PHENOMENON OR CRIME?

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ABSTRACT

Because, in the context of the crisis of illegal migration in Europe, the notion of migrants smuggling is increasingly used, especially in the field of judicial cooperation in criminal matters between romanian and other member states judicial authorities, we intend to determine whether this term is regulated as an independent crime or whether it is just the name of a new phenomenon at european level. At the same time, we try cu establish whether the notion of migrants smuggling is part of smuggling or migrants trafficking crime.

KEYWORDS: smuggling, migrants trafficking, migrants smuggling

INTRODUCTION

According to the definition from romanian's explanatory dictionary language smuggling consists in country's illegal introduction of prohibited goods or for which no customs duties have been paid, being one of the main forms of fraud in the European Union. This form of fraud supposes, in most cases, the use of ingenious ways of avoiding customs duties, which are often difficult to detect by the authorities responsible for combating this phenomenon.

The persons and goods free movement principle establishment and application has intensified smuggling and illicit trade in excisable products has led to substantial losses for billions of euros in annual budgets to the European Union and Member States. (Goods subject to excise duty are: alcohol, energy products and electricity, as well as tobacco products, (https://europa.eu/youreurope/business).

People free movement in recent years made Europe to deal with the worst migration challenge since World War II, as people have fled in large numbers to Europe to escape conflict, terror and persecution from their countries (https://www.europarl.europa.eu/news/ro/headlines).

In the context of the need for an overview on migration in European Union - which includes solidarity and fair ownership, border management and visa policy, existence of safe and legal routes to Europe for asylum seekers and refugees, strategies development to cooperate with third countries, appropriate legal economic migration development, funds analysis used in migration field and Common European Asylum System implementation - it is necessary to combat *migrants smuggling*, human beings trafficking and migrants labor exploitation.

From a legal point of view smuggling, trafficking and labor exploitation are three different phenomena, creating different legal obligations under international law and european law. In practice, however, these phenomena often overlap and their differentiation can be difficult.

In general terms, *migrants smuggling* involves facilitating the illegal entry or stay of a person in a Member State. On the other hand, trafficking in human beings involves the recruitment, transport or reception of a person by violent, deceptive or abusive means for the purpose of exploitation.

There are three elements that clearly differentiate smuggling from human trafficking:
1. source of profit: for human beings trafficking, the profit is obtained from victims exploitation. For smuggling, the profit comes from those who pay to benefit from the facilitators services. Under EU law, under Directive 2002/90 / EC, smuggling of migrants (facilitating illegal entry) is currently criminalized even in the absence of financial gain;
2. transnational component: human beings trafficking can take place in a single country (without crossing borders) or through legal or illegal border crossings; smuggling by definition involves an illegal crossing of international borders;
3. Victimization: smuggled migrants generally agree to this, although they often fall victim to violent crime along the way; human beings trafficking by definition involves the exploitation and, implicitly, person's victimization, whose consent has no value due to the means used to obtain it.

In this paper, we set out to analyze the constitutive content of a person's entry, stay or exit facilitating activity, on romanian territory, in order to establish if *migrants smuggling* can be considered a smuggling form according to Law No. 86/2006 on the Romanian Customs Code or migrants trafficking crime according to art.263 from Criminal Code.

Thus, we will analyze the constitutive content of both the crimes smuggling and migrants trafficking, but also the romanian judicial authorities decisions in criminal judicial cooperation with other states taken in this matters.

SMUGGLING CRIME

Smuggling includes all persons acts who manage to avoid the customs duties payment for excise goods (tobacco products, alcohol and petroleum products).

In other words, smuggling means a culpable violation of the law in order to avoid customs duties imposed on the goods crossing borders, which means that its existence supposes a legal customs regime, because, if there were no such regime legally, if rules had not been imposed on the crossing of certain categories of goods across borders, smuggling as a crime would not have existed.

Customs legal regime represents the set of provisions contained in the Customs Code, in its Regulations, as well as in other national and international legislation ratified by our state and which contain provisions regarding the customs field. These provisions regulate the goods's and transport's means customs control, the customs taxation by applying the customs tariff and other operations specific to the customs activity. (Florin Sandu, Smuggling - a component of organized crime, National Publishing House, 1997, p. 20).

The customs legal regime should not be confused with the customs regime, as there are relations between the two as part of the whole, the second being a branch of the first.

If, in Law no. 141/1997 on the old romanian Customs Code, the customs regime is defined as representing the totality of the norms that apply within the customs procedures, depending on the purpose of the commercial operation and the destination of the goods (Art. 47 of Law no. 141/1997 on the Romanian Customs Code, published in the Official Gazette of Romania No. 180 of August 1, 1997), in Law no. 86/2006 on the new romanian Customs Code, the customs regime represents the totality of customs operations carried out with goods or merchandise, respectively release for free circulation, transit, customs warehousing, inward processing, processing under customs control, temporary admission, outward processing and export (Art. 4, point 20 of the Law no.86 / 2006 on the Customs Code of Romania published in the Official Gazette of Romania, Part I no.350 / 19 April 2006).

At the same time, smuggling is considered a fraud that seriously affects the social relations in customs regime field, being an act of customs authorities misleading in relation to the situation of certain goods, generating uncertainty and disorder in the sphere of border crossing goods, in a word it creates social danger (Costică Voicu, Criminal Business Law, Rosetti Publishing House, Bucharest 2002, p. 200-201).

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We agree with this perspective according to which smuggling by misleading the customs authorities creates a social danger for the customs regime and for the romanian society by defrauding the country budget.

According with Romanian Language Explanatory Dictionary, smuggling represents border crossing goods without customs duties payment.

From our point of view, smuggling consists in crossing romanian border, without paying customs duties for certain categories of goods in order to obtain significant material gains.

According to the romanian legislation, smuggling crime is simple and consists border crossing, by any means, goods or merchandise, through other places than those established for customs control (Art. 270 paragraph 1 of Law no. 86/2006 on the Romanian Customs Code).

As can be seen, smuggling crime as simple form consists cerctains goods crossing borders, through other places than those established for customs control.

Therefore, there is an essential requirement for the existence of this crime's form - the place where it can be committed.

However, in the national legislation, customs border is one and the same with the Romania's state border.

Thus, it must be specified that the crossing of the state border of Romania is carried out, through the crossing points of the state border open to international traffic. It is also provided that the crossing Romania's border can be done through other places, but only on the basis of bilateral documents concluded by Romania with neighboring states and only in compliance with certain conditions established by mutual agreement.

Even if the places through which the entry / exit from the country is carried out are regulated by the state border legislation, the means of transport and goods crossing border will be done in compliance with the provisions of the customs regime.

Goods, luggage and persons customs control will be carried out after the control of documents for crossing the border state (art. 8 of O.UG. 105/2001 on the Romania's border state published in the Official Gazette of Romania no. 352 of June 30, 2001).

In the case of other forms smuggling crime, goods or merchandise category to be placed under a customs procedure includes any goods or merchandise which has been assigned a customs destination and which are placed under one of the two customs procedures - suspensive or economic - (Art. 107 of Law no. 86/2006). Subsequently, depending on the type of goods and the customs regime that can be used, the National Agency for Fiscal Administration may establish, by decision, the competence to carry out customs control and to apply customs regulations only for some customs offices (Art. 83 of Law no. 86/2006).

In addition, it should be noted that goods or merchandise customs value covers: the costs of transporting the goods to the Romanian border, the costs of loading, unloading and handling, related to transport, of imported goods related to the external route and the cost of insurance on the external route (Art.56 paragraph 2 of Law no. 86/2006).

With regard to the assimilated variant, it can be seen that in order to constitute crime, it must be proved by the criminal investigation bodies that the person in question knew that the goods came from smuggling.

From our point of view, assimilated smuggling crime is similar to concealment crime because of its material element which consists in collecting, holding, producing, transporting, taking over, storing, handing over, selling and selling.

Regarding the goods subject to excise duties, we mention that excise duties are special taxes levied directly or indirectly on the consumption of certain products including alcohol and alcoholic beverages, processed tobacco and energy products and electricity (Art.335 paragraph 2 of Law no. 255 / 2015 on the Fiscal Code, published in the Official Gazette of Romania No. 688 of September 10, 2015).

Another form of smuggling is qualified smuggling and involves the unlawful entry/exit across the border of weapons, ammunition, explosives, restricted explosive precursors, drugs, precursors, nuclear or other radioactive materials, toxic substances, waste, residues or hazardous chemicals.

With regard to this smuggling crime form, it can be seen that consists in the border croosing of certain goods or merchandise without the right to cross the border state.

In conclusion, regardless of whether it is a simple or qualified form, smuggling crime consists in crossing over the romania border state, without paying customs duties, certain categories of goods in order to obtain significant material gains.

As can be seen, smuggling crime, in romanian law, refers exclusively to the illegal goods's crossing borders for which the law established to pay customs duties. Human beings are not included in the category of such goods, as they are naturally subject to a different rule, which expressly stipulates the conditions they must fulfill in order to move freely and legally, and the persons that help the ones who do not fulfill the criteria established by law, to illegally enter/exit romanian territory, represents the crime of trafficking in migrants and is provided in art. 263 Criminal Code, which we will analyze further.

MIGRANTS TRAFFICKING CRIME

Migrant trafficking crime is the criminal act which consists in recruiting, guiding, transporting, transferring or sheltering a person, in order to fraudulently cross Romania's border state (art.263, alin.1).

This is more serious if it has been committed:

a) in order to obtain, directly or indirectly, a material benefit;

b) by means that endanger the life, integrity or health of the migrant;

c) by subjecting the migrant to inhuman or degrading treatment, the punishment is imprisonment from 3 to 10 years and the prohibition of exercising certain rights(art.263, alin.2).

Given the legal text, we appreciate that the migrants trafficking crime material element consists in several alternative actions, which is why we will analyze all of them.

Recruitment means the election of a person who has migrant status for the purpose of illegally crossing a state border.

Guidance consists in directing, giving a direction to the migrant in order to illegaly cross the border. Guiding involves being with the migrant and driving him or her across the border.

Thus, the guide is the crime's author that effectively illegaly crosses state border.

Persons's transport represents migrant's moving from one place to another by means of transport.

The transfer consists in migrant's handing over from one person to another in order to facilitate the entry, the stay or the exit from the territory of a state.

The shelter is the migrant's accommodation in order not to be uncovered until the moment when the transport will take place.

The state border of Romania delimits the romanian's territory from the territory of each of the neighboring states and the territorial sea of Romania from the contiguous zone. Vertically, the state border delimits the airspace and the basement of the Romanian state from the airspace and the basement of each of the neighboring states (art. 2 of GEO no. 105/2001 regarding the state border of Romania).

The quality of migrant is attributed to a stateless person who is in transit on the romanian's territory and if he fraudulently crosses the state border, on his own, he performs the specific actions of illegal border crossing (art. 262 Criminal Code).

MIGRANTS SMUGGLING

According to the Palermo Protocol against Migrants Illegal Trafficking by land, air and sea, in addition to the United Nations Convention against Transboundary Organized Crime - *migrants smuggling* – "means the help, for the purpose of obtaining, directly or indirectly, a financial or material benefit, the unlawful entry into a european state of a person who is not a national or a permanent resident of that state "(Article 3 (a) - Palermo Protocol against Illegal Trafficking in Migrants by land, air and sea, in addition to the United Nations Convention against Organized Cross-Border Crime; the text of the act published in the Official Gazette of Romania no. 813 of November 8, 2002).

Under the provisions of the same document, *human smuggling* consists in the existence of the voluntary agreement that the trafficked person has consented to, the illegal activity taking place when the migrant, due to legal restrictions and lack of knowledge about the legal ways of departure, cannot travel free across the borders of the country.

Thus, they also pay voluntary the smuggler to help them cross the border.

In the judicial practice of the romanian courts, the first mention of the notion of *migrants smuggling* appears in the Civil Sentence no. 1437/13.10.2009 of the Galați Court, by which the request formulated by the General Directorate of Passports Bucharest was resolved, which had as object the request to restrict the exercise of the right to free movement in Turkey of a person who was returned from Turkey on of 05.01.2009, based on the Readmission Agreement concluded by Romania with Turkey regarding the readmission of the citizens of their states and of the aliens in an illegal situation on the territories of these states published in the Official Gazette no. 604 of 06.07.2004. The provisions of this Agreement provide that each contracting part shall readmit, at the request of the other part, without special formalities, persons who do not or no longer fulfill the legal conditions to enter or reside in the territory of the requesting contracting state, prove or be reasonably presumed that such persons are nationals of requesting state.

The court also noted that this agreement is based on the desire to prevent illegal migration, *migrants smuggling* and human beings trafficking, respecting the inviolable rights of individuals, regardless of ethnicity, nationality, religion, color, sex, disability.

In another case, by the criminal sentence no. 29 of 26.05.2020, the Iași Appeal Court accepted german authorities's request for the execution of the european arrest warrant based on the national arrest warrant issued for participation as an accomplice in the " *migrants smuggling crime* in groups and dangerous *migrants smuggling*, repeatedly and profitably ", provided for in sections 97 II, 96 I and 95 I of the German Law of Residence.

One of the conditions for admitting the execution of a european arrest warrant is the finding of the existence of double criminality, respectively that the crime for which the requested person is being investigated is provided by the criminal law of both the requesting state and the requested state.

Thus, the romanian court considered this condition fulfilled, considering that *the migrants smuggling* crime in groups and dangerous migrants smuggling has the correspondent in the romanian legislation in the migrants trafficking crime, provided and sanctioned by art. 263 para. 1 and 2 of the Criminal Code and not in the smuggling crime provided and punished by art. 270 or art. 274 of Law no. 86/2006 on the Romanian Customs Code.

At the same time, by the criminal Sentence no. 81/F/ 06.05.2019 the Galati Appeal Court admitted the request of the hungarian authorities for the execution of the european arrest warrant based on the warrant for the execution of the sentence for 2 years imprisonment for committing the *migrants smuggling* crime provided by art. 353 of the Hungarian Criminal Code, having a correspondent in art. 263 para. 2 lit. a - Romania's Criminal Code in the migrants trafficking crime.

Analyzing the provisions of art. 353 of the Hungarian Criminal Code, we found that it is called "Clandestine Immigration Channel" and not "*migrants smuggling* " and is the act of

a person who provides support to another person for crossing the state border in violation of applicable law (http: // codexpenal.just.ro/laws/Cod-Penal-Ungaria-RO.html, accessed on 28.11.2021).

Furthermore, in the same legal text, it is provided that if the act of illegal immigrants trafficking is carried out for the purpose or for financial benefits or involves several persons for crossing the state border, as well as if the criminal activity of trafficking is carried out by torturing the person trafficked, carrying or displaying a deadly weapon or in association with other persons, the penalty provided for is higher.

Considering what romanian courts retained in the judicial cooperation in criminal matters with other Member States, we appreciate that the phrase *migrants smuggling* has the correspondent in the romanian legislation in the crime of migrants trafficking and not in the crime of smuggling.

At the same time, we believe that the notion of *migrants smuggling* is not regulated as a crime in its own right in the legislation of any of the Member States, being essentially just the name of a phenomenon that has grown in Europe amid the crisis of illegal migration.

CONCLUSIONS

In conclusion, the notion of *migrants smuggling* has been used at european level to refer to a new concept that involves the voluntary person's consent to be trafficked, paying sums of money in this regard, and illegal activity takes place when the migrant, due to legal restrictions and lack of knowledge about the legal ways of departure, cannot move freely across the country's borders.

Referring exclusively to the examples from judicial practice, we have found that the term *migrants smuggling* is not provided for as an independent crime, although the requests for judicial cooperation in criminal matters are specified, when invoking the legal basis of the effective cooperation procedure, the legal text indicated refers to migrants trafficking and not to smuggling.

In the same note, the romanian judicial authorities consider double criminality's condition fulfilled and set as the correspondent in the romanian legislation for *migrants smuggling* the migrant trafficking crime provided and sanctioned by art. 263 para. 1 and 2 of the Criminal Code and not the smuggling crime provided and punished by art. 270 or art. 274 of Law no. 86/2006 on the Romanian Customs Code.

We appreciate that the romanian courts have taken the correct decision on the grounds that the smuggling crime, in national law, refers exclusively to the illegal crossing of borders of goods that have established by law a material value for which the person transporting them must pay customs duties, category in which human beings are not included.

Human beings are naturally subject to a different legal regime, which expressly stipulates the conditions they must fulfill in order to move freely, legally, and the aid given to persons who do not meet the criteria established by law for entry, stay and legal exit in / from the Romania's territory, represents the migrants trafficking crime and is provided in art. 263 Criminal Code.

If it is decided at european level to classify the concept of *migrants smuggling* as an independent crime, the activity will be a long one, as it must first be clarified whether the act in question relates to a certain group of legal provisions infringements (crimes) or if it is simply an immoral act. Subsequently, the existence of the degree of social danger must be established in order to determine whether it constitutes an crime or delict.

In summary, we consider that it is not appropriate to qualify as a crime the term *migrants smuggling*, because a person who commits such an illegal activity does not go unpunished, as long as the criminal law provides for the smuggling crime, respectively the crime migrants trafficking crime, which is why *migrants smuggling* must remain an immoral act of an european phenomenon.

BIBLIOGRAPHY

1. Florin Sandu, Smuggling – An organized crime component, National Publishing House, 1997;
2. Costica Voicu, Business Criminal Law, Rosetti Publishing House, Bucharest 2002;
3. Law no. 141/1997 on the Romanian Customs Code, published in the Official Gazette of Romania no. 180 of August 1, 1997;
4. O.UG. 105/2001 regarding the state border of Romania published in the Official Gazette of Romania no. 352 of June 30, 2001, published in the Official Gazette of Romania no. 352 of June 30, 2001;
5. Law no. 86/2006 on the Romanian Customs Code published in the Official Gazette of Romania, Part I no. 350/19 April 2006;
6. Law no. 286/2009 on the Criminal Code published in the Official Gazette, Part I no. 510 of July 24, 2009, as subsequently amended and supplemented;
7. Law no. 255/2015 on the Fiscal Code, published in the Official Gazette of Romania no. 688 of September 10, 2015;
8. Palermo Protocol against Illegal Trafficking in Migrants by land, air and sea, in addition to the United Nations Convention against Organized Cross-Border Crime; the text of the act published in the Official Gazette of Romania no. 813 of November 8, 2002;
9. The readmission agreement concluded by Romania with Turkey regarding the readmission of the citizens of their states and of the aliens in an illegal situation on the territories of these states published in the Official Gazette no. 604 of 06.07.2004;
10. Civil Sentence no. 1437 of 13.10.2009 of the Galați Court, www.lege5.ro, consulted on 01.12.2021;
11. Criminal Sentence no. 29 of 26.05.2020, Iași Appeal Court, www.lege5.ro, consulted on 01.12.2021;
12. Criminal Sentence no. 81 / F dated 06.05.2019 Galați Appeal Court, consulted on 01.12.2021;
13. https://europa.eu/youreurope/business/taxation/excise-duties-eu/product-excise duties / index_ro.htm, accessed 27.09.2021);
14. https://www.europarl.europa.eu/news/ro/headlines/priorities/imigratia/20170629STO78631/criza-migratiei-in-europa, accessed on 05.12.2021;
15. www.lege5.ro, consulted on 01.12.2021;
16. http://codexpenal.just.ro/laws/Cod-Penal-Ungaria-RO.html, accessed on 28.11.2021.

AGORA International Journal of Juridical Sciences, http://univagora.ro/jour/index.php/aijjs
ISSN 1843-570X, E-ISSN 2067-7677
No. 2 (2021), pp. 83-85

LOCAL AND NATIONAL DEVELOPMENT IN THE FIELD OF FOOD SECURITY: THE IMPORTANCE AND BENEFITS OF CERTIFICATION THROUGH NATIONAL AND EUROPEAN QUALITY SCHEMES

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ABSTRACT

Quality schemes or quality standards are a way of recognizing the quality of agri-food products that have a sensory characteristic influenced by the geographical area. Among the pro arguments of the optional certification through quality schemes of agri-food products, we mention: the awareness of the European consumer on the quality of Romanian agri-food products with tradition and opportunities to access European funds.

KEYWORDS: national and international recognition, quality schemes, agri-food products, voluntary authorization, food security.

INTRODUCTION

National and European agri-food quality schemes involve the recognition of very well-defined technical specifications for agri-food products through voluntary authorization by producers.

The quality schemes with national recognition are: Romanian traditional products, Romanian consecrated recipes and Mountain product. The quality schemes with European recognition are: Protected geographical indication, Protected designation of origin and Traditional specialty guaranteed.

MATERIAL AND METHOD

The materials used in writing this paper consist of national and international normative acts, web pages, EU databases (e-Ambrosia - the EU geographical indications register) and romanian databases (National Register of Traditional Products and National Register of Romanian consecrated recipes). The methods used the logical and sociological method and the analytical method. They had the role of performing a systematic analysis of the information from the studied sources like the arhive of some national normative acts in order to elaborate the points of view and the conclusions of this paper.

RESULTS AND DISCUSSION

The benefits of registering agri-food products on national and European quality schemes are a good positioning of the Romanian economic operators in the confrontation with the other competitors in the field and removing barriers to entry in foreign markets and strengthening trade in the food industry. There is also the fact that within these quality schemes the compatibility, quality and performance of agri-food products and services are improving. The products certified as *Romanian consecrated recipes* imply a national recognition. There is a list with only 33 products approved by Ministry of Agriculture and Rural Development, with the mention that only these can be certified as coming from a romanian consecrated recipe.

Acording to statistical analysis regarding *Traditional romanian products* there are 715 certified products in Romania. Most of the certificates can be found in the counties: Brașov, Alba, Maramureș and Argeș. The counties with the least certified products being: Bacău, Dâmbovița, Giurgiu, Harghita and Mehedinți.

For all the quality schemes mentioned above, the manufacturer must comply with the requirements for proof of the quality of the product (eg it is forbidden to contain additives or preservatives) and all aspects must be confirmed by test reports.

If we channel our analysis towards the international recognition of quality schemes in the field of agri-food products it is necessary to mention the implementation and certification of the following quality scheme: *Protected geographical indication, Protected designation of origin and Traditional specialty guaranteed.*

Acording to the EU database e-Ambrosia: *„there are 1564 food products certified as Protected geographical indication, Protected designation of origin or Traditional specialty guaranteed”* (e-Ambrosia - https://ec.europa.eu/info/food-farming-fisheries/food-safety-and-quality/certification/quality-labels/geographical-indications-register/). At national level, in Romania there are 9 products certified by the European Commission on these quality schemes with international recognition; very advanced being France with 258 products certified.

In order to be recognized within one of these european quality schemes, an agri-food product must carry out a procedure for creating a specification file that which regulates who is the target group applying for certification, the area where the product is produced and the characteristics of that product.

The characteristics of the agri-food product require the specific delimitation of the product particularities, but with a correlation of them with the geographical area. For example: the product feta cheese is recognized as *Protected Designation of Origin.*

This means that milk used for the production of feta cheese ”*must come exclusively from sheep and goats in the Greek regions of West Macedonia, Central Macedonia, East Macedonia, Thrace, Epirus, Thessaly, Central Greece, Peloponnese, and the department of Lesbos, which is an island in the northeastern Aegean Sea”* (Article 1 of Ministerial Order 313025/1994 in Greece).

Acording to World Intelectual Property Organization: ”*Even with the Protected Designation of Origin secured, Feta cheese producers in Greece continue to face challenges due to a limited number of companies in other countries. “In most cases these companies have manufacturing facilities outside of the EU,” the Embassy of Greece in Tokyo explained in an email interview with the World Intelectual Property Organization Japan Office, and that “…in countries where the origin of the product does not have to be mentioned on the label, it is difficult to know where the products originate from”* (Article Defining a Name’s Origin: The Case of Feta, World Intelectual Property Organization)

Recognized as intellectual property, geographical indications are playing an increasingly important role in trade negotiations between the European Union and other countries.

The *Protected geographical indication* emphasizes the relationship between a specific geographical region and the name of the product, if a certain quality, reputation or other characteristic can be essentially attributed to the geographical origin of the product while the product names registered as *Protected designation of origin* are those that have the strongest links to the location where they were registered.

The traditional specialty guaranteed highlights traditional aspects, such as how the product is manufactured or its composition, without linking it to a specific geographical area. The name of a product registered as TSG protects it against counterfeiting and misuse.

As part of the European Union intellectual property rights system, product names registered as *Protected geographical indication* are legally protected against imitation and misuse in the EU and in third countries where a specific protection agreement has been signed.

CONCLUSIONS

The importance of voluntary certification of agri-food products through national and European quality schemes implies European consumer awareness on the quality of traditional Romanian agri-food products and a balanced quality/price ratio of products in this category.

There is also a signifiant development at local, regional and national level that consists in opportunities to access the European market and beyond and tools for identifying and promoting products with specific characteristics.

For all quality systems, the competent national authorities of each EU country shall take the necessary measures to protect the names registered in their territory. They should also prevent and stop the illegal production or marketing of products using such a name.

BIBLIOGRAPHY

1. Archive of Order no. 690/2004, Romania
2. Archive of the Order no. 724/2013 on the attestation of traditional products, Romania
3. Romanian traditional products 2005-2013 - by counties
4. National Register of Traditional Products 2014-2021 - https://www.madr.ro/industrie-alimentara/produse-traditionale-romanesti.html
5. National Register of Romanian consecrated recipes - https://www.madr.ro/industrie-alimentara/retete-consacrate-romanesti.html
6. Article Defining a Name's Origin: The Case of Feta, World Intelectual Property Organization https://www.wipo.int/ipadvantage/en/details.jsp?id=5578, 2015
7. EU Database: e-Ambrosia - the EU geographical indications register - https://ec.europa.eu/info/food-farming-fisheries/food-safety-and-quality/certification/quality-labels/geographical-indications-register/