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NOTES ON THE ASSIGNMENT OF CONTRACT IN THE NEW ROMANIAN CIVIL CODE

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ABSTRACT

Reduced to its basic functioning, the legal operation of assignment of contract implies a global transfer of the contractual position of one party, assignor, from a contract concluded with the ceded contractor, to a third party, assignee. If the legal operation as such does not seem to raise complications, it was an object of dispute in Romanian civil law even before the New Romanian Civil Code in force since 2011, considering the personal nature of the obligation relationship, especially with regard to the passive element of the obligation. Considering the debates around this topic in the legal doctrine of the Romanian Civil Code of 1864 and following certain arguments advanced in French civil law, the New Romanian Civil Code explicitly recognizes the assignment of contract as a distinct legal figure with specific effects in Articles 1315-1320. This article intends to analyse the legal regime of the assignment of contract, from the debates in the legal doctrine around this topic in both Romanian and other legal systems to the specific legal provisions which address the assignment of contract, starting with the notion of assignment of contract, the form of the assignment, the moment in which the assignment occurs, the effects the transfer has on the assignor, the legal exceptions which can be formulated by the ceded contractor and the warranty obligations of the assignor.

KEYWORDS: assignment of contract, cession of contract, transfer of contract, assignment of rights, obligation

Introduction

As article 1315 of the New Romanian Civil Code states, assignment of contract is a legal operation in which one of the parties of a contract substitutes a third party in its position in the relationships generated by the contract. As such, the assignment of contract implies a global transfer of a third party in the contractual place of a party, distinct from the substitution of a third party in the obligation relationship which may be accomplished through means of transfer of obligations. During the previous Romanian Civil Code, considered independently, this operation was a matter of debate, in contrast to the case when it had a subsequent character when it was accepted, for example, when transferring a business fund (Vasilescu, 2017, p. 47).

Two opposing opinions structured the legal debate on the subject. One opinion considered that, on the basis of the personal character of the obligation relationship, the transfer of the passive implied by obligations is inadmissible (Dogaru, Drăghici, 2014, pp. 238-239). As such, the assignment of contract was not considered a means to transfer the contractual position of one of the parties to a third party, but a form of novation, generating a new obligation relationship. In addition to this, the entire assignment of contract, which was a matter of debates, could have been achieved by a number of undisputed operations such as the assignment of rights and personal subrogation for the transfer of the personal right and for the transfer of the obligation the personal subrogation, novation through the change of debtor, assignment of rights, or contract in favour of third parties, as means of transferring and transforming obligations (Ciochină-Barbu, Jora, 2020, pp. 358-359). Even if the assignment of contract was realized through these means, the substitution of the original debtor with a new one was to be conditioned by the acceptance of the creditor (Pop, Popa, Vidu, 2020, pp. 516-517).

The opposing opinion considered that the assignment of contract was entirely admissible and a distinct legal figure from the subsequent operations such as personal subrogation, assignment of rights, novation or contract in favour of third parties (Codrea, 2018, pp. 164-178), to which it could not have been properly reduced (Veress, 2019, pp. 233-235). In support of this last opinion there are legislative solutions from different European civil regulations, such as articles 1216-1216-3 from the French Civil Code, articles 1406-1410 from the Italian Civil Code or articles 424-427 from the Portuguese Civil Code and also the Draft Common Frame of Reference explicitly states in article III. 5:302 (1) that *A party to a contractual relationship may agree with a third person, with the consent of the other party to the contractual relationship, that that person is to be substituted as a party to the relationship* (Vasilescu, 2017, p. 47). The 8th Section of the Chapter I, Book V, Title II, articles 1315-1320 of the New Romanian Civil Code is inspired by such regulations which recognize the assignment of contract as a distinct legal figure, with particular effects when related to binding force of contracts and opposability of contracts to third parties (Pop, Popa, Vidu, 2020, pp. 518-520) .

The notion of assignment of contract

The legal definition provided in article 1315 (1) of the New Romanian Civil Code states that the legal operation of assignment of contract implies a global transfer of the contractual position of one party, assignor, from a contract concluded with the ceded contractor, to a third party, assignee (Baias, Chelaru, Constantinovici, Macovei, 2021, pp. 1572-1573). Therefore, assignment of contract is a bilateral agreement between assignor and assignee, but since the approval of the ceded contractual party is also required, the contract can be concluded between the three parties. However, the assignment of contract is valid and binding even when concluded between assignor and assignee, while the approval of the third party is required only for the assignment of contract to produce its effects towards the ceded contractor (Oglindă, 2017, p. 386).

The legal doctrine has noted that the assignment of contract may occur in three different forms – as a main operation, as a subsequent operation, or as an effect of the exercise of a legal right (Pop, Popa, Vidu, 2020, p. 522).

Firstly, as a main operation, the assignment of contract can be concluded as a legal act between the three parties, assignor, assignee and ceded contractor, or as a contract between assignor and assignee which is later notified to the ceded contractor if the ceded contractor did not agree to the transfer of contract in advance. As a main operation, the assignment of contract can be seen as an autonomous operation, being related only to the original contract and formally independent of any other operations (Almășan, 2018, p. 231).

Secondly, as a subsequent operation, the assignment of contract is part of a main operation with the purpose of transferring property. For example, in the case of transfer of property of a real estate which was previously leased, the lease contract will be assigned to the new owner, as stated in article 1811 of the New Romanian Civil Code, or in the case of a business fund transfer, where the assignment of contract is related to the conditions of the main contract and not to the provisions 1315-1320 of the New Romanian Civil Code (Almășan, 2018, p. 232).

Thirdly, the legal doctrine pointed out that the assignment of contract can occur as a result of the exercise of a legal right, such as the legal or conventional pre-emption right.

Validity conditions

Since assignment of contract is itself a contract, it has to respect all the validity conditions stated in article 1179 (1) of The New Romanian Civil Code required for any contract, such as the conditions required for the ability to conclude contracts, consent, a determined and licit object and cause. With regard to the form, there are no specific requirements, since the assignment of contract is a consensual contract. However, article 1316

of the New Romanian Civil Code states that both the assignment of contract and the acceptance from the ceded contractor must be concluded in the formed required by law for the validity of the ceded contract, otherwise the operation would be completely void.

If the assignment of contract is binding from the moment of its conclusion for its parties, assignor and assignee, in order for the operation to have full effects and attain its purpose of substituting the assignee in the contractual position of the assignor, there has to be an approval of the ceded contractor. The approval of the ceded contractor cannot, however, affect the validity of the operation, but merely its effectiveness (Pop, Popa, Vidu, 2020, pp. 523), even if a distinct opinion was developed in the legal doctrine (Almășan, 2018, pp. 245-246). Even though without the approval of the ceded contractor the assignment of contract cannot produce its specific effects, it is still a valid legal operation, and was named in the legal doctrine an incomplete assignment of contract, in contrast to the complete one which produces full, specific effects. As such, the required approval of the ceded contractor is a condition of opposability, although there is an opposing opinion in the legal doctrine of Romanian, French and Italian legal systems, which consider the approval of the ceded contractor as a validity condition (Romoșan, 2018, pp. 355-356). However, whenever the ceded contract is *intuitu personae*, the approval of the ceded contractor is not required only for opposability but for the validity of the assignment of contract itself. Another condition required by article 1315 (1) of the New Romanian Civil Code is the one regarding the services of the ceded contract – they have to be not yet fully executed.

Effects

When considering the effects of the assignment of contract the approval of the ceded contractor is essential.

Before the approval or in its absence, the assignment of contract is subjected to article 1270 of the New Romanian Civil Code which states the full binding effects between the parties of any concluded contract. In addition to *pacta sunt servanda*, article 1320 (1) of the New Romanian Civil Code demands from the assignor to ensure the assignee of the validity of the ceded contract, which implies legally formed contractual rights and obligations. The assignor may be considered a personal guarantor if he also ensures the assignee of the performance of the ceded contract, as stated in article 1320 (2) of the New Romanian Civil Code.

Towards the ceded contractor, in the absence or before his approval, the assignment of contract does not have any effect. Article 1318 (2) of the New Romanian Civil Code states that if the ceded contractor explicitly refuses to release the assignor of his contractual duties, the assignor is liable whenever the assignee does not perform the ceded contract. In this case, the assignment of contract, since it does not transfer the contractual obligations to the assignee but only the contractual right, has, between assignor and assignee, the effects of an assignment of rights.

After the approval of the ceded contractor, the assignment of contract has full effects. The approval must be given in the form required for the assignment of contract, according to article 1316 of the New Romanian Civil Code. The approval may be included in the assignment of contract, or it can be given separately, either before or after the assignment of contract, as stated in article 1317 of the New Romanian Civil Code. The moment in which the assignment of contract is considered concluded overlaps with the moment in which it is opposable to the ceded contractor – either in the moment of the approval, or in the moment of the notification of the ceded contractor.

After the approval of the ceded contractor, the assignment of contract has full effects between its parties, the assignor and assignee, since it is subjected to article 1270 of the New Romanian Civil Code. Also, as a general rule, the assignor, after the approval of the ceded contractor, is released of his obligations deriving from the original contract, as stated in article 1318 (1) of the New Romanian Civil Code. As an exception, however, if the ceded contractor

does not release the assignor, he will have two debtors, both the assignor and the assignee. Therefore, if the assignee does not perform the original contract, the ceded contractor can hold the assignor liable within 15 days from the moment of non-performance or from the moment in which he knew the non-performance, with the risk of losing his right of recourse against the assignor, as stated in article 1318 (2).

Between the assignee and the ceded contractor there will be the effects of the original contract, with several exceptions such as the inability of the ceded contractor to oppose to the assignee any vice of consent or any other defences or exceptions risen from the original contract, unless he reserved this right when he approved of the assignment of contract, as stated in article 1319 of the New Romanian Civil Code.

Conclusions

Following the initiatives in other legal systems of introducing the assignment of contract in civil regulations such as the French, Italian, Portuguese or even considering the recognition of this legal figure in the Draft Common Frame of Reference, the New Romanian Civil Code addresses this legal operation in articles 1315-1320. Following the same sources and aligned to the dominant opinion in the legal doctrine of the previous Civil Code, in the new regulation the assignment of contract is recognized a specific status, distinct from several operations to which it cannot be properly reduced to, such as personal subrogation, assignment of rights, novation or contract in favour of third parties.

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AN EMPIRICAL STUDY OF EMBEZZLEMENT CASES IN CHINA

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ABSTRACT

Using the method of empirical research, this paper selects 194 valid judgments of embezzlement cases published by Chinese officials in 2019 as samples to explore the current situation of the subject, object and sentencing results of embezzlement cases. The analysis discloses some characteristics such as high educational level of criminals and high proportion of state organ staffs and grass-roots public servants. At the same time, many problems are revealed, such as the division of powers and responsibilities within the enterprises is not clear, as well as the external supervision in key fields is not enough, which all provide conditions for embezzlement crime. In addition, the phenomenon of unfair sentencing is obvious, and the sentencing mode is not accurately applied in judicial practice at this stage. Therefore, a more reasonable, accurate and effective embezzlement crime prevention system needs to be established in the future.

KEYWORDS: *embezzlement, empirical study, criminal law, China*

INTRODUCTION

The crime of embezzlement not only seriously infringes on the ownership of public property, but also tarnishes the image of state workers and undermines the position and prestige of the government in the hearts of the people. As one of the most serious corruption crimes, its harm can not be underestimated.

Looking at the work reports from Chinese Supreme People's Procuratorate and the Supreme People's Court in recent years, as it is shown in Figure 1, in 2013, there were 29,000 cases of dereliction of duty, embezzlement and bribery crimes as well as 31,000 state staffs participated in. In 2014, the number of embezzlement related criminal cases and criminals reached 31,000 and 44,000 respectively. In 2015, the data were 34,000 cases and 49,000 criminals, with a year-on-year increase of 9.7% and 11.4% respectively. In 2016, 45,000 embezzlement and bribery cases and 63,000 criminals were concluded, with a year-on-year increase of 32.4% and 28.6%. In 2017, about 56,000 cases and 76,000 criminals were concluded, with a year-on-year increase of 24.4% and 20.6% respectively. In brief, from 2013 to 2017, the number of embezzlement and bribery crimes tried by the court showed an upward trend, both in terms of the number of cases and the number of criminals involved. However, from the analysis of the data and information in 2018, the total number of various corruption cases was 28,000 and the number of individuals involved dropped to 33,000. It can be clearly seen that China has made great changes in the level of corruption crimes. In 2019, 25,000 embezzlement cases and 29,000 criminals were concluded, with a year-on-year decrease of 10.7% and 12.1%. In 2020, 22,000 embezzlement and bribery cases and 26,000 criminals were concluded, a year-on-year decrease of 12% and 10.3%.

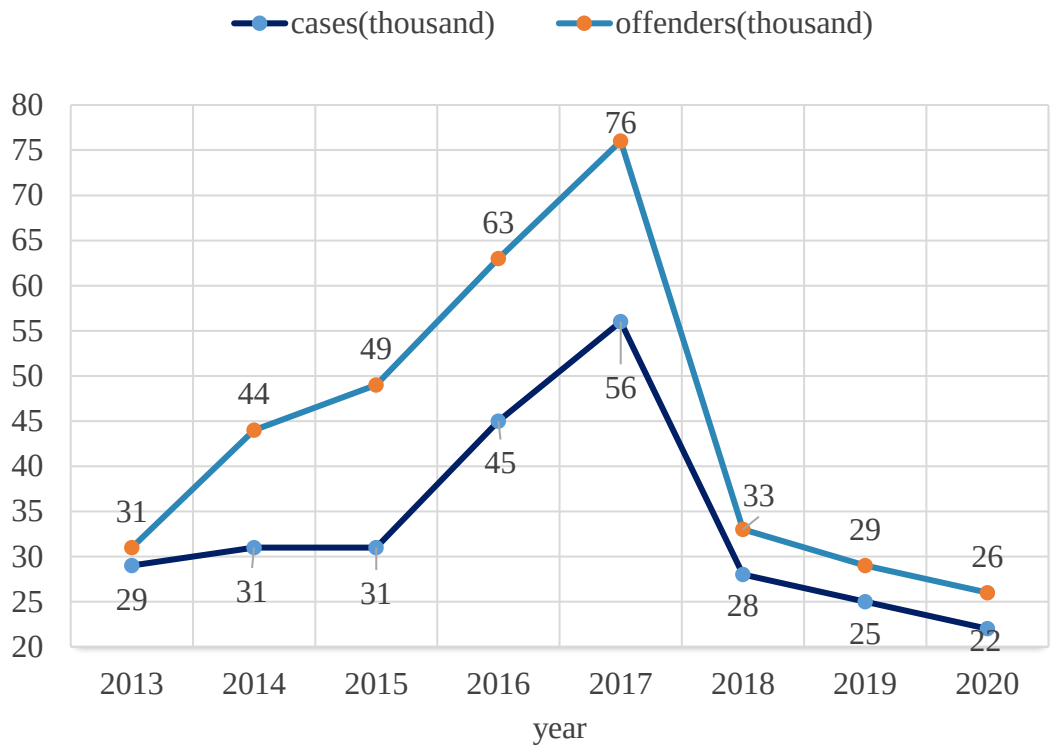


Figure 1 the trend of embezzlement cases in China

Since the 18th National Congress of the Communist Party of China, the crackdown on corruption has been strengthened. The revision of the conviction and sentencing standards of corruption crime in the Criminal Law Amendment (IX) enforced in 2015, as well as the interpretation on several issues of applicable law in handling criminal cases of embezzlement and bribery enforced in 2016 show the determination to governance corruption.

In recent years, the embezzlement cases concluded by the court show a downward trend year by year, which means that the application of new legislation has achieved certain results. While giving it positive evaluation, it should also be noted that the absolute number of embezzlement cases is still large at this stage, and the anti-corruption work should not be lax. As a quite serious type of crime in the current society, embezzlement has the necessity of in-depth exploration, which should be paid continuous attention and comprehensive reflection.

METHOD

I.1 Sample selection

All the judgments are collected from China Judgments Online (https://wenshu.court.gov.cn/). Through the advanced search engine of this network, the paper selects five conditions in turn, namely: case type (criminal case), year of judgment (2019), cause of case (embezzlement crime), court province (S province) and document type (judgment). Based on this, 219 judgments are selected, including 203 criminal first instance

judgments, 15 criminal second instance judgments and 1 criminal retrial judgment. It is found that 15 judgments belong to "other circumstances that the people's court deems inappropriate to publish on the Internet", and 2 judgments are repeated, so they are eliminated.

After that, in the process of carefully reading 202 judgments one by one and comparing the texts, five cases were charged with embezzlement in the prosecution stage, but the court finally decided to "misappropriate public funds" and "abuse of power", and another three cases were approved as embezzlement in the first instance. However, after appealing, the court of second instance revised the results of the first instance to define them as "official offence" and "private distribution of state-owned assets" and so on, and there is a large gap with other samples, so it is deleted.

Through a series of tests on the samples, the final number of samples is 194, including 181 first instance judgments, 12 second instance judgments and 1 retrial judgment.

Compared with other text specifications, the requirements for the content and format of the judgment are relatively high, and there are many contents that are difficult to be automatically recognized by intelligent devices of computers. Undoubtedly, this study pays high attention to variables: the amount of embezzlement, sentencing results, and criminal circumstances. Especially the amount of embezzlement, while in many cases it is clearly given, in some cases the total amount is still not counted in the final conclusion, and need to be traced back to the text of judgments. In order to make the statistics as accurate and precise as possible, such key information is manually verified by manual comparison.

It should be noted that in some judgments, more detailed information is recorded, involving nationality, gender, educational background, Party member status, etc. These informations are also entered in the sample statistics, but the missing value is too high. Such as "Party member status", only 43 judgments in the sample contained that. Such data were not representative enough, so they were not chosen to use in the cartographic analysis stage.

I.2 Question setting

Based on the needs of the research purpose, firstly, this paper designs the following four questions around the subject of embezzlement cases: 1. The distribution of the number of criminals in each age range; 2. Educational background of the offender; 3. Identity of criminal subjects; 3. Whether it is a joint crime. In this paper, the age range is divided into four groups: 26-35 years old, 36-45 years old, 46-55 years old, 56 years old and above. According to the educational level of criminals, this paper divides them into three groups based on Chinese education stages, namely high education, secondary education and compulsory education. As for the identity of criminals, this paper divides them into four categories. In order to facilitate the description and analysis of facts, they are briefly described, including staff of state organs, staff of state-owned enterprises or institutions, grass-roots public servants, and non-public officials (i.e. accomplices). For the question of joint or individual crime, after the completion of sample statistics, it is found that individuals of joint crimes ranges from 2 to 5. Therefore, according to the actual situation, the number of joint crimes is divided into 5 categories: 1, 2, 3, 4 and 5.

Secondly, this paper designs the following two questions around the objective aspects of embezzlement cases: 1. The means of illegal possession of public property; 2. Field of public property. According to Article 382 of the Criminal Law Amendment (IX), if state functionaries take advantage of their position rights to embezzle public finance or other people's private goods by defraud or steal, they will constitute the crime of embezzlement.

Therefore, this paper divides the means into four types: defrauding, encroaching, stealing and other means. With regard to the division of the amount of embezzlement, this paper adopts the classification standard of the official interpretation, and divides the amount of embezzlement into four stalls: 10,000-30,000 yuan (or only other serious circumstances), 30,000-200,000 yuan, 200,000-3 million yuan, 3 million yuan and above. According to the basic facts described in the judgment, the fields of embezzled state-owned property are divided in detail and summarized into 12 types: animal breeding, poverty alleviation and disaster relief, operation of state-owned enterprises / institutions, agricultural and forestry projects, debt / tax management, ecological governance, public security management, medical and health care, civil affairs subsidies, land acquisition and demolition, education and scientific research, construction project.

Finally, this paper designs the following two questions around the sentencing of embezzlement cases: 1. The number of embezzlement cases in different sentencing intervals; 2. Sentencing results comparison. There need to be highlighted that the specific length of sentencing is based on the fact that both criminal detention and fixed-term imprisonment are regarded as free punishment and principal punishment (*Zhou, 2020, p.47*). Next, with reference to the relevant provisions of the Criminal Law, this paper divides the length of declared punishment into three intervals, that is, less than 3 years (including 3 years); more than 3 years but less than 10 years (including 10 years); more than 10 years.

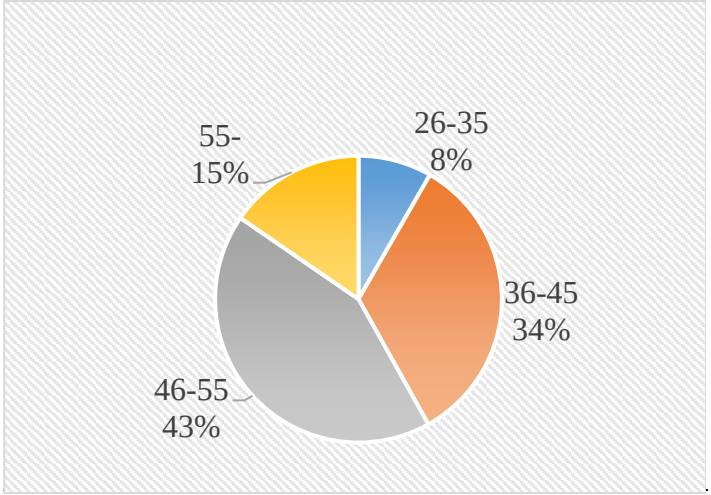
FACTS AND ANALYSIS

In the following part, this paper will describe the basic facts of the cases from the three dimensions, that is, subject of embezzlement, objective aspect of embezzlement, and sentencing results. Each part would be presented as the most intuitive tables and statistical charts as far as possible, and make a preliminary analysis to explore the possible explanation of this situation.

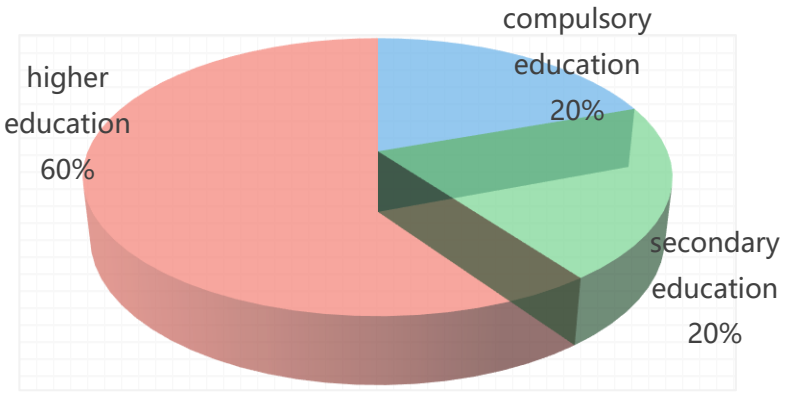
II.1 Subject of embezzlement

As shown in Table 1 and Figure 2, there are 253 criminals whose birth date is clearly recorded in the sample. The youngest was 27 years old and the oldest was 67 years old, with an average age of 47.2. Among them, the highest proportion is the group aged 46-55 (108 criminals, accounting for 43%), followed by the group aged 36-45 (85 criminals, accounting for 34%), then is the group aged 55 and over (39 criminals, accounting for 15%), and the group aged 26-35 (21, accounting for 8%) is the least.

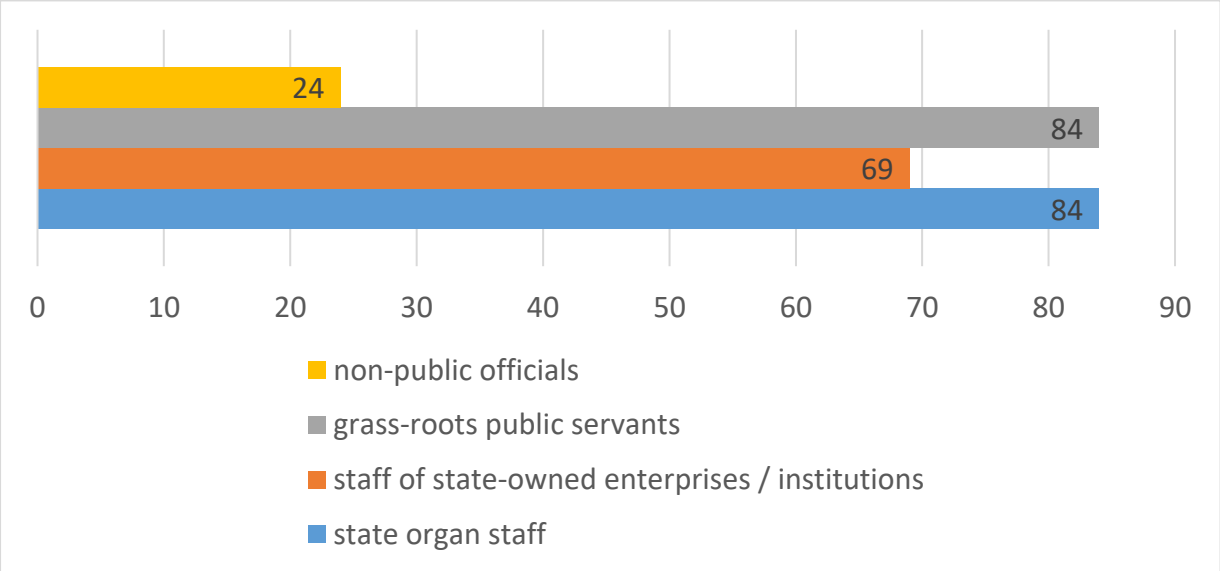
age	number of criminals
26-35	21
36-45	85
46-55	108
56-	39
total	253



The education level can be summarized and classified as shown in Figure 3. The number of criminals which have received high education is the largest (157, accounting for 60.2%); followed by 53 criminals with secondary education, accounting for 20.3%; the number of criminals with only compulsory education is the least (51, accounting for 19.5 %). What needs to be added here is that, among all the cases in the sample, the 5 cases with the highest amount of illegal property, the offenders are all at high education level.



As shown in Figure 4, among the 261 natural criminals, the most two types of identities are the staff of state organs and grass-roots public servants, both of which are 84, accounting for 32.2%, followed by the staff of state-owned enterprises or institutions (69, accounting for 26.4%), and the least are non-public officials (24, accounting for 9.2%), which are only accomplices in joint embezzlement cases.



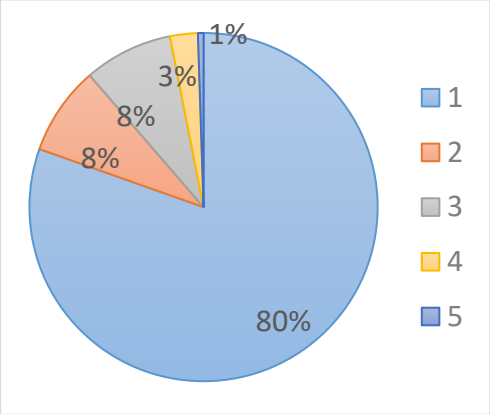
The typical view in theoretical criminal study is that, the subject of embezzlement crime is mainly represented by state agency staff *(Wang and Tang, 2002, p.25)*. Other individuals who are only entrusted by state-owned enterprises to manage and operate state-owned property, or those who do not have the status of state functionaries and engage in public service in accordance with the law are only regarded as the secondary subjects.

However, from the statistics of the sample, it can be seen that the subject identity of "grass-roots public servants" has become a really high-incidence group of embezzlement crimes. This group has just the same largest number of criminals as "staff of state organs ", which are both 84. They assist the Government in public service in several kinds of grass-roots organizations such as villagers' committees, and they are also called "other public servants in accordance with the law".

For embezzlement, the most key issue is the so-called "right of access" *(Li, 2017, p.34)*, such as the accounting, cashier and documents of the villagers' committee or residents' committee, as well as the tax and fine collection of the village head and community leader. The reason why they have become the "hardest hit area" of embezzlement is not that these people are in high power, but that they are closest to national assets. And most of the embezzlers are special funds and materials such as preferential care, poverty alleviation and disaster relief. Therefore, its harmfulness is self-evident.

Table 2 and Figure 5 below disclosure the circumstances of individual and joint embezzlement. Among the 194 cases, 156 of them are individual embezzlement, accounting for 80.41%. 38 cases are joint crimes, accounting for 19.59%. Overall, the number of individual embezzlement cases is far more than that of joint ones.

In addition, two and three people is more commonly seen in joint embezzlement. 16 cases were committed by two persons, accounting for 8.2%, which is the same as the number and proportion of cases committed by three persons; The second is the case of joint crime by four people, with 5 cases, accounting for 2.6%. The least is the case of joint crime by five people, with only 1 case, accounting for 0.52%.



type	numbers of offenders	cases	proportion
individual	1	156	80.41%
joint	2	16	19.59%
	3	16	
	4	5	
	5	1	
total	261	194	100%

Some scholars pointed out that with the gradual improvement of various national systems, it will become more difficult for individuals to easily embezzle state property through institutional loopholes, but there are still opportunities to embezzle through collective cooperation *(Chen, 2019, p.101)*. However, sample statistics reveal a higher proportion of individual crimes. On the one hand, the implementation of embezzlement does not necessarily require a high financial level. Now the level of science and technology is developed. Some behaviors that are difficult for individuals to implement in theory can be easily solved with the help of computer operating system. On the other hand, embezzlement does not require several people to act together, and the "lone wolf" action is usually more hidden. In the sample cases, it is not uncommon for one person to hold several positions, especially in grass-roots organizations, the unclear division of work functions is more significant.

II.2 Objective aspects of embezzlement

The so-called "encroaching" is the use of illegal means to occupy the property of others or public organizations. In the criminal means of misappropriation of property, there are generally three specific acts: (1) it should be handed in but not handed in; (2) it should be recorded but not recorded in the account; (3) illegal resale or unauthorized gift. The word "stealing" is actually taking advantage of the convenience of one's position to steal secrets or property. The core of "defrauding" is to conceal the truth, such as the amount of travel subsidies falsely reported by business travelers, or the unit price of goods falsely reported by purchasers to defraud public funds. Such means are relatively easy to identify in judicial practice, but sometimes "encroaching" means will also have the process of fictitious facts or concealing the truth, but the fictitious facts or concealing the truth is to cover up the fact of embezzlement of public property.

As for now, there is no definite conclusion on "other means" in doctrinal interpretation, such as absconding after state functionaries misappropriate public funds, or accepting a large

amount of property in activities related to public affairs, and so on. Some scholars believe that "other means" should be considered as a "pocket" provision *(Zhao, 2013, p.54)*.

In Table 3, among the 4 types of means of illegal possession of public property, the qualitative embezzlement cases of "defrauding" are the most (105, accounting for 54.1%), followed by "encroaching" (81, accounting for 41.8%), only 6 cases of "stealing", and 2 cases are classified as "other means".

means	cases	proportion
encroaching	81	41.8%
stealing	6	3.1%
defrauding	105	54.1%
other meas	2	1.0%
total	194	100%

It should be noted that, this table is made by combining the contents of the judgment with manual analysis and comparison. Actually, a considerable number of judgments is uncertain in the fact finding of "means of illegal possession of public property". Some judgments expressed it faintly, such as "the defendant took advantage of his position and illegally occupied public property, and his behavior has constituted the crime of embezzlement". Some judgments contained two means, such as "encroaching and defrauding public property". However, through reading and analyzing the cases, it can be found that, "defrauding" is sometimes only used as a cover-up act after encroaching public property, so it is more appropriate to just characterize its means as "encroaching".

In all, clarifying the specific means of illegal possession of public property is of great significance for the conviction of specific crimes. To some extent, judicial practice has encountered difficulties in determining means of embezzlement, which requires clearer and more persuasive explanation.

As shown in Table 4, according to the field of public property, the largest number of embezzlement cases is in the field of "state-owned enterprises / institutions operation", with 39 cases, accounting for 20.1%. Second, there are 34 cases in "construction projects", accounting for 17.5%. The third is "land acquisition and demolition", with 31 cases, accounting for 16.0%. The fourth is "civil affairs subsidies" (24 cases, accounting for 12.4%). The fifth is

field	cases	proportion	rank
Animal breeding	5	2.6%	9（parallel）
poverty alleviation and disaster relief	13	6.7%	6
enterprises/ institutions operation	39	20.1%	1
agricultural and forestry projects	19	9.8%	5
debt/ tax management	2	1.0%	12
ecological governance	3	1.5%	11
public security management	8	4.1%	8
medical and health care	5	2.6%	9（parallel）
civil affairs subsidies	24	12.4%	4
land acquisition and demolition	31	16.0%	3
education and scientific research	11	5.8%	7
construction projects	34	17.5%	2
total	194	100%	/

"agricultural and forestry projects" with 19 cases, accounting for 9.8%. Then followed "poverty alleviation and disaster relief" (13 cases, accounting for 6.7%). "Education and scientific research" has 11 cases, accounting for 5.8%. And then is 8 cases in "public security management" (accounting for 4.1%); There are both 5 cases in "animal breeding" and "medical and health care", accounting for 2.6% respectively. Only 3 cases in "ecological governance" (accounting for 1.5%) and 2 cases in "debt / tax management" (accounting for 1.0%).

As shown in Table 5, among the 10 cases with highest embezzlement amount of more than 3 million yuan (which is regarded as "particularly huge amount"), the field of "state-owned enterprises / institutions operation" also has the largest proportion, with 3 cases, accounting for 30%. "construction projects" and "medical and health care" fields accounting for 20% respectively. The other three belong to "land acquisition and demolition", "education and scientific research" and "agricultural and forestry projects", accounting for 10% respectively. The largest amount of embezzlement in the sample is 31.29862 million yuan, in the field of "construction projects".

embezzlement amount (**million yuan**)	field
31.29862	construction projects
15.1892	Education and scientific research
14.219766	medical and health care
8.144086	construction projects
6.905124	state-owned enterprises / institutions operation
6.679941	state-owned enterprises / institutions operation
4.887605	state-owned enterprises / institutions operation
4.015169	agricultural and forestry projects
3.506	medical and health care
3.1045	land acquisition and demolition

It can be seen that in fields such as the operation of state-owned enterprises / institutions and construction projects, not only embezzlement cases occur frequently, but also the amount of embezzlement is huge, which needs greater attention and stronger supervision.

II.3 Sentencing results

The Criminal Law in 1997 stipulated that whoever embezzles more than 5,000 yuan but less than 50,000 yuan shall be sentenced to fixed-term imprisonment of not less than 1 year but not more than 7 years; Whoever embezzles between 50,000 yuan and 100,000 yuan shall be sentenced to fixed-term imprisonment of five years or more; If the amount of embezzlement is 100,000 or more, he shall be sentenced to life imprisonment or fixed-term imprisonment of 10 years or more, and the terms of imprisonment show a certain intersection. The Criminal Law Amendment (IX) is revised to a sentence without cross connection, and the three legal sentences are arranged in a ladder manner. As shown in Table 6, the degree of punishment from light to heavy is fixed-term imprisonment or criminal detention of not more than 3 years, fixed-term imprisonment of not less than 3 years but not more than 10 years, fixed-term imprisonment of not less than 10 years, life imprisonment and death penalty. The relevant interpretation establishes the starting point of the sentencing amount of the three grades of legal punishment, which are 30,000 yuan, 200,000 yuan and 3 million yuan respectively, which is 6 times, 4 times and 30 times higher than the amount standards in the old version of Criminal Law.

sentencing interval	amount of cases
<=3 years	193
3 ~10 years	57
>10 years	7

Table 6

	max amount (thousand yuan)	mix amount (thousand yuan)	margin (thousand yuan)
<=3 years	2925	10	2915
3 ~10 years	8144	193	7951
>10 years	31299	3506	27793

Among the 193 criminals sentenced to fixed-term imprisonment of no more than 3 years or criminal detention, the lowest amount of embezzlement is 10,000 yuan (the defendant is sentenced to criminal detention for 3 months and suspended for 6 months), while the highest amount is 2.925 million yuan (the defendant is sentenced to 3 years imprisonment and suspended for 4 years), and the margin is 2.915 million yuan. Among the 57 criminals sentenced to no less than 3 years but not more than 10 years of imprisonment, the lowest amount is 193,000 yuan (the defendant is sentenced to 3 years and 6 months imprisonment), and the highest amount is 8.144 million yuan (the defendant is sentenced to 9 years), with an extreme difference of 7.951 million yuan. Among the 7 criminals sentenced to more than 10 years of imprisonment, the lowest amount is 3.506 million yuan (the defendant is sentenced to 11 years), and the highest amount is 31.299 million yuan (the defendant is sentenced to 15 years), with a huge margin of 27.793 million yuan.

The results show that the judicial practice does not seem to be the ladder distribution of sentences as expected by legislation, but the phenomenon of "pile up" of sentencing. That is, courts in the same region may impose the same prison term on cases involving embezzlement of 200,000 yuan and 2 million yuan. For the problem of unfair sentencing, we need to view its essence through phenomenon. The space of the amount range contained in each sentencing interval of the crime of embezzlement is large, which directly leads to the current situation of "piling up" of sentencing. As shown in Table 12 above, in judicial practice, from 193,000 yuan to 8,144,000 yuan, although the amount of crime varies by 40 times, they are all sentenced within the range of 7 years of fixed-term imprisonment (in the interval of more than 3 years and less than 10 years). In other words, there will be cases with large differences in the amount of embezzlement, and the sentences would be very similar, or the sentences would be quite different in cases with similar or the same amount of embezzlement. If cases in the sample are represented by points and placed in the coordinate system with the horizontal and vertical coordinates of the amount of embezzlement and the term of imprisonment respectively, what should be displayed may be a scatter diagram, which would cause an unbalanced impression and lead to the inference of unfair sentencing.

In fact, the reason why the same amount of embezzlement corresponds to different sentences, or different amounts of embezzlement correspond to the same sentence, is that the

circumstances have been taken into account in the administration of justice. From this point of view, the implementation of the Criminal Law Amendment (IX) and relevant interpretations have indeed broken through the previous single standard of sentencing only based on amount to a certain extent, showing a dual sentencing mode of "giving priority to amount and secondary to circumstances".

CONCLUSIONS

Through the empirical analysis of samples, this paper reveals some characteristics of embezzlement cases. As far as the subject of crime is concerned, most of them are 46-55 years old, with high educational level. Many of them are state organ staffs and grass-roots public servants, and individual crime is more common. As for the objective aspects of crime, the means are often defrauding and encroaching. The high incidence of embezzlement takes place in the operation of state-owned enterprises / institutions, construction projects and so on. Moreover, the study also found the problems existing in the current judicial practice. For example, the nature of embezzlement means sometimes are faint, and unfair sentencing is an obvious issue.

Generally speaking, embezzlement crime is the result of the interaction of many factors, including imperfect legislative system, insufficient judicial punishment, unclear rights and responsibilities within the enterprises as well as institutions, and lack of effective external supervision. At the micro level, personal factors such as greed and fluke also count.

In the fairly near future, there is a long way to go to prevent embezzlement crimes. While affirming the new legislation has achieved certain results, we also need deep reflection that there are still deficiencies in its fairness and rationality, which calls for further constant adjustment and improvement in both legislative provisions and judicial practice.

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THE STATUTE OF THE BRITISH CITIZENS ON THE TERRITORY OF ROMANIA IN THE CONTEXT OF BREXIT - UNION LEGISLATIVE AND TRANSPOSITION MECHANISMS

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ABSTRACT

On February 1, 2020 The Withdrawal Agreement[1] between the United Kingdom of Great Britain and Northern Ireland (generic-United Kingdom) and the European Union (EU) and the European Atomic Energy Community (Euratom), hereinafter referred to as the Union, has entered into force). This official document guarantees the two parties a withdrawal in conditions of legal certainty concerning areas such as the rights of British citizens and union nationals, the customs regime, trade and services, the rights of companies, etc. In a first analysis of the effects of Brexit, we mention the acquisition by the United Kingdom of the status of a third party with all the consequences that arise, such as withdrawal from the decision-making process, withdrawal of representatives from the Union institutional level. In order to support British citizens who continue to reside in the territory of the European Union but also to support Union nationals resident in the United Kingdom, in accordance with the Withdrawal Agreement, on the one hand, one continued to apply the European Union law to the United Kingdom on the entire transition period which lasted until 31 December 2020, while EU Member States were required to adopt national legal instruments governing both the transition period and beyond, the status of British citizens called "beneficiaries of Art. 50 TEUs who continued to live and work in the Union territory. Romania has fulfilled this obligation deriving from its status as a member state in the sense that on November 23, 2020, the Romanian executive adopted the Government Emergency Ordinance no. 204 of 23 November 2020 on the establishment of measures for the implementation of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, regarding the regulation of the right of entry and residence in Romania.

KEYWORDS: *Brexit, beneficiary of Article 50 TEU, British citizen, temporary residence, permanent residence.*

INTRODUCTION

I. Introductory considerations on the Pro-Brexit period of the United Kingdom

Brexit has its origins in the historical past of the United Kingdom's relations with the European Union[2], the successor to the European Economic Community. In order to understand this constant approach of the United Kingdom, we must understand the motivation behind it, which at least officially would consist of a repositioning in relation to the core of the six founding states of the EEC. Unofficially, we can note the "frustrations" of the United Kingdom over the two rejections of accession to the EEC in 1963 and 1967, motivated by the incompatibilities of an economic nature between the two parties. Even after joining the EEC

[1]Agreement on the withdrawal of the United Kongdom of Great Britain an d Northern Ireland from the European Union and the European Atomic Energy Community (OJ L 29,31.1.2020.P.7) (hereinafter referred to as the Withdrawal Agreement)
[2]Vâlcu Elise Nicoleta, Boghirnea Iulia, *"Jurisprudence and the juridical precedent of the European Court of law as source of law"* Lex et Scintia International Journal, LESIJ

in 1972, the United Kingdom failed to embrace its Union aspirations. As a result, two years after accession, in 1975, a referendum was held for Britain to leave the EEC, the result of the referendum was 67.2% in favor of belonging to the community space. Between 1994 and 1997, the rapid rise of the quickly dissolved but revived UKIP Referendum Party, a staunch supporter of Britain's secession from mainland Europe, is remembered. Thus, in February 2016, the British Prime Minister David Cameron launched June 23, 2016 as the date of the Brexit referendum. Following this process, 51.9% of voters decided that the United Kingdom should leave the European Union.

As a result of this vote, there have been key changes in the British political class: the resignation of Prime Minister David Cameron, the unconditional support of the Brexit population of Boris Johnson, given that his pro-Brexit position was in harmony with the vote of the population, the appointment of Theresa May, a member of the Conservative Party and anti-Brexit supporter, as chief executive.

On March 29, 2017, the United Kingdom of Great Britain and Northern Ireland, hereinafter referred to as the United Kingdom, invoked Article 50[3] of the Lisbon Treaty[4], initiating the process of withdrawal from the EU.

What was the official position of the European Union? The European Union has accepted the vote of British citizens, with Michael Barnier appointed by the European Commission as the EU's negotiator to represent the interests of the 27 member states.

The process of withdrawing the United Kingdom from the European Union (Brexit) was completed on 31 January 2020, as a result of which the withdrawal agreement entered into force on 1 February 2020, the date from which the United Kingdom became the third country with all legal consequences of this quality.

This marked the beginning of a transitional[5] period that lasted until 31 December 2020, so that throughout this period, the United Kingdom applied European Union law[6] and remained part of the Customs Union and the Single Market, but was no longer represented at at the institutional level nor at the level of the decision-making process. Thus, until the end of the transition period, there were no changes for EU and UK nationals, consumers, researchers, students and businesses.

In this context, some clarification is needed in the sense that, as a result of Brexit, the United Kingdom becomes an extra-EU state as a result of which its citizens acquire the status of non-EU nationals. With such a status and the appropriate legislation for their stay in the EU, it acquires specific nuances, in the sense that the provisions of Directive 2008/34 / EC are

[3] According to Article 50 of the Treaty of Lisbon, "Any Member State of the European Union may decide to withdraw from the Union in accordance with its own constitutional requirements. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State setting out the arrangements for its withdrawal, taking into account its future relations with the Union. This Agreement shall be negotiated in accordance with Article 218 (3) of the Treaty on the Functioning of the European Union. It shall be concluded by the Council acting on behalf of the Union, acting by a qualified majority, after obtaining the consent of the European Parliament. The Treaties shall cease to apply to the State concerned from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification provided for in paragraph 2, unless the European Council, in agreement with the Member State in decide unanimously to extend this period. For the purposes of paragraphs 2 and 3, a Member of the European Council or of the Council representing the withdrawing Member State shall not take part in the deliberations of the European Council or the Council or in decisions concerning it. A qualified majority shall be defined in accordance with Article 238 (3) (b) of the Treaty on the Functioning of the European Union. If a State which has withdrawn from the Union requests to rejoin, its application shall be subject to the procedure laid down in Article 49."

[4]Ioana Nely Militaru, European Union Law, Chronology. Springs. Principles. Institutions. The internal market of the European Union. Fundamental Freedoms, 3rd Edition, revised and added, Universul Juridic, Bucharest, 2017

[5] The transition period represents the period provided in art. 126 of the Withdrawal Agreement

[6] Ioana Nely Militaru, European Union Law, Chronology. Springs. Principles. Institutions. Second edition, revised and added, Universul Juridic, Bucharest, 2011

no longer applicable to them, consequently, the regulatory framework for the protection of the rights and interests of British citizens constitutes the Withdrawal Agreement.

Regarding the regulation of the status of British citizens on the territory of Romania, the Government Emergency Ordinance no. 204 of 23 November 2020 was adopted on the establishment of measures to implement the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and of the European Atomic Energy Community, in matters of the regulation of the right of entry and residence on the territory of Romania[7].

II. Regulation of the right to enter and stay in the territory of Romania recognized to British citizens - beneficiaries of art.50 TEU, within the meaning of GEO no.204 / 2020

2.1. *Concepts. Definitions*

This ordinance establishes rights and regulates obligations for the beneficiary of Article 50 of the Treaty on European Union, respectively for the British citizen located in Romania and who continues to reside in Romania after the end of the transition period[8], as well as his / her family members who either accompany them or join them after the end of the transition period, provided they have had the quality of family members before the transition.

We must keep in mind that the status of British citizens benefiting from Article 50 TEU on the territory of Romania is distinct both in relation to the status of non-EU nationals, called "foreigners" in the vision of GEO no. 194/2002 on the legal regime of foreigners[9], also differing from citizens to the member states of the European Union, as regulated by GEO no. 102/2005 on the free movement on the Romanian territory of the citizens of the member states of the European Union, the European Economic Area and the citizens of the Swiss Confederation, republished, with subsequent amendments and completions[10].

The family members of the British citizen, within the meaning of article 2 of GEO no. 204/2020, mean the persons, regardless of citizenship, who accompany him/her in Romania and are in one of the following situations:

I. *Husband* or *wife* of a British citizen benefiting from Article 50 TEU;
II. *Descendants in a straight line*, including those who have been adopted, who have not reached the age of 21 or who are dependent on the British citizen benefiting from Article 50 TEU or those of their spouse or partner;
III. *Direct ascendants*, who are dependent on the British citizen benefiting from Article 50 TEU or those of the spouse or partner;
IV. *Partner* means the person who coexists with the British citizen beneficiary of Article 50 TEU, if the partnership is registered according to the law of the state of origin or provenance or, if the partnership is not registered, the cohabitation relationship can be proved;
V. *The dependent person* is any other member of the family who, in the country of origin or provenance, is in maintenance or co-management with the British citizen benefiting

[7]Published in the Official Gazette no. 1132 of November 25, 2020.
[8] The period provided for in Article 126 of the Withdrawal Agreement
[9] GEO no. 194/2002 regarding the legal regime of foreigners was amended and supplemented by Law no. 309/2004, by Law no. 482/2004, by Law no. 482/2004, by Government Emergency Ordinance no. 113 / 2005 respectively by Law no. 56/2007 and republished pursuant to art. 7 of the Government Emergency Ordinance no. 55/2007 regarding the establishment of the Romanian Immigration Office through the reorganization of the Authority for Foreigners and of the National Office for Refugees.
[10] GEO no. 102/2005 on the free movement on the Romanian territory of the citizens of the member states of the European Union, the European Economic Area and of the citizens of the Swiss Confederation was published in the Official Gazette of Romania, Part I, no. 646 of July 21, 2005, was approved with amendments and completions by Law no. 260/2005, was amended and supplemented by Government Ordinance no. 30/2006 and republished pursuant to art. III of Law no. 80/2011

from Article 50 TEU, or is in a situation where, for serious medical reasons, his personal assistance is required;

VI. The frontier worker means the British citizen beneficiary of article 50 TEU who does not have the citizenship on the Romanian territory, but is employed in Romania before the end of the transition period and continues his activity even after this period.

2.2. The right of temporary residence granted to British citizens benefiting from Article 50 TEU

British citizens benefiting from Article 50 TEU who entered Romania between 1 and 31 December 2020, may request, within 90 days of entry, the extension of the right of temporary residence under the Withdrawal Agreement, to the territorial formations of the Inspectorate General for Immigration.

Also, British citizens who hold documents certifying a temporary residence as a Union citizen, acquired under GEO no. 102/2005 with subsequent amendments and completions, may request the extension of the right of temporary residence in Romania under the Withdrawal Agreement and GEO no. 204/2020 to the territorial formations of the General Inspectorate for Immigration starting with December 1, 2020 and until December 31, 2021 at the latest.

In order to admit the request for extension of the right of temporary residence on the Romanian territory, the British citizens must prove the fulfillment of the following conditions:

a) possess a valid document for crossing the border

b) are not registered by the authorities as persons who represent a danger to national defense and security

c) prove the legal ownership of a living space[11]

d) prove that they have the financial means to support themselves[12] and their family members, at least at the minimum guaranteed level in Romania.

If, on the basis of the documents submitted by the beneficiary of art. 50 TEU, the General Inspectorate for Immigration finds that the above mentioned conditions are not met in order to extend the right of temporary residence, within 30 days from the finding, he / she may present any documents necessary for the favorable settlement of the application.

Provided that, even after this deadline, it is found that the reason for the refusal remains, the General Inspectorate for Immigration issues a decision refusing the issuance of the temporary residence permit indicating the reasons for the refusal, the competent court and the time limit attacked[13]. Against the refusal to issue a temporary residence permit, an action may be filed in administrative litigation within 10 days from the communication of the decision by the General Inspectorate for Immigration[14].

Following such a measure, the British citizen must leave the territory of Romania within 30 days from the date of communication of the decision to refuse the issuance of the temporary residence permit.

Decisions:

- which provides for the immediate leaving of the Romanian territory, as well as
- decisions to refuse the issuance of a temporary residence permit, whose term of departure has not been met

[11] And he / she actually lives at the address where he declares that he / she has his/ her residence or domicile, see in this sense art.7 paragraph (1) letter (c) of the GEO. nr.204 / 2020

[12] Proof of means of subsistence can be provided with a salary certificate, pension slip, single income tax return, bank statement or other equivalent documents. In the case of students, the proof of the means of maintenance can be made by a statement on their own responsibility.

[13]See in this sense art.9 paragraph (1) of GEO no.204 / 2020

[14] See in this sense art. art.9 paragraph (1) of GEO no.204 / 2020 modified by the sole article of Law no.77 / 2021

they are executed or the exhortation of the person in question, within 24 hours, to the border or even to the country of origin by the specialized personnel within the General Inspectorate for Immigration, otherwise he/ she can be taken into public custody[15] at the same time. with the notification of the criminal investigation bodies for committing the crime provided in art.262 paragraph (2) letter (b) of Law no.286 / 2009 on the Criminal Code with subsequent amendments and completions[16] .

2.3. The right of permanent residence on the territory of Romania, recognized to the British citizens beneficiaries of art.50 TEU

In view of the provisions of Article 6 (1) of the Ordinance, the right of permanent residence in Romania is granted to British citizens benefiting from Article 50 TEU if until 31 December 2020, they have obtained permanent residence as nationals, under the conditions of article 20 paragraph (1) of GEO no. 102/2005 republished with the subsequent modifications and completions[17].

In these conditions, the British citizen, in order to maintain his permanent residence on the Romanian territory starting with January 1, 2021, must request the issuance of the permanent residence permit until December 31, 2020, fulfilling the following conditions:

a) Possess a valid document for crossing the border[18]

b) are not registered by the authorities as persons who represent a danger to national defense and security

c) prove the legal ownership of a living space.

In accordance with the provisions of Article 13 of the ordinance, the right of permanent residence is recognized, upon request and:

i. to the British citizens beneficiaries of art.50 TEU who entered Romania between 1 and 31 December 2020 and who were granted the right of temporary residence based on this ordinance;

ii. British citizens benefiting from art.50 TEU who hold documents certifying a temporary residence as a union resident, acquired on the basis of GEO no.102 / 2005

iii. family members who join the British citizen beneficiary of art. 50 TEU, after the end of the transition period, respectively, starting with January 1, 2021 until September 30, 2021

iv. family members who join the British citizen beneficiary of art. 50 TEU, after the end of the transition period, respectively, starting with October 1, 2021 until December 31, 2021

but with the cumulative fulfillment of the following conditions:

- had the right of temporary residence on the territory of Romania continuously for the last 5 years prior to the submission of the application, and during all this period no removal measures from the territory of the country were ordered against them;
- prove that they have the financial means to maintain themselves at the minimum guaranteed level in Romania;
- prove the legal ownership of a living space;

d) It does not constitute a threat to national security or public order[19].

Regarding the status of the minor, family member of the British citizen, beneficiary of art. 50 TEU, this can obtain the right of permanent residence on the Romanian territory,

[15]See in this sense GEO no.192/2002 on the legal regime of the elderly republished with subsequent amendments

[16] "Fraudulent crossing of the state border" - paragraph (1) Entering or leaving the country by illegally crossing the state border of Romania is punishable by imprisonment… .. paragraph (2) If the deed provided in paragraph (1) has been committed: … Read (b) by an undesirable foreigner or who has been denied in any way the right to enter or stay in the country, the penalty is… "

[17] "Citizens of the European Union who have a continuous and legal residence on the territory of Romania for a period of at least 5 years benefit from the right of permanent residence".

[18] Including the criminal record certificate or any other document with the same legal value issued by the authorities of the state of domicile or residence, see for more details art.12 paragraph (2) of GEO no.204 / 2020

[19] The condition is considered fulfilled if the non-beneficiary of art. 50 TEU, did not intentionally commit crimes on the Romanian territory for which a custodial sentence of more than 5 years was applied, see in this sense art.13 paragraph (1) letter (e) of GEO no.204 / 2020

without fulfilling any condition, except the one according to which both parents are entitled to permanent stay. If only one of the parents holds the right of permanent residence, the consent expressed in the authentic form of the other parent is required.

To what extent are the periods of absence from the territory of Romania considered interruptions in the calculation of the five years? Thus, the interruptions[20] in the calculation of the five years are not considered:

i. temporary absences from the territory of Romania that do not exceed 6 months within a year;
ii. absence from the territory of Romania for the satisfaction of compulsory military service;
iii. absence from the territory of Romania for justified reasons such as pregnancy, childbirth, serious illness, participation in education or training programs or moving in the interest of service to another Member State of the European Union or a third country, for a period for a maximum of 12 consecutive months;
iv. the period in which a period of deprivation of liberty was executed on the territory of Romania, less than 6 months.

2.4. The rights recognized to the family members of the British citizen beneficiary of art.50 TEU

In accordance with the provisions of Article 8 of the Ordinance, family members who join the British citizen beneficiary of Article 50 TEU, from 1 January 2021 to 30 September 2021 may request the extension of the right of temporary residence in Romania until 31 December 2021. Instead, family members who join the British citizen beneficiary of art. 50 TEU, starting with October 1, 2021, may request the extension of the right of temporary residence within a maximum of 90 days from the date of entry into Romania. For both situations they have to prove that:

a. there is a kinship or partnership relationship with the beneficiary of art. 50 TEU;
b. there are documents showing that the presence on the Romanian territory of the British member's family member is necessary for the latter in order not to be deprived of the right to family or partnership reunification.

At the same time, the right of temporary stay in Romania of the family members can be extended individually for each one, provided that the application is accompanied by the documents proving that:

a) they possess valid documents for crossing the border
b) they are not registered by the authorities as persons who represent a danger to national defense and security
c) they prove the legal ownership of a living space
d) they prove that they have the financial means to live at the minimum guaranteed level in Romania;

The family members of the British citizen beneficiary of art. 50 TEU, who join him after the end of the transition period [21]can obtain:

- an entry visa on the territory of Romania which is obtained free of charge by following an accelerated procedure;
- the visa for a temporary stay is granted, upon request for a period of 90 days during a period of 180 days, with multiple entries and valid for one year;

In order to obtain a temporary stay, the applicant, a family member will have to present the following supporting documents:

I. A valid border crossing document;

[20] Proof of the continuity of the permanent stay on the territory of Romania, which is the responsibility of the applicant and can be made by any means of proof.
[21]See also for details on Article 18(1) (m) of the Withdrawal Agreement

II. The copy of the residence permit of the beneficiary of art. 50 TEU accompanied by an authenticated statement from the latter stating the existence of the family relationship or partnership at the time of the request and the fact that they agreed that the applicant should join him/her;
III. Proof regarding the reason for which he did not request the registration as a family member of the beneficiary of art. 50 TEU within the transition term mentioned in this ordinance.
IV. Supporting documents[22] necessary to prove the continuity of the family relationship or partnership at the time of applying for the temporary residence visa

CONCLUSIONS

Brexit has been seen by a significant number of Union nationals as a threat to the values[23] and benefits of the European Union, and people have become more responsible for their common European future.

On the other hand, the same unionists believe that the British are not breaking away from the European Union as dramatically as many feared. But the move by the United Kingdom remains a "historic mistake," according to Bernd Riegert.

As Paul Craig states in his article, Brexit is a serious incident, contrary to the goals of political and economic integration and opposed to the idea of a "deeper union between the peoples of Europe"[24].

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THE HUMAN PERSONS PROTECTED BY MEANS OF THE CIVIL LAW

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ABSTRACT

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

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

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

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

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

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

KEYWORDS: guardianship, trusteeship, forbidden judiciary, physical disability.

INTRODUCTION

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

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

In the last period the sphere of the legal protection of the human being has been completed by the adoption of normative acts that have as purpose the protection of the natural person. Civil law, like other branches of law, includes numerous institutions and norms that ensure the defense and protection of the subjective rights of natural persons (Tărchilă, 2016:311). In principle, civil law is a right of protection "of human rights and especially of certain categories of persons. There is almost no institution or norm of civil law that does not reflect and protect the interests of the natural person: relative nullity is a "protection" nullity of a particular interest; the suspension and reinstatement within the limitation period are provided by law in the purpose of protecting the subjective rights of persons in special situations; the anticipated use capacity is a measure of protection of the child conceived but not yet born; capacity constraints are essentially protection measures.

1. Categories of natural persons protected by means of the civil law

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

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

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

1.1. Protecting the child through guardianship

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

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

a) Legal characters

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

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

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

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

- the person who turned 60 years old;
- the pregnant woman or the mother of a child younger than 8 years old;
- the person who raises or educates two or more children;
- the person exercising another guardianship or trusteeship;
- the person who, because of the disease, of the infirmity of the kind of work, of the departure of the domicile from the place where the goods of the minor are, or for other good reasons, could not fulfill the task of the guardianship.

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

supervisory authority, according to the circumstances, will be able to modify or suppress this remuneration "(art. 121, para. 2).

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

Opening the guardianship

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

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

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

b) when both parents are deprived of parental rights;

c) when both parents are unknown;

d) when both parents are placed under judicial interdiction;

e) when both parents are missing;

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

Content of guardianship protection

As with parental protection, guardianship protection comprises two sides: personal and patrimonial. As far as the personal side is concerned, the guardian has the same rights and obligations towards the minor under his tutelage as a natural parent. Thus, he has an obligation to raise him/her, "taking care of his physical health and development, his education, teaching and professional training according to his qualities." (Turjanu, 2008:388)

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

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

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

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

b.) - acts that the tutor can only validly conclude with the prior consent of the guardianship authority: legal documents available, including taking from the CEC (The Romanian Savings Bank) the amounts of money that exceed the maintenance needs of the minor. According to art. 128, Family Code: "It is stopped to conclude legal acts between the guardian, the husband, a relative in a straight line, or the brothers and sisters of the guardian, on the one hand, and the minor on the other." Also, art. 129, para. 1 states: "The guardian cannot, in the name of the minor, make donations or guarantee the obligation of another." (Tărchilă. 2016:311)

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

Termination of guardianship

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

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

1.3. Responsibility of the tutor

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

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

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

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

The civil liability may be:

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

Protecting the child through custody

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

Establishment of the custody

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

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

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

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

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

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

Content of protection by custody

The custody covers two categories of curator attributions:

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

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

Termination of custody

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

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

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

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

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

1.3. The competent court of law

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

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

The effects of banning

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

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

As long as an elderly, alienated, or mentally disabled person has not been placed under a ban, she/he is considered to have full exercise capacity. The legal acts he/she concludes are, in principle, valid (Dogaru, 2010:421). They could only be annulled if the alienated or mentally disabled could prove that he or she had completed the legal act at a time when he or she had no discerning in his / her actions. The fact that it would prove that his usual state of alienation or mental disability is not enough to create incapacity, until the court decision to

place the interdiction intervenes, because the alienated or the mentally disabled also has moments of lucidity. In order to reach the annulment of the act, proof of the lack of discernment must be provided at the time of the conclusion of the act, otherwise the act is perfectly valid.

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

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

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

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

Cessation of judicial prohibition

The judicial ban ends with:

- the death of the forbidden, either physically ascertained or declared by court. In the latter case the prohibition ceases on the date established in the declaration of death as the date of death. - lifting the prohibition by judicial decision, if the conditions that determined it ceased (Pop, 2015:345).

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

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

1.4. Protecting the adult natural person through custody

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

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

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

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

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

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

Cases for establishing the custody

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

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

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

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

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

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

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

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

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

Procedure for establishing the custody

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

According to art. 154, para. 2 Family Code: "The custody can be instituted only with the consent of the represented one, except in cases where the consent cannot be given (the case of missing person from home) (Dogaru, 2010:433). The jurisdiction of the appointment of the trustee belongs (except in the case of the trustee of a succession) to the tutelary authority; the territorial competence of the tutelary authority differs depending on the case in which the curator is established.

Content of protection

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

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

- the represented one can revoke the curator or he can also personally terminate the civil legal act. In this sense art. 153, Family Code stipulates: "In the cases provided in art. 152, the establishment of the custody is without prejudice to the capacity of the one the curator represents. ";
- while performaning her/his task, the curator must consider the cause, or the reason for the establishment of the custody.

2. Essential points in the logic of the theme
- the totality of the legal means used by the state for the purpose of protecting the individual, designates the system of legal means of protection of the natural person.
- the legal rules of the civil right, in accordance with the provisions of the new civil code, adopted on 01.10.2011, ensures the special means of the following categories of persons:
- to the minors, by protecting these through trusteeship and guardiansheep;
- to the alienated and mentally disabled by putting them under court prohibition and establishment of the trusteeship and guardianship;
- to natural persons found in special situations due to old age, diseases, physical disabilities and lack of people who can support them, by positioning them under the institution of the custody.

CONCLUSIONS

Civil law, like other branches of law, includes many institutions and norms that ensure the defense and protection of the subjective rights of natural persons. The norms of civil law ensure the protection of the following categories of persons by special means:
- to minors, through parental protection, guardianship and trusteeship;
- to the alienated and the mentally unstable, by putting under interdiction and establishing the guardianship and the custody;
- persons in special situations (old age, illness, physical disability), by establishing the custody.

The cases in which the minor will be placed under guardianship are listed by art.113 Family Code as follows:
a) when both parents are dead or declared as dead;
b) when both parents are deprived of parental rights;
c) when both parents are unknown;
d) when both parents are placed under Court interdiction;
e) when both parents are missing;
f) when, after the adoption, the underage child, the court, decides to establish the guardianship.

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

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

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

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

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

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

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

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

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ANALYSIS OF THE FRENCH DOCTRINE REGARDING THE NORMATIVE POWER OF THE OPINIONS OF THE COURT OF CASSATION

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ABSTRACT

In this article I continue to research the decisions of the supreme courts, which have the constitutional role of unifying the interpretation of the law at the national level, and implicitly of the judicial practice, by studying the French legal doctrine regarding the legal nature of the notices for appeals of the Court of Cassation.

KEYWORDS: notice for appeal, the French Court of Cassation, legal nature, normative power

INTRODUCTION

The opinion of the French Court of Cassation develops the written rule of law, interpreting it through a new technique, by issuing an opinion on a new question of law. This procedure appeared on May 15, 1991, by Law no. 91-491 of December 31, 1987, amending the Code of judicial organization and establishment procedure "saisine pour avis de la Cour de Cassation" (JORF, May 18, 1991) according to the model of the State Council, before which, by art. 12 of Law 87-1127 of December 31, 1987 on the reform of administrative litigation[1], the procedure called *renvoi pour avis* ("referral for opinion") was created, a procedure that aims to unify the interpretation of the law at the national level.

The referral for opinion is also close to the appeal in the interest of the law, a procedure with a curative effect of the non-unitary judicial practice, provided for by art. 618-1 of the new French Civil Procedure Code. The jurisprudence of the supreme court is a specific one: it is a genuine jurisprudential legislation as said by those who established it in 1837[2] – "The Court of Cassation and in general the Supreme Courts have a legislative mission, by offering an interpretation of the official texts, an interpretation which, like the law, it has a general nature and binding force", according to F. Zenati[3].

However, through this new procedure, the legislator assigns the High Jurisdiction[4] a new, consultative mission to prevent divergent jurisprudence[5].

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[1] Published in JORF January 1, 1988, repealed by art. 4 of the Ordinance no. 2000-387 of May 4, 2000, on the Code of administrative justice. Currently, the provisions of art. 12 of this law are found in art. 114-1 of the Code of administrative justice.

[2] The preparatory work for the Law of 1837, quoted by Z.-L. Hufteau, *Le référé législatif et les pouvoirs du juge dans le silence de la loi*, PUF Publ.-house, Paris, p.135

[3] F. Zenati, La saisine pour avis de la Cour de Cassation, Loi n. 91-491 du 15 mai 1991. Decret n. 92-228 du 12 mars 1992. *Recueil Dalloz Sirey*, Cronique – XLIX, 1992, p.252

[4] Analogous to this procedure, we also meet at the CJEU level, which has the role of a supreme court (since there is no other control court above it) which, through the procedure of preliminary questions, has the same role, to unify the interpretation of the Union regulations and follow our books. See in this regard: F.-Ch. Jeantet, *Originalité de la procédure d'interprétation du Traité de Rome*, Juris Classeur Périodique, La semaine juridique – Édition générale, 1966, I Doctr. 1987; E.-N. Valcu, "*The expedited procedure and the urgent preliminary procedure- Procedure for trial specific to the form of judicial cooperation within the European Union*", presented during the International Conference "*Society based on knowledge. Norms, Values and Contemporary*

The question is raised in the specialized literature, if the supreme judge, by interpreting a new legal matter with which he is referred, adds or creates a legal norm by issuing notices for referral.

Regarding the rule-creating character of the opinions[6] of the French Court of Cassation, it is shown in the French specialized literature[7] that it is all the more obvious as their purpose is to clarify the meaning of new legislative or regulatory provisions.

The issue of exceeding the limits of judicial power is raised here, through the Court of Cassation, called by the legislator to respond to a problem that arises in numerous litigations, knowing that the law forbids "the judge to rule by way of general provisions and regulation on cases that are subject to his judgment", as provided by art. 5 of French Civil Code (similar to art. 5 of the Romanian Code of Civil Procedure).

Morgan de Rivery-Guillaud agrees in his article with the opinion of several authors[8] who consider that the opinion of the Court of Cassation contributes to the formation of jurisprudence, participating, at the same time, in its normative power, whose reality is no longer contested today.

Practically, a proof that it is an instrument for developing jurisprudence[9] and its normative action[10], F. Zenati brings as an argument the fact that the referrals for opinion are published in the Official Journal of the French Republic, as provided by art. 1031-6 of the French Code of Civil Procedure.

They are also published in the "Bulletin des arrets" (the jurisprudence bulletin).

Art. 144-3 of the French Code of Civil Procedure provides that "the opinion issued by the Court of Cassation does not bind the court that formulated the referral request for the opinion", thus the legislator avoids establishing a new form of regulatory ruling (*arrêt de règlement*)[11].

Landmarks", 12th Edition, Faculty of Law and Administrative Sciences, Valahia University of Targoviste, Romania, June 10-11, 2016 and published in the Supplement of Valahia University – Law Study, pp.332-337; I. Boghirnea, E.-N. Vâlcu, "*Jurisprudence and the juridical precedent of the European Court of law as source of law*", Lex et Scientia International Journal, LESIJ No. XVI, vol 2/2009, pp. 253-258, I.N. Militaru, *Trimiterea prejudiciară faţa Curţii Europene de Justiţie*, Lumina Lex Publ.-house, 2005, p.80; I.-N. Militaru, *Dreptul Uniunii Europene. Cronologie, Izvoare, Principii, Instituţii Piaţa Internă a Uniunii Europene. Libertăţile fundamentale*, Universul Juridic Publ.-house, Bucharest, 2017, pp. 305-308.

[5] I. Boghirnea, *The analysis of the notions of "divergent jurisprudence" and the "unitary jurisprudence"*, in Legal and Administrative Studies, nr.2 (17)/2017, pp.106-112

[6] Waline, *Le pouvoir normative de la jurisprudence, Melange Secelle*, Paris: LGDJ, p. 622

[7] A.-M. Morgan de Rivery-Guillaud, *La saisine pour avis de la Cour de Cassation. Loi n. 91-491 du 15 mai 1991. Decret n.92-228 du 12 mars 1992.* Juris Classeur Périodique, La semaine juridique – Édition générale, I, 3576, p.176

[8] See this widely debated matter, authors quoted by A.-M. Morgan de Rivery-Guillaud, *op. cit.*, p.176, note 24: E.-L. Bach, *Rep. civ. Dalloz, v. Jurisprudence*; O. Dupeyroux, *La jurisprudence, source abusive de droit*, Melange Maury, Dalloz, 1960, p.349; J. Ghestin, G. Goubeaux, *Droit civil. Introduction*, 3eme édition, LGDJ, 1990, p.422; P. Hebroaud, *Le juge et jurisprudence*, Melanges Couzinet, p.329; Ph. Jestaz, *La jurisprudence, réflexions sur malentendu*, recueil Dalloy, 1987, p.11, Ph. Malaurie, *La jurisprudence combattue par la loi*, Melanges Savatier, Dalloz, 1965, p.603; J. Maury, *Observations sur la jurisprudence en tant que source de droit*, Melanges Ripert, LGDJ, 1950, p.28; M. Waline, *Le pouvoir normatif de la jurisprudence*, Melanges Secelle, LGDJ, 1950, p.613; F. Zenati, *La jurisprudence*, Dalloz, 1991.

[9] The referral may state whether it will be published in the Official Journal of the French Republic. Also, the opinion is notified to the parties and the registry of the Court of Cassation, it is sent to the Public Ministry and the court that addressed the request for the opinion, to the first president of the Court of Appeal and the general prosecutor, when the request does not emanate from the court.

[10] F. Zenati, *La saisine pour avis de la Cour de Cassation, op.cit.*, p.252

[11] A-M. Morgan de Rivery-Guillaud, *op.cit.*, p.176. *Per a contrario*, following this argument of the author Morgan Rivery-Guillaud, did the Romanian legislator, by the fact that it provided the binding force of the decisions of the I.C.C.J. established the regulatory decisions?

Moreover, the opinion of the French Court of Cassation does not know the relativity of the judgment[12] as it provides "a global answer to a series of questions"[13], an interpretation of a new rule of law without dividing the facts from the concrete situations.

Following the line of logical interpretation, if generality is the essential feature of the rule of law and what determines it from a material point of view, we must recognize that the generality of the answer given by the Court of Cassation points to the legislative nature of the opinion[14] and, from here, the consequence that the legislator provided, for this procedure, the publication of the opinion in the Official Journal of the French Republic "the vehicle of the law par excellence" (art. 1031-6 of the Code of Civil Procedure).

Morgan de Rivery-Guillaud considers that the binding nature of the opinion of the Court of Cassation does not result from the texts but from the adherence of the substantive jurisdictions to the interpretation it enunciates, considering that this interpretation is given by a prestigious panel of the Court of Cassation which gives it an exceptional authority[15].

The normative power of the Court, being "closely linked" to its power of control over legal legality, logically, it can be considered that it exercises its normative power before the settlement of disputes, exercising, at the same time, an *a priori* control of the legal legality of decisions which follows[16].

Art. 5 of the French Civil Code has had its justification so that the litigants would not be subjected to a standard trial, thus ensuring their individual freedom and equality. However, in the case of referral for opinion, there is no standard judgment but an interpretation of a standard concept, which, moreover, is not stated by the Court of Cassation but by the legislator, because "the interpretation of certain important concepts must be uniform, without ambiguity and fast"[17].

CONCLUSIONS

Through this procedure, the French doctrine[18] considers that the Supreme Jurisdiction turns into a direct auxiliary of the legislator, the referral procedure for opinion being created to deal with the inadequacies of the law.

[12] F. Zenati, *La jurisprudence*, Dalloz, Coll. "Méthodes du droit", Paris, 1991, p.123
[13] Morgan de Rivery-Guillaud, *op.cit.*, p.177
[14] Morgan de Rivery-Guillaud, *op.cit.*, p.177
[15] P. Drai, *Rapport de la Cour de Cassation*, 1990, p.46
[16] Morgan de Rivery-Guillaud, *op.cit.*, p.177- 178
[17] Morgan de Rivery-Guillaud, *op.cit.*, p.178
[18] Morgan de Rivery-Guillaud, *op.cit.*, p.179

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5. Jeantet F. Ch., *Originalité de la procédure d'interprétation du Traité de Rome*, Juris Classeur Périodique, La semaine juridique - Édition générale, 1966, I Doctr. 1987
6. I.-N. Militaru, *Trimiterea prejudiciară fața Curții Europene de Justiție,* Lumina Lex Publ.-house, 2005
7. I.-N. Militaru, *Dreptul Uniunii Europene. Cronologie, Izvoare, Principii, Instituții Piața Internă a Uniunii Europene. Libertățile fundamentale,* Ed. Universul Juridic, București, 2017
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9. F. Zenati, *La jurisprudence, La jurisprudence.* Ed. Dalloz, Coll. Méthodes du droit", Paris, 1991
10. F. Zenati, *La saisine pour avis de la Cour de Cassation, Loi n. 91-491 du 15 mai 1991. Decret n. 92-228 du 12 mars 1992.* Recueil Dalloz Sirey, Cronique - XLIX, 1992
11. Waline, *Le pouvoir normative de la jurisprudence, Melange Secelle*, Paris: LGDJ
12. E.-N.Vâlcu,"*The expedited procedure and the urgent preliminary procedure-Procedure for trial specific to the form of judicial cooperation within the European Union*" presented during the International Conference "Society based on knowledge. Norms, Values and Contemporary Landmarks", 12th Edition, Faculty of Law and Administrative Sciences, Valahia University of Targoviste, Romania, June 10-11, 2016, and published in the Supplement of Valahia University – Law Study.

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VOODOO AND HUMAN TRAFFICKING IN NIGERIA AS IMPEDIMENTS TO EFFECTIVE ADMINISTRATION OF JUSTICE

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ABSTRACT

Voodoo is the major factor that makes human trafficking to thrive in Nigeria. Voodoo is regularly used by traffickers in human trafficking to exert pressure over the victims. The use of voodoo is a form of mental coercion aim at reducing the need to use physical violence. The adverse power exerted over the trafficked victims is so enormous that they dare not disobey the trafficker. In this manner, the Nigerian networks can control their victim from a distance and no additional person is required to supervise them. This paper concludes that the use of voodoo by traffickers impedes effective administration of justice. Voodoo does not allow victims of human trafficking to reveal the identities of the trafficker so that the law enforcement agencies would not arrest and prosecute them.

KEYWORDS: *voodoo, human, trafficking, administration, justice.*

INTRODUCTION

Voodoo is regularly used by traffickers in human trafficking to exert pressure over the victim. voodoo in human trafficking binds the victims to the trafficker, and oblige them to respect their promises before they leave the origin country for their destination country. Promises made during the voodoo rituals are equal to a contract, which cannot be broken, between the trafficker and their victim. It is regarded as a source of security and certainty for the trafficker in human beings The fear instilled in the mind of victims by really impedes the effective administration of justice which makes victims to be silent with respect to the identities of traffickers which prevents the traffickers from being arrested and prosecuted by the law enforcement agencies.

1. Nature of voodoo

The origins of voodoo rites date back to ancient time and voodoo rites originally had a positive function in the traditional Nigerian communities and were practiced to defend the good.[1] Voodoo which is locally regarded as juju is a traditional religion in West Africa where it has been practised for many years. In Africa particularly Nigeria it is recognised that spirits or gods are believed to govern the earth and every aspect of the existence of man. They may protect people or punish them. Juju is deeply ingrained in our society particularly in Edo State, and many Nigerians, irrespective of their social class or education level, believe in it.[2] In general, the purpose of voodoo was to prevent suffering and illness caused by epidemic diseases through purges and vow-making during which the presence of the gods was evoked.

[1]E.L, Iacono, 'Victims, Sex Workers and perpetrators: Gray Areas in the Tafficking of Nigerian Women' *[*2014](17)*Trends Organ Crim* **,** 110–128 https://doi.org/10.1007/s12117-014-9212-1 accessed 7 May 2022.
[2]United Kingdom Home Office, Country information and Guidance Nigeria:Traficking of women August 2016, Version 1.0, https://www.refworld.org/docid/57b710594.html> accessed 10 May 2022.

During the western colonialism and the forced deportation of Africans, the old rituals and the cult of spirits helped the deported people to resist persecution and oppression.[3] With regard to the protective functions of voodoo, it has been observed that each step or element related to traveling abroad for example border control, passports, visas and air tickets are still regarded by Africans as something that belongs to the realm of spiritual empowerment.[4] A voodoo ritual process is therefore considered an essential step before leaving their country of origin to ensure trouble-free travel. Recently, the modern, negative interpretation of voodoo which is evident among Nigerian migrants stems from its current role in international trafficking. It originates in Africa where traffickers use voodoo as an element of control over victims of human trafficking. [5]Voodoo basically consists of an oath taking in the presence of a traditional priest, in which victims swears to pay off their debts to the trafficker, obedient and loyal to the trafficker.[6]

1.1. Voodoo Ceremonies

Voodoo is used to control victims of human trafficking and voodoo ceremony is a multidimensional and supernatural event with far-reaching aftermath. The voodoo ceremony commences immediately the victim is brought before the juju priest to the shrine. The ritual process commences with the beating of drums, singing and enchantments.[7]It involves utilisation of herbs and plants prepared by the voodoo priest.[8] The voodoo ritual process can be frightening and compel the victims of human trafficking to be obedient and t are intended to cause fear and worry.[9]The victim is instructed to undress, which puts fear in the victim.[10]A soot is prepared by the voodoo priest and the priest thereafter calls upon a spirit, aligned with the evil god Eshu, to enter the soot.[11]Numerous cuts with a razor blade all over the victim's body by the vodoo priest, and the priest rubs the soot purportedly containing the spirit, into the open wounds.[12] It is believed that in this way the spirit enters the victim's body and she can never escape from the spirit.

1.2. Efficacy of Voodoo or otherwise in Human Trafficking

One essential characteristic of the Nigerian trafficking system is the use of threats of voodoo curses to control Nigerian victims and force them into situations of prostitution. In fact, once arrangements for victims' trips abroad are completed, traffickers seal the deal by taking the victims to shrines of voodoo priests for oath taking.[13] It is the oath-taking ritual through the use of voodoo that is making the Nigerian human trafficking industry to thrive.[14]The country's trafficking ring would have long been busted and traffickers driven underground if the use of voodoo has not been very effective in human trafficking network

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[3]United Kingdom Home Office (n 2).
[4]Iacono (n 1)120.
[5]Iacono, 121.
[6]*Ibid*.
[7]O.J Agbeyegbe, 'Finding a voice: From Africa to Europe the effect of voodoo secrecy oath sworn by victims of sex Trafficking 'at International Human Trafficking and Social Justice Conference September 2018, held atToledo Ohio
[8]*Ibid*.
[9]J.Millett-Barrett, 'Bound by Silence: Psychological Effects of the Traditional Oath Ceremony Used in the Sex Trafficking of Nigerian Women and Girls,'[2019](4)(3) *Dignity: A Journal on Sexual Exploitation and Violence* 24, https://digitalcommons.uri.edu/dignity/vol4/iss3/3 accessed 9 May 2022.
[10]Marcel van der Watt & B. Kruger , 'Exploring 'juju' and Human Trafficking: Towards a Demystified Perspective and Response' *South African Review of Sociology*, 48:2, 70-86, DOI: 10.1080/21528586.2016.1222913, juju ceremony. < http://www.antitraffickingconsultants.co.uk_JuJu_Ceremony.pdf>accessed 11 May, 2022.
[11]*Ibid*.
[12]*Ibid*.
[13]United Kingdom Home office (n 2).
[14]M.Mojeed, 'Voodoo aids Human Trafficking' <http//lastradainternational.org>accessed 6 January 2022.

The efficacy of the oaths taken also relies on the beliefs of participants involved in the process of the ritual, it speaks to the performativity of the oath taking ritual, viewed as episodes of cultural communication that seeks to send a message to its participant but can only be understood by such participants that possess a 'shared' belief, culture or tradition.[15] One of the means of recruiting women and children is to subject them to a traditional oath of silence ceremony at the voodoo shrine. This control element is to silence victims and trap them in debt bondage and it has been extremely effective in its implementation. Victims are subjected to the oath prior to their departure from Nigeria to ensure debt commitment and non-disclosure of the identity of the traffickers.[16] The traffickers who use voodoo on the victims as element of control succeeds because the victim finds it very difficult to reject the oath –taking.[17]The victim of human trafficking also see the trafficker as a 'helper' or 'good Samaritan' .The victim on their on volition even volunteer to take the oath to reassure the trafficker of their allegiance in exchange for an anticipated opportunity for a enhanced life.[18] The belief of finding an improved life in Europe has been inculcated for many years in human trafficking with the help of madams who returned to Nigeria to recruit girls after living in Europe.[19]

The Juju is a major control mechanism for traffickers, and family members are more and more often involved in the rituals, which makes the victims of human trafficking feel that they are endangering their loved ones if they reveal the identity of the traffickers.[20] The voodoo priests are enforcers for the contract. Juju as a control mechanism ensures the victim's loyalty in a hidden manner that is difficult for the authorities to uncover and to prove in criminal prosecutions of traffickers.[21] The victims of human trafficking do not appear to be subjected to any kind of control when you see them physically. They appear to enjoy freedom of movement and many of them carry their own papers which is their identity.[22] However, the subjugation and control exerted over them is subconscious, based on the spiritual and material consequences that breaking the oath would bring for the victims, their families and future generations.[23]The victims are very fearful of the power of voodoo, and the tragedy that will befall them if they do not comply with the conditions of voodoo done in the shrine by the voodoo priest.[24]The traffickers tell the victims that if they do anything contrary they will invoke the spirit of voodoo. Which shall result in death, illness, misfortune to the victim and their families.[25]

2. Voodoo in Human Trafficking as impediments to Effective Administration of Justice

One of the fundamental factor that is making human trafficking business to thrive very well in Nigeria is the use of voodoo.[26] Voodoo acts as impediments to effective

[15]C .Olufade, 'Sustenance of Sex Trafficking in Edo State:The Combined Effect of Oath taking, Transnational Silence and Migration Imaginaries on Trafficked women in Edo State'<https://hal.archives-ouvertes.fr/hal-03313374>accessed 11 May 2022.

[16]N.H Msuya, 'Traditional "juju oath" and Human Trafficking in Nigeria: A Human Rights Perspective' [2019] *De Jure Law Journal* 138-162.

[17]M. Ikeora,'The Role of African Traditional Religion and ' juju' in Human Trafficking:Implications for Anti Trafficking '[2016])(17)(1)*Journal of International Women Studies* 8

[18]Ikeora(n 17).

[19]Millet (n 9), 14.

[20]*Ibid*.

[21]*Ibid*.

[22]Millet (n 9), 14

[23]*Ibid*.

[24]P.A Anyebe, 'Voodoo and Human Trafficking in Nigeria: A Nation's Albatross' [2015](3) (2) *Journal of Social Welfare and Human Rights* 33-55..

[25]Anyebe (n 24), 47.

[26]M.Mojeed, 'Voodoo aids Human Trafficking' <http//lastradainternational.org>accessed 11 May 2022).

administration of justice. In Nigeria, the human trafficking business is a very serious and really thriving because of the use of voodoo. Immediately arrangements for victims' travels abroad are completed, traffickers seal the deal by taking the victims to shrines of voodoo priests for oath taking.[27] The, victims are made to swear that they would conceal the identities of their traffickers to anyone if eventually arrested whether in the origin country, in course of the journey or in the destination countries.[28]

The use of voodoo as an element of control by traffickers on victims are very big problems for law enforcement officials to get victims to testify against their traffickers. [29]Witnesses brought to court are unable to give testimony due to the fear that they will break an oath and eventually invite misfortune upon themselves and their families. The belief in voodoo has been a strong impediment to the prosecution of traffickers, because any law enforcement officer cannot prosecute when nobody is willing to come forward to say that voodoo has been used on him or her. [30]

In Nigeria, the crime of human trafficking cases are difficult to prosecute because our law enforcement agencies are yet to understand the concept of voodoo and the mind-set of the victim in respect of voodoo in order to gain their trust and hope to gather enough evidence.[31] The consequences of this oath taking are not just destructive to the trafficked persons, yet it is impediment to the anti-trafficking measures, particularly for law enforcers and policy implementers. [32]The fear and intimidation that voodoo creates serve as an obstruction to investigate, arrest and prosecute traffickers. The voodoo is a great set back to successful arraignment and prosecution of trafficker since the victim who has been a star witness is unwilling to reveal the ordeal as result of the fear of juju. [33] It likewise serves as an impediment to the protective measures put in place for the victims. The investigation used to be upset since victims are terrified to give reliable information to enforcement officers because of the voodoo oath coerced on them. [34] The victims of human trafficking muddle up vital information that they decide to give, and that enables the traffickers to get away from being convicted. The absence of evidence as a result of victims trusting the oath of secrecy. [35]

The use of voodoo by traffickers render the victims powerless.[36]The traffickers seize the documents of the victims when they arrive the destination country.[37] When the victims find themselves in a foreign country lacking a network of friends and family, destitute, without documentation, unable to speak the language, and emotionally and physically down from the violence experienced during the course of moving from one country to another they become distressed[38] and are at the mercy of the traffickers. Voodoo which is used as as a control mechanisms by traffickers coerce the victims of human trafficking and generate a power versus powerless strong force throughout the recruitment, trafficking, and enslavement

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[27]*Ibid*.
[28]*Ibid*.
[29]E.W, Harrop, Ties that bind: African Witchcraft and Contemporary Slavery, Liberty and Humanity [2012] <http://libertyandhumanity.com/themes/humantrafficking/ties-that-bind-african-witchcraft-and-contemporary-slavery/> accessed 11 May 2022 .
[30]A.T Nwaaubani, 'A Voodoo curse on Human Traffickers'< https://www.nytimes.com/2018/03/24/opinion/sunday/voodoo-curse-human-traffickers.html>accessed 24 February 2022.
[31]Nwaaubani(n 30).
[32]U.M Usman et al., 'Traficking Twin Error:Mysterious Madam and Voodoo Victimisation in the case of Nigeria'[2018](8)(1)*Journal of Public Administration and Governance*,403.

[33]*Ibid*.
[34]*Ibid*.
[35]*Ibid*.
[36]Millet (n 9), 25.
[37]Millet (n 9), 25.
[38]Millet (n 9), 25.

process. [39]From the moment the recruiter indicates he has connections to traffic the victims for a better life, he has established a position of power.[40]

From there, God and the deities are to be feared and obeyed.[41]A victim in which voodoo has been administered upon will refuse to cooperate with prosecution as a witness in court. [42] In court, a victim of human trafficking who is regarded as a a major witness in a criminal trial to testify against the trafficker may refuse to appear in court or cooperate with law enforcement agents.[43]The victim of human trafficking who is a relevant evidence of exploitations against the traffickers when brought before the court is first of all afraid in the physical structure of the court room for instance, the manner in which the judge is dressed in wig with cream or white colour and gown with black or red colour .Standing before the public in an open court to see lawyers ,litigants or other witnesses also instills further fear in the victim because of the use of voodoo and that will enable the victim refuse to cooperate with the investigation by answering questions put to the victim knowing fully well the consequences of breaking the oath.[44] This is as result strong belief in the voodoo. [45]

The voodoo is meant to create fear in the victims to obey, be subservient and "loyal" to their traffickers, to ensure full exploitation of the victim without fear of detection by the law enforcement officers.[46] Victims of human trafficking in which voodoo has been administered or used upon have no confidence in our law enforcement officers, who sometimes do conclude that victims are with limited information.[47] While some victims usually capitalised on such flimsy claims of voodoo to avoid enforcement officers or to seek asylum. Victims who could not give necessary evidence as a result of voodoo are more substantial number, which impedes protection and assistance, halting the implementation of NAPTIP trafficking policies.[48] It also prevents prosecution, and makes it impossible to convict traffickers and this gives a setback to the protection of victims. [49]

Victims of human trafficking are not only traumatised by their oath but also by the exploitation they have been subjected to abroad as sex workers, and this is the reason why many victims abstain from giving evidence against traffickers. Most of the prosecuted cases against traffickers are as a result of the collaboration of the voodoo priests who served as our witnesses in court.[50]

The traffickers use voodoo to control the victim when she is out of physical reach. Within the minds of the victims, the voodoo oath is the same irrespective of where the victims are residing and this is the reason why most of the victims will not cooperate with the authorities in destination countries.[51]

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[39]*Ibid*.
[40]*Ibid.*
[41]*Ibid.*
[42]S.K,Kigbu, 'Challenges in investigating and prosecuting Trafficking in persons cases in Nigeria'[2015](38)*Journal of Law,Policy and Globalisation* ,146-157.
[43]*Ibid*,152.
[44]Kigbu (n 42),153.
[45]*Ibid*.
[46]Kigbu (n 42),153.
[47]Usman (n 32) 404.
[48]Usman (n 32) 404.
[49]*Ibid*.
[50]Danish Immigration Service,Protection of Victims of Human Trafficking in Nigeria:Report from Danish Immigration Fact Finding Mission to Lagos.Benin City and Abuja Nigeria 9 -26 September2007.< https://www.ecoi.net/en/document/1280377.html>accessed 19 May 2022
[51]*Ibid*.

In human trafficking network, voodoo is employed as a form of psychological control mechanism aimed at oppressing victims [52] Voodoo makes victim psychologically and spiritually bound to their traffickers. The act of being controlled by voodoo depicts that the victims of human trafficking do not legally consent to their continuous exploitation which is a key characteristic of human trafficking as defined by article 3(b) of the United Nations Protocol to Prevent, Suppress and Punish human trafficking.[53] It is also important to state here that the nature of threats though more of a psychological nature rooted in superstitions, are believed to have physical manifestations including death of the victim, if they cooperate with law enforcement agencies.[54]

It has also been acknowledged that although it is common for parties in a civil agreement to rescind their contractual obligations which will not be favourable to their interest, they are more unwilling to rescind where such contracts are concluded by oaths before a voodoo priest.[55] The unwillingness to rescind the contract is deeply rooted in traditional beliefs about deities whose judgments are believed to be immediate and catastrophic.[56] The potency of belief in voodoo lies primarily in the strong attachment and commitments to tradition and cultural life by Nigerians and Africans as a whole. Most of the victims are from a social environment where issues surrounding superstitions are taken seriously. As a result of this, irrespective of the inhuman treatment at the hands of their traffickers, victims are reluctant to seek assistance or cooperate with NAPTIP officials and other law enforcement agencies. Evidences have shown that victims involved in voodoo ritual process experience less violence from their traffickers when compared to victims not involved in voodoo ritual process, as the fear of the voodoo keeps them under control.[57] Accordingly, even in situations where the perpetrators have been arrested and NAPTIP officials depends on the testimony of the victim, they still maintain their refusal to testify against their traffickers because of their belief in the oaths taken by them and the potency of such oath which they believe will lead to their death or that of a close family relative or in some instances, insanity.[58]

Furthermore, because of the psychological nature of voodoo, no victim can be said to be safe from the subjective fear of the oath. Even though a victim gets the opportunity to remain abroad by legal means for instance if she is granted asylum because she has testified against traffickers would still fear that the voodoo priest is capable of killing her no matter where she might be.[59]

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[52]UNHCR 'Voodoo, Witchcraft and Human Trafficking in Europe' New Issues in Refugee Research, Research Paper no. 263, October 2013.< https://www.ecoi.net/en/file/local/1079285/1930_1382531731_526664234 pdf>accessed 24 March, 2022..

[53] M. Van der Watt and B.Kruger Exploring 'Juju' and Human trafficking: Towards a Demystified Perspective and Response' [2017] (48) *South African Review of Sociology* 70-86.

[54]United Nations Human Rights Office of the High Commissioner, *The Protection of Victims and Witnesses: A Compilation of Conference Reports and Consultations in Uganda* (2010) 83. http://www.uganda.ohchr.org/Content/publications/WitnessAndVictimProtectionInUganda.pdf. accessed 19 May 2022

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CONCLUSIONS

Victims of human trafficking are not only traumatised by their oath taken during the voodoo ceremonies but are also subjected to exploitation by traffickers to travel to abroad as sex workers, to enjoy good and comfortable life. This is the reason why many victims abstain from giving evidence against traffickers and reveal the identity of the traffickers in court of law. Most of the prosecuted cases against traffickers are as a result of the collaboration of the voodoo priests who served as our witnesses in court. Investigators in NATIP are regularly threatened by traffickers who send threat letters and make calls warning them to slow down on the fight against human trafficking or be prepared to lose their lives. "Prepare for war. Your family will get the result.[60]

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THE EXERCISE OF POLICE POWERS AND ENFORCEMENT OF INTERNATIONAL HUMAN RIGHTS NORMS IN NIGERIA: AN APPRAISAL

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ABSTRACT

The police have the duty of prevention, investigation and prosecution of crime in the society. In the course of their duties, conflicts arise between the law officers and the civilians. In Nigeria, the police are known for the abuse of legal processes and the right of the citizens often culminating at excessive use of force, unlawful detention and in extreme cases which is rampant extra-judicial killing. This paper gave an exposition of some international legal instruments and standards applicable to law enforcement and how they help curtail abuse of the citizens' right. The paper found that there is gross abuse of human rights in the course of the duty of the police in Nigeria. It was noted that the police have an obligation to observe, ensure compliance and implementation of these international human rights norms. It was recommended that there should be training and retraining of the police in Nigeria especially in forensic and technologically driven investigation and prevention of crime. Furthermore, corruption in the Nigerian police should be curbed by giving more incentives like salary increase to the police. The paper concluded that implementation of these recommendations will improve police human right observance in Nigeria.

KEYWORDS: police powers, enforcement, international human rights, violations, Nigeria.

INTRODUCTION

The police are central to the protection and implementation of international human rights norms in Nigeria. This is as a result of the strategic importance of their function in society to protect life and property, prevent and detect crime, and apprehend and prosecute offenders (Police Act, 2020, s.4). In the course of their duties, violation of the human right of suspects occurs, thus undermining the human right of individuals guaranteed under the law (Amnesty International, 2020a). In Nigeria, abuse of human rights of citizen abound. It appears from the rampant nature of the violations that the police in Nigeria operate without regard to international legal instruments on human rights, many of which Nigeria is signatory and has domesticated, including the African Charter on Human and People's Rights.

The Universal Declaration of Human Rights 1948 and the African Charter on Human and People's Rights 1981 provides for various human rights which includes right to life, right to personal liberty, right to fair hearing etc. However in the course of performing their duties as law enforcement officers, there are abuses of the rights of citizen which take different forms but not limited to the following: extra-judicial killing, torture and unlawful detention. Various reports are replete with the horrendous accounts of extra judicial killings in Nigeria, particularly in the hands of members of the Nigeria Police Force (Madaki, 2012: 302). For instance, from 2000 to 2003, about 5,776 out of the 24,941 reported armed robbery suspects arrested by the Nigerian Police were summarily executed without trial and classified as "killed in combat" (ibid). Torture is a widespread means employed by the police to obtain information from suspects (Mpamugo, 1996: 29). About 69.5% of statements or confessions made by suspects during interrogation in custody are extracted under duress or torture (ibid). '

Suspects are arrested illegally and detained beyond the legal period allowed for the detention of pre-trial suspects (Ezeamalu, 2017). Most suspects are not even given fair hearing particularly at police stations when they are arrested (Ajomo & Okagbue, 1991:106). The objective of this paper therefore is to discuss the role of the police in the application of international human rights norms in Nigeria. The paper concentrates on Universal Declaration of Human Rights, and the African Charter on Human and Peoples' Rights. It discusses the history and types of international human rights law and their incorporation into Nigerian domestic law and analyses the content of international human rights law applicable in Nigeria, their place as standard for enforcement of laws in Nigeria by the police and the functions of the Nigerian police in the protection of human rights.

1. What is Human Right?

Human right is universal (Shiij, 1959:10). In other words, it is seen as that which is accruable to all human beings irrespective of sex, race, religion and colour (Henkin, 1985:1; Rosebaum, 1981: 5). Human rights dignify man and some school of thought postulates that human rights are issued from natural law (Cranston, 1973:1). It is a primary condition to civilized existence (Ransom-Kuti v. A.G. Federation, 1985: 211). They inhere in all human beings by virtue of their humanity alone.

Ezejiofor (1994:3) sees human rights as what is traditionally known as natural rights and these may be defined as moral rights which every human being at all times ought to have because of the fact that he is rational and moral as distinct from other beings. Eze (1984:10) defines human rights in terms of group rights and states that human rights are demands or claims which individuals or groups make on society, some of which are protected by law and have become part of law. Human rights have also been defined as those claims made by men, for themselves or on behalf of other men, supported by some theories, which concentrate on the humanity of man, on man as a member of the human kind (Dowrick, 1979: 12). The Black's Law Dictionary defines it as the freedoms, immunities and benefits that, according to modern values (especially at an international level), all human beings should be able to claim as a matter of right in the society in which they live (Garner, 2004:758).

Nsirimovu (1994: 24) illustrates human rights as follows: The term human right means the conditions of life which men have right to expect by virtue of being a human being. The concept involves not a statement of fact but rather yardstick against which conditions in practice may be measured. Nor does the supposed existence of rights necessarily imply the existence or even possibility of laws to enforce or protect rights though in practice this may sometimes be the case. Rights are the ideals and distinguishing marks of a civilized society. The fundamental concept embraced in over-arching concept of rights may be identified as justice, equality, freedom and self-determination.

Upon coming into being of the Universal Declaration of Human Rights in 1948, human rights have been reinforced almost globally. Every human being in every society is entitled to have basic autonomy and freedom (Henkin, 1985: 7). Hence they can make a fundamental claim that a constituted authority observe or retrain from the doing of certain things that may be against their human dignity (Forsythe, 1991: 1). These rights are ineffective until they are enforced legally. Human rights impose duties both on the individual and the government. However the main responsibility to observe and protect human rights lies on the government (Nickel, 1987: 3).

Some of the human rights recognized under the Constitution of the Federal Republic of Nigeria are (i) right to life (s.33), (ii) right to the dignity of the human person (s.34), (iii) right to personal liberty (s.35), (iv) right to fair hearing (s.36), (v) right to private and family life (s.37), (vi) right to freedom of thought, conscience and religion (s.38), (vii) right to freedom of expression and the press (s.39), (viii) right to peaceful assembly and association (s.40), (ix) right to freedom of movement (s.41), (x) right to freedom from discrimination

(s.42), (xi) right to acquire and own immovable property anywhere in Nigeria (s.43), and (xii) compulsory compensation for acquisition of property (s.44).

2. History and Types of International Human Rights Law (IHRL)

The Universal Declaration of Human Rights was the first instrument on the Bill of rights that made provisions for fundamental rights of mankind. There is also the International Human Rights Covenants: the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR). These three human rights instruments form the international bill of rights. They address various human rights issues ranging from personal, legal, civil, political, subsistence, economic, social and cultural rights (Agbara, 2017: 28).

Scholars identify three generations of rights. The first generation of rights comprises the provisions of ICCPR. These include right to life and personal integrity, due process of law and a humane penal system, freedom to travel within as well as outside one's country, freedom from expression, religion and conscience, cultural and linguistic rights for minorities, the right to participate in government and free elections, the right to marry and the right to equality and freedom from discrimination.

The second generation rights embodied in the ICESCR has to do with economic, social and cultural rights. These rights are to be progressively realized by nations within the limit of available resources. These rights include: right to work, right to enjoy just and favourable conditions of work, right to join trade unions, the right to social security, right to protection for the family, for mothers and children, and right to have an adequate standard of living. Others include the right to the highest attainable standards of physical and mental health, right to education and the right to partake in cultural life.

The third generation rights are said to be collective and include: peoples' right to development, the right to a healthy environment, the right to peace, the right to the sharing of a common heritage and humanitarian assistance (Welch, 1984: 26). These rights form the basis of human rights laws in different countries. Other international human rights instruments (Mayer, 1981:34) include:

(i) International Convention on the Elimination of all forms of Racial Discriminations (ICERD).
(ii) The Convention on the Elimination of all forms of Discrimination Against Women (CEDAW).
(iii) The Convention Against Torture and Other Cruel, Inhuman and Degrading Treatments.
(iv) The Convention on the Protection of all forms of Rights of all Migrant Workers and their Family (ICRMW).
(v) The International Convention on the Protection of all Persons from Enforced Disappearance (CPED).
(vi) African Charter on Human and Peoples' Rights.
(vii) Convention on the Rights of the Child.
(viii) Convention on the Elimination of all forms of Discrimination Against Women.

The paper shall however, concentrate on the Universal Declaration of Human Rights and the African Charter on Human and Peoples' Rights.

3. Incorporation of IHRL into Nigerian Domestic Law

By virtue of section 12 of the Constitution of the Federal Republic of Nigeria 1999, international instruments to which Nigeria is party must be domesticated in order to be applicable in the country. However, the non-domestication of an international treaty does not detract from the obligation Nigeria has undertaken under that instruments in respect of other nations in international law as long as Nigeria is a signatory to that instrument and have

ratified or acceded to the treaty as the case may be (s.27 Vienna Convention on the Law of Treaties 1969). In *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in* the *Danzig Territory* (1932) the Permanent Court of International Justice in its advisory opinion stated "it should, however, be observed that a state cannot adduce as against another State its own constitution with a view to evading obligations incumbent upon it under international or treaties in force" (Eke, 2020).

Nwande (2017: 18) distinguished between a nation's domesticated rights and every other right, which a nation has not recognized as follows:

There is a clear distinction between 'fundamental rights' and 'human rights'. Human rights are rights, which were derived from the wider concept of natural rights. They are rights which every civilized society must accept as belonging to each person as a human being irrespective of citizenship, race, and religion and so on. Thus, human rights have now formed part of international law. Fundamental rights on the other hand, remain in the realm of domestic law. They are fundamental because they have been guaranteed by the fundamental law of the country, that is, the constitution.

Several international human rights instruments have been domesticated in Nigeria, which includes the African Charter on Human and Peoples' Rights 1981 and the UN Convention on the Rights of the Child 1989. This paper is however, limited to the Universal Declaration of Human Rights (UDHR) and the African Charter on Human and Peoples' Rights (ACHPR), and we shall analyze the provisions of these instruments together except where any of the instruments provide a different right. Both instruments provide as follows:

a) Equality before the law

This right provides that every person is equal before the law and therefore should not be treated differently no matter the status of the person. In other words, there should be equal protection before the law (Art. 1 & 2 UDHR; Art. 3 ACHPR).

b) Right to life, liberty and security of person.
c) No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
d) Right to liberty.
e) Right to fair hearing (Art. 10 & 11 UDHR; Art.7 ACHPR), which comprises:
    i) right to appeal to a competent national organ against acts of violation of fundamental rights as recognized or guaranteed under the law.
    ii) right to be presumed innocent until proved guilty by a competent court or tribunal.
    iii) right to defence, including the right to be defended by counsel of one's choice
    iv) right to be tried within a reasonable time by an impartial court or tribunal.
    v) right not to be condemned for an act that does not constitute an offence at the time it was committed.
f) Freedom of thought, conscience and religion (Art. 18 UDHR; Art. 8 ACHPR).
g) Right to freedom of opinion and expression (Art. 19 UDHR; Art. 9 ACHPR). This right incudes freedom to hold opinion without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.
h) Right to free association and peaceful assembly (Art. 20 UDHR; Art. 10 ACHPR). No one should be compelled to belong to any association.
i) Right to own property (Art. 17 UDHR; Art. 14 ACHPR). Nobody should be arbitrarily deprived of his property.
j) Right to freedom of movement and residence within borders of a state (Art. 13 & 14 UDHR; Art. 12 ACHPR).
k) Right to private and family life (Art. 16 UDHR; Art. 12 ACHPR).

Although, the African Charter on Human and Peoples' Rights have been domesticated in Nigeria, these rights mentioned above have also been enshrined in the constitution as fundamental human rights (Chapter IV of the 1999 Constitution of Nigeria). However, some of the rights provided in the Universal Declaration of Human Rights and the African Charter

on Human and Peoples' Rights may not be enforceable in Nigeria as a result of Chapter 2 of the 1999 constitution. The rights that may be enforceable in Nigeria by the national assembly by virtue of the domestication of the African Charter on Human and Peoples' Rights include the following:

1) Right to economic, social and cultural development (Art. 22 ACHPR).
2) Right to freely dispose of their wealth and natural resources (Art. 21 ACHPR).
3) Right to work under equitable and satisfactory conditions and receive equal pay for equal work (Art. 15 ACHPR).
4) Right to enjoy the best attainable state of physical and mental health (Art. 16 ACHPR).
5) Right to education (Art. 17 ACHPR).
6) Right to a standard of living adequate for the health and well-being of the person and the family including right to food, clothing, housing, 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 the control of the person (Art. 25 UDHR).
7)

4. Functions of the Police and Protection of Human Rights in Nigeria

4.1 History of the Nigerian Police Force

The police is the civil force of a State responsible for maintaining public order (Nwande, 2017: 21). A police officer in Nigeria is any member of the police force appointed or deemed to be appointed under the Nigerian Police Act. The word 'police' is derived from the Greek word '*politeia*', which means 'government'. It refers to the segment of government that deals with the protection of life and property, preservation of public tranquility and maintenance of order, and the prevention and control of crime (*MihirAdlikary* v. *State* 1983).

Originally, the word 'police' was used in a wider sense to connote the management of internal economy and the enforcement of governmental regulation in a particular country. Later, the term began to be used in a limited sense to mean an agent of the state for maintenance of law and order and enforcement of the orders of a criminal court (Nwande, 2017: 21). The primary object of the police as conceptualized in present times is the prevention and detection of crime and the maintenance of public order. The police in this context can be seen as instrument for enforcing the rule of law. Police can therefore be said to be persons under the government, employed for maintenance of law and order in the society, in accordance with the rule of law (Nwande, 2017: 24).

In Nigeria, the police system existed even before the arrival of the colonialists. Each independent kingdom prior to colonial rule had a system of policing. The Igbos in Eastern Nigeria for instance, used the system of age grade to check crimes and punish offenders. The age grade groups were also used to enforce village laws, customs and traditions as well as collecting taxes and fines from villagers for the good governance of the village. In Hausa states, the system of governance was highly centralized before the advent of the British colonialists. The *dogarai* who were bodyguards of the emirs performed full police functions for the empire, which include checking crimes and disciplining offenders. They were also responsible for collection of taxes on behalf of the emirs (Nwande, 2017: 24).

In the Yoruba kingdoms, the *Ilari*, *Emese* or *Ogunren* were the police officers. Their duties were to apprehend criminals and collect taxes for their Obas or Onis. The Nigerian police force was created by the colonialists out of a thirty-member consular guard formed in 1861 in Lagos Colony, which later transformed into an armed paramilitary called the Hausa Constabulary formed in 1879. In 1896, the Lagos police was established. Earlier, the Niger Coast constabulary was formed in Calabar. The Royal Niger Company set up a constabulary in 1888 in Lokoja (Nwande, 2017: 24).

The amalgamation of the Northern and Southern protectorates of Nigeria in 1914 brought about the merging of the Royal Niger Company constabulary and the Niger Coast Constabulary into Northern and Southern Nigeria Police. In 1930, the Northern and Southern Police were merged to form the Nigerian police force with Lagos as the Headquarters. The Nigeria Police Act was enacted in 1943 by the British colonial government.

Following independence, the constitution of the Federal Republic of Nigeria created the Nigeria Police Force. It provides as follows:

There shall be a police force for Nigeria which shall be known as the Nigerian police force and subject to the provisions of this section no other police force shall be established for the federation or any part thereof. Subject to the provision of this constitution, the Nigerian police force shall be organized and administered in accordance with such provisions as may be prescribed by an Act of the National Assembly (s.214 constitution of the Federal Republic of Nigeria 1999).

4.2 Duties of the Nigerian Police

Section 4 of the Nigeria Police Act, 2020 provides for the duty of the police**.** The Nigeria police personnel are employed for the prevention and detection of crime, the apprehension of offenders, preservation of law and order, protection of life and property and the due enforcement of all laws and regulations with which they are directly charged. They shall also perform such military duties within or outside Nigeria as may be required of them by or under the appropriate authority.

Thus, the main functions of the Nigeria police are to protect lives and property of the citizens and enforce the laws and order in the society. According to Nwande (2017: 27) the following are among the duties of the police in Nigeria: (a) detecting and preventing criminal activity; (b) apprehending offenders; (c) participating in court proceedings; (d) protecting constitutional guarantees; (e) assisting those who cannot care for themselves, or who are in danger of physical harm; (f) controlling traffic; (g) resolving day to day conflicts among family, friends and neighbours; (h) creating and maintaining a feeling of security in the commonly; (i) investigating crimes; and (j) promoting and preserving civil orders.

4.3 Nature of human rights violations

In the course of performing their duties, the police often violate the human rights of Nigerian citizens in various forms as discussed below:

(a) Custodial violence and persecution in police cells

Nigeria uses the accusatorial system of criminal justice under which a suspect is presumed innocent until proven guilty by a court of competent jurisdiction. Therefore, the police should also presume a person in their custody innocent until proved guilty by the court (Art. 11 UDHR; Art. 7 ACHPR; s.36(5) constitution 1999). Police may impose only those conditions and restrictions that will ensure the appearance of the accused person at trial, prevent their interference with evidence and commission of likely offence on bail. However, a lot of allegations abound on police maltreatment of suspects ranging from detaining suspects illegally, beating, hanging, mock execution, beating, punching and kicking, burning with cigarettes, water boarding, near-asphyxiation with plastic bags, forcing detainees to assume stressful bodily positions and sexual violence, torture, detaining beyond permitted period, not permitting to wear proper cloths, and not providing food (Edafe, 2021: 83; Amnesty International, 2020b). This significantly affects the rights of suspected offenders in Nigeria.

(b) Arbitrary Arrest and Illegal Detention

Detention means deprivation of personal liberty except as a result of conviction for an offence, whereas imprisonment means deprivation of personal liberty as a result of conviction for an offence. In free societies, the law is zealous of the liberty of citizens and does not permit detention unless there is a legal sanction for it (s. 35 Constitution of the Federal Republic of Nigeria 1999).

(c) Torture and Brutality

Human rights abuses through torture and brutality have left many people injured physically, mentally and psychologically as they go through experiences in police custody in Nigeria. Brutality encompasses both physical and verbal assaults, harassment and restraints from exercise of constitutional rights (Art. 1 Convention Against Torture 1984). Brutality also occurs in the form of extra-judicial killings or summary execution of suspects (Madubuike-Ekwe & Obayemi, 2019: 9). During criminal investigation, human rights are abused where the investigator resorts to torture to extract confession. Various methods used include beating with sticks, iron bars, wires and cables; sticking pins or sharp objects into private part of suspects; shooting of suspects on the limbs, and use of cigarette lights to inflict burns on suspects. Other practices include arresting a relation as substitute for wanted suspects. These practices apart from violating the human rights of suspects, create an indelible negative impression of the investigator among victims and the society at large (Adebowale, 2015).

5.The Role of the Nigerian Police in Implementing International Human Rights Norms

The role of the police in implementing international human rights norms in Nigeria cannot be over-emphasized. The police are the watchdog of security and protection of life, so a lot rests on them to ensure the human rights of citizens are observed and adhered to. One of the ways the police ensure the implementation of these international norms is through the observance of international standards for law enforcement (OHCHR, 1997). These standards are as follows:

(i) Ethical and Legal Conduct

The Standard provides that the law enforcement officials shall respect and obey the law at all times. They shall at all times fulfill the duty imposed upon them by serving the community and by protecting all persons against illegal acts, consistent with the high level of responsibility required by their profession.

Law enforcement official shall not commit any act of corruption. They shall vigorously oppose and combat all such acts. All police action shall respect the principles of legality, necessity, non-discrimination, proportionality and humanity.

(ii) Policing in Democracies

Limitations on the exercise of rights and freedoms shall be only those necessary to secure recognition and respect for the rights of others and for meeting the just requirements of morality, public order and the general welfare in a democratic society. Every law enforcement agency shall be representative of and responsive and accountable to the community as a whole.

(iii) Non-discrimination in law enforcement

Law enforcement shall respect and protect human dignity and maintain and uphold the human right of all persons. All persons are equal before the law and are entitled without discrimination, to equal protection of the law.

(iv) Police Investigations

In investigations, the interviewing of witnesses, victims and suspects, personal searches, searches of vehicles and premises and the interception of communications: (a) everyone has the right to fair hearing; (b) no pressure, physical or mental shall be exerted on suspects, witnesses, or victims in attempting to obtain information; (c) torture and other inhuman and degrading treatment is prohibited and (d) investigations shall only serve to identify victims, recover evidence, discover witnesses, discover cause, manner, location and time of crime; identify and apprehend perpetrators.

(v) Arrest

The Pocket Handbook of Standard for Law Enforcement (OHCHR, 1997) provides that no one should be subjected to arbitrary arrest or detention. Deprivation of liberty shall only be in accordance with the law. It further provides that anyone arrested should be informed at the

time of the arrest, reasons for his arrest and informed of the charges against him and promptly brought before a judicial authority. Detention without trial should be the exception rather than the rule. All arrested or detained persons shall have access to a lawyer or other legal representation and adequate opportunity to communicate with that representative.

(v) Detention

The Pocket Hand Book provides in respect of pre-trial detention that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Further, no detainee shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment or any form of violence or threats. Detained persons shall only be held in officially recognized places of detention and their family and legal representatives are to receive full information. Decisions about duration and legality of detention are to be made by a judicial or equivalent authority. Furthermore, no one should take advantage of detained persons to make him confess or incriminate himself or another person. Detainees should have the right to contact outside world, visit for family members and to communicate privately with a legal representative.

(vi) The Use of Force

In regard to the use of force, the Pocket Handbook provides that non-violent means are to be attempted first. Force is to be used when strictly necessary and is to be used only for lawful law enforcement purposes. It provides that no exception is to be allowed for unlawful use of force. Use of force should always be proportional to lawful objectives. It further provides that restraint is to be exercised in the use of force and that damage and injury are to be minimized. All officers are to be trained in the use of various means of differentiated use of force and are to be trained in use of non-violent means.

(vii) Accountability for the use of force and fire arms

The Pocket Handbook provides that all incidents of the use of force or firearms shall be followed by reporting to superior officers. Superior officials shall be held responsible for the actions of police under their command if the superior officer knew or should have known of abuses but failed to take concrete action. Furthermore, officials who refuse unlawful order should be given immunity. Officials who commit abuses of these rules should not be excused on the grounds that they were following superior orders.

(viii) Permissible circumstances for the use of Firearms

The Pocket Handbook provides that firearms are to be used only in extreme circumstances. It further provides that firearms are to be used only in self-defence or defence of others against imminent threat of death or serious injury and to prevent a particularly serious crime that involves a grave threat to life. Firearms can also be used to arrest or prevent the escape of a person posing such a threat and who is resisting efforts to stop the threat. However, firearm is to be used only when less extreme measures are insufficient. Intentional lethal use of force and firearms shall be permitted only when strictly unavoidable in order to protect human life.

(ix) Procedure for the use of fire arms

The Pocket Handbook provides that the officer is to identify self as police official and is to give a clear warning. The officer is to allow adequate time for warning to be obeyed. This shall not be required if the delay would result in death or serious injury to the officer or others.

(x) After use of Firearms

The Pocket Handbook provides that after the use of firearms, medical aid is to be rendered to all injured persons. The relatives or friends of those affected are to be notified and investigation is to be allowed where requested or required. Finally, a full and detailed report of the incident is to be provided.

If these rules are observed by law enforcement agencies, they would have played their role in implementing international human rights norms in Nigeria.

CONCLUSIONS

This paper has appraised the Universal Declaration of Human Rights and the African Charter on Human and Peoples' Right and the various provisions of the two international human right instruments. It also appraised the functions of the police and how these international instruments on human right have impacted the discharge of the law enforcement duties of the police. The paper observed that despite the existence of these international instruments on human rights, which should guide the police in the discharge of their functions, the Nigeria police force has largely disregarded them. The non-observance of these international human rights instruments in Nigeria has occasioned the rampant abuse of human right by the police. The observance and protection of human rights ensures a just society that promotes the rule of law. A just society leads to a prosperous and peaceful state. Therefore, the protection of human rights benefits every citizen including the law enforcement officers and the nation at large, which is why it is the duty of everybody to ensure that human rights are respected in the society.

In order for the police to observe, safeguard and implement international human right norms, the following recommendations are made.

a) Police reforms in Nigeria should address the problems of human rights violation in custodial matters and structural problems which have been identified as facilitating torture or ill-treatment and other human right violations.
b) Incorporation and emphasizing of human rights standards particularly those relating to arrest and detention procedures, safeguard against discrimination and use of force and firearms into Nigerian police training manual/curriculum
c) A review of the Police Act, to bring the laws governing the police into line with international standards.
d) Identification and punishment of culprits who may flout the rules.
e) Scientific investigation tools should be made available to the police to aid them in investigation of cases.
f) The public should also be educated to know their rights and duties towards the police, and the police should understand that they have legal powers to control human rights violations and that it is their responsibility to protect human rights without submitting to any kind of pressures like media, public and politicians.
g) Computerization, video recording and modern methods of record maintenance should be adopted by the police in Nigeria.
h) Increased remuneration and incentive to work and good working environment for the police.
i) Training and re-training of police officers and international exchange programmes to help police officer learn new methods of policing.
j) Investigation and gathering of evidence should precede arrest. This will curb arbitrary arrests.
k) Securing freedom of arrested/detained persons should not be with illegal conditions as failure to meet those conditions engender the violation of human rights of suspects.
l) There should be an established check and balances within the police force that should monitor the abuse of human right across police formations in Nigeria. Stringent disciplinary actions should be taken against police officers who abuse the rights of suspects or detainees in police custody.

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A NEW RELATIONSHIP FOR ECONOMICS AND EDUCATIONAL SCIENCES: FINANCIAL EDUCATION

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ABSTRACT

Among the many areas of dialogue between economics and educational sciences, one common object of study has now clearly emerged: economic and financial education, which was created to raise the literacy levels of the adult population and young people. Indeed, more and more decisions in everyday life are linked to economic and financial aspects. The current economic and financial knowledge of the population is not adequate to the needs as it comes mainly from financial socialisation processes; it is instead necessary for schools and not only the banking and insurance world to deal with these new educational processes. However, in order to introduce these topics, schools must train teachers who do not have adequate knowledge. In Romania, this is a recent issue, which is why it was decided to launch a new research project.

Keywords: *economics and pedagogy, financial literacy, financial socialization, economics and financial education, teacher training*

1. INTRODUCTION

Even today, after many years of scientific debate, economics and pedagogy still have a difficult relationship to define the object of study. The first references of pedagogical field are of the Seventies of the last century, Mialaret (1976) from France and Visalberghi from Italy (1978) before other scholars, have tried to build some topics of study close to each other as the german Abraham (1970); in Italy the most recent ones are referred to the links (Aglieri, 2017) or of the development areas (Refrigeri, 2020a) while others are referred to more consolidated pedagogical research areas such as the labour pedagogy. In Romania, research in this field started more than 15th years ago (Stănculescu, 2010), so it was decided to build on the research already available in Italy. It is economics that is recognised as the science to deal with this, while the others are only considered as emergent: psychology (Rumiati et al., 2008), anthropology (Grendi, 1972), sociology (Gallino, 1972) and, in fact, partly pedagogy; economics, however, continues to deal with measuring the effects of education on society (Jonhes, 1993, Delamotte, 2000) and only recently has it cast doubt on the ability of *homo oeconomicus* to make the most correct choices.

In this wide-ranging relationship between the two fields of research, the issue of the population's financial and economic literacy and ways of increasing it has attracted much interest in recent years. This has led to the recognition that it is essential to educate the population to make decisions in everyday life, also with a view to the future.

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Unfortunately, the strong interest in measuring financial literacy levels on the part of many institutions (OECD-PISA; World Bank, Bank of Italy, etc.) is not matched by an equally strong capacity to propose effective improvement plans; what is on offer today continues to be proposed to the population (adults, the generally weak, young people, students, etc.) in an inadequate manner; they are, in fact, awareness-raising and information actions and not education and instruction.

What emerges clearly from every survey is the low level of economic and financial literacy of the Italian population in all its generations and the consequent limited ability of Italians to disentangle themselves from current social contexts; even the low level of financial literacy could be attributed to the lack of awareness and relatively virtuous behaviour during the 2008 crisis which, presumably, contributed to the transformation of the financial crisis (that of the global banking system) into an economic crisis, that of the real economy, i.e. that of the production of goods and their consumption. (Klapper et al., 2012).

The daily use of increasingly complex and diverse financial services has highlighted that the literacy levels of citizens, particularly young people, are low (OECD, 2014a). It is therefore necessary to improve the knowledge and understanding of financial concepts so that adults and young people can improve their decision-making on money management. This led to the endorsement by the 2012 G20 leaders of the High Level Principles on National Strategies for Financial Education (G20, 2012; OECD/INFE, 2012) and the submission of a 2013 Policy Manual on the Implementation of National Strategies for Financial Education, which complements the Principles by supporting their implementation in relevant countries (OECD/INFE, 2015).

As already mentioned with respect to the structured reflection on the need to intervene in favour of the improvement of financial literacy levels (OECD, 2005), it is the banking and insurance worlds that were the first to take action to bridge the gap through economic and financial education actions aimed at the entire population, regardless of their planning competences. And this has allowed them to be attributed the role of non-formal educational agencies, precisely because of their intentionality in wanting to increase the economic and financial knowledge of students and the population in general; initiatives first surveyed by the Bank of Italy (2017) and more recently also by the National Observatory of Economic and Financial Education (ONEEF, 2019). This was born from a scientific-academic research initiative, which has precisely the purpose of census and monitoring the economic and financial education paths implemented in Italy and mainly addressed to schools and universities (http://economiascuola.it/oneef/).

To generalise on what has been done so far, it should be noted that although the initiatives are aligned with the National Strategy for Financial, Insurance and Pensions Education of the Committee for the Planning and Coordination of Financial Education Activities, they do not seem to be having the desired effectiveness on the literacy of the Italian population. In fact, an initial analysis of the latest 2018 OECD Pisa survey on financial literacy shows that the performance of young Italians in the years 2012, 2015 and 2018 is essentially the same, indeed it has worsened.

2. THE OECD PROGRAMM FOR INTERNATIONAL STUDENTS ASSESSMENT

The importance of developing financial skills among young people is increasingly recognised. Students approaching the end of compulsory education will soon be making decisions that will have significant consequences for their adult lives: deciding whether to continue their studies or to enter the labour market. In some countries, this decision also includes how to finance tertiary education and whether to take out a loan (e.g. to study). University fees range

considerably from one country to another, making loans more or less relevant. In any case, as young people enter adulthood, they will necessarily have to carry out more financial transactions, both at work and in their daily lives, especially if financial education and financial literacy are understood to mean "the process by which financial consumers/investors improve their understanding of financial products, concepts and risks and, through information, instruction and/or objective advice, develop the skills and confidence to become more aware of financial risks and opportunities, to make informed choices, to know where to go for help, and to take other effective actions to improve their financial well-being." (OCSE, 2005).

The key elements of this definition are "understanding", "confidence", "skills" and "effective action". In addition to these, financial literacy in PISA also includes the ability of students to use financial knowledge and skills to meet the challenges of the future. So literacy refers not only to the ability of 15-year-old students to apply knowledge and skills in key subject areas, but also to the ability of students to analyse, reason and communicate effectively while posing, solving and interpreting problems in a variety of situations. And PISA data show us the extent to which 15-year-olds already use money and are involved in financial decisions. In the 13 OECD countries that participated in the 2018 survey (Australia, Canada, Chile, Estonia, Finland, Italy, Latvia, Lithuania, Poland, Portugal, Slovakia, Spain and the United States) just over one in two students (54%) hold a bank account (or similar) - in Finland 89% while Italy is only at 44%; just under one in two students (45%) hold a payment or debit card (78% in Finland and 75% in Estonia and only 41% in Italy.

Moreover, many students already have experience with financial transactions, including digital ones. On average, in OECD countries, almost three out of four students (73%) bought something online (alone or with a family member) in the 12 months prior to the survey, while about two out of five students (39%) made a payment using a mobile phone.

Data from the OECD Survey on Adult Skills (PIAAC) show the extent to which young people and adults engage in basic financial activities (OECD, 2016): more than one in three 16-24 year olds in Australia, Finland and the United States reported reading bills, invoices, bank statements or other similar documents at least once a week in their daily lives while in Italy less than one in ten students (7.5%); more than one in four 16-24 year olds in Australia, Canada, Estonia, Poland, the Russian Federation and the Slovak Republic reported reading this type of document at least once a week as part of their current or last job while in Italy less than two in ten students (15.3%). More than one in two (more than 50%) 16-24 year olds in Australia, Finland and the United States reported trying to calculate prices, costs or budgets at least once a week in their personal lives while just over three in ten in Italy (32%). In Australia, Chile and Peru, they make financial calculations at least once a week at work, while less than three in ten in Italy (25.9%) do so.

Finally, at least one in three 16-24 year olds (over 33%) in Canada, Estonia, Finland and the United States carry out financial transactions on the Internet, such as buying or selling products or services, or banking transactions, at least once a week in their daily lives. These data show that the daily lives of young people are influenced too much by the lives they lead and how their families involve them at home.

Romania does not participate in this financial literacy programme and no research has yet emerged to measure the level of financial literacy of the adult and young population.

3. TO THE FORMAL EDUCATIONAL SYSTEM

The current economic and financial knowledge of the population, not only in Italy, is mainly the result of the processes of financial socialisation, i.e. that concur to place an individual in the financial environment in which they live and form their personality from a financial and money management point of view (Rinaldi, 2015, p. 17); these processes are informal education, i.e. unintentional, they clarify the attitudes of today's young people towards consumption and saving and explain how these are the consequence of what they have learned

since childhood. In fact, financial socialisation is initiated by parents and 'led' by other adults in the family or by the peers they hang out with; it is their behaviour when shopping in shops and supermarkets, even when influencing purchases with their requests, and while handling money, using ATMs, credit cards or other newer virtual payment means (Satispay, YAP, etc.) that educates young people; or, when listening to discussions and reflections by parents about wages, household expenses, mortgage or financing for goods purchases, taxes, etc., or receiving answers to questions about their money.) that educates young people; or, when they listen to discussions and reflections by their parents about wages, household expenses, mortgage or financing for purchases of goods, taxes, etc., or receive answers to questions about where the money comes from, what their parents do, etc., they are also asked about how the money is used. (Marchetti, Castelli, 2012).

It is, therefore, adults who unintentionally condition young people's ability to disentangle themselves from the economic and financial issues of their daily lives through their knowledge and behaviour.), financial products (bank account, credit cards, etc.) and insurance (car policy, or supplementary policy, etc.), the functioning of the labour market (income, employment and self-employment, etc.) and the business world (turnover, costs, self-employment, etc.) and the taxation system (VAT, taxes, contributions, etc.). It is the experience with older people that leads to the assumption of orientations and meanings, as well as the ability to adapt to the norms and rules of the social context in which the experience takes place, especially if it is not intentionally foreseen or explicitly expected.

Thus, the acquisition of economic concepts and, more generally, education in economic citizenship depend hierarchically on the family and, gradually, on the other social agents that young people encounter in their lives: their schoolmates and those in the afternoon activities, especially sports, and then the mass media, now increasingly social networks, and only in the last instance the private institutions and associations that act intentionally towards such education. As far as our context is concerned, it can be said that the current processes of economic socialisation lead to the formation of values and behaviours that are not very virtuous from the point of view of economic and financial literacy.

Alongside the processes of financial socialisation that characterise the informal dimension of learning, one has to consider the intentional dimension by social agents themselves. Each of these educating agents, not always aware of their role, contributes to the development of the individual's financial and economic skills as he or she grows up, albeit to varying degrees, and they convey heterogeneous representations and meanings of the relationship between money and well-being (OECD, 2014). Financial education, in fact, also consists of intentional actions aimed at making the individual acquire information, orientations, values inherent to the economic and financial dimension (since the process of financial socialisation is strongly interdependent with other aspects of socialisation itself, first and foremost the economy, consumption, politics and work), usually these actions are mediated by figures with legitimate authority in the field.

Each actor, therefore, must not only acquire information of an economic and financial nature, but must take an active role in processing the information and changing behaviour where necessary. In fact, the acquisition of financial literacy alone (acquisition of economic and financial notions and concepts useful to make competent decisions as a result of socialisation and unintentional processes alone) is recognised to be a process that is no longer sufficient to change ways of acting. Financial education thus becomes a tool to make people informed about specific economic and financial issues but does not always lead to behavioural changes (Lusardi, 2008).

It is therefore acknowledged that knowledge of economic and financial matters alone is not enough to form an economically aware citizen capable of making optimal choices; what is crucial is the way in which information is acquired and processed, i.e. the mechanisms that make it possible to regulate and control economic assessments and make decisions. In fact,

the traditional notion that better informed individuals are able to make better economic and financial decisions is increasingly being replaced by the notion that the subjective mental mechanisms involved in decisions are fundamental aspects of the quality of those decisions.
This is the only way to truly develop the capacity for criticism and reflection on the implications of the various existing economic models and awareness of the importance of capital in all its forms (economic, social, cultural).
It is considered necessary to start from the experience in order to stimulate the ability of the subjects to adopt a point of view different from their own and in this way also modify the social context. In this way it is possible to create the conditions for true economic and financial inclusion, allowing access to financial products and services best suited to everyone's needs at affordable prices and in a way that safeguards each individual (CYFI, 2013); only in this way can financial stability, well-being and confidence in the future be created (Sherraden, 2013).
The real goal must be to make everyone acquire financial capability: the ability to achieve a satisfactory level of financial well-being even in the absence of personal opportunities thanks to intentional training processes (Leonardi, 2009). Today, therefore, the conviction has matured that being economically and financially literate is not a sufficient condition for being capable. It is precisely by taking into account the various components of learning that interventions must be designed that will, over time, be capable of modifying the behaviour and lifestyles of individuals to enable them to go beyond the dimension of knowledge, which is the result of more complex processes of socialisation first and education later. Moreover, one cannot overlook the fact that economic and financial competence also requires the acquisition of other skills: symbolic, abstraction and calculation, relational, etc., all of which constitute a fundamental resource for living in an increasingly complex society.

4. FOR AN INTEGRATED FINANCIAL EDUCATION SYSTEM

As part of its function as the science of designing educational models, Italian pedagogy has also recently begun to address the improvement of the levels of economic and financial literacy of the Italian population, now considered one of the fundamental skills for students in the 21st century (World Economic Forum, 2016).
All the work that school and extracurricular institutions are doing in Italy must move towards the solution of integration between the different educational agencies: those of the banking, insurance and social security worlds as experts in the sector for the continuation of information and awareness-raising work towards adults, vulnerable categories (women, the elderly, small businessmen, etc.) and students; families, assisted by the former, to 'guide' their children in reading financial and economic phenomena in society through a more intentional involvement in the aspects of everyday life; schools, introducing the financial and economic phenomena of society through a more intentional involvement in the aspects of everyday life. The family, assisted by the former, to "guide" their children in reading the financial and economic phenomena of society through a more intentional involvement in the aspects of daily life; the school, introducing finance and economics into the disciplines currently present, renewing their contents and learning objectives.
Although is needed the contribution of everybody, schools have a central role to play because they are the place where everybody goes. It is hoped that pedagogy will also contribute to the design of an organic and structured intervention to introduce learning about economics and finance from the first grades of school through to university, as called for on several occasions by the OECD and in Italy by the Edufin Committee.
It is not only in Italy that the way of introducing economics and finance into schools is under discussion. In fact, the subjects who have so far undertaken actions addressed to young people (but also to adults) come directly from the world of finance, i.e. they are disciplinary experts but not of educational processes; as far as we could verify, the initiatives, for the modalities and the timing of implementation are actions of awareness and information and not of

education and training; and for this reason the change in behaviour is very low. (Bank of Italy, 2017).

In Italy what needs to be decided is whether financial education should be:

1. a specialised competence that is trained with a discipline. In this case, it is necessary to identify in which grades of school it should be taught and which teachers should teach it; and therefore which training should be given to them;
2. a transversal competence that is taught through the inclusion of economic and financial elements in the disciplines that are now taught. In this case, instead, it will be necessary to define in which disciplinary areas it should be introduced, which learning objectives should be defined for each school grade, and what training and refresher courses should be given to the teachers of the different disciplinary areas.

The Italian economy has chosen the path of specialised skills to be taught in a specific discipline. The Italian pedagogy, on the other hand, has to take a position, even if it is thought that the quickest way to do so would be to set up cross-curricular courses within the existing systems. This would probably have several advantages: there would be no need for a reform of the school, it could be taught by every teacher even if he or she would have to be trained, it would no longer be a simple knowledge but a competence for life (history from a socio-economic point of view, geography with a political-economic approach, mathematics in its applications in current and future daily life, etc.).

5. CONCLUSIONS

In the context of the relationship between economics and pedagogy, the research field of economic and financial education seems to be, at least to date, the one on which the greatest attention is being focused by both institutions and the academic world; the low level of financial and economic literacy of the population is well known, as is the difficulty in making decisions in the financial, economic and welfare spheres.

In fact, the same measurements made show that interventions implemented to date have not improved levels of financial literacy, especially among young people. It is therefore necessary to continue to improve, but a different way has to be found; that is, different solutions have to be found that put the school at the centre of the project and do not identify it merely as the subject on which to intervene.

Pedagogy must play an active role in this process, especially since there is still a lack of people who can find solutions that are really applicable to the world of adults and young people. And also in this socio-educational context, only by contributing concretely to the conception of effective and efficient solutions for the definition of the National Strategy for Economic and Financial Education will pedagogy obtain the institutional and social recognition it deserves, like the other social and educational sciences that have been dealing with economic issues for a long time.

Providing young people with financial education beyond that provided by families could help bridge the disparities due to differences in students' current socio-economic status, and potentially reduce differences in students' future socio-economic status. With this in mind, the OECD is developing a framework called The Future of Education and Skills: Education 2030 to identify the knowledge, skills, attitudes and values that young people will need to increase or maintain their level of well-being in society.

As research in Romania is only of an economic nature (Lacatus, 2016; Lacatus, Suciu, 2013), the Centre for European Studies intends to start with research on the financial literacy of school and university students in order to contribute a different vision, that of the educational sciences.

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THE IMPORTANCE OF ANALYZING THE MAIN ANTI-COMPETITIVE PRACTICES IN VIEW OF CREATING AN UNDISTORTED COMPETITIVE ENVIRONMENT

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ABSTRACT

Protecting fair competition by suppressing anti-competitive practices is a topical issue and a priority in the context of a functional market economy, the final stated goal in competition matters being to protect the interests of consumers by creating and developing a normal competitive environment.

KEYWORDS: *competition, anti-competitive practices, restrictive agreements, competitive environment.*

INTRODUCTION

The main regulation in the field of anti-competitive practices is, internally, the Competition Law, harmonized with the European acquis in the field of competition.

By anti-competitive practices we mean "any agreements between enterprises, decisions of enterprise associations and concerted practices, which have as their object or have the effect of preventing, restricting or distorting competition on the Romanian market or on a part of it".

Competition policy aims to apply the rules to ensure a fair development policy. They encourage both development and increased efficiency, give the consumer the opportunity to choose from a wider range of products and services, help reduce prices and support quality improvement.

General considerations regarding the creation of an undistorted competitive environment within a market economy

An essential feature of the market economy, the modern form of organizing economic activity, is free competition, competition between enterprises.

Competition is seen in the specialized literature as "the confrontation between professionals with similar or similar activities, exercised in the fields open to the market, to win and preserve the clientele, in order to make the company profitable"[1].

The almost unanimous point of view is that "the most important regulatory force of the market economy is competition"[2], this representing the engine of operation and the energy of the development of economic activity.

Between the companies that produce the same goods or offer the same services, there is a constant battle to attract customers for the goods and services offered on the market.[3]

[1] G. Boroi, *Dreptul concurenței*, București, 1996, p. 5; O. Căpățână, *Dreptul concurenței comerciale (concurența onestă)*, Ed. Lumina Lex, București, 1992, p. 86; I. Băcanu, „*Libera concurență în perioada de tranziție spre economia de piață*", în Dreptul, nr.9-12. P. 50;
[2] T. Moșteanu, *Concurența – abordări teoretice și practice*, Ed. Economică, București, 2000, p. 13;

Considering the need to create a competitive environment, the Constitution stipulates that Romania's economy is a market economy, based on free initiative and competition. [4] Also, the state is obliged to ensure the freedom of trade, the protection of fair competition, the creation of a favorable framework for the exploitation of all production factors.[5]

The concretization of these constitutional requirements was achieved on a legislative level through the adoption of Law no. 11/1991 on combating unfair competition[6], which provides for sanctioning the use of illegal means of attracting customers, and the Competition Law no. 21/1996[7], which represses anti-competitive, monopolistic agreements and practices that endanger the existence of competition.

One of the important obligations of the merchant is to carry on the trade "in good faith and according to honest custom" and not to compete unfairly with other merchants.[8] Only if the exercise of competition between professionals takes place within these limits, the competition is lawful or fair and, therefore, it is protected by law.

In the case of the abusive exercise of the right to competition, the use of means not permitted by law to attract customers, the competition is illegal and, consequently, it is prohibited.

The Competition Council represents the national administrative authority in the field of competition that aims to comply with the legislation in the field of competition, and in the event that they are violated, the sanctions provided for by law will be applied, thus exercising the coercive force of the state[9].

The legal norms provided by the Competition Law aim to protect, maintain and stimulate competition and a normal competitive environment, in order to promote the interests of consumers. These rules refer to the acts and facts that restrict, prevent or distort competition, being harmonized with the regulations of European law in the matter, generated by the adoption of Regulation (EC) no. 1/2003 on the implementation of the competition rules provided for in articles 81 and 82 of the Treaty establishing the European Community[10] (currently art. 101 and 102 of the Treaty on the Functioning of the European Union [11]).

The undistorted competitive environment is a basic condition for the existence of a functioning market economy, where professionals must interact freely without negative influences from companies in a dominant position, their associations or the state.

Competition law regulations aim to create such a competitive environment, in which objectives such as: economic progress, stimulation of entrepreneurship and efficiency, promotion of consumer interests, competitiveness of products and services, etc. are pursued.[12]

On economic development, competition exerts a positive influence, thus:

- it stimulates the achievement of progress, leading to the emergence of innovations that, after being implemented, favor the increase of economic efficiency, the economy of resources and a better satisfaction of consumer needs;
- favors the most creative and skilled entrepreneurs, eliminating the weakest traders;
- differentiates and diversifies the offer, as well as reducing the production cost and the price for the respective good or service;

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[3] S.D. Cărpenaru, *Drept comercial rom*ân, Ediția a VII-a, revăzută și adăugită, Ed. Universul Juridic, București, 2007, p. 112;

[4] I. Didea, *Dreptul european al concurenței*, Editura Universul Juridic, București, 2009, p. 5;

[5] Art. 135 din Constituția României, republicată în M. Of. Nr. 767/31.10.2003;

[6] Legea nr. 11/1991 privind combaterea concurenţei neloiale, publicată în M. Of. Nr. 24 din 30 ianuarie 1991;

[7] Legea nr. 21/1996, Legea concurenţei, publicată în M. Of. Nr. 88 din 30 aprilie 1996 (republicată în M. Of. Nr. 153 din 29 februarie 2016);

[8] S. Angheni, *Drept comercial. Profesioniştii-comercianţi*, Editura C.H. Beck, București, 2013, p. 31;

[9] M. M. Dumitru, *Dreptul concurenței*, Ed. Institutul European Iași, Iași, 2011, p. 97;

[10] Publicat în J. Of. nr. L1/1 din 4.1.2003;

[11] Publicat în J. Of. nr. C 115/1 din 9.5.2008;

[12] L. Maierean, *Dreptul concurenței comerciale*. Curs universitar, Ed. Cermaprint, București, 2009, p.21;

- gives the consumer the opportunity to choose the product with the best quality-price ratio thanks to the more varied offer and lower prices.

Anti-competitive agreements in the activity of enterprises

Anti-competitive practices or anti-trust law traditionally designates two types of business behavior likely to harm competition: anti-competitive agreements (antitrust or cartels) and abuse of a dominant position.[13]

Anti-competitive agreements are concentrations or collusions between two or more enterprises that have as their object or have the effect of preventing, restricting or distorting competition on the Romanian market or on a part of it, while the abuse of a dominant position is the act of an enterprise using of its position of economic power in a market to limit or exclude any competition.

As the doctrine stated, by preventing competition we should understand the creation of an "integral obstacle capable of paralyzing it. The restriction denotes the destruction in part of the freedom of the economic agents in the threatened sector, preventing them from adopting certain convenient decisions, without, however, excluding all of them. Finally, the distortion of competition means, according to the generally shared opinion, the fact of making changes to the exchange conditions, as they result from the market structure and the conjuncture".

These manifestations of pathological competition aim at the seizure of the market or a determined segment of the market by the most powerful companies in a certain field of goods production or service provision, a fact for which, in the specialized literature, it is also found under the name of monopoly[14] or antitrust law.[15]

The competition law enumerates, for example, in art. 5, cases in which prohibited monopolistic understandings are concentrated due to their illicit purpose and the impacts they can bring to free competition.

Monopolistic agreements are those that aim, in particular: to establish, directly or indirectly, purchase or sale prices or any other trading conditions; limitation or control of production, marketing, technical development or investments; the division of markets or sources of supply; the application, in relations with commercial partners, of unequal conditions for equivalent services, thus causing them a competitive disadvantage; conditioning the conclusion of some contracts on the acceptance by the partners of some clauses, stipulating additional services which, neither by their nature nor according to commercial customs, are related to the object of these contracts; participating, in a concerted manner, with rigged offers, in auctions or in any other form of tender competition; eliminating other competitors from the market, limiting or preventing market access and the freedom to exercise competition by other economic agents, as well as agreements not to buy from or not to sell to certain economic agents without reasonable justification.

Restrictive agreements or understandings between enterprises or associations of enterprises

The term "agreement" has a very broad scope, being able to take on the most different forms, leading first of all to a convention, a contract (for example, franchise, selective distribution, concession, etc.), but to it can just as easily be embodied in an anti-competitive clause contained in a certain contract.

The agreement between enterprises involves a contest of wills, with or without binding legal commitment, emanating from autonomous enterprises. They can materialize in different commitments, conventions or contractual clauses, concluded in writing or not,

[13] G. Coman, *Concurența în dreptul intern și european*, Editura Hamangiu, București, 2011, p. 173;
[14] O. Căpăţână, *Dreptul concurenţei comerciale*, ed. a II-a, Editura Lumina Lex, Bucureşti, 1998, p. 438;
[15] G. Coman, *Concurența în dreptul intern și european*, Editura Hamangiu, București, 2011, p. 174;

express or tacit, public or secret.[16] Also, the title of the act or its nature is also irrelevant, for example, the articles of association, shareholders' agreements can be characterized as anti-competitive.

The specificity and complexity of the relationships between professionals have shown that even some unilateral acts can be characterized as "anti-competitive agreements" which, due to their form, materialize in an "agreement". This can be the case of circular letters or invoices sent by the head of a network to its distributors. Most often, the provisions contained in these documents are tacitly accepted by their recipients.[17]

Moreover, anti-competitive agreements can also be made through the so-called "gentleman's agreement". It is a distinct kind of manifestations of will, which are taken into account at the legal level in order to suppress their potentially anti-competitive effects.

Thus, the competition law regulations provide the possibility of prohibiting the anti-competitive convention disguised in the form of simple promises, declarations of intentions, moral commitments. Even behaviors that continue an understanding or an agreement after the latter have been abrogated are prohibited and constitute anti-competitive precedents. Thus, in order to fall within the scope of the prohibitive regulations, it is sufficient for the parties to consider themselves bound, even if the respective act does not, from the point of view of civil law, have the binding effect of the "pacta sunt servanda" rule. The Romanian legislator understood to expressly regulate this aspect, mentioning, in art. 54 of Law 21/1996, that are sanctioned with absolute nullity any type of "commitments, conventions or contractual clauses" that refer to any anti-competitive practice prohibited in art. 5 of the law.

Restrictive agreements can be classified, from an economic point of view, into horizontal agreements - which concern companies located at the same stage of the economic process (e.g. agreements between producers, between distributors, limiting production), being involved companies that are competitors within the same market and vertical agreements – concerning enterprises located at different levels of the same economic process (e.g. agreements between producers and distributors of the same type of product, exclusive commercial agreements, maintenance of resale prices), involving enterprises located on different markets.

Horizontal cooperation agreements can lead to substantial economic advantages, especially if they combine complementary activities, skills or assets. Horizontal cooperation can be a means of sharing risks, saving costs, increasing investment, improving the quality and variety of products and launching innovation more quickly. On the other hand, horizontal agreements can lead to competition problems. This is, for example, the case where the parties agree to fix certain prices or a scale of production, share markets, gain or increase market power, and may therefore give rise to adverse market effects in terms of prices, production, product quality, product variety or innovation.

Vertical agreements are concluded between undertakings operating at different levels of the market. Businesses operating at different levels of the production or distribution chain often work together through "vertical agreements" to achieve results that they could not achieve individually. As part of these arrangements, the parties may include certain contractual restrictions or obligations deemed necessary to protect an investment or simply to facilitate day-to-day activities (such as distribution, supply or purchase arrangements). Vertical agreements may attract competition law risk, particularly when they may have the potential to raise barriers to entry, to foreclose markets, to facilitate horizontal collusion. For most vertical agreements, competition concerns will only arise if there is insufficient competition at one or more levels of trade - that is, if there is some level of market power at the level of the supplier or the buyer, or at both levels.

[16] G. Coman, *Concurența în dreptul intern și european*, Editura Hamangiu, București, 2011, p. 187;
[17] A. Fuerea, *Drept comunitar al afacerilor*, Editura Universul Juridic, Bucuresti, 2003, p. 239;

Horizontal agreements are usually more harmful to the competitive environment than vertical agreements, having the effect of restricting competition between normally competing undertakings. However, vertical agreements can have positive effects on the respective market, for example reducing the final price; at the same time, as a rule, the parties to such an agreement are not in a competitive position.

Decisions of business associations

The second category of anti-competitive agreements is represented by "decisions of business associations". Initially, the Romanian law by art. 36 paragraph 1 of law no. 15/1990, as well as art. 5 of law no. 21/1996 (in its initial form), declares that "association decisions" are prohibited, taking over and translating the community text in an unfortunate manner.

The doctrine[18] criticized at that time the formulation of the Romanian legislator, and this ultimately led to the modification of the text of art. 5, in the sense that "decisions of business associations" are prohibited.

The decisions prohibited in this form of manifestation of the precedents (regardless of the name: directives, internal regulations, circulars, etc.) are acts of collective will, emanating from the competent body of a professional group (decisions of their statutory management bodies) , which may or may not have legal personality. They are reprehensible to the extent that they have the vocation to impose a certain behavior on the market to its members, even if, apparently, they do not leave this impression.[19]

It is possible that the establishment of a professional group does not harm competition, but the decision taken by the governing body of such an association (general meeting or board of directors), to the extent that it obliges its members to adopt collective anti-competitive behavior, to have this effect.[20]

Among the most frequently encountered decisions of professional associations susceptible to violation of competition rules are those whose effect or object is the harmonization of the behavior of their members on the market, calling for boycotts or refusing membership applications.[21]

Concerted practices

Concerted practices, as specified by the European Commission, are those ways of coordination between enterprises that knowingly replace the risks of competition with a practical cooperation between them, thus leading to conditions of competition that do not correspond to normal market conditions.

In other words, they are forms of coordination between enterprises that lead to the disappearance or diminution of the competitive uncertainties characteristic of a market, without being able to prove the conclusion of any agreement.

The notion of "concerted practices" has its origin in American anti-trust law, under the name "conspiracy", which later became "concerted actions", found in section I of the US Sherman Antitrust Act, which includes forms of cooperation that do not is based on traditional conventions and other forms that may affect competition. A term with a similar meaning, under the name "arrangements", can also be found in English law, in the UK Restrictive Trade Practice Act.[22]

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[18] O. Căpăţână, *Dreptul concurenţei comerciale*, Editura Lumina Lex, Bucureşti, 1993, p. 43-44, E. Mihai, *Concurenţa Economică. Libertate şi constrângere juridică*, Editura Lumina Lex, Bucureşti, 2004, p. 88. În sens contrar, C. Butacu, *Analiza dispoziţiilor art. 5 din Legea concurenţei nr. 21/1996*, în Revista Profil: Concurenţa, nr. 2/1998, p. 23;

[19] G. Coman, *Concurența în dreptul intern și european*, Editura Hamangiu, București, 2011, p. 188;

[20] I. Didea, *Dreptul european al concurenței*, Editura Universul Juridic, București, 2009, p. 146;

[21] G. Coman, *Concurența în dreptul intern și european*, Editura Hamangiu, București, 2011, p. 189;

[22] I. Didea, *Dreptul european al concurenței*, Editura Universul Juridic, București, 2009, p. 150;

The incrimination of this modality of the ententes is difficult from the point of view of the rigor of classical law, but it is perfectly molded on the realities of the competitive market, giving the possibility to the competition supervisory bodies to ascertain the production of the effect on the market of such an agreement, even in the situation when there is no can prove a formal agreement.

The determining criterion for identifying a concerted practice is the conscious and voluntary acceptance of a loss of autonomy by the undertaking concerned.

In this way, a series of presumptions are created that ease the probation, it being enough to prove a collusive behavior and its effects on the market so that the companies that took part in it can be sanctioned. Thus, even "larvare" ententes, completely informal, the proof of which was almost impossible, can be sanctioned.

Conclusions

Competition encourages businesses to offer consumers goods and services on the most favorable terms. It encourages efficiency and innovation and lowers prices. To be effective, competition requires businesses to act independently of each other, but subject to competitive pressure from others.

For an agreement between two or more undertakings to be treated as an anti-competitive practice, it must meet the essential condition of affecting competition, namely the agreements, decisions or concerted practices must have as their object or effect the prevention, restriction or distortion of competition on the market in question and to affect trade between Member States or competition on a national market, respectively on a part of it.

Where a particular understanding is necessary to improve products or services, to create new products or to find new, better ways of making those products available to consumers and does not give businesses the ability to eliminate competition from a substantial part of the market of the products in question, the respective agreement is considered lawful and, therefore, it is not sanctioned.

Competition is an essential factor in terms of the positive evolution of the economy as a whole and the increase of well-being for consumers, generating a series of beneficial effects such as: restructuring and optimization of processes within enterprises, more efficient use of production factors, stimulation of innovations, attracting and encouraging investments, consumers thus benefiting from lower prices, a more varied and better offer of goods and services.

The most common form of anti-competitive agreement in practice is price-fixing agreements. They concern the concerted fixing, directly or indirectly, of sales or purchase prices, as well as any other contractually regulated discriminatory commercial conditions. These monopolistic agreements, including participating in a concerted manner, with rigged bids, in auctions or other forms of bidding contests, are considered serious violations of the competition rules, as they prevent the function of self-regulation of the market through supply and demand, being prohibited by law regardless of the market shares of the parties involved.

The most serious forms of anti-competitive agreements that can affect the competitive environment to a greater extent are the secret horizontal agreements, cartel-type, aimed at fixing prices, dividing markets and customers, limiting production and distribution, the evidence of their existence being difficult to find found precisely because of the secret nature of the agreement.

Among the main negative effects of anti-competitive agreements, we mention: limiting competition, increasing prices, decreasing the quality of products or services offered to consumers, reducing the offer, avoiding constraints that generate innovation.

In relation to anti-competitive agreements and/or concerted practices prohibited by art. 5 para. (1) from the law and art. 101 para. (1) of the TFEU, the Competition Council applies a policy of leniency, in which a participant in such an anti-competitive practice, independently

of the other companies involved, cooperates in an investigation carried out by the Competition Council or with a view to its initiation of an investigation, voluntarily providing the information he has about the anti-competitive practice and his role in it and receiving in return, immunity from fines or a reduction of the amount of fines that would be imposed for his involvement in that anti-competitive practice . Starting from 2019, the leniency policy applies to all anti-competitive agreements.

The leniency policy therefore represents a favorable treatment granted by the Competition Council to companies involved in an anti-competitive practice, which wish to renounce these understandings and cooperate with the competition authority in order to discover and investigate the respective practice, with the aim of facilitating the detection, destabilization and elimination anti-competitive practices, especially secret cartel-type ones, thus restoring a normal competitive environment.

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