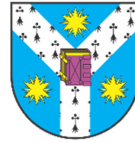
Vol. I - LEGAL SCIENCES

International Conference for Doctoral, Post-Doctoral Students and Young Researchers in Humanities and Social Sciences

Iași, ROMANIA
MAY 31-JUNE 2, 2023

TUDOREL TOADER
CARMEN TAMARA UNGUREANU
(Editors)



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„ALEXANDRU IOAN CUZA”
din IAȘI

Tudorel TOADER, Carmen Tamara UNGUREANU
(Editors)

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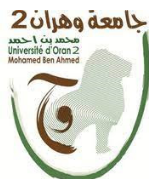

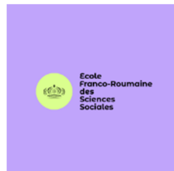

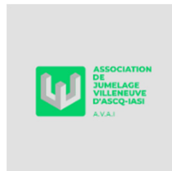

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Particular Features Regarding Incrimination against the Administration of Justice in the Legislation of the Member Countries of the European Union: A Comparison to the National Regulations

Diana-Mihaela CHEPTENE-MICU[1]

Abstract

The European regulations in the field of justice and their connection to the domestic legislation are benchmarks that point out the contemporary period by the need for increased adaptability in the field of legislation, but also in the field of jurisprudence, in order to harmonize the two levels of the European and national norms, autonomous but interdependent at the same time. The alignment with the European standards justifies the balance between the results of the justice administration activity and the protection that the legislation offers to this field, because the legal instruments to protect the administration of justice are likely to ensure its effectiveness.The amendments brought to the Romanian Penal Code in the matter of offenses against the administration of justice, by the incrimination of new acts as offenses or by rethinking already existing offenses, are a solid basis for the need to make an analysis in this matter, to verify to what extent the law responds to the current needs. This main reason is joined by the correlations or correspondences that must exist with the existing norms in the community space, in order to find out whether the legal regulations still need to be updated and whether they meet the European requirements. The evolution of these penal incriminations proves the existence of common concepts and benchmarks in the European space, whereas the comparative view of the penal rules enables the use of the appropriate tools for the complete and

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correct identification of their scope in the spectrum of the criminal protection of justice.

Keywords: The European regulations in the field of justice; European requirements; crimes against justice; the evolution of criminal offenses; criminal protection of justice.

General benchmarks on the concept of justice

Justice is an indispensable tool by which it is carried out at the European democratic level; justice represents a fundamental value in the current modern state, eminently entrusted with the idea of the full supremacy of the law, the protection of which has preoccupied and continues to preoccupy all the legislators in the space criminal community because, as judiciously stated by the famous American political philosopher John Rawls (1999), justice constitutes the most important virtue of an ideal society, in the absence of which individuals would return to the primary state, prior to the organization in the society.

Justice represents an essential component of the rule of law, with equally philosophical, political, ethical and moral valences; it has always been distinctly understood by the successive societies that undertook their own ideals of justice; however, separately from the socio-political context where it operated, it has the common goal of see to the making of the rights and freedoms of individuals, as well as the restoration of the social balance disturbed by behaviours contrary to the conduct standard dictated by each state.

The idea of justice presents a common core, but also multiple valences that vary from one people to another and it evolved simultaneously with the development of law (Cristian Ionescu, 2017). Therefore, the social relations and the execution of the act of justice have been normalized and continue to be normalized according to justice standards laid out and imposed upon the communities by each legislative power; it is exclusively competent to establish the methods of reconciling public order with safety and individual liberty. Special institutions emerge from the needs of each society, just as the legislators sometimes draw distinct conclusions from the same needs (Mircea Djuvara, 1995). It is the task of everyone to guide their legislation masterfully, according to the skills, needs and objectives of the people which they represent.

Beyond the existence of common precepts and guiding ideas, generally adopted by most of the modern world states, legal relativity naturally persists since law is a social science that starts from facts and from particular cases; it is

absurd to be conceived that there could be universal laws laid out in advance and that could be applied, with comparable efficiency, in all the societies, regardless of the period (Mircea Djuvara, 1995). As the German philosopher Gottfried Wilhelm Freiherr von Leibniz also showed (as quoted by Paul Janet, Felix Alican), there are no two absolutely indiscernible real beings in nature; if there were, God and Nature would have behaved irrationally by treating each other differently, from where we deduce the impossibility of aspiring to a perfect identity between two peoples, as long as this ideal cannot be made even on a small scale between the individuals that make up the society.

Each people is characterized by its own facts, circumstances, mentality and history, whereas the legal provisions invest exactly the social reality to which they apply, so that each state must have its legislation perfectly adapted to these indicators of uniqueness (Mircea Djuvara, 1995). Thus, it results that the legislation sets certain rights and it can only do so by reference to the factual situation, to the reality that characterizes its society, but when the factual situation exceeds the framework of the existing legislation and comes into conflict with it, the needs force the laws to be changed, either by legislation or by other means – such as jurisprudence, interpretation or completion (Mircea Djuvara, 1995).

The recent evolution of the regulations regarding the criminal protection of justice in Romania

This mechanism was also the basis of the numerous rectifications made in the Romanian law by the criminal offenses against justice; therefore, in the period after the Revolution of 1989, due to the political and economic-social changes, the criminal phenomenon registered a significant increase, which way why it became urgent to have the efficient and correct functioning of the judicial system.

The proclamation of Romania as a lawful, democratic and social state, in which the judicial power occupies a primary role and, subsequently, its accession to the European Union, implicitly accompanied by the necessity to undertake community standards and values, determined the need to adapt the criminal legislation to the realities and the ideals of those times.

Thus, in 2006, the offenses of insult and slander started to be no longer incriminated, by virtue of the subsidiary of the criminal protection means of the individuals’ rights and liberties, established jurisprudentially by the court in

Strasbourg. The aim was to create a balance between the relative right to the freedom expression, registered in art. 10, paragraph 1 of the European Convention on Human Rights[2] and the dignity of the human beings, as a fundamental value, protected in any democratic society, a series of behaviors offensive to the individual's honour and reputation of the person. It was considered that in such a situation, the incurring of the offensive civil responsibility is an adequate, sufficient form of protection corresponding to the severity of the injury caused.

Subsequently, by Law no. 286/2009, New Penal Code, in Romania, it was considered necessary to expand the scope of crimes aimed at the administration of justice, for which it started to incriminate behaviours that, according to the previous regulations, were not considered offenses, and it made the premises for the possibility of incurring criminal responsibility for committing various facts[3] having as a purpose the obstruction of justice, the revenge for the help given to justice, the compromise of its interests or assistance and the unfair representation in judicial cases and notarial procedures.

Also, having in view the severity of acts of posterior complicity subsequent to committing criminal offenses involving the illegal purchase of goods, it was preferred to transfer the offense of concealment to the category of those against justice, contrary to the fact that in the Romanian state, it was incriminated for a long time as a patrimonial offense. It was prevalent the circumstance that such an act obstructs the discovery of the truth in criminal cases by considering that, by its concrete content, concealment primarily affects the execution of the act of justice, beyond the consequences caused in material terms, from the pecuniary point of view.

Several already existing incriminations were equally reconfigured because it was noted that they were insufficiently able to contribute to the protection of the administration of justice in good conditions. A series of behaviours pointed

[2] According to which every person has the right to the freedom of expression. This right includes the freedom of opinion and the freedom to receive or communicate information or ideas without the interference of public authorities and regardless of borders. It does not prevent states from making broadcasting, cinematography or television companies to be subjects to an authorization regime.

[3] Such as preventing, without right, the criminal prosecution bodies from carrying out, under legal conditions, a procedural act or the commission of criminal acts for the purpose of revenge for the help given to the judicial bodies by statements or evidence presented in civil or criminal cases or any other proceedings where witnesses are heard.

out in the Romanian practice revealed certain shortcomings of the old regulation; there is an obvious discrepancy between, on the one hand, the significant number of cases where people interfered with the proper conduct of judicial procedures and, on the other hand, the infinitesimal number of convictions for this kind of acts (Sergiu Bogdan, 2007), a circumstance that justified, once more, the need for reform.

However, this preoccupation of the national legislator regarding the guarantee of legality, independence and impartiality in the process of administering justice was not a singular effort, given that, at the local level, the incrimination of offences against justice seems to be in a continuous improvement since they recently made an object of the constitutionality control[3] and of the mechanisms for the unification of judicial practice[4]. They were brought back to the general attention, as a result of the pronouncement of certain decisions that developed specific concepts and clarified essential issues regarding the area and their concrete application method. At the level of the community, the comparative examination of the criminal law certifies that, regardless of the type of organization, peoples have paid and continue to pay special attention to the main social relations specific to the protection of justice under all its components, justified by the fact that in the European criminal area there are multiple forms of the regulated common criminal offense, but also particular incrimination ways, which confirms the legal relativity mentioned in the previous paragraphs.

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[4] As an example, we mention the grounds in the Decisions no. 53/2019, 236/2020, 638/2021, 133/2022 and 1/2023 made by the Constitutional Court of Romania.

[5] By reference to Decisions no. 1/2019, 10/2019 and 1/2020 pronounced by the High Court of Cassation and Justice.

main social relations specific to the protection of justice under all its components, justified by the fact that in the European criminal area there are multiple forms of the regulated common criminal offense, but also particular incrimination ways, which confirms the legal relativity mentioned in the previous paragraphs.

Thus, by reference to the dynamism registered by the criminal phenomenon in the community states and to the own conceptions of national sovereigns regarding the assessment of the criminal nature of the acts, the means of preventing and fighting against them and the role of the punishments in each society, it is noted the occurrence of more or less distinct systematizations of crimes against justice, as well as a series of new regulations in certain foreign legislations.

General comparative aspects in the European legislations

Without any intention to make detailed analyses, we show that currently in Romania, there are 22 offences incriminated against the administration of justice and the national legislator grouped them together in the Special Part of the Penal Code. This type of organization was also preferred by the Austrian, Greek and Hungarian legislators, given that each of these states reserved a separate chapter for crimes and misdemeanors the commission of which affects the best and efficient operation of the judicial system.

A different perspective and increased attention of the community legislators regarding the complex and detailed structuring of offences aimed at the administration of justice are found in Spain, Italy and France, for which, as an example, we mention that in the Italian Penal Code there are 32 offenses incriminated, classified according to the way in which their commission harms the actual activity of administering justice, or the authority of the courts and the decisions made by the latter.

In addition, a new aspect compared to the Romanian codification, it is worth noting the third part of the Italian regulation that, in art. 392-401, lays out a series of acts likely to be committed by the ones who arbitrarily arrogate to themselves the right to do justice for themselves, by stipulating the sanctioning of persons who want to exercise a claimed right and have the possibility to address to a court, but they do not request the participation of the state authorities in order to do justice to them, instead they prefer to exercise abusively acts of violence on the property of other people.

There is a similar incrimination in the Spanish legislation that, in art. 455 of the Penal Code, lays out that the person who acts illegally to make his own right, by using violence or force on things, is punished. An aggravated variant of the offence can be committed when the offender uses weapons or other dangerous objects for intimidation.

These particular legal provisions result in an insufficiency of the natural law, based on the individual conscience, in the societies specific to Spain and Italy and the necessity to transpose into the positive law the elementary obligation to respect the goods, the rights and the liberties of other people, by incriminating the acts of the ones who arrogate to the themselves the prerogative to do their own justice by disregarding the judicial power. As Thomas Hobbes (1651, who was translated into Romanian and published in 2011) says in one of the most important works of political thoughts that has ever been written:

War is in human nature, and everybody is governed by their own reasoning, and there is nothing that they can use against their enemies. Therefore, in such a condition everybody has a right to anything, even to another's body and, as long as this right of every man to everything lasts, nobody has the guarantee to live as long as nature ordinarily allows people to live. It is a precept or a general reasoning rule that everybody must pursue peace as long as they hope to obtain it – in the contemporary age, by the contest of justice (our note) – and when they cannot obtain it, that they may seek and use all the facilities and advantages of war. (p. 19)

Non-reporting of offences and assistance given to perpetrators

A distinct approach of the modern European criminal legislators is also noticeable regarding the regulating way of the non-reporting offence, i.e. the obligation of persons to notify the authorities about the commission of criminal activities considered to be of particular severity, which comes from the concept of the moral duty (Jac. Novelus, 1575, as quoted by I. Tanoviceanu, V. Dongoroz, C. Chiseliță, Ș. Laday, E.C. Decusară, 1924) and in the general principle of the old French customary law: “Qui peut et n'empêche, pèche” (Antoine Loysel, as quoted by I. Tanoviceanu *et al*.), according to which whoever can prevent but does not do it makes a sin.

The legal transposition of this notification obligation shows obviously that the social relations related to the activity of making justice are a current necessity in the European space, justified by the importance for the society and

for the rule of law of the discovery and the prosecution of the persons guilty of committing various offences.

From this perspective, it is noted that in Austria, Estonia, France, Greece, Latvia, the Grand Duchy of Luxembourg, the Kingdom of Sweden, the Republic of Croatia, the Slovak Republic and the Kingdom of Slovenia, the persons have a general obligation to report any serious offence – "*offences*", according to the tripartite classification existing in the French penal law, "*acts punishable by the death penalty or by the freedom deprivation*", according to the Greek legislator, "*offences punishable by the imprisonment of five years or a harder penalty*" according to the Croatian law. In other states, such as Malta, Poland, Romania or Germany, the reporting obligation applies exclusively to determined, exhaustively listed criminal offences that are considered by the society among the most severe, such as: high treason, acts that endanger national security, criminal offences of terrorism and genocide, criminal war offences, criminal offences against humanity, acts that violate the supreme right to life of any person, the right to freedom or the right to sexual integrity.

According to the nature of the criminal acts to which non-reporting refers, it is placed in various chapters of criminal offences, some protecting justice, others state authority or public order. Thus, in the view of the Austrian, Czech, Danish, German, Dutch and Slovak legislators, by non-reporting, the perpetrator mainly harms public order and peace, whereas in the view of the Croatian, Estonian, Finnish, French, Greek, Italian, Latvian, Polish, Slovenian and Spanish legislators, just as in Romanian law, the failure to announce that criminal offences have been committed or are about to be committed seriously endangers social relations related to the administration of justice.

One of the most important differences in the regulation of this criminal act consists in the incrimination on the territory of several European states of not complying with the general obligation to report offences in progress or to be committed, to the extent that their negative consequences are more can still be prevented or limited by the intervention of the state authorities. There are three ways of approaching the criminal legislators in the community space, respectively: states that incriminate non-reporting before the offence it refers to has been committed (Austria, France, Greece, Latvia, the Grand Duchy of Luxembourg, Poland, the Kingdom of Sweden, the Republic of Finland and Spain), states that incriminate non-reporting either before or after the respective offence has been committed (Lithuania and the Federal Republic of Germany) and states that

incriminate non-reporting only after the respective offence imposed to be brought to the attention of the authorities has been committed (Estonia, Italy, the Republic of Croatia and Romania).

However, this different manner of approach proves that, although it tends towards standardization at the European legislation level, national sovereignties cannot be repressed in a legal-penal way, there are different conceptions about the assessment of the criminal nature of the failure to report the commission of criminal acts, as long as in some countries the legislative intention to prevent the commission of several criminal offences prevails, and in other countries the intention of sanctioning the persons guilty of committing illegal activities.

Moreover, the history of criminal law certifies that the offense of non-reporting has had, since ancient times, distinct conceptions of the various criminal legislators in what we define today to be a European legal space. On the one hand, in ancient Greece, it was considered that the person who could prevent the commission of a bad action but did not, became an accomplice to the criminal activity (I. Tanoviceanu *et al.*). In the Romanian law, in the middle of the first millennium, such an obligation was admitted exclusively by reference to persons involved in the state authority, it was considered that only officials had the duty to devote themselves to the general social interest since the citizens made sacrifices precisely to give the government the task of taking care of public order, with the natural consequence that private individuals should be preoccupied only with their personal interests.

As for the historical concept from ancient Greece mentioned above, in the current national practice, reflected jurisprudentially in recent years, it is considered that the lack of involvement in stopping an offence committed in the presence of a person can, under certain circumstances, constitute complicity in that offence, imputable to the one who assisted and did not intervene, although he should have done it, and who, subsequently, did not even report the committed crime, although he would have had the objective opportunity to do it. In this way, the failure of the person to act is distanced from the concept of incrimination regarding the failure to report an offence. In case where, in the conduct of the person who assisted and did not intervene to stop the offence, there are actions to help the perpetrator after committing the crime are also included (for example, in order to enable the disappearance of the traces of the illegal activity), it is necessary to analyze the possible crime of helping the defender.

In cases of this type, there have been divergent opinions[6] regarding the legal classification of the inaction of the wife who assists the husband to kill another person, even a relative of the wife, without intervening, and after the consummation of the murder, she helps the author to get rid of the corpse and to erase the traces of the offence. One opinion made reference to the existence of the offence of complicity to murder, whereas other opinions were expressed, mostly, to apprehend the offences of helping the offender and the failure to report some offences.

The central arguments of most opinions focused around the concept of moral complicity. It was argued that the simple presence with the perpetrator is considered moral complicity only in the case when it made for the perpetrator a mental state favourable to commit that crime, encouraging him to implement the criminal decision made or to continue the action. Moreover, it is argued that, for the existence of the moral complicity, it is necessary to establish that the accomplice also realized that their presence is such help, because complicity can only be committed with direct or indirect intention.

It was found that after the defendant had committed the offence, his wife helped him to erase the traces of the offence and fled the country with him, aspects of which, most opinions pointed out that, in the absence of a marital relationship between the perpetrators, these elements external to the committed murder could have been the constitutive elements of other offences, such as helping the criminal and the failure to report. Also, for this behaviour of the female defendant, there was a logical explanation taken into account, namely the medical-legal document drawn up after the psychiatric examination, the conclusions of which showed that she had a dependent personality disorder and she left it entirely up to the husband to make decisions.

In the least divergent opinion, it was considered that the defendant's attitude seen as meeting the constitutive elements of the offence of helping the offender would mean a distortion of reality, in obvious contradiction with the evidence in the case file, and to accept that a person, a family member (the husband/ the wife of the author), who assists in the commission of a murder on

[6] As an example, the Decision no. 142/A/2015, made by the High Court of Cassation and Justice – Penal Section.

another family member (child, mother-in-law, mother) in the described[7] way and circumstances and who does the activities done by the female defendant immediately after committing the act, is exempted from criminal responsibility in the form of simultaneous moral complicity, and will not be liable for acts of favoritism or concealment, motivated by the capacity of spouses between the author and the one who favours, respectively, between the author and the one who conceals. Thus, it was considered that this situation has the constitutive elements of the objective and subjective side of complicity in the offence of aggravated murder, respectively, that there is evidence to prove, beyond any reasonable doubt, that, by her attitude, the defendant helped the author of the offence – her husband – the mental comfort necessary to make the decision made spontaneously, to suppress the victim's life. As she did not have any reaction, the defendant by successive blows, persevered in the criminal activity and finally cut the victim's neck. The support given by the defendant to the author of the deed by favoring activities proves the existence of that subjective causal relationship between the author and the accomplice from the moment of committing the offence until its end. The common steps undertaken by the author and the accomplice after the commission of the act actually pursued their exoneration from criminal responsibility.

Therefore, the separation line is thin between the offence of complicity to murder, in the form of participation of this type (moral and simultaneous) and favouring the offender, according to the factual elements of each case, but also to the taken concept, derived from those enunciated in ancient times. The subsequent character of favoring in the realm of the penal law is also found in the legislation of other states, as it is a regulation that fulfills the criminal offense after a criminal act is committed by another person.

“The favoring the perpetrator” is provided in most European penal codes as an offence directed against justice or the public authority. It has a general and subsidiary character; it is incidental only in those situations where the help given to the person who committed an act provided for by the penal law does not cover the constitutive content of any other offence.

In all the analyzed legal systems, the starting point is a premise situation consisting in the previous commission of an act laid out by the criminal law by

[7] Accepting the exercise of acts of violence without any intervention, except for words such as “it's enough (...) let her go” and which, in fact, anyway aimed the final part of the attack made by the aggressor against the victim.

the person who is the beneficiary of the favoritism. The difference is that the Croatian, Greek, French and Italian law impose that the favored person adopted a very severe illegal conduct, qualified as "murder" or "misdemeanor" in Greece, "offence" or "act of terrorism punished by at least 10 years in prison" in France, "crime for which the law provides for the death penalty or life detention or imprisonment" in Italy or an "offence punishable by five years' imprisonment or a more severe penalty" in the Republic of Croatia. The Romanian law does not make such a distinction, it is sufficient that the person who benefits from the favor to have committed an act incriminated by the criminal law, regardless of its severity and the capacity in which he acted (a perpetrator, an accomplice, an instigator).

It is noted that in all the examined legislations, the material element of the offence has been attached an essential requirement regarding the purpose of the aid, which can be that of avoiding investigations, from the freedom deprivation or from the execution of the imposed punishment, with the mention that the Romanian regulation is wider, including in the scope of the offence of favoritism and the aid given for the simple hindrance of the judicial procedures or for the prevention of them from being carried out, even in those situations where the favoured person does not evade.

It is noted that the corresponding incriminations, identified in the German legislation, have a narrower scope, they are incident only in the early phase of the criminal trial, in the criminal prosecution stage. This is why, according to the German law, the alternative ways of making the material element can only consist in hindering or preventing the application or the enforcement of a measure or sanctions, but their hindering during the period when it is executed is excluded from the applicability scope of the offences regulated by art. 258 and 258.a, Penal Code of the Federal Republic.

In none of the compared legislations, the criminal responsibility of the favorer is not conditioned by the criminal responsibility of the favored person, which is why it is possible for the favorer to be sent to court and/or convicted, even if the beneficiary of the criminal activity has not been sent to court for the act he committed. This aspect is expressly pointed out in art. 378, Italian Penal Code which, in the last paragraph, lay out: "*The provisions of this article also apply when the helped person cannot be held responsible or when it turns out that he did not commit the offence.*"

From the perspective of incidental sanctions, in the Penal Codes of Bulgaria, the Czech Republic, Croatia, France, Germany, Portugal, Slovakia, Slovenia and Spain, as well as in Romania, it is mentioned that the concrete sentence enforced to the favorer cannot exceed the sanction that even the favored person risks.

False statements

Starting from the idea that the concealment of the illegal acts and those responsible for committing them means violating moral rules and seriously harming social interests, perjury is another tangential point of the penal legislation adapted to the current European societies, it is circumstantially regulated in some legislations, depending on the capacity of the active subject and the cause in which the willful distortion of the reality is made.

For this purpose, as an example, there is a distinct systematization, by matters, of the offence of "perjury" in the Republic of Malta, which regulates in art. 104 the offence of perjury committed in penal proceedings, and in art. 106, the offence committed in civil cases. Similarly, in Greece, Sweden or Hungary, legislators punish perjury distinctly as it occurs in penal trials, civil proceedings or in contraventions, disciplinary or in other legal proceedings.

The importance of issuing during the penal trial some statements that have a counterpart in the factual reality is pointed out by the Penal Codes of France, Malta and the Netherlands, by regulating aggravated versions of the offence of perjury when "*the person against whom or in whose favor it was committed is liable to a penal sentence*"[8] or "*when the false statement is made to the detriment of a defendant or a suspect in a penal trial*"[9].

In most states, perjury can be committed during any procedure where witnesses are heard (a criminal case, a civil case, a case before other jurisdictional bodies such as, for example, disciplinary commissions operating under special laws), but the premised situation will not obligatorily suppose a judicial

[8] According to paragraph (2) of art. 434-14 of the French Penal Code, perjury is punishable by 7 years in prison and a fine of 100,000 euros if the person against whom or in whose favor the perjury was committed is liable to a penal sentence.

[9] According to section 207, paragraph 2 of the Dutch Penal Code, if the false statement is made to the detriment of a defendant or a suspect in a criminal trial, the perpetrator is punished with imprisonment of up to nine years or a fine of the fifth category. Perjury committed in the basic form, regulated in point 1 of the same section, is punishable by imprisonment of up to six years or a fine of the fourth category.

procedure. In particular, in France, the false statement is an offence when it is made before any court or judicial police officer acting in the execution of a rogatory commission.

There are also important distinction elements regarding persons likely to make false statements, namely it is noted in Latvia that the active subject of this offence can be the injured person or any other person who has been warned about the consequences they risk in case they make false statements. In the Danish legislation the false statements are incriminated, without circumscribing the active subject by referring exclusively to the capacity of a witness, with the consequence that any person can be held criminally responsible if they make untrue statements before a national or foreign court, or before the Court of Justice of the European Union.

We consider that these two penal regulations correspond to the idea of Thomas Hobbes according to which the crimes that lack effects judgments are more severe than the prejudice caused to a few persons because:

The fact of receiving money in order to issue a false judgement or to make a false statement is a greater offence than cheating a person with a similar amount or a greater sum, not only because it prejudices the one who suffers from such judgements, but also because all the judgements become useless and there is an occasion for violence and private revenges. (Thomas Hobbes, 1651, translated into Romanian and published in 2011, p. 237)

But, beyond this traditional precept, whose moral foundation is indisputable, the standard imposed in the European space by the international conventions on the rights and freedoms of individuals cannot be ignored, given the impact they have on the appreciation margin of the legislative powers regarding the regulation of the offence of perjury, as long as the possibility of forcing an accused to incriminate himself is vehemently excluded at the community level.

It should be specified that the penal procedural legislation of most states in the European community expressly regulates the right of the witness to remain silent and not to incriminate themselves, so that both persons suspected/accused of committing acts provided for by the criminal law (so-called *de jure suspects*) and witnesses (*de facto suspects*, i.e. persons suspected before making an official notification) benefit from identical protection regarding the rights to silence and non-self-incrimination (Decision no. 236/2020 made by the Constitutional Court of Romania), and they are excluded from the scope of

potential active subjects of a crime of false statements committed about one's own cause.

Another offence incriminated in all the current European legislations aims to ensure the right of any person to express freely their procedural behaviour. It is represented by the offence of influencing statements, regulated analogously in the Penal Codes of Belgium, Cyprus, Croatia, Estonia, Finland, France, Germany, Greece, Italy, Latvia, Lithuania, Malta, Portugal, Romania, Slovakia, Slovenia, Spain and Hungary, with small distinctions regarding the essential requirements necessary to qualify concretely manifested antisocial behaviours as grounds capable of incurring the criminal responsibility of the perpetrators.

Thus, for example, we show that in Greece and in the Federal Republic of Germany, the attempt to determine or the determination of a person to make false statements in a judicial procedure corresponds to the penal law regardless of the way in which the penal activity is carried out. They emphasized on the importance of the sincerity of individuals before the judicial authorities, while in countries such as Romania, Bulgaria, Cyprus, Croatia, Italy, Estonia or France, these actions acquire the necessary weight to be included in the criminal sphere only if they are committed by coercion, corruption, intimidation or other acts likely to put the concerned person in difficulty, by limiting their possibility to guide their procedural behavior according to their will and beliefs.

Torture, inhuman and degrading treatments

We refer not only to the regulating way of the previously presented offences, but we refer to the entire codification by which the national legislators provided criminal protection to the judicial system and its activity. Thus, there is no doubt that the exponents of the legislative power in the European space were guided by minimum standards, derived from the values and requirements of the community block, from which it is inconceivable to make a derogation.

This appreciation finds its justification by analyzing the way in which the appropriation and the transposition of the international provisions on the prohibition of torture and cruel, inhuman or degrading treatments in the national legislation was preferred. Therefore, some states are distinguished by the option of cataloguing such acts as offences against justice, while most of the other states promote the idea that the use of torture mainly damages the physical and mental integrity of the person, by putting the effect on justice in the background, obviously without the intention of challenging it. By the regulatory

way of art. 282, Penal Code, Romania belongs to the first group, whereas Belgium, the Czech Republic, France or Portugal prefer the concept according to which by committing such offenses, the personal integrity is primarily affected.

In none of the examined legislations there is no precise definition of torture and degrading or inhumane treatments, which proves that all the European legislators referred to the standard meaning conferred to these concepts by the New York Convention adopted on 10th December 1984, according to which torture means any act by which severe physical or mental pain or suffering, is intentionally inflicted with the main purpose of obtaining information or punishing a certain person for an act which they or a third party committed or are suspected of having committed would have committed it either for the purpose of intimidation or discrimination, so that such conduct originates from a state agent or from any other person acting in an official capacity or at the instigation or with the express or tacit consent of such clerk.

It is universally accepted that torture does not refer to the pain or suffering inherent in the enforcement of the legally applied sanctions. Inhumane treatment means any other acts of exceptional severity, which cause the victim severe pain and suffering, but which do not reach the intensity level entailed by torture.

According to the European Court of Human Rights, a degrading treatment involves humiliating the individuals in front of themselves or others, causing them to act against their will or conscience, and is part of the category of ill-treatment, being on their lowest scale.

Penal protection of persons participating in the administration of justice

From the same perspective of the primacy of the fundamental right to health and bodily integrity, it is interesting to note that in most penal legislation in the European space, there is no distinct incrimination of the judicial contempt, respectively of acts of physical and verbal violence committed directly or indirectly against a magistrate or of a lawyer during their official assignments or in connection with these assignments. Therefore, these participants in the execution of the act of justice benefit either from protection equal to the protection conferred on the representatives of the other public authorities in the country, or from the general protection, ensured to any private person.

However, it is noted that, in a minority, Romania and France preferred the autonomous incrimination of judicial contempt, reserving separately written legal texts for this offence.

Thus, from the analysis of art. 279, Penal Criminal Code, it results that the Romanian penal legislator placed the exponents of the judicial power at a high level of penal protection, by establishing a special regulation and by increasing by half the punishment limits, in comparison to the increase by a third of the incident limits in case the contempt aims at other categories of officials vested with the exercise of state authority.

This special protection beach is even wider in France whose legislation protects not only magistrates, lawyers and members of their families, but also interpreters, experts and arbitrators who participate in the settlement of cases, by virtue of the important assignments they have in carrying out the act of justice, by sheltering them from all those manifestations of physical and verbal violence to which they could be exposed during the exercise of their assignments in the judicial procedure.

It is easy to anticipate, as it represents a mirror regulation of the judicial contempt, even the offence of revenge for the help given to justice is not popular in the European penal area. Therefore, a series of illegal behaviors committed against the people who participated in the execution of the act of justice are regulated as distinct offences exclusively in the legislation of three states: Romania, Estonia and Sweden are the only ones that provided an additional type of protection to the procedural subjects involved in a legal case.

Conclusions

Although there are numerous distinctions between the legislations, the previous examples prove the existence of common benchmarks that guide national legislators to protect justice as a fundamental pillar in the European democratic space, so that in all the analyzed Penal Codes, there are similar incriminated types of conduct, but also private ones, which tends to disregard the general obligation not to obstruct the state in the judicial activity. This is because justice is made not only in the name of the law, but especially with the support of the law which, as shown in this paper, is called to use various instruments of penal law in order to make and provide an adequate and necessary framework for its functioning in good conditions.

On the other hand, the permanent verification of the correspondence of national legislations with European benchmarks is a milestone in order to keep at the same level the balance between the efficient activity of making justice and the protection that this field must benefit from for the wanted functionality. Only

in this context of balancing the instruments made available for the defense of the mechanisms for the administration of justice can it be considered that all the possible measures are taken to achieve the optimal efficiency level in this direction. The comparative look at the methods by which the European states thought to regulate the natural defense shield of the means and persons entrusted with the administration of justice offers various sources of analysis of the ways to increase the efficiency of the criminal protection of the justice administration process.

Therefore, by using the existing indicators in the European legislative space, it is possible to bring elements to improve what each state has already regulated, while keeping the internal specificity, adapted to the society and the national legislative architecture, so that the process of maximizing the criminal protection of justice leads to the optimization of its results, the common goal of all the European states.

References

Bogdan, S. (2007). Scurte considerații privind unele infracțiuni în legătură cu înfăptuirea justiției. *Studia Universitatis Babeş-Bolyai*, 2/2007. http://arhiva-studia.law.ubbcluj.ro/articol/264.

Djuvara,M. (1995). *Teoria generală a dreptului (Enciclopedia Juridică). Drept rațional, izvoare și drept pozitiv*. Editura All, p. 101 și 240.

Hobbes, T. (2011). *Leviatanul. Despre om și societate.* Editura All, p. 19-20.

Ionescu, C. (2017). O perspectivă constituțională asupra justiției ca serviciu public. Comentarii pe marginea articolului 124 din Constituție, *Revista Dreptul,* 5/2017, p. 57-73.

Janet, P., Alcan, F. (1900). *Oeuvres philosophiques de Leibniz, Recueil des lettres entre Lebniz et Clarke – Cinquième réplique de M. Leibniz.* Ancienne Librairie Germer Bailliere, p. 765-797.

Rawls, J. (1999). *A Theory of Justice. Revised Edition.* Harvard University Press, p. 3.

Tanoviceanu, I., Dongoroz, V., Chiseliță, C., Laday, Ș., Decusară, E.C. (1924). *Tratat de drept și procedură penală. Edițiunea a doua a Cursului de drept și procedură penală, revăzut și completat* (Vol. 2). Tipografia Curierul Judiciar, p. 43.

Toader, T. (2018). *Codex penal – Codurile penale ale statelor membre ale Uniunii Europene,* C.H. Beck.

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Particularities of the Qualified Active Subject of Crimes against National Security and Crimes Committed by the Military

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Abstract

There are a few points of convergence between crimes against national security and those committed by the military, which result from the nature of the institutional structures in which the lawbreakers perform their duties. At the same time, the two categories of offences are relevant to the constitutional provisions on loyalty to the country and defence of the country, which are fundamental duties corresponding to the social relations protected by the rules of criminal law. Thus, the specific nature of the protected social values justifies the Romanian legislature's choice to attribute special status to the active subject of the offences in question.

Keywords: national security, military, service duties, citizenship

Fundamental duties – points of convergence between active subjects of crimes against national security and crimes committed by the military

Under the legal relations established between citizens and the State, several specific obligations arise, distinct from those that concern foreigners or stateless persons. For example, the State's legal conduct towards its citizens is different from that of the persons who do not have such status. Also, the

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sovereignty itself, as a constituent element of the state, is exercised by citizens through the empowerment of representatives in the Parliament (Ionescu, 2017, p. 120-121)

There is a spiritual and interdependent connection between the citizens and the state as a result of the legal relations established by the Constitution. In this regard, it was shown that the individuals do not feel bound so much to the state, identified by its authorities, as to the national territory that reflects the idea of the permanence of a collectivity. Thus, inhabitants first identify themselves with the territory on which they are organized and then with the form of political organization.

The concept of citizenship reflects, on the one hand, the sense of belonging of a collectivity to a certain territory, and, on the other hand, solidarity with the form of the organization of the state, which the citizens legitimize to exercise public power. Understanding of the concept of citizenship, by reference to territory and state, will outline the nature of the fundamental duties that the constituent legislator provided and the Fundamental law, and that, subsequently, the ordinary legislator protects by regulating contrary acts as crimes. It is only by virtue of this quality that the citizenship duties represented by loyalty to the country and the obligation to protect it can be integrated. Thus, the current research starts from the notion of citizenship, the duties that derive from a person's citizenship status and the sanctions for acts contrary to these duties.

The fundamental duties are provided for in Chapter III of the 2nd Title of the Romanian Constitution, and regarding this study, we will focus on the provision concerning the loyalty for the country (article 54) and defence of the country (article 55).

Loyalty to the country is incumbent on all Romanian citizens but has particular implications for civil servants and the military (Balan, 2015, p. 455) At the infra-constitutional level, we can identify several provisions that take over the substance of Article 54 from the Fundamental Law; for example art. 2 para. (2) of Law no. 51/1991 *concerning the national security of Romania* (republished in O.J. no. 190 of 18 March 2014) provides for the fact that "the Romanian citizens, as an expression of their loyalty to their country, have a moral duty to contribute to national security", and art. 8 point a) of Law no. 80/1995 *regarding the status of military personnel* (published in O.J. no. 155 of 20 July 1995) provides for the obligation of military personnel to be "loyal and devoted to the Romanian state and its armed forces, to fight for the defence of Romania, if

necessary to the point of sacrificing their lives, to respect and defend the values of constitutional democracy". Similarly, the provisions of art. 8 para. (1) point (b) of Law no. 21/1991 *on Romanian citizenship* (republished in O.J. no. 76 of 13 August 2010) states that the person applying for Romanian citizenship "proves, by behaviour, actions and attitude, loyalty to the Romanian State, does not undertake or support actions against the rule of law or national security and declares that he/she has not undertaken such actions in the past".

Regarding the public office holders and military personnel, the final part of para. (2) of art. 54 of the Constitution provides for the obligation to take the oath prescribed by the law, this being supplemented by the commitment to respect the Constitution and laws, as well as the rights and freedoms.

The defence of the country, according to art. 55 para. (1) of the Constitution, is incumbent on Romanian citizens and constitutes both a right and an obligation. This fundamental duty evokes a moral character that exists between the state and the citizen, particularly by reference to the defence of the territory, which is closely related to the common history and the sense of belonging. The obligation to defend the country arises when Romania's attributes of "national, sovereign and independent, unitary and indivisible state", as set out in art. 1 para. (1) of the Constitution, is at risk.

The failure to fulfil the fundamental duties of loyalty to the country or defence of the country constitutes grounds for withdrawing the citizenship of the person who has not acquired it by birth. Para. (1) of art. 25 of Law no. 21/1991 stipulates that Romanian citizenship may be withdrawn: (a) from a person who commits, from abroad, serious acts affecting the interests of the Romanian State or damages the prestige of Romania, (b) when he/she enlists in the armed forces of another state with which Romania has broken diplomatic relations or with which it is in a state of war, (c) respectively if he/she has connections or supports terrorist groups or if he/she commits acts that create a state of danger for national security. The grounds for withdrawing citizenship represent concrete ways in which loyalty to the country or the obligations to defend the country are violated.

Based on the interdependence of rights and obligations arising between the state and the individual as a result of citizenship, the ordinary legislator has created certain regulations of a special nature, namely sanctions of a criminal nature (Safta, 2023, p. 387) In this regard, we consider the fact that some of the offences against national security can be committed only by the person who is a

Romanian citizen, such as the offences of treason (art. 394 of the Criminal Code), treason by transmitting secret state information (art. 395 of the Criminal Code), treason by aiding the enemy (art. 396 C. pen.), high treason (art. 398 C. pen.), respectively in the case of offences committed by military personnel (Chapter I of Title XI of the Special Part of the Criminal Code) (Mitrache & Mitrache, 2022, p. 155). In the case of some of the aforementioned offences, the legislator requires a double qualification of the perpetrator, for example, he/she must be both a Romanian citizen and the President of Romania or be a Romanian citizen and a military officer, as provided for in art. 1 of Law no. 80/1995, to be a military officer, the individual must also have Romanian citizenship.

The citizen's belonging to a particular state and its territory determines "strongly and decisively the formation of national consciousness" (Ionescu, 2017, p. 123), hence the strong reverberations that the notion of treason has in the collective mind. Thus, the notion of treason is seen concerning the obligation of fidelity to the country, and such a duty can only be incumbent on the Romanian citizen, thus not being able to be claimed by the foreigner or stateless person.

Special status of the offender for some of the offences against national security Considerations concerning the qualified active subject according to the Romanian criminal law

The qualified active subject, also called special or circumstantial (Mărculescu-Michinici & Dunea, 2017, p. 526), implies the existence of special conditions required by the incriminating norm. The special status of the perpetrator, that of a Romanian citizen, for some of the offences against national security, must be verified in relation to the date established as to when the offence was committed. It is irrelevant whether the individual loses Romanian nationality after committing the offence or whether he/she did not have Romanian citizenship before committing the offence.

The special status required by the incriminating rule concerns the person/persons who directly committed the act provided for by the criminal law, the perpetrator or the co-perpetrators. Thus, the condition is not to be verified with regard to secondary participants, who may be instigators or accomplices. In this case, when the law does not require a particular quality for the instigator or accomplice, the classification will be in relation to the legal qualification given to the act for the qualified active subject (Udroiu, 2021, p. 128).

The special status of the perpetrator, in relation to the current regulation provided for in art. 394 of the Criminal Code, is that of being a Romanian citizen, a condition distinct from the perspective of the criminal legislator of 1968, which incriminated the act of treason committed both by the Romanian citizen and by the person who does not have Romanian citizenship, but who resides on Romanian territory (Toader T., 2012, p. 4). In fact, from the perspective of the quality of the active subject, the form of the offence of “treason against the Motherland” existing in the 1936 Criminal Code has returned. A similar approach existed as well in regard to the provisions of art. 67 of the 1864 Criminal Code, a criminal provision about which the literature expressed some reservations, considering it very unlikely that a foreign citizen who committed the crime of treason against the country could be held liable by the Romanian state, as if he/she is not on Romanian territory it would be difficult to bring the individual before the court, and if he/she were to enter the territory of the country he would have to be expelled (Dongoroz, 1929, p. 68).

The reason for which the current legislator has limited the scope of persons susceptible to commit the crime of treason to the category of Romanian citizens is explained through the fact that treason represents a violation of the fundamental duty to be loyal to the country, and such obligation can fall within the responsibility of the Romanian citizen (Toader T., 2012, p. 7). This legislative operation, which was carried out with the adoption of the current Criminal Code, should not be understood as a decriminalization of the crime, as committing the action as provided for by the incriminating rule by the foreign or stateless person will be classified per art. 399 Criminal Code as a hostile action against the state. Thus, in the hypothesis mentioned above, we are in a situation where not meeting *in concreto* the requirements for the special qualification determines the possibility of classifying the act in another, distinct, incriminating rule (Mărculescu-Michinici & Dunea, 2017, p. 527) (Udroiu, 2021, p. 129).

What is relevant for the fulfilment of the special quality required by the incriminating rule is that the offender has Romanian citizenship at the time of committing the incriminated act, being irrelevant if he/she also has the citizenship of another state. In this hypothesis, art. 399 Criminal Code becomes inapplicable as if the Romanian citizen also has the citizenship of another state, he cannot be considered a foreigner in relation to Romania.

Some particularities lie in relation to the crime of high treason, as it is provided for in the Criminal Code, which is the first incriminating norm that

represents an infra-constitutional application of the provisions of art. 96 of the Constitution on the impeachment of the President of Romania. The condition referred to in the text of the incrimination is that the offender must be a Romanian citizen, as well as the President of the country, Prime Minister or another member of the Supreme Council of National Defence (Boroi, 2022, p. 824).

With regard to the above issues, the hypothesis of high treason committed by the interim president was also put forward – that the provisions of art. 96 of the Fundamental Law should apply to him/her. Among the many opinions expressed in the specialised literature, one that we refer to concerns the interpretation of art. 99 of the Constitution, which states that the interim President can only be subject to political responsibility for serious acts that violate the constitutional provisions, and therefore not subject to high treason.

The content of the incriminating rule is represented by art. 398 of the Penal Code also refers to the members of the Supreme Council of National Defence, as being able to be active subjects of the offence. In this regard, we have into consideration art. 5 para. (3) of Law no. 415/2002 (published in O.J. no. 494 of 10 July 2002), which lists the following members of the Council: "the Minister of National Defence, the Ministry of Internal Affairs, the Minister of Foreign Affairs, the Minister of Justice, the Minister of Industry and Resources, the Minister of Public Finance, the Director of the Romanian Intelligence Service, the Director of the Foreign Intelligence Service, the Chief of the General Staff and the Presidential Adviser on National Security".

With regard to the category of active subjects of the offence of high treason, we underline that by Governmental Emergency Ordinance (GEO) no. 224/2008 (published in the O.J. no. 899 of 31 December 2008), the legislator amended the provisions of art. 5 para. (2) of Law no. 415/2002, which mentions the members of the Supreme Council of National Defence, in the sense that the Vice-President of the Council was also going to be the President of the Senate.

This legislative option was shortly criticised based on an objection of unconstitutionality, which is why the Court adopted the Decision of the Romanian Constitutional Court no. 1008/2009 (published in the O.J. no 507 of 23 July 2009) in which the Court established that the aforementioned provisions are contrary to the provisions of para. 6 of art. 115 of the Constitution, a provision which violated the regime in fundamental institutions.

Some controversial aspects in the specialised literature regard the possibility of committing the crime of high treason as accomplices, in the sense

that this form of criminal participation would not be possible when the act is committed by the Head of State. As far as we are concerned, the categories of active subjects referred to in the text of the incriminating provision are in line with Chapter 3 of Law no 415/2002, which indicates how the Council is organised and functions, and therefore the categories of members of the Council. Thus, we consider the indication of the President of Romania in the text of the incriminating rules of art. 398 of the Criminal Code is intended to achieve a correlation with the constitutional provisions that govern the indictment of the Head of State. Therefore, we consider that the offence of high treason can be committed as accomplices by any of the members of the Supreme Council of National Defence, for example by the Head of State and the Prime Minister.

Given the fact that the incriminating provision requires a special quality of the offender, we consider that the failure of one of the offenders to fulfil these qualities at the time when the crime was committed determines the establishment of a different classification for the concrete act committed by him/her, in which sense the provisions of art. 394-397, respectively art. 399 and 400 of the Criminal Code will be taken into account.

Considerations concerning the qualified active subject according to the legislation of other EU member states

Unlike the Romanian legislator's approach regarding the duties of loyalty and fidelity for the state that is required from the Romanian citizen who commits the crime of treason, the Italian legislator (art. 241, 243, 245 Italian Criminal Code) does not require such a condition to be met, the aforementioned crimes could be committed by an Italian citizen, as well as a person with the citizenship of another state. In this regard, the Italian literature appreciated that the necessity to maintain peace in Italy has priority in relation to the quality required from the offender (Albertini, 2008, p. 30).

We consider that some additional mentions are essential, for example, the provisions of art. 242 of the Italian Criminal Code also provides for the condition that the offence be committed by an Italian citizen. The texts of the incriminating rules laid down by the Italian legislator must be interpreted in the light of the provisions of art. 4 of the Italian Criminal Code, which states that, for the purposes of the criminal law, stateless persons who reside in Italy are to be regarded as Italian citizens. Moreover, art. 242 of the Italian Criminal Code states that a person who for any reason has lost the citizenship of the Italian State shall

be assimilated to an Italian citizen (Albertini, 2008, p. 22). This way of regulation aims to ensure greater protection by diversifying the categories of persons who are likely, from the point of view of criminal law, to be authors of the incriminating rules.

For comparison we will also consider the provisions of art. 581 and 592 of the Spanish Criminal Code that incriminate forms of the crimes of treason (Toader T., 2018, p. 616, 618). Thus, the Spanish legislator required that the offender has the special quality of citizen only in relation to the first of the two incriminating rules, and, in relation to the second incrimination, the active subject is uncircumscribed (Combo del Rosal & Quitanar Diez, 2004, p. 1144, 1159).

Similarly, the Spanish legislator provided that the offender must be a citizen of Spain also in the case of the incriminating rules provided in art. 582, 583 and 594 of the Spanish Criminal Code, which have a correspondence in the content of the incriminating text found in art. 396 of the Romanian Criminal Code.

Not all the criminal codes of the EU Member States contain incriminating rules which lay down the special condition that the offender must be a Head of State. In this regard, we note that Portuguese criminal law criminalises various offences which are prejudicial to Portugal's national security by employing special legislation. Thus, we have in mind Law no 34/1987 (published in Diario da Republica no. 161 of 16 July 1987). Art. 3 of the law states that the offences in question may be committed by a person in a public office, which expressly includes the President of Portugal. The acts criminalised by the above-mentioned law are set out in art. 8 to 27, including treason against the country, attacks against the Fundamental Law, and so on, which correspond to those set out in art. 394 et seq. of the Romanian Criminal Code.

Considerations regarding the quality of military personnel mentioned in the Romanian Constitution and in Chapter I of Title XI of the Special Part of the Criminal Code (Crimes committed by the military art. 413-431)

Considerations concerning the quality of the military according to the Romanian legislation

Globally, the past few years have been marked by major events (the Covid-19 pandemic and the war in Ukraine), which have brought forward again the importance and the defining role of the social category of the military, regardless

of the military structure they belong to, as the most appropriate human resource in crisis management. We consider that the periods of the states of emergency and alert during 2020-2022 were eloquent in this regard. The combat capability of the military in the armed forces is maintained by the way in which each member is motivated to carry out his/her service duties and the manner in which unlawful acts against this capability are deterred. The offences provided for in art. 413-431 of Title XI, Chapter I of the current Criminal Code represent one such means of deterring and maintaining discipline among the military, given that "the discipline is the soul of an army", as George Washington inspirationally said.

The Romanian soldier must be a fighter, with the culture of a fighter, a professional of arms, with the determination of a fighter, with the spirit of sacrifice and the courage of a warrior. In peacetime, the Romanian military must be prepared for combat, but also to be of use to society in humanitarian missions, peacekeeping, reconstruction, and helping members of the community in need.

Society sees the military as a social role model. For this role model to continue to exist, the military must also be a law-abiding man who fulfils this duty with the responsibility of one for whom the profession of arms is an honour. In any society or professional group there is a segment of criminality, and the military is unfortunately no exception, even if the phenomenon of military crime is much lower than in the civilian environment (Rotariu, 2020, p. 62).

At the same time, the analysis of art. 54 and 55 of the Fundamental Law also lead to the conclusion that, for the military, loyalty to the country and its defence are the main social and moral values that guide their entire activity, the military oath implying a commitment to supreme sacrifice for the defence of the country.

No provision of the Constitution, the Code of Criminal Procedure or the Criminal Code defines the scope of the notion of military, although this notion has implications in constitutional law, criminal law (active subject of the offences provided for in art. 413-431 of the Criminal Code) and criminal procedural law (Romanian Constitutional Court Decision no. 302/2007, absolute nullity of breaches of the rules of material competence or according to the person's status).

According to the definition in the Explanatory Dictionary of the Romanian Language, the term "military officer" applies to any person who is a member of the armed forces or who is serving a military service.

In the absence of a definition of military status in criminal or criminal procedural law, the general rules governing the concept of “military” to which we can refer are those governing the status of military personnel, namely Law no. 80/1995 *on the status of military personnel* (published in the O.J. no. 155 of 20 July 1995) and Law no. 384/2006 *on the status of soldiers and ranked professionals* (published in the O.J. of Romania, Part I, no. 868 of 24 October 2006).

Thus, according to art. 1 para. (1) of Law no. 80/1995 *on the status of military personnel* (published in the O.J. no. 155 of 20 July 1995), military personnel are Romanian citizens who have been granted the rank of officer, military master or non-commissioned officer, under the conditions laid down by law. The status of active military personnel is also maintained while they are released from their duties in order to undergo various forms of training in the interest of the service, as well as when they are made available for classification or transfer to the reserve or retirement, for cases of illness established by Government decision, while they are in captivity.

Given the fact that the status of military personnel on the term is no longer explicitly included in the scope of the active subject, it should be pointed out that this category of military personnel continues to exist under certain conditions established by law.

Thus, according to art. 3 para. 5 of the Law no. 446/2006 *on the preparation of the population for defence* (published in the O.J. no. 990 of 12 December 2006), when a state of war is declared or when a state of siege is established, the fulfilment of military service as a military officer on term becomes compulsory for men aged between 20 and 35 who fulfil the criteria for military service as set out in art. 7-8 of the law. In this context, military personnel on term may also be active subjects of the offences provided for in art. 413-431 of the Criminal Code. Similarly, military personnel who are concentrated and mobilised, although they too are not included in the list of active subjects of the offence, have this status from the date of concentration to the date of deconcentration or demobilisation, according to art. 18 of Law no. 446/2006 *on the preparation of the population for defence* (published in the O.J. no. 990 of 12 December 2006).

Furthermore, according to art. 4 of Law no. 80/1995 *on the status of military personnel* (published in the O.J. no. 155 of 20 July 1995), military personnel may be in one of the following situations:

a) in active service, when they hold a military position. Persons having Romanian nationality and residing in the country may be officers, military masters or non-commissioned officers on active service;
b) in reserve, when they do not hold a military position, but meet the conditions laid down by law for being called up for military service as concentrated or mobilised reservists, and, if necessary, as active military personnel;
c) in retirement, when, according to the law, they can no longer be called up for military service.

According to art. 5 of Law no. 80/1995 *on the status of military personnel* (published in the O.J. no. 155 of 20 July 1995), officers, military masters and non-commissioned officers in active service are professional military personnel. The profession of officer, military master or non-commissioned officer is an activity designed to ensure the functioning, improvement and management of the military body in peacetime and wartime. Similar provisions can be found in Law no. 384/2006 *on the status of soldiers and ranked professionals* (published in the O.J. of Romania, Part I, no. 868 of 24 October 2006), which refers to the provisions of Law no. 80/1995 concerning the military status.

There are two opinions in the specialised literature and the judicial practice on the military status of the active subject of offences committed by military personnel.

The first opinion is that "military" should be understood as meaning both active and retired military personnel, and isolated court decisions supporting this view, such as Decision no. 367/RC of 16 October 2020 in case no. 9312/193/2019 of the High Court of Cassation and Justice – Criminal Section appeal in cassation, unpublished, which states the following: "The High Court holds that the criminal procedure law uses the term military, without distinguishing between active or reserve military, the jurisdiction of the military courts being drawn by the status of military, without other conditions or exceptions".

A systematic interpretation of the provisions of the Constitution, the Criminal Code and the special laws on mobilisation and war could also lead to the conclusion that concentrated or mobilised reservists also carry out activities of a military nature and that the duties of active military personnel with regard to the defence of the country apply to them.

Thus, according to art.185 of the Criminal Code, wartime means the duration of mobilisation of the armed forces or the duration of the state of war.

According to art. 11 of Law no. 446/2006 *on the training of the population for defence* (published in O.J. no. 990 of 12 December 2006), the status of officer, military master or non-commissioned officer in active service is obtained under the conditions laid down by law, and according to art. 13, volunteer soldiers and non-commissioned officers are recruited, selected, trained and carry out their activities per the law.

Three other articles of the above-mentioned law state the following:

"Art. 16. (1) Volunteer reservists may be concentrated or mobilized, as appropriate, for:

a) training and peacetime and/or emergency missions;
b) supplementing the forces intended for defence when a state of siege is established when mobilisation or a state of war is declared.

(2) In the situation referred to in para. 1(a), volunteer reservists shall be concentrated based on the order of the minister/head of the institution to which the unit in which the reservist is assigned is subordinated.

(3) Reservists may, at the request of the institutions responsible for defence and national security, participate for a determined period in training or missions, based on their agreement, occupying positions in military structures. During this period, reservists shall have the rights and obligations laid down by law for the category of personnel corresponding to the temporary post held."

"Art. 17. Reservists may be concentrated or mobilized, as appropriate, for training, to carry out missions and to supplement the institutions responsible for defence and national security, or mobilized at work, according to the law."

"Art. 18. (1) Concentration, for this law, means:

a) the calling up of volunteer reservists for training and performance of missions;
b) the call-up of reservists from the mobilization reserve for training, the performance of missions and the filling of institutions with duties in the field of defence and national security during the state of siege.

(2) Upon the declaration of mobilisation or a state of war, reservists from the operational reserve and the citizens referred to in art. 3(5), incorporated, shall be considered mobilized, and the military service shall be extended until the date of demobilization.

(3) The military service as a concentrated soldier shall begin on the date of concentration and end on the date of de-concentration, and as a mobilised soldier shall begin on the date of mobilisation and end on the date of demobilisation."

Consequently, if the criterion for the jurisdiction of military prosecutors based on the offender's status as a serving military officer is the holding of military posts, the same reasoning should apply at least to reservists concentrated or mobilised during a state of siege, mobilisation or war.

What matters is the date of actual attainment of military status, respectively the date of loss of military status through reserve or retirement, during which time the person in question has active military status.

The second opinion is that "military" should be understood only as active military, not as military in reserve or retired, and several court decisions supporting this perspective, such as Decision no. 384/RC/2016 of the High Court of Cassation and Justice – Criminal Section appeal in cassation, available on the website www.iccj.ro: "In the case of military personnel, the legislator understood that this competence according to the person's quality is drawn from the military functions exercised. The fact that military reservists enjoy some of the rights conferred on military personnel (not all of them) does not constitute a sufficient argument to contradict the previous conclusion on personal jurisdiction." This view is also reflected in the following legal texts relating to military personnel:

– Art. 56 para. (4) of the Criminal Procedure Code provides that "in the case of offences committed by military personnel, criminal proceedings must be conducted by the military prosecutor";
– Art. 101 of Law no. 304/2004 *on the administration of justice* (republished in the O.J. no. 827 of 13 September 2005) reads as follows: "when the person under investigation is an active military person, criminal proceedings shall be conducted by the military prosecutor, regardless of the military rank of the person under investigation";
– Art. 112 of Law no. 304/2022 *on the administration of justice* (published in the O.J. no. 1104 of 16 November 2022) reads as follows: "when the person under investigation is an active military person, criminal proceedings shall be conducted by the military prosecutor, regardless of the military rank of the person under investigation".

After studying a significant number of legislative and legal acts relating to military status, we are in a position to support a different point of view, in the sense that "military" must be understood as active military and reserve military during the period in which they are concentrated or mobilised because they carry out activities with a military specificity, applying to them the duties of active military with regard to the defence of the country, including the respect for the orders and the rights of active military (pay, food allowance and so on). Reservists who do not comply with the order to go to the concentration camp commit the offence provided for in art. 435 of the Criminal Code – the failure to report for induction or concentration, and not the offence of insubordination – art. 417 of the Criminal Code, which is committed by an active military officer who refuses to carry out an order in connection with service duties.

Regarding the notion of the military in the Constitution, we consider that it refers to both the active military and the military in reserve or retired, in both forms Romanians have to fulfil the fundamental duties of loyalty to the country (art. 54) and defence of the country (art.55) as citizens and then as military.

Moreover, it should also be noted that there are persons who do not have the status of military personnel, although they are included in some structures of the Ministry of National Defence, the Ministry of Internal Affairs, or other military structures. Thus, students of military high schools are eligible under art. 120 para. 1(m) of the "Instructions on the organisation and functioning of national military colleges" of 13 October 2014 (approved by Order no. M 110/2014 of the Minister of National Defence, published in the O.J., Part I, no. 770 of 23 October 2014) awarding of/promotion in honorary military ranks, which do not confer military status[3].

There are also persons who are not military, although they are assimilated to them: according to art. 25 of Law 195 of 6 November 2000 *on the establishment and organization of the military clergy* (published in the O.J., Part I, no. 561 of 13

[3] Grades are honorary and are awarded by unit order on the day of the annual (semester) school report prior to leaving for vacation as follows: (a) top student: to students in the 10th grade; to class leaders in 9th grade at the end of the first semester; (b) corporal student: students in the 11th grade and class XI and class leaders in 10th grade; (c) sergeant student: to students in 12th grade and ranked/class leaders/female student responsible for the women sector, of 11th grade; (d) sergeant-major student and warrant officer student: to students substituting instructors in 12th grade; (e) warrant officer-major student: responsible for the lower/upper cycle, substitute of the deputy commander; (f) assistant warrant officer student: the student substituting the college commander, from 12th grades.

November 2000) military chaplains are assimilated to the officer corps, as follows:

a) assimilated to the rank of major: category I garrison chaplains and assistant chaplains;
b) assimilated to the rank of lieutenant-colonel: category II garrison chaplains;
c) assimilated to the rank of colonel: category III garrison chaplains, chaplains of the Bucharest garrison, chaplains in the religious assistance section;
d) assimilated to the rank of brigadier-general: inspector general and head of the Religious Assistance Unit. These do not have military status either, even though they benefit from military salaries and pensions.

Considerations regarding the military status in the legislation of other EU Member States

Section 114 of Chapter VII of the Criminal Code of the Czech Republic clarifies the general notion of military, specific and special subjects. It should be noted that in this legislative notion, in relation to the military offence committed only by the offender or accomplice must be a military officer, the instigator may be a person who does not have this status. Furthermore, the content of the notion of the military is unequivocally established. Where the Criminal Code provides for a special characteristic, quality or function, of the offender for a crime, the offender or accomplice can be only the person that meets this characteristic, quality or function. The offender or accomplice, in case of a military crime provided by Chapter 12 of the Special Part of this Code can be only a military officer.

(2) Where the Criminal code provides for a special characteristic, quality or function of the offender, it is sufficient that this special characteristic, quality or function to be represented by the legal person on whose behalf the offender is acting. This provision also applies if: a) the conduct of the offender occurs before the legal person was established, b) the legal person was established but its establishment does not meet the conditions of validity, or c) the legal act that authorises the right to act on behalf of the legal person is not valid and ineffective. (3) The organiser, instigator or person who facilitates the offence under subsections (1) and (2) may also be a person who does not possess the

respective characteristic, quality or function. (4) In cases where this Code refers to a member of the military, he/she shall be understood as referring to (a) a serving member of the military, (b) a member of the military who is not in the performance of his/her duties, if he/she is in uniform, (c) a member of the security forces for the offences of insubordination (Section 375), insubordination due to fault or neglect (Section 376), insulting a member of the military (Section 378), insulting a member of the military by use of violence or threat of violence (Section 379), insulting a military person of the same rank with violence or threat of violence (Section 380), striking a superior officer (Section 381), violation of the sentinel's consignment (Section 381), violation of the guard consignment or other duties (Section 390) and identifying, supporting and promoting a movement aimed at suppressing human rights and freedoms – Section 403 (2) (c), or (d) a war prisoner. (5) Where this Code refers to military service or military duty, these mean the service or duty of persons referred to in subsection (4) [4].

In Chapter VIII of the Criminal Code of the Republic of Croatia entitled "Meaning of Expressions in this Act", art. 87 para. 2 contains the meaning of the term "military": "Military person is the active military person, a soldier on active duty, a soldier on the term, a reserve military person and a cadet, a civil servant and an employee seconded in function to the Armed Forces of the Republic of Croatia"[5].

References

Albertini, B. (2008). *Dei delitti contro la personalità dello Stato.* Preluat de pe https://www.repository.unipr.it/bitstream/1889/923/1/i_delitti_contro_la_personalità_dello_Stato.pdf

Balan, M. (2015). *Drept constituțional și instituții politice. Vol. 1. Teoria generală a statului și a constituției. Constituția română în context european.* București: Hamangiu.

Boroi, A. (2022). *Drept penal. Partea specială. ed. a 6-a.* București: Ed. C.H. Beck.

Combo del Rosal, M., & Quitanar Diez, M. (2004). *Drecho penal espanol. Parte Especial.* Madrid: Ed. Dykinson S.L.

Decizia nr. 18A/2018 (Înalta Curte de Casație și Justiție, Secția penală).

[4] http://codexpenal.just.ro/downloads/Cod-Penal-UE-RO.pdf, p. 608.

[5] http://codexpenal.just.ro/downloads/Cod-Penal-UE-RO.pdf, p. 870.

Dongoroz, V. (1929). *Drept penal. Partea specială. Noțiuni generale și infracțiuni contra siguranței exterioare a statului (Articolele 66-75 Cod penal), vol. I.* București: Ed. Curierul Judiciar S.A.

Ionescu, C. (2017). in C. Ionescu, & C. (Dumitrescu, *Constituția României. Comentarii și explicații.* București: Hamangiu.

Mărculescu-Michinici, M.-I., & Dunea, M. (2017). *Drept penal. Partea generală. Curs teoretic în domeniul licenței (I).* București: Ed. Hamangiu.

Mitrache, C., & Mitrache, C. (2022). Drept penal român. Partea generală. București: Universul Juridic.

Rotariu, I. (2020). *Infracțiunile contra capacității de luptă a forțelor armate.* București: Ed. Militară.

Safta, M. (2023). *Drept constituțional și instituții politice. Vol. I. Teoria generală a dreptului constituțional. Drepturi și libertăți. ed. a 8-a.* București: Ed. Hamangiu.

Toader, T. (2012). *Drept penal român. Partea specială. ed. a 7-a.* București: Ed. Hamangiu.

Toader, T. (2018). *Codex penal. Codurile penale ale statelor membre ale Uniunii Europene, Vol. V.* București: Ed. C.H. Beck.

Udroiu, M. (2021). *Sinteze de Drept penal. Partea generală. Volumul I, ediția 2.* București: Ed. C.H. Beck.

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Controversies in Jurisprudence regarding the Establishment of the Object of the Contestation Formulated on the Base of art. 347 of the Criminal Procedure Code

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Abstract

Through this article, we want to analyze a legal issue that has generated different judicial practice regarding the establishment of the object of the challenge formulated on the basis of art. 347 of the Criminal Procedure Code. The legal issue regarding the establishment of the object of the appeal formulated on the basis of art. 347 of the Criminal Procedure Code consists in the interpretation of the mandatory or optional nature of the mention in the appeal statement of both the intermediate conclusion pronounced by the judge of the preliminary chamber based on art. 345 para. 3 of the Criminal Procedure Code, as well as of the final decision pronounced according to art. 346 of the Criminal Procedure Code.

***Keywords**:* preliminary chamber, statement of appeal, object of the appeal, establishment of the object of the appeal, intermediate conclusion of the preliminary chamber, final conclusion of the preliminary chamber.

Introductory considerations

The current criminal procedure code explicitly provided for a new phase of the criminal process, namely that of the preliminary chamber procedure. This procedural phase is located between the criminal investigation phase and the

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trial phase and takes place only in the situation where the notification to the court is carried out by means of an indictment. The purpose of the preliminary chamber consists in the verification by the judge of the preliminary chamber, after ordering the indictment of the accused, of the jurisdiction of the court and of the criminal investigation bodies, of the regularity of the indictment, of the legality and loyalty of the administration of the evidence and the legality execution of procedural and procedural documents by the criminal prosecution bodies.

In relation to the subject of the preliminary chamber procedure, requests and exceptions can be raised by the prosecutor, the parties and the injured person. Also, the pre-trial chamber judge may ex officio invoke exceptions regarding the subject matter of the pre-trial chamber procedure.

For the resolution of requests and exceptions formulated or invoked ex officio, the judge of the preliminary chamber will fix a term in the council chamber with the summoning of the parties, the injured person and the notification of the prosecution unit that drew up the indictment.

If the preliminary chamber judge finds irregularities in the indictment, if he sanctions according to art. 280-282 criminal investigation documents carried out in violation of the law or if it excludes one or more administered evidence, it will pronounce a conclusion by which it will order that within 5 days from its communication, the prosecutor will remedy the irregularities of the notification document and communicate to the judge of the preliminary chamber if he maintains the disposition of referral to court or requests the restitution of the case.

Later, if the judge of the preliminary chamber finds that the indictment is not drawn up according to regulations, that the irregularities were not remedied within the previously mentioned 5-day period and that these irregularities make it impossible to establish the object or limits of the trial, then he will order by another conclusion that the entire case be returned to parquet.

Also, the solution is the same if all the evidence administered during the criminal investigation was excluded or if the prosecutor requests the restitution of the case or if he did not respond that he maintains his disposition to be sent to court within the 5-day period provided by law.

Therefore, we find that in the presented situation, the judge of the preliminary chamber will issue two conclusions, respectively an intermediate

conclusion based on art. 345 para. 3 of the Criminal Procedure Code, and a final conclusion pronounced on the basis of art. 346 of the Criminal Procedure Code.

After the communication of the final conclusion pronounced on the basis of art. 346 of the Criminal Procedure Code, the prosecutor, the parties and the injured person can file an appeal within 3 days. This appeal may also concern the way of resolving requests and exceptions.

The problem that arose in the judicial practice of the courts was whether, when an appeal is declared, the holders of the right of appeal should or should not make the express statement that they are declaring an appeal both against the final decision of the preliminary chamber and against the intermediate decision or is it is enough to declare an appeal, being considered as being directed against both previously mentioned conclusions.

The legal issue is very important as it has in mind the establishment of the framework of the judgment regarding the eventual analysis or not by the judges of the preliminary chamber notified with the settlement of the appeal of the legality and the validity of the interim conclusion.

Incidental legislation

Law no. 135 of July 1, 2010 regarding the Criminal Procedure Code [Law no. 135 of July 1, 2010 regarding the Criminal Procedure Code, with subsequent amendments and additions, published in the Official Gazette of Romania, Part I, no. 486 of July 15, 2010]

ART. 342. The object of the procedure in the preliminary chamber. The object of the procedure of the preliminary chamber is the verification, after the referral to court, of the competence and legality of the referral to the court, as well as the verification of the legality of the administration of evidence and the execution of documents by the criminal prosecution bodies.

ART. 345. Procedure in the preliminary chamber

(1) At the deadline established according to art. 344 para. (4), the judge of the preliminary chamber solves the requests and exceptions formulated or the exceptions raised ex officio, in the council chamber, based on the works and material from the criminal investigation file and any new documents presented*), listening to the conclusions of the parties and the person injured, if present, as well as the prosecutor's; (2) The judge of the preliminary chamber pronounces in the council chamber, through a conclusion, which is immediately communicated to the prosecutor, the parties and the injured person; (3) If the judge of the

preliminary chamber finds irregularities in the notification act or if he sanctions according to art. 280-282 the acts of criminal investigation carried out in violation of the law or if it excludes one or more administered evidence, within 5 days from the communication of the conclusion, the prosecutor fixes the irregularities of the referral act and informs the judge of the preliminary chamber if he maintains the disposition of sending to court or requests the restitution of the case.

Art. 346. Solutions

(1) If requests and exceptions were not made within the terms provided for in art. 344 para. (2) and (3) and did not ex officio raise exceptions, upon the expiration of these terms, the judge of the preliminary chamber ascertains the legality of the notification to the court, the administration of the evidence and the execution of the criminal investigation documents and orders the trial to begin. The judge of the preliminary chamber pronounces in the council chamber, without summoning the parties and the injured person and without the participation of the prosecutor, by means of a conclusion, which is immediately communicated to them.

(2) If he rejects the requests and exceptions invoked or raised ex officio, under the conditions of art. 345 para. (1) and (2), by the same conclusion, the judge of the preliminary chamber ascertains the legality of the referral to the court, the administration of the evidence and the execution of the criminal investigation documents and orders the trial to begin.

(3) The preliminary chamber judge returns the case to the prosecutor's office if:

a) the indictment is drawn up irregularly, and the irregularity was not remedied by the prosecutor within the term stipulated in art. 345 para. (3), if the irregularity leads to the impossibility of establishing the object or limits of the judgment; b) excluded all evidence administered during the criminal investigation; c) the prosecutor requests the restitution of the case, under the conditions of art. 345 para. (3), or does not respond within the term stipulated by the same provisions.

(4) In all other cases in which he found irregularities in the notification act, he excluded one or more administered evidence or sanctioned according to art. 280-282 criminal investigation documents carried out in violation of the law, the preliminary chamber judge orders the start of the trial.

(41) In the cases provided for in para. (3) lit. a) and c) and para. (4), the judge of the preliminary chamber pronounces by conclusion, in the council chamber, with the summons of the parties and the injured person and with the participation of the prosecutor. The conclusion is communicated immediately to the prosecutor, the parties and the injured person.

(42) In the case provided for in para. (3) lit. b), the return of the case to the prosecutor is ordered by the conclusion provided for in art. 345 para. (2). (5) Excluded evidence cannot be taken into account in the substantive judgment of the case; (6) If he considers that the referred court is not competent, the preliminary chamber judge proceeds according to art. 50 and 51, which apply accordingly; (7) The preliminary chamber judge who ordered the start of the trial exercises the function of trial in the case.

Art. 347. Appeal

(1) Within 3 days from the communication of the conclusions provided for in art. 346 para. (1)-(42), the prosecutor, the parties and the injured person can appeal. The appeal can also concern the way of solving requests and exceptions.

(2) The appeal is judged by the judge of the preliminary chamber from the court hierarchically superior to the one referred to. When the court referred to is the High Court of Cassation and Justice, the appeal is judged by the competent panel, according to the law.

(3) The appeal is resolved in the council chamber, with the summoning of the parties and the injured person and with the participation of the prosecutor. The provisions of art. 345 and 346 apply accordingly.

(4) In the resolution of the appeal, no other requests or exceptions may be invoked or raised ex officio than those invoked or raised ex officio before the judge of the preliminary chamber in the procedure carried out before the court notified by indictment, except for cases of absolute nullity.

Analysis of the problem and opinion of the authors

The procedure of the preliminary chamber is structured, as a rule, in three stages, namely: the stage of preliminary measures (art. 344 of the Criminal Procedure Code), the stage of resolving the requests and invoked exceptions (art. 345 of the Criminal Procedure Code) and the stage of resolving the object of the procedure of the preliminary chamber (art. 346 of the Criminal Procedure Code).

In the first stage, the case is distributed randomly, the legal assistance of the parties and the injured person is ensured, if applicable, the notification is communicated, the term is established in which they can make requests or invoke exceptions.

In the second stage, the settlement of the requests and exceptions formulated or invoked ex officio takes place in a non-public meeting, with adversarial and oral procedure, with the judge of the preliminary chamber pronouncing an intermediate conclusion that is communicated to the prosecutor, the parties and the injured person.

In the situation where the judge of the preliminary chamber finds some irregularities in the indictment, sanctions the criminal investigation documents or excludes some evidence, this interim conclusion is communicated to the prosecutor for their remedy or to decide whether to maintain the provision of referral to court or whether to request the return of the file. This interim conclusion cannot be challenged with a separate appeal, as the legislator does not explicitly provide for an appeal that can be directed against this decision.

In the third stage, after the notification of the interim conclusion, the judge of the preliminary chamber proceeds to resolve the object of the preliminary chamber, pronouncing a new, final conclusion, by which he can order the start of the trial, return the case to the prosecutor's office or decline the jurisdiction to resolve the case.

The provisions of art. 347 para. 1 of the Criminal Procedure Code provide that both the final decision of the preliminary chamber (ordering the start of the trial or the return of the case to the prosecutor's office) and the intermediate solution (ordering on the requests and exceptions formulated or invoked by the parties, the injured person or raised ex officio in the case). This conclusion can be deduced from the final sentence of the previously mentioned legal text, which provides the following: “The appeal may also concern the way of resolving requests and exceptions”.

The interpretation that both conclusions pronounced by the judge of the preliminary chamber can be challenged by way of appeal is unanimously accepted both in the doctrine and in the judicial practice.

In the doctrine, it was shown that the object of the appeal can concern both the way of solving the requests and exceptions formulated by the parties or the injured person or invoked ex officio by the judge in the procedure provided by art. 345 of the Criminal Procedure Code, as well as the decision to start the

trial ordered in the procedure provided by art. 346 of the Criminal Procedure Code. It has also been shown that this appeal can concern both objects, or only one of them. [Udroiu Mihail, Synthesis of criminal procedure. The special part, Volume I, Second Edition, C. H. Beck Publishing House, Bucharest, 2021, p. 310]

During the professional meeting of the judges, the participants agreed with the opinion of I.N.M. according to which the criminal procedural provisions provide that the parties can contest both the final (disinvestment) and the intermediate conclusion, regarding the way of resolving claims and exceptions. [Minutes of the Meeting of the presidents of the criminal sections of the High Court of Cassation and Justice and the Bucharest Courts of Appeal, February 27-28, 2023, p. 81, available at https://inm-lex.ro/wp-content/uploads/2023/03/ Minutes-meeting-presidents-criminal-departments-Bucuresti-February-2023.pdf (inm-lex.ro)]

Also, during the professional meeting of the prosecutors, the participants agreed to the same opinion of I.N.M. according to which the holders of the right of appeal can contest both the decisions of the preliminary chamber (intermediate and final) within the 3-day period provided by law, since the legislator did not foresee the possibility of formulating a separate way of appeal against the intermediate decision. [Minutes of the meeting of the chief prosecutors of the section of the Prosecutor's Office attached to the High Court of Cassation and Justice, the National Anti-Corruption Directorate, the Directorate for the Investigation of Organized Crime and Terrorism and the prosecutor's offices attached to the Bucharest Courts of Appeal, April 3-4, 2023, p. 80, available at https://inm-lex.ro/wp-content/uploads/2023/05,Minuta-intalnire-procorori-3-4-aprilie-2023-Bucuresti.pdf (inm-lex.ro)]

In the judicial practice of the High Court of Cassation and Justice, the following were observed: “Only the conclusions by which the judge resolved the case in the preliminary chamber and pronounced one of the solutions provided in art. 346 para. 1-42 of the Code of Criminal Procedure, the other conclusions not being subject to appeal separately, but only together with the conclusion pronounced under art. 346 para. 1-44 of the Criminal Procedure Code, by which the preliminary chamber procedure was resolved”. [High Court of Cassation and Justice, Criminal Section, Decision no. 742 of September 8, 2021, www.scj.ro]

The same interpretation is confirmed by the jurisprudence of the Constitutional Court, which ruled that “through the appeal provided by art. 347

of the Criminal Procedure Code, legality control is ensured regarding a series of final conclusions pronounced in the preliminary chamber procedure, as a guarantee of compliance with the requirements of the principle of legality of the criminal process enshrined in art. 2 of the Criminal Procedure Code, which, in turn, is based on the provisions of art. 1 paragraph (5) of the Constitution regarding the principle of legality. The purpose of the appeal in the preliminary chamber procedure is to correct the errors of law committed by the preliminary chamber judge when verifying, after being sent to court, the legality of the referral to the court, as well as the legality of the administration of evidence and the execution of documents by the criminal prosecution bodies , errors that must be corrected within the same procedural phase, considering the reasons for which the preliminary chamber procedure was instituted." [The Constitutional Court of Romania, Decision no. 18 of January 17, 2017, paragraph 19, published in the Official Gazette of Romania, no. 312 of May 2, 2017]

However, regarding the establishment of the object of the appeal formulated on the basis of art. 347 of the Criminal Procedure Code, different opinions were expressed.

Thus, in the doctrine, the opinion was expressed according to which, in all cases, the prosecutor, the injured person or the parties must explicitly indicate, in the act declaring the appeal, which decision is being appealed. If it is stated in the content of the appeal that only the final decision is being challenged, the one pronounced on the basis of art. 346 of the Criminal Procedure Code and not the intermediate one provided by art. 345 of the Criminal Procedure Code, then this latter conclusion becomes definitive by not contesting, and criticisms regarding the way of resolving requests and exceptions can no longer be formulated in the appeal. [Udroiu Mihail, Synthesis of criminal procedure. The special part, Volume I, Second Edition, C. H. Beck Publishing House, Bucharest, 2021, p. 310]

In the recent professional meetings of judges and prosecutors, previously specified, the opinion agreed by I.N.M. according to which, even if the prosecutor, the parties or the injured person did not file an appeal within the 3-day period provided by law against the interim conclusion, the appeal directed against the final preliminary chamber conclusion is considered to be also filed against the intermediate conclusion.

In the judicial practice of the supreme court, it was noted that "in relation to the provisions of art. 347 para. 1 of the Criminal Procedure Code – according to which, within 3 days from the communication of the conclusions provided for

in art. 346 para. 1-42, the prosecutor, the parties and the injured person can file an appeal, and the appeal can also concern the way of resolving requests and exceptions-, compliance with the 3-day deadline regarding the final conclusion pronounced by the judge of the preliminary chamber based on art. 346 para. 3 letter a) of the Criminal Procedure Code allows the panel of 2 judges of the preliminary chamber vested in the appeal to also examine the intermediate conclusion by which the requests and exceptions were resolved, even if the intermediate conclusion was not distinctly indicated in the appeal, in the term provided for in art. 347 para. 1 of the Criminal Procedure Code, but only in the grounds of appeal". [High Court of Cassation and Justice, Criminal Section, Decision no. 779 of November 20, 2020, www.scj.ro]

The opinion of the authors of this paper is that the holder of the right of appeal must explicitly mention that he is declaring an appeal both against the final decision of the preliminary chamber, respectively against the one pronounced on the basis of art. 346 of the Criminal Procedure Code, as well as against the intermediate conclusion, respectively the one pronounced on the basis of art. 345 of the Criminal Procedure Code.

We appreciate that the legislator did not explicitly provide in the case of the ordinary way of appealing the appeal that the declaration of the appeal against the final conclusion of the preliminary chamber is considered to be made also against the intermediate conclusion of the preliminary chamber by which it disposes of the requests and exceptions formulated or invoked by the parties, person injured or removed from the office in question.

We believe that the legislator should have explicitly provided for this, since when he wanted to do it, as is the case with the appeal, nothing prevented him. Thus, according to art. 408 of the Code of Criminal Procedure, the appeal declared against the sentence is also considered against the conclusions.

Or, if in the case of a criminal sentence, the legislator clearly explained that the declaration of the right of appeal is considered to be made also against the previously pronounced conclusions, even more so, we appreciate that in the case of a conclusion it should have expressly stated whether have wanted this.

If we consider that the declaration of the appeal against the final decision of the preliminary chamber is considered to be made also against the intermediate decision of the preliminary chamber, then we appreciate that, by adding to the law, procedural rules are created that do not comply with the provisions that regulate the matter of appeals.

Moreover, from the analysis of the provisions of art. 4251 of the Criminal Procedure Code that regulates the way of appeal, it does not follow that the provisions of art. 408 para. 3 of the Criminal Procedure Code is also applied appropriately in the case of appeal, the legislator clearly indicating that only the provisions of art. 411 para. 1, art. 415, art. 416 and art. 418 of the Criminal Procedure Code applies accordingly. Therefore, if the legislator had wanted the provisions of art. 408 para. 3 of the Code of Criminal Procedure to be properly applied, nothing would have prevented him from doing so.

In support of this interpretation, we consider that the considerations of the Constitutional Court are relevant in the sense that "in resolving the challenge formulated, pursuant to art. 347 para. (1) of the Code of Criminal Procedure, analyzing the legality and validity of the solutions ordered in the background of the preliminary chamber and – to the extent that it is disputed – the way of solving the requests and exceptions invoked by the parties and the injured person, it is obvious that the judge at the court hierarchically superior will take into account all the criticisms invoked by the appellants regarding the concrete conduct of the preliminary chamber procedure in the first instance, including the aspects related to the administrative measures taken by the preliminary chamber judge within this procedure, the way in which the preliminary chamber judge solved any procedural issue, other than those invoked by way of requests or exceptions formulated by the parties and the injured person, since these aspects are the basis of the legality of the solutions provided by the conclusions provided for in art. 345 and 346 of the Criminal Procedure Code." [The Constitutional Court of Romania, Decision no. 376 of June 18, 2020, paragraph 28, published in the Official Gazette of Romania, no. 914 of October 7, 2020]

Therefore, the Constitutional Court retained the possibility of the panel of two judges of the preliminary chamber from the hierarchically superior court to analyze the way of solving the requests and exceptions invoked in the preliminary chamber procedure, but only in the situation where this is contested, not being able to extend from office the appeal of the appeal to other decisions, such as the case of the intermediate conclusion of the preliminary chamber.

It is also relevant that the participants in the professional meeting of the prosecutors, although they agreed with the point of view of the I.N.M., finally recommended to the prosecution units, in order to manage the appeals, the need to mention in the act through which is declared to be an appeal both the resolution of the preliminary chamber and the resolution of the exceptions,

when they understand to formulate criticisms with regard to the latter as well. This conclusion actually confirms the continued existence of different practices at the level of national courts in the sense that the point of view expressed and agreed at the meeting is not, however, embraced by some magistrates. [Minutes of the meeting of the chief prosecutors of the section of the Prosecutor's Office attached to the High Court of Cassation and Justice, the National Anti-Corruption Directorate, the Directorate for the Investigation of Organized Crime and Terrorism and the prosecutor's offices attached to the Bucharest Courts of Appeal, April 3-4, 2023, p. 81, available at https://inm-lex.ro/wp-content/uploads/2023/05,Minuta-intalnire-procorori-3-4-aprilie-2023-Bucuresti.pdf (inm-lex.ro)]

Conclusions

Finally, we consider that it is mandatory for the holder of the right of appeal to explicitly state in the statement of appeal that he is declaring an appeal both against the conclusion by which the final preliminary chamber solution was pronounced, as well as against the conclusion by which the intermediate solution was pronounced on the requests and exceptions formulated or invoked by the parties, injured person or ex officio in question.

In order to remove the legal controversy and ensure a unified practice at the national level, we consider, by law ferenda, that it is necessary to supplement the Criminal Procedure Code by mentioning by the legislator that the statement of appeal against the final conclusion of the preliminary chamber, respectively against the one pronounced on the basis of art. 346 of the Criminal Procedure Code, it is considered to be made also against the intermediate conclusion, respectively the one pronounced on the basis of art. 345 of the Criminal Procedure Code or by expressly mentioning that the provisions of art. 408 para. 3 of the Criminal Procedure Code is also applied accordingly in the case of appeal.

References

Law no. 135 of July 1, 2010 regarding the Criminal Procedure Code, with subsequent amendments and additions, published in the Official Gazette of Romania, Part I, no. 486 of July 15, 2010.

The Constitutional Court of Romania, Decision no. 18 of January 17, 2017, published in the Official Gazette of Romania, no. 312 of May 2, 2017.

The Constitutional Court of Romania, Decision no. 376 of June 18, 2020, published in the Official Gazette of Romania, no. 914 of October 7, 2020.

High Court of Cassation and Justice, Criminal Division, Decision no. 779 of November 20, 2020.

High Court of Cassation and Justice, Criminal Section, Decision no. 742 of September 8, 2021.

Udroiu Mihail, Synthesis of criminal procedure. The special part, Volume I, Second Edition, C. H. Beck Publishing House, Bucharest, 2021.

Minutes of the meeting of the presidents of the criminal sections of the High Court of Cassation and Justice and the Bucharest appeal courts, February 27-28, 2023.

Minutes of the meeting of chief prosecutors from the Prosecutor's Office attached to the High Court of Cassation and Justice, the National Anti-Corruption Directorate, the Directorate for Investigating Organized Crime and Terrorism and the prosecutor's offices attached to the Bucharest Courts of Appeal, April 3-4 2023.

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Legal and Ethical Dimensions of Processing Personal Data for Direct Marketing Purposes

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Abstract

The development of information technologies is perceived with great openness in the trade and marketing sector. Direct marketing is the activity of communicating, by any means, advertising information about products and services, which is directed to specific people. Direct marketing can bring a number of benefits, including: increasing sales, optimizing costs, better meeting customer needs, etc. At the same time, direct marketing can be accompanied by a number of risks, starting from annoying customers or potential customers, drawing them into addictions and vices (such as gambling, etc.) to violating their privacy. EU Regulation 679/2016 (hereinafter – GDPR) pays increased attention to respecting the rights of data subjects for marketing purposes. It is important that when processing data for marketing purposes, the principles of data protection contained in art. 5 of the GDPR, in particular the principle of transparency and data minimization. To be considered a genuine basis for data processing for marketing purposes, the data subject's consent should be free and well-informed. At the same time, the data subject must have the possibility to withdraw their consent at any time to the processing of their data for marketing purposes.

Keywords: data protection, data subject, consent, GDPR, marketing, data controller.

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Introduction

Not all advertising activities are direct marketing. For example: banners, TV advertising or any other form of advertising that is not necessarily targeted at a specific person is not direct marketing.

Contextual marketing is tailored to the content that is viewed or accessed by the user (Article 29 Data Protection Working Party, 2009). Routine customer service message do not count as direct marketing – in the other words, correspondence with customer to provide information they need about a current contract or past purchase (The ODPA, 2023).

However, if additional personal data is processed and the advertising is aimed at a specific person, one of the two legal grounds is required: the controller's consent or legitimate interest. The other legal bases such as contract, public interest, legal obligation, could hardly be regarded as the corresponding legal basis for direct marketing.

As described in the Cisco 2022 Consumer Privacy Survey, 76% of consumers said they would not buy from an organization they did not trust with their data, and 81% agreed that the way an organization treats their data is indicative of how it views and respects its customers (CISCO Systems INC, 2023).

Advertisers are finding it easier to target their adverts because of advances in machine learning and the huge volumes of data being generated (Rana, R., Bhutani, A., 2022). However, the data protection discussion is not just about company lawyers. These aspects must be integrated into the way of thinking and action of several decision-makers, both from the upper management hierarchy and from IT, trade and marketing professionals. If there is a gap between the way of understanding things between those listed, it will be very difficult to achieve high results in this field.

Literature review

The starting point in carrying out this study was, obviously, the legislation in force. Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (hereinafter – "Directive on privacy and electronic communications" or "e-privacy Directive") along with Directive 95/46, currently together with GDPR, represents the main act that regulates privacy in the electronic field.

According to Article 1 point 1 of e-Privacy Directive: “This Directive harmonises the provisions of the Member States required to ensure an equivalent level of protection of fundamental rights and freedoms, and in particular the right to privacy, with respect to the processing of personal data in the electronic communication sector and to ensure the free movement of such data and of electronic communication equipment and services in the Community” (e-privacy Directive, 2002).

Implementation of EU directives requires a minimum level of implementation and thus there is harmonization to a large extent (Custer et. all, 2019). Taking into account technological progress and the new directions of communication development, the need to improve this legislation has arisen. On January 10, 2017, the European Commission submitted the proposal for the E-Privacy Regulation. We note that, this time, as in the case of the GDPR, a “Regulation” was chosen as the form of the legislative act. Which means that it is directly applicable in all states, and there is no longer a need, as in the case of the Directive, for national transposition legislation. This ensures that rules are uniform across the entire EU (with certain exceptions, to be discussed below). This provides clarity for supervisory authorities and organizations alike. In addition, given the key role the GDPR plays in the Proposed Regulation, this helps ensuring consistency across both instruments (European Data Protection Supervisor, 2017). At the time of preparing this paper, the E-Privacy Regulation has not yet entered into force.

We continued to probe the aspects of data protection and privacy in the field of marketing through the lens of interpretations, opinions and Guidelines made available by the Article 29 Working Party and the EDPS, as well as the data protection authorities of different countries (such as CNIL; ICO etc.).

As for the legal doctrine, we note that, on the subject, there are mainly specific works with a utilitarian aspect, intended especially for organizations that only intend to comply with GDPR requirements in their activity segment – marketing. However, there are extensive works dedicated especially to related fields, but valuable information about data protection in the advertising system can be gleaned from them. We point out that many of the papers were written in recent years, so it is noticeable that the turnover is increasing in the legal literature.

Purpose of Present Study

New forms of marketing based on customer profiling and extensive data collection took place; information was no longer collected to support supply chains, logistics and orders, but to target products at specific users. As a result, the data subject became the focus of the process and personal information acquired an economic and business value (Mantelero, 2022).

This article is intended both for data subjects to understand what direct marketing actually means from the perspective of their rights, and for organizations to understand their obligations and mechanisms to ensure privacy while maintaining a high return for their companies of advertising.

According to a report carried out by the French data protection authority (CNIL, 2019) regarding the biggest concerns of data subjects 35,7% of complaints concern the dissemination of data on the internet, while in second place, 21% of complains concern the marketing/commerce sector.

By far, the processing of data for marketing purposes is one of the most annoying processing for data subjects for several reasons: (i) It is often aggressive; (ii) Data subjects feel that they are "Used"; (iii) There is insufficient knowledge about the legal basis of the processing and how they can exercise their rights.

For quite a long time it was believed that ensuring confidentiality and respecting the rights of data subjects, on the one hand, and entrepreneurial activity, on the other, were a zero-sum game.

This perception, a bit obtuse, is starting to be dismantled, step by step, since new institutions of data protection law are emerging as effective (privacy by design & privacy by default, data protection impact assessment, codes of conduct). So, companies are increasingly interested in investing time, money and attention in the matter of personal data in order to remain effective market players in the long term.

Methodology

Legal research in the field of data protection is completely and utterly specific.

Data protection legal research is entirely specific. It involves a mix of combining tradition and innovation. Without consolidated legal institutions it is

not possible, but at the same time, it has the characteristic of interdisciplinary with a lot of new technological, social, economic and legal trends.

The historical-evolutionary method was used to create this article. For us it was important to observe how certain institutions appeared and or developed in the legal regime of data protection and how they metamorphosed over time.

Logical method of analysis: The use of this method is imperative for any study and allows the definition of concepts, the delimitation of features, the formulation of conclusions and proposals (Istrati, 2021).

In the process of working on this study, we also used sociological methods, maybe not directly, but through the indicated references. This approach allowed the identification of the needs, fears, difficulties and anxieties of the data subjects, but also of the data controllers. Thus, theoretical concerns have taken shape in practical application.

In addition to many other methods and techniques, which cannot be exhaustively presented here, we will highlight the systemic method. We cannot research privacy and data protection issues in direct marketing without a systems approach. That is, a framing in the basic concepts (such as: processing principles, subjects' rights, field-specific instruments, the interpretations already given by Article 29 Working Party and EDPS and others) and vision starting from them.

Discussions

About direct marketing and privacy

For the purpose of direct marketing, personal data is often gathered from the data subject (customer). For instance, when shopping for some items, an individual leaves his/her contact details and wishes to be notified (Office of the Personal Data Protection Inspector, 2019). It is almost an axiom and a good starting point that, should there be a collision between the rights and interests of the data subject and the purposes of the controller who wants to carry out direct marketing actions, the former prevail. Personal data of individuals have begun to have value in the economic world, in the information and communication markets, and they start to be the subject of specialized marketing (Molinaro &Ruaro, 2022). Most of the time there are no template solutions to achieve a mutually beneficial outcome. An individual approach is necessary starting from some guidelines that enjoy a broad consensus.

Principles

Data protection principles need to be respected in all areas where data is processed. Data processing for marketing purposes may present increased risks for data subjects. At the same time, there are no clearly defined rules in this field, as marketing activities can take different forms. So, the processing principles are a guiding light that can help in carrying out legality and compliance tests. Obviously, below we present very succinctly the essence of these principles.

Since the principles of data protection can be interpreted as flexible, it is up to the data controller, in our case the one who determines the purpose and means of carrying out direct marketing, to adjust them to his particular situation.

Responsibility. The principle of responsibility is expressly indicated in art. 5 para. (2) of the GDPR and in art. 10 para. (1) of Convention Council of Europe for the Protection of Individuals with Regard to the Automatic Processing of Individual Data, adopted on 28 January 1981, modified by the Decision of the Committee of Ministers at the 128th session, 18 May 2018 (hereinafter – "Convention 108+"). Responsibility means the diligence that the data controller must show when putting into practice the rules regarding the confidentiality and security of the processing, the rights of the subjects, etc. Responsibility can be approached in stages, in the first phase the compliance with all legal obligations provided for all data controllers and, in the second phase, the compliance and implementation of good practices, recommendations, additional preventive measures in the specific field – our case of direct marketing. Referring to controller liability and responsibility, author Van Alsenoy summarizes that: […]in order to properly understand operator liability exposure, it is necessary to first understand the nature of the operator's obligations. [...]It should be noted that certain requirements require further assessment in the light of the specific circumstances of the processing (for example, whether or not the personal data is "excessive" will depend, inter alia, on the purposes of the processing). Therefore, the precise nature of the operator's obligations must always be determined (Van Alsenoy, 2016). An effective tool for transposing the principle of responsibility in life can be found in recitals 89 and 90 of the GDPR which address situations when certain processing operations are likely to generate increased risks and the measures to be taken by the controller in order to carry out the Data Protection Impact Assessment. Next, article 35 of the GDPR

describes the situations in which such a study is required and what it should contain.

Transparency. The concept of transparency in the GDPR is user-centric rather than legalistic and is realized by way of specific practical requirements on data controllers and processors in a number of articles (European Data Protection Supervisor, 2018). Communication of information should be done in an accessible manner, using clear and simple language. The information should be neither too legal nor too “technical”.

Fairness. The principle of fairness mainly concerns the relationship between the controller and the data subject. The ideal materialization of the fairness principle would be for data processing to be carried out only on the basis of consent and for the data subject to have effective control over the processing of the data concerning him. The principle of fairness extends beyond transparency and is linked to ethical considerations, which exceed legal requirements (European Union Agency for Fundamental Rights, 2018). In addition to legality, fairness also implies a deontological side and ethical diligence combined with transparency. From this principle follows the burden of proof that rests with the controller to demonstrate that the processing corresponds to all standards. This principle is all the more important in the conditions of the information society.

Purpose and storage limitation. The principle of purpose limitation is a paramount part of data protection law, as the properly defined purpose of the processing operation is a precondition to determine whether the processing complies with the law (Bieker, 2022). A wrong practice, but so common that it is a kind of *modus operandi* for most data controllers, is the excessive collection of data, both useful and useless, and then deciding what to do with it. This practice is all the more enticing as data storage capacities are getting cheaper and often the time and energy costs of selecting data are higher than storing it. Data controllers must first understand that limiting storage is primarily limiting collection. That is, collection for specific, explicit and legitimate purposes, and subsequent processing that is not incompatible with these purposes. If the purpose is reached or the storage term expires, an alternative solution to data deletion is the anonymization or pseudonymization of the data. To avoid violating these principle controllers should set deadlines for data destruction or periodic review. In the Digital Rights Ireland case, the CJEU invalidated Directive 2006/24/EC of the EP and the Council of 15 March 2006 on the retention of data

generated or processed in connection with the provision of publicly accessible electronic communications services or communications networks (Digital Rights Ireland, 2014). One of the reasons behind this solution was the lack of objective criteria for establishing the duration of data retention.

Availability and accuracy. Another component of the security obligation is to protect personal data against accidental destruction or loss (Van Alsenoy, 2019). On the other hand, the controller must ensure that the data processed is accurate. In the event that they are not processed in the true form, the controller must take measures to rectify them, and if it is not possible to ensure the deletion/destruction of the data.

The principle of data protection by design and by default. This principle is an increasingly popular one. It is found in art. 25 of the GDPR. With the application of respect for privacy from the moment of conception and by default, the problem, often invoked, is eliminated, such as that connecting a functional system, which involves data processing, to the rigors of the law requires disproportionate resources and costs. Generally speaking, the concept of privacy by design means that if a system includes choices for the consumer on how much personal data will be shared with others, the default settings should be the most privacy friendly ones (Jezova, 2020). Privacy cannot be guaranteed in the future just by adhering to legal requirements; instead, it must become an organization's standard operating procedure (Luthfi, 2022).

Legal basis for processing data for direct marketing purposes

In order to comply with data protection principles, any data processing must be based on a legal basis. The most well-known and firm legal basis for marketing activities is the consent of the data subject. But doctrine and practice consider that legitimate interest, in certain situations, can also be considered as a basis for this purpose, provided that the processing does not affect the rights and interests of the data subject.

The data protection regime (and eCommerce legal regime/framework) refers to permissible direct marketing and sets out various obligatory requirements while at the same time setting a default position of prohibiting non-exempted or non-permitted electronic direct marketing (Lambert, 2020).

Consent

To be considered valid, the consent must comply with the provisions of the GDPR. There are several component elements for a consent to be considered valid: **(i)** free; **(ii)** informed; **(iii)** specific; **(iv)** unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her (EU Regulation 679/2016, Article. 4). Consent cannot be considered free if it is subject to any restriction. For example, consent will be considered vitiated if it is obtained in exchange for an additional product or service, discount, etc. A common, but also quite practical, question is the possibility of using personal data for direct marketing that has been obtained from third parties, and not from the data subject. In this case, the data controller must be aware that at any time he must be able to demonstrate the origin of this data. If these data were obtained based on the data subject's consent, the controller must be able to demonstrate that the consent included the possibility of transmitting these data to third parties, for their direct marketing companies. The level of diligence of data controllers must be high, or the phenomenon of illegal commercialization of databases is constantly increasing.

According to a research of the price of personal data in the Dark Web, various pieces of information may be more valuable to criminals and it depends on a variety of factors. Thus, debit or credit card data can cost between $5 and $110, while login data on various non-financial platforms costs $1, and the price of a person's medical records varies between $1 and $1000 (Stack, 2017). Special care is required when the of personal data of children are used for the purposes of marketing or creating personality or user profiles and the collection of personal data with regard to children when using services offered directly to a child. The consent of the holder of parental responsibility should not be necessary in the context of preventive or counselling services offered directly to a child ((EU Regulation 679/2016, recital 38).

There are different forms by which the data subject can give his consent for the processing of his data for marketing purposes, as well as in the case of its withdrawal. 'Opt in' means a person has to take a specific positive step (e.g. tick a box, send an email, or click a button) to say they want marketing. 'Opt out' means a person must take a positive step to refuse or unsubscribe from marketing (ICO, 2018). In general users lack the basic understanding of the collection of any data, its uses, how the technology works and more importantly

how and where to opt-out. As a result, in practice very few people exercise the opt-out option (Article 29 Data Protection Working Party, 2010).

The U.S. online media and marketing industry, led by the Digital Advertising Alliance or “DAA,” has launched an opt-out program that uses icons in online ads (Ramirez, 2012). In fact, the “opt-out” must work both for data processing started based on the consent of the subject and in the case of processing based on the legitimate interest of the data controller. It is imperative that “opt-outs” are free and in no way conditional. The data subject does not have to justify his choice. The lack of the opt-out option, but especially the hiding of the identification data of the controller constitutes a violation of the principles of data protection.

It is a good practice, both when the controller relies on consent, but also when it opts for legitimate interest as the basis for processing, that the controller keeps a record of all data processing operations. Obviously, the register does not necessarily need to be kept in physical form, but can take different forms that are best tailored to the processes and needs of the controller.

Legit interest

The legitimate interest as a legal basis for the processing of personal data is expressly found in the GDPR itself, in the recital 47, according to which: the processing of personal data for direct marketing purposes may be regarded as carried out for a legitimate interest (EU Regulation 679/2016); invoking legitimate interest in processing activities for direct marketing purposes is rather an exception to the consent rule and should be used with great caution. The more sensitive the data, the better it is to opt for consent as the basis for processing.

It would be difficult for controllers to justify using legitimate interests as a lawful basis for intrusive profiling and tracking practices for marketing or advertising purposes, for example those that involve tracking individuals across multiple websites, locations, devices, services or data-brokering (Article 29 Data Protection Working Party, 2018). Advertisements based on legitimate interest should be closely related to the products and services already contracted by the data subject and controller.

Unlike the opt-in mechanism I talked about above, the “soft opt in” mechanism is a procedure by which controllers generate advertisements characteristic of direct marketing, using the subject's data, which he previously provided, when he used the controller's products and services or when he expressed such an intention.

When designing the marketing actions, the controller must ask himself whether, based on the relations he has with the data subject, the latter would have expected to be subjected to direct marketing or not. Eleni Costa considered the concept of soft opt-in quite questionable even before the advent of GDPR: The use of the term “soft opt-in” is used due to the fact that the customer has already given his electronic mail contact details to the sender in the context of a customer relation. However the term can be criticised, as the customers are given the opportunity to object to receiving direct marketing communications and they do not express in any way their agreement to receive such communications (Costa, 2013).

Marketers must be aware that, the more extensive or intrusive the profiling for direct marketing, the more likely it is to infringe on the individual`s rights and thus not fulfil the legitimate interest processing condition (Direct Marketing Association, 2018). Thus, more intrusive and opaque processing of personal data, including surveillance, profiling and automated decisions, is likely to require consent. Consent has the advantage that it provides documentation as well as clarity concerning the legitimate basis, which must be determined before the collection of personal data (Trzaskowski, 2022).

Relationship with data subjects: Rights

Most of the time, there is an imbalance in the relationship between the personal data controller and the data subject. This imbalance can be generated by the employee-employer relationship, the institutional and/or social architecture, or it can be one generated by financial factors, etc. In the case of direct marketing, the imbalance between the data controller and the data subject, and implicitly the bargaining power, may be caused by the data subject's lack of specific knowledge, the position of the data controller as a monopolist or a technological or economic giant, and/ or the authorized person.

In order to return the data subject to the position where he has a minimum control over his personality rights, the legislator has endowed him with certain rights specific to the legal regime of personal data protection. In order to more easily perceive the need for these rights, we could make an analogy with labor legislation or legislation on the protection of consumer rights. Below we will briefly refer to the most important ones.

Information and access. In order to ensure a fair and transparent data processing, the controller must make available to the data subject, at least, information relating to: his identity and contact details (possibly of the responsible person, if he has been appointed); the purpose and legal basis of the processing; the possible recipients of the data, the storage period, the rights of the subject, etc. Controllers of personal data, especially in the field of direct marketing, should show a proactive attitude and not necessarily wait for an address from data subjects. The information that needs to be shared with data subjects can be displayed at the headquarters of the legal entity, on its website, in the applications managed by it, available by accessing the QR code when providing products and services by the personal data controller. Attract attention the marketing fluff and declarations of good intentions, such as “We take privacy seriously,” “Your privacy is important to us” or “We deploy state-of-the-art data security measures.” Such statements do not provide the data subject with meaningful information and merely provide additional ammunition to plaintiff’s attorneys and regulators that believe the company did not in fact sufficiently respect privat interests or comply with laws (Determan, 2022).

Right to object. Data subjects have the right to object to their data being processed. Even if this right is provided for in the normative acts stated above, the controller must additionally inform the data subject about this right before or at the time of data collection. At least in the case of communications made via electronic media, also in each commercial communication directed at them (AUTOCONTROL, 2021). Article 21 (2) of GDPR determines that: 2. Where personal data are processed for direct marketing purposes, the data subject shall have the right to object at any time to processing of personal data concerning him or her for such marketing, which includes profiling to the extent that it is related to such direct marketing (EU Regulation 679/2016).

Right to data portability. The right to data portability aims to provide extended freedom to the data subject, allowing him/her not to be shackled with regard to his/her data by a particular controller. The right to data portability helps to stimulate data exchange which is essential in a digital economy. This right is provided for in art. 20 of the GDPR.

Rectification, Erasure and Restriction. Rectification, erasure and restriction are distinct rights but are part of the group of “Opposition” rights on the part of the data subject. To the general public, the right to delete data is known as “*the*

right to be forgotten". In the GDPR, the right to be forgotten is provided for in 2 articles: 17 "The right to delete data" and indirectly in art. 21 "The right to opposition". In the direct marketing sector, for example, the data subject who objects to direct marketing by phone will be put on a special list of persons whose phone number may not be used for direct marketing purposes (called for example 'orange list' or 'Robinson list') (Terwangne, 2013). The right to be forgotten can be interpreted as a tool to defend honor and dignity, but it remains a mechanism specific to the legal data protection regime, available to the data subject, which allows him to play an active role in protecting his rights.

This right helps redefine a person's behavior concerned with his own data, he having the opportunity to evaluate and reevaluate his personal information available to the public, thus increasing his control over his identity (Serban, 2017). The subject of the rights of data subjects can be approached multidimensional, including in the context we are talking about – direct marketing. We could refer to the psychological perspective. social, anthropological or at the most "Machiavellian" – economic. As it was seen, we chose to focus only on those rights provided for in the relevant legislation. Leaving, somewhat, the subject open. Jamie Day, in his PhD thesis "*Privacy vs Technology: what rights do we have and how can we protect these rights?*" when approaches the very interesting concept of "unobservability", underlines the fact that the theories related to privacy aim at 3 directions: (i) the interest in controlling/protecting a personal space, (ii) the interest in having/having control of one's personal relationships and (iii) the interest in expressing one's self-identity, in reflecting, in making decisions, in developing as a person and protecting one's personality/individuality (Day, 2018).

The right not to be subject to an automated decision and profiling without human intervention. Automated decision-making processes are used more and more in different fields, such as: recruitment, credit granting, insurance, etc. These processes bring with them a series of advantages: a high yield, cost reduction, time optimization, etc. Of course, automatic decision-making and especially profiling mechanisms are also used in individually targeted advertising. At first glance automated decision-making processes may seem harmless, but if decisions made by algorithms are capable of producing legal consequences for a natural person then the level of concern should be raised. In addition to the ethical considerations, which start from the ontological aspect that man is removed from the equation, it is worth taking into account the fact that any

process does not have 100% accuracy. Even though some algorithms have an efficiency of over 99%, for massive data processing (several tens of thousands per day, such as facial recognition in crowded public places) "mistakes" mean hundreds of people about whom a wrong decision was made, without being able to be contextualized. Thus, art. 22 para. (3) of the GDPR provides what are the guarantees and insurance measures that the controller must take in such cases. Human intervention is a key element. Any review must be carried out by someone who has the appropriate authority and capability to change the decision. The reviewer should undertake a thorough assessment of all the relevant data, including any additional information provided by the data subject (Article 29 Data Protection Working Party, 2017).

Right to file a complaint to the Data Protection Authority and Right to an effective judicial process. The role of the supervisory authorities in protecting natural persons when processing their data is extremely important. The legal data protection regime can be placed on 3 big pillars: a) Subjects' rights; b) Responsibility of controllers and authorized persons; c) The activity of the supervisory authorities. The importance of effective supervisory authorities is provided, among others, in art. 51, recital 145, 146 of the GDPR. In the jurisprudence of the Court of Justice of the European Union (hereinafter – CJEU), the role of the supervisory authorities was highlighted in several cases. In the CJEU Decision in case no. C 518/07 of March 9, 2010 European Commission, supported by the European Data Protection Authority versus the Federal Republic of Germany (*Commission v. Germany*, C-518/07), the Court emphasized the need to ensure "full independence" of the supervisory authority, in order to be protected from political influences, while remaining subject to compliance with the law, under the control of the courts. In another case initiated by the European Commission against Austria (*Commission v. Austria*, C-614/10), the CJEU highlighted the need for material and logistical assurance of the supervisory authorities in order to guarantee their total independence. And in a case initiated by the European Commission against Hungary (Commission v. Hungary, C-288/12), the CJEU emphasized the need to respect the independence of officials within the supervisory authorities and the danger of ending their mandates before the deadline, even if there is a restructuring or a change of organizational model .

In one of the most high-profile cases of the CJEU in the field of data protection, Case C-362/14 of 6 October 2015, initiated by the well-known activist

Maximillian Schrems against the Data Protection Commissioner with the participation of Digital Rights Ireland Ltd, the decision by which Privacy Shield was invalidated (Commission Decision 2000/520), the Grand Chamber referred to the powers of protection authorities in relation to international data transfers (Shremes, C-362/14).

In addition to the right to address the supervisory authority, the data subject has the right to address the court. Access to justice is a universal right, it is also applicable to the legal data protection regime, either to challenge a decision of the supervisory authority (article 78 GDPR) or to ascertain the violation of his rights by the controller and/or authorized person (article 79 GDPR). An under-explored mechanism is also the possibility of the data subject to request the repair of the damage and the granting of compensation.

Each of the rights described are equally important. Although some may be neglected by data subjects, controllers must ensure that they provide the necessary conditions for them to be exercised by data subjects.

Conclusion

Despite negative prediction from marketers, GDPR did not kill Marketing. For Anybody who scratched the surface of the GDPR, this was probably expected. However, it did change the marketing landscape, but that was a much needed change (Data Privacy Manager, 2022).

One of the challenges facing government, business community and broader society is that we currently know very little about the extent of injuries or harm on and from the Internet (Walter, Trakman & Zeler, 2019).

Data controllers must be more actively involved in legal and ethical aspects, by determining the exact roles (controller, joint-controller, processor, third party, subject, etc.) to establish the legal basis for processing, ensure compliance with the principles of protection and of the rights of the persons concerned. Given that direct marketing can be quite intrusive and annoying, controllers need to ensure openness, transparency and flexibility. Of course, the implementation of these rules involves additional resources, but they also bring with them a series of benefits, even if not very quickly noticeable and quantifiable. However, being “data protection compliant” represents a significant advantage over other players on the market who ignore the new legal and technological realities.

In order to demonstrate a pro-active attitude, the controller can make available a series of tools that increase confidentiality and respect for the rights of data subjects: pseudonymization; privacy dashboards; location granularity; encryption; protection against tracking etc.

The consent of the data subject is a shield against the intrusions to his privacy that relate to the processing of his personal data. However, the concept of privacy, exactly as the concept of data protection, is not a static one (Costa, 2013). As the forms of marketing take on new and new contours, so the protection measures must be reviewed periodically.

References

Alessandro Mantelero, (2022), *Big Data and Data Protection,* in González Fuster, G., Van Brakel, R. and De Hert, P. *Research Handbook on Privacy and Data Protection Law Values, Norms and Global Politics,* Cheltenham, UK • Northampton, MA, USA, http://dx.doi.org/10.4337/9781786438515 .

Article 29 Data Protection Working Party, (2009), "*Opinion 5/2009 on online social networking*", Brussels, Belgium. https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2009/wp163_en.pdf

Article 29 Data Protection Working Party, (2010), "*Opinion 2/2010 on online behavioral advertising*", Brussels, Belgium. https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2010/wp171_en.pdf

Article 29 Data Protection Working Party, (2017), "*Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679",* Brussels, Belgium. https://ec.europa.eu/newsroom/article29/items/612053

Article 29 Data Protection Working Party, (2018), "*Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679" WP251,* As last Revised and Adopted on 6 February 2018. Brussels, Belgium. https://ec.europa.eu/newsroom/article29/items/612053

AUTOCONTROL – The Association for the Self-Regulation of Commercial Communication, (2021) *Code of conduct – Data processing in advertising activities,* Madrid, Spain. https://edpb.europa.eu/system/files/2021-04/code_of_conduct_data_processing_in_advertising_activities_en.pdf

Bieker, Felix (2022), "*The Right to Data Protection Individual and Structural Dimensions of Data Protection in EU Law*", https://doi.org/10.1007/978-94-6265-503-4.

CISCO Systems INC, (2023) "*Privacy's Growing. Importance and Impact. CISCO 2023 Data Privacy Benchmark Study" https://www.cisco.com/c/en/us/about/trust-center/data-privacy-benchmark-study.html*

Commission Nationale Informatiques & Liberties, "*Rapport d'activité 2018 et enjeux 2019*" https://www.cnil.fr/sites/cnil/files/atoms/files/dossier_de_presse_cnil_bilan_2018_et_enjeux_2019.pdf

Convention Council of Europe for the Protection of Individuals with Regard to the Automatic Processing of Individual Data, adopted on 28 January 1981, modified by the Decision of the Committee of Ministers at the 128th session, 18 May 2018. https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/LIBE/DV/2018/09-10/Convention_108_EN.pdf

Custer, B., et. all (2019) "*EU Personal Data Protection in Policy and Practice",* https://doi.org/10.1007/978-94-6265-282-8

Data Privacy Manager, (2022) *GDPR and direct marketing. Understanding how to conduct a GDPR compliant marketing,* Croatia. https://dataprivacymanager.net/marketing-gdpr-requirements-gdpr-challenges-and-requirements/ .

Day, Jamie (2018) "*Privacy vs. Technology: What privacy rights do we have and how we protect these rights*?", Thesis Submitted in Fulfilment of the Requirements for the Degree of Doctor of Philosophy, Queen's University of Belfast.

De Terwangne, Cecile, *The Right to be Forgotten and the Informational Autonomy in the Digital Environment*. EUR 26434. Luxembourg (Luxembourg): Publications Office of the European Union; 2013. JRC86750, DOI: 10.2788/54562.

Determan, L. (2022), "*Determann`s Field Guide to Data Privacy Law, International Corporate COmpliance, Fifth Edition",* http://dx.doi.org/10.4337/9781802202915.

Direct Marketing Association (2018) *GDRP for marketers: The essentials.* United Kingdom. https://dma.org.uk/uploads/misc/5a8eea20f3566-gdpr-essentials-for-marketers----an-introduction-to-the-gdpr-amendment-v1_5a8eea20f34aa.pdf

European Data Protection Supervisor (2017), Opinion 01/2017 on the Proposed Regulation for the ePrivacy Regulation[2002,58/EC]. Brussels, Belgium. https://ec.europa.eu/newsroom/article29/items/610140/en

European Data Protection Supervisor (2018), *Guidelines on Transparency under Regulation 2016, 679.* Brussels, Belgium. JUSTICE AND CONSUMERS ARTICLE 29 – Guidelines on Transparency under Regulation 2016/679 (wp260rev.01) (europa.eu).

European Parliament and the Council of the European Union, Directive 2002/58/ EC of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) [2002] OJ L201/37 (31.07.2002).

European Union Agency for Fundamental Rights (2018) "Handbook on European data protection law" Luxembourg. Doi:10.2811/58814.

Georgian Office Of The Personal Data Protection Inspector (2019), *Recommendation on personal data processing for direct marketing purposes*, https://personaldata.ge/cdn/2019/01/Recommendations-on-Personal-Data-Processing-for-Direct-Marketing-Purposes.pdf

Information Commissioner's Office, 09 May 2018, "Guide to Privacy and Electronic Communications Regulations", page 15, https://ico.org.uk/for-organisations/direct-marketing-and-privacy-and-electronic-communications/guide-to-pecr/.

Istrati, Petru (2021), "*Methodological characteristics of the scientific research in personal data protection field*", CZU: [342.721+343.41/.45]:001.891.

Jezova, Daniela (2020) "*Principle of Privacy by design and Privacy by default*" DOI: https://doi.org/10.18485/iup_rlr.2020.ch10.

Judgement of 06 October 2014, *Schrems*, C-362/12=4, paragraph 43, 50. https://curia.eu.

Judgement of 08 April 2014, *Commission v. Hungary*, C-288/12, paragraph 57. https://curia.eu.

Judgement of 08 April 2014, *Digital Rights Ireland*, C-293/12&C-594/12, paragraph 63, 64. https://curia.eu.

Judgement of 09 March 2010, *Commission v. Germany*, C-518/07, paragraph 19, 42. https://curia.eu.

Judgement of 16 October 2012, *Commission v. Austria*, C-614/10, paragraph 57, 58. https://curia.eu.

Kosta, Eleni. (2013) *Consent in European data protection law*, (Nijhoff studies in EU law; volume 3) Leiden. Boston.

Lambert Paul, (2020), " *A User's Guide to Data Protection: Law and Policy*, Fourth Edition*"* ISBN: 978 1 52651 571 1.

Luthfi, Ahmad (2022) "*Towards Privacy by Design on the Internet of Things (IoT) Use: A Qualitative Descriptive Study*", http://journal-isi.org/index.php/isi, e-ISSN: 2656-4882 p-ISSN: 2656-5935.

Molinaro C.A. and Ruaro R.L. (2022) "*Privacy Protection with Regard to (Tele-) Communications Surveilance and Data Retention"* https://doi.org/10.1007/978-3-030-90331-2.

Ramirez, Edith (2012, 13 June), Remarks of Commissioner Edith Ramirez at Privacy by Design Conference, Hong Kong "*Privacy By Design and the New Privacy Framework of the U.S. Federal Trade Commission*".

Rana, Ramit, Bhutani, Apurva., (2022) "*Artificial Intelligence – The Need of the Hour*", in Dewani N. D. et all, "*Handbook of Research on Cyber Law, Data Protection and Privacy",* IGI Global. ISBN 9781799886433.

REGULATION (EU) 2016/679 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679

Serban, Andreea (2017) "*Regulation of the right to be forgotten*" Scientific Annals of the University "Al. I. Cuza" Iasi, Volume LXII, Legal Sciences, no. 2.

Stack, Brian (06 December 2017) “Here’s How Much Your Personal Information Is Selling for on the Dark Web”, https://www.experian.com/blogs/ask-experian/heres-how-much-your-personal-information-is-selling-for-on-the-dark-web/.

Surveillance and Data Retention” in Albers, M. et. all “*Personality and Data Protection Rights on the Internet – Brazilian and German Approaches*” p. 113-132. https://doi.org/10.1007/978-3-030-90331-2.

The Office of Data Protection Authority of Guernsey (2023), *Direct Marketing – A guide for Organizations*, Guernsey. https://www.odpa.gg/information-hub/guidance/direct-marketing/ .

Trzaskowski, Jan (2022) “*Data-driven business models –Privacy and marketing*” in Kosta, E., Leenes, R., Kamara, I., (2022) “*Research Handbook on EU Data Protection Law*”, Cheltenham, UK • Northampton, MA, USA. http://dx.doi.org/10.4337/9781800371682.

Van Alsenoy, Bredan (2019) “*Data Protection Law in the EU: Roles, Responsibilities and Liability*” ISBN 978-1-78068-828-2.

Van Alsenoy, Brendan (2016), *Liability under EU Data Protection Law: From Directive 95/46 to the General Data Protection Regulation*, 7 (2016) JIPITEC 271. URN: urn:nbn:de:0009-29-45064.

Walter, R., Trakman, L., Zeller, B., (2019) “*Data Protection Law – A Comparative Analysis of Asia-Pacific and European Approaches*” Singapore. https://doi.org/10.1007/978-981-13-8110-2 .

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Digitalisation of Banking in Europe – A New Opportunity to Overcome a Future Crisis?

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Abstract

The European Union's aim to establish a unified internal market through the free movement of services and capital depends heavily on financial services. However, the digitalization of financial markets is changing the landscape of financial product and service regulations for clients. This is due in part to the emergence of new entrants such as FinTech firms, which are leveraging advanced technologies and innovative business models to compete with established firms. The banking sector in Europe is particularly affected by the dynamics of this competition, including the entry of new and innovative competitors, the opportunities that arise from business model reshaping, and the balance between efficiency and competitiveness in the market. The European Union's digital finance strategy acknowledges the need for both regulation and private law to work in tandem. National private law systems must be robust enough to handle digital disruption, and regulatory competition should lead to the development of appropriate private law solutions if the European Union regulators ask the right questions. On one side, there are advocates of disruptive scenarios for the banking system, stating that banking is necessary, banks are not. On the other side, some believe that the FinTech phenomenon, like many others, will lose momentum in a few years, because FinTech is only another bubble for them, particularly if significant negative events occur in the sector.

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This article will answer the question of whether the banks will keep their priority and be the customer's first choice in banking and finance over the next decade.

***Keywords**:* Banks, FinTech, financial markets, digital banking, decentralized finance.

Introduction

The progression towards integration of the banking and financial markets in European Union has occurred in distinct stages: the elimination of national barriers to entry, the harmonization of national laws and policies, the achievement of the internal market, the establishment of the single currency area and post-crisis reforms (Born, K., 2017). The digital transformation has presented additional possibilities and challenges for financial services policy. The departure of the United Kingdom from the European Union introduces a new set of obstacles with potential implications for the financial services sector within and outside of the European Union.

The banking system has undergone significant changes since the long financial crisis due to various structural factors. The economic context has been volatile, and supervisory authorities have increasingly intervened in the banking system. Furthermore, the economic recession has had lingering effects in many countries, and technological innovations have developed rapidly. Unconventional monetary policy instruments have been adopted, and low, or negative, interest rates have continued. These changes have led to significant transformations in the way banking is carried out, perhaps more than in any previous period. One of the most notable consequences in Europe has been a persistent period of weak profitability (Matoušek, R. *et al*., 2012). This has resulted in negative rates of profit for many credit institutions in recent years. As prolonged absence of profitability can negatively impact banks' soundness and the stability of the entire credit sector, scholars, practitioners, and supervisory authorities have developed a new line of investigation into the strategic and operational choices of banks.

This article analyses the business models used by FinTech and BigTech firms and banking institutions in order to highlight differences and analogies, including in the light of current debates over the need for a renewed regulatory framework which balances the potential risks and opportunities generated by FinTech (Tanda, A. *et al*., 2019). Also, this article evaluates the European Union's strategy from a private law perspective and identifies possible deficiencies.

Payment services, outsourcing business models, crowd lending, robo-advice, and blockchain applications are identified as areas where the relationship between FinTech regulation and private law is most apparent.

This results in a reinterpretation of (digital) contractual obligations. Conventional liability rules must evolve, and contradictory ideas under the European Union's digital finance and data protection laws must be reconciled. The interface between FinTech and private law is exemplified by blockchain law. In order to attract business and address insolvency scenarios, Member States must enhance the private law status of crypto assets. Regulatory sandboxes are used as early warning systems to alert regulators and legislators to risks posed by innovative business models. As innovation intensifies, so will the evolutionary pressure on Member States' private law systems, potentially prompting demands for European Union legislative action if Member States do not perform well.

Discussion

The bank's business model in the fintech era

The primary business model of the European banking sector, which is largely influenced by the economic system it serves, is traditional commercial retail banking. This model focuses heavily on lending activity, with a large portion of funding coming from local depositors who utilize a widespread branch network. Although investment banks operating on a global scale exist, they do not represent the core of the European credit system. Due to the prolonged crisis in the banking sector, there has been a need to reconsider banks' business models. Regulators in the euro area are now scrutinizing the business models of individual credit institutions during the supervisory priorities and Supervisory Review and Evaluation Process (Svalova, V., 2018) as the sustainability of banking strategies has become a matter of concern.

As we delve into this topic, it becomes apparent that no single business model stands out as the clear winner. A wide range of results are evident in the literature and regulatory landscape, even when the business model is altered (European Central Bank, 2018). However, there is consensus that technology will play a significant role in reshaping the business model and all banking activities in the upcoming years. Financial technology, or FinTech, presents a major challenge for banks and is already a significant issue in many contexts. FinTech encompasses diverse activities and players who share common features such as

the exclusive use of technology to carry out various forms of financial activity, the adoption of new business models by intermediaries, and the creation or re-adaptation of financial instruments and services that offer greater security, faster execution, lower costs, and a wider range of users due to this technology.

In the early part of the decade, a debate emerged with opposing views on the potential evolution of digital banking. On one side, there are advocates of disruptive scenarios for the banking system, even suggesting the end of banks, resulting in the famous quote stating that "*Banking is necessary, banks are not*" (Hoppe, S., 2018). On the other side, some believe that the fintech phenomenon, like many others, will lose momentum in a few years, because fintech is only another bubble for them, particularly if significant negative events occur in the sector. Undoubtedly, the phenomenon represents a significant change in the perception of banking: technology, now pervasive in everyday life, has fundamentally transformed the approach of users and financial intermediaries in the financial sector, including banks. The huge challenge that banks are facing is therefore to comprehend whether they are still called upon to play a fundamental role in all segments of financial intermediation, or whether, in some way or for certain areas of activity, other operators will progressively replace them, to a greater or lesser degree.

The necessary skill set in this field involves processing data rather than banking expertise, which is why it is appealing to large companies that are adept at processing vast amounts of data quickly and inexpensively. The emergence of new players in the payment industry, such as PayPal and Apple, and their growing market share, as well as TransferWise in the international funds transfer space, serve as a good example of the significance of this threat. Another area of interest for fintech is in banking products and services that require some banking expertise and data analysis, albeit not highly sophisticated ones, such as consumer credit, low loan-to-value mortgages, or managing relatively modest savings.

The tasks traditionally carried out by credit officers or financial advisors can now be accomplished through electronic platforms, which may not necessarily be run by commercial banks. These platforms use algorithms and big data to match borrowers with lenders (peer-to-peer lending, loan-based crowdfunding, marketplace lending) and provide a risk ranking to screen borrowers. Alternatively, robot-advisor services can replace human wealth advisors, and are a more affordable option. Unlike traditional banks, fintech

companies typically utilize digital technologies and innovations to interact with customers entirely (or mostly) online, and to process large amounts of information.

Lastly, there is a third area where it is much more challenging for fintech companies to replace banks, which is specific to any credit institution, namely their lending and funding activities and their ability to address maturity mismatch issues. Banks provide liquidity and ensure the repayment of deposits, thanks to the existence of public or private insurance schemes, while also providing credit to borrowers, particularly for high-risk transactions where information, especially of the 'soft' type, which is difficult to process using technological algorithms, plays a crucial role in decision-making. The development of fintech is inevitable, and in many ways, it may even be advantageous. Recently, it has been shown that while digital technology alone cannot enhance financial inclusion, the utilization of financial technology, such as mobile phones and the internet for conducting financial transactions, can be extended to include individuals who lack an account – the unbanked – as well as to encourage greater use of digital financial services among those who have an account.

Fintech's impact on banks is bound to occur, resulting in a gradual decline in the latter's dominance in conventional business, which will inevitably lead to a substantial reduction in their profit margins. Recent research shows that bankers anticipate losing 25% of their market share due to fintech's continued growth, while fintech's expansion could eat away at 60% of banks' retail services profits (Wójcik, D., Knox-Hayes, J., 2020).

The enforcement of Payment Services Directive II (EU Directive 2366, 2015) in Europe presents a significant challenge for the banking industry. The directive aims to create a single integrated payment market with standardized rules between payment service providers, enhancing system security, promoting competition, and transparency towards customers. With Payment Services Directive II, users of online current accounts can use software created by authorized third parties to make payments or access bank account information. Banks must establish dedicated interfaces to communicate with authorized third parties, allowing these new players, if authorized, to operate on the current accounts of end-users. While this presents a risk of disintermediation for traditional banks, as well as a potential loss of competent personnel attracted to more innovative operating sectors, it also opens up new opportunities for developing more innovative and efficient services for customers. At the

regulatory level, authorities must ensure a level playing field by regulating the service provided rather than who provides it.

The Basel III standards (Delaney, M., 2019) have been gradually implemented over a prolonged period to aid banks in their gradual adaptation, and they are now in a generally advanced stage. Phase 1 requirements are operational in most places, often before the deadlines set by the Accord. Banks have restructured their balance sheets to comply with the new standards due to the pressure from market expectations. Fully loaded requirements have become the standard for investors, and credit institutions that are weak in regulatory terms often suffer negative market valuations. Additionally, supervisory authorities' increasing use of stress tests to evaluate the degree of resilience to sudden systemic shocks based on fully loaded regulatory parameters has 'forced' banks to make early adjustments for the next phase deadlines.

The reforms have had a clear impact: the balance sheets of Global Systemically Important Banks (G-SIBs) now show a larger quantity and higher quality of own funds, less reliance on short-term wholesale deposits, and more high-quality liquid assets. There has also been a gradual shift away from trading-related business lines towards a retail business model with relatively stable sources of funding (Berger, A., 2019). European Union banks, in particular, have significantly strengthened their capital position over time. This was largely due to the advent of computerized banking services, which rendered a customer's physical presence at the branch unnecessary, reduced transaction times, and limited errors.

Despite the substantial investment required to implement new IT systems and ensure the security of transactions, clients demanded lower fees for various services. Faster transactions and reduced human intervention led to their perception of lower transaction costs. Consequently, banks were forced to re-evaluate their structural strategies and rethink their activities. The financial crisis coincided with the widespread digitization and the growing sophistication and security of online banking services. As a result, branches experienced significantly reduced transaction volumes and became obsolete and often expensive relics of the past. Nevertheless, physical branches retain their inherent economic value because obtaining “soft” information at a distance or through fully automated operations is challenging and categorizing them unambiguously is even more complex.

However, the significant costs associated with maintaining such a *modus operandi*, coupled with the increased expenses resulting from the prolonged period of crisis (credit losses, stricter regulation costs, etc.), prompted banks to automate the collection of data and other information as much as possible, converting it into "hard" information. As a result, high levels of staff are only retained in transactions involving significant amounts and high added value, such as wealth management and corporate finance transactions.

This change has had a significant impact on the lending segment, primarily due to Basel II regulations that require credit institutions to assign a rating to each borrower based on objective and documented factors. Assigning a borrower to a particular risk category result in a different capital requirement for the bank, which is maximum if no rating is allocated. While placing emphasis on the rating as a critical element in evaluating a client's reliability and determining the loan's interest rate makes the evaluation process objective, it fails to account for soft information that cannot be evaluated using metrics.

Digital transformation of the banking and financial market

Financial systems have a subordinate or indirect role in terms of value citation. They provide support for the complex system of economic exchange, which is crucial for the division of labor to function effectively. The payment infrastructures and money facilitate this exchange, while financial intermediation and capital markets allow for the financing of investment and liquidity, as well as the diversification of risks associated with entrepreneurial activity. Consumer finance reduces the budgetary constraints of private households, which enables them to have more purchasing options. Public finance, on the other hand, is essential for governments to balance revenues and expenditures related to the provision of public services.

Furthermore, financial instruments provide insurance against various types of income risks that individuals and organizations may face. Moreover, financial systems have critical pricing and governance functions, which are derived from and complement the primary functions mentioned earlier. Within the financial system, fundamental prices of the economy such as exchange rates, interest rates, and risk premiums are determined. These prices guide the allocation of resources within and across organizations, industries, and national economies over time. It is also essential to assess and manage the risks that arise from most financial transactions and the value of financial assets, which are the

responsibility of those involved in financial transactions and the creation of financial assets.

Failing to fulfill these responsibilities can result in serious consequences. The 2008 global financial crisis, which stemmed from United States housing market loans, was caused by banks and rating agencies mis-assessing the default risk (Kirkpatrick, G., 2009). This was due to fundamental governance issues such as wrong incentives and ineffective oversight. All financial systems require three essential resources. First, physical infrastructure is necessary to support the circulation of money and information. This includes secure transportation of cash, as well as a network of branches and ATMs, and telecommunications networks. Second, it is necessary for service providers, legislators, regulators, and to some extent, corporate and individual users, to have sufficient financial knowledge for the system to work. Third, given the informational nature of finance, trust is essential for the functioning of a financial system.

Trust is essential because the reliability of information is as important as its content. Trust is established when all participants share consistent beliefs. These beliefs are closely related to the knowledge base, which is the second resource mentioned earlier. Additionally, financial systems rely on a legal framework and regulatory oversight, including rules, institutions, and procedures for their implementation. This is not limited to regulating financial instruments, institutions, and markets, but also encompasses corporate law and bankruptcy. The legal framework defines rights and duties, supports the governance of the system, contributes to its overall stability, and partially codifies its knowledge base. When combined, the legal framework and regulatory oversight represent a critical source of trust.

The design of the financial system is to carry out its functions, including markets, organizations, financial instruments, business models, and products and services. It is evident from the history of finance and the study of contemporary financial systems that there are multiple ways in which these functions can be fulfilled (Wirtz, B., 2020). For instance, the concept of money has evolved over time, as have exchange rate systems. While modern economies now rely on fiat money produced by central and commercial banks, the design of these banking systems still reflects distinct national characteristics.

The role and importance of financial intermediation, financial regulation, public finance, corporate finance, and the allocation of financial assets owned by private households vary across different countries. National differences in the

design of financial systems may appear to be the result of explicit design choices made by legislators, regulators, expert commissions, or business leaders in the financial industry. While such choices are certainly made, they are also path-dependent and influenced by the specific conditions of each country's context, as well as the political and economic interests that stem from the existing status quo. In times of crisis or with the advent of new technologies, decisions may be needed to adapt the system. However, the options available are still limited by the existing circumstances.

Digital Transformation and Finance: The Informational Nature of Finance

The transformation of digital technology is a revolutionary change that affects all areas of our lives. The internet, mobile networks, sensor technology, social networks, and platform business models have all contributed to tremendous connectivity, while advances in computing power such as neural networks and deep learning algorithms have also been significant. However, the profound and far-reaching effects of digital transformation are not solely the result of technological advancements. Instead, they are primarily linked to two other major factors.

The first factor of digital transformation is based on exploiting two key characteristics of digitalized information. These characteristics include its limitless shareability at almost zero marginal cost, and its ubiquitous accessibility and use, not bound to a specific location. The second factor pertains to the essential role that receiving, analyzing, and sending information plays in financial, social, and cultural life. While information has always been an essential part of our existence, digital transformation is making us aware of its existential nature and providing us with new tools to collect, analyze, and exchange vast amounts of information in previously unimaginable ways. The question of how we use these new powers is of fundamental importance.

The financial industry is being radically transformed by digital transformation, which is not surprising given that finance is primarily concerned with gathering and processing information, a task directly affected by digital transformation. Money, the foundational element of finance, is a clever device for conveying information. It serves as a unit of accounting and denominator of the price system, conveying information about the value of goods, services, assets, and liabilities. It also acts as a store of value and medium of exchange, keeping a record of who holds claims on the economy in terms of purchasing power, and

how those claims are redistributed through transactions such as trading, lending, borrowing, saving, and investing.

Undoubtedly, the financial industry deals with more than just money. It offers an array of services pertaining to risk management and governance. However, these activities also largely entail the collection and processing of information. This is not the first instance where the informative nature of finance has positioned it at the forefront of profound economic transformations. The financial sector was one of the initial industries to feel the impact of information and communication technologies. The utilization of mainframe computers and telecommunication networks facilitated the adoption of cashless transactions between banking accounts, the deployment of ATMs, and the use of credit and debit cards.

The financial industry has been a frontrunner during fundamental economic transformations because of its informational nature, which involves collecting and processing information. Although the financial industry provides various services related to risk management and governance, its core activity is handling money, which is an ingenious information device that informs about the value of goods and services as well as assets and liabilities in balance sheets. The impact of digital transformation on the financial system is significant and wide-ranging, but it is also complex as the actual outcomes depend on national contexts. Using this framework, it is crucial to acknowledge that the primary and secondary functions of finance remain unchanged by digital transformation, as they are not reliant on a particular technological system. Nevertheless, digital transformation does affect the resources and designs utilized to execute these functions. A lot of discussions about digital transformation tend to focus solely on the design level, overlooking the resource-related consequences.

Digital Finance Infrastructures

Today, central banks around the world are testing digital currencies that use distributed ledger technologies, which take advantage of the substantial growth in connectivity, computing power, and storage capacity. According to a recent survey by the Bank for International Settlements, roughly 60% of central banks worldwide are conducting trials with central bank digital currencies (Boar, C., Wehrli, A., 2021). In July 2021, the European Central Bank initiated an investigation phase for the development of a digital euro. The introduction of such currency systems could make current cash circulation and bank transfer

infrastructures partially obsolete. Additionally, crypto assets also utilize a distributed ledger technologies infrastructure and were initially introduced in the private sector outside of the public payment system.

Crypto assets, along with their infrastructures, can serve as a means of transaction and a store of value. Nevertheless, even with their significant diffusion and value, they are not considered legal tender and their use is restricted to economic entities who have willingly agreed to participate by investing in them. The extent to which crypto assets and their infrastructures can replace or complement the essential functions of the financial system is uncertain. The reason for this uncertainty lies in the fundamental issues related not only to the high volatility of prices but also to regulatory and security concerns. The emergence of cashless mobile or online payments was enabled by the internet, mobile networks, smartphones, and the development and dissemination of application programming interfaces. In contrast to distributed ledger technologies, these payment methods are dependent on the existing banking infrastructure. While they have significant implications for the design of business models, from an infrastructural viewpoint, they simply add an extra digital layer.

Digital disruption and the enablement of customers

The infrastructure of financial markets (Vives, X., 2019) has been altered by FinTech and artificial intelligence. The use of distributed ledger technology promotes algorithm-generated cross-border transactions, which speeds up the privatization of rulemaking (Möslein, F., Omlor, S., 2019). As a result, the application of artificial intelligence and machine learning strengthens the interconnection between financial markets and institutions (Financial Stability Board, 2017). Networks are appearing that evaluate the feasibility of private regulation, regulatory intervention, and the enforcement of norms in cross-border situations. FinTech has created an environment of regulatory competition on a global and EU level, which could lead to a race to the bottom in some areas. However, the intersection between functional digital markets and the monetization of financial data poses a complex challenge for regulators and industry professionals. Private blockchains operate under a set of rules agreed upon by the gatekeeper of a permissioned system (Reed, C., Murray, A., 2018). Therefore, lawmakers may need to provide private law remedies with *erga omnes* effects to ensure the enforceability of results generated by distributed ledger technology. In 2019, the UK Law Tech delivery panel launched a public

consultation on the legal status of crypto-assets, distributed ledger technology, and smart contracts under English law (UK Jurisdiction Task Force of the LawTech Delivery Panel, 2019).

Despite the flexibility of English common law, there was a sense that the financial community lacked certainty about the legal status of crypto-assets, distributed ledger technology, and smart contracts. Switzerland has also made a similar argument, noting that rules on the commodification and tradability of financial instruments (i.e., blockchain-based tokens) are needed to support openness towards innovation. This argument was used in the Swiss government's draft for a law on distributed ledger technology. Liechtenstein's new blockchain law is similarly influenced by this legislative approach. Competition authorities advocate for a principle-based approach that recognizes the positive welfare effects of financial disruption caused by FinTech, acknowledging that technology often advances faster than the law. The Spanish Competition Commission supports market entry under transparent rules that require disclosure of potential conflicts of interest. From a legislative perspective, a focus on transparency reflects a policy choice for informed markets (Buttigieg, *et al.*, 2020). However, some critics may argue that such emphasis on transparency could also reveal legislative unwillingness to intervene in the negative impacts of digital finance, leaving investors to bear the consequences and potentially resulting in litigation. As a result, private actors must absorb the allocative effects of this policy approach to innovation, relying on their ability to design contracts that can withstand challenges.

Critics argue that the current regulatory approach towards FinTech has a micro-transactional bias, which leads to the neglect of macro-level risks in favor of private business models. Some suggest that a technocratic focus on the micro-level could worsen self-referential growth and systemic risks, if applied as a normative imperative. Rather, a framework of public accommodation should be adopted to address privately created risks and liabilities (Omarova, S., 2019). However, it is challenging to evaluate the macro-economic effects of a purely transactional regulatory approach without examining the private law framework for FinTech transactions. The potential for innovation in finance is heavily reliant on the adaptability of private law, as regulators struggle to create standards that can anticipate and address the unintended consequences of machine learning (Chiu, I., 2016). This implies that the regulatory framework for the European Union financial sector may implicitly rely on private law to provide functional

solutions when statutory financial law falls short. Therefore, a polycentric approach that combines governmental rulemaking with effective private contract and digital asset rules is necessary.

Decentralised finance and fintech activities

The traditional banking system has been opened by the amended Payment Services Directive (PSD II) (EU Commission, 2020). Peer-to-Peer (P2P) and peer-to-Business (P2B) payments have become commonplace and mobile wallets are now widely accepted (EU Directive 2366, 2015). Real-time payment systems operate on platforms that are frequently surveyed by the European Central Bank or national banks. Any delay or disruption in the system is immediately noticeable to end-users, which can create reputational risks for the payment services provider. Due to the stricter regulatory requirements, customer online identification is now using tokenization of payment processes, supplemented by artificial intelligence devices that use past payment patterns to verify customer transactions.

The integration of tokenized payments into distributed ledger technology allows tokens to serve as private keys that grant access to value stored on a blockchain. How these tokens and keys are classified under private law will determine if payment service providers have correctly separated customer accounts and stored their values on the blockchain, making them insolvency-proof and protected from third-party attachment. The effectiveness of electronic storage and verification schemes depends on their compatibility with data protection laws. As payment services are increasingly provided in the context of outsourcing arrangements or distributed networks, digitization has prompted a shift in contract law analysis towards the exploration of specific duties of loyalty and care. Payment service providers often delegate the transfer of funds to comprehensive algorithms, without ever physically handling the transferred values. Cloud computing has provided an infrastructure for banks and start-ups, allowing for offshore data processing to reduce costs. It is up to each national legal order to determine whether designing a payment system or a distributed network also entails liability for malfunctions.

The compliance of the system

Compliance with risk management mechanisms is a prerequisite for outsourcing under both statutory law and supervisory practice, provided that

enforcement remains credible. While standard contracts can facilitate digital transactions, the bargaining power of parties on a digital network may vary, potentially leading to loss of autonomy for banks as FinTechs capture some of the added value. A data protection case from Sweden in 2013 showed that data processors may have a stronger position than data controllers, as the latter may lack sufficient control and insight into the data processing chain for storing information in the cloud. This legal uncertainty is magnified for consumers when payment service providers operate in interrelated contract networks with complex organizational features that may be difficult to trace back to a jurisdiction. In addition, diverging proprietary standards and protocols create challenges for cross-border business.

The Regulation on digital operational resilience for the financial sectors (EU Regulation 2554, 2022) sets out professional standards for financial service providers, their contractors, and sub-contractors. Article 4 of the Regulation requires internal governance mechanisms and control frameworks to manage risks, and mandates that the financial service provider remains responsible for the safe storage of personal financial data when outsourcing. Contractual arrangements with third-party providers and potential subcontractors are required to replicate the safety standards of the outsourcing financial entity. However, the Financial Stability Board has warned against excessive optimism that such safeguards will be passed along the chain of contracts to fourth or fifth parties or beyond. The European Banking Authority and the Board of the International Organization of Securities Commissions have both issued detailed sets of governance rules to mitigate this risk. The Expert Group on Regulatory Obstacles to Financial Innovation proposes a certification or licensing scheme to ensure minimum standards are observed. The Regulation on digital resilience, however, does not address liability standards concerning third-party storage of electronic assets and values. Safe storage of tokenized funds on permissioned blockchains, as required by Article 10(1)(a) of PSD II (EU Directive 2366, 2015), can only be guaranteed if such tokens are insolvency-proof. Strict adherence to Article 20(2) of PSD II would suggest no-fault liability if digital assets stored in networks are misappropriated. Under Article 24 of Directive 2009/65/EU (EU Directive 65, 2009), as amended, the depositary may escape liability if a loss has arisen due to an external event beyond its reasonable control with unavoidable consequences.

Artificial intelligence and robo-advice in financial market

The question of whether private law systems can balance the interests of investors against those of financial institutions relying on artificial intelligence is reinforced by robo-advisory schemes. Robo-advisers utilize various business models, with the level of human interaction and intervention varying when collecting and processing information to provide investment recommendations. Fully digitalized robo-advisory systems process market information and restructure customer portfolios based on algorithms that invest and rebalance the account according to customer risk preferences (U.S. Securities and Exchange Commission, 2017). Robo-advisory services are initiated through a service contract between the customer and the financial service provider, with support from a contract with the cooperating bank of the financial service provider. If automated financial advice schemes are provided by a network of firms with unclear allocation of liabilities between the financial institution and an outsource provider, risks may be amplified (Ringe, W. G., Ruof. C., 2018).

Automated investment services or robo-advice have been identified as susceptible to various issues, including home biases, behavioral biases, and conflicts of interest that are not disclosed. Inadequate software and algorithm design may result in customers incurring losses. To address these concerns, regulatory bodies have mandated that automated investment firms must enhance their governance and risk management structures, regularly supervise and update their algorithms, and disclose to potential customers the underlying assumptions, limitations, and risks associated with their algorithms. Singapore and European Union law stipulate that the responsibility for overseeing and managing client-facing tools lies with the board and senior management of the robo-advisory firm. However, it is unclear whether this oversight and disclosure framework complements the concept of providing proper investment advice under the service contract. In the United States, the level of duty owed under the service contract has sparked a debate on how robo-advice can be reconciled with the statutory duties under investment law, which are informed by portfolio theory.

The United States Financial Industry Regulatory Authority has observed that financial service providers that rely solely on robot-generated advice do not meet the standards of fiduciary care owed when advising clients. Consequently, financial advisory firms have developed hybrid models that involve human oversight and counterchecking of robot-generated advice before it is applied to

customer risk parameters. The Bank of England and the Financial Conduct Authority recommend specific risk management mechanisms when financial services employ machine learning applications. Machine learning algorithms must activate an alert mechanism that triggers human approval before execution. Under its regulatory sandbox scheme, the Financial Conduct Authority requires a qualified financial advisor to evaluate the quality of the underlying algorithms when testing robo-advice schemes. Algorithms must be revised in accordance with the advisor's assessment. The United States Financial Industry Regulatory Authority has proposed a similar approach.

Article 25(1) of MiFID II (EU Directive 65, 2014) and Article 54(1) of the MiFID II Delegated Regulation (EU Regulation 565, 2017) in the European Union require investment firms to conduct a suitability assessment before providing investment advice. Even when investment advice or portfolio management is given through an automated or semi-automated system, the investment firm still holds ultimate responsibility for conducting a proper suitability assessment, which cannot be delegated to algorithms. The European Securities and Markets Authority has established organizational standards for investment firms using algorithms to assess suitability, including policies to review and update algorithms in response to market changes and legislative developments. Additionally, internal procedures should be in place to detect errors within the algorithms that may result in inappropriate advice or disregard of relevant laws. Although European Securities and Markets Authority guidelines are considered soft law in the European Union, they are widely followed. These guidelines may be transformed into specific algorithm-related duties of care and loyalty under innovative FinTech contracts using standard interpretation techniques. While investment firms should not be able to contract out of their liability under the suitability rule, the precise legal implications of Article 25 MiFID and the MiFID II Delegated Regulation for national contract laws are uncertain. The potential of contract law to evolve is still being tested when it comes to determining the specific rights parties have when they sue an investment firm for breach of contract.

Conclusion

The present study showed that the private law and private contracting are essential for FinTech to thrive. The European Union Digital Finance Strategy aims to strike a balance between promoting innovation and investor protection by creating an efficient interface between financial regulation and the evolutionary

potential of private law. The European Union believes that mandatory rules and soft law codes of conduct will foster innovation and private ordering, with any resulting externalities to be absorbed by private law. However, this requires the evolution of national private law systems to accommodate the enforceability of claims, particularly in the areas of payment services, outsourcing models, crowdlending, robo-advice, and blockchain applications.

The liability rules for digital markets must be adequately established to provide a framework for the infrastructure of digital markets. The business models involved in FinTech are subject to varying degrees of liability under finance and data protection laws, with uncertainty surrounding the incorporation of algorithms and artificial intelligence into established liability concepts. Current regulatory sandbox models focus on transparency and insurance requirements for bilateral business relationships, ignoring a more fundamental liability problem in the context of long outsourcing chains and digital networks. The courts or legislators must decide whether those who design the organizational structure of a network should also be liable for its malfunctions, which would require a re-assessment of current burden-of-proof rules.

The classification of crypto assets under private law is not addressed in the European Union Digital Finance Strategy, unlike non-European Union jurisdictions. Erga omnes status must be afforded to crypto assets with respect to third-party interventions in service chains for digital payments, outsourcing to clouds, distributed ledger technology settlement processes, and insolvency scenarios. The European Union regulatory instruments and Member State private laws are still in a state of flux, and as private law systems accommodate practitioners' creativity and regulators' principle-based approach, shortcomings may become more apparent. The European Union should adopt fine-tuned private law rules for digital finance to address Member State diversity as a liability. Private international law rules for FinTech transactions and the interface between digital finance law and the General Data Protection Regulation should be given priority on a future legislative agenda.

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References

Berger, A. N., Wilson, J., Molyneux, P (2019). The Oxford Handbook of Banking. *Oxford, Oxford University Press.*

Boar, C., Wehrli, A. (2021). Ready, steady, go? Results of the third BIS survey on central bank digital currency. *Basel, BIS Papers*.

Born, K. (2017) Did Basel III miss the point?, *Hamburg: Anchor Academic Publishing*.

Buttigieg, C., P., et al (2020). A Critical Analysis of the Rationale for Financial Regulation Part II: Objectives of Financial Regulation, *ECFR*.

Chiu, I. (2016). FinTech and Disruptive Business Models in Financial Products, Intermediation and Markets – Policy Implications for Financial Regulators. *Journal of Technology Law and Policy*, 55, 56-111.

Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organizational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017R0565

Delaney, M. (2019). Progress on Adoption of Basel III Standards – Monetary Policy, Leverage Ratios and Risk Based Capital Adequacy Measures, *SSRN*.

Directive (EU) 2015/2366 of 25 November 2015 on payment services in the internal market amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/ 2010, and repealing Directive 2007/64/EC, al. L 337135 of 23 December 2015. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri =OJ:L:2015:337:FULL&from=PT

Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC. https://eur-lex.europa.eu/legal-content/EN/ TXT/?uri=celex%3A32015L2366

Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC. https://eur-lex.europa.eu/legal-content/EN/ TXT/?uri=celex%3A32015L2366

Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS). https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32009L0065

Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0065

EU Commission: Digital Finance Package: Commission sets out new, ambitious approach to encourage responsible innovation to benefit consumers and business, Brussels, Press Release: 2020.

European Central Bank (2018). SSM SREP Methodology Booklet, *Frankfurt*.

Financial Stability Board (2017). Artificial intelligence and machine learning in financial services Market developments and financial stability implications. *FSB*.

Hoppe, S. (2018). The Rise of FinTech. Threats and Opportunities for the German Retail Banking Market. *Hamburg: Studylab*.

Kirkpatrick, G. (2009). The Corporate Governance Lessons from the Financial Crisis. *Workingpaper, OECD*.

Matoušek, R., Stavárek, D (2012). Financial Integration in the European Union. *London: Routledge*.

Möslein, F., Omlor, S. (2019). FinTech-Handbuch – Digitalisierung, Recht, Finanzen, *München, Buck-Heeb/Koch*.

Omarova, S. (2019). New Tech v. New Deal: FinTech as a Systemic Phenomenon, *Yale, Yale Journal on Regulation*.

Reed, C., Murray, A. (2018). Rethinking the Jurisprudence of Cyberspace, *Gloucestershire, Edward Elgar Publishing Ltd*.

Regulation (EU) 2022/2554 of the European Parliament and of the Council of 14 December 2022 on digital operational resilience for the financial sector and amending Regulations (EC) No 1060/2009, (EU) No 648/2012, (EU) No 600/2014, (EU) No 909/2014 and (EU) 2016/1011.

Ringe, W. G., Ruof. C. (2018). A Regulatory Sandbox for Robo Advice. *European Banking Institute Working Paper.*

Svalova, V. (2018). Risk Assessment. *Rijeka: InTech*.

Tanda, A., Schena, C. (2019). FinTech, BigTech and Banks – Digitalisation and its impact on Banking Business Models. *Cham, Springer International Publishing*.

U.S. Securities and Exchange Commission: Guidance Update. (2017). *Robo-Advisers*.

UK Jurisdiction Task Force of the LawTech Delivery Panel, Public Consultation (2019). The status of crypto-assets, distributed ledger technology and smart contracts under English private law, *London*.

Vives, X. (2019). Digital disruption in financial markets, *IESE Business School, OECD*.

Wirtz, B. W. (2020). Business Model Management – Design, Process, Instruments. *Speyer, Springer.*

Wójcik, D., Knox-Hayes, J. (2020). The Routledge Handbook of Financial Geography. *London, Routledge.*

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The Role and Functions of Law in Contemporary Society the Law – a Plurilateral Developed Social Science

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Abstract

The process of creating and developing a science of Law has always had at its base a significant social, humanistic side, reflected by the way in which the individual is positioned in society and in relation to the society in which he lives. Man's conduct within a society created over time by his own physical forces was guided and balanced by the creation of rules, basic principles and current legal norms. The way society evolved over time, the role of history, politics, social and economic conditions, and state organization, represented and represents the premises for the development of a Science of Law that has the social obligation to adapt rapidly to the new conditions and needs of the contemporary state, part of a State Union and of a World order. The task of highlighting and promoting the multidisciplinary character of Law rests mainly in the hands of theorists and practitioners of law, those who can progressively analyze its characters and functions and draw new useful and current tasks for the rule of law.

Keywords: law, society, role, contemporary, evolution.

Introduction

The Science of Law is one of the most important human social sciences because of its social role in the society and because it represents the faith of the people worldwide in a force greater than the common features of the daily social interactions. The Law creates, directs and corrects human and social behaviors. A science about society, the Law is a pure social human social science. The Science of Law studies the laws of the existence and development of the state and of the Law, the political and legal institutions, their pure historical forms, the

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connections with the other components of the social system, the way in which the legal and political institutions influence the society and also how these institutions receive the social influence (Popa, 2008, p. 2).

The Law, as any other social science, represents a generalization of the human experience in a certain section of activity and contains a series of data verified and systematized, a number of notions, categories, concepts and principles, but also a methodological set than can be used in order to study and investigate the social phenomenon that is essential for creating the rule of law (Popa, 2008, p. 3).

The Law is a pure deductive Science, this feature can be observed both in the theory of law and in the legal practice, thanks to the power of the legal reasoning.

According to the Greek philosopher Epicur, the Law forms and must form according to the interests of every era, it is a law always changing and always with relative authority (Culic, Stroe, 1994, p. 81).

The word “right” can be used in several meanings, depending on the context. At its origin is the Latin directus, from dirigo = straight (in the sense of horizontal or vertical), direction, straight line. In Latin, the word jus was used to name the set of state rules (right in the legal sense, laws).

The Law represents the objective ethics, while the Moral represents the subjective ethics, and this is why for the right legal thinking it is important to combine the two.

For the Law to remain a force in the eyes of the people that are at the same time a part of communities, organizations and international order, it is necessary to remind them that the law has very strong roots and it is based on high Principles that will keep the Rule of Law alive and standing straight in the face of any armed conflict, economic crises or negative effects of the Artificial Intelligence.

It is in the nature of the Law to recreate and reshape itself when facing new social challenges, but it is also true that it is in the hands of the human legislators to access all the sources of the legal system in order for the Science of Law to be kept active, formative and naturally useful.

We can briefly define the etymological legal concept of Law as the general rule of mandatory human behavior (Tănăsescu, 2010, p. 37).

The Grounds of Legal thinking: Legal Philosophy – Analytical Jurisprudence – Sociological Theories

The Role of the LAW from the beginnings. The Law has its roots in the genuine ways of thinking of the ancient people, it was created by the need of understanding and applying a form of necessary natural behavior in the heart of communities, in order to prevent and punish certain conducts of people that harm the interests of others and fail to understand that there is a common good that needs to be respected by all individuals.

Man's reflections on his position in the community and in the Universe are the basis of the Legal Philosophy that is nowadays so valuable for the rule of law.

Starting with the Greek Philosophers like Aristotle and Plato and continuing with Hegel's philosophic system, the philosophic way of thinking regarding the world as God created it and the Gods protected it, represents without any doubt the basis of the entire Legal system as we know it worldwide.

The Legal philosophy has naturally received among time an influence of the Political Ideology that was characteristic for specific period of times, and when these two great forces started fighting for what is Just, the social need for separation of powers inside the communities became a priority.

When the Judicial power took form as a system that was given the role of applying the rule of law in different cases that needed to be analyzed in the sense of punishment and future prevention, the Judicial behavior came to light.

This judicial behavior, achieved with the interpretation of the law by a magistrate, even if it was or not influenced by political actors, has set the grounds for the Analytical Jurisprudence that is now found in any legal system and that has the important role of source of law.

According to the Greek Philosopher *Aristotle*, Laws are something different from what regulates and expresses the form of the Constitution; it is their office to direct the conduct of the Magistrate in the execution of his office and the punishment of the offenders (Friedmann, 1967, p. 11).

This way of looking at the rule of law – as a tool created not only for setting the rules for conducting individual behavior but also for conducting the role of the magistrate in the judicial system, is a very important key for understanding how a legal act of justice should take place in any civilized form of judicial act. I dare to say that it is the most important judicial truth that can help the judicial system become fair and moral, because it emphasizes the importance of the

moral truth in relation with the subjective moral beliefs of the human – magistrate.

The idea of what is *Just* is also a very sensitive philosophical subject, related to the idea of truth and morality, and in order to give a proper and fair sense of the rule of law it is important to know and take into consideration in any legal thinking or act just the moral principles that were thought and created in the ancient times, when the Society was not as much disturbed by subjective needs as it happens nowadays.

Talking about Society and about the actual needs of the individuals that form the society and life in it, takes us to the third important aspect of the Law, the Law as a *social fact*, the way the French sociologist Durkheim named it.

The Law is not only the reflection of the philosophy and political ideologies, and the order set by the judicial behavior, but is it also a social product, and this important feature is very strong related with the idealistic idea of rule of law.

The way that society evolves in time is strongly connected with the way the rule of law must take care of the proper and secure development of the human needs and rights.

For the reasons above, the Sociological theories are the third most important components of the legal thinking.

The Law cannot be separated by the society, it is created and developed to sustain and conduct the human behavior inside the society and in public relations between states, it has the role of shaping the conduct of a society according to the actual development of all its branches – economical, political, etc.

For creating the rule of law it is essential to analyze the human behavior inside the Society in each period of time relevant in the history of mankind because the individual behavior will always be directly influenced by the social reality as a whole, by economic development or regression, by the changes in the political area and by the changes in the world climate.

It is the major duty of the Law to create special rules in special cases and to shape the general rules in order to apply to a wide category of social facts that can have dangerous consequences if left to develop without a proper legal framework.

The fact that the Law can be defined and considered to be a common language all over the world, it is not only because of the strong principles born

in the ancient philosophy, but also because the law is considered to be the form of expression of the major social needs.

For the reasons above, the Science of law is strongly related to the Sociological sciences, and we can even talk about the science of Legal Sociology.

The Legal Sociology as a science, it is situated between the Sociology Science with its two components – General Sociology and Special, Technical Sociology, and the Science of Law, and it has the same role as the Law Discipline – General Theory of Law (Popa, 1989, p. 84).

It is very important to say that the whole three components of the Legal thinking mentioned and described above – the Legal Philosophy, the Analytical Jurisprudence and the Sociological Theories, must be always in connection when it comes to create, develop and apply The Rule of Law in any modern legal system, in order to have a just and complete legal vision, or better said, to give the Law its proper place in Society.

In order for the legal thinking to create a just rule of law in any historical, political and economic environment, it is also important to take into consideration the three Characteristics of the Law: The Stability, The Formalism and The Desire for security from disorder (Friedmann, 1967, p. 70)

In regard to the third characteristic of the law – the desire for security from disorder, it is necessary to underline the fact that it is custom for the rules of law to be created or shaped after the problem or the crisis occurs and the society has to deal with the negative consequences, and this is why one of the most important tasks for the legislator is to have the means and find the legal methods in order to anticipate the social problems and to create rules of law in actual timing, in a variety of domains that are developing with extremely fast steps and can be the causes for economic or social crises.

According to the French sociologist Durkheim, the progress translates in a society with the growth of the global quantity of rules of law (Tănăsescu, 2010, p. 44).

The Functions of the Law: Principles of law – Functions of law – Role of the law

The functions of the Law can be defined as the set of tasks that the law should respond inside a society, in order to respect and apply the social condition of the rule of law. By using the law according to its legal functions, the legislator makes sure that the way in which the society is conducted respects the Latin

phrase *Nihil sine lege*. The determination of the social-historical forms, the direction and the form of the legal system, with its legal institutions, law domains, the variety of rules of law and legal courts that directly apply the rules of law, they all define and compose the functions of the law. According to the legal doctrine created in Romania in the era of the Communist political regime, the functions of the law could be defined as the directions towards which the law generally sets his way, meaning that the functions of the law give the direction of the rule of law. Also, it is said that to define the functions of the socialist law it means to establish the role of the law in the society (Ceterchi, 1974, p. 15).

The functions of the law represent the social role of the law in general, the social purpose of the entire legal activity (Ceterchi, 1974, p. 16). The Romanian legal doctrine now classifies a number of four essential functions of the law : (a) The institutionalization function of the social-political organization; (b) The function of conservation, defense and guarantee of the fundamental values of the society; (c) The function of leading, conducting the society; (d) The normative function.

According to the legal communist doctrine, another function of the law was the one of harmonization of the personal interests and beliefs of the individuals with the general ones of the local communities and of the country.

Also, the socialist doctrine talked about a law function called the educational function, which had the role of increasing the level of social, civic conscience of the citizens, being believed that one of the roles of the law is to educate the individual in the name and the spirit of the law, in order for them to live and work for the benefit of their country and for the prosperity of it. This way of thinking was of course specific for all the dictatorial regimes that ruled in the history worldwide, and it exceeded the legal thinking.

a) According to the institutionalization function of the social-political organization, the structure of the national social system is created, in order to be active and to represent the society properly in relation with its citizens and with the other states. This function represents the legal power given by the citizens to the legal and administrative institutions of the country, which are created and ruled only according to the rule of law written in the Constitution and other ordinary laws.
b) The function of conservation, defense and guarantee of the fundamental values of the society represents one of the main roles of the Law in

general, according to which the rule of law should always treat as a priority the conservation, defense and guarantee of fundamental values of a society, such as the right to an independent state, the right of property and the wide category of citizens rights.

c) By using the function of leading the society, the legislator is primarily allowed to set the legal framework in order for the society to relate legally to its citizens and to other states, in concern to daily economic, social or political tasks or when the society deals with crisis or armed conflicts.

d) The last but not least, the normative function of the law is the one that allows the legislator to create rules of law in all the domains of the social sectors, all civil, administrative, commercial and criminal laws, that have the role of conducting the human behavior in order for all the individuals to have a moral and peaceful relation with the others and to prevent and discourage any misguided conduct in their social lives.

About this last function of the law, the normative one, the communist legal doctrine said that it represents the pure methods of achieving all the other functions of the law, that it expresses the specific social role of the law, as the one to regulate the human conduct, as individuals, in communities, or organizations (Ceterchi, 1974, p. 27). The normative function represents the corollary of the functions of law, the essence of LAW, the programming factor of human freedom of action, the only legal method that can ensure and guarantee the security, balance and equity of human conduct in relation to the accelerated development of technology and social evolution in relation to the economic, political and environmental factors, by performing the function of sanctioning deviant behavior, the only nonviolent and effective role that is attributed de jure and de facto to the legislator and to the contemporary society. The normative function is the base of the functions of law pyramid, and its most important present Role is to respond interdependently with European norms, permanently maintaining an active and efficient legal circuit. With the use of the four major functions, the Law can conduct and legally organize the whole country in any period of time given by political, social and economic circumstances, and the rule of law should always be just and equally applied towards individuals and other communities. Nonetheless, by knowing and understanding the legal power of the four functions of the law, the legal thinkers and all the law practitioners cand easily find objective legal answers in order to put into practice the higher role of the law in the society.

The immediate result of fulfilling the functions of the law is the perseverance of the judicial order in the entire society (Ceterchi, 1974, p. 27). It is also fair to say that the immediate, natural characterization of the rule of law is given in any society through the *social acceptance* – the actual observance of the Law by the community to which it is addressed (Friedmann, 1967, p. 14). The functions of law have their legal roots in the general Principles of Law, the ones that characterize the entire legal system of a country or of an organization such as the European Union. In the Romanian legal system, every domain of law has its own set of principles which guide the entire area of normative acts that are created by the legislator and these principles reflect the functions and the role of the law in our country. One of the most important legal principles is the one that stands for the supremacy of the law – a principle with an old character, expressing the sovereign will of the people, given in the hands of the judicial system and by that receiving the supreme obligation of the state and of the people – to respect the rule of law without making any social differences. It is right to say that the value of a country or of an entire nation represents the legal principles in which they truly believe and for which they stand in front of any political regime or economic crisis or armed war.

The principles of law are as important as the country's own hymn or flag. One of the principles of law mentioned in the communist legal doctrine and not found in the present legal doctrine is the principle of the active and formative role of the socialist law, a law created in order to stimulate, educate and prospect for the future the social relations and the human behavior, according to the strategic general goals established for the social-economic development of the country (Ceterchi, 1974, p. 29). I can say that this principle could also be part of the present legal norm in order to underline the importance of the active and formative role that the rule of law must have in order to face the present and future social, political and economic threats that come as part of the phenomenon of globalization.

A primary conclusion regarding the importance of the functions of law and of the principle of law for the legal and judicial order of a state or of an organization is that we cannot separate the new social realities from the rule of law, in order for a state to be ruled in a proper way, it is imperial necessary to actively develop the legislation, this process should never be interrupted or damaged by political actors or inadequate judicial or social behavior.

Also, it is important to underline the legal connection between the principles of law – Functions of law – Role of the Law, this connection is the legal key for developing and following the rule of law for the benefit of the states, individually or part of the EU, and in relation with the international rules.

The Role of the Law in the Present and near Future. State Law. EU Law. International Law.

The social and political state order nowadays is divided into Countries own rules, EU regulations and politics and international rules. Are these three sources of law in consent with one another, do they communicate efficient enough in order to solve the problems that affect communities and states in a reasonable period of time and with pro-active rules of law? This is the primary question that should be asked and responded by the legislators of the three sources of law mentioned, and this is how we all can find out which is the Role of the Law in the present, in the contemporary era. Nevertheless, at first sight, this is not an easy question to respond to, but it is, beyond any reasonable doubt, a question whose right answer can be found in the legal ancient thinking, in the principles of the law and in the functions of the law mentioned not long ago in my work.

The main purpose of this article is to underline the importance of the moral legal thinking that can always be a priceless source of solving social and political issues and crisis, and to emphasize the fact that the problem does not come from the Law or from the lack of special rules of law, it comes and it spreads because of the misinterpretation of the law given by the judicial and administrative behavior present nowadays inside the states, communities and organizations, and by the lack of active legal roles and legal view.

The common and most important feature for the three sources of law – State law, EU law and International Law is the fact they all represent and protect a *social product.* But this feature it is also the one that can be the cause of the non-reaction of the law in front of the world's present crisis and wars given its traditional characteristic, the idea of what is right according to the popular beliefs facing the challenges and the unknown territory of the global common good.

It is very important to underline the fact that the Law was created from the popular beliefs and thinking, this is why most of the first rules are still applied in the present, especially because of their strong moral sense, but once the Society faces a process of extremely fast evolution, the need of embracing new and visionary legal points of view becomes crucial both for the individuals as part

of their countries and for the same individuals as part of the EU community and of the International order.

If we are to analyze the sources of law of the Romanian legal system and the one of the European Union, we can notice that they both have the same pyramidal structure and the same legal norms as part of their general legal system. At the bottom of the pyramid, they both have the Common law and the Principles of Law, and at the top of the pyramid – the national legal system has the Constitution and the Constitutional laws and the EU system has the two basic Treaties (TFEU, TEU).

Secondly, starting from the bottom of the pyramid, both national and EU legal systems have the Jurisprudence, as a very important source of law worldwide.

At the middle ground of the pyramid, the national system is composed of public and local norms, Codes of each law domain, government decisions and organic laws. The EU legal pyramid has in the middle the Treaties and Conventions between EU and state members, Conventions between the state members and EU specific norms (Decisions, Regulations, Recommendations, Directives).

All the sources of law of the UE are known to form the ACQUIS of the European Union.

I have mentioned the above mirror comparison between the two legal system, of a state and of an Organization as the EU, in order to emphasize the fact that there are no major differences between the legal systems and this is a start for understanding that the EU legal system is apt to create rules of law as good as the national legal systems do, and that it is in our benefit as a part of the EU to assimilate the rules of law coming from the EU legislator and to contribute with our legal thinking and legal knowledge at making the EU law more active, formative and efficient, in order for the EU to be able to create in the near future legal supranational norms, not only politics.

When looking at the two legal pyramids, we can see that the functions of law apply for both of the legal systems and can be the legal binder between the two, and by connecting the two systems through the law functions, we can easily find objective answers and establish the Role of the Law inside the states and also in and out of the EU. We can also imagine that the two pyramids are looking at the same sky, with a big cloud and a brilliant sun, the cloud being the Legal Consciousness, that should be above and inside any legal thinking and decision, and the Sun representing the Global legal order and the Rule of Law. If we want to imagine a bigger picture, we can see the contemporary social, political and

economic problems, and the Ukrainian War, as being large meteorites that approach the Earth with fast speed, as fast as the globalization and the high-tech evolution.

Beyond any imaginative description, the purpose of this article is to find and underline at least some of the most important Roles of the law in the contemporary society, by following the legal reasoning mentioned above. Given the fact that the main function of the law is to give the politics, economics and social life a form and an order, we can say that the general Role of the law in the contemporary society is to express, protect and regulate the social reality in time of peace and in time of crisis.

In order to do so in a right and legal manner, any individual and society must understand that the intern law of the states should contribute to the EU rule of law and should also allow the EU to establish in time a supranational legal rule of law, with the one and only purpose of regulating the domains that the globalization phenomenon brought and will continue to bring all over the world. As for the international rule of law concerns, the international legal institutions should try to connect in a more active way with the EU legal institutions and vice versa, in order for the two major social and legal systems to set the legal grounds for responding properly to most of the challenges of the armed conflicts, climate changes, high-tech evolution (AI), economic crises, democratic recession, etc. The international criminal legislation has a very important role in dealing with contemporary crimes such as the crime of aggression that is the major crime committed by Russia in the war against Ukraine, thanks to the Rome Statute, and also the international jurisprudence has a wide category of criminal cases in order to search and find the proper legal answers for the indictment of those who commit crimes against humanity.

If we look back in the legal doctrine regarding the international rule of law, we can find that the view of the law theoreticians from that period of time – year 1977 – can also be applied and considered one of the roles of law in the contemporary society, not only for the international law, but also for the EU law which will develop in the years to come : In the conditions given by the contemporary era, era of profound revolutionary transformations, characterized by the affirmation for independence and equality of all the people, it becomes more and more important the role of the international law in establishing a peace and long-time collaboration, in eliminating the force and the threat by using the force in the international relations, in the building of a new system of

relations between the states, created firmly on high principles of morality and justice (Geamanu, 1977, p. 5).

Also the Romanian socialist legal doctrine mentioned that, according to the Yugoslav Professor R. Lang, in order to make sure that the law is efficient for the improvement of the social relations, as a constructive agent of the advanced socialist society, the legislator must have a wide vision regarding the model of the future situation, to start from a realistic model conduct, prepared after a thorough study of the tasks, of the social realities and of the effects of the decisional act, to know the dynamic of the domains that need to be regulated and to be warned regarding any unwanted side effects that could create social collision or create and maintain social contradiction (Ceterchi, 1974, p. 21).

It is also mentioned in the same work that some authors believe that every legal norm represents a normative forecast of the development of the social relations in the domain in which it regulates and that it must contain from the very beginning a written forecast that will be checked while the legal norm will be in force (Ceterchi, 1974, p. 22).

The above points of view regarding the work of the legislator is the reason for which the Law Science is considered to be the mathematics of the social sciences, and why the legal thinking should respect the connections described in the present article. A more detailed list of roles of the law found in the legal doctrine of the same period of time, underlining the importance of the social role of the law, describes a number of four methods and ways for achieving the purpose of the social law: (a) Ensuring a scientific character for the whole judicial activity; (b) Underlining the democratic character of the law; (c) Augmentation of the humanist character of the law; (d) Extension of the law area with norms created for a diversity of social relations (Ceterchi, 1974, p. 14).

We can definitely notice that all four methods mentioned are still of actual interest for the present rule of law, in all the domains and inside any state or organization, and this is another proof of the importance of the right legal thinking that should be found in all the legal systems. There is for sure another side of the problem that we can see and analyze regarding the fact that principles created for the needs of the society 30 years ago mirror the needs of the society in the contemporary era. This is a truth that can reveal at least two important issues concerning the rule of law: one is that which describes perfectly the arguments mentioned in this paper regarding the importance of knowing and respecting the principles of law, the functions and the roles of law that were

created by high level legal thinkers in the history of the world, because they will always reveal the legal truth and the legal values, but also the inevitable fact that the society did not succeed in more than 30 years to prevent and stop the perpetuation of armed conflicts, crimes against humanity, democratic recession and other important social and economic crises.

Looking at this fact with objective eyes and objective global thinking, I can say that even if the situation seems to be of a high level risk, we should take into consideration the fact that there will never be a perfect society, and not because the laws are not enough or because they are not applied properly, but mainly because the human behavior has so many features than can infinitely multiply when they met the wide area of social and economic possibilities, and there will be no stopping for the evolution of this natural psychological process. From this point of view, the French sociologist Durkheim described the crime as a natural phenomenon, because of the fact that the crime is found in all the societies, not matter the type. Furthermore, he sees the crime as being normal, as being necessary and connected to the fundamental conditions of every social life, and for this reason, the crime is useful, is useful in order to active the social, collective reaction of the individuals and of the state. According to Durkheim, in any society, the crime unites the consciences and strengthens them (Banciu, 2007, p. 51-52). Durkheim's point of view regarding the role of the crime as a natural phenomenon in any society, with its legal importance given by the fact that the crime awakes the social reaction that can turn into a source of law, reflects another feature of the contemporary rule of law – the fact that it follows the crime, instead of preceding it.

In the global legal area of state laws, EU laws and international laws, the concept of legal *transplant* is used in order to give a name to the legal methodology that needs to be set in order to create legal norms that can properly solve the issues and crimes with which the global society deals in the contemporary era.

In order to find the proper tools for helping the present legal system to keep under control the fast and degenerative way in which the society evolves, the worldwide legislators must reconsider and analyze the functionality of the legal values. The exact legal answers for all the social problems that nowadays create a diverse area of crimes cand be found with studying the theory of the science of law, with all its concepts, notions and principles, mainly because this represents the legal common ground for all the legal systems and secondly

because this is the only right method in order to create and relate to new legal typologies.

Another important role in creating the legal norms necessary for controlling the globalization phenomenon is that of the comparative law, as the English Professor Twining mentioned – in a globalized, cosmopolitan world, both the general studies regarding the Science of law and the ones concerning the comparative law, must become cosmopolitan, as a precondition for the revival of the general theory of law and as a wider reconsideration of the comparative law (Popa, 2008, p. 11).

Without any doubt, the process of analyzing the different legal norms found in the state's legal systems in order to integrate them in the EU legal system and vice versa, has to start from the basic concepts and principles found in the general theory of law, and to use all of them in a deductive way for the purpose of creating the new typology of laws, with their most important feature – the universality.

What we, as legal thinkers, can do regarding this thesis is to identify the areas of social domains that need to be regulated and find the legal means in order to create special legal frameworks for each and every domain, both administrative and criminal, in order to prevent that certain activities, create negative effects among people and outside the society. For accomplishing this, it is essential that all the legal systems connect in an active and formative way using the rule as law with its entire legal principles and methods. The Law should be able to create in the near future Hybrid sciences and a legal system of encoding the law domains in a supranational plan, both being the work that the state legislators, EU legislator and international forums should put into practice, taking into consideration that they all have the means to achieve that and that it will only take goodwill and trust in the strength and infinite power of the Rule of Law.

The higher role of the law in the contemporary society can be therefore described and classified as the Role of globalization the legal norm, together with the globalization of its concepts and methods, in order for the law to fight from the position of equality with the present threats and crises. When talking about an idealistic higher role of the law in the contemporary society we can revive the principle of Montesquieu regarding the international law, according to which all the states must make to one another in time of peace as much good as possible, and in time of war, as less harm as possible (Culic, Stroe, 1994, p. 163).

Conclusion

This is a quote used at the beginning of the movie *Le Proces,* a movie from 1962, based on the novel of the writer Franz Kafka. Although the meaning of the quote as it represents the subject of the movie was the denied access to the judicial system, the opaque windows of the judicial institutions, I felt the need to use it for the conclusions of this article by describing the Guard that stands in front of the Law as representing the Legal Conscience, the Morality and the Truth that define the right Law as part of the Law Science in any legal era. It is also important to mention that, in an era of fast social challenges and universal incertitude, we can always relate to the ancient Greek cult of *nomos,* a word that represents the combination of divine law, human law, habits, traditions, manners, human behavior – the orderly reality of the human world as a part of a universal order (Culic, Stroe, 1994, p. 32-33). The Law can be considered to be one of the most valuable treasures of every state and should be always protected and treated as one.

References

Banciu, Dan (2007). *Legal Sociology*. Bucuresti, Lumina Lex Publishing House.

Ceterchi, Dimitriu, Cosmovici. (1974). *The Role and functions of the Law in creating the multilateral developed socialist society*. 14, 15, 16, 21, 22, 27, 29.

Culic, Stroe (1994). *Moments from the history of the philosophy of law.* 32, 33, 163.

Friedmann (1967). *Legal Theory. Fifth Edition*. 11, 14, 70.

Geamănu (1977). *International Criminal Law and International Crimes*. 5.

Popa (1989). *Legal Sociology Lectures*. 84.

Popa (2008). *General Theory of Law*. 2, 3, 11.

Tănăsescu (2010). *Treatise of Criminal Sciences. Vol. 1*. 37, 44.

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The Embezzlement Crime: in View of the Case of Cassation Provided by art. 438 Paragraph 1 Point 7 Code of Criminal Procedure

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Abstract

The notion of „act that is not provided by the criminal law" inserted in the case of accommodation provided by the provisions of art. 438 paragraph 1 point 7 Code of criminal procedure concerns both abstract criminal incrimination, respectively if a certain conduct is provided by any rule of incrimination, as well as the conditions of objective typing, respectively the identity between the actual conduct and the elements of the content of the incrimination in terms of the objective side (but not in terms of the subjective side, the lack of subjective typing constituting a distinct thesis provided by art.16 letter b of the Code of Criminal Procedure and which was not taken over by art.438 paragraph 1 point 7 of the same Code). Through this study we seek to subject to the analysis the jurisprudential interpretation given by the High Court of Cassation and Justice regarding the elements of objective typing of the crime of embezzlement, which may be subject to analysis by the court, from the perspective of the case of cassation expressly provided for by the provisions of Article 438 paragraph 1 item 7 of the Code of Criminal Procedure.

Keywords: embezzlement, appeal in cassation, case law High Court of Cassation and Justice.

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Preliminary remarks

An appeal in cassation is an extraordinary remedy designed to ensure a balance between the principles of legality and respect for res judicata, and concerns only the legality of certain categories of final judgments and only on grounds expressly and exhaustively provided for by law. The provisions of Article 433 of the Code of Criminal Procedure explicitly regulate the purpose of the appeal in question, stating that the appeal in cassation is intended to submit to the High Court of Cassation and Justice the judgment, under the conditions of the law, on the conformity of the contested judgment with the applicable rules of law. Since it is carried out within the framework strictly regulated by law, the legality analysis of the appeal court is not exhaustive, but limited to violations of the law deemed serious by the legislator and regulated as such, expressly and restrictively, in Article 438(1) of the Code of Criminal Procedure.

As such, the grounds for annulment relied on must relate to the factual situation and to the elements which circumscribed the criminal activity, as established by the court of appeal, on the basis of the analysis of the evidence adduced in the case, in the judgment under appeal, since in this extraordinary appeal only aspects of law are examined, the High Court not being able to proceed to the evaluation of the evidentiary material or to the reassessment of the factual situation.

The notion of "an act which is not provided for by criminal law" inserted in the case of invalidation provided for in Article 438(1)(7) Code of Criminal Procedure concerns both the abstract incrimination, i.e. whether a certain conduct is provided for by any incriminating rule, and the conditions of objective typicality, i.e. the identity between the conduct itself and the elements of content of the incrimination from the objective point of view (but not from the subjective point of view, as the lack of subjective typicality is a separate sentence provided for by Article 16(b) of the Code of Criminal Procedure and has not been taken over by Article 438(1)(7) of the same Code) (Decision no. 78/RC/2015).

In the jurisprudence of the Supreme Court, it has been ruled that the ground for cassation provided for by Article 438, paragraph 7 of the Criminal Procedure Code concerns "those situations in which there is no complete correspondence between the act committed and the legal configuration of the respective type of offence, either because the act for which the defendant was definitively convicted does not meet the elements of typicality provided for by the incriminating norm, or because of the decriminalisation of the act (regardless

of whether it concerns the regulation as a whole or the modification of some elements of the constitutive content)" (Decision nr.442/R/2017).

Therefore, the appeal in cassation based on the case of cassation provided for in Article 438(1)(7) of the Code of Criminal Procedure can only be analysed in relation to the objective typicality of the offence. In this study we aim to analyse the interpretation of the case law given by the High Court of Cassation and Justice regarding the elements of objective typicality of the offence of embezzlement, from the perspective of the notion of "act not provided for by the criminal law" inserted in the case for annulment expressly provided for in Article 438 (1) (7) of the Code of Criminal Procedure.

Aspects of objective typicality circumscribed to the case of cassation provided for by Article 438 (1) (7) Criminal Procedure Code

The offence of embezzlement – active subject

Embezzlement is criminalised in the Criminal Code as a service offence, in Article 295 of the Criminal Code, in a standard variant, an aggravated variant and a mitigated variant, common to both variants.

The standard variant, Article 295(1) of the Criminal Code, consists of the appropriation, use or trafficking by a public official, for his own benefit or for the benefit of another, of money, assets or other property which he manages or administers and is punishable by imprisonment for a term of two to seven years and disqualification from holding public office. Similarly, the aggravated variant, Article 295(1) in conjunction with Article 309 of the Criminal Code, is carried out when the embezzlement described in the standard variant has produced particularly serious consequences, i.e. has caused damage exceeding 2,000,000 lei.

The mitigated variant (Article 295 in conjunction with Article 308 of the Criminal Code) is committed when the acts described in the variants are committed by or in connection with persons who exercise, permanently or temporarily, with or without remuneration, a duty of any kind in the service of a natural person among those referred to in Article 175(2) of the Criminal Code or in any legal person.

An analysis of the content of the incrimination of the basic form provided for in Article 295 of the Criminal Code shows that the structure of the offence of embezzlement is made up of intrinsic conditions (objective and subjective

aspects) and extrinsic, pre-existing conditions, which supplement the conditions in which the act is incriminated (the capacity of public official of the active subject).

Thus, the requirement in the incriminating rule that the active subject, the term of the offence, must have a certain quality means that this quality becomes a condition for the existence of the offence, a circumstantial element of the incrimination.

Similarly, for the attenuated version, which extends the scope of the active subject to persons who perform, permanently or temporarily, with or without remuneration, a task of any kind in the service of a natural person referred to in Article 175(1)(a), the following applies (2) of the Criminal Code or within any legal person does not change the nature of the circumstantial element, namely the status of the active subject, which is a condition for the existence of the offence in the attenuated version.

The material object of the offence of embezzlement consists, inter alia, of the money which the perpetrator actually manages or administers, and the active subject, the perpetrator of this offence, may be only a public official (proper or assimilated) or a private official.

According to Article 1 of Law No 22/1969, the manager is the person whose main duty is to receive, keep and release goods under the administration, even temporarily, of the establishment in which he is working; an active subject of the offence of embezzlement may also be a de facto manager, i.e. an employee who actually performs the main duty of a de jure manager (according to Article 31 of Law No 22/1969).

In the case-law of the Supreme Court, with strict reference to the special nature of the active subject of the offence of embezzlement, it has been held that the constituent elements of that offence are satisfied by the defendant's act of drawing up annexes to payment orders, which, after being approved by the Director of the Human Resources Directorate and the official responsible for preventive financial control, were sent to the Director of the Economic Directorate. The payment order was issued on the basis of these and contained only the total of the salaries to be paid to employees who had an account with a particular bank. After the payment order had been sent to the bank, the defendant drew up a table, an electronic file, which he sent to the bank by email, listing the employees to whom the money was to be transferred, the amounts due to each employee and the related accounts.

As such, the activity of the defendant (who appropriated the money in the manner described) was decisive in the operation of the payment of salaries to the employees of the company, he initiated the procedure for the payment of salaries by making the annexes (which were the product of the offence of intellectual forgery in continuous form, provided for in Article 321 of the Criminal Code, with the application of Article 35 of the Criminal Code) and completed the procedure by sending the document to the bank, so that the money could be deposited in the accounts of the employees.

Even though the defendant did not have the power to issue payment orders (an act by which the money actually left the assets of the civil party), by sending the file in electronic format to the bank, he released the money in the administration of the civil party, a circumstance which falls within the notion of de facto manager (Decision no. 596/RC/2022).

It has also been held in judicial practice, in another case decision, that the President of the Chamber of Commerce and Industry may also be an active subject of the offence of embezzlement. The status of 'official' required by law for the active subject of the offence of embezzlement is fulfilled both under Article 308 of the Criminal Code, as a person who temporarily performs, with or without remuneration, a task of any kind within a legal person, and under Article 147(2) of the Criminal Code, as a person who performs, with or without remuneration, a task of any kind within a legal person. (2) of the previous Criminal Code, as any person who temporarily exercises, with any title, regardless of how he was appointed, a task of any nature, with or without remuneration, in the service of a legal person other than public authorities, public institutions, institutions or other legal persons of public interest. Both conditions laid down by law are met for a person to be considered a civil servant within the meaning of the criminal law because: the person is carrying out an activity in the public interest within an institution of public utility (a condition met by the Chamber of Commerce and Industry of Romania and its president), and the institution is invested in its activity by a public authority (the Romanian Parliament, in this case).

In relation to the express powers laid down in Article 39 of Law No 335 /2007, the President who is one of the governing bodies of the Chamber of Commerce and Industry has the following main duties: a) represents and engages the National Chamber in relations with natural and legal persons, both in the country and abroad; b) concludes, amends and terminates, under the law,

the employment contracts of the employees of the National Chamber; c) ensures the implementation of the decisions of the general assemblies, the college and the board of directors; d) ensures the implementation of the income and expenditure budget of the National Chamber, approved by the general assembly; e) convenes the general assembly (...); f) convenes and conducts meetings of the Bureau and the Governing Board; g) performs any other duties laid down by the General Assembly and the Governing Board (Decision no. 574/RC/2022).

A particular feature of the active subject of the offence of embezzlement is also the special status of bank official, in relation to which the High Court of Cassation and Justice of Romania – Pannel competent to resove law issue (Decision no. 26/2014) has ruled that the concept of "public office" is related to the concept of "public interest", both of which seek to satisfy needs in the general interest, on the basis of constitutional prerogatives, which make the public interest prevail over the private interest, so that the public official carries out his activity with a view to achieving the public interest and, as such, in the exercise of his function, he has a duty to consider the public interest above personal interest.

In the same sense, the High Court of Cassation and Justice of Romania – Pannel competent to resove law issue (Decision no. 20/2014), established that: "are included (in the category of civil servants assimilated, according to Article 175 para. (2) of the Criminal Code) [...] private individuals who receive the management of a national or local public, economic or socio-cultural service, thus becoming of public utility. These are individuals who operate within the framework of private profit-making legal persons: commercial companies which, by means of administrative contracts, exploit public goods and services in the interests of the national or local community, as the case may be".

A wholly privately owned bank (credit institution) carries out an activity in the public interest, i.e. banking, which is defined in the provisions of Article 7(7) of the Treaty. (1) point 1 of Government Emergency Ordinance No 99/2006 as "attracting deposits or other repayable funds from the public and granting loans for own account; "The nature of the activity carried out by wholly privately owned banks (credit institutions) goes beyond the sphere of private interest and falls within the sphere of public interest, as they are included in the framework of legal persons exercising a service of public interest. In this regard, in the recitals of Decision No XIII/2006, the United Sections of the High Court of

Cassation and Justice held that “banking activity, although carried out by legal persons governed by private law, is undeniably in the public interest”.

The condition laid down in Article 175(1)(b) of the EC Treaty is that the public sector must be a public undertaking. (2) of the Criminal Code is fulfilled only when a public authority can entrust or supervise/control the activity of the person performing a public service. Basically, the public official must have a connection with the state authority and, as expressly stated in the Explanatory Memorandum to the new Criminal Code, Art. 175 para. (2) “concerns those persons who, although not properly civil servants, exercise powers of public authority delegated to them by an act of the competent state authority and are subject to its control, which justifies their assimilation to civil servants”.

A bank official, who is an employee of a bank (credit institution) wholly owned by private capital, does not satisfy the condition that he be entrusted by the public authorities with the exercise of a service in the public interest.

The employment contract concluded between the wholly privately owned bank (credit institution) and the bank official does not have the meaning of an appointment to perform a service in the public interest.

Similarly, in the appeal in cassation, the case-law of the Supreme Court assessed the fulfilment of the conditions of the active subject by reference to the alleged capacity of manager, as long as the defendant was performing the duties of a cook.

On the basis of previous case law which shows that an official, whether de jure or de facto manager, is an active subject of the offence of embezzlement, the High Court found that the defendant was a civil servant, initially as de facto manager, and later as de jure manager. In that regard, it was held that the defendant had been employed by individual employment contract as a cook and, subsequently, by decision of the company's administrator, he had been employed as manager of a work point, taking over the management of the shop, taking cognisance of and signing in that regard. It was also pointed out that the job description signed by the defendant stated that the post he held was that of a management worker.

As a result, the High Court found that the appellant was correctly held to have been a civil servant within the meaning of the criminal law, being a manager in fact, and subsequently in law, throughout his employment with a company (Decision no. 392/RC/2018).

Also, from the point of view of the active subject of the offence of embezzlement, the appeal in cassation assessed the capacity of manager of a locomotive driver, an employee of SNTFC CFR SA, who constantly recorded, on the locomotives which he serviced, unjustified consumption, totalling 305.6 kg of diesel, creating damage to the assets of the civil party in the amount of 2 218 lei, by appropriating the fuel using several means of misappropriation.

In the extraordinary appeal, the defendant argued that he did not have the status of manager required by the rule of the offence.

The Supreme Court, assessing the appeal in the light of the case of cassation provided for in Article 438(2)(a) of the EC Treaty, held that (1), item 7 of the Code of Criminal Procedure, held that the concept of manager is not limited to the definition given by Article 1 of Law No. 22/1969, Article 31 of the same act extending the scope of liability to de facto managers, namely to “the employee who receives, keeps and releases goods without being a manager within the meaning of Article 1”.

In this regard, it was held that the defendant appellant had received diesel fuel as an employee of S.N.T.F.C. C.F.R. S.A. in the position of mechanic, having the obligation to keep and use it according to its destination and for the purpose of carrying out the object of activity of the economic agent. For these reasons, fuel received by an employee for the performance of his duties is recorded in his management, it being of no importance that the asset is consumable, in which context the employee also acquires the status of de facto manager within the meaning of Article 31 of Law No 22/1969 (Decision no. 603/RC/2022).

Another approach to the offence of embezzlement in the appeal in cassation was in relation to the notary public's capacity as administrator or manager in the case of sums of money withheld by him by way of tax from the transfer of real estate, in respect of which he is obliged to transfer them to the state budget.

In order to make a complete assessment of this situation, it is necessary to recall the incidence of the legal rules and the development of case law in the light of the decisions handed down in the event of the notary's failure to transfer the sums received by way of tax on legal acts transferring property.

Thus, Article 6 of Law No 241/2005 on the prevention and punishment of tax evasion criminalises the act of withholding and wilful non-payment, within 30 days of the due date, of amounts representing taxes or contributions withheld at source.

By Constitutional Court Decision no. 363 of 07.05.2015, published in the Official Gazette, Part I, no. 495 of 06.07.2015, it was found that the provisions of Article 6 of Law no. 241/2005 for the prevention and punishment of tax evasion are unconstitutional, considering that a subject of law cannot be required to comply with a law that is not clear, precise, predictable and accessible, since he cannot adapt his conduct according to the normative hypothesis of the law.

In this regard, the case-law of the High Court, subsequent to Decision no 363/2015 of the Constitutional Court, has consistently held that the tax evasion offences provided for in Article 6 of Law No 241/2005 have been decriminalised (Decision no. 307/A/2015, Decision no. 330/A/2015 and Decision no. 6/A/2016, finding the unconstitutionality of the criminalization rule provided in art. 6 of Law no. 241/2005, by Constitutional Court Decision no. 363 of May 7, 2015, has the effect of decriminalizing the act provided for in art. 6 of Law no. 241/2005, with the consequence of the acquittal decision, according to art. 16 para. (1) lit. b) thesis I and art. 396 para. (5) from the Criminal Procedure Code).

In this case, following the decision of the Constitutional Court and the finding that the offence provided for in Article 6 of Law no. 241/2005 had been decriminalised, in the case of the acts committed by notaries public consisting in the failure to remit taxes on income from the transfer of real estate property, a committal for the offence of abuse of office was ordered.

Initially, after the Constitutional Court Decision no. 363 of 7 May 2015, the case law of the Supreme Court ruled that the notary's act is circumscribed to the crime of abuse of office, holding, in majority, that the obligation of the notary public, established by Law 541/2003 to calculate, collect and remit that tax is a duty that derives directly from the laws, the requirement established by Decision no. 405/2016 of the Constitutional Court being satisfied, and the failure to do so may constitute a material element of the crime of abuse of office (Decision no. 358/A/2017).

At the same time, in a separate opinion, it was held that the collection and remittance of tax on income from the transfer of real estate is not part of the duties of the notary's office, since the performance of the notary's duties in this respect, contrary to the law, has no effect on the proper performance of notarial activity, but only on the efficient collection by the State of the taxes due by taxpayers (Decision no. 358/A/2017).

The High Court held in the appeal in cassation that the notary public's failure to transfer to the State budget the tax collected on the income from the

transfer of real property, in accordance with the Tax Code, does not meet the constituent elements of the offence of abuse of office provided for in Art. 297 of the Criminal Code, since, in the case of the notary public, the duties of the service to which the provision of Article 297 of the Criminal Code refers are within the scope of the duties specific to the notary's activity as a service in the public interest which the notary is entrusted with performing. Consequently, the offence of abuse of office provided for in Article 297 of the Criminal Code may be committed by the notary public in the exercise of his duties relating to the performance of notarial acts and procedures and not to the performance of fiscal transactions, even if these are provided for in primary legislation (Decision no. 407/RC/2018).

As a result of this development in case law on the acts committed by notaries public, consisting in the failure to remit taxes on income from the transfer of real estate property, it has recently been ordered that they be detained and prosecuted for the offence of embezzlement.

In the case under consideration, it was stated that the offence of embezzlement consisted in the fact that, in his capacity as a notary public, he received, in the period from 1.01.2013 to 31.12.2014, by way of tax from the transfer of real estate, the sum of 117,865 lei, which he appropriated for his own benefit.

Contrary to the opinion of the court of appeal, it was held in the appeal in cassation that, from the point of view of the active subject of the offence of embezzlement, it is doubly circumstantial, as it can only be the person who, at the time of the commission of the offence, has the capacity of a civil servant and of administrator or manager. In this regard, it has been pointed out that not all public officials, as defined in Article 175 of the Criminal Code, can also be managers or administrators. Thus, persons who perform a service of public interest for which they have been appointed by the public authorities or who are subject to their control or supervision with regard to the performance of that public service are not managers or administrators.

With regard to the concept of “de facto manager”, which was enshrined prior to the amendments made by Law No 140/1996 amending and supplementing the Criminal Code, it was considered that, under the current rules, the status of “de facto manager” does not confer the status of active subject of the offence of embezzlement, since Article 175 of the Criminal Code expressly provides that the public official must perform the public function “permanently or temporarily”.

Thus, in relation to the provisions of Article 175 of the Criminal Code and Article 1 of Law No. 22/1969 on the employment of managers, the provision of guarantees and liability in connection with the management of the property of economic agents, authorities or public institutions, by reference to the rule of criminality circumscribed by the provisions of Article 295 of the Criminal Code, the notary public can meet neither the condition of administrator nor that of manager (Decision no. 149/RC/2021).

As far as we are concerned, we consider that the notary public's failure to transfer, within the time-limit laid down by law, the sums received by way of tax from the transfer of immovable property may give rise to criminal liability for the offence of embezzlement from the point of view of the active subject.

If, as regards the capacity of manager or administrator, certain discussions are necessary, we consider that the notary public has the capacity of civil servant, within the meaning of the provisions of Art. 175 para. 2 of the Criminal Code, which states that a person is considered a public official, within the meaning of the criminal law, who performs a service of public interest for which he has been appointed by the public authorities or who is subject to their control or supervision with regard to the performance of that public service.

In this regard, we recall that according to Article 3 para. 1 of No. 36/1995, Notaries Public and Notarial Activity Act, republished, the notary public is entrusted with the performance of a service in the public interest, has the status of an autonomous function and is appointed by the Minister of Justice.

The explanatory memorandum of the new Penal Code explains the significance of the function thus exercised: “An important change has also been made with regard to the content of the notion of civil servant. In the proposed legislation, in line with the solutions in this area in other legislation, the concept of civil servant will designate the person who exercises, permanently or temporarily, powers enabling him/her to take decisions, to participate in taking decisions or to influence the taking of decisions, within a legal person carrying out an activity that cannot be subject to the private domain. At the same time, the draft has opted to assimilate natural persons exercising a profession in the public interest, for which a special authorisation by the public authorities is required and which is subject to their control, such as notaries, bailiffs, etc., to civil servants (Lefterache L.V., 2016).

Moreover, the case law of the High Court itself has attested to the fact that the notary public fulfils the quality required by Article 175 of the Criminal

Code. Thus, the court ordered the conviction of the defendant T.M., notary public, for the offence of abuse of office against the interests of persons and intellectual falsehood (Decision no. 171/A/2015); ordered the conviction of the defendant D.P., notary public, for the offence of negligence in office (Decision no. 235/A/2015); ordered the conviction of the defendant S.M., notary public, for committing the offence of abuse of office (Decision no. 358/A/2017); ordered the termination of the criminal proceedings following the lapse of the statute of limitations on the criminal liability of the defendant O.C.R., notary public, for committing the offence of abuse of office(Decision no. 231/A/2019).

Moreover, the Constitutional Court held that "(...) according to the provisions of Articles 2 and 3 of Law 36/1995, notarial activity is carried out by notaries public through notarial acts and notarial legal consultations, under the conditions of the law, the notary public being entrusted to perform a service of public interest. ... The fact that the notary exercises public authority results from the nature and content of the activity which he performs, as an agent of the State, beyond any qualification of the law (paragraph 19) ... However, since the notary public is a 'public official', the persons occupying this position exercise the powers and responsibilities laid down by law for the purpose of exercising the prerogatives of public authority with which they are entrusted' (paragraph 20) (Decision no. 7/2018).

With regard to the status of manager, we note that the concept of manager is defined in Article 1(1) of the Staff Regulations. 1 of Law no. 22/1969 as an employee of a legal person whose main duties are the receipt, keeping and release of goods under its administration, use or possession, even temporarily. For the purposes of the legal provisions governing management, in particular Law No 22/1969, as amended by Law No 54/1994, the status of manager by operation of law derives directly from the official's main duties, is acquired in the context of the legal employment relationship and confers on the holder rights and obligations which he exercises in the context of direct and material contact with the goods.

Manager is the person who has, as main duties, receiving, keeping and releasing goods. Legal manager is the person who performs the activities specific to the de facto manager.

We believe that the public notary is vested to perform a service of public interest within and with the status of an autonomous function, context in which he receives the amounts paid by the taxpayer with the title of income tax from

the transfer of properties, which he keeps for the period provided by law and then transfers them to the state budget.

We remind you that the provisions of the Fiscal Code impose on the notary the obligation to calculate and collect the tax before authenticating the act or, as the case may be, drawing up the finalization of the succession, so that this tax is paid (transferred to the state budget) by the 25th inclusive of the month following the one in which it was collected. In consideration of these provisions, we appreciate that the obligation imposed on the notary public to collect the sums of money related to the income tax from the transfer of real estate properties, to keep them and later, to transfer them to the state budget within the term provided by law, gives the notary the quality to manage these amounts. This legal obligation rests with the notary as a result of the imperative provisions imposed by the Fiscal Code, being assumed at the time of entry into the profession, along with all of his professional obligations. His duties give the notary the capacity to manage sums of money, sums that do not enter into his patrimony, but, from the moment of receipt, belong to the state, the notary owning them, by virtue of the law, for the purpose of transfer to the state budget. The law imposes on the notary public the obligation to collect and transfer, subsequently, the sums of money collected as income tax from the transfer of real estate properties, turning him into a precarious holder of these assets and, implicitly, in managing them, until the moment of transfer to the state budget.

Moreover, although the payment amounts are incumbent on the taxpayer as income tax from the transfer of real estate properties, the legal obligation of collection and transfer, imposed on the public notary by the provisions of the Fiscal Code, transforms the latter into a manager of the sums of money received. The fact that the legal obligation generates attributions related or only tangential to the actual notarial activity appears to be irrelevant in relation to this quality.

In this sense, we appreciate that the withholding of the sums of money collected as tax from the income from the transfer of real estate properties, for a period of time, respectively until the 25th inclusive of the month following the one in which it was withheld, amounts paid and owed by taxpayers as tax, transforms the public notary into a manager of sums of money until the moment of their transfer to the state budget, and under this aspect, the public notary can acquire the quality of active subject of the crime of embezzlement, in the previously mentioned case.

The previously mentioned jurisprudence supports the existence of a criminal offense within such crimes. Offenses with the same factual basis were assessed as tax evasion, according to art. 6 of Law 241/2005, until the moment of declaring the criminalization rule as unconstitutional, the illegal activity was then characterized as abuse of office, so that later the accusations were directed towards the crime of embezzlement. In this sense, contrary to the opinion retained in the cassation appeal, we consider that in the presented situation, the public notary can be an active subject of the crime of embezzlement, having both the capacity of an official and that of a manager.

From a similar perspective, the question arises whether the bailiff can commit the crime of embezzlement if he appropriates the sums of money from the enforcement procedure due to the creditors.

We consider that in this case too, the bailiff fulfills the capacity of an active subject and can incur criminal liability for the crime of embezzlement in the case of the obligation imposed on him to collect and dispose of the amounts transferred to the recording account, in the event that the amounts of money, which were to be transferred, in the forced execution procedure, the creditors were appropriated in their own interest.

Contrary to the opinion of the supreme court which supported the non-meeting of the constitutive elements of the crime from the perspective of the active subject as a result of the fact that the bailiff does not fulfill either the condition of administrator or that of manager (Decision no. 228/A/2023), we appreciate that the bailiff fulfills the double quality required by the incrimination norm, both as an official as well as a manager.

Similar to the public notary, it cannot be argued that the bailiff does not have the capacity of an official within the meaning of the provisions of art. 175 of the Criminal Code. The jurisprudence of the supreme court certified the fact that the bailiff fulfills the capacity imposed by the law.

In this sense, the High Court ordered the conviction of the defendant D.C.R, bailiff, for committing the crime of abuse of office (Decision no. 312/A/2020); ordered the conviction of the defendant G.N., bailiff, for committing the crime of abuse of office (Decision no. 272/A/2021); ordered the conviction of the defendant D.M., bailiff, for committing the crime of abuse of office (Decision no. 14/A/2022); it was decided to convict the defendant P.D., bailiff, for committing the crime of abuse of office (Decision no. 471/A/2015).

Regarding the quality of manager, we consider that in the sense of the legal provisions that regulate the matter of management, mainly art. 1 paragraph (1) and art. 31 of Law no. 22/1969 amended, the quality of manager derives directly from the official's main job duties, being acquired within the legal employment relationship and confers on its holder rights and obligations that he exercises in the context of direct and material contact with goods.

The provisions of the Code of Civil Procedure and the Statute of the National Union of Judicial Executors and the profession of judicial executor impose on the executor the obligation to manage the money from the recording account in order to distribute it to creditors. The sums of money collected by the executor from the debtors, in the enforcement procedure, are released only on the basis of the decision of the bailiff or the enforcement court. Thus, the bailiff is empowered to perform a service of public interest within an autonomous function.

The legal reports created in a foreclosure file are premised on the attributions or specific functional powers of the executor regarding the sums of money transferred to the recording account and the legal obligation to hand over the money to the creditors. The bailiff exercises powers of collection of the sums of money owed to the creditors and disposes of these goods, exclusively in their interest. The sums of money collected in the foreclosure procedure are released only on the basis of its disposition or the enforcement court. On these sums, which do not belong to him, the bailiff disposes limitedly, respectively only in favor of the creditors, an aspect that creates in his charge a management attribute within some reports born from the instrumentation of the forced execution file. The preliminary report is replaced by the specific reports generated by the assumption of the execution file within which a fee will be charged for the service provided.

In this context, we appreciate that the appropriation of the sums of money that should have been transferred to the creditors in the foreclosure procedure, represents an illegal conduct of the bailiff and imposes criminal liability for the crime of embezzlement.

The supreme court did not evaluate the conditions for incurring criminal liability for the crime of embezzlement in this particular case of the bailiff in the cassation appeal, and the opinion expressed in this approach was shared only on the occasion of formulating a separate opinion of a decision pronounced by the High Court as a court of appeal.

The crime of embezzlement – aspects of objective typicality

According to the provisions of art. 295 of the Criminal Code, the crime of embezzlement consists in the appropriation, use or trafficking by an official, in his own interest or for another, of money, values or other assets that he manages or administers.

So, from the objective point of view, embezzlement is a comissive crime, and the type of conduct incriminated is indicated by the verbum regens.

The material element of the objective side can be realized through three alternative ways, namely appropriation, use or trafficking of money, valuables or other goods, in personal interest or for another, all of which constitute ways of evasion.

By "appropriation" is meant the removal of an asset from the possession or custody of a legal entity and its transfer into the ownership of the perpetrator, so that he can dispose of it through consumption, use or alienation.

Therefore, in the case of appropriation, first of all there must be an act of theft of the asset from the patrimony protected by law, and secondly, an act of passing the asset into the possession of the author of the embezzlement, possession which he must have, from the point of view of view of the perpetrator, definitive character. The perpetrator behaves as an owner in relation to these goods, definitively passed into his possession. The circumstance that this transfer of the good into the possession of the perpetrator can be achieved "in his interest or for another" does not change the meaning of the term "appropriation" in the content of art. 295 of the Criminal Code. Even if it is carried out for or in the interest of another person, any operation or effect in favor of a third party must be preceded by the appropriation of the asset by the perpetrator of the crime of embezzlement, respectively by the removal of the asset from the possession or detention of the injured person and its passing into the possession of the perpetrator. The phrase used by the legislator in the content of art. 295 of the Criminal Code "in his own interest or for another" is circumscribed to the subjective side of the crime, and not to the objective one, and reflects the intention of the legislator to criminalize the act regardless of whether the appropriation was made in the personal interest of the perpetrator or in the interest of another person.

"Usage", as a normative way of achieving the material object of the analyzed crime, consists in the initial removal of an asset from the possession of

a legal entity and its use, for the benefit of the perpetrator, followed by the return of the asset to the patrimony from which it was removed.

"Trafficking", in the sense of the same criminalization rule, consists in removing an asset from the patrimony of a legal person and using it by the perpetrator in order to obtain a profit, in a speculative manner.

The immediate consequence consists in the creation of a state of danger for social relations related to the economic activity of the legal entity in question, by removing the asset that forms the material object of the crime from the patrimonial sphere in which it was originally located and using it in the interest of the perpetrator or another person (Decision no. 461/2016).

Therefore, the premise situation consists in the case of this offense in the existence of administration or management relations between an institution, public authority or legal person, on the one hand, and a public official or a private official, on the other hand, having as object tangible goods that have an economic value, i.e. "money, securities or other goods".

In its jurisprudence (Decision no. 177/RC/2022), the High Court held that the constitutive elements of the crime of embezzlement are met, from the perspective of the material element, when the goods under the administration of the defendant, in his capacity as sole administrator of the company, are the very buildings that were the subject of the sales contracts -purchase. She, as the administrator appointed in the general assembly of 25.08.2004, had the authority to conclude disposition documents regarding the company's assets, even if the exercise of the right to dispose was conditioned by taking some decisions in the general assembly.

It was assessed that the circumstance that the defendant did not participate in the decision-making regarding the sale of the real estate is irrelevant, in the context where the decision itself is not the object of the accusation, but the fact that the sale was made at a much undervalued price, which was likely to generate a damage to the patrimony of the managed company, the transmission of the property operating in the exclusive interest of the buyer.

The practice of the supreme court is not uniform, however, in terms of meeting the elements of objective typicality, when the crime of embezzlement was committed in the form of appropriation for another. Relevant in this sense is the contradictory jurisprudential interpretation of the High Court regarding the notion of "appropriation for another" inserted in the contents of art. 295 paragraph 1 of the Criminal Code.

In a first opinion, it was appreciated that appropriation involves an illegal action of removing from the possession or detention of a person sums of money, values or other goods under the management or administration of the author and passing them into his possession, so that he can order of them as their own property. Appropriation can also be achieved by passing into the effective possession of another person, as a result of the author's illegal activity, it is not necessary for the asset to be initially taken into possession by the perpetrator and only later to be passed on to another person.

The literal interpretation of the phrase "in his interest or for another", excludes such a conclusion in the consideration of the disjunctive conjunction "or" which reveals the regulation of two distinct alternatives. In the absence of an express legal provision, the principle of legality opposes a jurisprudential interpretation that would reduce the two alternative requirements to one. In the situation where the will of the legislator would have been that the appropriation would have always assumed the passing of the good into the possession of the perpetrator, the thesis "second time for another" appears to be meaningless, the reasoning being contrary to the legal provision.

Therefore, in practice, it was held that the manner in which the defendants acted, namely that by concluding the sales-purchase contracts, the real estate was removed from the company's patrimony, to the detriment of the company and in the interest of other people, as long as the price was much undervalued, even derisory in relation to the real market value and, moreover, it was even returned to the buyer in a short interval, in the form of rents paid by the company for their use, is circumscribed to the material element in the alternative version of appropriation (Decision no. 177/RC/2022).

It was also appreciated, in another case decision, that the facts retained in the charge of the defendant to conclude, as a representative of SC F. SRL and SC I. SRL, between January 2005 and June 2006, fictitious service contracts services between SC G. SA and the two companies it administers, not pursuing the provision of real services, but the appropriation of the amount of 2,997,000 RON from the patrimony of SC G. SA, meets the constitutive elements of the crime of complicity in embezzlement with particularly serious consequences , in continuous form. The action of the defendant who helped the executive management of SC G. SA to create the appearance of a legal activity by signing and appropriating some works that were carried out by the defendant D. and later "placed" the

sums of money obtained from the concluded contracts, including in the relations of business conducted with defendants E. and D (Decision no. 121/RC/2018).

At the same time, in the jurisprudence of the supreme court, the meeting of the constitutive elements of the crime of embezzlement in the form of embezzlement and the act of the defendant, mayor, having in administration the sums of money belonging to the town hall and exclusive management of the fuel cards used by the Town Hall for fuel supply and designed a mechanism by which to remove from the sphere of control of the passive subject the goods that it administers/manages, which, in reality, consist of the sums of money affected by the municipality for the purchase of this product (Decision no. 378/RC/2022).

Equally, it was found that the act of the defendant, an employee of the company S.C.P.SRL, a company whose object of activity was the practice of gambling, having the function of cashier to credit the roulette with points to allow the defendant BRG to continue the game, without but to pay their value, but with the promise to bring him the money later, meets the constitutive elements of the crime of embezzlement in the variant of appropriation for another (Decision no. 563/RC/2021).

The second opinion outlined by the jurisprudence of the supreme court, minority, regarding the alternative version of appropriation reveals a different perspective, appreciating that first of all there must be an act of theft of the property from the patrimony protected by law, and secondly, an act of passing the good into the possession of the author of embezzlement, possession which must have, from the perpetrator's point of view, a definitive character. The perpetrator behaves as an owner in relation to these goods, definitively passed into his possession. The circumstance that this transfer of the good into the possession of the perpetrator can be achieved “in his interest or for another” does not change the meaning of the term “appropriation” in the content of art. 295 Criminal Code. Even if it is carried out for or in the interest of another person, any operation or effect in favor of a third party must be preceded by the appropriation of the asset by the perpetrator of the crime of embezzlement, respectively by the removal of the asset from the possession or detention of the injured person and its passing into the possession of the perpetrator. The phrase used by the legislator in the content of art. 295 Criminal Code “in his own interest or for another” is circumscribed to the subjective side of the crime, and not to the objective one, and reflects the legislator's intention to criminalize the act

regardless of whether the appropriation was made in the personal interest of the perpetrator or in the interest of another person.

In consideration of these aspects, in a case decision it was ordered to acquit the defendants motivated by the fact that the documents of the file do not reveal that they appropriated any amount of money for themselves or for another, but that as a director and member of the committee of credits of a bank, based on prior agreements with certain individuals, improperly exercising his duties, approved and subsequently signed 38 credit contracts with individuals and legal entities, in violation of banking regulations, knowing that the documentation is is incomplete, has flaws, or contains unreal documents (service contracts, rental contracts, financial statements, supporting documents), causing damage to the civil party in the amount of 19,352,522.25 lei and obtaining undue benefits both for himself (consisting in the benefits that were to be received following the granting of credits), as well as for the defendants beneficiaries of the approved credit contracts (consisting in the provision of sums of money for the payment of outstanding installments) (Decision no. 437/RC/2022).

In the relevant jurisprudence of the supreme court, it was held that the appropriation constitutes one of the material elements specific to the crime of embezzlement and is integrated into the objective side of the crime, while the purpose of the appropriation is an element that belongs to the subjective side and indicates whether the appropriation was made in the personal interest of the perpetrator or in the interest of another person. Consequently, the two are distinct constitutive elements of the crime of embezzlement and must be analyzed separately, each having to meet specific requirements (Decision no. 64/RC/2019).

Thus, from the perspective of the appropriation action, the elements of objective typicality will not be met if the material object of the crime of embezzlement ended up directly in the patrimony of a third party, even if this happened as a result of the exercise of the official duties by the perpetrator, as long as the latter did not take possession of the material object for a moment.

As far as we are concerned, we agree with the minority opinion and appreciate that appropriation as a way of stealing an asset consists in removing that asset from the possession or custody of a person and passing it into the possession of the perpetrator who can dispose of it, that is, can consume it, use it or dispose of it.

Or, even in the variant of appropriation for another, it is necessary that the act of the perpetrator of the crime constitutes a removal by him of the asset from the patrimony of the injured person, the action of “appropriation” implies a possession of the perpetrator with the asset, in the sense that, together with the action of appropriation, he will act towards the good as if he were their owner.

As a result, if the definitive removal of money from the patrimonial sphere of the injured person and the causing of damage is not preceded by an action to appropriate the amount of money by the defendants, such an act does not correspond to the pattern of incrimination of the crime of embezzlement.

The literal meaning of the word is to make it one's own, the term “appropriation” from the content of the crime of embezzlement translates the idea of making one's own an asset belonging to the owner's property (Toader T., Antoniu G, 2015).

Conclusions

The presentation of this table of the solutions pronounced by the supreme court in the matter of the appeal in cassation regarding the typical conditions of the crime of embezzlement, aimed to know the adjacent arguments, with the insertion of the objective and subjective aspects considered in the legal interpretation carried out on the case of annulment provided by the provisions of art. 438 paragraph 1 point (7) of the Code of Criminal Procedure. Although, the non-unitary judicial practice generated by a different interpretation of the norm of criminalization can lead to divergent solutions and susceptible to criticism, still the jurisprudence remains an “open book”, the most expressive and relevant form of objectification of “law in motion”, being the first benchmark of the quality of the law susceptible of application to various legal situations that have reached a conflicting state.

References

High Court of Cassation and Justice of Romania, Criminal Chamber, Decision no. 78/RC/2015, https://www.scj.ro/en/736/Search-jurisprudence;

High Court of Cassation and Justice of Romania, Criminal Chamber, Decision no. 442/RC/2017, https://www.scj.ro/en/736/Search-jurisprudence;

High Court of Cassation and Justice of Romania, Criminal Chamber, Decision no. 596/RC/2022, https://www.scj.ro/en/736/Search-jurisprudence;

High Court of Cassation and Justice of Romania, Criminal Chamber, Decision no. 574/RC/2022, https://www.scj.ro/en/736/Search-jurisprudence;
High Court of Cassation and Justice of Romania, Criminal Chamber, Decision no. 392/RC/2018, https://www.scj.ro/en/736/Search-jurisprudence;
High Court of Cassation and Justice of Romania, Criminal Chamber, Decision no. 603/RC/2022, https://www.scj.ro/en/736/Search-jurisprudence;
High Court of Cassation and Justice of Romania, Criminal Chamber, Decision no. 307/A/2015, https://www.scj.ro/en/736/Search-jurisprudence;
High Court of Cassation and Justice of Romania, Criminal Chamber, Decision no. 330/A/2015, https://www.scj.ro/en/736/Search-jurisprudence;
High Court of Cassation and Justice of Romania, Criminal Chamber, Decision no. 6/A/2016, https://www.scj.ro/en/736/Search-jurisprudence;
High Court of Cassation and Justice of Romania, Criminal Chamber, Decision no. 358/A/2017, https://www.scj.ro/en/736/Search-jurisprudence;
High Court of Cassation and Justice of Romania, Criminal Chamber, separate opinion in Decision no. 358/A/2017, https://www.scj.ro/en/736/Search-jurisprudence;
High Court of Cassation and Justice of Romania, Criminal Chamber, Decision no. 407/RC/2018, https://www.scj.ro/en/736/Search-jurisprudence;
High Court of Cassation and Justice of Romania, Criminal Chamber, Decision no. 149/RC/2021, https://www.scj.ro/en/736/Search-jurisprudence;
High Court of Cassation and Justice of Romania, Criminal Chamber, Decision no. 171/A/2015, https://www.scj.ro/en/736/Search-jurisprudence;
High Court of Cassation and Justice of Romania, Criminal Chamber, Decision no. 235/A/2015, https://www.scj.ro/en/736/Search-jurisprudence;
High Court of Cassation and Justice of Romania, Criminal Chamber, Decision no. 358/A/2017, https://www.scj.ro/en/736/Search-jurisprudence;
High Court of Cassation and Justice of Romania, Criminal Chamber, Decision no. 231/A/2019, https://www.scj.ro/en/736/Search-jurisprudence;
High Court of Cassation and Justice of Romania, Criminal Chamber, Decision no. 228/A/2023, https://www.scj.ro/en/736/Search-jurisprudence;
High Court of Cassation and Justice of Romania, Criminal Chamber, Decision no. 312/A/2020, https://www.scj.ro/en/736/Search-jurisprudence;
High Court of Cassation and Justice of Romania, Criminal Chamber, Decision no. 272/A/2021, https://www.scj.ro/en/736/Search-jurisprudence;
High Court of Cassation and Justice of Romania, Criminal Chamber, Decision no. 14/A/2022, https://www.scj.ro/en/736/Search-jurisprudence;
High Court of Cassation and Justice of Romania, Criminal Chamber, Decision no. 471/A/2015, https://www.scj.ro/en/736/Search-jurisprudence;
High Court of Cassation and Justice of Romania, Criminal Chamber, Decision no. 177/RC/2022, https://www.scj.ro/en/736/Search-jurisprudence;

High Court of Cassation and Justice of Romania, Criminal Chamber, Decision no. 177/RC/2022, https://www.scj.ro/en/736/Search-jurisprudence;

High Court of Cassation and Justice of Romania, Criminal Chamber, Decision no. 121/RC/2018, https://www.scj.ro/en/736/Search-jurisprudence;

High Court of Cassation and Justice of Romania, Criminal Chamber, Decision no. 378/RC/2022, https://www.scj.ro/en/736/Search-jurisprudence;

High Court of Cassation and Justice of Romania, Criminal Chamber, Decision no. 563/RC/2021, https://www.scj.ro/en/736/Search-jurisprudence;

High Court of Cassation and Justice of Romania, Criminal Chamber, Decision no. 437/RC/2022, https://www.scj.ro/en/736/Search-jurisprudence;

High Court of Cassation and Justice of Romania, Criminal Chamber, Decision no. 64/RC/2019, https://www.scj.ro/en/736/Search-jurisprudence;

High Court of Cassation and Justice of Romania, Pannel competent to resove law issue, Decision no. 26/2014, https://www.scj.ro/en/736/Search-jurisprudence;

High Court of Cassation and Justice of Romania, Pannel competent to resove law issue, Decision no. 20/2014, https://www.scj.ro/en/736/Search-jurisprudence;

Lefterache L.V., Criminal Code, Commentaries on articles, 2nd edition, Ed. C.H. Beck, Bucharest, 2016;

The Constitutional Court of Romania, Decision no. 461/2016, https://www.ccr.ro/en/other-relevant-decisions;

The Constitutional Court of Romania, Decision no. 7/2018, https://www.ccr.ro/en/other-relevant-decisions;

Toader T., Antoniu G, Explanations of the New Penal Code, Ed. Universul juridic, Bucharest, 2015;

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The Possibility of Analysing an Exception of Illegality of The Act of Initiating the Criminal Action and The Detention of One of the Cases provided for in art. 16 para. (1) of Criminal Procedure Code in The Preliminary Chamber Procedure Provided by art. 342 of CRPC

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Abstract

In the present study, the authors present a situation extracted from the Romanian criminal jurisprudence, with regard to an unprecedented situation, which generated controversies concerning the possibility of being the subject of the preliminary chamber or not. In order to analyse and express a documented point of view regarding the correct solution of a procedural law problem, such as the one in this study, the authors also present a request for resolution of a legal problem that was referred to the High Court of Cassation and Justice, which is in course of settlement, as well as how mutatis mutandis arguments from that legal situation could be applied in the case presented.

***Keywords**:* preliminary chamber; exception of illegality of the act of initiating the criminal action; indictment irregularity.

Introduction

The present criminal procedure code has introduced a new procedural phase into Romanian criminal procedural legislation, which targets the analysis of the aspects of jurisdiction and legality of the arraignment, as well as the

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verification of the legality of the administration of evidence and the execution of documents by the criminal investigation bodies. As expected, in jurisprudence a multitude of legal situations were encountered that the judge of the preliminary chamber faced, being invested with the analysis of their legality. The object of this study is a situation in which the incidence of one of the cases provided for in art. 16 para. (1) CrPC, namely the cases that prevent the initiation and exercise of the criminal action. We will present the applicable legislation in question, the case that generated controversies and the divergent opinions regarding the correct and just resolution of the preliminary chamber phase, as well as a similar situation, with which the High Court of Cassation and Justice was invested. for the issuance of a legal release.

Incidental legal texts in question

Law no. 135 of July 1, 2010 regarding the Criminal Procedure Code.

Art. 16 – The cases that prevent the initiation and exercise of the criminal action.

(1) The criminal action cannot be initiated, and once it has been initiated, it can no longer be exercised if:

a) the deed does not exist;

b) the act is not provided by the criminal law or was not committed with the guilt provided by the law;

c) there is no evidence that a person committed the crime;

d) there is a justifying reason or non-imputability;

e) there is no prior complaint, authorization or notification of the competent body or another condition provided by law, necessary for the initiation of the criminal action;

f) the amnesty or prescription intervened, the death of the suspect or the defendant natural person or the removal of the suspect or the defendant legal person was ordered;

g) the prior complaint has been withdrawn, in the case of crimes for which its withdrawal removes criminal liability, reconciliation has taken place or a mediation agreement has been concluded in accordance with the law;

h) there is a cause of non-punishment provided by law;

i) there is res judicata authority;

j) there has been a transfer of proceedings with another state, according to the law.

Art. 309 – Initiation of the criminal action.

(1) The criminal action is initiated by the prosecutor, by ordinance, during the criminal investigation, when he finds that there is evidence from which it follows that a person has committed a crime and there are no cases of obstruction provided for in art. 16 para. (1).

[...].

Art. 342 – The object of the procedure in the preliminary chamber.

The object of the procedure of the preliminary chamber is the verification, after the arraignment, of the competence and legality of initiating proceedings, as well as the verification of the legality of the administration of evidence and the execution of documents by the criminal investigation bodies.

Presentation of the matter

By conclusion no. 527/4.09.2020, Constanța County Court decided that under art. 4251 para. (7) point 2 letter a) CrPC rep. to art. 347 CrPC, to admit the appeal filed by the Prosecutor's Office attached to Constanța District Court against decision no. 543/15.06.2020 of Constanța District Court.

The Court annulled the contested conclusion and rejudging, pursuant to art. 346 para. (2) CrPC, rejected as unfounded the requests and exceptions invoked by the defendant S.O. regarding the irregularity of the notification to the court.

It also ascertained the competence and legality of the referral to Constanța District Court with indictment no. 763/P/2019 of the Prosecutor's Office attached to Constanța District Court, which ordered the prosecution of the defendant S.O. for committing the crime of qualified theft, provided for by art. 228 para. (1) – art. 229 para. (1) lit. a) Penal Code, with the application of art. 41 Penal Code, as well as the legality of the administration of evidence and the execution of criminal investigation documents.

In the end, the Court ordered the start of the trial looking at the defendant S.O. and sending the file to Constanța District Court.

In the recitals, it was found that by the criminal report no. 543/15.06.2020, ruled by Constanța District Court, the return to the Prosecutor's Office attached to Constanța District Court of criminal case no. 763/P/2019 regarding the defendant S.O., sent to court for committing the crime of qualified theft, prev. of art. 228 para. (1) – art. 229 para. (1) lit. a) of Penal Code, with the application of art. 41 of Penal Code.

To order thus, the preliminary chamber judge of Constanța District Court held that by indictment no. 763/P/2019 dated November 1, 2019 of the Prosecutor's Office attached to Constanța District Court, the defendant S.O. was sent to court, for committing the crime of qualified theft, prev. of art. 228 para. (1) – art. 229 para. (1) lit. a) of Penal Code, with the application of art. 41 of Penal Code.

In the reporting document, it was noted, in fact, that on January 18, 2019, around 14:15, while the injured person was on bus 2-43, between Centrul de Scafandri – Republica stations, the defendant S.O. stole a Huawei Y6 2018 mobile phone from the right pocket of the coat, the value of the damage being approximately 699 lei.

It was shown that the factual situation presented above is supported by the following means of evidence: the statement of the injured person P.M., the statements of the witnesses R.S., I.M.C. and O.Ş.; minutes of presentation for recognition from the video recordings of the surveillance cameras of bus 2-43, by the witnesses R.S. and I.M.C. and the boards with the video captures; minutes of recognition after filming; the statements of S.O. as a suspect/accused; the record of finding the “rose” type tattoo of the defendant and the photo board.

It was also mentioned that by the order of the criminal investigation bodies of January 18, 2019, it was ordered to start the criminal investigation regarding the crime of qualified theft, prev. of art. 228 para. (1) – 229 par. (1) lit. a) of Penal Code.

By the ordinance of the criminal investigation bodies dated March 1, 2019, confirmed by the prosecutor's ordinance dated March 1, 2019, it was ordered to continue the criminal investigation against the defendant S.O., and by the prosecutor's ordinance dated March 1, 2019 it was set in motion the criminal action against the same defendant.

Finding that the legal provisions that guarantee the discovery of the truth have been respected, that the criminal investigation is complete and that there is the necessary and legally administered evidence, as well as that the investigated crime exists, it was committed by the defendant and that he is criminally liable, pursuant to art. 327 lit. a) of CrPC it was ordered to send the above-mentioned defendant to court.

The case was registered in Constanța District Court on November 26, 2019.

Through the request submitted to the preliminary chamber file no. 32291/212/2019/a1 located on tabs 7-8 of the file, the defendant invoked

requests and exceptions, showing that during the criminal investigation, the defendant was detained for a period of 24 hours on February 28, 2019 and then arrested preventive order for a period of 30 days, starting from March 1, 2019, the defendant appealing against this solution.

On March 4, 2019, the minor injured person, accompanied by both parents, proceeded to authenticate a notarial statement in which he showed that he understood to reconcile with the defendant, this statement being submitted on March 5, 2019 at Constanța County Court, in order to be taken into account when judging the appeal against the preventive measure, which is why the defendant was immediately released.

It was also shown by the defendant that, after his release, he appeared at the notary's office and gave a reconciliation statement, and on March 6, 2019, the defendant's defense attorney submitted both notarial statements to the Prosecutor's Office attached to Constanţa District Court, submitting attached to his requests also the proof of the submission of statements to the Prosecutor's Office (page 9 of the preliminary chamber file).

It was also shown that the statements are not found in the criminal investigation file, and the prosecutor of the case, instead of ordering the closure of the case, ordered the prosecution of the defendant.

For these reasons, the return of the case to the Prosecutor's Office attached to Constanța District Court was requested for a just resolution of the case.

The requests and exceptions were not valid in law

It was also found that by the conclusion of January 29, 2020, ruled by Constanța District Court, the judge of the preliminary chamber admitted the requests and exceptions formulated by the defendant S.O., through the defense counsel, found the irregularity of the indictment no. 763/P/2019 of November 1, 2019 drawn up by the Prosecutor's Office attached to Constanța District Court, regarding the defendant S.O., and ordered the remedy of the irregularity of the notification act within 5 days from the communication of this decision.

In the motivation, it was shown that the case prosecutor solved the case with non-compliance with the provisions of art. 16 para. (1) lit. g) of Penal Code, as well as of art. 327 CrPC, ordering the prosecution of the defendant on November 1, 2019, although there was a cause for termination of the criminal process since March 6, 2019, when the defendant submitted to the criminal investigation file authentic statements of reconciliation.

Through the document submitted to the file, the Prosecutor's Office attached to Constanța District Court showed that in the preliminary chamber procedure, the incidence of any of the cases provided for by art. 16 of CrPC, on which only the judge at first instance will rule, requesting, consequently, the initiation of the judicial investigation against the defendant.

Analysing the documents and works within the file, the preliminary chamber judge held that, according to art. 346 para. (3) CrPC, the preliminary chamber judge can return the case to the prosecutor's office if:

a) the indictment is drawn up irregularly, and the irregularity was not remedied by the prosecutor within the term provided for in art. 345 para. (3) CrPC, if the irregularity leads to the impossibility of establishing the object or limits of the judgment;

b) excluded all evidence administered during the criminal investigation;

c) the prosecutor requests the restitution of the case, under the conditions of art. 345 para. (3) CrPC, or does not respond within the term stipulated by the same provisions.

Checking the file of the case, the judge of the preliminary chamber found that the irregularity established by the conclusion of January 29, 2020, respectively the illegal arraignment of the defendant, regarding which there was a cause for the termination of the criminal process since March 6, 2019, when the defendant submitted the authentic statements of reconciliation to the criminal investigation file, it was not remedied by the Prosecutor's Office attached to Constanța District Court.

Contrary to what was shown by the document submitted to the file for the court term of June 12, 2020, the Prosecutor's Office attached to Constanța District Court, showing that in the preliminary chamber procedure, the incidence of any of the cases provided for by art. 16 CrPC, with only the judge at first instance ruling on them, the judge of the preliminary chamber showed that the verification of the legality of the referral to court, is not equivalent to a ruling on the incidence of any of the cases provided for by art. 16 CrPC, since in the case no solution was ordered to terminate the criminal process in this procedure.

Only if the reconciliation of the parties had occurred after the court was notified of the indictment, the judge of the preliminary chamber should have ordered the start of the trial, and at the deadline fixed on the main issue of the matter of trial, the court should have taken note of this reconciliation.

The case is about the non-compliance with the provisions of art. 327 CrPC by the editor of the indictment, which is equivalent to the illegality of the arraignment, in the context where it was obvious that the solution that the case prosecutor had to give was completely different, considering the reconciliation statement submitted to the file by the defendant.

Thus, the indictment was drawn up without observing the circumstance that the defendant is not criminally liable, a verification that is imperatively required by art. 327 lit. a) the last thesis of CrPC.

Therefore, considering that the Prosecutor's Office attached to Constanţa District Court did not understand to remedy its own errors, insisting on sending the defendant to court, the only solution that was deemed necessary to be adopted in the case is the return of the case to the prosecutor's office, not being admissible for the case prosecutor's errors to be covered by the judge at first instance.

Consequently, seeing the provisions of art. 346 para. (3) CrPC, according to which the judge of the preliminary chamber returns the case to the prosecutor's office in case the detected irregularity was not remedied within the term provided by the law, based on the text of the law shown above, the return to the Prosecutor's Office was ordered in addition to Constanța District Court of criminal case no. 763/P/2019 regarding the defendant S.O.

The Public Prosecutor's Office attached to Constanța District Court filed an appeal against this conclusion, criticising it for illegality and groundlessness.

It was stated that in the justification of the appeal, the prosecutor from the Prosecutor's Office attached to Constanța District Court showed that, according to art. 342 CrPC, the object of the preliminary chamber procedure is the verification of the competence of the court referred to by the indictment and the competence of the criminal investigation bodies, the legality of the arraignment, the legality of the administration of the evidence, the legality of the execution of the criminal investigation documents.

In the preliminary chamber procedure, the validity of the accusation formulated by the referral act is not verified, nor the legality or validity of the retained legal classification or the existence of any impediment provided by art. 16 CrPC.

Thus, the prosecutor's omission not to attach to the criminal investigation file the documents submitted by the injured person attesting to the intervention of reconciliation cannot constitute an element of irregularity of the referral act

because, analysing the content of the indictment no. 763/P/2019 it can be stated that the preliminary chamber judge is not unable to establish the object and limits of the judgment.

The prosecutor considered that the legal solution that is required is not to return the case to the prosecutor's office in order to pronounce a solution to the classification, but to start the judicial investigation and pronounce a solution by the court to terminate the criminal process.

Examining the disputed conclusion in the light of the criticisms formulated, as well as ex officio, the judges of the preliminary chamber, in the exercise of the control of legality and grounds, found the appeal to be founded, admitting it.

It was shown that art. 342 CrPC establishes the object of the preliminary chamber procedure as the verification of the competence of the referred court and the criminal investigation body, the regularity of the referral act, the legality of the administration of evidence and the execution of criminal investigation documents.

The verification of the regularity of the indictment concerns two components, namely the form conditions extrinsic to the notification act, such as the verification in terms of legality and the basis by the superior hierarchical prosecutor and the verification from the perspective of compliance with the provisions of art. 328 CrPC and the substantive conditions, intrinsic to the indictment.

The second mentioned component concerns the suitability of the indictment to invest the court, respectively if the description of the facts that constitute the object of the accusation is sufficiently clear and complete, so that the limits and the object of the judgment are established. Given the procedural function of the preliminary chamber, the appearance of the validity of the indictment, which involves the evaluation of the evidence administered during the criminal investigation, the fairness of the legal framework, other material errors in the indictment or omissions that do not concern the object, are excluded from the scope of verifying the regularity of the referral act and the limits of the judgment, or the existence of any impediment provided for in art. 16 CrPC.

In this sense, contrary to the claims of the representative of the Prosecutor's Office attached to Constanța County Court, who argued that in the case of conciliation, the criminal action is devoid of object and not groundless, thus making it the subject of verification in the preliminary chamber and by the

judge of the preliminary chamber within the court, which assessed that the court cannot cover the errors of the prosecutor during the criminal investigation, the judges of the preliminary chamber of the court held that the acquittal or termination of the criminal process, following the finding of the incidence of any of the cases listed in art. 16 CrPC represent substantive solutions, which exceed the preliminary chamber procedure, as provided by art. 396 para. (5) and (6) CrPC. So, once the court is notified by an indictment that formally meets the conditions provided by the law, it cannot be verified in terms of the validity of the decision to send to court.

The mentioned article does not distinguish according to whether the case of termination occurred before or after the submission of the referral to the competent court, nor between cases of acquittal or termination of the criminal process, so that the only competent judicial body finds a cause for the termination of the criminal action, after arraignment, he is the judge at first instance.

The conclusions presented by the prosecutor of the Prosecutor's Office attached to Constanța County Court and the judge of the preliminary chamber of Constanța District Court are not supported by any criminal procedural norm and do not derive from the interpretation of any legal provision, so they cannot be retained. According to the theoretical considerations set out above, the irregularity of the notification act does not require the verification of the legality of the solution ordered by the prosecutor, that is arraignment, but only formal conditions related to the suitability of the act to invest the court.

It was found that non-compliance with art. 327 CrPC, the prosecutor having the authority to assess whether the prosecution of the defendant or another solution is required, the checks regarding the legality or validity of this solution being carried out on the main issue of the matter on trial.

Even if, in the judgment of the preliminary chamber judge from the court, the reason for termination is obvious, it should be noted that after the start of the trial, situations may arise that would not require a solution to terminate the criminal process: the document through which the reconciliation of the parties was achieved is not suitable to produce legal effects, the legal classification of the deed is erroneous, and the new classification does not allow the reconciliation of the parties or the withdrawal of the previous complaint, etc.

However, all these aspects require checks during the judicial investigation, and not in the preliminary chamber procedure, the object of which is limited to formal checks of the referral act.

Authors' opinion

As we mentioned at the beginning of this study, the appearance in Romanian procedural law of a new procedural phase, along with the current criminal procedure code, caused, as was probably expected, a multitude of eclectic, heterogeneous solutions in different procedural situations manifested during the criminal investigation which are analysed in the procedural phase of the preliminary chamber.

If initially both specialised literature and jurisprudence were unanimous in the assessment that the preliminary chamber is not the object of the analysis of the existence of an impediment among those provided for in art. 16 CrPC, the jurisprudence of the courts seems to be in the process of modification regarding certain issues regulated by art. 16 CrPC, which could still be analysed by the preliminary chamber judge (Udroiu, 2022; Manea *et al.*, 2017; Ghigheci, 2017).

Thus, recently, the courts referred the High Court of Cassation and Justice with the resolution of some legal issues, regarding the manner of application of the provisions of art. 16 para. (1) letter f) of Penal Code, art. 309 para. (1) CrPC. and para. 315 (1) letter b) CrPC, within the preliminary chamber procedures regulated by art. 342 et seq. CrPC.

It was deemed necessary that the High Court of Cassation and Justice to issue a binding opinion for the judiciary regarding the possibility that, within this procedure, aimed at verifying the legality of the arraignment, the administration of evidence and the execution of documents by the criminal prosecution bodies, in the context of analysing, mainly, some exceptions of illegality of the act of initiating the criminal action and of the act of arraignment, for the reason of their issuance after the expiry of the term of limitation of criminal liability, the judge of the preliminary chamber can retain the fulfilment of this term, incidentally, as a concrete basis of some illegalities of the contested acts, respectively of an illegality regarding the administration of evidence after the expiration of the criminal liability limitation period, subsequently to the finding of the nullity of the act of initiating the criminal action.

The court that notified the High Court of Cassation and Justice found that for the issuance by the prosecutor of the ordinance ordering the initiation of the criminal action, the provisions of art. 309 para. (1) CprPC., in accordance with the provisions of art. 305 para. (3) CrPC, impose the condition of the non-existence of one of the cases of obstruction provided for in art. 16 para. (1) CrPC, among

which in art. 16 para. (1) letter f) CrPC, the intervention of prescription is provided.

According to art. 305 para. (3) CrPC when there is evidence from which there is a reasonable suspicion that a certain person has committed the act for which the criminal investigation has been started and there is none of the cases provided for in art. 16 para. (1), the criminal investigation body orders that the criminal investigation be carried out further against it, which acquires the status of suspect. The measure ordered by the criminal investigation body is subject, within 3 days, to the confirmation of the prosecutor supervising the criminal investigation, the criminal investigation body being obliged to present the case file to him.

From the examination of the provisions of art. 18 of Penal Code, correlated with the provisions of art. 315 para. (1) letter b) CrPC and art. 396 para. (7) and (8) CrPC, in the case of the intervention of the prescription, the continuation of the criminal process can only take place at the request of the suspect or the defendant.

The criminal action, both from a material point of view, the right to hold the offender accountable, and from a formal, procedural point of view, representing the legal instrument through which the conflict of criminal law is deduced before the judicial bodies, in order to dynamize the criminal process and achieve the goal this one, is unanimously appreciated in doctrine as one of the fundamental institutions of the Romanian criminal process.

Its exercise must be carried out in accordance with the principle of legality provided by art. 2 CrPC.

The provisions of art. 3 CrPC stipulate that, in the course of the same criminal trial, the exercise of a judicial function is incompatible with the exercise of another judicial function, except for the one provided for in para. (1) letter c), the function of verifying the legality of sending or not sending to court which is not incompatible with the function of court.

According to the provisions of art. 3 para. (6) CrPC, the judge of the preliminary chamber pronounces on the legality of the act of referral to court and the evidence on which it is based, and according to art. 342 CrPC, within the object of the procedure of the preliminary chamber is also the verification of the legality of the administration of evidence and the execution of documents by the criminal investigation bodies.

From this perspective, the preliminary chamber judge could retain the existence of one of the cases provided for by art. 16 para. (1) CrPC, as a reason for the illegality of carrying out an act, under the provisions of art. 309 para. (1) CrPC, as the non-existence of one of the cases provided for by art. 16 para. (1) CrPC, as a reason for the illegality of the performance of an act by the prosecutor, under the provisions of art. 315 para. (1) letter b) CrPC, in the procedure provided by art. 336-341 CrPC.

The divergent interpretation on the way of applying the provisions relating to the conditions for issuing the order to initiate the criminal action and the subsequent effects of its illegality is essentially due to the conferring of a substantial character on the institution of the prescription of criminal liability, circumscribed to a method of extinguishment of the criminal action contained predominantly in the object of activity of the judge at first instance, leading to the opposite conclusion to that expressed in the previous paragraph, respectively in the sense of the impossibility of procedurally dissociating the retention of the fulfilment of the limitation period from the ruling on the criminal action, specifically, without ordering the classification at the same time, respectively without having the functional competence to pronounce the termination of the criminal process.

This opinion could have an appearance of rationality, to the extent that it is not mandatory to be evaluated in a wider perspective, respectively by comparison with the hypothesis of the checks carried out in the procedure provided for by art. 336-341 Penal Code, respectively by correlation with the principle of carrying out the criminal process within a reasonable time, provided by art. 8 CrPC.

We therefore note that in practice the possibility of analysing the legality of the acts carried out by the criminal investigation bodies is current, namely whether or not it exists at the time of issuing the warrant of suspect or defendant in one of the cases provided for in art. 16 para. (1) CrPC with the consequence of the annulment of the act and by way of consequence and the subsequent ones and the finding of irregularity of the indictment issued in the case, by the judge of the preliminary chamber.

The cause of nullity can only be relative, according to art. 282 para. (1) CrPC, can be obviously invoked only by the person sent to court, the procedural injury and the procedural interest being obvious in the conditions in which it was sent to court, although there is a cause that prevents the initiation and exercise

of criminal proceedings that would have led to the classification during the criminal investigation or to the acquittal or termination of the criminal process during the trial.

We note that according to the jurisprudence of the constitutional court, the judge of the preliminary chamber ex officio has the possibility to invoke a cause of relative nullity.

By Decision no. 554 of September 19, 2017, published in the Official Gazette no. 1013 of December 21, 2017, C.C.R. found that the legislative solution contained in the provisions of art. 282 para. (2) CrPC, which does not allow ex officio invocation of relative nullity, is unconstitutional.

We believe that this possibility given to the judge of the preliminary chamber to evaluate the legality of the suspect or defendant order from the perspective of the existence of one of the cases provided for in art. 16 para. (1) CrPC it is auspicious, given that it would be the only way in which the prosecution of some people could be censured, even if the presented solution is obvious.

Even though in the legal dissolution with which the High Court of Cassation and Justice was invested, the central legal issue concerns the prescription of criminal liability, we consider that mutatis mutandis solution can also be applied to other situations such as when the defendant had already died when the criminal action was initiated or if we are dealing with the withdrawal of the prior complaint or a reconciliation, as happened in the case I presented.

It remains to be seen if the situation is the same if the basis generating one of the causes preventing the initiation and exercise of the criminal action provided by art. 16 para. (1) CrPC appears after the initiation of the criminal action, but before the indictment is filed with the court and the preliminary chamber procedure starts.

According to art. 327 letter a) CrPC the prosecutor, when he finds that the legal provisions guaranteeing the discovery of the truth have been complied with, that the criminal investigation is complete and that there is the necessary and legally administered evidence, issues an indictment ordering the arraignment, if it follows from the criminal investigation material that the act exists, was committed by the defendant and that he is criminally liable.

It is therefore noted that among the imperative conditions mentioned in order to be able to order the issuance of the indictment, the necessity of the non-existence of one of the aforementioned cases provided by art. 16 para. (1)

CrPC is not mentioned, but only the finding that the person in question is criminally liable.

However, we consider that the phrase “he is criminally liable” must be interpreted from a systematic and teleological point of view with the rest of the procedural provisions, being in our opinion a gross error of legal logic to consider that it is necessary only when the suspect order is issued or for the defendant to not have any of the cases provided for by art. 16 para. (1) CrPC, and at the time of issuing the indictment not, a procedural act of greater importance than the other two previously mentioned.

If, however, it is found that the cause is not obvious, thus the document through which the reconciliation of the parties was achieved would not be able to produce legal effects, the legal classification of the fact is erroneous or the classification does not allow the reconciliation of the parties or the withdrawal of the prior complaint, these aspects may be invoked by the criminal investigation bodies, so that the judge of the preliminary chamber finds that a careful analysis of the substance of the problem is necessary, during the trial.

Or, in the presented case study, the criminal investigation bodies did not invoke such reasons, summing up only to invoke the inadmissibility of the finding of irregularity of the indictment.

Conclusions

We find that the jurisprudence is in a moment of changing the perception regarding the object of the preliminary chamber and the way of analysing a blatant reason that prevents the initiation and exercise of the criminal action.

We welcome this change in jurisprudence, which we hope will be consolidated by the High Court of Cassation and Justice through the decision he will provide in the file with which he was referred.

We believe that such an approach is necessary, in order to materialise a procedural discipline of the criminal prosecution bodies that should show particular diligence when analysing the appropriateness and legality of the referral to court, considering the inherently negative consequences on the person caused by this procedural option demonstrated by the prosecutor.

Moreover, absolutely embarrassing situations are avoided, such as those in which the trial is ordered against obviously deceased persons, which creates a negative image of the litigants regarding the judicial bodies.

Finally, we mention that in order to avoid contradictory jurisprudence, we appreciate that de lege ferenda should be expressly regulated under art. 327 letter a) CrPC the necessity of the non-existence of one of the previous cases. to art. 16 CrPC as well as the explicit conferring in the competence of the judge of the preliminary chamber of the possibility to ascertain the irregularity of the indictment in such obvious cases, manifested in the objective reality prior to the arraignment.

References

Conclusion no. 543 of June 15, 2020 of Constanța Court.

Conclusion no. 527 of September 4, 2020 of Constanța Court.

Conclusion of Constanța Court of Appeal dated January 10, 2023.

Ghigheci, C. (2017). *Cereri și excepții de cameră preliminară*, vol. I – *Procedura, regularitatea actului de sesizare, legalitatea actelor de urmărire penală. Comentarii și jurisprudență*, 124-126.

Law no. 135 of July 1, 2010 regarding the Criminal Procedure Code.

Manea, T., Uzlău, A. S., Voicu, C. (2017). Camera preliminară. Practică judiciară, 275-279.

Udroiu, M. (2022). Sinteze de Procedură penală. Partea specială, 292.

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Considerations on the Origin and Evolution of Conflict Mediation in Social Life

Constantin MIHALESCU[1]

Abstract

Mediation has always represented an alternative to state justice that facilitates the parties' amicable resolution of their dispute. Mediation existed from early times and in the oldest civilizations. In the form we know today, it appeared for first time in Europe in the 90s on the American chain, so that, by Directive CE/52/2008 of the European Parliament (Mihalescu, 2021, p. 71-83), virtually all The Member States should take steps to include mediation in civil and commercial cases where issues related to the parties' belonging to different, respectively cross-border, legal systems appear most frequently. Currently, in Romania, mediation operates on the basis of Law no. 196/2006 on mediation and the organization of the mediator profession, and in the Republic of Moldova, currently, by Law no. 137/2015 on mediation. The current deep crises that contemporary society is facing are the consequence of ignoring and not managing the sources of tension and conflict in time. This fact generated their dangerous development as a consequence of the non-prevalence of the rule of dialogue, negotiation and mediation, a practice of an authentic democracy that values the strength of solidarity and communication. In relation to these practices, slippages of any kind affect the rule of discussion, negotiation and mediation, and on this background individuals and communities become distrustful of alternative methods of conflict resolution and prefer to approach resolution through other means, such as war that dissipates community assets.

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Introduction

Currently, conflict and conflict mediation represent a topic of reflection that preoccupies current philosophical and social-political thinking, with a rich specialized literature devoted to it.

If we take into account the speed with which contemporary societies are transforming, the contradictory developments manifested in various forms of dispute, from peaceful to violent, between individuals, between social groups and human communities, then we realize that the concern is natural.

Mediation, along with negotiation, conciliation and arbitration, as an alternative method of conflict resolution, represents, in our opinion, the most effective ADR method. The acronym ADR ("Alternative Dispute Resolution", recently replaced by "Appropriate Dispute Resolution") "refers to procedures and techniques for resolving conflicts outside the courtroom, representing a reaction to the inefficiency of traditional ways of resolving conflicts" (Gorghiu *et al.*, 2011, p. 29).

The choice of an ADR method for the peaceful resolution of a dispute is closely related to the fact that generally warlike or dysfunctional conflicts waste considerable resources, both human and material, and avoiding or peacefully resolving such conflicts would ensure prosperity and progress. In the works of foreign authors, generally American (Gorghiu *et al.*, 2011, p. 8), there are some recommendations on mediation for which societies in the former communist camp are not yet ready to adopt them, as history has proven that Western societies, the USA and the United Europe, knew how to manage the sources of tension and conflict, a fact that generated their economic and social development, and in these societies the rule of dialogue, negotiation and mediation prevailed, a practice of an authentic democracy that emphasizes the strength of solidarity and communication.

In relation to these societies, the societies in the former communist camp are societies where authentic democracy is still being consolidated, and economic and social development does not meet the desired requirements. Against this background, individuals become circumspect and distrustful of alternative conflict resolution methods and prefer to approach conflict resolution in the traditional way, through state justice.

In Romania, the admission of the exception of unconstitutionality the provisions of Law no. 196/2006 on mediation and the organization of the mediator profession, which required litigants, *ab initio*, to go through an information procedure, was justified on the grounds that the obligation to provide information on mediation was in contradiction with art. 21 of the Constitution, which provides in paragraphs 1 and 2 that: "*1) Any person can turn to justice for the defense of his rights, freedoms and legitimate interests. 2) No law can limit the exercise of this right."* This eventually generated the weakening of the authorized mediator profession and the closure of most authorized mediator offices in the country.

On this matter, the European legislation is not more permissive either. Relatively recently, the European Parliament Resolution of September 12, 2017 was adopted. According to this resolution, "recommendations that will be sent to the governments and parliaments of the member states" are to be considered. This is relevant as in one of the recommendations it is stipulated that "additional measures should be taken to ensure the execution of mediated agreements in a fast and accessible way, with full respect of fundamental rights, Union law and national law (EU, Resolution, C 337/2, 2017)."

Or, for the time being, in the European legislation it has been established that "mandatory mediation affects the exercise of the right to an effective appeal before a court, a right enshrined in art. 47 of the Charter of Fundamental Rights of the European Union."

Regarding mediation in the Republic of Moldova, we must bear in mind that with the declaration of independence, Romania constantly and actively helped and supported, both through diplomatic efforts and through concrete assistance, its European course. In this sense, Romania has provided assistance in the creation of democratic institutions compatible with the requirements imposed by European legislation or transitional institutions with the perspective of gradual harmonization, to the extent that reality will allow it. The institution of mediation, as a new legal institution that is part of the second category due to the frequent legislative changes that this legal institution carries, was introduced in the Republic of Moldova through the first platform to promote mediation that appeared in the criminal sector following the adoption at European level of Recommendation R/99/19 regarding criminal mediation. This Recommendation was appropriated by the Criminal Code of the Republic of Moldova, adopted on 18.04.2002.

Thus, art. 109 – Conciliation, introduces the principles emanating from Recommendation R/99/19 regarding criminal mediation and enshrines these principles as mandatory. The Constitution of the Republic of Moldova by para. (2) of art. 20 also enshrines this universal principle "No law can limit access to justice".

However, the Italian legislator found a way to combine national and European legislation, in the sense that, according to the Impact Study launched in April 2013 by the European Parliament in relation to the implementation of the framework Directive 2008/52/EC on mediation, with the title " Restarting the mediation directive: evaluating the limited impact of its implementation and proposing measures to increase the number of mediations in the EU", Italy, by Decree no. 69/2013 – the so-called "Mandatory Mediation Decree" reintroduced mandatory mediation (EU, Study, 2014) . The reasoning that lays behind is that "urgent provisions for relaunching the economy". However, the Resolution of the European Parliament dated September 12, 2017, although it includes assessments of the Italian mediation law, does not recommend to the member states the introduction of mandatory mediation, but only considers "recommendations that will be sent to the governments and parliaments of the Member States, regarding: (a) the request to member states to intensify their efforts to encourage the use of mediation in civil and commercial disputes, especially through appropriate information campaigns; (b) the need to develop quality standards at the EU level for the provision of mediation services; (c) identifying solutions for extending the scope of mediation to other civil or administrative matters; (d) taking additional measures to ensure the execution of mediated agreements in a fast and accessible way, in full respect of fundamental rights, Union law and national law."

Practically, through this resolution, the European Union leaves it to the governments and parliaments of the Member States to identify the ways through which the institution of mediation can be viable.

The research methodology

Starting from a retrospective, historical approach to the researched field, the article offers the possibility of understanding the importance of the mediation institution regulated or not by mediation legislation. Mediation legislation as a distinct special legislation belonging, in particular, to civil law is regulated by legal norms that use the same methods of application and knowledge as in any branch

of law. Thus, the same methods used in the study of any branch of law were used. Mediation legislation, by its nature and purpose, is a phenomenon with many deep social and human connections and interferences. The research of the phenomenon that is part of law is carried out by using the same methods used in the study of law: general methods and concrete methods. Different general methods have been used in the article, such as: the generalization and abstraction method, the logical method, the historical method, the comparison method, the sociological method, the systemic analysis method and the prospective or forecasting method.

Considerations regarding conflict resolution through the institution of mediation and its established relevance

In the current circumstances generated by various crises, I believe, that the Italian model of the mediation law should be implemented at the European level. This is even more applicable, in Romania and the Republic Moldovan as both could implement this model, especially since neither in Romania nor in the Republic of Moldova, the real economy, shows signs of recovery.

This idea was also reinforced by the Report on the state of mediation in the member states published on 21.11.2018 by the European Parliament in which it is mentioned that “although mediation is everywhere and praised and promoted by everyone, it is very little used by European citizens and very little encouraged by the member states.” The same Report praises the progress achieved by Italy in terms of the mediation procedure by using the mandatory easy-out mediation, a procedure that passed the constitutionality tests, unlike Romania, outlined as a negative example of the implementation of mediation because it did not pass the two constitutionality examinations from 2014 and 2018. The Report also notes the fact that if Romania would have introduced an Italian-style mediation procedure, “with a mandatory mediation on the background of the conflict (not just for informing or probing the conflict) with the possibility for the parties to withdraw from the mediation at any time, then the mandatory mediation would have passed the constitutionality test”. It is gratifying that both in Romania and in the Republic of Moldova more and more voices from different social backgrounds, including among magistrates, support and recommend mandatory mediation for a series of disputes.

Recently, gathered in the “Consultative working group in the field of mediation”, experts from the Republic of Moldova proposed and discussed the

opportunities to establish mandatory mediation in certain categories of disputes. It is expected that such initiatives will appear in Romania, especially since recital (13) of Directive 2008/52/EC states that the parties “are themselves responsible for the procedure and can organize it as they wish and terminate it at any time”. The case law of the Court of Justice of the European Union (eg: related cases C-317/08, C-318/08, C-319/08, C-320/08, Alassini and others, C-75/16, Menini and Rampanelli, etc.) as well as the jurisprudence of the European Court of Human Rights (eg: the case of Momcilovic v. Croatia) have already, in my opinion, established guiding principles and tools in order to achieve the desired goal of introducing mandatory mediation for a series of minor disputes.

History and nature of the mediation institution

The need for mediation appears as an antidote in a world of controversies of all kinds that are generated by different points of view about historical development. These are determined by the existence of mechanisms of certain orders and by the tendency to explain them and always identify new ways of permanent development of social relations. Along with this development, in the systemic analysis of the social environment, of the relationship between members of society or between individuals and society, with the respective cognitive-axiological connotations, the issue of the conflict perceived at the individual level, brings into discussion the issue of mediation in social life. Mediation, more like other similar approaches, has the “primary ontological and axiological component, in relation to which it legitimizes and gives validity to any form of knowledge of some of the conflicts of society”, of the individual and the relationship between society and individual, at a given moment (Florescu & Bordea, 2010, p. 10).

Therefore, the determination of the sociological nature of the institution of mediation, implies the awareness of the emergence process, followed by its generic development. Evolving, human society took over the field of mediation from the ancient period, where it was outlined within the limits of freedom of will in a manifestation of will of private law. This institution of mediation was also applied to some institutions of public law, especially in the sphere of international law, mediation being used, with its valences of communication and negotiation, starting from the 17th century, as one of the functions of the ambassador.

The full international consecration of mediation, however, was obtained in the Hague Convention of October 18, 1907, in Title 2, art. 2, it is specified that "arms shall not be resorted to before the mediation of the conflict". Mediation, as a distinct type of human relationship, in the context of the diversity of human relationships, was and is the object of a multidisciplinary approach, retaining the attention of philosophy, sociology, pedagogy, law and political science "as it had to operate both on an analytical level, discerning the mechanisms of mediation in various areas of people's lives as well as on a synthetic level, subsuming the variety of situations in which the mediation of a theoretical model, a vision of a comprehensive nature intervenes" (Ancheș, 2010, p. 9).

Therefore, born from various pluridisciplinary fields and practices, mediation is a paradigm, representing, like other paradigms (Marcus, 2005) such as: time, space, communication, paradox, information, globalization, etc., a multivalent mixture made up of several disciplines, from which it results in "a richer and more nuanced understanding of the world and human behavior". The resolution of conflicts through mediation is nowadays a subject of real interest, all the actors involved being convinced that this peaceful alternative to conflict brings significant savings in energy, costs, intelligence and material resources. Mediation also adds value, to social relations in the community and ensures their functionality as opposed to open conflict that wastes both the parties' and the community's assets.

Life has proven and proves that those societies that knew how to manage their sources of tension and conflict experienced early economic and social prosperity. The success of the US and of the, United Europe, where dialogue, negotiation and mediation of conflicts have allowed the current prosperity, demonstrates that this strength comes from the practices of an authentic democracy that values the strength of solidarity and communication. Primitive customs preserved, as the immediate and singular form of regulating conflictual relations between the members of a community, private revenge or the law of retaliation (Mihalescu, 2021, p. 71-83). Sometimes even civil obligations had a correspondent in the plan of sanctions in corporal punishments similar, until identification, to the sanctions specific to crimes (Ciucă, 1998, p. 43).

This private justice was in ancient times effective and immediate, even if it was not intended to definitively extinguish a conflicting relationship. An advantage in terms of regulating social relations that custom carries with it is precisely its adaptive capacity, the flexibility in relation to the needs of the

parties. The disadvantages were more evident in litigious relations, when the flexible customary norm, favored the non-execution of conventions, according to the contractual will of the parties or the abuses of judges. With the laying of the foundations of Roman statehood Empire and the implementation of the Servian reforms by Servius Tullius, in the century VI Î.Cr., the system of judicial bodies was also implemented, specialized in the distribution of justice, both in public trials *(judicia publica*), but also in trials between individuals (*ordo judiciorum privatorum or judicia privata*). This legal system became even more rigorous thanks to the regulations contained in the *Lex duodecim Tabularum* (Law of the Twelve Tables), voted in the middle of the 5th century B.C. (450 B.C.) (Ciucă, 1998, p. 43-44).

Previously, an interesting aspect of the Romans, the science of law constituted a source of law since the beginning of the activity of the pontiffs. Their legal consultations (*responsa*), inseparable from religious ones, constituted true enigmas, and only the privileged blanket of the patricians could benefit from these favors (Ciucă 1998, p. 44). This monopol of the pontiffs over the science of law disappeared with the secularization of law, a process that began with the drafting of the Law of the XII Tables and the publication, by Cnacius Flavius, around 304 BC, of the judicial calendar and formulas of actions. The last a publication is known in the history of law as Jus Flavianum (Ciucă, 1998, p. 44).

It should be mentioned that even after the establishment of the state judiciary as the main instrument for making, justice, some vestiges of private justice survived or were assimilated. The principle of solving public or private cases by a third party, whether he is a judge, magistrate, *bonus vir,* in the tradition of private justice, arbitrator or consul, governor, etc. it has known in its application, many concrete forms and sinuosity. Thus, the private justice system experienced some limitations in that private revenge had to be authorized by elected judges or arbitrators within limits imposed by them. In a text from the *Pandectae*, attributed to Paulus (Ciucă, 1998, p. 44) (Digesta, L.17.176), this Roman jurist disavowed the old legal system on the basis of the following considerations: firstly, conflicts between families were never definitively resolved, the spiral of private revenges remained constant, which was likely to endanger the social order and, secondly, this system favored the strong ones, to the detriment of the weak. As such, Paulus concludes that "*private individuals should not be authorized to subrogate the prerogatives of the magistrates"* which we,

today, accept under the supreme, principle of social organization, according to which "*no one has the right to do his own justice*".

During the Middle Ages, the Geto-Dacian peoples of the Carpatho-Danubian-Pontic region preserved many of the legal institutions inherited from the Roman rule. Courts were the same for civil or criminal cases. They were the judes preserved with this name from the Roman practice and of *the good and old people*, who had the competence to investigate and give decisions, until the banishment from the communities of those guilty of serious deeds. By delegation from the wise elders, in the archaic village there were also age groups, sex groups, and work affinity groups, since in addition to the groups of mature people, the groups of young men, and to the groups of children, there were double corresponding female groups. Conflicts were resolved within the community, based on the solidarity of relatives, the law of talion, and the redemption of the crime established by the consensus of the parties (Vasiu, 2009, p. 146)_some fundamental evidence preserved for centuries in Romanian legal practice is reported in the sec. IV-IX. Thus, for the resolution of disputes regarding borders are the furrow oath and the conjurers, who gave testimony to establish the facts and sometimes also rendered judgments.

In this context, it can be seen that in the Middle Ages, the Geto-Dacians kept and adapted from the Roman legal system, through the trial procedure of *good and old people* and/or conjurers, procedures similar to mediation in the settlement of disputes outside the judicial system, litigations similar to those in Roman law – *lites*- subject, upon the choice of the parties, to examination by the wise men – *bonus viri* – of the community, private and disinterested persons.

During the period of early feudalism, the centuryes IX-XIV, are characterized by the identification of the Romanian people as a distinct ethnic group, with political organization and its own legal norms, specific to early feudalism. Written law began to be called law, with the appearance of rules – codes of written laws – appeared in the. 17th century, when Romanians had to distinguish between written and unwritten law, which was mainly called custom.

The Romanians kept the institution of the *good and old people* (Gonța, 2011, p. 432), as they had the same conception of the social good, and the *good and old people* were precisely those who, through their behavior, met the appropriate qualities (similar to the qualities currently required of mediators) and, therefore, were called to appreciate the conduct of their peers.

In the Romanian conception, justice is also equity (*acquitas*), i.e. it is in accordance with the ethical principles accepted during the early feudalism countries. The legal consciousness of the time included, in addition to the Daco-Roman heritage, some principles due to Byzantine influence and Christian morality (Noica, 1970, p. 132).

The Law of the Land (Cernea &Molcuț, 1999, p. 74) is the name that has been generalized since the period of early feudalism for the set of legal norms within the unions of Romanian "*countries*", without any territorial-geographical or ethnic determinative, which denotes the unitary character of these norms.

Another name often used alongside the "*Law of the Land"* is that of "*The Custom of the Land",* the word custom being of Slavic origin.

In the feudal era, there was a close relationship between the forms of property related to the existing social classes and the application of legal norms.

Apart from the two social classes: the feudal lords and the enslaved peasants (similar to the condition of the colonists in Roman law), in the Romanian feudal society there were also free peasants, townspeople and slaves, who, in turn, had a series of subdivisions through which it reflected the extremely complex character of the Romanian feudal society (Cernea &Molcuț, 1999, p. 74).

In principle, during this period, legal norms similar to those corresponding to the norms applied in Roman law were applied to the individuals belonging to these social classes. Enslaved peasants, like colonists in the Roman Empire, were personally dependent on the feudal lords on whose estates they worked, but could move to another estate to serve another feudal lord.

At the end of the century XVI and the beginning of the century. XVII, the right of displacement was abolished, consecrating, the binding of enslaved peasants. Under these conditions, it is obvious that the rights of individuals were also greatly restricted, with the natural consequence of worsening the protection of the rights belonging to disadvantaged social classes.

The natural person, from a legal point of view, is a subject of rights and obligations. In this sense, the natural person endowed with legal capacity since the beginning of its existence, as well as with the capacity to exercise rights and obligations, according to the legal norms in force. According to this current principle of law, in feudalism, man was placed in different position social, with apparently unequal legal regimes, which reflected precisely on his legal capacity.

The most privileged class (Cernea &Molcuț, 1999, p. 74), and over whom the full legal capacity was exercised, was constituted by the class of boyars and

clergy. This privilege was also recognized in Transylvania at the beginning. Later, this privilege was recognized only to boyars who fulfilled the condition of Hungarianization and leaving the Orthodox religion. Through the provisions of the *Approbatae et compilatae constutiones* laws, which qualified the Orthodox religion as a tolerant religion, the Orthodox clergy of Transylvania suffered a restriction of rights. Through the act of uniting the churches of Transylvania with Rome, some improvement was brought to the rights of clerics and people practicing the Orthodox religion.

If the townspeople had some similar to the boyars, the peasants, classified into free peasants and enslaved peasants, could not exercise their public rights. In relation to the enslaved peasants, it was argued that the norms of a "Romanian law" (Giurescu, 1943, p. 139) applied to them and not the Law of the Land, which applied to all Romanians as an ethnic group.

To the slaves, Tatars and Gypsies, the provisions of a "slave right" or a "Gypsy right" (Cernea, & Molcuț, 1999, p. 77) were applied. Slavery, in Romanian countries, is older than migration, of these ethnic groups to our lands, it dates back to the time of the Pechenegs and Cumans (Cernea & Molcuț, 1999, p. 77). Like slaves, in Roman law they were considered chattels on which they could transact but could not dispose of their lives. They could be sold or donated (Cernea &Molcuț, 1999, p. 77).

During the period of feudalism proper, the appearance of the "*Law of the Land"* was noted, in this period, by the unitary nature of the legal norms in all three Romanian countries. In the villages, however, the courts made up of *good and old people* were preserved, and in the fairs and cities the sholtuzi (judges) with the 12 jurors (similar to the jurors in the Anglo-Saxon and American law system), over which the state bodies overlapped, the directors: vornici, părcălabi, bani from the management of counties and lands, judges in their administrative constituencies, great vornici and great bani with competence in the parts of the country under their rule (Cernea & Molcuț, 1999, p. 83). It can be thus be noted that the procedure for solving conflicts through mediation was restricted especially to the poor rural environment, natively predisposed to unconditionally accept moral and Christian values. The institution of amicable reconciliation in this favorable environment could have been very successful.

In the modern and contemporary period, the codifications made until 1821 concern, in particular, the organization of the judicial courts, court procedure and civil law. The special attention given to the trial procedure is

explained by a few provisions of the Kuciuk-Kainardji, treaty. According to it, the Romanian countries could establish a series of relations with the European ones, but there was a fear that the citizens of other states would claim to be convicted, according to their laws on the grounds that the court procedure is backwards, as they did in Turkey. The effort to create a modern court procedure had a double meaning: on the one hand, the application of the capitulation regime in the Romanian countries was avoided, on the other hand, through this peculiarity of the foreigner regime, the idea that the Romanian countries were not part of the part of the Ottoman Empire.

The new laws were designated by the term condica, codice, or code, according to the Roman tradition and European practices of that time. Thus, in Wallachia, probably under the guidance of Enăchiță Văcărescu, in 1780, the Pravilnicea condicia entered into force, applied until the adoption, in 1818, of the Caragea Code (Cernea & Molcuț, 1999, p. 152), but repealed only in 1865 when the Romanian Civil Code entered into force.

The Calimach Code entered into force in Moldova in 1817 and was applied like the Caragea Code until 1865 (Cernea & Molcuț, 1999, p. 153) in the territories occupied by the Romanians. The new elements involved in the organization of the process find their expression in the rules regarding special procedures such as: auction sale, bankruptcy or the trial of merchants by arbitrators or mediators. As a result of the modernization of court procedures, a series of traditional institutions such as ordeals, zaveasca, swearers, etc. they disappeared from practice or fated away. This is also the case with, courts made up of *good and old people*.

The issue of the institution of mediation in the Republic of Moldova

With the declaration of independence on August 27, 1991, the Republic of Moldova knows the joy of returning to freedom, declaring its independence from the Soviet Union and thus becoming a sovereign, independent and democratic state. As a consequence, from that moment, it was, required the establishment of diplomatic relations with other countries, as well as collaboration links with regional and international bodies.

The Parliament of the Republic of Moldova adopted Law no. 692 of 27.08.1991, regarding the Declaration of Independence of the Republic of Moldova, published in the Official Gazette no. 011, art. no. 103; 118. Promulgated on 27.08.1991, “taking into account the millennial past of the Moldovan people

and its uninterrupted statehood in the historical and ethnic space of its national development, and considering the acts of dismemberment of the national territory from 1775 and 1812 as being in contradiction with the historical and gentile law and with the legal status of the Country of Moldova, acts refuted by the entire evolution of history and by the freely expressed will of the population of Bessarabia and Bucovina”.

Romania was the first state to recognize the independence of the Republic of Moldova, only a few hours after the proclamation. Diplomatic relations, at the embassy level, were established on August 29, 1991. The Embassy of Romania was the first diplomatic representation opened by a state in the capital of the Republic of Moldova, in Chisinau.

According to the website of the Embassy of Romania in the Republic of Moldova, Romania conceives its relationship with the Republic of Moldova on two major coordinates:

– affirming the special character of this relationship, conferred by the community of language, history, culture, traditions – realities that cannot be evaded or denied;
– the European dimension of bilateral cooperation, based on the strategic objective of integrating the Republic of Moldova into the European Union.

At the same time, Romania pragmatically approaches the relationship with the Republic of Moldova, circumscribed by its legitimate interest to see the Republic of Moldova entering the path of European integration and to ensure a zone of stability and security on Romania's eastern border, which has become the eastern border of North Atlantic Treaty Organization (NATO) and EU.

Recently, during the European Council of June 23, 2022, the EU leaders granted the Republic of Moldova the status of a candidate country for the EU, and in this context, they invited the European Commission to submit a report to the Council regarding the fulfillment of the conditions set out in the Commission's opinion on the request of accession of the Republic of Moldova.

In this context, a situation also valid in the case of Romania, the institution of mediation, especially the institution of commercial mediation (Mihalescu, 2021, p. 109-119) which can increase its value through digitalization (Mihalache & Mihalescu, 2021, p. 57-67), as well as the institution of the authorized mediator, I believe should be strengthened.

Conclusions

Therefore, in life we will constantly be witnesses to a panoply, of visible and invisible conflicts, depending on their stage of development, the dynamics and the intensity with which they manifest, which means that not every time the parties involved can realize that they are involved in a real conflict, especially when they are in an early or latent stage.

Conflicts represent a challenge at every step, at any age and in any field of social life as long as we live in a world full of conflicts. Extrapolated from the level of the individual to the level of society, the conflict seen as one of the fundamental conditions of human existence and left unresolved or treated in a destructive manner as in the case of the situation in Ukraine, can cause great damage to the parties involved and not only.

Mediation, as a legal institution part of the legal system, could help de-escalate many conflicts, provided that it is given greater importance by legislators and parties involved.

The institution of mandatory mediation in Romania and the Republic of Moldova appears, in the current national and international context, as a pressing necessity. This can also be supported by the Latin saying "opinion juris sive necessitatis", which would translate to the fact that the written law is equivalent to the unwritten law.

References

Ancheș, Diana – Ionela. Mediation in socio-political life. Foreword by Prof. Univ. Dr. Liviu Petru Zăpârțan. Bucharest: University Publishing House, 2010.

Cernea, Emil, Molcuț, Emil. History of the Romanian state and law, Bucharest: Mihaela Press Publishing House SRL, 1999.

Ciucă, Valerius M. Lessons in Roman law, vol. I. Iași: Polirom Publishing House, 1998.

The Mediation Council [cited 09.12.2022]. Available: https://mediere.gov.md/ro/content/grupul-consultativ-de-lucru-domeniul-medierii-discustat-cu-privire-la-opportunidaile-de.

Constitution of the Republic of Moldova. Adopted on July 29, 1994. Published in the Official Gazette of the Republic of Moldova no. 1 of 12.08.1994. Available: https://www.parlament.md/CadrulLegal/Constitution/tabid/151/language/ro-RO/Default.aspx.

Constitution of Romania. Published in the Official Gazette, Part I no. 767 of October 31, 2003. Available: https://www.constitutiaromaniei.ro/.

The Hague Convention [cited 12/5/2022]. Available: https://lege5. ro/gratuit/g42tamzq/conventia-de-la-haga-din-18-octombrie-1907-relativa-la-adaptarea-la-razboiul-maritim-a-principiilor-conventiei-de-la-geneva

European Court of Human Rights – https://e-justice.europa.eu/150/RO/international_case_law.

Court of Justice of the European Union – https://european-union.europa.eu/institutions-lawbudget/institutions-and-bodies/search-all-eu-institutions-and-bodies/court-justice-european-union-cjeu_en

Directive 52/2008/CE of the European Parliament and the Council of Europe. https://eurlex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32008L0052.

Gorghiu, Alina, Stănescu, Nicolae, Bogdan, Codruț, Sîrbu, Manuela, Munteanu, Mihai, Dedu, Ion. Mediation oxygen for business. Bucharest: Universul Juridic Publishing House, 2011.

Florescu, Dumitru A. P., Bordea, Adrian. Mediation. Bucharest: Universul Juridic Publishing House, 2010.

Giurescu, C. Social history studies. The antiquity of Romania in Wallachia and the connection of Michael the Brave. About the Romanians. About the boyars. Bucharest, 1943.

Gonța, Al. I. The village in Medieval Moldova. Iasi: Panfilius Publishing House, 2011.

Law no. 192/2006 on mediation and the organization of the mediator profession https://legislatie.just.ro/Public/DetaliiDocument/71928.

Marcus Solomon academician. Universal paradigms. Pitesti: Paralela Publishing House 45, 2005

Mihalache, Iurie, Mihalescu, Constantin. The impact of digital technologies on the activities of legal professionals and authorized mediators in today's society, *National Law Review*, *3*, 57-67.

Mihalescu, Constantin. The conflict and the history of conflict mediation, *National Review of Law, 2*, 2021, 71-83, https://doi.org/10.52388/1811-0770.2021.2(244).08

Mihalescu, Constantin, The need to strengthen the institution of mediation in commercial cases in Romania and the Republic of Moldova, *Revista Suprematia Dreptului*, 2021, *1*, 109–119, https://doi.org/10.52388/2345 – 1971.2021.1.10

Ministry of Foreign Affairs of Romania. [cited 12.10.2021]. Available: https://chisinau.mae.ro/node/221

Noica, C. Romanian philosophical speech. Bucharest: Science and Encyclopedia Publishing House, 1970.

The report on the state of mediation in the member states published on 21.11.2018 by the European Parliament [cited 21.10.2021]. Available: https://www.europarl.europa.eu/doceo/document/A-8-2018-0392_RO.html.

Resolution of the European Parliament of 12 September 2017. Published in the Official Journal of the European Union, series C 337/2 of 20.09.2018. Available:

https://eurlex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:52017IP0329&from=SK;

European Parliament, 2014, https://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET(2014)493042_EN.pdf

The impact study launched in April 2013 by the European Parliament in relation to the implementation of the Framework Directive 2008/52/EC on mediation, with the title: “Restarting the mediation directive: assessing the limited impact of its implementation and proposing measures to increase the number of mediations in EU”. https://www.europarl.europa.eu/thinktank/en/document/IPOL-JURI_ET(2014)493042

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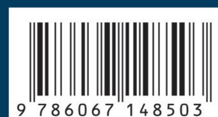

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